ARTICLES

Scrutinizing Sex

Jessica A. Clarke†

Critics of the Supreme Court's equal protection jurisprudence despair that the Court conceives of discrimination as the mere classification of individuals on forbidden grounds, such as race and sex, rather than systemic patterns of subordination. On the Court's anticlassification theory, affirmative action, which relies on overt racial or gender classifications, is generally forbidden. Anticlassification rules are insensitive to context: a classification is a classification, no matter how well-intentioned it might be, no matter what effects it might have, and no matter if it treats members of various groups in ways that are substantively equal. Whether a classification might be justified due to its purposes, effects, or substance is a separate inquiry demanding careful judicial scrutiny.

Such context-insensitive anticlassification rules could, in principle, extend to individuals who are members of groups often regarded with hostility and suspicion, such as transgender people. Indeed, this is how most trial courts have approached recent laws that classify individuals based on sex to exclude transgender people—concluding that those laws trigger heightened scrutiny and asking whether they serve important governmental interests. However, in a series of recent sex discrimination cases involving transgender plaintiffs, appellate courts have refused to take anticlassification rules seriously. For these judges, a classification is not a classification if it appears, by their own dim normative lights, to treat the sexes equally. These courts give a free pass to sex classifications that target transgender people, declining to ask what important interests these laws might serve.

This Article argues that all sex classifications, like all race-based ones, ought to trigger heightened constitutional scrutiny. It draws support from the principles undergirding anticlassification rules announced by the Roberts Court, most recently in its university affirmative-action decisions. Rather than being empty formalism, as critics contend, anticlassification theory is based in principles related to individual autonomy. These principles provide no basis for defining what counts as a classification differently in the context of sex as opposed to race, nor do they support exceptions to equal protection for transgender people.

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† Robert C. and Nanette T. Packard Professor of Law, University of Southern California Gould School of Law. Thanks to Courtney Cahill, Mary Anne Case, David Cruz, Mike Dorf, Ben Eidelson, Katie Eyer, Aziz Huq, Courtney Joslin, Craig Konnoth, Laura Lane-Steele, Chan Tov McNamarah, Laura Portuondo, Camille Gear Rich, Naomi Schoenbaum, Ann Tweedy, Ezra Young, Adam Zimmerman, and workshop participants at the 2024 West Coast Sexuality & Gender Law Workshop, Cornell Law School, and Vanderbilt Law School for feedback, and to Molly Gray for research assistance.

INTRODUCTION

In its 2023 opinion in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*),[1] the Supreme Court reiterated its view that "racial classifications, however compelling their goals," are "dangerous" and therefore, the use of any such classifications requires strict scrutiny from federal courts.[2] The Supreme Court has also said that "all gender-based classifications" are subject to their own form of "heightened scrutiny."[3] Accordingly, most trial courts have applied heightened scrutiny to laws that use sex classifications to exclude or target

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1 143 S. Ct. 2141 (2023).

2 *Id.* at 2165 (quoting Grutter v. Bollinger, 539 U.S. 306, 342 (2003)) (striking down race-based affirmative-action plans at Harvard University and the University of North Carolina (UNC)).

3 Sessions v. Morales-Santana, 137 S. Ct. 1678, 1689–90 (2017) (summarizing the Court's "post-1970 decisions" on "heightened review" for sex classifications).

transgender people, asking whether those classifications are substantially related to important governmental interests.[4]

But in a recent transgender rights case, *L.W. ex rel. Williams v. Skrmetti*,[5] the Sixth Circuit held that unlike racial classifications, not all sex classifications trigger heightened scrutiny.[6] Rather, it reasoned that sex classifications do not trigger any special scrutiny unless they offend some deeper antidiscrimination principle.[7] It also asserted that sex classifications should not concern courts when they "treat similarly situated individuals evenhandedly"[8] based on "biological" differences.[9] The Supreme Court granted certiorari in *Skrmetti* to consider whether Tennessee's ban on certain forms of health care for transgender minors

