

2023 Supreme Court Term-In-Review

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Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After Fisher v. University of Texas, Austin

Angela Onwuachi-Willig
Boston University School of Law

Mario Barnes

Erwin Chemerinsky

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**JUDGING OPPORTUNITY LOST:
ASSESSING THE VIABILITY OF RACE-BASED AFFIRMATIVE
ACTION AFTER *FISHER V. UNIVERSITY OF TEXAS***

Mario L. Barnes

University of California, Irvine School of Law

Erwin Chemerinsky

University of California, Irvine School of Law

Angela Onwuachi-Willig

University of Iowa, College of Law



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*Judging Opportunity Lost:
Assessing the Viability of Race-Based Affirmative
Action After Fisher v. University of Texas*

Mario L. Barnes

mbarnes@law.uci.edu

University of California, Irvine ~ School of Law

Erwin Chemerinsky

EChemerinsky@law.uci.edu

University of California, Irvine ~ School of Law

Angela Onwuachi-Willig

angela-onwuachi@uiowa.edu

University of Iowa ~ College of Law

The paper can be downloaded free of charge from SSRN at:



Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After *Fisher v. University of Texas*

Mario L. Barnes, Erwin Chemerinsky & Angela Onwuachi-Willig

ABSTRACT

In this Article, Mario Barnes, Erwin Chemerinsky, and Angela Onwuachi-Willig examine and analyze one recent, affirmative action case, *Fisher v. University of Texas, Austin*, as a means of highlighting why the anti-subordination or equal opportunity approach, as opposed to the anti-classification approach, is the correct approach for analyzing equal protection cases. In so doing, these authors highlight several opportunities that the U.S. Supreme Court missed to acknowledge and explicate the way in which race, racism, and racial privilege operate in society and thus advance the anti-subordination approach to equal protection. In the end, the authors suggest that, with regard to race-conscious affirmative action, courts should guide their consideration by the role that law must play in mitigating long-term, structural disadvantages maintained through race, which now functions as caste within the United States.

AUTHORS

Mario L. Barnes is the Associate Dean for Research and Faculty Development and Professor of Law, Joint appointment in Law & Criminology and Law & Society (by courtesy), and Faculty Affiliate in the Center in Law, Society & Culture, at the University of California, Irvine School of Law. He received his B.A. and J.D. from the University of California-Berkeley and his LL.M. from the University of Wisconsin. He can be reached at mbarnes@law.uci.edu.

Erwin Chemerinsky is the Dean, Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law at the University of California, Irvine School of Law. He received his B.S. from Northwestern University and his J.D. from Harvard Law School. He can be reached at echemerinsky@law.uci.edu.

Angela Onwuachi-Willig is a Visiting Professor of Law at Yale Law School and the Charles and Marion Kierscht Professor of Law at the University of Iowa. She received her B.A. from Grinnell College, her J.D. from the University of Michigan Law School, and her M.A. from Yale University. She can be reached at angela-onwuachi@uiowa.edu.

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You do not take a person who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe you have been completely fair . . . This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity . . . not just equality as a right and a theory, but equality as a fact and as a result.

—Lyndon B. Johnson, Commencement Address at Howard University (June 4, 1965).¹

INTRODUCTION

Within U.S. history, social and judicial understandings of the Constitution's pronouncement "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws" have been deeply conflicted when applied to the concept of race. In 1896, in *Plessy v. Ferguson*, the U.S. Supreme Court held that the Equal Protection Clause was not violated by state laws that required racially segregated public accommodations.² Less than sixty years later, however, the Court overturned that decision in *Brown v. Board of Education*.³ While the Court's treatment of race has shifted over time, these two cases reflect the Court's decisions related to programs that are explicitly designed to disadvantage racial minorities. Even more controversial in our country's recent history have been state considerations of race that have allegedly advantaged members of some minority racial groups. These programs, which have been constructed for myriad purposes, from remedying past racial exclusion to fostering racial inclusion and diversity, have typically come to be referred to as affirmative action.⁴

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1. Lyndon B. Johnson, Commencement Address at Howard University: "To Fulfill These Rights" (June 4, 1965), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES BK. II § 301, at 636 (1965).
 2. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (asserting that the Fourteenth Amendment was meant to ensure political rather than social equality).
 3. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494–96 (1954).
 4. Affirmative action programs typically include women and minorities, but this Article primarily addresses race-based benefits programs. Although including an analysis of the interrelation of race and gender in affirmative action would be ideal, such intersectional considerations would be too complicated to fully assess in this limited format, especially since white women—who, as a

Concerns about the fairness of race-based affirmative action programs have been the subject of scholarly debate from a wide range of perspectives.⁵ Moreover, citizen attitudes toward such programs are often contradictory.⁶ Although arguments against affirmative action have ostensibly been fueled by contemporary commitments to colorblindness⁷ and post-racialism,⁸ a significant substan-

group, have historically benefited from such programs—have often been plaintiffs in cases challenging race programs. See Michele Goodwin, *The Death of Affirmative Action?*, 2013 WIS. L. REV. 715, 721–22 (2013).

5. A number of scholars have argued that affirmative action programs are an important policy tool for ensuring equality for women and minorities. See, e.g., RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION AND THE LAW 11–12 (2013) (describing race-based affirmative action as a public good that serves as a means to redress social wrongs, integrate the marginalized, and enhance learning environments); WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER (2000) (presenting an empirically-focused defense of the use of race-conscious admissions programs in education); CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION AND AMERICAN VALUES (1998) (offering a defense of affirmative action from a social justice perspective). On the other side of the debate, scholars have argued that affirmative action is ill-advised, race-based discrimination. See, e.g., Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33 (1992) (arguing against affirmative action as a remedial tool because it violates the country's commitment to "colorblind law"); Stephan & Abigail Thernstrom, *Reflections on the Shape of the River*, 46 UCLA L. REV. 1583 (1999) (contending that affirmative action is reverse discrimination). A number of critiques have also questioned whether affirmative action programs and policies obscure more important questions about how race figures in conversations about merits and desert. See, e.g., RICHARD KAHLENBERG, THE REMEDY: CLASS, RACE AND AFFIRMATIVE ACTION (1996) (advocating for class-based affirmative action); William J. Wilson, *Race and Affirming Opportunity in the Barack Obama Era*, 9 DU BOIS REV. 5, 11 (2012) (using as one example a program initiated at UC Irvine after Proposition 209 went into effect to argue for "affirmative opportunity" premised upon flexible, merit-based criteria rather than race).
6. For example, a recent survey of attitudes regarding affirmative action indicated that 68 percent of Americans favor programs to remedy past discrimination, but 64 percent of respondents reject the use of race-based preferences in education admissions. Ironically, 38 percent of persons who reject race-based affirmative action admissions programs claim to otherwise support affirmative action. See Public Religion Research Institute Survey, *Americans Divided Between Principle and Practice on Affirmative Action, Divided on DOMA* (May 30, 2013), <http://publicreligion.org/research/2013/05/may-2013-religion-politics-tracking-survey>. For an additional discussion of recent studies assessing myriad views on affirmative action, see *Introduction* to *CONTROVERSIES IN AFFIRMATIVE ACTION: HISTORICAL DIMENSIONS* xvi–xvii (James A. Beckman, ed., 2014).
7. Colorblindness "is, roughly, the view that race does not and should not matter." Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1153 (2013). Colorblindness is often linked to Justice Harlan's call in the *Plessy* dissent that "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). Harlan further asserted: "In respect of civil rights, all citizens are equal before the law. . . . The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Id.* Harlan also proclaimed, "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty." *Id.*

tive debate has centered upon whether courts should regard state considerations of race for affirmative action programs to be as suspect as the use of invidious racial classifications.⁹

Opinions on affirmative action have been shaped by whether the Equal Protection Clause is interpreted to require all people to be treated the same or whether it should be understood as a guarantee of equal opportunity.¹⁰ This distinction is essentially the one that President Johnson drew in the quote highlighted at the beginning of this Article. Within the scholarly discourse, the debate regarding equal treatment versus equal opportunity has been described as the difference that illuminates an anticlassification approach versus an antistatutory approach to equal protection.¹¹

In this Article, we examine and analyze one recent affirmative action case, *Fisher v. University of Texas, Austin*,¹² as a means of highlighting why the equal opportunity or antistatutory approach is the correct approach to equal protection. Although two of us have previously written that the Fourteenth Amendment Equal Protection Clause should be interpreted in light of the goal of

Furthermore, as Devon Carbado and Mitu Gulati have explained, colorblindness does not truly mean colorblindness, it operates as a “color conscious burden” for people of color. For example, “[t]he colorblind norm does not require whites to avoid other whites or to associate with people of color. This norm does, however, require people of color to avoid other people of color (the negative racial duty) and to associate with whites (the affirmative racial duty).” Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1287 (2000).

8. Post-racialism is an extension of colorblindness—a declaration that America has moved beyond race as a salient structure. See, e.g., Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967 (2010); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009).
9. One Justice surmised in an educational affirmative action case that the purpose of the Fourteenth Amendment is to eradicate invidious discrimination as opposed to limiting the diversity goals of affirmative action programs. *DeFunis v. Odegaard*, 416 U.S. 312, 334–35 (1974) (Douglas, J., dissenting) (involving a case that the majority dismissed as moot because the petitioner was later admitted to the University of Washington Law School, which first denied the petitioner’s application).
10. See Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1929–30 (2000).
11. See, e.g., Bertrall L. Ross, II, *Democracy and Renewed Distrust, Equal Protection and the Evolving Judicial Conception of Politics*, 101 CAL. L. REV. 1565, 1597 (2013) (noting it was the Burger Court that initiated the universalist move toward an anticlassification approach in that, “[r]ather than focusing on the protection of racial minority groups from subordination, the Court sought to protect all individuals, white or minority, from government use of race”); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition, Anticlassification or Antistatutory?*, 58 U. MIAMI L. REV. 9 (2004); Reva Siegel, *Equality Talk, Antistatutory and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004).
12. 133 S.Ct. 2411 (2013).

the Reconstruction Amendments to make freed slaves full citizens,¹³ we now advance a more contemporary approach to constitutional interpretation. In particular, we suggest that with regard to race-conscious affirmative action, courts should guide their considerations by the role law must play in mitigating long-term, structural disadvantages maintained through race, which now functions as caste within the United States.¹⁴

Part I provides an overview of the rise, and perhaps, approaching demise, of race-based affirmative action programs in the United States. Governmental considerations of race-based benefits within the areas of employment and contracting have already been severely curtailed through state executive orders,¹⁵ ballot initiatives,¹⁶ and direct legal challenges to state and federal programs.¹⁷ In fact, education is one of the few areas where there is still some modest possibility to consider race-conscious assignments plans.¹⁸ Part I also analyzes the Court's pre-*Fisher v. Texas* history of applying the Equal Protection Clause to governmental programs that have sought to consider race as a factor in awarding educational opportunities.¹⁹ Part II then assesses the various opinions in *Fisher*. In so doing, it examines what *Fisher* reveals about the Court's understanding of race as a social construct and further specifies the many ways in which the Court's particular understanding of race resulted in missed opportunities for substantively addressing racial inequality. This Article concludes by very briefly considering the viability of race-based affirmative action moving forward.

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13. See Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1078–79 (2011).
 14. For an argument that racial progress in the United States has not eradicated the racial caste system, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 20–30 (2012).
 15. See, e.g., Fla. Exec. Order No. 99-281 (Nov. 9, 1999) (implementing Governor Jeb Bush's "One Florida Initiative," which effectively ended affirmative action in university admissions and state employment and contracting).
 16. With Proposition 209, California voters banned affirmative action in employment, contracting, and education in 1996. The ban has been twice upheld by federal courts. See *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012); *Coal. for Econ. Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997). Michigan's Proposal 2 created a similar ban, which was challenged but ultimately upheld by the U.S. Supreme Court. See *Schuette v. Coal. to Defend Affirmative Action*, 134 S.Ct. 1623 (2014) (overturning a Sixth Circuit decision that struck down Proposal 2 and the resulting Amendment 26).
 17. See *infra* notes 32–52 and accompanying text.
 18. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787–88 (2007), (Kennedy, J., concurring) (joining plurality decision to strike down race-based considerations for integration plans in Seattle and Louisville, but allowing that race might still be considered for such purposes); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (reaffirming the *Bakke* plurality's approval of the consideration of race, based upon its value to diversity within education as a compelling interest).
 19. *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013).

I. A BRIEF HISTORY OF AFFIRMATIVE ACTION

This Part offers a brief history of affirmative action. It begins with the origins of affirmative action programs through Executive Orders. Thereafter, it briefly details the history of affirmative action jurisprudence in the U.S. Supreme Court.

A. The Executive Genesis of Affirmative Action

The proliferation of affirmative action programs began with the issuance of Executive Orders. In 1961, President John F. Kennedy issued Executive Order 10925, which created the Committee on Equal Employment Opportunity (CEEO).²⁰ One purpose of the CEEO was to “recommend additional *affirmative steps* which should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination.”²¹ President Kennedy also ordered government contractors to “take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”²² This mandate to contractors was reiterated in 1965, when President Johnson superseded Kennedy’s Order with Executive Order 11246.²³ Although Johnson’s Order abolished the CEEO, it passed some of its functions to the Equal Employment Opportunity Commission and empowered the Secretary of Labor to ensure contractor and agency compliance.²⁴ Additionally, Johnson’s Order went further by requiring government contractors (except where exempt in light of factors such as numbers of workers or size of the contracts) to post notices of nondiscrimination to workers, unions, and subcontractors; to include nondiscrimination clauses within contracts; and to file compliance reports with the Labor Department.²⁵ Johnson’s

20. See David J. Garrow, *The Evolution of Affirmative Action and the Necessity of Truly Individualized Admissions Decisions*, 34 J.C. & U.L. 1, 2 (2007).

21. Exec. Order No. 10925, 26 Fed. Reg. 1977 (May 8, 1961) (emphasis added).

22. Exec. Order No. 10925, 26 Fed. Reg. 1977 (May 8, 1961) (emphasis added). Some have argued, however, that the earliest forms of legislation committed to race-conscious remedy took place during Reconstruction. See Carl E. Brody, Jr., *A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent by the Supreme Court*, 29 AKRON L. REV. 291, 294 (1996) (claiming that the Freedman’s Bureau legislation of the mid-1890s was designed to remedy the ills of slavery); James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal and Political Realities*, 70 IOWA L. REV. 901, 904 (1985) (citing the NAACP’s amicus brief in *Bakke*, which similarly advanced this point).

23. Neal E. Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723, 1731 (1991) (reviewing HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA* (1990)).

24. *Id.*

25. Exec. Order No. 11246, 3 C.F.R. 1964–65 (1965).

Order directly influenced what became explicitly recognized as affirmative action during the Nixon administration.

Soon thereafter, affirmative action programs were expanded to not only prohibit discrimination but also to establish hiring goals for African American employees. For example, based on President Johnson's Executive Order 11246 and a local plan originally introduced in 1967, the city of Philadelphia, in consultation with United States Department of Labor, adopted the aptly named Revised Philadelphia Plan on June 27, 1969. The Revised Philadelphia Plan not only prohibited government contractors from discriminating on the basis of race but also specifically required them to create hiring goals for African American employees as a means of ameliorating systemic and historic discrimination practiced in certain trade unions. These affirmative approaches to ensuring opportunities quickly spread to other cities and states.²⁶ Additionally, in August of 1969, President Nixon issued Executive Order 11478, which required equal employment opportunity for federal employees to be achieved through a "continuing affirmative program in each executive department and agency."²⁷ The U.S. Comptroller General initially issued a report indicating that such plans violated Title VII of the Civil Rights Act of 1964, but President Nixon lobbied Congress to reject these findings.²⁸ Furthermore, the plans were presumed to be constitutional when the Supreme Court refused to grant certiorari to a Third Circuit case that held that the Revised Philadelphia Plan violated neither the Title VII nor the Fifth Amendment Due Process Clause.²⁹ This presumption of constitutionality continued when the Court upheld a program that reserved 50 percent of the openings in a training plan for African Americans.³⁰

B.1 Growing Pains: Affirmative Action Backlash in the Courts (and Elsewhere)

The era in which affirmative action programs were viewed as consistent with the constitutional protection of equality was decidedly short-lived. Less

26. Rudy Sandoval & Laura Lisa Sandoval, *In Search of Equality in Legal Education: The Grutter v. Bollinger Case*, 5 PACE L. REV. 91, 93 n.8 (2004).

27. Exec. Order No. 11478, 3 C.F.R. 803 (1969).

28. See Patricia A. Carlson, Adarand Constructors, Inc. v. Pena: *The Lochnerization of Affirmative Action*, 27 ST. MARY'S L.J. 423, 431 (1996).

29. Contractors' Ass'n of E. Pa. v. Schultz, 442 F.2d 159 (3rd Cir. 1971). Although the Fifth Amendment does not include an equal protection clause, the Court has read this protection into the amendment to prevent any disjuncture between the Fifth and Fourteenth Amendments. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

30. *United Steel Workers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979) (overturning a Fifth Circuit holding that the program violated Title VII).

than ten years after the implementation of the Revised Philadelphia Plan, a plurality opinion in *Regents of the University of California v. Bakke*³¹ signaled that the Court was loath to view affirmative action programs as restoring equality for minorities who had suffered past discrimination. Instead, the Court was more likely to view affirmative action programs as reverse discrimination against groups not favored by such programs.³²

Bakke struck down the use of race-conscious quotas in higher education admissions without directly discussing governmental employment and contracting. In the years immediately following the *Bakke* decision—in cases worth noting because they did not employ the strict scrutiny standard of review³³—the Court upheld two minority set-aside programs in employment.³⁴ Within a decade after the *Bakke* decision, the understanding of remedial race-conscious set-aside programs as unconstitutional would also invade employment and contracting cases. In a set of cases looking at affirmative action within the employment and government contracting arenas—*Wygant v. Jackson Board of Education* (1986),³⁵ *City of Richmond v. J.A. Croson Co.* (1989),³⁶ *Adarand Constructors v. Peña* (1995)³⁷—the Supreme Court systematically exhibited hostility toward affirmative action by requiring strict scrutiny analysis for all governmental uses of racial classifications.³⁸ The Supreme Court de-

31. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

32. *Id.* Justice Powell wrote the Court's opinion and was joined by four justices, who pronounced a special admissions program at the University of California, Davis Medical School that reserved sixteen seats per year for minority applicants—some of whose entry test scores were lower than candidates rejected in the regular admissions program—to be unconstitutional and a violation of federal law. *Id.* at 271; see also Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 30–31 (2013) (“The earliest arguments for applying strict scrutiny to ‘all classifications’ are concerned about harms to whites. . . . Early justifications for judicial oversight suggest that the Justices who first applied strict scrutiny to affirmative action acted from empathy: they fashioned a body of equal protection law that cares about the impact of state action on citizens, and about citizens’ confidence in the fairness of the state, in ways that the discriminatory purpose decisions of the Burger Court do not.”).

33. Strict scrutiny is the most stringent level of judicial review applied in equal protection cases. It is now automatically applied to cases where government action is based upon a racial classification. See Siegel, *supra* note 32. Strict scrutiny requires that the racial classification be narrowly tailored to serve a compelling governmental purpose or interest. Few programs can withstand strict scrutiny review. See Barnes & Chemerinsky, *supra* note 13, at 1078–79.

34. See *Weber*, 443 U.S. at 196; see also *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding as lawful a section in the Public Works Employment act of 1977 that required state and local recipients of federal funds to use 10 percent of their funding to procure services from among designated minority groups).

35. 476 U.S. 267 (1986).

36. 488 U.S. 469 (1989).

37. 515 U.S. 200 (1995).

38. For an argument that it makes little sense for courts to treat racial classifications that benefit racial minorities in the same manner as they do disadvantaging classifications, see Angelo Guisado,

mandated a strong basis in evidence to justify remedial race-based decisionmaking and adopted “colorblindness” as the prevailing perspective for analyzing equal protection claims.³⁹

Wygant, a plurality decision, addressed a race-conscious system of lay-offs for teachers. Five justices agreed that the work policy violated the Equal Protection Clause. The five justices also adopted a “strong basis in evidence” standard to justify the use of race-conscious remedies. Justice Powell, writing for the Court, also proposed that strict scrutiny should apply to any governmental classification or preference based on racial or ethnic criteria.⁴⁰ Three years later, in *Croson*, the Court adopted Justice Powell’s strict scrutiny suggestion, at least for racial classifications used by individual states.⁴¹ Much of the dicta in *Croson* relied upon Powell’s *Bakke* opinion stating that racial classifications could unfairly burden Whites⁴² as well as minorities.⁴³ Additionally, although the Court indicated that remedying specific past discrimination could be a compelling interest, it rejected general societal discrimination as sufficient to meet the test.⁴⁴ Finally, in *Adarand*, the Court struck down a federal government program that created financial incentives for general contractors to hire subcontractors who were “socially and economically disadvantaged,” which, for some contractors, included

Reversal of Fortune: The Inapposite Standards Applied to Remedial Race-, Gender-, and Orientation-Based Classifications, 92 NEB. L. REV. 1 (2013).

39. On colorblindness as “mythologized racial justice,” see Jerome M. Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162 (1994). Prominent legal scholar and Harvard Professor Randall Kennedy has described the Court’s colorblind jurisprudence as follows:

Constitutional color blindness threatens policies that are assisting to create a multiracial polity in which previously oppressed peoples participate as productive, equal actors in every sphere of American life. Constitutional color blindness is thus a destructive jurisprudence.

KENNEDY, *supra* note 5, at 12.

40. 476 U.S. at 273–74.
41. 488 U.S. at 493. For states, then, the Court rejected the notion that racial considerations could be regarded as “benign.”
42. Throughout this Article, we capitalize the words “Black” and “White” when we use them as nouns to describe a racialized group; however, we do not capitalize these terms when we use them as adjectives. Professor Kimberlé Crenshaw, one of the founders of Critical Race Theory, has explained that “Black” deserves capitalization because “Blacks, like Asians [and] Latinos, . . . constitute a specific cultural group and, as such, require denotation as a proper noun.” Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).
43. A former law professor and current Associate California Supreme Court Justice, however, has argued that claims that affirmative action for African Americans deprive white applicants of spots at selective institutions are erroneous. Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002).
44. 488 U.S. at 496–97. The Court then struck down the city of Richmond’s minority set-aside program and remanded the case back to the Circuit to apply strict scrutiny.

considerations of race.⁴⁵ In so doing, the Court extended *Croson's* application of strict scrutiny to all state uses of racial classifications to the federal government.

In addition to the Court's curtailment of affirmative action programs, a series of states began prohibiting considerations of race in education, employment, and contracting. The University of California Board of Regents became an early proponent of discontinuing considerations of minority status in education, eliminating affirmative action in admissions in 1995.⁴⁶ Also, in 1995, then Governor Pete Wilson made a similar policy shift when he issued an executive order eliminating affirmative action in state employment.⁴⁷ In 1996, 54 percent of the voters in California passed Proposition 209, which banned minority group considerations in education, employment, and contracting through an amendment to the state Constitution.⁴⁸ Styled as a civil rights initiative, Proposition 209 included universalist language that proclaimed the state shall "not discriminate against, or grant preferential treatment to" any person in employment, education, or contracting, based on "race, sex, color, ethnicity, or national origin."⁴⁹ Soon, it became a model for other states seeking to prohibit the consideration of race in any arena. Following California's lead, anti-affirmative action ballot initiatives expanded to other states, including Washington's Initiative 200, Nebraska's Initiative 424, Amendment 46 in Colorado, and Proposal 2 in Michigan.⁵⁰ The

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45. 515 U.S. at 207. With regard to the decision to apply strict scrutiny to federal programs that considered race, *Adarand* overruled the approach followed in an earlier case. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (applying intermediate scrutiny in upholding a federal government program considering racial set-asides, which the Court described as "benign").
46. Linda Martin, Note, *Affirmative Action in University of California Admissions: An Examination of the Constitutionality of Resolution Sp-1*, 19 WHITTIER L. REV. 373, 373 (1997) (noting that Regents' actions were historic).
47. See MICHAEL D. SUMNER ET AL., U.C. BERKELEY THELTON E. HENDERSON CENTER FOR SOCIAL JUSTICE, PROPOSITION 209 AND PUBLIC EMPLOYMENT IN CALIFORNIA: TRENDS IN WORKFORCE DIVERSITY 3 (2008).
48. *Id.* Ward Connerly, a member of the U.C. Board of Regents, spearheaded repeal of affirmative action within the U.C. system and then championed not only Proposition 209 but also similar initiatives in other states. See *Ward Connerly's Falling Star*, 43 J. BLACK ISSUES HIGHER EDUC. 26–29 (Spring 2004). A recent article indicates that Proposition 209 has produced long-term negative consequences to public higher education in California. See William C. Kidder, *Mishaping the River: Proposition 209 and the Lessons for the Fisher Case*, 39 J.C. & U.L. 53, 55–56 (2013) (noting of the University of California schools that "data from eight campuses confirms that the campus racial climate is significantly more inhospitable for African Americans and Latinos than at UT Austin" and "Proposition 209 . . . triggered a series of educationally harmful 'chilling effects'").
49. Erwin Chemerinsky, *The Impact of the Proposed California Civil Rights Initiative*, 23 HASTINGS CONST. L. Q. 999, 1004 (1996).
50. See Kim West-Faulcon, *The River Runs Dry: When Title VII Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1088–1089 (2009).

proposals passed in each state but Colorado.⁵¹ The U.S. Supreme Court's 2014 decision in *Schuette v. Coalition to Defend Affirmative Action*,⁵² which overturned the Sixth Circuit's decision that Proposal 2 was unconstitutional, ensured that these initiatives would remain a viable means through which white majorities could eliminate affirmative action.⁵³

C.! The Last Remaining Vestiges of Affirmative Action (for Now)

Although the Court held that race-conscious set-aside programs in higher education admissions violated the Equal Protection Clause in *Regents of the University of California v. Bakke*, five justices also preserved the idea that achieving diversity among the student body involves a compelling state interest and that race can be considered a "plus" factor in creating diversity in admissions.⁵⁴ In *Grutter v. Bollinger*, a Justice O'Connor-led majority reaffirmed what has come to be referred to as "the diversity rationale" articulated in *Bakke*. The Court upheld the constitutionality of a race-conscious admissions process at the University of Michigan Law School, which considered race as one factor in a highly individualized admissions process.⁵⁵

Although *Grutter* legitimized the diversity rationale for race-conscious admissions considerations, Justice O'Connor opined: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."⁵⁶ Though not intended, Justice O'Connor's looming expiration date placed on the diversity rationale has, in many ways, invited more affirmative action litigation.⁵⁷ Based on the Court's opinion in *Fisher v. Universi-*

51. Nebraska and Washington both passed the initiatives with 58 percent of the votes. Ward Connerly's group attempted similar initiatives in Oklahoma, Arizona, and Missouri, but they failed. See Naomi Zeveloff, *Amendment 46 to Repeal Affirmative Action Loses Despite Hefty Odds*, COLO. INDEP. (Nov. 7, 2008), <http://www.coloradoindependent.com/14699/amendment-46-to-repeal-affirmative-action-loses-despite-hefty-odds>.

52. *Schuette v. Coal. to Defend Affirmative Action*, 134 S.Ct. 1623 (2014).

53. *Id.* (finding that Michigan's constitutional amendment that prohibited state universities from considering race as part of university admissions processes did not alienate minorities from the political process and did not violate the Equal Protection Clause of the U.S. Constitution).

54. *Bakke*, 438 U.S. at 311–14, 317. Scholars have contested whether the meaning of the diversity rationale is clear. See Carbado, *supra* note 7, at 1144.

55. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003). In the same term, the Court found the University of Michigan undergraduate admissions system's consideration of race to be unconstitutional. *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (finding that the points awarded to race in the admissions system involved no individual assessment and almost always made the difference for the admissions decision).

56. *Grutter*, 539 U.S. at 330–31.

57. Kevin R. Johnson, *From Brown to Bakke to Grutter: Constitutionalizing and Defining Racial Equality: The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENTARY 171, 187

ty of *Texas*—a case involving race-conscious higher education admissions standards—it appears we may not have to wait until 2028 for a new determination on the efficacy of affirmative action. Although *Fisher* did not overrule *Grutter* or ban affirmative action in educational admissions, it did refine *Grutter's* meaning to require less deference to institutions of higher education. In so doing, *Fisher* actually increased the likelihood of other similar cases being appealed to the Court.

II.! FISHER V. UNIVERSITY OF TEXAS AND AFFIRMATIVE ACTION— MISSED OPPORTUNITIES IN SUBSTANCE AND PROCESS

Through its decision in *Fisher*, the Supreme Court revealed the damaging consequences of the use of narrow conceptions and understandings of race. In 2008, petitioner Abigail Fisher was denied admission to the undergraduate college of the University of Texas, Austin, which has a two-pronged admissions system. The largest portion of undergraduates is admitted via the race-neutral practice⁵⁸ of accepting the top 10 percent of graduating Texas high school students. The year that Fisher applied to the University, residents in the top 10 percent of their high school classes took 81 percent of the seats in the entering class.⁵⁹ This result left 17,131 applicants to compete for only 1216 remaining seats for Texas residents in the second prong of the admissions system.⁶⁰ Although Fisher was admitted to another University of Texas campus and ultimately enrolled at Louisiana State University, she sued the University and school officials, alleging that the University's use of a race-conscious system violated the Equal Protection Clause.⁶¹

(2004) (“At the same time, by encouraging future litigation, a 25-year limit almost ensures the Court’s reconsideration of affirmative action.”); Derrick Bell, *On Grutter and Gratz: Examining “Diversity” in Education: Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1628 (2003) (arguing that the various opinions in *Grutter* and *Gratz* “further confuse rather than clarify Justice Powell’s opinion in *Bakke*,” and “[they] will likely encourage affirmative action opponents to mount more litigation challenges . . .”).

58. As discussed below, whether the plan is, in fact, race-neutral is a point of contestation. See *infra* notes 94–104 and accompanying text.
59. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 637 (2014).
60. *Id.*; see also Erwin Chemerinsky, *What’s Next for Affirmative Action*, ABA JOURNAL (Aug. 6, 2013 9:25am), http://www.abajournal.com/news/article/chemerinsky_whats_next_for_affirmative_action.
61. Fisher also claimed violations of 42 U.S.C. §§ 1981 and 1983, and Title VI of the Civil Rights Act of 1964. *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d 587, 590 (W.D. Tex. 2009), *vacated*, *Fisher*, 33 S.Ct. at 2411. Interestingly, at least one scholar has described suits such as Fisher’s as involving the assertion of an individual property-like interest in diversity, which should be a shared common good for universities and all students. See Sheldon Lyke, *Diversity As Commons*, 88 TULANE L. REV. 317, 323 (2014) (“[I]ndividuals like Fisher sue to end affirmative action, thereby “privatizing” admissions processes in order to gain admission to elite universities. As a result, these plaintiffs enclose education, and extinguish common rights to use diversity.”).

The Supreme Court decided Fisher's appeal in June 2013. Affirmative action opponents thought there might be five votes in *Fisher* to overrule, or greatly narrow, *Grutter v. Bollinger*. After all, Justices Scalia, Kennedy, and Thomas dissented in *Grutter*. Chief Justice Roberts wrote an opinion in *Parents Involved in Community Schools v. Seattle School Dist. No. 1* that stated that the Constitution requires the government to be colorblind and rejected diversity in the classroom as a compelling government interest.⁶² Additionally, the replacement of Justice O'Connor, the author of the Court's opinion in *Grutter*, was Justice Alito, who joined the *Parents Involved* opinion. Taken together, the changed composition of the Court and decisions from other germane cases led many to believe that a majority of the Court was poised to deem most forms of racial considerations within educational admissions processes unconstitutional.⁶³

Justice Kennedy, who essentially replaced Justice O'Connor as the tiebreaker in contentious race-related cases, authored the *Fisher* majority opinion. With Justice Kennedy as the author, many imagined *Fisher* would produce a close decision divided along ideological lines. Instead, *Fisher* was a 7-1 decision, with only Justice Ginsburg dissenting. The near unanimity in *Fisher* was especially surprising given the Court's current conservative majority that often produces 5-4 decisions on cases involving hot-button social issues, such as race.⁶⁴ Rather than substantially revisiting *Grutter's* core points, the seven justices in *Fisher* voted to remand the case to the Circuit Court for further proceedings. The scope of their decision, however, was very narrow. The Court reached its decision by avoiding the question of whether diversity is a suitable compelling interest and focusing instead on the lower court's application of the narrow tailoring prong of strict scru-

62. *Parents Involved*, 551 U.S. at 702-04.

63. A new biography detailing Justice Sotomayor's rise to the Court makes the changed composition point and indicates it was the Court's new (post-*Grutter*) make-up that led conservative anti-affirmative action proponents to select and fund Abigail Fisher's case. JOAN BISKUPIC, *BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE* 194-97 (2014).

64. In fact, a prominent author and Supreme Court journalist has indicated that until the final week of the Court's term in June 2013, *Fisher* was likely to produce a 5-3 majority (with Justice Kagan recusing herself) for striking down the university's admissions policy. *Id.* at 200-01. The 7-1 compromise was brokered in response to a stinging dissent drafted by Justice Sotomayor, for which "some [justices] were anxious about how Sotomayor's personal defense of affirmative action and indictment of the majority would ultimately play to the public." *Id.* at 205-06. In the term in which *Fisher* was decided, however, there were several 5-4 opinions, divided along ideological lines. See *Vance v. Ball State Univ.*, 133 S.Ct. 2434 (2013) (5-4 Justice Alito decision narrowing the definition of who can be treated as a supervisor under Title VII); *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S.Ct. 2517 (2013) (5-4 Justice Kennedy decision requiring Title VII retaliation plaintiff's to prove but-for causation for their claims); and *Shelby Cnty. v. Holder*, 133 S.Ct. 2612 (2013) (5-4 Justice Roberts decision striking down Section 4 of the Voting Rights Act).

tiny analysis. The Court called for “careful judicial inquiry” into whether acceptable diversity could be achieved without using race, requiring courts to determine whether there were race-neutral alternatives.⁶⁵

In so deciding *Fisher*, we argue, the Court ignored significant issues of both process and substance. Specifically, we argue that based on precedent addressing remedies for denied University applicants, the Court never should have heard Fisher’s complaint. We further contend that even as the Court heard the arguments from Fisher, the majority, concurrences, and dissent all failed to use the *Fisher* case as a meaningful opportunity to explicate equal protection doctrine as a function of the lived experiences of racial minorities within the United States.

A.1 Why *Fisher* Never Should Have Been Heard: Precedent and Process Limits for Denied Applicants

In deciding to hear *Fisher*, the Supreme Court failed to issue a decision that comported with its precedent. The Court never should have heard or decided *Fisher* because it lacked jurisdiction to do so. The plaintiffs in other affirmative action cases involving higher education such as *Regents of the University of California v. Bakke* and *Grutter v. Bollinger* were seeking injunctive and declaratory relief. Abigail Fisher was not. She had already graduated from Louisiana State University in 2012, and she no longer had a claim for an injunction or a declaratory judgment. She had no desire to return to college. Additionally, her lawsuit was not a class action suit or a suit with any other remaining plaintiffs.⁶⁶ Her only remaining claim was for \$100 in money damages—\$50 for her application fee and \$50 for her housing deposit.

Another problem was that the defendants named in the lawsuit were the University of Texas, a state university, and its officers who were sued in their “official capacity.” The Eleventh Amendment and sovereign immunity bar lawsuits for money damages against a state government or its officials who are sued in their official capacity for a constitutional violation.⁶⁷ The fact that Fisher failed to name any other defendants and that those defendants who were named could not

65. *Fisher*, 133 S.Ct. at 2420–21.

66. Originally, *Fisher* included co-plaintiff Rachel Michalewicz, who was also admitted to and enrolled at a school other than the University of Texas, Austin; unlike *Grutter*, *Fisher* involved no claims on behalf of future applicants. See Adam D. Chandler, *How (Not) To Bring an Affirmative-Action Challenge*, 122 YALE L.J. Online 85, 86–88 (2012), <http://www.yalelawjournal.org/forum/how-not-to-bring-an-affirmative-action-challenge> (also commenting that the case arguably could have been rendered moot had the University returned the application fees).

67. See *Scheuer v. Rhodes*, 416 U.S. 232, 241–43 (1974).

be sued in federal court because of the Eleventh Amendment similarly should have doomed Fisher's affirmative action lawsuit.

Moreover, it is questionable whether Fisher had standing to bring the claim. Her injury—a loss of money for the application and housing fees—was not caused by the University of Texas's affirmative action plan. Given her family's legacy at the University of Texas, Austin and her self-proclaimed childhood dream of attending the University, Fisher surely would have applied anyway.⁶⁸ In fact, in *Texas v. Lesage*, the Court expressly distinguished between an affirmative action case that sought an injunction, prospective relief, as opposed to one that sought only money damages. The Court declared:

Of course, a plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered. The relevant injury in such cases is the inability to compete on an equal footing. But where there is no allegation of an ongoing or imminent constitutional violation to support a claim for forward-looking relief, the government's conclusive demonstration that it would have made the same decision absent the alleged discrimination precludes any finding of liability.⁶⁹

In the federal district court, the University of Texas demonstrated that Fisher would not have been accepted even if she had a perfect personal achievement score.⁷⁰ As the Fifth Circuit recently explained in its 2014 decision for the remanded *Fisher* case,

Fisher's [Achievement Index] AI scores were too low for admission to her preferred academic programs at UT Austin; Fisher had a Liberal Arts AI of 3.1 and a Business AI of 3.1. And, because nearly all the seats in the undeclared major program in Liberal Arts were filled with Top Ten Percent students, all holistic review applicants "were only eligible for Summer Freshman Class or CAP [Coordinated Admissions Program] admission, unless their AI exceeded 3.5." Accordingly, even if she had received a perfect PAI score of 6, she could not have re-

68. Adam Liptak, *Race and College Admissions, Facing a New Test by the Justices*, N.Y. TIMES (Oct. 8, 2012), http://www.nytimes.com/2012/10/09/us/supreme-court-to-hear-case-on-affirmative-action.html?pagewanted=all&_r=0.

69. *Texas v. Lesage*, 528 U.S. 18, 21 (1999) (quoting *Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993)).

70. Brief for Respondents at 15–16, *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. at 2411 (No. 11-345) (internal quotation marks omitted). Fisher's exact Personal Achievement Index (PAI) is in a sealed brief. *Id.* at 15.

ceived an offer of admission to the Fall 2008 freshman class. *If she had been a minority the result would have been the same.*⁷¹

For Fisher to have had standing to sue in federal court, she would have been required to allege and prove an injury that was caused by the unconstitutional policy. But Abigail Fisher's remaining injury, for which she was suing, was simply the loss of \$100 in her application fees. That harm simply was not caused by the University of Texas's affirmative action plan because she would have applied to the school even if the affirmative action plan did not exist.

Although it is puzzling that the University of Texas did not do more to emphasize these procedural issues in its brief and argument to the Court, such lack of emphasis should not have been the reason that Fisher's case moved forward. The Court is obligated to raise problems with jurisdiction on its own, including Eleventh Amendment violations and lack of standing. Yet, the Court did not even acknowledge these jurisdictional obstacles. It appears that the Court's desire to decide the issue caused it to ignore that dismissal was required.⁷²

B.! The *Fisher* Majority and Missed Opportunities for Addressing the Lived Experience of Race

Beyond narrowing how strict scrutiny is applied and ignoring procedural constraints, the Supreme Court repeatedly missed opportunities to challenge routinely held assumptions (mainly by Whites) about race and its relevance to the everyday lives of applicants. By so doing, the Court essentially defined the experiences of Whites in the United States as the normative standard by which all college and university applicants, and thus all affirmative action programs, should be evaluated. The end result of the *Fisher* majority opinion was the reinforcement and fortification of white privilege. For example, while detailing its precedent in

71. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 639 (2014) (emphasis added). See *infra* note 85 and accompanying text (detailing what is considered in computing the PAI).

72. On remand, the University argued that Fisher lacked standing to bring her lawsuit, and the Fifth Circuit acknowledged its arguments, but declined to decide the case on standing grounds. The Fifth Circuit explained:

UT Austin's standing arguments carry force, but in our view the actions of the Supreme Court do not allow our reconsideration. The Supreme Court did not address the issue of standing, although it was squarely presented to it. Rather, it remanded the case for a decision on the merits, having reaffirmed Justice Powell's opinion for the Court in *Regents of the University of California v. Bakke* as read by the Court in *Grutter v. Bollinger*. It affirmed all of this Court's decision except its application of strict scrutiny. The parties have identified no changes in jurisdictional facts occurring since briefing in the Supreme Court. Fisher's standing is limited to challenging the injury she alleges she suffered—the use of race in UT Austin's admissions program for the entering freshman class of Fall 2008.

Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 640 (2014).

the affirmative action arena, the Court proffered a statement about “race” that tends to comport with the actual lived experiences of Whites in the United States. Specifically, the Court asserted:

Justice Powell’s central point . . . was that this interest in securing diversity’s benefits, although a permissible objective, is complex. ‘It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. . . . To be narrowly tailored, a race-conscious admissions program cannot use a quota system,’ but instead must ‘remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.’⁷³

Implicit in these statements is the notion that race does not play a defining role in the actual lives of university and college applicants. Such statements assume that race has no meaning other than to work as a plus or minus during the admissions process. Indeed, the Court assumes that race plays no role but the role that applicants and admissions officers choose to assign to it.

The Court’s statements about and treatment of race ignores the lived experience of non-Whites in the United States. As Professors Michael Omi and Howard Winant reveal in their book *Racial Formation in the United States: From the 1960s to the 1990s*, “[f]rom the very inception of the Republic to the present moment, race has been a profound determinant of one’s political rights, one’s location in the labor market, and indeed one’s sense of ‘identity.’”⁷⁴ In other words, race has never represented a mere decorative symbol for individuals in our society. Instead, race has always carried with it real substantive consequences for the lives of people of color, who generally endure some form of racial subordination on a regular basis.⁷⁵ As Professors Richard Delgado and Jean Stefancic describe, unlike most Whites, who generally do not “have to think about race,”⁷⁶

73. *Fisher*, 133 S.Ct. at 2418 (quoting *Bakke*, 438 U.S. at 315 (citation omitted)).

74. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 1 (2d ed. 1994).

75. Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, available at <http://www.case.edu/president/aaction/UnpackingTheKnapsack.pdf>.

76. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 11 (2d ed. 2012). See also Barbara J. Flagg, “Was Blind, But Now I See”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969 n.73 (1993) (quoting

race and racism “[s]till, by every social indicator . . . continue[] to blight the lives of people of color, including holders of high-echelon jobs, even judges.”⁷⁷ Indeed, for most people of color in the United States, particularly African Americans, American Indians, and Latinos, race has involuntarily become a defining feature in their lives.⁷⁸

For this reason, when the Court failed to acknowledge the real meaning of race, racism, and their consequences in the United States, it essentially solidified what Professors Devon Carbado and Cheryl Harris have identified as a racial preference in favor of Whites in the admissions process.⁷⁹ After all, as Carbado and Harris point out in reference to the tasks of writing and evaluating personal admissions essays, to assume that race has no meaning or consequence in people’s lives and thus should not be a part of their applications unfairly assumes that one can speak about herself and her life in a coherent fashion without regard to race. While the requirement to completely avoid race in describing one’s self and one’s potential contributions to a school may make sense for most Whites, who, due to their skin color, view and think of themselves as raceless,⁸⁰ it makes little sense for people of color for whom race often plays a key part in social and work interactions.⁸¹ In sum, “the life story of many people—particularly with regard to describing disadvantage—simply does not make sense without reference to race.”⁸²

Robert W. Terry, *The Negative Impact on White Values*, in *IMPACTS OF RACISM ON WHITE AMERICANS* 119, 120 (Benjamin B. Bowser & Raymond G. Hunt eds., 1981).

77. DELGADO & STEFANCIC, *supra* note 76.

78. *See id.* at 1–2.

79. *See* Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139, 1148, 1168 (2008) (arguing that a mandate to ignore race in admissions ends up “conferring a preference for applicants for whom race does not matter”).

80. Flagg, *supra* note 76, at 970 (“White people externalize race. For most whites, most of the time, to think or speak about race is to think or speak about people of color, or perhaps, at times, to reflect on oneself (or other whites) in relation to people of color. But we tend not to think of ourselves or our racial cohort as racially distinctive. Whites’ ‘consciousness’ of whiteness is predominantly *unconsciousness* of whiteness.”) (emphasis in the original).

81. *See* DELGADO & STEFANCIC, *supra* note 77, at 1–2 (briefly discussing how microaggressions can “mar the days of women and folks of color” and referring to microaggressions as “dispiriting transactions”); DERALD WING SUE, *MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER, AND SEXUAL ORIENTATION* 5 (2010) (defining microaggressions as “brief and commonplace, daily, behavioral and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative, racial, gender, sexual-orientation, or religious slights and insults to the target person or group”).

82. Carbado & Harris, *supra* note 79, at 1148–53 (highlighting how essays written by President Barack Obama and Justice Clarence Thomas, for example, would make little sense if race were ignored or if President Obama or Justice Thomas were assumed to be white). For example, in discussing how a portion of Justice Thomas’s autobiography would be distorted without acknowledging race and its saliency in his life, Professors Carbado and Harris note:

In Thomas’s case, that history of disadvantage is also racial. It would be virtually impossible for him to tell the story of his background without reference to race. His story would

When the Court's opinion failed to acknowledge how race is a central and defining feature in the lives of many people of color, it essentially accepted, without challenge, that a person of color can describe, explain, or make sense of his or her existence without any account of race and thus missed an opportunity to deconstruct white privilege.⁸³

In addition, the Court missed an opportunity to highlight how failures to account for race in admissions evaluations can discount the achievements of a candidate of color in the admissions process.⁸⁴ For example, in its facts section, the Court described the University of Texas's Personal Achievement Index, which in conjunction with the Academic Index, was used to evaluate applicants who did not earn admission under the Texas Ten Percent Plan, stating:

This Personal Achievement Index (PAI) measures a student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances that give insight into a student's background. These included growing up in a single-parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student's family.⁸⁵

By detailing the University's statements that factors such as growing up in a single-parent home or speaking a language other than English can provide useful insights into a person's background and thus their potential contributions to an institution, the Court acknowledged, to some extent, that the evaluation of an applicant's leadership, awards, and extracurricular activities is contextual. After all, many would consider a student's achievement in becoming her school's best fiction writer to be more impressive if that student were a nonnative English speaker. Similarly, a student's significant achievements in being elected and serving as a strong leader in many activities at her school would be even more impressive if that student grew up in a poor single-mother household that required her to work twenty hours per work in addition to her

be both incomplete and incomprehensible. The difficult position Thomas finds himself in here exposes the problem of formally removing race from an admissions process against a social backdrop in which race both matters and is cognizable.

Id. at 1186.

83. For a cogent discussion of how current affirmative action policies, including the diversity rationale, are supportive of white privilege and thwart the development of white antiracist identity formation, see Osamudia R. James, *White Like Me, The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 430–31 (2014).

84. Angela Onwuachi-Willig, *'I Wish I Were Black' and Other Affirmative Action Tales of Privilege*, CHRON. HIGHER EDUC., Oct. 28 2013, available at <http://chronicle.com/article/I-Wish-I-Were-Black-and/142561>.

85. *Fisher*, 133 S.Ct. at 2415–16 (emphasis added).

academics than if that student grew up in a wealthy household and did not encounter such burdens.

Nevertheless, the Court missed the opportunity to take this understanding even further by exploring and explicating how race may often further contextualize each of these judgments during the admissions process. For instance, if the fiction writing student mentioned above is of Mexican descent and speaks Spanish as her first language, as opposed to being of French descent and speaking French as her first language, an astute admissions officer would consider the extreme prejudices and presumptions of incompetency and criminality that are generally imposed on Latinos who are of Mexican descent in evaluating her achievements.⁸⁶ More so, the same admissions officer would consider and give the student credit for the extra focus, skill, and hard work it must have taken to overcome those stereotypes and prejudices in achieving her literary accomplishments. Or, if one were to add the fact that the student in a single-parent home lives with her black mother, such information, too, would attach important dimensions to understanding the applicant's story, as the public has both historically and presently had different perceptions of single mothers, particularly if they require any government assistance, depending on whether they are black or Latino as opposed to white.⁸⁷ In sum, in both instances, the inclusion of racial details

86. See, e.g., Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1585 (2011) (discussing the implication of immigration being used as a pretext to investigate criminality and contending “assuming that the officer is persuaded that the Latino is a citizen or legal resident, he might still believe that the Latino is a criminal (based on stereotypes about Latino criminality) and, under the guise of enforcing immigration laws, continue to detain the Latino to confirm or dispel that race-based suspicion”); Mary Romero, *State Violence and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 DENV. U. L. REV. 1081, 1083–85 (2001) (discussing how black and Latino youth are viewed as “superpredators” and how this designation is “socially constructed through a racial lens—the lens that reflects the images of White middle class youth as ‘our’ children and Latino adolescent males as violent, inherently dangerous and endangering”). See generally Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013, 1013–14 (2004) (arguing that stereotypes are often deployed to associate people of color with undesirable personal qualities, such as “laziness, incompetence and hostility”); Neil Gotanda, *A Critique of “Our Constitution Is Colorblind,”* 44 STAN. L. REV. 1, 6 (1991) (“Any trace of African ancestry makes one Black. In contrast, the classification white signifies ‘uncontaminated’ European ancestry and corresponding racial purity. The socially constructed racial categories white and Black are not equal in status. They are highly contextualized, with powerful, deeply embedded social and political meanings.”).

87. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 107 (1995) (“[I]n the public’s mind, and despite overwhelming evidence to the contrary, the face of poverty has increasingly become that of a single mother, particularly the African-American single mother.”); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1542–44 (1995) (asserting that there is an assumption that many welfare recipients are poor Mexican immigrant mothers); see also Angela Onwuachi-Willig,

gives a fuller picture of the student's background—their Personal Achievement Index—and thus their merits for admission. Race and an individual's background cannot be separated—trying to separate them undercuts the significance of the different applicants' achievements by failing to take into account the race-related obstacles that they overcame.

Ignoring race also leads to discounting the struggle and success of people of color. For example, it would make little sense to ignore race when considering the fact that a student was the first African American student body president at a predominantly white institution. Ignoring this fact would also mean ignoring positive qualities that demonstrate leadership, vision, and tenacity, such as how the student was able to first visualize himself in this pathbreaking role and then achieve that goal despite never seeing any role models in that position, or how that student was able to overcome what may have been a historically hostile racial environment in school to persuade enough white students to cast their votes for him. Indeed, as many scholars have pointed out, evaluating Justice Thomas's achievements from elementary school until his appointment to the Supreme Court, and even his performance on the Supreme Court, is impossible without taking race, racism, and their effects on him into account.⁸⁸ Justice Thomas's autobiography is full of references to the ways in which race has influenced his life and stories concerning the race-based obstacles and hostilities he has encountered and overcome. The central focus given to race in his autobiography suggests that, at least implicitly, Justice Thomas agrees with the idea that examining race-related obstacles that have been overcome is critical to assessing achievement.⁸⁹

Finally, the Court missed the opportunity to confront perhaps the most offensive assumption behind challenges to race-based affirmative action: the notion that Whites, not people of color, naturally belong in the seats at public institutions. Public institutions are meant to serve the entire public within the state, regardless of the state's demographics. The Court missed this important oppor-

The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control, 93 CAL. L. REV. 1647, 1665–73 (2005) (highlighting how black mothers, specifically black welfare mothers, are stereotyped and demonized); Adrien Katherine Wing & Laura Weselmann, *Transcending Traditional Notions of Mothering: The Need for Critical Race Feminist Praxis*, 3 J. GENDER RACE & JUST. 257, 274 (1999) (“The law’s preference for stay-at-home mothers never applied to Black mothers.”).

88. See Angela Onwuachi-Willig, *Using the Master's “Tool” to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113–14 (2005) (using Thomas's life, including the race-based obstacles he faced, to highlight why the Justice is a good example of affirmative action working in the right manner).

89. See generally CLARENCE THOMAS, *MY GRANDFATHER'S SON: A MEMOIR* (2007); see also Carbado & Harris, *supra* note 79, at 1174–86, 1195–99 (examining excerpts from Thomas's autobiography and explicating how his narrative makes little sense without attention to race).

tunity when it described what it believed to be an increase in the African American and Latino student populations at the University of Texas, Austin since the Fifth Circuit's last affirmative action decision in *Hopwood v. Texas*⁹⁰ in 1996. The Court failed to make any reference to the demographic changes in the state that had taken place during the ten-year period. The Court stated:

The University's revised admissions process, coupled with the operation of the Top Ten Percent Law, resulted in a more racially diverse environment at the University. Before the admissions program at issue in this case, in the last year under the post-*Hopwood* AI/PAI system that did not consider race, the entering class was 4.5% African-American and 16.9% Hispanic. This is in contrast with the 1996 pre-*Hopwood* and Top Ten Percent regime, when race was explicitly considered, and the University's entering freshman class was 4.1% African-American and 14.5% Hispanic.⁹¹

The Court, however, is factually wrong in one important respect. The measure for the increase in students of a particular racial group at a public university cannot simply be determined over a ten-year period by the rise in numbers alone—that is, unless the percentages of each racial group in that state essentially remained constant over that fifteen-year period. In Texas, demographics changed significantly during that short period, particularly with respect to the Latino population, which, as the University asserted, exploded during that time. For instance, in 2004, Latinos made up 34.2 percent of the state's population as compared to just 25 percent in 1996.⁹² In this sense, the Court missed the opportunity to challenge assumptions deeply held by many Whites about who belongs in the United States more generally, and at the University of Texas, Austin, specifically.

In essence, the Supreme Court's assumptions about race in *Fisher* only worked to reinforce white privilege by identifying the experiences of Whites as the normative standard by which all others are to be evaluated.⁹³ In so doing, the Court ended up “conferring a preference for applicants for whom race does not matter,”⁹⁴ or more accurately, for those who do not suffer the traditional harms

90. 78 F.3d 932 (5th Cir. 1996).

91. *Fisher*, 133 S.Ct. at 2416.

92. U.S. CENSUS BUREAU, THE AMERICAN COMMUNITY—HISPANICS 2004, AMERICAN COMMUNITY SURVEY REPORTS 6 (2007).

93. See Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2012-13 (1995) (articulating the “transparency phenomenon,” which results in decisions being based upon white norms that many whites understand as race neutral). The operation of white norms and white privilege within the affirmative action context have been deftly addressed in recent scholarship. See James, *supra* note 83, at 470–79.

94. Carbado & Harris, *supra* note 79, at 1168.

stemming from structural racism. In all, the Court failed to challenge white privilege and colorblind rhetoric that works to reify current racial hierarchies. This failure to acknowledge the meaningfulness of race within the admissions scoring process at the University of Texas, Austin ignores and discounts the lived experience of many people of color in the United States.

C. Fisher's Modest Dissent and Justice Thomas' Misplaced Analogies

In *Fisher*, Justice Ginsburg dissented, and Justices Thomas and Scalia wrote separate concurring opinions. Each of these opinions could have moved equality jurisprudence forward by clarifying how race-conscious admissions practices should be reconciled with modern conceptions of equal protection. Yet Justice Ginsburg missed this opportunity, Justice Scalia wholesale rejected it, and Justice Thomas confused the contemporary equality conversation by relying significantly on ahistorical analogies in his analysis of the University of Texas's use of race. Taken together, these opinions have not provided balanced or nuanced approaches to assist in deciding future cases.

1.1 Justice Ginsburg: Questioning Neutrality and Dissenting Without Raising the Race Question

The other *Fisher* opinions failed to remedy the majority's avoidance of substantive questions regarding the acceptable contours of constitutionally-sound considerations of race in admissions. Justice Scalia's one-paragraph opinion need not be discussed at length because he merely wrote to state that the Court was not asked to overturn *Grutter*—a result he supports and that many commentators predicted would occur when *Fisher* was granted certiorari. In contrast, Justice Ginsburg's dissent claimed that the Fifth Circuit opinion complied with the *Grutter* decision. She, however, did not provide compelling or detailed support for this claim. In her *Gratz* dissent, by contrast, she strongly stated: "The stain of generations of racial oppression is still visible in our society. . . , and the determination to hasten its removal remains vital."⁹⁵ Despite her failure to reiterate this point or similar points regarding the significance of racial disparities that still remain in this country in *Fisher*,⁹⁶ her dissent was nevertheless critical because it was the only direct challenge to the majority's controlling argument—that *Grutter* requires a more robust application of the "narrow tailoring" prong of strict scrutiny.

95. *Gratz v. Bollinger*, 539 U.S. 244, 304 (2003).

96. *Id.* at 299–300.

Justice Ginsburg's more significant, and perhaps more controversial point in her *Fisher* dissent was that the majority was misguided in framing the debate over the University of Texas program as involving a choice between race-conscious admissions and the Texas Ten Percent Plan. Specifically, she stated: "I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious,"⁹⁷ and "it [the Texas Ten Percent Plan] was adopted with racially segregated neighborhoods and schools front and center stage."⁹⁸ According to Justice Ginsburg, the Texas Ten Percent Plan is not a "race neutral" program. This claim acknowledges that ostensibly race-neutral admissions practices have likely been so labeled to achieve diversity in the wake of court decisions invalidating explicitly race-conscious methods.⁹⁹ This claim also undoubtedly complicates the judicial landscape moving forward. On the one hand, Justice Ginsburg's pronouncement is designed to influence future cases by pointing out the fallacy of the Court's attempt to argue that race-conscious admissions are unnecessary given the availability of race-neutral alternatives. Consistent with her *Gratz* dissent, this argument is made in support of transparent considerations of race in admissions.¹⁰⁰ Nevertheless, this argument also has a potential downside. As previously noted, if the intent behind the Texas Ten Percent Plan was to improve minority enrollment, then one could argue that it should be subject to strict scrutiny rather than rational basis review.¹⁰¹ This claim seems somewhat contradictory when one considers cases where the Court has ignored evidence of disparate racial impact for constitutional claims because the government's actions or the relevant statutory language were facially neutral and

97. *Fisher*, 133 S.Ct. at 2433 (Ginsburg, J., dissenting).

98. *Id.*

99. For example, the Texas Ten Percent Plan was formed in the wake of *Hopwood v. Texas*, *supra* note 90, which struck down race-conscious admissions in the Fifth Circuit. Kim Forde Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2332–33, (2000). A recent article, however, has questioned when the race-neutral form of legislation, rather than its race-conscious objective, should provide a basis for strict scrutiny to be applied. Stephen M. Rich, *Inferred Classifications*, 99 VA. L. REV. 1525 (2013).

100. See *Gratz*, 539 U.S. at 302–05. Like Justice Ginsburg, others have argued that the more formulaic consideration of race at issue in *Gratz* was superior to the individualized review approved in *Grutter*. Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 519–20 (2007).

101. See Mazrui, *supra* note 99, at 2388 ("[T]he use of race-neutral classifications as a proxy for racial minorities as a proxy for diversity would also involve a discriminatory purpose,"); Brian Fitzpatrick, *Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?*, 13 MICH. J. RACE & L. 277 (2007). One scholar has recently described this tension between race-neutrality and race-consciousness in the Texas Ten Percent Plan as a paradox for both supporters and detractors of affirmative action policies. Leslie Y. Garfield, *The Paradox of Race-Conscious Labels*, 79 BROOK. L. REV. 1523 (2014).

the Court was unwilling to infer a discriminatory purpose.¹⁰² In the future, however, critics are likely to cite to Justice Ginsburg's dissent as a reason to interrogate admissions plans based on their presumed improper purpose rather than their facial neutrality.¹⁰³

Justice Ginsburg's dissent, however, might have been more helpful had she included either a more particularized defense of why the Texas Ten Percent Plan was sufficiently narrowly tailored or otherwise addressed the continuing constitutionality of race-conscious decisionmaking in education. The *Grutter* opinion borrowed the diversity rationale from *Bakke* and premised the importance of diversity, in part, on its importance to business and military interests.¹⁰⁴ It would have been much more useful to future cases if Justice Ginsburg had spent some time describing the forces that make race-conscious admissions necessary and why these programs remain consistent with the goals of equal protection.

Had she been so inclined, Justice Ginsburg could have also pointed out for the Court that the Texas Ten Percent Plan cannot be separated from race in light of residential and, thus, school segregation in Texas. It is hard to separate race and the consequences of our social structure from the lives of many people of color, which in turn makes it impossible to evaluate the application of any student or any person's life without taking race into account. Put simply, race and racism infect and affect all aspects of our lives, whether our privilege allows us to ignore them or whether our disadvantage forces us to confront them. As Professor Neil Gotanda explained in his formative article, *A Critique of "Our Constitution Is Colorblind,"* "any revised approach to race and the Constitution must explicitly recognize that race is not a simple, unitary phenomenon. Rather . . . race is a unique social formation with its own meanings, understandings, discourses, and interpretive frameworks. As a socially constructed category with multiple meanings, race cannot be easily isolated from lived social experience."¹⁰⁵

2.1 Justice Thomas: Concurring Through the Lens of (Contested) History

Unlike Justice Ginsburg's dissent, Justice Thomas's concurrence provided a detailed account of how race-based affirmative action should be reconciled with the Fourteenth Amendment's equality mandate. Justice Thomas concurred in

102. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Washington v. Davis*, 426 U.S. 229 (1976).

103. See, e.g., Ilya Somin, Fisher, *The Texas Ten Percent Plan, and "Race-Neutral" Alternatives to Affirmative Action*, VOLOKH CONSPIRACY (June 24, 2013, 12:41 PM), <http://www.volokh.com/2013/06/24/fisher-the-texas-ten-percent-plan-and-race-neutral-alternatives-to-affirmative-action>.

104. *Grutter*, 539 U.S. at 308.

105. Gotanda, *supra* note 86, at 63.

the judgment because he agreed that the Fifth Circuit incorrectly applied strict scrutiny but wrote separately to assert that race-based affirmative action is categorically unconstitutional. Most of his opinion, however, centered on justifying the overturning of *Grutter*. Justice Thomas believes very few governmental considerations of race should withstand judicial review, though he would support the use of racial classifications to support “pressing public necessity.”¹⁰⁶ He contended that this standard was met by the national security concerns at stake in *Korematsu*. Justice Thomas also endorsed the race considerations in *Richmond v. Croson* to remedy past discrimination where there was a strong basis in evidence supporting the need of the program.¹⁰⁷ This standard, however, is unlikely to be met without specific proof of continuing discrimination being carried out by an identifiable actor. Because of Justice Thomas’s beliefs about the very limited ways the state can or should consider race, he interprets *Grutter* as a radical departure from an acceptable standard of racial classification.

Justice Thomas expanded his attack on *Grutter* through comparisons to other cases and circumstances where he believes race was improperly considered. His analogies, however, are somewhat controversial. He first attacked the concept of the diversity rationale itself by citing to *Brown v. Board of Education*¹⁰⁸ for the proposition that “the argument that education benefits justify racial discrimination was advanced in support of racial segregation in the 1950’s.”¹⁰⁹ He went on to compare contemporary supporters of affirmative action with segregationists and maintained that their specific justifications—claims related to creating leaders, improving interracial relations, and understanding such practices as temporary—were substantially congruent.¹¹⁰ He made a final historical argument by analogy to support his belief that it is nearly impossible to discern when race-based decisions help or hurt minorities. Justice Thomas equated affirmative action advocates who claim such programs involve so-called benign considerations of race with slaveholders and segregationists who claimed racial segregation was beneficial for black children.¹¹¹ Then, Justice Thomas articulated a modern example of the harm such programs produce for minorities by citing to studies of “mismatch”—the negative consequences and stigma produced from purportedly underprepared minority students being undeservedly admitted into elite institutions.¹¹² For many, Justice Thomas’s concurring opinion was ahistorical, mis-

106. *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944).

107. *Fisher*, 133 S.Ct. at 2423.

108. 347 U.S. 483 (1954).

109. *Fisher*, 133 S.Ct. at 2424.

110. *Id.* at 2424–27.

111. *Id.* at 2429–30.

112. *Id.* at 2430–32.

leading, and rife with contradictions. Indeed, there are too many contradictions to discuss in this short Article, but we highlight just a few examples.

First, as Justice Thomas compared the arguments of segregationists to the supporters of affirmative action, he simultaneously referenced research concerning mismatch theory. Mismatch theory posits that African Americans and Latinos would perform better in college and beyond if they went to schools for which their scores indicate they would be better matched. Justice Thomas and other proponents, however, never raised any concerns about ostensibly mismatched white students under this theory.¹¹³ Specifically, Justice Thomas never raised any concerns about students like Abigail Fisher, who would have been a mismatched student had she been admitted to and enrolled at the University of Texas, Austin. In its Supreme Court brief, the University of Texas, Austin asserted that Fisher, who had an Academic Index score of 3.1, “would not have been admitted to the Fall 2008 freshman class even if she had received a ‘perfect’ [Personal Achievement Index (PAI)] score of 6.”¹¹⁴ In fact, Ms. Fisher was also denied admission to the University’s 2008 summer freshmen admissions program, in which 168 African Americans and Latinos with AI/PAI scores equal to or higher than Fisher’s were also denied admission.¹¹⁵ Moreover, Fisher’s SAT score of 1180 would

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113. See generally Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004). Within legal academia, Sander’s theory has been significantly criticized. See, e.g., William Kidder & Angela Onwuachi-Willig, *Still Hazy After All These Years: The Lack of Empirical Evidence and Logic Supporting Mismatch*, 92 TEXAS L. REV. 895 (2014) (reviewing RICHARD H. SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT* (2013)); Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers*, 57 STAN. L. REV. 1807 (2005) (refuting Sander’s claim that mismatch, which is fueled by affirmative action, leads to fewer black lawyers); David Wilkins, *A Systematic Response to Systematic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005). Additionally, there are other university admissions policies, such as legacy programs that favor the children of alumni, which create types of advantage for applicants that go largely uncontested by the Court. Based purely on the racially disproportionate numbers of Whites who have attended college throughout U.S. history—numbers themselves influenced by opportunities being foreclosed to minorities until quite recently—the legacy privilege confers a benefit that is racialized without ever being considered in this way. On this point, see Mark S. Brodin, *The Fraudulent Case Against Affirmative Action—The Untold Story of Fisher v. University of Texas*, 62 BUFF. L. REV. 237, 240–41 (2014) (“We of course have always had (with nary a complaint) ‘affirmative action’ for certain privileged groups. In higher education, these include athletes (especially those on the coach’s recruiting list), ‘legacies’ (dubbed ‘affirmative action for rich white people’), ‘development cases,’ oboe players, applicants from farm states, children of faculty, etc.” (footnotes omitted)).
114. Brief for Respondents at 15–16, *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013) (No. 11-345) (internal quotation marks omitted). Fisher’s exact PAI is in a sealed brief. *Id.* at 15.
115. For example, the *Fisher* Brief stated:
 Although one African-American and four Hispanic applicants with lower combined AI/PAI scores than petitioner’s were offered admission to the summer program, so were 42 Caucasian applicants with combined AI/PAI scores identical to or lower than petitioner’s.

have placed her below at least 84 percent of the summer-program students at UT Austin in 2008.¹¹⁶

Moreover, Justice Thomas and other opponents of affirmative action fail to acknowledge that advocating mismatch theory can be viewed as supporting racial discrimination. While Justice Thomas tries to liken affirmative action supporters to segregationists, he completely fails to acknowledge that same comparison can be made more forcefully between the proponents of mismatch theory and segregationists. After all, unlike proponents of affirmative action, whose arguments center on the benefits of racial integration through diversity programs, proponents of mismatch theory arguably make claims that are akin to those of segregationists.¹¹⁷ Indeed, much like past segregationists argued that racially segregated schools provided the best learning environments for African Americans, mismatch proponents argue that institutions without affirmative action—schools that are less integrated—would be more suitable learning environments for black students. Furthermore, mismatch proponents indicate that their form of discrimination—worrying about mismatch for African Americans but not for

In addition, 168 African-American and Hispanic applicants in this pool who had combined AI/PAI scores identical to or *higher* than petitioner's were *denied* admission to the summer program.

Id. at 15–16.

116. Compare *id.* at 15 (identifying Fisher's SAT score of 1180), with Univ. of Tex. at Austin Office of Admissions, *The Performance of Students Attending The University of Texas at Austin as a Result of the Coordinated Admission Program (CAP): Students Applying as Freshmen 2008*, at 4 (Mar. 11 2011), available at <http://www.utexas.edu/student/admissions/research/CAPreport-CAP08.pdf> (demonstrating that a sum of 84 percent of the 2008 summer-program freshmen at UT Austin had SAT scores of 1200 or higher). See also Kidder & Onwuachi-Willig, *supra* note 113, at 937 (noting that Richard Sander, the primary proponent of mismatch theory, argued in his book that "Hispanics who are admitted due to preferences typically enter with markedly less academic preparation," and then cited as his supporting evidence that in 2009 Latinos admitted outside the Ten Percent Plan had SAT scores at the 80th percentile nationally in 2009, compared to the 89th percentile for whites and 93rd percentile for Asian Americans, when Fisher's SAT score itself was equivalent or lower to the Latino SAT mean score that Sander and Taylor cited as primary evidence of "markedly less academic preparation" (quoting Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party, *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013) (No. 11-345))). Sander and Taylor were referencing SAT percentile ranks for scores on the 2400-point scale that includes the writing section, but the sparse record in *Fisher* only seems to report her SAT of 1180 on the 1600-point scale (500 on critical reading; 680 on math). Joint Appendix at 41a, *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013) (No. 11-345). We use the terms "or lower" because it is unclear if Abigail Fisher took the SAT writing test, but if she did, then her discrepant scores between reading and math provide some reason to think that her SAT score on a 2400-point scale (including writing) was not at the 80th percentile (1780) nationally. See College Board, *SAT Percentile Ranks for Males, Females, and Total Group: 2008 College Bound Seniors—Critical Reading + Math + Writing*, http://professionals.collegeboard.com/profdownload/sat_percentile_ranks_2008_composite_cr_m_w.pdf.

117. We are not making such claims against mismatch proponents.

Whites and thus separating black students from Whites—is what is best for African Americans. In sum, Justice Thomas’s views on benign and malicious discrimination leave his concurrence with multiple layers of inconsistency.

Second, Justice Thomas’s declarations in his concurring opinion fail to account for the realities of race even as he has previously employed them in opinions and his own writings, including his autobiography. For instance, in his *Fisher* concurrence, Justice Thomas proclaimed, just as he did in *Grutter*, that “[t]here is no principled distinction between the University’s assertion that diversity yields educational benefits and the segregationists’ assertion that segregation yielded those same benefits.”¹¹⁸ Yet years before, during a conference on *Missouri v. Jenkins*,¹¹⁹ Justice Thomas made a statement that seems to reveal that he at least intuitively realizes the distinctions between the two. He announced to his colleagues: “I am the only one at this table who attended a segregated school.”¹²⁰ In fact, he was not the only justice who attended segregated schools, because all or nearly all of his colleagues at the time had attended all-white schools. Intuitively, Justice Thomas understood that his experience—his type of segregation—was not the same as his colleagues’ because of the unequal resources and stigma that attached to such inequities. Justice Thomas’s additional statements demonstrate this understanding, for he continued:

And the problem with segregation was not that we didn’t have white people in our class. The problem was that we didn’t have equal facilities. We didn’t have heating, we didn’t have books, and we had rickety chairs. All society owed us [were] equal resources and an equal opportunity to make something of ourselves. . . . The evil of segregation was that black students had inferior facilities, not that they were denied the chance to go to school with white students. . . . All my classmates and I wanted . . . was the choice to attend a mostly black school or mostly white school, and to have the same resources in whatever school we chose.¹²¹

This sentiment is arguably the most significant missed opportunity in the *Fisher* opinions: the opportunity to link the segregation and discrimination experienced by Justice Thomas and civil rights icons such as Heman Sweatt, a black man and grandson of slaves who fought for and won the right to gain admission to the University of Texas Law School in 1950,¹²² to the very different but still dis-

118. *Fisher*, 133 S.Ct. at 2428 (Thomas, J., concurring).

119. 515 U.S. 70 (1995).

120. Jeffrey Rosen, *Moving On*, NEW YORKER, Apr. 29, 1996, at 66.

121. *Id.*

122. Brief of the Family of Heman Sweatt as Amicus Curiae in Support of Respondents, at p.30, *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013) (No. 11-345). In a case argued by

heartening discrimination that so many students of color, as well as white students, are experiencing today. As the Sweatt family highlighted in its amicus brief: “Public schools in Texas’s major cities are even more highly segregated [today]. In 2011–12, only 8.1% of all students in the 279-school Houston Independent School District were white. At Jack Yates High School, from which Heman Sweatt graduated, only 6 of the 1,179 students that year—or 0.5%—were white, and 91.7% were African American.”¹²³ The family explained that such racial segregation in public schools is not what the Court envisioned when it asserted in *Sweatt v. Painter* that “that education ‘cannot be effective in isolation from the individuals and institutions with which the law interacts’; it ‘cannot be removed from the interplay of ideas and exchange of views with which the law is concerned.’”¹²⁴ According to the Sweatt family, such interplay and exchange requires the consideration of, not the avoidance of, race. Such considerations of race, the family explained, are distinct from the considerations of race that nearly prevented Heman Sweatt from obtaining admission to the University of Texas Law School in 1950.¹²⁵

Clearly, Justice Thomas believes racial classifications are never benign and that history is pertinent to exposing the dangers of state considerations of race in education. The problem is that he ignores his personal history and uses history more generally to suggest that justifications for considering race that were once advanced by segregationists share some commonality with the arguments of proponents of affirmative action. Unlike the Sweatt family, Justice Thomas claims to see no meaningful difference in using race as a tool for inclusion or segregation, despite the historical significance of the Fourteenth Amendment’s intended purpose of integrating freed slaves into society. Also absent from his analysis are any references to generations of institutional racialized inequalities—inequalities not likely to be remedied with either of the race-conscious standards Justice Thomas claims are acceptable under precedent. For example, scholars have described the dangers of regarding racial inequality as produced only through the willful actions of self-motivated individuals, rather than considering the “historical-structural, state-based account.”¹²⁶ Specifically, they argue: “As this historical narrative sug-

Thurgood Marshall in 1946, the Court ordered that Mr. Sweatt be admitted to the University of Texas Law School because the “law school for negroes” that Texas planned to open in 1947 would not provide an education “substantially equal to that which he would receive if admitted to the University of Texas Law School.” *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

123. Brief of the Family of Heman Sweatt, *supra* note 122.

124. *Id.* at 17 (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

125. *Id.* at 37; *see also* *Sweatt v. Painter*, 339 U.S. 629 (1950).

126. Michael K. Brown & David Wellman, *Embedding the Color Line: The Accumulation of Racial Advantage and the Disaccumulation of Opportunity in Post-Civil Rights America*, 2 DU BOIS REV.

gests, federal social policies have combined with White control of labor markets to promote White accumulation of economic advantages while contributing to Black disaccumulation through segregation and disinvestment.”¹²⁷ The history of racialized distribution of resources continues to create material deficits in the lives of minorities today, especially African Americans.¹²⁸ Given Justice Thomas’s penchant for connecting present considerations of race to the past, the question that proponents of affirmative action should next pose to him is why it is unconstitutional for the state to more broadly consider race-conscious remedies today when history reveals longstanding, race-conscious origins to the problems.

CONCLUSION: THE VIABILITY OF RACE-BASED AFFIRMATIVE ACTION MOVING FORWARD

In economic theory, an opportunity loss is the value of a lost chance or profit forgone through actions taken that did not permit it to be realized. The *Fisher* opinions resulted in lost opportunities arising from the Court’s failure to resolve critical questions relevant to the future of race-based affirmative action in education. A number of these questions—such as the resolution of jurisdictional issues, what constitutes a critical mass for diversity purposes, and whether the Texas Ten Percent Plan will continue to be treated as race-neutral moving forward—may be litigated in future affirmative action challenges. Alongside these questions, we have attempted to identify other topics important to reconciling race-conscious decisionmaking in higher education admissions with the Equal Protection Clause.

Our hope is that the Court will come to grips with the myriad ways that race shapes opportunities and outcomes in American life. To do so, the Court

187, 189 (2005); see also JOHN A. POWELL, RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY 79 (2012) (“Privilege is distributed and mediated through structures, language, power and institutions that always outrun the control of any given individual.”).

127. Brown & Wellman, *supra* note 126, at 201; see also WILLIAM JULIUS WILSON, *Structural and Cultural Forces that Contribute to Racial Inequality*, in MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY 1–24, 17 (2009) (“One of the effects of living in racially segregated neighborhoods is exposure to group-specific, cultural traits . . . that emerged from patterns of racial exclusion and that may not be conducive to factors that facilitate social mobility.”); Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557 (2005) (tracking government’s differential financial treatment across race of rural southern landowners and the high resulting levels of black land loss).
128. See, e.g., Barnes, Chemerinsky & Jones, *supra* note 8, at 981–92 (detailing racial gaps in income, wealth accumulation, home ownership, educational attainment, and treatment within the criminal justice system).

will need to do much more than merely question whether racial classifications may operate in a benign manner. Instead, the Court will have to concern itself in a more robust way than it previously has with the societal deficits of those who have been marked by minority racial status and how these deficits are reproduced institutionally and structurally, rather than by individual decisions. So while the Court has moved beyond the proffered biological origins of race that were prevalent during the time of *Plessy*,¹²⁹ they must do more to understand the post-*Brown* social construction of race. The modern concept of race “more meaningfully reflects cultural and cognitive frames than any objective differences between people,”¹³⁰ but it still involves identifying a subgroup so that their place in a hierarchical society can be justified. Mismatch theory is one example of how a belief that certain bodies—marked by minority racial classifications—should be limited to certain places is operationalized. It is for this reason that a more critical analysis of how affirmative action interacts with equality would ensue from the Court moving toward understanding constructions of race as the purpose for, rather than merely a result of, an assignment system.¹³¹

With regard to expanding the scope of its analysis, the Court will need to pay closer attention to population demographics, statistics reflecting the continuing consequences of racial segregation in America, and the ways in which belonging to a minority racial group creates challenges relevant for deciding the merits of distributing opportunity. Neither *Fisher*, nor *Shelby County v. Holder*¹³²—a recent case concerning voting rights where the Court underestimated the influence of America’s history of racism on contemporary life—provide reasons for proponents to hope that affirmative action programs will survive moving forward. Real change will only occur when the terms of the debate shift, likely through appointments that disrupt the Court’s current conservative majority, in a manner that allows for interpretations of equality under the Fourteenth Amendment that do not require dissimilar life circumstances to be treated similarly. While this may contradict conservative commitments to colorblindness, we believe that concept is often applied ahistorically.¹³³

129. See Ian F. Haney-López, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 9-10 (1994); Jennifer Eberhardt, *Imaging Race*, 60 AMERICAN PSYCHOL. 181, 186-87 (2005).

130. CHARLES EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 41 (2014) (footnote omitted).

131. See VILNA BASHI TREITLER, THE ETHNIC PROJECT: TRANSFORMING RACIAL FICTION INTO ETHNIC FACTIONS 11 (2013) (“Racialized societies are inherently hierarchical—the purpose of race is to assign differential human value to human lives.”).

132. 133 S.Ct. 2612 (2013).

133. We find the following approach to colorblindness more desirable:

The long history of race discrimination in America that is bounded between the decisions in *Plessy* and *Brown* is one where opportunities for non-Whites were limited and decidedly unequal. That the period where opportunities were somewhat more evenly distributed was cut so short by the rise of a universalist conception of equality—a conception, which is remarkable for the fact that there was little judicial acknowledgment of it during the period of “separate but equal”—is regrettable. Anticlassification, colorblind, and postracial approaches to interpreting Fourteenth Amendment equality now treat the act of being classified by race as the problem. The real problem, we have tried to argue here, is not that one may be classified by race, but the negative treatment and limited opportunities extended to persons who belong to unfavorably viewed racial groups. In other words, classification itself is not necessarily a proxy for an invidious motive. Opportunities being afforded and denied based upon the stigmatized perceptions tied to certain racial groups is the problem. At bottom, affirmative action programs within education, which may well not survive another review in the Supreme Court, are one of very few legal means for fighting this injustice. For those who would suggest that it is the affirmative action programs that are stigmatizing, we agree with the words of Heman Sweatt and his family: “Stigma attaches not when one is recognized as a member of a racial or ethnic group; stigma attaches when one is seen as nothing more.”¹³⁴

I do not even want to insist that the ideal government would at all times and at all places be entirely blind to color . . . What is needed, rather, is the development of a better grammar of race, a way through which we can at once take account of it and not punish it.

STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 227–28 (1991).

134 Brief of the Family of Heman Sweatt, *supra* note 122, at 37.

WHAT CAN *BROWN* DO FOR YOU?: ADDRESSING
MCCLESKEY V. KEMP AS A FLAWED
STANDARD FOR MEASURING THE
CONSTITUTIONALLY SIGNIFICANT RISK OF
RACE BIAS

Mario L. Barnes & Erwin Chemerinsky

ABSTRACT—This Essay asserts that in *McCleskey v. Kemp*, the Supreme Court created a problematic standard for the evidence of race bias necessary to uphold an equal protection claim under the Fourteenth Amendment of the U.S. Constitution. First, the Court’s opinion reinforced the cramped understanding that constitutional claims require evidence of not only disparate impact but also discriminatory purpose, producing significant negative consequences for the operation of the U.S. criminal justice system. Second, the Court rejected the Baldus study’s findings of statistically significant correlations between the races of the perpetrators and victims and the imposition of the death penalty within Georgia criminal courts as insufficient proof of discriminatory intent, overlooking unconscious and structural racism. Third, Justice Lewis Powell’s approach to causation in *McCleskey* would have rendered almost any social science study incapable of proving the existence of race bias to his satisfaction, creating an unduly high bar for proving intent.

Furthermore, this Essay contrasts the Court’s use of the Baldus data in *McCleskey* with its use of social science data in other cases. For example, in oral arguments for a recent gerrymandering case, *Gill v. Whitford*, Chief Justice John Roberts summarily rejected the utility of applying empirical findings. In *Brown v. Board of Education*, by contrast, the Court positively endorsed studies on the harms of racial segregation that were less robust than the Baldus data. In response to uneven uses of empirical data in these cases, this Essay suggests approaches courts might develop to distinguish between stronger and weaker empirical evidence, including an update of how appellate courts review research introduced under the *Daubert v. Merrell Dow Pharmaceuticals, Inc.* standard. In the wake of decisions such as *McCleskey*, and the troubled history of considerations of race within social science research, this Essay also articulates the unique challenges that must be confronted when courts consider data on racial impact.

AUTHORS—Mario L. Barnes, Professor of Law & Criminology, Law and Society (by courtesy); Senior Associate Dean for Academic Affairs; Co-Director, Center on Law, Equality and Race (CLEaR), University of California, Irvine. Erwin Chemerinsky, Dean and Jesse H. Choper Distinguished Professor of Law, University of California at Berkeley, School of Law. Thank you to University of Miami Law Professor Charlton Copeland for planting the seed for this article, the participants of the *Northwestern University Law Review McCleskey* Symposium and workshops at the University of Denver (Sturm College of Law and Modern Learning Center) and University of California at Irvine School of Law, especially Roberto Corrada, Nancy Ehrenreich, Rashmi Goel, Sam Kamin, Stephen Lee, Kaaryn Gustafson, Michele Bratcher Goodwin, Carrie Menkel-Meadow, Carroll Seron, Henry Weinstein, Seth Davis, Jonathan Glater, and Sameer Ashar. We are also grateful for the thoughtful contributions of research assistant Christopher Williams and *Northwestern University Law Review* members Adithi Grama, Arielle Tolman, Brandon Harmer, Hillary Chutter-Ames, and Sophia Khan.

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[I]f you’re the intelligent man on the street and the Court issues a decision, and let’s say, the Democrats win, and that person will say: Well, why did the Democrats win? And the answer is going to be because EG was greater than 7 percent, where EG is the sigma of party X wasted votes minus the sigma of party Y wasted votes over the sigma of party X votes plus party Y votes. And the intelligent man on the street is going to say that’s a bunch of baloney.

—Chief Justice John Roberts[†]

[†] Transcript of Oral Argument at 37–38, *Gill v. Whitford*, 137 S. Ct. 2268 (2017) (No. 16-1161).

INTRODUCTION

As Chief Justice John Roberts’s above quotation—which derives from the oral argument for *Gill v. Whitford*, a political gerrymandering case heard during the Supreme Court’s fall 2017 term—suggests, at least some distinguished members of the nation’s highest court are deeply skeptical of social science evidence. In fact, later in the argument, the Chief Justice further cautioned against courts attempting to make decisions based on “sociological gobbledygook.”¹ Beyond Roberts’s expressed belief in *Gill* that political science data can be unfathomable to the common person and thus should not be relied on by the Court, there have been numerous instances of the Court more generally applying inconsistent approaches to social science research. This has especially been the case when the Court has considered social science data on racial impact. On this, the thirty-year anniversary of *McCleskey v. Kemp*,² we suggest that the Court’s decision in that case stands out for a number of problematic reasons, but namely as a case where social science evidence elucidating the meaning of race in America was woefully ill-considered.

The majority opinion in *McCleskey* made two very disturbing assertions about social science data. First, the Court claimed the Baldus studies introduced by McCleskey, a black man sentenced to death for the killing of a white police officer, failed to prove a sufficient causal link between race and the imposition of the death penalty in Georgia.³ Second, the Court maintained the data did not “demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.”⁴ The Justice Lewis Powell-led opinion reached these conclusions despite data in the studies confirming that a black person who killed a white person in Georgia was treated very differently,⁵ receiving the death penalty 22% of the time, as

¹ *Id.* at 40. Eduardo Bonilla-Silva, the president of the American Sociological Association, has written an open letter in response to Chief Justice Roberts’s comments. See Letter from Eduardo Bonilla-Silva, President, Am. Sociological Ass’n, to John G. Roberts, Jr., Chief Justice, Supreme Court of the U.S. (Oct. 10, 2017), <http://www.asanet.org/news-events/asa-news/asa-president-eduardo-bonilla-silva-responds-chief-justice-john-roberts> [<https://perma.cc/S9G5-AYJV>] (“In an era when facts are often dismissed as ‘fake news,’ we are particularly concerned about a person of your stature suggesting to the public that scientific measurement is not valid or reliable and that expertise should not be trusted. What you call ‘gobbledygook’ is rigorous and empirical.”).

² 481 U.S. 279 (1987).

³ *Id.* at 312 (“At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system.”).

⁴ *Id.* at 313.

⁵ See David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 707–10 (1983) (“In other words, our data strongly suggests that Georgia is operating a dual system, based upon the race of the victim, for processing

opposed to the 1% of black defendants who received the death penalty when their victims were black.⁶ Powell’s claims about the Baldus data reflect an incommensurate approach for courts considering empirical research on race. For example, he seems to suggest that he would have been influenced by empirical data more persuasively evincing causation. Specifically, Powell stated: “Even Professor Baldus does not contend that his statistics *prove* that race enters into any capital sentencing decisions or that race was a factor in McCleskey’s particular case. Statistics at most may show only a likelihood that a particular factor entered into some decisions.”⁷ In determining, however, that *McCleskey* involved no constitutional violation, he ignored the relative strength of the multiple regressions in the Baldus research—which are by definition probabilistic measures⁸—and the reality that social science studies very rarely expound on causation in a manner that could support absolute certainty.⁹

This Essay claims the *McCleskey* Court demonstrated a cramped understanding of both equal protection doctrine and the value of social science evidence. First, we propose that the *McCleskey* majority opinion problematically expanded the antidiscrimination standard articulated in earlier cases by adhering to a rigid “because of” requirement for establishing

homicide cases. Georgia juries appear to tolerate greater levels of aggravation without imposing the death penalty in black victim cases . . .”).

⁶ See DAVID BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 190 (1990); John C. Bolger, *Keynote Address—McCleskey v. Kemp: Field Notes from 1977–1991*, 112 NW. U. L. REV. 1637 (2018) (describing the Baldus discovery of these data in 1982 and that “racial factors were indeed still playing an important role in Georgia’s capital sentencing system”).

⁷ *McCleskey*, 481 U.S. at 308. Justice Powell was not wrong to question the strength of correlative data generally. See ROBERT M. LIEBERT & LYNN LANGENBACH LIEBERT, SCIENCE AND BEHAVIOR: AN INTRODUCTION TO METHODS OF PSYCHOLOGICAL RESEARCH 85 (4th ed. 1995) (“When a psychologist observes a naturally occurring correlation between two variables, *X* and *Y*, it is often tempting to assume that the relationship is causal in nature . . . This assumption is unsound.”). Justice Powell, however, fails to comment upon whether the research design and methods used to test multiple variables in the Baldus data met social science standards for supporting a causal inference. This may have been the case because it was the implications of the study rather than the methods that concerned Justice Powell. See Scott E. Sundby, *The Loss of Constitutional Faith: McCleskey v. Kemp and the Dark Side of Procedure*, 10 OHIO ST. J. CRIM. L. 5, 12 (2012) (noting that when a clerk’s memo criticized the district court’s attack on the Baldus study methods, rather than supporting or questioning the substance of the attack, Justice Powell asked, “What if one accepts the study as reflecting sound statistical analysis? Would this require that no blacks be sentenced to death where victim was white?”).

⁸ Julian Reiss, *Causation in the Social Sciences: Evidence, Inference, and Purpose*, 39 PHIL. SOC. SCI. 20, 24 (2009).

⁹ Margaret Mooney Marini & Burton Singer, *Causality in the Social Sciences*, 18 SOC. METHODOLOGY 347, 348 (1988) (noting, in part, that in social science research “causal relationships are always identified against the background of some causal field, and specification of the field is critical to interpretation of an observed relationship”).

intent to discriminate in a specific case.¹⁰ The Court's *Washington v. Davis* opinion in 1976 first explicated that a Fourteenth Amendment Equal Protection Clause claim required both disparate racial impact and a discriminatory purpose.¹¹ In 1979, *Personnel Administrator of Massachusetts v. Feeney* clarified that, in order to prove the discriminatory purpose of some state legislation, one would need to prove the state selected the course of action "because of," not merely "in spite of," its adverse effects upon a protected group.¹² The *McCleskey* majority recommitted to these standards but did so despite the Court's willingness to authorize complaints based solely on disparate impact in other areas of the law¹³ and the availability of social science data that revealed racial inequality in death sentencing in Georgia. To our minds, the racial impact data in *McCleskey* demonstrated the fallacy of overly weighing intent in discrimination cases and the limits of the discriminatory purpose requirement more generally.

Second, we suggest that, at times, the Court's approach to considering racial impact data has been quite uneven. In other cases, the Court has been much more open to social scientific considerations of race, even with data that were less robust than the findings of the Baldus studies. As an example of the unevenness of the Court's approach to racial data, we look to the Court's consideration of social science evidence in *Brown v. Board of*

¹⁰ See generally *Washington v. Davis*, 426 U.S. 229 (1976); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979). The *McCleskey* Court also considered the Baldus data as justification for the Eighth Amendment challenge. See 481 U.S. at 299–314. Though one of us has done so elsewhere, see Mario L. Barnes, *McCleskey v. Kemp*, in *CRITICAL RACE JUDGMENTS* (Devon Carbado et al. eds., forthcoming 2018), we do not substantially address the arguments pertaining to Eighth Amendment doctrine in this Essay.

¹¹ *Davis*, 426 U.S. at 239 ("But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.").

¹² 442 U.S. at 279. In *McCleskey*, Justice Powell applied the rule from *Feeney* and determined, "[t]here was no evidence . . . that the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose." 481 U.S. at 298.

¹³ 481 U.S. at 293–94 (discussing how death penalty jury deliberation differs from Title VII employment and *Batson* jury-strike cases—cases where the Court had previously accepted multiple regression analysis and impact data, respectively, to determine the existence of unconstitutional discrimination).

Education.¹⁴ In *Brown*, in perhaps one of the most famous¹⁵ (or infamous¹⁶) footnotes in Fourteenth Amendment jurisprudence, the Court referenced social science data attesting to the negative psychological effects of segregation on African-American children.¹⁷ The Court, however, cited to studies without presenting the findings or interrogating the strength of the methodologies employed. This fact takes on greater relevance when one considers that numerous critics have challenged the findings of those studies over the years.¹⁸ Ironically, then, what some consider to be weaker data on the impact of race was welcomed by the Court in *Brown*, while significantly more robust studies evaluating race in capital sentencing (alongside numerous other factors) were rejected in *McCleskey*. *Brown*, however, was not an ideal example of how the Court should consider social science data.¹⁹ Dr. Kenneth Clark, a researcher who testified in the trial court in *Brown* and conducted doll studies that were cited in footnote 11, for example, claimed the Court ignored two of his important findings that racism was uniquely an American institution and that Whites were also negatively affected by segregation.²⁰ Nevertheless, we argue that despite the imperfect manner in which the social science evidence was treated in *Brown*, the outcome of the

¹⁴ 347 U.S. 483 (1954).

¹⁵ The Court refers to the social science evidence in footnote 11 of the opinion. *Id.* at 494 n.11. In the years immediately following the issuance of the *Brown* opinion, footnote 11 gained notoriety. See Herbert Garfinkel, *Social Science Evidence and the School Segregation Cases*, 21 J. POL. 37, 38 (1959); Allan Ides, *Tangled Up in Brown*, 47 HOW. L.J. 3, 9 (2003). Of course, one can debate such claims, but footnote 4 in *United States v. Carolene Products Co.*, which included language that suggested government decisions affecting “discrete and insular minorities” require more searching judicial review, is arguably more well-known. 304 U.S. 144, 152 n.4 (1938).

¹⁶ Some of the criticism of *Brown*’s footnote 11 has been terribly unflattering. See Michael Heise, *Brown v. Board of Education, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 294 (2005).

¹⁷ MARTHA MINOW, IN *BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK* 140–41 (2010).

¹⁸ See, e.g., ROY L. BROOKS ET AL., *CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES* 70 (3d ed. 2005); ROY L. BROOKS, *INTEGRATION OR SEPARATION?: A STRATEGY FOR RACIAL EQUALITY* 14–16 (1996); A. James Gregor, *The Law, Social Science, and School Segregation: An Assessment*, in *DE FACTO SEGREGATION AND CIVIL RIGHTS: STRUGGLE FOR LEGAL AND SOCIAL EQUALITY* 99, 101–04 (Oliver Schroeder, Jr. & David T. Smith eds., 1963); Michael G. Proulx, *Professor Revisits Clark Doll Tests*, HARVARD CRIMSON (Dec. 1, 2011), <http://www.thecrimson.com/article/2011/12/1/clark-dolls-research-media> [<https://perma.cc/6L42-FAR8>] (discussing the meaning of the studies with Harvard African-American Studies Professor Robin Bernstein and reporting her opinion that “the choices made by the subjects of the Clark doll tests was not necessarily an indication of black self-hatred. Instead, it was a cultural choice between two different toys—one that was to be loved and one that was to be physically harassed, as exemplified in performance and popular media”).

¹⁹ See *infra* notes 144–153 and accompanying text.

²⁰ *Brown at 60: The Doll Test*, NAACP LEGAL DEF. & EDUC. FUND, <http://www.naacpldf.org/brown-at-60-the-doll-test> [<https://perma.cc/AP3J-7G88>].

decision appropriately addressed the harm—namely, racial segregation—and its societal consequences. This was not the case in *McCleskey*.

The disparate approaches to social science data across cases such as *Brown*, *McCleskey*, and *Gill*, reflect that the Court is in need of guidance on both evaluating social science data more generally and on the special considerations that may be necessary when assessing race data. This Essay proceeds in four parts. In Part I, we consider the shortcomings of the Court’s approach to intent in *McCleskey* and its implications for equal protection doctrine. In particular, we argue that the Court’s dismissal of data finding an association between juror decision-making and disparate racial impact in criminal sentences paved the way for the rise of the Court’s current post-racial reality²¹—a contemporary moment where a majority of the Justices rarely assume that racial outcomes are tied to racial animus.²² In Part II, we specifically point out how the *McCleskey* Court underestimates the robustness of the social science data presented in the case. In Part III, we highlight the Court’s history of inconsistently considering social scientific studies of race, in part by looking to the Court’s analysis in the *Brown v. Board of Education* case.

In Part IV, we suggest that in light of the Court’s peculiar dismissal of social science data in cases like *McCleskey*, it would be advisable for appellate courts to apply more regularized standards when considering social science data. These standards, however, would need to be mindful of the knotty history surrounding how scientific studies have considered race²³ and

²¹ On the Court’s current commitment to post-racial reasoning in its equality jurisprudence, see Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1620–21 (2009), and see generally Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967 (2010) and Mario L. Barnes, “*The More Things Change . . .*”: *New Moves for Legitimizing Racial Discrimination in a “Post-Race” World*, 100 MINN. L. REV. 2043 (2016). This latter article builds on foundational work on the Court’s race jurisprudence that was first articulated not long after *McCleskey* was decided. See Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407 (1990).

²² This perceived disassociation between racial animus and outcomes has been effectively theorized by both legal scholars and social scientists. See generally EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 2, 16 (4th ed. 2014) (articulating “color-blind racism,” as being tied to a new racial order that arose in the 1960s and in which “social practices and mechanisms to reproduce racial privilege acquired a new, subtle, and apparently nonracial character”); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1027 (2010) (decrying “post-racial racism,” a term describing how societal racial disadvantage persists even though many within society disavow harboring racist views).

²³ See generally BOB CARTER, *REALISM AND RACISM: CONCEPTS OF RACE IN SOCIOLOGICAL RESEARCH* 2 (2000) (“Race concepts within sociology are an especially fruitful field of inquiry . . . but more importantly, the employment of race concepts within social theories vividly illustrates the pitfalls that follow from an under-theorized notion of science.”); SEAN ELIAS & JOE R. FEAGIN, *RACIAL THEORIES IN SOCIAL SCIENCE: A SYSTEMIC RACISM CRITIQUE* (2016); DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST*

best contemporary practices for capturing the complicated nature of race as a research study variable. As part of this assessment, we consider work by a number of sociolegal scholars who have recently advocated for a subfield that merges conceptualizations of race from critical studies with social science methods.²⁴ Given the possibilities presented across various disciplines and involving myriad types of methods, it would make little sense to argue for an adoption of a one-size-fits-all approach to considering social science research data. Rather, our goal is to begin a discussion about how appellate courts should interpret the standard from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁵ Presently, that case is seen as requiring trial judges to perform a gatekeeping function by ensuring that expert witness testimony rests on a reliable foundation and is relevant to the scientific issue at hand. There needs to be, however, a greater emphasis placed on formulating evidentiary standards for appellate courts to consistently apply when reviewing cases with social science data, especially where that research bears on disparate racial impact.

I. THE IMPLICATIONS TO EQUAL PROTECTION DOCTRINE OF THE HOLDING IN *MCCLESKEY*

There are at least three harms that have resulted from the Court's holding in *McCleskey*. First, the Court further instantiated the misguided approach to discriminatory intent for constitutional equal protection claims that it first articulated in *Washington v. Davis*.²⁶ Second, this construction of an intent requirement has overly focused on individual animus, to the

CENTURY (2011); TUKUFU ZUBERI & EDUARDO BONILLA-SILVA, WHITE LOGIC, WHITE METHODS: RACISM AND METHODOLOGY (2008).

