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Sex Equality's Irreconcilable Differences

ABSTRACT. This Feature uses recent developments in LGBTQ-equality law to unsettle sex equality's enduring commitment to biology as a basis for sex discrimination. Sex equality rejects sex discrimination when it is based on sex stereotypes, defined as gross generalizations about women and men, but not when it is based on biological differences between the sexes, like pregnancy, anatomy, and strength. Biological justifications for race discrimination—once common—have been relegated to the trash heap of history. But biological justifications for sex discrimination persist. This is so because sex equality insists that biology alone is neither a stereotype nor an expression of bigotry. Biological rationales for sex discrimination remain attractive to lower federal and state courts, and have received the Supreme Court's blessing, most recently in *Dobbs v. Jackson Women's Health Organization*. The result is a broad swath of laws across substantive areas—including family law, tort, immigration law, criminal law, property, and abortion law—that sustain sex inequality courtesy of biology and despite a fairly robust anti-stereotyping principle.

This Feature argues that sex equality's continued embrace of real differences should not survive what LGBTQ equality shows: that biologically rationalized sex discrimination is an illegal sex stereotype. It uses recent developments in LGBTQ equality surrounding sex, the body, procreation, and parenthood to unsettle sex equality's beliefs in the *reality* of biological differences between the sexes and in the *legality* of laws based on those differences. It urges sex equality to grapple with what LGBTQ equality has to say about biology and its role in lawmaking and imagines what the American law of sex might look like when it does. Biologically rationalized sex distinctions have always been sex stereotypes. It is just that now, LGBTQ equality makes those stereotypes easier to see, harder to ignore, and impossible to justify.

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INTRODUCTION

One legal doctrine tolerates criminal abortion laws on the ground that only women have abortions,¹ but a kindred doctrine recognizes that men can get pregnant²—and, by implication, have abortions.

One legal doctrine tolerates sex discrimination in federal immigration law on the ground that children cannot be born of men,³ but a kindred doctrine rejects sexual-orientation discrimination in federal immigration law on the ground that children can be “born . . . of” men.⁴

One legal doctrine tolerates female-only criminal topless bans on the ground that women have physiologically distinct “female breasts,”⁵ but a kindred doctrine recognizes that trans men can be legal males without removing their “female breasts.”⁶

The first doctrine in each scenario above is sex equality’s doctrine of real differences. The second is the law of LGBTQ equality. It is this Feature’s objective to surface the tensions between the two in the hopes of building on sex equality’s existing strengths and of actualizing its untapped potential.

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Last June, the Supreme Court relied on biology when it rejected the argument that a criminal abortion law rested on illegal sex stereotypes about women

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1. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245 (2022).
 2. *Beatie v. Beatie*, 333 P.3d 754, 755 (Ariz. Ct. App. 2014) (holding that a man did not lose his “male” legal status after giving birth to his three children).
 3. *Nguyen v. INS*, 533 U.S. 53, 62-64 (2001) (upholding sex discrimination in federal immigration law against a sex-stereotyping challenge under the Fifth Amendment’s Equal Protection Clause by appealing to the fact that only women get pregnant and bear children).
 4. *Kiviti v. Pompeo*, 467 F. Supp. 3d 293, 306-08 (D. Md. 2020) (recognizing that a child can be “born . . . of” same-sex parents through alternative reproduction for the purpose of a federal immigration law requiring that a child born overseas must be “born . . . of” married, citizen parents for U.S. citizenship to attach); *Mize v. Pompeo*, 482 F. Supp. 3d 1317, 1332 (N.D. Ga. 2020) (same).
 5. *Free the Nipple—Springfield Residents Promoting Equal. v. City of Springfield*, No. 15-3467-CV-S, 2017 WL 6815041, at *1-2 (W.D. Mo. Oct. 4, 2017) (upholding a law that defined indecent exposure to include “exposure of . . . the female breast with less than a fully opaque covering of any part of the areola or nipple,” by reasoning, in part, that “there is no denying that men’s and women’s breasts are different”).
 6. *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1312 (M.D. Ala. 2021) (holding that it is illegal sex discrimination under the Equal Protection Clause to require an individual to get certain body parts (or lose certain body parts) in order to change their legal sex on a driver’s license).

and mothers.⁷ Writing for the majority in *Dobbs v. Jackson Women's Health Organization*, Justice Alito reasoned that abortion distinctions were not even sex classifications, let alone illegal sex discrimination or sex stereotyping, because abortion was unique to women.⁸ “The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a ‘mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other,’” said Alito.⁹ In other words, because only women had abortions,¹⁰ laws criminalizing abortion were nonsex classifications subject to (and constitutional under) rational-basis review¹¹ rather than heightened scrutiny, the level of judicial review that sex classifications both warrant¹² and need to smoke out illegal sex stereotypes.¹³ *Dobbs* said something that the Court has hinted at but never said explicitly: that laws based on

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7. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245-46 (2022), *overruling* *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). *Dobbs* primarily focused on why abortion was not constitutionally protected as a matter of due process and therefore why restrictive abortion laws were subject to rational-basis review only. But in a brief paragraph, *Dobbs* dispensed with other arguments for the abortion right, including equality arguments that have informed constitutional analysis of the abortion right since *Roe v. Wade* in 1973, see Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 823 (2007), and which were made to the Court in *Dobbs*, see Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray & Reva B. Siegel as Amici Curiae in Support of Respondents at 1-5, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392), which argued that abortion is protected as a matter of constitutional equality and that the criminal abortion law at issue in *Dobbs* was motivated by illicit sex stereotypes about women and mothers.
 8. See *Dobbs*, 142 S. Ct. at 2245-46.
 9. *Id.* (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)).
 10. In actuality, of course, Justice Alito did not even say *that*, reducing “women” to the “one sex” that can have abortions. *Id.*
 11. See *id.* at 2246, 2283. The Court upheld the criminal abortion law at issue under rational-basis review based on the State’s “legitimate reasons” and indicated that “legitimate interests include respect for and preservation of prenatal life at all stages of development”; “protection of maternal health and safety”; “the elimination of particularly gruesome or barbaric medical procedures”; “the preservation of the integrity of the medical profession”; “the mitigation of fetal pain”; and “the prevention of discrimination on the basis of race, sex, or disability.” *Id.* at 2283-84.
 12. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (“Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994))).
 13. *Dobbs* held that heightened judicial review would only apply to abortion classifications if challengers could provide evidence of “invidious discrimination.” 142 S. Ct. at 2246. However, in

characteristics unique to either sex are not sex classifications within the meaning of the Constitution.¹⁴ In so doing, the Court set the stage for biology to be an even greater roadblock than it already is to meaningful judicial review of sex discrimination.

Biology has always constrained what sex-discrimination jurisprudence – or sex equality – can, or is willing to, do.¹⁵ Sex equality’s crown jewel is the anti-

sex-discrimination cases, it is the moving parts of *heightened review itself* that helps reveal invidious discrimination. See, e.g., *Craig*, 429 U.S. at 204 (holding that sex discrimination in a drinking age law “invidiously discriminates against males” because the relationship between the law and the reasons for it was “far too tenuous to . . . be substantially related to achievement of the statutory objective,” as heightened judicial review for sex classifications demands).

14. *Dobbs*, 142 S. Ct. at 2245 (referring to regulations of characteristics distinctive of “one sex” as “not . . . sex-based classification[s]” under the Equal Protection Clause). While *Dobbs* cited to footnote 20 from *Geduldig v. Aiello*, 417 U.S. 484, 496 (1974), in support of that proposition, footnote 20 never said that regulations of characteristics unique to one sex were nonsex regulations within the meaning of the Equal Protection Clause. The footnote states, in part, that “[w]hile it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . [g]iven that [n]ormal pregnancy is an objectively identifiable physical condition with unique characteristics.” *Geduldig*, 417 U.S. at 496 n.20. What *Geduldig* meant by “unique characteristics” is unclear. The State of California’s brief in *Geduldig* made a variety of uniqueness claims, including that pregnancy was “unique” compared to other medical conditions because “unlike illness or injury, pregnancy and childbirth are often viewed by women employees as a logical point at which to terminate their jobs”; that pregnancy, unlike sickness, is a “normal biologic function”; that pregnancy, unlike sickness, is “desirable” or voluntary; and that pregnancy is a “unique female condition” because only women get pregnant. See Brief for Appellant at 18-23, *Geduldig*, 417 U.S. 484 (No. 73-640), 1974 WL 185750. The footnote itself didn’t explicitly endorse any one of those uniqueness arguments. Nor has the Court clarified what *Geduldig* meant by “uniqueness” in the few decisions – seventeen – in which it has cited to *Geduldig* since 1974. See, e.g., *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 271 (1993) (citing to *Geduldig* simply for the proposition that “to disfavor [abortion] is [not] *ipso facto* to discriminate invidiously against women as a class”); see also *id.* at 327 (Brennan, J., dissenting) (“*Geduldig*, of course, did not purport to establish that, as a matter of logic, a classification based on pregnancy is gender-neutral.”). Some commentators have interpreted footnote 20 as standing for the proposition that *Dobbs* endorsed, namely, that pregnancy and abortion classifications were sex neutral because pregnancy and abortion only affected women. See, e.g., Katharine T. Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532 (1972); Linda Greenhouse, *Justice Alito’s Invisible Women*, N.Y. TIMES (May 5, 2022), <https://www.nytimes.com/2022/05/05/opinion/abortion-alito-discrimination.html> [<https://perma.cc/BC7G-J6KU>] (“*Geduldig v. Aiello* . . . held in 1974 that because pregnancy is a condition unique to women, a state could withhold equal benefits from pregnant women without violating the Equal Protection Clause.”).
15. See, e.g., Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995); Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Cary Franklin, *Biological Warfare: Constitutional Conflict over “Inherent Differences” Between the Sexes*, 2017 SUP. CT. REV. 169; Douglas NeJaime, *Bigotry in Time: Race, Sexual*

stereotyping principle,¹⁶ which condemns laws reflective of gross generalizations about the way that women and men are.¹⁷ The anti-stereotyping principle has uprooted a lot of biologically rationalized sex discrimination, but it has never gone all the way: that is, it has never condemned all biologically rationalized sex discrimination. Rather, at some point, anti-stereotyping hits a wall of “real differences between the sexes” or “inherent biological differences between the sexes,” and it stops. Those inherent differences include pregnancy and birth,¹⁸ body parts (like breasts),¹⁹ strength and stature,²⁰ violence,²¹ athletic ability,²²

Orientation, and Gender, 99 B.U. L. REV. 2651 (2019) [hereinafter NeJaime, *Bigotry in Time*]; Douglas NeJaime, *Marriage, Biology, and Gender*, 98 IOWA L. REV. BULL. 83 (2013) [hereinafter NeJaime, *Marriage, Biology, and Gender*].

16. On sex equality's anti-stereotyping principle, see Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449 (2000), which argues that sex stereotypes are never justifiable under intermediate scrutiny, the level of judicial review reserved for sex classifications; David H. Gans, *Stereotyping and Difference: Planned Parenthood v. Casey and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875, 1876 (1995), which observes that “[s]tereotyping is the central evil that the Court's equal protection doctrine seeks to prevent”; and Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 83-91 (2010), which traces the evolution of the anti-stereotyping principle in constitutional law.
17. See *Virginia*, 518 U.S. at 550 (“[G]eneralizations about ‘the way women are’ . . . no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”).
18. See *Nguyen v. INS*, 533 U.S. 53, 61 (2001) (holding that sex discrimination in federal immigration law is a constitutionally permissible reflection of the fact that only women get pregnant and give birth).
19. See *Tagami v. City of Chicago*, 875 F.3d 375, 380, 382 (7th Cir. 2017) (upholding a sex-discriminatory breast-exposure criminal law that Chicago argued was “wholly attributable to the basic physiological differences” between “female breasts” and “male breasts,” not to gross generalizations about women, modesty, and femininity).
20. See, e.g., *State v. Wright*, 563 S.E.2d 311, 315 (S.C. 2002) (holding that the aggravating circumstance of a “difference in the sexes” in the offense of criminal domestic violence was not an illegal sex stereotype under the Equal Protection Clause because “it is a matter of common knowledge, and a proper subject for judicial notice, that women, as a general rule, are of smaller physical stature and strength than are men” (quoting *Buchanan v. State*, 480 S.W.2d 207, 209 (Tex. Crim. App. 1972))).
21. See *DuPont v. Comm’r of Corr.*, 861 N.E.2d 744, 753 (Mass. 2007) (holding that a prison regulation requiring male prisoners to be in special detention for certain in-prison offenses but exempting female prisoners who commit those same in-prison offenses was not impermissible sex discrimination because male inmates have a greater propensity for violence than female inmates).
22. See, e.g., *Bauer v. Lynch*, 812 F.3d 340, 350 (4th Cir. 2016) (holding that a gender-normed physical-fitness test, which required different levels of physical fitness for male and female applicants for a position within the Federal Bureau of Investigation (FBI), was not a sex clas-

parental bonding,²³ parental identification,²⁴ and some parental responsibilities, both before and after a child is born.²⁵ If a law treats women and men differently because of these differences, it is usually upheld on the ground that biology is real, as opposed to being a stereotype or a manifestation of bigotry.²⁶ As one court recently put it: laws based on “physical differences *between* men and women” are not “stereotypes *about* men and women.”²⁷ Biological justifications for race discrimination—once common²⁸—are now universally condemned as

sification because of “physiological differences between the sexes”); *Clark v. Ariz. Interscholastic Ass’n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (upholding a school’s rejection of a male student’s request to compete on the female volleyball team given that “there is no question that the Supreme Court allows for . . . average real differences between the sexes to be recognized [and] . . . they allow gender to be used as a proxy in this sense if it is an accurate proxy”). *But see Case*, *supra* note 16, at 1449–50 (observing that “the assumption at the root of the sex-respecting rule must be true of either all women or no women or all men or no men; there must be a zero or a hundred on one side of the sex equation or the other”).

23. See *In re Adoption of J.S.*, 358 P.3d 1009, 1030–31 (Utah 2014) (stating that an unwed mother’s connection to her child is objectively established by her decision “to carry the child to term,” whereas “[a]n unwed father’s role is inherently different”); *In re Adoption of A.K.O.*, 250 So. 3d 1097, 1099 (La. Ct. App. 2018) (Moore, J., concurring) (quoting *In re Adoption of J.S.* in stating that “[a]n unwed mother’s connection to her child is objectively apparent,” whereas an unwed father’s connection is “inherently different”).
24. *Stennett v. Miller*, 245 Cal. Rptr. 3d 872, 890 (Ct. App. 2019) (“The mother carries the baby to term and gives birth; the father does not. Only a mother’s parental relationship is established at birth.”).
25. For the law’s differential treatment of fathers and mothers during pregnancy because of real differences, see David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309, 311–12 (2019), which argues that “the Supreme Court has decided that pregnancy is an event almost exclusively for women and has therefore assumed that caregiving during pregnancy is almost exclusively for women too.” For the law’s differential treatment of fathers and mothers after pregnancy because of real differences, see, for example, *Grimes v. Van Hook-Williams*, 839 N.W.2d 237, 245 (Mich. Ct. App. 2013), in which the court concluded that a mother’s care work “during the infant’s first weeks of life” is the product of “genuinely differentiating characteristics” between mothers and fathers.
26. See NeJaime, *Bigotry in Time*, *supra* note 15, at 2652–54 (observing that courts do not condemn judgments about sex differences as bigoted in the same way that they would condemn judgments about race differences as bigoted).
27. *Eline v. Town of Ocean City*, 452 F. Supp. 3d 270, 281 (D. Md. 2020) (making this distinction when upholding a sex-discriminatory criminal breast law against a sex-stereotyping challenge (emphasis added)).
28. See, e.g., *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955) (upholding Virginia’s criminal antimiscegenation law, in part, by finding that Virginia’s interests in preventing the “corruption of blood,” in preserving “the racial integrity of its citizens,” and in preventing “a mongrel breed of citizens” were legitimate under the Constitution); *Scott v. State*, 39 Ga. 321, 323 (1869) (“The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are

expressions of racism and bigotry.²⁹ By contrast, courts regularly tolerate biological justifications for sex discrimination as constitutionally innocuous expressions of fact. Even anti-stereotyping landmarks that reject biological rationales on anti-stereotyping grounds carve out space for some biologically rationalized sex distinctions to remain.³⁰

This Feature argues that sex equality's juggling act between anti-stereotyping and real differences should not survive what an allied doctrine increasingly shows: that biologically rationalized sex discrimination *is* a sex stereotype – all the way down. That allied doctrine is LGBTQ equality, defined as the statutory and constitutional law addressing the rights of people who depart from sex and gender norms. Using recent developments in LGBTQ equality surrounding sex, the body, procreation, and parenthood, this Feature unsettles sex equality's beliefs in the *reality* of biological differences between the sexes and in the *legality* of laws based on those differences. It urges sex equality to grapple with what LGBTQ equality has to say about biology and its role in lawmaking and imagines what the American law of sex might look like when it does.

Anti-stereotyping and real differences have always been in conflict. For example, the anti-stereotyping principle prohibits laws that overgeneralize about men and women;³¹ laws that treat men and women differently when they are, in

generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race.”); *State v. Jackson*, 80 Mo. 175, 179 (1883) (stating that it is “a well authenticated fact that if . . . a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny,” and that “such a fact” justifies civil and criminal bans on “the intermarriage of blacks and whites”); *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (upholding a criminal Jim Crow law, in part, by reasoning that “[l]egislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation”), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

29. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (characterizing Virginia's reasons for criminalizing interracial relationships, including its biological reasons for doing so, as unconstitutional expressions of White Supremacy).
30. See, e.g., *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) (suggesting that physiological justifications were sometimes a constitutionally permissible reason to discriminate on the basis of sex but rejecting the physiological justification for sex discrimination in that case); *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1694 (2017) (striking down a sex classification similar to the one at issue in *Nguyen* on sex-stereotyping grounds but leaving undisturbed *Nguyen's* basic insights on pregnancy and birth).
31. *Virginia*, 518 U.S. at 550 (defining stereotypes as “generalizations about ‘the way women are,’ [and] estimates of what is appropriate for *most women*”).

fact, the same;³² laws that prioritize groups over individuals;³³ and laws that look backward rather than forward in time to determine whether sex discrimination is legal today.³⁴ Biologically rationalized sex discrimination does all of the above, and yet, sex equality continues to insist that laws based on real differences are not sex stereotypes.³⁵

Similarly, the anti-stereotyping principle prohibits laws that reflect and reproduce social judgments about men and women, but biologically rationalized

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32. *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (observing that employers engage in illegal sex stereotyping when they grant leave to new mothers but not to new fathers even when mothers and fathers are equally capable of caring for children).
33. *Virginia*, 518 U.S. at 550 (defining sex stereotypes as “estimates of what is appropriate for *most women*”); *id.* at 517 (holding that the “constitutional violation in this case is the categorical exclusion of women, in disregard of their individual merit, from an extraordinary educational opportunity afforded men”); *City of Los Angeles v. Manhart*, 435 U.S. 702, 702-03 (1978) (holding that an illegal sex stereotype under federal antidiscrimination law is a law or policy that overlooks individual differences, including individual differences that are true in the aggregate); *Manhart*, 435 U.S. at 708 (“Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.”).
34. *Sessions*, 137 S. Ct. at 1692 (“The classification must substantially serve an important governmental interest *today*, for ‘new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.’” (quoting *Obergefell v. Hodges*, 576 U.S. 644, 673 (2015))).
35. For example, real-differences arguments for sex discrimination and sex separatism overgeneralize about male and female bodies and their capabilities. *See, e.g.*, *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (upholding the exclusion of males from a female volleyball team based on “average physiological differences” between men and women, even though the anti-stereotyping principle condemns sex classifications rooted in averages). Moreover, real-differences arguments treat men and women as different when they are, in fact, similarly situated. *See, e.g.*, *Fontana & Schoenbaum*, *supra* note 25, at 311-12 (arguing that “the Supreme Court has decided that pregnancy is an event almost exclusively for women and has therefore assumed that *caregiving during pregnancy is almost exclusively for women too*,” even though expectant fathers are fully capable of doing that work (emphasis added)). Likewise, real-differences arguments for sex discrimination ignore exceptional cases. *See, e.g.*, *Nguyen v. INS*, 533 U.S. 53, 53-54 (2001) (rejecting an unwed father’s sex-discrimination claim by reasoning that most fathers’ biological and social connections to their children were unclear, despite the fact that Joseph Boulais, the father in *Nguyen*, was his son’s primary caretaker and had a DNA test confirming his paternity). For a critique of *Nguyen*’s abandonment of the anti-stereotyping principle’s individualist focus, see Kenji Yoshino, *Sex Equality’s Inner Frontier: The Case of Same-Sex Marriage*, 122 *YALE L.J.F.* 275, 277-78 (2013), which argues that the reasoning in *Nguyen* “problematically ignores the Court’s prior analysis [in *United States v. Virginia*]” because it overlooks the fact that “if even one man were capable of meeting the [government’s] standards of conferring automatic citizenship (i.e., knowing and bonding with his child), then no man should be denied the opportunity to do so.” Finally, real-differences arguments look to tradition to determine whether a sex distinction is legal today. *See, e.g.*, *State v. Lilley*, 204 A.3d 198, 208 (N.H. 2019) (upholding a criminal topless ban against a sex-stereotyping challenge by reasoning that “men and women are not fungible with respect to the *traditional understanding* of what constitutes nudity” (emphasis added)).

sex discrimination allows social judgments about men and women to flourish in plain sight.³⁶ For example, the Supreme Court has condoned laws that assume that fathers have less robust connections to their children at birth than mothers—a social judgment—by casting those laws as neutral expressions of a biological fact, namely, the fact that no man can give birth.³⁷

Likewise, the anti-stereotyping principle condemns laws that create “self-fulfilling prophecies”³⁸ about men and women, but laws rooted in real differences create self-fulfilling prophecies about men and women. For example, real differences helps explain why federal employment law provides leave protection to expectant mothers but not to expectant fathers to attend parenting classes and prenatal appointments.³⁹ However, leave protection for mothers but not fathers to engage in caretaking before pregnancy leads to “[s]tickily behaviors marking women as caregivers and men as providers” well after pregnancy is over, as David Fontana and Naomi Schoenbaum argue.⁴⁰ Similarly, real differences is one of the reasons for female-only criminal topless bans,⁴¹ but female-only criminal topless bans make us see women’s bodies—and women generally—as inherently sexual.⁴² In both of those examples, it is the logic of real differences that ends up creating the very differences that the anti-stereotyping principle ought to reach.⁴³

36. See, e.g., Siegel, *supra* note 15, at 271-72 (“The naturalistic framework in which the Court reasons about reproductive regulation obscures questions concerning its normative content that would be the central focus of doctrinal inquiry if the Court recognized that reproductive regulation concerned matters of gender, and not merely physiological sex.”).

37. *Nguyen*, 533 U.S. at 62-63.

38. See *Mississippi v. Hogan*, 458 U.S. 718, 730 (1982) (rejecting the categorical exclusion of men from a state nursing program on sex-stereotyping grounds and reasoning that the school’s “admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy”); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994) (stating that constitutional sex equality prohibits state actors from relying on “overbroad” generalizations to make “judgments about people that are likely to . . . perpetuate patterns of discrimination”).

39. See Fontana & Schoenbaum, *supra* note 25, at 336-42 (cataloging these laws).

40. See *id.* at 313.

41. See *infra* notes 59-71 and accompanying text.

42. See, e.g., *Tagami v. City of Chicago*, 875 F.3d 375, 383 (7th Cir. 2017) (Rovner, J., dissenting) (arguing that criminal topless bans shape the way that we see and treat women).

43. See Franke, *supra* note 15, at 1-2 (arguing that sex equality’s acceptance of real biological difference as a valid basis for sex discrimination “explains why sex discrimination laws have been relatively ineffective in dismantling profound sex segregation in the labor market, in shattering ‘glass ceilings’ that obstruct women’s entrance into the upper echelons of corporate management, and in increasing women’s wages, which remain a fraction of those paid men” (footnotes omitted)).

While always in tension with sex equality's anti-stereotyping principle, real differences is increasingly in tension with LGBTQ equality. For years, real differences stymied LGBTQ equality. Transgender people could be denied marital, parental, and employment rights because their biology did not fit their gender identity.⁴⁴ Individuals could not change their legal sex on official documents like birth certificates because sex was immutable.⁴⁵ Same-sex couples could not legally engage in consensual sex nor marry because they could not procreate with each other.⁴⁶

Increasingly, however—and in some contexts, overwhelmingly—LGBTQ equality is unsettling real differences. It is doing so in two ways. First, LGBTQ equality is upending the reality of real differences by recognizing phenomena—like pregnancies in men,⁴⁷ children being “born . . . of” two women or two men,⁴⁸ and nonbinary sex designations⁴⁹—that real-differences arguments overlook. Second, LGBTQ equality is unsettling the legality of real differences by rejecting biological justifications for LGBTQ discrimination, often on sex-stereotyping grounds that carry forward the anti-stereotyping principle to new terrain: discrimination based on “biology *alone*.”⁵⁰ For example, defenders

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44. See, e.g., *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (rejecting a transgender employee's sex-discrimination claim under Title VII in part because it was unclear medically whether the plaintiff “is properly classified as male or female”); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (denying a transgender employee's sex-discrimination claim under Title VII in part because Title VII protected men and women and plaintiff was neither, and questioning whether “a woman can be so easily created from what remains of a man”).
45. See, e.g., *Littleton v. Prange*, 9 S.W.3d 223, 224, 231 (Tex. App. 1999) (ruling that Texas did not recognize legal-sex changes because biological sex was “immutably fixed by [the] Creator at birth”).
46. See, e.g., *Singer v. Hara*, 522 P.2d 1187, 1189, 1195 (Wash. Ct. App. 1974) (ruling that a same-sex marriage prohibition was not unconstitutional sex discrimination because marriage is “the appropriate and desirable forum for procreation and the rearing of children”).
47. See *Beatie v. Beatie*, 333 P.3d 754, 760-61 (Ariz. Ct. App. 2014) (holding that a man did not lose his “male” legal status after giving birth to his three children).
48. See, e.g., *Mize v. Pompeo*, 482 F. Supp. 3d 1317, 1336 (N.D. Ga. 2020) (holding that a child born overseas to two married men, both U.S. citizens, could be “born . . . of” them under a federal law extending U.S. citizenship to children born overseas to married U.S. citizens); *Kiviti v. Pompeo*, 467 F. Supp. 3d 293, 307-08 (D. Md. 2020) (same).
49. See, e.g., *Zzyym v. Pompeo*, 958 F.3d 1014, 1017-18 (10th Cir. 2020); see also Colleen Slevin, *United States Issues Its 1st Passport with ‘X’ Gender Marker*, ASSOCIATED PRESS (Oct. 27, 2021), <https://apnews.com/article/us-passports-x-gender-designation-2c29e18fc6566d549b9a06fd0857602> [<https://perma.cc/6B38-QQJD>] (announcing that the United States has begun to issue passports with a gender “X” designation).
50. See, e.g., *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 715 (D. Md. 2018) (rejecting a school board's contention that transgender discrimination “based on biology alone”

of transgender bathroom bans have argued that the bans are not sex stereotypes because they discriminate because of “*physiology, period*,”⁵¹ and because the Supreme Court has held that discrimination for purely physiological reasons is beyond the reach of the anti-stereotyping principle.⁵² In response, courts have held that discrimination due to “*physiology, period*” violates sex equality because it overgeneralizes about male and female anatomy and fails to treat individuals as

was not an illegal sex stereotype and reasoning that such an argument “is unavailing because [it] define[s] gender stereotyping too narrowly” (emphasis added)). The Supreme Court has never definitively said that discrimination based on biology per se is a sex stereotype. Of course, there are decisions that gesture in that direction. *See, e.g., United States v. Virginia*, 518 U.S. 515, 533-34 (1996) (rejecting the State’s contention that barring women from a military academy was not a sex stereotype because no woman could satisfy the academy’s physical demands, and reasoning that if even one woman were capable of satisfying those demands, then it was a sex stereotype to exclude her); *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 738-40 (2003) (recognizing that “state practices [that] continue to reinforce the stereotype of women as caregivers” once pregnancy ends—including policies denying employment leave for new fathers—violated the Constitution’s Equal Protection Clause). However, neither *Virginia* nor *Hibbs* fully endorsed the idea that sex difference is as socially constructed as race difference. *Hibbs* was limited to sex discrimination *after* the biological process of pregnancy was over. Moreover, only five years after *Virginia*, the Supreme Court said in *Nguyen v. INS* that ignoring real differences between the sexes would offend constitutional sex equality. *See* 533 U.S. 53, 73 (2001). Since *Nguyen* was decided in 2001, dozens of lower and state courts have relied on it—and on real-differences justifications more generally—to uphold sex distinctions, even when those distinctions violate the anti-stereotyping principle’s condemnation of gross generalizations that neglect individual or exceptional cases. *See, e.g.,* Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. 2221, 2223-24 (2020) (collecting these cases); Kristin A. Collins, *Equality, Sovereignty, and the Family in Morales-Santana*, 131 HARV. L. REV. 170, 195 (2017) (“*Nguyen* became a resource for lawyers defending the gender-based regulation of parentage and, more generally, the family.”).