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[4] *See, e.g.*, Poe *ex rel.* Poe v. Labrador, 709 F. Supp. 3d 1169, 1193, 1200 (D. Idaho 2023) (granting a preliminary injunction against a law barring transgender minors from accessing certain healthcare treatments), *appeal filed*, No. 24-142 (9th Cir. Jan. 9, 2024); K.C. v. Individual Members of Med. Licensing Bd. of Ind., 677 F. Supp. 3d 802, 815–18 (S.D. Ind. 2023) (same), *rev'd and remanded*, 2024 WL 4762732 (7th Cir. Nov. 13, 2024); L.W. *ex rel.* Williams v. Skrmetti, 679 F. Supp. 3d 668, 692–94 (M.D. Tenn.) (same), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023), *cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024) (mem.); Doe 1 v. Thornbury, 679 F. Supp. 3d 576, 582 (W.D. Ky. 2023) (same), *rev'd and remanded sub nom. Skrmetti*, 83 F.4th 460; Koe v. Noggle, 688 F. Supp. 3d 1321, 1357 (N.D. Ga. 2023) (same); Doe v. Ladapo, 676 F. Supp. 3d 1205, 1219 (N.D. Fla. 2023) (same); Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1147 (M.D. Ala. 2022) (same), *vacated sub nom.* Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1231 (11th Cir. 2023); Brandt v. Rutledge, 551 F. Supp. 3d 882, 889 (E.D. Ark. 2021) (same), *aff'd*, 47 F.4th 661, 671–72 (8th Cir. 2022). *But see* Poe v. Drummond, 697 F. Supp. 3d 1238, 1252–53 (N.D. Okla. 2023) (denying a preliminary injunction), *appeal filed*, No. 23-5110 (10th Cir. Oct. 10, 2023).

[5] 83 F.4th 460 (6th Cir. 2023), *cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024) (mem.).

[6] *Id.* at 483 (quoting Johnson v. California, 543 U.S. 499, 506 (2005)):

> When laws on their face treat both sexes equally, as these laws do, a challenger must show that the State passed the law because of, not in spite of, any alleged unequal treatment . . . . By contrast, "racial classifications" always receive strict scrutiny "even when they may be said to burden or benefit the races equally."

The Sixth Circuit reversed two district court decisions granting preliminary injunctions against bans on certain forms of gender-affirming health care for minors. *Id.* at 469–70.

[7] *Id.* at 480 (reasoning that a ban on certain forms of health care for transgender minors did not require heightened scrutiny because it "does not trigger any traditional equal-protection concerns").

[8] *Id.* at 479.

[9] *Skrmetti*, 83 F.4th at 481 ("It is true that, by the nature of their biological sex, children seeking to transition use distinct hormones for distinct changes. But that confirms only a lasting feature of the human condition, not that any and all lawmaking in the area is presumptively invalid."); *see also K.C.*, 2024 WL 4762732, at *11 (reversing the district court's grant of a preliminary injunction on the ground that a ban on certain forms of health care for transgender minors was subject only to rational basis review); *Eknes-Tucker*, 80 F.4th at 1227 (same).

violates the Equal Protection Clause.[10] Twenty-four states have passed similar laws.[11]

These laws, which I will refer to as Transgender Health Care Bans (THCBs),[12] prohibit transgender minors from accessing healthcare treatments that are permitted for nontransgender[13] minors. Although sometimes referred to as "gender affirming health care bans," THCBs are not blanket bans on medications or surgeries that affirm a minor's gender identity.[14] Rather, THCBs prohibit transgender minors from accessing treatments that are permitted to affirm the gender identities of nontransgender minors.[15] Thus, these laws allow doctors to prescribe testosterone to a boy to affirm his gender identity, so long as that boy was assigned male at birth.[16] But they bar a doctor from prescribing testosterone to a boy who was assigned female at birth, in other words, to a transgender boy.[17]

The argument that there is something different about sex classifications that justifies exemptions from heightened scrutiny is a threat not just to LGBTQ rights, but to the broader corpus of sex discrimination law that is Justice Ruth Bader Ginsburg's legacy.[18] Biology is the quintessential justification for sex

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10 *Skrmetti*, 144 S. Ct. at 2679.