²⁴ See, e.g., Mario L. Barnes, *Empirical Methods and Critical Race Theory: A Discourse on Possibilities for a Hybrid Method*, 2016 WIS. L. REV. 443; Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149 (2014); Laura E. Gómez, *A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory*, in BLACKWELL COMPANION TO LAW AND SOCIETY 453 (A. Sarat ed., 2004) [hereinafter Gómez, *A Tale of Two Genres*]; Laura E. Gómez, *Looking for Race in All the Wrong Places*, 46 LAW & SOC'Y REV. 221 (2012) [hereinafter Gómez, *Looking for Race*]; Osagie K. Obasogie, *Foreword: Critical Race Theory and Empirical Methods*, 3 U.C. IRVINE L. REV. 183 (2013).

²⁵ 509 U.S. 579 (1993) (where the Court set the standard for the admissibility of scientific evidence under Federal Rule of Evidence 702). To be clear, we are not the first scholars to raise concerns about the rule from *Daubert* and its effects on the admissibility of research. See Teresa S. Renaker, *Evidentiary Legerdemain: Deciding When Daubert Should Apply to Social Science Evidence*, 84 CALIF. L. REV. 1657 (1996) (noting it is not readily apparent when *Daubert* will be seen as controlling evidence rooted in social science); A. Leah Vickers, *Daubert, Critique and Interpretation: What Empirical Studies Tell Us About the Application of Daubert*, 40 U.S.F. L. REV. 109 (2005) (offering an overview of criticisms of the case and raising questions of related the effects of judicial deference and desires for efficiency).

²⁶ See *supra* note 11.

detriment of exploring other relevant concepts such as the operation of unconscious bias and structural or systemic forms of racism. Finally, the standard for discerning intent that developed after *McCleskey*—one that does not create consequences for systems that fail to take corrective action though they are aware of racial harm—has made it increasingly difficult to prevail when raising constitutional discrimination claims.

A. *The Misguided Requirement of Proof of Discriminatory Intent*

The Supreme Court's decisions over the last forty years requiring proof of discriminatory purpose in order to demonstrate an equal protection violation, including in *McCleskey v. Kemp*,²⁷ have dramatically lessened the ability of claimants to use the Constitution to create a more just society.²⁸ These decisions are terribly misguided and the Court has compounded the problem by adopting a standard for proving intent that is very difficult to meet.

Whether discrimination can be proven by showing the disparate impact of a governmental action is crucial to determining the reach of the Equal Protection Clause. Undoubtedly, there are many instances where a significant discriminatory impact can be shown but there is insufficient evidence of a discriminatory purpose.²⁹ Without proof of such a purpose, however, the current law provides that the government need not offer a racially neutral explanation for these unequal effects and, indeed, generally must do no more than satisfy a rational basis test.³⁰ To prove a violation of the Equal Protection Clause—or at least to shift the burden to the government to prove a non-race explanation for its action—requires a showing of discriminatory intent.³¹

What is wrong with the Court's requirement of proof of discriminatory purpose? First, it misunderstands the purpose of the Constitution's guarantee of equal protection. The Equal Protection Clause should protect against the discriminatory results of government actions and

²⁷ 481 U.S. 279 (1987).

²⁸ For other cases requiring proof of discriminatory intent to show a racial classification, see, for example, *City of Mobile v. Bolden*, 446 U.S. 55 (1980), and *Washington v. Davis*, 426 U.S. 229 (1976). See also Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1080–83 (2011).

²⁹ See text accompanying notes 58–84 (discussing this in the areas of crack-cocaine sentencing, the death penalty, and schools).

³⁰ Barnes & Chemerinsky, *supra* note 28, at 1081–82.

³¹ The Supreme Court has said that if there is proof that a decision is “motivated in part by a racially discriminatory purpose,” the burden shifts to the government to prove that “the same decision would have resulted even had the impermissible purpose not been considered.” *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21. (1977).

not just against the discriminatory motivations of government actors. In other words, the government should not be able to act in a manner that harms racial minorities, regardless of why it took the action.

In *Washington v. Davis*, the Court, in maintaining a requirement for proof of discriminatory intent, said that the purpose of the Equal Protection Clause “is the prevention of official conduct discriminating on the basis of race.”³² But the Court has never justified this premise that the focus of an equal protection analysis should be the government’s motives and not the effects of its actions. Quite to the contrary, equal protection should be concerned with, and measured by, outcomes as well as intentions.³³ Courts should ask whether the government’s action is creating inequalities on the basis of race (or other protected classifications). If so, at the very least, the government should have to offer a sufficient nondiscriminatory explanation for its actions. As Professor Laurence Tribe has articulated, the Equal Protection Clause was not designed to regulate impure thoughts and motivations. Rather, its goal is to “guarantee a full measure of human dignity for all” by ensuring protection for individuals who may also be harmed “when the government is ‘only’ indifferent to their suffering or ‘merely’ blind to how prior official discrimination contributed to it and how current official acts will perpetuate it.”³⁴

B. *Overlooking Unconscious Bias and Structural Racism*

A second issue with the Court’s requirement for proof of a discriminatory purpose in *McCleskey* is that it ignores the reality of unconscious bias. In today’s society, a discriminatory motivation will rarely, if ever, be expressed and benign purposes can typically be articulated for

³² 426 U.S. at 239.

³³ At times, the Court has subscribed to this philosophy, especially for certain statutory claims. *See, e.g.,* Bazemore v. Friday, 478 U.S. 385 (1986) (pattern or practice wage discrimination case, which relied upon multiple regression data); Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977) (Court using statistical data on hiring of teachers to support a pattern or practice discrimination case where not all claimants could prove explicit or intentional discrimination in individual cases). Most recently, within the statutory context, the Court decided that disparate impact claims available under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act were also available under the Fair Housing Act. *See* Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015). The Court in *Washington v. Davis*, by contrast, flatly rejected this approach for constitutional claims. 426 U.S. at 238–39 (“As the Court of Appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer’s possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.” (citation omitted)).

³⁴ LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1516–19 (2d ed. 1988).

most laws.³⁵ Therefore, many laws with both a discriminatory purpose and effect will be upheld simply because of evidentiary problems inherent in requiring proof of such a purpose. Scholars such as Professor Charles Lawrence argue that this is especially true because racism is often unconscious and such “unconscious racism . . . underlies much of the racially disproportionate impact of governmental policy.”³⁶

Since the Court decided *Washington v. Davis* in 1976, which held that proof of discriminatory intent is required for an equal protection violation, a large body of psychological literature has documented the reality of implicit bias and explained its significance for the legal system.³⁷ The science of implicit bias shows that “actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.”³⁸ While implicit bias may affect us all, research in this area has shown that Whites may have biases at an unconscious level that are often out of step with the egalitarian values that many espouse³⁹ and may influence their decision-making processes in ways of which they are completely unaware.⁴⁰

³⁵ See Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989).

³⁶ Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355 (1987). Professor Lawrence’s research on unconscious bias and discriminatory intent was actually referenced by one of the dissents in *McCleskey*. See 481 U.S. at 332–33 (Brennan, J., dissenting); see also Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 36–40 (1991) (contending the Court has been obsessed with status race rules that treated black inferiority as a legal fact and formal race rules that gave primacy to questions of neutrality irrespective of racial segregation, rather than historical understandings of race which accept racial subordination within this country as a truism).

³⁷ See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1508 (2005) (describing implicit bias as follows: “[t]he point here is not merely that certain mental processes will execute automatically; rather, it is that those implicit mental processes may draw on racial meanings that, upon conscious consideration, we would expressly disavow. It is as if some ‘Trojan Horse’ virus had hijacked a portion of our brain”); see also Laurie A. Rudman et al., “Unlearning” Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 856 (2001); Annika L. Jones, Comment, *Implicit Bias as Social-Framework Evidence in Employment Discrimination*, 165 U. PA. L. REV. 1221 (2017).

³⁸ Greenwald & Krieger, *supra* note 37, at 946.

³⁹ This particular phenomenon of a disconnect between our stated values and conduct regarding race has been described as “aversive racism.” Samuel L. Gaertner & John. F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, AND RACISM 61 (John. F. Dovidio & Samuel L. Gaertner eds., 1986) (describing aversive racism as resulting from white people espousing positive outward attitudes regarding racial equality but whose beliefs about Blacks are informed by cultural and cognitive forces); see also MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* 69 (2013).

⁴⁰ Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187–88 (1995) (discussing the notion that people categorize information as they receive it as part of the central premise of social cognition theory).

A crucial problem with requiring proof of discriminatory intent is that it focuses solely on what is expressed; it often completely ignores these unconscious biases. Professor Lawrence has explained as follows:

Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker’s beliefs, desires, and wishes.⁴¹

Thus, the requirement of a discriminatory purpose in order to prove the existence of an equal protection violation fails to account for the reality of implicit bias. As Professors Christine Jolls and Cass Sunstein explained: “Ordinary antidiscrimination law will often face grave difficulties in ferreting out implicit bias even when this bias produces unequal treatment.”⁴²

Implicit bias research creates a basis for believing that laws with a racially disparate impact do not necessarily result from coincidence but rather reflect unstated—and perhaps unrealized—discriminatory intentions. Implicit bias alone, however, does not explain the complications associated with an intent requirement. In addition to implicit bias, legal and social science researchers have commented on other social cognition phenomena connected to motivation and behavior such as in-group favoritism,⁴³

⁴¹ Lawrence, *supra* note 36, at 322 (citation omitted).

⁴² Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 976 (2006).

⁴³ See Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CALIF. L. REV. 1251, 1322–27 (1998); Naoki Masuda & Feng Fu, *Evolutionary Models of In-Group Favoritism*, 7 F1000PRIME REP. 27 (2015) (describing in-group favoritism as a tendency of group members to “cooperate more with others in the same group than with those in different groups” and discussing the evolutionary origins of the behavior).

confirmation bias,⁴⁴ stereotype threat,⁴⁵ heuristics,⁴⁶ moral credentialing,⁴⁷ and of course, covert (conscious) bias.⁴⁸ Moreover, rather than making decisions based on race itself, in a number contexts, people make decisions based on proxies—traits closely associated or aligned with race.⁴⁹ Courts, however, have not consistently found using such proxies to be a violation of antidiscrimination statutes.⁵⁰ All of these concepts help to further explain

⁴⁴ Phoebe C. Ellsworth, *Legal Reasoning and Scientific Reasoning*, 63 ALA. L. REV. 895, 904 (2012) (“Confirmation bias is the tendency to seek, believe, and remember information that agrees with what we already think.”).

⁴⁵ Claude M. Steele, *The Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, in CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 203–04 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998) (“[S]tereotype threat [] is a situational threat—a threat in the air—that, in general form, can affect the members of any group about whom a negative stereotype exists”); Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235, 2238 (2017) (“In addition to the copious literature focusing on implicit bias, legal academics have begun to explore how ‘stereotype threat,’ the concern about confirming a negative stereotype about one’s group, can undermine performance on cognitively challenging tasks.”).

⁴⁶ See Jonathan P. Feingold & Evelyn R. Carter, *Eyes Wide Open: What Social Science Can Tell Us About the Supreme Court’s Use of Social Science*, 112 NW. U. REV. ONLINE 1, 16 (2018) (“Cognitive biases and heuristics function as mental filters and shortcuts that help humans quickly and effortlessly process, interpret, and manage information.”); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 295 (2012) (using the term *suspicion heuristic* to explain “how normal psychological processes that operate below the level of conscious awareness can lead to systematic errors in judgments of criminality”).

⁴⁷ Daniel A. Effron et al., *Endorsing Obama Licenses Favoring Whites*, 45 J. EXPERIMENTAL SOC. PSYCH. 590, 590 (2009) (reporting results of studies finding that “establishing oneself psychologically as unprejudiced may make people feel more comfortable expressing views that could be interpreted as prejudiced”); Victor D. Quintanilla & Cheryl R. Kaiser, *The Same-Actor Inference of Nondiscrimination: Moral Credentialing and the Psychological and Legal Licensing of Bias*, 104 CALIF. L. REV. 1, 7 (2016) (pointing out doctrines within employment law which reward employers accused of discrimination for earlier decisions that were favorable to workers of color in a manner that “reinforces the psychological effect of this moral credential and, in turn, increases the likelihood that the moral licensing that follows will result in discrimination”).

⁴⁸ See Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1054 (2009) (arguing that the overemphasis on conscious bias in antidiscrimination law obscures both the operation of covert bias and the ends of racial justice).

⁴⁹ See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262–63 (2000) (noting that discrimination often takes place not based on status identity alone, but based on whether one “performs” one’s social identity consistent with stereotypical expectations); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1161 (2004); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded as Black,” and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1283–84 (using empirical studies annotating employment decisions based on “black-sounding names” on resumes to argue that Title VII should borrow from the Americans with Disabilities Act to include a “regarded as” claim where racial status is misperceived due to the use of proxies for race).

⁵⁰ Such issues have routinely arisen around grooming codes, where courts have rejected proxy claims for typically race-neutral policies that disproportionately affect people of color. See, e.g., *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1030–35 (11th Cir. 2016) (rejecting “race as culture” arguments

why purposeful discrimination as a standard fails to capture much of the social behavior around race and decision-making. Put another way, all of these phenomena reflect that in a society with a long history of discrimination, perhaps, there can be a presumption that many laws with a discriminatory impact likely were motivated by a present but unacknowledged discriminatory purpose.⁵¹

C. *Proving Discrimination After McCleskey*

A third issue with the majority decision in *McCleskey* is that the Court compounded the problem of its cramped approach to equal protection by adopting a definition of “intent” that makes this requirement very difficult to prove. The Court has made it clear that showing a discriminatory purpose requires proof that the government desired to discriminate; it is not enough to prove that the government took an action with knowledge that it would have discriminatory consequences. In *Personnel Administrator of Massachusetts v. Feeney*, the Court declared: “‘Discriminatory purpose,’ however, implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”⁵²

Feeney involved a challenge to a Massachusetts law that gave preference in hiring for state jobs to veterans. At the time of the litigation, over 98% of the veterans in the state were male and only 1.8% were female.⁵³ The result was a substantial discriminatory effect against women in hiring for state jobs. Nonetheless, the Supreme Court held that the Massachusetts law did not violate the Equal Protection Clause because the law creating a preference for veterans was facially gender-neutral and there was not proof that the state’s purpose in adopting the law was to disadvantage women.⁵⁴

and finding no race discrimination under Title VII, where a black woman was fired after refusing to change her “locked” hairstyle); *Eatman v. UPS*, 194 F. Supp. 2d 256, 266 (S.D.N.Y. 2002) (finding no basis for a disparate impact claim for a race-neutral grooming code, where based on the policy, seventeen of the eighteen affected workers were black); *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 234 (S.D.N.Y. 1981) (finding no availability of a racial discrimination claim where a race-neutral workplace policy prohibited all-braided hairstyles); see also D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit’s Take on Workplace Bans Against Black Women’s Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987, 987–88 (2017).

⁵¹ See David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 1000 (1989). Again, this is the essential claim of Neil Gotanda’s theory of “historical race.” See Gotanda, *supra* note 36, at 39–40.

⁵² 44 U.S. 256, 279 (1979) (citations omitted).

⁵³ *Id.* at 270.

⁵⁴ *Id.* at 280–81. *Feeney* makes it clear that proving a gender classification is identical to proving a racial classification. See *id.* at 272–73.

The Court essentially rejected the tort definition of intent as acting with knowledge of foreseeable consequences and instead adopted a criminal law definition of intent meaning the desire to cause those results.⁵⁵ The Justices, however, seemed to ignore the companion criminal law concept of willful blindness, which permits the inference of intent where plaintiffs technically can claim no actual knowledge of a circumstance because they were not willing to inquire into the circumstance, though reasonable persons would have been moved to do so.⁵⁶ Professor Larry Simon argues that:

[A] showing of significant disproportionate disadvantage to a racial minority group, *without more*, gives rise to an inference that the action may have been taken or at least maintained or continued with knowledge that such groups would be relatively disadvantaged [I]t raises a possibility sufficient to oblige the government to come forward with a credible explanation showing that the action was (or would have been) taken quite apart from prejudice.⁵⁷

But the Supreme Court has not taken this approach and instead has required proof that the government desired the discriminatory consequences. This makes the requirement for proof of a discriminatory purpose even more onerous and difficult to meet.

In almost every area of law, the requirement for proof of discriminatory intent has frustrated the ability to use the Equal Protection Clause to remedy race discrimination. Consider a few examples. For instance, it is well documented that criminal sentences for crack cocaine possession and trafficking were for many years as much as 100 times greater than those for powder cocaine, even though it is the same drug.⁵⁸ This had a huge racially discriminatory impact. As the Sentencing Project explained:

Approximately 2/3 of crack users are white or Hispanic, yet the vast majority of persons convicted of possession in federal courts in 1994 were African American, according to the [U.S. Sentencing Commission]. Defendants

⁵⁵ According to Professor Reva Siegel, the standard of intent adopted by the Court in *Feeney* is tantamount to the “malice” standard used for murder offenses in criminal law. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135 (1997).

⁵⁶ See Barnes, *supra* note 10 (rewriting the *McCleskey* majority opinion and its approach to intent, in part, based on a theory of willful blindness).

⁵⁷ Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1111 (1978).

⁵⁸ For a critique of the disparity between sentences for powder and crack cocaine, see, for example, DORIS MARIE PROVINE, *UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS* 92–93 (2007); Jim Sidanius et al., *Hierarchical Group Relations, Institutional Terror and the Dynamics of the Criminal Justice System*, in *CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE*, *supra* note 45, at 140–44; and Mario L. Barnes, *Foreword: Criminal Justice for Those (Still) at the Margins—Addressing Hidden Forms of Bias and the Politics of Which Lives Matter*, 5 U.C. IRVINE L. REV. 711, 723–24 (2016).

convicted of crack possession in 1994 were 84.5% black, 10.3% white, and 5.2% Hispanic. Trafficking offenders were 4.1% white, 88.3% black, and 7.1% Hispanic. Powder cocaine offenders were more racially mixed. Defendants convicted of simple possession of cocaine powder were 58% white, 26.7% black, and 15% Hispanic. The powder trafficking offenders were 32% white, 27.4% black, and 39.3% Hispanic. The result of the combined difference in sentencing laws and racial disparity is that black men and women are serving longer prison sentences than white men and women.⁵⁹

In California, for example, the racial disparities in cocaine-related sentences are quite apparent. People of color account for over 98% of those sent to California state prisons for possession of crack cocaine for sale.⁶⁰ From 2005 to 2010, Blacks accounted for 77.4% of state prison commitments for crack possession for sale, although they made up just 6.6% of the state's population.⁶¹ Latinos account for 18.1% of those convicted of crack-cocaine offenses, while Whites account for just 1.8% of those convicted.⁶² By contrast, those convicted for powder-cocaine offenses are overwhelmingly white.

Yet efforts to challenge this disparity as violating equal protection failed because the courts said that there was not proof of a discriminatory intent for the sentencing disparity.⁶³ As a result, the law had an enormously discriminatory effect—many more African-Americans were sent to prison—but the courts provided no remedy. As Professor David Sklansky noted, “The federal crack penalties provide a paradigmatic case of unconscious racism.”⁶⁴ Congress lessened, though did not eliminate, this disparity with the Fair Sentencing Act of 2010, which reduced the statutory penalties for crack-cocaine offenses to produce an eighteen-to-one crack-to-powder drug

⁵⁹ SENTENCING PROJECT, CRACK COCAINE SENTENCING POLICY: UNJUSTIFIED AND UNREASONABLE 2, <https://www.prisonpolicy.org/scans/sp/1003.pdf> [<https://perma.cc/YMD6-7DEP>].

⁶⁰ Press Release, ACLU of N. Cal., Governor Signs Historic California Fair Sentencing Act (Sept. 28, 2014), <https://www.aclunc.org/news/governor-signs-historic-california-fair-sentencing-act> [<https://perma.cc/8BUE-SHPC>] (discussing Governor Jerry Brown's signing of the California Fair Sentencing Act (SB 1010)).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See, e.g.*, *United States v. Clary*, 34 F.3d 709 (8th Cir. 1994) (reversing the district court's conclusion that the disparity between crack and powder cocaine violated equal protection); *see also* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1284 (1995) (explaining why the disparity between crack and powder cocaine sentencing could not be challenged under equal protection: “Federal appellate courts have uniformly rejected these challenges, based on a largely mechanical application of the equal protection rules developed by the Supreme Court”).

⁶⁴ Sklansky, *supra* note 63, at 1308.

quantity ratio and eliminated the mandatory minimum sentence for simple possession of crack cocaine.⁶⁵

Another example of the barrier created by requiring proof of discriminatory intent is in the area of the death penalty. This, of course, was the focus of *McCleskey v. Kemp*, where the Supreme Court held that proof of discriminatory impact in the administration of the death penalty was insufficient to show an equal protection violation.⁶⁶ As we explicate more completely below, statistical evidence powerfully demonstrated racial inequality in the imposition of capital punishment in Georgia.⁶⁷ The key results of the Baldus studies highlighted in the *McCleskey* majority opinion were: The death penalty was imposed in 22% of the cases involving black defendants and white victims; in 8% of the cases involving white defendants and white victims; in 1% of the cases involving black defendants and black victims; and in 3% of the cases involving white defendants and black victims.⁶⁸ There were also differences in prosecutorial discretion, with Professor David Baldus finding that “prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.”⁶⁹ After adjusting for many other variables, Baldus concluded that “defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks.”⁷⁰ How, then, the Court failed to see this evidence as giving “rise to an inference of discriminatory purpose” became what Professor Reva Siegel has described within this Symposium as the “\$64,000 question.”⁷¹

The Supreme Court answered that question by determining that for the defendant to demonstrate an equal protection violation, he “must prove that the decision-makers in *his* case acted with discriminatory purpose.”⁷² Because the defendant could not prove that the prosecutor or jury in his case was biased, no equal protection violation existed. Moreover, the Court stated

⁶⁵ For the updated statute, see Barnes, *supra* note 58, at 723–24 & n.58 (citing Fair Sentencing Act of 2010, 21 U.S.C. § 841 (2012)).

⁶⁶ *McCleskey v. Kemp*, 481 U.S. 279, 279–80 (1987).

⁶⁷ See *infra* notes 90–103 and accompanying text.

⁶⁸ 481 U.S. at 286.

⁶⁹ *Id.* at 287.

⁷⁰ *Id.*

⁷¹ Reva Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in McCleskey v. Kemp—And Some Pathways for Change*, 112 NW. U. L. REV. 1269, 1274 (2018).

⁷² *McCleskey*, 481 U.S. at 292.

that to challenge the law authorizing capital punishment, the defendant “would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect.”⁷³ In reaching this ruling, which was inconsistent with how such impact data had been analyzed in other contexts, the Court effectively “erect[ed] a firewall between the criminal justice setting and those cases where the Court had accepted statistical evidence as raising inferences about discriminatory bias”⁷⁴ Racial disparities in imposing the death penalty are well-documented. As Matt Ford noted:

The national death-row population is roughly 42 percent black, while the U.S. population overall is only 13.6 percent black, according to the latest census Some individual states are worse. In Louisiana, the most carceral state in the Union, blacks are roughly one-third of the population but more than two-thirds of the state’s death-row inmates.⁷⁵

Undoubtedly, these statistics reflect the (often unconscious) biases of prosecutors, as to when to seek the death penalty, or juries, as to when to impose it. But the requirement for proof of a discriminatory intent makes it impossible to challenge these grave sentencing disparities on equal protection grounds.⁷⁶

One more example of the barrier created by requiring proof of discriminatory purpose is in the area of school segregation. There was obviously no difficulty in proving discrimination in states that by law had required separation of the races in education. But in Northern school systems, where segregated schools were not the product of state laws but residential segregation, the issue arose as to what had to be proved in order to demonstrate an equal protection violation and justify a federal court remedy.

⁷³ *Id.* at 298.

⁷⁴ Siegel, *supra* note 71, at 8.

⁷⁵ Matt Ford, *Racism and the Execution Chamber*, ATLANTIC (June 23, 2014), <https://www.theatlantic.com/politics/archive/2014/06/race-and-the-death-penalty/373081> [<https://perma.cc/EDF3-TQQQ>]. For additional data on race and the death penalty, see *NAACP Death Penalty Fact Sheet*, NAACP (Jan. 17, 2017), http://www.naacp.org/latest/naacp-death-penalty-fact-sheet/#_edn1 [<https://perma.cc/8TFT-ZVCR>], noting racial disparities in federal and state administrations of the death penalty and citing research for Delaware, Florida, and North Carolina).

⁷⁶ This type of result should not be surprising, given that even where actual animus is demonstrated by a juror, it can be very difficult to overturn jury decisions. See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (finding that multiple juror affidavits claiming that another juror made comments premised upon negative racial stereotypes in describing the defendant’s potential guilt was sufficient to overcome a Sixth Amendment rule strongly favoring nonimpeachment of final jury decisions).

The Supreme Court addressed this issue in *Keyes v. School District No. 1, Denver, Colorado*.⁷⁷ The Supreme Court recognized that it was not a case where schools were segregated by statute, but the Court said,

[n]evertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system.⁷⁸

Nonetheless, the Court held that absent laws requiring school segregation, plaintiffs must prove intentional segregative acts affecting a substantial part of the school system.⁷⁹

The Court drew a distinction between de jure segregation, which existed throughout the South, and de facto segregation, which existed in the North.⁸⁰ The latter constitutes a constitutional violation only if there is proof of discriminatory purpose.⁸¹ This approach is consistent with the Supreme Court cases holding that when laws are facially neutral, proof of a discriminatory impact alone is not sufficient to show an equal protection violation; there also must be proof of a discriminatory purpose.⁸² But requiring proof of discriminatory purpose also created a substantial obstacle to desegregation in Northern school systems where residential segregation—which was a product of a myriad of discriminatory policies—caused school segregation.

Thus, proof of racial separation in schools, alone, is not sufficient to establish an equal protection violation or to provide a basis for federal court remedies. As is true in other areas of equal protection law, there must be either proof of laws that mandated segregation or evidence of intentional acts

⁷⁷ 413 U.S. 189 (1973).

⁷⁸ *Id.* at 201.

⁷⁹ *Id.* at 189.

⁸⁰ *Id.* at 193, 195–96, 205. De jure segregation requires no additional intent inquiry because it is understood to be “a current condition of segregation resulting from intentional state action.” *Id.* at 205.

⁸¹ *Id.* at 198 (noting, with regard to de facto segregation, “[p]etitioners apparently concede for the purposes of this case that in the case of a school system like Denver’s, where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action”).

⁸² *See, e.g.,* *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.”); *Akins v. Texas*, 325 U.S. 398, 403–04 (1945) (“A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination.”).

to segregate the schools.⁸³ This created an enormous obstacle to the courts' ability to remedy school segregation in Northern cities.⁸⁴

We choose these three examples—cocaine sentencing, the death penalty, and education—because they are areas where there are no statutes allowing recovery based on a disparate impact theory and thus there are enormous effects of the Supreme Court's requirement for proof of discriminatory purpose. Indeed, the areas where there are statutes that allow for proof of discrimination by a showing of disparate impact—Title VII for employment discrimination,⁸⁵ the Fair Housing Act,⁸⁶ and the Voting Rights Act Amendments of 1982⁸⁷—demonstrate the great benefit of assessing liability without the requirement of discriminatory intent. Rather than embracing the availability of such a remedy for constitutional claims, the Court continues to support a concept of intent that would require victims of racial discrimination to interrogate the mental state of the *very* governmental actor believed to be engaged in bias, rather than allowing for the possibility that intent can be considered “as a historical and sociological inquiry into the legitimacy of the challenged government action.”⁸⁸ The Court's current approach not only fails to resolve the disconnect between statutory and constitutional disparate impact claims, but it also undermines equal protection of the laws, especially for vulnerable populations, and ensures the continued instantiation of discrimination within antidiscrimination law.⁸⁹

⁸³ For a criticism of the Court's approach, see Owen M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 584 (1965) (“[I]n every case of racially imbalanced schools sufficient responsibility can be ascribed to government to satisfy the requirement that stems from the equal protection clause's proscription of unequal treatment by government.”), and Strauss, *supra* note 51, at 962 (criticizing the Court's focus on discriminatory intent because both “overt and covert racial classifications” can have “insulting, stigmatizing, or subordinating effects”).

⁸⁴ See *supra* notes 77–79 and accompanying text.

⁸⁵ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–31 (1971) (finding that Title VII, which prohibits employment discrimination based on race, sex, or religion, allows liability based on proof of disparate impact).

⁸⁶ See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2518–22 (2015) (explaining how the Fair Housing Act allows liability based on disparate impact).

⁸⁷ These were enacted to overrule the Supreme Court's decision in *Mobile v. Bolden*, in which the Court found that electoral practices contested under the statute must have been maintained or adopted with discriminatory intent. 446 U.S. 55, 87 (1980); see also *Thornburg v. Gingles*, 478 U.S. 30, 43–44 (1986) (noting that the purpose of the 1982 Amendments to the Voting Rights Act was to reject *Mobile*).

⁸⁸ Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1797 (2012).

⁸⁹ For a discussion of how the Court's antidiscrimination jurisprudence legitimates discrimination, see, for example, Barnes, *supra* note 21, at 2047 (“Applying Professor Freeman's method of assessing key antidiscrimination cases in voting, education, and employment within a modern context, this Article identifies the contemporary manner in which post-race discourses are used to legitimize discrimination.”), and Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1057–81 (1978) (reviewing Supreme Court antidiscrimination cases from 1954 to 1974 and finding that in these cases, the Court betrayed the

II. THE COURT'S CONSIDERATION OF SOCIAL SCIENCE DATA IN *MCCLESKEY*

David Baldus and his research team actually conducted multiple empirical studies of the death penalty in Georgia.⁹⁰ Though one can argue about how the majority assessed the research data presented in the case, the Baldus studies were clearly central to the Court's analysis in *McCleskey*. In their examination of capital sentencing cases in Georgia,⁹¹ the researchers "calculated the predicted likelihood that the defendant would receive a death sentence for each case by using a multiple regression analysis."⁹² Germane to the claims of Warren McCleskey, the researchers described their method of discerning the role of race in death penalty sentencing: "The regression analyses used to produce the predicted likelihood of a death sentence also included variables for the race of the victim and the race of the defendant.

ends of equality by valorizing colorblind approaches, overly focusing on violations instead of remedies, and emphasizing perpetrator behavior rather than the conditions of victims).

⁹⁰ See BALDUS ET AL., *supra* note 6, at 44–46 (explaining the Charging and Sentencing Study was partially funded by the National Association for the Advancement of Colored People and designed to assess the extent to which impermissible factors such as race affected the Georgia criminal justice process from indictment to sentencing); David C. Baldus et al., *supra* note 5, at 661 (describing a comparative sentencing study for Georgia death penalty cases). Baldus's research was not the first time empirical evidence had been introduced in courts to argue the impact race on death penalty sentencing. See, e.g., SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 100 (1989) (explaining a study using FBI Supplemental Homicide Reports to evaluate death penalty in eight states from 1976 to 1980); Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 AM. ACAD. POL. & SOC. SCI. 119, 126–33 (1973) (describing a study on racial discrimination in death penalty sentences for race in the South from 1945 to 1965).

⁹¹ For the comparative review of death sentences in Georgia, the researchers looked at separate data sets of cases. See Baldus et al., *supra* note 5. First, they considered 113 murder cases decided before September 29, 1972 (when *Furman v. Georgia*, 408 U.S. 238 (1972), was decided) where the death penalty was imposed in 20 cases. *Id.* at 680. The second set of data was for 594 post-*Furman* murder defendants who received 203 penalty trials with 113 death sentences being imposed. *Id.* Lastly, 68 of the post-*Furman* cases were used to compare excessive sentences across cases in a manner designed to mimic the Georgia Supreme Court's process of review. *Id.* at 683. For the Charging and Sentencing Study, the researchers looked at death-sentencing rates for all murder and voluntary manslaughter cases in Georgia (2484). BALDUS ET AL., *supra* note 6, at 314–15.

⁹² Baldus et al., *supra* note 5, at 689. The researchers claimed that multiple regression analysis was preferred due to the sample size of relevant cases. BALDUS ET AL., *supra* note 6, at 314–16 (1990) (noting they first attempted to use cross-tabular techniques to control for variables, but with 501 cases, "the limits of a fine-grained cross-tabular analysis are quickly reached"). The researchers also paired two methods—salient factors method and main determinants method—to assess the death penalty. The saliency measure was designed to assess the features of the case most likely to have affected the sentencing decision. Baldus et al., *supra* note 5, at 681–83 (describing how salient factors were used to assess which cases were most similar and then compute the rates of death-penalty sentencing). The main determinants method identified similarities in factual characteristics that affected jury determinations. *Id.* at 684.

This was done to increase the validity of the weight assigned to each legitimate aggravating and mitigating factor underlying the index.”⁹³

In one of their studies, the researchers found that a relatively small number of cases sentenced defendants to death and that the presence of aggravating factors most influenced discretionary decisions by the prosecutors and juries.⁹⁴ The studies confirmed that the death penalty was handed down less often in cases with black victims,⁹⁵ and this was so even when there were more aggravating factors.⁹⁶ With regard to this finding the researchers claimed:

This disparity is particularly apparent when prosecutors are deciding whether to seek a death sentence, and its effect persists after one adjusts for the aggravation level of different cases. In other words, our data strongly suggests that Georgia is operating a dual system, based upon the race of the victim, for processing homicide cases.⁹⁷

The disparity based on the race of the victim was also tied to aggravating factors in the cases, with race-of-victim effects being largest in the more aggravated cases.⁹⁸

In the Baldus Charging and Sentencing Study—which provided the data most considered in *McCleskey*⁹⁹—for over 2000 Georgia murder and manslaughter cases, the researchers analyzed 230 potentially aggravating,

⁹³ Baldus et al., *supra* note 5, at 689 n.98. Regarding *McCleskey*’s case in particular the researchers claimed, “The centerpiece of race-of-victim evidence was the partial-regression coefficient for the race-of-victim variable estimated in a logistic-regression analysis after controlling for a core model of thirty-nine legitimate variables.” BALDUS ET AL., *supra* note 6, at 316–17 (“The linear-regression coefficient estimated for the race-of-victim variable, after adjustment for the 39 core background variables, was .08, significant at the .001 level.”).

⁹⁴ See Baldus et al., *supra* note 5, at 698. Aggravating factors vary by jurisdiction but have been generally described as follows:

In order to use the death penalty, states must have “genuinely narrowed” the class of people eligible for death to the so-called “worst of the worst.” To do this (in a strategy blessed by the U.S. Supreme Court in its *Gregg* and *Jurek* cases), juries must find certain “aggravating factors” that ostensibly prove that *this* crime and *this* criminal were among the offenders most deserving of death.

Chad Flanders, *Is Having Too Many Aggravating Factors the Same as Having None at All?: A Comment on the Hidalgo Cert. Petition*, 51 U.C. DAVIS L. REV. ONLINE 49, 50 (2017) (citations omitted). In Warren *McCleskey*’s case, the aggravating factors under the Georgia statute were that “the murder was committed during the course of an armed robbery, § 17-10-30(b)(2); and the murder was committed upon a peace officer engaged in the performance of his duties, § 17-10-30(b)(8).” *McCleskey v. Kemp*, 481 U.S. 279, 285 (1987).

⁹⁵ Baldus et al., *supra* note 5, at 709 (stating that the rate for Blacks was 15 of 246 (.06) versus 85 of 345 (.24) for Whites).

⁹⁶ *Id.*

⁹⁷ *Id.* at 709–10 (citation omitted).

⁹⁸ *Id.* at 710.

⁹⁹ 481 U.S. at 298–99.

mitigating, or evidentiary factors.¹⁰⁰ Based on a regression analysis involving the thirty-nine most significant factors, the researchers compiled data that indicated “the death-sentencing rate for the white-victim cases is 8.3 times (.11/.0133) higher than the rate for black-victim cases.”¹⁰¹ For these cases, however, they also considered the effects of the race of the defendant. In cases involving black defendants and white victims, the death penalty was imposed at a .21 rate (50/233) while the rate for cases with white defendants and black victims was .02 (2/60).¹⁰² Starting with this raw data of racial disparities, the researchers “developed a series of multivariate analyses to estimate statewide race-of-defendant and race-of-victim effects after adjustment for a variety of legitimate nonracial background factors.”¹⁰³ They found that even after controlling for hundreds of legitimate other factors, the effect of the race of the victim and the race of the defendant had a significant effect on the probability that the defendant would receive the death penalty. The bottom line of the multivariate analysis in the Baldus studies was that for a review of over 2000 homicide cases in Georgia, defendants killing Whites were 4.3 times more likely to have the death penalty imposed than those killing Blacks. This disparity could not be explained on nonracial grounds by either the 230 variables originally considered or the smaller subset of 39 particularly pertinent variables that were later considered.¹⁰⁴

Though the Court did not find the Baldus data to be sufficient evidence of constitutional violations in the administration of Georgia’s death penalty,¹⁰⁵ others have found it very persuasive. For example, supporters of the studies have given great credence to the comprehensiveness of the research.¹⁰⁶ Based on the quality of the studies, a number of commentators have surmised that it is impossible to view the Baldus data as anything other

¹⁰⁰ *Id.* at 287.

¹⁰¹ BALDUS ET AL., *supra* note 6, at 314 (citation omitted).

¹⁰² *Id.* at 315 (explaining that the rate for a white defendant with a white victim was .08 (58/748) and for a black defendant with a black victim it was .01 (18/1443)).

¹⁰³ *Id.* at 314. Aggravation also produced curious results for these findings. *See id.* at 315 (“Among the less aggravated cases, in which the death-sentencing rates are quite low, the race-of-victim effects are also quite modest. But among the more aggravated cases, which show .16 and .27 death-sentencing rates, the race-of-victim disparities are 13 and 25 percentage points, respectively.”).

¹⁰⁴ *See* NINA M. MOORE, THE POLITICAL ROOTS OF RACIAL TRACKING IN AMERICAN CRIMINAL JUSTICE 71 (2015).

¹⁰⁵ 481 U.S. at 308.

¹⁰⁶ *See, e.g.,* Samuel R. Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 18 U.C. DAVIS L. REV. 1275, 1275–76 (1985) (describing the research as “the most comprehensive empirical record of racial patterns in the imposition of the death penalty that has ever been developed in this country, or that is likely to be developed in the foreseeable future”); Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1236 (2013) (describing the Baldus studies at the time as “the most complex and thorough study of its kind”).

than strong evidence that the consideration of race influenced the operation of Georgia's death penalty.¹⁰⁷ Some commentators, however, have noted that the data in Baldus's studies, which did not specifically implicate the type of process failings the Court previously identified as unconstitutional in *Furman v. Georgia*,¹⁰⁸ were by their very nature not of a type that could have resulted in a finding of unconstitutionality.¹⁰⁹

Others took issue with the studies' methods. A number of scholars problematized Baldus's use of regression models. For example, Baldus's effort was criticized as follows: "To be fair to the researchers, extracting reliable data on the many factors that go into a capital sentencing decision from the case files is a huge task, perhaps an impossible one. But we are concerned with the quality of the product, not the quality of the effort."¹¹⁰ Importantly, the Baldus team acknowledged the limits of their research method, stating:

Regression analysis is subject to a variety of weaknesses, one being that it can only estimate for any given factual characteristic the average impact in all cases. It cannot identify the specific factors that most influenced the jury in any particular death sentence case under review. On the other hand, we do suggest that understanding the factors that are generally important to juries may assist a court in trying to identify the most important factors in any individual case.¹¹¹

At least one critic of the Baldus studies, however, not only surmised that statistical models are inappropriate and ineffective for measuring discrimination in capital sentencing decisions, but also that the dataset in the Charging and Sentencing Study was flawed.¹¹²

¹⁰⁷ See, e.g., Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1398–400 (1988) (explaining why the district court in *McCleskey* was "clearly erroneous" in rejecting the Baldus study).

¹⁰⁸ 408 U.S. 238 (1972) (holding the imposition of the death penalty in these cases violated the Eighth Amendment because of the arbitrary manner in which it was imposed).

¹⁰⁹ Sam Kamin & Justin Marceau, *Waking the Furman Giant*, 48 U.C. DAVIS L. REV. 981, 1010–11 (2015).

¹¹⁰ Kent Scheidegger, *Rebutting the Myths About Race and the Death Penalty*, 10 OHIO ST. J. CRIM. L. 147, 153 (2012).

¹¹¹ Baldus et al., *supra* note 5, at 689. The Baldus team also included a description of the following danger with regression analysis:

The principal problem with the regression-based approaches is the circularity inherent in using factors identified as the most predictive of the observed results as the basis for testing the system's consistency. The tendency of multiple regression analyses to generate a unique overfitted solution with respect to a particular set of decisions compounds this problem. The result is that matches based upon factors identified in this way tend to exaggerate the degree of consistency within the system undergoing analysis.

Id. at 695.

¹¹² Joseph L. Katz, Warren McCleskey v. Ralph Kemp: *Is the Death Penalty in Georgia Racially Biased?*, in *CAPITAL PUNISHMENT: A BALANCED EXAMINATION* 400 (Ewan J. Mandery ed., 2005)

Though the Supreme Court rejected the Baldus studies' data as evincing a significant risk that race impermissibly affected Georgia's administration of the death penalty or that there was purposeful discrimination in McCleskey's case, Justice Powell did not note any particular weaknesses with regard to how the data was collected or assessed.¹¹³ Rather, he criticized the Baldus studies on a basis that all empirical studies could be criticized: the data failed to prove to an absolute certainty a causal link between race and the imposition of the death penalty. Justice Powell thus seemed to require that the statistical model provide proof of a "but for" relationship or "counterfactual dependence" between racial consideration and death,¹¹⁴ rather than allowing for a broader concept of causation to govern the analysis.¹¹⁵ For example, his statement forecloses the possibility that the deliberation process could be captured by "redundant causation," where a number of potential causes compete in bringing about an effect.¹¹⁶ Further,

(challenging the coding of questionnaires used in the Baldus research and noting that over 100 questionnaire items were unknown for a significant number of cases in the dataset). Picking up on arguments advanced by Joseph Katz, another researcher claimed there were potential explanations other than bias for the racial variance observed in the Baldus studies. See ALFRED B. HEILBRUN, JR., CRIMINAL DANGEROUSNESS AND THE RISK OF VIOLENCE 123–26 (1996) (discussing Katz's claim that black defendant/white victim cases involve fewer mitigating circumstances and introducing research that cases with white victims involved more aggravating factors and that Blacks who killed Whites were more dangerous).

¹¹³ The disengagement with the studies increased at each level of review. As one scholar noted:

The district court took on the study directly and held that it is so flawed that it proves nothing. The court of appeals retreated, but only halfway: it assumed that the study was valid but rejected it on the inexplicable empirical ground that the magnitude of discrimination shown was constitutionally insufficient. The Supreme Court eliminated all empirical issues entirely by deciding that this type of evidence cannot in principle establish a violation of the Constitution.

Samuel R. Gross, *David Baldus and the Legacy of McCleskey v. Kemp*, 97 IOWA L. REV. 1906, 1915 (2012).

¹¹⁴ Reiss, *supra* note 8, at 22; see also Marini & Singer, *supra* note 9, at 350 ("An important implication of our analysis is that subject-matter considerations play a critical role in identifying the evidence needed to support a causal inference and, therefore, must play a critical role in designing research to obtain that evidence.").

¹¹⁵ The exploration of causal relationships is at the core of social science research. See JOHN M. NEALE & ROBERT M. LIEBERT, SCIENCE AND BEHAVIOR: AN INTRODUCTION TO METHODS OF RESEARCH 11 (2d ed. 1980) ("The critical problem for social science research is always one of determining the relationship among well-specified variables."). As the following passage suggests, however, the nature of causal links can be myriad and complex:

The search for causal relationships in nature is rarely straightforward. For one thing, there are a number of different types of causal relationships. Moreover, these different types can operate in various combinations to influence a given phenomenon . . . [F]our broad types of causal relationships can be identified: necessary and sufficient relationships, necessary but not sufficient relationships, sufficient but not necessary relationships, and contributory relationships.

LIEBERT & LIEBERT, *supra* note 7, at 88.

¹¹⁶ Reiss, *supra* note 8, at 22. In other words, Justice Powell not only saw causation in *McCleskey* through a lens that was deterministic, his views required the Baldus data to do a great deal of work because his theory of causation and the social sciences was fairly unitary, rather than open to exploring a "plurality of causal assumptions." John Gerring, *Causation: A Unified Framework for the Social Sciences*, 17 J.

he reduced the data's value to an assessment of whether it proved the existence of an unacceptable risk of racial prejudice influencing capital sentencing decision-making.¹¹⁷

Justice Powell then went on to champion the importance of preserving discretion for jurors and to suggest the unexplained racial correlations would not be regarded as invidious.¹¹⁸ In conclusion, the Court held that Baldus's data had not proven the existence of a "constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."¹¹⁹ The majority reached its decision without significantly engaging with the robustness of the data in the Baldus studies¹²⁰ or articulating the nature of the data that could have sustained a causal inference between race and the imposition of the death penalty.¹²¹ Other than to describe the data as incapable of proving juror motivation in McCleskey's individual case, the real concerns in the opinion centered on what it would mean for the Court to accept such evidence as proof of discrimination.

The *McCleskey* Court also rejected the dissent's framing of the type of racial impact data that should trigger strict scrutiny analysis under the Fourteenth Amendment. Justice William Brennan's dissenting opinion—which Justice Thurgood Marshall, Justice John Paul Stevens, and Justice

THEORETICAL POL. 163, 163 (2005) ("The plural vision of causation has a long lineage. Aristotle divided the subject into four, quite different, types: formal causes (that into which an effect is made, thus contributing to its essence), material causes (the matter out of which an effect is fashioned), efficient causes (the motive force which made an effect), and final causes (the purpose for which an effect was produced).").

¹¹⁷ *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987). This framing essentially questions whether the causal relationship between racial bias and capital sentencing is "necessary and sufficient" rather than sufficient but not necessary (e.g., bias is one of many causes) or contributory. See LIEBERT & LIEBERT, *supra* note 7, at 88.

¹¹⁸ *Id.* at 297 ("Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. The unique nature of the decisions at issue in this case also counsels against adopting such an inference from the disparities indicated by the Baldus study. Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in *McCleskey's* case acted with discriminatory purpose.").

¹¹⁹ *Id.* at 313. The Court also expressed concern that racially correlative data of the type considered in the context of the death penalty would also likely exist at other junctures in the criminal justice system and that the arguments in the case were better suited to be addressed by legislative bodies. *Id.* at 319.

¹²⁰ Justice Powell did indicate that since studies provided that any number of other considerations could sway juror deliberations, including a defendant's attractiveness, studies such as Baldus's offered "no limiting principle to the type of challenge brought by *McCleskey*." *Id.* at 318. Justice Powell also extensively cited to the district court's criticisms of the Baldus study, without endorsing them. *Id.* at 287–89.

¹²¹ See, e.g., Siegel, *supra* note 71, at 1276 ("After rejecting the Baldus study as insufficient proof of discriminatory purpose in *McCleskey's* case, the Court seemed wholly uninterested in inviting other plaintiffs to explore what the 'statistically valid' Baldus study or other statistical evidence might show about the risk of racial bias in capital sentencing or the criminal justice system more generally." (footnote omitted)).

Harry Blackmun also joined—began with a description of a hypothetical conversation between McCleskey and his counsel, where the defendant asks whether he will be sentenced to die. Given the data that a black person that killed a white person in Georgia was most likely to be sentenced to death, the dissenting Justices surmised that McCleskey could not help but figure out during the conversation that race would play a role in whether he “lived or died.”¹²² The dissent, then, criticized the majority for failing to see the systemic consequences of race casting such “a large shadow on the capital sentencing process.”¹²³ They made this claim even though Baldus admitted that his study at best helped to establish “a likelihood that a particular factor entered into some decisions”¹²⁴ The dissent, however, could have pressed further by asking an important question the majority failed to consider: If racial animus does not explain the persistent racial effects arising in Baldus’s statistical models, What does?

The tension in *McCleskey* over what types of social science data should be regarded as rigorous enough to support a finding that the case involves an unconstitutional discriminatory purpose remains a relevant matter for inquiry. This is especially the case in criminal proceedings, where studies conducted after *McCleskey* continue to routinely find racial disparities in punishment adjudication.¹²⁵ To be certain, measuring the effects of race within a study that employs multiple regression analysis can present challenges.¹²⁶ The assessments the Court does provide regarding the meaning of the racial impact data and causal inference, however, are unsatisfying. In

¹²² *McCleskey*, 481 U.S. at 321 (Brennan, J., dissenting).

¹²³ *Id.* at 321–22.

¹²⁴ *Id.* at 322 (internal quotation marks omitted). The dissent claimed absolute causality was not needed because the controlling decision in *Furman* only concerned itself with a risk that the sentence being imposed based on arbitrary factors. *Id.*

¹²⁵ See, e.g., David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998); Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383 (2006); Shatz & Dalton, *supra* note 106, at 1246 (“Since *McCleskey*, there have been numerous empirical studies focused on racial disparities in death-charging and death-sentencing, and virtually all found significant racial disparities in death-charging, death-sentencing, or both.”); Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361 (2012).

¹²⁶ See JACK NIEMONEN, RACE, CLASS, AND THE STATE IN CONTEMPORARY SOCIOLOGY: THE WILLIAM JULIUS WILSON DEBATES 72–75 (2002); Tyler J. VanderWeele & Whitney R. Robinson, *On the Causal Interpretation of Race in Regressions Adjusting for Confounding and Mediating Variables*, 25 EPIDEMIOLOGY 473 (2014); PAUL W. HOLLAND, EDUC. TESTING SERV., RR-03-03 CAUSATION AND RACE 3 (2003), <http://onlinelibrary.wiley.com/doi/10.1002/j.2333-8504.2003.tb01895.x/pdf> [<https://perma.cc/MN73-8ANB>] (“R[ace] is not a causal variable and for this reason [race] effects, per se, do not have any direct causal interpretation. It is also clear, however, that a [race] variable can play some type of important role in causal studies and that more clarity as to what this role is will help us understand concepts like ‘discrimination’ and ‘bias’ in ways that make fruitful use of causal ideas.”).

Part III below, we look at the *Brown v. Board of Education* decision and its consideration of social science evidence to demonstrate how the Court, at times, has accepted much less robust data as supporting the existence of unconstitutional racial discrimination. In Part IV, we discuss the pitfalls of the approaches to social science data utilized in *Brown* and *McCleskey* and articulate some questions and analyses that could improve the Court's consideration of empirical social science data moving forward.

III. THE COURT'S CONSIDERATION OF SOCIAL SCIENCE DATA IN *BROWN*

The Court has rarely looked to social science data to assess the risk that race is operating impermissibly within decision-making processes of death penalty juries.¹²⁷ Much of that hesitancy has centered on the fact that empirical studies, even ones that demonstrate a statistically significant effect of racial considerations, are rarely suitable for supporting claims of an absolute causal connection between race and a sentencing outcome. The irony of the Baldus studies, as suggested above, is that the regression method did, in fact, suggest that race of the victim was a significant variable in explaining how some juries decided who was sentenced to death in Georgia.¹²⁸ Although the *McCleskey* majority rejected the studies as proof of impermissible race discrimination under the Fourteenth Amendment, the Court has not always been so demanding in its assessment of what type of social science data pertaining to race are rigorous enough to support equal protection claims.

A number of scholars believe the doll studies conducted by psychologists Kenneth and Mamie Clark were vital to the Court's decision in *Brown*,¹²⁹ which upended the "separate but equal" standard that had been

¹²⁷ See Baldus et al., *supra* note 125, at 1729 (“[A]lthough the Court was aware of empirical studies suggesting racially discriminatory patterns, especially in southern states, it has demonstrated a persistent reluctance to confront the race question directly. In a number of capital cases between 1962 and 1986, the Court either declined requests to hear issues of racial discrimination by denying certiorari or resolved the case on other grounds.”). The Court has also not been hesitant to declare some racial impact data to be incapable of supporting the finding of race conscious governmental actions. See, e.g., *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2618–19 (2013) (claiming, in an opinion authored by Chief Justice Roberts, that Congress had overlooked evidence of racial progress and impermissibly used outdated data of racial disadvantage to justify continuing preclearance practices for voting regulation changes in nine states).

¹²⁸ Baldus et al., *supra* note 125, at 1693–94; see also HERBERT I. WEISBERG, BIAS AND CAUSATION: MODELS AND JUDGMENT FOR VALID COMPARISONS 11–14 (2010).

¹²⁹ See, e.g., HERBERT HILL & JACK GREENBERG, CITIZEN'S GUIDE TO DESEGREGATION: A STUDY OF SOCIAL AND LEGAL CHANGE IN AMERICAN LIFE 121 (1955); Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535 (1998); Rachel F. Moran, *What Counts As Knowledge?: A Reflection on Race, Social Science, and the Law*, 44 LAW & SOC'Y REV. 515, 523 (2010) (advancing “[a] new role for social science evidence is perhaps *Brown*'s most lasting contribution, a legal innovation on a par with its iconic status, regardless of whether the case achieved lasting gains in school desegregation”).

in place since the Court's decision in *Plessy v. Ferguson*.¹³⁰ In the Clark studies, 253 black children between the ages of three and seven years old were provided black and white dolls and asked such questions as which doll was nice, looked nice or bad, had a nice color, and was more desirable to play with.¹³¹ They were also asked which doll looked like them.¹³² The majority of children associated negative qualities with black dolls and positive qualities with white ones. These results were interpreted to mean that segregation led to feelings of inferiority or poor self-esteem.¹³³ The Court referred to the Clark data when it claimed the harms of segregation are “amply supported by modern authority.”¹³⁴ Though the Court cited to research by the Clarks and others in a footnote,¹³⁵ Chief Justice Earl Warren wrote that the decision was premised upon “intangible considerations” related to segregation.¹³⁶ Some scholars have argued, however, that the research was critical to supporting the Court's claims regarding the harms of

¹³⁰ 163 U.S. 537 (1896). The phrase “separate but equal” was never actually used in the *Plessy* majority opinion. The phrase, however, captures the Court's belief that separate seating created no stigma for Blacks. According to the majority:

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

Id. at 551.

¹³¹ See Kenneth B. Clark, *The Effect of Prejudice and Discrimination on Personality Development*, in MIDCENTURY WHITE HOUSE CONFERENCE ON CHILDREN AND YOUTH (1950); Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, in READINGS IN SOCIAL PSYCHOLOGY 169 (Theodore M. Newcomb & Eugene L. Hartley eds., 1947).

¹³² Clark & Clark, *supra* note 131.

¹³³ See Neil G. Williams, *Brown v. Board of Education Fifty Years Later: What Makes for Greatness in a Legal Opinion?*, 36 LOY. U. CHI. L.J. 177, 182 (2004) (noting that, based on the responses of the children in the studies, “Kenneth Clark reasoned that the self-image of black children was being negatively impacted by segregation in the South”).

¹³⁴ *Brown v. Bd. of Ed.*, 347 U.S. 483, 494 (1954). Kenneth Clark also testified about the doll studies during the district court case in *Brown*.

¹³⁵ *Id.* at 494 n.11 (listing the following studies: “K.B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44–48; Frazier, The Negro in the United States (1949), 674–681. And see generally Myrdal, An American Dilemma (1944)”). For brief descriptions of the studies referenced in footnote 11 in *Brown*, see Sanjay Mody, Note, *Brown Footnote 11 in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793, 802 n.33 (2002).

¹³⁶ *Brown*, 347 U.S. at 493. The term “intangible considerations” was also implicated by language earlier mentioned in *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (noting that universities are marked by “qualities which are incapable of objective measurement but which make for greatness”).

segregation.¹³⁷ This assertion has, however, been contested. As one scholar noted, “Critics advanced two broad attacks against footnote 11. First, a technical critique focuses on the quality of the research cited in footnote 11. Second, a theoretical critique questions the extent to which footnote 11 influenced the outcome in *Brown*.”¹³⁸

Nevertheless, the *Brown* Court ultimately concluded, that with regard to segregated black school children, “[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone”¹³⁹—a statement that is consistent with Kenneth Clark’s findings.¹⁴⁰ As one scholar has surmised on the significance of the Court’s finding, “The Fourteenth Amendment may permit racial separation but it does not permit racial subordination or racial stigmatization.”¹⁴¹

In *Brown*, though it is unclear whether the Justices themselves were aware of scholarly criticisms of the doll studies during the pendency of the case,¹⁴² Chief Justice Warren—like Justice Powell in *McCleskey*—did not

¹³⁷ See, e.g., Moran, *supra* note 129. At least one commentator has identified a broader relationship between the research in *Brown* and the larger impact of social science data on constitutional jurisprudence. Heise, *supra* note 16, at 297 (“Although no direct evidence exists to support (or refute) this assertion, indirect evidence abounds to support the claim that footnote 11 empiricized the equal educational opportunity doctrine.”).

¹³⁸ Heise, *supra* note 16, at 294.

¹³⁹ *Brown*, 347 U.S. at 494. One way the Court could have decided the case without relying upon the doll studies at all would have been to focus on the purpose rather than effect of segregation. See Charles R. Lawrence III, “One More River to Cross”—Recognizing the Real Injury in *Brown*: A Prerequisite to Shaping New Remedies, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 51 (Derrick Bell ed., 1980) (noting that “segregation American-style . . . has only one purpose: to create and maintain a permanent lower class or subcaste defined as race”).

¹⁴⁰ Even critics of the doll studies who cannot state that the Court relied on the evidence see connections between the Clarks’ conclusions and the Court’s reasoning in *Brown*. See Ernest van den Haag, *Social Science Testimony in the Desegregation Cases – A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69, 70 (1960) (“Though more vague and less crude, the Court’s reasoning [in *Brown*] strikes me as having something in common with Professor Clark’s conclusions even though not relying on his evidence.”).

¹⁴¹ BROOKS, *supra* note 18, at 11–12. Tying segregation to feelings of racial inferiority was part of the game plan of social scientists who testified at the trial stage of *Brown*. See *id.* at 13. The Court’s use of the doll studies also had an effect beyond the *Brown* case. See, e.g., Gwen Bergner, *Black Children, White Preference: Brown v. Board, the Doll Tests, and the Politics of Self-Esteem*, 61 AM. Q. 299, 301 (2009) (noting the *Brown* opinion’s use of the studies “create[d] a juggernaut for the racial preference paradigm—while simultaneously reinforcing social psychology’s centrality to U.S. public policy”).

¹⁴² John Davis, counsel for the State of South Carolina, did criticize the doll studies. See William J. Rich, *Betrayal of the Children with Dolls: The Broken Promise of Constitutional Protection for Victims of Race Discrimination*, 90 CORNELL L. REV. 419, 420 (2005). Though the reasoning was not necessarily based upon the soundness of the studies, at least two Justices were skeptical of relying upon them. *Ides*, *supra* note 15, at 12–13.

seem particularly interested in engaging a discussion of the studies' methods or results. Rather, the doll studies were briefly cited among a group of studies, none of which were extensively commented upon. The studies were treated as evidence of something for which no scientific proof was needed—an understanding that racial segregation infers a message of inferiority and damages the self-esteem of racial minorities.¹⁴³ Considered in another way, one can think of the Court as regarding these studies as credible but not dispositive on the question of why segregation is harmful. For reasons such as this, a number of scholars have argued that the social science data was of limited use to the Court in *Brown*.¹⁴⁴ By contrast, for them, “*Brown* vindicates our political, ethical, and moral ideals. It does not rest on the tenuous base of the sociological statement . . . that segregation produces injury to the psyche of Negro youth.”¹⁴⁵

Since the *Brown* decision, many law and social science commentators have been critical of the Clarks' methodology and findings.¹⁴⁶ For example, Sara Lightfoot commented that the doll experiments did not describe the “natural behaviors and perceptions of children but rather their responses to a contrived experimental task” and failed to inquire into the motivations for

¹⁴³ See Ides, *supra* note 15, at 12–13, at (noting that the doll studies would have been a “dangerously fragile” foundation upon which to base the *Brown* decision and that the social science research was treated as “see also” information); van den Haag, *supra* note 140, at 69 (1960) (“[N]o one will ever know to what extent the Court’s common sense view that Negroes are humiliated and frustrated by segregation was reinforced by Professor Clark’s pseudo-scientific ‘proof.’”). Again, this particular understanding of racial hierarchy as obviously subordinating is most consistent with Neil Gotanda’s theory of “historical race.” See Gotanda, *supra* note 36, at 39.

¹⁴⁴ See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 39 YALE L.J. 421, 428 (1960) (addressing the question of whether segregation constituted unconstitutional segregation, he posited “that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid”); Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 160 (1955) (noting that while the Court “graciously” mentioned the social science evidence in a footnote, that “the Court was not disposed in the least to go farther or base its determination on the expert testimony”); James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659 (2003).

¹⁴⁵ Ovid C. Lewis, *Parry and Riposte to Gregor’s “The Law, Social Science, and School Segregation: An Assessment,”* in DE FACTO SEGREGATION AND CIVIL RIGHTS: STRUGGLE FOR LEGAL AND SOCIAL EQUALITY 115, 131 (Oliver Schroeder, Jr. & David T. Smith eds., 1965). The author acknowledges, however, the studies had been generally believed to be proof of the harm of segregation. *Id.* at 131 & n.93.

¹⁴⁶ See John Hart Ely, *If at First You Don’t Succeed, Ignore the Question Next Time?: Group Harm in Brown v. Board of Education and Loving v. Virginia*, 15 CONST. COMMENT 215, 217 n.9 (1998) (describing multiple critiques of the studies’ methods and findings). Critics began to respond to the use of the Clark studies in *Brown* in the years immediately after the decision was handed down. See, e.g., Cahn, *supra* note 144; van den Haag, *supra* note 140. *But see* Kenneth B. Clark, *The Desegregation Cases: Criticism of the Social Scientist’s Role*, 5 VILL. L. REV. 224 (1959) (defending the role of social scientists in the desegregation cases). For a positive gloss on the doll studies, see Robert Carter, *The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*, 22 J. NEGRO EDUC. 68 (1953) (positively describing the content of the doll studies referenced in *Brown*).

the children's choices.¹⁴⁷ Other critics note that the studies failed to evaluate the benefits of integration,¹⁴⁸ lacked a necessary control group,¹⁴⁹ and failed "in isolating the critical variable" that connected self-hatred to school segregation "per se."¹⁵⁰ A number of critics have also commented on the studies' claims regarding segregation being severely undermined by the finding that children from the North who attended integrated schools were more likely to associate blackness with negative attributes.¹⁵¹ Recently, scholars from law and other disciplines have complained, more generally, about the studies' claims regarding self-esteem/black inferiority¹⁵² and identity formation.¹⁵³

Though claims attacking the methods in the Clark studies are now prevalent, it is not clear that such criticisms would have altered Chief Justice Warren's opinion in the case had they been available then. This is because the consideration of the social science research in *Brown* teaches us something that is confirmed in the Court's review of the data in *McCleskey*—that how the Court interprets racial data may be controlled, in part, by judicial

¹⁴⁷ Sara Lawrence Lightfoot, *Families as Educators: The Forgotten People of Brown*, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION, *supra* note 139, at 5–6.

¹⁴⁸ See van den Haag, *supra* note 140, at 71 ("Curiously, social scientists, with rare exceptions, are not very interested in investigating the effects on Negro children of going to school with hostile whites The Court's view that 'segregation with the sanction of law' is humiliating is doubtlessly true under the historical circumstances. But the implication that such segregation is *more* humiliating than congregation by legal compulsion is a *non sequitur* . . .").

¹⁴⁹ Heise, *supra* note 16, at 294 (citation omitted). The study also only considered segregation's effects on Blacks. See Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, J. AM. HIST. 92, 96 (2004) ("The Court's measure of segregation's psychological costs counted its apparent effect on black children without grappling with the way segregation also shaped the personality development of whites.").

¹⁵⁰ Gregor, *supra* note 18, at 101.

¹⁵¹ See *id.* at 105; Ely, *supra* note 146, at 217 n.9; Heise, *supra* note 16, at 295; van den Haag, *supra* note 140, at 76–77.

¹⁵² Legal scholar Roy L. Brooks has commented on the backlash toward the studies' treatment of black inferiority:

Whether it is conservatives like Justice Clarence Thomas, who faults *Brown* and its progeny for creating "a jurisprudence based upon a theory of black inferiority," or liberals like Alex Johnson, who flat out states that "*Brown* was a mistake," many African Americans who came of age in the 1960s and 1970s have come to reject *Brown*'s assumption regarding African-American identity.

BROOKS, *supra* note 18, at 17 (citation omitted); see also Proulx, *supra* note 18.

¹⁵³ English Professor Gwen Bergner's literary commentary is representative of the identity formation critique:

The doll test discourse not only reflects shifting racial politics but also configures notions of racial identity. Though researchers purport only to measure the psychic effects of systemic racial discrimination, they actually construct an essentialist view of racial identity, whereby black children must choose black dolls to demonstrate "accurate" racial preference. Thus the logic of the doll test discourse is consistent across time even if the results are not: white preference behavior indicates that African American children idealize whiteness, denigrate blackness, and therefore disavow their racial identity.

Bergner, *supra* note 141, at 301.

presuppositions about the meaning of behaviors. That such judicial presuppositions and preferences may displace ostensibly neutral and dispassionate decision-making should not be surprising given the social science research on judicial decision-making, motivated reasoning, and cognition.¹⁵⁴ This claim about judicial decision-making is similar to theories advanced by legal realists.¹⁵⁵ Scholars, however, have problematized the realist account as an oversimplification that “overly privileges a judge’s conscious and deliberate intent . . . [and] discounts the degree to which automatic and unconscious mental processes—biases and heuristics—can impact judicial decisionmaking.”¹⁵⁶ In *Brown*, it is clear that Chief Justice Warren believed that racial segregation negatively affected life outcomes for African-Americans. The social science data, though unconfirmed, may have merely been referenced as evidence that generally confirmed Chief Justice Warren’s beliefs.¹⁵⁷ Similarly, in a world where preserving the discretion of juries and the viability of the criminal justice system were of paramount concern to Justice Powell, the seemingly robust data in *McCleskey* was regrettably deemed insufficient to convince the Court that racial effects were tied to impermissible racial animus.

¹⁵⁴ See, e.g., Richard E. Redding & N. Dickon Reppucci, *Effects of Lawyers’ Socio-political Attitudes on Their Judgments of Social Science in Legal Decision Making*, 23 LAW & HUM. BEHAV. 31, 34, 50 (1999) (reporting on study that found that judges’ sociopolitical attitudes about the specific social issue in question affect their judgments about the admissibility of social science research); Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307, 308 (2013) (explaining psychological theory of motivated cognition and exploring its application to judges); Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 863 (2015) (describing how judges rely on their intuitive, emotion reactions without subjecting them to scrutiny to produce rational choices); see also Feingold & Carter, *supra* note 46, at 14 (arguing that motivated reasoning interacts with other cognitive phenomena, which requires mindfulness of how “common biases and heuristics on the one hand, and socially salient stereotypes on the other . . . will predictably and systematically operate as justifiers that facilitate prejudice in the form of judicial deference to evidence that reinforces and perpetuates racial hierarchy in America”).

¹⁵⁵ On the approach to judicial decision-making espoused by legal realists old and new, see Howard Erlanger et al., *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 338–39 (providing an overview of how the “New Legal Realism” movement is using social science to advance legal research), and Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 267–68 (1997) (discussing the realist claim that the political and moral leanings of judges influence legal outcomes). Importantly, some new legal realists have explicitly identified the relevance of empirical studies to charting the space between law on the books and law in action. See, e.g., Bryant Garth & Elizabeth Mertz, *Introduction: New Legal Realism at Ten Years and Beyond*, 6 U.C. IRVINE L. REV. 121, 123 (2016) (emphasizing empirical methods and perspectives to inform the study of law as a “key aspect” of New Legal Realism).

¹⁵⁶ See Feingold & Carter, *supra* note 46, at 10.

¹⁵⁷ See Moran, *supra* note 129, at 524 (noting that some scholars have concluded that Chief Justice Warren’s use of social science was “mere window dressing, a way to justify a decision that the justices would have reached in any event”).

That motivated reasoning may help to explain how social science data was used in *McCleskey* is ironic but not unforeseeable given the *Brown* Court's treatment of such data. Neither *Brown* nor its progeny of cases considering social science data specifically articulated a coherent standard for considering such data. This may have been so for at least two reasons. First, because there was no real discussion of the doll experiments or any of the studies listed in footnote 11, the *Brown* Court signaled there was no requirement for engaged analysis. Second, to the extent the *Brown* opinion was seen as ushering in a requirement for lower court judges to consider research studies—at least in the context of civil rights cases—many of them were not familiar with evaluating expert evidence of this kind.¹⁵⁸ A general failing of *Brown*, then, was that it did not lay the groundwork for courts to develop a more regularized approach to considering empirical data. With regard to racial impact data in particular, the Court also overlooked unique challenges that could arise related to research design in this domain, as well as the fraught social and political sensitivities surrounding the subject. These two points are considered in the next Part.

IV. EXPLICATING SOCIAL SCIENCE DATA AND THE MEANING OF RACE IN THE COURTS

As Professor Mark Yudof, former Chancellor of the University Texas system and President of the University of California system,¹⁵⁹ has noted:

It is difficult to make systematic observations about the reliance of courts on social science research; the uses to which the evidence is put depend, in part, on its nature. Since *Brown*, my impression is that, with few notable exceptions, there has been a marked decline in the willingness of the Supreme Court to embrace social science evidence as the basis for constitutional decisions. To be sure, the Court occasionally makes reference to social science research, but primarily on factual matters.¹⁶⁰

In light of Yudof's above analysis, it appears that the Supreme Court's limited use of the social science evidence in its *Brown* opinion, in effect, foreshadowed its misapprehensions about such research that surfaced in

¹⁵⁸ *Id.* at 523 (noting that *Brown* has been described as involving a situation where “courts and judges were thrust into ‘relatively unfamiliar intellectual terrain’ that revealed their limitations in dealing with expert evidence” (quoting Michael Heise, *Equal Educational Opportunity by the Numbers: The Warren Court's Empirical Legacy*, 59 WASH. & LEE L. REV. 1309, 1312 (2002))).

¹⁵⁹ See RODNEY A. SMOLLA, *THE CONSTITUTION GOES TO COLLEGE: FIVE CONSTITUTIONAL IDEAS THAT HAVE SHAPED THE AMERICAN UNIVERSITY* 15 (2011).

¹⁶⁰ Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57, 70 (1978).

McCleskey.¹⁶¹ Unfortunately, as a result of both the *Brown* and *McCleskey* opinions, it is difficult to discern how much and what kinds of racial impact data are needed to support constitutional complaints. This is so, in part, because the Court inconsistently evaluates empirical data on race and its impact,¹⁶² and at times, its decision-making appears to be largely animated by matters external to the data.¹⁶³ Moreover, even if the courts were inclined to develop better standards for reviewing social science data, they would need to be mindful of how their assessments, including of race-related data, may turn on pre-commitments or “pre-understandings” that are often associated with stereotypes.¹⁶⁴ And while courts may make lay claims about concepts such as causation that they believe to be neutral or objective in nature, even determinations of this kind are somewhat controlled by experience and expectations.¹⁶⁵ Given that a majority of the current Supreme Court Justices have neither displayed a great interest in a principled interrogation of race and disadvantage nor the importance of incorporating empirical data within judicial analysis, it is doubtful that federal courts could be convinced to forgo some of the flexibility they now enjoy in addressing such matters. Should, however, the day arrive where the attitudes of a majority of the Justices change, below we suggest questions and

¹⁶¹ See Moran, *supra* note 129, at 524 (“Other critics go even further . . . contending that there never was a golden age of law and social science after *Brown*, which in turn collapsed with the *McCleskey* decision.”).

¹⁶² The following description is instructive:

In fact, most of the [trial court’s] criticisms of Professor Baldus’s research are unfair and inaccurate, and many of the statements about statistics are simply false, as I have discussed at length elsewhere. But there is little reason to pay attention to the district court opinion. Its rationale and conclusions were all but ignored by the Eleventh Circuit on appeal and by the Supreme Court in its review of the Eleventh Circuit.

Gross, *supra* note 113, at 1913. The appellate court, however, still determined that “[v]iewed broadly, it would seem that the statistical evidence presented here, assuming its validity, confirms rather than condemns the system.” *McCleskey v. Kemp*, 753 F.2d 877, 899 (11th Cir. 1985).

¹⁶³ See *supra* note 154 (discussing judicial motivated reasoning). At bottom, however, our claim is that is hard to make a successful normative argument about data consideration within cases because some courts may often behave opportunistically. This is essentially a legal realist position. See *supra* notes 155, 160.

¹⁶⁴ Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1847 (1994) (defining pre-understanding as the tendency of courts to make decisions about what is going on in a case by simply assessing the identities of the parties involved); Mario L. Barnes, *Black Women’s Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 974 (2006) (describing that within courts, “a series of inferences related to negative connotations about class, race, and gender can cause formal, doctrinal narratives to erase personal identity and substitute an alternate construction of a legal subject”).

¹⁶⁵ See Marini & Singer, *supra* note 9, at 379 (“Causal inference occurs not only through the ‘bottom-up’ process of forming hypotheses on the basis of empirical observation but also through the ‘top-down’ process of relating what is observed empirically to an existing body of relevant knowledge, including knowledge of the world gained through previous experience with similar empirical relations.”).

considerations that could lead to more useful deliberations around social science data and racial impact.

A. Appellate Review of Research Data

As Chief Justice Roberts's quotation that begins this Essay suggests, there does not appear to be an overriding sense on the Court that social science data should be given deference. And while there are cases that have used some sophisticated datasets,¹⁶⁶ the Court has not embraced a set of best practices for how to evaluate the use of such data. This is true despite the fact that the Court has recognized that there are situations in which scientific expertise is required. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Court established a rule for guiding trial courts in their assessments of the admissibility of expert opinions under Rule of Evidence 702.¹⁶⁷ The *Daubert* case itself involved the scientific validity of a plaintiff's study offered to prove that the anti-nausea drug in question in the case caused birth defects.¹⁶⁸ There, the Court held that it was incumbent upon trial judges confronted with such science-based questions to make sure that the "expert's testimony both rests on a reliable foundation and is relevant to the task at hand."¹⁶⁹ *Daubert* was decided after the *Brown* and *McCleskey* cases.¹⁷⁰ Part of what cases like *Brown*, *McCleskey*, and now *Gill* demonstrate, however, is that courts need to develop more nuanced standards for evaluating and admitting social science research data in order to effectively treat social science as a science.¹⁷¹

¹⁶⁶ There are some research areas, such as Law and Economics, where judges appear comfortable applying underlying theories and methods. See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1983) (exploring law and economics applied to justice, ancient legal institutions, privacy and reputation, and racial discrimination); Adam Chodorow, *Economic Analysis in Judicial Decision Making - An Assessment Based on Judge Posner's Tax Decisions*, 25 VA. TAX REV. 67, 68-69 (2005) (describing judges who use economic analysis to varying degrees to resolve the issues before them as jurists). There are also certain areas of law, such as antitrust, where courts have routinely analyzed economic data. See Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 18-20 (2016) (describing quantitative and qualitative economic models important to analyzing competition cases). Finally, as we have previously stated here, prior to *McCleskey*, multiple regression analysis had been used within the context of Title VII and other antidiscrimination cases. See, e.g., *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977); Barbara A. Norris, *Multiple Regression Analysis in Title VII Cases: A Structural Approach to Attacks of "Missing Factors" and "Pre-Act Discrimination,"* 49 LAW & CONTEMP. PROBS. 64 (1986).

¹⁶⁷ 509 U.S. 579 (1993).

¹⁶⁸ *Id.* at 582.

¹⁶⁹ *Id.* at 597.

¹⁷⁰ Prior to the decision in *Daubert*, the standard from *Frye v. United States* was often used to assess the admission of expert testimony. 293 F. 1013 (D.C. Cir. 1923). In the *Brown* case, many critics took issue with the testimony provided by Kenneth Clark in the lower court. See *supra* notes 18, 140.

¹⁷¹ Professors John Monahan and Laurens Walker have previously called for improving standards for considering social science data in courts. See, e.g., John Monahan & Laurens Walker, *Judicial Use of*

Daubert essentially controls the admission of expert testimony at the trial level. Both the *Brown* and *McCleskey* cases included such testimony. In federal court, however, decisions made by judges at the trial level are typically assigned to one of three classifications with an accompanying designation for appellate review: “questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for abuse of discretion).”¹⁷² Admissibility of expert testimony and data may implicate more than one of these classifications.¹⁷³ As such, some trial court decisions on whether evidence should be admitted as scientifically valid, may be reviewed *de novo* (anew) by appellate courts, including the Supreme Court. The three distinct judicial approaches the district court, appeals court, and Supreme Court took toward the Baldus data in *McCleskey*¹⁷⁴ are instructive on this point but also evince the peculiar and

Social Science Behavior, 15 LAW & HUM. BEHAV. 571 (1991) (proposing steps that courts should undertake when reviewing empirical data of human behavior); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CALIF. L. REV. 877 (1988). We clearly agree with other scholars who believe that much of the research conducted within the social sciences, including complex datasets such as those produced in the Baldus studies, should be covered by the rule in *Daubert*. See, e.g., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 1:31 (David L. Faigman et al. eds., 2017) (arguing that under Rule 702, “social science does not differ substantially from forensic science”). This is not a universally held view. See *id.* (“[D]espite the free use of the science label, the general perception is that social science is soft and non-threatening.” (citation omitted)); MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 702.5 (4th ed. 1996) (noting “there is no obvious clear demarcation between scientific knowledge and technical and other specialized knowledge”); Renaker, *supra* 25 at 1673–80 (attempting to distinguish between the scientific-knowledge testimony to which the *Daubert* rule applies and specialized-knowledge testimony, to which it does not). A more detailed explanation of appropriate subject matter for the *Daubert* inquiry from one state provides as follows:

Finally, the trial court must determine whether the expert is testifying about the right thing, that is, a subject matter amenable to expert opinion. An appropriate “subject matter” has been characterized as one in which scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. A matter generally qualifies where it is “not within the range of ordinary training or intelligence,” is “too complex to be really grasped by the average mind,” or is sufficiently beyond common experience.

Robert L. Sterup, *Into the Twilight Zone: Admissibility of Scientific Expert Testimony in Montana After Daubert*, 58 MONT. L. REV. 465, 469 (1997) (citation omitted).

¹⁷² *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000) (internal quotation marks omitted) (citing *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)).

¹⁷³ The type of appellate review turns on the nature of the trial court’s actions. For example, a trial court’s decision on whether a preliminary hearing is warranted as part of its gatekeeping function is likely reviewed under an abuse of discretion standard. See MODERN SCIENTIFIC EVIDENCE, *supra* note 171, at 29. The same standard would be applied to trial court evaluations of the qualifications of experts. See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 137–38 (1977); MODERN SCIENTIFIC EVIDENCE, *supra* note 171, at 49. Whether the trial court has effectively fulfilled the gatekeeping function, however, may be reviewed *de novo*. *Id.* at 32 (citing *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083 (10th Cir. 2000)).

¹⁷⁴ See *McCleskey v. Kemp*, 481 U.S. 279, 288–89 (1987); *supra* notes 113, 162. Describing the assessment of the Baldus studies in the lower courts, Justice Powell noted,

the [trial] court found that the methodology of the Baldus study was flawed in several respects. Because of these defects, the court held that the Baldus study “fail[ed] to contribute anything of

inconsistent manner in which these reviews may be conducted. Moreover, appellate courts are currently under no obligation to comment on whether they believe the lower courts' assessments are consistent with any field-specific standards for evaluating methods or results.¹⁷⁵

One way to address the anomaly of courts failing to reveal precisely how social science data is considered would be to develop more specific guidance or guidelines for appellate courts evaluating the sufficiency of the scientific record in the lower courts. In certain areas of the law, courts have, at times, used technical advisors and special masters to educate courts on particularly complex matters.¹⁷⁶ There is no information on whether courts would be open to broadly applying such an approach in cases involving social science studies. Another option would be for federal courts to develop an analytical research arm, similar to the Congressional Research Service or Government Accounting Office. Doing so, however, would not negate the need to create substantive standards for the review of empirical data.

At a bare minimum, appellate courts need to be open to conducting inquiries useful for the enterprise of more carefully reviewing lower court assessments of research data. Though inquiries under the *Daubert* standard typically relate to assessing novel science, admissibility may turn on the qualifications of the expert introducing the testimony.¹⁷⁷ Courts applying the *Daubert* standard, however, formally consider four factors—testability/falsifiability, error rate, peer review, and general acceptance—in determining the validity of proffered scientific evidence.¹⁷⁸ It should be incumbent upon appellate courts, however, to ensure that lower courts more thoroughly interrogate the soundness of methods and research results prior to adopting or discarding a study's findings. The types of questions appellate courts would expect to see explicated below might include the following

value" to McCleskey's claim . . . The Court of Appeals for the Eleventh Circuit, sitting en banc, carefully reviewed the District Court's decision on McCleskey's claim. It assumed the validity of the study itself and addressed the merits of McCleskey's Eighth and Fourteenth Amendment claims. *McCleskey*, 481 U.S. at 288–89 (footnote and citation omitted). The Supreme Court did not critique the merits of the study but found the results "insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose." *Id.* at 297.

¹⁷⁵ Rather, under *Daubert*, the primary requirement is that trial judges "demonstrate on the record—a sufficient appreciation of the scientific method to make a preliminary assessment." MODERN SCIENTIFIC EVIDENCE, *supra* note 171, at 32–33.

¹⁷⁶ See, e.g., Wayne D. Brazil, *Special Masters in the Pretrial Development of Big Cases: Potential and Problems*, 1982 AM. B. FOUND. RES. J. 287; Neil A. Smith, *Complex Patent Suits: The Use of Special Masters for Claim Construction*, 2 LANDSLIDE 36 (2009).

¹⁷⁷ MODERN SCIENTIFIC EVIDENCE, *supra* note 171 at 44 (indicating that trial courts may rely on expert qualifications alone to justify admissibility of testimony, but citing cases that find such a decision to be an abuse of discretion).

¹⁷⁸ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993). This list is not meant to be exhaustive. See, e.g., *Kumho Tire, Ltd. v. Carmichael*, 526 U.S. 137 (1999).

nonexhaustive list: What was the purpose of the study? For what purpose has the introducing party offered the findings to the court? What experts, if any, have been consulted in the creation of the study? What are the methods employed? Are there generally accepted standards within a relevant field for interpreting these methods? How should one evaluate reliability (reproducibility), viability,¹⁷⁹ and the strength of the findings of the study? Are there confidence limits? Have others within relevant disciplinary communities assessed the results? Does the data tend to confirm how a rule should be applied or a fact of consequence that should be considered by a court? Have other studies of this kind confirmed similar findings? Are there complicating variables, such as race, which implicate additional matters for consideration? The suggested number of inquiries, their precise wording, and the constitution of the judicial, legislative, or academic body responsible for their development are all matters requiring significant discussion and debate that are beyond the scope of this Essay. The Court's analysis in *Brown* and *McCleskey*, as well as the comments made during the oral argument for the *Gill* case, however, confirm that a meaningful intervention of this kind is long overdue.

Drawing specific attention to how appellate courts address the review of social scientific data should result in fewer cases where courts fail to identify particular strengths and weaknesses of some study or speak in incommensurate terms about the research across the trial and appellate decisions. It would also prevent a lower court from outright refusing to consider social science data for fear that it is too complicated. Should guidelines governing the appellate review of the admission of social science

¹⁷⁹ The courts' queries should extend to both internal viability ("whether the methods and analyses employed were sound enough to justify the inferences drawn by the researcher") and external viability ("whether the inferences drawn from the study can be applied to groups beyond those actually studied"). SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 68–69 (John Monahan & Laurens Walker eds., 9th ed.). The *Daubert* case itself set out the viability inquiry as a key function of the trial court. 509 U.S. at 594–95 (noting that the judge's role in applying Rule 702 was to assess "scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission"). As the following passage provides, discerning viability within this context, however, can be quite difficult:

The *Daubert* Court's ruling that scientific validity constitutes a preliminary fact under Rule 702, while not surprising as a general evidentiary matter, generated a second issue that is largely unique to scientific evidence: What is the proper focus of the validity assessment to be made by judges? In ordinary evidentiary contexts, the preliminary facts judges must find when applying evidentiary rules are plainly defined and unique to the respective case In contrast, the preliminary fact at issue in *Daubert* was whether the methods and principles of years of scientific research and numerous published studies support expert testimony that Bendectin is a teratogen that causes birth defects when ingested by people like the plaintiff's mother. This is not a straightforward factual inquiry or one that arises only in the case at hand.

David L. Faigman, Christopher Slobogin & John Monahan, *Gatekeeping Science: Using the Structure of Scientific Research to Distinguish Between Admissibility and Weight in Expert Testimony*, 110 NW. U. L. REV. 859, 869 (2016).

evidence be adopted, a helpful outcome would likely be that trial courts would also improve their decision-making in such cases, as they would have a better understanding of the types of analysis that are likely to be upheld during appellate review. While there is certainly a need for better standards for courts considering the import of research data, we next consider special concerns a court would need to address when such studies advance findings regarding race and other social identity categories.

B. *Special Considerations for Racial Impact Data*

The Roberts Court has not been particularly progressive in its approach to state considerations of racial classifications, regardless of whether such classifications have been bolstered by empirical data or not. In only a handful of cases in the last several years has the Court been willing to either sanction invidious race-based practices¹⁸⁰ or to uphold race-conscious benefits programs.¹⁸¹ Rather, in its recent cases, the Court has either employed conceptions of racial discrimination that have moved away from previous understandings of race-based harm¹⁸² or it has largely ignored the significance of historical contexts when considering racial impact data.¹⁸³

¹⁸⁰ See Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017) (providing that proof of explicit racial bias can be sufficient to overcome a preference for finality regarding jury decisions); Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015) (approving the use of disparate impact claims in the fair housing context).

¹⁸¹ See Fisher v. Texas, 136 S. Ct. 2198 (2016) (upholding the race-conscious admissions plan of the University of Texas Law School).

¹⁸² See Ricci v. DeStefano, 557 U.S. 557 (2009) (finding that when a governmental entity takes actions to avoid a disparate impact claim by workers of color, it may create a discriminatory intent claim for others); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (finding that attempts by schools to manage diversity through assignment plans in primary and secondary school was impermissible “racial balancing” rather than a tool to combat the legacy of segregation).

¹⁸³ Perhaps the most obvious recent example of the Court ignoring history is in Chief Justice Roberts’s majority opinion in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). In that case, Roberts declared that the racial data were outdated and that historical disadvantages in voter activity have been overcome. He did so, however, despite claims by scholars that “[a]n overwhelming amount of social scientific evidence demonstrates that current conditions in jurisdictions covered by Section 4 are consistent with past conditions.” Pantea Javidan, *Legal Post-Racialism as an Instrument of Racial Compromise in Shelby County v. Holder*, 16 BERKELEY J. AFR.-AM. L. & POL’Y 127, 129 (2015). Roberts also deployed an essentialist lens in his racial progress narrative for elected black officials. This is the case because most of the political success he pointed to pertains to black men and he completely overlooked intersectional analyses suggesting differential results for black women. See Barnes, *supra* note 21, at 2081 & n.196. For an overview of the important literatures on anti-essentialism and intersectionality, respectively, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (identifying essentialism as a fallacy arising when one believes an “essence” marks membership within a particular social group and results in that group being perceived as necessarily representative of the interests of constituent subgroups), and Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (describing a theory of intersectionality premised upon an interconnection between social identity

Given the Court's present disposition with regard to considerations of race, having a majority of Justices pay special attention to how social science studies define, measure, and assess the concept is likely to be a challenge. The result in racial impact cases such as *McCleskey*, however, indicates that is exactly the reorienting that is needed. One important problem, then, is that merely regularizing how courts consider social science data, including studies addressing race as a variable, will not guarantee better outcomes.

In addition to gaining the tools to more carefully consider research data, courts must also question the ways in which these underlying studies address race. Historically, empirical studies have not always been particularly sensitive to racial dynamics. First, some studies have, at times, studied race in an abusive and immoral manner.¹⁸⁴ Second, even studies where methods are not abusive may suffer from insensitivities in design and analysis that result in inaccurate assessments of racial effects¹⁸⁵ or “somewhat carelessly incorporate[] race into their research by treating it as a readily measurable, dichotomous (black/white) variable that affects law at various points.”¹⁸⁶ Finally, at least within sociolegal research, where studies have not been typically influenced by critical perspectives on identity, race has not always been seen as either a factor germane to some research study or worthy of study as a separate topic.¹⁸⁷ Given that some social science studies have often failed to account meaningfully for how race has been operationalized, improving how courts assess empirical data may not necessarily ensure that courts become appropriately sensitive to racial impact data. There is also the problem that the use of social science data in *Brown* reveals: adopting more rigorous standards for research on race may lead to studies—the findings of which progressive courts might facially agree with—being rejected. Hence, before we can move forward with better educating courts on race and social

categories such as gender, race, and class, where the categories create overlapping and reinforcing systems of subordination).

¹⁸⁴ One need only reference the infamous Tuskegee experiments to see such an example. See JAMES H. JONES, *BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT* (1993); DeNeen L. Brown, ‘You’ve Got Bad Blood’: The Horror of the Tuskegee Syphilis Experiment, WASH. POST (May 16, 2017), <https://www.washingtonpost.com/news/retropolis/wp/2017/05/16/youve-got-bad-blood-the-horror-of-the-tuskegee-syphilis-experiment> [<https://perma.cc/6JQ3-9TF8>] (describing study where 399 black men were part of a study for which the government “[n]ever obtained informed consent from the men and never told the men with syphilis that they were not being treated but were simply being watched until they died”). There are, of course, other examples of the exploitation of race in the medical sciences. See ROBERTS, *supra* note 23; REBECCA SKLOOT, *THE IMMORTAL LIFE OF HENRIETTA LACKS* (2010); L. Song Richardson, *When Human Experimentation Is Criminal*, 99 J. CRIM. L. & CRIMINOLOGY 89 (2009).

¹⁸⁵ See CARTER *supra* note 23; ELIAS & FEAGIN, *supra* note 23; ZUBERI & BONILLA-SILVA, *supra* note 23.

¹⁸⁶ Gómez, *Looking for Race*, *supra* note 24, at 229 (internal quotation marks omitted).

¹⁸⁷ Gómez, *A Tale of Two Genres*, *supra* note 24; Obasogie, *supra* note 24.

science, there needs to be a larger commitment to ensuring the proper consideration of race within social science.

In recent years, a group of scholars from law and other disciplines has been annually convening to create a project or subfield that encourages empirical researchers to be more mindful of critical theories, and critical scholars to incorporate social science research into their work. The project and scholarship it has produced are referred to as empirical methods and Critical Race Theory (eCRT).¹⁸⁸ Though the formation is young and fluid, scholars associated with this enterprise have done excellent work within various research areas,¹⁸⁹ including criminal justice studies.¹⁹⁰ Recently, for example, Temple University sociologist Nicole Gonzalez Van Cleve published *Crook County*, an illuminating ethnographic study of the racialized forms of injustice taking place within the Chicago criminal justice system.¹⁹¹ Additional representative work has been published by Georgetown Law Professor Paul Butler. In his exceptional new book, *Chokehold*,¹⁹² Professor Butler uses empirical data to interrogate raced and gendered police violence more broadly. Currently, the most significant contribution of eCRT has been in the production of excellent work of this kind. The need for courts to be better educated on the meaning of race within social science research, however, presents an opportunity for eCRT to expand beyond its current functionality. Filling this gap might also encourage more of the work of

¹⁸⁸ On the emergence of the eCRT project and the work that has been produced, see Obasogie, *supra* note 24; Kimani Paul-Emile, *Foreword: Critical Race Theory and Empirical Methods Conference*, 83 FORDHAM L. REV. 2953 (2015); and Barnes, *supra* note 24, at 448–54. For a more thorough discussion of critical race theory and social science, see Carbado and Roithmayr, *supra* note 24, and CRITICAL RACE REALISM, INTERSECTIONS OF PSYCHOLOGY, RACE AND LAW (Gregory Parks et al. eds., 2008).

¹⁸⁹ See, e.g., Tonya L. Brito et al., “*I Do for My Kids*”: *Negotiating Race and Racial Inequality in Family Court*, 83 FORDHAM L. REV. 3027 (2015) (an ongoing research project looking at how issues of race, gender, and class shape child support enforcement and contempt proceedings); Geoff Ward, *Microclimates of Racial Meaning: Historical Racial Violence and Environmental Impacts*, 2016 WIS. L. REV. 575 (using archival research to perform empirical analysis of historical racial violence).

¹⁹⁰ Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211 (2015); Osagie K. Obasogie & Zachary Newman, *Black Lives Matter and Respectability Politics in Local News Accounts of Officer-Involved Civilian Deaths: An Early Empirical Assessment*, 2016 WIS. L. REV. 541; Mario L. Barnes, *Taking a Stand?: An Initial Assessment of the Social and Racial Effects of Recent Innovations in Self-Defense Laws*, 83 FORDHAM L. REV. 3179 (2015); Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297 (2013).

¹⁹¹ NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT* (2016).

¹⁹² PAUL BUTLER, *CHOCKE HOLD: POLICING BLACK MEN* (2017). There are also scholars that are not formally affiliated with eCRT who have also carefully considered race within empirical studies of police stops and the collateral consequences of punishment. See, e.g., CHARLES R. EPP ET AL., *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* (2014) (analyzing 2000 police stops in the Kansas City metro area, using both quantitative and qualitative methods, and measuring the effect of race as an independent variable and in interaction with numerous other variables).

eCRT, which is often separately produced by scholars from either law or social science disciplines, to be collaboratively conducted by representatives from various disciplines.¹⁹³

One role for the evolving eCRT project would be to create and maintain a repository for studies that consider race in robust and complex ways. These studies, then, could serve as exemplars for courts considering racial impact data. Another role would be for eCRT scholars to be included among the stakeholders consulted for creating the previously discussed guidelines for appellate courts to review lower court admissions of social science research. Finally, regardless of whether either of the previous options is available, eCRT scholars could be a resource for routinely filing amicus briefs in cases where the Court is likely to confront racial impact data. Based on *McCleskey* and many of the cases that have followed it, there are few reasons to believe that the current Court will be open to any of these options. This does not mean, however, that these goals should be abandoned. First, the Supreme Court's approach to certain types of claims and evidence will shift over time with the changing composition of that body. Also, for many years, critical scholars have understood that to achieve any goal tied to racial justice, at times, one must be prepared to accept "satisfaction in the struggle itself."¹⁹⁴ In other words, even if there is a lack of immediate progress, it is necessary to invest in the change one hopes will eventually come to pass.

CONCLUSION

Three years after he retired from the U.S. Supreme Court, Justice Powell identified *McCleskey* as the case he should have decided differently while he was on the Court.¹⁹⁵ His change of heart, however, had nothing to do with revisiting the strength of the data contained in the Baldus studies. Rather, he simply decided that the death penalty should be eradicated altogether.¹⁹⁶ *McCleskey*, we have argued, was wrongly decided, but for reasons beyond those affecting Justice Powell's change of heart. The Baldus studies confirmed for the death penalty in Georgia something many scholars (and Justice Powell) believe about the U.S. criminal justice system overall: At every critical juncture within that system, race matters in determining outcomes. Had the *McCleskey* Court been predisposed to an understanding of the operation of racial disadvantage that was adopted by the Court in *Brown*, it is almost certain that the Baldus data would have been sufficient

¹⁹³ For a discussion of the varying forms of eCRT scholarship, see Barnes, *supra* note 24, at 545–63.

¹⁹⁴ See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 98 (1992).

¹⁹⁵ Gross, *supra* 113, at 1918.

¹⁹⁶ *Id.* at 1919.

to support the finding of a violation of the Equal Protection Clause. It is also true that had Justice Powell privileged justice over preserving discretion within a biased but presumptively necessary criminal justice system, the last thirty years could have been spent addressing rather than lamenting the seamless overlaps between race, crime, and punishment that remain in this country. Here, however, we have attempted to lay the groundwork for options to improve current judicial assessments of social science research in general, and racial impact data more specifically. The Court's post-race societal sentiments being what they are today,¹⁹⁷ it would be folly to expect courts to embrace a different understanding of the connection between race and societal disadvantage in the near term. Still, we should continue to create tools that will assist courts in thinking about social science data and the meaning of race in new and more sophisticated ways, understanding that this task may seem Sisyphean until the day comes when more Justices see statistically significant evidence of racial impact data as sufficient to sustain a constitutional equal protection claim.

¹⁹⁷ See *supra* notes 21–22.

Where Do Americans Stand on Affirmative Action?

Whites hate it, everyone else supports it.

BY JAMELLE BOUIE JUNE 13, 2013



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The last week or so has seen several polls on the popularity of affirmative action, as a preface (of sorts) to the Supreme Court's anticipated ruling in *Fisher v. University of Texas*. But major differences between the

polls make it difficult to judge where Americans stand on racial preferences

One survey from *The Washington Post* and ABC News, for example, found a huge, diverse majority against "allowing universities to consider applicants race as a factor in deciding which students to admit."

Overall, 76 percent of Americans opposed race conscious admissions, while only 22 percent gave their support. This was consistent among all racial groups: 79 percent of whites opposed using race as a factor, along with 68 percent of Hispanics and 78 percent of blacks. For opponents of affirmative action, this seems to be a welcome sign that the whole of American society has turned against race-based efforts to increase diversity in higher education.

But that's only one poll. Another survey, from NBC News and *The Wall Street Journal*, found a less decisive public. When asked if affirmative action programs were "still needed to counteract the effects of discrimination against minorities, and are a good idea as long as there are no rigid quotas," 45 percent of Americans agreed. On the other end, 55 percent of Americans supported the claim that "Affirmative action programs have gone too far in favoring minorities, and should be ended because they unfairly discriminate against whites."

Here, there's a much greater racial divide. Only 34 percent of whites agreed with the first statement, compared to 82 percent of African Americans and 68 percent of Latinos. By contrast, whites largely favored the second statement, with 56 percent affirming the view that whites are unfairly discriminated against in American life. These results are similar to an earlier poll from the Public Religion Research Institute, which finds 57 percent opposed to affirmative action in college admissions, with whites forming the bulk of opposition,

and minorities broadly supportive.

Indeed, it's worth noting an even earlier poll from PRRI-released last spring-where 56 percent of white millennials said that government paid too much attention to the problems of minorities, and 58 percent said that discrimination against whites was "as big a problem as discrimination against blacks and other minorities.

All of this raises a question: What's up with *The Washington Post* results? No where else do we see such wide opposition to racial preferences in college admissions.

The answer is in the *wording* of *The Washington Post* poll. The *Post* doesn't ask if respondents are opposed to affirmative action-a policy which, for the most part, people understand, even if they are mistaken about its results-it asks if they support universities using "race as a factor." That's ambiguous. Does the *Post* mean affirmative action, or does it mean active discrimination against minority groups? There's a good chance that when confronted with the question, minority respondents reached for the second meaning, not the first. And obviously, blacks and Latinos are going to oppose anything that could block their path to upward mobility.

By explicitly asking about affirmative action and not just alluding to it, PRRI and *The Wall Street Journal* drew answers that line up with what we know about public opinion. Despite our short historical distance from Jim Crow-and the enduring legacy of economic and social policies meant to cement white supremacy-a majority of whites oppose any effort to increase diversity in college admissions. A majority of minorities, on the other hand, do not.

The "American public" isn't opposed to affirmative

the American public isn't opposed to affirmative action-whites are. And while opposition is couched in terms of fairness, meritocracy, and colorblindness, there's also an element of resistance-many whites feel that minorities are getting an unfair advantage.