51. A school board repeatedly made this argument during the five-year *Grimm v. Gloucester County School Board* litigation. *See, e.g.,* Brief in Support of Motion to Dismiss Amended Complaint at 20, *Grimm v. Gloucester Cnty. Sch. Bd.*, 400 F. Supp. 3d 444 (E.D. Va. 2019) (No. 15-cv-54), 2017 WL 11408395 (arguing that a policy prohibiting a transgender boy from using the men’s restroom was not sex stereotyping under Title IX because “the policy designates multiple-stall restrooms and locker rooms based on *physiology, period*—regardless of how ‘masculine’ or ‘feminine’ a boy or girl looks, acts, talks, dresses, or styles their hair”); *id.* (arguing that “it makes no sense to say that distinguishing boys from girls on the basis of *physiological or anatomical characteristics* amounts to prohibited sex ‘stereotyping’”); Brief in Support of Amended Motion to Dismiss Amended Complaint at 21-22, *Grimm*, 400 F. Supp. 3d 444 (No. 15-cv-54), 2018 WL 9458271 (same); Brief in Support of Gloucester County School Board’s Motion for Summary Judgment at 25, *Grimm*, 400 F. Supp. 3d 444 (No. 15-cv-54), 2019 WL 4061215 (same).
52. *See, e.g.,* Brief in Support of Motion to Dismiss Amended Complaint, *supra* note 51, at 19 (relying on Supreme Court decisions addressing real differences for the proposition that “[p]hysiological differences between men and women are real ones” and that laws based on those differences are constitutional).

individuals, with both effects prohibited by the anti-stereotyping principle.⁵³ As one court put it, anti-stereotyping protections reach “the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,”⁵⁴ whether the stereotypes are gross generalizations about social roles or gross generalizations about the body.

This Feature argues that these developments in LGBTQ equality matter for sex equality because sex equality and LGBTQ equality matter for each other. They came of age together in the 1960s and 1970s, when second-wave feminists and gay liberationists “revolt[ed] against the [same] sex-role structure,”⁵⁵ at times “join[ing] together and publicly affirm[ing] their shared commitment to eradicating sex-role stereotyping.”⁵⁶ They deal with statuses (sex, sexual orientation, and gender identity) and forms of discrimination (sex, sexual-orientation, and gender-identity discrimination) that interrelate, as the Supreme Court recognized when it held in *Bostock v. Clayton County* that sexual-orientation and transgender discrimination is illegal sex discrimination under federal employment law.⁵⁷ They overlap doctrinally, especially since *Bostock* prompted dozens of lower and state courts to find that LGBTQ discrimination is illegal *because* it is sex discrimination.⁵⁸

This Feature asks: Given the historical, conceptual, and doctrinal connections between sex equality and LGBTQ equality, how can sex equality credit the

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53. See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618–19 (4th Cir. 2020) (holding that transgender bathroom assignments are illegal sex stereotypes under Title IX because they “rely on [a school’s] own discriminatory notions of what ‘sex’ means”); *id.* at 609–10 (reasoning that biologically rationalized transgender discrimination in bathroom access was an illegal sex stereotype because it relied on “overbroad generalizations” about the sexes and “stereotypic notions” of the fixed roles of men and women).
 54. *M.A.B.*, 286 F. Supp. 3d at 715.
 55. Franklin, *supra* note 16, at 163 (quoting Martha Shelley, *Gay Is Good*, RAT (Feb. 24, 1970), reprinted in *OUT OF THE CLOSETS: VOICES OF GAY LIBERATION* 31, 32 (Karla Jay & Allen Young eds., 1972)).
 56. *Id.* at 118.
 57. 140 S. Ct. 1731, 1741–43 (2020).
 58. See, e.g., *Rouch World, LLC v. Dep’t of C.R.*, No. 162482, 2022 WL 3007805, at *11, *15 (Mich. July 28, 2022) (holding that discrimination on the basis of sexual orientation was illegal sex discrimination under a state public-accommodation law and relying on *Bostock* in support of that holding); *Hobby Lobby Stores, Inc. v. Sommerville*, 186 N.E.3d 67, 82 (Ill. App. Ct. 2021) (citing *Bostock* in holding that transgender discrimination is illegal sex discrimination under state employment and public-accommodations laws); *N.H. v. Anoka-Hennepin Sch. Dist.* No. 11, 950 N.W.2d 553, 570, 572 (Minn. Ct. App. 2020) (relying on *Bostock* to hold that transgender discrimination is illegal sex discrimination under the Minnesota constitution). In addition, President Biden appealed to *Bostock* in his sweeping executive order declaring LGBTQ discrimination to be illegal sex discrimination under federal law. See Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

law and logic of real differences when LGBTQ equality disrupts the law and logic of real differences? If sex equality and LGBTQ equality are *fundamentally* about sex, then how can sex equality condone biological justifications for sex discrimination as something other than sex stereotypes when LGBTQ equality shows that biological justifications for LGBTQ discrimination *are* sex stereotypes? If sex equality and LGBTQ equality are of a piece, then how can sex equality conceptualize biology and biologically rationalized sex discrimination *in one way* and LGBTQ equality conceptualize biology and biologically rationalized LGBTQ discrimination *in a different way*?

Consider the Introduction's third scenario, which juxtaposed sex equality's approach to issues of body regulation and LGBTQ equality's approach to issues of body regulation. Every state and thousands of localities have laws and regulations that penalize females, often as young as ten,⁵⁹ for being topless in every space imaginable, including on beaches,⁶⁰ in adult entertainment clubs,⁶¹ in the water,⁶² in forests,⁶³ and *at home*.⁶⁴ In 2017, the Seventh Circuit upheld Chicago's

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59. For example, a Gainesville, Florida, public-nudity law provides that it is “unlawful for any person to knowingly, intentionally, or recklessly appear, or cause another person to appear, nude in a public place or in any other place which is readily visible to the public,” defines nudity differently for men and women, and defines “person” as “[a]ny live human being aged ten (10) years of age or older.” GAINESVILLE, FLA., ORDINANCES ch. 17, § 13 (2022). The Gainesville City Commission recently considered repealing this portion of its public-nudity law as part of a larger effort to replace all gender-specific terms in the city code with gender-neutral terms. The larger effort to gender-neutralize the city code succeeded—but not with respect to the public-nudity statute. See *infra* notes 379-384 and accompanying text.
60. See, e.g., *Eline v. Town of Ocean City*, 7 F.4th 214, 221, 224 (4th Cir. 2021); *State v. Lilley*, 204 A.3d 198, 216-17 (N.H. 2019).
61. See, e.g., *City of Jackson v. Lakeland Lounge*, 688 So.2d 742, 743 (Miss. 1996).
62. See, e.g., *City of Seattle v. Buchanan*, 584 P.2d 918, 918-19 (Wash. 1978).
63. See, e.g., GAINESVILLE, FLA., ORDINANCES ch. 17, § 13 (2022).
64. See *Utah v. Buchanan*, Civ. No. 191901507, at 14 (Utah Dist. Ct. Jan. 19, 2020) (upholding criminal lewdness conviction of a woman who was topless in front of her stepchildren, in part by rationalizing sex distinction in criminal lewdness law as a reflection of real biological differences between female and male breasts). For a collection of criminal topless laws, see Courtney Megan Cahill, *Equality or Bust* (unpublished manuscript) (on file with author), which collects and catalogues these laws. In 2020, Utah resident Tilli Buchanan was charged with “lewdness involving a minor” after her stepchildren saw her and her husband bare-chested before entering the shower. With the help of the ACLU, Buchanan challenged the law under which she was charged on constitutional sex-equality grounds, arguing that it violated the Equal Protection Clause’s command that similarly situated individuals, like Buchanan and her husband, be treated the same. The trial court rejected her argument, reasoning that the challenged law was “rooted in physical differences between the sexes” and “reflect[ed] contemporary community standards regarding nudity.” See, e.g., *Buchanan*, Civ. No. 191901507, at 13. Rather than take her case further, Buchanan took a deal under which she admitted to

topless law as a valid expression of real differences between male breasts and female breasts,⁶⁵ relying, in part, on the Supreme Court's recognition in *United States v. Virginia* that “[p]hysical differences between men and women . . . are enduring.”⁶⁶ In so doing, the Seventh Circuit joined dozens of state and federal courts that have upheld female-only topless bans over the past fifty years by reasoning that women's breasts are socially different because they are physically different,⁶⁷ either because of “the size of the [female] breast”⁶⁸ or because the female breast, unlike the male breast, is “a mammary gland”⁶⁹ that (somehow) serves a “procreative function.”⁷⁰ Even the exceedingly few courts that have struck down topless laws on stereotyping grounds acknowledge that male and female breasts are physically different and that laws based purely on biological difference are constitutional. For these courts, criminal topless laws are not

being topless in front of her stepchildren and paid a six-hundred-dollar fine in return for avoiding the most severe consequences of her offense, including a one-year jail sentence and mandatory sex-offender registration. See Maria Cramer, *Utah Judge Rules Against Woman Who Was Topless in Her Own Garage*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/01/22/us/tilli-buchanan-topless-utah.html> [<https://perma.cc/LK5N-RAPT>].

65. *Tagami v. City of Chicago*, 875 F.3d 375, 380 (7th Cir. 2017).
66. *Id.* at 380 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).
67. For state and federal courts that have upheld the constitutionality of female-only topless bans, typically on some combination of real differences and morality, see *Eline v. Town of Ocean City*, 7 F.4th 214, 221 (4th Cir. 2021); *State v. Lilley*, 204 A.3d 198 (N.H. 2019); *Free the Nipple—Springfield Residents Promoting Equality v. City of Springfield*, 923 F.3d 508 (8th Cir. 2019); *Ways v. City of Lincoln*, 331 F.2d 596 (8th Cir. 2003); *State v. Vogt*, 775 A.2d 551 (N.J. Super. Ct. App. Div. 2001); *Buzzetti v. City of New York*, 140 F.3d 134 (2d Cir. 1998); *City of Tucson v. Wolfe*, 917 P.2d 706 (Ariz. Ct. App. 1995); *Schleuter v. City of Fort Worth*, 947 S.W.2d 920 (Tex. App. 1997); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1256 (5th Cir. 1995); *J & B Soc. Club #1 Inc. v. City of Mobile*, 966 F. Supp. 1131 (S.D. Ala. 1996); *United States v. Biocic*, 928 F.2d 112 (4th Cir. 1991); *Craft v. Hodel*, 683 F. Supp. 289 (D. Mass. 1988); *City of Seattle v. Buchanan*, 584 P.2d 918 (Wash. 1978) (en banc); *Eckl v. Davis*, 124 Cal. Rptr. 685 (Ct. App. 1975); *State v. Turner*, 382 N.W.2d 252, 256 (Minn. Ct. App. 1986); *City of Albuquerque v. Sachs*, 92 P.3d 24 (N.M. Ct. App. 2004); *City of Jackson v. Lakeland Lounge*, 688 So.2d 742 (Miss. 1996); and *MJR's Fare of Dallas v. City of Dallas*, 792 S.W.2d 569, 575 (Tex. App. 1990). For an example of where a court struck down a female-only topless ban on constitutional-equality grounds, see *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 807 (10th Cir. 2019).
68. *Vogt*, 775 A.2d at 558 (recognizing that “the size of the [female] breast exposed” partially accounts for the “male-female distinction” in a criminal topless ban, even while also recognizing that “one could infer from the photographs admitted at trial some men are more full breasted than some women”).
69. *MJR's Fare of Dallas*, 792 S.W.2d at 575.
70. *Buchanan*, 584 P.2d at 920-22 (upholding a criminal topless ordinance against a sex-discrimination challenge by reasoning that the ordinance “applie[d] alike to men and women, requiring both to cover those parts of their bodies which are intimately associated with the procreation function”). Clearly, breasts themselves do not serve a “procreative function,” even if they are used after procreation to nourish an infant.

grounded in real differences, but if they were, they would pass constitutional muster.⁷¹

The same year that the Seventh Circuit ruled that Chicago's topless regulation was a valid expression of real differences, Illinois passed a law eliminating the requirement that people change their bodies—including their breasts—to change their legal sex.⁷² Since then, more states have joined Illinois in eliminating surgical requirements for legal-sex changes to official documents like birth certificates.⁷³ In some cases, courts have enjoined enforcement of surgical requirements that remain on the books by strongly suggesting that they constitute illegal sex stereotyping under the Equal Protection Clause.⁷⁴ One court, for instance, recently ruled that Alabama's surgical requirements for driver's license changes likely violated the Constitution's prohibition of sex discrimination because those requirements imposed the State's understanding of sex on private individuals, "denying [those individuals] the ability to decide their sex for themselves instead of being told who they [we]re by the State."⁷⁵ The court noted that anti-stereotyping landmarks like *United States v. Virginia* and *Sessions v. Morales-Santana* prohibited laws that "'rely on overbroad generalizations' about the roles and attributes of men and women," and reasoned that surgical requirements fell into that category because they overgeneralized about male bodies and female bodies.⁷⁶ In so doing, the court rejected the State's bid to view the surgical requirements as simple expressions of real biological differences between the sexes, which, the State urged, were constitutionally valid under existing Supreme Court jurisprudence.⁷⁷

LGBTQ equality disrupts states' arguments that topless bans are constitutional reflections of physical differences between the sexes—arguments that

71. See, e.g., *Free the Nipple—Fort Collins v. City of Fort Collins*, 237 F. Supp. 3d 1126, 1130, 1132 (D. Colo. 2017) (stating that "the most obvious difference is that female breasts have the potential to nourish children, whereas male breasts do not" and recognizing that laws based on real differences are constitutional so long as they do not express outmoded sex stereotypes), *aff'd*, 916 F.3d 792 (10th Cir. 2019).

72. Ray Duval & Arli Christian, *Congratulations, Illinois! A New Law Improves Access to Accurate Birth Certificates*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Sept. 1, 2017), <https://medium.com/transequalitynow/congratulations-illinois-a-new-law-improves-access-to-accurate-birth-certificates-631a718e952d> [<https://perma.cc/W8TL-B9JR>] (discussing HB 1785, which revises the Illinois Vital Records Act to allow transgender and intersex people to update their birth certificates without surgery).

73. See *infra* notes 229–230 and accompanying text (listing these states).

74. See *infra* notes 229–250 and accompanying text.

75. *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1315 (M.D. Ala. 2021).

76. *Id.* at 1315–17 (quoting *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1684 (2017)).

77. See Defendants' Brief in Support of Their Motion for Summary Judgment at 45, *Corbitt*, 513 F. Supp. 3d 1309 (No. 18-cv-91), 2019 WL 690376.

courts credit.⁷⁸ First, sex-change jurisprudence (an LGBTQ-equality issue) establishes that people do not have to lose breasts or get breasts to change their legal sex. As such, how can topless jurisprudence (a sex-equality issue) assure that breasts always track legal sex? Of course, breasts have never invariably tracked legal sex: many men have “female-looking” breasts, and many women have “male-looking” breasts. But to the extent that LGBTQ equality now recognizes as a matter of law that breasts and sex do not invariably align, how can sex equality insist that they do? Does LGBTQ equality not make *an already gross generalization* about male and female anatomy *grosser*?⁷⁹ And in doing that, does it not help us see what we already know: that criminal topless bans are policing not breasts but women,⁸⁰ which, according to the philosopher Kate Manne, is the very definition of misogyny?⁸¹

Second, legal-sex-change jurisprudence suggests that it is a sex stereotype for the state to craft legal rules with coercive effects around the state’s understanding of the relationship between sex and bodies. If that is right, then why isn’t it a sex stereotype for the state to enact topless bans with coercive effects that codify the state’s understanding of male and female breasts? The analogy might not be perfect, but it is close enough for us to wonder why sex equality tolerates actions that LGBTQ equality condemns on anti-stereotyping grounds.

The point is that when we juxtapose sex equality and LGBTQ equality in this way—which the dialogic and intersectional relationship between sex equality

78. See, e.g., *Eline v. Town of Ocean City*, 382 F. Supp. 3d 386, 388-89 (D. Md. 2018) (quoting the topless law’s “legislative findings” that there is an “indisputable difference” between male and female breasts and that “[t]he equal protection clause does not demand that things that are different in fact be treated the same in law, nor that a government pretend there are no physiological differences between men and women”).

79. Sex stereotypes include gross generalizations about how women and men are as well as gross generalizations about how women and men should be. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 119 (2d Cir. 2018) (stating that sex stereotypes include judgments about “both how the sexes are and how they should be”).

80. To be clear, court decisions about topless bans often *acknowledge* that these laws police women. But they *justify* that policing by relating it back to physical differences, reasoning that society sexualizes women’s breasts only because women’s breasts look different (or in some cases, function differently) from men’s breasts—not because society wants to sexualize women, control women, mark them as other, or keep them down. In this sense, criminal breast laws (and jurisprudence) track other real-differences arguments, which immunize otherwise unconstitutional social judgments about men and women by adorning them in the patois of biology. See generally Siegel, *supra* note 15 (finding that the Court’s framing of reproductive regulation as being grounded in biological differences between the sexes obscures the reality that such regulation may be informed by constitutionally illicit judgements about women); NeJaime, *Marriage, Biology, and Gender*, *supra* note 15, at 92 (arguing that biological preferentialism functions to preserve normative arguments about sex rules in the parenting context).

81. See KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY* 13 (2017) (describing misogyny as the policing arm of sexism).

and LGBTQ equality would seem to require – then it becomes easier to see and harder to ignore the problems with all real-differences justifications for sex discrimination. Radical feminists and queer theorists have long argued that biological justifications for sex difference and sex discrimination are sex stereotypes because culture always shapes our understanding of biological categories.⁸² As Katherine M. Franke wrote more than two decades ago, “By accepting these biological differences, equality jurisprudence reifies as foundational *fact* that which is really an *effect* of normative gender ideology.”⁸³ Agreeing with Franke’s argument, this Feature uses recent developments in the law of LGBTQ equality to make those stereotypes more visible and less defensible.

The remainder of this Feature unfolds in four Parts. Part I describes the two faces of contemporary sex equality – real differences and anti-stereotyping – and identifies the tensions between them. Part II summarizes the relationship between biology and LGBTQ equality both historically and today. It shows that historically, biological arguments constrained LGBTQ equality, whereas today, LGBTQ equality is constraining biological arguments, often by conceptualizing biologically rationalized LGBTQ discrimination as a sex stereotype. Part III argues that sex equality’s continued allegiance to real differences cannot be reconciled with what LGBTQ equality reveals about biology and about biologically

82. See, e.g., JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 9 (1990) (suggesting that “perhaps this construct called ‘sex’ is as culturally constructed as gender; indeed, perhaps it was always already gender with the consequence that the distinction between sex and gender turns out to be no distinction at all”); Jules Gleeson, *Judith Butler: ‘We Need to Rethink the Category of Woman,’* *GUARDIAN* (Sept. 7, 2021, 6:14 AM EDT), <https://www.theguardian.com/lifeandstyle/2021/sep/07/judith-butler-interview-gender> [https://perma.cc/P8J2-ZMQQ] (“Gender is an assignment that does not just happen once: it is ongoing. We are assigned a sex at birth and then a slew of expectations follow[s] which continue to ‘assign’ gender to us. The powers that do that are part of an apparatus of gender that assigns and reassigns norms to bodies, organises them socially, but also animates them in directions contrary to those norms.”); JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX”* 4-12 (1993); MARJORIE GARBER, *VESTED INTERESTS: CROSS-DRESSING AND CULTURAL ANXIETY* 47-51 (1992); ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 4 (2000) (observing that “[o]ur bodies are too complex to provide clear-cut answers about sexual difference,” and that “[t]he more we look for a simple physical basis for ‘sex,’ the more it becomes clear that ‘sex’ is not a pure physical category”); ANNE FAUSTO-STERLING, *MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN* 220-21 (1985) (“Any biological theory about human behavior that ignores the complex of forces affecting behavior as well as the profound two-way interactions between mind and body is scientifically hopeless.”); THOMAS LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* 61-62 (1990); SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* 11 (1970) (arguing that “the end goal of feminist revolution must be . . . not just the elimination of male *privilege* but of the sex *distinction* itself”); Kate Millet, *Sexual Politics: A Manifesto for Revolution*, in *RADICAL FEMINISM* 365, 366 (Anne Koedt, Ellen Levine & Anita Rapone eds., 1973).

83. Franke, *supra* note 15, at 7.

rationalized sex discrimination. Part IV imagines what the law might look like if it were more responsive to LGBTQ equality's understanding of biology and addresses fears that readers might have about eliminating real differences from the American law of sex.

I. SEX EQUALITY, REAL DIFFERENCES, AND ANTI-STEREOTYPING

Sex equality is a juggling act of two ideas: real differences and anti-stereotyping. This Part describes these two faces of sex equality, their theoretical underpinnings, and their latent inconsistencies. Section I.A summarizes constitutional and statutory real-differences jurisprudence and distills its common themes. Section I.B does the same for anti-stereotyping jurisprudence. Section I.C explains why real differences and anti-stereotyping are strange bedfellows.

A. Real Differences

Real differences has shaped the meaning of constitutional sex equality since the ratification of the Fourteenth Amendment in 1868. For example, in the 1872 decision *Bradwell v. Illinois*, Justice Bradley famously appealed to nature to justify the Court's decision to withhold a law license from Myra Bradwell, a married woman who wanted to practice law in Illinois.⁸⁴ "The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things," wrote Bradley, "indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."⁸⁵ Similarly, in the 1912 decision *Quong Wing v. Kirkendall*, the Supreme Court appealed to real differences in order to uphold a Montana law that granted a tax exemption for women (but not men) who owned certain laundry businesses.⁸⁶ The Fourteenth Amendment "does not interfere by creating a fictitious equality where there is a real difference,"⁸⁷ said Justice Holmes's majority opinion. Of course, the tax at issue in *Quong Wing* was a legal difference, not a biological one. But no matter. All sex distinctions during that time were understood in biological terms, and biology invariably shielded sex discrimination from a finding of unconstitutionality.⁸⁸

84. 83 U.S. (16 Wall.) 130, 141-42 (1872) (Bradley, J., concurring).

85. *Id.* at 141.

86. 223 U.S. 59, 63 (1912).

87. *Id.*

88. *See, e.g., Muller v. Oregon*, 208 U.S. 412, 422-23 (1908) (upholding a maximum-hour law for women only by adverting to "the inherent difference between the two sexes" and dismissing

Today, constitutional sex equality condemns a lot of biologically rationalized sex discrimination on anti-stereotyping grounds but still does not reach all of it. Unlike constitutional race-equality doctrine, which rejects biological justifications for race discrimination as manifestations of bigotry,⁸⁹ constitutional sex-equality doctrine does not view judgments about sex difference as “bigoted.”⁹⁰ Rather, as Reva B. Siegel writes, biology continues to “play[] some significant but not adequately explained role in shaping equal protection law” in regard to sex or gender.⁹¹ Biological rationales still have purchase in Supreme Court reasoning around sex discrimination⁹² and remain attractive to lower federal and

the constitutional relevance of “individual exceptions” since woman “is properly placed in a class by herself”); *Miller v. Wilson*, 236 U.S. 373, 380, 382 (1915) (upholding a law that prohibited women but not men from working in hotels for more than eight hours a day on the ground that the State had a legitimate interest in preserving “woman’s physical structure [and] maternal functions” and dismissing exceptional women on the ground that “[t]he legislature is not debarred from classifying according to general considerations and with regard to prevailing conditions,” even if “inequalities [exist] as to some persons or things embraced within any specified class”); *Bosley v. McLaughlin*, 236 U.S. 385, 393-94 (1915) (citing to physical differences to justify a sex-discriminatory maximum-hours law); *Radice v. New York*, 264 U.S. 292, 295 (1924) (same); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (upholding a minimum-wage law for women on the ground that the law furthered the State’s legitimate interest in women’s health); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (upholding a law prohibiting women from working as bartenders on the ground that the law furthered the State’s interest in public morality and women’s health); *Hoyt v. Florida*, 368 U.S. 57, 62-63 (1961) (upholding a state law making jury participation mandatory for men but optional for women on the ground that it furthered the State’s interest in freeing women up for “family responsibilities”).

89. See *supra* notes 28-29 and accompanying text.

90. NeJaime, *Bigotry in Time*, *supra* note 15, at 2668 (“[T]oday, views that are expressly premised on judgments about racial difference are rejected as bigoted. Yet . . . views that are expressly premised on judgments about sex difference are not.”); see also Reva B. Siegel, *Gender and the United States Constitution: Equal Protection, Privacy, and Federalism*, in *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 306, 313 (Beverly Baines & Ruth Rubio-Marin eds., 2005) (“[T]he more permissive standard [for constitutional review of sex-based state action] is said to express the judgment that sex differentiation is not always invidious in the way that racial differentiation is generally assumed to be.”).