11 *Bans on Best Practice Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT (last updated Aug. 8, 2024), https://perma.cc/XD2S-BXJW.

12 *See, e.g.*, ARK. CODE. ANN. §§ 20-9-1501 to -1504, 23-79-164 (2021); FLA. STAT. § 456.001(9)(a) (2024); MONT. CODE ANN. § 50-4-10 (2023). I am grateful to Ezra Young for suggesting this more precise nomenclature.

13 While acknowledging that terminological choices on gender are always contestable, I avoid the term "cisgender" in this Article for reasons including some of the arguments made by Professor Kadji Amin in *We Are All Nonbinary: A Brief History of Accidents*, 158 REPRESENTATIONS 106, 117 (2022).

14 "Gender identity" refers to "[a] person's internal, deeply held knowledge of their own gender." *Glossary of Terms: Transgender*, GLAAD, https://perma.cc/URW8-HCJ2. It is commonly contrasted with sex "assigned at birth." *Id.* ("Infants are assigned a sex at birth, 'male' or 'female,' based on the appearance of their external anatomy, and an M or an F is written on the birth certificate.").

15 A transgender person is defined as one "whose gender identity differs from the sex they were assigned at birth." *Id.*

16 THCBs include exceptions for intersex variations as well. *See, e.g.*, ARK. CODE. ANN. §§ 20-9-1501(6)(B), 20-9-1502(c). "Intersex" is "[a]n adjective used to describe a person with one or more innate sex characteristics, including genitals, internal reproductive organs, and chromosomes, that fall outside of traditional conceptions of male or female bodies." *Glossary of Terms: LGBTQ*, GLAAD, https://perma.cc/33YM-G3CR. Nearly all THCBs include these exceptions. Ido Katri & Maayan Sudai, *Intersex, Trans, and the Irrationality of Gender-Affirming-Care Bans*, 134 YALE L.J. (forthcoming 2025).

17 A "transgender boy" is a minor who was assigned female at birth and whose gender identity is that of a boy. *See supra* notes 14–15 (explaining terminology).

18 *See, e.g.*, *"The Most Important Woman Lawyer in the History of the Republic": How Did Ruth Bader Ginsburg Change America? More than 20 Legal Thinkers Weigh In*,

discrimination;[19] to immunize classifications based on biology from heightened judicial scrutiny would be to neuter the Equal Protection Clause's guarantee of gender equality. This Article argues that all sex classifications, like all race-based ones, ought to trigger heightened scrutiny, regardless of the purposes or effects of those classifications, and notwithstanding arguments about whether the sexes are similarly situated or if sex is somehow a cause of differential treatment. I draw support for this argument from the Supreme Court's anticlassification principle—the idea that some types of official classifications require judicial oversight—an idea the Court takes seriously in contexts including race,[20] religion,[21] free speech,[22] and, as this Article will argue, sex, notwithstanding the Sixth Circuit's assertion to the contrary.[23] In transgender rights cases, courts are struggling to apply and understand the anticlassification principle[24] with little guidance from civil rights scholars, who have long focused on critique of that principle and declined to theorize it or explain its role in doctrine.[25] Jurists, left to puzzle about anticlassification rules and

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POLITICO (Sept. 18, 2020), https://www.politico.com/news/magazine/2020/09/18/ruth-bader-ginsburg-legacy-418191 (quoting law professor Kenji Yoshino describing Justice Ruth Bader Ginsburg as "the founding mother—or simply founder—of our nation's sex equality jurisprudence" and explaining that she "transformed sex equality law—as a professor, as an advocate, as a judge and then finally as a justice on the United States Supreme Court").

19 When it comes to gender, American law has too often mistaken biology for destiny. The classic examples are *Muller v. Oregon*, which upheld a law limiting women's working hours based on "a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil," 208 U.S. 412, 420 (1908), and Justice Joseph Bradley's concurrence in *Bradwell v. Illinois*, a case upholding the exclusion of women from the practice of law, asserting that "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman." 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

20 *See, e.g.*, *supra* note 1 and accompanying text (discussing *SFFA*, 143 S. Ct. at 2165).