That they're getting an advantage isn't untrue. There are almost certainly cases of white students losing admission to elite schools (and otherwise) due to racial preferences. But, if we're serious about accounting for the past, that's unavoidable. For most of this country's history, all levels of government were used to advantage whites over all other racial groups, and blacks in particular. Whites were intentionally protected from competition in jobs, housing, education, and other areas of life. When you consider this, the call for complete meritocracy in college admissions is perverse-it does nothing but perpetuate existing disparities, which are large and growing.

This summer is the 50th anniversary of the March on Washington, and Martin Luther King Jr.'s "I Have a Dream" speech. As it approaches, a wide variety of public figures will affirm their commitment to King's dream of racial equality. Make no mistake-this is progress. But it also carries a whiff of insincerity. If we were fully committed to King's dream-if we truly aimed to fulfill his legacy-we would do far more to address the particular problems that face African Americans and other nonwhites, from mass incarceration and the war on drugs, to hyper-segregation and entrenched, generational poverty.

As a country, we invested a tremendous amount of time and energy into building a caste society of racial inequality, and we've taken huge strides in dismantling it. But to build a society of racial equality and opportunity takes even more time, and even more energy. Which is why I can't help but feel dread as we

wait for the Supreme Court to announce its decisions on affirmative action and the Voting Rights Act. It's clear that a majority of the Court is willing to end the former and sharply limit the latter. And if it does, it's another sign that, regardless of what we say, we aren't prepared to do what it takes to secure genuine racial equality. We never have been, and likely, we never will be.



JAMELLE BOUIE

Jamelle Bouie is a staff writer at The American Prospect.

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JAMELLE BOUIE

What 'Structural Racism' Really Means

Nov. 9, 2021



By **Jamelle Bouie**
Opinion Columnist

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Whether for inspiration, new ideas or simply as a refresher, it is important to revisit the classics of whatever constitutes your field of interest. It was with that in mind that I spent much of the weekend rereading the 1948 book “Caste, Class, and Race: A Study in Social Dynamics,” an influential (if now somewhat obscure) work of sociological analysis by the Trinidadian scholar Oliver Cromwell Cox.

If there is a reason to revisit this specific book at this particular moment, it is to remind oneself that the challenge of racism is primarily structural and material, not cultural and linguistic, and that a disproportionate focus on the latter can too often obscure the former.

Cox was writing at a time when mainstream analysis of race in the United States made liberal use of an analogy to the Indian caste system in order to illustrate the vast gulf of experience that lay between Black and white Americans. His book was a rebuttal to this idea as well as an original argument in its own right.

Over the course of 600 pages, Cox provides a systematic study of caste, class and race relations, underscoring the paramount differences between caste and race, and, most important, tying race to the class system. “Racial antagonism,” he writes in the prologue, “is part and parcel of this class struggle, because it developed within the capitalist system as one of its fundamental traits.”

Put differently, to the extent that Cox had a single problem with the caste analysis of American racism, it was that it abstracted racial conflict away from its origins in the development of American capitalism. The effect was to treat racism as a timeless force, outside the logic of history.

“We may reiterate that the caste school of race relations is laboring under the illusion of a simple but vicious truism,” Cox wrote in a section criticizing the Swedish economist Gunnar Myrdal’s famous study “An American Dilemma: The Negro Problem and Modern Democracy.” “One man is white,

another is black; the cultural opportunities of these two men may be the same, but since the black man cannot become white, there will always be a white caste and a black caste.”

In Cox’s reading of Myrdal, caste exists as an independent force, directing the energies and activities of Black and white people alike. The solution to the “race problem,” in this vision, is to shake whites from their psychological commitment to the caste system. Or, as Cox summarizes the point, “If the ‘race problem’ in the United States is pre-eminently a moral question, it must naturally be resolved by moral means.”

But this, for Cox, is nonsense. “We cannot defeat race prejudice by proving that it is wrong,” he writes. “The reason for this is that race prejudice is only a symptom of a materialistic social fact.” Specifically, “Race prejudice is supported by a peculiar socioeconomic need which guarantees force in its protection; and, as a consequence, it is likely that at its centers of initiation force alone will defeat it.”

For most of American history, until the Civil War, this socioeconomic need was the production of tobacco, agricultural staples and, eventually, cotton. After the war, it was the general demand for cheap workers and a pliant, divided labor force coming from Southern planters and Northern industrialists. Whether in the United States or around the world, Cox argues, it is capitalist exploitation — and not some inborn tribalism — that drives racial prejudice and conflict.

“Race prejudice,” Cox writes, “developed gradually in Western society as capitalism and nationalism developed. It is a divisive attitude seeking to alienate dominant group sympathy from an ‘inferior’ race, a whole people, for the purpose of facilitating its exploitation.” What’s more, “The greater the immediacy of the exploitative need, the more insistent were the arguments supporting the rationalizations.”

Although Cox was writing in an era very different from our own — Jim Crow ruled the American South, and the dismantling of colonial empires was only just beginning — his insights still matter. We must remember that the problem of racism — of the denial of personhood and of the differential exposure to exploitation and death — will not be resolved by saying the right words or thinking the right thoughts.

That’s because racism does not survive, in the main, because of personal belief and prejudice. It survives because it is inscribed and reinscribed by the relationships and dynamics that structure our society, from segregation and exclusion to inequality and the degradation of labor.

The solution, as the Rev. Dr. Martin Luther King Jr. wrote in the year of his assassination, must involve a “revolution of values” that will “look uneasily on the glaring contrast of poverty and wealth” and see that “an edifice which produces beggars needs restructuring.”

“If democracy is to have breadth of meaning,” King declared, “it is necessary to adjust this inequity. It is not only moral, but it is also intelligent. We are wasting and degrading human life by clinging to archaic thinking.”

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JURISPRUDENCE

Clarence Thomas May Destroy Native Children's Rights Based on a Lie

BY MARK JOSEPH STERN

NOV 07, 2022 • 5:09 PM



Supreme Court Justice Clarence Thomas sits with his wife, conservative activist Virginia Thomas, while he waits to speak at the Heritage Foundation on Oct. 21, 2021, in Washington. Drew Angerer/Getty Images

On Wednesday, the Supreme Court will hear arguments in *Brackeen v. Haaland*, a case engineered to hobble the federal government's power to protect Native communities from exploitation. The plaintiffs are asking the justices to invalidate the 44-year-old Indian Child Welfare Act, which prioritizes the placement of Native American children in custody proceedings with Native families. But they're also contesting a constitutional foundation of Indian law itself. Allying with Republican legal groups and lawmakers, the plaintiffs want to kneecap congressional authority to regulate tribes for the benefit of their own members.

After greenlighting countless laws diminishing tribal sovereignty, the Supreme Court could soon strike down a law attempting to enhance it. And the court may do so on the basis of history that is not just dubious but objectively false, rooted in a mistaken theory about the Founders' vision for relations with Native tribes that has been conclusively debunked.

It's important to understand that history to see how wrong the plaintiffs' originalist argument is. In 1787, the Framers needed to provide a solution to various problems created by the Articles of Confederation, including challenges around Indian affairs. The articles had tried to split authority over tribal relations between the states and the federal government, and the result was a disaster. Some states, for instance, refused to comply with treaties between the federal government and tribal nations, leading to violent conflicts over white settlement on Indian land.

To resolve this, the new Constitution handed all authority over Indian affairs to the federal government. It gave the government broader treaty and war powers—which, at the time, was crucial to tribal relations—and removed those powers from the states. It also gave Congress the ability to “regulate commerce” with “the Indian tribes.” (This is called the Indian Commerce Clause.) From George Washington's administration onward, the federal government interpreted its constitutional powers to encompass exclusive authority over Indian affairs.

Southern states with large Native populations disliked this arrangement. In the 1820s, they tried to expand jurisdiction over tribes within their borders. Georgia, for example, tried to abolish tribal governments through legislation. Several states also seized tribal lands illegally, arguing that, as “sovereign” states, they had inherent authority to do so. In 1832, the Supreme Court shot down this theory, rejecting state claims of a constitutional right over “Indian nations.” By that point, however, the states had an ally in President Andrew Jackson, who signed the Indian Removal Act that brutally deported these nations to the West.

The tragic history continued from there, even as the court consistently sided with the federal government over the states in relations with Native populations. Throughout the 19th century, Congress used this power to “assimilate” tribal members. Among other things, it sold off tribal lands without the consent of the tribes and stole Native children from their families, sending them to boarding schools where they would be “civilized.”

It's this practice—the legalized theft of Native kids—that forms the backdrop of the Indian Child Welfare Act (ICWA), which *Brackeen* puts in the Supreme Court's crosshairs. In the second half of the 20th century, Congress slowly adopted a different approach to Indian

regulations, and passed multiple laws designed to respect and reinforce tribal sovereignty. ICWA was one of these measures. The law grew out of investigations into the removal of Indian children from their families. Congress found that state and private child welfare agencies colluded with state courts to seize these kids from their homes without any evidence of mistreatment. Indian children were placed in the foster care system at far higher rates than other kids and almost always placed in non-Indian homes. States seized Indian children from their parents on a massive scale, with no due process for the families, and concealed their actions from tribes to prevent protest.

ICWA addresses this problem in several ways. It favors family reunification over foster care, requiring Native kids to be placed with their extended families whenever feasible. If reunification is not possible, ICWA favors placement with another tribal member. The law also imposes procedural requirements on state courts—which were complicit in the forced “assimilation” of Native children for so long. For instance, it requires state courts to notify tribes about involuntary child custody proceedings involving Native children, and allows tribes to intervene to promote placement with family or a tribal member. (The adoptive parents who sued in *Brackeen* are aggrieved that tribes exercised these rights, complicating their efforts to adopt Native kids.)

In short, ICWA takes a federal power that was long used to *break up* Native communities and uses it to keep them together, instead. Why, then, is it under fire at the Supreme Court? Because in recent years, Republican lawyers, activists, and judges have put forth a revisionist history of the Constitution that denied Congress’ clear authority to regulate Indian affairs. Their first argument claims that ICWA violates equal protection by using race-based classifications—even though it looks *not* at race but at tribal membership, which the Supreme Court has long identified as a permissible “political” classification. Their second argument is that ICWA exceeds congressional power, an idea that would’ve been unthinkable before the concerted conservative effort to lend it plausibility.

A turning point came in 2007, when University of Montana law professor Robert Natelson published an article in the *Denver Law Review* titled “The Original Understanding of the Indian Commerce Clause.” Natelson is a former scholar, talk radio host, and failed Republican candidate for Montana governor. He purported to proffer historical evidence Congress has no constitutional authority to regulate Indian affairs, a theory that would render ICWA—and countless other federal laws—unconstitutional. Recall that the Constitution allows Congress to regulate “commerce” with “the Indian tribes.” According to Natelson, “commerce” in this context originally meant nothing more than “trade.” So, he argued, Congress can regulate the exchange of goods with tribes, and nothing more.

Justice Clarence Thomas favorably cited Natelson in a 2013 opinion that turbocharged this assault on Indian law. The plaintiffs in *Brackeen* use his article to make their case. Texas, a plaintiff in the case, cites Natelson. Conservative groups supporting Texas cite Natelson. Other red states supporting Texas cite Natelson.

It is a problem for the plaintiffs, then, that Natelson is wrong. In 2015, Stanford law professor Gregory Ablavsky published a lengthy article in the Yale Law Journal that, among other things, rebutted Natelson's claims. Unlike Natelson, Ablavsky has a Ph.D. in history and his scholarship adheres to the rigorous standards of academic historical analysis. Ablavsky identified a series of errors in Natelson's article that do not just undermine but refute his conclusions.

For example, Natelson claimed to undertake an exhaustive review of the phrase "commerce with Indian tribes" in the 18th century and asserted that it "almost invariably" meant economic "trade with Indians" and "nothing more." Ablavsky undertook his own comprehensive review and discovered that "commerce with Indian tribes" was routinely used to describe far more than the mere trade of goods. He also found that the definition of "trade" itself was vastly broader than Natelson asserted, encompassing a vast array of non-economic activities—including, decisively in the current case, the adoption of children.

Natelson also completely misrepresented the position of a Founding-era essayist who opposed the Indian Commerce Clause. Moreover, based on his "knowledge of Latin" and certain constitutional language, he incorrectly wrote that the Framers did not view Indian tribes as sovereign. Ablavsky provided ample Founding-era sources that describe tribes as sovereigns, akin to a foreign nation—a direct rejoinder to Natelson's Latin-based extrapolation. The list goes on, but the upshot is clear: Natelson's work was riddled with errors, exaggerations, omissions, and misstatements. It is not a reliable source of scholarship.

When *Brackeen* arrived at the 5th U.S. Circuit Court of Appeals, Ablavsky filed a brief describing Natelson's argument as "deeply flawed, marred by inaccurate versions of sources and unsupported assertions directly at odds with explicit Founding-era evidence." Natelson responded by furiously criticizing Ablavsky for writing a "shyster-like" brief. He later published a document "cite checking" Ablavsky's article that purported to identify various errors. Ablavsky responded with a long article thoroughly rebutting each one of Natelson's accusations, then filed another brief when *Brackeen* came to SCOTUS.

This conflict is more than a mere academic tiff. It is a challenge to originalism as a reliable and honest methodology. Rarely in constitutional law does the history point so clearly in

one direction. Because he is a real historian, Ablavsky refuses to say he has reached the “correct” answer; in an interview, he told me: “There aren’t right answers in history. There are interpretations that are better and better founded in evidence. That’s what it is to be a historian. There’s always room for doubt.”

That is surely true, but the Supreme Court has put itself in the position of divining a “right answer” anyway. *Brackeen* therefore provides a perfect acid test of originalism, and Thomas’ approach in particular. If the justice refuses to abandon his previous views in light of new, unassailable evidence, it will prove that he applies this methodology in a hollow, insincere, and inconsistent manner—latching onto a conclusion that fits his policy preferences, then refusing to budge when it is repudiated. If Thomas lacks the integrity to apply the Constitution’s original meaning here, there is no reason to believe that he ever will. 📌

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JAMELLE BOUIE

This Is How to Put the Supreme Court in Its Place

Oct. 14, 2022



By **Jamelle Bouie**
Opinion Columnist

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I have written before about the ways that Congress could restrain an overbearing and ideological Supreme Court, using its powers under the Constitution.

In short, Article III, Section 2 states that the Supreme Court shall have “original jurisdiction” in all cases affecting “Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.” And in all other cases, the court shall have “appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”

The “exceptions” and “regulations” are key. Most of the business of the Supreme Court is appellate work. It hears cases that have already gone through the federal judicial process. *Dobbs v. Jackson Women’s Health Organization*, for example, began its life as a case before the U.S. District Court for the Southern District of Mississippi before going to the U.S. Court of Appeals for the Fifth Circuit, which holds appellate jurisdiction over Texas, Mississippi and Louisiana. If Congress can regulate the appellate jurisdiction of the Supreme Court, then it can determine which cases it can hear, the criteria for choosing those cases and even the basis on which the court can make a constitutional determination.

Congress could say, for instance, that the court needs more than a bare majority to overturn a federal statute. Even if you agree that the court has the mostly exclusive right to interpret the Constitution, it doesn’t therefore follow that five justices can essentially nullify the constitutional views of the legislators who passed a law, the president who signed it and the four other justices who affirmed it. Constitutional meaning, in other words, flows as much from the elected branches (and the people themselves) as it does from courts and legal elites.

In the same way that it takes a supermajority of Congress to propose a constitutional amendment, it should probably take a supermajority of the court to say what the Constitution means, especially when it relates to acts and actions of elected officials. If there is any place for mandatory consensus in our government, it should be in an area where any given decision can have broad and far-reaching consequences for the entire constitutional order.

Typically when I write about these issues it is all hypothetical, under the assumption that Congress hasn’t ever used its power to shape the court in this manner. But recently, while reading up on legal disputes during Reconstruction, I learned that at one point Congress attempted to do exactly what I’ve described: limit the court’s use of judicial review to overturn congressional statutes by raising the bar for a decision from a simple majority to a supermajority.

At issue was the Supreme Court’s decision in *Ex parte Milligan*. In 1864, Union Army officers arrested a group of Indiana Democrats who had been vocal critics of the Lincoln administration and its allies. A military commission authorized by President Abraham Lincoln under a previously issued executive order charged the men — including Lambdin P. Milligan, a leader in the “Order of American Knights,” a pro-slavery, secessionist group — with, among other things, inciting insurrection and conspiring against the U.S. government. Milligan and others were convicted and sentenced to death.

The following year, in May, lawyers for Milligan filed a petition for a writ of habeas corpus in the circuit court district of Indiana. Shortly thereafter, President Andrew Johnson — who took office the month before in the wake of Lincoln’s assassination — commuted Milligan’s sentence to life in prison. In the meantime, Justice David Davis — who rode circuit in Indiana, hearing cases along with a Federal District Court judge as they moved through the appeals process — reviewed Milligan’s petition. Davis did not think that a military commission was the appropriate way to try Milligan, a civilian in a state where there was no active rebellion. The other judge disagreed.

Their disagreement sent the case to the Supreme Court, which held oral arguments the next year, in 1866. Writing for five of the nine justices, Davis declared it unconstitutional to try civilians in military courts when civilian courts were still available. Chief Justice Salmon P. Chase, along with the remaining three justices, agreed that the use of military courts was inappropriate but disagreed that it was unconstitutional. The overall judgment on Milligan’s treatment was unanimous, but on the constitutional issue, there was a 5-4 split.

“For the chief justice,” Walter Stahr explains in “Salmon P. Chase: Lincoln’s Vital Rival,” “the Milligan case was only in part about events in Indiana in the recent past; it was also about the scope of federal authority in the violent present. Chase was well aware that, in many parts of the South, the state civilian courts provided no protections for blacks; only the federal military courts would punish whites for crimes against blacks.”

Republicans in Congress, still struggling with Johnson for control of Reconstruction policy, were outraged. The Chicago Tribune spoke for many Republicans when it said that this decision — along with another that concerned the ability of Congress and the states to require a loyalty or “test” oath for former Confederates who wished to serve in public capacity — showed a “deliberate purpose of the Supreme Court to thus usurp the legislative powers of the government to defeat the will of the loyal men of this nation in the interests of a rebellion crushed by military power.”

The remedy for this problem, The Tribune wrote, was simple: “We think the time has come for Congress to pass a law requiring the concurrence of three-fourths, or at least two-thirds of the whole bench, to pronounce authoritatively against the constitutionality of any act of Congress.”

Republicans took heed of the argument. In 1868, as Congress awaited the court’s decision in another case, *Ex parte McCordle*, that could undermine its military Reconstruction policies, the House of Representatives debated a bill that would require, according to The New York Herald, “a concurrence of two-thirds of all the members necessary to a decision adverse to the validity of any law of the United States.”

Democrats condemned the bill as one of the “very gravest” of “all the revolutionary measures brought before the last or present Congress tending to subvert and destroy the institutions of the country.” If Congress could override the “deliberate judgment of the Supreme Court of the United States,” declared Representative Samuel S. Marshall of Illinois, as recorded by The New York Times, “there would be established a despotism, not of one man, but an oligarchy or a mob, elected by the people, but usurping powers never given to it by the Constitution or the people.”

Representative John Bingham of Ohio, author of the 14th Amendment and a Republican, disagreed. “It would be a sad day for American institutions and for the sacred cause of Republican Governments if any tribunal in this land, created by the will of the people, was above and superior to the people’s power.” The Supreme Court, he continued, in a reference to its decision in *Dred Scott v. Sandford*, “had disgraced not only itself as a tribunal of justice, but it had disgraced humanity when it dared to mouth from its high seat of justice, the horrible blasphemy that there were human beings, either in this land, or in any land, whose rights white men were not bound to respect.”

The bill passed the House and Senate but it was never signed into law. President Johnson simply refused. In February, the House voted overwhelmingly to impeach Johnson, who was eventually acquitted in the Senate by a single vote. After this, as far as I can tell, Republicans in Congress made no further effort to force the issue.

In November, Republicans won the White House with Ulysses S. Grant at the top of the ticket. In 1869, a Republican Congress passed a law that set the size of the Supreme Court at nine justices (up from eight) and provided that any justice over 70 with sufficient experience could retire at full salary for the rest of his life. By mid-1870, Grant had appointed two associate justices of the Supreme Court, who would go on to affirm his policies. Republicans were content that the court was in their hands.

The point of all this is to say that disputes over the Supreme Court's power of judicial review are not new. The reforms to curb it, likewise, are not novel. And even if you stipulate that the Republicans of 1868 were motivated by partisan concerns, it is also true that these Republicans — the lawmakers who wrote the Reconstruction amendments and reshaped our entire constitutional order — grasped a serious problem with the Supreme Court's role in our ostensibly democratic political system. Their experience of the previous decade — of Dred Scott and the secession crisis and the war — had put court reform at top of mind, even if they ultimately only took minor steps to reshape the institution.

But this decision to spare the court the rod of discipline undermined the Republicans' own political project, although they could not see this in the moment. Within 20 years, the Supreme Court would render much of the 13th and 14th Amendments a dead letter. And by the end of the century, the 15th would have almost no impact on life in the South.

Despite some of the more interesting ideas that came out of President Biden's court reform commission, there is no chance at this time for serious court reform. There is no consensus for it within the Democratic Party and there are certainly not the votes for it in Congress. But circumstances do change, often unexpectedly. Should progressives gain the opportunity to make structural changes to the Supreme Court, they should take it. Democrats in the 21st century should not make the same mistake Republicans in the 19th century did.

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Jamelle Bouie became a New York Times Opinion columnist in 2019. Before that he was the chief political correspondent for Slate magazine. He is based in Charlottesville, Va., and Washington. @jbouie

JAMELLE BOUIE

Something's Got to Give

May 5, 2023



By Jamelle Bouie
Opinion Columnist

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It's been 52 years since Congress passed, and the country ratified, a constitutional amendment — the 26th Amendment, which lowered the voting age to 18 in the wake of the Vietnam War and the broader disruption of the 1960s. (The 27th Amendment, ratified in 1992, was passed in 1789.) It's been 64 years since Congress added states to the union — Alaska and Hawaii, in 1959. And it's been 94 years since Congress capped the size of the House of Representatives at 435 members.

You might be tempted to treat these facts as trivia. But the truth is that they say something profound about American politics. For more than 50 years, the United States has been frozen in a kind of structural and constitutional stasis. Despite deep changes in our society — among them major population growth and at least two generational waves — we have made no formal changes to our national charter, nor have we added states or rearranged the federal system or altered the rules of political competition.

One reason this matters, as Kate Shaw and Julie C. Suk observe in a recent essay for Times Opinion, is that “several generations of Americans have lost the habit and muscle memory of seeking formal constitutional change.” Unaccustomed to the concept and convinced that it is functionally impossible, Americans have abandoned the very notion that we can change our Constitution. Instead, we place the onus for change on the Supreme Court and hope for the best. Out with popular sovereignty, in with judicial supremacy.

There is another reason this matters. Our stagnant political system has produced a stagnant political landscape. Neither party has been able to obtain a lasting advantage over the other, nor is either party poised to do so. The margins of victory and defeat in national elections are slim. The Republican majority that gave President George W. Bush a second term in the White House — and inspired, however briefly, visions of a permanent Republican majority — came to just 50.7 percent of the overall vote. President Barack Obama won his second term by around four percentage points, and President Biden won by a similar margin in 2020. Donald Trump, as we know, didn't win a majority of voters in 2016.

Control of Congress is evenly matched as well. Majorities are made with narrow margins in a handful of contested races, where victory can rest more on the shape of the district map — and the extent of the gerrymandering, assuming it holds — than on any kind of political persuasion. That's the House. In the Senate, control has lurched back and forth on the basis of a few competitive seats in a few competitive states. And the next presidential election, thanks to the Electoral College, will be a game of inches in a small batch of closely matched states rather than a true national election.

Past eras of political dynamism often came from some change in the overall political order. Throughout the 19th century, for example, the addition of states either transformed the terrain on which Americans fought partisan politics or opened avenues for long-term success for either one of the two major parties. States could be used to solidify partisan control in Washington — the reason we have two Dakotas instead of one — or used to extend and enlarge an existing coalition.

Progressive-era constitutional transformations — the direct election of senators, women's suffrage and Prohibition — reverberated through partisan politics, and the flood of Black Americans from Southern fields to Northern cities put an indelible stamp on the behavior of Democrats and Republicans.

We lack for political disruption on that scale. There are no constitutional amendments on the table that might alter the terms of partisan combat in this country. There's no chance — anytime soon — that we'll end the Electoral College or radically expand the size of the House, moves that could change the national political calculus for both parties. There are no prospects, at this point, for new states, whether D.C., Puerto Rico or any of the other territories where Americans live and work without real representation in Congress.

There's nothing either constitutional or structural on the horizon of American politics that might unsettle or shake the political system itself out of its stagnation. Nothing that could push the public in new directions or force the parties themselves to build new kinds of coalitions. Nothing, in short, that could help Americans untangle the pathologies of our current political order.

The fact of the matter is that there *are* forces that are trying to break the stasis of American politics. There's the Supreme Court, which has used its iron grip on constitutional meaning to accumulate power in its chambers, to the detriment of other institutions of American governance. There's the Republican Party, which has used the countermajoritarian features of our system to build redoubts of power, insulated from the voters themselves. And there is an authoritarian movement, led and animated by Trump, that wants to renounce constitutional government in favor of an authoritarian patronage regime, with his family at its center.

Each of these forces is trying to game the current system, to build a new order from the pieces as they exist. But there's nothing that says we can't write new rules. And there's nothing that says that we have to play this particular game.

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Jamelle Bouie became a New York Times Opinion columnist in 2019. Before that he was the chief political correspondent for Slate magazine. He is based in Charlottesville, Va., and Washington. @jbouie

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JURISPRUDENCE

John Roberts and Brett Kavanaugh Really Did Just Save the Voting Rights Act

BY MARK JOSEPH STERN

JUNE 08, 2023 • 12:40 PM

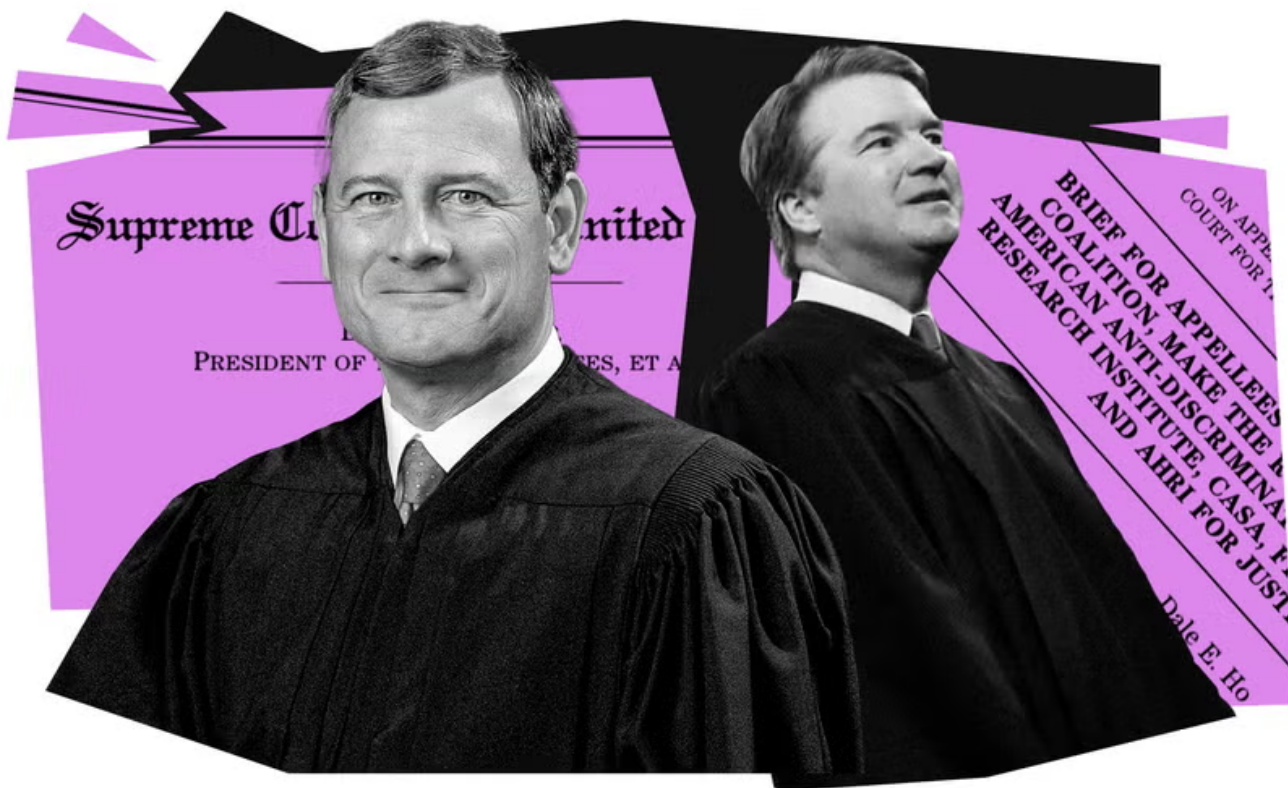



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The Supreme Court's [5-4 decision](#) in *Allen v. Milligan* on Thursday, which found that Alabama's congressional map violates the Voting Rights Act's ban on racial vote dilution, sends two clear messages. First, a bare majority of the court—Chief Justice John Roberts, Justice Brett Kavanaugh, and the three liberals—believes that the VRA still plays a meaningful role in maintaining a multiracial democracy (or is willing to defer to Congress' judgment on the matter). Second, that same majority of the court does not look kindly upon red states' race to shred decades of precedent in an effort to wipe out the voting power of Black Americans. Roberts' opinion for the court has a broader meaning that reaches far beyond this case: Red states cannot pressure the court into rewriting the VRA for no reason other than their shameless, brazen desire to elect more white Republicans.

Milligan revolves around Alabama's current congressional map, which GOP legislators drew after the 2020 census. Black residents make up nearly one-third of the state's population, but lawmakers gave them a majority [in just one](#) of the state's seven congressional districts. They did so by drawing a single, snaking district that captured most Black communities, then dispersing the remainder of Black voters throughout majority-white districts. The obvious purpose was to ensure that Black Alabamians could only have a real opportunity to elect one representative of their choice.

This tactic is plainly illegal under [Section 2](#) of the VRA, which prohibits voting laws (including redistricting plans) that have a racially discriminatory *effect*, meaning a disparate impact on Black voters. In January 2022, a three-judge district court [struck down](#) the map, finding that it illegally diluted the votes of Black Alabamians. But the Supreme Court swiftly [halted that decision](#) on the shadow docket. Its order split 5-4 (with Kavanaugh in that majority), and though Roberts dissented, he objected only to the majority's use of the shadow docket to overhaul precedent, and was open to narrowing Section 2 in the future. After SCOTUS' intervention, it seemed inevitable that the conservative supermajority would use *Milligan* to eviscerate what remains of the Voting Rights Act.

But it didn't! In fact, it did the opposite, vigorously reaffirming the ongoing importance and validity of this portion of the VRA in the face of ceaseless GOP attacks. Roberts' opinion for the court on Thursday traced the history of racist voter suppression after the Civil War, leading up to the initial passage of the VRA in 1965. He explained how, in 1980, the Supreme Court [held](#) that the law barred only discriminatory *intent*, not effect—a decision that

“produced an avalanche of criticism, both in the media and within the civil rights community.” Roberts wrote that some lawmakers were wary that an “effects test” (which measured impact rather than intent) would require a “quota system” or “racial proportionality” in districting, raising equal protection concerns. And so Congress settled on a bipartisan, “hard-fought compromise,” which amended Section 2 to require that the electoral process be “equally open to participation” by all racial groups.

What’s shocking about Roberts’ history lesson is that, at the time, he was on the front lines of the fight *against* expanding the VRA to include an effects test. As a lawyer at Ronald Reagan’s Department of Justice, he wrote about 25 memos in opposition of the new test and drafted op-eds on the topic for administration officials. Indeed, it is quite likely that Roberts actually ghostwrote one op-ed that he quoted in *Milligan* to illustrate the Justice Department’s hostility. Once on the Supreme Court, of course, Roberts consistently voted to narrow the VRA in line with his earlier views. So *Milligan* represents a total about-face: For the first time ever, the chief justice has embraced the law as a legitimate means of safeguarding Black Americans’ equal participation in the electoral process.

What happened? We will debate that question for decades, but one answer leaps off the page: Alabama pushed too far, too fast, too transparently. The state wanted the court to either gut the VRA under the guise of “interpretation” or simply strike it down as unconstitutional. Roberts turned down both requests, and Kavanaugh went along with him. Notably, his analysis of Alabama’s map itself is extremely brief, as if to illustrate that this case is not a close call. He explained that the court uses the “*Gingles* test” to identify a violation of Section 2. Under that test, a minority group must be large and compact enough to constitute a majority in one “reasonably configured” district; the group must be “politically cohesive,” meaning its members generally share the same political preferences; and it must be able to demonstrate that white voters can consistently block its “preferred candidate.” If all these conditions are met, the group must then show that elections are not “equally open” to racial minorities under a “totality of the circumstances.”

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The district court found these conditions satisfied, and Roberts agreed, writing that the court “faithfully applied our precedents” to reach sound “legal conclusions.” That conclusion

needs little explanation based on the facts relayed above; it is painfully clear that Alabama's overarching goal was to minimize Black voters' ability to elect their preferred representative. So the balance of Roberts' opinion amounts to a complete demolition of Alabama's attempt to "remake our Section 2 jurisprudence anew." The state's GOP attorney general, he wrote, urged the court to adopt a new test that it called the "race-neutral benchmark." It involves using a computer to create a ton of maps that do not consider race, then calculating the "average number of majority-minority districts in the entire multi-million-map set." If the actual map aligns with the average simulated map, it cannot violate the VRA.

This is absurd, and Roberts said as much. First, it simply has zero basis in the text of Section 2, and was created out of whole cloth by conservative lawyers who want to maximize white voting power in their state. Second, as Justice Ketanji Brown Jackson pointed out at oral arguments, Congress *wanted* states to consider race when drawing districts to ensure that they did not lock out racial minorities. "Racial considerations" are appropriate, the chief justice explained, so long as they do not "predominate" map-drawing. Third, Alabama's test could, in practice, make it impossible for states to draw maps that comply with the VRA, because ostensibly "race-neutral" maps often have the effect of diluting Black Americans' votes.

Finally, Alabama argued that the VRA's "effects test" is unconstitutional because it exceeds Congress' power under the 14th and 15th Amendments. This theory loomed over the whole case, raising the distinct possibility that SCOTUS would end its campaign of death by a thousand cuts and finally bring down the hammer on the law. But Roberts spurned it in a single paragraph, writing that the court had upheld the law's constitutionality in the past, and had no interest in revisiting those precedents. That conclusion is a stunning turnabout for the chief justice that suggests he really has made peace with the law as it exists today.

The 1982 version of John Roberts (or even the 2013 version, and possibly the 2021 version) probably would have nodded his head in agreement with each of Alabama's propositions. The 2023 version rejected them wholesale. His 34-page opinion boils down to a warning against red states taking his vote for granted—which may explain why Kavanaugh signed on: to ally himself with the chief justice's performance of independence. Kavanaugh even penned a brief concurrence reiterating that the court's decision was compelled by precedent, which is curious since he cast the decisive vote in 2022 to preserve Alabama's illegal map through the midterm elections. Thursday's decision makes that vote all the more inexplicable, and it may well be that Kavanaugh changed his mind and sided against the state after the chief justice seized upon this case to demonstrate the court's refusal to be bullied by Alabama. (The decision also ensures that Democrats will pick up at least one

congressional district in Alabama, and potentially several more in other red states with similarly unlawful maps.)

It is difficult to overstate the impact of *Milligan* on voting rights law. For several years now, many progressive attorneys have assumed that the VRA is pretty much dead, and the only question was when SCOTUS would deliver the final blow. Alabama wanted to play that role; it failed miserably. Justices Clarence Thomas’ dissent—joined by Justices Samuel Alito, Neil Gorsuch, and Amy Coney Barrett—described the court’s decision as a “disastrous misadventure.” But the real disaster here was white Alabama Republicans’ crusade to obliterate the VRA based on arrogant certainty that they had five or six justices in their pocket. Their miscalculation wound up reaffirming Congress’ constitutional authority to combat state assaults on our multiracial democracy. ■

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Religion Is Not A Basis For Harming Others

Erwin Chemerinsky

echemerinsky@law.uci.edu

University of California, Irvine ~ School of Law

Michele Goodwin

mgoodwin@law.uci.edu

University of California, Irvine ~ School of Law

The paper can be downloaded free of charge from SSRN at:

Religion Is Not a Basis for Harming Others:

REVIEW ESSAY OF PAUL A. OFFIT'S BAD FAITH: WHEN RELIGIOUS BELIEF UNDERMINES MODERN MEDICINE

ERWIN CHEMERINSKY* AND MICHELE GOODWIN**

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Increasingly, people are claiming that practicing their religion gives them a right to inflict injuries on others. Court clerks assert their religion gives them a right to refuse to give marriage licenses to same-sex couples.¹ Businesses claim that their owners' religious beliefs are a basis for refusing to provide services at same-sex weddings.² Employers demand the right to deny insurance coverage to employees for contraceptives.³ Doctors maintain that they may refuse to

* Dean and Distinguished Professor, Raymond Pryke Professor of First Amendment Law, University of California, Irvine School of Law. © 2016, Erwin Chemerinsky.

** Chancellor's Professor of Law, Director of the Center for Biotechnology & Global Health Policy, University of California, Irvine School of Law. © 2016, Michele Goodwin. The authors thank Jordan Liebman, Laura Lively, and Hayley Penan for their excellent research assistance.

1. Ann M. Simmons, *How a County Clerk Is Refusing to Issue Gay Marriage Licenses and Defying the Supreme Court*, L.A. TIMES (Aug. 18, 2015, 7:02 PM), <http://www.latimes.com/nation/nationnow/lan-na-nn-kentucky-marriage-license-20150818-htmlstory.html> [<http://perma.cc/TVM8-WY5J>].

2. *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 77 (N.M. 2013) (holding that a photographer could not refuse to take pictures at a same-sex wedding based on religious beliefs).

3. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (holding that the contraceptive requirement, as applied to closely held corporations, violated the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb (2000)).

provide assisted reproductive technology services to lesbians and same-sex couples.⁴ Pharmacists want the right not to fill prescriptions that they see as violating their religious beliefs.⁵ Parents profess a religious right to restrict their children from receiving medical care, opting instead for prayer. As we have written in the context of vaccinations, some states provide religious exemptions for parents who wish to withhold this important, basic preventative treatment from their children, placing not only their kids, but also others at risk.⁶

This is the context for Dr. Paul A. Offit's powerful new book.⁷ He focuses on how children are suffering and dying because of their parents' religious beliefs. Dr. Offit's book is about medicine and how religious beliefs are preventing the administration of needed medical care to children. The book is replete with stories of children who died because their parents refused to provide medical care to treat illnesses based on religious beliefs.⁸ Toward the end of the book, he quotes a study that found "twenty-three denominations in thirty-four states . . . practice faith healing" and "tens of thousands of Americans were refusing medical care for themselves and their children."⁹ The study's authors found a strong likelihood that denial of medical care due to religious reasons led to the death of 172 children.¹⁰ There is actually no way to count the number of children who suffer or die because they are denied medical care based on religion¹¹—that is why Dr. Offit's book primarily contains stories of specific instances where this occurred.

Dr. Offit's discussion of the law is incidental to this, such as when he applauds court decisions requiring that children be given needed medical care or criticizes laws that create a religious exemption for medical treatment.¹² He surmises that the threat of criminal punishment may deter religiously motivated parents from denying medical care to their children. Dr. Offit also proposes statutory changes to laws creating religious exemptions.¹³ We agree with Dr. Offit's analysis and recommendations. However, the book's legal analysis falls

4. See *Benitez v. N. Coast Women's Care Med. Grp.*, 106 Cal. App. 4th 978, 988–89 (2003) (holding that ERISA did not preempt a patient's claims against her doctors alleging they refused to provide additional fertility treatments because of her sexual orientation).

5. See *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1071 (9th Cir. 2015) (holding that a regulation requiring pharmacies to timely deliver all prescription medications, even if the pharmacy owner had a religious objection, was facially neutral for purposes of the Free Exercise Clause and constitutional); *infra* notes 160–62 and accompanying text.

6. Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 Nw. U. L. REV. (forthcoming 2016).

7. PAUL A. OFFIT, *BAD FAITH: WHEN RELIGIOUS BELIEF UNDERMINES MODERN MEDICINE* (2015).

8. See, e.g., *infra* text accompanying notes 21–29.

9. OFFIT, *supra* note 7, at 181.

10. *Id.* at 180 (describing children who had "died under suspicious circumstances," including a twelve-year-old girl whose bone cancer had grown to be "the size of a watermelon," among others).

11. See *id.* at 181 (describing the suspicion that "many more fatalities ha[d] occurred" than those they had discovered because "deaths in faith healing sects were often reported as due to natural causes . . . [or] never reported").

12. *Id.* at 183–84, 192–93.

13. *Id.* at 183–84, 192–93.

within just a handful of pages in a relatively short work (198 pages). He writes as a doctor and an expert on public health, not a lawyer, law professor, or judge.

In this Review Essay, we add a more explicitly legal framework. Our thesis is that free exercise of religion—whether pursuant to the Constitution or a statute—does not provide a right to inflict injuries on others. One person’s freedom ends when another person will get hurt. Our position is not anti-religion and it does not deprive free exercise of religion of meaning. Free exercise of religion is a basic right, reflected in the First Amendment and federal statutes, such as the Religious Freedom Restoration Act of 1993 (RFRA). No one questions that. The relevant issue is whether a parent’s free exercise of religion justifies denying needed medical care to children. We argue people still can believe what they want, worship as they choose, and follow their religious precepts—until and unless doing so would hurt someone else. It is for this reason that Dr. Offit is correct that parents have no right to inflict suffering or death on their children in the name of religion.

Our Review Essay proceeds in three parts. Part I provides a synopsis of Dr. Offit’s book, particularly focusing on his discussion that children are hurt and die because of medical neglect in the name of religion. Part II summarizes the law concerning free exercise of religion. It specifically addresses the constitutional standards and analysis to be applied to our principal concern: the problem of parents denying medical care to their children. The current legal standards are an unusual, if not unique, amalgam of constitutional, federal statutory, and state constitutional and statutory law. In fact, as Dr. Offit points out, and as we discuss below, for a time federal law required that states give an exemption from prosecution and liability to parents whose children were hurt from the denial of medical care for religious reasons.¹⁴

Finally, Part III develops our thesis that free exercise of religion does not provide a right to injure others. We use this to support Dr. Offit’s conclusion: parents do not have the right to deny needed medical care to their children. We favor laws that require access to needed medical treatment for children and require state governments to provide such medical care. Further, we believe these principles explain why the religious beliefs of some should never be the basis for denying medical care to others.

I. THE DENIAL OF MEDICAL CARE TO CHILDREN IN THE NAME OF RELIGION

The central thesis of Dr. Offit’s book is that “children are suffering and dying because their parents are choosing prayer instead of modern medicine.”¹⁵ He especially focuses on religions, like Christian Science, which eschew medical

14. *See id.* at 168–72 (discussing the Child Abuse Prevention and Treatment Act (CAPTA) requirement that states, as a condition for receiving federal money, create such exemptions); *infra* notes 113–20.

15. *Id.* at 193.

care.¹⁶ He tells the story of how Mary Baker Eddy, whose mother believed she was a “Divine Spirit sent by God,” developed the religion in the nineteenth century.¹⁷ Eddy, who suffered from numerous illnesses throughout her childhood and early adult life, came to believe that the power of suggestion could render miraculous medical benefits when combined with religious teachings.¹⁸ Dr. Offit writes that “Eddy’s healings resembled those of the psychics, spiritualists, and mediums of her day” at first, until she came to “believe[] that diseases were imaginary.”¹⁹

He likens such religions to cults and describes the common characteristics of cults: they “control information,” their leaders say that they are “chosen by God,” they “demand purity,” they “demand confession for imagined sins,” they are “inflexible,” they “load the language” with jargon, and their “doctrine trumps experience.”²⁰ Dr. Offit’s observations help to explain why parents, even highly educated ones, deny medical care to their children and watch them die as a result.²¹ Such was the case with a twelve-year-old boy from California, Andrew Wantland, as reported in *The New York Times*.²² Andrew was denied basic care for diabetes while his father kept him at home, choosing prayer over medicine—even as the child’s condition worsened, according to the lawyer representing the boy’s mother.²³ Andrew Wantland died before he reached a nearby hospital. Sadly, it was believed Andrew’s life could have been spared even hours before had he been provided insulin.²⁴ Yet, his death was not an isolated occurrence.²⁵

Elizabeth Ashley King, the daughter of a real estate executive in Paradise Valley, Arizona, suffered a similar fate. Elizabeth died when her parents denied medical care to treat her bone cancer, opting instead for prayer.²⁶ Other cases involve babies dying when their parents choose prayer over medicine and even hire Christian Science prayer practitioners, such as the case of Natalie Middleton-

16. See Caroline Fraser, *Suffering Children and the Christian Science Church*, ATLANTIC MONTHLY, Apr. 1995, at 105, 105 (providing a personal account of being a Christian Scientist and noting that had a child in her family “contracted a serious illness or met with a life-threatening accident while . . . growing up, we would have been . . . expected to heal ourselves of colds, flu, allergies, and bad behavior”).

17. OFFIT, *supra* note 7, at 2–4.

18. *Id.*

19. *Id.* at 3–4.

20. *Id.* at 29–31.

21. See, e.g., Fraser, *supra* note 15, at 113–14 (describing the failure of a father, who was a real estate executive, to treat his child’s cancer that resulted in her death).

22. *Church Faces Suit Over Boy’s Death*, N.Y. TIMES (Dec. 19, 1993), <http://www.nytimes.com/1993/12/19/us/church-faces-suit-over-boy-s-death.html> [<https://perma.cc/C9X5-9Q3W>].

23. *Id.*

24. See *id.* (“The boy . . . would have lived had he received routine treatment with insulin and fluids, said . . . the [mother’s] lawyer.”)

25. See *id.*

26. See Fraser, *supra* note 15, at 113–14; Tamara Jones, *Prayers, Parental Duty: Child Deaths Put Faith on Trial*, L.A. TIMES (June 27, 1989), http://articles.latimes.com/1989-06-27/news/mn-4359_1_christian-science-child-abuse-parents [<https://perma.cc/G6W4-RJYT>] (noting that in the five years before the article’s publication, “seven cases . . . ha[d] come under public scrutiny”).

Rippberger, who died before her first birthday.²⁷ Natalie's parents hired two people to pray for her rather than consult a doctor.²⁸

Herbert and Catherine Schaible prayed while Brandon, their eight-month-old baby, died from pneumonia.²⁹ Rather than providing medical treatments, they prayed more fervently. This was the Schaible's second child to die from that illness; only a few years earlier, their two-year-old son, Kent, also died from pneumonia while they prayed.³⁰

Ironically, in each case described above, the parents never claimed to be motivated by a desire to punish or harm their children. So what accounts for parents denying medical attention to their children, even while watching them suffer in pain and die? As Dr. Offit explains: "Members of faith healing cults like Christian Science aren't held at gunpoint or drugged or beaten into submission. All willingly stay and do what is instructed, even if it means watching their children die from treatable diseases."³¹ Why? According to Dr. Offit, "If asked, most members . . . would probably say the same thing. Their leaders had correctly interpreted the Word of God. Therefore, they and they alone will be afforded eternal life in Heaven—a promise that causes some people to act in unimaginable ways."³²

The book primarily consists of detailed stories of children who died of treatable illnesses—like bacterial pneumonia, bacterial meningitis, and infections—because parents denied their children essential, timely medical care on the basis of their religious beliefs.³³ Dr. Offit also tells of diseases spread through religious rituals.³⁴ For example, he discusses how some mohels, during circumcisions of Orthodox Jewish baby boys, use their mouths to suck blood and how this has spread herpes.³⁵

A troubling aspect about these cases is that the illnesses from which the children died are treatable—in some instances with highly accessible, inexpensive medications like antibiotics. And, although it is difficult to know exactly how many children die each year while their parents choose prayer over therapy, we think the law should be clear that parents cannot use religion as a shield against providing their children urgently needed medical care.

27. See Jones, *supra* note 25 (noting that in that case, the parents hired two prayer practitioners but never took the child to the hospital).

28. *Id.*

29. Eliana Dockterman, *Faith-Healing Parents Jailed After Second Child's Death*, TIME (Feb. 19, 2014), <http://time.com/8750/faith-healing-parents-jailed-after-second-childs-death/> [<https://perma.cc/Y9W7-BXTP>].

30. Dave Warner, *Philadelphia Faith-Healer Couple Sentenced to Prison in Son's Death*, REUTERS (Feb. 19, 2014, 2:41 PM), <http://www.reuters.com/article/us-usa-crime-faithhealing-idUSBREA111XJ20140219> [<https://perma.cc/Y89Z-2UBK>].

31. OFFIT, *supra* note 7, at 32.

32. *Id.*

33. See *id.* at 169, 178.

34. See *id.* at 67–73.

35. See *id.* at 69–73.

Only toward the end of the book does Dr. Offit relate this to the law. He discusses how states came to create exemptions to their civil and criminal codes to protect parents from liability when their children are injured from the denial of life-saving medical treatment.³⁶ He urges the repeal of such laws and the criminal punishment of parents who cause harm to their children in the name of religion.

What Dr. Offit does not discuss—and what is the key underlying issue—is whether free exercise of religion permits parents to make these choices. Analyzing this requires a consideration of the law of free exercise of religion. We turn to this in Part II.

II. THE LAW OF FREE EXERCISE OF RELIGION

Assessing the right of parents, on the basis of religion, to deny medical care to their children requires an examination of the current law protecting free exercise of religion. At this point in time, the law concerning free exercise of religion is an unusual combination of constitutional, federal statutory, and state laws. Interestingly, the Constitution provides no basis for a religious right to refuse medical care or for inflicting injuries on others in the name of religious beliefs, but federal and especially state laws can be used to justify this. After reviewing this law, we explain in Part III why it does not provide a legitimate basis for denying children needed medical care.

A. THE CONSTITUTION: THE FREE EXERCISE CLAUSE

The Free Exercise Clause of the First Amendment provides no basis for parents to deny medical care to their children or, more generally, for people to inflict other injuries in the name of religion. Prior to 1990, when the Supreme Court decided *Employment Division, Department of Human Resources v. Smith*,³⁷ challenges to laws based on free exercise of religion under the First Amendment rarely prevailed. These challenges are even less likely to succeed after *Smith*, where the Court determined that the Free Exercise Clause is not violated by neutral laws of general applicability.³⁸ Thus, parents cannot claim a religious exemption from laws requiring medical care or avoid prosecution from the harms they cause by denying that care on the basis of their religion.

The Supreme Court's earliest treatment of free exercise of religion was in *Reynolds v. United States*.³⁹ A federal law prohibited polygamy in the territories, and a defendant argued that his Mormon religion required that he have multiple wives.⁴⁰ The Supreme Court rejected the Free Exercise Clause argument and the claim that the constitutional provision required an exemption from

36. See *id.* at 167–76; *infra* notes 113–20 and accompanying text.

37. 494 U.S. 872 (1990).

38. *Id.* at 878–89.

39. 98 U.S. 145 (1878).

40. *Id.* at 161.

otherwise applicable criminal laws.⁴¹ Chief Justice Waite wrote:

[A]s a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.⁴²

The Court thus drew a distinction between beliefs and actions; the Free Exercise Clause limited government regulation of the former, but not the latter. Chief Justice Waite said: “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”⁴³ This distinction between beliefs and actions has not been the basis for subsequent decisions because it is too simplistic. Free exercise of religion would have little meaning if it were limited to protecting just beliefs. There also must be some protection for the right to practice one’s religion. The Court in *Reynolds* does not provide a useful test for evaluating when actions based on religion are constitutionally protected.

Prior to 1963, the Court had not articulated any test with regard to the Free Exercise Clause. But in *Sherbert v. Verner*, the Supreme Court expressly held that strict scrutiny was the appropriate test in evaluating government laws burdening religious freedom.⁴⁴ In that case, a state denied unemployment benefits to a member of the Seventh-day Adventist Church who had been discharged from her job because she would not work on the Saturday Sabbath.⁴⁵ The Court concluded that the denial of benefits imposed a substantial burden on religion:⁴⁶ the woman had to choose between an income and her faith.⁴⁷ The Court thus said that the issue was “whether some compelling state interest enforced in the eligibility provisions of the . . . statute justifies the substantial infringement of appellant’s First Amendment right.”⁴⁸ The Court found no such compelling interest and ruled that the denial of benefits constituted a violation of the Free Exercise Clause.⁴⁹

41. *See id.* at 166–67.

42. *Id.*

43. *Id.* at 164.

44. 374 U.S. 398, 403, 406–07 (1963).

45. *Id.* at 399–400.

46. *See id.* at 406.

47. *See id.* at 404 (“The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.”).

48. *Id.* at 406.

49. *See id.* at 406–07 (finding that no requisitely grave danger “ha[d] been advanced”).

Sherbert clearly stated that strict scrutiny must be applied in evaluating laws infringing on free exercise of religion. However, following *Sherbert*, the Court rarely struck down laws on this basis.⁵⁰ In fact, there were only two areas where the Court ever invalidated laws for violating free exercise: laws, like the statute in *Sherbert*, that denied benefits to those who quit their jobs for religious reasons;⁵¹ and the application of a compulsory school law to the Amish.⁵² In all other Free Exercise Clause cases between 1960 and 1990, the Court sided with the government and ruled against religious claims.

In *Wisconsin v. Yoder*, the Court held that the Constitution's protection of free exercise of religion required that Amish parents be granted an exemption from compulsory school laws for their fourteen- and fifteen-year-old children.⁵³ The Court noted:

[The] Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a "worldly" influence in conflict with their beliefs.⁵⁴

The Court accepted this argument and found that requiring fourteen- and fifteen-year-old Amish children to attend school both violated the Free Exercise Clause and infringed on the right of parents to control the upbringing of their children.⁵⁵ The Court concluded that the effect of the compulsory-attendance law on the parents' practice of their Amish religion "is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with . . . their religious beliefs."⁵⁶ In fact, the Court went on to find that "enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs."⁵⁷

50. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986) (rejecting Free Exercise Clause claim of a clinical psychologist in the military whose religion required wearing a yarmulke); *United States v. Lee*, 455 U.S. 252, 254, 261 (1982) (rejecting a Free Exercise Clause challenge to requiring a member of the Old Order Amish to pay Social Security taxes).

51. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 709, 720 (1981) (holding that denying unemployment benefits to a Jehovah's Witness who left his job because his religious beliefs forbade him from fulfilling his duties "constituted a violation of his First Amendment right to free exercise of religion").

52. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

53. See *id.* at 207, 234–36.

54. *Id.* at 210–11.

55. *Id.* at 214, 234.

56. *Id.* at 218.

57. *Id.* at 219.

The Court concluded that the “self-sufficient” nature of Amish society made education for fourteen- and fifteen-year-old children unnecessary.⁵⁸ The Court said that the lack of “two . . . additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.”⁵⁹

We disagree that denying education to children under sixteen is harmless and thus disagree with the Court’s holding in *Yoder*, but it is crucial to note that *Yoder* is based on the Court’s conclusion that exempting these children from the schooling requirement was *unlikely* to harm them.⁶⁰ This, of course, is quite different than the issue discussed in Dr. Offit’s book: children being harmed, and even killed, because of their parents’ decisions to deny medical care. *Wisconsin v. Yoder* thus does not provide support for interpreting the Free Exercise Clause to allow parents to deny life-saving medical treatment to their children.

Other than the employment compensation cases and *Yoder*, the Court during this period never found another law to violate the Free Exercise Clause. The Court was asked in many cases to allow an exemption to a law based on free exercise. In each, the Court rejected the constitutional claim.⁶¹ As the Court noted in *Employment Division v. Smith*:

We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied. In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all.⁶²

The cases rejecting free exercise challenges occurred in a wide variety of contexts, and most striking is that they often involved relatively insignificant government interests. For example, in *Braunfeld v. Brown*, the Supreme Court rejected a Free Exercise Clause challenge to Sunday closing laws.⁶³ In that case, Orthodox Jews challenged a criminal statute that required businesses to be closed on Sundays. They argued that the law interfered with their free exercise

58. *Id.* at 235.

59. *Id.* at 234.

60. *See id.* at 230 (“This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.”). We also disagree about whether parents should be able to deny this fundamental educational benefit to their children. The children should be educated so that they can make their own choice about whether to stay in the Amish community or function outside of it. Parents should not be able to use their religious beliefs to inflict harm on their children, whether educationally, medically, or otherwise.

61. *See supra* note 49 and accompanying text.

62. 494 U.S. 872, 883 (1990) (citations omitted).

63. 366 U.S. 599, 600, 609 (1961).

of religion by imposing “serious economic disadvantages upon them” because their faith required “the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday.”⁶⁴ They argued it was difficult for them to adhere to their religion if they also had to be closed on Sundays.⁶⁵ Chief Justice Warren, writing for the plurality, rejected this argument and reasoned:

[T]he statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief To strike down . . . legislation which imposes only an indirect burden on the exercise of religion . . . would radically restrict the operating latitude of the legislature.⁶⁶

The Court accepted the state’s argument that Sunday closing laws served the government interest of providing a uniform day of rest.⁶⁷

In other cases, the Court rejected free exercise claims based on a conclusion that there was a compelling government interest. In many cases during this time period, the Court rejected challenges to tax laws based on free exercise of religion.⁶⁸ For example, in *United States v. Lee*, the Court rejected a claim by an Amish individual that Social Security taxes violated the Free Exercise Clause.⁶⁹ The argument was that “the Amish believe it sinful not to provide for their own elderly and needy and therefore are religiously opposed to the national social security system.”⁷⁰ The Court found, however, that this restriction on religious freedom was “essential to accomplish an overriding governmental interest.”⁷¹ The Court concluded that mandatory participation in the Social Security system was “indispensable to [its] fiscal vitality.”⁷²

In *Employment Division v. Smith*, the Court expressly changed the test for the Free Exercise Clause.⁷³ There, Native Americans challenged an Oregon law

64. *Id.* at 601.

65. *Id.* at 601.

66. *Id.* at 603, 606.

67. *See id.* at 607 (“[W]e cannot find a State without power to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation and tranquility . . .”). In his dissent, Justice Brennan clearly framed the majority’s analysis as holding that a uniform day of rest was a compelling state interest. *Id.* at 613–614 (Brennan, J., dissenting) (“What, then, is the compelling state interest which impels the Commonwealth of Pennsylvania to impede appellants’ freedom of worship? . . . It is the mere convenience of having everyone rest on the same day.”).

68. *See, e.g.*, *Hernandez v. Comm’r*, 490 U.S. 680, 683–84, 700 (1989) (rejecting Free Exercise Clause challenge to payment of income taxes alleged to make religious activities more difficult).

69. 455 U.S. 252, 259–61 (1982).

70. *Id.* at 255.

71. *Id.* at 257–58.

72. *Id.* at 258; *see also Hernandez*, 490 U.S. at 683–84, 700 (rejecting Free Exercise Clause challenge to payment of income taxes alleged to make religious activities more difficult).

73. 494 U.S. 872, 879 (1990).

prohibiting use of peyote, a hallucinogenic substance.⁷⁴ Specifically, they challenged the state's determination that their religious use of peyote, which resulted in their dismissal from employment, was misconduct disqualifying them from receipt of unemployment compensation benefits.⁷⁵

Justice Scalia, writing for the majority, rejected the claim that free exercise of religion required an exemption from an otherwise applicable law. Scalia wrote that the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of [the Court's] free exercise jurisprudence contradicts that proposition."⁷⁶ Scalia thus declared "that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"⁷⁷

Justice Scalia's opinion then reviewed the cases where Free Exercise Clause challenges had been upheld and found that none involved Free Exercise Clause claims alone. All involved "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents to direct the education of their children."⁷⁸ The Court held that *Smith* was distinguishable because it did not involve such a "hybrid situation," but was a free exercise claim "unconnected with any communicative activity or parental right."⁷⁹

Moreover, the Court reasoned that the *Sherbert* line of cases applied only in the context of the denial of unemployment benefits; it did not create a basis for an exemption from criminal laws. Scalia wrote that "[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law."⁸⁰

The Court expressly rejected the use of strict scrutiny for challenges to neutral laws of general applicability that burden religion. Justice Scalia wrote that:

Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.⁸¹

74. *See id.* at 874.

75. *See id.*

76. *Id.* at 878–89.

77. *Id.* at 879 (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

78. *Id.* at 881 (citations omitted).

79. *Id.* at 882.

80. *Id.* at 884.

81. *Id.* at 888 (citation and emphasis omitted).

The Court suggested that those seeking religious exemptions from laws should look to the democratic process for protection, not the courts.⁸²

Smith changed the test for the free exercise clause. Strict scrutiny was abandoned for evaluating laws burdening religion; neutral laws of general applicability only have to meet the rational basis test, no matter how much they burden religion. But in reality, *Smith* really just changed the phrasing of the doctrine of the Free Exercise Clause to reflect the actual pattern of decisions. As reviewed above, the Court had rejected all Free Exercise Clause claims since 1960 except for the employment benefit cases and *Yoder*. *Smith* provided a legal doctrine to explain this outcome: the Free Exercise Clause is not violated by a neutral law of general applicability.

The Free Exercise Clause of the First Amendment thus does not provide a basis for challenging laws that prevent harms to others—whether in the area of discrimination, provision of reproductive health care services, or ensuring needed medical treatment. As we discuss more fully in Part III, there is a compelling government interest in ensuring that children receive medical care so as to reach adulthood and make their own religious decisions.

B. FEDERAL STATUTES

RFRA was adopted to negate the *Smith* test and require strict scrutiny for Free Exercise Clause claims.⁸³ Indeed, the findings section of the Act notes that *Smith* “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.”⁸⁴ The Act declares that its purpose is “to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened; and . . . to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”⁸⁵

The key provision of the Act states:

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except . . . it may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest.⁸⁶

In other words, Congress sought by statute to restore religious freedom to what it previously had been under the Constitution.

82. *Id.* at 890.

83. 42 U.S.C. § 2000bb (2012).

84. *Id.* § 2000bb(a)(4).

85. *Id.* § 2000bb(b) (citations omitted).

86. 42 U.S.C. § 2000bb-1(a)-(b).

Congress, through RFRA, thus sought to overrule *Smith* and make strict scrutiny the test for all Free Exercise Clause claims. In *City of Boerne v. Flores*, the Supreme Court declared RFRA unconstitutional as applied to state and local governments.⁸⁷ The Court, in a six-to-three decision, ruled that Congress exceeded the scope of its power under Section 5 of the Fourteenth Amendment in enacting the law.⁸⁸

City of Boerne invalidated RFRA as applied to state and local governments, but its reasoning does not speak to the constitutionality of the law as applied to the federal government. The congressional authority to regulate state and local governments was claimed to be Section 5 of the Fourteenth Amendment; but this provision, like the entire Fourteenth Amendment, does not apply to the federal government.⁸⁹ Therefore, the constitutionality of RFRA as applied to the federal government was not resolved by *City of Boerne v. Flores*.

However, in subsequent cases, the Court applied RFRA to the federal government. In 2006, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Court used RFRA to unanimously rule in favor of a religion and against the federal government.⁹⁰ The case involved a small religion that used a controlled substance in making a tea used in its religious rituals.⁹¹ The Court, in an opinion by Chief Justice Roberts, used strict scrutiny under RFRA and ruled in favor of the religion, concluding that the government failed to show that keeping this small religion from using the controlled substance would serve a compelling government interest.⁹² The Court did not expressly consider the constitutionality of RFRA as applied to the federal government, but it assumed this in unanimously ruling in favor of the religious group.⁹³

Most importantly, in *Burwell v. Hobby Lobby Stores, Inc.*, the Court held that it violates RFRA to require that a closely held corporation provide insurance coverage for contraceptives in violation of its owners' religious beliefs.⁹⁴ A federal law required that the Department of Health and Human Services promulgate regulations requiring that health insurance provided by employers include preventative health care coverage for women.⁹⁵ These regulations mandated that employer-provided insurance include contraceptive coverage for women.⁹⁶ According to the law, religious institutions and nonprofit corporations affiliated with religious institutions may exempt themselves from this requirement; how-

87. 521 U.S. 507, 511 (1997).

88. *Id.* at 536.

89. See U.S. CONST. amend XIV, § 1 (“No state shall make or enforce any law . . .”); *id.* § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

90. 546 U.S. 418, 439 (2006).

91. See *id.* at 423.

92. See *id.* at 439.

93. See *id.*

94. 134 S. Ct. 2751, 2785 (2014).

95. *Id.* at 2762.

96. *Id.*

ever, for-profit corporations must comply.⁹⁷

In a five-to-four decision, the Supreme Court held that it violated RFRA to require a closely held for-profit corporation to provide coverage for contraceptives that it says violate the religious beliefs of its owners.⁹⁸ Justice Alito wrote the majority opinion. The Court said that Congress “included corporations within RFRA’s definition of ‘persons’”⁹⁹ and that corporations can claim to have religious beliefs and religious free exercise.¹⁰⁰ It stated: “A corporation is simply a form of organization used by human beings to achieve desired ends. . . . When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.”¹⁰¹

The Court had “little trouble concluding” that the contraceptive mandate substantially burdened the religious beliefs of owners of close corporations who opposed certain contraceptives.¹⁰² The Court said that it would assume that the government has a compelling interest in ensuring the availability of contraceptives for women, but that there were less restrictive alternatives: Congress could directly pay for these contraceptives or Congress could allow for-profit corporations the same ability to opt out that it had given to nonprofit corporations that are affiliated with religions that oppose contraception.¹⁰³ The Court thus concluded that “[t]he contraceptive mandate, as applied to closely held corporations, violates RFRA.”¹⁰⁴

Problematically, the denial of medical care based on religious beliefs can be arbitrarily applied and enforced—even within the contexts of contraception—as in this case, where employers denied women the medications but covered vasectomy treatments for their male employees.¹⁰⁵ Justice Ginsburg wrote a vigorous dissent, joined by Justices Breyer, Sotomayor, and Kagan, and disagreed with every aspect of the majority’s opinion. The dissent disagreed that for-profit corporations can have religious beliefs or religious free exercise and stated that “until today, religious exemptions had never been extended to any entity operating in the commercial, profit-making world.”¹⁰⁶ The dissent also disagreed that there was a substantial burden on religious belief in requiring employers to provide insurance that includes coverage for contraceptives.¹⁰⁷ Justice Ginsburg wrote:

97. *Id.* at 2763.

98. *See id.* at 2785.

99. *Id.* at 2768.

100. *Id.*

101. *Id.*

102. *Id.* at 2775.

103. *Id.* at 2759.

104. *Id.* at 2785.

105. *See* Alexander C. Kaufman, *Hobby Lobby Still Covers Vasectomies and Viagra*, HUFFINGTON POST (July 2, 2014, 7:59 pm), http://www.huffingtonpost.com/2014/06/30/hobby-lobby-viagra_n_5543916.html [<http://perma.cc/KB7R-XUV3>].

106. *Burwell*, 134 S. Ct. at 2795 (Ginsburg, J., dissenting) (citation omitted).

107. *See id.* at 2797–99.

The requirement carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans. . . . Any decision to use contraceptives made by a woman covered under Hobby Lobby's or Conestoga's plan will not be propelled by the Government, it will be the woman's autonomous choice, informed by the physician she consults.¹⁰⁸

The dissent also disagreed with the majority's conclusion that there are less restrictive alternatives.¹⁰⁹ Justice Ginsburg's dissenting opinion stressed that this will open the door to other claims under RFRA for exemptions to providing health insurance coverage.¹¹⁰ She wrote:

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)?¹¹¹

Two other federal statutes are worth noting. In response to *City of Boerne v. Flores*, Congress adopted the Religious Land Use and Institutionalized Persons Act.¹¹² This law requires that the government meet strict scrutiny when it significantly burdens religion in two areas: land use decisions and institutionalized persons.¹¹³ Congress justified the regulation of land use decisions under its commerce power and the regulation of institutionalized persons under its spending power as a condition on federal funds.¹¹⁴ This statute is much less likely to be involved in issues concerning the denial of medical care on religious grounds. Neither land use decisions nor the treatment of prisoners are implicated when parents deny medical care to their children.

The other federal statute is much more directly relevant to Dr. Offit's book. In 1974, Congress passed CAPTA and appropriated funds to qualifying states to

108. *Id.* at 2799.

109. *See id.* at 2801–03.

110. *See id.* at 2802.

111. *Id.* at 2805. The dissent was concerned, too, that this could lead to claims for religious exemptions to other federal laws, such as antidiscrimination statutes. *See id.* at 2804–05. The majority opinion responded to this by denying this possibility because “[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.” *Id.* at 2783 (majority opinion).

112. 42 U.S.C. § 2000cc (2012).

113. *See id.* § 2000cc(a)(1).

114. *See id.* § 2000cc(a)(2).

establish programs to reduce the incidences of child abuse and neglect.¹¹⁵ The implementing regulations, however, contained a provision that appeared to require states to enact a spiritual treatment exception in order to receive federal funds.¹¹⁶ The regulations also stated:

[A] parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian; *However*, such an exception shall not preclude a court from ordering that medical services be provided to the child, where his health requires it.¹¹⁷

Dr. Offit describes how this provision was the result of the efforts of two key individuals in the Nixon Administration who were Christian Scientists: H.R. Haldeman, President Nixon's Chief of Staff, and John Ehrlichman, his Chief of Domestic Affairs.¹¹⁸ Dr. Offit notes that "within a few years, forty-nine states (the exception being Nebraska) and the District of Columbia had laws protecting religiously motivated medical neglect."¹¹⁹

Within a decade, these regulations were changed. Dr. Offit writes: "By 1984, the Department of Health and Human Services, realizing the absurdity of the mandate, eliminated it. But it was too late. The damage had been done."¹²⁰ By that time, many children who were denied medical care in favor of prayer interventions had died.¹²¹

The new CAPTA regulations stated unambiguously: "Nothing in this part should be construed as requiring or prohibiting a finding of negligent treatment or maltreatment when a parent or guardian practicing his or her religious beliefs does not . . . provide medical treatment for a child . . ." ¹²² Thus, the states were free to abolish their religious exemptions and still obtain CAPTA funding. Yet, most states left the exemptions in effect.¹²³

115. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101-5119c (2000)), *amended by* CAPTA Reauthorization Act of 2010, Pub. L. No. 111-320 (2010); Walter Wadlington, *Medical Decision Making for and by Children: Tensions Between Parent, State, and Child*, 1994 U. ILL. L. REV. 311, 324 (1994).

116. 45 C.F.R. § 1301.31 App. A (1994).

117. 45 C.F.R. § 1340.1-2(b)(1) (1975).

118. OFFIT, *supra* note 7, at 170-71.

119. *Id.* at 171.

120. *Id.*

121. For example, Dr. Offit provides the example of Sarah Hershberger, a ten-year-old child with lymphoma that had an 85% chance of being cured, but who was denied treatment because of her parents' religious beliefs. *Id.* at 173-74.

122. 45 C.F.R. § 1340.2(d)(2)(ii) (1983).

123. Donna K. LeClair, Comment, *Faith-Healing and Religious-Treatment Exemptions to Child-Endangerment Laws: Should Parental Religious Practices Excuse the Failure to Provide Necessary Medical Care to Children?*, 13 U. DAYTON L. REV. 79, 96-97 (1987).

C. STATE LAWS

As of 2015, eighteen states have Religious Freedom Restoration Acts.¹²⁴ Although the phrasing of these state laws vary, they all require that the government meet strict scrutiny when substantially burdening religious freedom. Interestingly, these laws have not generally been used to provide protection for religious freedom. As Professor Christopher Lund summarized:

[F]our states have never decided even a single case under their state RFRA's. Six other states have decided only one or two cases apiece. . . . And when state RFRA claims have been brought, they rarely win. In most jurisdictions, plaintiffs have not won a single state RFRA case litigated to judgment. . . . [S]ome states have seen significant state RFRA litigation and there have been some very important victories. But in many states, state RFRA's seem to exist almost entirely on the books.¹²⁵

Professor Lund's conclusion was that "[i]n most places, state RFRA's simply have not translated into a dependable source of protection for religious liberty at the state level."¹²⁶ But they do exist and are likely to be invoked much more often in light of the increasing claims of religious exemptions to laws.

The other state laws that are relevant are those that create an exception to child abuse or other criminal prosecutions for parents who deny medical care to their children. As discussed above, forty-nine states adopted such laws in response to CAPTA, some have rescinded them, and others remain on the books. For example, Alabama law states:

When . . . a parent or legal guardian legitimately practicing his or her religious beliefs has not provided specific medical treatment for a child, the parent or legal guardian shall not be considered a negligent parent or guardian for that reason alone. This exception shall not preclude a court from ordering that medical services be provided to the child when the child's health requires it.¹²⁷

Delaware law similarly provides:

Nothing in this chapter shall be construed to authorize any court to terminate the rights of a parent to a child, solely because the parent, in good faith, provides for his or her child, in lieu of medical treatment, treatment by spiritual means alone through prayer in accordance with the tenets and practice of a recognized church or religious denomination. However, nothing

124. Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 68 & n.156 (2015).

125. Christopher C. Lund, *Religious Liberty after Gonzales: A Look at State RFRA's*, 55 S.D. L. REV. 466, 467 (2010) (footnotes omitted).

126. *Id.* at 468.

127. ALA. CODE § 26-14-7.2(a) (2013).

contained herein shall prevent a court from immediately assuming custody of a child and ordering whatever action may be necessary, including medical treatment, to protect his or her health and welfare.¹²⁸

Dr. Offit argues strongly for the repeal of such state laws.¹²⁹ We agree and believe that such laws should be repealed for the reasons we have expressed throughout this review essay: the religious beliefs of a parent never justify denying medical care to a child.

III. PREVENTING HARMS INFLICTED IN THE NAME OF RELIGION

Our review of law concerning free exercise of religion leads us to the conclusion that the government may require medical treatment be provided to children, including over the parents' objections. Nothing in the Constitution or statutes requires an exemption from state laws creating civil or criminal liability for parents who harm their children based on religion. Moreover, we believe that free exercise of religion provides no basis for exemptions from laws that require that medical care be provided, including for reproductive healthcare.

These conclusions, of course, focus on what the government *may* do. We further believe that the government should not recognize religious exemptions to the provision of medical services to others. In other words, people should not have the right to inflict an injury on others based on their claim of free exercise of religion. As a descriptive matter, as shown in Part II, no Supreme Court case (at least until *Hobby Lobby* in 2014) has ever permitted people to inflict harm on others in the name of free exercise of religion.¹³⁰ It is striking that both before *Employment Division v. Smith* and under its holding, there is no constitutional basis for a religious exemption for laws requiring medical care for children.

As a normative matter, we believe that the freedom of one person ends when it inflicts an injury on another. As Justice Ginsburg observed, with respect to free exercise claims no less than free speech claims, “[y]our right to swing your arms ends just where the other man’s nose begins.”¹³¹ This is especially so when the victims are children, as discussed throughout Dr. Offit’s book.

In this Part, we discuss free exercise of religion in relation to the denial of medical care to children and argue that states can constitutionally pass laws requiring that children be provided needed medical care. We then focus on the larger question raised by Dr. Offit’s book of when religion can be a basis for

128. DEL. CODE ANN. tit. 13, § 1103(c) (West 2009).

129. See OFFIT, *supra* note 7, at 183–84.

130. As we describe above, even in *Wisconsin v. Yoder*, the Court stressed that it did not perceive the children as being harmed by their exemption from the compulsory schooling requirement. See 406 U.S. 205, 230 (1972).

131. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2791 (2014) (Ginsburg, J., dissenting) (alteration in original) (quoting Zachariah Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919)).

denying access to needed medical care, including reproductive health care. We believe that the religious beliefs of the parents never provide a basis for denying needed medical care to a child.

A. LAWS REQUIRE MEDICAL CARE FOR CHILDREN

Dr. Offit's book focuses on children who suffer and even die because their parents denied or otherwise withheld medical care they urgently needed. Our review of the law in Part II supports the conclusion that free exercise of religion is no obstacle to a state acting to require that medical care be provided to a child. In terms of the Free Exercise Clause of the First Amendment, state laws and state government actions to require the provision of medical care are "neutral law[s] of general applicability" under *Employment Division v. Smith*.¹³² Therefore, there would be no basis for a First Amendment free exercise objection by parents to medical treatment being provided to their children.

That said, parents could bring a challenge in the eighteen states that have state Religious Freedom Restoration Acts. They could argue that provision of medical care to their children over their religious objections substantially burdens their religion. Further, they could claim that civil liability or criminal prosecutions violate their religious beliefs. If the federal government ever were to act to require provision of medical care, a similar challenge could be brought against it based on the federal Religious Freedom Restoration Act. But such federal action is much less likely in light of the long tradition of such matters being handled at the state government level.

Such statutory claims by parents should fail because providing medical care to children, to save their lives and prevent their suffering, meets strict scrutiny. No Religious Freedom Restoration Act gives an absolute right to practice one's religion; all allow limits where strict scrutiny is met. There is a compelling government interest in saving the lives and preventing the suffering of children like those described in Dr. Offit's book. There is no alternative or less burdensome choice but the provision of medical care.

Indeed, the law is clear and consistent: the government has a compelling interest in both mandating certain medical treatments for children, such as vaccines, and providing medical care to children. Courts have consistently rejected any claim of a right of parents, whether based on religion or control over the upbringing of their children, to deny needed medical care to their children.

Consider just a few of the illustrative cases. *Walker v. Superior Court* involved a child who died because of the parents' religious objection to medical care.¹³³ Defendant Laurie Grouard Walker was a member of the Church of Christ, Scientist. Her four-year-old daughter, Shauntay, developed meningitis and was ill for seventeen days until her death. Instead of taking Shauntay to a

132. 494 U.S. 872, 879 (1990).

133. 763 P.2d 852, 855 (Cal. 1988).

physician, Walker contacted a Christian Science prayer practitioner and a Christian Science nurse to try to heal Shauntay. The only treatment Shauntay received was prayer. Shauntay then died of acute meningitis. Walker was convicted of involuntary manslaughter and felony child endangerment because her criminal negligence proximately caused Shauntay's death.¹³⁴ Walker then appealed her sentence to the California Supreme Court.¹³⁵

The issue was whether a prosecution for involuntary manslaughter and felony child endangerment can be maintained against the mother of a child who died of meningitis after receiving treatment by prayer instead of medical attention. The court ruled the prosecution is permitted by the California Penal Code because the involuntary manslaughter and child endangerment statutes impose liability for providing no medical care and letting one's child die.¹³⁶ California does not have a CAPTA-like exception in its laws. The court stressed that the Free Exercise Clause provides no constitutional protection to the parents because of the state's interest in keeping children alive.¹³⁷ The court explained that prayer "will be accommodated as an acceptable means of attending to the needs of a child only insofar as serious physical harm or illness is not at risk. When a child's life is placed in danger, we discern no intent to shield parents from the chastening prospect of felony liability."¹³⁸

The court found that Walker's religious rights under the First Amendment do not trump the government's interest in keeping children alive.¹³⁹ The court explained: "[r]egardless of the severity of the religious imposition, the governmental interest is plainly adequate to justify its restrictive effect."¹⁴⁰

The Wisconsin Supreme Court reached a similar conclusion in its holding and reasoning in *State v. Neumann*.¹⁴¹ In that case, eleven-year-old Madeline Kara Neumann died from diabetic ketoacidosis resulting from untreated juvenile onset diabetes mellitus on Easter Sunday, March 23, 2008.¹⁴² According to the court, "Kara died when her father and mother, Dale R. Neumann and Leilani E. Neumann, chose to treat Kara's undiagnosed serious illness with prayer, rather than medicine."¹⁴³ Each parent was charged with and convicted of violating Wisconsin's second-degree reckless homicide law, "in separate trials with different juries."¹⁴⁴

Wisconsin does have a treatment-with-prayer exemption in its physical child abuse law, but the court said that does not mean that treatment with prayer

134. *Id.* at 855–56.

135. *Id.* at 856.

136. *Id.* at 873.

137. *Id.* at 866.

138. *Id.*

139. *Id.* at 869–70.

140. *Id.* at 870.

141. 832 N.W.2d 560 (Wis. 2013).

142. *Id.* at 570.

143. *Id.* at 567.

144. *Id.* (citing WIS. STAT. § 940.06(1) (2009–10)).

negates liability under its second-degree reckless homicide statute.¹⁴⁵ The court held that “when a parent fails to provide medical care to his or her child, creates an unreasonable and substantial risk of death or great bodily harm, is aware of that risk, and causes the death of the child, the parent is guilty of second-degree reckless homicide.”¹⁴⁶

Despite the fact that these two cases involved prosecution of parents after the deaths of their children, the law is similarly clear that the state may act to prevent such harm. *In re McCauley* involved Jehovah’s Witness parents who objected to their daughter receiving blood transfusions.¹⁴⁷ Eight-year-old Elisha was diagnosed with leukemia, but in order for her to receive chemotherapy, she needed a blood transfusion due to her very low red blood cell count. Elisha’s parents refused the blood transfusion for their daughter. Representatives of the hospital sought an order for the blood transfusion from a judge, who granted the order. Thus, the procedural posture of this case was different than the two decisions discussed above because it involved the state ordering medical treatment.

The court held that although parental rights and religious rights are important, those rights must yield to the state’s interest in keeping a child alive when that child is dangerously ill.¹⁴⁸ The court conceded that the right of free exercise of religion and the right of a parent to control the upbringing of his or her child are fundamental rights. However, as the court stated:

[T]hese fundamental principles do not warrant the view that parents have an absolute right to refuse medical treatment for their children on religious grounds. The State’s interest in protecting the well-being of children “is not nullified merely because the parent grounds his claim to control the child’s course of conduct on religion or conscience. . . . The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”¹⁴⁹

Additionally, the court found that when a child is seriously ill, then the parents’ rights are not the top priority; protecting the child is the highest interest.¹⁵⁰

These cases exemplify many decisions in which courts reject a religious right of parents to withhold needed medical care from children. Saving a child’s life, or preventing a child from suffering, is a compelling interest. Similarly, the cases are unanimous in upholding compulsory vaccination laws even when they

145. *See id.* at 583.

146. *Id.*

147. 565 N.E.2d 411, 412 (Mass. 1991).

148. *Id.* at 414.

149. *Id.* at 413 (quoting *Prince v. Massachusetts*, 312 U.S. 158, 166–67 (1944) (citations omitted)).

150. *Id.* at 414.

have no exceptions for denying vaccinations based on religion or conscience.¹⁵¹

We thus believe that states should intervene when possible to ensure the provision of needed medical care to children who are being denied it for religious reasons. We also agree with Dr. Offit that state laws providing an exemption to parents from criminal penalties or civil liability for the denial of medical care should be repealed.

B. THE RELIGIOUS BELIEFS OF SOME SHOULD NOT BE THE BASIS FOR DENYING
MEDICAL CARE TO OTHERS

Our analysis of the law of free exercise of religion—constitutional and statutory, federal and state—leads us to the conclusion that the religious beliefs of some *never* provide them a right to deny medical care to others. In terms of the Free Exercise Clause of the First Amendment, laws requiring the provision of medical care are neutral laws of general applicability and no constitutional basis for a religious exemption exists in light of *Employment Division v. Smith*. In terms of federal and state Religious Freedom Restoration Acts, there is a compelling interest in ensuring the provision of medical care and there is no less restrictive alternative.

We expand the focus of our analysis beyond the parent and child context to argue that religious beliefs of some should not be the basis for denying medical care to others. We take up this broadened inquiry because this issue has arisen recently in the context of reproductive health care. Most notably, whether there is a right to deny medical care to others based on religious beliefs was the underlying issue in *Burwell v. Hobby Lobby Stores, Inc.*, discussed above. But it also has arisen in the context of state laws that require pharmacies to fill prescriptions even if the medication violates the religious beliefs of the pharmacists. Based on the analysis in Part II, we believe that *Hobby Lobby* was wrongly decided precisely because it allows employers, based on their religious beliefs, to deny medical care to others. At the same time, we agree with the court decisions that have upheld laws requiring that pharmacists fill prescriptions regardless of their religious beliefs.

151. See, e.g., *Zucht v. King*, 260 U.S. 174 (1922) (finding that a city can impose compulsory vaccination for all children in school, even if there is no immediate threat of an epidemic); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding the constitutionality of compulsory vaccination laws); *Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App'x 348 (4th Cir. 2011) (holding that a West Virginia law requiring all school children to be vaccinated (with no exemption for religious reasons) is constitutional because compulsory vaccination laws are within the state's police power, even though there may not be an immediate threat of disease, and because a state is not required to have an exemption for religious reasons in such a law); *Wright v. DeWitt Sch. Dist.*, 385 S.W.2d 644, 646 (Ark. 1965) (holding that it is within the state's police power to require school children to be vaccinated and that such a requirement "does not violate the constitutional rights of anyone, on religious grounds or otherwise" (quoting *Cude v. State*, 377 S.W.2d 816, 819 (Ark. 1964))). These cases are discussed in Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws are Constitutional*, 110 Nw. L. REV. 589 (2016).

There is much that is troubling about the Supreme Court's decision in *Hobby Lobby*. This was the first time in American history that the Supreme Court held that for-profit corporations can have religious beliefs and can engage in free exercise of religion.¹⁵² A corporation is a fictional entity. It cannot have a religion or engage in religious practices. It is deemed legally distinct from its owners in that they are not legally liable for its actions. But the Supreme Court, for the first time, said that the owners can attribute their beliefs to this separate entity.¹⁵³

As we discuss above, this holding is also problematic because of its potential reach. Hobby Lobby is no small organization. It would be a mistake to construe closely held corporations as a small fraction of companies doing business in the United States. For example, "the overwhelming majority of U.S. corporations incorporate as 'closely held' businesses."¹⁵⁴ Hobby Lobby is incorporated "as a non-income tax paying 'S Corporation' similar to several million U.S. corporations."¹⁵⁵ According to the Pew Research Institute, in 2011, "there were 4,158,572 S corporations" operating in the United States.¹⁵⁶ In their much cited research study, Professors Morten Bennisden and Daniel Wolfenzon noted that less than one quarter of 1% of U.S. corporations are publicly held.¹⁵⁷

Hobby Lobby was the first time in American history that the Supreme Court found a substantial burden on free exercise of religion where a person is merely required to take action that might enable other people to do things that are at odds with the person's religious beliefs. Obviously, no one was required by federal law to use or refrain from using contraceptives. Hobby Lobby and its owners could speak out against contraception and abortion. In this case, the law simply required businesses like Hobby Lobby to provide insurance for their employees or pay a per-employee tax; if they provided insurance, contraceptive coverage for women had to be an included option. Hobby Lobby challenged the law based on religious grounds.

This decision will lead to much broader challenges. Christian Scientists, for example, will claim that they do not have to provide any health insurance to

152. See 134 S. Ct. 2751, 2794–95 (2014) (Ginsburg, J., dissenting).

153. The Court's holding was limited to close corporations. See *id.* at 2775 (majority opinion). But nothing in the Court's reasoning would limit its holding to just these businesses. The Court stressed that owners of a business should not have to give up their ability to practice their religion by choosing to incorporate. See *id.* at 2767–68. The Court said that other types of businesses are "unlikely" to assert religious freedom, but not that they cannot do so. See *id.* at 2774.

154. Michele Goodwin & Allison Whelan, *Constitutional Exceptionalism*, U. ILL. L. REV. (forthcoming 2016); Morten Bennisden & Daniel Wolfenzon, *The Balance of Power in Closely Held Corporations*, 58 J. FIN. ECON. 113, 114 (2000).

155. Goodwin & Whelan, *supra* note 152. According to the Pew Research Center, S corporations "cannot have more than 100 shareholders (although all members of the same family are treated as a single shareholder)." Drew DeSilver, *What is a 'Closely Held Corporation,' Anyway, and How Many are There?*, PEW RES. CTR. (July 7, 2014), <http://www.pewresearch.org/fact-tank/2014/07/07/what-is-a-closely-held-corporation-anyway-and-how-many-are-there/> [<http://perma.cc/URF5-C285>].

156. DeSilver, *supra* note 153.

157. Bennisden & Wolfenzon, *supra* note 152, at 114.

their employees. In fact, why can't an employer, at least in a family-owned business, even require as a condition of employment that no money paid as salary be used to purchase contraceptives (or other medical treatments that violate the employer's religious beliefs)? If the employer does not have to have its money used for things deemed religiously objectionable, why would this be limited to dollars paid for employees' insurance and medical care?

Most importantly, *Hobby Lobby* was the first time in American history that the Supreme Court held that people, based on their religious practices, can inflict harm on others. As described above, the prior Supreme Court case involving the RFRA asked whether a small religion could use hoasca, a hallucinogenic substance, in its religious rituals.¹⁵⁸ The Court ruled in favor of the religion, noting that no one was injured by its practices.¹⁵⁹ The most important Supreme Court decision protecting free exercise of religion under the First Amendment involved a woman who was denied unemployment benefits by the state when she quit her job rather than work on her Saturday Sabbath.¹⁶⁰ The Court ruled that this violated her free exercise of religion by forcing her to choose between her income and her religion.¹⁶¹

However, in these and other cases, no one else was hurt. The effect of the Supreme Court's decision in *Hobby Lobby* is that many female employees will be seriously hurt in being denied insurance coverage for their contraceptives. This is inconsistent with our central premise: no one should be able to inflict an injury on another based on free exercise of religion. Put another way, the government has a compelling interest in ensuring that contraceptives are provided to women, and realistically, there is no other way to achieve the goal.¹⁶²

In contrast to our strong disagreement with the Court's decision in *Hobby Lobby*, we agree with decisions holding that pharmacies must fill prescriptions for contraceptives, even if it violates the pharmacists' religious beliefs. For

158. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 425–26 (2006).

159. *See id.* at 432, 439.

160. *See Sherbert v. Verner*, 374 U.S. 398, 399–401 (1963).

161. *See id.* at 404.

162. The Court in *Hobby Lobby* identified two other alternatives: Congress could provide funds to women directly for contraceptives or Congress could give for-profit corporations the same option it gave nonprofit corporations that are affiliated with religions. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780–82 (2014). Justice Ginsburg, in dissent, offers a persuasive refutation of the claim that these are less restrictive alternatives. She wrote:

And where is the stopping point to the “let the government pay” alternative? Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, or according women equal pay for substantially similar work? Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection?

Id. at 2802 (Ginsburg, J., dissenting) (citations omitted). She also explained that the treatment of nonprofit corporations does not provide a basis for extending the same benefit to for-profit corporations. She referred to “the ‘special solicitude’ generally accorded nonprofit religion-based organizations that exist to serve a community of believers, solicitude never before accorded to commercial enterprises comprising employees of diverse faiths.” *Id.* at 2802–03.

example, in *Stormans, Inc. v. Wiesman*, the United States Court of Appeals for the Ninth Circuit recently upheld the constitutionality of a Washington regulation, promulgated by the Washington Pharmacy Quality Assurance Commission, requiring pharmacies to timely deliver all prescription medications, even if the pharmacist owner had a religious objection.¹⁶³ The regulation allowed for individual pharmacists with religious objections to deny delivery, so long as another pharmacist working for the pharmacy provided timely delivery of the medication.

The plaintiffs in this case were the owner of a pharmacy and two pharmacists who objected to delivering emergency contraceptives, such as Plan B, to patients based on religious beliefs. However, the reach of the pharmacists' withholding of medical devices extended beyond contraceptives. Evidence was presented before the Commission and at trial demonstrating that "pharmacists and pharmacies had refused to fill prescriptions for several kinds of medications other than emergency contraceptives," including refusing "to deliver diabetic syringes, insulin, HIV-related medications, and Valium."¹⁶⁴

The Ninth Circuit rejected the Free Exercise Clause challenge based on *Employment Division v. Smith*, emphasizing that the Washington regulation was neutral and of general applicability.¹⁶⁵ The court explained that the regulations ensure that patients are not harmed by "being denied safe and timely access to their lawfully prescribed medications" regardless of whether the pharmacist or pharmacy owner's conduct was religiously motivated or otherwise.¹⁶⁶ The court thus concluded that the law met rational basis review.¹⁶⁷

We agree because the religious views of some should not allow them to inflict injuries, such as the denial of needed prescription medicines, on others. Reproductive health care should be treated no differently than other kinds of medical care.

CONCLUSION

People can justify the most horrible of actions, including watching their children die from treatable illnesses, in the noblest of rhetoric. Many cases and anecdotes in Dr. Offit's book attest to this. Often these cases involve common illnesses for which the most accessible forms of medical care could spare their children's lives. In this Review Essay, we highlight a few such cases involving diabetes, meningitis, pneumonia, and cancer. In each case we describe, the children died. In these cases, the parents used religion to justify denying their children urgently needed medical care.

163. 794 F.3d 1064, 1071 (9th Cir. 2015).

164. *Id.* at 1077.

165. *Id.* at 1084–85.

166. *Id.* at 1078.

167. *Id.* at 1075, 1084–85.

Yet, increasingly, people are trying to use religion as the basis for inflicting harms.¹⁶⁸ Our focus has been on one such aspect that is discussed in Dr. Offit's book: the denial of life-saving medical treatment to children. But we believe that our analysis supports a larger proposition: people should not be able to use their religions to inflict injury on others, including in cases that involve corporations denying female employees access to contraceptive medicines, state-licensed pharmacists refusing to fill certain prescriptions, or county clerks withholding marriage licenses to same-sex couples.¹⁶⁹ In other words, people should not have the right to inflict an injury on others in the name of free exercise of religion.

168. *See, e.g., supra* text accompanying notes 1–5.

169. Although it is beyond the scope of this paper, we believe that freedom of religion does not provide a basis for discriminating against others, such as in employment or in the provision of services. *See, e.g.,* Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177 (2015) (explaining why religious freedom does not provide a right to discriminate in public accommodations).

JURISPRUDENCE

Progressive Judges May Have Found a Use for Clarence Thomas' Terrible Guns Ruling

BY MARK JOSEPH STERN

JUNE 07, 2023 • 3:22 PM




Demonstrators gather for a Second Amendment rally at the Washington State Capitol on March 20, 2021, in Olympia, Washington. David Ryder/Getty Images

*This piece is a part of **Opinionpalooza!** Slate's coverage of Supreme Court decisions. We consider this coverage so essential that we're taking down the paywall for it. If you would like to help us continue to cover the courts aggressively, please consider **joining Slate Plus for \$5**. And **sign up for the pop-up newsletter** to see the latest every week in your inbox.*

Will progressive judges ever find use for the Supreme Court's recently expanded and disastrous interpretation of the Second Amendment? A major ruling on Tuesday suggests that they already are. By an 11-4 vote, the U.S. Court of Appeals for the 3rd Circuit held that some people convicted of felonies retain their right to bear arms. The decision drew support from judges across the ideological spectrum, uniting the court's most conservative and liberal judges despite—or perhaps because of—its potentially revolutionary implications. This consensus suggests that we may be entering a new era of Second Amendment litigation, one in which left-leaning judges reluctantly embrace gun rights as a tool of progressive constitutionalism.

Range v. Garland, Tuesday's decision from the 3rd Circuit, revolved around a federal law that bars individuals from possessing a gun if they were ever convicted of a felony. The government prosecutes thousands of "felon-in-possession" cases every year; it is the most common federal gun charge. Courts have consistently affirmed the ban's constitutionality; indeed, just last Friday, a conservative panel of the U.S. Court of Appeals for the 8th Circuit unanimously upheld it. Like other courts, it did so because the Supreme Court seemingly confirmed the statute's constitutionality in 2008's D.C. v. Heller, which stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons."

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Clarity and consistency, however, are not strengths of the Supreme Court's Second Amendment jurisprudence. And in last year's Bruen decision, the court cast doubt upon Heller's assurances about this "longstanding prohibition." Justice Clarence Thomas' majority opinion declared that every restriction on the right to bear arms is unconstitutional unless the government can identify analogous laws from sometime between 1791 and 1868. He did not exempt felon-in-possession laws from this searing scrutiny. Thomas' extreme language prompted Justice Brett Kavanaugh, joined by Chief Justice John Roberts, to pen a concurrence pledging that such bans remain "presumptively lawful."

So why did the 3rd Circuit hold otherwise? In his majority opinion, Judge Thomas Hardiman asserted that Bruen's reasoning, rather than Kavanaugh's concurrence, bound the lower

courts. And rather than ask about *all* people convicted of felonies, he looked only at the plaintiff in this case: Bryan Range, who was convicted of making a false statement to obtain food stamps in 1995. This (piddling) criminal record, Hardiman wrote, does not exclude Range from “the people” who are “protected by the Second Amendment.” And rather than identify the precise contours of that right, Hardiman concluded that the government hadn’t identified “a longstanding history and tradition of depriving people like Range of their firearms.”

Hardiman’s opinion was joined by his fellow George W. Bush appointees on the circuit, as well as every Donald Trump appointee. But he also won the votes of Judge Joseph A. Greenaway, a Barack Obama appointee, and Judge Arianna J. Freeman, a Joe Biden appointee. Moreover, his bottom-line conclusion drew support from Judge Thomas L. Ambro, a Bill Clinton appointee, and Judge Tamika Montgomery-Reeves, another Biden appointee. (In a separate opinion, Ambro, Greenaway, and Montgomery-Reeves stressed that the government could still disarm people who “threaten the orderly functioning of civil society.”) Three of the dissenters were Obama appointees, and the fourth was a George H.W. Bush appointee.

What’s behind the cross-ideological support for Range? Probably *not* a deep certainty that Hardiman’s cursory historical overview and logic were correct, at least on the left flank of the court: In her exhaustive dissent, Judge Cheryl Ann Krause, an Obama appointee, eviscerated the majority’s historical analysis with a mountain of evidence proving that “legislatures have historically possessed the authority to disarm entire groups, like felons, whose conduct evinces disrespect for the rule of law.” (Krause also pointed out that Range’s conduct would have been a capital offense in 1791, and it’s difficult to see how a crime could be punishable by execution but not disarmament.) In *Bruen*, though, Justice Thomas simply ignored or discredited any evidence that did not fit his preferred narrative, tacitly inviting lower courts to do the same. We are long past the point of pretending that the actual historical record matters to judges who are eager to bulldoze gun safety laws.

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What’s a progressive judge to do? Public defenders have already offered an answer: employ the Second Amendment in furtherance of progressive constitutional values like equal

protection and the rights of criminal defendants. Because so many high-profile gun cases are manufactured by conservative activists—including this one—it's easy to forget who's really on the front lines of the Second Amendment revolution: criminal defense attorneys representing indigent clients charged with firearm offenses. (It's telling that one Biden appointee who joined the majority in *Range*, Arianna Freeman, spent her entire legal career as a federal public defender.) Public defenders have a Sixth Amendment obligation to provide their clients with a zealous defense, which increasingly includes constitutional challenges to gun restrictions.