91. Reva B. Siegel, *The Pregnant Citizen: From Suffrage to Present*, 108 *GEO. L.J.* 167, 201 (2020).

92. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245-46 (2022) (reasoning that abortion restrictions were not sex distinctions because pregnancy and abortion were unique to women); *Nguyen v. INS*, 533 U.S. 53, 73 (2001) (relying on pregnancy and birth to justify sex discrimination against fathers); *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1694 (2017) (striking down a sex classification similar to the one at issue in *Nguyen* on sex-stereotyping grounds but leaving undisturbed *Nguyen*’s basic insights on pregnancy and birth and their significance for some aspects of immigration law).

state courts, which regularly give even blatant sex stereotyping a pass when biological differences are at issue.⁹³ “[C]lassifications predicated on anatomical and biological differences between men and women are generally upheld,” said a lower court in a recent sex-discrimination decision.⁹⁴

Sometimes, courts in constitutional sex-equality cases appeal to biology in order to neutralize a sex classification, reasoning that the uniqueness of a sex characteristic means that laws based on that characteristic are nonsex classifications deserving of rational-basis review only rather than the intermediate scrutiny typically accorded sex classifications under the Constitution.⁹⁵ As already mentioned, the Supreme Court used biology in this way when it held in *Dobbs* that criminal abortion laws did not violate the Equal Protection Clause because abortion is a procedure that “only one sex” undergoes.⁹⁶ The same year that the Supreme Court decided *Dobbs*, the Iowa Supreme Court concluded with scant elaboration that restrictive abortion laws did not violate the Iowa Constitution’s equality guarantees because men and women “are not similarly situated in terms

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93. Before *Dobbs*, Reva B. Siegel noted that passages about biological differences were “rare” in Supreme Court reasoning around sex-based state action, only obviously buttressing modern Supreme Court sex-discrimination jurisprudence in a few decisions, including in *Michael M. v. Superior Court*, 450 U.S. 464, 478 (1981), and *Nguyen*, 533 U.S. at 73, both of which upheld a sex distinction by appealing to the real difference of pregnancy. See Siegel, *supra* note 91, at 201 (stating that the Supreme Court’s biological reasoning has been limited to a few “scattered” passages in decisions like *Michael M.* and *Nguyen*). Even so, Siegel noted that, while rare, these “scattered passages” play a “significant” role in shaping equal-protection law, articulating as they do “the belief that laws based on reproductive differences between the sexes do not rest on constitutionally suspect stereotypes in the way that laws based on generalizations about social differences between the sexes do.” *Id.* Importantly, lower federal and state courts routinely appeal to decisions like *Michael M.* and *Nguyen* for the proposition that laws based on real biological differences between the sexes are not sex stereotypes about the sexes. See, e.g., *Matter of Doe*, 517 P.3d 830, 837 (Idaho 2022) (upholding unwed father’s sex-discrimination challenge to sex distinctions in Idaho parentage law by reasoning that “the Equal Protection Clause does not require ‘things which are different in fact . . . to be treated in law as though they were the same’” (quoting *Michael M.*, 450 U.S. at 469)); *State v. Lilley*, 204 A.3d 198, 226 (N.H. 2019) (favorably citing *Michael M.* in upholding a law that had nothing to do with pregnancy (a criminal topless ordinance)).
94. *Free the Nipple – Springfield Residents Promoting Equal. v. City of Springfield*, No. 15-3467-CV-S, 2017 WL 6815041, at *2 (W.D. Mo. Oct. 4, 2017) (citing *Michael M.*, 450 U.S. at 470-71).
95. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (“Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” (citation omitted)).
96. *Dobbs*, 142 S. Ct. at 2245-46. For the possibility that “*Dobbs*’ natural sex differences logics [will] forge a mold for future Fourteenth Amendment sex equality decisions,” see Marc Spindelman, *Dobbs*’ Sex Equality Troubles 12 (Jan. 2023) (unpublished manuscript) (on file with author).

of the biological capacity to become pregnant.”⁹⁷ A year before that, a court in Pennsylvania reasoned that the state’s Medicaid exclusions for most abortions did not trigger the state constitution’s Equal Rights Amendment because only women had abortions. Relying on (and quoting) a previous decision from the Pennsylvania Supreme Court, the court reasoned that the Medicaid exclusion “did not impose a benefit or burden on the basis of the citizen’s sex simply because the procedure involved ‘physical characteristics unique to one sex.’”⁹⁸

Decisions evaluating the constitutionality of criminal topless bans also appeal to biology to neutralize sex distinctions. For example, in 2019, the Supreme Court of New Hampshire held that a law criminalizing female (but not male) toplessness was not a sex classification, let alone unconstitutional sex discrimination, because of the physical and functional differences between female and male breasts. Quoting from decades-old topless decisions that “concluded that [topless bans] do not trigger any form of heightened constitutional review,” the court observed that topless bans simply reflected the facts that (1) “there are more parts of the female body intimately associated with the procreative function,”⁹⁹ and (2) “[n]ature, not the legislative body, created the distinction between that portion of a woman’s body and that of a man’s torso.”¹⁰⁰

Other times, courts in constitutional sex-equality cases appeal to biology to justify a sex classification, reasoning that sex discrimination satisfies heightened scrutiny when it is based on biological characteristics unique to one sex.¹⁰¹ The Supreme Court followed this approach in *Nguyen v. INS*, which held that sex discrimination against unwed fathers in a provision of federal immigration law

97. *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 743 (Iowa 2022).

98. *Allegheny Reprod. Health Ctr. v. Pa. Dep’t Hum. Servs.*, 249 A.3d 598, 611 (Pa. Commw. Ct. 2021) (quoting *Fischer v. Dep’t Pub. Welfare*, 502 A.2d 114, 125 (Pa. 1976)).

99. *State v. Lilley*, 204 A.3d 198, 207 (N.H. 2019) (quoting *City of Seattle v. Buchanan*, 584 P.2d 918, 922 (Wash. 1978) (en banc)).

100. *Id.* (quoting *Eckl v. Davis*, 124 Cal. Rptr. 685, 696 (Ct. App. 1975)).

101. Some courts have suggested that intermediate scrutiny itself follows two paths, with the first and stricter form reserved for “official action that closes a door or denies opportunity to women (or to men),” and the second and less strict form reserved for laws whose “differential treatment of men and women stems initially . . . from a straightforward matter of biology.” *In re Adoption of J.S.*, 358 P.3d 1009, 1027–28 (Utah 2014) (making this distinction and citing to *Nguyen v. INS* for support); see also *Utah v. Buchanan*, Civ. No. 191901507 (Utah Dist. Ct. Jan. 19, 2020) (“[N]ot all sex-based classifications implicate the same considerations under this intermediate standard of scrutiny.”). For criticism of the majority’s holding in *In re Adoption of J.S.*, see *In re Adoption of J.S.*, 358 P.3d at 1057–58 (Parrish, J., dissenting), which faulted the majority for “implying that there are actually two categories of intermediate scrutiny” depending on whether the sex distinction is rooted in biological difference.

passed intermediate scrutiny because it was based on one of “our most basic biological differences . . . the fact that a mother must be present at birth but the father need not be.”¹⁰² To fail to recognize that difference, *Nguyen* continued, would “mak[e] the guarantee of equal protection superficial, and so disserv[e] it.”¹⁰³ Importantly, in the 2017 sex-stereotyping landmark, *Sessions v. Morales-Santana*, the Court rejected biology as a justification for a *different* provision of federal immigration law that discriminated against unwed fathers,¹⁰⁴ finding that the provision rested on the “overbroad generalizations” about mothers and fathers that intermediate scrutiny rejects.¹⁰⁵ Even so, *Morales-Santana* preserved *Nguyen*’s holding that differential treatment of mothers and fathers because of pregnancy and birth was not an illegal sex stereotype.¹⁰⁶ Perhaps for that reason, some lower courts since *Morales-Santana* have maintained that “*Morales-Santana* did not modify the equal protection analysis courts apply to gender-based classifications,”¹⁰⁷ particularly when those classifications rest on true differences, like pregnancy and birth.¹⁰⁸

102. 533 U.S. 53, 73 (2001).

103. *Id.*

104. *Morales-Santana* considered whether Congress could require unwed fathers to be physically present in the United States longer than unwed mothers in order to naturalize any children conceived and born overseas with a non-U.S. citizen. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017). The federal government justified its sex-discriminatory physical-presence requirements for the same reasons that it had justified its sex-discriminatory parental-proof requirements in *Nguyen*: pregnancy and birth.

105. *Morales-Santana*, 137 S. Ct. at 1692; *see also id.* at 1695 (reasoning that the physical-presence requirement at issue in that case was based on false assumptions or stereotypes about “unwed fathers car[ring] little about . . . their children” once they are born).

106. *See id.* at 1694 (distinguishing the “paternal-acknowledgment requirement at issue in *Nguyen* and *Miller* [from] the physical-presence requirements now before us”). For commentary, *see Franklin, supra* note 15, at 202, which observed that “[t]he nexus between biological differences and the sex distinction in *Nguyen* was arguably closer than the nexus between biological differences and the sex distinction in *Morales-Santana*,” but arguing that “[i]f the Court had actually applied the same level of scrutiny in *Nguyen* that it applied in *Morales-Santana* . . . it would have detected the fairly substantial gaps between the government’s stated ends and its use of a sex discriminatory rule.”

107. *Free the Nipple – Springfield Residents Promoting Equal. v. City of Springfield*, 923 F.3d 508, 511 (8th Cir. 2019) (upholding a criminal topless ban as something other than a sex stereotype despite the challengers’ argument that the ban was an illegal sex stereotype under *Morales-Santana*).

108. *See, e.g., Dale v. Barr*, 967 F.3d 133, 143-45 (2d Cir. 2020) (rejecting the argument that *Morales-Santana* required the reversal of a previous Second Circuit decision upholding a citizenship provision in the Immigration and Naturalization Act that differentiates on the basis of sex); *Stennett v. Miller*, 245 Cal. Rptr. 3d 872, 890 (Ct. App. 2019) (appealing to *Morales-Santana* when reasoning that “[i]t is not impermissibly discriminatory to have different requirements

Regardless of the form that real differences takes, the result is the same: sex discrimination survives constitutional scrutiny in large swaths of law because of real biological differences between women and men, including in family law,¹⁰⁹

for establishing natural parent status for birth mothers and biological fathers because mothers and fathers are not similarly situated when it comes to their role in becoming parents”).

109. See, e.g., *Matter of Doe*, 517 P.3d 830, 837 (Idaho 2022) (upholding sex distinctions in parental-termination and adoption statutes by appealing to the real difference of pregnancy and its role in ensuring a social relationship between parent and child); *In re Adoption of J.S.*, 358 P.3d 1009, 1027, 1031-32 (Utah 2014) (affirming the termination of an unwed father’s parental rights under a statute that treated unwed fathers and unwed mothers differently because of the real differences of pregnancy and birth); *In re Baby Girl S.*, 407 S.W.3d 904, 906-07, 914-15 (Tex. Ct. App. 2013) (same); *Grimes v. Van Hook-Williams*, 839 N.W.2d 237, 244-45 (Mich. Ct. App. 2013) (upholding a provision of a Michigan law requiring that the father of a child born out of wedlock be unaware of the mother’s marriage in order to sue for parental rights); *In re Adoption of A.A.T.*, 196 P.3d 1180, 1184-85, 1195 (Kan. 2008) (affirming the termination of the biological father’s parental rights despite the mother never informing the father of the pregnancy); *In re Adoption Petition of Bobby Antonio R.*, 175 P.3d 914, 924 (N.M. 2007) (“The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father’s parental claims must be gauged by other measures.” (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting))); *In re Adoption of B.B.D.*, 984 P.2d 967, 972 (Utah 1999) (“[A] reasonable basis for the different classification of unwed fathers and unwed mothers . . . is the fact that . . . identification of a child’s mother is automatic because of her role in the birth process, while identification of the father is not.” (quoting *Swayne v. L.D.S. Soc. Servs.*, 795 P.2d 637, 641 (Utah 1990))).

criminal law,¹¹⁰ immigration law,¹¹¹ and property law.¹¹² Challenging sex discrimination in these areas can resemble a game of constitutional whack-a-mole. A plaintiff might succeed in convincing a court that a sex distinction is sex discriminatory but still lose if the court justifies the sex distinction as a valid expression of real differences between the sexes.¹¹³

Just as it has shaped the meaning of constitutional sex equality, real differences also has shaped the meaning of statutory sex equality. For example, Title IX, which prohibits sex discrimination in educational institutions that receive federal funding,¹¹⁴ contains a number of exemptions permitting sex segregation

110. See, e.g., *People v. Carranza*, No. B240799, 2013 WL 3866506, at *8 (Cal. Ct. App. July 24, 2013) (upholding a law criminalizing the nonconsensual touching of female but not male breasts based on the “significant differences in the physical appearance and anatomical function of mature male and female breasts”).

111. See, e.g., *Dale v. Barr*, 967 F.3d 133, 143-45 (2d Cir. 2020); *United States v. Duffy*, 773 F. App’x 947, 949-50 (9th Cir. 2019) (citing favorably to *Nguyen* when upholding the deportation of a citizen of Mexico whose father was a United States citizen); *United States v. Lewis*, No. 16-CR-00471, 2017 WL 2937606 (E.D.N.Y. July 7, 2017); *Pierre v. Holder*, 738 F.3d 39 (2d Cir. 2013). *Dale* suggested that Congress’s differential treatment of unwed mothers and unwed fathers under federal immigration law was not the result of “some outdated stereotype,” but rather the “biological inevitability that a mother, by nature of her status as the parent giving birth, ‘inherently legitimate[s]’ and establishes an immediate biological connection with her child in a way that fathers—as a matter of nature—cannot.” *Dale*, 967 F.3d at 143 (quoting *Pierre*, 738 F.3d at 140). Of course, not all mothers “establish” immediate biological connections through birth; some mothers don’t give birth, including mothers who use surrogates to have children, as well as mothers in two-mother households, only one of whom births a child. In addition, even if the person having the child is that child’s biological mother in the way that *Dale* envisions, she “establishes” an immediate biological connection not at birth but at conception—as do unwed fathers in the same class as the plaintiff in *Dale*. In other words, biological connections are often “established” at the same time for mothers and for fathers. It could be that *Dale* was thinking about “establishing” not in the sense of *creating* biological connection but of *signifying* biological connection, and that mothers *signify* biological connection through birth in a way that fathers “as a matter of nature” do not. But if that is right, then again, *Dale*’s vision of motherhood is underinclusive because it fails to recognize a whole class of mothers who don’t *signify* biological connection at birth because they are not the actors *giving* birth. See generally Cahill, *supra* note 50 (arguing that biological arguments surrounding the certainty of motherhood at birth rest on a monolithic conception of motherhood that perpetuates sex stereotypes about women and mothers as well as men and fathers).

112. See, e.g., *Stennett v. Miller*, 245 Cal. Rptr. 3d 872, 890 (Ct. App. 2019) (rejecting an equal-protection challenge to a provision of California’s intestacy laws distinguishing inheritance rights for nonmarital children on the basis of parental sex).

113. See, e.g., *Nguyen v. INS*, 533 U.S. 53, 60, 68, 73 (2001) (making clear that intermediate scrutiny applies to sex classifications and that sex stereotypes violate intermediate scrutiny, but upholding the sex discrimination anyway as a valid expression of real biological differences).

114. 20 U.S.C. § 1681 (2018). Courts have interpreted Title IX’s prohibition on sex discrimination to reach sex stereotyping. See, e.g., *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist.*

in certain settings, including in “toilet, locker room, and shower facilities,”¹¹⁵ in “separate living facilities for the different sexes,”¹¹⁶ and in “separate [sports] teams for members of each sex.”¹¹⁷ All of those exemptions are authorized in the name of anatomical and functional differences between male and female bodies. For instance, schools (and courts) have justified sex segregation in showers by appealing to students’ need for privacy from exposure to the anatomy of the “other” sex;¹¹⁸ they also have justified sex segregation in sports by appealing to the inherently different physical capabilities of male and female athletes.¹¹⁹

Similarly, Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination by certain employers,¹²⁰ still does not reach much “sex-based differential treatment” in the workplace, including “sex-differentiated grooming codes and sex-segregated bathrooms” as well as sex-differentiated physical-fitness tests.¹²¹ Real biological differences is behind many – perhaps all – of these

No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017) (applying a theory of sex stereotyping to find that Title IX prohibits a school board from treating a transgender student differently from cisgender students).

115. 34 C.F.R. § 106.33 (2021).

116. 20 U.S.C. § 1686 (2018).

117. 34 C.F.R. § 106.41(b) (2021).

118. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 132 F. Supp. 3d 736, 750 (E.D. Va. 2015) (stating that “[r]estrooms and locker rooms are designed differently because of the biological differences between the sexes”). The Department of Education facially subscribes to the real-differences belief that sex reduces to two by referring to “one sex” and “the other sex” in its implementing regulations, which permit sex segregation in bathrooms, locker rooms, and showers, among other spaces. See *Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 720 (4th Cir. 2016) (noting that the Department of Education’s “repeated formulation” of “one sex” and the “other sex” in its regulations implementing Title IX “indicates two sexes . . . and the only reasonable reading of the language used throughout the relevant regulatory section is that it references male and female”).

119. See, e.g., *Clark v. Ariz. Interscholastic Ass’n*, 886 F.2d 1191, 1193 (9th Cir. 1989).

120. 42 U.S.C. § 2000e-2(a) (2018). The Supreme Court has interpreted Title VII to reach “the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” *City of Los Angeles v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249-50 (1989) (endorsing the sex-stereotyping theory of sex discrimination under Title VII and holding that an employer is liable under Title VII if sex stereotyping was a motivating factor in an employment decision).

121. See, e.g., Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 156 (remarking that if you “[v]isit almost any American workplace, . . . you will find employees being subjected to . . . sex-based differential treatment on a daily basis, with no relief in sight from Title VII”); *id.* at 158 (“The American workplace is replete with sex-based differential treatment and Title VII constrains only some of it.”). For analysis of gender-normed physical-fitness tests, see Recent Case, *Fourth Circuit Applies “Unequal Burdens” Analysis to Gender-Normed Fitness Test*, *Bauer v. Lynch*, 129 HARV. L. REV. 2257, 2257 (2016), which states that “[i]n employment law,

exemptions. Take, for instance, sex-differentiated physical-fitness tests, which discriminate based on sex by setting forth different raw cutoff scores for female and male applicants to jobs for which physical fitness is a requirement, like law enforcement.¹²² Typically, an explicit sex-based policy satisfies Title VII only if an employer can prove that it is a bona fide occupational qualification (BFOQ) related to the “essence” of an employer’s business.¹²³ This is so even if the motive behind the sex-based policy is benign,¹²⁴ as is the case with gender-normed physical-fitness tests, which are intended to prevent the disparate impact on women that could result from a unitary physical-fitness standard.¹²⁵

However, courts have relieved employers of their burden of proving a BFOQ for explicitly sex-discriminatory physical-fitness tests by reasoning that the tests are actually sex-neutral expressions of real biological differences between the sexes¹²⁶—much as the Supreme Court relieved the state of its intermediate scrutiny burden in *Dobbs v. Jackson Women’s Health Organization* by reasoning that abortion classifications were sex neutral because only women got abortions.¹²⁷

men and women are formally recognized as equally smart, equally capable, equally professional, but not equally strong.”

122. For in-depth treatment of gender-normed physical-ability tests, see Eve A. Levin, Note, *Gender-Normed Physical-Ability Tests Under Title VII*, 118 COLUM. L. REV. 567 (2018).
123. See *Bauer v. Holder*, 25 F. Supp. 3d 842, 861 (E.D. Va. 2014), *vacated sub nom. Bauer v. Lynch*, 812 F.3d 340 (4th Cir. 2016) (“It is well-settled that under the BFOQ defense, an employer may use an explicit sex-based policy where ‘sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.’” (quoting 42 U.S.C. § 2000e-2(e) (2018))); see also *id.* at 862 (“A successful BFOQ defense requires that a ‘job qualification . . . relate to the essence, or to the central mission of the employer’s business.’” (quoting *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 203 (1991))).
124. See, e.g., *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (“The absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.”).
125. See Levin, *supra* note 122, at 568 (“To avoid incurring disparate impact liability, some law enforcement agencies use gender-normed [physical-ability tests].”).
126. See, e.g., *Powell v. Reno*, No. 96-2743, 1997 U.S. Dist. LEXIS 24169, at *10-11 (D.D.C. July 24, 1997); *In re Scott*, 779 A.2d 655, 661 (Vt. 2001); *Alspaugh v. Comm’n on Law Enf’t Standards*, 634 N.W.2d 161, 169 (Mich. Ct. App. 2001).
127. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245-46 (2022) (holding that “[t]he regulation of a medical procedure *that only one sex can undergo* does not trigger heightened constitutional scrutiny unless the regulation is a ‘mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other’” (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 & n.20 (1974) (emphasis added))). The Fourth Circuit in *Bauer* explicitly relied on constitutional sex-equality jurisprudence to hold that gender-normed physical-fitness tests were not sex distinctions because they captured real biological differences between

The Fourth Circuit followed this approach in *Bauer v. Lynch*, which held that a gender-normed physical-fitness test administered by the Federal Bureau of Investigation was not a sex-based policy (so long as it was truly gender-normed) given that “[m]en and women simply are not physiologically the same for the purposes of physical fitness programs.”¹²⁸ The lower court held that the test was a sex distinction with no connection whatsoever to any “qualifications that affect an employee’s ability to do the job.”¹²⁹ But because of real differences, the Fourth Circuit never got to the BFOQ defense, laying the groundwork for employers to rely more heavily on gender-normed screening tests – which do not necessarily help women and might actually harm them¹³⁰ – without ever having to justify them.

Finally, there is a constellation of federal, state, and local laws that extend benefits only to women, and that protect only women from either discrimination or criminal prosecution, based on real-differences beliefs surrounding pregnancy and breastfeeding. Such laws include, among others, the Family and Medical Leave Act,¹³¹ the Pregnancy Discrimination Act,¹³² the Patient Protection and Affordable Care Act (ACA),¹³³ and state and local breastfeeding laws that

women and men. See *Bauer v. Lynch*, 812 F.3d 340, 350–51 (4th Cir. 2016) (relying on *United States v. Virginia*, 518 U.S. 515 (1996), and *Michael M. v. Superior Court*, 450 U.S. 464 (1981), to support the proposition that sex distinctions are not “invidious” if they “realistically reflect[] the fact that the sexes are not similarly situated in certain circumstances” (quoting *Michael M.*, 450 U.S. at 469)).

128. 812 F.3d at 350.

129. *Bauer v. Holder*, 25 F. Supp. 3d 842, 863 (E.D. Va. 2014), *vacated sub nom. Bauer v. Lynch*, 812 F.3d 340 (4th Cir. 2016); see also *id.* (“If physical fitness is indeed essential to performing the tasks required of a Special Agent, it makes no sense that the FBI has no policy requiring that Special Agents maintain a particular level of fitness once they are actually on the job.”).

130. See *infra* notes 198–199 and accompanying text (summarizing the sex-equality critique of gender norming in physical-ability tests).

131. 29 C.F.R. § 825.120(a)(5) (2022). On Family and Medical Leave Act (FMLA) regulations with facially sex-discriminatory provisions, see Fontana & Schoenbaum, *supra* note 25, at 336.

132. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

133. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2713(a)(4), 124 Stat. 119, 131 (2010) (codified at 42 U.S.C. § 300gg-13(a)(4)). On the Affordable Care Act’s (ACA) facially sex-discriminatory provisions, see Fontana & Schoenbaum, *supra* note 25, at 342, which states that “in many contexts the ACA requires covered employers to provide coverage for prenatal benefits only to pregnant women,” with such benefits including “breastfeeding pumps, counseling for tobacco users, and prenatal education interventions, but only for pregnant women,” and that “[e]mployer-offered insurance plans need not provide comparable benefits to expectant fathers.”

exempt certain breastfeeding women from criminal breast-exposure prohibitions.¹³⁴ By explicitly limiting their protections to “expectant mothers”¹³⁵ or “mothers,”¹³⁶ these laws further the real-differences beliefs that all aspects of pregnancy and breastfeeding are exclusively and uniquely female,¹³⁷ despite the existence of pregnant men,¹³⁸ and despite the existence of nonpregnant men who are able to participate in many aspects of pregnancy and breastfeeding.¹³⁹

Four themes emerge from constitutional and statutory real-differences jurisprudence: (1) biology is neutral, or biology is not bigotry; (2) the two sexes are not similarly situated when it comes to biology; (3) the law of averages controls;

134. For a collection of these laws, see Meghan Boone, *Lactation Law*, 106 CALIF. L. REV. 1827, 1840-43 (2018).

135. See, e.g., 29 C.F.R. § 825.120(a)(4) (2022) (providing that “[t]he expectant mother is entitled to FMLA leave . . . for prenatal care”).

136. See Boone, *supra* note 134, at 1845 (“The statutory language of state and federal lactation laws is relatively homogenous, with most laws containing three common textual characteristics. First, the laws often refer to lactating women, either solely or in conjunction with other terms, as ‘mothers’ instead of as individuals, employees, or even just as ‘women.’ Of the forty-nine states with laws addressing breastfeeding, forty include the statutory term ‘mother’ in place of, or in conjunction with, the term ‘woman.’”).

137. See Fontana & Schoenbaum, *supra* note 25, at 311-12 (“[T]he Supreme Court has decided that pregnancy is an event almost exclusively for women and has therefore assumed that caregiving during pregnancy is almost exclusively for women too. The result is a wide swath of laws regulating pregnancy – including prenatal leave under the FMLA, essential health benefits under the Affordable Care Act, and employment protections under the Pregnancy Discrimination Act – that apply only or mostly to women.”); Naomi Schoenbaum, *Unsexing Breastfeeding*, 107 MINN. L. REV. 139, 142 (2022) (arguing that “the law enshrines a view of breastfeeding as for women only, and thus treats the carework associated with breastfeeding as for women only, too”); see also Schoenbaum, *supra*, at 142 n.21 (citing cases in which courts have held that breastfeeding is uniquely female); *Stanley v. Illinois*, 405 U.S. 645, 665 (1972) (Burger, C.J., dissenting) (stating that the State did not violate the Equal Protection Clause by recognizing unwed biological maternity but not unwed biological paternity since “the biological role of the mother in carrying *and nursing* an infant creates stronger bonds . . . than the bonds resulting from the male’s often casual encounter” (emphasis added)).

138. See, e.g., Fontana & Schoenbaum, *supra* note 25, at 338 (“The FMLA’s limitation of prenatal leave to ‘expectant mothers’ . . . has implications for transgender men,” who could be rendered “ineligible for sex-based pregnancy benefits like those provided by the FMLA.”); Jessica Clarke, *Pregnant People?*, 119 COLUM. L. REV. F. 173, 179 (2019) (arguing, in a review of Fontana & Schoenbaum, *supra* note 25, that the law still does not recognize that “transgender men and nonbinary people . . . become pregnant”); Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223, 234 (2016) (criticizing sex-equality scholarship and advocacy for “eras[ing] . . . reproductive trans bodies” as well as describing “the existence of women who are transgender and unable to become pregnant by conflating the definition of womanhood with an ability to be or become pregnant”).

139. See Fontana & Schoenbaum, *supra* note 25, at 339 (“Workplace law . . . grants pregnant women accommodations and protections against discrimination for carework they perform during the pregnancy while excluding expectant fathers in similar caregiving situations.”).

and (4) history matters when evaluating what counts as a real difference and whether laws based on that difference are constitutional.

1. *Biology Is Neutral, or Biology Is Not Bigotry*

Real differences assumes that biology itself is neither a stereotype nor a reflection of bigotry. For example, in the 1974 decision *Geduldig v. Aiello*, the Supreme Court held that pregnancy classifications without more were not sex distinctions; for a court to find that they were, a challenger would have to show evidence of “invidious discrimination”—that is, evidence beyond the mere existence of a pregnancy classification.¹⁴⁰ Similarly, in *Dobbs*, which relied on *Geduldig* for support, the Court reasoned that abortion restrictions on their own were not sex distinctions because abortion was something that only women experienced.¹⁴¹

Dobbs and *Geduldig* channeled an idea common in real-differences jurisprudence: that biology is a simple question of “what is” rather than a normative judgment of “what should be.” As Justice Marshall articulated in a different context, “A sign that says ‘men only’ looks very different on a bathroom door than a courthouse door.”¹⁴² In the first case, the door communicates nothing more than a biological fact, whereas in the second case, the door communicates obvious “invidious discrimination.”

2. *The Two Sexes Are Not Similarly Situated When It Comes to Biology*

Real-differences jurisprudence assumes that there are only two sexes. For instance, Title IX, which prohibits sex discrimination by educational institutions that receive federal funding, only ever refers to “one sex” and the “other sex.”¹⁴³ Similarly, constitutional decisions addressing sex discrimination only ever refer to “women” and “men,” and “mothers” and “fathers.”