21 *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422 (2022) (holding that government policies trigger strict scrutiny if they are "specifically directed at [ ] religious practice" (quoting Emp. Div. v. Smith, 494 U.S. 872, 878 (1990)).

22 *See generally, e.g.*, Genevieve Lakier, Reed v. Town of Gilbert, Arizona*, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233.

23 *See supra* note 6 and accompanying text.

24 *See, e.g.*, Jessica A. Clarke, *Sex Discrimination Formalism*, 109 VA. L. REV. 1699, 1725–67 (2023) [hereinafter Clarke, *Sex Discrimination Formalism*] (surveying case law on sex discrimination following the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)).

25 For exceptions, see Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1602 (2020) [hereinafter Eidelson, *Respect, Individualism*] (advancing an argument for race-based affirmative action from the Supreme Court's own principles, and noting that this "moment of transition" with respect to the ideology of the Court "invites varied responses, but central among them should be a renewed effort to engage the case for

how far they might extend, are now circumscribing sex discrimination law, with implications beyond transgender rights.

In the context of race discrimination, the Supreme Court has repeatedly held that so long as decision-makers use racial classifications, the law is subject to the standard of strict scrutiny. Purposes are irrelevant.[26] Effects are irrelevant.[27] Whether any sort of purpose or effect might constitute a "governmental interest[ ]" that would justify a racial classification is a separate inquiry that requires careful examination by courts.[28] This separate inquiry occurs on the back end of the analysis, independent of the threshold question of whether strict scrutiny has been triggered. These rules for race discrimination cases did not develop in a doctrinal vacuum; rather, they were informed, at every step, by parallel decisions with respect to sex discrimination.[29] Thus, the Court has held that, if a law "differentiates on the basis of gender," "heightened scrutiny" is triggered.[30] To be sure, there are differences in the back end of the analysis that apply to racial and gender classifications. The Supreme Court has held that, while strict scrutiny for racial classifications requires a "compelling" governmental interest,[31] heightened scrutiny for gender classifications requires only an "important" one.[32] And while racial classifications must be "necessary" to achieve governmental objectives,[33] gender classifications must be only "substantially related to the achievement of those objectives."[34] But, as a matter of doctrine, there are no differences between the definition of a "classification" that would trigger special scrutiny in the race and gender contexts. Neither is there any principled reason to invent any.

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colorblindness on its own philosophical terms"); Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1255–56 (2018) (arguing that "the anticlassification rule might be better supported by the argument that impermissible classifications embody or elicit objectionable forms of official intentionality" and noting a lack of scholarly attention to questions of discriminatory intent generally).

26 *See SFFA*, 143 S. Ct. at 2166 (holding that Harvard's and UNC's affirmative-action plans, "however well intentioned and implemented in good faith," failed strict scrutiny).

27 *See id.* at 2175 (insisting that "[s]eparate but equal is '*inherently* unequal,'" and rejecting the argument that "[i]t depends" on whether minority races "benefit" (emphasis in original) (quoting Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954))).

28 *Id.* at 2162 (quotation marks omitted) (quoting *Grutter*, 539 U.S. at 326).

29 *See infra* Part II.

30 *Morales-Santana*, 137 S. Ct. at 1690.

31 *SFFA*, 143 S. Ct. at 2162.

32 *Morales-Santana*, 137 S. Ct. at 1690.

33 *SFFA*, 143 S. Ct. at 2162 (quoting Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 311–12 (2013)).

34 *Morales-Santana*, 137 S. Ct. at 1690 (quoting United States v. Virginia (VMI), 518 U.S. 515, 533 (1996)).

This Article contributes to antidiscrimination theory and doctrine by outlining the features of anticlassification rules and explicating the principles that underlie them.[35] Scholars have criticized "classifications" as undefined[36] and anticlassification theory as perverse "fetishization of the facial classification."[37] A "chorus of academic critics" has condemned the Court's anticlassification jurisprudence for its "'individualistic' premises,"[38] arguing that equal protection law should instead be concerned with group-based subordination.[39] On this view, the Court's decision in *SFFA* is a dead end for racial and gender justice. This Article argues, by contrast, that failing to take the Roberts Court's affirmative-action jurisprudence seriously on its own terms poses grave risks for gender equality.