That's why New York City's public defenders filed a brief in *Bruen* urging the Supreme Court to strike down nearly all limitations on public carry. And it's why the 3rd Circuit's top public defenders—Freeman's former colleagues—filed a similar brief in *Range* attacking the federal felon-in-possession ban. The Supreme Court's Second Amendment decisions all envision "law-abiding, responsible citizens" who seek to protect themselves and their families from violence. But in the real world, the people who have the most to gain from these rulings are criminal defendants facing down years or decades in prison. Recent decisions establishing a right to scratch out a gun's serial number and purchase a firearm while under indictment or restraining order all arose out of criminal prosecutions, not NRA-backed test cases.

Like a growing number of public defenders, liberal judges like Freeman, Ambro, Greenaway, and Montgomery-Reeves may think that the Second Amendment can be repurposed as a weapon against over-policing and mass incarceration. If upheld by the Supreme Court, *Range* will certainly be a boon to the criminal defense bar, as well as a source of immense confusion for prosecutors. The majority's standard is extraordinarily vague: It acknowledges that *some* people may be disarmed for committing a felony, but a person "like Range" could not. How can judges tell when someone falls on Range's side of the line? The majority didn't say. In 2019, then-Judge Amy Coney Barrett took a stab at a clearer standard, asserting that only "dangerous" and "violent felons" may be disarmed. But which crimes count as "violent"? Is selling or using cocaine "violent"? How about possessing child pornography? Drunk driving? Burglary? Harassment? In a 2015 decision, the Supreme Court found it impossible to give the term "violent felony" a "principled and objective" standard. Why should courts have any more luck today?

This uncertainty would force prosecutors to think twice before bringing felon-in-possession charges, asking first whether they could persuade a court that the defendant is sufficiently "dangerous" or "violent" or "non-law-abiding" to justify disarmament. And from a criminal justice reform perspective, that's not necessarily a bad thing. Plenty of left-leaning commentators have argued that the felon-in-possession ban is disproportionately enforced

against people of color, contributing to mass incarceration and persecution of minority communities. For many progressives, these problems raise concerns about equal protection, unlawful policing, and unconstitutional sentences. But this Supreme Court doesn't see them that way; it cares far more about gun rights than traditional civil rights, such as basic civic equality of Black Americans. So progressive judges may instead seek to use the Second Amendment as a stand-in for constitutional principles that SCOTUS has abandoned.

If that's the strategy, it carries real risks. Most obviously, this approach risks legitimizing a sweeping and lethal interpretation of the Second Amendment during an epidemic of gun violence in America. Liberal support for an expansive right to bear arms could entrench decisions like *Bruen*, contributing to their status as "settled" precedent that will be harder to overturn in the future. In 2023, though, progressive judges must take their wins wherever they can find them. Only they can decide whether the trade-offs are worth it. 🗡️

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They, Them, and Theirs

Jessica A. Clarke

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THEY, THEM, AND THEIRS

Jessica A. Clarke

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THEY, THEM, AND THEIRS

Jessica A. Clarke*

Nonbinary gender identities have quickly gone from obscurity to prominence in American public life, with growing acceptance of gender-neutral pronouns, such as “they, them, and theirs,” and recognition of a third-gender category by U.S. states including California, Colorado, Minnesota, New Jersey, Oregon, and Washington. People with nonbinary gender identities do not exclusively identify as men or women. Feminist legal reformers have long argued that discrimination on the basis of gender nonconformity — in other words, discrimination against men perceived as feminine or women perceived as masculine — is a harmful type of sex discrimination that the law should redress. But the idea of nonbinary gender as an identity itself appears only at the margins of U.S. legal scholarship. Many of the cases recognizing transgender rights involve plaintiffs who identify as men or women, rather than plaintiffs who seek to reject, permute, or transcend those categories. The increased visibility of a nonbinary minority creates challenges for other rights movements, while also opening new avenues for feminist and LGBT advocacy. This Article asks what the law would look like if it took nonbinary gender seriously. It assesses the legal interests in binary gender regulation in areas including law enforcement, employment, education, housing, and health care, and concludes these interests are not reasons to reject nonbinary gender rights. It argues that the law can recognize nonbinary gender identities, or eliminate unnecessary legal sex classifications, using familiar civil rights concepts.

What gender am I? I bet you thought either male or female before I even asked the question. And this assumption is called the gender binary.

I was born non-binary, meaning my body and mind don't fit into either gender. At the age of 2, I told my parents I wasn't a girl. At 12, I was the only person on my football team without a penis. And today at 36, I can wield a chainsaw 50 feet up a tree, and I'm also really a soft sensitive artist type.

* Professor of Law, Vanderbilt University Law School. Thanks to Toby Adams, Bradley Areheart, Genny Beemyn, Stephanie Bornstein, Mary Bryson, Erin Buzuvis, Mary Anne Case, Paul Castillo, Arli Christian, David Cruz, Heath Fogg Davis, Robin Dembroff, Deborah Dinner, Elizabeth Emens, Katie Eyer, Joseph Fiskhin, Andrea Freeman, Andrew Gilden, Michele Goodwin, Aimi Hamraie, Gautam Hans, Jill Hasday, Aziz Huq, Alex Iantaffi, Neha Jain, Dru Lefvasseur, Bill McGeveran, Shannon Minter, Amy Monahan, Rebecca Morrow, Douglas NeJaime, AJ Neuman Wipfler, Bethany Davis Noll, David Noll, Aaron Potenza, Jessica Roberts, Darren Rosenblum, Laura Rosenbury, Alan Rozenshtein, Naomi Schoenbaum, Jennifer Shinall, Russell Spiker, Maayan Sudai, Hudson Taylor, Ezra Young, the University of Minnesota Public Law Workshop, the Institute for Advanced Study at the University of Minnesota, the Vanderbilt LGBT Policy Lab, the University of Chicago Workshop on Regulation of Family, Sex, and Gender, and the law faculties at the University of Minnesota and the University of Florida for conversations and comments on this project. Thanks to Katie Hanschke of the Vanderbilt Law Library for tracking down sources. For research assistance and valuable substantive feedback, I am grateful to Maria Brekke, Emily Lamm, Sara Lewenstein, Jessica Sharpe, Derek Waller, Claire Williams, and the editors of the *Harvard Law Review*. All opinions expressed here are my own.

Our identities, who we know ourselves to be, is affected by our biology and the environment, nature and nurture. There are non-binary folks who are intersex, they have ambiguous genitalia, chromosomes that are not XX or XY. 1 in 100 people have bodies that differ from standard male or female.

And there are non-binary folks who do have genitalia that is considered standard male or female, but our brains have always been transgender. And collectively, we are the solid evidence that there is, and always has been, a spectrum of gender variation in the human species.

— Carly Mitchell¹

INTRODUCTION

With stunning speed, nonbinary gender identities have gone from obscurity to prominence in American public life. The use of gender-neutral pronouns such as “they, them, and theirs” to describe an individual person is growing in acceptance.² “All gender” restrooms are appearing around the country.³ And an increasing number of U.S. jurisdictions are recognizing a third-gender category. In June 2016, an Oregon court became the first U.S. court to officially recognize nonbinary gender identity.⁴ In October 2017, California passed its Gender Recognition Act,⁵ a law allowing any individual to change the sex

¹ *Gender Identity: Female, Male, or Nonbinary: Hearing on S.B. 179 Before the Assemb. Standing Comm. on Judiciary*, 2017–2018 Leg., Reg. Sess. (Cal. 2017) [hereinafter *Cal. Assemb. Judiciary Hearing*] (statement of Carly Mitchell), <https://ca.digitaldemocracy.org/hearing/53965?startTime=705&vid=55910b927084f97bc382c39bfoecade2> [<https://perma.cc/H8T3-NJ6R>].

² See, e.g., THE ASSOCIATED PRESS STYLEBOOK 274 (Paula Froke et al. eds., 2017) (advising journalists in describing “people who identify as neither male nor female or ask not to be referred to as he/she/him/her” to “[u]se the person’s name in place of a pronoun, or otherwise reword the sentence, whenever possible. If they/them/their use is essential, explain in the text that the person prefers a gender-neutral pronoun. Be sure that the phrasing does not imply more than one person” (emphasis omitted)); Lexy Perez, *Super Bowl: Coca-Cola Represents “Them” in Non-binary Ad*, HOLLYWOOD REP. (Feb. 5, 2018, 10:37 AM), <https://www.hollywoodreporter.com/news/super-bowl-coca-cola-represents-binary-ad-1081767> [<https://perma.cc/JJ3B-4ZWD>] (discussing a Super Bowl advertisement featuring a person described as a “them” rather than a “him” or a “her”).

Not all nonbinary people use “they, them, and theirs” but these seem to be the most commonly used gender-neutral pronouns. SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 18, 49 (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> [<https://perma.cc/35MN-AVDX>] (surveying 27,715 transgender people and reporting that 29% use “they/them,” *id.* at 49). Some people who have male or female gender identities use “they, them, and theirs” as well.

³ Aimee Lee Ball, *In All-Gender Restrooms, the Signs Reflect the Times*, N.Y. TIMES (Nov. 5, 2015), <https://nyti.ms/1RxHpEM> [<https://perma.cc/789Q-N2TX>].

⁴ *In re The Sex Change of Jamie Shupe*, No. 16CV13991, slip op. at 1 (Cir. Ct. Or. Multnomah Cty. June 10, 2016).

⁵ S.B. 179, 2017 Leg., Reg. Sess. (Cal. 2017) (enacted).

designation on their official documents to “nonbinary.”⁶ At the time of this writing, eight states, New York City, and Washington, D.C., have all adopted rules to allow “non-binary” or “X” designations on certain identification documents.⁷ These U.S. jurisdictions are catching up with other countries, including Canada, Australia, India, and Germany.⁸

People with nonbinary gender identities do not exclusively identify as men or women.⁹ The term “gender identity” generally refers to a person’s internal sense of whether they are a man or a woman¹⁰ while “sex” refers to “bodily characteristics” or the male or female designation ascribed to an infant at birth.¹¹ Nonbinary people are often said to fit

⁶ *Id.* § 11 (allowing applicants to change the sex markers on their birth certificates and drivers’ licenses to “nonbinary” upon attestation that the change “is to conform the person’s legal gender to the person’s gender identity and is not made for any fraudulent purpose”).

⁷ *Id.*; N.J. STAT. ANN. § 26:8-40.12 (West 2018) (allowing people to change their birth certificate gender markers to “undesignated/non-binary” effective February 2019); Nonbinary Identification Cards Amendment Act of 2018, D.C. Act 22-466, 65 D.C. Reg. 011402 (Oct. 9, 2018) (to be codified at D.C. CODE § 50-1401.01 after a 30-day period of congressional review) (allowing applicants for drivers’ licenses to “designate their gender as nonbinary”); WASH. ADMIN. CODE § 246-490-075 (2018) (allowing people to identify as X rather than M or F on birth certificates); N.Y.C., N.Y., ADMIN. CODE § 17-167.1 (Oct. 9, 2018) (allowing an “x” designation on birth records to designate “a sex that is not exclusively male or female,” *id.* § 17-167.1(a)); Press Release, Dep’t of the Sec’y of State, State of Me., Maine BMV to Offer Non-binary Gender Designation on Driver’s Licenses, ID Cards (June 11, 2018), <https://www.maine.gov/sos/news/2018/genderdesignationdclid.html> [<https://perma.cc/T9XA-Y9XQ>]; News Release, Or. Dep’t of Transp., “Not Specified” Gender Choice Coming to Driver Licenses (June 15, 2017), <https://content.govdelivery.com/accounts/ORDOT/bulletins/1a2bd9e> [<https://perma.cc/9JU4-86C4>]; Associated Press, *Minnesota Licenses Can Now Designate Gender as “Nonbinary,”* STARTRIBUNE (Oct. 3, 2018, 1:00 PM), <http://www.startribune.com/minnesota-licenses-can-now-designate-gender-as-nonbinary/495046021/> [<https://perma.cc/PJH5-5BDG>]; Curtis M. Wong, *Arkansas Has Been Offering a Nonbinary Gender Option on State IDs for Years*, HUFFINGTON POST (Oct. 17, 2018, 6:50 PM), https://www.huffingtonpost.com/entry/arkansas-gender-neutral-state-id-option_us_5bc79f75e4bod38b5874a669 [<https://perma.cc/GF2K-ZA3S>]; *FAQ: Non-binary Sex Identifier on Driver Licenses and Identification Cards*, COLO. DEP’T OF REVENUE (Nov. 8, 2018), <https://www.colorado.gov/pacific/sites/default/files/CO%20non-binary%20sex%20identifier%20FAQ%2011.08.18.pdf> [<https://perma.cc/K6G6-M7L8>].

⁸ Canada began offering nonbinary designations on identity documents in August 2017, joining Australia, Bangladesh, Germany, India, Malta, Nepal, New Zealand, and Pakistan, which all offer some form of nonbinary recognition. Niraj Chokshi, *Canada Introduces “X” as a Third Sex Category for Passport Holders*, N.Y. TIMES (Aug. 25, 2017), <https://nyti.ms/2wvdnRf> [<https://perma.cc/JG9H-CKU7>].

⁹ GLAAD MEDIA REFERENCE GUIDE 11 (10th ed. 2016), <http://www.glaad.org/sites/default/files/GLAAD-Media-Reference-Guide-Tenth-Edition.pdf> [<https://perma.cc/Z7PR-C8ZQ>]. I offer the definitions in this paragraph in the interest of clarity. I do not purport that these definitions are “correct” in any metaphysical or moral sense, nor do I argue the law should define these terms in any particular way in every context. See *infra* section II.A, pp. 933–36 (arguing against any one definition). I also note that terminology is in flux. While these terms and definitions are standard at present, they may one day be supplanted by others as social movements refine the relevant terminology to reflect evolving understandings.

¹⁰ GLAAD MEDIA REFERENCE GUIDE, *supra* note 9, at 10 (defining “gender identity” as “[a] person’s internal, deeply held sense of their gender,” most commonly whether they are “man or woman (or boy or girl)”).

¹¹ *Id.* (explaining that “sex” means “a combination of bodily characteristics including: chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics”).

under the heading “transgender”: “An umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth.”¹² But not all non-binary people identify as transgender, and many transgender people identify as men or women.¹³ Nonbinary gender identity is not the same thing as intersex variation. “‘Intersex’ refers to people who are born with any of a range of sex characteristics that may not fit a doctor’s notions of binary ‘male’ or ‘female’ bodies.”¹⁴ While some nonbinary people have intersex variations, not all do,¹⁵ and many people with intersex variations have male or female gender identities.¹⁶

Nonbinary gender identities are not new,¹⁷ but media attention to nonbinary people in the United States has increased significantly since 2015.¹⁸ Nonbinary characters are now portrayed on television as

¹² *Id.* Gender expression means “[e]xternal manifestations of gender, expressed through a person’s name, pronouns, clothing, haircut, behavior, voice, and/or body characteristics.” *Id.*

¹³ See, e.g., Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANSGENDER RIGHTS* 3, 4–5 (Paisley Currah et al. eds., 2006).

¹⁴ *Intersex Definitions*, INTERACT, <https://interactadvocates.org/intersex-definitions/> [<https://perma.cc/JA3P-JXA5>] (“Variations may appear in a person’s chromosomes, genitals, or internal organs like testes or ovaries. Some intersex traits are identified at birth, while others may not be discovered until puberty or later in life.”). The percentage of the population with intersex traits is estimated at less than 2%. Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151, 161 (2000) (surveying medical literature since 1955 and concluding that deviation from medical ideals of dimorphism in chromosomes, gonads, and genitalia could be as frequent as 2% of live births, although a much smaller percentage of those infants would be recognized as intersex). While this percentage may seem small, it is larger than the incidence of children born with Down syndrome. Kristin Zeiler & Anette Wickström, *Why Do “We” Perform Surgery on Newborn Intersexed Children? The Phenomenology of the Parental Experience of Having a Child with Intersex Anatomies*, 10 FEMINIST THEORY 359, 359 (2009).

¹⁵ See *supra* note 1 and accompanying text.

¹⁶ See, e.g., SHARON E. PREVES, *INTERSEX AND IDENTITY: THE CONTESTED SELF* 60–85 (2003) (interviewing people with intersex variations who struggle to be accepted as women or men).

¹⁷ See, e.g., Gilbert Herdt, *Preface*, in *THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY* 11, 11 (Gilbert Herdt ed., 1996) (“For centuries the existence of people who did not fit the sex/gender categories male and female have been known but typically dismissed from reports of certain non-Western societies, while in the Western European tradition they have been marginalized, stigmatized and persecuted.”). While nonbinary gender identity has only recently become prominent in national media in the United States, people have been publicly identifying as nonbinary since at least the 1990s. See KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN AND THE REST OF US* 51–69 (Vintage Books 1995) (1994); GENDERQUEER: VOICES FROM BEYOND THE SEXUAL BINARY (Joan Nestle et al. eds., 2002).

¹⁸ See, e.g., *Gender: The Space Between* (CBS News television broadcast Mar. 27, 2017), <https://www.cbsnews.com/video/gender-the-space-between/> [<http://perma.cc/9THJ-KNZL>]; Julie Scelfo, *A University Recognizes a Third Gender: Neutral*, N.Y. TIMES (Feb. 3, 2015), <https://nyti.ms/16rpyoY> [<https://perma.cc/B343-ABH4>]. This group identifies by a variety of terms, including “gender-queer,” “gender-nonconforming, bi-gender, non-binary, or just being fluid.” Steven Petrow, *Don’t Know What “Genderqueer” Is? Meet Someone Who Identifies that Way.*, WASH. POST (May 9, 2016), <http://wapo.st/1OhnQ14> [<https://perma.cc/7LSG-27HQ>].

sympathetic rather than silly.¹⁹ In the largest survey of transgender people to date, 35% stated that they identify as nonbinary.²⁰ If that survey is representative, there may be about half a million people who identify as nonbinary in the United States, a population the size of the city of Miami.²¹ These numbers are likely to increase as social acceptance of nonbinary gender identities grows.²² Yet nonbinary people still face discrimination. Medical professionals are recognizing individuals with nonbinary identities as a population at risk of particular mental health problems due to stress stemming from marginalization and victimization.²³ Survey responses about transgender people's experiences with

¹⁹ See, e.g., Scott Collins, *Asia Kate Dillon on "Billions," Acting and Non-binary Choices*, VARIETY (June 6, 2017, 11:30 AM), <http://variety.com/2017/tv/awards/asia-kate-dillon-billions-acting-non-binary-choices-showtime-1202454977/> [<https://perma.cc/DP8Z-4799>] (discussing Asia Kate Dillon, who identifies as nonbinary and plays Taylor Mason, a nonbinary character on the cable-network show *Billions*); Danielle Corcione, "Chilling Adventures of Sabrina" Star Lachlan Watson on Non-binary Identity and Telling a Bit of Their Own Story Through Susie Putnam, TEEN VOGUE (Oct. 29, 2018, 2:54 PM), <https://www.teenvogue.com/story/lachlan-watson-susie-putnam-chilling-adventures-of-sabrina> [<https://perma.cc/CXL4-TL25>] (discussing a nonbinary actor who plays a character who "is exploring their gender" on a Netflix series); Jackie Strause, *Blowing Up the Binary: How "Transparent" Season 4 Is Personal for Jill Soloway*, HOLLYWOOD REP. (Sept. 25, 2017, 9:35 AM), <https://www.hollywoodreporter.com/live-feed/transparent-season-4-jill-soloway-gender-binary-1042629> [<https://perma.cc/PJZ9-CT3P>] (discussing an Amazon series that "features one character's journey to identifying as gender non-binary"). In the 1990s, the Saturday Night Live sketch "It's Pat" featured a character whose indeterminate sex was played for laughs. See MARJORIE GARBER, *VICE VERSA: BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE* 207, 230-31 (1995).

²⁰ JAMES ET AL., *supra* note 2, at 18, 45 (describing the results of the U.S. Transgender Survey (USTS) and concluding: "With non-binary people making up over one-third of the sample, the need for advocacy that is inclusive of all identities in the transgender community is clearer than ever," *id.* at 5). The USTS defined its study population to include "individuals who identified as transgender, trans, genderqueer, non-binary, and other identities on the transgender identity spectrum . . . at any stage of their lives, journey, or transition." *Id.* at 23.

²¹ This rough calculation assumes 35% of the 1.4 million transgender adults in the United States identify as nonbinary. ANDREW R. FLORES ET AL., WILLIAMS INST., *HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES?* 2 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf> [<https://perma.cc/M9LJ-3HHQ>] (estimating that 1.4 million adults identify as transgender). This figure may not reflect the growing number of people who do not identify exclusively as men or women. In a 2017 survey of 31,217 college students, 1.5% reported that they describe their gender identity as something other than man, woman, trans man, or trans woman. AM. COLL. HEALTH ASS'N, NATIONAL COLLEGE HEALTH ASSESSMENT, FALL 2017 REFERENCE GROUP DATA REPORT 55, https://www.acha.org/documents/ncha/NCHA-II_FALL_2017_REFERENCE_GROUP_DATA_REPORT.pdf [<https://perma.cc/A9T9-NELK>] (surveying students from fifty-two postsecondary institutions in the United States).

²² One commonly reported experience is a "moment" when a nonbinary person first realized that a gender identity other than man or woman might be possible and "everything . . . fell into place and made sense." *Gender: The Space Between*, *supra* note 18, at 11:36 (interview with Ela Hosp). The Internet is facilitating this moment. See *id.* at 21:00 (interview with Talia Bellia).

²³ See, e.g., H  l  ne Frohard-Dourlent et al., "I Would Have Preferred More Options": Accounting for Non-binary Youth in Health Research, 24 NURSING INQUIRY, Jan. 2017, at 1, 4; Christina Richards et al., *Non-binary or Genderqueer Genders*, 28 INT'L REV. PSYCHIATRY 95, 97-98 (2016).

education, health care, employment, and policing suggest that those with nonbinary gender identities are “suffering significant impacts of anti-transgender bias and in some cases are at higher risk for discrimination and violence” than transgender men and women.²⁴

Nonbinary gender identity is not a niche concern. To the contrary, the legal response to nonbinary gender has important implications for a variety of other identity-based legal movements. Feminist legal reformers have long argued that discrimination on the basis of gender nonconformity — in other words, against men perceived as feminine or women perceived as masculine — is a harmful type of sex discrimination that the law should redress.²⁵ And scholars advocating for transgender rights have debated the role of what we might today call nonbinary identities in transgender rights struggles.²⁶ But surprisingly, the idea of nonbinary gender as an identity itself has appeared only at the margins of legal scholarship, not as a central object of study.²⁷

This Article asks what American law would look like if it took nonbinary gender seriously.²⁸ What would it mean for the law to ensure

²⁴ Jack Harrison et al., *A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey*, 2 LGBTQ POL’Y J. HARV. KENNEDY SCH. 13, 13 (2011–2012) (describing results of the 2008 National Transgender Discrimination Survey (NTDS), which surveyed 6450 transgender and gender-nonconforming people).

²⁵ See, e.g., Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 2–3 (1995); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 3–5 (1995); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1774–88 (1998); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 9–10 (1995).

²⁶ See, e.g., Currah, *supra* note 13, at 4–5. Legal scholars have argued about whether sex discrimination law would protect nonbinary genders. Compare, e.g., David B. Cruz, *Acknowledging the Gender in Anti-transgender Discrimination*, 32 LAW & INEQ. 257, 258 (2014) (arguing that sex discrimination law forbids discrimination against “transgender people,” including those with an “inner sense of themselves as female or male (or less often, as both or neither)”), with Stevie V. Tran & Elizabeth M. Glazer, *Transgenderless*, 35 HARV. J.L. & GENDER 399, 403 (2012) (arguing that “imperfect gender-nonconformists, whose gender identities are more difficult to understand from a binary perspective . . . would likely fall outside of the protection of federal civil rights law in its current formulation of gender non-conformity as sex discrimination”). The law review literature has advanced broad theories of gender deconstruction, including recent works such as Adam R. Chang & Stephanie M. Wildman, *Gender In/sight: Examining Culture and Constructions of Gender*, 18 GEO. J. GENDER & L. 43, 54–63, 67–68 (2017) (outlining concepts); and Melina Constantine Bell, *Gender Essentialism and American Law: Why and How to Sever the Connection*, 23 DUKE J. GENDER L. & POL’Y 163, 206–220 (2016) (advocating an approach to challenge sex classifications grounded in Canadian doctrine).

²⁷ Christina Richards et al., *Introduction*, in GENDERQUEER AND NON-BINARY GENDERS 2 (Christina Richards et al. eds., 2017) (discussing “the dearth of existing literature” on nonbinary gender from various academic perspectives, and offering a chapter on U.K. but not U.S. law).

²⁸ No prior work of legal scholarship has asked this question. A few articles have focused on identity documents. See, e.g., Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 732–38 (2008) (discussing gender reclassification doctrines for transgender people); Anna James (AJ) Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender*

nonbinary people's full participation in social, political, and economic life? This Article assesses the legal interests in maintaining systems that divide people into male and female categories in areas including law enforcement, employment, education, housing, and health care, and demonstrates that those interests are not reasons to reject the project of nonbinary inclusion. The law can recognize nonbinary gender using familiar civil rights tools and concepts. Nonbinary gender rights might take the form of recognition of a third-gender category, elimination of unnecessary legal sex classifications, or thoughtful integration of nonbinary people into rules or spaces that require binary categories. Many of the interventions suggested in this Article would require only modest extensions of existing law.

One contribution of this Article is to offer the legal literature a descriptive account of nonbinary gender. While nonbinary gender is not new, its legal possibilities are. Rights claims based on nonbinary gender require particular attention, because they are distinct from, if overlapping with, those focused on women or men who are gender-nonconforming, transgender, lesbian, gay, bisexual, or intersex. Nonbinary people pose a direct challenge to all modes of sex segregation, unlike transgender people seeking recognition as men or women.²⁹ Earlier iterations of feminist argument against binary gender took place within a cultural context in which alternatives to binary gender were scarcely imaginable. To many jurists and theorists, the concept of gender freedom seemed too "conceptually complex and practically costly" to implement.³⁰ Against this backdrop, challenges to binary gender appeared theoretical, utopian, and impossible, and therefore threatening to other feminist and LGBT projects. The increased visibility and advocacy of nonbinary people, as a minority, makes new legal arguments possible.³¹ Yet nonbinary gender is, in many ways, a misfit for legal

Identity and the Possibility of Genderless Identity Documents, 39 HARV. J.L. & GENDER 491, 491 (2016) (advocating the eventual end of sex classification). My own work has explored binary sex classifications by analogy to the problem of *numerus clausus* in commercial law: When should there be a limited number of legal forms that the law recognizes, as in property, as opposed to a nearly infinite variety of agreements, as in contract? See Jessica A. Clarke, *Adverse Possession of Identity: Radical Theory, Conventional Practice*, 84 OR. L. REV. 563, 609 (2005); Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 747, 768–69 (2015). For a different take on that analogy, see Sonia K. Katyal, *The Numerus Clausus of Sex*, 84 U. CHI. L. REV. 389, 398–400 (2017) (arguing that sex is better analogized to intellectual property than to real estate). This Article's ambition is different — it is to examine the very recent and dramatic advance in nonbinary visibility and to ask what the law would look like, as a practical matter, if it took nonbinary gender seriously.

²⁹ Cf. *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1055 (7th Cir. 2017) (noting approvingly that "allowing transgender students to use [male or female] facilities that align with their gender identity has actually reinforced the concept of separate facilities for boys and girls").

³⁰ KIMBERLY A. YURACKO, *GENDER NONCONFORMITY AND THE LAW* 143–44 (2016).

³¹ Cf. S. Bear Bergman & Meg-John Barker, *Non-binary Activism*, in *GENDERQUEER AND NON-BINARY GENDERS*, *supra* note 27, at 31, 33 (discussing how the "new social movement," as

categorization because nonbinary people defy categorization as a group. In resisting categorization, this minority casts new light on long-running debates over sex and gender regulation.

But this Article is not about theories of gender. Sex and gender regulation is an area of legal scholarship that might be described as *over-theorized*.³² A second contribution of this Article is to suggest a contextual approach to debates over sex and gender regulation: analysis of the interests at stake in binary gender in each particular legal context. It examines recent legal, public, and legislative debates over nonbinary gender rights. These debates are often stymied by efforts to craft an all-purpose definition of sex or gender. They are hindered by simplistic assumptions about the shape that nonbinary gender rights must take. Opponents caricature the options as either creating a separate third-gender category that is afforded special legal treatment, or stripping law and society of all gender. For example, they ask, would nonbinary people require their own sports teams under Title IX?³³ Or would they demand the end of all women's sports under Title IX?³⁴

This Article argues that U.S. civil rights law offers many options for addressing nonbinary gender rights. One strategy might be sex neutrality: eliminating the use of unnecessary sex classifications by government. This strategy would not attempt to abolish gender or mandate androgyny.³⁵ It would simply mean getting rid of rules that require people to choose the “male” or “female” category, when those rules do not serve important interests. For example, there is no good reason to designate

well as “the longer histories of non-binary gender experience which have often been erased,” can “provide some sense of liveable non-binary lives”).

³² See *infra* section II.A, pp. 933–36 (discussing theoretical debates about the definitions of sex, gender, and gender identity).

³³ See *Gender Identity: Female, Male, or Nonbinary: Hearing on S.B. 179 Before the S. Standing Comm. on Judiciary*, 2017–2018 Leg., Reg. Sess. (Cal. 2017) (statement of Jonathan Keller, Chairman and CEO, California Family Council), <https://ca.digitaldemocracy.org/hearing/52473?startTime=465&vid=64fe0449e847fd5c9d8d349540eaa75> [<https://perma.cc/8HEA-SVDH>] (“The third gender would be subject to Title IX, which could mean that California’s 150 public universities, and over 10,000 public schools serving K-12 students would be required under federal law to not only provide male and female athletic teams and facilities, but non-binary facilities and teams as well.”).

³⁴ See *infra* section III.C.2, pp. 966–74.

³⁵ For example, it is telling that MTV’s first gender-neutral acting award went to an actor portraying a Disney princess. Hilary Lewis, *MTV Movie & TV Awards: Asia Kate Dillon Presents Gender-Neutral Acting Award to Emma Watson*, HOLLYWOOD REP. (May 7, 2017, 5:31 PM), <http://www.hollywoodreporter.com/news/mtv-movie-tv-awards-asia-kate-dillon-presents-gender-neutral-acting-award-emma-watson-1000935> [<https://perma.cc/DQ68-M2YF>] (discussing Emma Watson’s award for her role as the bookish princess Belle in Disney’s live-action *Beauty and the Beast*). This move toward gender neutrality is hardly the end of gender. Instead, it is a renegotiation of gender roles, which might be analyzed critically. See, e.g., PEGGY ORENSTEIN, *CINDERELLA ATE MY DAUGHTER: DISPATCHES FROM THE FRONT LINES OF THE NEW GIRLIE-GIRL CULTURE* 14 (2011).

single-user restrooms as men's and women's.³⁶ But sometimes, sex or gender classifications may serve useful functions. For example, at present, having an identification document with a sex designation that matches one's self-reported gender identity may protect a person from harassment by government officials.³⁷ In such cases, the appropriate strategy might be third-gender recognition: providing a third category to protect people with nonbinary gender identities and to express that they deserve the same respect as men and women. In a limited number of cases, there may be significant impediments to both third-gender recognition and sex neutrality. Sex-segregated prison housing might be an example.³⁸ In such cases, thoughtful integration of nonbinary people into binary categories may be the best short-term approach. This approach would redefine binary sex and gender categories to best fulfill the purposes of the regulation, while also respecting every person's gender identity, to the extent possible. This Article argues that these approaches are not mutually exclusive and that no one approach is the best fit for every context.

Opponents of nonbinary gender recognition argue that their "objections go well beyond the ideological" and pertain to the government's "many legitimate interests" in maintaining a system of binary sex classification.³⁹ They claim that the right to nonbinary gender identity will "open[] a Pandora's Box" of unforeseen evils.⁴⁰ A final contribution of this Article is to demonstrate this is not the case. Now that marriage law no longer needs to determine anyone's sex,⁴¹ a diminishing number of legal arrangements rely on binary sex or gender classifications. This Article assesses the remaining legal interests in dividing people into male and female categories, including: ensuring the accuracy of identification documents and data; facilitating law enforcement; administering pregnancy protections; allowing people to use gendered pronouns without fear of liability for harassment; maintaining single-sex restrooms, educational programs, sports, and housing facilities; hiring members of one sex for particular jobs; and avoiding health care costs. It does not aim to rehash debates about transgender rights in general; it takes as a given

³⁶ See *infra* section III.D.1, pp. 981–83.

³⁷ See *infra* section III.A, pp. 947–51.

³⁸ See *infra* section III.D.2, pp. 983–86.

³⁹ *WoLF Members Pushing Back Against Local "Gender Identity" Legislation*, WOMEN'S LIBERATION FRONT (Aug. 21, 2017), <http://womensliberationfront.org/wolf-members-pushing-back-against-local-gender-identity-legislation/> [<https://perma.cc/JH7T-F46M>].

⁴⁰ Tammerlin Drummond, *Not Male or Female: Proposed Law Would Create Gender-Neutral Option on California IDs*, EAST BAY TIMES (Aug. 21, 2017, 9:37 AM), <http://www.eastbaytimes.com/2017/08/20/not-male-or-female-proposed-law-would-create-third-gender-neutral-option-on-california-ids/> [<https://perma.cc/RVR6-KETB>] (quoting Jonathan Keller, CEO of the Family Research Council).

⁴¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

that the law should generally respect a transgender person's gender identity as a man or a woman.⁴² This Article is interested in how non-binary gender changes the discussion in each particular context of binary gender regulation. Upon careful examination, it turns out that rather than opening Pandora's box, nonbinary gender rights may have unforeseen benefits.

This Article proceeds in three Parts. Part I describes nonbinary gender identity as a discrete phenomenon, advancing legal claims that both converge with and diverge from those of other civil rights movements. Part II argues for a contextual approach to nonbinary gender rights, demonstrating that civil rights law offers many possible legal models. Part III applies that contextual approach, cataloguing and assessing potential legal interests in keeping sex and gender binary, as opposed to the best legal alternatives in each context. It concludes the law does not require a universal definition of sex or gender that limits the options to two.

I. NONBINARY GENDER

This Part describes nonbinary gender identities. It discusses the diversity of nonbinary genders and reasons for bias against nonbinary people. It then situates nonbinary gender with respect to movements around other identity issues, including feminist arguments for rights to gender nonconformity, the rights of transgender men and women, intersex advocacy, arguments for sexual-orientation nondiscrimination, and antiracist and postcolonial struggles. While there are overlaps between these rights claims, there are also areas of divergence.

This Part makes descriptive claims based on currently available data and information. These claims are provisional, by necessity, because nonbinary gender identities, terminology, and legal arguments are ever evolving. This Article does not presume to speak for any particular person or group. People with nonbinary gender identities and their advocates are developing a variety of arguments for inclusion, based on values such as liberty, equality, respect, privacy, and human flourishing. While I hope that some of these arguments may resonate with readers, this Article's goal is not to build the positive case for inclusion as an abstract matter.⁴³ I ask readers to assume that the law should treat

⁴² This Article cannot and does not attempt to persuade any reader who does not share this premise or is unwilling to assume it for the sake of argument. For a human rights argument, see Holning Lau, *Gender Recognition as a Human Right*, in *NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC* (Andreas von Arnould et al. eds., forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3056110 [https://perma.cc/Q8WR-HBWB].

⁴³ One U.K. court made the positive case for nonbinary gender rights in terms of the rights to "private life" and "gender identification" protected by the European Convention on Human Rights.

nonbinary gender identities as having the same status as male and female ones. My question is what legal results would follow. This Article's normative argument, advanced in Parts II and III, is that the law has no abiding interest in maintaining a universal scheme of binary sex or gender regulation that would exclude nonbinary people.

A. *The Diversity of Nonbinary Gender Identities*

There is no single model or even archetype of nonbinary gender identity. The following is a brief overview of the diversity of nonbinary gender identities. My purpose is not to offer anything approaching a precise definition of nonbinary gender, nor is it to flatten the diversity of nonbinary genders into a classificatory scheme.⁴⁴ Social media site Facebook offers its U.S. English-language users the option to describe their own gender identities in “a free-form field.”⁴⁵ As one set of survey researchers concluded, the wide array of gender identifiers listed by respondents “speak[s] to the creative project of gender identity creation” and “testifies to resilience, humor, and a spirit of resistance to gender indoctrination and policing.”⁴⁶ Nonbinary people may have any number of relationships to gender, including, to name a few, hybridity, rejection, dynamism, insistence on a third option, subversion, or all of these.⁴⁷

R (on the application of *Elan-Cane v. Sec’y of State for the Home Dep’t* [2018] EWHC (Admin) 1530 [107]–[08], 2018 WL 03093374.

For thoughts on normative theories that might ground claims to nondiscrimination in the U.S. context, see Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2 (2015) (criticizing theories based on immutability and advancing theories based on antisubordination); and Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 377–78 (2014) (listing criteria that might apply to traits covered by discrimination law).

⁴⁴ I use the umbrella term nonbinary following the USTS, JAMES ET AL., *supra* note 2, at 4–5, while recognizing there is controversy over the best umbrella term to describe those people who do not exclusively identify as men or women, as well as controversy over whether an umbrella term is appropriate at all.

If anything, I aim to suggest a “nonce taxonomy” of individualized gender identities. “Nonce” means a term that can be used only once. Cf. EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 23 (1990). Sedgwick wrote of the diversity of desires — each one unique — but “nonce taxonomy” is also an apt descriptor for a discussion of nonbinary gender identities.

⁴⁵ Facebook Diversity, FACEBOOK (Feb. 26, 2015), <https://www.facebook.com/facebookdiversity/posts/774221582674346> [<https://perma.cc/SWN9-NZKZ>]; see also Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 261 (2005) (rejecting the analogy of gender to a “spectrum” and referring to it as a “galaxy”).

⁴⁶ Harrison et al., *supra* note 24, at 20.

⁴⁷ See, e.g., *id.* (“There appears to be no tension for many [survey respondents who wrote in their gender identities] between simultaneously identifying as fluidly gendered, multiply gendered, performing gender, or having no gender.”); Interview by Andrea Jenkins with Alex Iantaffi, Transgender Oral History Project 3 (Oct. 6, 2015) [hereinafter Iantaffi Interview], <https://umedia.lib.umn.edu/sites/default/files/archive/60/application/pdf/1553623.pdf> [<https://perma.cc/HM52-4G2Z>] (describing their gender identity as “non-binary gender-queer trans masculine”); Interview by Andrea Jenkins with Kate Bornstein, Transgender Oral History Project 3 (Aug. 20, 2015) [hereinafter Bornstein Interview], <https://umedia.lib.umn.edu/sites/default/files/archive/60/application/>

Examples of gender hybridity — combining gender roles into non-traditional configurations — might include bigender, pangender, and androgynous identities. For example, during an interview with the Transgender Oral History Project, therapist and scholar Alex Iantaffi described their identity as “mixed”: “not fully masculine, not fully feminine.”⁴⁸ They recall seeing the movie *Flashdance* when they were fourteen years old and identifying with the main character, named Alex, who “had sexual agency, she wears this tuxedo thing at one point, and she is a metal-welding dancer.”⁴⁹ College student Quinn Cox explains: “My gender identity, or how I feel inside, is more masculine, but still not fully male. If being female was like vanilla ice cream and male was like chocolate, I would be chocolate with a tiny vanilla stripe.”⁵⁰

Examples of gender rejection — refusal to adopt traditional gender categories — might include agender, genderless, gender neutral, or unisex identities. For example, as one person explained: “I take agender a bit literally, in that my gender is more about the lack of it. Growing up, I never had that sense of being a guy, girl, or something else. My gender simply isn’t there.”⁵¹ Gender rejection may also be about avoiding stereotyped expectations. Television producer and writer Jill Soloway observes that “when people see me as non-binary, I get treated more as a human being.”⁵² They explain: “I identify as trans, which means that I am not seeking to synthesise my appearance with the label assigned to me at birth and instead am opting to live in a space where a label other than male or female is used to define me.”⁵³

Examples of gender dynamism — gender identities that are not static over time — might include gender fluidity.⁵⁴ A gender fluid person

pdf/1337158.pdf [https://perma.cc/VZ6Z-Y5FH] (“[R]ight now I would call myself non-binary . . . femme-identified transsexual, or transgender . . . [T]here’s my sexual identity . . . I would call that diesel-femme. . . . Then there’s the identity I live every day now and I would call that, ‘little old lady.’ Really.”).

⁴⁸ Iantaffi Interview, *supra* note 47, at 16.

⁴⁹ *Id.*

⁵⁰ Quinn Cox, Opinion, *The Sex “X” Bill*, WESTERN HERALD (Nov. 9, 2017), http://www.westernherald.com/opinion/article_3267eb80-c564-11e7-8548-f77dde6f35e1.html [https://perma.cc/9HYZ-7DJX] (describing their identity as “landing on the genderqueer spectrum”).

⁵¹ Vera Papisova, *What It Means to Identify as Agender*, TEEN VOGUE (Jan. 20, 2016, 9:51 AM), <https://www.teenvogue.com/story/what-is-agender> [https://perma.cc/ACY6-YWSJ] (quoting an unidentified interviewee).

⁵² Hadley Freeman, *Transparent’s Jill Soloway: “The Words Male and Female Describe Who We Used to Be,”* THE GUARDIAN (May 21, 2017, 10:00 AM), <https://www.theguardian.com/tv-and-radio/2017/may/21/transparents-jill-soloway-the-words-male-and-female-describe-who-we-used-to-be> [https://perma.cc/AFM6-ZZTS]. At the same time, Soloway has stated that they are “happy to speak on behalf of women and on behalf of feminism.” *Id.* They “agree that ‘woman’ shouldn’t mean a particular thing.” *Id.*

⁵³ *Id.*

⁵⁴ See, e.g., Harrison et al., *supra* note 24, at 14 (reporting that 20% of 2008 NTDS respondents selected “part time as one gender, part time as another” for their primary gender identity today).

might experience their gender differently at different times.⁵⁵ Actor Amandla Stenberg has said “I don’t think of myself as statically a girl.”⁵⁶ Gender fluid people may feel more male and use “he” pronouns on some occasions and feel more female and use “she” pronouns on others.⁵⁷ Or a person might be working on discovery of their gender identity, conceptualizing it as a journey or process. Professor Petra Doan’s experience of gender fluidity has prompted her to ask “whether one can perform the same gender twice.”⁵⁸ Author, playwright, and scholar Kate Bornstein has described gender fluidity as “the ability to freely and knowingly become one or many of a limitless number of genders, for any length of time, at any rate of change.”⁵⁹

Examples of third genders — categories in addition to man and woman — might include “Two-Spirit (First-Nations)” or “Mahuwahine (Hawaiian),” or any number of other culturally recognized gender forms.⁶⁰ They might include “creative and unique” genders, “such as twidget, birl, OtherWise, and transgenderist.”⁶¹ For example, Jessi Brandon, another participant in the Transgender Oral History Project, identified themselves as “non-binary, although [they] have had thoughts of maybe identifying . . . as a demiboy . . . where you feel partially like a boy but not really.”⁶²

⁵⁵ Laura K. Case & Vilayanur S. Ramachandran, *Alternating Gender Incongruity: A New Neuropsychiatric Syndrome Providing Insight into the Dynamic Plasticity of Brain-Sex*, 78 MED. HYPOTHESES 626, 627 (2012) (studying the experiences of thirty-two bigender people who experience “involuntary” gender switches as frequently as “multiple times a day”).

⁵⁶ Abby Aguirre, *Amandla Stenberg Is a Voice for the Future*, VOGUE (Apr. 19, 2017, 9:01 AM), <https://www.vogue.com/article/amandla-stenberg-interview-gender-feminism-black-culture> [https://perma.cc/JSK2-7PA6].

⁵⁷ Vivian Giang, *What It’s Like to Be Young, Gender Neutral and in the Job Market*, FORTUNE (Oct. 20, 2015), <http://fortune.com/2015/10/20/gender-neutral-fluid-job/> [https://perma.cc/EQU8-2ZY9]; see also *Gender: The Space Between*, *supra* note 18, at 27:45 (interviewing Brendan Jordan and his friends with Jordan explaining that he is not offended when his friends use both “he” and “she” to refer to him).

⁵⁸ Petra L. Doan, *The Tyranny of Gendered Spaces — Reflections from Beyond the Gender Dichotomy*, 17 GENDER, PLACE & CULTURE 635, 639 (2010).

⁵⁹ BORNSTEIN, *supra* note 17, at 52.

⁶⁰ Harrison et al., *supra* note 24, at 14. Some cultures have more than three genders. See, e.g., SHARYN GRAHAM DAVIES, *GENDER DIVERSITY IN INDONESIA: SEXUALITY, ISLAM AND QUEER SELVES* 2, 10–11 (2010) (discussing the Bugis, an ethnic group in South Sulawesi).

⁶¹ Harrison et al., *supra* note 24, at 14 (listing responses to the gender identity question on the 2008 NTDS); *id.* at 20 (describing other write-in genders including “Jest me, skaneellog, . . . gender-treyf, trannydyke genderqueer wombat fantastica, Best of Both, and gender blur”).

⁶² Interview by Andrea Jenkins with Jessi Brandon, Transgender Oral History Project 6 (Nov. 27, 2016) [hereinafter Brandon Interview], <https://umedia.lib.umn.edu/sites/default/files/archive/60/application/pdf/1553882.pdf> [https://perma.cc/S77K-YGFQ].

Examples of subversive genders — gender identities that parody or deconstruct the gender binary — might include genderqueer.⁶³ For example, Bornstein describes their identity as a set of paradoxes, including “not man, not woman,” “lovable freak,” and “[s]mart blonde.”⁶⁴ In response to the question, “What is your primary gender today?,” some 2008 National Transgender Discrimination Survey Respondents wrote that “gender is a performance.”⁶⁵

People with nonbinary identities may view their gender identity, in terms of their inner sense of self, as separate from their gender expression, in terms of their outward appearance.⁶⁶ They may sometimes be perceived as men or women.⁶⁷ High school student Star Hagen-Esquerria, for example, “likes to wear lacy dresses, dramatic cat-eye makeup, and their hair styled in cascading curls. They like to date straight boys. This made coming out as nonbinary harder, more confusing.”⁶⁸

Like transgender men and women, nonbinary people may or may not seek or require medical treatment.⁶⁹ Some nonbinary people may not seek medical treatment because they do not wish to “pass” as men

⁶³ The term “genderqueer” derives from “queer theory,” an academic theory that questions and critiques norms with respect to sex, gender, and sexuality. See Jen Jack Gieseck, *Queer Theory*, in 2 ENCYCLOPEDIA OF SOCIAL PROBLEMS 737 (Vincent N. Parrillo et al. eds., 2008) (describing queer theory); Riki Wilchins, *A Certain Kind of Freedom: Power and the Truth of Bodies — Four Essays on Gender*, in GENDERQUEER: VOICES FROM BEYOND THE SEXUAL BINARY, *supra* note 17, at 23, 27–29 (discussing the term “genderqueer”).

⁶⁴ Bornstein Interview, *supra* note 47, at 6.

⁶⁵ Harrison et al., *supra* note 24, at 20. Other subversive gender identities included “genderfuck, rebel, or radical.” *Id.* The statement “gender is a performance” may be a reference to ideas from queer theory. See *supra* note 63.

⁶⁶ See *supra* note 12 for a definition of “gender expression.”

⁶⁷ JAMES ET AL., *supra* note 2, at 48 (asking nonbinary respondents to the 2015 USTS “what gender they were perceived to be by people who did not know they were non-binary,” and reporting that 58% “assumed they were non-transgender women,” 17% “assumed they were non-transgender men,” and 19% “reported that assumptions about their gender varied”); *id.* at 50 (asking nonbinary respondents “[h]ow often people could tell they were transgender without being told,” and reporting that 6% said “[a]lways or most of the time,” 32% said “sometimes,” and 62% said “[r]arely or never”).

⁶⁸ Jessica Testa, *This 17-Year-Old Could Be the First Teenager to Put Nonbinary on Their Driver's License*, BUZZFEED NEWS (May 27, 2017, 10:04 AM), <https://www.buzzfeed.com/jtes/california-non-binary-gender-identity-recognition> [<https://perma.cc/NU6R-5WMV>].

⁶⁹ See, e.g., James Bellringer, *Surgery for Bodies Commonly Gendered as Male*, in GENDERQUEER AND NON-BINARY GENDERS, *supra* note 27, at 247, 249–50, 261–62 (discussing possible surgical options for nonbinary people); David Ralph et al., *Genital Surgery for Bodies Commonly Gendered as Female*, in GENDERQUEER AND NON-BINARY GENDERS, *supra* note 27, at 265, 267, 280 (same); Andrew Yelland, *Chest Surgeries*, in GENDERQUEER AND NON-BINARY GENDERS, *supra* note 27, at 225, 225–26 (same).

or women.⁷⁰ Others might seek medical treatment so as not to have physical features inconsistent with their gender identities.⁷¹

While nonbinary gender may be most prevalent among younger people, it is not limited to millennials.⁷² In the 2015 U.S. Transgender Survey (USTS), 80% of nonbinary respondents “had female on their original birth certificate, and 20% had male on their original birth certificate.”⁷³ Most nonbinary respondents who reported having transitioned stated that they began their transitions between the ages of eighteen and twenty-four.⁷⁴ Nonbinary people do not share uniform views on political issues, not even those related to transgender rights.⁷⁵ Some nonbinary people are religious.⁷⁶ There is some evidence nonbinary people are less likely to be white and more likely to be multiracial than other transgender people.⁷⁷ They have a variety of sexual orientations,

⁷⁰ See Tim Murphy, *Non-binary Brown Alumni Discuss Life Beyond the Bounds of Gender*, NEWS FROM BROWN (Aug. 15, 2018), <https://news.brown.edu/articles/2018/08/nonbinary> [https://perma.cc/BT7U-36DK] (interviewing Dréya St. Clair (“I actually had started meeting trans women of color not on campus but in the broader Providence community, in clubs, and some of them were pressuring me into taking hormones, telling me that I had soft features and that I could easily transition and pass on the streets. But I didn’t want that. I was saying, ‘I’m a boy who’s feminine and dresses like a girl and there’s nothing wrong with that.’ And I’ve stayed on that course ever since.”)).

⁷¹ Colby Sangree, *A Non-binary Perspective on Top Surgery*, HUFFINGTON POST (Mar. 23, 2017), https://www.huffingtonpost.com/entry/a-non-binary-perspective-on-top-surgery_us_58d27b27e4b062043ad4ae76 [https://perma.cc/K552-DBB5] (discussing reasons for seeking “top surgery”: “Everyone in my life told me that growing breasts defined femininity. No longer could I remain a tomboy — genderfluid, free to express myself — I was on my way to a forced womanhood”).

⁷² JAMES ET AL., *supra* note 2, at 46 (reporting that 61% of nonbinary respondents to the 2015 USTS were aged eighteen to twenty-four, 35% were aged twenty-five to forty-four, and 5% were forty-five or older).

⁷³ *Id.* at 45.

⁷⁴ See *id.* at 48 (reporting that 24% of nonbinary respondents transitioned under the age of eighteen, 56% between the ages of eighteen and twenty-four, 16% between the ages of twenty-five and thirty-four, and 4% at the age of thirty-five or over). The survey defined transitioning as “living full-time in a gender other than that on their original birth certificate.” *Id.*

⁷⁵ For example, Jamie Shupe, the first person to win a U.S. court order changing their sex designation to nonbinary, has argued there can be “problems with transgender military service.” Jamie Shupe, *This Debate Is About Gender Dysphoria, Not Transgender Military Service*, MERCATORNET (Aug. 1, 2017), <https://www.mercatornet.com/conjugality/view/this-debate-is-about-gender-dysphoria-not-transgender-military-service/20168> [https://perma.cc/WL8H-GJ6A] (“President Trump is seriously mistaken in putting a blanket ban on transgender military service because not every trans service member is impacted by gender dysphoria. Neither does every trans person need to transition their sex. But the President and those that share his views are not completely wrong.”).

⁷⁶ Wail Qasim, *Being a Black, British, Queer, Non-binary Muslim Isn’t a Contradiction*, THE GUARDIAN (June 20, 2016, 4:00 AM), <https://www.theguardian.com/commentisfree/2016/jun/20/black-british-queer-non-binary-muslim-isnt-contradiction> [https://perma.cc/Z5VH-W8SL]; Brandon Interview, *supra* note 62, at 11 (“One of my main concerns was finding a place where I could be out as queer but I could also be a Christian and talk about how my queerness and my religion intersect . . .”).

⁷⁷ Harrison et al., *supra* note 24, at 18–19 (reporting that those selecting “gender not listed here” on the 2008 NTDS were 70% white, compared with 77% of other respondents; 18% multiracial,

although only 2% identify as “[s]traight or heterosexual.”⁷⁸ Some survey evidence suggests that this population has a significantly higher level of educational attainment than average, but a lower household income.⁷⁹ They may be more likely to live on the coasts and in the Northeast than transgender men and women.⁸⁰

B. Reasons for Bias Against Nonbinary People

Nonbinary people report that they face harassment, violence, and discrimination, with adverse health consequences. Out of nonbinary respondents to the 2015 USTS, 39% had attempted suicide, compared with 4.6% of the general population.⁸¹ This may relate to other findings of the survey — that nonbinary people experience high rates of discrimination, family rejection, harassment, and assault.⁸² Nonbinary people may encounter mistreatment for a variety of reasons, including disbelief in nonbinary identity, erasure of nonbinary experiences, dehumanization of those who do not fit conventional gender categories, concern that nonbinary people will undermine traditional gender roles, and politicization of nonbinary identity in a time of increasing polarization.

Bias against nonbinary people often takes the form of disbelief, disregard, disrespect, and paternalism. Nonbinary people report that one of the most common reasons for bias against them is the belief that they are insincere and attention seeking,⁸³ or that nonbinary identity is a

compared with 11% of other respondents; 5% Black, compared with 4% of other respondents; 3% Asian, compared with 2% of other respondents, and 4% Latino/a, compared with 5% of other respondents).

⁷⁸ JAMES ET AL., *supra* note 2, at 59 (reporting that, among nonbinary respondents to the 2015 USTS, 34% identify as queer, 21% identify as pansexual, 17% identify as asexual, 10% identify as bisexual, 8% identify as gay, lesbian, or same-gender-loving, 2% as straight or heterosexual, and 8% as an orientation not listed).

⁷⁹ Harrison et al., *supra* note 24, at 19–20. The 2008 NTDS respondents in general had a higher level of educational attainment than the general population. *Id.* at 20.

⁸⁰ *Id.* at 19.

⁸¹ JAMES ET AL., *supra* note 2, at 114; *see also id.* at 105 (49% of nonbinary people reported current, serious psychological distress).

⁸² *Id.* at 76 (32% reported family rejection since transitioning); *id.* at 133–34 (16% reported being physically attacked and 10% reported being sexually assaulted in K–12 schools because of the perception that they were transgender); *id.* at 135 (15% left a K–12 school because of mistreatment); *id.* at 150 (7% lost a job because of their gender identity or expression); *id.* at 186 (71% reported that they were never or only sometimes treated with respect by law enforcement).

⁸³ Papisova, *supra* note 51 (“For Mya, the biggest misconception they face about their gender identity is ‘definitely that it doesn’t exist, or that I’m just trying to get attention.’”); Brandon Interview, *supra* note 62, at 12 (describing the response: “They’re just being special snowflakes who want attention”). Psychologists regard it as unlikely that claiming a nonbinary gender is attention-seeking behavior. *See* STEPHANIE BRILL & LISA KENNEY, THE TRANSGENDER TEEN: A HANDBOOK FOR PARENTS AND PROFESSIONALS SUPPORTING TRANSGENDER AND NON-BINARY TEENS 14 (2016) (“Being . . . non-binary . . . is a difficult road to walk. . . . If your teen simply wanted to annoy you or try to get your undivided attention with their gender, they would likely do

trend or a political posture.⁸⁴ Some opponents of nonbinary recognition argue that science and religion demonstrate that everyone is either a man or a woman, and the idea of a third gender is “ridiculous,” “nonsense,” “insane,” “absurd,” and the result of “brainwash[ing].”⁸⁵ Another common reaction is that nonbinary identities should not be respected because those identities are a developmental phase, a result of confusion, or a form of experimentation.⁸⁶ Relatedly, bias against nonbinary people is often rooted in paternalism: beliefs by medical professionals, family members, and educators that nonbinary people must be protected from themselves, lest they make choices they will come to regret, such as medical intervention, or that will expose them to tragic and irreversible social consequences.⁸⁷

Yet another form of bias is erasure — a sense of “feeling like the debris that is falling through the cracks” of policies aimed at transgender inclusion.⁸⁸ Some nonbinary people may be criticized for “not being trans enough” and left out of networks of support for transgender people.⁸⁹ Mistreatment of nonbinary people may sometimes result from

what teens have done for generations and use gender expression to assert their individuality and independence (think hair, makeup, clothing styles).”).

⁸⁴ See, e.g., Trav Mamone, *9 Things Not to Say to a Non-binary Person*, EVERYDAY FEMINISM (Feb. 15, 2017), <https://everydayfeminism.com/2017/02/things-not-to-say-non-binary-ppl/> [<https://perma.cc/SGL6-ZFNY>] (discussing people “who want to write off anything that doesn’t fit the binarist view of gender as ‘made up’” and the false charge that the social media site Tumblr “invented” nonbinary gender).

⁸⁵ Just Want Privacy, *Oppose 3rd Gender Option on WA Birth Certificates*, FACEBOOK (Dec. 5, 2017), <https://www.facebook.com/events/967556456753263/> [<https://perma.cc/2SMH-L3FX>] (quotations from a public Facebook page collecting comments on Washington State’s rule to allow a nonbinary designation on birth certificates).

⁸⁶ At the hearing for recognition of Star Hagen-Esquerra’s nonbinary gender identity, the judge asked them if they were making an impulsive decision. Hagen-Esquerra, an AP student, responded, “I’ve never made an impulsive decision in my entire life.” Testa, *supra* note 68; see also *Gender Identity: Female, Male, or Nonbinary: Hearing on S.B. 179 Before the Assemb. Standing Comm. on Transp.*, 2017–2018 Leg., Reg. Sess. (Cal. 2017) [hereinafter *Cal. Assemb. Transp. Hearing*] (statement of Jonathan Clay), <https://ca.digitaldemocracy.org/hearing/54049?startTime=0&vid=acf9eb2f37a98dafa47cac34d69378d8> [<https://perma.cc/ZC5J-VRR7>] (“We’ve been asked many times, is this a phase for our child? And the answer’s no. I mean, since a very early age, it’s now, looking back, been pretty apparent, that this was . . . the path our child is taking.”).

⁸⁷ Parents of transgender children commonly report concern that their children will never find romantic love, will be targeted for violence and discrimination, or will engage in self-harm. BRILL & KENNEY, *supra* note 83, at 19–20.

⁸⁸ Interview by Andrea Jenkins with Roze (R.B.) Brooks, Transgender Oral History Project 11 (Nov. 3, 2016) [hereinafter Brooks Interview], <https://umedia.lib.umn.edu/sites/default/files/archive/60/application/pdf/1553885.pdf> [<https://perma.cc/K5YB-PZM9>].

⁸⁹ Genny Beemyn, *Get Over the Binary: The Experiences of Nonbinary Trans College Students*, in TRANS PEOPLE IN HIGHER EDUCATION (Genny Beemyn ed., forthcoming 2019) (manuscript at 251) (on file with the Harvard Law School Library) (discussing nonbinary interviewees who were assigned male at birth and were “frequently critiqued by both cis and other trans people on how well they ‘do transgender’”).

ignorance or misunderstanding.⁹⁰ Policymakers may sometimes refuse to entertain the claims of nonbinary people because they believe it is only “a very small number of people” that “consider themselves to be of neither gender.”⁹¹ A related form of discrimination is insistence that nonbinary people hide, “cover,” or downplay their nonbinary identities so as not to disrupt their schools or workplaces.⁹² Many nonbinary people report that they often let strangers assume they are men or women, rather than spend their time trying to explain nonbinary gender identities.⁹³ Nonbinary respondents to the 2015 USTS were almost twice as likely as other transgender respondents to avoid asking their employers to use their correct pronouns.⁹⁴

Other reactions to nonbinary identities may be dehumanizing. The moment the sonogram technician proclaims “It’s a girl!” or “It’s a boy!” may be the moment someone is first recognized as human.⁹⁵ Some people regard as monstrous “that which eludes gender definition.”⁹⁶ They may react with discomfort, disgust, or anger, feeling that a nonbinary person is trying to deceive them.⁹⁷ Nonbinary people may be targeted

⁹⁰ Misunderstandings abound; there is an entire genre of online news articles that lists them. See, e.g., Suzannah Weiss, *9 Things People Get Wrong About Being Non-binary*, TEEN VOGUE (Feb. 15, 2018, 4:56 PM), <https://www.teenvogue.com/story/9-things-people-get-wrong-about-being-non-binary> [https://perma.cc/NDR5-3TSZ]; Meg Zulch, *7 Things Genderqueer People Want You to Know*, BUSTLE (Dec. 3, 2015), <https://www.bustle.com/articles/124009-7-things-genderqueer-people-want-you-to-know> [https://perma.cc/TA5M-YNZ9].

⁹¹ Bergman & Barker, *supra* note 31, at 36 (quoting a U.K. Ministry of Justice statement that it is “not aware that that results in any specific detriment” to this group).

⁹² JAMES ET AL., *supra* note 2, at 155 (reporting that 14% of nonbinary respondents to the USTS hid their “past transition to avoid discrimination in the past year”); Giang, *supra* note 57 (quoting one nonbinary job seeker: “I fear I and many other people may have to hide an essential part of who we are — our genders — in order to find jobs”). See generally KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* ix (2006) (“To cover is to tone down a disfavored identity to fit into the mainstream.”).

⁹³ JAMES ET AL., *supra* note 2, at 49 (finding that 44% of nonbinary respondents to the 2015 USTS “usually let others assume they were a man or woman, and 53% sometimes corrected others”). The most common reasons for not disclosing a nonbinary identity were: “[m]ost people do not understand so they do not try to explain it” (86%), “[i]t is easier not to say anything” (82%), “[m]ost people dismiss it as not being a real identity or a ‘phase’” (63%), and “[t]hey might face violence” (43%). *Id.*

⁹⁴ *Id.* at 154.

⁹⁵ See JUDITH BUTLER, *BODIES THAT MATTER* 232 (1993).

⁹⁶ PETER BROOKS, *What is a Monster? (According to Frankenstein)*, in *BODY WORK* 199, 219 (1993) (“Because a monster is that which calls into question all our cultural codes, including language itself, we can understand the persistent afterlife of Mary Shelley’s creation, which shows us that, quite literally, once you have created a monster, whatever the ambiguities of the order of its existence, you can never get rid of it.”); cf. Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, 1 *GLQ: J. LESBIAN & GAY STUD.* 237, 250 (1994) (“Like [Mary Shelley’s] creature, I assert my worth as a monster in spite of the conditions my monstrosity requires me to face, and redefine a life worth living.”).

⁹⁷ Doan recalls an incident of street harassment in which a man confronted her with “smouldering anger” and “started yelling ‘I know what you are! You can’t fool me! You are disgusting!’” Doan, *supra* note 58, at 640.

for violence and assault because they are perceived as both socially vulnerable and without human feeling and dignity.⁹⁸ Nonbinary gender identities may unleash moral panic because they call into question accepted social norms about gender identity.⁹⁹ One agender person reports regularly being told to “throw myself on the tracks” when waiting for a subway train.¹⁰⁰ People may fear that those who are willing to transgress social norms with respect to binary gender may also be willing to transgress other social boundaries, posing threats to safety.¹⁰¹ Or they may fear contagion. One nonbinary trans man reports that his father kicked him out of the house for fear that he would influence his younger sister to “be gay or be trans.”¹⁰²

Investments in binary gender may also drive animus against nonbinary people. Those who celebrate and cherish gender difference may fear that nonbinary identities will render their views politically incorrect or even legally impermissible.¹⁰³ They may worry that binary gender will become a minority perspective that is no longer the default position respected by public discourse or institutions. Additionally, those who are privileged because they fall on the masculine side of the gender binary may fear a loss of that privilege if gender were reconceived as a free-form range of possibilities. Or, those whose feminine identities afford them particular forms of privilege — such as access to all-female social spaces or awards — may fear the intrusion of nonbinary people, the dilution of benefits as nonbinary people insist on spaces for themselves, or the dissolution of the very categories of women or femininity.¹⁰⁴

⁹⁸ Doan tells about an incident in which a drunken man in an elevator groped her breasts, expecting to find them false. *Id.* at 641. What was most hurtful about the assault was that the man had a female companion, which had “lulled” Doan “into feeling safe.” *Id.* Doan writes, “I am fairly certain that if he had tried to fondle a female whose femininity was unimpeachable, his companion would probably have pulled him back in horror. . . . This incident simply drove home the point that people whose gender does not seem quite right are fair game for all manner of treatment.” *Id.*

⁹⁹ See Tucker Carlson, *Are “Gender-Neutral” Babies the Future?*, FOX NEWS (July 17, 2017), <http://video.foxnews.com/v/5510847908001/?#sp=show-clips> [<https://perma.cc/FU8K-YQGY>] (“Well for all of our lives we’ve lived in a world of boys and girls but that is changing along with everything else in 2017. . . . Are we ready for a world here where baby boys and girls are replaced by baby somethings?”). For discussion of moral panics, see generally STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS* (1972).

¹⁰⁰ *Gender: The Space Between*, *supra* note 18, at 7:00 (interviewing Brin Solomon).

¹⁰¹ Cf. Kath Browne, *Genderism and the Bathroom Problem: (Re)materialising Sexed Sites, (Re)creating Sexed Bodies*, 11 GENDER, PLACE & CULTURE 331, 336–38 (2004) (discussing experiences of the “bathroom problem” “where individuals are challenged in toilet spaces and their gender questioned,” *id.* at 336–37, and hypothesizing that “where bodies are revealed as unstable and porous, flowing between sexes may be more threatening,” *id.* at 338).

¹⁰² *Gender: The Space Between*, *supra* note 18, at 2:34 (interviewing Quinn Diaz).

¹⁰³ See *Cal. Assemb. Transp. Hearing*, *supra* note 86 (statement of Michael McDermott) (opposing California’s Gender Recognition Act because “the purpose of political correctness is neither to inform nor to educate, but rather to humiliate”).

¹⁰⁴ See Jessica Chasmar, *Girls Complain After “Non-binary” Boy [sic] Is Crowned Prom Queen in NYC*, WASH. TIMES (June 29, 2016), <https://www.washingtontimes.com/news/2016/jun/29/high->

General trends of increasing political polarization may increase hostility toward nonbinary people, who may be figured as emblems of the left's position on gender roles. Opposition to nonbinary gender identity may result in intentional "misgendering": the refusal to refer to a person by the correct pronouns or other gender designations.¹⁰⁵ Nonbinary people may be stereotyped as "difficult."¹⁰⁶ Underlying this concern may be a fear of causing social offense by using the wrong terms.¹⁰⁷ Nonbinary people may be associated with controversial ideas in higher education, such as "trigger warnings" or "political correctness."¹⁰⁸

C. *Convergences and Divergences with Other Rights Struggles*

Advocates of nonbinary recognition have framed their case in terms of universal values such as self-determination, love, safety, privacy, human flourishing, inclusion, and respect.¹⁰⁹ This section begins to map out some of the connections between the movement for nonbinary gender rights and feminist, LGBT, intersex, antiracist, and postcolonial

school-girls-complain-after-non-binary-boy-is/ [https://perma.cc/WB6N-CY8J] (discussing negative reactions on social media). *But see* Zoe Sullivan, *Wisconsin High School to Unveil Gender-Neutral Homecoming Court*, THE GUARDIAN (Oct. 16, 2015, 7:00 AM), https://www.theguardian.com/us-news/2015/oct/16/wisconsin-high-school-to-unveil-gender-neutral-homecoming-court [https://perma.cc/SY3S-WGYL] ("A high school in Wisconsin is poised to unveil a gender-neutral homecoming court after nearly half the student body signed a petition calling for changes to the court's structure. . . . Instead of being crowned 'king' or 'queen', the top vote earners at Madison West will be able to choose their titles.").

¹⁰⁵ Misgendering may also be negligent or accidental. Nonbinary people sometimes report that a consequence of accidental misgendering is a demand that the nonbinary person forgive and console the person who made the mistake. *See, e.g.*, Mamone, *supra* note 84; Paulus van Horne, *Introducing Myself as "They/Them/Their" at My Workplace*, at 19:58, PUB. RADIO INT'L (Aug. 8, 2016, 11:00 AM), https://www.pri.org/stories/2016-08-08/so-what-are-your-pronouns [https://perma.cc/WQK6-GNFD] (interview with Jack Qu'emi) ("You don't need to make a big deal about it. . . . I had somebody misgender me and then cry in front of me about it. I was uncomfortable . . .").

¹⁰⁶ Bergman & Barker, *supra* note 31, at 37.

¹⁰⁷ *See supra* note 105.

¹⁰⁸ Bergman & Barker, *supra* note 31, at 37.

¹⁰⁹ *See, e.g.*, *Cal. Assemb. Judiciary Hearing*, *supra* note 1 (statement of Cristina Garcia, Member, Assemb. Standing Comm. on Judiciary) (responding to an opponent of the Gender Recognition Act: "I do hope that as we move forward, we come from a place of love, a place of understanding, and a place where we let individuals decide for themselves what they need"); *id.* (statement of Ash Kalra, Member, Assemb. Standing Comm. on Judiciary) (arguing in support of the Gender Recognition Act as a way to "stand on the side of ensuring that we create not just a safe community for all but one in which everyone can live their full potential and live their lives in a way that allows them to be loved and supported by their community"); Press Release, Exec. Office of the Mayor of D.C., Mayor Bowser Announces Addition of Gender Neutral Identifier to Drivers Licenses and Identification Cards (June 23, 2017), https://mayor.dc.gov/release/mayor-bowser-announces-addition-gender-neutral-identifier-drivers-licenses-and [https://perma.cc/V4VS-8AYT] (quoting a Washington, D.C., official: "The implementation of a gender neutral identifier is consistent with our DC values of inclusion and respect").

advocacy, with an emphasis on legal arguments.¹¹⁰ It is beyond the scope of this Article to canvass these connections in any comprehensive way. This section intends to provide an overview of some potential convergences and divergences among the legal interests of these identity movements. Its aim is to illustrate that nonbinary gender identity is worthy of independent analysis and has broad implications.

1. *Feminist Arguments.* — Feminist theory of the late twentieth century criticized binary concepts of gender, and those critiques found limited uptake in the law. Nonbinary gender rights advocacy today both draws on feminist arguments and diverges from them, opening new legal possibilities.

Early feminist critiques of binary gender were built on a distinction between sex as physical and gender as social.¹¹¹ In 1975, cultural anthropologist Gayle Rubin criticized the “sex/gender system,” which she analogized to Marx’s explanation of the relationship between race and slavery.¹¹² Rubin argued for critical analysis of the “social apparatus which takes up females as raw materials and fashions domesticated women as products.”¹¹³ She described how kinship systems, resting on “[c]ompulsory heterosexuality,”¹¹⁴ organized social life and production around marriage and “the sexual division of labor,” making men dominant breadwinners and women subordinate caretakers.¹¹⁵ This system rests on “a taboo against the sameness of men and women, a taboo dividing the sexes into two mutually exclusive categories, a taboo which exacerbates the biological differences between the sexes and thereby *creates* gender.”¹¹⁶ Thus, Rubin made the case for freeing women from the constraints of subordination. But her theory was also about broader gender freedom. She concluded: “Ultimately, a thoroughgoing feminist revolution would liberate more than women. It would liberate forms of sexual expression, and it would liberate human personality from the straightjacket of gender.”¹¹⁷

¹¹⁰ These topics were selected due to the extent of their overlap with nonbinary rights claims, but that is not to deny that there may also be useful intersections to explore with respect to disability, class, age, religion, and other identities.

¹¹¹ See, e.g., Donna J. Haraway, “Gender” for a Marxist Dictionary: *The Sexual Politics of a Word*, in *CULTURE, SOCIETY AND SEXUALITY: A READER* 82, 86–89 (Richard Parker & Peter Aggleton eds., Routledge 2d ed. 2007) (1999).

¹¹² See Gayle Rubin, *The Traffic in Women: Notes on the “Political Economy” of Sex*, in *TOWARD AN ANTHROPOLOGY OF WOMEN* 157, 158–59 (Rayna R. Reiter ed., 1975).

¹¹³ *Id.* at 158.

¹¹⁴ *Id.* at 198. This term was popularized in an essay by Adrienne Rich. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 *SIGNS: J. WOMEN CULTURE & SOC’Y* 631 (1980).

¹¹⁵ Rubin, *supra* note 112, at 178.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 200.

Twentieth-century feminists debated whether this liberation would result in a sort of idealized androgyny, where all individuals combine the best of both masculine and feminine traits,¹¹⁸ or in an unbounded diversity of gender identities, with each person determining their own reconfigurations of masculinity and femininity, and other genders off the spectrum.¹¹⁹ Fiction, like Ursula Le Guin's novel *The Left Hand of Darkness*, assisted in the project of imagining different configurations of gender.¹²⁰

At the same time, feminist lawyers pursued legal strategies that attempted to chip away at legally enforced sex roles for men and women, stereotype-by-stereotype, rather than engaging in wholesale critique of binary gender.¹²¹ In these cases, men challenged rules that assumed that only women would be caretakers,¹²² and women challenged rules that assumed only men would be breadwinners.¹²³ Today, the U.S. Supreme Court is skeptical of laws that classify on the basis of sex, requiring that they be supported by an "exceedingly persuasive justification."¹²⁴ That justification must hold up by present-day standards.¹²⁵ The Supreme Court's sex-stereotyping jurisprudence protects gender nonconformists: for example, women who want to attend military academies and men

¹¹⁸ Compare CAROLYN G. HEILBRUN, TOWARD A RECOGNITION OF ANDROGYNY, at ix–x (1973) ("[O]ur future salvation lies in a movement away from sexual polarization and the prison of gender toward a world in which individual roles and the modes of personal behavior can be freely chosen."), with Joan W. Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD. 33, 45 (1988) (arguing that the problem with "subsuming women into a general 'human' identity" is that it brings us back "to the days when 'Man's' story was supposed to be everyone's story").

¹¹⁹ See, e.g., Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1578 (1983) ("Rather than shades of grey as an alternative to all black and all white, I envision reds and greens and blues.").

¹²⁰ URSULA K. LE GUIN, *THE LEFT HAND OF DARKNESS* (1969) (depicting, in science fiction, an androgynous species in which individuals move back and forth between male and female reproductive roles). For a different fictional vision of androgyny, see MARGE PIERCY, *WOMAN ON THE EDGE OF TIME* (1976).

¹²¹ See, e.g., Cary Franklin, *The Anti-stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 120 (2010).

¹²² See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648–53 (1975) (holding unconstitutional a Social Security rule that provided benefits to mothers but not fathers).

¹²³ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 688–91 (1973) (plurality opinion) (holding unconstitutional a statutory requirement that female officers, but not male officers, needed to prove the dependency of their spouse in order to receive benefits).

¹²⁴ *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (quoting *United States v. Virginia*, 518 U.S. 515, 531 (1996)).

¹²⁵ *Id.* ("Moreover, the classification must substantially serve an important governmental interest today, for 'in interpreting the [e]qual [p]rotection [guarantee], [we have] recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.'" (alterations and omission in original) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015))).

who want to attend nursing schools.¹²⁶ Even without the Court's direction, the antistereotyping principle has succeeded in convincing legislatures to remove sex classifications from the statute books.¹²⁷

But the force of the antistereotyping principle has been limited. The Court has distinguished laws based on "overbroad generalizations about the different talents, capacities, or preferences of males and females" from those sex classifications based on the "enduring" nature of "[p]hysical differences between men and women."¹²⁸ Thus, equal protection challenges against laws that forbid women, but not men, to bare their chests, have had mixed success.¹²⁹ Courts have refused to upset sex-specific rules they regard as reflecting "comfortable gender conventions" and having a trivial impact on women, such as job requirements that women, but not men, wear makeup.¹³⁰ And courts have upheld policies that consider sex for affirmative action purposes.¹³¹

In the twentieth century, the more radical feminist project of re-envisioning gender identity to include genders that are not male or female ran into opposition. Conventional wisdom is that everywhere one looks, one sees human life sorted into male and female categories — with counterexamples written off as exceptions to the rule.¹³² The

¹²⁶ *Virginia*, 518 U.S. at 534 (holding that the exclusion of women from the Virginia Military Institute was unconstitutional); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729–31 (1982) (holding unconstitutional a policy of excluding men from a nursing school because it "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job," *id.* at 729).

¹²⁷ For example, although the Supreme Court in 1981 upheld a state statute defining statutory rape as sexual intercourse by a male with a female, *Michael M. v. Superior Court*, 450 U.S. 464, 472–73 (1981), all U.S. states have since amended their laws to apply to anyone who has sex with a minor, Carolyn Cocca, "16 Will Get You 20": *Adolescent Sexuality and Statutory Rape Laws*, in *ADOLESCENT SEXUALITY: A HISTORICAL HANDBOOK AND GUIDE* 15, 21 (Carolyn Cocca ed., 2006). Though the statutes may be gender neutral, it is important to note they are selectively enforced along gendered lines. See Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 204 (2017).

¹²⁸ *Virginia*, 518 U.S. at 533; see also *id.* at 550 n.19 (noting that physical differences between male and female cadets "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs"). In 2001, the Supreme Court upheld an immigration rule that "require[d] unwed U.S.-citizen fathers, but not mothers, to formally acknowledge parenthood of their foreign-born children in order to transmit their U.S. citizenship to those children." *Morales-Santana*, 137 S. Ct. at 1694 (discussing *Nguyen v. INS*, 533 U.S. 53, 62–63 (2001)). The explanation: because of the physical nature of pregnancy, a woman's parental status is established when she gives birth, while an unwed father's connection to a child requires some additional evidence. *Id.*

¹²⁹ Compare *Free the Nipple v. City of Fort Collins*, 216 F. Supp. 3d 1258, 1264–66 (D. Colo. 2016) (denying a motion to dismiss plaintiff's equal protection challenge), with *Tagami v. City of Chicago*, 875 F.3d 375, 380 (7th Cir. 2017) (upholding, in a divided decision, a law that allows men, but not women, to bare their breasts against equal protection challenge).

¹³⁰ YURACKO, *supra* note 30, at 45.

¹³¹ See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 619–20 (1987) (Title VII challenge); *Schlesinger v. Ballard*, 419 U.S. 498, 499–500, 510 (1975) (constitutional challenge).

¹³² See Joan C. Williams, *Feminism and Post-Structuralism*, 88 MICH. L. REV. 1776, 1778 (1990) (reviewing ZILLAH R. EISENSTEIN, *THE FEMALE BODY AND THE LAW* (1988)) (arguing that

critique of binary gender is often reduced to straw figures easily dismissed. For example, critics charge that feminists deny biological facts about sexual dimorphism in the human species or deny biology altogether.¹³³ Critics assume the only alternative is an impossible form of gender blindness or a tyrannical form of gender abolition.¹³⁴

Some advocates for nonbinary people today frame their arguments in terms that recall Rubin's idea of "liberat[ing] human personality from the straightjacket of gender."¹³⁵ These new arguments emphasize the liberty and autonomy of each individual with respect to gender, rather than the potential for subordination in dualisms like male/female.¹³⁶ They also emphasize authenticity.

Consider the case brought by Dana Zzyym challenging the State Department's policy of requiring an applicant to mark either M or F on a passport application.¹³⁷ Zzyym is intersex¹³⁸ and nonbinary¹³⁹ and uses they/them pronouns.¹⁴⁰ Zzyym requested a passport with an X as the sex designation, and the State Department denied that request.¹⁴¹ The district court ruled for Zzyym, holding that the State Department's "gender policy is arbitrary and capricious and not the product of rational decision making."¹⁴² While the court's decision did not discuss the

theory cannot dissuade people, rather, feminists need "detailed redescription" in the form of "psychological data that allows us to see how a continuum of behavior variation is so consistently interpreted as a male/female dichotomy" in order to "help[] people recognize the artificiality of the gender verities they 'see' at work around them").

¹³³ Many feminist arguments have been "interactionist": about the relationship between biology and culture, not a denial of biology. Haraway, *supra* note 111, at 87.

¹³⁴ Suzanne B. Goldberg, Essay, *Risky Arguments in Social-Justice Litigation: The Case of Sex-Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2089, 2133 (2014) (arguing that judges may have "an internalized sense . . . that if sex-based rules were not tolerated on occasion, we would all wind up in unisex tunics, having lost our sexed and gendered bearings," *id.* at 2133); Joan Williams, *Implementing Antiessentialism: How Gender Wars Turn Into Race and Class Conflict*, 15 HARV. BLACKLETTER L.J. 41, 81 (1999) ("We live in a world where most people feel awkward if they don't know whether you are a 'he' or a 'she.' A world where gender was as unimportant as eye color, many people feel, would leave them literally speechless. (The alternative of inventing a new language, which holds considerable appeal for intellectuals, probably holds little appeal for most people.)").

¹³⁵ Rubin, *supra* note 112, at 200.

¹³⁶ See, e.g., *Cal. Assemb. Judiciary Hearing*, *supra* note 1 (statement of Carly Mitchell) ("We need autonomy over our own bodies and minds, which means we need doctors taken out of this process.").

¹³⁷ *Zzyym v. Pompeo*, No. 15-cv-02362, 2018 WL 4491434, at *1 (D. Colo. Sept. 19, 2018).

¹³⁸ *Id.*

¹³⁹ Reporter's Transcript Hearing on Pending Motions at 7, *Zzyym v. Kerry*, 220 F. Supp. 3d 1106 (D. Colo. 2016) (No. 15-cv-02362) [hereinafter *Zzyym Transcript*].

¹⁴⁰ *Id.*

¹⁴¹ *Zzyym*, 2018 WL 4491434, at *1.

¹⁴² *Id.* at *8. The court also held that the State Department had exceeded its statutory authority, because "[t]he authority to issue passports and prescribe rules for the issuance of passports under 22 U.S.C. § 211a does not include the authority to deny an applicant on grounds pertinent to basic identity, unrelated to any good cause as described in" Supreme Court precedents. *Id.* at *9.

nature of the harm to Zzyym, Zzyym's rights claims were plainly important. The government's lawyer accused Zzyym of "cause litigation," arguing they were "asking the Court to upset the traditional binary that pervades our society."¹⁴³ The accusation of "cause litigation" suggests that theoretical arguments against binary gender are not persuasive, perhaps because they are political rather than legal. The government further argued that the passport "is not a matter of self-expression," rather, it "is a government form."¹⁴⁴

The judge, however, asked questions suggesting the issue was the right of nonbinary people to travel internationally, without having to misrepresent their identities by selecting inaccurate F or M designations.¹⁴⁵ This argument stakes a claim to a type of liberty, but not in the thin sense of freedom of choice. It asserts that nonbinary people should not be forced to adopt a binary sex category that is a lie. As California Senator Scott Wiener explained in support of the Gender Recognition Act: "[W]e want people to live their authentic lives as who they are, and this is simply removing a government barrier."¹⁴⁶ Senator Wiener connected the Gender Recognition Act to the feminist critique of binary gender:

We have a history in this country and in this world of forcing people into gender roles. Whether it's forcing women to be a certain way in life or forcing young boys to be a certain way or forcing all manner of people to be who society says they are as opposed to who they actually are.¹⁴⁷

While nonbinary gender rights claims may build on feminist arguments, it is important to note potential areas of divergence between feminist and nonbinary gender advocacy. Some feminists may be concerned that expanding the space outside binary gender will trade off with efforts to expand what it means to be a woman.¹⁴⁸ Others may believe sex discrimination law should challenge only the most egregious forms of subordination of women, rather than pursuing the libertarian project

¹⁴³ Zzyym Transcript, *supra* note 139, at 45.

¹⁴⁴ *Id.* at 52.

¹⁴⁵ *See, e.g., id.* at 14 (question from Judge Jackson asking the lawyer for the government to respond to the concern that a "person with . . . ambiguous genitalia, who is neither male or female, can't leave the country because you have to have the passport to get out legally, can't leave the country unless they lie. And by lie, they check 'F' or they check 'M.'").

¹⁴⁶ *Cal. Assemb. Judiciary Hearing, supra* note 1 (statement of Sen. Scott Wiener).

¹⁴⁷ *Id.*; *see* Brandon Interview, *supra* note 62, at 13 ("[T]o me, really, identifying as non-binary is really a rather cool notion because you're basically looking at centuries worth of this enforced expectation of the gender you were assigned at birth and just saying, 'Screw that, that's not how I feel, this is how I feel and I want this to be respected.'").

¹⁴⁸ *Cf.* Freeman, *supra* note 52 (discussing an interview with nonbinary writer and director Jill Soloway in which the interviewer voiced the concern "that the definition of a woman should be broader, as they have shown in their work. To retreat from being called a woman feels as if they are giving up the field").

of releasing all people from the straightjacket of gender.¹⁴⁹ And others have criticized moves toward gender neutrality on the ground that, due to the unique forms of subordination experienced by people who were socialized as women, certain spaces or opportunities should be reserved for only those who were assigned female at birth.¹⁵⁰ In debates over nonbinary gender rights, some radical feminists have expressed concerns about the “implications . . . for the safety, privacy, and bodily integrity of women and girls.”¹⁵¹

Other feminists have drawn upon transgender experiences without concern about how feminist projects would affect transgender people.¹⁵² Feminists have been criticized for reducing transgender people to useful examples, rather than subjects in their own right. In the 1990s, Riki Wilchins described the evolution of academic approaches to transgender people as one in which “psychiatrists” first cast them as “patients,” and “[t]hen came the feminist theorists who — while erasing our own voices, and without soiling their pages with the messy complexities of our lived experience — appropriated us as illustrations for their latest telling theories or perceptive insights. We had become examples.”¹⁵³ A feminist movement focused on expanding the social space for gender nonconforming women or men does not necessarily make space for those who cast off those labels altogether.

As nonbinary people become increasingly visible, their existence may work to undermine the conventional wisdom that gender identities are binary and that sex-specific rules are largely inoffensive. The circulation of narratives about nonbinary people trying to navigate social and

¹⁴⁹ See YURACKO, *supra* note 30, at 23–24 (describing how this view influences legal doctrine in the context of “sex-based grooming codes”).

¹⁵⁰ For an example of this genre of “radical feminist” writing, see Sheila Jeffreys, *The Politics of the Toilet: A Feminist Response to the Campaign to “Degender” a Women’s Space*, 45 WOMEN’S STUD. INT’L F. 42, 42 (2014). For background on arguments raised by radical feminists such as Jeffreys against transgender rights in general, see Michelle Goldberg, *What Is a Woman?: The Dispute Between Radical Feminism and Transgenderism*, NEW YORKER (Aug. 4, 2014), <https://www.newyorker.com/magazine/2014/08/04/woman-2> [https://perma.cc/565N-5DBQ]. For a thoughtful response to the radical feminist argument, see generally Lori Watson, *The Woman Question*, 3 TRANSGENDER STUD. Q. 246 (2016).

¹⁵¹ *WoLF Members Pushing Back Against Local “Gender Identity” Legislation*, *supra* note 39 (“Will any man, for any reason, be allowed to declare himself to be ‘nonbinary gender’ and gain access to women’s spaces? Will the District’s special programs for women and girls become available to men who self-identify as ‘non-binary’?”).

¹⁵² The same could be said of some feminist appropriations of postcolonial and antiracist struggles, without concern for how feminist projects might impact people of color. See *infra* section I.C.5, pp. 930–33.

¹⁵³ RIKI ANNE WILCHINS, *READ MY LIPS: SEXUAL SUBVERSION AND THE END OF GENDER* 21 (1997). This Article makes no effort to advance any particular gender theory. It does not intend to use nonbinary people as “patients,” “examples,” or, as Wilchins charges anthropologists with doing, as “natives.” *Id.* at 22. This Article attempts to ask what it would mean for U.S. law to take nonbinary people seriously as full and equal participants in social, economic, and political life.

legal institutions founded on binary sex classifications can compel empathy, understanding, and efforts at inclusion.¹⁵⁴ As the diversity of nonbinary gender identities becomes more apparent, it may defang the arguments that inclusion requires enforced androgyny, the end of gender, or the abolition of programs that benefit women.

2. *Transgender Rights.* — Some nonbinary people identify as transgender, but others do not.¹⁵⁵ Most transgender respondents to the 2015 USTS primarily identified as men or women.¹⁵⁶ From its inception, the transgender rights movement has included voices arguing for what might now be called nonbinary inclusion.¹⁵⁷ But the legal strategies of transgender men and women may sometimes diverge from those whose gender identities are nonbinary.

Whatever their gender identities, transgender people may share interests in self-determination with respect to sex and gender.¹⁵⁸ They may sometimes agree that the law should not classify people by sex or gender at all.¹⁵⁹ Advocates for nonbinary rights also stake their claims in terms of the commonalities of discrimination, oppression, and violence visited upon nonbinary people and transgender men and women.¹⁶⁰

¹⁵⁴ Cf. Edward Schiappa et al., *The Parasocial Contact Hypothesis*, 72 COMM. MONOGRAPHS 92, 94–97, 111 (2005) (discussing support for the “Contact Hypothesis”: that interpersonal contact with members of minority groups reduces prejudice, especially with respect to gay men and lesbians, and conducting experiments providing some support for the “Parasocial Contact Hypothesis”: that exposure to television and other mass media depictions of “gay men and male transvestites” also reduces prejudice, *id.* at 111); Martha Minow, *Rights of One’s Own*, 98 HARV. L. REV. 1084, 1099 (1985) (reviewing ELISABETH GRIFFITH, *IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON (1984)*) (discussing the history of women’s rights struggles, including “Lucy Stone’s unprecedented decision to keep her own name after marriage,” and reflecting that “[a]lthough one who takes extreme positions runs the risk of moving beyond the comprehension of people in the mainstream, being ‘ultra’ may also succeed in expanding the bounds of what is comprehensible”).

¹⁵⁵ For a definition of “transgender,” see *supra* text accompanying note 12. Out of nonbinary respondents to the 2015 USTS, 82% reported they were “‘very comfortable,’ ‘somewhat comfortable,’ or ‘neutral’ . . . with the word ‘transgender’ being used to describe them.” JAMES ET AL., *supra* note 2, at 40.

¹⁵⁶ JAMES ET AL., *supra* note 2, at 45 (reporting that 29% of USTS survey respondents identified primarily as a “transgender man” or a “man” and 33% identified primarily as a “transgender woman” or a “woman”). *But see* Rob Clucas & Stephen Whittle, *Law, in GENDERQUEER AND NON-BINARY GENDERS*, *supra* note 27, at 73, 74 (arguing it is “short sighted” to view transgender men and women as binary, because they too undermine the naturalization of gender).

¹⁵⁷ *See, e.g.*, Bergman & Barker, *supra* note 31, at 32–33 (discussing work by Kate Bornstein and Stephen Whittle written in the 1990s).

¹⁵⁸ *See, e.g.*, Clarke, *Identity and Form*, *supra* note 28, at 763–64 (discussing “elective” concepts of sex and gender).

¹⁵⁹ *See, e.g.*, Olga Tomchin, Comment, *Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans* People*, 101 CALIF. L. REV. 813, 815 n.4, 818 (2013) (arguing that “only total elimination of ‘sex’ as a legal category will eliminate [the] harms” of rules such as those “governing marriage-based immigration for trans* people,” *id.* at 818).

¹⁶⁰ *See, e.g.*, *Cal. Assemb. Judiciary Hearing*, *supra* note 1 (statement of Carly Mitchell) (“So, why do we need a non-binary identification? This week alone, I was harassed multiple times, because

These claims sound in universal rights to human flourishing and respect, rather than liberty. They tap into arguments against group-based stigma, caste, and subordination.¹⁶¹

But “who decides your sex or gender?” is a different question than “how many options are there?” In law, arguments for transgender rights have sometimes been in tension with critiques of binary gender.¹⁶² Some transgender people may want legal recognition of their male or female gender identities, rather than elimination of those categories.¹⁶³ On the flip side, scholars and activists who critique binary gender have long debated whether the inclusion of transgender people in the existing categories of “male” or “female” will make it more difficult to reimagine those categories.¹⁶⁴

Pragmatic legal advocates may calculate that it is strategic to decouple arguments for recognition of a male or female gender identity from arguments for recognition of nonbinary identities. Nonbinary gender may sound less sympathetic, more disruptive, and too novel to judges and the public. There is a Kafkaesque “man trapped in a woman’s body” narrative that is sometimes persuasive to non-transgender people, who can imagine what it would be like to wake up one day in the wrong body.¹⁶⁵ But nonbinary people may seem to disrupt this narrative. For example, Wilchins has said, “I’ve never been trapped in anyone else’s body, and I hope you haven’t either . . . I admit I do still occasionally

I deviate from my assigned gender. We are assaulted, imprisoned, murdered, and this daily stress has caused 41% of us to attempt suicide, like I did.”); *supra* p. 910.

¹⁶¹ See Jessica A. Clarke, *Frontiers of Sex Discrimination Law*, 115 MICH. L. REV. 809, 833–37 (2017) (book review) (discussing antisubordination theories and their potential in transgender rights litigation).

¹⁶² See, e.g., JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 262–63 (2006) (asking how “insistence on the fluidity of all the elements of gender and sexuality” would “cope with the strong desire of many transsexuals to embody one gender or the other, *really*, and to consolidate themselves and their lovers as m or f all the way down”).

¹⁶³ See, e.g., Talia Mae Bettcher, *Trapped in the Wrong Theory: Rethinking Trans Oppression and Resistance*, 39 SIGNS: J. WOMEN CULTURE & SOC’Y 383, 385 (2014) (“Many trans people see themselves as men and women. Taken to its most extreme, the beyond-the-binary model suggests these people are mistaken (i.e., it invalidates their self-identities).”).

¹⁶⁴ See, e.g., WILCHINS, *supra* note 153, at 67 (expressing the concern that a “transgender rights movement . . . unable to interrogate the fact of its own existence, will merely end up cementing the idea of a binary sex which I am presumed to somehow transgress or merely traverse”). For a recent debate about how this plays out in legal arguments, compare YURACKO, *supra* note 30, at 174 (arguing that “[v]ictory” for nonconformists who rely on arguments about the immutability of gender identity “may come at the expense of greater rigidity of gender roles and expectations for all workers”), with Paisley Currah, *Transgender Rights Without a Theory of Gender?*, 52 TULSA L. REV. 441, 446 (2017) (book review) (arguing that Yuracko has no evidence of a causal connection between the successes of transgender plaintiffs who argue gender identity is immutable and the losses of other gender-nonconforming plaintiffs), and Cruz, *supra* note 26, at 277 (arguing that those authors concerned about tradeoffs “overstate what a court must do to rule for a transgender plaintiff”).

¹⁶⁵ Riki Wilchins, *Epilogue: Gender Rights Are Human Rights*, in GENDERQUEER: VOICES FROM BEYOND THE SEXUAL BINARY, *supra* note 17, at 289, 290.

awake quivering in the night with the conviction that I am trapped in the wrong culture.”¹⁶⁶

Additionally, nonbinary gender seems to require more extensive social change in disrupting sex-segregated spaces and binary gender norms. In a 2017 case in which a transgender boy won the right to use facilities consistent with his gender identity, the court noted approvingly that “allowing transgender students to use [male or female] facilities that align with their gender identity has actually reinforced the concept of separate facilities for boys and girls.”¹⁶⁷ Courts may perceive requests for accommodation from nonbinary individuals as a much greater “ask” than requests to be integrated into male or female categories.

Opponents of the extension of discrimination law to cover gender identity may point to nonbinary people as demonstrating the purported absurdity of the project.¹⁶⁸ While these opponents may have been willing to agree that it is gender identity–based harassment for an employer to insist on referring to a transgender woman as “he” and “Mr.,” they may not agree that employers should be required to use more unfamiliar pronouns, such as “ze and hir.”¹⁶⁹ Issues related to pronouns are often distorted and politicized. After a guide on gender-neutral pronouns led to false reports that the University of Tennessee, Knoxville, had banned the use of “he” and “she,” the Tennessee legislature voted to defund the University’s Office for Diversity and Inclusion, and to forbid the University from using state funds “to promote the use of gender neutral pronouns.”¹⁷⁰ But sometimes, nonbinary gender recognition may be uncontroversial. When New Jersey passed its Babs Siperstein Law¹⁷¹ recognizing the right of transgender people to change the sex designations on their birth certificates without the need for any medical

¹⁶⁶ *Id.* at 290–91.

¹⁶⁷ *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1055 (7th Cir. 2017).

¹⁶⁸ See *supra* notes 85–86 and accompanying text (discussing unique reasons for opposition to nonbinary gender identities, including the idea that these identities are a trend or are absurd).

¹⁶⁹ Cf. Eugene Volokh, Opinion, *You Can Be Fined for Not Calling People “Ze” or “Hir,” If That’s the Pronoun They Demand that You Use*, WASH. POST: VOLOKH CONSPIRACY (May 17, 2016), <https://wapo.st/24Xqa6Y> [<https://perma.cc/3D4H-5B2E>] [hereinafter Volokh, *You Can Be Fined*] (“Or what if some people insist that their title is ‘Milord,’ or ‘Your Holiness’? They may look like non-gender-related titles, but who’s to say?”). Professor Volokh himself, however, has a number of First Amendment objections to harassment doctrine in general, and might not even agree that it should be illegal harassment to insult a transgender woman by calling her “Mr.” and “him.” See, e.g., Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1819–43, 1846 (1992). For a discussion of harassment law, see *infra* section III.B.3, pp. 957–63.

¹⁷⁰ TENN. CODE ANN. § 9-4-5119 (West 2018); see also Scott Jaschik, *Fear of New Pronouns*, INSIDE HIGHER ED (Sept. 8, 2015), <https://www.insidehighered.com/news/2015/09/08/14-tennessee-withdraws-guide-pronouns-preferred-some-transgender-people> [<https://perma.cc/L7R3-X2QT>].

¹⁷¹ N.J. STAT. ANN. § 26:8-40.12 (West 2018).

documentation, the fact that the law also included a new “undesigned/non-binary” option did not seem to attract any specific opposition.¹⁷²

A related novelty concern may be that legal claims that sex discrimination law prohibits discrimination on the basis of transgender status will be weighed down by nonbinary gender, because nonbinary gender was not envisioned by the drafters of civil rights-era statutes in the 1960s and 1970s.¹⁷³ This controversy turns on what “sex” discrimination means.¹⁷⁴ Federal courts increasingly agree that discrimination against someone for being transgender is a form of sex discrimination because it rests on sex stereotypes.¹⁷⁵ The Obama Administration explicitly extended this logic to nonbinary gender identity, promulgating regulations that clarify that “[sex] stereotypes can include the expectation that individuals will consistently identify with only one gender.”¹⁷⁶ This

¹⁷² Or at least, none is apparent from the legislative history. See *Hearing on A. 1718 Before the Assemb. Human Servs. Comm.*, 218th Leg., 2018 Sess., at 1:07:08 (N.J. 2018) <https://www.njleg.state.nj.us/media/mp.asp?M=A/2018/AHU/0312-0200PM-MO-1.M4A&S=2018> [<https://perma.cc/X5MA-BES2>].

¹⁷³ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2012). There is a good argument that the drafters’ intentions should *not* govern this question. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998) (Scalia, J.) (holding that, with respect to the meaning of “sex” discrimination in Title VII, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed,” *id.* at 79).