In addition, real-differences jurisprudence assumes that the two sexes have distinct anatomies and capabilities. For instance, in decisions addressing the constitutionality of female-only criminal topless bans, courts assume that

140. 417 U.S. 484, 494-96 (1974).

141. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245-46 (2022).

142. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 468-69 (1985) (Marshall, J., concurring).

143. 20 U.S.C. §§ 1681-88 (2018).

women and men have different body “parts.”¹⁴⁴ Similarly, in decisions addressing the constitutionality of laws that discriminate against unwed fathers, courts assume that maternity is always certain whereas paternity is not,¹⁴⁵ as well as that mothers always connect with their children in utero whereas fathers do not.¹⁴⁶

3. *The Law of Averages Controls*

Real-differences jurisprudence is about what is true most of the time or in the vast majority of cases, not some of the time or in some cases. It justifies sex discrimination based on what most men and women look like, or based on how most fathers and mothers are, waving away exceptions to the general rules of nature as constitutionally irrelevant. For instance, the plaintiffs in a recent topless case, *Free the Nipple v. Springfield*, called medical and public health experts to testify that “there are no identifiable morphological differences between male and female breasts” and that “[b]reasts themselves range considerably in size and do not necessarily indicate a person’s biological sex or their adopted gender.”¹⁴⁷ The Eighth Circuit dismissed their evidence with little explanation, citing a prior panel decision that upheld sex discrimination in breast regulation based on generalized assertions of biological differences between men and women’s breasts.¹⁴⁸ The same thing has happened in constitutional unwed-father jurisprudence. For example, the father in *Nguyen v. INS* argued that Congress’s sex distinction in federal immigration law insufficiently protected men who *did* maintain relationships with their children at and after birth.¹⁴⁹ In re-

144. *State v. Lilley*, 204 A.3d 198, 207 (N.H. 2019) (quoting and citing *City of Seattle v. Buchanan*, 584 P.2d 918, 921-22 (Wash. 1978) (en banc)).

145. *Nguyen v. INS*, 533 U.S. 53, 59-60, 62-63 (2001); *Bolden v. Doe*, 358 P.3d 1009, 1011-12 (Utah 2014).

146. *Bolden*, 358 P.3d at 1011-12, 1030-31 & 1030 n.34.

147. Brief of Appellants at 12, *Free the Nipple – Springfield Residents Promoting Equal. v. City of Springfield*, 923 F.3d 508 (8th Cir. 2019) (No. 17-3467), 2018 WL 1136320; Declaration of Debby Herbenick at 67, *Free the Nipple – Springfield Residents Promoting Equal. v. City of Springfield*, No. 15-cv-3467 (W.D. Mo. May 4, 2017), 2017 WL 2778997.

148. See *Free the Nipple*, 923 F.3d at 511 (citing *Ways v. City of Lincoln*, 331 F.3d 596 (8th Cir. 2003)); see also *City of Seattle v. Buchanan*, 584 P.2d 918, 934 (Wash. 1978) (Horowitz, J., dissenting) (“In popular understanding, female breasts are a characteristic of the female, not of the male.”).

149. See Brief of Petitioners at 14-15, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071), 2000 WL 1706737 (“Defying the stereotype, and accepting full responsibility for his child, Boulais cared for his son first in Vietnam and later in the United States. Boulais was a responsible father

sponse, the *Nguyen* Court rejected the idea that constitutional sex equality requires the State to craft laws “capable of achieving [their] ultimate objective in every instance.”¹⁵⁰

4. *History Matters When Evaluating What Counts as a Real Difference and Whether Laws Based on that Difference Are Constitutional*

In real-differences sex-discrimination cases, courts turn to history and tradition when determining (1) what counts as a real difference, and (2) whether laws based on that difference are constitutional. For example, in *State v. Lilley*, the Supreme Court of New Hampshire upheld a criminal topless ban against a sex-stereotyping challenge by reasoning that “men and women are not fungible with respect to the traditional understanding of what constitutes nudity.”¹⁵¹ Similarly, in *Tagami v. City of Chicago*, the Seventh Circuit upheld a criminal topless ban against a sex-stereotyping challenge by reasoning, in part, that such a ban “has existed in one form or another for decades.”¹⁵²

B. *Anti-Stereotyping*

Sex equality’s anti-stereotyping principle is the idea that sex classifications are illegal when they force people to conform to sex roles, like the homemaker

who provided support to his son throughout his minority.”); *id.* at 34-35 (criticizing the sex distinction for “rel[ying] on rough (and therefore, often inaccurate) proxies to assess whether non-marital children have ties to their citizen parents and the United States”).

150. *Nguyen*, 533 U.S. at 70; see also *Caban v. Mohammed*, 441 U.S. 380, 411-12 (1979) (Stevens, J., dissenting) (disagreeing with the majority’s decision to protect an apparently exceptional unwed father by arguing that “we cannot test the conformance of rules to the principle of equality simply by reference to exceptional cases,” and reasoning that this differential treatment of mothers and fathers was justified because of the real difference of pregnancy).

151. *State v. Lilley*, 204 A.3d 198, 208 (N.H. 2019). A similar dynamic was at play in *People v. Carranza*, which rejected a sex-equality challenge to a criminal assault law prohibiting the forcible touching of the female but not of the male breast. No. B240799, 2013 WL 3866506, at *1 (Cal. Ct. App. July 24, 2013). The State justified its sex-discriminatory assault law by appealing to real biological differences between male and female breasts. In response, a male defendant convicted under the law contended that the State’s rationale for the law failed to account for the fact that society had become “more ‘unisexual’ in nature” with respect to what constitutes a male body and a female body. *Id.* at *8. Rather than engage with the defendant’s argument, the court simply noted that (1) “physiological distinctions between male and female breasts continue to exist,” and (2) the law reflected “the indisputable fact that the naked female breast has for centuries been a symbol of sexuality but that no such generalization can be made about the male chest.” *Id.* (quoting *Locker v. Kirby*, 107 Cal. Rptr. 446, 450-51 (Ct. App. 1973) (emphasis added)).

152. 875 F.3d 375, 379 (7th Cir. 2017).

wife or the breadwinning husband.¹⁵³ A response to the Victorian-era belief that sex discrimination against women and men was always constitutional because women and men were biologically distinct in all ways and for all purposes, the anti-stereotyping principle first received the Court's explicit endorsement in the 1973 decision *Frontiero v. Richardson*.¹⁵⁴ At issue in *Frontiero* was an armed services' policy that made it harder for female service members than for male service members to get benefits for their spouses. Whereas benefits for the wives of male service members were automatic, regardless of need, benefits for the husbands of female service members were contingent on a showing of actual need.¹⁵⁵ Congress defended the policy on administrative-convenience grounds, arguing that it reflected the reality that most wives were dependent on their spouses for support given the reality that most women did not work because of family obligations.¹⁵⁶

The *Frontiero* Court condemned the policy as unconstitutional sex discrimination under the Fifth Amendment, reasoning that it represented just the sort of "gross, stereotyped distinctions between the sexes" with which "our statute books gradually became laden."¹⁵⁷ This stereotype, said the Court, was now a law that "relegat[ed] the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."¹⁵⁸ The armed services' policy at issue in *Frontiero* satisfied that definition because it assumed that all wives were dependent on their husbands for support when, in fact, many were not. The woman standing before the Court—Sharron Frontiero—was one of them.

Since *Frontiero*, dozens of decisions have struck down laws and policies that reflect "overbroad generalizations about the different talents, capacities, or preferences of males and females"¹⁵⁹ on anti-stereotyping grounds, even laws and

153. For the anti-role-typing theory of sex stereotyping and its evolution in sex-equality jurisprudence, see generally Franklin, *supra* note 16.

154. 411 U.S. 677, 687-88 (1973) (plurality opinion). Two years before *Frontiero*, the Court struck down a sex classification in *Reed v. Reed* as "arbitrary" without explicitly conceptualizing the classification as a sex stereotype. 404 U.S. 71, 74 (1971).

155. *Frontiero*, 411 U.S. at 678-79.

156. *See id.* at 688-89 (summarizing the government's argument).

157. *Id.* at 685.

158. *Id.* at 687.

159. *United States v. Virginia*, 518 U.S. 515, 533 (1996); *see, e.g., Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Craig v. Boren*, 429 U.S. 190 (1976); *Orr v. Orr*, 440 U.S. 268 (1979); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991 § 107, Pub. L. No. 102-166, 105 Stat. 1075, *as recognized in Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020); *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994).

policies that are based on facts that are “unquestionably true,” like the fact that most women have better longevity than most men.¹⁶⁰ Such generalizations, the Court has said, violate constitutional and statutory equality by failing to treat individuals as individuals.¹⁶¹ They also curtail constitutional liberty by turning “assumption[s] . . . into self-fulfilling prophec[ies]” that limit an individual’s life course.¹⁶²

Four themes emerge from anti-stereotyping jurisprudence: (1) anti-stereotyping looks suspiciously on biology as a reason to discriminate because of sex; (2) anti-stereotyping condemns laws that treat men and women differently when they are in fact the same; (3) anti-stereotyping prioritizes individual or exceptional cases over averages or generalities; and (4) the legality of sex distinctions is measured according to contemporary norms and values, not history and tradition.

1. *Anti-Stereotyping Looks Suspiciously on Biology as a Reason to Discriminate on the Basis of Sex*

Frontiero v. Richardson was the first decision in which the Court explicitly condemned a sex distinction as a sex stereotype. There, a plurality analogized sex to race, reasoning that because

sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth[;] the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate “the basic concept of our system that legal burdens should bear some relationship to individual responsibility.”¹⁶³

2. *Anti-Stereotyping Condemns Laws that Treat Men and Women as Different When They Are the Same*

The anti-stereotyping principle prohibits laws and policies that treat women and men as dissimilarly situated when they are, in fact, similarly situated. For example, in *Nevada Department of Human Resources v. Hibbs*, the Supreme Court indicated that it was a sex stereotype to grant mothers but not fathers parental leave following the birth of a child given that mothers and fathers were often

160. *City of Los Angeles v. Manhart*, 435 U.S. 702, 708 (1978).

161. *See Virginia*, 518 U.S. at 541.

162. *Hogan*, 458 U.S. at 730.

163. *Frontiero*, 411 U.S. at 686-87 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

similarly situated in terms of their ability to give care.¹⁶⁴ *Hibbs* remarked that the longer leave times extended to women “were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work.”¹⁶⁵ In other words, *Hibbs* suggested that it was a sex stereotype for the government to craft sex distinctions that assumed “different physical needs” when “different physical needs” did not actually exist.

3. *Anti-Stereotyping Prioritizes Individual or Exceptional Cases over Averages or Generalities*

Before the anti-stereotyping principle, the Supreme Court dismissed the constitutional relevance of exceptional women and men who appeared to buck general norms. For example, in *Bradwell v. Illinois*, the concurrence reasoned that because the Fourteenth Amendment was concerned with “the nature of things” and not with “exceptional cases,” the State of Illinois did not violate the Amendment by refusing to admit a married woman who wanted to be a lawyer to the Illinois bar.¹⁶⁶ Similarly, in *Muller v. Oregon*, the Court reasoned that a State did not violate the Fourteenth Amendment by setting forth a maximum-hours law for women only because most women did not want to work as much as most men. “Doubtless there are individual exceptions” to the general rule that women are dependent on men, said the *Muller* Court, but women, in general, need men’s protection.¹⁶⁷

Since the advent of the anti-stereotyping principle in the 1970s, the Court has reversed course, holding that illegal sex stereotyping occurs when state and private actors fail to prioritize individuality and exceptionality. In *Frontiero*, a Court plurality reasoned that constitutional equality prohibited the government from legislating on the basis of generalities overlooking “individual qualifications.”¹⁶⁸ In *Craig v. Boren*, the Court cautioned that “the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning . . . aggregate groups.”¹⁶⁹ In

164. 538 U.S. 721, 731 (2003).

165. *Id.*

166. 83 U.S. (16 Wall.) 130, 141-42 (1872) (Bradley, J., concurring).

167. *Muller v. Oregon*, 208 U.S. 412, 422 (1908); see also *Miller v. Wilson*, 236 U.S. 373, 380, 382 (1915) (upholding a law that prohibited women but not men from working in hotels more than eight hours a day on the ground that most women were ill-suited for working long hours).

168. *Frontiero*, 411 U.S. at 682.

169. 429 U.S. 190, 208-09 (1976).

Weinberger v. Weisenfeld, the Court rejected a law based on a “generally accepted presumption” that ignored individual cases.¹⁷⁰ In *City of Los Angeles v. Manhart*, the Court defined a sex stereotype under Title VII as “[e]ven a true generalization about the class . . . [which] disqualif[ies] an individual to whom the generalization does not apply.”¹⁷¹ In *J.E.B. v. Alabama ex rel. T.B.*, the Court reasoned that sex distinctions were sex stereotypes when they overgeneralized about men and women, “even when some statistical support can be conjured up for the generalization.”¹⁷² And in *Mississippi University for Women v. Hogan* and *United States v. Virginia*, the Court ruled that it was an illegal sex stereotype under the Equal Protection Clause to deny even one man or one woman access to educational institutions on the presumption that most men or most women would not want to attend (or were not qualified to attend) those institutions.¹⁷³ In *Virginia*, the State argued that its particular academic program was “designed around the rule . . . and not around the exception” – the rule being that the program at issue would be “inherently unsuitable to women.”¹⁷⁴ Writing for the Court, Justice Ginsburg, one of the anti-stereotyping principle’s architects,¹⁷⁵ rejected Virginia’s universalist logic, reminding the State that constitutional sex equality was concerned not with “most” but with “some,” not with the law of averages but with the law of one.¹⁷⁶

4. *The Legality of Sex Distinctions Is Measured According to Contemporary Norms and Values, Not History and Tradition*

Anti-stereotyping appraises the constitutionality of government rationales for sex classifications through a contemporary lens, rejecting classifications

170. 420 U.S. 636, 644 (1975) (quoting DALMER HOSKINS & LENORE E. BIXBY, U.S. SOC. SEC. ADMIN., DHEW PUB. NO. (SSA)73-11800, WOMEN AND SOCIAL SECURITY: LAW AND POLICY IN FIVE COUNTRIES 77 (1973)).

171. 435 U.S. 702, 708 (1978).

172. 511 U.S. 127, 139 n.11 (1994).

173. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729-30 (1982); *United States v. Virginia*, 518 U.S. 515, 541-42, 550 (1996).

174. *Virginia*, 518 U.S. at 541 (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1434 (W.D. Va. 1991) (internal quotation marks omitted)); *id.* (quoting *United States v. Virginia*, 976 F.2d 890, 899 (4th Cir. 1992)).

175. See Franklin, *supra* note 16, at 88 (“Ginsburg pressed the claims of male plaintiffs in order to promote a new theory of equal protection founded on an anti-stereotyping principle.”).

176. *Virginia*, 518 U.S. at 550-51. On this aspect of *Virginia*, see Yoshino, *supra* note 35, at 277, which argues that *Virginia* “requires that if any woman can avail herself of an opportunity, no woman can be denied it by the state.”

rooted in “outmoded,”¹⁷⁷ “archaic,”¹⁷⁸ “outdated,”¹⁷⁹ and “obsolescing” views.¹⁸⁰ A sex “classification must substantially serve an important governmental interest today,” said the Court in *Sessions v. Morales-Santana*, which condemned sex discrimination against unwed fathers in federal immigration law as rooted in regressive views about the relationships between fathers and their children.¹⁸¹

C. *Strange Bedfellows*

Sex equality and anti-stereotyping are strange bedfellows for at least three reasons. First, real-differences arguments *function* like sex stereotypes: they overgeneralize about bodies and their capabilities¹⁸² and about mothers and fathers;¹⁸³ they assume that men and women are always different in a biological sense, when, in fact, they are often alike;¹⁸⁴ they substitute the law of averages for the law of one;¹⁸⁵ and they rely on history and tradition to determine what counts as a real difference today.¹⁸⁶ In real-differences sex-discrimination cases,

177. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985) (explaining that differential treatment of the sexes “very likely reflect[s] outmoded notions of the relative capabilities of men and women”).

178. *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

179. *Craig v. Boren*, 429 U.S. 190, 198-99 (1976).

180. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692 (2017).

181. *Id.* at 1690.

182. *See, e.g.*, *Tagami v. City of Chicago*, 875 F.3d 375, 380 (7th Cir. 2017) (crediting the government’s argument that criminal topless bans were constitutional in part because of “basic physiological differences” between women and men’s breasts).

183. *See, e.g.*, *In re Adoption of J.S.*, 358 P.3d 1009, 1030 (Utah 2014) (upholding a sex distinction in an adoption statute on the ground that mothers, unlike fathers, commit to their children by carrying them to term).

184. *Compare* *Nguyen v. INS*, 533 U.S. 53, 61 (2001) (holding that sex discrimination in federal immigration law is a constitutionally permissible reflection of the fact that only women get pregnant and give birth), *with* *Beatie v. Beatie*, 333 P.3d 754, 759 (Ariz. Ct. App. 2014) (holding that giving birth did not “abrogate[]” a man’s legal designation as male).

185. *See, e.g.*, *Clark v. Ariz. Interscholastic Ass’n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (upholding a school’s rejection of a male student’s request to compete on the female volleyball team given that “there is no question that the Supreme Court allows for . . . average real differences between the sexes to be recognized or that they allow gender to be used as a proxy in this sense if it is an accurate proxy”).

186. *See, e.g.*, *People v. Carranza*, No. B240799, 2013 WL 3866506, at *8 (Cal. Ct. App. July 24, 2013) (upholding a law that subjected men but not women to criminal penalties for the non-consensual touching of another individual’s breast by relying on real differences, reasoning that the law reflected “the indisputable fact that the naked female breast has for centuries been a symbol of sexuality but that no such generalization can be made about the male chest” (quoting *Locker v. Kirby*, 107 Cal. Rptr. 446, 450-51 (Ct. App. 1973) (emphasis added))).

courts appear to forget about the anti-stereotyping principle's moving parts, content to ratify biological rationales that conflict with everything the anti-stereotyping principle stands for.¹⁸⁷

Second, real-differences justifications help to perpetuate *other* sex stereotypes. Consider in this regard the Fourth Circuit's 2021 decision in *Eline v. Town of Ocean City*.¹⁸⁸ In *Eline*, the Fourth Circuit upheld the constitutionality of a topless ban that was passed on an emergency basis after one woman, Chelsea Eline, "submitted written inquiries to both the Ocean City Police Department and the Worcester County State's Attorney 'regarding her stated intention to go "topless" in Ocean City[,] including on its beaches.'"¹⁸⁹ When Eline challenged the law as unconstitutional sex discrimination, a lower court upheld it on two grounds: real biological differences (between female and male breasts) and public morality.¹⁹⁰

The Fourth Circuit panel affirmed. Remarkably, it did so despite its recognition that public-morality justifications could be problematic from a constitutional-equality perspective,¹⁹¹ and despite a concurring judge's condemnation

187. See, e.g., Gans, *supra* note 16, at 1878-80 (recognizing that the Court abandons sex-stereotyping analysis when reviewing laws based on real differences even though laws based on real differences perpetuate sex stereotypes). Kenji Yoshino argues that the *Nguyen* Court failed to respect the *Virginia* Court's "rule of one" understanding of a sex stereotype, according to which "if even one man were capable of meeting the standards of conferring automatic citizenship (i.e., knowing and bonding with his child), then no man should be denied the opportunity to do so." As Yoshino tells it, the *Nguyen* Court "permitted the government's enunciation of a real biological difference to become a Trojan horse through which cultural assumptions—including stereotypes—were imported." See Yoshino, *supra* note 35, at 277-78. *Nguyen* used a gentler, milder definition of a sex stereotype—an "irrational or improper" assumption—when holding that sex discrimination against unwed fathers in federal immigration law because of pregnancy and birth was not a sex stereotype. See *Nguyen*, 533 U.S. at 68 ("There is nothing irrational or improper in the recognition that at the moment of birth—a critical event in the statutory scheme and in the whole tradition of citizenship law—the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype."). Had the Court used *Virginia*'s more stringent understanding of a sex stereotype—a failure to protect "even one person" who can satisfy or has satisfied a law's objective—it might very well have concluded that the federal government's treatment of the father in *Nguyen* was illegal.

188. 7 F.4th 214 (4th Cir. 2021).

189. *Eline v. Town of Ocean City*, 452 F. Supp. 3d 270, 273 (D. Md. 2020), *aff'd*, 7 F.4th 214 (4th Cir. 2021).

190. *Id.* at 278-82.

191. *Eline*, 7 F.4th at 222 (stating that "[t]he judicial legacy of justifying laws on the basis of the perceived moral sensibilities of the public is far from spotless," and recognizing that "[s]ome government action that we now rightly view as unconstitutional, if not immoral, has been justified on that basis," but concluding that "in this situation, protecting public sensibilities serves an important basis for government action").

of topless bans on sex-stereotyping grounds.¹⁹² Citing Betty Friedan and bell hooks, Chief Judge Gregory observed that topless bans “heighten the ‘feminine mystique’ and all the baggage that it forces women to carry.”¹⁹³ In addition, Gregory noted that topless bans, like restrictive abortion laws,

embody problematic stereotypes through the control imposed upon the bodies of women and not men. . . . By treating women’s breasts (but not those of men) as forbidden in public sight, these laws may reduce women’s bodies to objects of public gaze, reproduce the Victorian-era belief that women should be seen but not heard, and reinforce stereotypes that sexually objectify women rather than treating them as people in their own right.¹⁹⁴

Even so, Chief Judge Gregory agreed with his colleagues that Ocean City’s topless ban passed constitutional muster, in part because of a precedent in the Fourth Circuit¹⁹⁵ and in part because Gregory (curiously) did not find sufficient evidence that Ocean City’s topless ban was motivated by sex stereotypes. Gregory made this decision despite clear evidence in the record to the contrary,¹⁹⁶ and despite his *own recognition* that topless bans “reinforce stereotypes that sexually objectify women rather than treating them as people in their own right.”¹⁹⁷

Eline exemplifies a common pattern in real-differences sex-discrimination cases: courts rationalizing laws that perpetuate illegal judgments (or stereotypes) about men and women by couching those laws as simple expressions of fact, or at least tethering them in some way to biology. This pattern is perverse for many reasons, not the least of which is that those simple expressions of fact are *themselves* sex stereotypes because they grossly overgeneralize about male and female biology. In this sense, courts in real-differences sex-discrimination cases double down on sex stereotyping by using one stereotype to excuse another.

192. *Id.* at 226-27 (Gregory, C.J., concurring) (comparing criminal topless bans to criminal abortion laws).

193. *Id.*

194. *Id.*

195. *Id.* at 227 (urging the court to reconsider *United States v. Biocic*, 928 F.2d 112 (4th Cir. 1991), which held that a United States Fish and Wildlife regulation prohibiting female but not male toplessness on federal lands was not unconstitutional sex discrimination because males and females were not similarly situated with respect to nudity).

196. *Id.* For instance, Ocean City justified its ban by arguing that “a prohibition against females baring their breasts in public, although not offensive to everyone, is still seen by society as unpalatable.” *Id.* at 217 (majority opinion) (summarizing the law’s legislative findings).

197. *Id.* at 227.

Third, real-differences arguments help to rationalize and exacerbate the substantive inequality that anti-stereotyping ought to reach. For example, real differences is the reason for gender-normed physical-fitness tests, but gender-normed physical-fitness tests perpetuate stereotypes about women that negatively impact women's employment opportunities.¹⁹⁸

Similarly, real differences is the reason for sex segregation in sports,¹⁹⁹ and especially for keeping males off female sports teams,²⁰⁰ but sex segregation in sports is not always good for women generally or for female athletes specifically.²⁰¹ Recent scholarship suggests that sex segregation in sports is bad for "women's health" because it "reduces women's participation in sports and changes the nature of the sports in which women participate, both of which have implications for myriad health issues."²⁰² In addition, sex segregation in sports has been linked to the materially inferior conditions in which female athletes operate.²⁰³ For example, by communicating "the unproven assumption that

198. See, e.g., Levin, *supra* note 122, at 598-99; Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 979 (2019) ("Disparate [physical fitness] standards may perpetuate false stereotypes about women's inferiority for law enforcement and fire-fighting jobs.").

199. See, e.g., Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982) (upholding the exclusion of males from a female volleyball team based on "average physiological differences" between men and women).

200. See, e.g., *id.* at 1127; Kleczek *ex rel.* Kleczek v. R.I. Interscholastic League, Inc., 768 F. Supp. 951 (D.R.I. 1991) (upholding the exclusion of males from a female field hockey team); Williams v. Sch. Dist. of Bethlehem, 998 F.2d 169 (3d Cir. 1993) (same). *But see* Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, Inc., 393 N.E.2d 284 (Mass. 1979) (holding that an athletic association's categorical bar against male participation on female sports teams violated Massachusetts's Equal Rights Amendment, in part because it rested on gross generalizations about male and female athletes that overlooked their individual differences).

201. See, e.g., ADRIENNE N. MILNER & JOMILLS HENRY BRADDOCK II, SEX SEGREGATION IN SPORTS: WHY SEPARATE IS NOT EQUAL 1-13 (2016); Nancy Leong, *Against Women's Sports*, 95 WASH. U. L. REV. 1249, 1262-80 (2018); Nancy Leong & Emily Bartlett, *Sex Segregation in Sports as a Public Health Issue*, 40 CARDOZO L. REV. 1813, 1815 (2019); Caroline Voyles, *Sex Segregation in Sport: A Denial of Rights and Opportunities for Health*, HEALTH & HUM. RTS. J. (June 28, 2019), <https://www.hhrjournal.org/2019/06/sex-segregation-in-sport-a-denial-of-rights-and-opportunities-for-health> [<https://perma.cc/52UH-6QC9>]; Maggie Mertens, *Separating Sports by Sex Doesn't Make Sense*, ATLANTIC (Sept. 17, 2022), <https://www.theatlantic.com/culture/archive/2022/09/sports-gender-sex-segregation-coed/671460> [<https://perma.cc/UYZ7-X7BX>].

202. Leong & Bartlett, *supra* note 201, at 1815.

203. Leong, *supra* note 201, at 1260-61.

women cannot compete against men in [all] athletic activities,”²⁰⁴ sex separatism, shored up by the logic of real differences, makes it easier to justify female athletes being paid grossly less than men.²⁰⁵

Likewise, real differences is the reason for criminal topless bans, but criminal topless bans make people see and treat women differently. Judge Rovner recognized this dynamic in her *Tagami v. City of Chicago* dissent, which criticized Chicago’s criminal breast ordinance for “call[ing] attention to and sexualiz[ing] the female form, and [for] impos[ing] a burden of public modesty on women alone, with ramifications that likely extend beyond the public way.”²⁰⁶

* * *

Despite the above-mentioned problems with real differences from an anti-stereotyping perspective, sex equality continues to give real differences a proverbial seat at the table. The next Part describes the body of law that makes that already-bad decision worse.

II. LGBTQ EQUALITY, REAL DIFFERENCES, AND ANTI-STEREOTYPING

This Part turns from the sex-equality approach to real differences and anti-stereotyping to the LGBTQ-equality approach to real differences and anti-stereotyping. Section II.A describes biology as a constraint on LGBTQ rights historically. Section II.B describes LGBTQ equality as a constraint on biology today.

A. *Real Differences as a Constraint on LGBTQ Rights*

In a notoriously transphobic decision from 1999, *Littleton v. Prange*,²⁰⁷ the Texas Court of Appeals relied on real differences to hold that a woman assigned male at birth was forever a legal male. Christie Littleton underwent hormone therapy and sex-affirmation surgery over several years before marrying her husband, who died at the hands of a negligent doctor. Littleton sued the doctor for wrongful death, arguing that she had standing to do so as her deceased husband’s surviving spouse.