A close examination of anticlassification doctrine reveals that laws that classify based on sex to the detriment of transgender people should be subject to heightened scrutiny. While there may be gray areas at the peripheries of the distinction between a classification and a facially neutral rule, the core features of these

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[35] *See infra* Parts I.B, II.

[36] *See, e.g.*, Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: An Equality Amendment*, 129 YALE L.J.F. 343, 349 n.19 (2019) ("There is no doctrinal test for what is facial and what is not."); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1542 (2004) [hereinafter Siegel, *Equality Talk*] ("American antidiscrimination law has no determinate criteria for deciding what practices are group-based classifications.").

[37] Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism About Equal Protection*, 66 ALA. L. REV. 627, 643 (2015); *see also id.* at 637, 639–40 (analogizing Supreme Court equal protection doctrine to a "machine"); Rachel F. Moran, Bakke*'s Lasting Legacy: Redefining the Landscape of Equality and Liberty in Civil Rights Law*, 52 U.C. DAVIS L. REV. 2569, 2606–07 (2019) ("[C]ritics have decried an anticlassification interpretation of the Constitution as fetishistic formalism that strips cases of their history and context.").

[38] Eidelson, *Respect, Individualism*, *supra* note 25, at 1605.

[39] *See, e.g.*, Justin Driver, *The Strange Career of Antisubordination*, 91 U. CHI. L. REV. 651, 655 (2024) ("It is not too much to say that this [antisubordination] idea serves as *the* central pillar of modern legal liberalism." (emphasis in original)); *see also* Siegel, *Equality Talk*, supra note 36, at 1475; *infra* notes 45, 316, 317, 320 (collecting accounts of the Court's anticlassification jurisprudence). A few scholars have critically questioned whether anticlassification and antisubordination theories lead in expected directions. *See, e.g.*, Driver, *supra*, at 656 (exploring "antisubordination's malleability—and, indeed, its manipulability—in our contemporary constitutional order"); *cf.* Michael Dorf, *A Partial Defense of an Anti-Discrimination Principle*, 2 ISSUES LEGAL SCHOLARSHIP, no. 1, 2002, at 2, 14 ("Although [Professor Owen] Fiss did not think so, the anti-discrimination principle is broad enough to do much of the important egalitarian work that he so articulately championed in *Groups and the Equal Protection Clause*.").

concepts are not hard to discern.[40] It is only by setting aside anticlassification rules that courts create supposed puzzles. For example, the Sixth Circuit could not understand how THCBs could be a form of sex discrimination, while bans on abortion, which apply only to women, are not.[41] Elaboration of what anticlassification rules require causes this puzzle to dissolve. The Supreme Court has held that classifications based on pregnancy do not equate to sex classifications.[42] Therefore, a law forbidding abortion does not classify based on sex; it forbids a medical procedure that can be defined without categorizing the patient by sex.[43] But a law forbidding only transgender people from accessing certain forms of health care inevitably classifies based on sex. To determine who is and is not transgender, these laws must and do turn on the sex of the patient.[44]

With respect to anticlassification theory, a rule requiring that all classifications trigger heightened scrutiny is not merely fetishistic formalism. Rather, the Roberts Court's opinions reflect two related principles: first, that treating people as no more than members of their race is stereotyping that is offensive to individual autonomy and dignity, and second, that decision-making based on racial classifications detracts from the goal of fair distribution of resources based on individual responsibility. Prominent commentators have criticized the Court's affirmative-action jurisprudence as reflecting no more than majority-group grievances.[45]

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[40] *See infra* Part I.B.1 (defining the core concept of a classification and illustrating how it applies).

[41] *See, e.g.*, *Skrmetti*, 83 F.4th at 481 (reasoning that THCBs do not trigger heightened scrutiny because "laws regulating 'medical procedure[s] that only one sex can undergo' ordinarily do not 'trigger heightened constitutional scrutiny'" (quoting Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245–46 (2022))).