¹⁷⁴ See Clarke, *supra* note 161, at 824. Title VII and Title IX do not include “gender identity” as a prohibited ground for discrimination, although many state and local rules do. See *State Maps of Laws & Policies*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/state-maps> [<https://perma.cc/2DQ3-C2QZ>] (cataloguing state laws that prohibit discrimination on the basis of gender identity in education, employment, identification documents, hate crimes, housing, public accommodations, and health care). *But cf.* Mary Anne Case, Essay, *Legal Protections for the “Personal Best” of Each Employee: Title VII’s Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1366–68 (2014) (discussing how “gender identity” provisions might be defined or interpreted so as to preclude coverage for nonbinary forms of gender identity and expression).

¹⁷⁵ *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 745–46 (E.D. Va. 2018) (discussing precedents from the First, Sixth, Ninth, and Eleventh Circuits). A recent Sixth Circuit opinion held that discrimination based on transgender status is sex discrimination because, among other reasons, it rests on sex stereotyping and might be analogized to discrimination based on religious conversion. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574–76 (6th Cir. 2018).

¹⁷⁶ 45 C.F.R. § 92.4 (2017) (defining sex stereotypes in Department of Health and Human Services (HHS) regulations interpreting the Affordable Care Act); Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375, 31,392 (May 18, 2016) (responding to the comment that there was no authority for the proposition that “non-binary genders” are “a protected class” by explaining that prohibited “[s]ex stereotypes can also include a belief that gender can only be binary and thus that individuals cannot have a gender identity other than male or female”). The Affordable Care Act borrows its definition of sex discrimination from Title IX. 42 U.S.C. § 18116(a) (2012). For discussion of litigation over this regulation, see *infra* section III.E, pp. 986–90.

The Sixth Circuit noted its approval of the Obama Administration’s argument in a Title VII sex discrimination case, stating:

[D]iscrimination because of a person’s transgender, intersex, or sexually indeterminate status is no less actionable than discrimination because of a person’s identification with two

interpretation may be exploited by opponents of transgender rights.¹⁷⁷ Their argument: Congress's references to "one sex" or "the other sex" in another provision of the statute demonstrate that Congress could not have intended to cover nonbinary genders.¹⁷⁸ But no court has adopted this view. If a court were to agree with this argument, it would justify voiding the regulation only as to nonbinary gender, not as to transgender men and women.

3. *Sexual Orientation.* — Gender identity is conceptually distinct from sexual orientation.¹⁷⁹ Nonbinary people have a diverse array of sexual orientations. In response to the 2015 U.S. Transgender Survey, 17% of nonbinary people reported being asexual,¹⁸⁰ 2% reported being straight or heterosexual, and the other 81% reported various orientations, such as queer, pansexual, bisexual, gay, or lesbian.¹⁸¹ In discussing why many nonbinary people prefer terms such as pansexual and queer, scholar Genny Beemyn explains: "They see *bisexual* as implying a binary, and they are attracted to individuals who are outside of a gender binary or identify outside of a gender binary themselves, or they consider bisexuals to be attracted to different aspects of gender in different people, whereas they are attracted to people regardless of gender."¹⁸²

There are many convergences between arguments for equality based on nonbinary gender identity and arguments for lesbian, gay, and bisexual equality. Advocates for nonbinary recognition often phrase their claims in the same core values of the marriage equality movement, such as love and acceptance.¹⁸³ Legal arguments for nonbinary gender

religions, an unorthodox religion, or no religion at all. And 'religious identity' can be just as fluid, variable, and difficult to define as 'gender identity'; after all, both have 'a deeply personal[,] internal genesis that lacks a fixed external referent.'

R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d at 575 n.4 (quoting Sue Landsittel, Comment, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 NW. U. L. REV. 1147, 1172 (2010)).

¹⁷⁷ See Plaintiffs' Brief in Support of Their Motion for Partial Summary Judgment or, in the Alternative, Preliminary Injunction at 13, *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016) (No. 16-cv-00108), 2016 WL 9049696.

¹⁷⁸ *Id.* at 16 (quoting 20 U.S.C. § 1681(a)(2), (8)). The relevant provisions of Title IX include an exception for "father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex," 20 U.S.C. § 1681(a)(8), as well as an exemption for certain institutions transitioning from single-sex to admitting "students of both sexes," *id.* § 1681(a)(2).

¹⁷⁹ GLAAD MEDIA REFERENCE GUIDE, *supra* note 9, at 6 (defining sexual orientation as "an individual's enduring physical, romantic and/or emotional attraction to members of the same and/or opposite sex, including lesbian, gay, bisexual, and heterosexual (straight) orientations").

¹⁸⁰ See Emens, *supra* note 43, at 307–29 (discussing asexuality as a sexual orientation).

¹⁸¹ See *supra* note 78 and accompanying text.

¹⁸² Genny Beemyn, *Coloring Outside the Lines of Gender and Sexuality: The Struggle of Nonbinary Students to Be Recognized*, 79 EDUC. F. 359, 360 (2015) (discussing interviews of college students).

¹⁸³ See sources cited *supra* note 109.

inclusion in the United States are possible only against the backdrop of prior achievements in sexual orientation equality.¹⁸⁴ Before *Obergefell v. Hodges*,¹⁸⁵ opponents of nonbinary gender rights had the easy argument that binary sex definitions were required to ensure marriage was only between a man and a woman.¹⁸⁶ That argument is no longer in their quiver.

However, nonbinary people may end up with interests in conflict with some LGBT rights arguments, for reasons similar to the marginalization of bisexuality.¹⁸⁷ As Professor Kenji Yoshino has explained, one reason bisexuality is often left out of discussions of LGBT rights is that it seems to detract from the argument that sexual orientation is immutable.¹⁸⁸ “[I]mmutability offers absolution by implying a lack of choice.”¹⁸⁹ Yet bisexuals are perceived to have had the choice to engage in heterosexual relationships.¹⁹⁰ On the one hand, nonbinary gender identity might be perceived as mutable, particularly by those who see it as a phase, a political statement, or a trend.¹⁹¹ On the other hand, nonbinary gender (like bisexuality) might be immutable in the sense of being an expression of one’s authentic self and a fundamental feature of identity that no one should be asked to change.¹⁹² A second reason for bisexual erasure is that the LGBT community may perceive bisexuals as “flight risks — individuals who could at any time abandon the gay

¹⁸⁴ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (holding that same-sex couples may not be deprived of the right to marry); *United States v. Windsor*, 570 U.S. 744, 751 (2013) (striking down a federal law that excluded same-sex partners from the definition of “spouse”); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (striking down a Texas statute criminalizing same-sex intimacy between consenting adults).

¹⁸⁵ 135 S. Ct. 2584.

¹⁸⁶ See, e.g., Mathew D. Staver, *Transsexualism and the Binary Divide: Determining Sex Using Objective Criteria*, 2 LIBERTY U. L. REV. 459, 473 (2008).

¹⁸⁷ See Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415, 452–53 (2012) (discussing how advocates in the marriage equality cases went to great lengths to ignore bisexuality and to characterize their clients as lesbian or gay); Ann E. Tweedy & Karen Yescavage, *Employment Discrimination Against Bisexuals: An Empirical Study*, 21 WM. & MARY J. WOMEN & L. 699, 699–700 (2015) (arguing that bisexuals “remain largely invisible in the case law and in the popular understanding of discrimination”).

¹⁸⁸ See, e.g., Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 405–07 (2000) (offering several explanations for the marginalization of bisexuals in lesbian and gay rights movements).

¹⁸⁹ *Id.* at 406; see also Clarke, *supra* note 43, at 13–17 (discussing the “powerful intuitive appeal,” *id.* at 17, of the concept that a person should not be penalized for “‘accidents of birth’ . . . because they bear no relationship to individual responsibility,” *id.* at 16, and tracing this idea through equal protection law).

¹⁹⁰ Yoshino, *supra* note 188, at 406. This is despite the fact that some bisexuals report they could not live exclusively as heterosexuals or homosexuals. *Id.* at 407 n.294.

¹⁹¹ See *supra* pp. 910–11; cf. Tran & Glazer, *supra* note 26, at 401–02 (“[W]hat troubles society most about transgender people is that they make choices about aspects of their gender that society believes are not their choices to make.”).

¹⁹² See Clarke, *supra* note 43, at 23–28 (discussing this version of immutability).

community to lead straight lives.”¹⁹³ Similarly, one reason for bias against nonbinary people is fear that their choices as to gender identity will be reversed.¹⁹⁴ A third reason for bisexual erasure is that, by asserting that sex might not be the primary factor in desire, bisexuality threatens sex as a primary category of social organization.¹⁹⁵ Many variations on nonbinary gender identity do this explicitly rather than implicitly.¹⁹⁶ And finally, bisexual people make poor poster children due to stereotypes that they are “promiscuous.”¹⁹⁷ Nonbinary people, many of whom adopt sexual orientations other than straight, gay, or lesbian, may trigger this prejudice as well.

Yet there are also opportunities for convergence. To the extent that nonbinary legal advocacy challenges the need for legal sex classifications, it may assist legal arguments for nondiscrimination on the basis of sexual orientation. Federal antidiscrimination statutes, such as Title VII of the Civil Rights Act of 1964¹⁹⁸ and Title IX of the Education Amendments of 1972,¹⁹⁹ do not explicitly prohibit discrimination on the basis of “sexual orientation.” One controversy in federal courts is whether discrimination on the basis of sexual orientation is always a type of sex discrimination prohibited by federal law.²⁰⁰ The Second Circuit has accepted the argument that it is, because to discriminate on the basis of sexual orientation, the discriminator must first classify people based on sex — for example, the discriminator must identify a person as a woman, and then disapprove of her sexual attraction for other women.²⁰¹ Opponents argue that this logic would void every sex classification by employers, disturbing, for example, sex-differentiated dress

¹⁹³ Yoshino, *supra* note 188, at 407.

¹⁹⁴ See *supra* notes 83–86 and accompanying text (discussing the fear of flightiness as a reason for bias against nonbinary people).

¹⁹⁵ Yoshino, *supra* note 188, at 413 (“Without a clear and privileged distinction between ‘man’ and ‘woman,’ there is no clear and privileged distinction between ‘straight’ and ‘gay.’”).

¹⁹⁶ See *supra* notes 95–98 and accompanying text. Some forms of third-gender identity may serve to underscore the importance of sex as a category of social organization. See *infra* note 236 and accompanying text.

¹⁹⁷ Yoshino, *supra* note 188, at 420.

¹⁹⁸ 42 U.S.C. § 2000e-2(a)(1) (2012).

¹⁹⁹ 20 U.S.C. § 1681(a) (2012).

²⁰⁰ Compare *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018) (en banc) (holding it is), and *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc) (same), with *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir.) (holding it is not), *cert. denied*, 138 S. Ct. 557 (2017).

²⁰¹ *Zarda*, 883 F.3d at 113–14. A similar argument is that discrimination against, for example, a lesbian, is sex discrimination because if she were a man, her employer would not object to her sexual attraction to women. *Hively*, 853 F.3d at 345. This argument is consistent with a concept of sexual orientation that recognizes people outside of sex and gender binaries. Robin A. Dembroff, *What Is Sexual Orientation?*, 16 PHILOSOPHERS’ IMPRINT, no. 3, Jan. 2016, at 1, 19–20.

codes for men and women.²⁰² As nonbinary people challenge the need for sex-differentiated rules across a number of domains of social life, and as nonbinary gender identities gain greater acceptance, they may undermine the persuasive force behind this type of argument.

4. *Intersex Variations.* — There are also obvious overlaps between intersex and nonbinary organizing.²⁰³ But the intersex movement is a distinct one, with its own particular relationships to other social justice movements.²⁰⁴ Many people with intersex variations have binary gender identities, but not all do.²⁰⁵ And many people with nonbinary gender identities do not have intersex variations.²⁰⁶ These groups may sometimes share legal interests, although their interests may sometimes diverge.

Individuals who are both intersex and nonbinary may be at the forefront of advocacy efforts, for strategic and practical reasons. Nonbinary people with intersex traits may seem more sympathetic to the public and judiciary, because intersex traits are regarded as somatic rather than psychological or elective.²⁰⁷ In American legal discourse, psychological conditions are often treated with skepticism.²⁰⁸ Nonbinary people like Dana Zzyym, whose claims appear to be grounded in their physical bodies, may have more legitimacy with a skeptical public and judiciary.²⁰⁹

²⁰² See *Zarda*, 883 F.3d at 150–51 (Lynch, J., dissenting); Brief for the United States as Amicus Curiae at 17, *Zarda*, 883 F.3d 100 (No. 15-3775), 2017 WL 3277292. There are also doctrinal arguments against this position, for example, that courts can and do handle dress code controversies under a special doctrinal framework.

²⁰³ One advocacy group marries these two concerns, calling itself the Intersex & Genderqueer Recognition Project. INTERSEX & GENDERQUEER RECOGNITION PROJECT, <http://www.intersexrecognition.org/> [<https://perma.cc/L9NH-SWGS>].

²⁰⁴ See, e.g., JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW: WHY SEX MATTERS 97–105 (2012) (mapping out conflicts). To say the movement is distinct is not to say that everyone agrees “intersex” is an identity. See Ellen K. Feder & Katrina Karkazis, *What’s in a Name?: The Controversy over “Disorders of Sex Development,”* 38 HASTINGS CTR. REP., no. 5, Sept.–Oct. 2008, at 33, 35 (discussing controversies over conceptualizing intersex as an identity versus a set of “clinically specific diagnoses” that are “widely disparate” in their features).

²⁰⁵ See, e.g., PREVES, *supra* note 16, at 60–85.

²⁰⁶ See, e.g., JAMES ET AL., *supra* note 2, at 44 (describing a USTS survey question asking participants to check all items that described their gender identities in which 31% of respondents selected “non-binary” but only 3% selected “intersex”).

²⁰⁷ See M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 988 (2015) (“One of the barriers to recognition and respect that transgender people face in the courts and beyond is that ‘brain sex’ is not readily apparent, and transgender people must be believed about who they are.” (footnote omitted)).

²⁰⁸ See, e.g., Dov Fox & Alex Stein, *Dualism and Doctrine*, 90 IND. L.J. 975, 977–80 (2015) (arguing that “much of our doctrine . . . treats mind and body as if they work and matter in critically different ways,” often minimizing mental harm, *id.* at 979). Judges may be wholly unsympathetic to what they perceive as choices with respect to identities. See sources cited *supra* note 189 and accompanying text.

²⁰⁹ See *supra* pp. 918–19. In the *Zzyym* case, the government argued that it could not issue passports with gender options other than M or F because of “uncertainty about how it would evaluate persons ‘transitioning’ to a third sex.” *Zzyym v. Pompeo*, No. 15-cv-02362, 2018 WL 4491434,

They may be able to secure legal changes that redound to the benefit of all nonbinary people. Intersex people in general embody the argument that sex is not a coherent set of binary traits: that chromosomes, hormones, and phenotype do not always provide a consistent answer to the question of whether a person is male or female.²¹⁰

There is a risk, though, that legal efforts on behalf of people with intersex variations may be limited to those deemed to possess an immutable or natural trait.²¹¹ This might exclude altogether the claims of nonbinary people without intersex traits. Or it might support arguments for medical gatekeeping — requiring that nonbinary people secure a physician’s opinion regarding their psychological gender as a prerequisite to legal protection.²¹² Moreover, opponents of nonbinary recognition often point to the fact that a small percentage of the population is intersex as a reason the law should not protect nonbinary people at all.²¹³

One area of potential convergence is with respect to ending the practice of unnecessary surgeries to “fix” intersex infants. The new visibility of nonbinary people may lend support to “[t]he primary goal of the intersex movement,” which “is to eliminate or decrease the number of medically unnecessary cosmetic genital surgeries being performed on infants with an intersex condition.”²¹⁴ A United Nations Special Rapporteur

at *7 (D. Colo. Sept. 19, 2018). The court held that this argument “misse[d] the ball” because “intersex people are born as they are.” *Id.* This argument also misses the ball for people undergoing transitions to nonbinary gender identities. The State Department’s rules for receiving a passport with a different gender marker simply require a letter from a doctor “stating the applicant has had appropriate clinical treatment for gender transition to the new gender of either male or female.” U.S. DEP’T OF STATE, 8 FOREIGN AFFAIRS MANUAL 403.3-2(B)(d)(5) (2018), <https://fam.state.gov/FAM/08FAM/08FAM040303.html> [<https://perma.cc/K7CD-2863>]. Appropriate clinical treatment does not always entail surgery or hormone therapy. *See, e.g.*, WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 2, 8–9 (7th ed. 2011) [hereinafter WPATH STANDARDS]. If there is some reason a doctor’s certification is required, people with nonbinary gender identities might also provide letters certifying that they have received appropriate clinical treatment for their gender transitions.

²¹⁰ *See* sources cited *supra* note 14 and accompanying text.

²¹¹ *See* Clarke, *supra* note 43, at 32–52 (discussing ways courts have artificially curtailed the reach of discrimination law to exclude protection for traits deemed mutable).

²¹² *Cf.* Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 24 (2003) (critiquing requirements that trans people perform a certain narrative of binary gender identity to medical professionals before receiving legal protection).

²¹³ *See, e.g.*, Letter from Women’s Liberation Front to John Wiesman, Sec’y, Wash. State Dep’t of Health, Comments on Preproposal Statement of Inquiry to Amend Chapter 246-490 WAC, Vital Statistics (Aug. 22, 2017), at 2–3 (Sept. 28, 2017) [hereinafter WoLF Letter], http://womensliberationfront.org/wp-content/uploads/2017/09/Comment-on-wac-246-490-075-birth-certificates_final_9-28-17.pdf [<https://perma.cc/C9UF-TKCC>].

²¹⁴ GREENBERG, *supra* note 204, at 4. *See generally* GEORGIANN DAVIS, CONTESTING INTERSEX: THE DUBIOUS DIAGNOSIS (2015); ALICE DOMURAT DREGER, HERMAPHRODITES

has characterized “involuntary genital normalizing surgery” as a form of torture.²¹⁵ An international coalition of medical authorities recommends delaying “unnecessary genital surgery to an age of patient informed consent.”²¹⁶ Surgeries on infants have been criticized for “caus[ing] more physical and psychological trauma than does growing up with atypical genitalia.”²¹⁷ One justification for these surgeries has been that binary sexual anatomy is crucial for parents to raise a child with a binary gender identity.²¹⁸ Parents are sometimes advised to allow these surgeries to avoid stigmatization of their child, or to ensure their child appears “normal.”²¹⁹ But, as Professor Georgiann Davis writes: “Intersex is a problem because it disrupts the traditional gender order. If our behaviors weren’t constrained by gender, if opportunities weren’t filtered through gender, and if gender weren’t tied to bodies and identities, it is doubtful that intersex would be as problematic throughout the world as it is today.”²²⁰ As nonbinary lives become mainstream, parents and the medical profession may have less to fear for children with ambiguous genitalia or other sex characteristics, and these surgeries may decrease.²²¹

5. *Antiracist and Postcolonial Struggles.* — Struggles for nonbinary gender rights also have convergences with and divergences from anti-racist and postcolonial arguments.

Some nonbinary people point to intersections with antiracist struggles. For example, Jessi Brandon reports that what resonated with them was the slogan “[r]espect my existence or expect my resistance,” because

AND THE MEDICAL INVENTION OF SEX (1998); KATRINA KARKAZIS, *FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE* (2008); SUZANNE J. KESSLER, *LESSONS FROM THE INTERSEXED* (1998).

²¹⁵ Juan E. Mendéz (Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment), *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ¶ 77, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013), <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53-English.pdf> [<https://perma.cc/K72Z-U8M6>].

²¹⁶ Christopher P. Houk et al., *Summary of Consensus Statement on Intersex Disorders and Their Management*, 118 *PEDIATRICS* 753, 755 (2006); *see also* INTERACT & LAMBDA LEGAL, *PROVIDING ETHICAL AND COMPASSIONATE HEALTH CARE TO INTERSEX PATIENTS* 2 (2018), https://www.lambdalegal.org/sites/default/files/publications/downloads/resource_20180731_hospital-policies-intersex.pdf [<https://perma.cc/7X96-XMTC>] (“Leading medical associations, recognizing that irreversible and deeply life-altering procedures can be safely delayed to both ensure best outcomes and avoid the potential ramifications of anesthesia on the developing brain, are developing policies informed by the patient community to delay harmful, medically unnecessary procedures.”).

²¹⁷ GREENBERG, *supra* note 204, at 18.

²¹⁸ *See, e.g.*, Zeiler & Wickström, *supra* note 14, at 367.

²¹⁹ *Id.* at 360; *see also id.* at 367.

²²⁰ DAVIS, *supra* note 214, at 7–8.

²²¹ *But cf.* Maayan Sudai, *Revisiting the Limits of Professional Autonomy: The Intersex Rights Movement’s Path to De-medicalization*, 41 *HARV. J.L. & GENDER* 1, 19–20 (2018) (discussing how some parents of intersex children may prefer medical understandings of intersex traits to avoid associating their children with the LGBT movement).

“all Black people want, what people of color want, all that queer people and non-binary people want is to be respected and treated as equals, as equals to someone who is cis gender or straight or white.”²²² Others point to how the intersection of racial and gender stereotypes can complicate nonbinary identity. As writer Cicely-Belle Blain explains: “Society does not allow space for black folks to be alternative, to be nerdy, to be weird, to be queer, to be different from the narrow boxes created for us throughout history.”²²³

Others argue by analogy. Lauren Lubin, a nonbinary athlete, criticizes application forms that force an applicant to select one of two categories for sex, asking: “Can you imagine if you did that with race?”²²⁴ This argument invites a comparison to multiracial identities. In the race context, there is debate over whether racial fluidity makes it impossible to collect meaningful data about the persistence of racial disparities or to identify beneficiaries of affirmative action programs.²²⁵ Those who “decline to state” their race on official forms may be making the political statement that they believe race should not be significant for purposes of diversity programs.²²⁶ While it is unlikely that those nonbinary people who resist sex classifications are doing so because they oppose affirmative action, similar concerns might be raised about the impact of gender fluidity on data about sexism.²²⁷ Moreover, there could be tensions between the goals of nonbinary rights movements and antiracist struggles. For example, advocates for nonbinary and other transgender

²²² Brandon Interview, *supra* note 62, at 14. “Cis” is a term meaning the opposite of trans — in other words, a person who identifies with the gender associated with the sex they were assigned at birth.

²²³ Cicely-Belle Blain, Opinion, *The Political Rebellion of Being Black and Non-binary*, XTRA (June 9, 2017, 1:34 PM), <https://www.dailyxtra.com/the-political-rebellion-of-being-black-and-non-binary-73646> [<https://perma.cc/JW4S-X7RM>]. Ashleigh Shackelford makes another intersectional argument: “As we see in the media and within our interpersonal spaces, femininity is significantly scripted through whiteness and thinness. I am none of those things.” Ashleigh Shackelford, *Why I’m Non-binary but Don’t Use “They/Them,”* HUFFINGTON POST (Feb. 21, 2017, 1:36 PM), https://www.huffingtonpost.com/entry/why-im-nonbinary-but-dont-use-they-them_us_58ac875ee4b05e6b9b192c07 [<https://perma.cc/T6SH-QN6K>] (“The way whiteness and white supremacist ideology is set up, we’re not seen as feminine or woman or human. In many ways, the masculinizing of our bodies and performance has been the basis for our dehumanizing and denial of gender conformity.”).

²²⁴ Aimee Heckel, *Lauren Lubin, Former CU Athlete, Subject of Documentary*, DAILY CAMERA (Sept. 5, 2016, 9:25 PM), http://www.dailycamera.com/news/ci_30326197/lauren-lubin-former-cu-athlete-subject-documentary [<https://perma.cc/66Y4-7FYH>].

²²⁵ See Lauren Sudeall Lucas, Essay, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 CALIF. L. REV. 1243, 1245 (2014).

²²⁶ Camille Gear Rich, *Decline to State: Diversity Talk and the American Law Student*, 18 S. CAL. REV. L. & SOC. JUST. 539, 549 (2009).

²²⁷ See, e.g., WoLF Letter, *supra* note 213, at 4 (speculating about the impact of nonbinary gender recognition on the collection of crime statistics based on sex).

people might seek better enforcement of hate crime statutes.²²⁸ But those laws operate within the context of a criminal justice system that disproportionately burdens racial minorities.²²⁹

Other advocates of nonbinary recognition may link their resistance with anticolonialism, pointing to the history of suppression of third genders in non-Western cultures.²³⁰ Researchers highlight that nonbinary genders have existed “across time and place” to challenge the view that humanity is naturally and inevitably divided into male and female categories.²³¹ Historical and present-day examples include Indian Hijra, Thai Kathoey, Indonesian Waria, various Two-Spirit identities of First Nations tribes, and South American Machi identities, among others, each with a distinct meaning not reducible to man or woman.²³² These examples may suggest it is possible “for alternate genders and sexual categories to emerge in certain times and places, transcending sexual dimorphism.”²³³ But these examples have been overlooked due to “ethno-centric Western interpretations of gender” that “have dominated the natural and social sciences.”²³⁴ For example, when the British came to rule India, they passed laws criminalizing Hijra practices and removing state protection.²³⁵ Cross-cultural and historical arguments may serve to denaturalize binary gender arrangements. But they may not point the way toward gender liberation. For example, in India, despite “the continued salience of the alternative gender role of the hijra,” hijras

²²⁸ However, it is important to note that transgender people, particularly those who are people of color, are often reluctant to seek assistance from law enforcement. See JAMES ET AL., *supra* note 2, at 188 (reporting that 57% of transgender respondents to the 2015 USTS were “somewhat uncomfortable or very uncomfortable asking for help from the police”); *id.* at 189 fig. 14.9 (breaking down percentages by race and ethnicity). Seventy-one percent of nonbinary respondents to the 2015 USTS reported they were “never or only sometimes . . . treated with respect” by law enforcement, compared with 55% of transgender men and women. *Id.* at 186.

²²⁹ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012).

²³⁰ See Iantaffi Interview, *supra* note 47, at 18 (“[T]here are the bigger issues tha[n] the gender binary itself . . . it’s part of this colonizing, Christianizing, white supremacist thing because the more we really look at evidence from anthropology, there have always been a variety of genders in lots of different cultures and places.” (ellipsis in original)).

²³¹ Ben Vincent & Ana Manzano, *History and Cultural Diversity*, in *GENDERQUEER AND NON-BINARY GENDERS*, *supra* note 27, at 11, 11; see also, e.g., Herdt, *supra* note 17; Vincent & Manzano, *supra*, at 18–25. Vincent and Manzano also point out that European history includes examples of nonbinary understandings of gender, such as English mollies, Italian femminielli, and Albanian sworn virgins. Vincent & Manzano, *supra*, at 13–17.

²³² See Vincent & Manzano, *supra* note 231, at 18–25. I cannot do justice here to these identities, so I will not attempt to explain them. I refer readers to the cited texts.

²³³ Herdt, *supra* note 17, at 16 (posing this as a question).

²³⁴ Vincent & Manzano, *supra* note 231, at 12.

²³⁵ Serena Nanda, *Hijras: An Alternative Sex and Gender Role in India*, in *THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY*, *supra* note 17, at 373, 414. In 2014, India’s Supreme Court recognized a third gender category entitled to equal rights under India’s Constitution. *Nat’l Legal Servs. Auth. v. Union of India*, (2014) 5 SCR 119, 142–44.

remain stigmatized, and the “role functions in a culture in which male and female sex and gender roles are viewed as essential, sharply differentiated and hierarchical.”²³⁶

* * *

Thus, nonbinary gender identities are diverse. Nonbinary people are targeted for discrimination due to animus, ignorance, disbelief, disregard, disrespect, and the threat they pose to traditional gender norms. The movement for nonbinary gender rights has complicated relationships with other identity-based legal arguments. It may sometimes be in tension with feminist, LGBT, intersex, and antiracist legal efforts, but it also offers these movements new opportunities and possibilities for convergence.

II. A CONTEXTUAL APPROACH TO NONBINARY GENDER RIGHTS

This Part asks how the law might respond to rights claims by a diverse nonbinary minority.²³⁷ Its purpose is not to prescribe any particular model for legal response. Rather, it is to argue that there are many ways the law might address nonbinary gender, and that efforts to find a one-size-fits-all theory stifle discussion. It argues instead for a contextual approach. It will begin by resisting the demand to define sex and gender with precision, arguing instead that these terms are and should be culturally contested, and must be defined with attention to each legal context. It will then discuss possible regulatory models, resisting the characterization of the issue as either third-gender recognition or gender abolition.

A. *Against Universal Definitions of Sex and Gender*

Rather than attempting an all-purpose legal definition of sex or gender, this section argues that when a definition is required, it should be tailored to serve the interests at stake in regulation. Attempts to settle metaphysical debates about what sex and gender *are* distract from the question of how these concepts *should be* defined in particular legal contexts, if at all.

²³⁶ Nanda, *supra* note 235, at 417. *But see* Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 122 (2008) (discussing historical examples from Native American societies in which “[g]ender variance was fully incorporated into tribal life and was generally well-respected and valued within the community”).

²³⁷ I note where these various approaches are already supported by U.S. legal doctrine, but I leave for another day questions about whether courts, legislatures, or agencies, or federal, state, or local governments are best suited to implement legal change.

Debates over procedural rules are instructive here.²³⁸ In these debates, scholars ask whether rules should be “transsubstantive,” meaning the same in every substantive context.²³⁹ The benefits of uniform rules are simplicity and depoliticization. Uniform rules are easier for courts, lawyers, and the public to learn.²⁴⁰ They are depoliticizing, because they avoid debates over which rules apply in which contexts — debates that will inevitably entail political judgments.²⁴¹ The main disadvantage is that uniform rules may not serve the interests of particular substantive regulatory schemes. Uniform definitions are inappropriate for terms like “employee,” a concept that serves different purposes under the common law, the Fair Labor Standards Act, the Occupational Safety and Health Act, the Tax Code, and so forth.²⁴²

The “simplicity” advantage of universal rules does not have much force in the context of sex and gender. Because there are relatively few contexts left in which the law requires an operative definition of sex or gender, devising contextual definitions is not an unwieldy legal project.²⁴³

The “depoliticization” argument works against universal definitions. Because sex and gender identities are deeply controversial, personal, and important to many people, any attempt at universal definition will be met with immediate resistance. Even the distinction between sex and gender, once the pivot point of feminist argument, is controversial.²⁴⁴ Some on the left would prefer to deconstruct the distinction — following the views of influential theorist Judith Butler.²⁴⁵ They argue that the hormonal, genetic, nervous, and morphological aspects of what we call sex are only about sex because we call them that.²⁴⁶ Some on the right

²³⁸ I have previously analogized legal sex to the property law “metaphor of a bundle of sticks.” Clarke, *Identity and Form*, *supra* note 28, at 829. Rather than thinking of ownership as a right to a thing, this metaphor suggests it “is a bundle of rights, such as the right to exclude others from the property, . . . to sell the property, and so forth.” *Id.* We might similarly think of legal identities as bundles of rights that can be unbundled. Sex might be unbundled into the right to use certain restrooms, to have particular occupations, to participate on certain sports teams, and so forth. *See id.* at 831–32; *see also infra* Part III, pp. 945–90.

²³⁹ *See, e.g.*, Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 378 (2010).

²⁴⁰ *Id.* at 387.

²⁴¹ *See id.* at 387–88.

²⁴² *See, e.g.*, Kristin E. Hickman & Claire A. Hill, *Concepts, Categories, and Compliance in the Regulatory State*, 94 MINN. L. REV. 1151, 1179–81 (2010).

²⁴³ *See infra* Part III, pp. 945–90 (listing possible contexts).

²⁴⁴ *See supra* section I.C.1, pp. 915–21.

²⁴⁵ *See* JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 1–34 (1990).

²⁴⁶ Please forgive me for this oversimplification for the sake of brevity. *See, e.g.*, Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATRE J. 519, 522 (1988) (arguing that although sex and gender purport to be natural, they are both constituted by “tacit collective agreement to perform, produce, and sustain discrete and polar genders”).

would prefer to reconstruct an integrated understanding of sex and gender.²⁴⁷ For example, the Catholic Church views traditional roles for men and women as natural rather than socially constructed.²⁴⁸ The nuances of these debates may be altogether lost on the judiciary, which uses the word “gender” rather than “sex” because the term “sex” sounds salacious.²⁴⁹ Ultimately, neither the Catholic Church,²⁵⁰ nor the American Psychological Association,²⁵¹ nor the state of North Carolina²⁵² can settle ideological controversies over sex and gender by defining terms.

Moreover, “there is no logically necessary connection between showing or proving that gender is contingent and achieving any particular substantive outcome or result.”²⁵³ Some opponents of transgender rights base their arguments on the premise that there is a distinction between sex and gender identity.²⁵⁴ They argue sex should be primary.²⁵⁵ Which definition of sex or gender should matter is a moral or political question. It cannot be settled with factual arguments.²⁵⁶

²⁴⁷ Consider the views of the Vatican. See Mary Anne Case, *After Gender the Destruction of Man? The Vatican's Nightmare Vision of the "Gender Agenda" for Law*, 31 PACE L. REV. 802, 803 (2011) (“For the last several decades, the English word ‘gender’ has been anathema to the Vatican and those seeking to influence secular law and policy throughout the world on its behalf.”).

²⁴⁸ The Church’s reasons include opposition to “ideologies which, for example, call into question the family, in its natural two-parent structure of mother and father, and make homosexuality and heterosexuality virtually equivalent, in a new model of polymorphous sexuality.” *Id.* at 806–07 (quoting Letter from Joseph Cardinal Ratzinger, Prefect, Congregation for the Doctrine of the Faith, to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World (May 31, 2004), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html [<https://perma.cc/7J5R-NNAX>]).

²⁴⁹ In a now-famous story, then-lawyer Ruth Bader Ginsburg began using the term “gender” rather than “sex” in the 1970s, after her assistant pointed out that judges would be distracted by seeing the term “sex” in legal briefs. For a colorful retelling, listen to *More Perfect: Sex Appeal*, WNYC STUDIOS (Nov. 23, 2017), <https://www.wnycstudios.org/story/sex-appeal/> [<https://perma.cc/946D-BR3J>].

²⁵⁰ See Case, *supra* note 247, at 806–07.

²⁵¹ See AM. PSYCHOLOGICAL ASS’N, DEFINITIONS RELATED TO SEXUAL ORIENTATION AND GENDER DIVERSITY IN APA DOCUMENTS (2015), <https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> [<https://perma.cc/CEA8-CWHH>] (adopting progressive definitions).

²⁵² See Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 3, § 1.3 (defining “biological sex” as “male” or “female”), *repealed by* 2017 N.C. Sess. Laws 4, § 1.

²⁵³ Shannon Minter, *Why Gender Theory Should Not Determine Transgender Advocacy* 13 (2010) (unpublished manuscript) (on file with the Harvard Law School Library).

²⁵⁴ See, e.g., *Boyden v. Conlin*, No. 17-cv-264, 2018 WL 4473347, at *4 (W.D. Wis. Sept. 18, 2018) (discussing the argument of opponents of health insurance coverage for transition-related care that “sex is immutable, whereas gender identity is a developmental process”); WoLF Letter, *supra* note 213, at 2 (opposing nonbinary recognition on the ground that “[s]ex and ‘gender’ are distinct concepts” and arguing the law should only recognize sex).

²⁵⁵ WoLF Letter, *supra* note 213, at 2–4.

²⁵⁶ See David B. Cruz, Essay, *Getting Sex “Right”: Heteronormativity and Biologism in Trans and Intersex Marriage Litigation and Scholarship*, 18 DUKE J. GENDER L. & POL’Y 203, 217 (2010) (“It misdirects our focus, to someone’s political detriment, to appeal to the natural or to ‘the facts’ of sex (as proclaimed by medical practitioners) as the basis for what are really political judgments about what identities and relationships to recognize.”); Robin Dembroff, *Real Talk on the*

Conversation might be facilitated by careful examination of the interests at stake in each potential area of sex or gender regulation.²⁵⁷ Whether sex or gender should be defined based on genetics, hormones, morphology, physiology, psychology, elective choice, documentary evidence such as birth certificates, public perceptions, something else, or not at all — is a difficult question to answer in general.²⁵⁸ The answer may be different if the law’s purpose is to forbid discrimination, express respect for a person’s identity, ensure accurate medical records, create fair divisions in sporting events, provide affirmative action for people disadvantaged by male dominance, or some mix of these goals. Meanings may change over time. Rather than attempting to settle questions once and for all, contextualized definitions might create opportunities for various constituencies to argue about what is at stake in each context of sex or gender regulation. To be sure, one danger of contextual analysis is that its results are contestable. Decisionmakers may ultimately prioritize interests in different ways and arrive at different outcomes.²⁵⁹ But a particularized approach may create opportunities for discussion about nonbinary gender rights that are not foreclosed at the outset by ideological or theoretical disagreements about the meaning of sex or gender.²⁶⁰

B. Regulatory Models for Nonbinary Gender Rights

Discussions of nonbinary gender rights are often stifled by the assumption that those rights must always take the form of gender neutrality or, alternatively, that the law must always recognize a third gender.

Metaphysics of Gender 1–2 (May 15, 2017) (unpublished manuscript) (on file with the Harvard Law School Library).

²⁵⁷ *But see* Talia Mae Bettcher, *Trans Women and the Meaning of “Woman,”* in *THE PHILOSOPHY OF SEX: CONTEMPORARY READINGS* 233, 243 (Nicholas Power et al. eds., 6th ed. 2013) (objecting to context-specific definitions of who is a woman because they mean that there could be contexts in which a trans woman’s claims to being a woman might be false, while, on the author’s alternative “multiple-meaning view, a trans woman can say that she is a woman in *all* legitimate contexts because those contexts in which she is not a woman occur in a dominant culture” with a view of gender that she rejects on philosophical grounds). While this Article assumes that people’s gender identities are what they say they are, it does not begin from the premise that there could never be a context in which the law might legitimately offer definitions based on something other than self-identification. Instead, it examines each legal context.

²⁵⁸ *See, e.g.,* Clarke, *Identity and Form*, *supra* note 28, at 760, 763–64, 792–99 (discussing alternative legal definitions of “sex”).

²⁵⁹ This objection is roughly analogous to a line of criticism of balancing tests in constitutional law. *See, e.g.,* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943, 982 (1987) (arguing that balancing approaches to constitutional law are problematic because, among other reasons, “[n]o system of identification, evaluation, and comparison of interests has been developed”).

²⁶⁰ Consider, for example, how some advocates of policies to address climate change have overcome polarization by framing discussions around individual legal or policy questions on a micro level. Hari M. Osofsky & Jacqueline Peel, *Energy Partisanship*, 65 *EMORY L.J.* 695, 701–02 (2016) (discussing research from psychology that explains why political polarization makes solutions to climate change at the federal legislative level impossible and proposing that change proceed locally by building consensus on specific proposals).

Rather than advocating either of these options as the best fit for nonbinary gender rights, this section describes potential upsides and downsides of each model. It proposes that there are variations on these models, and combinations of the two approaches, that might best fit different circumstances. There is also a third option: integrating nonbinary people into binary sex or gender regulations, but tailoring the definition of “sex” or “gender” so as to best fulfill the purposes of the regulation, while respecting every person’s gender identity to the extent possible.

1. *Third-Gender Recognition.* — A recognition model would provide a third option to better reflect the lived experiences of people who do not check the M or F boxes. This model has the potential upsides of conferring legal dignity and protection, as well as facilitating affirmative efforts at inclusion and accommodation. But recognition also has potential downsides: the forms of gender identity the law can recognize are limited. Additionally, a third legal option may generate backlash, reinforce stereotypes about the third category, and domesticate the radical potential of nonbinary gender.

A first potential benefit of third-gender recognition is in conferring legal status and protection. A recognition model responds to concerns about disbelief, disrespect, and disregard of nonbinary people. Recognition legitimates nonbinary identity as a “civil status”; in other words, it affirms the “position of a person within the legal system.”²⁶¹ By giving legal imprimatur to nonbinary gender, on par with the gender identities of men and women, recognition expresses the civil equivalence of nonbinary identities. Legal recognition may serve as a shield, giving nonbinary people authority in their demands for fair treatment from public and private actors.

Another advantage of recognition is that it might facilitate projects that see nonbinary gender as an aspect of organizational diversity that should be sought after. Recognition can facilitate the collection of data and information on the nonbinary population to identify problems and challenges people with nonbinary gender identities commonly face, as with the U.S. Transgender Survey. It might entail a right to affirmative changes in policy to accommodate nonbinary gender identities. The concept of “reasonable accommodation” found in disability law is a type

²⁶¹ Press Release No. 95/2017, Bundesverfassungsgericht, Civil Status Law Must Allow a Third Gender Option (Nov. 8, 2017), <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-095.html> [<https://perma.cc/F5HP-MP8G>] (describing an order of the First Senate of the German Federal Constitutional Court recognizing the right to registration of a “diverse” gender other than male or female); Peter Dunne & Jule Mulder, Developments, *Beyond the Binary: Towards a Third Sex Category in Germany?*, 19 GERMAN L.J. 627, 636–37 (2018) (discussing how the German decision “expressly acknowledges and validates the legitimacy of non-male and non-female identities,” *id.* at 637).

of recognition.²⁶² On this theory, institutions must make reasonable adjustments to their policies and practices to accommodate people with disabilities.²⁶³ When a person with a disability requests an accommodation, their employer must engage in an “interactive process” to come to a solution.²⁶⁴

Whether the Americans with Disabilities Act²⁶⁵ (ADA) protects non-binary gender, as a legal matter, is a complicated question. The ADA explicitly excludes “gender identity disorders not resulting from physical impairments.”²⁶⁶ But one court has construed this provision “narrowly to refer to simply the condition of identifying with a different gender, not to exclude from ADA coverage disabling conditions that persons who identify with a different gender may have — such as . . . gender dysphoria.”²⁶⁷ This reasoning could extend to those nonbinary people with gender dysphoria, but would not cover anyone unwilling or unable to assert they suffer from a “disabling condition.”²⁶⁸ Some, but not all, nonbinary people may have gender dysphoria.²⁶⁹ At present, U.S. sex discrimination law does not include any right to reasonable

²⁶² See, e.g., 42 U.S.C. § 12112(b)(5)(A) (2012) (providing that prohibited discrimination includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless . . . the accommodation would impose an undue hardship on the operation of the business”).

²⁶³ *Id.*

²⁶⁴ 29 C.F.R. § 1630.2(o)(3) (2018) (“To determine the appropriate reasonable accommodation [for a given employee,] it may be necessary for the [employer] to initiate an informal, interactive process with the [employee].”).

²⁶⁵ 42 U.S.C. §§ 12101–12213.

²⁶⁶ *Id.* § 12211(b)(1). For an argument that this exclusion is a violation of the Constitution’s Equal Protection Clause, see Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 551, 557–58 (2016).

²⁶⁷ *Blatt v. Cabela’s Retail, Inc.*, No. 14-cv-04822, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017). Gender dysphoria is significant distress or impairment resulting from incongruence between one’s gender identity and one’s assigned sex. *Id.* at *2 & n.1. The Trump Administration agrees that the ADA covers gender dysphoria when it results from a “physical impairment.” Statement of Interest of the United States of America at 3, *Doe v. Arrisi*, No. 16-cv-08640 (D.N.J. July 17, 2017).

²⁶⁸ *Blatt*, 2017 WL 2178123, at *3–4 (concluding that the plaintiff’s gender dysphoria was a disability because it “substantially limits her major life activities of interacting with others, reproducing, and social and occupational functioning,” *id.* at *4). One concern may be that disability law pathologizes transgender identity. *But see* Kevin Barry & Jennifer Levi, *Blatt v. Cabela’s Retail, Inc. and a New Path for Transgender Rights*, 127 YALE L.J.F. 373, 386 (2017) (“This concern ignores the distinction between transgender identity and gender dysphoria. Transgender identity is *not* a medical condition. Gender dysphoria, on the other hand, *is* a medical condition; it is real, serious, and physically incapacitating, and often can only be ameliorated by medical care.” (footnote omitted)).

²⁶⁹ In 2013, the American Psychiatric Association’s Diagnostic Statistical Manual updated the definition of “[g]ender dysphoria,” to “reflect[] a change in conceptualization of the disorder’s defining features by emphasizing the phenomenon of ‘gender incongruence’ rather than cross-gender identification per se.” AM. PSYCHIATRIC ASS’N, HIGHLIGHTS OF CHANGES FROM DSM-IV-TR TO DSM-5, at 14 (2013). It clarifies: “The experienced gender incongruence and resulting gender dysphoria may take many forms.” *Id.*

accommodation.²⁷⁰ Whether or not the letter of the law applies, nonbinary people might make arguments for institutional inclusion that sound in the theory of reasonable accommodation: sometimes equality requires affirmative changes in structures and rules.

However, the recognition model also has potential drawbacks. One is that recognition may be purely expressive, amounting to lip service to nonbinary gender that does not disturb existing institutional arrangements that work to the advantage of the binary majority. Recognition does not always entail accommodation. For example, recognition could mean that a university includes “nonbinary” as an optional sex designation in its official records but does no work to educate staff or students about nonbinary gender identities, fails to respond to complaints of harassment from nonbinary students, and maintains only single-sex dormitories.

Additionally, precisely because it expresses the legitimacy of nonbinary gender identities, recognition may incur political backlash from those who are invested in maintaining binary gender. As new identities make claims for recognition, they are also met with resistance from those fatigued by identity politics in general.²⁷¹ To the extent that recognition is perceived to entail costly accommodations, it may incur all the more resistance.²⁷²

Moreover, adding an X option to M and F does not confer dignity on every gender identity; it only expands the list of legal sex classifications to three. The X designation may be a poor fit for those people who regard their gender identities as hybrids of M and F, altogether absent, or subversive. Conceivably, sex designations could be a blank form field, allowing people to choose whatever gender descriptor they might prefer, as on social media websites.²⁷³ But in the law, infinite variation can be a problem. On the principle of *numerus clausus*, the law sometimes limits the types of social forms that will be legally recognized because third parties have an interest in understanding legal claims.²⁷⁴ To the extent that there are third-party interests in understanding someone’s sex or gender identity, it may be impossible to

²⁷⁰ This is relevant assuming that sex discrimination includes discrimination against someone for having a nonbinary gender identity. See *supra* p. 924.

²⁷¹ See, e.g., Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 794 (2011).

²⁷² See, e.g., Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 311–12 (2009) (identifying a “socio-legal backlash,” for which “[a] primary target . . . has been the ADA’s accommodation mandate”).

²⁷³ See, e.g., Facebook Diversity, *supra* note 45.

²⁷⁴ See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 4 (2000). This is the case in property law, where a limited number of types of ownership are recognized. *Id.* In other instances, such as in contract law, the law enforces a nearly unlimited variety of forms of private agreements. *Id.* at 3. For applications of this theory to sex and gender, see Clarke, *Identity and Form*, *supra* note 28, at 769; and Katyal, *supra* note 28.

recognize an unlimited variety of identities. Many fill-in-the-blank gender identities are unlikely to have widespread social understanding or may be misunderstood.

By identifying a third gender, the recognition model also runs the risk of reinforcing new stereotypes, exclusionary categories, and stigmatizing practices. The X category may come to stand for a new “package” of gender stereotypes, rather than opening space for a diversity of gender identities.²⁷⁵ Authorities may end up policing who is and is not a legitimate member of the third category. The history of racial categorization demonstrates that the addition of new categories can be in the service of subordination rather than liberation.²⁷⁶ Even if it is freely chosen, the X may come to mark stigma. In those cultures that recognize third genders, the third-gender category is usually subordinate.²⁷⁷

A recognition model also risks domesticating nonbinary identity, in the way that queer theorists expressed concern that marriage would domesticate LGB people, blunting the edge of radical critiques of normative sexualities.²⁷⁸ Integration of nonbinary people into a third category may remove the pressure to eliminate the state’s power to impose legal sex classifications.²⁷⁹ But whether this is likely to be true in a given context is an empirical question. Social movements might pursue recognition as a stopgap strategy, while keeping more radical goals as long-term aspirations. Or they might pursue limited forms of recognition in some contexts and make more radical demands for sex or gender neutrality in others.

2. *Sex or Gender Neutrality.* — An alternative legal strategy is sex or gender neutrality. The term “gender neutrality” has long generated confusion.²⁸⁰ One question is what aspects of sex or gender the law should treat neutrally. Another question is how neutrality is to be achieved. Neutrality is unlikely to mean enforced androgyny. Rather, the law might insist on masking gendered characteristics in certain contexts, eliminating rules that classify by sex, or decoupling certain traits

²⁷⁵ See Mary Anne Case, *Unpacking Package Deals: Separate Spheres Are Not the Answer*, 75 DENV. U. L. REV. 1305, 1306 (1998).

²⁷⁶ Professor Mary Anne Case offers the example of “the ever finer slicing of racial classifications from Black and White to quadroon and octoroon in antebellum Louisiana, or the distinction between Black, White, and Colored in South African apartheid law.” Case, *supra* note 25, at 15 n.35.

²⁷⁷ See, e.g., S.F. Ahmed et al., Review, *Intersex and Gender Assignment; The Third Way?*, 89 ARCHIVES OF DISEASE IN CHILDHOOD 847, 848 (2004). But see Gildden, *supra* note 236, at 122–23 (describing the “high status granted to gender variant individuals” in some Native American communities, *id.* at 123).

²⁷⁸ See, e.g., MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 84–116 (1999); Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1400–01 (2004).

²⁷⁹ Cf. Currah, *supra* note 164, at 445–46 (discussing an analogous debate with respect to rights for transgender men and transgender women).

²⁸⁰ See, e.g., Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 837–38 (1989).

from sex classifications. Alternatively, it might follow the nonendorsement or pluralism strands of the law's treatment of religion.

One view is that the law should be neutral not only with respect to sex, in the physical sense of that term, but also with respect to gender, in the social sense of masculinity and femininity.²⁸¹ This would mean abolition of gender — the old radical feminist dream of an androgynous or unisex society.²⁸² But ending gender is a troublesome legal project, for theoretical and practical reasons.²⁸³ As a matter of theory — what would it mean to end gender? Would it mean no one could wear frilly dresses or suits and ties?²⁸⁴ Would it mean jobs like firefighting, which prize traditionally masculine traits, like risk-taking and physical strength, must be restructured to give equal weight to traditionally feminine traits, like caretaking and gentleness?²⁸⁵ As a practical matter, this version of “gender neutrality” would be difficult to implement and likely to encounter political resistance. The idea that law could eradicate social practices like race or gender, even if it tried, is questionable.²⁸⁶ Whatever the virtues of gender abolition might be, the idea is unlikely to catch on in a culture in which gender remains a source of meaning and identity for many people, including many transgender men, transgender women, and nonbinary people.

Alternatively, gender neutrality might attempt a project of lesser ambition. It might aim not to eradicate gender across the board, but to “mask” gendered social characteristics in certain contexts, as in the famous orchestra auditions study in which aspiring musicians played behind a curtain so that the judges could not guess their sexes or gender

²⁸¹ Psychologists have devised measures for determining what traits are gendered in this social sense, such as the Bem Sex Role Inventory, which report the results of surveys about whether particular traits, behaviors, or characteristics are desirable in men or women. See, e.g., Andrew P. Smiler & Marina Epstein, *Measuring Gender: Options and Issues*, in 1 HANDBOOK OF GENDER RESEARCH IN PSYCHOLOGY 133, 134 (Joan C. Chrisler & Donald R. McCreary eds., 2010). Notably, these surveys allow masculinity and femininity to be assessed independently; individuals may be high in both male and female traits or low in both. See *id.*

²⁸² See *supra* p. 916.

²⁸³ See YURACKO, *supra* note 30, at 144.

²⁸⁴ See JULIA SERANO, EXCLUDED: MAKING FEMINIST AND QUEER MOVEMENTS MORE INCLUSIVE 128 (2013) (“What exactly is the ‘end of gender’? What does it look like? Are there words to describe male and female bodies at the end of gender? Or do we purge all words that refer to male- or female-specific body parts and reproductive functions for fear that they will reinforce gender distinctions? Do we do away with activities such as sports, sewing, shaving, cooking, fixing cars, taking care of children, and of course, man-on-top-woman-on-bottom penetration sex, because these have been too closely associated with traditional masculine and feminine roles in the past? What clothes do we wear at the end of gender?”).

²⁸⁵ See YURACKO, *supra* note 30, at 146–48. Or would it mean somehow attempting to delink these stereotypical traits from gender?

²⁸⁶ Antidiscrimination law has more moderate ambitions: to intervene in particular social practices that uphold racialized, gendered, or otherwise problematic hierarchies. See, e.g., Robert Post, 1998–99 Brennan Center Symposium Lecture, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 17 (2000).

identities, and as a result, more women ended up being selected.²⁸⁷ This approach might aim to protect privacy in addition to ensuring equality.

Another limited form of neutrality is anticlassification. Rather than insisting that the law neuter society, this variation on neutrality would insist that legal rules stop classifying people based on sex.²⁸⁸ Rather than adding a third-gender option to identity forms, this approach might mean eliminating the sex category altogether from official documents. It would mean treating sex more like race, which was once, but is no longer, a classification listed on the face of birth certificates²⁸⁹ and a mode of segregating restrooms. Eliminating classifications makes it more difficult for governments and others “to locate and persecute members of stigmatized groups.”²⁹⁰

Yet another approach is decoupling. Neutrality might mean decoupling traits or characteristics associated with men or women from sex. To give another musical example, an a cappella group might limit its members to those with tenor, baritone, or bass voices, rather than to men only.²⁹¹ Family law rules might define their beneficiaries in terms of the category of “primary caretakers,” who could be mothers, fathers, or parents with nonbinary gender identities, rather than limiting their benefits to mothers.²⁹² Or a sports team might limit players to those with low levels of testosterone, rather than women per se.²⁹³

Thus, these limited forms of sex neutrality may reduce discrimination against nonbinary people. But sex neutrality may also have advantages for other transgender and gender-nonconforming people, and for society as a whole. One is that sex neutrality avoids the need for

²⁸⁷ See Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 715–16 (2000).

²⁸⁸ See HEATH FOGG DAVIS, *BEYOND TRANS: DOES GENDER MATTER?* 10 (2017) (arguing that “[t]he administrative discretion to decide who is female and who is male is the essence” of a harmful type of sex discrimination that the author terms “sex identity discrimination”); Tomchin, *supra* note 159, at 861 (arguing that “legal sex classification . . . — which hurts so many — should be eliminated, much like the formerly ubiquitous system of legal racial classification,” but not proposing “gender-blindness,” which, “like race-blindness, would harm those who are most impacted by discrimination”).

²⁸⁹ Racial data are still collected. See Clarke, *Identity and Form*, *supra* note 28, at 800.

²⁹⁰ Laurie Shrage, *Does the Government Need to Know Your Sex?*, 20 J. POL. PHIL. 225, 228 (2012).

²⁹¹ See Pat Eaton-Robb, *Poof! Ivy League Glee Club’s Gender Restrictions Disappear*, ASSOCIATED PRESS (Feb. 11, 2018), <https://www.apnews.com/76974daffade44ed8119618f8437fca0> [<https://perma.cc/7BBA-7MH8>] (“The 14-member Whiffenpoofs, a group formed in 1909, will continue to comprise tenor, baritone and bass voices, and the Whims will continue to be for sopranos and altos.”).

²⁹² See, e.g., Williams, *supra* note 280, at 839–40 (“People disadvantaged by gender can be protected by properly naming the group: in this case, not mothers, but anyone who has eschewed ideal worker status to fulfill child-care responsibilities.”).

²⁹³ See, e.g., Joanna Harper, *Athletic Gender*, 80 LAW & CONTEMP. PROBS. 139, 151–53 (2017) (proposing the concept of “athletic gender,” which would be determined based on testosterone levels solely for purposes of sporting events and considered distinct from one’s gender identity).

gender policing, which can be degrading and humiliating. Professor Heath Fogg Davis offers the example of the “male” and “female” stickers that the Southeastern Pennsylvania Transportation Authority insisted on affixing to bus passes up until 2013.²⁹⁴ As a result of the stickers, many gender-nonconforming people were refused rides, harassed, humiliated, or had their passes confiscated.²⁹⁵ This included both people who self-identified as LGBT and those who did not, such as younger and older people with more androgynous appearances.²⁹⁶ Gender policing is often based on definitions of masculinity and femininity inflected with classism and racism.²⁹⁷ A second set of advantages is expressive. Sex segregation may reflect archaic or confining stereotypes about men and women. Its unquestioned use sends the message that sex is a primary and important way of dividing people into groups.²⁹⁸ It also suggests one’s sex is, and should be, a public matter or one left to the government.²⁹⁹ A third advantage is practical: as with the a cappella example, it is possible that the best baritone is not a man. Confining the group to men means that the group may not include the best voices.

But even limited forms of sex neutrality have drawbacks. The anti-classification strand in race discrimination law is often faulted for failing to redress covert or implicit biases, disparate impacts, and structural inequalities.³⁰⁰ These same criticisms are leveled at contemporary sex discrimination doctrine. Neutrality may be in name only. Neutral rules may have the purpose or effect of classifying based on traditional notions of sex, for example, if testosterone testing is intended to (or widely believed to) preserve women’s sports for “real women.”³⁰¹ In practice,

²⁹⁴ DAVIS, *supra* note 288, at 2. The purported purpose of these stickers was to stop husbands and wives from sharing monthly bus passes. *Id.* at 2–3.

²⁹⁵ *Id.* at 3 (describing “the widespread harm done by the stickers” to “people who self-identified as transgender and those who did not, as well as . . . riders who self-identified as queer and those who did not”).

²⁹⁶ *Id.* at 5–6.

²⁹⁷ *See, e.g., id.* at 30.

²⁹⁸ *Cf. id.* at 14 (“We are asked to tick binary sex boxes on myriad bureaucratic forms ranging from school, job, mortgage, and apartment rental applications to government census forms, dental and medical intake questionnaires, online dating sites, social media and marketing surveys, and on and on.”).

²⁹⁹ *Cf.* Robin Dembroff, *The Nonbinary Gender Trap*, N.Y. REV. BOOKS (Jan. 30, 2018, 7:00 AM), <http://www.nybooks.com/daily/2018/01/30/the-nonbinary-gender-trap/> [<https://perma.cc/DRV6-GTJF>] (“For me, adding ‘nonbinary’ to the list of legal gender options does not address the core problem: any legal system that requires a person to record their gender perpetuates government control over our bodies and identities.”).

³⁰⁰ *See, e.g.,* Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 68 (1991); Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 84–107 (2000).

³⁰¹ *Cf.* Katrina Karkazis & Morgan Carpenter, *Impossible “Choices”: The Inherent Harms of Regulating Women’s Testosterone in Sport*, J. BIOETHICAL INQUIRY 3 (Aug. 16, 2018), <https://>

supposedly neutral baselines often favor those who adopt traditionally male life patterns. Feminists have long argued that in workplace and family law, the sex-blind approach can result in rules tailored for the “ideal worker” who needs no flexibility because he is supported at home by a caretaking partner.³⁰² While women could theoretically meet the “ideal worker” standard, they rarely do because of the prevalence of gender roles. Moreover, a rule against all sex classifications could sweep away not only those classifications that perpetuate subordination, but also those designed to remedy it.³⁰³ For example, some legal rules might give women favorable treatment.³⁰⁴ To impose “neutrality” might mean “leveling down” by holding women to the same inhumane standards as men, rather than “leveling up” to give men the same humane treatment as women.³⁰⁵

Another version of the neutrality model would draw on religious freedom for support, employing concepts such as nonendorsement and pluralism.³⁰⁶ Such a model might protect a panoply of beliefs about gender identity, just as the First Amendment protects a wide array of religious beliefs without endorsing any particular set of beliefs. For purposes of this Article, I will refer to pluralism strategies as those in which a sex or gender neutral option is created alongside a sex or gender segregated one. In practice, however, the neutral category may end up indistinguishable from a third-gender one, incurring all the disadvantages of third-gender recognition, such as the possibility of stereotyping and stigmatization. Moreover, a pluralism model invites objections from those with religious commitments to traditional, binary

link.springer.com/article/10.1007/s11673-018-9876-3 [<https://perma.cc/2ETP-QWPX>] (arguing that even a testosterone rule that states that it does not intend to question a competitor's sex can “mete out both suspicion and judgment on the sex and gender identity of the athletes regulated”).

³⁰² JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 2* (2000); *see also, e.g., id.* at 1–3.

³⁰³ *See, e.g.,* CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN 117* (1979) (proposing an alternative approach to sex classifications that would ask “whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status”).

³⁰⁴ *See, e.g.,* *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689–93 (2017) (scrutinizing an immigration rule that gave favorable treatment to the children of unmarried citizen mothers over those of unmarried citizen fathers).

³⁰⁵ *See id.* at 1701 (selecting leveling down as a remedy to apply the same harsh standard whether the child's U.S. citizen parent was their mother or father).

³⁰⁶ *See* David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997, 1005, 1040 (2002) (discussing the analogy to religious freedom and describing how U.S. law's neutrality, non-preferentialism, and nonendorsement approaches to religion could be translated to sex and gender); Katyay, *supra* note 28, at 477 (advocating “gender pluralism as a replacement for the binary system” that would “demonopolize the classificatory power of the state in determining sex or gender identity”).

notions of sex, who will argue that their interests should win out over the interests of gender nonconformists when in competition.³⁰⁷

3. *Integration into Binary Sex or Gender Regulation.* — A final approach to nonbinary gender rights would be to integrate nonbinary people into binary sex or gender regulations, while tailoring the definition of “sex” or “gender” so as to best fulfill the purposes of each legal rule, and respecting every person’s gender identity, to the extent possible.³⁰⁸ This approach would ask what interests sex segregation serves, and whether the definition of sex or gender used is tailored to meet that interest.³⁰⁹ For example, if a program sought to increase gender diversity in a traditional, male-dominated workplace, it might define its beneficiaries as not just “women,” but also “people who do not identify exclusively as male and LGBT people.”³¹⁰ The advantage of this approach is that it may be the least disruptive to binary structures that would require time and money to change, such as physical or digital architectures, and so it might serve as a stopgap or compromise solution as regulators consider recognition and neutrality approaches. But integration strategies have all the drawbacks of third-gender recognition. In addition, they are likely to shoehorn nonbinary people into misfit categories at the expense of gender self-determination.

* * *

Rather than being faced with a choice between third-gender recognition and gender neutrality, the law offers an array of options for the protection of nonbinary gender identities. Determining which legal model is optimal requires investigation of the interests at stake in binary sex or gender, and will therefore depend on context. Any definition of sex or gender should be tailored to serve the purposes of regulation.

III. LEGAL INTERESTS IN BINARY SEX OR GENDER?

This Part responds to the claim that nonbinary gender rights would upset a host of legal interests that are ostensibly advanced by maintaining a single, uniform system of binary sex classification.³¹¹ Nonbinary rights would have implications for the law with respect to identification documents, antidiscrimination, and sex-segregated physical spaces and

³⁰⁷ For an example of these arguments in the sexual orientation context, see *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1724 (2018).

³⁰⁸ This integration strategy differs from the decoupling strategy described above only in that there is no formal attempt at neutrality — it uses binary categories that are explicitly about sex or gender.

³⁰⁹ See *supra* section II.A, pp. 933–36.

³¹⁰ See *infra* section III.B.1, pp. 952–54.

³¹¹ See *supra* p. 903.

activities.³¹² These domains have also been sites of contestation for transgender people seeking recognition as men and women. It is often assumed that nonbinary people only complicate and heighten these challenges. But that assumption may be based on unquestioned premises about the need for binary categories and simplistic ideas about the legal options for advancing nonbinary gender rights.

This Part rebuts the argument that nonbinary gender rights would upset some foundational premise of the legal order, with unforeseen and catastrophic results. Rather than being a universal ordering principle, legal sex and gender classifications are diminishing and exceptional. A careful look at the remaining contexts in which the law regulates sex and gender reveals no abiding and universal interest in binary classification. Rather, it shows that the purported interests binary classifications serve are variable and context dependent. These interests might include protecting conventionally gendered ideas of privacy or safety; facilitating easy identification; preserving free speech; providing opportunities for women; collecting relevant data; creating educational, athletic, or health care programs tailored toward the needs of specific populations defined by sex or gender; or avoiding the costs of transition. This Part argues that in most instances, these interests are weak or unsubstantiated, or they can be accommodated, if not better served, by one of the regulatory approaches to nonbinary gender rights discussed in Part II: neutrality, recognition, or integration.

This Part builds from the premise that in most every context of sex or gender regulation, the law should recognize self-determination with respect to someone's gender identity as a man or woman.³¹³ It also takes for granted that nonbinary genders deserve the same legal status as binary ones, rather than making that case on abstract grounds.³¹⁴ It asks how the assumption that nonbinary gender identities should be accorded the same status as male and female gender identities would transform legal debates. It offers tentative conclusions on the best regulatory model for nonbinary gender rights in each context, considering how nonbinary rights claims might converge and diverge with those of other identity-based movements, including feminist and other LGBT interests. These conclusions reflect political judgments about how to prioritize the various interests at stake in each context. There is room for reasonable disagreement with my particular conclusions as to the best approach in each case. But my overall argument does not depend on the outcomes of these fine-grained legal debates. Rather, I aim to show that legal regimes that rely on binary sex or gender classification are

³¹² While my main focus is on legal rules, at points this discussion also considers how nongovernmental institutions might revise their rules and procedures to take nonbinary gender identities seriously. For detailed advice on how to conduct a "gender audit" to "make [an] organization[] more inclusive of people with diverse sex identities," see DAVIS, *supra* note 288, at 151.

³¹³ See *supra* note 42 and accompanying text.

³¹⁴ See *supra* note 43 and accompanying text.

exceptional, not inevitable, and not a reason to resist the larger project of nonbinary gender rights.

A. Identification

One argument often raised against nonbinary inclusion is that it will render efforts at identification and surveillance by law enforcement more difficult. This argument has long been made with respect to *any* changes to official sex markers, even from M to F or F to M.³¹⁵ But the argument takes new forms with respect to nonbinary gender, which would also require the recognition of an X category or, alternatively, the elimination of any sex or gender markers altogether. The question is, does law enforcement need binary M and F sex markers to identify people, determine police or emergency response, or track crimes?³¹⁶ Third-gender recognition is the best option in this context, at least at present.

Those who assert the importance of binary gender markers for identification documents do not explain why law enforcement needs those markers in addition to photographs.³¹⁷ In *Zzyym v. Pompeo*,³¹⁸ the court concluded that the State Department's policy of requiring an applicant to mark either M or F on a passport application was arbitrary and capricious.³¹⁹ Not all law enforcement databases include sex or gender designations, and in the case of transgender individuals, the designations in various databases may already conflict.³²⁰ The "identity fraud" argument — that criminals will change their gender markers so that their names do not come up in law enforcement databases — is not a unique problem with recognizing nonbinary gender; it is a problem with any system that allows corrections to gender markers. The State Department already allows sex marker corrections between M and F, without proof of surgery.³²¹ Moreover, fraud concerns are dubious considering the

³¹⁵ See, e.g., Lisa A. Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 413–15 (2013).

³¹⁶ See WoLF Letter, *supra* note 213, at 2 (arguing that the government has "legitimate interests in recording and maintaining accurate information about its residents' sex, for purposes of identification, tracking crimes, . . . and determining the appropriate emergency medical and police services").

³¹⁷ Even if photographs can be tampered with, those seeking to commit fraud can tamper with the gender marker as well, or can simply find false passports with M or F markers that match their own appearances. Facial recognition and other biometric forms of identification are better tailored to address fraud concerns.

³¹⁸ No. 15-cv-02362, 2018 WL 4491434 (D. Colo. Sept. 19, 2018).

³¹⁹ *Id.* at *1. *Zzyym* brought suit under the Administrative Procedure Act, which disallows agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2012).

³²⁰ See *Zzyym*, 2018 WL 4491434, at *6 (noting that a passport holder's identity could be verified without checking the gender designation because databases include "other fields" such as "social security number, date of birth, name, etc.").

³²¹ Mottet, *supra* note 315, at 415.

number of other countries, including Australia, New Zealand, and India, that have managed nonbinary markers without apparent incident.³²² The United States accepts passports from these countries with nonbinary gender markers.³²³ The International Civil Aviation Organization, the UN agency that sets international standards for machine-readable passports, has long allowed “X” as a sex marker for “unspecified.”³²⁴ As Judge Jackson put it during a hearing in the *Zzyym* case, “I’ll bet you that if the State Department rethought its policy and decided to accept the X designation, the sun would still come up tomorrow.”³²⁵

Another version of this argument might be that law enforcement and emergency services routinely use binary gender identifiers to visually identify crime suspects and people in need of assistance.³²⁶ But authorities may use any number of descriptors for these purposes, not just perceived sex or gender presentation, but also race, age, height, weight, and other identifying features. Under equal protection doctrine, this limited use of visually identifying features, even racial ones, is widely regarded as permissible.³²⁷ It is therefore implausible that recognition of nonbinary gender rights would invalidate the use of perceived gendered characteristics for purposes of visual identifications. Nor should it.

Opponents of nonbinary gender recognition have also expressed the worry that it would skew crime statistics, obscuring the fact that men commit more violent crimes than women.³²⁸ But considering the vast disparities in violent crime rates between men and women, the number of criminals likely to identify as nonbinary is too small to have this effect.³²⁹

³²² See *Zzyym* Transcript, *supra* note 139, at 37. The lawyer from the State Department in *Zzyym* was not aware of any evidence that jurisdictions that recognize an X designation had any law enforcement trouble. *Id.* at 46.

³²³ *Id.* at 35–36 (discussing how the U.S. State Department will permit noncitizens from Australia to enter the United States with an X designation on their passports, but will not allow citizens of the United States to leave with an X designation).

³²⁴ Int’l Civil Aviation Org. [ICAO], *Machine Readable Travel Documents*, at 14, ICAO Doc. 9303 (7th ed. 2015), https://www.icao.int/publications/Documents/9303_p4_cons_en.pdf [<https://perma.cc/H6DH-LFN4>] (allowing “F for female, M for male, or X for unspecified”).

³²⁵ *Zzyym* Transcript, *supra* note 139, at 52.

³²⁶ Bela August Walker, Note, *The Color of Crime: The Case Against Race-Based Suspect Descriptions*, 103 COLUM. L. REV. 662, 671 (2003) (“The description of a criminal suspect, whether created by the victim, an eyewitness, or the police, always begins with race and gender.”).

³²⁷ R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1090–95 (2001) (explaining that race-based suspect descriptions have not triggered equal protection scrutiny because “the prevailing approach [is to assume] that suspect description reliance should never be viewed as a racial classification”). Even if this were not the case, suspect descriptions might survive the test of strict scrutiny, as narrowly tailored to achieve a compelling state interest. See *id.* at 1119.

³²⁸ See WoLF Letter, *supra* note 213, at 4.

³²⁹ See *id.* (citing FBI statistics that men committed 88% of murders in 2015). The Williams Institute estimates that 0.58% of adults in the United States identify as transgender. FLORES ET AL., *supra* note 21, at 3.

Recognition of an X designation may have law enforcement *benefits*. Some nonbinary people do not consistently appear to others as men or women.³³⁰ A third designation might better match how they are perceived. Providing an X designation might avoid friction from police, customs, or TSA officers who would otherwise question a person whose gender identity does not appear to match the designation on their documents.³³¹ This type of friction is administratively costly for law enforcement, leading to unnecessary delays and even wrongful arrests and detentions. More importantly, it harms nonbinary people and their families, who are forced to reargue their gender identities with officials on a regular basis.³³²

As many have argued, the fact that official documents include sex designations at all is offensive to the values of self-determination and privacy, and it reinforces state authority over sex and gender in a troubling way.³³³ An X designation has the potential drawback of allowing those who would harm nonbinary people to identify targets for violence and abuse, although I am unaware of any examples in which identity documents have been used for this purpose.³³⁴ At present, there are good reasons to prefer a recognition model to a neutrality one. Recognition is more politically palatable, it allows the limited collection of sex-differentiated statistics to continue, and identity documents that reflect a person's gender identity offer that person a measure of security and legitimacy. A partial solution is to make sex designators on identification documents optional, giving people the choice to leave them blank, as New York City does with its identification cards.³³⁵

³³⁰ See JAMES ET AL., *supra* note 2, at 48; *supra* p. 908.

³³¹ See JAMES ET AL., *supra* note 2, at 89 (reporting that 10% of nonbinary respondents to the 2015 USTS had been denied services or benefits when the name or gender on their identification documents did not match their gender presentation).

³³² *Cal. Assemb. Transp. Hearing, supra* note 86 (statement of Jonathan Clay) (discussing how a nonbinary child's incorrect ID "always opens us up to all sorts of questions going through security and other places. . . . Which is very difficult for my wife and I, because it puts [us] in a role where we are now having conversations with people, whether it's security, doctors, other folks. Having this conversation in a venue that we don't control, and unfortunately, it typically happens in front of our child which is also very difficult. Because that identity is very important to them").

³³³ See, e.g., Spade, *supra* note 28, at 738 ("Why is gender identification taken for granted as a legitimate domain of governance?"); Wipfler, *supra* note 28, at 492 ("Ultimately, . . . so long as such documents include a sex designation field, new and seemingly progressive government policies of gender inclusivity harmfully reify sex classification.").

³³⁴ This concern was initially raised in litigation over the X designation on U.K. passports, but dropped when evidence failed to substantiate it. *R (on the application of Elan-Cane) v. Sec'y of State for the Home Dep't* [2018] EWHC (Admin) 1530 [16], [82], 2018 WL 03093374. The U.K. court nonetheless refused to require an X designation on passports pending a "comprehensive review" of the implications of such a change by U.K. authorities. *Id.* at [124].

³³⁵ Wipfler, *supra* note 28, at 526 (discussing this approach, which has been adopted by a number of municipalities, but arguing it "still runs the risk of outing those who choose not to include a sex designation as abnormal if the majority of bearers opt to display their gender"). Another idea would

One reason the drafters of California's Gender Recognition Act opted for the recognition model was because it had been used by the District of Columbia, Oregon, and countries outside of the United States without problems.³³⁶ Additionally, federal regulations implementing the REAL ID Act require "gender" designations on identity documents, giving states discretion to define that term.³³⁷

Moreover, the federal government uses birth certificate sex data, just as it uses data on race, for purposes of collecting public health statistics.³³⁸ Although this is an argument for continuing to collect the data, it does not suggest that the data must be displayed on the face of the certificate.³³⁹ Collection of information on intersex infants and nonbinary gender identities might improve this data by allowing researchers to study the health of these populations.³⁴⁰

Additionally, identity documents with gender designations can act as shields against discrimination and sources of validation for transgender people, whether those designations are M, F, or X. Designations that better match a person's self-presentation may help avoid difficult and dangerous conflicts with law enforcement.³⁴¹ Transgender men and

be to design application forms that leave the gender designation blank by default, requiring individuals who wish to have gender designations to affirmatively select them.

³³⁶ *Cal. Assemb. Transp. Hearing*, *supra* note 86 (statement of Sen. Toni Atkins) (responding to the question, "why even have gender or sex on an ID card, or on a driver's license specifically" with the answer: "We could go the other route, but we really would then be further out of compliance with what other countries and states are doing").

³³⁷ 6 C.F.R. § 37.17 (2018) ("To be accepted by a Federal agency for official purposes, REAL ID driver's licenses and identification cards must include on the front of the card (unless otherwise specified below) the following information: . . . (c) *Gender*, as determined by the State.").

³³⁸ Wipfler, *supra* note 28, at 539.

³³⁹ One scholar has proposed a partial neutrality approach: that the birth certificate provided to parents not include sex information on its face, but that data about the baby's phenotypical sex at birth be collected and sent to the National Center for Health Statistics, to be treated like data on race and kept confidential. See Elizabeth Reilly, *Radical Tweak — Relocating the Power to Assign Sex*, 12 CARDOZO J.L. & GENDER 297, 318 (2005) (proposing that the "sex" field on the birth certificate be moved from the section on identifying data to the one on "information for medical and health purposes only").

³⁴⁰ How sex or gender should be defined depends on the aims of the research. Canada offers one model. See, e.g., *Gender of Person*, STAT. CAN. (Jan. 25, 2018), <http://www23.statcan.gc.ca/imdb/p3Var.pl?Function=DEC&Id=410445> [<https://perma.cc/CR2J-XNDM>] (urging that users of statistics exercise caution in comparing indicators for sex and gender, as "[s]ex and gender refer to two different concepts"); *Classification of Gender*, STAT. CAN. (Jan. 25, 2018), <http://www23.statcan.gc.ca/imdb/p3VD.pl?Function=getVD&TVD=467245> [<https://perma.cc/Q4SK-EMY8>] (providing options for gender including "Male gender," "Female gender," and "Gender diverse").

³⁴¹ See *Cal. Assemb. Transp. Hearing*, *supra* note 86 (statement of Cecilia Aguiar-Curry, Member, Assemb. Standing Comm. on Transp.) ("In emergency services, and if someone were to come upon an automobile accident or something along that, be able to look at someone's identification and know that they're special and may need special handling, that would be really important to me as a family member."). Documents alone cannot always overcome prejudice. See DAVIS, *supra* note 288, at 55 (discussing an incident in which a bouncer harassed a transgender woman in the women's restroom, and when she showed him an ID demonstrating she was a woman, he said: "Your ID is

women may need readily available documentation to prove they are not trespassing in sex-segregated spaces like restrooms.³⁴² This may be a particularly acute concern “[f]or low-income trans women of color,” for whom an “‘accurate’ ID is essential to avoiding harassment or violence, being turned away for public assistance, or being placed in dangerous sex-segregated environments in detention facilities and/or homeless shelters.”³⁴³

Identity documents such as passports, driver’s licenses, and birth certificates can also play a meaningful role in a person’s conception of self.³⁴⁴ The documentary formalities that recognize nonbinary gender can legitimate an individual’s claim to that status.³⁴⁵ In recognizing nonbinary gender, state and local governments express its moral equivalence to male and female gender identities, which may undermine discrimination by delegitimizing arguments that nonbinary identity is not real or valid.

B. Antidiscrimination Rules

Taking nonbinary gender seriously would entail protection from discrimination and harassment in housing, employment, education, public accommodations, and other domains.

As an initial matter, some might object that nonbinary identities are too diverse and amorphous to be included as a “protected class” for purposes of antidiscrimination law. But antidiscrimination law can protect a diverse array of nonbinary gender identities, just as it protects people of every race and religion.³⁴⁶ Nondiscrimination rules do not generally define identity groups with precision; rather, they define prohibited grounds for discrimination (such as “sex” or “gender identity”).³⁴⁷ The question in a sex discrimination case is not whether the plaintiff belonged to a particular class.³⁴⁸ It is whether the plaintiff was mistreated because of sex. For example, it is sex discrimination for an employer to

neither here nor there”); Wipfler, *supra* note 28, at 539 (arguing that in the short term, transgender people need IDs reflecting their gender identities to avoid “gender-probing” and other administrative problems).

³⁴² Wipfler, *supra* note 28, at 541.

³⁴³ *Id.* at 540 (footnote omitted).

³⁴⁴ See Clarke, *Identity and Form*, *supra* note 28, at 792.

³⁴⁵ See, e.g., JAMES ET AL., *supra* note 2, at 85 (quoting one survey respondent: “As a non-binary person, not being able to change my gender on any of my identification documents is really disheartening, dysphoria inducing, and kind of dehumanizing. I’m not allowed to be me”).

³⁴⁶ Including atheists. Nancy Leong, *Negative Identity*, 88 S. CAL. L. REV. 1357, 1402 (2015) (discussing antidiscrimination protection for atheists).

³⁴⁷ Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 110 (2017).

³⁴⁸ See *id.*; see also Cruz, *supra* note 26, at 278 (“Title VII sex discrimination doctrine . . . does not actually confine protection to a limited class of persons and so does *not* require courts to decide the sex/gender class to which a plaintiff belongs.”).

insist that a worker conform to sex stereotypes.³⁴⁹ In the federal courts, there is an emerging consensus that discrimination on the ground of transgender status is a form of sex discrimination because it rests on sex stereotypes.³⁵⁰ This logic extends to discrimination against someone for not adhering to sex stereotypes that require binary gender identity.³⁵¹ Those federal, state, and local rules that ban discrimination on the basis of “gender identity” should cover nonbinary gender identities as well.³⁵²

Most of the arguments against prohibiting discrimination against nonbinary gender identities are no different from the arguments against prohibiting discrimination against transgender identities in general. But there are some questions uniquely applicable to extending protection to nonbinary gender identities, including (1) whether it would eliminate data collection necessary to identify patterns of sex discrimination, and relatedly, whether it would eliminate affirmative action for women, (2) whether it would preclude pregnancy protections, and (3) whether harassment law would require the use of unfamiliar pronouns. This section will discuss these arguments, which apply to antidiscrimination doctrines generally. Later sections will discuss arguments that apply specifically to the operation of antidiscrimination law in particular domains, such as educational programs, the workplace, housing, and health care.

1. Data Collection and Affirmative Action. — With respect to data and affirmative action, recognition approaches work best.³⁵³ Institutions collect information on racial identity, even though some people’s identities are multiracial and others refuse to state any racial information.³⁵⁴ The existence of complicated racial identities does not preclude the enforcement of legal doctrines that depend on statistical underrepresentation of minority groups, despite the fact that a larger percentage of people identify as multiracial than transgender.³⁵⁵ Neither

³⁴⁹ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion) (“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . .”).

³⁵⁰ See *supra* note 175.

³⁵¹ See *supra* note 176.

³⁵² See *supra* p. 924.

³⁵³ For a discussion of theories of discrimination that rely on statistical patterns, such as “pattern or practice” and “disparate impact,” and an argument that these theories can work without a concept of the “protected class,” see Clarke, *supra* note 347, at 173–77.

³⁵⁴ See Lucas, *supra* note 225, at 1249; Rich, *supra* note 226, at 549.

³⁵⁵ See FLORES ET AL., *supra* note 21, at 3 (reporting that 0.58% of adults in the United States identify as transgender); NICHOLAS A. JONES & JUNGMIWHA BULLOCK, U.S. DEP’T OF COMMERCE, THE TWO OR MORE RACES POPULATION: 2010, at 4 tbl.1 (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-13.pdf> [<https://perma.cc/7MNL-C2ZA>] (reporting that 2.9% of the population identified as two or more races).

should the existence of complicated gender identities be a barrier to collection of information on sex or gender identity.³⁵⁶

As for affirmative action, the Supreme Court has held that Title VII allows employers to consider an applicant's sex as a factor pursuant to an affirmative action plan.³⁵⁷ Nonbinary gender and other LGBT identities can be factors recognized for diversity or affirmative action programs as well.³⁵⁸

Nor does nonbinary gender throw a wrench into gender-based affirmative action programs with numerical requirements.³⁵⁹ The recognition that some people's genders are not binary does not render unadministrable laws that would require, for example, that corporate boards include one or more self-identified women.³⁶⁰ The Democratic National Committee charter states that all committees "shall be as equally divided as practicable between men and women (determined by gender self-identification) meaning that the variance between men and women in the group cannot exceed one," and that "gender non-binary delegates . . . shall not be counted as either a male or female, and the remainder of

³⁵⁶ Equal Employment Opportunity Commission (EEOC) forms require data on race and sex to help the Agency identify discriminatory patterns and trends. Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1520 (2014). At present, these forms include only two options for sex, but multiple options for "Race/Ethnicity" including "Two or more races." See Equal Emp't Opportunity Comm'n, Standard Form 100, EMPLOYER INFORMATION REPORT EEO-1 (2006) <https://www.eeoc.gov/employers/eo1survey/upload/eo1-2-2.pdf> [<https://perma.cc/9DXU-VPTU>]. The rules for racial data collection prioritize self-determination and privacy. See Rich, *supra*, at 1520–27. Just as rulemakers give consideration to whether they are interested in data on race or ethnicity, they can give consideration to whether they are interested in data on sex, gender identity, or some other trait. See *supra* note 340 (discussing how Canada's national statistical agency takes this approach).

³⁵⁷ *Johnson v. Transp. Agency*, 480 U.S. 616, 632 (1987) (allowing consideration of sex as a factor pursuant to an affirmative action plan designed to eliminate a "manifest imbalance" in a "traditionally segregated job category").

³⁵⁸ See, e.g., Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965), amended by Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 17, 1967), Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014), reprinted as amended in 42 U.S.C.A. § 2000e (West 2018) (providing that federal contractors "will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin"); CAL. PUB. RES. CODE § 25230(a)(4), (b)(1) (West 2018) (requiring that a state commission that administers grants and loans "implement an outreach program" to minority businesses, including "LGBT business enterprises" defined as those that are "at least 51 percent owned by a lesbian, gay, bisexual, or transgender person or persons").

³⁵⁹ These rules may fall outside the ambit of Title VII because Title VII applies only to employment relationships. They are not subject to constitutional requirements unless they are tied to state action.

³⁶⁰ See 2018 Cal. Legis. Serv. 954 (S.B. 826) (West) (to be codified at CAL. CORP. CODE §§ 301.3, 2115.5). The question whether any particular gender-based affirmative action policy by a government entity will survive constitutional scrutiny has never turned on whether gender is or is not binary. Cf. Ajmel Quereshi, *The Forgotten Remedy: A Legal and Theoretical Defense of Intermediate Scrutiny for Gender-Based Affirmative Action Programs*, 21 AM. U. J. GENDER SOC. POL'Y & L. 797, 813–17 (2013) (outlining the various legal tests courts have applied to gender-based affirmative action under the Constitution).

the delegation shall be equally divided.”³⁶¹ Such a rule does not create incentives to exclude nonbinary people, but neither does it create any incentives to include them. Policymakers should go further to reconsider the purposes of these programs and ask whether those purposes might be better served by rules that aim to affirmatively encourage the inclusion of nonbinary and other LGBT people.³⁶²

2. *Pregnancy Protections.* — Like transgender men who become pregnant, nonbinary people may at first seem to pose a challenge to rules that prohibit discrimination on the basis of pregnancy and related conditions, or rules that afford accommodations for pregnancy³⁶³ or special treatment for biological mothers.³⁶⁴ In the pregnancy context, a decoupling approach works.³⁶⁵ Pregnancy is distinct from gender identity. People of all gender identities can be pregnant,³⁶⁶ and pregnancy protections can be neutral as to gender identity. Sometimes such protection requires no stretch of the statutory language. Title VII, for example, prohibits pregnancy discrimination by defining discrimination

³⁶¹ DEMOCRATIC NAT’L COMM., THE CHARTER & THE BYLAWS OF THE DEMOCRATIC PARTY OF THE UNITED STATES 8 (2018), <https://democrats.org/wp-content/uploads/2018/10/DNC-Charter-Bylaws-8.25.18-with-Amendments.pdf> [<https://perma.cc/HG2Y-2J45>].

³⁶² The moral case may be stronger than the business one. See, e.g., Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 379 (2014) (“[T]he ‘business case for diversity’ is less compelling than other reasons rooted in social justice, equal opportunity, and corporate reputation.”).

³⁶³ See NAT’L P’SHP FOR WOMEN & FAMILIES, REASONABLE ACCOMMODATIONS FOR PREGNANT WORKERS: STATE AND LOCAL LAWS (2018), <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf> [<https://perma.cc/45XZ-PWLS>] (surveying state and local laws).

³⁶⁴ See, e.g., Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2314 (2017) (reviewing the law of parentage with respect to artificial reproductive technologies and concluding that “even in an age of sex and sexual-orientation equality, courts and legislatures continue to treat *biological mothers* as the parents from whom the *legal family* necessarily springs”).

³⁶⁵ I focus here on pregnancy rather than parenting in general, but with respect to parental leave, consider that even a scholar arguing for “fatherhood bonuses” to encourage fathers to take parental leave admits that these benefits should also be extended to “lesbian co-mothers” and even “single parents” who would receive double the benefits. Keith Cunningham-Parmeter, *(Un)Equal Protection: Why Gender Equality Depends on Discrimination*, 109 NW. U. L. REV. 1, 55 (2014).

³⁶⁶ See, e.g., Lara Karaian, *Pregnant Men: Repronormativity, Critical Trans Theory and the Re(conceive)ing of Sex and Pregnancy in Law*, 22 SOC. & LEGAL STUD. 211, 212–13 (2013); Tori Truscheit, *All the Things I Worry About as My Nonbinary Partner Prepares to Give Birth*, THE CUT (Dec. 12, 2017), <https://www.thecut.com/2017/12/giving-birth-outside-the-gender-binary.html> [<https://perma.cc/7MVL-X2DA>]. Nonbinary people may also menstruate, see, e.g., James Michael Nichols, *Powerful Photo Shows that Women Aren’t the Only Ones Who Get Periods*, HUFFINGTON POST (Dec. 22, 2017), https://www.huffingtonpost.com/entry/cass-clemmer-trans-periods_us_597101bce4b0aa14ea78a251 [<https://perma.cc/7XWB-DYS4>] (discussing trans menstrual health advocate Cass Clemmer), and lactate, see, e.g., Trevor MacDonald et al., *Transmasculine Individuals’ Experiences with Lactation, Chestfeeding, and Gender Identity: A Qualitative Study*, 16 BMC PREGNANCY & CHILDBIRTH 1, 2 (2016), <https://bmcpregnancychildbirth.biomedcentral.com/articles/10.1186/s12884-016-0907-y> [<https://perma.cc/6J8Y-3LEX>].

based on “sex” to include discrimination based on pregnancy.³⁶⁷ This provision is not limited to discrimination against women.³⁶⁸ But sometimes statutory language refers to females or women. For example, Title VII also includes a provision that states: “women affected by pregnancy, childbirth, or related medical conditions” are to be treated the same as nonpregnant workers “similar in their ability or inability to work.”³⁶⁹ Rules such as this can be clarified to specify that they apply to all people who are pregnant.³⁷⁰ In statutes governing family law as well, terms such as “gestational mother” might be replaced with “gestational parent.”³⁷¹

One feminist objection might be that this logic severs pregnancy from women’s issues and indirectly hinders arguments for constitutional protection.³⁷² In 1974, the Supreme Court rejected an equal protection challenge to a state disability fund that excluded pregnancy coverage, reasoning that “[t]he program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”³⁷³ One rebuttal to this formalistic argument is to insist, just as formalistically, on the equivalence of women and pregnancy, because only “biological women” get pregnant.³⁷⁴ This rebuttal has had some

³⁶⁷ 42 U.S.C. § 2000e(k) (2012) (defining discrimination “because of sex” to include discrimination “because of . . . pregnancy, childbirth, or related medical conditions”).

³⁶⁸ See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684–85 (1983) (allowing male employees to challenge employer benefits plans that covered female employees’ pregnancies but not male employees’ spouses’ pregnancies).

³⁶⁹ 42 U.S.C. § 2000e(k).

³⁷⁰ For an example of one fix, see *Cal. Fair Emp’t & Housing Council, Amendments to the Fair Employment and Housing Act Regulations 25–26* (2015) (codified at CAL. CODE REGS. tit. 2, § 11035(f)–(g) (2018)) <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/FinalText.pdf> [<https://perma.cc/UPX7-TLUU>] (clarifying that an “eligible female employee” for purposes of pregnancy accommodation includes “a transgender employee who is disabled by pregnancy”).

³⁷¹ The 2017 Uniform Parentage Act’s definitions of parents have moved in the direction of gender neutrality. See, e.g., UNIF. PARENTAGE ACT § 107 (UNIF. LAW COMM’N 2017) (“To the extent practicable, a provision of this [act] applicable to a father-child relationship applies to a mother-child relationship and a provision of this [act] applicable to a mother-child relationship applies to a father-child relationship.” (alterations in original)). However, the Act still uses gendered terms such as “woman who gave birth to a child.” E.g., *id.* § 301. This language could be changed to “person who gave birth to a child” or “gestational parent” to include nonbinary people and transgender men.

³⁷² Cf. Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223, 229–30 (2016) (offering examples of this genre of argument against transgender inclusion in reproductive rights discussions).

³⁷³ *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

³⁷⁴ See, e.g., Vivian M. Gutierrez & Berta E. Hernández-Truyol, *UnSexing Pregnancy?*, in Darren Rosenblum et al., *Pregnant Man?: A Conversation*, 22 YALE J.L. & FEMINISM 207, 233 (2010) (“A person/parent with a female reproductive system is pregnant, regardless of how that person presents socially or legally.”).

success in state courts interpreting their own constitutions to prohibit discrimination based on pregnancy.³⁷⁵

But the argument also has risks for feminists. If the law defines women as a class by their capacity to become pregnant, then this capacity appears to be a legitimate basis for discrimination against women.³⁷⁶ In any event, there are any number of more substantive arguments linking pregnancy discrimination to sex: for example, that in practice, discrimination based on pregnancy drives women's inequality,³⁷⁷ that it is based on the assumption that all workers meet a traditionally male norm,³⁷⁸ or that it is a thinly veiled attempt to exclude women from the workplace.³⁷⁹ The fact that nonbinary people, like transgender men, may also avail themselves of pregnancy protections in no way undermines these substantive arguments.

Likewise, in the family law domain, even scholars arguing for rules that would mostly benefit mothers are able to cast their prescriptive recommendations in sex-neutral terms.³⁸⁰ Laws governing parents might go further in the direction of gender neutrality by recognizing more of the social as well as biological aspects of parenthood.³⁸¹ Nonbinary parents, like many other LGBT parents, may demonstrate the

³⁷⁵ A Connecticut state court advanced this formalistic argument, among several others, in holding that the Connecticut Constitution's Equal Rights Amendment prohibited the state from refusing to fund medically necessary abortions. *Doe v. Maher*, 515 A.2d 134, 159–60 (Conn. Super. Ct. 1986) (“Since only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical expenses are paid by the state for both men and women is sex oriented discrimination.” *Id.* at 159.).

³⁷⁶ See, e.g., Cary Franklin, *Biological Warfare: Constitutional Conflict over “Inherent Differences” Between the Sexes*, 2017 SUP. CT. REV. 169, 180 (“[P]regnancy is, in some instances, deemed to be a fundamental difference between the sexes that gives the state a legitimate reason to treat men and women differently.”).

³⁷⁷ This was the type of argument that the *Doe* court regarded as “most important.” *Doe*, 515 A.2d at 159 (“Since time immemorial, women’s biology and ability to bear children have been used as a basis for discrimination against them. . . . This discrimination has had a devastating effect upon women.”).

³⁷⁸ Cf. *id.* (holding that a benefits plan was discriminatory because “all the male’s medical expenses associated with their reproductive health, for family planning and for conditions unique to his sex are paid and the same is provided for women *except* for the medically necessary abortion that does not endanger her life”).

³⁷⁹ See *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (stating that “a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other” would be sufficient to constitute a violation of the Equal Protection Clause).

³⁸⁰ See, e.g., Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 500 (2017) (arguing that genetics alone should not entitle a person to parental rights, but biology along with a relationship should).

³⁸¹ For an argument about how “[p]arentage law could move away from separate regulations of *maternity and paternity* and instead work toward general regulation of *parentage*” by considering social as well as biological connections, see NeJaime, *supra* note 364, at 2337–38. For an argument that the law should go even further to “unsex” pregnancy protections by encouraging nonpregnant partners to engage in more care work, such as setting up health care appointments, choosing a

importance of social bonds as well as biological relationships in family law, reproductive health care, and parenting.³⁸²

3. *Misgendering and Pronouns.* — Another concern is whether law will require the use of nonbinary pronouns and titles. Most transgender people, including many who identify as nonbinary, use gendered pronouns such as he and she.³⁸³ However, 29% of transgender respondents to the USTS stated they use “they/them” pronouns.³⁸⁴ Some transgender people may request even more unfamiliar pronouns, such as ze (pronounced “zee”) and hir (pronounced “hear”).³⁸⁵ Rather than Ms., Mrs., or Mr., some may request the honorific prefix Mx. (most often pronounced “Mix”).³⁸⁶ When nonbinary people request unfamiliar pronouns, they may encounter discrimination and harassment.³⁸⁷ The law should recognize nonbinary gender identities in this context, just as it requires equal respect for male and female gender identities. Whether harassment law applies will depend on the circumstances: harassment

pediatrician, purchasing a car seat, or taking a childcare class, see David Fontana & Naomi Schoenbaum, *The Sexed Pregnancy*, COLUM. L. REV. (forthcoming 2019) (manuscript at 16–20) (on file with the Harvard Law School Library).

³⁸² This Article does not develop these arguments, because they have been discussed in other work. See e.g., Darren Rosenblum, *Epilogue and Response*, in Rosenblum et al., *supra* note 374, at 261, 269 (“Parenting should be unsexed to embrace both the fluidity of contemporary understandings of gender and the need for balancing roles within the family.”); *supra* note 381.

³⁸³ JAMES ET AL., *supra* note 2, at 49 (reporting that 37% of nonbinary respondents to the 2015 USTS use he/his pronouns, 37% use she/her, 29% use they/their, 20% do not ask for any particular pronouns, and 4% use other unique choices).

³⁸⁴ *Id.*

³⁸⁵ See, e.g., *id.* at 49–50 (reporting that 2% use ze/hir); Beemyn, *supra* note 182, at 359. Beemyn explains that “students who want to be recognized as nonbinary have tended to gravitate toward ‘they/them/their,’ because it is language that others already have and its usage to describe one person is gaining support in the dominant society.” Beemyn, *supra* note 89, at 251 (discussing the results of a survey of 111 nonbinary college students in 2014). “The handful of students I interviewed who had chosen other pronoun options, specifically ‘ze/hir/hir,’ ‘ze/zim/zir,’ or ‘xe/xem/xir,’ often had difficulty, or did not try, getting people beyond their close friends to refer to them with these pronouns.” *Id.*

³⁸⁶ Robin Henry, *Now Pick Mr, Mrs, Miss, Ms . . . or Mx for No Specific Gender*, THE TIMES (May 3, 2015, 1:01 AM), <https://www.thetimes.co.uk/article/now-pick-mr-mrs-miss-ms-or-mx-for-no-specific-gender-t2rb5bh62rs> [<https://perma.cc/B489-J2Y4>] (reporting that “[t]he first recorded use of Mx was in *Single Parent*, the American magazine, in 1977” and quoting an assistant editor of the Oxford English Dictionary as saying: “The early proponents of the term seem to have had gender politics as their central concern [and] saw the title as one which could sidestep the perceived sexism of the traditional ‘Mr’, ‘Mrs’ and ‘Miss.’” (second alteration in original)); *On the Pronunciation of Mx*, GENDER CENSUS (Apr. 25, 2016, 12:40 PM), <http://gendercensus.com/post/143382802540/on-the-pronunciation-of-mx> [<https://perma.cc/X83B-6BG6>] (informal online poll on pronunciation).

³⁸⁷ See, e.g., Casey Parks, *Gresham-Barlow School District Agrees to Pay Transgender Teacher, Add Gender-Neutral Bathrooms After Complaint*, OR. LIVE (May 20, 2016), http://www.oregonlive.com/education/index.ssf/2016/05/gresham_barlow_transgender_tea.html [<https://perma.cc/Q8DW-JJAZ>]; Lori Rozsa, *Transgender Teacher Removed from Classroom After Some Parents Object to Gender-Neutral Prefix ‘Mx.’*, WASH. POST (Sept. 29, 2017), <http://wapo.st/2xLEiYL> [<https://perma.cc/BRN4-SDK5>].

law does not reach accidental or isolated remarks, nor does it generally require the use of any idiosyncratic pronouns a person might request.