²⁰⁴ *Id.* at 1264.

²⁰⁵ Olivia Abrams, *Why Female Athletes Earn Less Than Men Across Most Sports*, FORBES (June 23, 2019, 8:00 AM EDT), <https://www.forbes.com/sites/oliviaabrams/2019/06/23/why-female-athletes-earn-less-than-men-across-most-sports/?sh=316b785a40fb> [<https://perma.cc/U22P-Y7EY>].

²⁰⁶ 875 F.3d 375, 383 (7th Cir. 2017) (Rovner, J., dissenting).

²⁰⁷ 9 S.W.3d 223, 231 (Tex. App. 1999).

“Christie is medically termed a transsexual, a term not often heard on the streets of Texas, nor in its courtrooms,” a divided court began its decision denying Christie’s wrongful death claim.²⁰⁸ For such a claim to prevail, the court observed, Christie had to first show that she was a surviving spouse, and that she could not do, said the court, because Christie was a legal male in a marriage with another man, which Texas did not recognize in 1999.²⁰⁹ “At the time of birth, Christie was a male, both anatomically and genetically,” the court remarked.²¹⁰ While she “believes herself to be a woman . . . [and] has made every conceivable effort to make herself a female, including a surgery that would make most males pale and perspire to contemplate,”²¹¹ neither Christie’s thoughts nor actions altered her legal sex, which the “Creator” fixed at birth.²¹² “There are some things we cannot will into being. They just are,” *Littleton* concluded.²¹³

Far from an anomaly, *Littleton* reflected the zeitgeist of the day when it came to transgender rights. Transgender people could not marry someone who was assigned the same sex as them at birth on the theory that sex was determined by physical characteristics at birth, not by characteristics resulting from an “operative intervention” later in life.²¹⁴ Transgender people could be fired from work on the basis of their transgender status without consequence, with courts denying relief under federal antidiscrimination law on the ground that sex was unchangeable.²¹⁵ In most states, transgender people could not change their legal

208. *Id.* at 225.

209. *Id.* at 231.

210. *Id.*

211. *Id.* at 230-31.

212. *Id.* at 224, 231.

213. *Id.* at 231.

214. *In re Ladrach*, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987) (citing *Corbett v. Corbett* (1970) 2 All ER 33 at 48 (Eng.)); see also *In re Estate of Gardiner*, 42 P.3d 120, 124 (Kan. 2002) (affirming the lower court’s ruling that a marriage between a transgender woman and cisgender man was void under Kansas law).

215. See, e.g., *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (rejecting a transgender employee’s sex-discrimination claim under Title VII in part because “[plaintiff] has not claimed to have been treated discriminatorily because she is male or female, but rather because she is a transsexual who chose to change her sex”); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal. 1975) (holding that Title VII’s prohibition of sex discrimination against men and women does not reach discrimination against transsexuals), *aff’d mem.*, 570 F.2d 354 (9th Cir. 1978); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (rejecting a transgender employee’s sex-discrimination claim under Title VII in part because medical experts disagreed over whether the plaintiff “is properly classified as male or female,” therefore creating an intractable dilemma surrounding bathroom usage); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (rejecting a transgender employee’s sex-discrimination claim under Title VII in part because Title VII protected men and women and

sex despite surgical interventions on the theory that sex was fixed at birth and chromosomal, even though doctors generally did not test an infant's chromosomes upon birth.²¹⁶ When states finally allowed transgender people to change their legal sex, they did so only on the condition that they changed their body first, so as to look and even function like the "other" sex.²¹⁷ In this sense, biology was as much a reason behind states' refusal to recognize legal-sex changes as it was behind their eventual willingness to do so.

Transgender rights was not the only area of LGBTQ law constrained by biologism, that is, by the appeal to biology to justify legal conclusions. The law denied sexual minorities the rights to sexual autonomy and marriage on the theory that "no same-sex couple offers the possibility of the birth of children by their union."²¹⁸ Similarly, the law left queer people without formal parenthood recognition because they lacked biological connections to their children.²¹⁹ In these and other settings, the law thwarted the equality, liberty, and dignity rights of LGBTQ people by invoking the same set of ideas that has fueled sex inequality for centuries: that biology is destiny, that biological differences between the sexes are real, and that discrimination is not illegal when it is based on biological facts.

B. LGBTQ Equality as a Constraint on Real Differences

Today, LGBTQ equality is constraining the logic and law of real differences rather than the other way around. This Section describes that jurisprudence, fo-

plaintiff was neither, and questioning, in language similar to that employed by the Texas appeals court in *Littleton v. Prange*, whether "a woman can be so easily created from what remains of a man").

216. See, e.g., *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 321-22 (Sup. Ct. 1966) (denying a legal-sex-change application and noting that only ten states allowed such changes following surgical interventions).

217. See Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 768 (2008). Dean Spade notes that some jurisdictions required "proof that the applicant ha[d] undergone one of two very specific procedures: vaginoplasty or phalloplasty." *Id.* at 769. Others required that "the applicant ha[d] undergone penectomy (surgical removal of the penis) or hysterectomy and mastectomy." *Id.* While jurisdictions "var[ied] in what proof [was] required and in the specificity of [their] evidentiary requirements," every jurisdiction required some bodily manipulation as a condition precedent to a legal-sex reclassification. *Id.* at 768. For men, that usually meant the construction of a penis, the removal of breasts, and the injection of testosterone. For women, that usually meant the construction of a vagina, the presence of breasts, and the injection of estrogen. For men and women alike, the requirements almost always meant a trade-off between procreative autonomy and the ability to change their legal sex. *Id.* at 736.

218. *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974).

219. Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 265 (2020).

cusing first on the law's rejection of biology as a basis for transgender discrimination, and then on the law's rejection of biology as a basis for discrimination against same-sex couples. Common themes unite this vast body of law, which includes statutory and constitutional-equality doctrine as well as substantive areas ranging from legal-sex changes to same-sex marriage. One such theme is that sex is neither binary nor (just) biological. Another is that women and men are the same or similar in the very areas that sex equality insists they are different: fathers can bear children, children can be "born . . . of" two men or two women, and maternal identity can be as uncertain and contested as paternal identity. Yet another theme is that even discrimination based on "biology alone"²²⁰ can be a sex stereotype if it grossly overgeneralizes about male and female anatomy, prioritizes averages over individuals, and is grounded in hide-bound conceptions of sex, the body, procreation, and parenthood—all of which the anti-stereotyping principle prohibits. In this sense, LGBTQ equality is laying the foundation for sex equality 2.0, wherein all biological justifications for sex discrimination are open to critique on sex-stereotyping grounds.

Importantly, this Section does not suggest that the law has completely abandoned real differences as a constraint on the lives of LGBTQ people; one need only witness the recent wave of anti-transgender sports and medical-treatment bans,²²¹ all of which have been justified on real-differences grounds.²²² This Section does suggest, though, that signs generally point away from real differences as a reason to sustain LGBTQ discrimination. For example, so far, every court to hear a constitutional challenge to an anti-trans sports and medical-treatment ban has temporarily enjoined the enforcement of the ban by rejecting biological difference as a constitutionally permissible justification for transgender discrimination.²²³ The same holds true for most transgender bathroom bans: real differences and its associated Supreme Court precedents, like *Nguyen v. INS*, have failed to persuade courts that transgender discrimination in bathroom access is legal.²²⁴ Katie Eyer writes that, despite some defeats, "the constitutional land-

220. *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704 (D. Md. 2018).

221. *See In 2021, Our Fight for LGBTQ Rights Moved to the States*, ACLU (Dec. 16, 2021), <https://www.aclu.org/news/lgbtq-rights/in-2021-our-fight-for-lgbtq-rights-moved-to-the-states> [<https://perma.cc/Q6JC-RFW9>] (discussing these laws).

222. *See infra* notes 286-290 and accompanying text.

223. *See infra* notes 291-300 and accompanying text.

224. *See infra* notes 266-282 and accompanying text. A notable exception to this trend is a recent en banc decision from the Eleventh Circuit holding that a school did not violate either the Equal Protection Clause or Title IX by prohibiting a student from using the bathroom consistent with his nonassigned sex and gender identity. *See Adams ex rel. Kasper v. Sch. Bd. of*

scape has shifted in vital ways for transgender rights in recent years, and indeed . . . the transgender rights movement may have reached a ‘tipping point’ in securing constitutional protections.”²²⁵ Courts never condemn biologically rationalized sex discrimination as tantamount to the Jim Crow law repudiated in *Brown v. Board of Education* and to the White Supremacy repudiated in *Loving v. Virginia*.²²⁶ But not so in decisions addressing the constitutionality of biologically rationalized transgender discrimination. There, comparisons among transgender discrimination, Jim Crow, and White Supremacy are somewhat common, and powerful.²²⁷

1. Transgender Discrimination

A lot has changed for transgender people since the transphobic *Littleton* decision in 1999, even in Texas, which legislatively overruled *Littleton* in 2009 by

St. John’s Cnty., No. 18-13592, 2022 WL 18003879 (11th Cir. Dec. 30, 2022) (en banc). There, the majority appealed to *Nguyen v. INS* for the proposition that “the Supreme Court has repeatedly recognized the biological differences between the sexes by grounding its sex-discrimination jurisprudence on such differences.” *Id.* at *12.

225. Katie Eyer, *Transgender Constitutional Law*, U. PA. L. REV. (forthcoming 2023) (manuscript at 7), <https://ssrn.com/abstract=4173202> [<https://perma.cc/M2TP-K9VU>].
226. To clarify: The Supreme Court has analogized women and racial minorities when making the case for heightened scrutiny of sex-based state action. *See, e.g.,* *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (plurality opinion) (observing that “throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes,” in support of strict scrutiny for sex-based state action). However, the Court has never said that biologically rationalized sex discrimination is akin to the biologically rationalized race discrimination from slavery and the Jim Crow era. That is, the Court has never said that biology *on its own* is bigoted when it comes to sex in the same way that it has said that biology *on its own* is bigoted when it comes to race. *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1, 11-12 & n.11 (1967) (rejecting Virginia’s biological justification for anti-miscegenation prohibitions – maintaining the “integrity of the white race” – as an unconstitutional expression of “White Supremacy”). To the contrary, the Court has suggested that “[i]nherent differences’ between men and women . . . remain cause for celebration.” *United States v. Virginia*, 518 U.S. 515, 533 (1996). For a skeptical reading of the latter passage, see Franklin, *supra* note 15, at 170 n.6, which argues that the *Virginia* Court put “inherent differences” in quotation marks to signal “the Court’s awareness of the long and sorry history of the government’s reliance on specious biological distinctions to justify the differential treatment of the sexes and its increasing skepticism toward attempts to justify discrimination on those grounds.”
227. *See, e.g.,* *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1315 (M.D. Ala. 2021); *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 350, 357 (S.D. W. Va. 2021); *Gonzalez v. Nevares*, 305 F. Supp. 3d 327, 334 (D.P.R. 2018).

allowing for changes to birth certificates in some instances.²²⁸ This Section provides an overview of those changes, focusing on different substantive areas and on the law's move away from real differences as a constraint on transgender people's rights in those areas.

a. Legal-Sex Changes

The law and logic of real differences decreasingly constrains individuals' freedom to choose their legal sex. Today, the federal government and most states allow individuals to change their legal sex on official documents like birth certificates, driver's licenses, and passports. Twenty-two jurisdictions allow individuals to select or change their gender designation to "gender X" on driver's licenses; seventeen jurisdictions allow individuals to do the same on birth certificates.²²⁹ Two jurisdictions allow a parent or parents to leave their newly born child's birth certificate silent with respect to sex, giving that child the freedom to make their own gender choices later in life.²³⁰ The few jurisdictions that prohibit legal-sex changes might soon go the way of Idaho, Ohio, Kansas, and Puerto Rico, in

228. See *In re Estate of Araguz*, 443 S.W.3d 233, 245 (Tex. App. 2014). But see *In re McReynolds*, 502 S.W.3d 884, 890-91 (Tex. App. 2016) (limiting *Araguz* to sex changes to birth certificates obtained by courts *outside of Texas*).

229. For a complete list, see *X Gender Markers by State*, LAMBDA LEGAL (July 28, 2020), <https://www.lambdalegal.org/x-markers> [<https://perma.cc/6PVN-VUXP>], which collects and links to these laws. See also Brooke Migdon, *Here Are the States Where You Can (and Cannot) Change Your Gender Designation on Official Documents*, HILL (May 31, 2022), <https://thehill.com/changing-america/respect/diversity-inclusion/3507206-here-are-the-states-where-you-can-and-cannot-change-your-gender-designation-on-official-documents> [<https://perma.cc/CY6D-NEJG>] (listing jurisdictions with these laws).

230. These jurisdictions include California and New York City. See Gender Recognition Act, 2017 Cal. Legis. Serv. 853 (West) (creating, among other things, a nonbinary gender category on birth certificates that new parents or a new parent can select); Josh Hafner, *Gender 'X': New York City Adds Gender-Neutral Option to Birth Certificates*, USA TODAY (Jan. 3, 2019, 4:57 PM ET), <https://www.usatoday.com/story/news/nation/2019/01/03/new-york-city-birth-certificates-now-feature-third-gender-option-x/2472189002> [<https://perma.cc/2MCD-TQS4>] (reporting that the law allows individuals to change their gender designation to gender X later in life as well as allows parents to choose gender X for their children upon birth). Taking the lead from these progressive jurisdictions, the American Medical Association urged states in 2021 to remove the category of sex entirely from the publicly accessible part of a person's birth certificate, arguing that "[a]ssigning sex using binary variables in the public portion of the birth certificate [not only] fails to recognize the medical spectrum of gender identity," but also "lead[s] to discrimination and unnecessary burden[s] on individuals whose current gender identity does not align with their designation at birth . . . when they register for school or sports, adopt, get married, or request personal records." Marcia Frellick, *Remove Sex from Public Birth Certificates, AMA Says*, WEBMD (June 16, 2021), <https://www.webmd.com/a-to-z-guides/news/20210616/remove-sex-from-public-birth-certificates-ama-says> [<https://perma.cc/NM4V-38ML>].

which federal courts have recently found that those jurisdictions violate constitutional sex equality, transgender equality, and/or information privacy by refusing to recognize legal-sex changes.²³¹

In addition, states have abandoned the requirement that someone's body look or function in a certain way in order for them to change their legal sex. In 2008, Dean Spade reported that "[f]orty-seven states and New York City allow[ed] gender reclassification on birth certificates" but only if an applicant could provide "evidence of surgery to warrant a gender reclassification."²³² Today, by contrast, surgical and other bodily interventions are no longer a required antecedent to changing one's legal sex on a birth certificate in most jurisdictions, and specific bodily interventions are not statutorily required in any jurisdiction. That is, today, no state specifically requires someone to get "female breasts" to be a legal female or to lose "female breasts" to be a legal male.²³³ Moreover, today, no state specifically requires someone to lose their ability to carry and give birth to a child in order to get or maintain their male legal status.²³⁴

Importantly, when state officials have tried to read such requirements into statutes addressing legal-sex changes, courts have struck those interpretations down on constitutional equality and liberty grounds. For instance, in *Beatie v. Beatie*, Arizona state officials tried to argue that a man, Thomas Beatie, effectively

231. See, e.g., *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1135 (D. Idaho 2018) (finding the practice of denying transgender individuals' applications to change the sexes listed on their birth certificates violated the Equal Protection Clause); *F.V. v. Jeppesen*, 477 F. Supp. 3d 1144, 1151 (D. Idaho 2020) (clarifying Idaho's requirement to permit legal-sex changes on birth certificates as a matter of constitutional equality and liberty); *Ray v. McCloud*, 507 F. Supp. 3d 925, 940 (S.D. Ohio 2020) (holding that Ohio's refusal to allow individuals to change their legal sex on birth certificates amounted to unconstitutional discrimination under the Fourteenth Amendment's Equal Protection Clause); Consent Judgment at 2-4, *Foster v. Andersen*, No. 18-02552-DDC-KGG (D. Kan. June 21, 2019) (ordering Kansas to permit legal changes to birth certificates following an agreement by the parties that Kansas's policy prohibiting such changes was unconstitutional discrimination under the Fourteenth Amendment's Equal Protection and Due Process Clauses); *Gonzalez*, 305 F. Supp. 3d. at 333 (finding that a policy prohibiting legal-sex changes to birth certificates in Puerto Rico violated transgender plaintiffs' right to decisional privacy under the Constitution). For pending cases, see Complaint for Declaratory and Injunctive Relief at 4, *Gore v. Lee*, No. 19-cv-00328 (M.D. Tenn. Apr. 23, 2019); and Complaint for Declaratory and Injunctive Relief at 3, *Fowler v. Stitt*, No. 22-cv-00115 (N.D. Okla. Mar. 14, 2022), which challenges Oklahoma's reversal of the Oklahoma State Department of Health's prior practice of allowing transgender people to correct their birth certificates to match their gender identity.

232. Spade, *supra* note 217, at 767-68.

233. For a state-by-state breakdown of the requirements for legal-sex changes, see *ID Documents Center*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Nov. 2021), <https://transequality.org/documents> [<https://perma.cc/JM3G-GTED>]. A review of each state shows that even states that require surgical interventions nowhere specify what those surgical interventions must be.

234. See *id.*

lost his male legal status after carrying and giving birth to his three children.²³⁵ Disagreeing with the State, a court asserted that “there is no apparent basis in law or fact for the proposition that in the event Thomas gave birth after having modified his gender designation, it would have abrogated his ‘maleness,’ as reflected upon the amended birth certificate.”²³⁶ In fact, the court continued, to require someone “to forego procreation” to change their legal sex (or, in Beatie’s case, to *keep* that legal-sex change), would be to violate the constitutional right to procreation.²³⁷ “[T]he right to have children is a liberty interest afforded special constitutional protection,” said the court.²³⁸

Similarly, in *Corbitt v. Taylor*, a federal court considered whether Alabama Law Enforcement Agency officials could require individuals to have surgical interventions to make their bodies consistent with gender norms—breasts for women, penises for men—in order to change their legal sex on a driver’s license.²³⁹ Alabama defended its surgical requirement on real-differences grounds, arguing that the requirement reflected the sort of biological difference long embraced by the Supreme Court as a constitutional basis for sex discrimination. “[W]hile intermediate scrutiny must do more than rely on stereotypical generalizations,” the State argued, “it may also take into account ‘biological differences’ between the sexes, such as the indisputable fact that for most people external genitalia at birth typically conform with a person’s gender identity.”²⁴⁰

Rejecting the State’s real-differences defense, *Corbitt* suggested that Alabama officials engaged in illegal sex stereotyping by imposing on private citizens the belief that “individuals born with penises are male and individuals born with

235. 333 P.3d 754, 756–57 (Ariz. Ct. App. 2014). *Beatie* addressed whether Arizona courts could grant a divorce in a marriage between a woman assigned female at birth and a man assigned female at birth. The lower court in *Beatie* held that it lacked subject-matter jurisdiction to grant the couple a divorce on the grounds that the husband was still a legal female in Arizona, even though he had changed his legal sex in Hawaii years earlier, because he carried and gave birth to the couple’s three children. *See id.* at 757. As summarized by the appeals court, the family court reasoned that the husband in *Beatie* was really a wife because “the Arizona legislature has repeatedly recognized pregnancy as a uniquely female attribute,” and because the legal category of “man” in Arizona “exclude[d] people capable of giving birth.” *Id.* Reversing the lower court’s refusal to grant the divorce, the appeals court held that there was no legal basis to dismiss the husband’s legal-sex change in Hawaii given that the husband had satisfied all the requirements to change one’s legal sex in Hawaii, as well as in Arizona. *Id.* at 760.

236. *Id.* at 759.

237. *Id.*

238. *Id.* at 760 n.10 (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

239. *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1311 (M.D. Ala. 2021).

240. Defendants’ Brief in Support of Their Motion for Summary Judgment at 45, *Corbitt*, 513 F. Supp. 3d 1309 (No. 18-cv-91), 2019 WL 690376.

vaginas are female.”²⁴¹ “The sex classification of [Alabama’s driver’s license policy] is . . . one imposed by the State,”²⁴² said the court. “Through [it],” *Corbitt* continued, “the State sets the criteria by which it channels people into sex classifications In so doing, the policy imposes its sex classification, denying the [plaintiffs] the ability to decide their sex for themselves instead of being told who they are by the State.”²⁴³ Drawing an analogy to racial-purity laws during slavery and Jim Crow, *Corbitt* concluded by stating that “designat[ing] people’s race based on state-determined criteria . . . would be troubling: bureaucrats comparing skin tones and tracing family lineages to decide who is white and who is black. Laws demanding such inquiries have a long and loathsome history.”²⁴⁴

The State has appealed the lower court’s decision in *Corbitt* to the Eleventh Circuit, but despite what happens there, *Corbitt* has already resonated in other states, like Michigan, whose attorney general cited *Corbitt* in a recent opinion letter that argued that Michigan’s surgical requirements for legal-sex changes amounted to illegal sex stereotyping.²⁴⁵ Other courts have made similar conclusions, holding that states cannot require individuals to undergo specific bodily interventions to change their legal sex since states “are not equipped” to determine which characteristics define the female sex or the male sex.²⁴⁶ For example, the Utah Supreme Court in *In re Childers-Gray* “caution[ed] against relying even on the term ‘biological sex’ as defined by observable external attributes”²⁴⁷ given that “many definitions [of sex] focus . . . on ‘psychological,’ ‘behavior[al],’ or ‘character’ differences, which are not necessarily tied exclusively to physiology or observable characteristics at birth.”²⁴⁸ And a state court in Montana observed in

241. Brief of the State Defendants-Appellants at 2, *Corbitt v. Taylor*, No. 21-10486 (filed May 26, 2021), 2021 WL 2189713.

242. *Corbitt*, 513 F. Supp. 3d at 1315.

243. *Id.*

244. *Id.*

245. See Mich. Att’y Gen., Opinion Letter on Constitutionality of the “Sex-Reassignment Surgery” Requirement of MCL 333.2831(c) (June 30, 2021), at 4. Noting that Michigan’s statute “is silent on the nature and extent of the required ‘sex-reassignment surgery,’” the letter asks whether “only external genital surgery is necessary,” or whether “breast or chest surgery also [is] required.” *Id.* at 8. “What about aesthetic procedures?” the letter continues, “[o]r is it whatever surgical options the physician deems appropriate for the individual?” *Id.* at 8-9. “Bottom line,” the letter concludes, Michigan’s legal-sex change law “mandates an undefined surgery to satisfy an undefined biological standard,” thereby amounting to unconstitutional sex discrimination under intermediate scrutiny. *Id.* at 9.

246. *In re Childers-Gray*, 487 P.3d 96, 122 (Utah 2021).

247. *Id.*

248. *Id.* at 120 (quoting *Childers-Gray*, 487 P.3d at 148 n.100 (Lee, J., dissenting) (internal citations omitted)).

Marquez v. State, which temporarily enjoined the enforcement of a law that requires unspecified surgical interventions for legal-sex changes on birth certificates, that the State “impermissibly delegates basic policy matters to . . . judges . . . for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”²⁴⁹ In some cases, states have consented to decrees that prohibit them from conditioning legal-sex changes on medical interventions after plaintiffs challenged those conditions as a violation of constitutional liberty and equality.²⁵⁰

b. Insurance Coverage for Gender-Affirming Care

Courts increasingly reject biology as a reason to discriminate against transgender people in insurance coverage, as exemplified by *Boyden v. Conlin*.²⁵¹ *Boyden* considered whether the State of Wisconsin engaged in illegal sex and transgender discrimination—including illegal sex stereotyping—under the Equal Protection Clause, Title VII, and the ACA by excluding gender-affirming care from insurance coverage for state employees.²⁵² The State offered three arguments in defense of its exclusions.

First, the State argued that the exclusions did not facially discriminate because of transgender status or sex but rather because of medical procedures—like mastectomies—that not all transgender individuals would undergo.²⁵³ To support that argument, the State appealed to *Geduldig v. Aiello*, which held, in part, that pregnancy classifications were not sex classifications because not all women would get pregnant.²⁵⁴

Second, the State argued that the plaintiffs’ sex-discrimination claim failed because sex discrimination only reached discrimination on the basis of one’s biology, not on the basis of “socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls

249. No. DV 21-873, at 27 (Mont. Dist. Ct. Apr. 21, 2022) (quoting *City of Whitefish v. O’Shaughnessy*, 704 P.2d 1021, 1025 (Mont. 1985)).

250. See, e.g., Amended Consent Judgment, *Campos v. Kinsley*, No. 21-cv-00880 (M.D.N.C. June 22, 2022).

251. 341 F. Supp. 3d 979 (W.D. Wis. 2018).

252. See *id.* at 995-97.

253. See State Defendants’ Brief in Support of Motion for Summary Judgment at 16-20, *Boyden v. Wis. Dep’t of Emp. Tr. Funds*, No. 17-CV-0264 (W.D. Wis. June 1, 2018).

254. *Id.* at 18-20 (citing *Geduldig v. Aiello*, 417 U.S. 484 (1974)). As discussed earlier, the Supreme Court in *Dobbs v. Jackson Women’s Health Organization* interpreted *Geduldig* to stand for the proposition that pregnancy classifications on their face were sex neutral because pregnancy was a biological condition experienced by women only. See *supra* note 14.

and women.”²⁵⁵ In other words, in the State’s view, gender-identity discrimination fell outside the ambit of sex-discrimination law because gender identity (conduct) was not sex (biology).

Third, the State contended that the plaintiffs’ sex-stereotyping claim failed because the “[t]he gravamen of a sex stereotyping claim . . . is behaviors, mannerisms, or appearances,” not surgical interventions on one’s body, let alone surgical interventions intended to “conform” the body “to sex stereotypes.”²⁵⁶ If, according to the State, the plaintiffs’ sex-discrimination claim failed because they *could not* show discrimination because of sex-as-biology, then their sex-stereotyping claim failed because they *could only* show discrimination (if that) related to bodily characteristics.

Ruling for the plaintiffs, the *Boyden* court rejected all of the State’s arguments, holding that the State’s exclusion of gender-affirming care amounted to illegal sex discrimination, including illegal sex stereotyping, under the Constitution, Title VII, and the ACA.²⁵⁷ In response to the State’s claim that the exclusion did not discriminate by sex because it regulated a procedure that only some people experienced rather than a status that everyone had, *Boyden* reasoned that sex equality protected individuals, not groups. The court noted, “[T]he Exclusion need not injure *all* members of a protected class for it to constitute sex discrimination.”²⁵⁸

In addition, answering the State’s contention that sex equality’s anti-stereotyping principle did not reach policies that regulated gender-conforming surgical interventions, the court said:

[A]ll individuals, whether transgender or cisgender, have their own understanding of what it means to be a woman or a man, and the degree to which one’s physical, sexual characteristics need to align with their identity. . . . [T]he Exclusion implicates sex stereotyping by . . . requiring transgender individuals to maintain the physical characteristics of their natal sex. In other words, the Exclusion entrenches the belief that

255. State Defendants’ Brief in Support for Summary Judgment, *supra* note 253, at 22.

256. *Id.* at 25–26. Note the deep inconsistency between the second and third rationales. According to the second, transgender discrimination is not sex discrimination because it is *not* biologically motivated, but according to the third, transgender discrimination is not sex discrimination (in the form of sex stereotyping) because it *only* involves the body (as opposed to, say, gender presentation).

257. *Boyden*, 341 F. Supp. 3d at 1005–06.