[42] Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974). For discussion, see *infra* notes 187–203 and accompanying text.

[43] This is not to say abortion bans do not violate the Equal Protection Clause for other reasons. I agree with scholars who say they do. *See* Clarke, *Sex Discrimination Formalism*, *supra* note 24, at 1756–57 (discussing the argument that the law does not require fathers to undertake any health risks akin to pregnancy for the sake of children).

[44] *See, e.g.*, TENN. CODE ANN. § 68-33-103(a)(1)–(2) (2023) (prohibiting medical procedures for the purpose of "[e]nabling a minor to identify with, or live as, a purported identity inconsistent with *the minor's sex*" or "[t]reating purported discomfort or distress from a discordance between *the minor's sex* and asserted identity" (emphasis added)); *id.* § 68-33-102(9) (defining "[s]ex" as "a person's immutable characteristics of the reproductive system that define the individual as male or female, as determined by anatomy and genetics existing at the time of birth").

[45] *See* Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 135–37 (2022) (arguing that the Court's affirmative-action jurisprudence shows "a special sensitivity to white people's feelings" of "outrage and resentment," and "allow[s] white claimants a unique freedom to innovate in their articulation of redressable racial

This Article, by contrast, takes the Supreme Court at its word when it explains the principles animating its anticlassification jurisprudence and asks where those principles lead. It argues these principles demand particular scrutiny of rules that restrict an individual's access to goods and services based on what public officials think is normal or appropriate for their sex.

In recognizing that anticlassification principles are the guiding lights of the Roberts Court, I do not go so far as to argue they *ought* to be the guiding lights of an ideal antidiscrimination jurisprudence. But I note that while the principle that resources should be allocated based on individual responsibility may be closely associated with conservative causes, the prohibition on stereotyping has broad appeal.[46] This Article attempts a sympathetic reconstruction of anticlassification theory in the hopes of revealing grounds on which equal protection decisions might accord with widely shared values.

While scholars have identified the values at work in the Supreme Court's modern equal protection doctrine, they have not connected them with the problem of *classification*, which presents a strong argument for judicial review. This Article explains why classifications, among other forms of discrimination, are uniquely problematic and amenable to judicial review.[47] Because they are facial—in the text—classifications present particular risks of harm in how they ask individuals and the polity to think about group-based identities. Additionally, that a legislature has chosen to achieve its aims with classifications signals a possible dysfunction in the political process calling for judicial supervision.

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injuries"); Ian F. Haney-López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 987–88 (2007) [hereinafter Haney-López, *A Nation of Minorities*] (describing as "risible" and "reactionary" the "anticlassification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility"); Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 43 (2013) [hereinafter Siegel, *Equality Divided*] ("Open discussion of the interests of whites and innocent third parties, so common in the earlier affirmative action cases, is now rare; it has been abstracted and transmuted into discussion of individual dignity interests and common goods in avoiding balkanization.").

[46] *See, e.g.*, Bridges, *supra* note 45, at 142–43 (disagreeing with the premises of the *SFFA* decision, but acknowledging merit in criticisms of how university affirmative-action plans have been carried out without acknowledgment of "heterogeneity among 'Asians' as a racial group"); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 83 (2010) [hereinafter Franklin, *Anti-Stereotyping Principle*] (arguing that Justice Ruth Bader Ginsburg's 1970s litigation strategy "was grounded not in a commitment to eradicating sex classifications from the law, but in a far richer theory of equal protection involving constitutional limitations on the state's power to enforce sex-role stereotypes").

[47] *See infra* Part II.B.