Sincere questions about pronouns, as well as accidental or isolated misgendering, do not qualify as harassment. This is because the law generally requires that harassment be “severe or pervasive” to be actionable.³⁸⁸ Even in the most protective of jurisdictions, harassment law does not reach “petty slights and trivial inconveniences.”³⁸⁹ For example, the New York City Commission on Human Rights has issued a guidance document stating that City rules require employers, landlords, and providers of public accommodations “to use an individual’s preferred name, pronoun, and title (*e.g.*, Ms./Mrs.).”³⁹⁰ It further provides that pronouns may include “they/them/theirs or ze/hir.”³⁹¹ As an example of a violation of the law, the guidance gives: “[i]ntentional or repeated refusal” to use the correct terms “after [a person] has made clear which pronouns and title she uses.”³⁹² Misgendering a nonbinary person could therefore be part of a pattern of prohibited gender-identity or sex-based harassment.³⁹³

Additionally, the law requires that harassment be objectively hostile, not just subjectively offensive.³⁹⁴ Thus, the law must account for the social meaning of harassing language, not just the individual victim’s

³⁸⁸ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

³⁸⁹ *Nelson v. HSBC Bank USA*, 929 N.Y.S.2d 259, 264 (N.Y. App. Div. 2011). New York does not have a “severe or pervasive” requirement. *Id.* at 263.

³⁹⁰ N.Y.C. COMM’N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW NO. 3 (2002); N.Y.C. ADMIN. CODE § 8-102(23), at 4 (2016), https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/GenderID_InterpretiveGuide_2015.pdf [<https://perma.cc/C994-QAMV>]. This Article generally avoids the term “preferred pronouns” because this phrasing suggests pronoun usage is a matter of mere preference rather than an issue of equal respect. It uses the term “correct pronouns” instead.

³⁹¹ *Id.*

³⁹² *Id.* at 5; *see also* D.C. MUN. REGS. tit. 4, § 808.2 (2017) (providing that “[d]eliberately misusing an individual’s preferred name[,] form of address or gender-related pronoun” “may constitute evidence of unlawful harassment and hostile environment” considering “the nature, frequency, and severity of the behavior,” among other factors).

³⁹³ A court might require a plaintiff to demonstrate some form of mistreatment in addition to refusal to use gender-neutral pronouns. I have found no cases in which a nonbinary person has brought a claim alleging discrimination based solely on a refusal to use gender-neutral pronouns. In one Oregon case, a schoolteacher alleged that their employer forbade other employees from using the correct pronoun (“they”), and their coworkers called them “she,” “lady,” or “Miss,” smeared Vaseline on their cabinets, yelled insults at them in the hallway, and conspired to prevent them from using the school’s only gender-neutral restroom. Parks, *supra* note 387. The teacher won a settlement. *Id.*

³⁹⁴ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (“Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII’s purview.”).

perspective.³⁹⁵ Harassment that expresses disrespect for a person's gender identity is objectively hostile, just like harassment that expresses disrespect for a person's racial or religious identity. For example, imagine a scenario in which xenophobes harass a coworker they know to be from India by referring to him as an "Arab."³⁹⁶ This deliberate ascription of an incorrect identity is a form of racism — among other things, it expresses the idea that all people with brown skin are "Arab" and that Indian identity is unworthy of respect.³⁹⁷ Similarly, intentional misgendering expresses stereotypes about what real "men" and "women" are and informs its target that their own gender identity is unworthy of respect. It is unreasonable to refuse to refer to a person by their first name, for example, calling a man "Jane" rather than "John," due to a disagreement about whether his male gender identity is valid.³⁹⁸ Likewise, it is unreasonable to insult him by referring to him as "she," as the Equal Employment Opportunity Commission has concluded.³⁹⁹ And if a person uses they/them pronouns, it is unreasonable to insist on referring to them as "he" or "she."⁴⁰⁰

But what if a person who goes by the name Jane-John insists on a new set of pronouns that no one else uses?⁴⁰¹ At present, it does not seem unreasonable to deny this request, although it may be unkind. The law does not protect a person's right to be identified in any manner they wish; it prohibits harassment based on sex. Pronouns, unlike proper names, are "closed class words" that require particular "mental effort"

³⁹⁵ Some courts may consider the inquiry to ask what a reasonable person would think, "from the victim's perspective," noting that men and women may view the same conduct differently. *See, e.g.,* *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991). But not even this standard is a subjective one; it asks what a reasonable person in the plaintiff's circumstances would perceive.

³⁹⁶ *See, e.g.,* *EEOC v. WC&M Enters. Inc.*, 496 F.3d 393, 401–02 (5th Cir. 2007) (reversing a district court's conclusion that an Indian plaintiff whose coworkers called him an "Arab" was unprotected by Title VII).

³⁹⁷ *Cf.* Robin Dembroff & Daniel Wodak, *He/She/They/Ze*, 5 *ERGO* 371, 376 n.8 (2018). It also denigrates Arab identity, but that is not the only reason it is wrong.

³⁹⁸ This is true whether or not John is transgender.

³⁹⁹ *See* Lusardi v. McHugh, EEOC Appeal No. 0120133395, 2015 WL 1607756, at *11 (Apr. 1, 2015) ("While inadvertent and isolated slips of the tongue likely would not constitute harassment, under the facts of this case, S3's actions and demeanor made clear that S3's use of a male name and male pronouns in referring to Complainant was not accidental, but instead was intended to humiliate and ridicule Complainant. As such, S3's repeated and intentional conduct was offensive and demeaning to Complainant and would have been so to a reasonable person in Complainant's position.")

⁴⁰⁰ *See* Dembroff & Wodak, *supra* note 397, at 372 ("[E]nough of the morally relevant facts that explain why it is wrong to misgender transgender women . . . are equally applicable to genderqueer individuals . . .").

⁴⁰¹ *Cf.* Brenda Cossman, *Gender Identity, Gender Pronouns, and Freedom of Expression: Bill C-16 and the Traction of Specious Legal Claims*, 68 *U. TORONTO L.J.* 37, 51 (2018) (discussing the "unsettled" controversy over whether Ontario's human rights law grants the right to choose *which* gender neutral pronouns to use).

to adopt.⁴⁰² They create a sort of *numerus clausus* problem.⁴⁰³ What is objectively unreasonable is to misgender Jane-John as “he” or “she” when there are gender-neutral alternatives, like the singular “they” or “hir.” These options are not wholly idiosyncratic,⁴⁰⁴ they are not novel,⁴⁰⁵ and regulated entities in some places have been put on notice by administrative agencies that they might be required to use such terms.⁴⁰⁶ Readers may object that harassment law offers no bright-line rule as to what modes of address are required, but there is never any bright-line test of what constitutes sexual, racial, or religious harassment.⁴⁰⁷ The test cannot be pinned down with precision or frozen in time because it must depend on context and contemporary norms.⁴⁰⁸

There are special institutional contexts in which there might be particular reasons to compel recognition of any pronouns used by a person, including idiosyncratic ones. A California law known as the LGBT Senior Bill of Rights, passed in October 2017, makes it unlawful for nursing home staff to “[w]illfully and repeatedly fail to use a resident’s preferred name or pronouns after being clearly informed of the preferred name or pronouns,” unless that requirement is “incompatible with any professionally reasonable clinical judgment.”⁴⁰⁹ Such a rule is warranted in the context of the long-term care industry, which involves a

⁴⁰² See John McWhorter, *Goodbye to “He” and “She” and Hello to “Ze”?*, CNN (Oct. 14, 2015, 8:31 AM), <https://www.cnn.com/2015/10/14/opinions/mcwhorter-pronouns-gender-neutral/index.html> [<https://perma.cc/SU86-NJ55>].

⁴⁰³ See *supra* p. 939.

⁴⁰⁴ See *supra* p. 957.

⁴⁰⁵ See, e.g., LESLIE FEINBERG, *TRANS LIBERATION: BEYOND PINK OR BLUE* 71 (1998) (discussing the author’s use of “hir” and “ze” in the 1990s).

⁴⁰⁶ See *supra* p. 958.

⁴⁰⁷ See, e.g., Post, *supra* note 286, at 17 (“[A]ntidiscrimination law is itself a social practice, which regulates other social practices, because the latter have become for one reason or another controversial. It is because the meaning of categories like race, gender, and beauty have become contested that we seek to use antidiscrimination law to reshape them in ways that reflect the purposes of the law.”).

⁴⁰⁸ Cf. *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (per curiam) (holding that a court of appeals had erred by concluding that the insult “boy,” used to describe an adult African American man, was nondiscriminatory, and noting that whether a term is evidence of discrimination “depend[s] on various factors including context, inflection, tone of voice, local custom, and historical usage”).

⁴⁰⁹ CAL. HEALTH & SAFETY CODE § 1439.51 (West 2018). This is a criminal rather than a civil statute because, when the law was first proposed, the long-term care industry objected to any private right of action. See, e.g., *Hearing on S.B. 219 Before the S. Standing Comm. on Judiciary*, 2017–2018 Leg., Reg. Sess. (Cal. 2017) [hereinafter *Cal. Hearing on S.B. 219*] (statement of Matthew Robinson, California Association of Health Facilities), <https://ca.digitaldemocracy.org/hearing/52473?startTime=52&vid=6c776ddd1a23558229f9c6de97aadecc> [<https://perma.cc/ZDK7-DB4U>]; *id.* (statement of Lori Ferguson, California Assisted Living Association). Violations are misdemeanors, which could technically be penalized with fines of up to \$2500, 180 days in county jail, or both, depending on factors including “[w]hether the violation exposed the patient to the risk of death or serious physical harm.” CAL. HEALTH & SAFETY CODE § 1290(c). If the statute were ever enforced, it is likely that prosecutors would seek small fines. Chris Nichols, *Claims Mislead About*

captive and vulnerable population of LGBT seniors.⁴¹⁰ Long-term care providers are charged with protecting the physical and mental health of this population and should not endanger the well-being of their charges by disrespecting their identities, however idiosyncratic.

A number of objections have been raised to the extension of harassment law to require recognition of nonbinary identity. Some object that by requiring pronouns other than “he” or “she,” government is taking sides on the acceptability of nonbinary gender identities, an issue on which public opinion polls are divided.⁴¹¹ But discrimination law always takes sides in social controversies,⁴¹² and harassment law inevitably intervenes in the use of language. Changing modes of address often express changes in the social status of groups. During the civil rights era, the Supreme Court once intervened to require that an African American woman be addressed with the honorific “Miss,” just like a white woman.⁴¹³ Formerly common modes of class-based address — such as “my lord” — have fallen out of favor.⁴¹⁴ Experience with “Ms.” demonstrates that new forms of address are possible and can quickly become culturally legible.⁴¹⁵

Other objections are particular to pronouns. Law professor Eugene Volokh has argued that “[c]ompelling people to change the way they use the ordinary, commonplace words of everyday speech — turning plurals into singulars (or vice versa) — is a serious imposition.”⁴¹⁶ But why is

California Forcing Jail Time for Using Wrong Transgender Pronoun, POLITIFACT (Sept. 26, 2017, 5:13 PM), <http://www.politifact.com/california/article/2017/sep/26/claims-mislead-about-california-bill-forcing-jail/> [<https://perma.cc/U22T-QF5U>] (statement by the bill’s sponsor, Senator Scott Wiener, that “no one is going to jail” for incorrect pronoun use, an infraction that he predicts will be treated akin to a violation of the ban on smoking).

⁴¹⁰ See *Cal. Hearing on S.B. 219*, *supra* note 409 (statement of Sen. Scott Wiener) (“[T]hese seniors, people who are in their 70s, 80s, 90s and above today, are the people who created the modern LGBT community. . . . These are heroes, and they deserve to age gracefully and with the dignity and respect that they have earned 100 times over.”).

⁴¹¹ See Josh Blackman, Opinion, *The Government Can’t Make You Use “Zhir” or “Ze” in Place of “She” and “He,”* WASH. POST (June 16, 2016), <https://wapo.st/1t4rWZ> [<https://perma.cc/Q4MC-GTTW>] (opposing antiharassment rules that would require gender-neutral pronouns on the ground that “while a non-binary view of gender may be orthodoxy in certain segments of society, a near-majority of Americans reject it as a fact of life”).

⁴¹² See Post, *supra* note 286, at 17.

⁴¹³ *Bell v. Maryland*, 378 U.S. 226, 248 n.4 (1964) (Douglas, J., concurring) (discussing *Hamilton v. Alabama*, 376 U.S. 650 (1964) (per curiam)).

⁴¹⁴ Titles of nobility never made it over to the United States. See U.S. CONST. art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States . . .”).

⁴¹⁵ “Ms.” has a long history, but quickly entered common usage in the 1970s due to feminist advocacy. See, e.g., Ben Zimmer, *Ms.*, N.Y. TIMES MAG. (Oct. 23, 2009), <https://nyti.ms/2k9ehvH> [<https://perma.cc/KQV6-CXDS>].

⁴¹⁶ Eugene Volokh, Opinion, *Claims by Transgender Schoolteacher (Who Wants to Be Called “They”) Yield \$60,000 Settlement, Agreement to Create Disciplinary Rules Regulating “Pronoun Usage,”* WASH. POST: VOLOKH CONSPIRACY (May 25, 2016), <https://wapo.st/1qJ29RU> [<https://perma.cc/X6NS-BMUX>].

this a “serious” imposition? The objection might be related to grammar, clarity, or compulsion.

Rules of grammar are often invoked to resist gender-neutral pronouns.⁴¹⁷ The primary problem with this objection is that it elevates rules of grammar over considerations of how to treat one another equally. But even on its own terms, the grammatical objection is dubious. Language is ever evolving. The American Dialect Society voted the singular “they” Word of the Year in 2015, noting that it was used by writers including Geoffrey Chaucer, William Shakespeare, and Jane Austen to refer to an unknown person.⁴¹⁸ Usage of the singular “they” to describe an unknown person is still ubiquitous, despite the strivings of Victorian grammarians to replace it with a universal “he.”⁴¹⁹

A related objection may be the lack of clarity — is the referent of “they” a singular person or group? But context is usually clarifying, as with “you,” a pronoun that is both singular and plural.⁴²⁰ While English speakers once distinguished “thou” (singular) from “you” (plural), “thou” has disappeared.⁴²¹ While new uses of language may at first cause friction, as new terms become more familiar, confusion abates. The English language is plastic, and “change is normal, ongoing, and entertaining.”⁴²² In any event, as philosophers Robin Dembroff and Daniel Wodak have argued, “[e]ven if using *they* slightly complicates communication, it is preferable to further maligning minority gender groups.”⁴²³

The objection may be about government compulsion of speech: mandating particular pronouns rather than forbidding misgendering.⁴²⁴ Yet

⁴¹⁷ Some ersatz grammarians are insincere. Bergman & Barker, *supra* note 31, at 43 (pointing out that some people who oppose the singular “they” do not otherwise care about grammatical rules and hypothesizing that grammatical objections are easier to voice than the real sentiment: “I think your identity is invalid because it challenges my beliefs about the world”).

⁴¹⁸ 2015 Word of the Year Is Singular “They,” AM. DIALECT SOC’Y (Jan. 8, 2016), <https://www.americandialect.org/2015-word-of-the-year-is-singular-they> [<https://perma.cc/F3MD-V296>].

⁴¹⁹ Geoff Nunberg, *Everyone Uses Singular “They,” Whether They Realize It or Not*, NPR (Jan. 13, 2016, 1:00 PM), <https://www.npr.org/2016/01/13/462906419/everyone-uses-singular-they-whether-they-realize-it-or-not> [<https://perma.cc/9PDN-4LEP>].

⁴²⁰ See McWhorter, *supra* note 402.

⁴²¹ See *id.*

⁴²² AM. DIALECT SOC’Y, *supra* note 418.

⁴²³ Robin Dembroff & Daniel Wodak, *The Problem with Pronouns*, PHILOSOPHER (June 23, 2017), <https://politicalphilosopher.net/2017/06/23/featured-philosophers-robin-dembroff-daniel-wodak/> [<https://perma.cc/LUR6-UG5D>].

⁴²⁴ See Cossman, *supra* note 401, at 42–45 (discussing the compelled speech objection to Canadian gender nondiscrimination law); Volokh, *You Can Be Fined*, *supra* note 169 (“New York is requiring people to actually say words that convey a message of approval of the view that gender is a matter of self-perception rather than anatomy, and that, as to ‘ze,’ were deliberately created to convey that . . . message.”).

harassment law constantly compels speech by requiring people to interact on equal terms with others they believe are unequal.⁴²⁵ For example, a sexist police officer would be compelled to refer to a female colleague as “Officer,” even if he believes women should not have that title because their role is in the home. Alternatively, those who object to the gender-neutral honorific “Mx.” have the option of avoiding gendered honorifics altogether, and not referring to any students or coworkers as “Mr.” or “Ms.” An analogy to our instincts about harassment based on religion might be instructive. Should it be considered harassment on the basis of religion to refuse to refer to a person by religious titles such as “Your Holiness,” “Rabbi,” or “Imam,” when no one else in a school or workplace uses religious titles? To compel participants in secular life to use religious honorifics seems incorrect. Those who object to gender-neutral pronouns may use proper names to refer to everyone, as the district court ultimately did in one of its *Zzyym* opinions.⁴²⁶ In close quarters, where it is impossible to avoid the use of pronouns, equal treatment means giving “them” the same respect as “he” and “she.”

C. Sex-Specific Roles and Programs

The law allows binary sex segregation in some educational programs, sporting events, and workplaces. These limited contexts are not reasons to reject the project of nonbinary inclusion.

1. *Education.* — Many controversies over transgender students — such as whether schools should respect the gender identities of children over parental opposition — are not any different with respect to nonbinary gender, and so are beyond the scope of this Article. But nonbinary students may pose special challenges for sex-segregated schools, classrooms, and programs. Various neutrality, recognition, and integration strategies may be ways forward in these contexts.

Many feminist scholars have advocated for an anticlassification approach to education, based on research finding that single-sex programs have negligible educational benefits, they are costly, and they advance damaging gender stereotypes.⁴²⁷ The existence of nonbinary students,

⁴²⁵ In 2006, the Supreme Court rejected a compelled speech objection to a law that required law schools to treat military recruiters like other recruiters, even though it compelled law schools to speak by including military recruiters in their promotional materials. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61–62 (2006). The Court noted that the regulation of speech is always “incidental” to the enforcement of antidiscrimination laws: the fact that Title VII “will require an employer to take down a sign reading ‘White Applicants Only’ hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct.” *Id.* at 62.

⁴²⁶ See *Zzyym v. Kerry*, 220 F. Supp. 3d 1106 *passim* (D. Colo. 2016) (referring to the plaintiff throughout as “Dana” without pronouns).

⁴²⁷ See, e.g., Rebecca S. Bigler et al., *Analysis and Evaluation of the Rationales for Single-Sex Schooling*, in 47 *ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR* 225, 252–53 (Lynn S.

who do not fit the stereotypes behind single-sex education, provides another argument against these programs. But those who disagree on the policy arguments need not oppose inclusion of nonbinary people in general, because the law requires pluralism. Department of Education regulations permit funding of single-sex schools and classes, so long as student enrollment is “completely voluntary” and the school “provides to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity.”⁴²⁸ Thus, all students have the option of coeducational classes, while students who wish to claim binary gender identities can opt into segregated classes.

Nonbinary gender also creates challenges for private women’s colleges.⁴²⁹ But these institutions have responded to these challenges with integration strategies: asking what interests sex-segregation serves and whether the definition of sex or gender used is tailored to meet those interests.⁴³⁰ Thus, many are moving toward admitting any students who identify as transgender (men or women) or nonbinary.⁴³¹ The argument in favor of this move is that these institutions regard their missions as countering marginalization based on sex and gender identity.⁴³² Professor Davis suggests that these colleges should go further to become

Liben & Rebecca S. Bigler eds., 2014) (arguing that empirical research does not support rationales for single-sex education, and that studies that show benefits fail to control for selection effects); Diane F. Halpern et al., *The Pseudoscience of Single-Sex Schooling*, 333 SCIENCE 1706, 1707 (2011) (discussing evidence of the stereotyping argument); Erin Pahlke et al., *The Effects of Single-Sex Compared with Coeducational Schooling on Students’ Performance and Attitudes: A Meta-Analysis*, 140 PSYCHOL. BULL. 1042, 1064–65 (2014) (meta-analysis of 184 studies of single-sex education concluding that those that used the best research methods demonstrated only trivial advantages, and noting that poorly designed studies may be fueling advocacy for single-sex schooling).

⁴²⁸ 34 C.F.R. § 106.34(b) (2018). For an argument that this regulation is unconstitutional, see David S. Cohen & Nancy Levit, *Still Unconstitutional: Our Nation’s Experiment with State-Sponsored Sex Segregation in Education*, 44 SETON HALL L. REV. 339 (2014).

⁴²⁹ Title IX includes an exemption for “any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.” 20 U.S.C. § 1681(a)(5) (2012).

⁴³⁰ See DAVIS, *supra* note 288, at 98–101.

⁴³¹ See *Admission of Transgender Students*, MOUNT HOLYOKE, <https://www.mtholyoke.edu/policies/admission-transgender-students> [<https://perma.cc/BLV2-HDLZ>] (clarifying that it admits anyone “who is female or identifies as a woman” in whole or in part); Anna North, *Can Transgender Students Go to Women’s Colleges? Across the Country, the Answer Is Evolving.*, VOX (Sept. 22, 2017, 11:17 AM), <https://www.vox.com/identities/2017/9/21/16315072/spelman-college-transgender-students-womens-colleges> [<https://perma.cc/CAB3-MEXC>] (surveying women’s colleges and demonstrating the trend toward admitting all transgender students).

⁴³² Scott Jaschik, *Trans Applicants Welcome*, INSIDE HIGHER ED (Sept. 3, 2014), <https://www.insidehighered.com/news/2014/09/03/mount-holyoke-will-now-accept-applications-transgender-women> [<https://perma.cc/5NVG-GCQ6>].

“historically women’s colleges,” following the model of historically black institutions that now admit students of all races.⁴³³

Nonbinary students might also challenge school dress codes that prescribe different standards for boys and girls. This would be a good thing, because sex-differentiated dress codes perpetuate gender stereotypes that are harmful to all students, “communicat[ing] that girls’ bodies are inherently sexual, provocative, [and] dangerous” and that boys will inevitably objectify and harass girls.⁴³⁴ The best practice is sex neutrality: to prohibit certain forms of inappropriate apparel or “mandate[] which body parts must be covered,” and to apply the rules uniformly.⁴³⁵

Another question is whether teachers should refer to students with gendered terms. A radical demand would be for gender-neutral early-childhood education, to allow young children to work out their own gender identities.⁴³⁶ This would follow the model of some taxpayer-funded preschools in Stockholm, Sweden, where teachers assiduously avoid gendering their young charges, using the gender-neutral Swedish pronoun “hen,” calling them “friends” rather than “boys and girls,” and not treating them according to stereotypes.⁴³⁷ In the United States, however, where publicly funded preschool is not even universally available, the goal of eliminating sex stereotyping in early childhood education

⁴³³ DAVIS, *supra* note 288, at 87; *see id.* at 107 (arguing that single-sex admissions policies are not essential to the mission of women’s colleges and suggesting instead that these colleges require essays that “ask prospective students to reflect upon how their own sex identities relate to the college’s commitment to fighting institutional sexism”).

⁴³⁴ Meredith Johnson Harbach, *Sexualization, Sex Discrimination, and Public School Dress Codes*, 50 U. RICH. L. REV. 1039, 1044 (2016); *id.* at 1047 (discussing successful equal protection challenges to discriminatory school dress codes).

⁴³⁵ Kimmie Fink, *The Importance of Inclusive School Dress Codes*, HUM. RTS. CAMPAIGN (Jan. 30, 2017), <https://www.hrc.org/blog/the-importance-of-inclusive-school-dress-codes> [<https://perma.cc/J3NT-86HS>] (advising schools to “[a]void gender-specific policies altogether and instead allow all students the same clothing choices regardless of gender”).

⁴³⁶ *See* Iantaffi Interview, *supra* note 47, at 18 (“I dream of a world where a child is born and, of course, we’re not going to know their gender until they tell us. So we just use gender neutral pronouns and then when they’re four or five, they’ll tell us because that’s when children tell you who they are.”).

⁴³⁷ John Tagliabue, *Swedish School’s Big Lesson Begins with Dropping Personal Pronouns*, N.Y. TIMES (Nov. 13, 2012), <https://nyti.ms/2uLl7sq> [<https://perma.cc/CJT7-9S4Y>]. One study found that children at a gender-neutral preschool scored lower on a measure of gender stereotyping and were more willing to play with children of other genders. Kristin Shutts et al., *Early Preschool Environments and Gender: Effects of Gender Pedagogy in Sweden*, 162 J. EXPERIMENTAL CHILD PSYCHOL. 1, 12 (2017). Other Swedish psychologists are skeptical that the schools will have any long-term impacts on the children or society. Katy Scott, *These Schools Want to Wipe Away Gender Stereotypes from an Early Age*, CNN (Nov. 1, 2018, 8:39 AM), <https://www.cnn.com/2017/09/28/health/sweden-gender-neutral-preschool/index.html> [<https://perma.cc/8NK8-WG9E>].

seems a remote one.⁴³⁸ Nonetheless, teachers might work to avoid language that excludes nonbinary students, using terms like “students” rather than “ladies and gentlemen.”⁴³⁹ Educational institutions should provide nonbinary students with processes that allow them to decide when to disclose their pronouns, without requiring that they confront teachers or putting them on the spot to announce their gender identities in front of other students.⁴⁴⁰

2. *Athletics.* — Another domain in which nonbinary inclusion poses a challenge is sports. In the longer term, nonbinary athletes may inspire society to think creatively about forms of sport in which many different types of bodies are competitive. But in the shorter term, neutrality strategies may come at the cost of women’s participation, and integration of nonbinary athletes into the men’s or women’s divisions may be preferable. Whether neutrality or integration is the best solution will depend on the type of competition, the age of the competitors, and the reasons for sex-segregated events.⁴⁴¹ In any event, the legal issues that nonbinary gender raises for sports are not reasons to reject nonbinary gender wholesale.

Sex discrimination in athletics may run afoul of U.S. law, most notably Title IX, which forbids sex discrimination in sports programs at schools receiving federal funding.⁴⁴² In 1975, Department of Education

⁴³⁸ See, e.g., U.S. DEP’T OF EDUC., A MATTER OF EQUITY: PRESCHOOL IN AMERICA (2015), <https://www2.ed.gov/documents/early-learning/matter-equity-preschool-america.pdf> [<https://perma.cc/8ZX7-EXH3>] (describing the lack of access to preschool for many American children).

⁴³⁹ Meg-John Barker et al., *Non-binary Staff and Student Guidance for Higher Education Institutions*, REWRITING THE RULES 4, <https://rewriting-the-rules.com/wp-content/uploads/2017/01/Non-BinaryGenderHigherEducationGuidance-1.pdf> [<https://perma.cc/UX7Y-GWS7>].

⁴⁴⁰ *Id.* at 3–4; Beemyn, *supra* note 182, at 361 (interviewing over 200 college students who identify outside of gender or sexual binaries and reporting “[t]he interviewees who approached faculty members about their pronouns stated that most were willing to use the requested pronouns, but many of the students did not feel comfortable going to their instructors, not knowing how they would react or not wanting to have such a conversation with a professor”); Dembroff & Wodak, *supra* note 423 (“Your student should get to choose whether and when they disclose their gender identity to others; you should not force them to disclose this information to strangers, partly out of respect for their autonomy, and partly to protect them from serious risks of stigmatization and discrimination.”).

⁴⁴¹ Cf. DAVIS, *supra* note 288, at 113–14 (asking that, for each age and level of play, organizations reconsider the aims of sex segregation in athletics, which might be fostering equal opportunity, student athleticism, recreation, or elite competition, or catering to the desires of fans for gender specialization).

⁴⁴² 20 U.S.C. § 1681(a) (2012) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance [with certain specified exceptions].”). Additionally, the Fourteenth Amendment may forbid sex discrimination by sports leagues that qualify as “state actors.” See *Perkins v. Londonderry Basketball Club*, 196 F.3d 13, 18 (1st Cir. 1999) (concluding that a “voluntary, nonprofit” basketball league, *id.* at 16, did not qualify as a “state actor”). Some state and local laws may forbid sex discrimination by sports leagues that qualify as public accommodations. See *Nat’l Org. for Women v. Little League Baseball, Inc.*, 318 A.2d

regulations carved out an exception to this rule, allowing sex-segregated teams “where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”⁴⁴³ If selection is based on competitive skill, members of the sex whose athletic opportunities were previously limited (generally women or girls) “must be allowed to try-out for the team offered unless the sport involved is a contact sport.”⁴⁴⁴ The regulation requires that, on the whole, a school must “provide equal athletic opportunity for members of both sexes.”⁴⁴⁵

Third-gender recognition is an unlikely approach to athletics. Opponents of California’s Gender Recognition Act argued that recognition of nonbinary gender would require that schools establish separate sports teams just for nonbinary students.⁴⁴⁶ Even assuming the regulation applies to nonbinary athletes despite its reference to “both sexes,” separate teams would not “effectively accommodate” nonbinary athletes because they are too small in number at present.⁴⁴⁷ Moreover, without a critical mass of athletes, separate nonbinary divisions are likely to amount to stigmatization rather than inclusion.⁴⁴⁸

The best way to accommodate nonbinary athletes may be incremental moves toward eliminating sex classifications in sports.⁴⁴⁹ Growing recognition of gender fluidity renders the project of classification of athletes into the male and female divisions more difficult and suspect.⁴⁵⁰

33, 37–38 (N.J. Super. Ct. App. Div. 1974) (holding that a Little League was a place of public accommodation and therefore could not discriminate on the basis of sex under New Jersey antidiscrimination law).

⁴⁴³ 34 C.F.R. § 106.41(b) (2018). For legal discussion of the interaction between Title IX and equal protection standards, and an argument in favor of revision of the statute or Department of Education regulations, see Jamal Greene, *Hands Off Policy: Equal Protection and the Contact Sports Exemption of Title IX*, 11 MICH. J. GENDER & L. 133, 163–65 (2005).

⁴⁴⁴ 34 C.F.R. § 106.41(b).

⁴⁴⁵ *Id.* § 106.41(c).

⁴⁴⁶ See sources cited *supra* note 33 and accompanying text.

⁴⁴⁷ See 34 C.F.R. § 106.41(c) (discussing factors to consider in assessing “whether equal opportunities are available,” including whether the allocation of teams “effectively accommodate[s] the interests and abilities of members of both sexes”).

⁴⁴⁸ A third category for intersex athletes is particularly troubling. Karkazis & Carpenter, *supra* note 301, at 6–7 (opposing the creation of an intersex division in track and field on the grounds that it forces people into the “third sex as punishment” for refusing to submit to medical treatments that would lower their testosterone and requires an athlete to disclose her “intersex variation violating her privacy and calling her identity into question,” *id.* at 7).

⁴⁴⁹ Erin Buzuvis, *Hormone Check: Critique of Olympic Rules on Sex and Gender*, 31 WIS. J.L. GENDER & SOC’Y 29, 48 (2016) (“The approach of eliminating gender categories [in sporting events] would also be inclusive of those individuals whose gender-identities are non-binary or fluid.”); Alex Channon et al., *Introduction: The Promises and Pitfalls of Sex Integration in Sport and Physical Culture*, in *SEX INTEGRATION IN SPORT AND PHYSICAL CULTURE* 1, 3 (Alex Channon et al. eds., 2017) (discussing, as a benefit of sex-integrated sports, “greater inclusivity of non-binary people”).

⁴⁵⁰ See Ronald S. Katz & Robert W. Luckinbill, *Changing Sex/Gender Roles and Sport*, 28 STAN. L. & POL’Y REV. 215, 241 (2017) (“[I]n a gender-fluid era, by what right does an organization or person dictate to another on the subject of that other’s sex or gender?”).

Nonbinary people's narratives of the cruelties and indignities of classification are also persuasive arguments for integrating sports.⁴⁵¹ Nonbinary athlete Lauren Lubin has said: "The first identity I ever formed, as a young child, was 'I'm an athlete,' before even a gender."⁴⁵² Lubin played women's college basketball until the dissonance with their internal sense of nonbinary identity caused them to quit the team and lose their scholarship.⁴⁵³

Reenvisioning sports without sex classifications aligns with the goals of much feminist theory. A large body of sociological research describes how sports inculcate gender roles: producing, maintaining, and validating male privilege and virtue.⁴⁵⁴ While women's sports have given women a chance to "challenge the notion that it is only men who can be brave, competitive, and strong," the fact that sports remain sex segregated sends the message that men will always have the edge with respect to these characteristics.⁴⁵⁵

There are already many examples of integrated sports leagues for children in grades K–12.⁴⁵⁶ Prior to puberty, children can play in the same games, and arguments about safety and fairness find no basis in statistical differences between boys' and girls' bodies.⁴⁵⁷ Some sociological research supports the argument that at older ages, desegregated events — such as equestrian competitions, cheerleading, karate, tennis, korfbal, quidditch, and floorball — can emphasize "collaboration and teamwork" over "policing gender divisions and broadly help to establish

⁴⁵¹ Jon Shadel, *This Gender Neutral Athlete Wants to End Sex Segregation in Sports*, VICE (Nov. 10, 2016, 4:28 PM), https://www.vice.com/en_us/article/mvk33x/this-gender-neutral-athlete-wants-to-end-sex-segregation-in-sports [<https://perma.cc/AKD9-53Y6>] (observing that nonbinary "athletes face a dizzying, seemingly impossible choice: disregard their gender identity — arguably an unhealthy and wholly unacceptable option given the negative effects of remaining closeted — or sacrifice their love of sports").

⁴⁵² NON-BINARY INCLUSION IN SPORTS (WNET New York Public Media 2015), <https://tpt.pbslearningmedia.org/resource/tp17.lgbtq.werun.nonbinary/non-binary-inclusion-in-sports/> [<https://perma.cc/K9Q2-LQVB>].

⁴⁵³ Kristin Russo, *An Athlete Makes the Case for Gender Not to Matter in Sports*, TIME (Oct. 7, 2015), <http://time.com/4063096/how-important-is-gender/> [<https://perma.cc/6Z92-5J97>].

⁴⁵⁴ Channon et al., *supra* note 449, at 1.

⁴⁵⁵ *Id.* at 2; see also Nancy Leong, *Against Women's Sports*, 95 WASH. U. L. REV. 1249, 1275–78 (2018) (discussing how sex-segregated sports perpetuate gender stereotypes).

⁴⁵⁶ Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC'Y 271, 274–79 (2013).

⁴⁵⁷ See *id.* at 287; see also Susanna Stenevi Lundgren et al., *Normative Data for Tests of Neuromuscular Performance and DXA-Derived Lean Body Mass and Fat Mass in Pre-Pubertal Children*, 100 ACTA PÆDIATRICA 1359, 1361 (2011) (finding "no constant gender differences" in neuromuscular performance such as balance and jumping in boys and girls under age twelve); Marnee J. McKay et al., *Reference Values for Developing Responsive Functional Outcome Measures Across the Lifespan*, 88 NEUROLOGY 1512, 1516 (2017) (comparing physical capabilities of children aged three to nine and finding no significant sex differences).

positive, supportive, mutually respectful relationships between men and women.”⁴⁵⁸

Sports might be redesigned so as not to advantage male or female bodies.⁴⁵⁹ The Paralympic movement demonstrates how restructured games and the integration of technology can facilitate competition for athletes with different types of bodies.⁴⁶⁰ It also suggests ways athletes might be classified other than by sex, including by age, body mass, or performance level.⁴⁶¹ Handicaps in golf and weight classes in wrestling are examples.⁴⁶² At some point in the future, the advantages of male bodies might be leveled out by genetic enhancements or e-sports.⁴⁶³ When asked about how sports will change to include nonbinary people, Lubin said: “There’s not a single answer. I believe this is going to be the culmination of many different disciplines and institutions coming together to reorganize themselves.”⁴⁶⁴

But in the short term, inclusion of nonbinary athletes may require integration into sporting events that are segregated by sex (or that, like

⁴⁵⁸ Channon et al., *supra* note 449, at 3; *see, e.g.*, Eric Anderson, “*I Used to Think Women Were Weak*”: *Orthodox Masculinity, Gender Segregation, and Sport*, 23 SOC. F. 257, 258 (2008) (studying “heterosexual men who were first socialized into the masculinized sport of high school football but later joined the feminized sport of collegiate cheerleading” and finding that “[v]irtually all informants who had not previously respected women’s athleticism reported changing their attitudes; and all informants said they had learned to better respect women’s leadership abilities and to value their friendship”); Adam Cohen et al., *Investigating a Coed Sport’s Ability to Encourage Inclusion and Equality*, 28 J. SPORT MGMT. 220, 226 (2014) (conducting qualitative analysis of the coed sport quidditch, including surveys and focus groups, and finding that “both females and males reported a stereotype reduction of the opposite gender occurring due to their participation in the sport”). This is not to say integrated sports are necessarily egalitarian; paternalistic sex stereotypes and male dominance may simply change form in integrated games. *See, e.g.*, Channon et al., *supra* note 449, at 4 (offering examples); Cohen et al., *supra*, at 230 (noting that among quidditch players, “some males held a degree of ambivalent sexism toward their female teammates . . . commend[ing] them for their efforts, but maintain[ing] the belief that they are sacrificing competitiveness for the sake of fairness or inclusivity”).

⁴⁵⁹ *See* Leong, *supra* note 455, at 1286–87 (imagining a gymnastics competition combining men’s and women’s events, “floor, vault, beam, parallel bars, uneven parallel bars, high bar, pommel horse, and rings,” in which the best all-around athlete would win).

⁴⁶⁰ For a critical take, *see* generally DAVID HOWE, *THE CULTURAL POLITICS OF THE PARALYMPIC MOVEMENT* 120–52 (2008).

⁴⁶¹ *See, e.g.*, Sean M. Tweedy et al., *Paralympic Classification: Conceptual Basis, Current Methods, and Research Update*, 6 PM&R S11, S12 (2014); *see also* Leong, *supra* note 455, at 1284.

⁴⁶² Another example is a recreational tennis league that divides athletes into A, B, C, and D skill levels, rather than by gender. *See* DAVIS, *supra* note 288, at 138.

⁴⁶³ *Cf.* THE FUTURE OF SPORTS 14–15, 30–33 (Josh McHugh et al. eds., 2015), <https://www.gannett-cdn.com/usatoday/editorial/sports/The-Future-of-Sports-2015-Report.pdf> [<https://perma.cc/4DGP-98QN>] (predicting that genetic enhancements for athletes will one day become commonplace and regulated and that e-sports will grow in popularity). To say this might be possible as a technical matter is not to say it is likely that gaming culture will welcome non-male competitors. *Cf.* Giovanni Luca Ciampaglia, *Can Online Gaming Ditch Its Sexist Ways?*, THE CONVERSATION (Nov. 16, 2017, 7:59 PM), <https://theconversation.com/can-online-gaming-ditch-its-sexist-ways-74493> [<https://perma.cc/MB7X-2CPX>].

⁴⁶⁴ Shadel, *supra* note 451.

mixed doubles tennis or pairs figure skating, require an athlete of each sex).⁴⁶⁵ Integration requires careful analysis of the purposes for limiting eligibility in each division, so that definitions of eligibility can be tailored to meet those purposes.⁴⁶⁶

The arguments in favor of excluding “non-males” (however defined) from any male sports are weak. While some non-males may not have the ability to compete at high levels, that is not an argument for excluding those who do.⁴⁶⁷ The exception for contact sports in Title IX’s implementing regulations is much criticized.⁴⁶⁸ Courts have rejected the argument that certain games are too dangerous for girls,⁴⁶⁹ and the number of girls playing football is on the rise.⁴⁷⁰ To the extent that male games are too dangerous for women, girls, and nonbinary people, they are likely too dangerous for men and boys as well.⁴⁷¹ Paternalistic arguments support banning these games, or changing the rules or equipment to make them safer for everyone, rather than excluding non-males. Arguments that nonbinary and female athletes degrade homosocial male sporting experiences deserve particular skepticism for how they might perpetuate toxic gender ideologies.⁴⁷²

⁴⁶⁵ One alternative is a gender maximum rule. Quidditch, a game with seven athletes per team, requires that teams may not have more than four or five players “who identify as the same gender in play” at various points during the game. US QUIDDITCH RULEBOOK 10 (12th ed. 2018), https://www.usquidditch.org/files/USQ_Rulebook_12.pdf [<https://perma.cc/86QB-T3JL>]. This rule applies to “those who don’t identify within the binary gender system” as well as those who do. *Id.*

⁴⁶⁶ For an argument that this analysis is required by the Constitution’s Equal Protection Clause, see Leong, *supra* note 455, at 1283–84.

⁴⁶⁷ See, e.g., Greene, *supra* note 443, at 136 (“[T]he skills gap, long used to justify exclusion of females, is the best argument in favor of a reasonable one-way ratchet that allows women to participate in male-only sports without extending the same opportunity to males who wish to participate in female-only sports.”); Katz & Luckinbill, *supra* note 450, at 226 (“[P]rohibiting females from trying out for contact sports — has been consistently found by the courts to be unconstitutional. . . . Why should the 180-pound woman be prevented from trying out for football when the 97-pound male may do so?”); Skinner-Thompson & Turner, *supra* note 456, at 276 (“Put simply, courts have often rejected essentialist arguments claiming that girls are physically incapable of participating in youth sports with boys.”).

⁴⁶⁸ See, e.g., Greene, *supra* note 443, at 160–63 (arguing that “[t]he contact sports exemption, even if it directly affects only younger athletes, eventually affects the interest and abilities of older ones,” *id.* at 160; that it limits the number of teams on which women can be involved and thereby excludes them from the educational, social, and health advantages of sports; and that it sends an expressive message enforcing gender stereotypes).

⁴⁶⁹ Skinner-Thompson & Turner, *supra* note 456, at 275 (discussing cases rejecting arguments about “keeping girls safe”).

⁴⁷⁰ Cork Gaines, *The Number of Girls Playing High School Football Is on the Rise Even Though Overall Participation Is Down*, BUS. INSIDER (Oct. 3, 2016, 2:47 PM), <https://www.businessinsider.com/more-girls-are-playing-high-school-football-2016-10> [<https://perma.cc/PPT7-7DCA>] (describing data from the National Federation of State High School Associations showing an increasing number of girls playing football).

⁴⁷¹ See Leong, *supra* note 455, at 1271–72.

⁴⁷² See, e.g., Anderson, *supra* note 458, at 257 (discussing how “segregation of men into a homosocial environment limits their social contact with women and fosters an oppositional masculinity

As for women's sports, this is a context in which gender neutrality can have the disadvantage of precluding equal opportunity for women.⁴⁷³ Where the competitive stakes are low, as with most high school and amateur athletics, the best rule is one like California's or CrossFit's: deference to a person's choice to play in the women's division if it best matches their gender identity.⁴⁷⁴ Some nonbinary people may be willing to play on women's teams.⁴⁷⁵ A self-identification rule is best because "equal opportunity" in this context means giving everyone a chance to participate. It does *not* mean fairness in the sense of leveling any natural advantage that was not the result of hard work and training. Not just testosterone, but many traits give athletes advantages: height, body mass, better eyesight, larger hands, coordination, and lung

that influences the reproduction of orthodox views regarding women"); Deborah L. Brake, *Wrestling with Gender: Constructing Masculinity by Refusing to Wrestle Women*, 13 NEV. L.J. 486, 488 (2013) (arguing that when boys refuse to wrestle girls, "what is really at stake in the incident is the construction of masculinity, both the masculinity of the forfeiter and the masculinity of the sport of wrestling — a masculinity that is deeply threatened by mixed-sex wrestling competition"); Channon et al., *supra* note 449, at 1 ("[T]he exclusion of women from many high-profile sporting competitions throughout much of the twentieth century preserved sport as a symbolic space for celebrating men's embodiment of . . . 'masculine' virtues, while the tendency to stigmatize and ridicule female athletes when they did enter the 'male' sporting arena helped prevent them from effectively challenging the legitimacy of men's symbolic ownership of sport and its requisite qualities.").

⁴⁷³ See Buzuvis, *supra* note 449, at 48–49.

⁴⁷⁴ See, e.g., CAL. EDUC. CODE § 221.5(f) (West 2018) ("A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on records."); Mary Emily O'Hara, *EXCLUSIVE: The CrossFit Games Will Now Allow Transgender Athletes to Compete*, THEM. (Aug. 4, 2018), <https://www.them.us/story/crossfit-games-trans-policy> [<https://perma.cc/UEZ4-TSQM>] (discussing the announcement by CrossFit's CEO that "[i]n the 2019 CrossFit competitive season, starting with the Open, transgender athletes are welcome to participate in the division with which they identify").

In 2016, the Obama Department of Education took the position that Title IX requires that schools defer to students' gender identities rather than the sex assigned at birth, but the Trump Administration rescinded that advice and is now reconsidering the issue. Dear Colleague Letter from Sandra Battle, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. & T.E. Wheeler, II, Acting Assistant Attorney Gen. for Civil Rights, U.S. Dep't of Justice (Feb. 22, 2017), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx> [<https://perma.cc/SZX3-4E82>] (withdrawing the Obama Administration's May 13, 2016 letter "in order to further and more completely consider the legal issues involved").

⁴⁷⁵ See, e.g., Kevin Majoros, *Breaking Barriers for Non-binary Athletes*, WASH. BLADE (Aug. 24, 2017, 3:51 PM), <http://www.washingtonblade.com/2017/08/24/breaking-barriers-non-binary-athletes/> [<https://perma.cc/X3JA-KPEG>] (discussing competitive swimmer G Ryan who "identifies as non-binary or genderqueer and swims on the women's team at the University of Michigan"); NCAA OFFICE OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 15 (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf [<https://perma.cc/UL7N-A2L7>] (quoting Morgan Dickens, former Cornell basketball and rugby player, as saying: "There are differences between being male and female, but being gender fluid doesn't mean I reject these differences, it just means I'm rejecting the idea that I have to be defined one way or another").

capacity, among other accidents of birth.⁴⁷⁶ Some male athletes have atypically high testosterone levels, but no one suggests they be barred from competition.⁴⁷⁷ In any event, gains in “fairness” must be weighed against the costs of subjecting intersex and transgender athletes to cruel and demeaning sex-verification rules.

The specter of fraud haunts these discussions, but it is hard to find evidence of recent bad faith claims to gender identity in sports, however “bad faith” is defined.⁴⁷⁸ Due to continued stigma and bias against transgender people, it is unlikely that many people would be willing to claim a gender identity not their own in any public context. A more likely “gender identity fraud” scenario is the man who chooses to identify as nonbinary in an effort to show how lax the self-determination standard is and thereby undermine the case for nonbinary rights.⁴⁷⁹ A rule against bad faith conduct would screen out these types of behavior. The rule could forbid athletes from selecting nonbinary or female gender identities for the sole purpose of prevailing in or disrupting athletic competition. Such rules would not be inadministrable. The law of religious accommodation offers a model for how to ensure that claims to identity are not made insincerely.⁴⁸⁰

There may be different considerations in elite sports. There is typically a ten to twelve percent performance difference between male and

⁴⁷⁶ Buzuvis, *supra* note 449, at 43 (citing *Chand v. Athletics Fed’n of India*, CAS 2014/A/3759 ¶ 260 (CAS July 24, 2015)) (listing “increased hemoglobin levels caused by defective EPO receptors, tallness (in some sports), shortness (in others), low body mass index, unusually high lung capacity, mitochondrial conditions that increase aerobic capacity, acromegaly (i.e. large hands and feet), perfect vision, and unusually efficient systems for muscle growth and blood flow”).

⁴⁷⁷ *See id.*

⁴⁷⁸ *See* Katz & Luckinbill, *supra* note 450, at 242.

⁴⁷⁹ Similar protest strategies have been attempted in school restroom cases. *See Doe v. Reg’l Sch. Unit 26*, 86 A.3d 600, 603 (Me. 2014) (discussing how a transgender girl’s “use of the girls’ bathroom went smoothly, with no complaints from other students’ parents, until a male student followed her into the restroom on two separate occasions, claiming that he, too, was entitled to use the girls’ bathroom. The student was acting on instructions from his grandfather, who was his guardian and was strongly opposed to the school’s decision to allow [the transgender girl] to use the girls’ bathroom”).

⁴⁸⁰ Courts are generally reluctant to find religious beliefs to be insincere. *See* Frederick Mark Gedicks, “Substantial” Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA, 85 GEO. WASH. L. REV. 94, 112 (2017) (“Even when religiously contradictory behavior is evident, the courts defer to the claimant’s explanations.”). But they can tell when a claim to religious faith is no more than a sham to gain some particular benefit. *See, e.g., Ideal Life Church of Lake Elmo v. County of Washington*, 304 N.W.2d 308, 318 (Minn. 1981) (holding that an institution was not a “church” where “the primary, and perhaps the sole, purpose for incorporating . . . was to provide [taxpayers] the benefit of a tax-free home while maintaining the same use and control they had prior to incorporation”); *see also* Ben Adams & Cynthia Barmore, Essay, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59, 59–60 (2014) (“There is a long tradition of courts competently scrutinizing asserted religious beliefs for sincerity without delving into their validity or verity.”).

female competitors at elite levels.⁴⁸¹ Testosterone may be the reason, although the evidence on this is, to say the least, complex.⁴⁸² Professor Erin Buzuvis has argued: “If eliminating the binary in sport is a strategy for challenging gender stereotypes, it is one with great potential to backfire.”⁴⁸³ At elite levels, gender neutrality would reduce the number of women who qualify for national teams and win medals.⁴⁸⁴ If only a few women succeed, they will be written off as “outliers” and their small numbers will be used as evidence of women’s natural athletic inferiority rather than “an indictment of society’s suppression of female athleticism.”⁴⁸⁵

This Article’s task is to argue nonbinary gender inclusion is feasible; it cannot settle broader debates about intersex and transgender inclusion in elite women’s sports. But one principle to consider might be protecting the reliance interests of those people who have competed in women’s sports all their lives.⁴⁸⁶ This principle avoids hormonal testing of athletes with intersex variations, which is widely regarded as a public referendum on a female athlete’s gender identity.⁴⁸⁷ Athletes with intersex variations disqualified from women’s sports have faced stigmatization and shunning, and as a result of one case, an athlete attempted suicide.⁴⁸⁸ On the ground, sex verification practices are suspiciously intertwined with racialized notions of femininity; it cannot be ignored that

⁴⁸¹ See, e.g., Robinson Meyer, *We Thought Female Athletes Were Catching Up to Men, but They’re Not*, THE ATLANTIC (Aug. 9, 2012), <https://www.theatlantic.com/technology/archive/2012/08/we-thought-female-athletes-were-catching-up-to-men-but-theyre-not/260927/> [<https://perma.cc/B6Y5-98HD>].

⁴⁸² Buzuvis, *supra* note 449, at 40–42 (discussing evidence that there is no linear relationship between endogenous testosterone and performance, that elite male and female performance levels often overlap, that women whose bodies are insensitive to testosterone are overrepresented among female athletes, and that many male athletes have low testosterone levels). *But see* Doriane Lambelet Coleman, *Sex in Sport*, 80 LAW & CONTEMP. PROBS. 63, 70–84 (2017) (arguing the ten to twelve percent performance gap is driven by differences in testosterone, even if there is no perfect mathematical correlation).

⁴⁸³ Buzuvis, *supra* note 449, at 48.

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.* at 49.

⁴⁸⁶ *Id.* at 54–55 (“Reliance is the legal principle that says in some circumstances, one’s rights are determined by the fact that one has been exercising those rights for a long time on the reasonable assumption that those rights were secure.” *Id.* at 54.); *see also* Katz & Luckinbill, *supra* note 450, at 241 (“[I]ndividuals should not have to go through invasive, humiliating and degrading procedures about one of the most personal subjects, one’s sex or gender.”). Bioethicist Alice Dreger has long taken this position. *See, e.g.*, Alice Dreger, *Intersex and Sports: Back to the Same Old Game*, HASTINGS CTR.: BIOETHICS F. (Jan. 22, 2010), <https://www.thehastingscenter.org/intersex-and-sports-back-to-the-same-old-game/> [<https://perma.cc/ELE4-637N>].

⁴⁸⁷ *See* Buzuvis, *supra* note 449, at 47 (“[A]s long as the categories for participation are still called ‘men’s’ and ‘women’s,’ (rather than ‘above’ and ‘below’ 10 nmol/L) the hormone standard will likely be interpreted as a proxy for sex verification.”).

⁴⁸⁸ *Id.* at 37.

women of color from the Global South are disproportionately (if not exclusively) scrutinized by sporting authorities.⁴⁸⁹

Some transgender men may also have reliance interests in playing women's sports, having been denied equal athletic opportunities for most of their lives.⁴⁹⁰ But there are concerns that, due to high levels of testosterone from hormone treatments, these athletes will dominate and crowd out opportunities for others. Accordingly, the NCAA allows transgender men who are not taking testosterone to play women's sports.⁴⁹¹ Transgender women, however, may not have had the same history of disadvantage. Buzuvis therefore suggests a rule that "would exclude transgender women who have not undergone hormone treatment" from elite women's sports unless they "bring their testosterone level below the 'normal male range' cutoff of 10 nmol/L."⁴⁹² This same rationale would support allowing elite nonbinary athletes who have long competed in women's sports to continue to do so, as long as they are not pursuing masculinizing hormonal therapy.⁴⁹³

While nonbinary athletes present a long-term challenge to sex-segregated sports, in the short term, they may prompt rethinking of the rules of eligibility for particular events, along with transgender and intersex athletes.

3. *Workplaces.* — Another potential argument against nonbinary inclusion is that the labor market requires that men and women do different jobs. Although the majority of job categories are filled primarily by women (like administrative assistant) or men (like truck driver), formal occupational sex segregation is rare.⁴⁹⁴ Title VII bars employer rules

⁴⁸⁹ Katrina Karkazis & Rebecca M. Jordan-Young, *The Powers of Testosterone: Obscuring Race and Regional Bias in the Regulation of Women Athletes*, 30 FEMINIST FORMATIONS, 2018, at 1, 6 (discussing how "black and brown women from the Global South come to be the exclusive targets of the supposedly new, neutral, and scientific T regulation").

⁴⁹⁰ Buzuvis, *supra* note 449, at 51–52 ("[A] transgender man may by virtue of his female body and birth assignment have been raised as female, a designation that influenced — and likely limited — his athletic opportunities." *Id.* at 52.).

⁴⁹¹ *Id.* at 52 (citing NCAA OFFICE OF INCLUSION, *supra* note 475, at 8).

⁴⁹² *Id.* at 53. The International Association of Athletics Federations now recommends a threshold of 5 nmol/L for certain track and field events. Press Release, Int'l Ass'n of Athletics Fed'ns, IAAF Introduces New Eligibility Regulations for Female Classification (Apr. 26, 2018), <https://www.iaaf.org/news/press-release/eligibility-regulations-for-female-classifica> [https://perma.cc/3LSA-GCE5].

⁴⁹³ See Buzuvis, *supra* note 449, at 55. For an argument that it is unwise and unfair to require any hormonal treatment as a condition of participation in collegiate sports, see Elliot S. Rozenberg, *The NCAA's Transgender Student-Athlete Policy: How Attempting to Be More Inclusive Has Led to Gender and Gender-Identity Discrimination*, 22 SPORTS LAW J. 193, 207–08 (2015).

⁴⁹⁴ See, e.g., ARIANE HEGEWISCH ET AL., INST. FOR WOMEN'S POLICY RESEARCH, BRIEFING PAPER: SEPARATE AND NOT EQUAL? GENDER SEGREGATION IN THE LABOR MARKET AND THE GENDER WAGE GAP 13 (2010).

that classify by sex,⁴⁹⁵ except where sex is a bona fide occupational qualification (BFOQ).⁴⁹⁶ This defense is construed “narrowly,”⁴⁹⁷ and applies to a diminishing number of jobs. The simple fact that customers might prefer men or women cannot support a BFOQ defense.⁴⁹⁸ Nor can stereotypes about men or women.⁴⁹⁹ Apart from the BFOQ defense, there are also judicially crafted exceptions to Title VII’s ban on explicit sex-based classifications with respect to sex-differentiated dress codes and physical standards.⁵⁰⁰ In light of the small number of remaining employment contexts in which binary sex segregation is permissible, the main challenge in integrating nonbinary people into employment markets is overcoming the biases against them. Nonetheless, nonbinary workers may prompt renewed scrutiny of the validity of BFOQ defenses, dress codes, and physical standards, requiring that employers and courts rethink whether sex classifications meet important interests or reaffirm stereotypes.

(a) *The BFOQ Defense.* — The most commonly accepted sex-based BFOQ argument is that certain positions must be filled by men or women to protect the privacy interests of patients, customers, or inmates in being viewed or touched only by members of the same sex.⁵⁰¹ To the extent that nonbinary people throw a wrench in this doctrine, it is good riddance. The doctrine tends to disadvantage women in the labor market.⁵⁰² The cases are premised on a troubling assumption of universal

⁴⁹⁵ See, e.g., *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978).

⁴⁹⁶ 42 U.S.C. § 2000e-2(e) (2012) (allowing discrimination “on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise”).

⁴⁹⁷ *Int’l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991).

⁴⁹⁸ See, e.g., *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (“[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.”); 29 C.F.R. § 1604.2(a)(1) (2018).

⁴⁹⁹ See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring) (“By adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing ‘to hire an individual based on stereotyped characterizations of the sexes.’ . . . The exception for a ‘bona fide occupational qualification’ was not intended to swallow the rule.” (footnote omitted)).

⁵⁰⁰ Theories of discrimination that rely on statistical showings and affirmative action are discussed *supra* pp. 952–54.

⁵⁰¹ Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1259–60 (2003) (describing cases in which courts accepted this defense in “contexts including labor and delivery rooms, mental hospitals, youth centers, washrooms, and nursing homes” (footnotes omitted)).

⁵⁰² *Id.* at 1283 (describing how same-sex privacy BFOQs disadvantage women in labor markets because in the prison context, ninety-five percent of prisoners are men, and in the nursing context, they prevent men from filling jobs in lower-status care work); see also KATHARINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 116–17 (4th ed. 2006) (arguing that the BFOQ defense reinforces “age-old stereotypes that Title VII was meant

heterosexuality — that there is no same-sex sexual desire.⁵⁰³ The cases overvalue traditional notions of female modesty and discount threats to men.⁵⁰⁴ They sanction stereotypes about the female gaze as nonthreatening⁵⁰⁵ and men as natural predators.⁵⁰⁶ They are “shot through with discriminatory attitudes about class and possibly race.”⁵⁰⁷ To give legal sanction to these attitudes is troubling.

However, there may be instances in which the privacy BFOQ holds up to scrutiny, involving physical touching or bodily exposure of vulnerable populations. Professor Amy Kapczynski has explained “the same-sex privacy BFOQ” as “a concession to the way people experience cross-sex bodily exposure as a threat or risk.”⁵⁰⁸ She gives an example of a woman in a prison who was forced to undergo a clothed body search by a male correctional officer. The woman “was so distressed that ‘her fingers had to be pried loose from the bars she had grabbed; she returned to her cell-block, vomited, and broke down.’”⁵⁰⁹ Kapczynski reflects:

We could insist, of course, that her reaction was a kind of false consciousness, that she was misidentifying all men as a threat, or at least misidentifying *this* man as a threat. There is a way in which these things in fact might be true — but is *this* the place to make that point? Would it be possible, in a context in which approximately eighty-five percent of women have been sexually or physically abused by men, to remake associations between gender and assault by ignoring them?⁵¹⁰

to condemn — i.e., women’s role washing and cleaning up after people, and men’s role as the skilled professional,” *id.* at 117).

⁵⁰³ Kapczynski, *supra* note 501, at 1287.

⁵⁰⁴ See *id.* at 1291 (discussing how courts disregard the threat of same-sex assault against male inmates).

⁵⁰⁵ See Kim Shayo Buchanan, *Engendering Rape*, 59 UCLA L. REV. 1630, 1638–39 (2012) (“[S]urvey respondents consistently report much higher rates of sexual victimization by women staff than by fellow inmates.”).

⁵⁰⁶ See, e.g., *Ambat v. City and County of San Francisco*, 757 F.3d 1017, 1028 (9th Cir. 2014) (reversing grant of summary judgment on a prison employer’s BFOQ defense because “the County has not shown that the Sheriff had ‘a substantial basis for believing that all or nearly all’ male deputies were likely to engage in sexual misconduct with female inmates, nor has it shown that ‘it is impossible or highly impractical . . . to insure by individual testing’ that a male deputy does not pose such a threat” (omission in original)); *Breiner v. Nev. Dep’t of Corr.*, 610 F.3d 1202, 1211 (9th Cir. 2010) (rejecting a BFOQ defense based on arguments that male correctional officers presented a risk of sexual misconduct in a women’s prison as based on “unproven and invidious stereotype[s]”); Kapczynski, *supra* note 501, at 1281.

⁵⁰⁷ Kapczynski, *supra* note 501, at 1286 (“Courts have been more solicitous of the privacy interests of white collar men who fear that a cleaning woman might knock on their bathroom door than of the privacy interests of women and men incarcerated in prisons that are often the site of severe violations of physical and sexual integrity.” (footnote omitted)).

⁵⁰⁸ *Id.* at 1274.

⁵⁰⁹ *Id.* at 1288 (quoting *Jordan v. Gardner*, 986 F.2d 1521, 1534 (9th Cir. 1993) (Reinhardt, J., concurring)).

⁵¹⁰ *Id.* (footnote omitted). Men are also victims of sexual assault, including by other men. Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1266–71 (2011). However, the law concedes here to social norms that construct cross-gender exposure as uniquely threatening to one’s

Kapczynski proposes that the costs of changing gender norms should not be imposed on particularly vulnerable persons, such as inmates and patients in residential care.⁵¹¹

The best approach to this problem is to ask: “Might there be technologies, if not today, then tomorrow, that can accomplish the state’s interest in engaging in bodily searches to maintain safety without raising the troubling issue of gender?”⁵¹² In the interim, integration may be best. Whether any particular nonbinary person might trigger fear of sexual assault in vulnerable populations is not a question that can be answered in general, due to the diversity of the nonbinary population. Fears of sexual assault from nonbinary people may stem from anti-transgender biases in general, that, like racism, the law cannot endorse.⁵¹³ In the limited set of jobs involving bodily contact with vulnerable people, or exposure of naked bodies, a compromise would be to exclude those nonbinary people who will not identify as women (or men) for purposes of the job.

The BFOQ defense might also justify sex-specific casting calls in entertainment,⁵¹⁴ and sex-specific hiring for sex work, although there is little litigation on these questions.⁵¹⁵ The idea of a sex BFOQ for acting and sex work that might exclude transgender people is a strange one, as transgender people have long been actors and sex workers.⁵¹⁶ In the

dignity. See, e.g., *Byrd v. Maricopa Cty. Sheriff’s Dep’t*, 629 F.3d 1135, 1142 (9th Cir. 2011) (en banc) (holding that a strip search of a male inmate was unreasonable under the Fourth Amendment because it was conducted by a female officer in the absence of an emergency).

⁵¹¹ Kapczynski, *supra* note 501, at 1291–92; see also *Teamsters Local Union No. 117 v. Wash. Dep’t of Corr.*, 789 F.3d 979, 990, 994 (9th Cir. 2015) (affirming summary judgment to a prison employer on its BFOQ defense for a narrow category of female-only job assignments to ensure inmate privacy, improve security by allowing more pat downs, and prevent sexual assaults); *Jones v. Henryville Corr. Facility*, 220 F. Supp. 3d 923, 929 (S.D. Ind. 2016) (granting summary judgment to an employer on its BFOQ defense where the prison preferred male employees for particular shifts in case a strip search of male inmates might be required).

⁵¹² I. Bennett Capers, *Unsexing the Fourth Amendment*, 48 U.C. DAVIS L. REV. 855, 916 (2015) (footnotes omitted) (discussing advances in surveillance technologies).

⁵¹³ Cf. *TLDEF Helps Transgender Man Achieve Settlement in Discrimination Suit*, TRANSGENDER LEGAL DEF. & EDUC. FUND, http://www.transgenderlegal.org/headline_show.php?id=429 [<https://perma.cc/2DRK-3NY9>] (discussing a 2011 settlement in a discrimination case on behalf of a transgender man who was fired from a job “monitoring male outpatients as they provided urine samples for drug testing” after his employer learned he was transgender).

⁵¹⁴ See 29 C.F.R. § 1604.2(a)(2) (2018); Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 3 (2007).

⁵¹⁵ Those cases discussed in Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147, 157 & n.27 (2004), mostly involve dicta about the possibility of this defense. For an argument that discriminatory preferences should be allowed in “proximate sex work that involves physical contact or face-to-face interactions” because of the implications for “decisional privacy,” see Adrienne D. Davis, *Regulating Sex Work: Erotic Assimilationism, Erotic Exceptionalism, and the Challenge of Intimate Labor*, 103 CALIF. L. REV. 1195, 1269 (2015); and also *id.* at 1262–69.

⁵¹⁶ Cf. Case, *supra* note 25, at 12 n.23 (“I find it bizarre that sex is considered a BFOQ, in the interests of ‘authenticity or genuineness,’ for the job of actor or actress. After all, the very essence

1950s and 1960s, “[t]ransitioning often led to sharp downward mobility, and for working class women especially, dancing and sex work were two of the most likely jobs after surgery.”⁵¹⁷ Nonbinary people might also play roles as men or women. Nonbinary actor Asia Kate Dillon, for example, has played female characters⁵¹⁸ as well as a nonbinary character.⁵¹⁹ Dillon has said they wished to play male characters as well.⁵²⁰

(b) *Dress Codes*. — Under a judicially crafted exception to Title VII, employers are permitted to prescribe sex-differentiated dress codes, so long as those dress codes do not impose “unequal burdens” on men and women.⁵²¹ This separate-but-equal doctrine is explained by courts’ desires to protect employer prerogatives and comfortable gendered social conventions, while avoiding subordination of women by ensuring women are not overly burdened.⁵²² Sex-differentiated dress codes may not be problematic for transgender people, so long as they are permitted to choose the set of rules consistent with their gender identities.⁵²³ But they pose a challenge for those nonbinary people who do not feel comfortable complying with either set of rules.

While courts have not been persuaded by what they regard as freedom of expression arguments in favor of dress code noncompliance,⁵²⁴ they are more likely to be persuaded by the claims of nonbinary people. One reason is that many nonbinary people make arguments in the register of immutability: that they have a core, authentic, essential identity that they should not be forced to sacrifice to keep their jobs.⁵²⁵ A second reason is the increasing uptake of the argument that binary gender is

of this job is to pretend to be something one is not. All that a producer should be allowed to require is that the pretense be convincing.” (citation omitted).

⁵¹⁷ See Margot Canaday, *Pink Precariat: LGBT Workers in the Shadow of Civil Rights, 1945–2000* ch. 2, at 40 (Oct. 27, 2017) (unpublished manuscript) (on file with the Harvard Law School Library). Professor Canaday discusses transgender soap opera star Aleshia Brevard, who had a successful career as an actress in the 1960s. *Id.* at 35–40.

⁵¹⁸ Julie Miller, *Meet the Actor Breaking Down Hollywood’s Gender Barriers*, VANITY FAIR (May 5, 2017, 1:21 PM), <https://www.vanityfair.com/hollywood/2017/05/asia-kate-dillon-mtv-awards> [<https://perma.cc/F9BU-4Z8S>] (mentioning Asia Kate Dillon’s role as a female character on the television show *Orange is the New Black*).

⁵¹⁹ *The Ellen DeGeneres Show* (CBS television broadcast Mar. 20, 2017), https://www.youtube.com/watch?v=f97aLkl_kWc [<https://perma.cc/D3VC-FP9X>] (discussing the character Taylor Mason on *Billions*).

⁵²⁰ *Id.* (discussing their childhood desire to play the title role in *Oliver!*).

⁵²¹ See, e.g., *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1108–11 (9th Cir. 2006) (en banc).

⁵²² See YURACKO, *supra* note 30, at 24.

⁵²³ See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 572–74 (6th Cir. 2018) (rejecting the argument that enforcement of a sex-specific dress code that required men to wear a pants-suit with a necktie and women to wear a skirt-suit would be a defense against a discrimination suit brought by a transgender woman).

⁵²⁴ See YURACKO, *supra* note 30, at 137–46.

⁵²⁵ See Clarke, *supra* note 43, at 23–27 (discussing the persuasiveness of the “new immutability,” and the drawbacks of this argument).

itself a subordinating sex-stereotype that may not be enforced.⁵²⁶ And a third reason is that, as nonbinary gender presentations become more mainstream, the implicit assumption that they are disruptive to employer prerogatives loses force.⁵²⁷ This mainstreaming also makes it less likely that employers will respond to calls for neutrality by insisting that all workers dress in a blandly androgynous manner.⁵²⁸

(c) *Physical Standards.* — As for differential physical standards,⁵²⁹ many of the same arguments that apply to segregated sports apply in this context as well.⁵³⁰ But here, sex neutrality may be the best approach: leveling down to the minimum standard required to do the job. Courts have gone wrong by inventing legal rules that ask only whether different rules for men and women are “separate but equal,” and giving no consideration to whether the standard has any relationship to the job.⁵³¹ Disparate standards may perpetuate false stereotypes about women’s inferiority for law enforcement and fire-fighting jobs.⁵³² An inquiry into the business reasons for disparate standards is likely to reveal that the bar is set too high for men: if women can do the job by meeting a lower standard, then men can too.⁵³³

⁵²⁶ See *supra* note 176.

⁵²⁷ Cf. YURACKO, *supra* note 30, at 146.

⁵²⁸ But see *id.* at 52 (“The employer who does not want to employ men in bob haircuts will simply not make this an option under its dress code, even if it does not mind women wearing them.”).

⁵²⁹ A 2003 study found that approximately twenty-seven percent of police departments surveyed that use physical fitness tests apply different cutoffs for men and women. Kimberly A. Lonsway, *Tearing Down the Wall: Problems with Consistency, Validity, and Adverse Impact of Physical Agility Testing in Police Selection*, 6 POLICE Q. 237, 258 (2003).

⁵³⁰ See *supra* section III.C.2, pp. 966–74.

⁵³¹ In one recent case, *Bauer v. Lynch*, 812 F.3d 340 (4th Cir. 2016), the Fourth Circuit applied the judicially invented “equal burdens” analysis, *id.* at 349, which asks only if men and women are equally burdened by separate tests. *Id.* at 349–51 (upholding a sex-differentiated standard for a push-up test against a challenge by a male applicant for a position as an FBI special agent). But the Supreme Court has prescribed a different rule in an analogous situation involving race. See *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009). Under *Ricci*, a higher standard for men would only be allowed if an employer had a strong basis in evidence for believing that applying the same standard would have a disparate impact on women and if applying the same standard would not serve a business necessity. See *id.* There is no basis in the text of Title VII for rejecting this rule in a sex discrimination case. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n.9 (1989) (plurality opinion) (“[T]he statute on its face treats each of the enumerated categories exactly the same.”). The only potential difference is the BFOQ defense, which applies to sex but not race. Like the *Ricci* framework, the BFOQ defense would have required an examination of the business justifications for the disparate standard. See Eve A. Levin, Note, *Gender-Normed Physical-Ability Tests Under Title VII*, 118 COLUM. L. REV. 567, 590 (2018) (arguing the BFOQ defense should have applied in *Bauer*).

⁵³² Cf. Ruth Colker, *Rank-Order Physical Abilities Selection Devices for Traditionally Male Occupations as Gender-Based Employment Discrimination*, 19 U.C. DAVIS L. REV. 761, 796 (1986) (“The stereotype that ‘more strength is better’ has led employers to use physical performance tests on a rank-order basis and thereby exclude women from employment opportunities.”).

⁵³³ *Id.*; see also Case, *supra* note 25, at 88–94.

A number of nonbinary people serve in the military.⁵³⁴ Title VII does not apply to the U.S. military, but the military too is moving away from sex classifications, even with respect to physical fitness standards.⁵³⁵ Although the Supreme Court upheld the male-only draft system in 1981,⁵³⁶ as of 2012, all positions in the U.S. military are formally open to women.⁵³⁷ Only the Marine Corps still segregates male and female troops for basic training.⁵³⁸ It is true that the status of transgender servicemembers is now uncertain. But the Trump Administration's legal arguments in favor of exclusion of transgender service members are based in speculation about medical costs and do not differentiate between binary and nonbinary gender identities.⁵³⁹

⁵³⁴ JAMES ET AL., *supra* note 2, at 168 (reporting that 22% of “non-binary people with male on their original birth certificate” and 2% of “non-binary people with female on their original birth certificate” were “[a]mong those with past or current military service”).

⁵³⁵ See Jeff Schogol, *The PFT and CFT Can Be Gender Neutral. Here's How.*, MARINE CORPS TIMES (July 10, 2017), <https://www.marinecorpstimes.com/off-duty/military-fitness/2017/07/10/the-pft-and-cft-can-be-gender-neutral-here-s-how/> [<https://perma.cc/YN94-BEXM>] (quoting Lt. Col. Misty Posey, commander of the Marine Corps' only female recruit training battalion, as saying: “Whether intentional or not, the Marine Corps has been evolving toward a single fitness standard”). Air Force Major Mary Jennings Hegar argues, “I’ve seen firsthand that the warrior spirit is not directly proportional to how many pull-ups you can do. . . . In my opinion, you keep the standards very high and you maintain one standard. There shouldn’t be two standards for women and men, there should be a standard for this job: To do this job, you should have to do these things. And those requirements should be job-specific and not arbitrarily high in order to specifically keep women out.” *A Purple Heart Warrior Takes Aim at Military Inequality in “Shoot Like A Girl,”* NPR: FRESH AIR (Mar. 2, 2017, 2:56 PM) (alteration in original), <https://www.npr.org/2017/03/02/517944956/a-purple-heart-warrior-takes-aim-at-military-inequality-in-shoot-like-a-girl> [<https://perma.cc/37NJ-FRAS>].

⁵³⁶ See *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981). Should the draft return, it seems likely it would be gender neutral. See Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extra-judicial Constitutional Change*, 93 MINN. L. REV. 96, 134 (2008) (“[E]xtrajudicial changes since *Rostker* in women’s military status may undermine *Rostker* and support a Court judgment striking down male-only registration, conscription eligibility, and combat positions.”). In 2016, the Senate approved a bill that would extend the draft to women, although the effort ultimately failed. Jennifer Steinhauer, *Senate Votes to Require Women to Register for the Draft*, N.Y. TIMES (June 14, 2016), <https://nyti.ms/1UtDflf> [<https://perma.cc/TRN3-7UGS>].

⁵³⁷ Memorandum from Martin E. Dempsey, Chairman of the Joint Chiefs of Staff & Leon Panetta, Sec’y of Def., to Sec’y of the Military Dep’ts, Acting Under Sec’y of Def. for Pers. and Readiness & Chiefs of the Military Servs. (Jan. 24, 2013), <https://dod.defense.gov/Portals/1/Documents/WISRJointMemo.pdf> [<https://perma.cc/C7AM-M9GD>]. Women have even begun Navy SEAL training, although none have yet made it through. Nancy Coleman, *First Woman Enlists to Become a Navy SEAL*, CNN (July 22, 2017, 11:19 PM), <http://www.cnn.com/2017/07/21/us/first-female-navy-candidates-seal-trnd/index.html> [<https://perma.cc/3YCQ-6MNC>].

⁵³⁸ Associated Press, *The Marine Corps Is the Only Military Boot Camp that Separates Sexes. That Could Soon Change in Southern California*, L.A. TIMES (Aug. 8, 2017, 8:25 AM), <https://www.latimes.com/nation/nationnow/la-na-women-in-combat-training-20170808-story.html> [<https://perma.cc/8JTV-Q6TG>].

⁵³⁹ See Defendants’ Motion to Dismiss and Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 33–34, *Karnoski v. Trump*, No. C17-1297 (W.D. Wash. Dec. 29, 2017), 2017 WL 7058272 (arguing that the exclusion “rests on the reasonable concern that at least some transgender

D. Sex-Segregated Spaces

The law allows, and sometimes requires, sex segregation of public and private spaces, most notably restrooms, changing facilities, and dormitories. But these arrangements are exceptional, not inevitable, and not a reason to resist the larger project of nonbinary inclusion.

1. *Restrooms and Changing Facilities.* — The restroom debate has engendered political controversy over claims for recognition of the gender identities of transgender people who are asking only to use the male or female facilities.⁵⁴⁰ This Article is interested in how people with nonbinary gender identities change that debate. People with nonbinary gender identities, like many transgender men and women, report avoiding public restrooms altogether, with adverse health consequences.⁵⁴¹ Because their gender presentations may not accord with norms, the presence of a nonbinary person in either the men’s or women’s restroom may result in harassment or even violence.⁵⁴² The best solution is neutrality: to phase out gendered restrooms in favor of spaces that provide safety and privacy for each individual. This approach would require legal, architectural, and social change — but that is not an argument for disregarding nonbinary gender altogether. Stopgap efforts include integration: allowing people to use whichever male or female facility they are most comfortable in, or recognition: creating third options such as “family” restrooms, in addition to “male” and “female” ones.

individuals suffer from medical conditions that could impede the performance of their duties,” *id.* at 33).

⁵⁴⁰ See, e.g., G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 714–15 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017) (mem.); Carcaño v. McCrory, 203 F. Supp. 3d 615, 621 (M.D.N.C. 2016).

⁵⁴¹ JAMES ET AL., *supra* note 2, at 228 (reporting that 53% of nonbinary respondents to the 2015 USTS stated they “[s]ometimes or always avoid[ed] bathrooms in the past year”).

⁵⁴² See, e.g., Hannah Boufford, *Transgender, Non-binary Students Discuss Bathroom Concerns*, IND. DAILY STUDENT (Feb. 19, 2017, 7:58 PM), <http://www.idsnews.com/article/2017/02/transgender-non-binary-students-discuss-bathroom-concerns> [<https://perma.cc/NN2B-ZFGG>] (quoting nonbinary student Spencer Biery: “They say you can use whichever [restroom] you’re comfortable with And I’m not comfortable going into a restroom with a bunch of guys, but I also know that if I went into a female restroom — which I also don’t really identify with — people would cause even more of a ruckus.”); Ashe McGovern, Commentary, *Bathroom Bills, Selfies, and the Erasure of Nonbinary Trans People*, ADVOCATE (Apr. 1, 2016, 6:01 AM), <https://www.advocate.com/commentary/2016/4/01/bathroom-bills-selfies-and-erasure-nonbinary-trans-people> [<https://perma.cc/NL5H-KYTV>] (“Most days, entering a bathroom means experiencing discomfort because of disapproving, confused looks and comments. But it also brings up memories of when I’ve been physically threatened and attacked because someone believes I’m in the ‘wrong bathroom.’ . . . As a white, masculine-presenting person, I know experiences like mine, although far too common, are also far from the worst ones.”); Jacob Tobia, *Why All Bathrooms Should Be Gender-Neutral*, TIME (Mar. 23, 2017), <http://time.com/4702962/gender-neutral-bathrooms/> [<https://perma.cc/CVK2-EQAJ>] (“If I choose the women’s restroom, I risk facing panicked women who take one look at my facial hair and assume that I’m a predator. If I choose the men’s restroom, I risk facing transphobic men who, with one glance at my dangling earrings, begin hurling slurs or throwing punches.”).

The ideal solution is neutrality: making all facilities “all gender,” with larger, open, public spaces and fully enclosed private stalls that would better ensure safety, accommodate families, and operate fairly and efficiently.⁵⁴³ There are design ideas and architectural solutions that would enable “people [to] sort themselves out by the equipment they need rather than what they putatively *are*.”⁵⁴⁴ As people gain experience using all-gender facilities, concerns about safety, cleanliness, and discomfort will deflate.⁵⁴⁵

One revelation of the locker room debate is that many students — whatever their gender identities — would prefer private spaces for undressing.⁵⁴⁶ As the awareness and acceptability of same-sex desire have increased, the assumption that same-sex spaces are “no sex” spaces has withered.⁵⁴⁷ And students may want privacy for reasons other than avoiding sexualization, such as maintaining autonomy over who can view (and possibly judge and shame them for) their naked bodies.⁵⁴⁸ In one case, an investigation revealed that girls in a girls’ locker room had

⁵⁴³ See, e.g., Mary Anne Case, *Why Not Abolish Laws of Urinary Segregation?*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING* 211, 220–25 (Harvey Molotch & Laura Norén eds., 2010) (debunking the various arguments in favor of “urinary segregation”); Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 152 (2017) (“We should transition towards making large, communal public restrooms available to ‘all-comers,’ with a variety of private toileting options, as well as have available a limited number of single-stall restrooms.”); Terry S. Kogan, *Public Restrooms and the Distorting of Transgender Identity*, 95 N.C. L. REV. 1205, 1206, 1234–38 (2017) (discussing the sexist origins of separate men’s and women’s facilities, and arguing that “all gender, multi-user public restrooms,” *id.* at 1238, would best protect everyone’s privacy and safety); Joel Sanders & Susan Stryker, *Stalled: Gender-Neutral Public Bathrooms*, 115 S. ATLANTIC Q. 779, 781–88 (2016) (similar).

⁵⁴⁴ Harvey Molotch, *On Not Making History: What NYU Did with the Toilet and What It Means for the World*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING*, *supra* note 543, at 255, 265; see also Lisa Selin Davis, *The Simple Design Solutions that Can Make Bathrooms Better — For All Genders*, QUARTZ (Mar. 16, 2017), <https://qz.com/933704/how-to-design-transgender-friendly-bathrooms-that-make-people-of-all-genders-feel-safe/> [<https://perma.cc/LT82-N4FV>].

⁵⁴⁵ It is false that women’s restrooms provide safe hiding places from violent men, as men can and do enter women’s restrooms to commit violence. Case, *supra* note 543, at 220. And it is false that women’s restrooms are cleaner than men’s. See, e.g., Mary Schmuch, *Sharing Bathroom with Men Raises Question of Cleanliness*, CHI. TRIB. (Jan. 29, 2016, 5:02 AM), <http://www.chicagotribune.com/news/columnists/schmuch/ct-gender-neutral-bathroom-mary-schmuch-0129-20160128-column.html> [<https://perma.cc/4JMV-SRTM>] (reporting the comment of the owner of one commercial cleaning service that women’s restrooms are dirtier “hands down”). In any event, it is unfair to subject men or women to dirtier spaces based on stereotypes.

⁵⁴⁶ See Clarke, *supra* note 161, at 829.

⁵⁴⁷ Naomi Schoenbaum, *Heteronormativity in Employment Discrimination Law*, 56 WASHBURN L.J. 245, 249 (2017) (“[O]ne of the reasons behind sex-segregated bathrooms is the heteronormative assumption that same-sex spaces will not entail sexuality or acts of sex.”).

⁵⁴⁸ *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 624 (M.D.N.C. 2016) (discussing the testimony of a school diversity officer who was “confident that the privacy interests of transgender and non-transgender students alike could be accommodated through the same means used to accommodate any student with body image or shyness issues” in locker rooms).

devised a “buddy system” in which friends would hold up towels to protect one another’s privacy while they changed into swimming attire.⁵⁴⁹ The best solution might be to provide privacy curtains for all students who would prefer them.

But it is costly to upgrade old facilities. Moreover, some anachronistic building codes require separate spaces.⁵⁵⁰ A pluralism approach is an interim solution: creating additional “all gender” or “family” spaces alongside the men’s and women’s ones.⁵⁵¹ This approach is not optimal, as it runs the risk of signaling that transgender people are different. Transgender people might end up being *required* to use inadequate or stigmatizing third facilities, when the male or female facilities would accord with their gender identities.⁵⁵² Another temporary solution is to permit nonbinary people to use whichever facility they feel the safest in, or which they believe best matches their sex or gender, just as transgender men and women should be able to.

2. *Housing.* — Nonbinary inclusion may also threaten interests in sex-segregated housing in unique institutional contexts such as incarceration, shelters, long-term care facilities, and education. Changing all spaces to neutral ones is worth consideration. Barring that, institutions can take an integration approach: determining the placement that will be the safest and most affirming.

Third-category recognition strategies have been tried in some contexts, but they have major drawbacks. In the prison context, one example is L.A. County’s special facility for LGBT inmates.⁵⁵³ This approach is problematic in many ways, including that prison officials rely on stereotypes to determine which prisoners are LGBT; that it, in effect, excludes bisexual people; that it constructs gay and transgender people as victims; and that it forces inmates to disclose their LGBT status in the violent context of incarceration.⁵⁵⁴ Sometimes correctional facilities may have space to house nonbinary people in individual sleeping

⁵⁴⁹ Letter from Adele Rapport, Reg’l Dir., U.S. Dep’t of Educ., Office for Civil Rights, to Daniel E. Cates, Superintendent, Twp. High Sch. Dist. 211, at 6 (Nov. 2, 2015), <https://www2.ed.gov/documents/press-releases/township-high-211-letter.pdf> [<https://perma.cc/A44V-GET9>].

⁵⁵⁰ Colker, *supra* note 543, at 161.

⁵⁵¹ See, e.g., Keress Weidner, *I’m Non-binary, and “Trans-Accessible” Restrooms Should Include Me, Too*, GLSEN, <https://www.glsen.org/blog/i%E2%80%99m-non-binary-and-%E2%80%99trans-accessible%E2%80%99d-restrooms-should-include-me-too> [<https://perma.cc/V74X-D6EN>].

⁵⁵² See, e.g., G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 716–17 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017) (mem.).

⁵⁵³ Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1309 (2011) (“The Los Angeles County Men’s Jail segregates gay and transgender inmates and says that it does so to protect them from sexual assault. But not all gay and transgender inmates qualify for admission to the K6G unit. Transgender inmates must appear transgender to staff that inspect them.”).

⁵⁵⁴ *Id.* (among other drawbacks).

quarters, but there is a danger that they will end up isolated for too long, which can be psychologically damaging.⁵⁵⁵

As Professor Dean Spade has explained, gender-neutral prisons, or “co-corrections,” are not unprecedented.⁵⁵⁶ Beginning in the 1970s, a number of minimum security prisons housed men and women together, although men and women had separate living units.⁵⁵⁷ Some survey research suggests these programs provided more safety and better training opportunities for women, although they came with the disadvantage of increased surveillance.⁵⁵⁸ But “[i]n the eyes of conservative politicians,” these “minimum-security facilities were . . . coed ‘country clubs.’”⁵⁵⁹ The co-correctional experiment was a casualty of the “tough-on-crime” policies of the 1990s, and by 1999 there were no co-correctional facilities left.⁵⁶⁰ The experiment is worth trying again.

From 2012 to 2018, the federal approach to housing gender-nonconforming prisoners was integration: determining the best placement for gender-nonconforming prisoners on a case-by-case basis.⁵⁶¹ Facilities were required to screen all individuals for their risk of perpetrating or experiencing sexual abuse, and to use that information to determine housing.⁵⁶² Rather than presenting an insurmountable challenge to sex classification in prisons, nonbinary people were assimilated into it. This ought to have allayed any fears that nonbinary gender might open a Pandora’s box of disruptive consequences for prison housing.⁵⁶³ Yet the Trump Administration has revised the policy to give

⁵⁵⁵ RHODES PERRY ET AL., N.Y.C. ADMIN. FOR CHILDREN’S SERVS., SAFE & RESPECTED: POLICY, BEST PRACTICES, & GUIDANCE FOR SERVING TRANSGENDER, GENDER EXPANSIVE, & NON-BINARY CHILDREN AND YOUTH INVOLVED IN THE CHILD WELFARE, DETENTION, AND JUVENILE JUSTICE SYSTEMS 26–27 (2017), <https://www1.nyc.gov/assets/acs/pdf/lgbtq/SAFEAndRespectedUpdate061417.pdf> [<https://perma.cc/56F4-F48S>].

⁵⁵⁶ Spade, *supra* note 28, at 811.

⁵⁵⁷ MICHAEL WELCH, CORRECTIONS: A CRITICAL APPROACH 195 (3d ed. 2011) (discussing a co-correctional facility, the Federal Correctional Institution in Fort Worth, Texas, which housed “low-risk and non-violent” inmates between 1971 and 1988).

⁵⁵⁸ Sue Mahan et al., *Sexually Integrated Prisons: Advantages, Disadvantages and Some Recommendations*, 3 CRIM. JUST. POL’Y REV. 149, 149 (1989) (“Despite the shortcomings, staff and inmate responses were in general agreement with the statement: ‘For the most part the co-corrections institution is an agreeable place.’”); cf. James R. Davis, *Co-Corrections in the U.S.: Housing Men and Women Together Has Advantages and Disadvantages*, 23 CORRECTIONS COMPENDIUM, Mar. 1998, at 1, 3 (discussing the need for longitudinal studies on co-correctional facilities).

⁵⁵⁹ WELCH, *supra* note 557, at 195–96.

⁵⁶⁰ *Id.* at 196 (“In view of the tough-on-crime campaigns and President George Bush’s initiative to eliminate furlough and other unpopular policies, the U.S. Department of Justice worried that co-corrections did not uphold the ‘tough’ image of prison life that the White House had been fiercely promoting.”).

⁵⁶¹ 28 C.F.R. § 115.42(a), (c) (2018).

⁵⁶² *Id.*

⁵⁶³ It should be worrying, however, that anyone can be assimilated into the system of mass incarceration. See generally ALEXANDER, *supra* note 229.

primacy to “biological sex” for purposes of placement of transgender and intersex inmates.⁵⁶⁴

Economically marginalized transgender people encounter difficulties seeking social services and shelters due to sex segregation.⁵⁶⁵ As a result of fear of violence and harassment, transgender and nonbinary people who need these services may not even approach them.⁵⁶⁶ The Department of Housing and Urban Development’s regulations require that single-sex emergency shelters and other services defer to a person’s stated gender identity,⁵⁶⁷ but this policy does not assist in cases in which a person’s identity is nonbinary.⁵⁶⁸ Gender-neutral social services may be the best option for survivors of gender-based violence.⁵⁶⁹ Arguments related to women’s safety are troubling in this context.⁵⁷⁰ The assumptions of masculine predation and invulnerability that underlie these defenses of sex-segregated services are not supported and are harmful to men.⁵⁷¹ There is some anecdotal evidence that trainings and education may help to undermine these assumptions.⁵⁷² Providing all residents with doors that lock, panic buttons, and other measures may improve safety and ensure a sense of security.⁵⁷³ Nonetheless, for temporary shelters, or those that cannot afford private rooms or apartments, there may be a good argument for continuing to sex-segregate shared bedrooms by gender identity⁵⁷⁴ — based on the same considerations that might

⁵⁶⁴ FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, CHANGE NOTICE, TRANSGENDER OFFENDER MANUAL 6 (2018), <https://www.bop.gov/policy/progstat/5200-04-cn-1.pdf> [<https://perma.cc/AAA2-V85R>]. The policy allows assignment to facilities in accord with an inmate’s gender identity in certain cases “where there has been significant progress towards transition as demonstrated by medical and mental health history.” *Id.*

⁵⁶⁵ Spade, *supra* note 28, at 752–53, 778–80.

⁵⁶⁶ See, e.g., MICHAEL MUNSON & LOREE COOK-DANIELS, FORGE, GENDER-INTEGRATED SHELTERS: EXPERIENCE AND ADVICE 7 (2016), <http://forge-forward.org/wp-content/docs/gender-integrated-shelter-interviews-FINAL.pdf> [<https://perma.cc/9MWQ-G2ZG>] (reporting on a survey of 1000 transgender and nonbinary individuals in 2011, in which nearly two-thirds stated they would not, or might not, access domestic violence or rape crisis centers).

⁵⁶⁷ 24 C.F.R. § 5.106 (2018). The Violence Against Women Act (VAWA), which provides federal grants to programs like emergency shelters, prohibits discrimination on the basis of “gender identity” by grant recipients. 34 U.S.C.A. § 12291(b)(13)(A) (West 2018). It allows “sex-specific programming” that “is necessary to the essential operation of a program,” so long as “comparable services” are provided to those who are excluded from those programs. *Id.* § 12291(b)(13)(B).

⁵⁶⁸ MUNSON & COOK-DANIELS, *supra* note 566, at 8.

⁵⁶⁹ *Id.* (arguing that integrated services are the most inclusive way to respond to VAWA’s requirement of offering “comparable services” to all, and noting that alternatives, such as putting male survivors up in hotels, are not cost effective).

⁵⁷⁰ *Id.* at 23–28 (listing objections to integration such as the concern that cisgender men would assault women and children in the shelter).

⁵⁷¹ *Cf. id.* at 12–17 (offering anecdotes from staff at integrated shelters about men, including men who are not LGBTQ, who are survivors of abuse).

⁵⁷² *Id.* at 31–33 (discussing experiences with training shelter staff).

⁵⁷³ *Id.* at 45–46.

⁵⁷⁴ See OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF JUSTICE, FREQUENTLY ASKED QUESTIONS: NONDISCRIMINATION GRANT CONDITION IN THE VIOLENCE AGAINST WOMEN

support the privacy BFOQ.⁵⁷⁵ Nonbinary people might appropriately be placed where they are most safe and comfortable.⁵⁷⁶

As for housing on college campuses and in other educational and professional contexts, institutions are adopting a pluralism strategy. Campus housing is a problem for transgender students in general.⁵⁷⁷ Many educational institutions are developing gender-inclusive housing policies.⁵⁷⁸ One school, for example, “allows students to live in a suite with others regardless of their sex or gender identity” if they “complete a gender inclusive housing contract confirming their agreement.”⁵⁷⁹ Some colleges designate certain residence halls or floors as gender neutral, or provide living space for students who identify as LGBTQ.⁵⁸⁰ Others provide case-by-case accommodation.⁵⁸¹

E. Health Care

In the health care domain, the ideal approach would be an individualized sort of recognition: to tailor care to the particular needs of each

REAUTHORIZATION ACT OF 2013, at 6–7 (2014) (discussing situations in which sex-segregated housing may be appropriate, depending on the circumstances); MUNSON & COOK-DANIELS, *supra* note 566, at 39.

⁵⁷⁵ See *supra* p. 976.

⁵⁷⁶ See MUNSON & COOK-DANIELS, *supra* note 566, at 39–40.

⁵⁷⁷ JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 33 (2011), https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf [<https://perma.cc/ZP9E-4JKE>] (reporting that nearly one-fifth of respondents in higher education were denied appropriate campus housing, and five percent were denied housing altogether).

⁵⁷⁸ Joseph Erbenraut, *College Campuses Are More Trans-Inclusive than Ever, but Still Have a Long Way to Go*, HUFFINGTON POST (Dec. 6, 2017), http://www.huffingtonpost.com/2015/05/18/trans-friendly-colleges_n_7287702.html [<https://perma.cc/46ZG-HX52>]. For a list of the 267 colleges and universities with gender-inclusive housing, see *Colleges and Universities that Provide Gender-Inclusive Housing*, CAMPUS PRIDE, <https://www.campuspride.org/tpc/gender-inclusive-housing/> [<https://perma.cc/TFF5-P6QB>].

⁵⁷⁹ *Harvard College Handbook for Students: Gender Inclusive Housing*, HARV. U., <https://handbook.fas.harvard.edu/book/gender-neutral-housing> [<https://perma.cc/8345-NEFX>].

⁵⁸⁰ See, e.g., *Gender Neutral Program*, DARTMOUTH GROUP DIRECTORY, <http://dgd.dartmouth.edu/group/450> [<https://perma.cc/RXV9-RBVS>] (“Gender neutral housing allows for same-gender, opposite-gender or other-gender identities to live together regardless of biological sex. This program floor will provide a living/learning environment where residents can learn about and explore gender identity and expression in a supportive environment.”); *Inclusive Housing*, U. NEB. OMAHA, <https://www.unomaha.edu/student-life/housing-and-residential-life/prospective-students/inclusive-housing.php> [<https://perma.cc/22T8-ULSW>] (“Any student who is lesbian, gay, bisexual, transgender, queer/questioning, intersex, asexual, not straight, gender nonconforming, (LGBTQIA+) and/or ally is eligible to live in University housing including in an apartment designated as Gender-Inclusive Housing.”).

⁵⁸¹ See, e.g., *Contract*, U. WIS.-MADISON, <https://www.housing.wisc.edu/residence-halls/assignments/contract/> [<https://perma.cc/8FPA-5W7E>] (“University Housing acknowledges that not all students may identify as female or male, and we want to create a welcoming environment for you in the residence halls. We would be happy to work with students who may identify as trans*gender, genderqueer, gender non-conforming, and/or non-binary regarding life in the halls.”).

nonbinary person, with awareness of the unique forms of bias that nonbinary people may face.⁵⁸² Like other gender-nonconforming people, nonbinary people may ask that reproductive health care be offered in ways that do not assume gender roles or stereotypes.⁵⁸³ Nonbinary people, like transgender men and women, may require transition-related health care and be diagnosed with gender dysphoria.⁵⁸⁴ However, the law requires no more than neutrality with respect to any transgender patient.

Health care providers are beginning to recognize the unique needs of nonbinary patients, and finding ways to provide more supportive and affirming care.⁵⁸⁵ In addition to asking for a patient's "sex" assigned at birth, health care forms should also ask an open-ended question about "current gender identity."⁵⁸⁶ Patients must be assured that their responses to questions about sex and gender identity will be kept confidential, like other health care information. One set of guidelines concludes, "all of the recommended practices could be easily implemented in any health care setting, without a need for large-scale structural change, or extensive knowledge on gender identity."⁵⁸⁷

Like transgender men and women, some nonbinary adults have sought or received access to transition-related health care services, such as hormone therapy, chest reduction or reconstruction, augmentation mammoplasty, phalloplasty, vaginoplasty, hair removal, and voice surgery, among other treatments.⁵⁸⁸ Nonbinary children, like other transgender children, may seek reversible puberty-blocking hormones and other treatments.⁵⁸⁹ Opponents liken such treatments to "elective

⁵⁸² See NAT'L LGBT HEALTH EDUC. CTR., PROVIDING AFFIRMATIVE CARE FOR PATIENTS WITH NON-BINARY GENDER IDENTITIES 8–9 (2017), <https://www.lgbthealtheducation.org/wp-content/uploads/2017/02/Providing-Affirmative-Care-for-People-with-Non-Binary-Gender-Identities.pdf> [<https://perma.cc/DDS7-CJ5T>].

⁵⁸³ See *supra* note 366 and accompanying text.

⁵⁸⁴ See Richards et al., *supra* note 27, at 3; see also *supra* note 269 and accompanying text.

⁵⁸⁵ NAT'L LGBT HEALTH EDUC. CTR., *supra* note 582, at 3.

⁵⁸⁶ *Id.* at 7. One sample form offers the options "male," "female," and "choose not to disclose" for sex assigned at birth. *Id.*

⁵⁸⁷ *Id.* at 13.

⁵⁸⁸ See, e.g., JAMES ET AL., *supra* note 2, at 99, 101 fig.7.13, 103 fig.7.15. In general, people who identify as nonbinary report less interest in these treatments than do transgender men and women. See, e.g., *id.* at 99 (reporting that 95% of transgender men and women have wanted hormone therapy, compared with 49% of nonbinary survey respondents).

⁵⁸⁹ See Sara Solovitch, *When Kids Come in Saying They Are Transgender (or No Gender), These Doctors Try to Help*, WASH. POST (Jan. 21, 2018), <http://wapo.st/2DrsBL4> [<https://perma.cc/MG8N-645Z>].