258. *Id.* at 996.

transgender individuals must preserve the genitalia and other physical attributes of their natal sex over . . . personal preference²⁵⁹

Boyden's reasoning resonates with what several courts have said about surgical requirements for legal-sex changes: that such requirements constitute illegal sex stereotypes because they “impose” the State’s beliefs about how legal sex and the body both do align and ought to align, “denying [individuals] . . . the ability to decide their sex for themselves.”²⁶⁰ It also is consistent with other courts’ approaches to gender-affirming-care insurance exclusions.

For example, in *Flack v. Wisconsin Department of Health Services*, a federal court in Wisconsin found that “discriminating on the basis that an individual was going to, had, or was in the process of changing their sex— or the most pronounced physical characteristics of their sex— [by excluding insurance coverage for those changes] is *still* discrimination based on sex.”²⁶¹ Similarly, in *Fletcher v. Alaska*, a federal district court held that the State engaged in illegal sex discrimination under Title VII by extending insurance coverage if surgery “reaffirm[ed] an individual’s natal sex” but denying it if surgery “diverg[ed] from an individual’s natal sex.”²⁶² In response to the State’s contention that the insurance exclusion did not violate Title VII because it treated (transgender) men and (transgender) women the same by denying coverage for both, *Fletcher* stated that Title VII makes it illegal to discriminate against an individual. The court noted that “[t]he statute’s focus on the individual is unambiguous.”²⁶³

Likewise, in *Kadel v. Folwell*, a federal court reasoned that North Carolina engaged in illegal sex stereotyping under the Equal Protection Clause by insuring bodily interventions that conformed to one’s sex assigned at birth but excluding from coverage bodily interventions that diverged from one’s sex assigned at birth.²⁶⁴ Insisting that individuals match physiological types, said *Kadel*, was no different than insisting that individuals match social types, the latter of which the Supreme Court had long recognized as illegal sex discrimination.²⁶⁵

259. *Id.* at 996–97.

260. *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1315 (M.D. Ala. 2021).

261. 328 F. Supp. 3d 931, 949 (W.D. Wis. 2018).

262. 443 F. Supp. 3d 1024, 1030 (D. Alaska 2020).

263. *Id.* at 1030 (quoting *City of Los Angeles v. Manhart*, 435 U.S. 702, 708 (1978)).

264. No. 19-cv-00272, 2022 WL 3226731, at *24 (M.D.N.C. Aug. 10, 2022).

265. *Id.* at *19.

c. *Public-Facility Access*

Several decisions addressing the legality of transgender discrimination in public-facility access, including bathroom access, have rejected real-differences justifications as offensive to the anti-stereotyping principle's core features: its embrace of contemporary norms, its attention to on-the-ground facts, and its protection of individuality and exceptionality.

Consider, for example, *Grimm v. Gloucester County School Board*, a five-year transgender bathroom litigation in Virginia that ended in 2020 when the Fourth Circuit ruled that a school board engaged in illegal sex discrimination under the Equal Protection Clause and Title IX by denying Gavin Grimm access to the bathroom associated with his gender identity.²⁶⁶ The decisions in *Grimm* are notable for their consistent rejection of the State's real-differences defenses throughout the "winding years of [the *Grimm*] litigation."²⁶⁷ Taken together, the *Grimm* decisions (1) rejected a binary definition of sex, noting, for instance, that "a hard-and-fast binary division [of sex] on the basis of reproductive organs . . . was not universally descriptive,"²⁶⁸ and that "[m]odern definitions of 'sex' . . . implicitly recognize the limitations of a nonmalleable, binary conception of sex";²⁶⁹ (2) found that it was an illegal sex stereotype to exclude people whose "physical attributes . . . [do not] align perfectly with biological maleness or femaleness,"²⁷⁰ and to punish people for deviating from what "a male or a female student *should* be, and from the physiological characteristics . . . that a male

266. 972 F.3d 586, 616, 619 (4th Cir. 2020).

267. *Id.* at 593.

268. G.G. *ex rel.* *Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 721 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017). The Fourth Circuit's decision in *Grimm* on the issue of *Auer* deference was vacated by the Supreme Court after the 2016 election of President Trump, whose Secretary of Education issued another letter in 2017 "withdrawing the statements of policy and guidance reflected in" the prior two letters. See U.S. Dep't of Just., Civ. Rts. Div. & U.S. Dep't of Educ., Dear Colleague Letter (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [<https://perma.cc/5PGR-7DLN>]. Despite those setbacks, in 2017 and 2019, Grimm filed amended complaints in federal district court that again argued that transgender public-facility refusals were illegal sex discrimination. See Amended Complaint, *Grimm v. Gloucester Cnty. Sch. Bd.*, 302 F. Supp. 3d 730 (E.D. Va. 2018) (No. 15-cv-00054); Second Amended Complaint, *Grimm*, 302 F. Supp. 3d 730 (No. 15-cv-00054). The Second Amended Complaint additionally argued that the board engaged in illegal sex discrimination by refusing to amend Grimm's school records to reflect "male" after the State of Virginia had granted his petition to change his legal sex on his driver's license and birth certificate. Second Amended Complaint, *supra*, at 14-15.

269. *Grimm*, 822 F.3d at 721 n.7.

270. *Grimm*, 302 F. Supp. 3d at 743 (citing Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869, 3875 (2017)).

or a female student *should* have”;²⁷¹ and (3) rejected the State’s argument that discrimination “based on *physiology*, period”²⁷² was permissible under existing anti-stereotyping doctrine because that doctrine only reached discrimination based on *actions* associated with sex, not discrimination based on biology itself.

Grimm is no outlier. To the contrary, nearly every recent court decision to consider the legality of transgender bathroom refusals has found that it is illegal sex discrimination – and, often, illegal sex stereotyping – to assign people certain restrooms based on their sex assigned at birth.²⁷³

For example, in *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, the Seventh Circuit ruled that a school board engaged in illegal sex discrimination when it denied a male student assigned female at birth access to the boys’ restroom.²⁷⁴ Among other things, *Whitaker* reasoned that transgender dis-

271. *Id.*

272. See Brief in Support of Motion to Dismiss Amended Complaint, *supra* note 51, at 20 (arguing that a policy prohibiting a transgender boy from using the men’s restroom wasn’t sex stereotyping under Title IX because “the policy designates multiple-stall restrooms and locker rooms based on *physiology*, period – regardless of how ‘masculine’ or ‘feminine’ a boy or girl looks, acts, talks, dresses, or styles their hair”).

273. For decisions other than the ones discussed below, see *Evancho v. Pine-Richland School District*, 237 F. Supp. 3d 267, 284-95 (W.D. Pa. 2017), which held that excluding transgender students from restrooms consistent with their gender identity likely constitutes sex-based discrimination in violation of the Equal Protection Clause; *Board of Education of Highland Local School District v. United States Department of Education*, 208 F. Supp. 3d 850, 865, 871, 877 (S.D. Ohio 2016), which held that excluding a transgender student from restrooms consistent with her gender identity likely constituted sex-based discrimination under Title IX and the Equal Protection Clause; *Hobby Lobby Stores, Inc. v. Sommerville*, 186 N.E.3d 67, 78-80 (Ill. App. Ct. 2021), which held that an employer violated state law prohibiting sex discrimination in employment by barring an employee from using the bathroom associated with her gender identity and rejecting the employer’s contentions that sex is “immutable,” that sex does not include gender identity, that anatomy is the “*sine qua non*” of sex, and that sex discrimination is not gender-identity discrimination; *Dodds v. United States Department of Education*, 845 F.3d 217, 222 (6th Cir. 2016); *J.A.W. v. Evansville Vanderburgh School Corp.*, 396 F. Supp. 3d 833, 842-43 (S.D. Ind. 2019); *A.H. ex rel. Handling v. Minersville Area School District*, 290 F. Supp. 3d 321, 324 (M.D. Pa. 2017); *N.H. v. Anoka-Hennepin School District No. 11*, 950 N.W.2d 553, 566, 570 (Minn. Ct. App. 2020); and *Parents for Privacy v. Dallas School District No. 2*, 326 F. Supp. 3d 1075, 1082 (D. Or. 2018). *But see* *Adams ex rel. Kasper v. Sch. Bd. of St. John’s Cnty.*, No. 18-13592, 2022 WL 18003879 (11th Cir. Dec. 30, 2022) (en banc).

274. 858 F.3d 1034, 1049-50 (7th Cir. 2017). The school board argued that “detrimental gender classifications by the government . . . do not always [violate the Constitution], for the reason that there are differences between males and females that the Constitution necessarily recognizes.” Brief in Opposition to Plaintiff’s Motion for Preliminary Injunction at 18-19, *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-cv-943 (E.D. Wis. Sept. 22, 2016), 2016 WL 10951132 (quoting *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 670 (W.D. Pa. 2015)). The Seventh Circuit rejected the board’s argument as reflective of an illegal sex stereotype. See *Whitaker*, 858 F.3d at 1049-50.

crimination in bathroom access was a sex stereotype because it reflected and perpetuated gross generalizations about how sex and anatomy do align and ought to align.²⁷⁵

Likewise, in *M.A.B. v. Board of Education of Talbot County*, a federal court held that a school board engaged in illegal sex stereotyping by prohibiting a male student assigned female at birth from using the boys' locker room.²⁷⁶ The board defended its decision, in part, by drawing a distinction between discriminating on the basis of conduct and discriminating on the basis of biology. Anti-stereotyping doctrine, it contended, reached policies that regulated how people “dress[], talk[], act[], or any other outward expression,” not policies that regulated people “based on biology alone,” regardless of how they look, act, talk, or dress.²⁷⁷ The school board did not elaborate, but by “biology alone” it presumably meant policies that classified people on the basis of their physical characteristics as subjectively interpreted by medical personnel at birth.

The court rejected the school board's conduct/biology distinction, remarking that the school board “define[d] gender stereotyping too narrowly.”²⁷⁸ It noted that statutory anti-stereotyping jurisprudence—that is, decisions interpreting the meaning of sex stereotyping under federal statutes like Title VII— “[do] not require gender stereotyping to take the specific form of discrimination on the basis of appearance or behavior.”²⁷⁹ Rather, said the court, Congress intended “to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes” when it enacted laws prohibiting sex discrimination.²⁸⁰ While such treatment could involve “discrimination based on appearance and behavior,”²⁸¹ it could also involve discrimination based on “biology alone.”²⁸²

275. *Whitaker*, 858 F.3d at 1051.

276. 286 F. Supp. 3d 704, 716 (D. Md. 2018) (holding that prohibiting a transgender boy from a boys' locker room based on transgender status is a Title IX sex-discrimination claim as well as a gender-stereotyping claim).

277. *Id.* at 715.

278. *Id.*

279. *Id.*

280. *Id.* (internal quotation marks and citation omitted).

281. *Id.*

282. *Id.*

d. Employment Discrimination

Biology is no longer a defense to transgender-discrimination actions under Title VII.²⁸³ *Bostock v. Clayton County* held that Title VII's prohibition of "sex discrimination" includes gender-identity or transgender discrimination because sex is a "but for" cause of gender-identity discrimination.²⁸⁴ Before *Bostock*, courts had additionally held that Title VII's prohibition of sex discrimination reached transgender discrimination because (1) "sex," according to contemporary medical definitions of the term, had both a biological and a nonbiological component—that is, "sex" as a category included gender identity within it; and (2) discrimination "on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex" because "an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align."²⁸⁵

283. For early Title VII decisions that appeal to biology to reject transgender-discrimination claims, see *supra* note 215 and accompanying text. For fuller elaboration on how biology functioned in these decisions to deny transgender litigants relief under Title VII, see Jessica A. Clarke, *How the First Forty Years of Circuit Precedent Got Title VII's Sex Discrimination Provision Wrong*, 98 TEX. L. REV. ONLINE 83, 96 (2019), which argues that early Title VII decisions refused relief under Title VII's sex discrimination provision to transgender litigants by reasoning that transgender status was different from "sex," which was "thought to be a matter of nature that could not and should not be changed."

284. 140 S. Ct. 1731, 1741-43 (2020).

285. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571, 576 (6th Cir. 2018) (emphasis added). Appealing to the Supreme Court in *Harris Funeral Homes*, one of the three consolidated cases in *Bostock*, the employer criticized the above-quoted language from the Sixth Circuit decision for suggesting that "sex" is "a stereotype." Petition for Writ of Certiorari at 23, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019) (No. 18-107). Specifically, the employer argued that "the Sixth Circuit's decision adopted a bewildering view of sex stereotyping" by suggesting that "the very idea of sex—which determines a person's status as male or female based on reproductive anatomy and physiology—is a stereotype." *Id.* Nothing in the Court's jurisprudence, said the brief, "suggests that sex is itself a stereotype." *Id.* To the contrary, "this Court has squarely held that physical differences between men and women relating to reproduction—the very features that determine sex—are not gender-based stereotypes," argued the employer, quoting and citing *Nguyen v. INS* in support of that proposition. *Id.* (internal quotation marks and citation omitted). The *Bostock* Court never addressed the *Harris Funeral Homes* employer's attempt to graft constitutional law's biological limit onto Title VII because the Court did not decide the case—at least explicitly—on anti-stereotyping grounds.

e. Sports and Medical-Treatment Bans

A record number of anti-transgender sports and medical-treatment bans and directives were filed in 2021 and 2022.²⁸⁶ These bans vary from state to state, but all of the anti-trans sports bills prohibit anyone assigned *male* at birth from competing on female sports teams at any level, from youth sports through college sports.²⁸⁷ Moreover, all of the anti-trans medical bills prohibit healthcare professionals from performing or assisting “gender reassignment surgery or hormone replacement therapy” on minors “for the purpose of attempting to change or affirm the child’s perception of the child’s sex.”²⁸⁸ Some anti-trans sports bills additionally prohibit anyone assigned *female* at birth from competing on male sports teams at any level, and potentially require any female (but not male) athlete to “prove” her sex through intrusive procedures like “a routine sports physical examination of . . . the [athlete’s] reproductive anatomy.”²⁸⁹ States have defended all of these laws by arguing that they track the “inherent differences” between females and males that the Supreme Court has endorsed as a valid basis for sex discrimination.²⁹⁰

Not all of the sports bans have become enacted law, either dying in committee or on governors’ desks.²⁹¹ Among those that have, several have been temporarily enjoined as likely violations of statutory and constitutional sex-equality guarantees, often on sex-stereotyping grounds.

286. See *supra* note 221. For a complete list, see *Legislative Tracker: Anti-Transgender Legislation, FREEDOM FOR ALL AMs*. [hereinafter *Legislative Tracker*], <https://freedomforallamericans.org/legislative-tracker/anti-transgender-legislation> [<https://perma.cc/4LPK-KG3W>] (collecting all proposed and enacted anti-trans bills).

287. See *Legislative Tracker, supra* note 286.

288. *Id.* As of the time of this Feature, five states have enacted laws or policies restricting minors’ access to gender-affirming care, including Alabama, Arizona, Arkansas, Florida, and Texas. See *id.* Several others are considering similar legislation, some of which has died in committee. See, for example, S.B. 214, 2021 Leg. Sess. (Kan. 2021), which was introduced in the Kansas senate in February 2021 but died in committee in May 2022.

289. See, e.g., IDAHO CODE § 33-6203(3) (2022).

290. See, e.g., W. VA. CODE § 18-2-25d (2022) (prefacing anti-trans sports law by finding that “[t]here are inherent differences between biological males and biological females, and that these differences are cause for celebration, as determined by the Supreme Court of the United States in *United States v. Virginia* (1996),” and that “inherent differences are a valid justification for sex-based classifications when they realistically reflect the fact that the sexes are not similarly situated in certain circumstances, as recognized by the Supreme Court of the United States in *Michael M. v. Sonoma County, Superior Court* (1981)”).

291. For a full list, see *Legislative Tracker, supra* note 286.

For example, in *Hecox v. Little*, a district court enjoined the enforcement of Idaho's sports ban because it rested on "overbroad generalizations without factual justification" about the "'absolute advantage' between transgender and cisgender women athletes."²⁹² Similarly, in *B.P.J. v. West Virginia Board of Education*, a district court enjoined the enforcement of West Virginia's sports ban as applied to an eleven-year-old girl, assigned male at birth, who wanted to join the girls' cross-country and track teams.²⁹³ West Virginia argued that the ban was necessary to protect female athletes and female athletics from being swamped by athletically superior transgender female athletes.²⁹⁴ The court responded that West Virginia's law was a solution in search of a problem: "At this point," said Judge Goodwin, "I have been provided with scant evidence that this law addresses any problem at all, let alone an important problem. When the government distinguishes between different groups of people, those distinctions must be supported by compelling reasons."²⁹⁵ None of the State's reasons satisfied that standard. "[P]ermitt[ing] [plaintiff] to participate on the girls' teams would not take away athletic opportunities from other girls," given the small number "of transgender people who wish to participate in school-sponsored athletics," said the court.²⁹⁶ Nor would giving the plaintiff access to the noncontact sports of cross country and track threaten "the physical safety of other girl athletes."²⁹⁷ Far from compelling, West Virginia's law rested on "stereotypical generalizations" rather than "evidence-informed analysis,"²⁹⁸ a classification motivated by no more than "[a] fear of the unknown and discomfort with the unfamiliar."²⁹⁹

As for medical-treatment bans, every court that has been asked to enjoin the enforcement of such a ban during the pendency of litigation has granted the request. For example, in *Brandt v. Rutledge*, a district court considered whether Arkansas's ban amounted to unconstitutional sex- and transgender-discrimination under the Equal Protection Clause as well as an unconstitutional infringement on parental autonomy under the Due Process Clause.³⁰⁰ Like other medical-treatment bans, Arkansas's prohibits doctors from performing "gender transition procedures" on a minor, defined, in part, as procedures that will "alter" the features "typical" of an individual's "biological sex" to "resemble" the features

²⁹². *Hecox v. Little*, 479 F. Supp. 3d 930, 982 (D. Idaho 2020).

²⁹³. 550 F. Supp. 3d 347 (S.D. W. Va. 2021).

²⁹⁴. *See id.* at 355 (summarizing these arguments).

²⁹⁵. *Id.* at 350.

²⁹⁶. *Id.* at 356.

²⁹⁷. *Id.*

²⁹⁸. *Id.* at 354 (internal quotation marks and citation omitted).

²⁹⁹. *Id.* at 350.

³⁰⁰. 551 F. Supp. 3d 882 (E.D. Ark. 2021).

“typical” of “a sex different from the individual’s biological sex.”³⁰¹ Excluded from the ban are any procedures intended to *align* an individual’s physical characteristics—including hormone production—with those “typical” of their biological sex, as when, for example, a male minor receives testosterone shots for low hormone production.³⁰²

Granting the plaintiffs’ motion for a preliminary injunction, the district court held, in part, that Arkansas’s law would not even satisfy rational-basis review but was especially vulnerable under heightened scrutiny as a form of illegal sex stereotyping.³⁰³ “Defendants’ rationale that the Act protects children from experimental treatment . . . is counterintuitive to the fact that it allows the same treatment for cisgender minors as long as the desired results conform with the stereotype of their biological sex.”³⁰⁴ On appeal to the Eighth Circuit, the State argued that the district erred in several respects, including by classifying the law as a sex stereotype rather than as an expression of real biological differences between the sexes. The law “does not raise constitutional problems simply because it, at some level, recognizes sex differences,” asserted the State, quoting *Nguyen v. INS* for the proposition that “mechanistic classification of all our differences as stereotypes . . . obscures those misconceptions and prejudices that are real.”³⁰⁵ A unanimous Eighth Circuit agreed with the district court that the law amounted to illegal sex discrimination for which the State failed to articulate an exceedingly persuasive justification.³⁰⁶

301. ARK. CODE ANN § 20-9-1501(6) (2022).

302. *See id.* § 6(B)(ii) (“Gender transition procedures do not include . . . [s]ervices provided when a physician has otherwise diagnosed a disorder of sexual development that the physician has determined through genetic or biochemical testing that the person does not have normal sex chromosome structure, sex steroid hormone production, or sex steroid hormone action . . .”).

303. *Brandt*, 551 F. Supp. 3d at 891-92 (finding that the law “cannot withstand heightened scrutiny and based on the record would not even withstand rational basis scrutiny if it were the appropriate standard of review”).

304. *Id.* at 891.

305. Brief of Defendants-Appellants at 38, *Brandt*, 551 F. Supp. 3d 882 (No. 21-2875), 2021 WL 5513499.

306. *Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022) (faulting the law on underinclusiveness grounds for the way in which it permitted testosterone injections for minors generally, but not if those shots were for gender-affirming care); *see also* *Eknes-Tucker v. Marshall*, No. 22-cv-184, 2022 WL 1521889 (D. Ala. May 13, 2022) (temporarily enjoining Alabama’s criminal medical-treatment law on the grounds that it likely violated the fundamental rights of parents to make medical decisions with respect to their children).

2. *Discrimination Against Same-Sex Couples*

As it has in the context of transgender discrimination, biology has faded as an official justification for discrimination against same-sex couples. Consider the string of Supreme Court decisions starting in 2003 with *Lawrence v. Texas*³⁰⁷ and continuing through 2017 with *Pavan v. Smith*.³⁰⁸ In *Lawrence*, the Court considered the constitutionality of a criminal sodomy law whose defenders argued was a valid reflection of physical differences between anal and vaginal intercourse, not illegal sex stereotypes.³⁰⁹ In *United States v. Windsor*³¹⁰ and *Obergefell v. Hodges*,³¹¹ the Court considered the constitutionality of state and federal marriage exclusions whose proponents maintained were necessary to protect and facilitate the “begetting” and raising of children by their own biological mothers and fathers, which “only a man and a woman” can do.³¹² And in *Pavan*, the Court weighed in on the constitutionality of a law that withheld legal parentage from the wife of a birth mother because she lacked a biological relationship to the child, even though the state in question extended legal parentage to the husband of a birth mother even if he was not biologically related to his child.³¹³

Briefs filed on behalf of the state in all of the above cases invoked the Supreme Court’s real-differences jurisprudence for support. One brief argued that *Geduldig v. Aiello* reinforced the idea that discrimination on the basis of biology was not tantamount to unconstitutional bigotry or animus.³¹⁴ Many others contended that decisions like *Nguyen v. INS* and even *United States v. Virginia* authorized discrimination when it rested on “biological differences” between women and men.³¹⁵ As one brief filed on behalf of the states in *Obergefell* argued: “Our constitutional jurisprudence acknowledges that “[t]he two sexes are

307. 539 U.S. 558 (2003).

308. 137 S. Ct. 2075 (2017).

309. Brief of Texas Eagle Forum, Daughters of Liberty Republican Women, Houston, Texas and Spirit of Freedom Republican Women’s Club as Amici Curiae in Support of Respondent at 9–10, *Lawrence*, 539 U.S. 558 (No. 02-102).

310. 570 U.S. 744, 752, 774 (2013) (striking down the provision of the Defense of Marriage Act that prohibited the federal government from recognizing same-sex marriage).

311. 576 U.S. 644, 665 (2015) (holding that the Federal Constitution protects a right to marry that includes same-sex couples).

312. See H.R. REP. NO. 104-664, at 13 (1996).

313. *Pavan*, 137 S. Ct. at 2077.

314. Brief of the American Freedom Law Center as Amicus Curiae in Support of Respondents at 8, *DeBoer v. Snyder*, 575 U.S. 947 (2015) (No. 14-571), 2015 WL 138410.

315. See, e.g., Brief for Respondents at 54, 56, *DeBoer*, 575 U.S. 947 (No. 14-571), 2015 WL 1384104.

not fungible.’ . . . It thus logically follows that a child would benefit from the diversity of having both her father and mother involved in her everyday upbringing.”³¹⁶

None of the states’ real-differences defenses to LGBTQ discrimination in sex, marriage, and parenthood prevailed. *Obergefell* dismissed the idea that marriage was about procreation.³¹⁷ *Pavan* observed that legal parenthood was about more “than just genetics”³¹⁸ and that the State could not, consistent with *Obergefell*, impose a biological paradigm of parenthood on same-sex married couples when it did not subject opposite-sex married couples to that same standard.³¹⁹ All of the decisions mentioned above held that same-sex couples and opposite-sex couples were the same in all of the ways that traditionalists insisted they were different. “There is no difference between same- and opposite-sex couples with respect” to marriage and parenting, said *Obergefell*.³²⁰

The rejection of real differences as a justification for LGBTQ discrimination in marriage and parenthood did not happen overnight. As Douglas NeJaime writes, “Well before marriage equality seemed possible, LGBT advocates . . . elaborate[d] a new model of parenthood capable of recognizing their constituents’ nonmarital, nonbiological parent-child relationships.”³²¹ Among other strategies, LGBTQ advocates “shifted the focus away from biological, dual-gender parenting and toward new concepts of parental intent and function.”³²² “Ultimately,” says NeJaime, “intentional- and functional-parenthood principles would enable recognition of parents not on the basis of biology, gender, sexual orientation, or even marriage, but instead on the basis of actual familial relationships.”³²³

One important byproduct of this shift from biology to functionality in legal parentage for same-sex couples has been the *narrowing* of differences between

316. Brief of Amicus Curiae Family Trust Foundation of Kentucky, Inc. at 25, *Obergefell*, 576 U.S. 644 (No. 14-556), 2015 WL 1478018 (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996)). Douglas NeJaime has written that states relied on biological arguments of this kind in marriage-equality litigation as a way to “neutralize” illicit judgments about “sex roles,” NeJaime, *Marriage, Biology, and Gender*, *supra* note 15, at 84, in much the same way that *Geduldig* relied on biology to take the “sex” out of pregnancy discrimination.

317. *Obergefell*, 576 U.S. at 646 (“Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on the capacity or commitment to procreate.”).

318. *Pavan*, 137 S. Ct. at 2078.

319. *Id.* at 2078-79.

320. *Obergefell*, 576 U.S. at 670.

321. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1188 (2016) (emphasis omitted).

322. *Id.* at 1188.

323. *Id.* at 1188-89.

women and men and between mothers and fathers. For example, courts have held that the marital presumption—the common-law rule that treats the husband of the birth mother as the father of her child—applies as much to the wives of birth mothers as it does to the husbands of birth mothers because husbands and wives in those situations are similarly situated with respect to parentage.³²⁴ In so doing, courts have refused to credit states' arguments that biology renders mothers and fathers dissimilarly situated when it comes to parenthood—and states' reliance on Supreme Court decisions like *Nguyen v. INS* to support that idea.³²⁵

Since *Lawrence*, *Windsor*, *Obergefell*, and *Pavan*, the law has continued to reject real differences as a justification for parentage discrimination against same-sex couples. For example, in *In re Gestational Agreement*, the Utah Supreme Court ruled that the State could not require a gestational-surrogacy agreement to have an “intended mother” to be legal because it would make it impossible for same-sex couples, but not for opposite-sex couples, to become parents through surrogacy.³²⁶ As the court explained, “It is impossible for married same-sex male couples to meet this requirement since neither member is a ‘mother’ Under *Obergefell* and *Pavan*, the Constitution proscribes such disparate treatment.”³²⁷

Similarly, in *Kiviti v. Pompeo* and *Mize v. Pompeo*, two federal courts interpreted a provision of federal immigration law to allow for the possibility that children could be “born . . . of” two women or two men just as they could be “born . . . of” a woman and a man.³²⁸ The State Department tried to deny citizenship rights to certain children born overseas to married same-sex couples by arguing that federal immigration law required children to be “born . . . of” their parents, and that “born . . . of” meant that children were biologically related to *both* parents.³²⁹ In support of its cross-sex, biological reading of the statute in question, the Department appealed to *Nguyen*, arguing that *Nguyen* emphasized “the importance of the government’s interest in ‘assuring that a biological . . . relationship exists’ between a child and a parent through whom the child claims citizenship.”³³⁰

324. See, e.g., *McLaughlin v. Jones ex rel. Cnty. of Pima*, 401 P.3d 492, 501-02 (Ariz. 2017) (holding that Arizona’s marital presumption applies to the wives of birth mothers).

325. *Id.* at 498 (summarizing this argument).

326. 449 P.3d 69 (Utah 2019).

327. *Id.* at 82.

328. *Kiviti v. Pompeo*, 467 F. Supp. 3d 293, 307-08 (D. Md. 2020); *Mize v. Pompeo*, 482 F. Supp. 3d 1317, 1337-38 (N.D. Ga. 2020).

329. *Kiviti*, 467 F. Supp. 3d at 302.

330. *Id.* at 312 (quoting *Nguyen v. INS*, 533 U.S. 53, 60 (2001)).

Rejecting the State Department’s narrow, biological interpretation of parenthood in favor of a more “elastic[],”³³¹ functional, and collaborative understanding of that relationship, *Kiviti* remarked that the phrase “born . . . of” “is susceptible [to] multiple interpretations.”³³² “A child,” said *Kiviti*,

could fairly be deemed to originate from parents other than through a genetic relationship, such as where two married parents both play a fundamental and instrumental role in the creation of the child, for example by, as here, together planning and supporting the use of surrogacy and [assisted reproductive technology] to bring about the birth of a child to whom they have both committed in advance to be a parent.³³³

Similarly, *Mize* observed that “[born . . . of] can also refer more generally to ‘[t]he act or fact of arising or springing from something’ or to an entity’s ‘beginning of existence in reference to its source or cause.’”³³⁴ “Born . . . of,” *Mize* concluded, did not require biological connection for American citizenship to attach.³³⁵

III. SEX EQUALITY’S IRRECONCILABLE DIFFERENCES

LGBTQ equality is a work in progress, with many more mountains to cross and many more real-differences arguments to battle.³³⁶ That said, LGBTQ

331. *Id.* at 308.

332. *Id.* at 312.

333. *Id.* at 308.

334. *Mize v. Pompeo*, 482 F. Supp. 3d 1317, 1337 (N.D. Ga. 2020).

335. *See id.* at 1332. While neither court struck down the statute on constitutional grounds—tethering their holdings instead to an expansive reading of the language “born . . . of”—they both recognized that the Department’s biological interpretation was in serious tension with *Obergefell* and *Pavan*. As *Mize* said, *Obergefell* and *Pavan* “raise serious doubts about the constitutionality of a biological parent-child requirement in [the immigration provision at issue].” *Id.* at 1335.

336. For instance, most states still require individuals seeking to change their legal sex on official documents like birth certificates to go through some kind of medical gatekeeper who can “confirm[] appropriate clinical treatment for gender transition.” *See, e.g., Florida*, NAT’L CTR. FOR TRANSGENDER EQUAL. (Nov. 2021), <https://transequality.org/documents/state/florida> [<https://perma.cc/UWV2-QMBV>]. “[A]ppropriate clinical treatment” could mean a lot of things, but likely involves the same or similar standards used by the medical profession to determine whether someone is eligible for gender-transition medical interventions such as hormone treatment or hormone suppression. Those standards, which require an individual seeking gender-affirming medical interventions to have lived in their “desired gender role” for at least one year before receiving treatment, replicate the gender binary by effectively forcing

equality increasingly is challenging the law and logic of real differences in at least two ways. First, LGBTQ equality is showing that the fundamental assumptions on which sex equality's real-differences arguments rest—for example, that sex is binary, that only mothers give birth, and that male and female bodies are anatomically distinct—are wrong. Second, LGBTQ equality is rejecting, often on sex-stereotyping grounds, the same biological justifications that sex equality so often credits. In so doing, LGBTQ equality is carrying forward the anti-stereotyping principle's core values to discrimination based on the body itself. Again and again, defenders of LGBTQ discrimination have argued that the Supreme Court's sex-equality jurisprudence stands for the proposition that biologically rationalized discrimination is not a sex stereotype, and again and again, courts have held that biologically rationalized LGBTQ discrimination is a sex stereotype. In this sense, LGBTQ equality is *the next chapter of sex equality*, the one in which the anti-stereotyping principle exposes the stereotypes behind *all* biological rationales for sex discrimination. It is not as if sex equality has not made this insight before. It is just that sex equality has never quite articulated this insight in the way that LGBTQ equality does.

All this matters for sex equality. Far from separate and distinct, sex equality and LGBTQ equality are overlapping and interdependent. To borrow a metaphor used by Laurence Tribe to describe the relationship between equal protection and due process, sex equality and LGBTQ equality are like two strands in a “double helix.”³³⁷ Historically, the social and political movements for sex equality and LGBTQ equality were intertwined—at least for a time—based on their shared commitment to eradicating sex-role stereotypes.³³⁸ Moreover, in *Bostock*

individuals to conform to one of its two ends—or, more precisely, to conform to what a medical professional *thinks* those two ends look like. In addition, transgender bathroom equality just suffered a significant defeat in the Eleventh Circuit. See *Adams ex rel. Kasper v. Sch. Bd. of St. John's Cnty.*, No. 18-13592, 2022 WL 18003879 (11th Cir. Dec. 30, 2022) (en banc). Finally, as Katie Eyer notes, even as “transgender constitutional law plaintiffs are overwhelmingly succeeding in their constitutional claims in the lower federal and state courts,” there “were a much smaller number of Equal Protection and Due Process claims in the study cases which did fail.” Eyer, *supra* note 225 (manuscript at 47). That said, Eyer explains those losses as “the result of factors that are not indicative of the broader transgender constitutional law landscape, such as poor pleading or briefing of the claim.” Eyer, *supra* note 225 (manuscript at 47-48).

337. Laurence Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015) (“*Obergefell*'s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of equal dignity—and to have located that doctrine in a tradition of constitutional interpretation as an exercise in public education.”). In his dissent in *Dobbs v. Jackson Women's Health Organization*, Justice Breyer also observed the nexus between constitutional equality and constitutional liberty when cautioning against thinking about the two constitutional guarantees as “hermetically sealed containers.” 142 S. Ct. 2228, 2328 (2022) (Breyer, J., dissenting).

338. See Franklin, *supra* note 16, at 114-20.

v. Clayton County, the Supreme Court recognized the connections among the *categories* addressed by sex equality and LGBTQ equality when it held that sexual-orientation and transgender discrimination were impermissible sex discrimination under Title VII for two reasons.³³⁹ First, because sex, sexual orientation, and transgender status were “inextricably bound up with sex.”³⁴⁰ Second, because “discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”³⁴¹ Finally, sex equality and LGBTQ equality doctrinally intersect, especially after *Bostock*, which has prompted dozens of courts to find that LGBTQ discrimination is illegal sex discrimination under constitutional and statutory sex-equality guarantees.³⁴²

The dialogic and intersectional relationship between sex equality and LGBTQ equality means a lot for LGBTQ equality—that much we already know.³⁴³ But it also means, or should also mean, a lot for sex equality,³⁴⁴ including sex equality’s enduring commitment to the idea that laws based on real differences between the sexes are not sex stereotypes about the sexes. If sex equality and LGBTQ equality are intersectional, then how can sex equality commit to a set of assumptions about sex, the body, procreation, and parenthood that LGBTQ equality shows are gross generalizations about men and women, the very definition of a sex stereotype? Similarly, if sex equality and LGBTQ equality are intersectional, then how can sex equality tolerate the same biological justifications for sex discrimination that LGBTQ equality rejects, often on sex-stereotyping grounds?

Take the first scenario that prefaced this Feature. Constitutional law says that criminal abortion laws are not sex classifications—let alone illegal sex stereotypes—because only women get abortions. But LGBTQ equality shows that this is not true because men can also get pregnant and have abortions. If a stereotype

339. 140 S. Ct. 1731 (2020).

340. *Id.* at 1742.

341. *Id.* at 1747.

342. See *supra* note 58 (listing the decisions since *Bostock* finding that LGBTQ discrimination constitutes illegal sex discrimination under state- and constitutional-equality guarantees that facially prohibit discrimination based on sex but not based on sexual orientation or gender identity).

343. See *id.*

344. For recent work on how LGBTQ equality could shape sex equality writ large, see Eyer, *supra* note 225; Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105 MINN. L. REV. 831 (2020); Rachel Slepoy, *Bostock’s Inclusive Queer Frame*, 107 VA. L. REV. ONLINE 67 (2021); Marc Spindelman, *Queer Black Trans Politics and Constitutional Originalism*, 13 CONLAWNOW 93 (2022); Clarke, *supra* note 198; and Susannah Cohen, Note, *Redefining What It Means to Discriminate Because of Sex: Bostock’s Equal Protection Implications*, 122 COLUM. L. REV. 407 (2022).

includes generalizations that are true in most instances – even 99% of the time – then it is technically a stereotype to say that laws that criminalize or restrict abortion are unproblematic from a sex-equality perspective because abortions are unique to women. To be clear: there are abundant reasons why abortion restrictions are problematic from a sex-equality perspective that have nothing to do with pregnant men and everything to do with women, pregnant or not. But the point is that LGBTQ equality unsettles the argument—that abortion is unique to women—which functions as a bar to exposing and exploring those reasons.

Or, take the second scenario. Sex equality asserts that sex discrimination against unwed fathers in federal immigration law is not a sex stereotype when that discrimination simply tracks nature – specifically, the fact that mothers but not fathers establish a biological and social connection at birth because mothers but not fathers give birth. LGBTQ equality problematizes that assertion by showing (1) that sometimes mothers do not give birth (as in the context of two-mother households),³⁴⁵ (2) that sometimes fathers do give birth, as discussed above,³⁴⁶ and (3) that sometimes children can be “born . . . of” two men or two women through nonbiological pathways like intent and conduct³⁴⁷ – the very pathways that sex equality often pushes aside when the rights of unwed fathers are at stake.³⁴⁸

Finally, take the third scenario, already discussed in the Introduction. Sex equality maintains that criminal breast bans are not sex stereotypes because male and female breasts look different and function differently. That logic has always had its flaws. For one, it gives shelter to obvious sex stereotypes about female (and male) sexuality. For another, it is just wrong, as breasts often look the same regardless of sex or gender.

But LGBTQ equality sharpens those flaws’ edges by making clear as a matter of law that (1) states do not require people to get breasts nor to lose them to be women or men; (2) states cannot require people to get breasts nor to lose them to change their legal sex; and (3) courts are ill equipped to weigh in on such questions as “what is a male body?” and “what is a female body?”³⁴⁹ If states and courts cannot be surveilling breasts (or the lack thereof) for LGBTQ equality, then why can they still surveil breasts (or the lack thereof) for sex equality?

345. See, e.g., *St. Mary v. Damon*, 309 P.3d 1027, 1029 (Nev. 2013).

346. See *supra* notes 235-238 and accompanying text.

347. *Kiviti v. Pompeo*, 467 F. Supp. 3d 293, 307-08 (D. Md. 2020); *Mize v. Pompeo*, 482 F. Supp. 3d 1317, 1337-38 (N.D. Ga. 2020).

348. *Nguyen v. INS*, 533 U.S. 53, 68 (2001). *But see Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1700-01 (2017) (ruling in favor of an unwed father’s sex-equality claim).

349. See *In re Childers-Gray*, 487 P.3d 96, 120-23 (Utah 2021).

In short, sex equality's commitment to real differences has always been irreconcilable with sex equality's anti-stereotyping principle for the reasons discussed in Part I. But now that commitment is also irreconcilable with what a kindred doctrine increasingly says about biology and its role in lawmaking.

To be sure, some might argue that (at least) certain aspects of LGBTQ equality reinforce rather than challenge real differences and therefore are not irreconcilable with it. For example, technically speaking, transgender bathroom jurisprudence accedes to real differences by accepting biologically rationalized sex separatism, just not biologically rationalized sex assignment. That is, plaintiffs in transgender bathroom cases (ostensibly) are fine with sex separatism in restrooms; their disagreement is with the sex category into which they have been assigned.³⁵⁰ The same holds true for plaintiffs in transgender-sports litigation: theirs is an issue of sex assignment, not sex separatism.³⁵¹

In addition, as Jessica A. Clarke has observed, the more successful plaintiffs in transgender bathroom litigation have been those who (1) have medically transitioned (or are medically transitioning) and/or (2) have socially assimilated to the norms associated with their sex and gender identity.³⁵² The same can be said for transgender-female plaintiffs in litigation over sports bans: they have succeeded (so far) by convincing courts that they have sufficiently modified their body—through medical interventions like hormone treatment—to participate on girls' and women's teams.

These are important qualifications, but they fail to appreciate how even the more conservative aspects of LGBTQ equality unsettle real differences. For example, biological difference is as much a justification for separating restrooms as it is a justification for assigning trans students a particular restroom.³⁵³ As such, courts' explicit condemnation of real differences as a sex stereotype in the context of transgender assignment is at least an implicit condemnation of real differences as a sex stereotype in the context of sex separatism. Put another way: If anatomy is irrelevant to what a transgender student does in a restroom—as courts have suggested³⁵⁴—then why would anatomy not be irrelevant to what all students do in a restroom? If the law has condemned biologically rationalized sex assignments for assuming that sex is binary, that biology is destiny, and that all men and all women look the same, then why would the law tolerate biologically rationalized sex separatism, which rests on those same assumptions?

350. Jessica A. Clarke, *Sex Assigned at Birth*, 122 COLUM. L. REV. 1821, 1876 (2022).

351. *See id.* at 1871-72.

352. *See id.* at 1855-56, 1882.

353. *See supra* note 118 and accompanying text.

354. *See, e.g., Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1052 (7th Cir. 2017).

What about transgender-sports jurisprudence, a context where courts have acknowledged that differences are not just real but often relevant? Even here, LGBTQ equality unsettles the same real-differences logic it sometimes supports. For example, *Hecox* recognized that some transgender-female athletes had athletic advantages over their cisgender teammates, but it also faulted Idaho for assuming that all transgender-female athletes had those advantages given that many such athletes took puberty blocking hormones that rendered them more physiologically equal to their cisgender teammates.³⁵⁵ As Clarke notes, *Hecox* rejected broad generalizations about male and female physiology in favor of a more nuanced approach that prioritized facts and empirics over hypothesized concerns³⁵⁶ – the very kind of approach that sex equality’s anti-stereotyping principle demands. Importantly, this approach is lacking in legal debates over sex separatism in sports, which fall prey to just the sort of gross generalizing about “innate differences between the sexes” that *Hecox* denounces on sex-stereotyping grounds.

The point is that even when LGBTQ equality does not appear to be challenging real differences, it is challenging real differences. A rough analogue here is the movement for marriage equality, which, on Douglas NeJaime’s account, has transformed marriage even while preserving it (or at least certain aspects of it).³⁵⁷ The same might be said of LGBTQ equality. It, too, is transforming a traditional institution even when appearing to navigate within its borders.

IV. AFTER DIFFERENCES

This Feature’s primary purpose has been to argue that sex equality’s enduring commitment to the idea that real differences is not sex stereotypes should fail to survive LGBTQ equality. More prospective in scope, this Part considers what selected areas of sex jurisprudence might look like if they were less tethered to real differences and more attentive to what LGBTQ equality has to say about biology and biologically rationalized discrimination. This Part also addresses concerns that readers might have about the idea of eliminating real differences from the American law of sex.

355. *Hecox v. Little*, 479 F. Supp. 3d 930, 977 (D. Idaho 2020).

356. See Clarke, *supra* note 350, at 1890-91.

357. See NeJaime, *supra* note 321, at 1191-92.

A. *Sex Equality Without Differences*

Sex equality without real differences could impact (1) judicial scrutiny of sex classifications under the Constitution, (2) legislative sex distinctions, and (3) sex segregation.

1. *Judicial Scrutiny of Sex Classifications Under the Constitution*

Sex equality without differences could mean strict scrutiny for sex-based state action, or at least a more robust form of intermediate scrutiny than the one courts apply today to sex-based state action. Biological difference was at least one of the reasons why the Supreme Court ultimately settled on intermediate rather than strict scrutiny for sex classifications in the 1970s. Katherine M. Franke writes: “It was this fact of sexual difference that justified less-than-heightened scrutiny for sex-based classifications. In other words, the Court built its sex-based equality jurisprudence on the presumption that, on a fundamental level, males and females are not similarly situated—they are in fact different kinds of beings.”³⁵⁸ If LGBTQ equality increasingly shows that men and women are not “in fact different kinds of beings,” then there is little reason to sustain a level of judicial review under the Equal Protection Clause that took shape around the idea that they were.³⁵⁹

358. Franke, *supra* note 15, at 11. Serena Mayeri has argued that the Supreme Court ultimately settled on intermediate rather than strict scrutiny for sex classifications not only because of beliefs in real differences between the sexes (and, by extension, in the legitimacy of sex-based action based on those differences) but also because of the Court’s reluctance to constitutionalize equal rights for women through the Fourteenth Amendment when feminists were politically mobilizing for equal rights through an Equal Rights Amendment. She writes:

Intermediate scrutiny . . . split the difference between the strictest standard of review—embodied in the ERA and in advocates’ interpretation of the Fourteenth Amendment—and the old rational basis standard that permitted most sex-based distinctions as a logical outgrowth of disparate gender roles and immutable physical differences This compromise has often been rationalized as a recognition of the limitations of the race-sex analogy, a nod to the fact that while racial differences are mutable, socially constructed, or imaginary, sex differences are in some way ‘real’ or biologically determined. Politically, though, intermediate scrutiny was also a compromise between Justice Brennan’s effective embrace of legal feminism’s dual strategy, and the position of justices who, like Justice Powell, believed that the ERA’s pendency counseled restraint.

Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 828-29 (2004) (citations omitted).

359. Of course, whether strict (versus intermediate) scrutiny actually changes the way in which courts reason about sex-based action under the Equal Protection Clause is a separate issue.

Alternatively, sex equality without real differences could mean a more robust form of intermediate scrutiny than the one that courts currently apply to sex-discrimination claims, especially claims that involve government assertions of real biological differences. In the wake of *Nguyen v. INS*, Serena Mayeri called intermediate scrutiny an unreliable “guarantor of sex-based equal protection,” given intermediate scrutiny’s willingness to turn a blind eye to sex distinctions rooted in biology.³⁶⁰ She specifically called attention to the “inherent malleability” of the intermediate-scrutiny standard, which at least in *Nguyen*, appeared to turn on whether a sex distinction was motivated by biology or by stereotypes. Decisions since *Nguyen* confirm Mayeri’s intuition about the slipperiness of intermediate scrutiny. For example, in upholding a Utah woman’s conviction for being topless in front of her stepchildren at home, a trial court stated that the robustness of intermediate scrutiny turns on whether the sex distinction is “rooted in inherent differences between the sexes,” or whether it “closes a door

Some courts, at least, have suggested that it might. *See, e.g., In re Adoption of J.S.*, 358 P.3d 1009, 1027-28 (Utah 2014) (suggesting that a law making it easier to terminate the rights of unwed fathers than those of unwed mothers passed constitutional muster only because intermediate scrutiny tolerated a level of overinclusiveness that strict scrutiny wouldn’t); *Kleczek v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 738 (R.I. 1992) (suggesting that a school’s exclusion of a male high-school student from the girls’ hockey team survived constitutional challenge only because the court applied intermediate rather than strict scrutiny to the school’s action). For empirical evidence that strict scrutiny increases the likelihood of a pro-equality result in a constitutional sex-discrimination case, see Lisa Baldez, Lee Epstein & Andrew D. Martin, *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35 J. LEGAL STUD. 243, 272 (2006), which found, based on an empirical study of state constitutional sex-discrimination decisions in states with equal rights amendments (ERAs), that ERAs “increase the probability of a court applying a higher standard of law to adjudicate claims of sex discrimination,” and that “the application of a higher standard of law, even after controlling for other relevant factors, increases the probability of a court reaching a disposition favorable to litigants alleging a violation of their rights.” The authors conducted the above-mentioned study in order to test empirically the claim that a federal Equal Rights Amendment would have the practical consequence of enhancing equality for women by changing the standard for scrutinizing sex-based state action from intermediate to strict. *See Baldez et al., supra*, at 244-46 (summarizing the arguments of those who believe that the ERA will change sex-discrimination jurisprudence as well as the arguments of those who doubt that the ERA will have much, if any, effect on that jurisprudence). Finally, some scholars have cautioned that strict scrutiny for sex classifications could promote sex-blind constitutionalism that makes it easier for the state to ignore sex inequality, much as strict scrutiny for race classifications has promoted colorblind constitutionalism that makes it easier for the state to ignore race inequality. *See Kim Forde-Mazrui, Why the Equal Rights Amendment Would Endanger Women’s Equality: Lessons from Colorblind Constitutionalism*, 16 DUKE J. CONST. L. & PUB. POL’Y 1, 4 (2021).

360. Mayeri, *supra* note 358, at 830; *see also id.* at 831 (“*Nguyen* signaled the vulnerability of the robust version of intermediate scrutiny applied in *Virginia* and epitomized the standard’s inherent malleability.”).

or denies opportunity to women (or to men),”³⁶¹ as if laws based on real differences *do not* close doors.

By contrast, intermediate scrutiny has been a very reliable guarantor of LGBTQ-based equal protection, even though defenders of LGBTQ discrimination have tried to graft intermediate scrutiny’s “slipperiness” onto LGBTQ-based equal protection. Consider same-sex marriage litigation prior to *Obergefell v. Hodges*, which held that the Fourteenth Amendment required all states to extend marriage recognition and benefits to same-sex couples. Unlike *Obergefell*, which was decided mainly on due-process grounds, many state and lower federal courts ruled in favor of same-sex couples by reasoning that marriage exclusions amounted to constitutionally impermissible sexual-orientation (or, in some cases, sex) discrimination under the Federal Constitution or under analogous state-equality guarantees.³⁶² When determining what level of scrutiny to apply to laws affecting sexual minorities under those guarantees, courts reasoned that sexual minorities were *at least* a quasi-suspect class — justifying the application of intermediate scrutiny to laws that discriminated against them — because, in part, sexual orientation was irrelevant to one’s ability to contribute to society.³⁶³ After

361. *Utah v. Buchanan*, Civ. No. 191901507, at 6 (Utah Dist. Ct. Jan. 19, 2020) (quoting *In re Adoption of J.S.*, 358 P.3d 1009, 1027–28 (Utah 2014)) (making this claim in a decision upholding a criminal law that defines lewdness with a child differently for women and men).

362. See, e.g., *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008) (finding that a marriage exclusion violated the state constitution’s equal-protection provision); *Varnum v. Brien*, 763 N.W.2d 862, 883–84 (Iowa 2009) (finding that a marriage exclusion violated state constitutional-equality guarantees); *Latta v. Otter*, 771 F.3d 456, 476 (9th Cir. 2014) (finding that Idaho and Nevada’s marriage exclusions constituted illegal sex discrimination under the federal Equal Protection Clause).

363. One’s “ability to perform or contribute to society” is one of the criteria on which courts rely to determine whether a class is suspect, quasi-suspect, or non-suspect for equal-protection purposes. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (citing this criterion); *Kerrigan*, 957 A.2d at 465–66; *Varnum*, 763 N.W.2d at 890. Courts in marriage-equality litigation overwhelmingly found that sexual orientation has no bearing on ability to perform or contribute. See *Kerrigan*, 957 A.2d at 435 (“[H]omosexuality bears no relation at all to [an] individual’s ability to contribute fully to society.” (internal quotation marks and citation omitted)); *Varnum*, 763 N.W.2d at 890 (“Not surprisingly, *none* of the same-sex marriage decisions from other state courts around the nation have found a person’s sexual orientation to be indicative of the person’s general ability to contribute to society.” (emphasis added)). As Katie Eyer shows, the same holds true for courts in transgender litigation. They, too, have overwhelmingly found that transgender status is never relevant to the ability to contribute. See Eyer, *supra* note 225 (manuscript at 23–24) (reporting that “the courts that addressed the issue of whether the transgender community ought to be afforded suspect or quasi-suspect class status all easily concluded that ‘transgender status bears no relation to ability to contribute to society,’” and arguing that “[t]his burgeoning common-sense recognition that transgender status carries with it no inherent indication of incapability of contributing to society marks perhaps the most important aspect of recent cases finding transgender people to be a suspect or quasi-suspect class”).

concluding that sexual orientation had no relevance “at all” to one’s societal contribution and therefore that intermediate scrutiny ought to apply³⁶⁴ – something that the Supreme Court has never said with respect to sex³⁶⁵ – these courts found that marriage bans violated equal protection. This is so despite the fact that defenders of marriage inequality appealed to biology – and to the Supreme Court’s real-differences decisions, like *Nguyen v. INS* – to justify (1) why sexual orientation, particularly in marriage, was relevant, and (2) why sexual-orientation discrimination in marriage was constitutional.³⁶⁶

Similarly robust intermediate scrutiny – *resistant* to biological justifications – has emerged from transgender constitutional jurisprudence. In her recent empirical study on transgender constitutional-rights litigation, Katie Eyer observes that intermediate scrutiny has quite reliably ensured victories for transgender plaintiffs. She writes that courts not only have been “unanimous in holding that transgender people as a class are deserving of protection as a suspect or quasi-suspect class (when they reached the issue),” but also have “held that discrimination against the transgender community *must be afforded intermediate scrutiny as a form of sex discrimination, and could not satisfy this standard of review.*”³⁶⁷

Eyer draws several lessons from her study of transgender constitutional-rights litigation, including that “new protected classes are possible,”³⁶⁸ that “rational basis review is not empty and meaningless,”³⁶⁹ that “new fundamental rights may still be possible,”³⁷⁰ and that the politics of a judge’s “appointing party

364. See *Kerrigan*, 957 A.2d at 434-35.

365. See, e.g., *Frontiero*, 411 U.S. at 686 (“[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic *frequently* bears no relation to ability to perform or contribute to society.” (emphasis added)); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1984). *Frontiero*’s insertion of “frequently” was deliberate. In support of the above-stated proposition, *Frontiero* cited, in a footnote, a 1969 *Harvard Law Review* note that argued that race and color were suspect characteristics because they “bear no relation to one’s ability to perform or contribute to society.” Note, *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1173 (1969) (emphasis added); see *Frontiero*, 411 U.S. at 686 n.18. One question raised by LGBTQ-equality jurisprudence is why courts stop at intermediate scrutiny for LGBTQ classifications if they view LGBTQ status like race – as something that bears no relation – rather than like sex – as something that frequently bears no relation.

366. See, e.g., Brief Amicus Curiae of the Family Institute of Connecticut in Support of the Defendants-Appellees at 10-11, *Kerrigan*, 957 A.2d 407 (No. SC 17716), 2007 WL 4729865 (arguing for Connecticut’s same-sex marriage exclusion by claiming that children ought to be reared by two biological parents of different sexes).

367. Eyer, *supra* note 225 (manuscript at 38) (emphasis added) (footnotes omitted).

368. *Id.* (manuscript at 53).

369. *Id.* (manuscript at 55).

370. *Id.* (manuscript at 56).

is not a reliable proxy for outcome, especially at the district court level.”³⁷¹ But another lesson is the same one that can be drawn from the deployment of intermediate scrutiny in marriage-equality litigation: that intermediate scrutiny can be the reliable “guarantor of sex-based equal protection” that Mayeri saw lacking in *Nguyen* and in decisions like *Nguyen*.³⁷² If, as Eyer found, reliably robust intermediate scrutiny applies to transgender-based state action, then reliably robust intermediate scrutiny should also apply to sex-based state action, if transgender-based state action is sex-based state action, and warrants intermediate scrutiny in part for that reason.