In the United States, parental consent is generally required for minors seeking medical treatments. Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1534–35 (2018). While there is research suggesting positive mental health outcomes from allowing transgender children to "socially transition" to their male or female gender identity, more research is required on nonbinary children. Jack L. Turban, *Transgender Youth: The Building Evidence Base for Early Social Transition*, 56 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 101, 102

cosmetic surgery” that is not covered by insurance.⁵⁹⁰ But unlike elective cosmetic surgery, transition-related services are covered by health insurers as medically necessary to treat gender dysphoria.⁵⁹¹ Patients should not be required to conform to binary concepts of gender to receive care.⁵⁹² Under section 1557 of the Affordable Care Act⁵⁹³ (ACA), any health program or activity that receives federal funds may not discriminate on the basis of sex.⁵⁹⁴ Federal courts have interpreted such language to preclude discrimination against someone due to transgender identity.⁵⁹⁵ A set of 2016 regulations interpreting the ACA clarified that providers could not discriminate based on “[s]ex stereotypes” including “the expectation that individuals will consistently identify with only one gender.”⁵⁹⁶ Health plans may also be precluded from discriminating against transgender patients under Title VII, which bars sex discrimination in employment;⁵⁹⁷ the Fourteenth Amendment, which bars sex discrimination by public entities;⁵⁹⁸ and some state insurance laws, which bar discrimination based on gender identity.⁵⁹⁹

While health care providers should affirmatively accommodate non-binary patients and insurers should cover medically necessary care, the law seems to require, at most, neutrality. The 2016 ACA regulations provide that covered entities may not deny health care coverage “for specific health services related to gender transition if such denial . . .

(2017) (“Children have a range of identities along a spectrum that might not fall neatly into male or female categories. More data are needed to better understand the benefits of social transition in these gender-non-binary children.”).

⁵⁹⁰ See, e.g., *Activist-Clinicians Tout “Cultural Humility” & Surgery-on-Demand for “Nonbinaries” & “Genderfluids,”* 4THWAVENOW (Dec. 27, 2015), <https://4thwavenow.com/2015/12/27/activist-clinicians-tout-cultural-humility-surgery-on-demand-for-nonbinaries-genderfluids/> [<https://perma.cc/EKF3-E2VC>] (characterizing nonbinary people seeking transition-related services as motivated by “[c]omfort, exploration, wants” rather than medical necessity). 4thWaveNow is a website that describes itself as “[a] community of parents & others concerned about the medicalization of gender-atypical youth and rapid-onset gender dysphoria.” *Id.*

⁵⁹¹ See AM. MED. ASS’N HOUSE OF DELEGATES, RESOLUTION: 122, SUBJECT: REMOVING FINANCIAL BARRIERS TO CARE FOR TRANSGENDER PATIENTS (2008) (recognizing “[a]n established body of medical research” that “demonstrates the effectiveness and medical necessity of mental health care, hormone therapy and [gender-affirming] surgery as forms of therapeutic treatment for many people diagnosed with [gender dysphoria]”); WPATH STANDARDS, *supra* note 209, at 8; see also *Boyden v. Conlin*, No. 17-cv-264, 2018 WL 4473347, at *11–15 (W.D. Wis. Sept. 18, 2018) (rejecting an “unsupported analogy,” *id.* at *12, between gender-conforming surgeries and uncovered cosmetic surgeries on the ground that it does not rest on judgments about what is appropriate treatment according to medical standards and research).

⁵⁹² See, e.g., Spade, *supra* note 212, at 19–23.

⁵⁹³ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

⁵⁹⁴ 42 U.S.C. § 18116 (2012).

⁵⁹⁵ See, e.g., *supra* note 175.

⁵⁹⁶ See *supra* note 176.

⁵⁹⁷ *Boyden v. Conlin*, No. 17-cv-264, 2018 WL 4473347, at *11–15 (W.D. Wis. Sept. 18, 2018).

⁵⁹⁸ *Id.* at *16–18.

⁵⁹⁹ See, e.g., CAL. CODE REGS. tit. 10, § 2561.2(a)(4)(A) (2018).

results in discrimination against a transgender individual.”⁶⁰⁰ Whether a denial constitutes “discrimination” is a difficult question. It may be discrimination if a provider acknowledges it declined coverage because the services in question were transition related.⁶⁰¹ Or it may be discrimination if similar services are covered for people who are not seeking transition-related care.⁶⁰² This latter rule is unlikely to apply in a scenario in which “a medical procedure would be denied as cosmetic or medically unnecessary in all other cases, but is in fact medically necessary to treat gender dysphoria.”⁶⁰³ Thus, if for example, a health plan never covered hair removal, it would not have to cover hair removal as treatment for gender dysphoria. But in any event, the rules are likely to apply (or not), to transgender women, transgender men, and nonbinary people alike.

The 2016 regulation has been challenged in court and seems likely to be reversed by the Trump Administration.⁶⁰⁴ The questions in litigation are whether there must be religious exemptions to the regulations, and whether the definition of “sex” should include “gender identity” at all, or is limited “to the biological differences between males and

⁶⁰⁰ 45 C.F.R. § 92.207(b)(5) (2017).

⁶⁰¹ Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,433 (May 18, 2016) (“OCR will evaluate whether coverage for the same or a similar service or treatment is available to individuals outside of that protected class or those with different health conditions and will evaluate the reasons for any differences in coverage. Covered entities will be expected to provide a neutral, nondiscriminatory reason for the denial or limitation that is not a pretext for discrimination.”). Sex stereotypes, such as the idea that transgender people should “maintain the physical characteristics of their natal sex,” will not suffice. *Boyden*, 2018 WL 4473347, at *12.

⁶⁰² *Boyden*, 2018 WL 4473347, at *12 (concluding that a health insurance plan discriminated on the basis of “natal sex” by covering care like reconstructive breast surgery for women who were assigned the female sex at birth, but not chest surgery for transgender women who had been assigned the male sex at birth); Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,433.

⁶⁰³ Samuel Rosh, *Beyond Categorical Exclusions: Access to Transgender Healthcare in State Medicaid Programs*, 51 COLUM. J.L. & SOC. PROBS. 1, 20 (2017).

⁶⁰⁴ In 2016, a number of states and health care providers brought suit, arguing that the rule’s provision with respect to “gender identity” violates the Administrative Procedure Act because it is incorrect as a matter of law, and that it violates the Religious Freedom Restoration Act because it fails to include religious exemptions. *Franciscan All., Inc. v. Price*, No. 16-CV-00108, 2017 WL 3616652, at *1 (N.D. Tex. July 10, 2017). A federal district court in Texas granted a preliminary injunction, preventing the HHS from enforcing the regulation. *Id.* at *2. The litigation is now stayed while the Trump Administration reassesses the regulation. *Id.* at *5. But the injunction purports to apply only to government actions to enforce the regulation, not private parties seeking to enforce the statute’s nondiscrimination provisions. *See, e.g.*, *Prescott v. Rady Children’s Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1105 (S.D. Cal. 2017) (holding that a private action alleging gender-identity discrimination under the ACA could proceed based on the language of the statute and did not need to rely on the 2016 HHS regulations).

females.”⁶⁰⁵ The resolution of this dispute does not turn on whether nonbinary people are covered.⁶⁰⁶

* * *

This examination of the few remaining contexts of sex or gender regulation demonstrates that the law has no reason to require a universal definition of sex or gender that limits the options to two. The purpose of this Part has not been to definitively settle particular legal debates, but rather, to argue that U.S. civil rights law offers various tools to resolve controversies over inclusion of nonbinary gender identities. As U.S. states increasingly enact legislation to recognize nonbinary gender, researchers will have more opportunities to collect empirical evidence on the upsides and downsides of different interventions.⁶⁰⁷

CONCLUSION

This Article has asked what it would mean for the law to take nonbinary gender seriously, in other words, to treat people with nonbinary gender identities as full participants in social, economic, and political life. It has argued for a contextual approach to nonbinary gender rights, rather than insisting on uniform definitions or universal rules. This approach would examine each context of sex or gender regulation, considering the relative merits of various strategies for achieving nonbinary gender rights, including third-gender recognition, the elimination of sex classifications, or integration into binary sex or gender categories. While opponents have argued that nonbinary gender rights would have unforeseen and dangerous effects on a host of legal regimes, careful analysis reveals that there are few contexts left in which the law relies on binary sex classifications after *Obergefell*. In those few remaining contexts of binary sex regulation, there are many possible paths forward for nonbinary gender rights.

Theoretical debates — such as how the law should define sex or gender as a general matter, or whether the optimal end state is third-gender recognition or gender neutrality — can make it appear as though there are irreconcilable conflicts among nonbinary gender rights claims and feminist and LGBT priorities, particularly those of transgender men and women. But analysis of each legal context suggests fewer such conflicts in practice. Existing sex discrimination law protects transgender men and women because bias against them is based on sex stereotypes, not

⁶⁰⁵ *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 688 (N.D. Tex. 2016).

⁶⁰⁶ Opponents of the regulation pointed to the fact that it covered nonbinary gender identities in their legal briefs — as if that were a damaging fact for the government. See *supra* notes 177–178 and accompanying text. But it did not seem to matter in terms of the legal argument, and the court made no mention of it. See *Franciscan All., Inc.*, 227 F. Supp. 3d 660.

⁶⁰⁷ International experience may also prove instructive. See *supra* note 8.

because they are a protected class or because their identities are immutable in some way. The same anti-stereotyping argument precludes discrimination against people with nonbinary gender identities. Rather than requiring dramatic legal changes or novel theories, protection of nonbinary rights may only require moderate extensions of existing law and the application of familiar civil rights concepts from doctrine on sex, race, and religion.

Feminists have long argued for release from the straightjacket of gender, but never before have nonbinary gender identities seemed so likely to go mainstream. This movement may be challenged by entrenched attitudes about the naturalness of binary gender and the belief that the legal options are limited to unpalatable forms of gender recognition or absolute gender neutrality. But on a closer look, it is apparent that neither human lives nor legal options are binary. Indisputably, nonbinary gender poses challenges to legal interests, but these challenges are not insurmountable, and the possibility of inclusion, which not long ago seemed unimaginable, is now beginning to seem inevitable.

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A reasonable supreme court? Hardly. Don't be fooled by this extremist establishment

Moira Donegan



Recent stay on the abortion pill ban is a contest between conservative institutionalists and ideologues on the court

Tue 25 Apr 2023 08.19 EDT



In a way, Matthew Kacsmaryk - the Trump-appointed federal district court judge in Amarillo, Texas, who issued a sprawling and aggressive injunction on 7 April that would have removed the abortion drug mifepristone from the market - did the supreme court's conservative majority a big favor: he made them look reasonable by comparison.

On Friday, after days of anxious waiting for abortion providers, the pharmaceutical industry and American women, the supreme court declined to allow Kacsmaryk's stay - and another, also dramatic ruling from the fifth circuit court of appeals - to go into effect. The court that destroyed the abortion right last year thereby preserved the availability of the most common abortion method - at least in the dwindling number of states where abortion remains legal at all.

The ruling came on the court's shadow docket - that body of informal but increasingly important choices made by the justices, once largely procedural but now often binding and merits-based, in which the court hears no oral arguments and in which they do not need to disclose their votes. Still, we have a decent guess about how the votes broke down, because two of the justices - Clarence Thomas and Samuel Alito - noted publicly that they would have allowed the drug to be pulled from distribution.

It's possible that other conservative justices agreed with them, but it seems clear that at least one of them didn't: in a four-page written dissent, one which had little in the way of legal argument but an abundance of sniping and peevish grievance, Samuel Alito took a swipe at several of his female colleagues over their approach to shadow docket rulings, including his fellow conservative Amy Coney Barrett.

▄▄ There is sharp intra-Republican disagreement over how to handle the unexpectedly virulent political fallout from the Dobbs decision

It seems reasonable to deduce, then, that even among the supreme court justices who overturned women's rights to control their bodies and lives, there is sharp intra-Republican disagreement over how to handle the unexpectedly virulent political fallout from the Dobbs decision. Like their counterparts in Congress and on the campaign trail, the Republicans on the supreme court may be looking to put a gentler spin on abortion bans, or to shore up their own dwindling legitimacy by scorning legally sloppy and thinly pretexted orders like Kacsmark's.

Several members of the court have long preferred to have better, more robust excuses for their cruel and myopic transformations of the law - Chief Justice John Roberts, in particular, has always preferred to attack voting rights, women's rights and other pillars of pluralist, representative democracy in the most respectful possible fashion. It's not he and those like him are not rabid conservatives, eager to do violence to the traditions and aspirations that make the US worthwhile. It's that they prefer the kind of violence that wears a suit.

▄▄ The ideologues want to hit the gas and the institutionalists want to pump the brakes. But they're driving in the same direction

Not so with Alito and Thomas - and not so with their successors, like Kacsmark, the fifth circuit panel, the heavily conservative federal judiciary and the rest of the increasingly emboldened conservative legal movement. These are the rightwing players who want to seize the moment, to take advantage of the uneasy and unsustainable political state of affairs in the US where legislative gridlock means that lawmaking and policy power has been delegated almost entirely to a captured and unchecked court system. The problem, for institutionalists on the court like Roberts and possibly Barrett, is that going as fast as the supreme court has been going makes them look bad. The court has never been so unpopular as it has become since Dobbs;

dramatic reforms, like term limits and court expansion, have never had as much broad support as they do now. And so we may see some tensions arise within the supreme court's six-judge conservative supermajority: the ideologues want to hit the gas, and the institutionalists want to pump the brakes. But rest assured that they're all driving in the same direction. Do not let the mifepristone ruling fool you about where this extremist court is going.

In the end, what might be most distressing about the fiasco that unfolded as the nation waited for the supreme court's ruling was realizing just how far the Overton window has shifted, and just how low the standards for women's health and freedom have sunk, in the months since Dobbs. For days before the court issued its order, developments that could only be fairly understood as grave insults to women's dignity were instead pitched as mercies or signs of moderation.

Kacsmark, a lifelong anti-abortion activist, issued an order consisting of bunk science, anti-choice rhetoric, novel interpretations of both standing doctrine and statutes of limitations, and a remarkably expansive interpretation of the federal judiciary's power over the Food and Drug Administration; but when he stayed his own injunction from going into effect for seven days, we were meant to greet the delay with relief. When the fifth circuit then said that mifepristone's availability should be curtailed back to its pre-2016 status - which involved a densely bureaucratic and labyrinthine process of multiple doctor's appointments to get the medicine, and medically unnecessary gestational limits on its use - we were meant to be happy, because technically, that ruling would have allowed mifepristone to stay on the market, in some form.

■ It is unacceptable, and unbecoming the dignity of citizenship, that American women are threatened this way at all

For days before the supreme court issued its ruling keeping the drug available, abortion providers, hospitals, drugmakers and most importantly, American women, were left holding their breath, uncertain about whether a safe medication would be legal, or whether it would abruptly become illegal, and inaccessible, because of the whims of a handful of jurists - whom nobody voted for and who possess no medical expertise - because those people want to preserve a gendered social hierarchy that the medication threatens. That this threat did not come to fruition, at least not this time, is no consolation. It is unacceptable, and unbecoming the dignity of citizenship, that American women are threatened this way at all.

Moira Donegan is a Guardian US columnist

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Opinion

Americans want to join unions. The supreme court doesn't like that

Moira Donegan



Court's new ruling makes it harder for workers to join a union, easier to break one and riskier to try to force concessions

Tue 6 Jun 2023 06.12 EDT



Their contract had expired, so the local teamsters, drivers of concrete-mixing barrel trucks for a firm called Glacier Northwest, in Washington state, decided to walk off the job. Like all strikes, the point of the work stoppage was to inflict financial consequences on a recalcitrant management side: to show the bosses that their employees were united in shared interest and mutual protection and that it would cost them less money to negotiate in good faith and agree to the workers' demands than to continue to fight the union for less favorable, more exploitative conditions. When the teamsters began their strike, 16 of the barrel mixing trucks were full. They drove them back to the Glacier Northwest lot and left them there.

But if you don't mix concrete, it hardens, and becomes useless. If this happens in a barrel truck, sometimes that can cause damage to the truck, too. When Glacier Northwest realized that their teamster employees had gone on strike, non-union workers were able to remove the concrete over the course of five hours, averting damage to the trucks. But they lost the use of all the concrete that had been mixed in those 16 barrel trucks that day.

This injury - the loss of 16 trucks' worth of concrete to a regional construction supplier in the north-west - is the pretext that the **US supreme court** used this week to weaken the National Labor Relations Board and deal a blow to the right to strike.

In the case, Glacier Northwest v International Brotherhood of Teamsters, eight of the court's nine justices found that management could sue the union for the damage caused to their property during the strike. Only Justice Jackson dissented. In addition to encouraging companies to sue their workers over strikes and ensuring that unions will pre-emptively avoid strikes or adopt less effective tactics to protect themselves from liability, the ruling also opens a wide new avenue for union-busting litigators to evade the authority of the National Labor Relations Board - the federal body that was created by Congress specifically to handle such conflicts and enforce workers' rights.

The decision, then, furthers two of the supreme court's major long-term projects: the erosion of labor protections, and the weakening of administrative agencies, whose expertise the court routinely ignores and whose authority the justices seem determined to usurp for themselves.

It might risk reinforcing the dramatically low standards for the supreme court's behavior to note that **the majority opinion**, authored by Amy Coney Barrett, did not represent the worst of all possible outcomes. Barrett included some limiting language

in her writing that preserves the possibility of binding NLRB oversight in these lawsuits. She clarified that unions do have some right to time their strikes in order to maximize financial damage to management - a move that would protect, say, the right of Amazon workers to initiate work stoppages during the holiday shipping rush, **as they did** last year. The gestures toward a continued right to strike appear designed to secure the votes of Elena Kagan and Sonia Sotomayor, who joined the majority, and to dilute the power of Samuel Alito, Neil Gorsuch and Clarence Thomas, who wanted to gut NLRB authority over strike-related litigation entirely.

But it is important to consider Glacier Northwest in context: in recent years, the court has made it easier for companies to bar their employees from bringing class-action lawsuits, made it harder for public-sector unions to collect dues and struck down a California law that allowed unions to recruit agricultural workers on farms. The new ruling, which finds that strikes are often illegal when they lead to damage to employers' property, only furthers their long project of making it harder for workers to join a union, easier for employers to break one up, and more legally risky for workers to take the kinds of action that can actually elicit concessions from the boss.

It will get worse. If they get their way - a less procedurally complicated case, a more amenable vote from Roberts, Barrett or Kavanaugh - the court's most extreme conservatives will shape a bleak future for American labor. Their aim is to all but eliminate rights to organize and strike that are enjoyed by people in the most important, foundational and meaningful part of their public lives: the workplace.

"Workers are not indentured servants, bound to continue laboring until any planned work stoppage would be as painless as possible for their master," Jackson wrote in her dissent. But that is the labor settlement that at least three members of the extremist conservative wing hope to enact. There is only one direction that this court's labor jurisprudence is going.

The ruling comes at a moment when the American labor movement, long dormant and defeated, is experiencing something like a small resurgence, however timid and sporadic. According to data from the Bureau of Labor Statistics, the number of unionized workers grew last year in both the public and private sectors, with the biggest increases in sectors like transportation and warehousing, arts and entertainment and durable goods manufacturing.

This growth has been accompanied by highly visible, media-savvy worker organizing drives among journalists, fast-food workers and graduate student instructors, and

comes on the heels of high-profile strikes by groups ranging from Oakland teachers to Hollywood writers. Since 2021, this union resurgence has been aided in no small part by the Biden NLRB, which has been unusually hospitable to labor's claims, even for a Democratic administration.

More and more workers are saying that they want to be a part of a union - and more and more of them are finding ways around the many and onerous obstacles designed to prevent them from forming one. Given the growing power of American unions, maybe the anti-worker court is right to be scared.

Moira Donegan is a Guardian US columnist

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THE JUDICIAL AND GENERATIONAL DISPUTE OVER TRANSGENDER RIGHTS

Mark Joseph Stern,* Karen Oehme,** Nat Stern,***
Ember Urbach,**** Elena Simonsen,*****
& Alysia Garcia*****

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

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

* Writer, Slate Magazine.

** Distinguished University Scholar & Director of the Institute for Family Violence Studies, Florida State University.

*** John W. and Ashley E. Frost Professor of Law, Florida State University.

**** Researcher, University of Kansas.

***** Research Assistant, Florida State University.

***** Research Assistant, Florida State University.

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INTRODUCTION

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

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

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

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

3. 42 U.S.C. § 2000e(k) (2016).

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

I. EXPANDING DEFINITIONS OF SEX DISCRIMINATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30. 822 F.3d 709.

31. *Id.* at 716.

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

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

34. *Id.* at 727.

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

36. 34 C.F.R. § 106.33 (2012).

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

38. *Id.* at 721-22.

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

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

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

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

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

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

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

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

41. *Id.* at 739.

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

43. *Id.*

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

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

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

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

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

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

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

49. *Id.* at 731.

50. *Id.* at 730.

51. *Id.* (footnote omitted).

52. *Id.* at 731.

53. *Id.* at 730.

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

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

II. HIGH SCHOOL CONVERSATIONS ABOUT TRANSGENDER ISSUES

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

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

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

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

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

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

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

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

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

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

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

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

65. *Id.*

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

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

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

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

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

69. Marsh, *supra* note 67.

70. Marsh, *supra* note 67.

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

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

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

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

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

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

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

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

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

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

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

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

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

TABLE 1

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

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

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

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

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

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

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

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

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

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

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

A. *Student Awareness of Transgender Individuals and Issues*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Bathroom Use

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. *Other Voices*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

160. *Id.* lines 3901-12.

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

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

CONCLUSION

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

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

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

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

Distorting the Reconstruction: A Reflection on *Dobbs*

Michele Goodwin[†]

History will likely record *Dobbs v. Jackson Women's Health Organization*¹ as the most devastating case of the Supreme Court's 2021 term and perhaps one of the worst Supreme Court decisions of all time. However, the *Dobbs* decision offers an opportunity to revisit the damaged path to reproductive freedom, dating back to American slavery and bridge pathways forward with better understanding. This Essay offers a reflection on *Dobbs*, speaking to the origins of reproductive autonomy and justice concerns that preexisted Reconstruction. The Essay argues that by examining the antebellum archive, a different type of slavery and involuntary servitude comes into view, namely the involuntary reproductive servitude imposed on Black girls and women.

This Essay's thesis is that the record of American slavery extended beyond physical labor in cotton fields to wealth maximization in forced reproduction. It argues that the intent of the Thirteenth and Fourteenth Amendments included freeing Black women from forced reproduction. As such, this contribution adds greater nuance and insight to contemporary debates about the concerns of Reconstruction Amendments' abolitionist ratifiers. By closely examining the Antebellum and Reconstruction archives, with specific attention on the arguments, debates, speeches, and writings of the abolitionist ratifiers, greater clarity is revealed regarding their efforts to stamp out slavery and involuntary reproductive servitude, particularly the abolitionist ratifiers that shaped the Reconstruction Amendments.

In keeping with the brevity of contributions for our symposium, this Essay proceeds in two succinct parts. Part I addresses *Dobbs* and the normalization of women's pain. It briefly reviews the opinion, while concentrating on the Court's omissions, specifically related to the grave rates of maternal mortality and morbidity in the United States. Part II turns to the

[†] Chancellor's Professor, University of California, Irvine School of Law and Founding Director of the Center for Biotechnology and Global Health Policy. The author is grateful to the *Yale Journal of Law Feminism* editors and staff. This Essay benefited from the helpful research of the University of California, Irvine School of Law library as well as the Georgetown Law School Library and their respective staffs. A special note of appreciation to Amy Atchinson and Suzanne Miller. This invited Essay builds on the symposium's theme, *Meeting the Moment: Legal Frameworks for Feminist Futures*.

¹ 142 S. Ct. 2228 (June 24, 2022).

iconography of reproductive coercion and pain in the antebellum period. Told through excavated advertisements for enslaved girls and women. First, it argues that forced reproduction, inflicted on enslaved Black girls and women, was visible. Second, it contends that the abolitionist ratifiers were concerned with the harms resulting from sexual assault and forced reproduction on Black women and girls. Third, it maintains that the Court distorts the intent of the Reconstruction ratifiers when it ignores that chief among their concerns was putting an end to forced reproduction and involuntary reproductive servitude. By resurrecting lost advertisements, this Essay also helps to complicate and correct contemporary understandings of slavery as an enterprise concentrated on field labor.² By acknowledging the distressing involuntary reproductive servitude endured by Black girls and women, the Essay expands the narratives about both slavery and reproductive freedom and contributes to scholarship that seeks to fill the gap on Black women and the Reconstruction Amendments.

Part I: *Dobbs* and The Iconography of Pain

Read in the most elementary terms, *Dobbs* is primarily concerned with overturning the constitutional protections for abortion provided by *Roe v. Wade*³ and *Planned Parenthood v. Casey*.⁴ According to the Court, “*Roe* was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people.”⁵ Writing for the majority, Justice Alito stated that the 7-2 *Roe* majority “usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people”⁶ and unconvincingly declared that the case does not jeopardize other privacy concerns, such as gay

² For other excellent contributions to this subject, see HARRIET A. JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 35 (Lydia Maria Child ed., The Belknap Press of Harvard University Press 1987) (1861) (“[M]y master was, to my knowledge, the father of eleven slaves. But did the mothers dare to tell who was the father of their children? Did the other slaves dare to allude to it, except in whispers among themselves? No, indeed! They knew too well the terrible consequences.”); see generally PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES (1997) (documenting that enslaved women’s reproductive freedom and family liberty were central to the arguments put forth by abolitionists that drafted the Reconstruction Amendments); DOROTHY ROBERTS, KILLING THE BLACK BODY (1997) (examining the centrality of sexual harms against Black women to the founding of the United States); RACHEL A. FEINSTEIN, WHEN RAPE WAS LEGAL: THE UNTOLD HISTORY OF SEXUAL VIOLENCE DURING SLAVERY (2019) (analyzing the widespread accounts of sexual violence forced on Black enslaved women by white men in the United States).

² See Christine Kenneally, *Large DNA Study Traces Violent History of American Slavery*, N.Y. TIMES (Sept. 20, 2021), <https://www.nytimes.com/2020/07/23/science/23andme-african-ancestry.html> [<https://perma.cc/7C6T-5KNR>]; Steven J. Micheletti et al., *Genetic Consequences of the Transatlantic Slave Trade in the Americas*, 107 AM. J. HUM. GENETICS 265 (2020).

³ 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

⁴ 505 U.S. 833 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

⁵ *Dobbs*, 142 S. Ct. at 2265.

⁶ *Id.* at 2265.

marriage, access to contraception, or interracial marriage.⁷ This sophistry served to justify upending decades of precedent affirming reproductive autonomy from the Court's 1942 *Skinner v. Oklahoma*⁸ decision to its 2020 *June Medical Services L.L.C. v. Russo*⁹ decision striking down a Louisiana targeted regulation of an abortion provider ("TRAP law").

Pre-*Roe* iconography comes to mind. The disturbing 1964 police photograph of Gerri Santoro, a twenty-eight-year-old mother and victim of domestic violence, crouched over a pile of blood-soiled, white sheets in a cheap Norwich, Connecticut motel.¹⁰ Blood visibly stains her naked body. Santoro's troubling death captured the human distress of criminalizing abortion. The image captured the open secret of botched, self-induced abortions and the tremendous human toll on women and their families prior to *Roe*.

Such deaths in the pre-*Roe* era were not uncommon. According to Leslie Reagan, author of *When Abortion Was a Crime: Women, Medicine, and Law in the United States*, "[p]hysicians and nurses at Cook County Hospital saw nearly one hundred women come in every week for emergency treatment following their abortions."¹¹ Of the women, "[s]ome barely survived the bleeding, injuries, and burns; others did not."¹² Major medical facilities like Cook County Hospital designated entire wards to address "abortion-related complications."¹³ Serious injuries affected "[t]ens of thousands of women every year" who needed emergency care following self-induced or back-alley abortions.¹⁴ Deaths were particularly acute among women of color.¹⁵

⁷ Supposedly, the precedents in *Griswold v. Connecticut*, *Lawrence v. Texas*, *Obergefell v. Hodges*, and *Loving v. Virginia* will be spared a similar, future fate, despite Justice Thomas's concurring opinion. *Id.* at 2280-81 ("But we have stated unequivocally that '[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.' We have also explained why that is so: rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed 'potential life.'") (internal citations omitted). *But see id.* at 2301-02 (Thomas, J. concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents. After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated.") (internal citations omitted). *Id.* at 2301-02.

⁸ *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (finding that "invidious discriminations" manifest when state legislation interferes with "the basic civil rights of man" to determine his own reproductive and procreative destiny).

⁹ 140 S. Ct. 2103 (2020), *abrogated by Dobbs*, 142 S. Ct. 2228.

¹⁰ *See* Mary Elizabeth Williams, *The Photograph that Showed Us the Horrors of Illegal Abortion*, SALON (May 3, 2022), <https://www.salon.com/2022/05/03/gerri-santoro-photo-pro-choice-symbol> [<https://perma.cc/QN2H-PXXX>].

¹¹ *See* LESLIE REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES* 210 (1997).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 210-11.

¹⁵ *Id.* at 212-13 (explaining that "[t]he racial differences in abortion-related deaths and access to safe therapeutic abortions mirrored the racial inequities in health services in general and in overall

Today, researchers predict that “Black women will largely bear the brunt of abortion restrictions” and the deaths likely resulting as well.¹⁶ The United States ranks as the deadliest place in the developed world to be pregnant.¹⁷ Its chilling maternal mortality and morbidity rates are dramatically out of line with peer nations.¹⁸ A recently released report by the Commonwealth Fund underscores the dangers, highlighting that “U.S. women have the highest rate of maternal deaths among high-income countries, while Black women are nearly three times more likely to die from pregnancy-related complications than white women are.”¹⁹ In *Dobbs*, the majority makes no reference to the gravity of pregnancy risks, nor its prior findings and analyses in *Whole Woman’s Health v. Hellerstedt*, when it recognized that “[n]ationwide, childbirth is 14 times more likely than abortion to result in death.”²⁰

Instead, the Court ignores any current trends related to maternal deaths, including in Mississippi, a state with one of the highest maternal mortality rates in the nation.²¹ In fact, Justice Alito cabins the Court’s inquiry

health” and noting that “[m]aternal mortality rates of black women were three to four times higher than those of white women”).

¹⁶ Cecilia Lenzen, *Facing Higher Teen Pregnancy and Maternal Mortality Rates, Black Women Will Largely Bear the Brunt of Abortion Limits*, TEX. TRIBUNE (June 30, 2022), <https://www.texastribune.org/2022/06/30/texas-abortion-black-women> [<https://perma.cc/8GY6-Q9P4>] (“Black women are three to four times more likely to experience a pregnancy-related death than white women, and the risk spans income and education levels.”).

¹⁷ See Vineeta Gupta, *I’m a Maternal Health Physician. The U.S.’s Maternal Death Rate Is Shameful.*, MS. MAGAZINE (Nov. 10, 2022), <https://msmagazine.com/2022/11/10/maternal-mortality-pregnancy-death-women> [<https://perma.cc/UHZ6-S8J2>]; see also *Dobbs*, 142 S. Ct. at 2340 (“Mississippi has the highest infant mortality rate in the country, and some of the highest rates for preterm birth, low birthweight, cesarean section, and maternal death. It is approximately 75 times more dangerous for a woman in the State to carry a pregnancy to term than to have an abortion.”) (citing *Infant Mortality Rates by State*, CTR. FOR DISEASE CONTROL & PREVENTION (Mar. 3, 2022), https://www.cdc.gov/nchs/pressroom/sosmap/infant_mortality_rates/infant_mortality.htm [<https://perma.cc/FB37-QSDF>]; *Infant Mortality Report 2019 & 2020*, MISS. STATE DEPT. HEALTH 18-19 (2021), https://www.msdh.ms.gov/msdhsite/_static/resources/18752.pdf [<https://perma.cc/YPJ9-Z8VB>]; *Percentage of Babies Born Low Birthweight by State*, CTR. FOR DISEASE CONTROL & PREVENTION (Feb. 25, 2022), https://www.cdc.gov/nchs/pressroom/sosmap/lbw_births/lbw.htm [<https://perma.cc/9V96-6MRL>]; *Cesarean Delivery Rate by State*, CTR. FOR DISEASE CONTROL & PREVENTION (Feb. 25, 2022), https://www.cdc.gov/nchs/pressroom/sosmap/cesarean_births/cesareans.htm [<https://perma.cc/M8TC-LRNB>]; *Mississippi Maternal Mortality Report 2013-2016*, MISS. STATE DEPT. HEALTH 5, 25 (Mar. 2021), https://www.msdh.ms.gov/msdhsite/_static/resources/8127.pdf [<https://perma.cc/MGJ6-A4AL>]).

¹⁸ Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2020*, CTR. FOR DISEASE CONTROL & PREVENTION (2022), <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/maternal-mortality-rates-2020.htm> [<https://perma.cc/VSL3-8HPS>] (last visited Feb. 14, 2023) (“Rates for non-Hispanic Black women were significantly higher than rates for non-Hispanic White and Hispanic women. The increases from 2019 to 2020 for non-Hispanic Black and Hispanic women were significant.”).

¹⁹ Munira Z. Gunja, Shanoor Seevai, Lauri Zephyrin & Reginald D. Williams II, *Health and Health Care for Women of Reproductive Age*, COMMONWEALTH FUND, (Apr. 5, 2022), <https://www.commonwealthfund.org/publications/issue-briefs/2022/apr/health-and-health-care-women-reproductive-age> [<https://perma.cc/86JX-KRJZ>].

²⁰ 579 U.S. 582, 618 (2016).

²¹ See Danielle M. Ely & Anne K. Driscoll, *Infant Mortality in the United States, 2019: Data From the Period Linked Birth/Infant Death File*, 70 NAT’L VITAL STAT. REP. 14 (Dec. 2021), <https://www.cdc.gov/nchs/data/nvsr/nvsr70/nvsr70-14.pdf> [<https://perma.cc/NY3P-7YTY>].

on maternal mortality to 1973 in criticism of the majority in *Roe*.²² Why, after all, the queries, did the Court fail to defer to Texas or at least explain why it demonstrated deference in protecting pregnant women's lives rather than leaving such matters to the state's legislators?²³ A skeptical reading of the majority's opinion suggests that consequences of poor maternal health policies, including death, are beyond judicial review.

With harrowing contemporary stories of women and girls fleeing abortion-restrictive states to terminate pregnancies in "reproductive free states," *Dobbs* now resuscitates elements of the pre-*Roe* era, a dynamic Reva Siegel describes as "preservation-through-transformation."²⁴ That is, new medical, psychological, and legal dangers lurk in the post-*Dobbs* era, particularly in abortion restrictive states.²⁵ Finally, in the constellation of the Court's concerns, sexual violence such as rape and incest do not rise within view, even though the Mississippi Gestational Age Act²⁶—the law at the heart of the case—made no exceptions for either—a worrisome feature of recent anti-abortion legislation.²⁷ The majority's failure to even gesture towards these issues signals their apathy.

Part II: Reproductive Servitude, Antebellum Iconography, and Reconstruction Distortions

In *Dobbs*, the Supreme Court not only reframes abortion law in the U.S. to serve a political end,²⁸ but it also misreports and mischaracterizes the history of Reconstruction and the Reconstruction Amendments. In doing so, the Court invests in distortion and a political agenda at odds with ending involuntary reproductive servitude. Even if the Court's purported methodology—to derive contemporary meaning from history and traditions

²² *Dobbs*, 142 S. Ct. at 2268 ("What *Roe* did not provide was any cogent justification for the lines it drew. Why, for example, does a State have no authority to regulate first trimester abortions for the purpose of protecting a woman's health? The Court's only explanation was that mortality rates for abortion at that stage were lower than the mortality rates for childbirth.").

²³ *Id.*

²⁴ See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119-20 (1997); Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2178-87 (1996).

²⁵ Alexa Lardieri, *U.S. Hospitals Do Little to Protect Mothers During Birth*, U.S. NEWS (July 27, 2018), <https://www.usnews.com/news/health-care-news/articles/2018-07-27/report-us-most-dangerous-place-to-give-birth-in-developed-world#:~:text=The%20United%20States%20is%20the,and%20about%20700%20mothers%20dying.> ("The United States is the most dangerous place in the developed world to give birth, with more than 50,000 mothers suffering severe injuries during or after childbirth and about 700 mothers dying.").

²⁶ MISS. CODE ANN. § 41-41-191 (2022).

²⁷ See Michele Goodwin & Mary Ziegler, *Whatever Happened to the Exceptions for Rape and Incest?*, THE ATLANTIC (Nov. 21, 2021), <https://www.theatlantic.com/ideas/archive/2021/11/abortion-law-exceptions-rape-and-incest/620812> [<https://perma.cc/X8GW-SW77>].

²⁸ See Reva Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEXAS L. REV. (forthcoming 2023) (manuscript at 5) (on file with author) ("On this account, executive branch appointments politics matter critically to originalism's authority, as do originalism's appeals to constitutional memory to legitimate the exercise of public power.").

deeply rooted in the Constitution—was a morally and ethically sustainable approach to judicial review, it fails on its own accord. Instead, the Court siphons race and sex from Reconstruction and the Reconstruction Amendments. This omission reflects the Roberts Court’s utilitarian approach to engaging the nation’s history of racial violence. In *New York State Rifle & Pistol Ass’n v. Bruen*,²⁹ the Court addresses at length the concerns of Black men and their denial of gun ownership pre-Reconstruction. While, ironically, the Court makes no mention of Black women at all in *Dobbs*.

Despite the Court’s claims otherwise, *Dobbs* offers no searching review of history or the present. To the contrary, the Court neglects any mention of the period leading to and inspiring Reconstruction, evading the Reconstruction debates, and never mentions *slavery*, *involuntary sexual servitude*, or *forced “breeding”*—hard truths that galvanized abolitionist ratifiers of the Reconstruction Amendments.

Generally, the neglected history of abolition and the Reconstruction Amendments leaves a troubling void in American legal analysis, creating two distinct problems. First, this void affects the framing, retelling, and prioritization of legal narratives across canons, discourses, and disciplines in American law, constitutional law most obviously, but also criminal law, civil procedure, contracts, property, torts, and family law—to name but a few. As such, *Dred Scott v. Sanford*³⁰ is recorded as a tragic story about an enslaved Black man’s quest for freedom and an odious opinion written by Chief Justice Taney. Both are true.³¹ However, *Dred Scott* should also be as a case about family ties and connections. By erasing Mr. Scott’s family, he becomes a less complex character in the American drama about slavery.

Second, the abandoned history of abolition in legal analysis serves to obscure women and girls, and their unique concerns and quests for

²⁹ 142 S. Ct. 2111 (2022).

³⁰ 60 U.S. 393 (1857).

³¹ See PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION’S HIGHEST COURT 172-219 (2018) (explaining in the chapter *Roger B. Taney: Slavery’s Great Chief Justice*, that “no other justice was like Roger Taney. At the time of his death in October 1864 he was denounced and vilified.”); Sol Wachtler, *Dred Scott: A Nightmare for the Originalists*, 22 *TOURO L. REV.* 575, 593 (2006) (explaining that “[i]n the *Dred Scott* case, a slave was taken into free territory and then returned to a slave state. The slave claimed that once in free territory, he should be free forever.”); Isabel Paterson, *The Riddle of Chief Justice Taney in the Dred Scott Decision*, 3 *GEORGIA L. REV.* 192, 192 (1949) (offering a compelling reading about the case, but bearing no mention of Harriet or the Scott daughters, “It was indeed, eight years since the plea of the Negro Dred Scott had first been entered in any court. Briefly, the case was this: Dred Scott was born in slavery in Virginia . . . Years afterward, he brought suit in St. Louis . . . for his liberty, claiming that his residence in Illinois had freed him by virtue of the state constitution”); Michael A. Schoeppner, *Status Across Borders: Roger Taney, Black British Subjects, and a Diplomatic Antecedent to the Dred Scott Decision* 100 *J. AM. HIST.* 46, 46 (2013) (noting that Justice Taney also “deduced that black Britons were not protected by existing Anglo-American treaties and that Great Britain had no power to compel the United States to guarantee their free entry and movement.”). *But see*, Charles Noble Gregory, *A Great Judicial Character, Roger Brooke Taney*, 18 *YALE L. J.* 10, 21 (1908) (“He was seventy-nine years old when he wrote the opinion, and that he should seek to crystalize the views of the past, rather than the feeling of the present or the conviction of the future, was natural to his age and his origin. At a like age we will be equally incapable of changing our views as to the ownership in horses and cattle if the world, in its advance, ever recognizes, as I sometimes hope it will, their inalienable rights.”).

freedom. That is, Mr. Scott sought not only his freedom but that of his wife, Harriet Robinson Scott, and daughters, Eliza and Lizzie Scott.³² Indeed, Eliza, born in October 1838, was delivered on the steamboat *Gipsey*, between territories that prohibited slavery.³³ *Dred Scott*, recorded and retold in the absence of depth and rigor, renders his daughters and wife imperceptible, their claims to freedom and their hunger for liberation, invisible. *What should readers make of that which is absent from the study of American law, save that, at some point, it became irrelevant to the stories (and people) we prioritize in American law and society?*

On deeper inspection and resurrection of their case, Mr. and Mrs. Scott fought to keep their daughters literally *free* and protected from the insatiable sexual grasps of American slavery,³⁴ which normalized sexual violence in full view.³⁵ Arresting advertisements from the Antebellum period serve as the backdrop and iconography to Mrs. Scott's story and that of countless others:

“RUNAWAYS. The following negroes ran away or absconded from me on Friday last . . . a negro woman named Lina, about 18 years of age and her child named Mary, about 2 years old. . . . Mary is a bright mullatto child” Advertisement, Republican Star, Oct. 15, 1811 (Easton, Maryland).

³² See Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L. J. 1033, 1033-34 (1997) (noting that “[i]n the progression of American people toward freedom, the contributions of one person whose life was central to that struggle have long been ignored: Harriet Robinson Scott, ‘Mrs. Dred Scott.’” In fact, “Harriet Robinson Scott, his lawfully wedded wife . . . brought her own case for freedom, a case that was submerged in his,” however, “conventional history has relegated her life to a footnote.”).

³³ See Missouri State Archives, *Missouri’s Dred Scott Case, 1846-1857*, MISS. DIGIT. HERITAGE, <https://www.sos.mo.gov/archives/resources/africanamerican/scott/scott.asp> [<https://perma.cc/YVE8-P32S>] (“On that October trip back to Fort Snelling, Eliza Scott, named for her mistress, was born on the steamer *Gipsey*, captained by Thomas Gray, north of the boundary of 36° 30’, in free territory.”).

³⁴ See VanderVelde & Subramanian, *supra* note 32 at 1073 (Mrs. Harriet Scott “may have been primarily concerned with keeping her family intact. In addition, [she] may have experienced abuse Taken from her family of origin to the outer frontier of Fort Snelling at age fifteen or perhaps even earlier, Harriet may also have suffered the sexual abuse (from the soldiers or other men) that many enslaved women experienced and feared”).

³⁵ Thomas Jefferson shrewdly calculated the gains to be made on his plantations. Arguably, he determined that the maximization of capital on his plantation resided at least in part on the sexual exploitation of the enslaved Black women on his plantation. In a letter to John Wayles Eppes on June 30, 1820, now archived at Monticello, Jefferson wrote, “I know no error more consuming to an estate than that of stocking farms with men almost exclusively. I consider a woman who brings a child every two years as more profitable than the best man of the farm. [W]hat she produces is an addition to the capital, while his labors disappear in mere consumption.” And much like Jefferson, Eppes’ fathered six Black children, all whom were enslaved, including three Black girls. See Letter from Thomas Jefferson to John Wayles Epps (June 30, 1820) (archived at <https://tjrs.monticello.org/letter/380>) [<https://perma.cc/G2JG-TM5Z>]; *Sexual Violence Targeting Black Women*, EQUAL JUST. INITIATIVE, <https://cji.org/report/reconstruction-in-america/the-danger-of-freedom/sidebar/sexual-violence-targeting-black-women> [<https://perma.cc/7ZV6-84RY>] (reporting that “[e]nslaved Black women had no legal means to resist or protect themselves from sexual assault by white slaveowners. As early as the 1830s, Black abolitionist Maria Stewart called for the law to recognize Black women as full humans with rights to control their bodies and to grant or withhold consent, but reality lagged far behind.”).

“Five Dollars Reward. Ranaway on Tuesday, the 13th . . . the subscriber’s NEGRO GIRL, named Maria, with her female Mullato Child about nine months old— Maria was lately the property of Dr. Thomas H. McCall . . . N.B. Captains of vessels and all others are forbid carrying said Wench off the state, as the law will be put in force against them.” Advertisement, *City Gazette and Daily Advertiser*, March 22, 1810. (Charleston, South Carolina) p. 3.

“For Sale or Exchange, a Young Healthy Negro wench & child . . . tis not convenient to have a breeding Wench in the family.” Advertisement, *Virginia Chronicle*, March 9, 1793.

“A NEGRO WENCH, named Margaret; has a Mulatto Child, and is at this time pregnant . . . Any person apprehending and delivering her to the Master of the Work-house . . . shall have Four Dollars.” Advertisement, *City Gazette and Daily Advertiser*, Aug. 6, 1799 (Charleston, South Carolina) p. 3.

“To be Sold at Private Sale, A small gang of NEGROES, nearly all young . . . consistent of fellows and fine breeding wenches...” Advertisement, *City Gazette*, March 5, 1794 (Charleston, South Carolina) p. 4.

“FOR SALE . . . A young likely NEGRO WENCH, with a healthy MULLATTO CHILD; She is a complete Washer, Ironer, and Seamstress. For particulars, apply to DAVIS & REID, Advertisement, *City Gazette*, Nov. 5, 1796 (Charleston, South Carolina) p. 4.

As these advertisements convey, baked in the story of American slavery and abolition is the story of sexual terrorism inflicted on Black girls and women, so troublingly normalized that the descriptors “breeding wench” and “mullato child” simultaneously read as mundane daily affairs and horrors.³⁶

³⁶ Inserted among the advertisements seeking the return of escaped Black girls and women are advertisements for the sale of insurance, the leasing homes, and notices regarding the dissolution of businesses. These are the advertisements and notices that surround that of “MARGERUM runaway.” In this posting, a reward of fifty dollars is offered for her return. *See e.g.*, *City Gazette and Commercial Daily Advertiser*, 1, June 14, 1820 (Charleston, South Carolina).

Conclusion

In *Dobbs*, the Court has delivered a modern breed of *Plessy*. The majority offered an important rejoinder to the question of whether harmful precedents should ever be overturned, accurately pointing to several cases, chief among them, the Court's landmark decision *Brown v. Board of Education*,³⁷ which marked the Court's reversal of its distressing holding in *Plessy v. Ferguson* and over five decades of "separate but equal" doctrine.³⁸ Sadly, however, in this context, the Court's invocation of *Plessy*—from which many lessons remain to be drawn³⁹—serves as troubling race-baiting. Justice Alito writes, "the Court repudiated the 'separate but equal' doctrine, which had allowed States to maintain racially segregated schools and other facilities. In doing so, the Court overruled the infamous decision in *Plessy* . . . [a] precedent[] that had applied the separate-but-equal rule."⁴⁰ In other words, *Plessy* serves as a smokescreen to obscure that in striking down *Roe*, the Court resuscitated the type of odious discrimination and inequality *Plessy* made possible.

In the aftershock of *Dobbs*, exercising reproductive bodily autonomy is permissible only in some states, while banned in others—a feature reminiscent of American slavery and Jim Crow. *Dobbs* results in a two-tiered legal system related to women's bodily autonomy, and significant chaos and distress has ensued in its aftermath. *Dobbs* also signals that striking down odious, race-discriminatory laws may serve as a proxy for upholding sex-discriminatory laws, which will hurt women generally and women of color particularly, creating a new *Jane Crow* where there was once *Jim Crow*.

Surprisingly, the Court claims to have "engaged in a careful analysis of the history of the right at issue."⁴¹ Yet, their effort and concern for the lives of the women most impacted are imperceptible.

³⁷ 347 U.S. 483 (1954).

³⁸ *Plessy* served as an exhilarant on a raging legacy of racial discrimination and white supremacy in America. When the Court granted its imprimatur, discriminatory, Jim Crow laws emerged throughout the United States. 163 U.S. 537 (1896).

³⁹ See generally STATES' LAWS ON RACE AND COLOR (Pauli Murray ed., Univ. of Ga. Press reprt. 2016).

⁴⁰ See *Dobbs*, 142 S. Ct. at 226.

⁴¹ See *Dobbs*, 142 S. Ct. at 2246-47 (The Court claimed to consider one question in deciding whether abortion falls into a category the majority will recognize, "whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'").

PRESENT CHALLENGES

CONSTITUTIONAL GERRYMANDERING AGAINST ABORTION RIGHTS: *NIFLA V. BECERRA*

ERWIN CHEMERINSKY† & MICHELE GOODWIN‡

In National Institute of Family Life Advocates v. Becerra, the Supreme Court said that a preliminary injunction should have been issued against a California law that required that reproductive healthcare facilities post notices containing truthful factual information. All that was required by the law was posting a notice that the state of California makes available free and low-cost contraception and abortion for women who economically qualify. Also, unlicensed facilities were required to post a notice that they are not licensed by the state to provide healthcare.

In concluding that the California law is unconstitutional, the Court’s decision has enormously important implications. It puts all laws requiring disclosures in jeopardy because all, like the California law, prescribe the required content of speech. All disclosure laws now will need to meet strict scrutiny and thus are constitutionally vulnerable. Moreover, the ruling is inconsistent with prior Supreme Court decisions that allowed the government to require speech of physicians intended to discourage abortions. The Court ignored legal precedent, failed to weigh the interests at stake in its decision, and applied a more demanding standard based on content of speech.

But NIFLA v. Becerra is only secondarily about speech. It is impossible to understand the Court’s decision in NIFLA v. Becerra except as a reflection of the conservative Justices’ hostility to abortion rights and their indifference to the rights and interests of women, especially poor women. In this way, it is likely a harbinger of what is to come from a Court with a majority that is very hostile to abortion.

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† Erwin Chemerinsky, Dean and Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley School of Law.

‡ Michele Goodwin, Chancellor’s Professor of Law & Director, Center for Biotechnology & Global Health Policy, University of California, Irvine School of Law. We wish to thank Jonathan Huang for his excellent research assistance. © 2019 by Erwin Chemerinsky & Michele Goodwin.

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INTRODUCTION

Forty-five years after the Supreme Court's landmark decision in *Roe v. Wade*,¹ the Supreme Court declared unconstitutional a California law meant to help ensure that women are provided accurate information about reproductive health services available to them, including but not exclusively about abortion.² In the aftermath of the Court's decision, numerous prominent women's rights organizations issued statements, declaring that the Court endangered the future of women's reproductive autonomy and health.³ Catholics for Choice

¹ 410 U.S. 113 (1973).

² Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

³ For example, after the Court's ruling, the National Women's Law Center issued a statement, calling the opinion "damaging" and "infuriating," explaining, "We should all be able to agree that pregnant women deserve timely and accurate information about their pregnancies and the full range of options available to them, but instead, the Court struck down a California law which did just that." See Heather Shumaker, *NIFLA v. Becerra: SCOTUS Fails to Protect Women from Deceptive Practices of Anti-Abortion Counseling Centers*, NAT'L WOMEN'S L. CTR. (June 28, 2018), <https://nwlcl.org/blog/nifla-v-becerra-scotus-fails-to-protect-women-from-the-deceptive-practices-of-anti-abortion-counseling-centers/>; see also *Supreme Court Decision Awards Free Pass to Deceptive Crisis Pregnancy Centers*, CTR. FOR REPROD. RTS., (June 26, 2018), <https://www.reproductiverights.org/press-room/supreme-court-decision-awards-free-pass-to-deceptive-crisis-pregnancy-centers> ("We disagree . . . that fake health centers have a free speech right to dress up like medical centers and deceive pregnant women. . . . [T]he anti-choice movement relies on deceptive

issued a statement describing the Court's ruling as disappointing, and noting that it is "morally bankrupt to deceive poor women."⁴ Glenn Northern, the Domestic Program Director for the organization, put it this way: "It is simply immoral and unkind to present yourself as a source of help for a woman only to drive her toward a decision that only she will have to move forward with."⁵

At issue in *National Institute of Family and Life Advocates (NIFLA) v. Becerra*⁶ was the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act).⁷ The FACT Act required crisis pregnancy centers (CPCs) to provide notices to women that visit their clinics that California provides free or low-cost reproductive health services.⁸ The law also mandated that unlicensed CPCs notify women that California had not licensed the clinics to provide medical services.⁹ No one working in the clinics was required to say anything, let alone provide contraception, abortion services, or referrals. The FACT Act was supported by detailed legislative history documenting that women often did not know or have access to this critical information concerning their reproductive choices.¹⁰

Justice Clarence Thomas wrote for the Court in a 5–4 decision split along familiar ideological lines, joined by Chief Justice Roberts and Justices Kennedy, Alito, and Gorsuch. Justice Thomas either overlooked or disregarded the well-documented realities the FACT Act sought to address. For example, the chilling accounts by pregnant women of deception, coercion, distress, and confusion at CPCs, which

tactics like fake health centers to pursue their aim of denying the right to decide to end a pregnancy."); Kelly Blanchard, *Ibis Responds to NIFLA v. Becerra*, IBIS REPROD. HEALTH (June 2018), <https://ibisreproductivehealth.org/news/ibis-responds-nifla-v-becerra> ("The Supreme Court's decision to allow crisis pregnancy centers to deliberately mislead women about abortion and contraception services endangers women's lives, specifically and significantly impacting low-income women. This decision undermines women's ability to make decisions that are best for them and their loved ones.").

⁴ See Casey Baker, *It's Morally Bankrupt to Deceive Poor Women – NIFLA v. Becerra Ruling*, CATHOLICS FOR CHOICE (July 26, 2018), <http://www.catholicsforchoice.org/morally-bankrupt-deceive-poor-women-nifla-v-becerra-ruling/> ("We are deeply disappointed with today's ruling. At the heart of our Catholic faith is the belief that every individual is endowed with the inherent dignity to make their own moral decisions and not be coerced into a predetermined path.").

⁵ *Id.*

⁶ 138 S. Ct. 2361 (2018).

⁷ Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act, Cal. Health & Safety Code Ann. §§ 123470–123473 (West 2018) [hereinafter FACT Act], invalidated by *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

⁸ *Id.* § 123472(a)(1).

⁹ *Id.* § 123472(b).

¹⁰ See *infra* Section I.A.

primarily solicit their services to poor pregnant teens and women.¹¹ According to an investigation conducted by NARAL Pro-Choice America (NARAL) in California, 40% of the CPCs in their study “advised that hormonal birth control increases the risk of infertility and breast cancer;”¹² 60% warned that “condoms are ineffective in reducing pregnancy and the transmission of certain STDs;”¹³ and a confounding 70% made the ridiculous assertion that “abortion increases the risk of breast cancer.”¹⁴

Even more chilling, “85% of the CPCs investigated in California misled women to believe that abortion is both traumatizing and dangerous.”¹⁵ Such patently false claims obscure the fact that an American woman is fourteen times more likely to die in pregnancy and childbirth than by terminating her pregnancy.¹⁶ However, these claims have the intended purpose—and undoubted effect—of coercing women’s reproductive decision-making, and steering women

¹¹ See *infra* Section I.A; see also U.S. HOUSE OF REPRESENTATIVES COMM. ON GOV’T REFORM—MINORITY STAFF SPECIAL INVESTIGATIONS DIV., FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS 1 (2006), <https://fedupburlington.files.wordpress.com/2011/07/congressional-report-cpcs.pdf> (“Pregnancy resource centers often mask their pro-life mission in order to attract ‘abortion-vulnerable clients.’”) (quoting Kurt Entsminger, *Building a Successful Internet Advertising Campaign for Your Pregnancy Center*, CARE NET REPORT (Mar.–Apr. 2007), http://carenet-test.digiknow.com/uploads/report_date/cnrMarApril07.pdf); NARAL PRO-CHOICE AM., CRISIS PREGNANCY CENTERS LIE: THE INSIDIOUS THREAT TO REPRODUCTIVE FREEDOM (2015), <https://www.prochoiceamerica.org/wp-content/uploads/2017/04/cpc-report-2015.pdf>; Beth Holtzman, Note, *Have Crisis Pregnancy Centers Finally Met Their Match: California’s Reproductive FACT Act*, 12 NW. J.L. & SOC. POL’Y 78 (2017); Allison Yarrow, *The Abortion War’s Special Ops*, NEWSWEEK (Aug. 20, 2014), <https://www.newsweek.com/2014/08/29/inside-covert-abortion-war-265866.html> (detailing the experience of a visitor to a CPC, who said they told her “an abortion could cause scarring, fertility problems and something they call post-abortion syndrome, a cocktail of depression, regret and suicidal thoughts”); *‘Misconception’: New Documentary Exposes the Dark, Deceptive World of Crisis Pregnancy Centers*, PUBLICHEALTHWATCH (Sept. 24, 2014), <https://publichealthwatch.wordpress.com/2014/09/24/misconception-new-documentary-exposes-the-dark-deceptive-world-of-crisis-pregnancy-centers/> (“CPC’s [sic] are widely known for using highly deceptive tactics to mislead women and scare them away from making an informed choice to have a legal abortion.”).

¹² NARAL PRO-CHOICE CAL. FOUND., UNMASKING FAKE CLINICS: THE TRUTH ABOUT CRISIS PREGNANCY CENTERS IN CALIFORNIA 2 (2010), <https://www.sfcityattorney.org/wp-content/uploads/2015/08/Unmasking-Fake-Clinics-The-Truth-About-Crisis-Pregnancy-Centers-in-California-.pdf>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ NARAL PRO-CHOICE AM., *supra* note 11, at 9.

¹⁶ See Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 215 (2012).

into continuing unwanted pregnancies that may threaten their lives.¹⁷ According to NARAL, “[a]fter a year investigating crisis pregnancy centers across California, it became clear that CPCs only have one agenda: stop any woman from accessing abortion care, regardless of her situation.”¹⁸

Nevertheless, the Court ruled that the FACT Act violates the First Amendment. We find several flaws with the Court’s analysis and ultimate ruling. First, as Justice Breyer explains in a dissenting opinion, the Court erroneously relied “on cases that prohibit rather than require speech.”¹⁹ Second, the majority ignores Supreme Court precedent, including cases where the Court previously ruled that an entity’s “constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.”²⁰ Third, the Court undermines poor women’s reproductive health rights as well as their interests as healthcare consumers. Finally, the Court further weaponizes the First Amendment, and in the process opens an avenue to challenge notice requirements on free speech grounds.²¹

¹⁷ CPCs have long had connections to anti-abortion violence; one study found the mere presence of a CPC near an abortion clinic increased the risk of violence against clinics, including invasions, bombings, arson, and gunfire. Kathryn Joyce, *The Anti-Abortion Clinic Across the Street*, Ms. MAG. (Fall 2010), <http://www.ms magazine.com/Fall2010/CPCExcerpt.asp>. Today, the strategies are different; CPCs deploy more sophisticated tactics based largely on luring women into their facilities and discouraging them from ending pregnancies through deception and coercion. Heartbeat International, which credits itself with serving over 1.5 million pregnant women each year, articulates its vision as “mak[ing] abortion unwanted today and unthinkable for future generations.” HEARTBEAT INT’L, <https://www.heartbeatinternational.org/> (last visited Oct. 3, 2018). The National Institute of Family and Life Advocates (NIFLA) proclaims its mission as providing legal counsel and training to “protect the work of these life-affirming centers.” *About NIFLA*, NAT’L INST. FAM. & LIFE ADVOC., <https://nifla.org/about-nifla/> (last visited Oct. 3, 2018); see also *infra* notes 188–92. According to NARAL, “[a]t every visit, our investigator reported that CPC workers repeated a similar set of lies and myths, noting, ‘it was scary how they all said the same things, it was like it didn’t matter who I was, they only had one script.’” NARAL PRO-CHOICE CAL. FOUND., *UNMASKING FAKE CLINICS: AN INVESTIGATION INTO CALIFORNIA’S CRISIS PREGNANCY CENTERS* (2015), <https://www.prochoiceamerica.org/wp-content/uploads/2018/03/NARAL-Pro-Choice-CA-Unmasking-Fake-Clinics-2015.pdf>.

¹⁸ NARAL PRO-CHOICE CAL. FOUND., *supra* note 17.

¹⁹ Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2387 (2018) (Breyer, J., dissenting).

²⁰ Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).

²¹ In fact, countless laws at state and federal levels of government require disclosure of accurate information to patients, consumers, and others. See *infra* Section III.A. Thus, on one hand, by its decision, the Supreme Court opens the door to challenges of numerous laws and regulations requiring disclosures. On the other hand, if its holding applies only to shield anti-abortion organizations and deny protections to pregnant women, Justice Thomas and the Court expose their selective and targeted hostility toward women.

As we show in this Article, *NIFLA v. Becerra* is inconsistent with other Supreme Court precedents concerning notice requirements, including decisions upholding requirements that lawyers disclose pertinent information to potential clients²² and that mandate doctors provide information to women seeking abortions.²³ In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court upheld a law that required doctors to provide information to a woman deciding whether to proceed with an abortion.²⁴ The Court rejected a challenge that this was impermissible compelled speech.²⁵

Yet the errors of the case extend beyond its disregard of precedent, precisely because the Court's majority "contorts the law to fit [its] anti-choice objective."²⁶ In *Casey*, the Supreme Court ruled, "we . . . see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials," including those related to consequences of the pregnancy such as fetal development, "even when those consequences have no direct relation to her health."²⁷ Justice Thomas did not apply the Court's *Casey* standard and by failing to do so, he ensured an outcome consistent with anti-abortion ideological leanings of the majority. This is what we call constitutional gerrymandering against abortion rights. The problem is in and of the Court's line drawing, which colors the majority's holding and ultimately results in an opinion that is contrary to and conflicting with established law. As one commentator explains, "*Casey* is the big elephant in the room; it is standing in the way between Clarence Thomas and sound logic, and he can't get around it."²⁸

Put this way, *NIFLA v. Becerra* is only secondarily about speech. Instead, we believe this case is primarily about five conservative Justices' hostility to abortion rights. The Court ignored legal precedent, failed to weigh the interests at stake in its decision, and applied a more demanding standard based on content of speech. Mere months after Justice Thomas' great protection for free speech in *NIFLA*, he

²² See, e.g., *Zauderer*, 471 U.S. at 651; *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978).

²³ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); see also *infra* text accompanying notes 313–25 for further discussion of the *Casey* decision.

²⁴ *Id.*

²⁵ *Id.* at 882.

²⁶ Imani Gandhi, *The Supreme Court Just Gave Crisis Pregnancy Centers a License to Lie*, REWIRE.NEWS (June 26, 2018), <https://rewire.news/ablc/2018/06/26/supreme-court-gives-crisis-pregnancy-centers-license-lie/>.

²⁷ *Casey*, 505 U.S. at 882.

²⁸ Gandhi, *supra* note 26. This commentator also observed that "[t]he rules that normally apply apparently don't apply to evangelicals who are looking to impose their will on vulnerable people." *Id.*

issued a blistering attack on *New York Times v. Sullivan*,²⁹ an iconic free speech case,³⁰ referring to it and its progeny as “policy-driven decisions masquerading as constitutional law.”³¹ Such inconsistencies in Justice Thomas’ First Amendment jurisprudence are ironic at best. Unless the Court is willing to invalidate disclosure laws across a vast array of consumer protections, the Court seems to be uniquely unprotective of women’s reproductive rights.

It is impossible to understand the Court’s decision in *NIFLA v. Becerra* except as a reflection of the conservative Justices’ hostility to abortion rights and their indifference to the rights and interests of women, especially poor women. A simple hypothetical powerfully reveals this hostility. Imagine if state *X* were to adopt a law that required two things:

First, any facility where women might be seeking any abortion, including any doctor, must tell the woman the health risks of abortion and of childbirth, communicate the “probable gestational age of the unborn child,” and make available printed materials describing the fetus, medical assistance for childbirth, potential child support, and the agencies that would provide adoption services (or other alternatives to abortion).

Second, facilities must post a notice that women who economically qualify can receive free or low-cost contraceptives and abortions paid for by the state, and unlicensed facilities must post that fact.

The first part of the law seems much more intrusive than the latter: It requires that doctors actually engage in speech and is unquestionably motivated by a desire to discourage women from exercising their constitutional rights. Yet it is clear that the first part of the law is constitutional, having been expressly upheld in *Planned Parenthood v. Casey*.³² However, the second part of the law is exactly what the Court declared unconstitutional in *NIFLA v. Becerra*. In other words, a state can compel speech intended to discourage abortions, but not speech meant to inform women of their rights with regard to abor-

²⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

³⁰ See Adrienne Stone, *Defamation of Public Figures: North American Contrasts*, 50 N.Y.U. L. REV. 9, 9 (2005) (referring to *New York Times v. Sullivan* as an iconic First Amendment case).

³¹ *McKee v. Cosby*, No. 17-1542, 2019 WL 659764, at *1 (Feb. 19, 2019) (Thomas, J., concurring).

³² *Casey*, 505 U.S. at 838–39.

tion.³³ At the very least, such a content-based approach to speech is inconsistent with a core principle of the First Amendment.³⁴

In this Article, we argue *NIFLA v. Becerra* was incorrectly analyzed and decided. As such, we predict the case will lead to pernicious results.³⁵ First, the case lays the groundwork for burdening and discriminating against speech that protects reproductive rights. This is what Justice Elena Kagan has referred to as “weaponizing” the First Amendment.³⁶

Second, the case ignores and ultimately undermines women’s informational interests as consumers of reproductive health services. Finally, the case will likely upend disclosure laws nationally. That is, because this case is written as a First Amendment decision, it opens the door to challenges to a myriad of laws that require disclosures. Most importantly, the opinion reflects a Court prepared to dramatically diminish reproductive freedom for women.

This Article proceeds in three parts. Part I establishes the facts of the case. It describes the California statute, articulates what was at stake for the litigants, and summarizes the Court’s decision. In Part II, we analyze how and why the Court got it wrong in *NIFLA v. Beccera*. We turn to the empirical record, identifying health, safety, and economic interests that undergirded and justified the law’s enactment. In this Part, we argue that the Court failed to balance interests, departed from its own precedent, and dispensed with even-handed decision-making. In Part III, the Article forecasts the implications and potential consequences of this decision for the future, including jeopardizing reproductive rights vis-à-vis other types of protections and the potential weakening or eradication of disclosure laws.

³³ Justice Breyer framed it this way: “If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services?” Nat’l Inst. of Family & Life Advocates v. *Becerra*, 138 S. Ct. 2361, 2385 (2018) (Breyer, J., dissenting).

³⁴ See, e.g., *Police Dep’t of the City of Chi. v. Moseley*, 408 U.S. 92, 95–96 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.”).

³⁵ Sadly, barely six months after the Supreme Court issued its *NIFLA v. Becerra* ruling, our prediction is manifesting. On January 31, 2019, the Ninth Circuit *en banc* declared unconstitutional an ordinance requiring disclosures for sugar-sweetened beverages. The court relied on *NIFLA v. Becerra*. *Am. Beverage Ass’n v. City & Cty. of S.F.*, 916 F.3d 749, 753 (9th Cir. 2019).

³⁶ See *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (accusing the majority of “weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy”).

I
STATUTE, CONTEXT, AND DECISION IN
NIFLA v. BECERRA

In Part I, we turn to the underlying controversy, the litigation brought by three crisis pregnancy centers with the National Institute of Family and Life Advocates as their named plaintiff. We begin by carefully examining the statute at issue before the Court: the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act—the FACT Act. Next, we explain why California lawmakers enacted the law, turning to both the legislative record and empirical research related to CPC practices to weave together a more holistic account about the underlying justifications for law. Finally, we describe the Supreme Court’s reaction to the statute.

As we show, much was at stake in California, including addressing and stemming high rates of maternal mortality, unintended pregnancies, and sexually transmitted diseases among women and teens in the state. These important health concerns were compounded by glaring economic considerations.

A. *The California Reproductive Freedom, Accountability,
Comprehensive Care, and Transparency Act*

The legislative path to the FACT Act began five years before the law’s enactment; even a few years before its eventual sponsor, David Chiu, was an elected member of the California Assembly.³⁷ In the fall of 2009, the California legislature’s committee on Business, Professions and Consumer Protection commissioned a report about CPCs’ practices.³⁸ According to the legislative record, the Committee was concerned “that CPCs throughout California were disseminating medically inaccurate information about pregnancy options available in the state”³⁹ The California Assembly’s Committee on Health reported that both licensed and unlicensed CPCs “present themselves as comprehensive reproductive health centers, but are commonly affil-

³⁷ See Press Release, NARAL Pro-Choice Cal., Assemblymembers Chiu & Burke Introduce the Reproductive FACT Act (Apr. 13, 2015), <https://prochoicecalifornia.org/2015/04/13/assemblymembers-chiu-burke-introduce-the-reproductive-fact-act/>.

³⁸ *Reproductive FACT Act: Hearing on A.B. 775 Before the Assemb. Comm. on Health*, 2015 Leg., 2015–16 Sess. 4 (Cal. 2015) [hereinafter *FACT Act Assembly Hearing*]. The report, completed in December of 2010 and published by the Public Law Research Institute, discusses several options for regulating CPCs, including creating new regulations, leveraging existing regulations aimed specifically at medical services, as well as creating a new statute. See CASEY WATTERS ET AL., U.C. HASTINGS COLL. OF THE LAW PUB. LAW RESEARCH INST., PREGNANCY RESOURCE CENTERS: ENSURING ACCESS AND ACCURACY OF INFORMATION 1 (2011).

³⁹ *FACT Act Assembly Hearing*, *supra* note 38, at 4.

iated with, or run by organizations whose stated goal is to prevent women from accessing abortions.”⁴⁰ These developments particularly alarmed California lawmakers, who noted that existing state law “[g]rants a specific right of privacy under the California Constitution and provides that the right to have an abortion may not be infringed upon without a compelling state interest.”⁴¹

Further adding to their concern, in California, as in much of the United States generally, CPCs outnumbered abortion clinics by a significant margin. According to a study by the Guttmacher Institute, in 2014, a year before the FACT Act was signed into law, there were 152 clinics that provided abortion services in California,⁴² while there were about 200 CPCs operating in the state.⁴³ Research reviewed by the California Assembly showed that CPCs strategically set up their operations throughout the state.⁴⁴ Then and now, their online platforms used algorithms to steer women searching the term “abortion” to their CPCs.⁴⁵ Moreover, “79 percent of the crisis pregnancy centers that advertised on Google indicated that they provided medical services such as abortions, when, in fact, they are focused on counseling services and on providing information about alternatives to abortion.”⁴⁶ According to NARAL, these organizations “employ a number of tactics to get women in their doors, including strategically . . . locat[ing] near comprehensive women’s health-care clinics”⁴⁷

⁴⁰ *Id.* at 3.

⁴¹ *Id.*

⁴² See *State Facts About Abortion: California*, GUTTMACHER INST. (2018), <https://www.guttmacher.org/sites/default/files/factsheet/sfaa-ca.pdf> (describing how some forty-three percent of California counties lacked clinics providing abortions).

⁴³ See WATTERS ET AL., *supra* note 38, at 4. Heartbeat International provides search tools to locate CPCs in areas around the world. Using its database, we were able to determine that at least 331 CPCs are located in California today and more than 4115 are operating in the United States. The database alerts users, “some help centers choose not to have their locations made public for security reasons.” See *Worldwide Directory of Pregnancy Help*, HEARTBEAT INT’L, <https://www.heartbeat-services.org/worldwide-directory> (last visited Oct. 4, 2018).

⁴⁴ See, e.g., *FACT Act Assembly Hearing*, *supra* note 38, at 3–4; NARAL PRO-CHOICE AM., *supra* note 11, at 14 (describing CPCs co-locating in medical buildings).

⁴⁵ See, e.g., Sam Levin, *Google Search Results for Abortion Services Promote Anti-Abortion Centers*, GUARDIAN (Feb. 13, 2018), <https://www.theguardian.com/world/2018/feb/13/abortions-near-me-google-search-results-anti-pro-life-groups-promote> (“Google searches for abortion services direct users to anti-abortion centers across the US, according to a new report that has sparked concerns from reproductive rights’ groups.”); Hayley Tsukayama, *Google Removes “Deceptive” Pregnancy Center Ads*, WASH. POST (Apr. 28, 2014), <https://www.washingtonpost.com/news/the-switch/wp/2014/04/28/naral-successfully-lobbies-google-to-take-down-deceptive-pregnancy-center-ads/> (describing Google’s removal of CPC advertisements which violate their factually supportable advertising policy, following NARAL investigation report).

⁴⁶ Tsukayama, *supra* note 45 (citing statistics provided by NARAL).

⁴⁷ NARAL PRO-CHOICE AM., *supra* note 11, at 2.

The Committee on Health found CPCs in California operated “to interfere with women’s ability to be fully informed and exercise their reproductive rights”⁴⁸ Based on their review of various reports and one California-focused study, the Committee concluded that CPCs’ “intentionally deceptive advertising and counseling practices often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical healthcare.”⁴⁹ In 2015, lawmakers set about addressing these alarming trends by enacting the FACT Act.⁵⁰

At the final senate hearing before the bill’s enactment, lawmakers hailed California’s “proud legacy of respecting reproductive freedom and funding forward-thinking programs to provide reproductive health assistance to low income women.”⁵¹ However, as Assembly Member David Chiu explained, “[t]he power of the law is only fully realized when California’s women are fully informed of the rights and services available to them.”⁵² Lawmakers sought to place notices in CPCs, “[b]ecause family planning and pregnancy decisions are time sensitive,” and they sensibly believed “California women should receive information that helps them make decisions and access financial support at the sites where they seek care.”⁵³ Chiu summed up the importance of the law as a matter of the best interest of patients, providers, and the state “that women are aware of available assistance for preventing, continuing or terminating a pregnancy.”⁵⁴

The law was straightforward. The preamble states the law’s intended purposes and the legislature’s goal. The law had two components.⁵⁵ The first required CPCs to provide notices to women who visit their clinics, including that California provides free or low-cost reproductive health services.⁵⁶ The second mandated that unlicensed CPCs notify women that California did not license the clinics to provide medical services.⁵⁷

⁴⁸ *FACT Act Assembly Hearing*, *supra* note 38, at 3.

⁴⁹ *Id.*

⁵⁰ FACT Act, *supra* note 7.

⁵¹ *Reproductive FACT Act: Hearing on A.B. 775 Before the S. Comm. on Health*, 2015 Leg., 2015–16 Sess. 5 (Cal. 2015) [hereinafter *FACT Act Senate Hearing*] (quoting Assembly Member David Chiu, author of the FACT Act).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ A.B. 775, 2015–16 Sess. (Cal. 2015).

⁵⁶ *See id.*

⁵⁷ *See id.*

1. *Licensed Facilities*

The law required that all licensed covered facilities must disseminate a notice stating: “California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].”⁵⁸

The Act also defined a licensed covered facility as “a facility licensed under [state health and safety codes] or an intermittent clinic operating under a primary care clinic pursuant to [state health and safety codes], whose primary purpose is providing family planning or pregnancy-related services,” and that also satisfies two or more of the following criteria:

- (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.
- (2) The facility provides, or offers counseling about, contraception or contraceptive methods.
- (3) The facility offers pregnancy testing or pregnancy diagnosis.
- (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.
- (5) The facility offers abortion services.
- (6) The facility has staff or volunteers who collect health information from clients.⁵⁹

The Act required that the “Licensed Notice” be disclosed by licensed facilities in one of three possible manners:

A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22–point type.

A printed notice distributed to all clients in no less than 14–point type.

A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures.⁶⁰

Clearly and quite importantly in terms of the issue of compelled speech, the law did not require anyone in the facility say anything. The state simply required that CPCs post a notice on the wall, providing individuals factual information about services California provides.⁶¹

⁵⁸ FACT Act, *supra* note 7, § 123472(a)(1).

⁵⁹ *Id.* § 123471(a).

⁶⁰ *Id.* § 123472(a)(2).

⁶¹ *See generally id.* § 123472.

2. *Unlicensed Facilities*

Finally, the California legislature also enacted a disclosure requirement for unlicensed facilities. This was particularly important, given the misleading appearance of unlicensed CPCs, which deceptively portray themselves as medical clinics. According to the California law, an unlicensed clinic is “a facility that is not licensed by the state of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services” and that also satisfies two of the following criteria:

- (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.
- (2) The facility offers pregnancy testing or pregnancy diagnosis.
- (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.
- (4) The facility has staff or volunteers who collect health information from clients.⁶²

The law required that unlicensed clinics must disseminate a notice (the “Unlicensed Notice”) stating: “This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.”⁶³ The Unlicensed Notice must be “disseminate[d] to clients on site and in any print and digital advertising materials including Internet Web sites.”⁶⁴ Information in advertising material must be “clear and conspicuous,” and the onsite notice must be “at least 8.5 inches by 11 inches and written in no less than 48–point type, and . . . posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services.”⁶⁵

The FACT Act was consistent with existing California law. California already licensed and regulated clinics, including primary care and surgical clinics, through its Department of Public Health (DPH).⁶⁶ The state required the DPH to inspect licensed health facilities, “including but not limited to clinics.”⁶⁷ California provided a mechanism for exemptions from licensing requirements for certain types of clinics, including those federally operated, community clinics, free clinics, and local government primary care clinics.⁶⁸ And, like

⁶² *Id.* § 123471(b).

⁶³ *Id.* § 123472(b)(1).

⁶⁴ *Id.* § 123472(b).

⁶⁵ *Id.* § 123472(b)(2)–(3).

⁶⁶ See *FACT Act Assembly Hearing*, *supra* note 38, at 2.

⁶⁷ *FACT Act Senate Hearing*, *supra* note 51, at 1.

⁶⁸ See *id.*

other notice requirements mandated by the state, California enforced its law through the imposition of civil penalties. All violators of the Act were “liable for a civil penalty of five hundred dollars . . . for a first offense and one thousand dollars . . . for each subsequent offense.”⁶⁹

The CPC notice requirement was not unlike other California notice requirements intended to protect the public. For example, to address workplace conditions in barbershops and beauty salons, California enacted two laws that provide salon employees, including nail salon workers, “with information on their employment rights.”⁷⁰ One of the laws requires educational information for all licensees and the other mandates that barbering establishments and salons post specific information. Similar to the FACT Act, the “barber shop” legislation “requires any establishment that is licensed by the Board of Barbering and Cosmetology (BBC) (e.g., hair salons, nail salons, estheticians, etc.) to post a notice regarding workplace rights and wage-and-hour laws.”⁷¹

The law also requires that businesses post the notices in four languages.⁷² According to the California Chamber of Commerce, “both bills are intended to educate business owners and workers about existing labor laws that they may be unaware of and violating.”⁷³ Similarly, California mandates poster requirements regarding domestic violence. If an employer employs more than twenty-five persons, she or he must provide new employees with a written notice about the rights of victims of domestic violence, sexual assault, protected time off, and medical treatments.⁷⁴ These two laws reflect the

⁶⁹ FACT Act, *supra* note 7, § 123473(a). The law permitted the state attorney general, city attorney, or county counsel “to bring an action to impose a civil penalty” against a noncompliant facility when two conditions were met: (1) the facility was provided reasonable notice of noncompliance (informing the facility of liability if no remedial action was taken within 30 days of the notice being sent), and (2) the enforcing authority verified that the violation was not corrected within the 30-day period. *See id.*

⁷⁰ *See* Gail Cecchetti Whaley, Cal. Chamber of Commerce, *Mandatory Poster and Education Requirements for California Barbering and Cosmetology Licensees July 1*, HRWATCHDOG (June 26, 2017), <https://hrwatchdog.calchamber.com/2017/06/mandatory-poster-education-barbering-cosmetology/>.

⁷¹ *Id.*

⁷² The Barbering and Cosmetology Act, CAL. BUS. & PROF. CODE § 7353.4 (West 2018).

⁷³ Whaley, *supra* note 70.

⁷⁴ CAL. LAB. CODE § 230.1(h)(1) (West 2018). All California employers with twenty-five or more employees must provide reasonable accommodations for victims of domestic violence provide victims of domestic violence, sexual assault, and stalking the opportunity to be released from work in order to seek medical attention, psychological counseling, safety planning, and other services from a domestic violence shelter, program, or rape crisis center. *Id.* § 230.1(a).

myriad notification or poster requirements imposed by California legislators on businesses operating in that state. In short, there was nothing particularly unusual about the notice requirement in the case at hand, except that the state sought to protect pregnant women, which CPCs found objectionable.

There were compelling concerns undergirding the law that extended beyond the crafty, deceptive messaging of CPCs.⁷⁵ The crisis centers' corrosive practices interfered with the state's broader public health agenda related to women's health. Lawmakers discovered that a great number of California women were unaware of the existence of state-sponsored healthcare programs.⁷⁶ This mattered, because California experienced one of the highest rates of unplanned and unintended pregnancies in the United States.⁷⁷

California's unintended pregnancy rate—just as those in all states and elsewhere—was associated with known health risks, including maternal deaths.⁷⁸ Such problems were not unique to California. Based on the nation's high rates of maternal injury and mortality, the United States has been called “the most dangerous place to give birth in the developed world.”⁷⁹

⁷⁵ For instance, CPCs in California have falsely informed pregnant women that abortion is both traumatizing and dangerous. They have also inaccurately warned clients that abortions are high-risk procedures that could well result in infection and death. Frequently, these clinics parade as actual medical centers; employees dress in medical scrubs and white medical laboratory coats, even when sometimes the staff lack more than high school education and have no medical training. *See, e.g., NARAL PRO-CHOICE AM., supra* note 11, at 7, 9; ‘Misconception’: *New Documentary Exposes the Dark, Deceptive World of Crisis Pregnancy Centers, supra* note 11.

⁷⁶ A.B. 775, 2015–16 Sess. (Cal. 2015).

⁷⁷ ADAM SONFIELD & KATHRYN KOST, GUTTMACHER INST., PUBLIC COSTS FROM UNINTENDED PREGNANCIES AND THE ROLE OF PUBLIC INSURANCE PROGRAMS IN PAYING FOR PREGNANCY-RELATED CARE: NATIONAL AND STATE ESTIMATES FOR 2010 (2015), https://www.guttmacher.org/sites/default/files/report_pdf/public-costs-of-up-2010.pdf.

⁷⁸ *See* Jessica D. Gipson et al., *The Effects of Unintended Pregnancy on Infant, Child, and Parental Health: A Review of the Literature*, 39 *STUD. FAM. PLAN.* 18, 28 (2008) (discussing that although there have been few studies of the relationship between unintended pregnancy and maternal mortality, there is likely to be a relationship because by definition, pregnancy increases risk of maternal death and is likely to occur in the very young or old, for whom pregnancy risks are greater). *See also* RACHEL BENSON GOLD, *LESSONS FROM BEFORE ROE: WILL PAST BE PROLOGUE?*, GUTTMACHER REP. PUB. POL'Y 8 (2003), <https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue> (linking unintended pregnancy to illegal abortion and mortality).

⁷⁹ *U.S. “Most Dangerous” Place to Give Birth in Developed World, USA Today Investigation Finds*, CBS NEWS (July 26, 2018) [hereinafter *U.S. “Most Dangerous”*], <https://www.cbsnews.com/news/us-most-dangerous-place-to-give-birth-in-developed-world-usa-today-investigation-finds/>; *see also* CENT. INTELLIGENCE AGENCY, *World Factbook—Country Comparison: Maternal Mortality Rate*, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2223rank.html> (last visited Oct. 4, 2018) (ranking 184 nations based on their maternal mortality rates). Equally horrific are the rates of infant mortality in the United States; infants are just as likely to survive if they are born in an

The difference between California and other states was that lawmakers actively sought to address these problems.

B. The Statute's Purpose: Addressing Sexual Health, Unintended Pregnancies, Sexually Transmitted Diseases, and Costs in the United States and California

In this section, we examine California's justifications for enacting the FACT Act by turning to the glaring problems of maternal deaths, unintended pregnancies, and unplanned births. We provide an empirical account of the reproductive health challenges faced by women in California. By engaging this approach, we distill a more nuanced account of what was and remains at stake in California. Empirical accounts of women's lived lives, especially in reproductive health contexts, deserve greater attention within legal literature, especially as they provide a more accurate portrait of women's experiences than fallible anecdotal presentments.⁸⁰

Our conclusion is that the FACT Act served California's health and safety interest by preemptively protecting women in its state from known, and in some cases deadly, reproductive health risks. Secondly, we show the FACT Act served the state's economic interests. These important, if not compelling, concerns were not addressed by Justice Thomas and the majority in *NIFLA v. Becerra*.

1. Maternal Mortality

The United States is now the deadliest nation in the developed world for a woman to give birth.⁸¹ In 2000, countries around the world responded to the United Nations Millennium Development Goals (MDGs), one of which directly addressed reducing pregnancy related deaths.⁸² One hundred ninety-one member state nations and nearly two dozen international organizations committed to achieve eight goals, which included eradicating extreme poverty; achieving universal

economically distressed and formerly war-torn nation such as Serbia as they are in the United States. See CENT. INTELLIGENCE AGENCY, *World Factbook—Country Comparison: Infant Mortality Rate*, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2091rank.html> (last visited Oct. 13, 2018).

⁸⁰ An evidence-based approach also helps to contextualize arguments and theories related to abortion rights, debunk the false assumption that pregnancies are by default safe and safer than abortions, and demonstrate how the chipping away of reproductive rights actually harms the health interests of women.

⁸¹ See *supra* note 79 and accompanying text.

⁸² INDEP. EVALUATION GRP., *DELIVERING THE MILLENNIUM DEVELOPMENT GOALS TO REDUCE MATERNAL AND CHILD MORTALITY: A SYSTEMATIC REVIEW OF IMPACT EVALUATION EVIDENCE* (2016), <https://www.oecd.org/derec/norway/WORLDBANK-DeliveringtheMDGtoreducematernalandchildmortality.pdf>.

primary education; promoting gender equality and women's empowerment; and improving maternal mortality among other goals.⁸³ All but a handful of nations showed progress.⁸⁴ The United States was among the few nations to regress, showing an increase in the maternal mortality rate of nearly 140%.⁸⁵ As one reporter explained, "[j]ust as the world turned its attention to this matter with marked success, the United States stopped offering data and began moving backward."⁸⁶

Texas, a state where some lawmakers express pride in enacting the nation's most restrictive anti-abortion regulations,⁸⁷ now holds the dubious distinction of being the deadliest place in the developed world for women to give birth.⁸⁸ Close behind are Mississippi⁸⁹ and Louisiana,⁹⁰ states marked by deliberate legislative evisceration of

⁸³ Jessica Ravitz, *Maternal Deaths Fall Across Globe but Rise in US, Doubling in Texas*, CNN (Apr. 17, 2018), <https://www.cnn.com/2016/08/24/health/maternal-mortality-trends-double-texas/index.html>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See, e.g., Press Release, Office of the Tex. Governor, Governor Abbott Signs Pro-Life Insurance Reform (Aug. 15, 2017), <https://gov.texas.gov/news/post/governor-abbott-signs-pro-life-insurance-reform> ("As a firm believer in Texas values, I'm proud to sign legislation that ensures no Texan is required to pay for a procedure that ends the life of an unborn child."); see also Alex Zielinski, *The Growing List of Anti-Abortion Bills Texas Conservative Lawmakers Hope to Pass This Year*, SAN ANTONIO CURRENT (Jan. 25, 2017), <https://www.sacurrent.com/the-daily/archives/2017/01/25/the-growing-list-of-anti-abortion-bills-texas-conservative-lawmakers-hope-to-pass-this-year> ("In the past few months, state lawmakers have filed no less than 17 anti-abortion bills (and judging by past legislative sessions, more are on the horizon).").

⁸⁸ Sophie Novack, *Texas' Maternal Mortality Rate: Worst in Developed World, Shredded off by Lawmakers*, TEX. OBSERVER (June 5, 2017), <http://www.texasobserver.org/texas-worst-maternal-mortality-rate-developed-world-lawmakers-priorities> (reporting the doubling of the rate of maternal mortality in Texas and how it "now exceeds that of anywhere else in the developed world"); Katha Pollitt, *The Story Behind the Maternal Mortality Rate in Texas Is Even Sadder than We Realize*, NATION (Sept. 8, 2016), <http://www.thenation.com/article/the-story-behind-the-maternal-mortality-rate-in-texas-is-even-sadder-than-we-realize> ("Unbelievably, Texas now has the highest rate of maternal mortality in the developed world."). But see Marian F. MacDorman et al., *Recent Increases in the U.S. Maternal Mortality Rate: Disentangling Trends from Measurement Issues*, 128 OBSTETRICS & GYNECOLOGY 447, 453 (2016) (expressing skepticism in the accuracy of the data showing the mortality rate doubled in just a two year period).

⁸⁹ See Danielle Paquette, *Why Pregnant Women in Mississippi Keep Dying*, WASH. POST: WONKBLOG (Apr. 24, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/04/24/why-pregnant-women-in-mississippi-keep-dying/> (reporting that "Mississippi's maternal mortality rate, one of the highest in the country, has been climbing for more than a decade" and that "[f]rom 2010 to 2012, the last measure, an average of nearly 40 women died for every 100,000 births").

⁹⁰ Louisiana exceeds the nation's maternal mortality rate by a dramatic proportion. In particular, while maternal mortality is dire among Black women in the United States generally, in Louisiana the incidences of death are far greater. The average maternal mortality for white women is 18.1 in the United States and 27.3 in Louisiana. For Black women, the U.S. incidence of maternal mortality is 47.2 and in Louisiana 72.6. See, e.g.,

reproductive rights and access, leaving 1.5 and 2.4 million female residents, respectively, with only one abortion clinic remaining in their states.⁹¹ Staggering maternal mortality rates in these states and others come as little surprise considering that dozens of clinics that provided contraceptive care, breast, ovarian, and cervical cancer screenings, and testing for sexually transmitted diseases, shuttered in the wake of anti-abortion lawmaking.⁹² When clinics closed, many women in those regions had no other health providers and only crisis pregnancy centers.⁹³

The dangers of pregnancy facing Black women in particular have attracted recent media attention. One pundit ran a piece titled, *Childbirth Is Killing Black Women in the US, and Here's Why*.⁹⁴ The *New York Times Magazine* ran a cover story on this grave matter, *The Hidden Toll: Why Are Black Mothers and Babies in the United States Dying at More than Double the Rate of White Mothers and Babies?*⁹⁵ just weeks before the Court's ruling in *NIFLA v. Becerra*. Shortly after the Court's decision, Senator Kamala Harris (D-California) fur-

United Health Found., *Maternal Mortality in Louisiana in 2018*, AMERICA'S HEALTH RANKINGS, https://www.americashealthrankings.org/explore/health-of-women-and-children/measure/maternal_mortality/state/LA (last visited Oct. 4, 2018).

⁹¹ See, e.g., Jenny Jarvie, *In a State with Only One Clinic, Mississippi Approves the Most Restrictive Ban in the U.S.*, L.A. TIMES (Mar. 8, 2018), <http://www.latimes.com/nation/lan-na-mississippi-abortion-20180308-story.html>; *Data Center*, GUTTMACHER INST., <https://data.guttmacher.org/states> (last visited Oct. 29, 2018).

⁹² Michele Goodwin, *Dismantling Reproductive Injustices: The Hyde Amendment & Criminalization of Self-Induced Abortion*, 18 GEO. J. GENDER & L. 279, 282 (2017) (explaining that Texas legislators' efforts to restrict funding to Planned Parenthood led to the closure of eighty-two family planning clinics); Amanda J. Stevenson et al., *Effect of Removal of Planned Parenthood from the Texas Women's Health Program*, 374 NEW ENG. J. MED. 853, 853 (2016) ("[T]he exclusion of Planned Parenthood affiliates from a state-funded replacement for a Medicaid fee-for-service program in Texas was associated with adverse changes in the provision of contraception.").

⁹³ See Carolyn Jones, *Anti-Abortion Pregnancy Centers Thrive in Texas as Real Clinics Close*, AL JAZEERA (Jan. 2, 2014), <http://america.aljazeera.com/articles/2014/1/2/as-texas-abortionclinicscloseunregulatedpregnancyclinicsflourish.html> (discussing how clinic closures in a Texas town left women with few options, including pregnancy centers with no doctors employed); Mary Tuma, *Millions for Propaganda . . . Nothing for Women's Health*, AUSTIN CHRON. (Apr. 17, 2015), <https://www.austinchronicle.com/news/2015-04-17/millions-for-propaganda-nothing-for-womens-health/> (discussing how clinic closures affected access to reproductive health).

⁹⁴ Jacqueline Howard, *Childbirth Is Killing Black Women in the US, and Here's Why*, CNN (Nov. 15, 2017), <https://www.cnn.com/2017/11/15/health/black-women-maternal-mortality/index.html>.

⁹⁵ Linda Villarosa, *The Hidden Toll: Why Are Black Mothers and Babies in the United States Dying at More than Double the Rate of White Mothers and Babies?*, N.Y. TIMES MAG., Apr. 15, 2018, at 31.

ther elevated the issue by introducing new legislation, The Maternal Care Act, and a resolution, Black Maternal Health Week.⁹⁶

Sadly, health organizations are reaching the same dramatic conclusion: Birthing in the United States has become a dangerous, if not deadly, proposition for Black women.⁹⁷ According to the Centers for Disease Control and Prevention (CDC), the nation's leading public health authority, "[t]he risk of pregnancy-related deaths for black women is 3 to 4 times higher than those of white women" in the United States.⁹⁸

Despite rising maternal death rates nationwide, California achieved a decrease in maternal deaths.⁹⁹ In fact, California's maternal mortality was reduced by half, "while deaths rose across most of the country."¹⁰⁰ Very likely California's success can be attributed to strategic efforts to implement safety measures, notification requirements, and other policies to protect the reproductive health and rights of women in its state.¹⁰¹ According to a four-year investigative report released in July 2018 by *USA Today*, "[a]t least as far back as 2010, researchers in California began promoting 'tool kits' of childbirth safety practices . . . [that] were made up of policies, procedures

⁹⁶ Press Release, Sen. Kamala D. Harris, Sen. Harris Introduces Bill Aimed at Reducing Racial Disparities in Maternal Mortality (Aug. 22, 2018), <https://www.harris.senate.gov/news/press-releases/sen-harris-introduces-bill-aimed-at-reducing-racial-disparities-in-maternal-mortality> ("This bill is a step towards ensuring that all women have access to culturally competent, holistic care, and to address the implicit biases in our system."); see also Jennifer Haberkorn, *Maternal Mortality Rates in the U.S. Have Risen Steadily. Sen. Kamala Harris Has a Plan to Change That*, L.A. TIMES (Aug. 22, 2018), <http://www.latimes.com/politics/la-na-pol-congress-harris-maternal-health-20180822-story.html> ("Sen. Kamala Harris says she wants to force the medical community to address an uncomfortable reality: Black women in the United States are three to four times more likely than white women to die immediately before or after childbirth.").

⁹⁷ See, e.g., CTRS. FOR DISEASE CONTROL & PREVENTION, PREGNANCY-RELATED DEATHS (2018), <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-relatedmortality.htm>. Senator Harris also received broad support for her bill from the American College of Obstetricians and Gynecologists; the Association of Maternal & Child Health Programs; the Association of Women's Health, Obstetric and Neonatal Nurses; Black Mamas Matter Alliance; the Black Women's Health Imperative; the Center for Reproductive Rights; and many other organizations that warn about the failure of states to take account of maternal deaths. See Press Release, Sen. Kamala D. Harris, *supra* note 96.

⁹⁸ CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 97.

⁹⁹ See MacDorman et al., *supra* note 88, at 447; Ravitz, *supra* note 83.

¹⁰⁰ Alison Young, *Hospitals Know How to Protect Mothers. They Just Aren't Doing It.*, USA TODAY (July 27, 2018), <https://www.usatoday.com/in-depth/news/investigations/deadly-deliveries/2018/07/26/maternal-mortality-rates-preeclampsia-postpartum-hemorrhage-safety/546889002/> (noting that California is an exception in the United States, "where safety experts and hospitals worked together to implement practices that are now endorsed by leading medical societies as the gold standard of care"); see also U.S. "Most Dangerous," *supra* note 79.

¹⁰¹ See, e.g., Young, *supra* note 100.

and checklists that, pursued together, appeared to save mothers' lives."¹⁰²

2. *Unintended Pregnancies*

The rate of unintended pregnancies in the United States is at crisis levels. Despite a recent decline, the rate of unplanned pregnancies and births remains incredibly high,¹⁰³ posing physical and psychological risks to the women who experience them.¹⁰⁴ As with maternal deaths, the United States also outpaces many other developed nations in its rate of unintended pregnancies.¹⁰⁵ According to researchers at the Guttmacher Institute, nearly forty-five percent of pregnancies in the United States are unintended—a decrease from 2008.¹⁰⁶

In addition, nearly seventy-five percent of pregnancies in women and girls under age twenty are unintended.¹⁰⁷ There are about forty-five unintended pregnancies per 1000 girls and women aged fifteen to forty-four—a significantly higher rate than many developed countries.¹⁰⁸

In California, nearly half of all pregnancies are unintended and unplanned.¹⁰⁹ California experiences one of the highest rates of annual pregnancies, with “more than 700,000 California women becom[ing] pregnant every year.”¹¹⁰ Not all of these pregnancies will result in birth, but over forty percent will, and in 2010, a year after California lawmakers began investigating CPCs, almost sixty-five percent of California's unplanned births were publicly funded.¹¹¹ The same year, among women and girls aged fifteen to forty-four,

¹⁰² *Id.*

¹⁰³ See Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States, 2008–2011*, 347 *NEW ENG. J. MED.* 843, 843 (2016).

¹⁰⁴ See *infra* notes 117–27 and accompanying text.

¹⁰⁵ *Unintended Pregnancy in the United States*, GUTTMACHER INST. (Sept. 2016) (citing Susheela Singh et al., *Unintended Pregnancy: Worldwide Levels, Trends, and Outcomes*, 41 *STUD. FAM. PLAN.* 241 (2010)), <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states>.

¹⁰⁶ GUTTMACHER INST., *STATE FACTS ABOUT UNINTENDED PREGNANCY: CALIFORNIA 1* (2017), <https://www.guttmacher.org/sites/default/files/factsheet/up-ca.pdf>; see also Finer & Zolna, *supra* note 103, at 843.

¹⁰⁷ GUTTMACHER INST., *supra* note 106, at 1.

¹⁰⁸ *Id.*

¹⁰⁹ See, e.g., KATHRYN KOST, GUTTMACHER INST., *UNINTENDED PREGNANCY RATES AT THE STATE LEVEL: ESTIMATES FOR 2010 AND TRENDS SINCE 2002*, at 8 tbl.1 (2015), https://www.guttmacher.org/sites/default/files/report_pdf/stateup10.pdf (noting that forty-eight percent of pregnancies in California are unintended).

¹¹⁰ FACT Act, *supra* note 7, § 1(b); see also KOST, *supra* note 109, at 8.

¹¹¹ GUTTMACHER INST., *supra* note 106, at 2.

“California’s unintended pregnancy rate . . . was 50 per 1,000 women.”¹¹²

Those most impacted by unintended pregnancies are among the poorest of American women. According to a study published in the *New England Journal of Medicine* in 2016, the unintended pregnancy rate among women who fall below the federal poverty designations is two to three times the national average.¹¹³ By comparison to their wealthier counterparts, American women living with a family income below the federal poverty level were more than five times more likely to experience an unintended pregnancy than women with income that was double the poverty level.¹¹⁴

Unintended pregnancies can be devastating in the lives of women and girls, especially those who are most economically and socially vulnerable.¹¹⁵ For example, “[c]hild-rearing is time-consuming and is spread out over a number [of] years after a child is born,” and because of this, “a woman’s ability to accumulate human capital may be substantially constrained for some time after her first birth.”¹¹⁶ For these economic reasons and others, a woman may desire not to carry through with an unintended pregnancy.

The negative impacts can be economic, physical, and psychological. As one study found, “research ‘indicate[s] that teen pregnancy interferes with young women’s ability to graduate from high school and enroll in and graduate from college.’”¹¹⁷ Another study conducted by the economist Heinrich Hock, an expert on quantitative evaluation of unemployment, education, and training, suggests that the advent of oral contraceptives—the pill—also benefited men. That is, men who were more likely to have dropped out of school, because of unwanted

¹¹² *Id.* California is not alone in its high rate of unintended pregnancies. Some states, such as Mississippi, Alabama, Louisiana, and Arkansas, experience even higher rates of unintended pregnancies. *See, e.g.,* KOST, *supra* note 109, at 8 tbl.1. Meanwhile some states have lower rates. For example, the rate of unintended pregnancies among fifteen- to forty-four-year-old teens and women was as low as 32 in 1000 in New Hampshire, 36 in 1000 in Vermont, and 38 in 1000 in Wisconsin. KOST, *supra* note 109, at 8 tbl.1; *see also* GUTTMACHER INST., *supra* note 106.

¹¹³ *Finer & Zolna, supra* note 103, at 843.

¹¹⁴ GUTTMACHER INST., *supra* note 106, at 1.

¹¹⁵ *See* ADAM SONFIELD ET AL., GUTTMACHER INST., THE SOCIAL AND ECONOMIC BENEFITS OF WOMEN’S ABILITY TO DETERMINE WHETHER AND WHEN TO HAVE CHILDREN 4 (2013), https://www.guttmacher.org/sites/default/files/report_pdf/social-economic-benefits.pdf (“[E]conomically disadvantaged women continue to have fewer opportunities than higher income women to realize the benefits linked to using effective contraception, specifically educational and economic achievement, stable marriages and success for their children.”).

¹¹⁶ Heinrich Hock, *The Pill and the College Attainment of American Women and Men* 1 (Sept. 15, 2005) (unpublished manuscript) (on file with authors).

¹¹⁷ SONFIELD ET AL., *supra* note 115, at 29.

fatherhood, were able to avoid that fate because their girlfriends and wives used contraception.¹¹⁸ In other words, “male college completion suggest[s] that the schooling options for men might also have been constrained by undesired early fertility among their female partners.”¹¹⁹

Well documented are the numerous hardships and burdens on girls and women who endure unintended pregnancies, non-married births, teen pregnancies, and Medicaid-funded births. Not only are there economic consequences, but also physical and psychological ones. For example, “unplanned births are tied to increased conflict and decreased satisfaction in relationships.”¹²⁰ Unintended births are also connected with “depression, anxiety and lower reported levels of happiness.”¹²¹

In fact, research has long shown that unplanned births increase the risks that relationships between the biological parents will fail.¹²² Conversely, studies find “planning, delaying, and spacing births appears to help women achieve their education and career goals.”¹²³ Access to contraception, such as oral medicines and long-acting devices may positively “affect mental health outcomes by allowing couples to plan the number of children in their family.”¹²⁴ Empirical research supports the conclusion that there is a link between “state laws granting unmarried women early legal access to the pill (at age 17 or 18, rather than 21), and their attainment of postsecondary education and employment.”¹²⁵ In addition, early access to contraception is historically linked to increased financial stability, “a narrowing of the gender gap in pay, and later, more enduring marriages.”¹²⁶ Moreover, “[d]elaying a birth can also reduce the gap in pay that typically exists

¹¹⁸ See, e.g., Hock, *supra* note 116, at 2 (“Compared to the previously prevailing reversible methods of contraception, the pill reduced the risk of an unwanted pregnancy by more than five-fold.”).

¹¹⁹ *Id.* at i.

¹²⁰ SONFIELD ET AL., *supra* note 115, at 29; see also NAT’L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, UNPLANNED PREGNANCY AND FAMILY TURMOIL 5 (2008) https://www.dibbleinstitute.org/Documents/SS34_FamilyTurmoil.pdf (“Parents who have a birth resulting from unplanned pregnancy are less likely to be in a committed relationship, less likely to move into a more formal union, and more likely to have high levels of relationship conflict and unhappiness.”).

¹²¹ SONFIELD ET AL., *supra* note 115, at 21

¹²² *Id.* at 29; NAT’L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, *supra* note 120, at 5 (“In fact, the majority of single and cohabiting parents having an unplanned birth do not move into closer parental unions (marriage in particular) and a large share of cohabiting parents’ relationships dissolve.”).

¹²³ *Id.* at 1.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

between working mothers and their childless peers and can reduce women's chances of needing public assistance."¹²⁷

Whether planned or not, researchers are undivided on the urgent need for comprehensive medical services and accurate information to assist pregnant adolescents.¹²⁸ The World Health Organization (WHO) underscores the critical importance of this. In their report, *Pregnant Adolescents: Delivering on Global Promises of Hope*, the WHO emphasizes that pregnant adolescents require a "continuum of care," which includes care provided at health facilities from medical providers.¹²⁹ Because unlicensed CPCs are not health facilities and cannot legally perform medical tests, administer medications, or treat illnesses and diseases, they lack the capacity to provide the type and quality of care that pregnant teens need and deserve. The problem is that teens may not be aware of this, especially when CPCs are cloaked in the garb and messaging of a health facility. As important as actual medical care, the WHO also stresses the importance and value of clear, accurate information for "families and communities."¹³⁰ Pregnant adolescents in particular "are unprepared for the birth and out of touch with services" despite the fact that they are "the most likely to need support."¹³¹

Even while we flag these matters here, they are not new; Justice Blackmun and *Roe's* 7–2 majority spoke poignantly to the plight of women who endure unintended and unwanted pregnancies. In 1973, when the Supreme Court decriminalized abortion in *Roe v. Wade*, the Court cited to extensive scientific evidence explicating that motherhood and childbearing could be harmful to women's physical and

¹²⁷ *Id.*

¹²⁸ See Nathalie Fleming et al., *Adolescent Pregnancy Guidelines*, 37 J. OBSTETRICS & GYNAECOLOGY CAN. 740, 740–42 (2015), [https://www.jogc.com/article/S1701-2163\(15\)30180-8/pdf](https://www.jogc.com/article/S1701-2163(15)30180-8/pdf) (reporting the recommendations of adolescent health societies, which say that "[c]ounseling about all available pregnancy outcome options (abortion, adoption, and parenting) should be provided to any adolescent with a confirmed intrauterine gestation" as well as STI testing, nutritional assessments, and more); Theresa O. Scholl et al., *Prenatal Care and Maternal Health During Adolescent Pregnancy: A Review and Meta-Analysis*, 15 J. ADOLESCENT HEALTH 444, 444 (1994) (concluding that prenatal care that includes medical care and social services could improve the health outcomes for the pregnancy and mother).

¹²⁹ WORLD HEALTH ORG., *PREGNANT ADOLESCENTS: DELIVERING ON GLOBAL PROMISES OF HOPE* 19 (2006), http://apps.who.int/iris/bitstream/handle/10665/43368/9241593784_eng.pdf ("A pregnant adolescent . . . requires opportunities to learn about immunization, hygiene, infant feeding and neonatal care and about the prevention of sexually transmitted infections (STIs) and HIV and AIDS. A pregnant adolescent should know how, where and when to seek care, and should make a birth plan . . .").

¹³⁰ *Id.* at 19.

¹³¹ *Id.* at 20 (also noting pregnant adolescents "are less likely to have social support" and "may lack access to care").

emotional health.¹³² The Court concluded that to force women into potentially detrimental motherhood, which they did not want, violated autonomy and the constitutional right to privacy. Justice Blackmun movingly wrote:

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.¹³³

In *Roe*, the Court at last acknowledged the “detriment” and various harms that states had long imposed on women by denying them any voice or choices about their reproductive destinies.¹³⁴ Justice Blackmun explained that “[s]pecific and direct harm medically diagnosable even in early pregnancy” are among the consequences forced upon vulnerable women when states force them to bear children.¹³⁵ *Roe*’s turn to empirical evidence, including social science, represented a fundamental shift; Justice Blackmun consulted sociology, history, Christian theology, and science.¹³⁶ Sadly, the social burdens and economic consequences associated with unwanted and unintended pregnancies remain.

3. *Economic Costs of Unintended Pregnancies, Unwanted Births, and Other Reproductive Health Concerns*

In 2010, almost sixty-five percent of unplanned births in California were publicly funded.¹³⁷ The costs were extraordinary. The state and federal governments expended \$1.8 billion on unintended pregnancies.¹³⁸ The federal government underwrote more than \$1 billion of these costs, and California paid the balance of over \$689 million.¹³⁹ By contrast, federal and state expenditures for family planning such as contraception access and services totaled just over \$600 mil-

¹³² See *Roe v. Wade*, 410 U.S. 113, 160 (1973).

¹³³ *Id.* at 153.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See *id.* at 130–34.

¹³⁷ GUTTMACHER INST., *supra* note 106, at 2.

¹³⁸ *Id.*

¹³⁹ *Id.*

lion.¹⁴⁰ California contributed roughly \$69 million to family planning—about one tenth of what it expended on unplanned births.¹⁴¹

Nationwide, unintended pregnancies are costly to federal and state governments, resulting in \$21 billion in public expenditures in 2010.¹⁴² The overwhelming majority of these funds are federal expenditures—about \$14.6 billion—while \$6.4 billion is underwritten by state funds.¹⁴³

In 2010, nearly seventy percent of the nation's 1.5 million unplanned births were funded by public insurance programs, compared to fifty-one percent of all births and thirty-eight percent of planned births.¹⁴⁴ States with the highest rates of federally funded, unplanned births were primarily located in the South and “categorized by the U.S. Census Bureau” as a “region with high levels of poverty.”¹⁴⁵ In eight states (and the District of Columbia), roughly seventy-five percent of unplanned births were underwritten by public funds.¹⁴⁶ In Mississippi, a state which has virtually eliminated meaningful access to abortion, eighty-two percent of funding for its unplanned pregnancies comes from public funds.¹⁴⁷

Clearly, unintended pregnancies are a social, political, and economic challenge in the United States and in California. As dramatic as such costs are, these expenditures might have been even greater in the absence of publicly funded family planning services. One study estimates that “the public costs of unintended pregnancies in 2010 might have been 75% higher” absent state and federal expenditures on family planning.¹⁴⁸ Indeed, research shows that state investment in reproductive health and family planning is prudent, cost effective, and saves lives. In 2010 alone, California's efforts to reduce unintended pregnancies and unplanned births saved the state and federal government nearly \$1.3 billion.¹⁴⁹

Importantly, family planning expenditures helped to avert unintended pregnancies. The Guttmacher Institute estimates that in 2014, the year before California Governor Jerry Brown signed the FACT

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *See generally* SONFIELD & KOST, *supra* note 77, at 8.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 9–10.

¹⁴⁵ *Id.* at 8.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ SONFIELD & KOST, *supra* note 77, at 1.

¹⁴⁹ *Id.* at 13 tbl.3.

Act, over 320,000 unintended pregnancies were prevented.¹⁵⁰ The organization estimates that those unintended pregnancies might otherwise have “resulted in 156,100 unplanned births and 115,800 abortions.”¹⁵¹

California’s mandate that CPCs post notices related to family planning services—such as the availability of nineteen federally approved methods of birth control—and availability of state resources to subsidize or pay for such medications, was not only fiscally prudent,¹⁵² but also beneficial to the health of California women. That is, “[p]ublic expenditures for the US family planning program not only prevented unintended pregnancies but also reduced the incidence and impact of preterm and [low birth weight] births, STIs, infertility, and cervical cancer.”¹⁵³

Further, studies “indicate[] that the health impact and public-sector savings of publicly supported family planning services in the United States extend well beyond the impact of preventing unintended pregnancies.”¹⁵⁴ This research shows that by enhancing and empowering women’s abilities “to plan, delay, and space pregnancies, contraception is linked to improved maternal and child health outcomes.”¹⁵⁵ In addition, “pregnancy spacing is linked to better birth outcomes, including the reduced likelihood of babies born prematurely, at a low birth weight (LBW), or small for their gestational age.”¹⁵⁶ And for every dollar spent on family planning, more than seven dollars is saved by the state.¹⁵⁷

4. Sexually Transmitted Diseases

Finally, we turn to what seemingly remains a taboo topic—an epidemic in sexually transmitted diseases.¹⁵⁸ California’s FACT Act man-

¹⁵⁰ GUTTMACHER INST., *supra* note 106, at 2. In that same year, over 2.5 million California women aged 13 to 44 needed publicly funded family planning services and half of that population, over 1.3 million girls and women, received birth control of some kind at state funded family planning centers. *Id.*

¹⁵¹ *Id.*

¹⁵² See Jennifer J. Frost et al., GUTTMACHER INST., *Return on Investment: A Fuller Assessment of the Benefits and Cost Savings of the US Publicly Funded Family Planning Program*, 92 MILBANK Q. 667, 667–68 (2014).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 669.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 667.

¹⁵⁸ See generally INST. OF MED., THE HIDDEN EPIDEMIC: CONFRONTING SEXUALLY TRANSMITTED DISEASES (Thomas R. Eng & William T. Butler eds., 1997); CTRS. FOR DISEASE CONTROL & PREVENTION, 2016 SEXUALLY TRANSMITTED DISEASES SURVEILLANCE (2017), https://www.cdc.gov/std/stats16/CDC_2016_STDS_Report-for508WebSep21_2017_1644.pdf; Vanessa Romo, *California STDs Raging at All Time*

dated CPCs post notices related to sexual health and, as we show, for very important reasons. Sexually transmitted diseases are an alarming public health threat in California and throughout the United States. The Institute of Medicine (IOM) refers to the crisis of sexually transmitted infections and diseases in the United States as a “hidden epidemic.”¹⁵⁹

The authors of the study report that this epidemic has “tremendous health and economic consequence[s] in the United States.”¹⁶⁰ They write that sexually transmitted diseases are particularly problematic because they are hidden from view, “because many Americans are reluctant to address sexual health issues in an open way and because of the biological and social factors associated with these diseases.”¹⁶¹ Of the top ten most frequently reported diseases in this country, five are sexually transmitted.¹⁶² The United States has the highest rates of transmission in the developed world for a number of sexually transmitted diseases.¹⁶³ Moreover, the costs of addressing this phenomenon are significant; in 1995, roughly \$10 billion was spent in the United States to address this problem.¹⁶⁴ Today, according to the CDC, sexually transmitted infections account for “as much as \$16 billion annually” in healthcare costs.¹⁶⁵

Sadly, since the publication of this landmark IOM study, the rate of sexual transmission of disease in the United States has only become worse.¹⁶⁶ Nearly twenty years ago, the rates of syphilis and gonorrhea were “slowly declining in the United States.”¹⁶⁷ Public health officials

Highs for Third Year in a Row, NPR (May 15, 2018), <https://www.npr.org/sections/thetwo-way/2018/05/15/611307046/california-stds-raging-at-all-time-highs-for-third-year-in-a-row>; Harriet Rowan & Alex Leeds Matthews, *California's Deadly STD Epidemic Sets Record*, WASH. POST (May 22, 2018), https://www.washingtonpost.com/national/health-science/californias-deadly-std-epidemic-sets-record/2018/05/22/fa6f2caa-59b2-11e8-9889-07bcc1327f4b_story.html.

¹⁵⁹ See INST. OF MED., *supra* note 158, at 16 (urging that “[a]ll healthcare professionals should counsel their patients during routine and other appropriate clinical encounters regarding the risk of STDs and methods for preventing high-risk behaviors”).

¹⁶⁰ *Id.* at 1.

¹⁶¹ *Id.* at 300.

¹⁶² *Id.* at 19 n.1.

¹⁶³ See *id.* at 28 (noting also that the rates of transmission also exceed that of “some developing regions”).

¹⁶⁴ *Id.* at 249.

¹⁶⁵ *Sexually Transmitted Diseases*, HEALTHYPEOPLE.GOV, <https://www.healthypeople.gov/2020/topics-objectives/topic/sexually-transmitted-diseases> (last updated Oct. 25, 2018).

¹⁶⁶ See *id.*; Sandee LaMotte, *New STD Cases Hit Record High in U.S., CDC Says*, CNN (Sept. 28, 2017, 10:53 AM), <https://www.cnn.com/2017/09/26/health/std-highest-ever-reported-cdc/index.html> (“In 2016, Americans were infected with . . . the highest number of . . . sexually transmitted diseases ever reported.”).

¹⁶⁷ INST. OF MED., *supra* note 158, at 28.

thought the eradication of syphilis in the United States was in sight.¹⁶⁸ Today, that trend has reversed, alarming public health officials and epidemiologists throughout the United States.

Officials at the CDC worry that even the startlingly high rate of sexual disease transmission signifies “only a fraction of America’s STD burden.”¹⁶⁹ Of course, because untreated sexual infections lead to very serious complications, are communicable, can result in cancer, and can end in death, these are serious matters for state legislatures and public health officials to address. Untreated syphilis can be communicable during pregnancy, developing into congenital syphilis, resulting in low-birth-weight babies and stillbirth.¹⁷⁰

A 2017 CDC report on congenital syphilis (CS) found, “[a]fter a steady decline from 2008–2012, data show a sharp increase in CS rates.”¹⁷¹ In fact, “[i]n 2017, the number of CS cases was the highest it’s been since 1997.”¹⁷² Public health officials warn that babies that are not treated develop horrific symptoms later, experience seizures, developmental delays, and sometimes die.¹⁷³ For women who contract syphilis, the infection can lead to heart failure, organ damage, blindness, paralysis and dementia.¹⁷⁴

CPCs may offer sonograms, but that technology does not detect or treat sexually transmitted diseases in women or their babies. As a practical medical and legal matter, these are important health issues that unlicensed CPCs cannot address, because they do not provide screenings for STDs and cannot prescribe medications. For pregnant women who rely on “medical care” and counseling from such CPCs,

¹⁶⁸ See *The National Plan to Eliminate Syphilis from the United States – Executive Summary*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/stopsyphilis/exec.htm> (last visited Oct. 26, 2018); see also CTRS. FOR DISEASE CONTROL & PREVENTION, *THE NATIONAL PLAN TO ELIMINATE SYPHILIS FROM THE UNITED STATES 5* (1999), <https://www.cdc.gov/stopsyphilis/plan.pdf> (“As we approach the end of the 20th century, the United States is faced with a unique opportunity to eliminate syphilis . . . and nationally, it is at the lowest rate ever recorded and it is confined to a very limited number of geographic areas.”).

¹⁶⁹ See CTRS. FOR DISEASE CONTROL & PREVENTION, *REPORTED STDs IN THE UNITED STATES, 2017* at 1, available at <https://stacks.cdc.gov/view/cdc/59579/Share>.

¹⁷⁰ See CTRS. FOR DISEASE CONTROL & PREVENTION, *SYPHILIS – CDC FACT SHEET* (June 13, 2017) [hereinafter CDC, *SYPHILIS*], <https://www.cdc.gov/std/syphilis/stdfact-syphilis.htm>; CTRS. FOR DISEASE CONTROL & PREVENTION, *CONGENITAL SYPHILIS – CDC FACT SHEET* (Sept. 26, 2017) [hereinafter CDC, *CONGENITAL SYPHILIS*], <https://www.cdc.gov/std/syphilis/stdfact-congenital-syphilis.htm>. Moreover, “[w]ithout treatment, syphilis can spread to the brain and nervous system (neurosyphilis) or to the eye (ocular syphilis).” CDC, *SYPHILIS*, *supra*, at 3. Neurosyphilis and ocular syphilis can occur during any stage of the disease. *Id.*

¹⁷¹ CDC, *CONGENITAL SYPHILIS*, *supra* note 170, at 2.

¹⁷² *Id.*

¹⁷³ *Id.* at 1.

¹⁷⁴ See CDC, *SYPHILIS*, *supra* note 170, at 3.

the probability would be high that any STDs they have would not be detected and thus would remain untreated.

Here is a snapshot of the real-life challenge at hand in California. Vulnerable groups, especially youth, the poor, and communities of color, are more likely to suffer the gravest harms. The data bear this out. Over half of California's reported cases of chlamydia are among people under age 25.¹⁷⁵ The rates of this disease "among females were 60% higher than among males," most notably among 15 to 24 year-olds.¹⁷⁶ Among African Americans, the rates of chlamydia were nearly five times that of their white counterparts.¹⁷⁷ Finally, California's 283 CS cases, "including 30 stillbirths in 2017, [is] an increase of 32% over 2016."¹⁷⁸

Indeed, nearly half of the nation's incidences of stillbirths due to CS occurred in California.¹⁷⁹ This represents the highest number of stillbirths due to syphilis since 1995.¹⁸⁰ Unfortunately, in California, 2017 marked the "5th consecutive year for increases in the number of infants born with congenital syphilis."¹⁸¹ In Los Angeles County alone, CS cases jumped "from eight in 2013 to 47" in 2018.¹⁸² Overall, the magnitude of the current rates of sexually transmitted diseases in California was last observed in the 1990s.¹⁸³

¹⁷⁵ CAL. DEP'T OF HEALTH, SEXUALLY TRANSMITTED DISEASES IN CALIFORNIA: 2017 SNAPSHOT 1, <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/STDs-CA-2017Snapshot.pdf>.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 2; see also Rowan & Matthews, *supra* note 158 ("California has the second-highest rate of congenital syphilis in the country after Louisiana, according to the most recent national data.").

¹⁷⁹ JIM BRAXTON ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., SEXUALLY TRANSMITTED DISEASE SURVEILLANCE 2017, at 2 (2018), https://www.cdc.gov/std/stats17/2017-STD-Surveillance-Report_CDC-clearance-9.10.18.pdf ("In 2017, there were a total of 918 reported cases of congenital syphilis, including 64 syphilitic stillbirths and 13 infant deaths."); CAL. DEP'T OF PUB. HEALTH, SYPHILIS IN WOMEN AND BABIES: 2017 SNAPSHOT FOR CALIFORNIA 1 (2018), <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/Syphilis-Women-Babies-2017Snapshot.pdf> (finding 283 congenital syphilis cases including 30 stillbirths in 2017).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Christopher Weber, *STDs Reach All-Time High in California, Leading to Spike in Stillbirths Due to Syphilis, State Health Authorities Say*, USA TODAY (May 15, 2018, 9:41 AM), <https://www.usatoday.com/story/news/health/2018/05/15/stds-reach-all-time-high-california-leading-spike-stillbirths/610724002/>.

¹⁸³ See CAL. DEP'T PUB. HEALTH, SEXUALLY TRANSMITTED DISEASES IN CALIFORNIA: 2017 SNAPSHOT (2018), <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/STDs-CA-2017Snapshot.pdf> (featuring graphs displaying rates of disease from the 1990s to the present).

In 2016, nearly 630 cases of CS were transmitted to newborns.¹⁸⁴ The rate of congenital transmission of syphilis is so high that public health officials warn, “[f]or the first time in many years, we are now seeing more cases of babies born with congenital syphilis than babies born with HIV.”¹⁸⁵ Public health officials attribute the rise in congenital syphilis to “women . . . not getting access to prenatal care, testing, and treatment for syphilis.”¹⁸⁶ These are medical concerns that unlicensed CPCs and even some or most licensed CPCs likely cannot address, because their work centers on encouraging women to continue pregnancies. Importantly, women’s health is not their stated priority; preventing abortion is their chief goal.¹⁸⁷

NIFLA’s website emphasizes their strategy, which is the recognized “importance of using ultrasound in a pregnancy center setting for reaching abortion-minded women . . . and . . . pioneering,” a key tool in “the pro-life movement.”¹⁸⁸ In fact, under their banner labeled “medical” on their website, there are no references to women’s health, saving women’s lives, addressing women’s reproductive health concerns, treatment for sexually transmitted infections, assessment of unintended pregnancies, or reference to any other matter relevant to quality of care and health for women.¹⁸⁹ At least according to their website, “medical” does not include women.

Rather, NIFLA’s website conveys an important message: ultrasounds are an “important tool” to “offer[] a window to the womb” in order to “impact[] a woman’s decision to choose life.”¹⁹⁰ Thus, if a pregnant woman suffering from an untreated sexually transmitted disease consults a CPC, it is possible, particularly at an unlicensed clinic, she might receive an ultrasound—indeed this is likely—but not any care for her life-threatening infection.

The need to address the public health implications of sexually transmitted diseases is urgent. One need not look too far back to reflect on the devastating toll and human suffering associated with lawmakers ignoring the incidences of HIV/AIDS.¹⁹¹ As Dr. Gail

¹⁸⁴ LaMotte, *supra* note 166.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See *About NIFLA*, NAT’L INST. FAM. & LIFE ADVOCS., <https://nifla.org/about-nifla/> (last visited Oct. 5, 2018) (describing the purpose of the organization to “protect life-affirming pregnancy centers that empower abortion-vulnerable women and families to choose life”).

¹⁸⁸ *Id.*

¹⁸⁹ See *id.*

¹⁹⁰ *Id.*

¹⁹¹ See RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC* xxii (1987) (“The bitter truth was that AIDS did not just happen to America—it was allowed to happen by an array of institutions, all of which failed to perform their

Bolan, the Director of the CDC's Division of STD Prevention, puts it, "[t]he CDC cannot do this alone and we need every community in America to be aware that this risk is out there and help educate their citizens on how to avoid it."¹⁹² David Harvey, the Executive Director of the National Coalition of STD Directors, which represents state and local health departments, echoed those concerns. He frames it like this: "STDs are out of control with enormous health implications for Americans."¹⁹³

Furthermore, while these diseases can be treated with antibiotics, a lack of public awareness, medical screenings, and education too frequently results in teens and adults being "undiagnosed and untreated."¹⁹⁴ Notably, the United States leads all developed nations in the rate of sexually transmitted infections and diseases.¹⁹⁵ Even with the challenges identified in California, a state with comparatively robust access to sexual health resources,¹⁹⁶ it is not lost on us that the states struggling with the highest rates of chlamydia and gonorrhea are those, such as Mississippi and Louisiana, that have gutted reproductive health rights and services.¹⁹⁷

All of this explains why California adopted the FACT Act, requiring the posting of disclosure notices. Yet, none of this is discussed, or even acknowledged, in Justice Thomas's majority opinion in *NIFLA v. Becerra*.

C. *The Supreme Court's Reaction to California's Statute*

In a 5–4 decision split along ideological lines, the Court reversed the Ninth Circuit and held that a preliminary injunction should have been granted on the ground that the law likely violates the First Amendment. Justice Clarence Thomas wrote the opinion for the Court, joined by Chief Justice Roberts and Justices Kennedy, Alito,

appropriate tasks to safeguard the public health."); German Lopez, *The Reagan Administration's Unbelievable Response to the HIV/AIDS Epidemic*, VOX (Dec. 1, 2016), <https://www.vox.com/2015/12/1/9828348/ronald-reagan-hiv-aids> (documenting President Reagan's press secretary joking about the AIDS epidemic and the fact that one reporter might have the disease).

¹⁹² LaMotte, *supra* note 166.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See Warren E. Leary, *Rate of Sexual Diseases in U.S. Is Highest in Developed World*, N.Y. TIMES (Nov. 20, 1996), <https://www.nytimes.com/1996/11/20/us/rate-of-sexual-diseases-in-us-is-highest-in-developed-world.html>; Lauren Weber, *U.S. Has Highest STD Rates in Industrialized World. Experts Blame a Lack of Resources*, HUFFPOST (Aug. 28, 2018), https://www.huffingtonpost.com/entry/highest-std-rates-sexually-transmitted-diseases_us_5b85856de4b0162f471cf805.

¹⁹⁶ See Romo, *supra* note 158.

¹⁹⁷ See *supra* text accompanying notes 89–91.

and Gorsuch. Justice Kennedy wrote a short concurring opinion joined by Roberts, Alito, and Gorsuch that expressed even stronger reservations about the California statute. The Court held that the California law was compelled speech in violation of the First Amendment. Justice Breyer wrote a vehement dissent, joined by Justices Ginsburg, Sotomayor, and Kagan.

Justice Thomas began his opinion by stating that the California statute was a content-based restriction on speech because it prescribed the content of the disclosures required by the facilities. He wrote: “The licensed notice is a content-based regulation of speech. By compelling individuals to speak a particular message, such notices ‘alte[r] the content of [their] speech.’”¹⁹⁸

The Court reiterated the familiar principle that content-based restrictions on speech must meet strict scrutiny.¹⁹⁹ That is, such restrictions must be narrowly tailored to achieve a compelling government interest.²⁰⁰ As discussed below in Part III, this is quite significant because *all* laws requiring disclosure of information, by definition, prescribe the content of what must be disclosed.²⁰¹

The Court rejected the Ninth Circuit’s decision that strict scrutiny did not apply because the law is a regulation of professional speech.²⁰² Judge Dorothy Nelson authored the Ninth Circuit opinion, which concluded that intermediate scrutiny was the proper level of review.²⁰³ Accordingly, Judge Nelson determined, “the district court did not abuse its discretion in finding that [NIFLA] cannot demonstrate a likelihood of success on their free speech claim.”²⁰⁴ As to the license notice, the Ninth Circuit concluded that it “regulates professional speech, subject to intermediate scrutiny, which it survives.”²⁰⁵ With regard to the notice requirement for unlicensed CPCs, the court determined that the notice “survives any level of review.”²⁰⁶

However, Justice Thomas declared, “this Court has not recognized ‘professional speech’ as a separate category of speech.”²⁰⁷ He surmised, “[s]peech is not unprotected merely because it is uttered by

¹⁹⁸ Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018).

¹⁹⁹ *See id.*

²⁰⁰ *Id.*

²⁰¹ *See infra* Section III.A.

²⁰² 138 S. Ct. at 2371.

²⁰³ Nat’l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 834–35 (9th Cir. 2016).

²⁰⁴ *Id.* at 844.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018).

professionals.”²⁰⁸ Instead, Thomas claimed the Supreme Court “has been reluctant to mark off new categories of speech for diminished constitutional protection.”²⁰⁹ This sophistry obscured the fact the Court has long upheld states’ disclosure requirements, including in relation to licensed entities.²¹⁰ In an earlier case, the Court concluded that a lawyer’s “constitutionally protected interest in *not* providing any particular factual information . . . is minimal.”²¹¹

Nevertheless, Justice Thomas found that even if the Court were to recognize professional speech as a distinct category, the “dangers associated with content-based regulation[]” of it could still trump the state’s weighty policy goals.²¹² He stated that “[a]s with other kinds of speech, regulating the content of professionals’ speech pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.”²¹³ Justice Thomas conjectured that medicine is a potent example of state power deployed to manipulate and suppress vulnerable groups through speech regulation. He wrote: “Take medicine, for example. ‘Doctors help patients make deeply personal decisions, and their candor is crucial.’ Throughout history, governments have ‘manipulat[ed] the content of doctor-patient discourse’ to increase state power and suppress minorities.”²¹⁴

The Court found that the California law failed strict scrutiny. Justice Thomas wrote, “[i]f California’s goal is to educate low-income women about the services it provides, then the licensed notice is ‘wildly underinclusive.’”²¹⁵ He reasoned, “[t]he notice applies only to clinics that have a ‘primary purpose’ of ‘providing family planning or pregnancy-related services’ and that provide two of six categories of specific services.”²¹⁶ In his view, “[o]ther clinics that have another primary purpose, or that provide only one category of those services, also serve low-income women”²¹⁷ According to Justice Thomas, they too “could educate [California women] about the State’s services.”²¹⁸

²⁰⁸ *Id.* at 2371–72.

²⁰⁹ *Id.* at 2372 (citations omitted).

²¹⁰ *See, e.g.,* Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985); Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978); Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977).

²¹¹ 471 U.S. at 651.

²¹² 138 S. Ct. at 2374.

²¹³ *Id.* (citation omitted).

²¹⁴ *Id.* (citations omitted).

²¹⁵ *Id.* at 2375 (citation omitted).

²¹⁶ *Id.* (citation omitted).

²¹⁷ *Id.*

²¹⁸ *Id.*

The Court also found that the law failed strict scrutiny because California could achieve its goal while using alternatives that were less restrictive of speech. The Court stated, “California could inform low-income women about its services ‘without burdening a speaker with unwanted speech.’ Most obviously, it could inform the women itself with a public-information campaign. California could even post the information on public property near crisis pregnancy centers.”²¹⁹

The Court then declared unconstitutional the requirement that unlicensed facilities disclose their unlicensed status to women. Justice Thomas regarded California’s interest as searching and theoretical, based purely on conjecture, despite the pressing reproductive public health concerns that California identified. Despite the state’s detailed brief and amicus briefs submitted by reproductive health and rights organizations in California,²²⁰ Justice Thomas wrote, “California has not demonstrated any justification for the unlicensed notice that is more than ‘purely hypothetical.’”²²¹

According to the Court, California failed to prove that women did not know that the facilities were unlicensed, and they further decided that “[e]ven if California had presented a nonhypothetical justification for the unlicensed notice, the FACT Act unduly burdens protected speech.”²²² In what Justice Breyer’s dissent referred to as a lack of “evenhandedness,” given the differential treatment of abortion providers in *Casey*,²²³ the Court averred that the law “imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California’s informational interest.”²²⁴ Justice Thomas even criticized the state for applying the law to a “curiously narrow subset of speakers.”²²⁵

It is notable that the Court found both parts of the California law unconstitutional not by denying the sufficiency of the government interest, but by arguing that the means were not necessary to achieve the goals.

²¹⁹ *Id.* at 2375–76 (citation omitted).

²²⁰ *See, e.g.*, Brief for the State Respondents at 16–27, *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (No. 16-1140), 2018 WL 1027815, at *16–27; Brief for the Am. Acad. of Pediatrics et al. as Amici Curiae in Support of Respondents at 26–32, *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (No. 16-1140), 2018 WL 1110040, at *26–32; Brief of the Cal. Women’s Law Ctr. et al. as Amici Curiae in Support of Respondents at 27–30, *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (No. 16-1140), 2018 WL 1156614, at *27–30.

²²¹ *Id.* at 2377 (citation omitted).

²²² *Id.*

²²³ *See id.* at 2385 (Breyer, J., dissenting).

²²⁴ *Id.* at 2377.

²²⁵ *Id.*

Justice Thomas reached the startling conclusion that “California has offered no justification that the notice plausibly furthers.”²²⁶ The all-male majority found that the FACT Act “targets speakers, not speech, and imposes an unduly burdensome disclosure requirement that will chill their protected speech.”²²⁷ The Court ruled, “[t]aking all these circumstances together, we conclude that the unlicensed notice is unjustified and unduly burdensome”²²⁸

In what would be one of his last opinions before retiring from the Court, Justice Kennedy expressed even greater hostility to the law than Justice Thomas’s majority opinion. In a concurring opinion, Kennedy argued, it “appear[s] that viewpoint discrimination is inherent in the design and structure of this Act.”²²⁹

Joined by Chief Justice Roberts and Justices Alito and Gorsuch, Kennedy described the law as a “paradigmatic example” of the “serious threat” that occurs when “government seeks to impose its own message in the place of individual speech, thought, and expression.”²³⁰ For here, he surmised, “the State requires primarily pro-life pregnancy centers to promote the State’s own preferred message advertising abortions,” thus compelling “individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these.”²³¹ The next day, Justice Kennedy announced his retirement from the Supreme Court.²³²

II

WHY THE COURT GOT IT WRONG IN *NIFLA v. BECERRA*

In Part II, we explain why, in our view, the Court reached the wrong conclusion in *NIFLA v. Becerra*. As we show, the case departs from other Supreme Court decisions, including those specifically addressing health and speech. Thus, if the case is about speech, it is only secondarily concerned with it. Instead, we believe the case reflects constitutional gerrymandering: five conservative, male judges exercising their hostility toward reproductive rights. Speech serves as a fig leaf in this process.²³³ Sadly, such hostility to the reproductive

²²⁶ *Id.* at 2378.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 2379 (Kennedy, J., concurring).

²³⁰ *Id.*

²³¹ *Id.*

²³² *E.g.*, Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html>.

²³³ As discussed elsewhere, historically, the Court has shown disdain and outright indifference for the interest of poor and working class women. *See* Erwin Chemerinsky &

rights of women is not new to the Court,²³⁴ and now *NIFLA v. Becerra* bears this out. Section II.A provides an overview of the Court's decision and Section II.B unpacks the Court's errors.

A. *The Failure to Properly Balance the Competing Interests*

Quite crucially, the Court fails to recognize and balance the competing interests in the case. After all, “balancing between individual freedoms and government interests is inevitable in constitutional law.”²³⁵ This is because there will always be competing interests in constitutional conflicts. Balancing demands weighing these competing interests and analyzing the relative merits and strengths as well as weaknesses of the interests at stake.²³⁶ But judges are not legislators and therefore direct policymaking is not their function or role.²³⁷ For courts, then, the balance to be struck is whether and under what cir-

Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189 (2017). In prior cases, poor women's reproductive rights have been truncated or eviscerated altogether. Cases dating back to *Buck v. Bell* evidence our concern. 274 U.S. 200, 205, 207 (1927) (upholding compulsory sterilization of the so-called “feeble-minded,” mentally ill, and socially unfit, under the Fourteenth Amendment's Due Process Clause).

²³⁴ See Michele Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty, and the State*, 127 YALE L.J. 1270 (2018); see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (“HHS asserts that the contraceptive mandate serves a variety of important interests, but many of these are couched in very broad terms, such as promoting ‘public health’ and ‘gender equality.’ RFRA, however, contemplates a ‘more focused’ inquiry . . .” (internal citation omitted)); *Harris v. McRae*, 448 U.S. 297, 316 (1980) (“[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.”); *Maher v. Roe*, 432 U.S. 464, 473–74 (1977) (concluding that *Roe v. Wade* “implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds. . . . An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth . . .”); *Beal v. Doe*, 432 U.S. 438, 445 (1977) (“[W]e do not agree that the exclusion of nontherapeutic abortions from Medicaid coverage is unreasonable under Title XIX”).

²³⁵ Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 402–03 (2016); see also T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943 (1987) (arguing that it is “undeniable” that balancing “must be a part of any practical legal system”); Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1024 (1978) (“Exercise of judgement, including some balancing of underlying values and interests, pervades all constitutional interpretation, such as deciding whether the power given Congress to determine the time, place, and manner of holding elections includes the power to determine qualifications for voting in those elections.”).

²³⁶ See *Schneider v. State*, 308 U.S. 147, 161 (1939) (“[A]s cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.”).

²³⁷ See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) (finding that an Oklahoma law making it unlawful for anyone other than licensed optometrists or ophthalmologists to fit lenses to a face “may exact a needless, wasteful requirement in

cumstances to defer to the legislature (and therefore the democratic process), or, alternatively, to act unilaterally to protect important values, which may be vulnerable to legislation borne of that democratic process.

Absent justification for distrusting the state, the judiciary should defer to laws and government decisions. Dating back to *Jacobson v. Massachusetts*, the Supreme Court has recognized the authority of the state to enact laws for the protection of the public health and has weighed that against individual freedoms.²³⁸

In this case, there are three interests to be weighed in evaluating the constitutionality of the California law: the facilities' interest in not having to post the disclosures; the state's interest in making sure that women receive accurate information about state services and about whether a facility is licensed by the state; and the woman's interest in receiving accurate health and service information. The Court overestimates the burden on the facilities, underestimates the state's interest in requiring disclosure, and completely ignores the woman's interest in receiving information.

As to the former, the Court based its decision entirely on the required disclosures being unconstitutional compelled speech.²³⁹ However, it is notable that the employees of the facilities do not have to utter a word; they just have to post notices on their walls.²⁴⁰ This is significantly less than what was required in earlier cases where the professionals themselves had to engage in speech.²⁴¹ Moreover, the notices are entirely factual and contain unquestionably accurate information.²⁴²

At the same time, the Court gave little weight to the state's important interest in making sure that women in California are provided accurate information about state-provided services and about whether a facility is unlicensed. As to the former, the Court did not deny the importance of the state interest, but insisted that the government could achieve its goal through other means, such as engaging in

many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement").

²³⁸ 197 U.S. 11, 30 (1905) ("[T]he function of a court . . . [is not] to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain."); *see also* *New York v. Ferber*, 458 U.S. 747, 763–64 (1982) (upholding a statute criminalizing the distribution of child pornography, opining "the evil . . . restricted [by the statute] so overwhelmingly outweighs the expressive interests, if any, at stake").

²³⁹ *See* *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

²⁴⁰ *Id.* at 2368–70.

²⁴¹ *See infra* Section II.B.

²⁴² *See supra* Section I.A. *Contra NIFLA*, 138 S. Ct. at 2372.

its own speech. The Court stated: "California could inform low-income women about its services 'without burdening a speaker with unwanted speech.' Most obviously, it could inform the women itself with a public-information campaign. California could even post the information on public property near crisis pregnancy centers."²⁴³

Quite importantly, the Court does not question the compelling state interest in making sure that women are properly informed. In none of the earlier cases had the Supreme Court considered whether there were other ways of informing the clients of the information.²⁴⁴ The problem with the Court's approach, as we discuss below, is that virtually every disclosure requirement is then unconstitutional because the government always could find some way on its own to inform people.²⁴⁵

Equally as important, this alternative that the Court suggests is unlikely to be a successful alternative and would be a poor strategy for achieving the state's goals. For instance, requiring that a particular facility disclose to women that it is unlicensed cannot be achieved by the state announcing generally that there are some unlicensed facilities in the state providing healthcare services to pregnant women.

The Court's greatest failing, though, was in refusing to recognize the interest of women in receiving accurate information about state services and about whether a facility is licensed to provide healthcare services. The Court often has held that the First Amendment includes a right to receive information. For example, it declared:

In keeping with this principle, we have held that in a variety of contexts 'the Constitution protects the right to receive information and ideas.' This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the sender's First Amendment right to send them: 'The right of freedom of speech and press . . . embraces the right to distribute literature, and necessarily protects the right to receive it.' 'The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.' More importantly, the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom.²⁴⁶

²⁴³ 138 S. Ct. at 2376.

²⁴⁴ See *infra* Section II.B (discussing multiple precedents and the factors that underlay the decisions).

²⁴⁵ See *infra* Section III.A.

²⁴⁶ *Bd. of Educ. v. Pico*, 457 U.S. 853, 866-67 (1982) (citations omitted).

The Court in *NIFLA v. Becerra* never acknowledges this First Amendment interest, let alone explains why it is less important than the First Amendment interests of the healthcare facilities in not posting notices on their walls. In terms of freedom of speech, the Court simply favored the right of the clinics to not speak over the right of women to receive important information, critical to their health and safety.

The Court significantly erred here: The burden on the clinics was minimal, the state's interests significant, and the women's interests should have been overriding. This is especially so because the information related to the women's ability to exercise their fundamental rights with regard to contraception and abortion. Given the Court's history of protecting consumers against the potential for confusion, fraud, and deception, the case is profound for its disregard of women's informational interests and safety as *healthcare consumers*, particularly given the devastating rates of maternal mortality, communicable and congenital sexual diseases, and unintended pregnancies in the United States and California specifically.²⁴⁷ In *NIFLA v. Becerra*, the Court has essentially decided that readers of newspapers who might become clients of lawyers have a greater informational interest than pregnant women in the medical clinical setting.

B. *Selectively Dispensing with Precedent*

The Court's errors, though, extend beyond its failure to balance interests. To begin with, the Court's decision in *NIFLA v. Becerra* was inconsistent with its prior decisions.²⁴⁸ Never before had the Supreme Court held that laws requiring disclosure of information should or must be treated as content-based requirements. Nor had the Court ever held that disclosure laws or those requiring information disclosure must meet notice scrutiny. To the contrary, the Court previously upheld disclosure requirements in two contexts directly relevant to this case: professional services and abortion. Given this, the Court's holding invites vigorous critique and dissent.

First, in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, the Supreme Court held that truthful advertisements are protected by the First Amendment. However, the Court emphasized, the government can punish deception, including that

²⁴⁷ See *supra* Section I.B.4.

²⁴⁸ See, e.g., *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 647 (1985); *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

which occurs through omission.²⁴⁹ The Court characterized the speech interest at stake as “minimal.”²⁵⁰

In that case, an attorney published two sets of advertisements. The first was a small advertisement that ran in the *Columbus Citizen Journal* for two days, informing readers that the attorney’s “law firm would represent defendants in drunken driving cases.”²⁵¹ The advertisement advised that clients’ “[f]ull legal fee [would be] refunded if [they were] convicted of DRUNK DRIVING.”²⁵² This advertisement was withdrawn following a call from the Office of Disciplinary Counsel of the Supreme Court of Ohio, explaining that the advertisement “appeared to be an offer to represent criminal defendants on a contingent-fee basis, a practice prohibited by . . . the Ohio Code of Professional Responsibility.”²⁵³

According to the Court, the lawyer’s second advertisement was “more ambitious.”²⁵⁴ The second advertisement offered to represent women injured by the contraceptive device known as the Dalkon Shield Intrauterine Device.²⁵⁵ The lawyer placed this advertisement in thirty-six Ohio newspapers. This advertisement “featured a line drawing of the Dalkon Shield accompanied by the question, DID YOU USE THIS IUD?”²⁵⁶ The advertisement stated:

The Dalkon Shield Interuterine [sic] Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield’s manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.²⁵⁷

²⁴⁹ 471 U.S. at 651–52.

²⁵⁰ *Id.* at 651.

²⁵¹ *Id.* at 629.

²⁵² *Id.* at 629–30.

²⁵³ *Id.* at 630. Following the call, the lawyer “immediately withdrew the advertisement and in a letter . . . apologized for running it, also stating in the letter that he would decline to accept employment by persons responding to the ad.” *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 631. The “ad concluded with the name of appellant’s law firm, its address, and a phone number that the reader might call for ‘free information.’” *Id.*

Subsequently, the lawyer was charged by the Office of Disciplinary Counsel of the Supreme Court of Ohio for violating multiple disciplinary rules.²⁵⁸

Four main disciplinary issues were presented for the Supreme Court's review. First, the Office of Disciplinary Counsel disciplined the lawyer for violations associated with the drunken driving advertisement, because, "the [drunken driving] advertisement failed to mention the common practice of plea bargaining in drunken driving cases" ²⁵⁹ A disciplinary panel found that "it might be deceptive to potential clients who would be unaware of the likelihood that they would both be found guilty (of a lesser offense) *and* be liable for attorney's fees (because they had not been convicted of drunken driving)." ²⁶⁰

The second reprimand was for violating a rule that prohibited self-promotional advertisements about a specific legal problem.²⁶¹ Third, he was punished because his advertisement included an illustration, a drawing of a Dalkon Shield.²⁶² Finally, he was disciplined for general deception. The Dalkon Shield advertisement stated that the lawyer and his firm would provide representation on a contingency fee basis and that the client would not be required to pay any fee if the case was not won.²⁶³ However, the advertisement did not disclose that the clients were liable for litigation costs.²⁶⁴

²⁵⁸ *Id.* (noting that the Office of Disciplinary Counsel "filed a complaint against appellant charging him with a number of disciplinary violations arising out of both the drunken driving and Dalkon Shield advertisements").

²⁵⁹ *Id.* at 634.

²⁶⁰ *Id.*

²⁶¹ *See id.* at 633 (alleging that the advertisement violated a regulation prohibiting attorneys from "recommend[ing] employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer").

²⁶² *Id.* at 632. Specifically, the Office of Disciplinary Counsel found that the lawyer violated Disciplinary Rules: DR2-101(B), "which prohibits the use of illustrations in advertisements run by attorneys, requires that ads by attorneys be 'dignified,' and limits the information that may be included in such ads to a list of 20 items . . ." *Id.*

²⁶³ *Id.* at 631. The Court also noted that "[t]he advertisement was successful in attracting clients: appellant received well over 200 inquiries regarding the advertisement, and he initiated lawsuits on behalf of 106 of the women who contacted him as a result of the advertisement." *Id.*

²⁶⁴ *Id.* at 633. The advertisement allegedly violated DR-2-101(B)(15), "which provides that any advertisement that mentions contingent-fee rates must 'disclos[e] whether percentages are computed before or after deduction of court costs and expenses.'" *Id.* Consequently, the ad's "failure to inform clients that they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful rendered the advertisement 'deceptive' in violation of DR-2-101(A)." *Id.*

The Court examined three types of regulations Ohio imposed on attorney advertising.²⁶⁵ First, “prohibitions on soliciting legal business through advertisements containing advice and information regarding specific legal problems.”²⁶⁶ Second, “restrictions on the use of illustrations in advertising by lawyers.”²⁶⁷ And third, “disclosure requirements relating to the terms of contingent fees.”²⁶⁸

The Supreme Court rejected the first two grounds for discipline.²⁶⁹ However, the Court accepted the third.²⁷⁰ The Court said that a state could not prohibit advertisements that targeted a particular audience or a group of clients with a specific legal problem.²⁷¹ Moreover, the Court said that illustrations were allowed in ads unless there was proof in a specific case that they were deceptive or misleading.²⁷²

However, the Court emphasized that the omission of a statement about the client’s liability for litigation costs could be a basis for discipline because its absence was deceptive. Citing *Friedman v. Rogers*,²⁷³ the Court stated, “States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.”²⁷⁴ The Court rejected any claim that the lawyer had a First Amendment right to omit the information. The Court said: “Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the infor-

²⁶⁵ *Id.* at 638.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 644, 649, 655–56.

²⁷⁰ *Id.* at 652.

²⁷¹ Speaking to this, the Court stated, “[b]ecause appellant’s statements regarding the Dalkon Shield were not false or deceptive, our decisions impose on the State the burden of establishing that prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest.” *Id.* at 641. The Court found this standard unmet, reasoning that because “[t]he State is not entitled to interfere with [civil] access [to the courts] by denying its citizens accurate information about their legal rights . . . it is not sufficient justification for imposing discipline that . . . truthful and nondeceptive advertising ha[s] a tendency to or [does] in fact encourage others to file lawsuits.” *Id.* at 642–43. The Court emphasized the difference from in-person solicitations in that “[p]rint advertise[ments] . . . lack the coercive force of the personal presence of a trained advocate.” *Id.* at 642. This distinction was relevant because the Court validated other substantial governmental interests in protecting against invasions of privacy and undue influence sufficient to uphold restrictions on in-person legal solicitation were inapplicable in the context of print advertisements. *Id.* at 641–42.

²⁷² *Id.* at 649.

²⁷³ 440 U.S. 1, 9 (1979) (upholding a state commercial-speech regulation and finding that state restrictions on false, deceptive, and misleading commercial speech are permissible).

²⁷⁴ *Zauderer*, 471 U.S. at 638.

mation such speech provides, [the] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.”²⁷⁵ In other words, the Court found that the lawyer could properly be disciplined for the failure to disclose important information.²⁷⁶ The Court did not apply strict scrutiny²⁷⁷ and emphasized the importance of consumers receiving accurate information.²⁷⁸

In *NIFLA v. Becerra*, the Court poorly attempted to distinguish *Zauderer* and cited to, but did not discuss *Milavetz, Gallop & Milavetz, P.A. v. United States*. Justice Thomas summarized the *Zauderer* decision as follows: “Noting that the disclosure requirement governed only ‘commercial advertising’ and required the disclosure of ‘purely factual and uncontroversial information about the terms under which . . . services will be available,’ the Court explained that such requirements should be upheld unless they are ‘unjustified or unduly burdensome.’”²⁷⁹

Oddly, Justice Thomas concluded that “[t]he *Zauderer* standard does not apply here.”²⁸⁰ For example, he stated, “[m]ost obviously, the licensed notice is not limited to ‘purely factual and uncontroversial information about the terms under which . . . services will be available,’” and “[t]he notice in no way relates to the services that licensed clinics provide.”²⁸¹ Instead, according to Justice Thomas, the notice requirement “requires these clinics to disclose information about state-sponsored services—including abortion, anything but an ‘uncontroversial’ topic.”²⁸²

In any case, the Court’s opinion departs from a line of decisions plainly relevant to *NIFLA v. Becerra*, including the unanimously decided *Milavetz, Gallop & Milavetz, P.A. v. United States*, which

²⁷⁵ *Id.* at 651.

²⁷⁶ *Id.* at 650–53, 655 (declining to apply heightened scrutiny and affirming the imposition of discipline on the grounds of failure to disclose important information).

²⁷⁷ Strict scrutiny in this context subjects restrictions on free speech to a “least restrictive means” analysis, under which legislation “must be struck down if there are no other means by which the State’s purpose may be served.” *Id.* at 651 n.14. The *Zauderer* court distinguished disclosure requirements from other legislation which may chill speech and held such requirements to a lower level of scrutiny. *Id.* at 651–52, 651 n.14 (“[W]e hold that an advertiser’s rights are adequately protected so long as disclosure requirements are *reasonably related* to the State’s interest in preventing deception of customers.” (emphasis added)).

²⁷⁸ *Id.* at 651 (“[W]arning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.” (internal citation omitted)).

²⁷⁹ *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (internal citation omitted).

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

Chief Justice Roberts and Justices Thomas, Kennedy, and Alito joined.²⁸³ In that case, the Court applied *Zauderer* to uphold a federal law—the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005—requiring that debt relief agencies, including attorneys, disclose in their advertisements that they are “debt relief agencies.”²⁸⁴

In *Milavetz*, the Court upheld this disclosure requirement and reasoned that it “share[s] the essential features of the rule at issue in *Zauderer*.”²⁸⁵ The Court explained:

As in that case, [the] required disclosures are intended to combat the problem of inherently misleading commercial advertisements—specifically, the promise of debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs. Additionally, the disclosures entail only an accurate statement identifying the advertiser’s legal status and the character of the assistance provided, and they do not prevent debt relief agencies like *Milavetz* from conveying any additional information.²⁸⁶

Specifically, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) amended the Bankruptcy Code to classify a cohort of bankruptcy professionals as “debt relief agencies” in order to “correct perceived abuses of the bankruptcy system.”²⁸⁷ The lawyers who brought the litigation emphatically opposed this disclosure requirement, which mandated that they refer to themselves as “debt relief agencies.”²⁸⁸ The firm “asked the court to hold that it is not bound by these provisions and thus it may freely advise clients to incur additional debt and need not identify itself as a debt relief agency in its advertisements.”²⁸⁹ They believed that debt relief as that term was used in the statute was not an accurate description of their services.²⁹⁰

Thus, in *Milavetz*, the new law required several disclosures from “debt relief agencies,” including (a) that debt relief agencies “clearly and conspicuously disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general

²⁸³ See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010). Justice Gorsuch was not a member of the Court in 2010.

²⁸⁴ *Id.*; see also Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) § 528(a)(4), Pub. L. No. 109-8, 119 Stat. 23 (2005).

²⁸⁵ *Milavetz*, 559 U.S. at 250.

²⁸⁶ *Id.* The Court also upheld a provision of the law prohibiting debt relief agencies from advising clients to take on additional debt. *Id.* at 248. This would seemingly prevent a lawyer from advising a client to get a mortgage, even where it would be lawful and nonfraudulent to do so.

²⁸⁷ *Id.* at 231–32.

²⁸⁸ *Id.* at 232.

²⁸⁹ *Id.* at 234.

²⁹⁰ *Id.*

public;” (b) a disclosure “that the services or benefits are with respect to bankruptcy relief;” and (c) a statement in all advertisements that “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.”²⁹¹ The attorneys petitioned for heightened review, which the Court rejected, explaining “the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech,” and thus the “less exacting scrutiny described in *Zauderer* governs”²⁹²

Writing for the Court, Justice Sotomayor stated that the “threshold question” was “whether attorneys are debt relief agencies when they provide qualifying services.”²⁹³ The Court found that they are, and next considered “whether the Act’s provisions . . . requiring them to make certain disclosures in their advertisements . . . violate the First Amendment rights of attorneys.”²⁹⁴

The Court held that the disclosure requirements were valid, thereby foreclosing *Milavetz*’s argument that the government had “adduced no evidence that its advertisements [were] misleading.”²⁹⁵ Citing *Zauderer*, Justice Sotomayor wrote, “[w]hen the possibility of deception is as self-evident as it is in this case, we need not require the State to ‘conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.’”²⁹⁶ The Court found the congressional record demonstrating “a pattern of advertisements that hold out the promise of debt relief without alerting consumers to its potential costs . . . is adequate to establish that the likelihood of deception . . . ‘is hardly a speculative one.’”²⁹⁷

According to the *Milavetz* Court, BAPCPA’s notification requirements shared the substantive features of the rule challenged in *Zauderer*.²⁹⁸ In other words, the “disclosures are intended to combat the problem of inherently misleading commercial advertisements,” and they “entail only an accurate statement of the advertiser’s legal status and the character of the assistance provided.”²⁹⁹ Additionally, the Court found that the disclosures “do not prevent debt relief agencies,” such as the lawyers in question, “from conveying any additional

²⁹¹ *Id.* at 233–34.

²⁹² *Id.* at 249.

²⁹³ *Id.* at 232.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 251.

²⁹⁶ *Id.* (quoting *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 652–53 (1985)).

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 250.

²⁹⁹ *Id.*

information” through their communications to clients or in advertisements.³⁰⁰

Similarly, in *NIFLA v. Becerra*, the disclosures were completely factual: (a) that the state provides free and low-cost contraceptives and abortions to women who economically qualify; and (b) that a particular facility is not licensed. However, the judicial outcome was markedly different. What made this controversial was simply that the clinics did not want to have to make this disclosure. But pushback may occur whenever a professional does not want to disclose certain information or be regulated.³⁰¹ Indeed, the Court has not confined its regard to regulating lawyers and shielding the public from potentially harmful conduct by professionals.

In *Williamson v. Lee Optical*, unlicensed optometrists pushed back against a requirement requiring a license to fit glasses. The Court upheld the Oklahoma licensing requirement, finding “[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”³⁰² In *Semler v. Oregon State Board of Dental Examiners*, where a dentist challenged the validity of an Oregon statute prohibiting advertisements conveying professional superiority and potentially misleading information, the Court held:

We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief.³⁰³

The Court’s decision in *NIFLA v. Becerra* was also inconsistent with the Court’s earlier rulings about disclosure in the abortion con-

³⁰⁰ *Id.*

³⁰¹ See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (upholding an Oklahoma statute requiring licenses to fit lenses notwithstanding unlicensed optometrists’ strong objections); *Semler v. Or. State Bd. of Dental Exam’rs*, 294 U.S. 608, 610 (1935) (finding “[p]laintiff is not entitled to complain of interference with the contracts he describes, if the regulation of his conduct as a dentist is not an unreasonable exercise of the protective power of the State”); *Roschen v. Ward*, 279 U.S. 337 (1929) (upholding a New York statute making it unlawful to sell eyeglasses at retail in any store unless a duly licensed physician were in attendance and in charge).

³⁰² 348 U.S. at 488.

³⁰³ 294 U.S. 608, 612 (1935).

text. We discussed this in our introduction and it is a key point of Justice Breyer's dissent.³⁰⁴ Justice Breyer reviewed the Supreme Court's earlier decisions concerning requirements that a doctor must make to a woman seeking an abortion.³⁰⁵

Initially, the Court found certain disclosure requirements to be unconstitutional in the abortion context. In *City of Akron v. Akron Center for Reproductive Health*, for example, the Supreme Court declared unconstitutional a part of a city ordinance that required physicians to inform women seeking abortions about fetal development, and that the "unborn child is a human life from the moment of conception."³⁰⁶ Also, the city mandated that women seeking abortions be informed of "the date of possible viability, [and] the physical and emotional complications that may result from an abortion."³⁰⁷ The Court reasoned:

[M]uch of the information required is designed not to inform the woman's consent, but rather to persuade her to withhold it altogether. . . . By insisting upon recitation of a lengthy and inflexible list of information, Akron unreasonably has placed obstacles in the path of the doctor upon whom the woman is entitled to rely for advice in connection with her decision.³⁰⁸

Similarly, in *Thornburgh v. American College of Obstetricians and Gynecologists*, the Court invalidated a Pennsylvania law that required, in part, that seven different kinds of information be distributed to pregnant women at least 24 hours before they give consent for abortions.³⁰⁹ This information included telling the woman that there may be unforeseeable "detrimental physical and psychological effects" to having an abortion, that prenatal and childbirth medical care might be available, and that the father is required to pay child support.³¹⁰

In addition, the law required that physicians inform women of the availability of printed materials that describe the anatomical and physiological characteristics of the "unborn child" at "two-week gestational increments."³¹¹ The Court held, as in *Akron*, that the Pennsylvania law was unconstitutional because it was motivated by a desire to discourage women from having abortions and because it

³⁰⁴ See *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2383 (2018) (Breyer, J., dissenting).

³⁰⁵ *Id.* at 2383–92.

³⁰⁶ 462 U.S. 416, 444 (1983).

³⁰⁷ *Id.* at 442.

³⁰⁸ *Id.* at 444–45 (citations omitted).

³⁰⁹ 476 U.S. 747, 760 (1986).

³¹⁰ *Id.* at 760–61.

³¹¹ *Id.* at 761.

imposed a rigid requirement that a specific body of information be communicated regardless of the needs of the patient or the judgment of the physician.³¹²

Notably, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, however, the Court upheld a provision virtually identical to that invalidated in *Thornburgh*. The joint opinion in *Casey* said:

To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires . . . the giving of truthful, non-misleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth, and the “probable gestational age” of the fetus, those cases go too far, are inconsistent with *Roe*’s acknowledgment of an important interest in potential life, and are overruled.³¹³

The shift from *Akron* and *Thornburgh* to *Casey* reflects the Court’s abandoning the position that the state may not regulate abortions in a way to encourage childbirth. Specifically, the Court upheld a section of the statute that required that women be told information. The Court found it permissible that women be informed of the availability of materials that describe the fetus, be provided information about medical care for childbirth, and that they receive a list of adoption providers.³¹⁴

In *Casey*, the Court explicitly considered whether the required disclosure was impermissible compelled speech in violation of the First Amendment. The joint opinion of Justices O’Connor, Kennedy, and Souter declared:

All that is left of petitioners’ argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician’s First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.³¹⁵

In *NIFLA v. Becerra*, Justice Thomas’s majority opinion struggled to distinguish *Casey* by saying that it was an “informed-consent” requirement.³¹⁶ But as the joint opinion in *Casey* acknowledged, the Pennsylvania law compelling speech by doctors went far beyond informed consent, such as by requiring doctors to inform the woman

³¹² *Id.* at 762.

³¹³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992).

³¹⁴ *Id.* at 881.

³¹⁵ *Id.* at 884 (citations omitted).

³¹⁶ *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018).

about the availability of a list of adoption providers.³¹⁷ Plainly stated, adoption has nothing to do with a woman's health; suggestions otherwise are disingenuous and inaccurate. The justices in *Casey* recognized and approved the Pennsylvania regulations as a law designed to discourage abortions.

Justice Breyer made exactly this point in his dissent in *NIFLA v. Becerra*: "If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services?"³¹⁸ He further observed that the Court failed to offer any "convincing reason to distinguish between information about adoption and information about abortion in this context."³¹⁹ Indeed, there is no legal justification for distinguishing the information in question.

Further, Justice Breyer responded directly to the majority's contrived attempt to distinguish *Casey* as concerning a regulation of professional conduct that only incidentally burdened speech.³²⁰ Specifically, he wrote, "*Casey*, in [the majority's] view, applies only when obtaining 'informed consent' to a medical procedure is directly at issue. This distinction, however, lacks moral, practical, and legal force."³²¹ This is because the CPCs "are all medical personnel engaging in activities that directly affect a woman's health—not significantly different from the doctors at issue in *Casey*."³²² Justice Breyer brought further clarity to the matter:

After all, the statute here applies only to "primary care clinics," which provide "services for the care and treatment of patients for whom the clinic accepts responsibility." And the persons responsible for patients at those clinics are all persons "licensed, certified or registered to provide" pregnancy-related medical services. . . . If the law in *Casey* regulated speech "only 'as part of the practice of medicine,'" so too here.³²³

Justice Breyer pointed to the majority's sophistry when it asserted that the FACT Act's disclosure requirement "is unrelated to a 'med-

³¹⁷ 505 U.S. at 881.

³¹⁸ 138 S. Ct. at 2385 (Breyer, J., dissenting).

³¹⁹ *Id.*

³²⁰ *See id.* at 2373–74 (characterizing the law in *Casey* as primarily regulating the practice of medicine rather than speech).

³²¹ *Id.* at 2385 (Breyer, J., dissenting).

³²² *Id.*

³²³ *Id.* at 2385–86 (Breyer, J., dissenting) (citations omitted) (first quoting CAL. CODE REGS. tit. 22, § 75026(a) (2018); then quoting CAL. CODE REGS. tit. 22, § 75026(c); and then quoting *NIFLA*, 138 S. Ct. at 2373).

ical procedure,' unlike that in *Casey*, and so the State has no reason to inform a woman about alternatives to childbirth (or, presumably, the health risks of childbirth)."³²⁴ Simply stated, the majority's justifications distinguishing *Casey* from *NIFLA v. Becerra* stretch their holding's credibility. Justice Breyer put it this way, "Really? No one doubts that choosing an abortion is a medical procedure that involves certain health risks. But the same is true of carrying a child to term and giving birth."³²⁵

Thus, it is clear that the Court has abandoned its precedents in holding that the California law should have been enjoined as violating the First Amendment. The distinctions of the earlier cases, namely *Zauderer* and *Casey*, are specious.

C. Creation of Content-Based Restrictions on Speech

Finally, Justice Thomas began his majority opinion by saying that the California law was a content-based restriction on speech because it prescribed the required content of the disclosures, and thus it had to meet strict scrutiny.³²⁶ This, of course, is consistent with the well-established principle that content-based restrictions on speech must meet strict scrutiny. For example, the Court has declared that "[c]ontent-based regulations are presumptively invalid."³²⁷

In *Turner Broadcasting System v. FCC*, the Court reaffirmed the general rule that content-based restrictions on speech must meet strict scrutiny, while content-neutral regulations need only meet intermediate scrutiny.³²⁸ Justice Kennedy, writing for the Court, explained that "[g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential [First Amendment] right."³²⁹ Justice Kennedy thus noted, "[f]or these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."³³⁰ In countless cases, the

³²⁴ See *id.* at 2386 (Breyer, J., dissenting).

³²⁵ *Id.* (citing *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2315 (2016)).

³²⁶ *Id.* at 2371.

³²⁷ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); see also *United States v. Alvarez*, 567 U.S. 709, 716–17 (2012) (plurality opinion) ("[T]he Constitution demands that content-based restrictions on speech be presumed invalid and that Government bear the burden of showing their constitutionality." (quotation marks omitted)).

³²⁸ 512 U.S. 622, 642 (1994).

³²⁹ *Id.* at 641.

³³⁰ *Id.*

Supreme Court has reaffirmed that content-based restrictions on speech must meet strict scrutiny.³³¹

But in this case, the Court has done exactly what its prior First Amendment jurisprudence says the government cannot do, in two ways. First, it has created a content-based rule with regard to speech. The government can require disclosure of information by a professional if the information is “factual and uncontroversial,”³³² but not otherwise. That, by its very definition, makes the inquiry turn on the content of the speech. Moreover, the Court offers no criteria for what is factual and uncontroversial except for its own perceptions. There is no escaping the conclusion that five male justices find women’s reproduction and healthcare options to be controversial precisely because of their own hostility to abortion rights.

Second, by approvingly citing to the disclosure requirements that had been upheld in *Casey* and by striking down those in the FACT Act, the Court is saying that a state may compel speech intended to discourage abortions, but it may not require speech designed to provide women information concerning the availability of contraception and abortions. This is not simply a content-based restriction on speech, but it is based on viewpoint. And viewpoint restrictions on speech are never allowed.³³³ It is ironic that Justice Kennedy’s concurring opinion sees the California law as viewpoint-based while joining a majority opinion that embraces an approach that permits the government to act to discourage abortions, but not to provide women accurate information about their rights. It is hard to imagine clearer viewpoint discrimination than what a state can and cannot do after *NIFLA v. Becerra*.

III

THE IMPLICATIONS OF *NIFLA v. BECERRA*

As we outlined in Part II, the Court significantly erred in *NIFLA v. Becerra*. Its decision implicates broad areas of law where states and the federal government mandate disclosures in the realms of medicine, law, business, education, child welfare, banking, alcohol and drugs, and even barbering and cosmetology. We see the possibility of

³³¹ See, e.g., *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

³³² 138 S. Ct. at 2376.

³³³ See, e.g., *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 364, 394 (1993) (“The principle that has emerged from our cases ‘is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.’” (quoting *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984))).

two outcomes. The first is that this case weakens notification laws or makes them vulnerable to constitutional challenges. This concern is materializing in the very circuit that previously upheld California's FACT Act. Most recently, the Ninth Circuit en banc struck down a California ordinance that requires warnings on specific sugar sweetened beverages. The plaintiffs claimed that the ordinance violated their First Amendment free speech rights. In ruling the ordinance unconstitutional, the Court stated:

The Ordinance requires health warnings on advertisements for certain sugar-sweetened beverages (“SSBs”). Plaintiffs argue that the Ordinance violates their First Amendment right to freedom of speech. Relying on the United States Supreme Court’s decision in *National Institute of Family & Life Advocates v. Becerra* (“*NIFLA*”) . . . we conclude that Plaintiffs will likely succeed on the merits of their claim that the Ordinance is an “unjustified or unduly burdensome disclosure requirement[] [that] might offend the First Amendment by chilling protected commercial speech.”³³⁴

Or, second, this case will establish a unique disregard for laws that seek to protect women’s reproductive rights relative to other interests. In Part III, we analyze the implications of the decision. In Section III.A, we examine the future of disclosure laws. In Section III.B, we turn to the Court’s unclothed hostility to abortion rights.

A. *The Future of Disclosure Laws*

The majority’s hostility toward women’s reproductive rights is poorly concealed in *NIFLA v. Becerra*. Beyond that, the Supreme Court’s decision opens the door to challenges to the myriad of laws that require disclosure of information to patients, to consumers, to employees, and to others. The Court expressly says that a law requiring disclosure of specific information is a content-based restriction on speech because it prescribes the content of the expression and thus it must meet strict scrutiny.³³⁵ However, by this approach, every law requiring disclosure would be a content-based restriction on speech because each prescribes the required content of expression.

To appreciate the breadth of the implications of this, consider a narrow sample of the laws requiring disclosure. The 1968 Federal Truth in Lending Act was enacted to enable an awareness of the cost of credit to allow “informed use of credit” by consumers.³³⁶ The Truth in Lending Act is codified at 15 U.S.C. §§ 1601–1667 and originally

³³⁴ *Am. Beverage Ass’n v. City & Cty. of S.F.*, 916 F.3d 749, 753 (9th Cir. 2019).

³³⁵ 138 S. Ct. at 2371.

³³⁶ 15 U.S.C. § 1601(a) (2012).

authorized the Federal Reserve Board, and now the Consumer Financial Protection Board, to issue regulations to implement the Act.³³⁷ These regulations are mostly found in Regulation Z.³³⁸ Regulation Z contains a variety of disclosure requirements.

For instance, regarding open-end credit, Regulation Z requires that disclosures generally must be made in writing in a form the consumer may retain,³³⁹ that disclosures required to be made in tabular form must use the specific term “penalty APR,”³⁴⁰ that disclosures be made before the first transaction or as soon as reasonably practical if opened over the phone,³⁴¹ that they must describe the legal obligations between the parties “based on the best information reasonably available,”³⁴² and that new disclosures may be required should the old ever become inaccurate.³⁴³ Regarding closed-end credit, Regulation Z similarly dictates that the disclosure must be in written form and retainable by the consumer,³⁴⁴ that disclosure must occur “before consummation of the transaction,”³⁴⁵ and that there can be delays for disclosure in certain circumstances.³⁴⁶ Regulation Z contains similar provisions for certain home mortgage transactions,³⁴⁷ private education loans,³⁴⁸ and credit offered to college students,³⁴⁹ typically requiring prior disclosure and laying out the required format and content of the disclosures.

Likewise, the Residential Lead-Based Paint Hazard Reduction Act of 1992 contains a provision that requires the disclosure of lead-based paint hazards for all houses built before 1978 before a purchaser or lessee is obligated under any contract of purchase or lease.³⁵⁰ The Act requires that contracts of purchase and sale include a statement

³³⁷ *Id.* § 1604.

³³⁸ *See* 12 C.F.R. § 226 (2018).

³³⁹ *Id.* § 226.5(a)(1)(ii) (noting some limited exceptions in which disclosures need not be in writing or retainable by the consumer).

³⁴⁰ *Id.* § 226.5(a)(2)(iii).

³⁴¹ *Id.* § 226.5(b)(1)(i), (iii).

³⁴² *Id.* § 226.5(c).

³⁴³ *Id.* § 226.5(e).

³⁴⁴ *Id.* § 226.17(a)(1).

³⁴⁵ *Id.* § 226.17(b).

³⁴⁶ *Id.* § 226.17(g).

³⁴⁷ *See id.* § 226.31 (requiring that written disclosures be provided at least three business days before consummation of a mortgage transaction).

³⁴⁸ *See id.* § 226.46 (requiring certain written disclosures to be provided at the time of any application, solicitation, or approval for private education loans).

³⁴⁹ *See id.* § 226.57 (requiring card issuers who have college credit card agreements to submit annual reports to the Board of Governors of the Federal Reserve System detailing, among other items, the amount of money paid by the card issuer to the college and the total number of credit card accounts opened under the agreement).

³⁵⁰ *See* 42 U.S.C. § 4852d(a)–(c) (2012).

that the purchaser received a lead warning statement and information pamphlet, understands the warning, and had opportunity to assess the risk before purchase.³⁵¹ Moreover, the Act requires a lead warning statement, to be “printed in large type on a separate sheet of paper attached to the contract,” that warns of the permanent neurological hazards of lead poisoning in children, warns of the risk of lead to pregnant women, and recommends an inspection and risk assessment of lead-based hazards prior to purchase.³⁵²

Consider just some of the various other disclosure laws in California. California requires that real estate agents disclose their names, license identification numbers, unique identifiers, and the identities of the responsible brokers in all publications.³⁵³ This requirement applies to all solicitation materials, including business cards, stationary, flyers, TV ads, any print or electronic media, real estate-related signs, and any “other materials designed to solicit the creation of a professional relationship between the licensee and a consumer.”³⁵⁴

California also requires that unaccredited law schools provide students with a disclosure statement specifying that the school is unaccredited prior to the payment of any registration fee.³⁵⁵ The law also requires disclosure of the school’s first year exam and bar exam passage rates from the last five years, the amount of legal volumes in the school’s library, the qualifications of the faculty, the student-faculty ratio, the status of any applications for accreditation submitted by the school within the last five years, and a notice that the education may not satisfy the requirements of other states for practicing law.³⁵⁶ This disclosure agreement must be signed by each student, and the student should be given a copy of that signed disclosure.³⁵⁷ A law school’s failure to comply entitles a student to a full refund of all fees.³⁵⁸

Contractors in California must provide a disclosure document if they have had their license suspended or revoked twice or more within eight years.³⁵⁹ The disclosure document must be “either in capital letters in 10-point roman boldface type or in contrasting red print

³⁵¹ *Id.* § 4852d(a)(2).

³⁵² *Id.* § 4852d(a)(3).

³⁵³ CAL. BUS. & PROF. CODE § 10140.6 (West 2018).

³⁵⁴ *Id.* § 10140.6(b)(2).

³⁵⁵ *Id.* § 6061; *see also* COMM. OF BAR EXAM’RS, STATE BAR OF CAL., GUIDELINES FOR UNACCREDITED LAW SCHOOL RULES 4–5 (2018), <http://www.calbar.ca.gov/Portals/0/documents/admissions/GuidelinesforUnaccreditedLawSchoolRules.pdf>.

³⁵⁶ CAL. BUS. & PROF. CODE § 6061 (West 2018).

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.* § 7030.1(a).

in at least 8-point roman boldface type,” and it must be provided prior to contracting to work on a residential property with four or fewer units.³⁶⁰

California solar energy system companies are required to prepare a “solar energy system disclosure document” that discloses, “in boldface 16-point type” on the front page of any solar energy contract, the total cost and payments for the system, information on filing complaints, and the consumer’s right to a three-day cooling off period.³⁶¹

California public accountants who are paid a commission for recommending a product or service are required to disclose to clients the fact that they will be paid a commission when they recommend the product or service.³⁶²

California “invention developer[s]” who charge any fee or who “require[] any consideration” for their “invention development services” must disclose that fact in all advertisements of their services.³⁶³

California licensed midwives must provide to prospective clients both oral and written disclosure containing, among other requirements: a statement that the midwife is not a certified nurse-midwife and is unsupervised by a physician or surgeon; the midwife’s licensure status and number; the midwife’s practice settings; any lack of liability coverage; an acknowledgement that failure to consult a physician or surgeon when advised to do so limits the client’s legal rights; the specific arrangements for referral to a physician and surgeon; the specific arrangements for the transfer of care; recommendations for preregistration at a hospital with obstetric emergency services; and a statement that laws governing midwifery and the procedures for filing complaints may be found on the Medical Board of California’s website.³⁶⁴ The statute authorizes the Medical Board of California to dictate the form of the disclosure, and the disclosure and consent must be signed by both the licensed midwife and the client.³⁶⁵

California landlords are required to provide several disclosures to tenants before they sign. For instance, California requires that a clause, dictated by statute, must be placed in rental agreements informing the lessee that information about registered sex offenders is available in a statewide database at a particular website, though landlords have no further obligation to provide information on sex

³⁶⁰ *Id.*

³⁶¹ *See id.* § 7169 (requiring the development of a standardized disclosure document for use by solar energy companies).

³⁶² *Id.* § 5061(d).

³⁶³ *Id.* § 22380.

³⁶⁴ *Id.* § 2508(a).

³⁶⁵ *Id.* § 2508(b)–(c).

offenders.³⁶⁶ California landowners are also required to provide written notice to both potential tenants and affected current tenants if the landlord knows or has reasonable cause to believe that mold exceeds permissible exposure limits or poses a health threat.³⁶⁷ This notice must also come with a California Department of Public Health approved booklet disclosing the health risks of mold exposure.³⁶⁸ California landowners who have “actual knowledge” of any former federal or state ordinance locations within one mile of the dwelling in question must disclose the locations before a lease can be signed.³⁶⁹

Consider another state: New York requires healthcare practitioners with financial ties to healthcare providers to disclose such financial relationships to patients before the practitioner may refer a patient to the provider.³⁷⁰ New York requires that this disclosure also inform the patient of the right to utilize a “specifically identified alternative healthcare provider.”³⁷¹

If an out-of-state camp solicits enrollment of children residing in the state, New York requires anyone operating that camp to complete a “disclosure statement” in the form prescribed by the Commissioner of Public Health, that must include, at least, the name and mailing address of the camp, form of the owners and directors, name of the owners, financial stability statements, political subdivision of the camp, physical features of the camp, provisions for sanitation and water supply, staffing ratios, living and sleeping and food arrangements, occupancy limits, insurance coverage, emergency and medical services, and recent inspection results.³⁷² This disclosure statement must be filed annually with the Department of Health prior to any solicitation or acceptance of money³⁷³ and must be mailed or delivered to the parents or guardians of children sought for enrollment.³⁷⁴

Public vending machines in New York are required to have prominently affixed notices that indicate the name, address, and phone number of the owner and operator of the machine.³⁷⁵

New York also requires pet dealers who sell animals under the representation that the animal is “registered or registrable with an animal pedigree registry organization” to provide a written disclosure

³⁶⁶ CAL. CIV. CODE § 2079.10a(3) (West 2018).

³⁶⁷ CAL. HEALTH & SAFETY CODE § 26147 (West 2018).

³⁶⁸ *Id.* § 26148.

³⁶⁹ CAL. CIV. CODE § 1940.7(b) (West 2018).

³⁷⁰ N.Y. PUB. HEALTH LAW § 238-d(1) (McKinney 2018).

³⁷¹ *Id.* § 238-d(2).

³⁷² *Id.* § 1400(2).

³⁷³ *Id.* § 1401.

³⁷⁴ *Id.* § 1402(1).

³⁷⁵ N.Y. GEN. BUS. LAW § 399-t(2) (McKinney 2018).

with language largely dictated by statute, that must be signed by the purchaser in acknowledgement.³⁷⁶

A New York statute requires that “video tape service provider[s]” provide “informed, written consent of the consumer” prior to furnishing any “video tape services,” to give consumers the choice of whether their personally identifiable information will be disclosed.³⁷⁷ The disclosure is dictated by statute and must be made in the form of a written notice on all membership agreements in “at least ten point bold face type,” as well as posted “in full and clear view of the consumer at the point of rental transaction.”³⁷⁸

Even New York restaurants that serve margarine “in such a manner that the customer cannot identify it” must give consumers notice that reads as “[o]leomargarine served here” or “margarine served here.”³⁷⁹ The notice must be on signs readily visible by all customers or given on menus.³⁸⁰

The New York City Housing Maintenance Code contains a provision that requires landlords to disclose, in a form approved by the state division of housing and community renewal, the bedbug infestation history of both the particular unit being rented and the building.³⁸¹ The provision requires owners of multiple dwellings to provide all new and renewing tenants both the infestation history and information about preventing and dealing with bedbug infestation, or to post this information in a prominent place.³⁸²

Make no mistake, the foregoing narrow sampling of disclosure laws across the fields of education, health, environment, credit lending, real estate, housing, and even vending machines is not exhaustive; we could expand it, state-by-state, listing thousands of disclosure requirements. Each and every one of them now will have to meet strict scrutiny. The only guidance the Court provided in *NIFLA v. Becerra* was to say that it is different if it is “purely factual and uncontroversial information about the terms under which . . . services will be available.”³⁸³ However, the Court offers no criteria for determining what is “factual and uncontroversial.”

Ultimately, to satisfy its problematic hunger to upend women’s reproductive rights, the Supreme Court has placed in jeopardy count-

³⁷⁶ *Id.* § 753-c(3)(b)–(c).

³⁷⁷ *Id.* § 672(6).

³⁷⁸ *Id.*

³⁷⁹ N.Y. AGRIC. & MKTS. § 61(3)(b), (d) (McKinney 2018).

³⁸⁰ *Id.* § 61(3)(c).

³⁸¹ NEW YORK CITY, N.Y., HOUS. MAINT. CODE subch. 2, art. 4, § 27-2018.1(a) (2018).

³⁸² *Id.* § 27-2018.1(c).

³⁸³ 138 S. Ct. 2361, 2372 (2018).

less consumer protection efforts designed to benefit the elderly, children, first-time home buyers, student loan borrowers, patients, and numerous others through notifications regarding their rights. Anyone who objects to a disclosure requirement will argue that it is controversial. More importantly, the legal test to be applied is strict scrutiny. The Court has said that a disclosure law is unconstitutional so long as the government has a way of informing people that is a less restrictive alternative and that virtually always exists.

Finally, doctrines announced by the Supreme Court must be applied by lower courts. Justice Thomas's opinion in *NIFLA v. Becerra* now suggests that they must subject all of these disclosure laws to strict scrutiny. Ultimately, the Court now will need to figure out a principle for which disclosure laws are unconstitutional compelled speech and which are permissible. But until then, the Court has invited enormous litigation.

B. *Hostility to Abortion Rights*

Our central thesis is that the only way to understand the Supreme Court's decision in *NIFLA v. Becerra* is that it reflects the hostility of the Court's majority to reproductive rights and its indifference towards the rights and interests of women. The Court's abandonment of precedent, its ignoring the interests of women in receiving accurate information, its creating a content-based restriction on speech, its opening the door to challenging all disclosure laws must be seen as being about five justices being very hostile to abortion rights and thus women's reproductive health and rights.

For example, shortly after penning the Court's decision in *NIFLA v. Becerra*, expressing great solicitude for the First Amendment to protect CPCs, Justice Thomas then, in *McKee v. Cosby*, voiced deep ambivalence about speech protections in defamation cases.³⁸⁴ We find Justice Thomas's current ambivalence regarding First Amendment protections for defamation cases ironic in light of his solicitude for First Amendment rights in *NIFLA v. Becerra*.

As such, *NIFLA v. Becerra* should not only be recognized as a conceptually shortsighted and legally flawed decision, but also one that reflects a dangerous turn in the Court for which we should all be concerned. The majority's decision is not grounded in precedent as we discuss in Section II.A, nor in advancement of civil liberties, protection of civil rights, or response to Americans' views on abortion. Only eighteen percent of Americans believe abortion should be illegal in all circumstances, and seventy-nine percent support abortion rights to

³⁸⁴ See *supra* Introduction (quoting Justice Thomas's concurrence).

varying degrees with fifty percent supporting abortion in all circumstances.³⁸⁵

Rather, the decision evinces an anti-reproductive rights agenda harbored by the Court's all male, conservative guard. Consequently, protecting First Amendment interests simply serves as a fig leaf. In essence, the Court manipulates the boundaries of constitutional jurisprudence to favor their distaste for reproductive rights. Importantly, this hostility to abortion rights directly bears on women's health as discussed in Part I, and as pointed out forty-five years ago by Justice Blackmun in *Roe*.

Justice Blackmun emphasized, "[t]he detriment that the State would impose upon the pregnant woman by denying this choice" is significant.³⁸⁶ The harms to women are not secret or hidden, but rather, "altogether . . . apparent."³⁸⁷ Those harms have not been eradicated; rather, the Court exacerbates them.

The *Roe* Court sought to correct a glaring record of indifference to women and their reproductive privacy. He wrote, that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."³⁸⁸ The Court recognized that "[s]pecific and direct harm medically diagnosable even in early pregnancy may be involved" in continuing a pregnancy—whether it is intended or unintended.³⁸⁹ Justice Blackmun demonstrated great sensitivity to the real, lived lives of women:

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.³⁹⁰

Additional harms also include the shaming of pregnant women, which is alive in the Court's decision in *NIFLA v. Becerra*. When Justice Thomas proposes that California lawmakers abandon medical facilities as places to notify poor pregnant women of the medical services available to them as well as their rights and choose instead random billboards to convey this information, he makes a statement

³⁸⁵ *Abortion: Gallup Historical Trends*, GALLUP, <https://news.gallup.com/poll/1576/abortion.aspx> (last visited Aug. 21, 2018).

³⁸⁶ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Id.*

about the dignity of poor women and that they are less deserving as consumers and rights bearers.

The impression imparted by Justice Thomas and his brethren in the majority is that poor, pregnant women do not deserve immediately available information, reasonably communicated, in the dignity of the clinics that service them. Instead, they are to assemble their medical knowledge and information on the streets and boulevards. The notion that poor, pregnant women should or could roam the streets of California to ascertain their reproductive healthcare rights and discover the affordable services available to them is not only unreasonable, but also ludicrous. It is hard to read this case in any other way than the majority's inhumanity toward and contempt for poor, pregnant women.

In this way, the greatest significance of *NIFLA v. Becerra* likely will be in what it tells us about how the Court is likely to treat other laws concerning abortion and even contraception. In light of *Burwell v. Hobby Lobby Stores, Inc.*,³⁹¹ even access to contraceptive medicines could be in jeopardy for poor and working class women. For example, only months after assuming office, the Trump Administration expanded the "rights of employers to deny women insurance coverage for contraception and issued sweeping guidance on religious freedom."³⁹²

The Departments of Labor, Treasury, and Health and Human Services issued interim final rules that accommodate vague and ill-defined moral and religious objections to mandated, preventative services, including contraceptive coverage under the Patient Protection and Affordable Care Act (PPACA) otherwise known as Obamacare. The rules are so vague that in one section they refer to "items or services believed to involve abortion," failing to identify whose beliefs count in such scenarios.³⁹³

The new regulations raise the question: Is it permissible to deny women contraception so long as an employer believes it involves abortion? The Trump Administration seems to think so. The Trump Administration argues the federal government's compelling interest is in protecting the rights of businesses that articulate "religious beliefs." Therefore, their answer seems to be yes. According to the new rules,

³⁹¹ 134 S. Ct. 2751 (2014).

³⁹² Robert Pear, Rebecca R. Ruiz & Laurie Goodstein, *Trump Administration Rolls Back Birth Control Mandate*, N.Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html>.

³⁹³ Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,793 (Oct. 13, 2017) (to be codified in scattered sections of C.F.R.).

the departments may exercise their “discretion to reevaluate these . . . accommodations” and take into account “protection of the free exercise of religion in the First Amendment and by Congress in the Religious Freedom Restoration Act of 1993.”³⁹⁴

With the enactment of the new rules, which carry out President Trump’s agenda to “not allow people of faith to be targeted, bullied, or silenced anymore,”³⁹⁵ millions of women could be in serious jeopardy of losing the basic, long overdue protections mandated by the PPACA.

If regulations such as these are challenged, a case may make its way to the Supreme Court. If that happens, the law could encroach even further on contraceptive coverage.

Further, between 2011 and 2015, state legislatures adopted almost 290 new laws restricting abortion.³⁹⁶ Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito have voted to uphold every restriction on abortion that has come before them.³⁹⁷

At the very least, these Justices are certain votes to uphold the almost infinite variety of state laws that have been or will be adopted to impose restrictions on abortion and other reproductive health services. Upholding these laws will make abortion unavailable to most women in the United States even if *Roe v. Wade* is not overruled. In fact, there is nothing in the writings or opinions of Roberts, Thomas, and Alito that causes reason to doubt that they will overrule *Roe v. Wade* if given the chance. Neil Gorsuch will likely be with them.

As we put forth in previous work, in light of Justice Gorsuch’s recent appointment to the Court, “his record on women’s rights while sitting on the Tenth Circuit Court of Appeals causes deep concern,”³⁹⁸ including on issues of “contraceptive care access,”³⁹⁹ “defunding

³⁹⁴ *Id.*

³⁹⁵ Pear, Ruiz & Goodstein, *supra* note 392 (quoting President Donald Trump).

³⁹⁶ Lauren Kelley, *Nearly 400 Anti-Abortion Bills Were Introduced Last Year*, ROLLING STONE (Jan. 4, 2016, 6:27 PM), <http://www.rollingstone.com/politics/news/nearly-400-anti-abortion-bills-were-introduced-last-year-20160104> (“[S]tates adopted nearly as many abortion restrictions during the last five years (288 enacted 2011–2015) as during the entire previous 15 years (292 enacted 1995–2010).”).

³⁹⁷ See, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2321, 2330 (2016) (Thomas, J., dissenting; Alito, J., dissenting, joined by Roberts, C.J. and Thomas, J.); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding federal Partial-Birth Abortion Ban Act of 2003). *But see* *June Med. Servs., LLC v. Gee*, No. 18A774, 2019 WL 488298 (U.S. Feb. 7, 2019) (Mem.) (Chief Justice Roberts joining the majority in temporarily blocking implementation of a Louisiana abortion law virtually identical to a Texas regulation struck down by the Court in 2016).

³⁹⁸ Chemerinsky & Goodwin, *supra* note 233, at 1194.

³⁹⁹ *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1157 (10th Cir. 2013) (Gorsuch, J., concurring) (referring to the Religious Freedom Restoration Act (RFRA) as “something of a ‘super-statute’” which trumps all other legislation, including federal laws

Planned Parenthood,”⁴⁰⁰ and “discrimination against pregnant women.”⁴⁰¹ Furthermore, his “statements on privacy rights indicate

like the Affordable Care Act, which mandates contraceptive health coverage for women (quoting Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253 (1995)); see also *Little Sisters of the Poor Home for the Aged v. Burwell*, 799 F.3d 1315 (10th Cir. 2015) (then-Judge Gorsuch dissenting from a denial of en banc review, where a Tenth Circuit panel ruled that the government’s “accommodation scheme relieves [nursing home owners] of their obligations under the [Affordable Care Act’s contraceptive mandate] and does not substantially burden their religious exercise under RFRA or infringe upon their First Amendment rights.” *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1160 (10th Cir. 2015)). Even though the plaintiffs did not issue a petition for rehearing, then-Judge Gorsuch urged and voted for an en banc review of the court’s decision because he believed, as his fellow dissenting judge wrote, that the opinion was “clearly and gravely wrong.” *Little Sisters of the Poor Home for the Aged*, 799 F.3d at 1316.

⁴⁰⁰ Sitting as a judge on the Tenth Circuit Court of Appeals, then-Judge Gorsuch wrote an opinion dissenting from the denial of en banc review in a case where the circuit court upheld an injunction against Utah Governor Gary Herbert’s attempt to defund Planned Parenthood. *Planned Parenthood Ass’n v. Herbert*, 839 F.3d 1301, 1307 (10th Cir. 2016) (Gorsuch, J., dissenting). Then-Judge Gorsuch recommended an en banc rehearing in the case (although the Governor did not appeal the court’s decision). *Id.* at 1307, 1308 n.1. The court denied the en banc rehearing, and in Gorsuch’s dissent, he wrote that, “[i]f the Governor discontinued funding,” because he believed Planned Parenthood affiliated with illegal fetal tissue sellers, “as he said he did” then “no constitutional violation had taken place.” *Id.* at 1307. Troublingly, Gorsuch’s dissenting opinion gave judicial authority to Governor Herbert’s unsubstantiated claims that illegally obtained, surreptitiously filmed, and deeply edited videos purporting to show Planned Parenthood staff negotiating over fetal body parts were credible evidence against the organization. See *id.*

⁴⁰¹ Justice Gorsuch has denied claims that he has stated or indicated that women abuse maternity leave policies, thereby harming the interests of employers—and that women engage in such behavior with alarming frequency. Sean Sullivan, *Gorsuch Denies Former Student’s Allegation on Maternity Benefits Question*, WASH. POST (Mar. 21, 2017), <https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/gorsuch-denies-former-students-allegation-on-maternity-leave-question/> [https://perma.cc/UK5D-K5S9]. Specifically, when asked by Senator Richard J. Durbin (D-Ill.) whether he asked “students in class . . . to raise their hands if they knew of a woman who had taken maternity benefits from a company and then left the company after having a baby,” Gorsuch answered, “No.” *Id.* However, Justice Gorsuch refused to clarify his position as to whether he believes women abuse maternity leave policies or whether employers should be entitled to ask family planning questions that currently violate federal law. *Judge Gorsuch Confirmation Continues*, CNN: TRANSCRIPTS (Mar. 21, 2017), <http://transcripts.cnn.com/TRANSCRIPTS/1703/21/wolf.01.html> [https://perma.cc/432L-SBCD]. For example, when Senator Durbin asked, “[w]hether employee[s] should or should not make inquiries into whether an applicant or employee intends to become pregnant,” Justice Gorsuch deflected the question, quoting Socrates. *Id.* He told Senator Durbin that “it sounds like you’re asking me about a case or a controversy” and, “with all respect, when we come to cases [and] controversies, a good judge will listen.” *Id.* For a discussion of Justice Gorsuch’s former clerks’ positions on the allegations, see Arnie Seipel & Nina Totenberg, *Amid Charges by Former Law Student on Gender Equality, Former Clerks Defend Gorsuch*, NPR (Mar. 20, 2017), <http://www.npr.org/2017/03/20/520743555/former-law-student-gorsuch-told-class-women-manipulate-maternal-leave>.

enmity and opposition to women's reproductive rights."⁴⁰²

In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice Anthony Kennedy was the fifth vote to reaffirm *Roe v. Wade*.⁴⁰³ As has been widely reported, he initially voted with the conservative justices and then changed his mind and saved *Roe*.⁴⁰⁴ In 2016, in *Whole Woman's Health v. Hellerstedt*, Justice Kennedy was the fifth vote to strike down a Texas law restricting abortions that would have closed most facilities in state.⁴⁰⁵

Justice Kavanaugh has not yet participated in an abortion case on the Supreme Court. But his record as a judge on the United States Court of Appeals for the District of Columbia provides a clear indication that he is likely to be with the conservatives in abortion cases. In *Garza v. Hargan*, Judge Kavanaugh wrote a vehement dissent from an en banc decision that recognized the right of a teenager in detention custody to have access to an abortion.⁴⁰⁶ The tone of his dissent left no doubt where he stands on abortion issues. He said that the majority's decision was:

[B]ased on a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand, thereby barring any Government efforts to expeditiously transfer the minors to their immigration sponsors before they make that momentous life decision. The majority's decision represents a radical extension of the Supreme Court's abortion jurisprudence. It is in line with dissents over the years by Justices Brennan, Marshall, and Blackmun, not with the many majority opinions of the Supreme Court that have repeatedly upheld reasonable regulations that do not impose an undue burden on the abortion right.⁴⁰⁷

⁴⁰² Chemerinsky & Goodwin, *supra* note 233, at 1194–95. We have also had the opportunity to read a 1996 amicus brief written by Justice Gorsuch before he entered the bench. In the brief, Justice Gorsuch expressed that countless problems “plagued the Court's abortion jurisprudence.” Brief for the Am. Hosp. Ass'n as Amicus Curiae Supporting Petitioners, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (Nos. 96-110, 96-1858), 1996 WL 656278, at *8. He surmised that *Planned Parenthood v. Casey* was a case rooted in stare decisis rather than the Court affirmatively upholding abortion rights. *Id.* at *7 (“[T]he plurality's opinion [in *Casey*] rests at heart upon stare decisis principles, upholding the abortion right largely because of the need to protect and respect prior court decisions in the abortion field . . .”).

⁴⁰³ 505 U.S. 833 (1992).

⁴⁰⁴ See LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 203–04 (2005); Linda Greenhouse, *The Evolution of a Justice*, N.Y. TIMES MAG. (Apr. 10, 2005), <http://www.nytimes.com/2005/04/10/magazine/10BLACKMUN.html>.

⁴⁰⁵ 136 S. Ct. 2292 (2016).

⁴⁰⁶ 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

⁴⁰⁷ *Id.*

With Kennedy having retired from the Court, the law of abortion is about to change dramatically. There likely will be five votes to uphold all restrictions on abortion and to overrule *Roe v. Wade*. In this sense, *NIFLA v. Becerra* is likely a harbinger of what is to come: a Court that will treat abortion differently from other constitutional rights. Laws designed to help women exercise their rights will be unconstitutional; laws designed to limit these rights will be upheld. It is the beginning of a time of the Court gerrymandering abortion rights out of the Constitution.

CONCLUSION

In *Janus v. American Federation*, Justice Elena Kagan in dissent spoke of the Court “weaponizing the First Amendment.”⁴⁰⁸ She was referring to conservatives turning to the First Amendment to strike down economic and social regulations that they don’t like. That is exactly what happened in *NIFLA v. Becerra*: A Court majority that is hostile to reproductive rights used the First Amendment to invalidate a law that clearly should have been upheld.

There is no way to understand the Court’s decision in *NIFLA v. Becerra* other than as a reflection of the conservative Justices’ views on abortion rights. With Justice Kennedy retiring, it is likely that the Court will be upholding far more laws restricting abortion and striking down more protecting women’s reproductive rights. Almost thirty years ago, Justice Harry Blackmun wrote: “For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.”⁴⁰⁹ Above all, *NIFLA v. Becerra* shows that in 2018 that chill wind indeed blows.

⁴⁰⁸ *Janus v. Am. Fed’n of State, Cty. & Mun. Emps.*, Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

⁴⁰⁹ *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 560 (1989) (Blackmun, J., dissenting).