2. Legislative Sex Distinctions

Sex equality without differences could mean the expansion of laws that discriminate on the basis of sex because of real biological differences, including laws that prohibit pregnancy discrimination against women but not men,³⁷³ laws that extend benefits to pregnant women but not men,³⁷⁴ laws that define breastfeeding as labor exclusive to women,³⁷⁵ sexual abuse or sexual assault laws that prohibit the nonconsensual touching of female but not male breasts,³⁷⁶ and laws that require fathers but not mothers to prove their biological and social connection to their child in order to have parental rights.³⁷⁷

In addition, sex equality without differences could mean the repeal of criminal topless bans, an area of sex-discrimination law that helps to keep alive not just repressive and regressive views of women but also biological justifications

371. *Id.* (manuscript at 58) (challenging the “conventional wisdom in constitutional law—and more generally across the legal academy— . . . that judges are likely to vote in politically self-interested ways” by showing that “even among Republican-appointed judges, victories for transgender litigants remain quite common”).

372. Mayeri, *supra* note 358, at 830.

373. *E.g.*, Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2018).

374. *E.g.*, 29 C.F.R. § 825.120(a)(5) (2022) (“The expectant mother is entitled to FMLA leave for incapacity due to pregnancy.”).

375. *See* Schoenbaum, *supra* note 137, at 216-44 (collecting federal breastfeeding laws, state healthcare breastfeeding laws, state workplace breastfeeding laws, state public-indecency breastfeeding laws, state public-accommodations breastfeeding laws, state lactation-room laws, state jury-service breastfeeding laws, and state hortatory breastfeeding policies, the vast majority of which define breastfeeding as labor undertaken by women or mothers only).

376. *See, e.g.*, UTAH CODE ANN. § 76-5-404.1(2) (West 2022) (“[A]n actor commits sexual abuse of a child if the actor: . . . (B) touches the breast of a female child.”); CAL. PENAL CODE § 243.4 (West 2022) (prohibiting the touching of an “intimate part” of another person against their will and defining “intimate part” as “the sexual organ, anus, groin, or buttocks of any person, and the breast of a female”).

377. *See supra* note 109 (collecting cases).

for sex (and transgender) discrimination.³⁷⁸ Some local governments have tried (or are trying) to move in this direction.³⁷⁹ For example, in 2021, the Gainesville City Commission proposed eliminating any references to gender from its laws in the name of gender equality. “There are multiple portions of the code where we are using ‘his’ and ‘her,’ or we are using [] ‘he’ and ‘him,’ or ‘husband’ or ‘wife,’ and things like that,” said one city commissioner.³⁸⁰ “Removing this language is important so that our code does not reinforce outdated stereotypes,” said another city official.³⁸¹

As part of that proposal, a few commissioners supported eliminating gender-specific language from Gainesville’s public-nudity law, which currently criminalizes the baring of “the female breast” by “human beings ages 10 or older,” and which defines “breast” in the following way:

A portion of the human female mammary gland (commonly referred to as the female breast) including the nipple and the areola (the darker colored area of the breast, surrounding the nipple) and an outside area of such gland wherein such outside area is

1. Reasonably compact and contiguous to the areola and
2. Contains at least the nipple and areola and one-fourth of the outside surface area of such gland.³⁸²

378. For example, states have expressly invoked criminal topless jurisprudence for the proposition that banning individuals assigned female at birth from using male locker rooms is not illegal sex discrimination under constitutional-equality guarantees because “men and women are not similarly situated when a distinction is based on differences between unclothed male and female body parts.” Reply Brief of Appellant Anoka-Hennepin School District No. 11 at 20, *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553 (Minn. Ct. App. 2020) (No. A19-1944), 2020 WL 4195050.

379. See, e.g., John Henderson, ‘Gender-Neutral’ Laws Would Make Topless Women Legal, *GAINESVILLE SUN* (Feb. 8, 2021, 8:22 AM ET), <https://www.gainesville.com/story/news/local/2021/02/07/gainesville-commission-discusses-proposal-allow-women-go-topless-public/4388502001> [<https://perma.cc/M8B8-XU5J>] (reporting on the failed effort to repeal Gainesville, Florida’s female-only topless ban); Gina Castro, *Evanston Public Nudity Rules Stricter, Less Inclusive than Nearby Communities*, *EVANSTON ROUNDTABLE* (Sept. 28, 2022), <https://evanstonroundtable.com/2022/09/28/evanston-public-nudity-rules-stricter-less-inclusive-than-many-nearby-communities> [<https://perma.cc/A6NH-6RTA>] (reporting on the ongoing effort to repeal Evanston, Illinois’s female-only topless ban).

380. Henderson, *supra* note 379 (quoting Adrian Hayes-Santos, one of Gainesville’s city commissioners).

381. Sarah Mandile, *Gainesville City Commissioners Opt Against Allowing Women to Be Topless in Public*, *WUFT* (Feb. 12, 2021), <https://www.wuft.org/news/2021/02/12/gainesville-city-commissioners-opt-against-allowing-women-to-be-topless-in-public> [<https://perma.cc/N5SX-ET9D>] (quoting Zeriah Folston, Gainesville’s policy oversight administrator).

382. GAINESVILLE, FLA., ORDINANCES ch. 17, § 13(b) (2022).

Gainesville's law reads like a parody of legislative inscrutability. (Is there such a thing as a female nipple? A female areola? Do we really see those things as "female breasts"? And where exactly is "one-fourth of the outside surface area of [the mammary] gland"?) As reported in local news outlets, the proposal to change the law failed to pass following a "nail-biting vote" resulting in a 3-3 tie.³⁸³ Perfectly enough, the tiebreaking vote would have been made by a commissioner named David Arreola—but he was "absent from the meeting."³⁸⁴

Some commissioners who supported the repeal of Gainesville's topless ban argued that repeal was necessary to protect transgender and nonbinary community members, who were at unique risk of being policed under a law that empowers law enforcement to surveil bodies for indicia of femaleness and maleness.³⁸⁵ But what they should also have argued—but did not—is that the law surrounding LGBTQ people in Florida makes the stereotypes and misogyny behind Gainesville's topless law more obvious. In Florida, trans men do not have to lose "female breasts" to be legal males, and trans women do not have to get "female breasts" to be legal females.³⁸⁶ This creates a situation where breasts in Florida *do not* track bodies in the sex-specific ways that criminal topless bans like

383. Michelle Holder, *Gainesville Won't 'Free the Nipple' Following Proposal to De-Gender Toplessness*, ALLIGATOR (Feb. 15, 2021, 6:30 AM EST), <https://www.alligator.org/article/2021/02/free-nipple> [https://perma.cc/4WGB-MW97].

384. *Id.*

385. John Henderson, *Move to Allow Women to Bare Breasts Dies in Tie Vote*, GAINESVILLE SUN (Feb. 11, 2021, 6:47 PM ET), <https://www.gainesville.com/story/news/politics/2021/02/11/push-allow-topless-women-gainesville-fails-tie-vote/6720784002> [https://perma.cc/2WYQ-5YTA] ("This isn't just about men and women being treated equally. . . . It is also about our transgender, gender-fluid and non-binary neighbors and how we treat them." (quoting Adrian Hayes-Santos, one of Gainesville's city commissioners)); *see also* Castro, *supra* note 379 ("What is a female nipple? . . . Nipples are nipples, and the idea of having a law or ordinance specifying certain things are not allowed for female breast tissue or female nipples. It doesn't mean anything. . . . Therefore, my question then becomes about the impact of enforcement on the transgender and nonbinary community." (quoting Dr. Teddy G. Goetz, a medical doctor who supports the repeal of Evanston, Illinois's ban)).

386. *See* Brittany Link, *Blog*, EQUAL FLA. (Mar. 20, 2018), <https://www.eqfl.org/transactionfl/birth-certificates> [https://perma.cc/3CWC-ZMWK] (announcing the Florida Department of Health's discontinuation of the "practice of requiring proof of 'sexual reassignment surgery'" to change birth certificates and adoption of a new policy allowing for "letters from medical providers asserting that the individual has undergone 'appropriate clinical treatment for gender transition'").

Gainesville's assume. Should the Gainesville City Commission reconsider the issue in the future,³⁸⁷ it might think about appealing to LGBTQ equality to supplement arguments for why repeal of criminal topless bans is not just a good idea from a social-justice perspective but also necessary from a constitutional-equality perspective.

Curiously, some courts issuing transgender-inclusive rulings have suggested that transgender body regulation has no bearing on criminal breast jurisprudence. Take, for example, *N.H. v. Anoka-Hennepin School District No. 11*, which considered whether a school board violated equal protection by requiring a student assigned female at birth to use a separate – and private – area of the boys' locker room.³⁸⁸ There, the Board argued that the requirement did not illegally discriminate on the basis of sex because the plaintiff was “similarly situated” not to other boys but to other girls – none of whom could use the boys' locker room – because he had the body of a girl.³⁸⁹ In support, the Board appealed to criminal breast jurisprudence, which, the Board argued, stood for the proposition that “men and women are not similarly situated when a distinction is based on physiological differences between unclothed male and female body parts.”³⁹⁰

Rejecting the Board's arguments and ruling for the plaintiff, the court ruled that biology was irrelevant to the question of whom the plaintiff was “similarly situated” to. The plaintiff “is similarly situated to other males because he *identifies* as male,” said *N.H.*'s majority, not because of anything that his body does or does not have.³⁹¹ In response to the Board's reliance on criminal breast jurisprudence, the court said that such jurisprudence was “inapposite because [it] addressed a different context of public displays of nudity,” and because it was irrelevant to the “unique issue of transgender classification within the context of school-facility access.”³⁹²

N.H.'s dismissal of any relationship between criminal topless jurisprudence and transgender jurisprudence is surprising. If the body is irrelevant to questions of “similarly situatedness” for transgender litigants in bathroom/locker room cases, then why would the body continue to be relevant to questions of “similarly situatedness” for female litigants in criminal topless law cases? What makes

387. For now, the Commission has “table[d] the proposal.” Josh Kimble, *Gainesville Commissioners React to New Gender-Neutral Ordinance Proposal*, WCJB (Jan. 29, 2021, 5:34 PM EST), <https://www.wcjb.com/2021/01/29/gainesville-commissioners-react-to-new-gender-neutral-ordinance-proposal> [<https://perma.cc/M8DP-9HY5>].

388. 950 N.W.2d 553 (Minn. Ct. App. 2020).

389. *Id.* at 568.

390. *Id.* at 567.

391. *Id.* (emphasis added).

392. *Id.* at 568.

transgender classification in the school-facility access context so “unique” and therefore orthogonal (1) to questions of transgender discrimination in other settings and (2) to questions of sex discrimination in criminal topless laws? If the body is not a bar to sex-discrimination claims involving transgender litigants and locker rooms, then why should it be a bar to sex-discrimination claims involving women who want to go topless in public, including in the privacy of their home? The *N.H.* court does not tell us, perhaps because it does not know, or perhaps because on some level it understands that these issues are related, not distinct.

In any event, decriminalizing female toplessness – through the juxtaposition of sex equality and LGBTQ equality on issues of body regulation – could have effects beyond allowing women to go topless, including at home, without fear of criminal prosecution. One such effect could be to normalize breastfeeding, especially in public. Although breastfeeding rates have increased in recent years, and although criminal topless bans exempt certain breastfeeding practices in public, breastfeeding in public is still rare, policed, and stigmatized.³⁹³ One likely explanation is criminal breast regulations, which cast their disciplinary shadow over the very conduct they allow by way of exemption.

Another effect concerns the regulation of women’s bodies in the virtual world. According to the “community standards” of social-media sites like Instagram, users are prohibited from posting images with “female nipples,” unless those nipples are associated with “breastfeeding, birth giving and after-birth moments,” with “post-mastectomy, breast cancer awareness or gender confirmation surgery,” with “an act of protest,” or with photos of paintings and sculptures.³⁹⁴ A recent *New York Times* article reports that “if Instagram’s content reviewers have context signaling that a user identifies as a man or nonbinary (for example, if the user states their pronouns), nipple exposure is allowed.”³⁹⁵ However, if that same user identifies as a woman, then Instagram will remove the nipple-exposing photo – even if the photo looks exactly the same as the one posted by the self-identified man or nonbinary person.³⁹⁶ To the extent that social media’s community standards track formal law, changing that law could have

393. See, e.g., Schoenbaum, *supra* note 137, at 179 (stating that while breastfeeding protections “protect the right to breastfeed in public,” “[g]iven the anxiety and shaming that some women experience when breastfeeding in public, the right to do so might not mean much without a right to support as well”).

394. *Community Guidelines*, INSTAGRAM, <https://help.instagram.com/477434105621119> [<https://perma.cc/QDQ9-5QP9>].

395. Julia Jacobs, *Will Instagram Ever “Free the Nipple”?*, N.Y. TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/22/arts/design/instagram-free-the-nipple.html> [<https://perma.cc/3V36-6VT2>].

396. *Id.*

the effect of freeing women up to express themselves in a way that men take for granted – and in the virtual spaces where people increasingly spend most of their time.³⁹⁷

3. *Sex Separatism*

Sex equality without differences could mean a more nuanced approach to sex separatism in the myriad of domains where the law either requires or tolerates it, including in living quarters, bathrooms, locker rooms, and sports.³⁹⁸ Other scholars have already imagined what these domains might look like in the absence of sex separatism;³⁹⁹ this Feature will not repeat those arguments here. Suffice it to say that while there might be good reasons to sustain sex separatism in some areas, including in some areas of sport,⁴⁰⁰ *generalized* appeals to real biological differences between the sexes should not be one of them, no more than *generalized* appeals to real differences have sufficed to justify transgender exclusion from sex-segregated spaces. Moreover, defenders of sex segregation should bear the burden of showing why sex-neutral alternatives would not work as well as the categorical sex exclusions that sex segregation mandates.⁴⁰¹ For example, defenders of sex segregation in sports should bear the burden of showing why sex segregation is preferable to, say, segregation on the basis of “height, weight, or skill rather than solely on gender,”⁴⁰² as already occurs in some sports, like wrestling.

397. See, e.g., Adam Seagrave, *The Internet Is Changing the Way that All of Us Think and Socialise*, MERCATORNET (Apr. 9, 2021), <https://mercatornet.com/the-internet-is-changing-the-way-all-of-us-think-and-socialise/71246> [<https://perma.cc/7M4Y-FPGF>].

398. On sex segregation in the law generally, see David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 COLUM. J. GENDER & L. 51 (2011).

399. See, e.g., Leong, *supra* note 201; Clarke, *supra* note 198.

400. For example, Nancy Leong argues that sex separatism, while inappropriate in lower school, is probably appropriate at higher levels. See Leong, *supra* note 201, at 1283 (“Sports in which testosterone provides an advantage, primarily sports that measure speed and strength in a relatively pure form, are likely reasonable candidates for sex segregation at the highest levels.”).

401. See *id.* (“[T]he default should be one of integration, with the burden on the organization overseeing a particular sport or competition to demonstrate that the activity in question should instead be segregated along lines of sex or gender.”).

402. *Att’y Gen. v. Mass. Interscholastic Athletic Ass’n, Inc.*, 393 N.E.2d 284, 295 (Mass. 1979). At issue in the case was whether a state interscholastic athletic association rule mandating sex segregation in secondary school athletic programs violated the Equal Rights Amendment to the Massachusetts constitution. *Id.* at 285. The association argued (1) that the rule did not discriminate because of sex given the functional differences between male and female athletes, and (2) that even if the rule were sex-based, it was justified because real biological differences

B. Anticipated Criticisms (and Responses to Them)

Readers might push back at the idea of making real differences less salient in the American law of sex. For example, they might argue that foregrounding male pregnancy will make it harder to prove that pregnancy and abortion discrimination are sex-based actions under the Equal Protection Clause, the latter of which has taken on new urgency in light of *Dobbs v. Jackson Women's Health Organization*. Moreover, readers might fear that challenging sex separatism could pose unreasonable risks to women, including risks to women's athletic opportunities.

The first concern mentioned above assumes that foregrounding male pregnancy will threaten something that women already have, namely, success with the argument that pregnancy and abortion discrimination are sex-based actions under the Constitution. To the contrary, the argument that pregnancy and abortion discrimination are sex-based actions under the Constitution – without additional evidence of invidious discrimination against women – has failed in part *because* the Court has insisted on seeing pregnancy and abortion as unique to women. This is exactly what happened in *Dobbs*, which relied on abortion's uniqueness to women to dismiss decades-old arguments about why abortion is necessary for women's equality and why abortion restrictions rest on illegal sex stereotypes about women as mothers. The argument that pregnancy discrimination is sex-based action under the Constitution has always been a double-edged sword. Jessica Clarke writes: "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."⁴⁰³

Moreover, it is entirely possible to argue that pregnancy and abortion are themselves sex neutral, but that pregnancy and abortion discrimination are not. Take, for instance, a recent lawsuit brought by Shaun Simmons against Amazon in New Jersey. Simmons argued that Amazon engaged in pregnancy and gender-identity discrimination in violation of state law after (1) Simmons's supervisors

between the sexes meant that boys could not compete on girls' teams without threatening the girls' safety and without overtaking female athletics. *Id.* at 293-94. Rejecting both arguments, the court found that the rule constituted sex-based action for which the state failed to satisfy strict scrutiny, the level of review afforded sex classifications under Massachusetts's Equal Rights Amendment. *Id.* at 291. Specifically, the court faulted the association for resorting to gross generalizations about male and female athletic ability, for perpetuating "a psychology of 'romantic paternalism'" toward female athletes, *id.* at 296, and for overlooking sex-neutral approaches "that could solve any anticipated problem of boys in substantial numbers displacing girls from competition to the serious detriment of the development of athletics for girls," including the "[u]se of standards focusing on height, weight, or skill rather than solely on gender." *Id.* at 295.

403. Clarke, *supra* note 198, at 956.

“criticiz[ed] [his] work performance after [he] disclosed that he was pregnant”;⁴⁰⁴ (2) Simmons’s coworker “harassed [him] based on the fact that [he] was pregnant . . . [by] stat[ing] to [him] as [he] was entering the men’s bathroom ‘aren’t you pregnant?’”;⁴⁰⁵ and (3) Simmons was placed on paid leave after “report[ing] to human resources that he was being harassed.”⁴⁰⁶ Simmons’s complaint alleged, among other things, that Simmons was “a member of a protected class as an individual who advanced his rights to the [New Jersey Law Against Discrimination] in making a request for an accommodation due to his pregnancy.”⁴⁰⁷ Simmons’s case eventually settled, so we do not know how a court would have ruled on his pregnancy- and gender-identity discrimination claims. What we do know from Simmons’s case is that pregnancy discrimination rests on sex stereotypes about women even when men are the pregnant people subject to discrimination, as evidenced by Simmons’s coworker’s suggestion that pregnant men should not be in the men’s restroom because pregnancy is something that only women should do even when men can do it – and are doing it. If anything, the existence of pregnant men could help throw these sex stereotypes into relief – stereotypes that the Supreme Court has identified once pregnancy is over but *never during pregnancy itself*.

Finally, it is worth recognizing that two proposed federal statutes would make pregnancy discrimination illegal regardless of the sex of the pregnant person. The first, the Pregnant Workers Fairness Act, makes it unlawful for an employer to refuse reasonable accommodations for “a qualified employee affected by pregnancy, childbirth, or related medical conditions.”⁴⁰⁸ The second, the Equality Act, defines prohibited sex discrimination as discrimination on the basis of “pregnancy, childbirth, or a related medical condition,” without tethering

404. Complaint and Jury Demand at 3, *Simmons v. Amazon.com Servs., Inc.*, No. 20-cv-13865 (N.J. Super. Ct. L. Div. Oct. 5, 2020).

405. *Id.*

406. *Id.*

407. *Id.* at 6.

408. Pregnant Workers Fairness Act, H.R. 1065, 117th Cong., § 2 (2021) (emphasis added). The Act passed overwhelmingly in the House (315-101) in May 2021 but has stalled in the Senate. U.S. HOUSE OF REPRESENTATIVES, Roll Call Vote No. 143, 117th Cong. (May 14, 2021), <https://clerk.house.gov/Votes/2021143> [<https://perma.cc/5YZ2-HL5A>]. While the text of the Act refers to pregnancy in gender-neutral terms, the preamble of the Act explains the purpose of the law in gender-specific terms: “To eliminate discrimination and promote women’s health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.” H.R. 1065 pmb1.

pregnancy (or childbirth) to women specifically.⁴⁰⁹ In other words, the Equality Act defines pregnancy discrimination as a form of sex discrimination regardless of whether the pregnant person is male or female.

The second concern suffers from the same weakness as the first: it assumes that women are benefitting from the status quo of sex segregation and that they would lose something were the status quo to change. As scholars have shown, sex separatism is not the unqualified good for women that its proponents suggest it is. For example, sex segregation in bathrooms has costs for women, including a lack of access to the power brokering that seems to take place in men's restrooms.⁴¹⁰ Similarly, sex separation in sports communicates the belief that females are categorically inferior to males when it comes to athletics, contributes to the deep substantive inequalities (including gross pay inequity) that female athletes face, and might actually disincentivize girls from competing in sports in the first place.⁴¹¹

CONCLUSION

The Supreme Court has suggested that sex equality needs real differences for the anti-stereotyping principle to work. "Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real,"⁴¹² said the Court in *Nguyen v. INS*, which appealed to real biological differences to authorize a form of sex discrimination that represented the very epitome of a sex stereotype. On this account, constitutional sex equality is better served through a recognition of real differences between the sexes, and "disserved" by ignoring them. An amicus brief filed in *Dobbs* made a similarly stunning claim when arguing that the Court's previous abortion jurisprudence "failed to recognize the possible damage that the unrestricted availability of abor-

409. Equality Act, H.R. 5, 117th Cong. § 1101(a)(4)(B) (2021). The Equality Act passed in the House in February 2021 (224-206) but has stalled in the Senate. U.S. HOUSE OF REPRESENTATIVES, Roll Call Vote No. 39, 117th Cong. (Feb. 25, 2021), <https://clerk.house.gov/Votes/202139> [<https://perma.cc/4VGB-3REP>].

410. Mary Anne Case, *Why Not Abolish the Laws of Urinary Segregation?*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING* 211, 224 (Harvey Molotch & Laura Norén eds., 2010); Taunya Lovell Banks, *Toilets as a Feminist Issue: A True Story*, 6 *BERKELEY WOMEN'S L.J.* 263, 270 n.19 (1990). See also Emily Crockett, *The Bizarre History of Bathrooms Getting in the Way of Equal Rights*, *VOX* (Dec. 30, 2015, 4:00 PM EST), <https://www.vox.com/2015/12/30/10690802/bathrooms-equal-rights-lgbtq> [<https://perma.cc/LW5N-LD22>] (discussing equality dimensions of sex-segregated bathrooms).

411. Leong, *supra* note 201, at 1260-61, 1264.

412. *Nguyen v. INS*, 533 U.S. 53, 73 (2001).

tion could visit upon authentic progress toward sexual equality in light of ‘*inherent difference[s] between men and women.*’⁴¹³ According to the brief’s authors, abortion has made women less equal in society, in part because it has denied women their biologically unique capabilities.⁴¹⁴

The argument that sex stereotypes will proliferate without real differences – and that real differences *advances* equality for women – has never been coherent, especially given that real differences is the reason for *not* applying the sort of judicial scrutiny necessary to expose sex stereotypes. But that argument is even less coherent in light of what LGBTQ equality shows: that real-differences arguments are sex stereotypes that frustrate, not further, sex and LGBTQ equality. Opponents of LGBTQ equality have repeated the above-quoted language from *Nguyen* like a mantra in briefs supporting LGBTQ discrimination under statutory and constitutional sex-equality guarantees.⁴¹⁵ In the vast majority of cases, courts have refused to listen.

Sex equality is under threat – and at a crossroads. The Equal Rights Amendment remains in limbo, despite receiving the requisite number of states to ratify in 2020.⁴¹⁶ The pandemic has exacerbated gender inequality around the world, undoing “generations of progress for women and girls.”⁴¹⁷ The Supreme Court just gutted a right that a Court plurality previously described as an enabler of women’s equality.⁴¹⁸ Thirty years later – almost to the day – the *Dobbs* Court dismissed the equality dimension of reproductive rights as a “new theory” that is “squarely foreclosed” by a biological reality, namely, the fact that only women get pregnant and have abortions.⁴¹⁹ For anyone who thought that the Court

413. Brief of 240 Women Scholars and Professionals, and Prolife Feminist Organizations in Support of Petitioners at 7, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 3469798 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1995) (emphasis added)).

414. *See id.* at 35-37.

415. *See, e.g.*, En Banc Brief of Appellant the School Board of St. John’s County, Florida at 18, *Adams v. Sch. Bd. of St. John’s Cnty.*, No. 18-13592 (11th Cir. Oct. 26, 2021), 2021 WL 5028043 (citing the language from *Nguyen* in support of the argument that transgender discrimination is not illegal sex discrimination under the Equal Protection Clause).

416. For an explanation why, see Jesse Wegman, *Why Can’t We Make Women’s Equality the Law of the Land?*, N.Y. TIMES (Jan. 28, 2022), <https://www.nytimes.com/2022/01/28/opinion/equal-rights-amendment-ratification.html> [<https://perma.cc/YT6M-VXNC>].

417. *Generations of Progress for Women and Girls Could be Lost to COVID Pandemic*, UN NEWS (Aug. 31, 2020), <https://news.un.org/en/story/2020/08/1071372> [<https://perma.cc/EEA7-XZTT>].

418. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”).

419. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245-46 (2022).

might have moved on from biology as a justification or excuse for sex inequality, *Dobbs* is a stark reminder otherwise.

To greater and lesser degrees, some self-avowed feminists are wary about the implications of making the movement for reproductive rights more transgender inclusive.⁴²⁰ *New York Times* contributor Pamela Paul gave voice to some of their concerns in an opinion essay published a few days after *Dobbs*. “[T]oday,” Paul wrote, “a number of academics, uber-progressives, transgender activists, civil liberties organizations and medical organizations are working toward . . . deny[ing] women their humanity, reducing them to a mix of body parts and gender stereotypes” through terms like “‘pregnant people.’ . . . Women didn’t fight this long and this hard only to be told we couldn’t call ourselves women anymore.”⁴²¹

Paul’s (and others’) impulse to erect walls between sex equality and LGBTQ equality is far from new.⁴²² It is, however, profoundly misguided, especially in an era in which sex equality needs all the help it can get in challenging biologism and the sex inequality it nourishes. To be sure, recent developments in LGBTQ rights alone are insufficient to dismantle biologically rationalized sex inequality. But they are a start.

420. See, e.g., Pamela Paul, Opinion, *The Far Right and the Far Left Agree on One Thing: Women Don’t Count*, N.Y. TIMES, July 3, 2022, <https://www.nytimes.com/2022/07/03/opinion/the-far-right-and-far-left-agree-on-one-thing-women-dont-count.html> [<https://perma.cc/5LWJ-YLDF>]; Helen Lewis, *The Abortion Debate Is Suddenly About ‘People,’ Not ‘Women,’* ATLANTIC (May 14, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/abortion-rights-debate-women-gender-neutral-language/629863> [<https://perma.cc/CMT3-VA9E>]; Carrie N. Baker & Carly Thomsen, *The Importance of Talking About Women in the Fight Against Abortion Bans*, MS. MAG. (June 23, 2022), <https://msmagazine.com/2022/06/23/women-abortion-bans-inclusive-language-pregnant-people> [<https://perma.cc/Y2HX-XZUW>].

421. Paul, *supra* note 420.

422. See, e.g., Franklin, *supra* note 16, at 118 (explaining that feminists parted ways with LGBTQ advocates in the late 1970s, “when the continuity between women’s rights and gay rights became a political liability in the battle over the ERA”).