To be sure, transgender rights are politicized. Judges with ideological reasons for upholding laws that target transgender people will find grounds for doing so, even if they acknowledge that those laws classify on the basis of sex and therefore trigger heightened scrutiny.[48] But broad definitions of classifications, in the gender context, are likely to lead to more accountable, transparent, and legitimate judicial decision-making. When courts wrestle with which sex classifications do and do not trigger heightened scrutiny, their decisions devolve into empty formalistic reasoning that obscures the political and practical stakes of antidiscrimination controversies. But when judges accept that all sex classifications trigger heightened scrutiny and decide cases on the back end of that standard, they engage in substantive inquiries that give careful and transparent scrutiny to legislative means and ends.[49]

Another contribution of this Article is to explain why there is no principled basis for any distinction between race and sex when it comes to what a classification is.[50] In *Skrmetti*, the Sixth Circuit reasoned that, unlike race-based distinctions, sex classifications are suspect only if they are first found to "perpetuate[ ] invidious stereotypes or unfairly allocate[ ] benefits and burdens."[51] On this view, courts should give no special scrutiny to supposedly "benign" sex classifications. This Article collects and refutes potential arguments for treating the trigger for special equal protection scrutiny for sex and race differently, such as the arguments that sex is exceptional because it is biological. To be sure, many people today understand sex to be a biological phenomenon, while biological understandings of race have fallen out of favor. But even

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48 *See infra* Part II.B.3.

49 For an illustrative example, see *infra* notes 107–20 and accompanying text.

50 *See infra* Part III. Analogies between race and sex have been criticized as "epitomiz[ing] white women's exploitation of African Americans' hard-won victories." SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 3 (2011) (discussing this criticism). This Article analogizes instead from the hard-won victories of white and Asian American challengers to race-based affirmative action, as well as men who challenged sex classifications that favored women, to argue that equal protection doctrine cannot exclude transgender people.

Analogies have also been criticized for equating race and sex, as social phenomena, and for ignoring their complex intersections. *See id.*; *cf.* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140. This Article makes no claim that race and sex are equivalent or distinct as social phenomena; rather, it argues that their differences and intersections do not matter to the Supreme Court's rule that all sex classifications require heightened scrutiny. *See infra* Part III.C.

51 *Skrmetti*, 83 F.4th at 484.

if biology explains sex or race to some extent, that does not mean it justifies sex or racial classifications. The very purpose of heightened scrutiny is to determine whether a classification is in fact justified by biological differences or otherwise, an inquiry that takes place on back-end review. Another argument is that sex classifications, unlike racial ones, remain ubiquitous in public life, and heightened scrutiny would entail tedious judicial review of banal and inoffensive rules. This objection misunderstands the nature of classifications, overstates the number of sex classifications remaining in public life, and understates the extent to which many classifications *ought* to be reconsidered.[52]

The potential abdication of judicial review of sex classifications has tremendous stakes. As a result of an unprecedented wave of legislation attempting to curtail transgender rights, lower federal courts have been grappling with how to apply constitutional sex discrimination law.[53] While trial courts have generally applied anticlassification rules in straightforward ways, holding that heightened scrutiny is required,[54] as cases climb up the appellate hierarchy, decisions become less fact bound and more polarized. While *Skrmetti* offers the most thorough articulation of the argument against heightened scrutiny for all sex classifications, it is not an isolated decision.[55] In addition to THCBs, another controversy is whether schools may exclude transgender children from restrooms consistent with their gender identities. On this issue, the Eleventh Circuit has muddled the classification question, scrutinizing only whether school districts may segregate restrooms based on sex, rather than whether they

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[52] Elsewhere, I have attempted to catalogue those remaining contexts in which sex classifications persist. *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 945–90 (2019) [hereinafter Clarke, *They, Them, and Theirs*].

[53] I have chronicled this litigation in prior work. *See* Clarke, *Sex Discrimination Formalism*, *supra* note 24, at 1731–37 (discussing litigation over restroom access policies); *id.* at 1741–45 (discussing litigation related to gender-affirming health care); *id.* at 1745 n.245 (collecting cases on transgender student participation in sports); Jessica A. Clarke, *Sex Assigned at Birth*, 122 COLUM. L. REV. 1821, 1878 n.329 (2022) [hereinafter Clarke, *Sex Assigned at Birth*] (collecting cases). For a survey of earlier cases, see Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405, 1415–58 (2023) [hereinafter Eyer, *Transgender Constitutional Law*] (surveying litigation from 2017–2021).

[54] *See, e.g.*, *supra* note 4. A survey of cases ending in 2021, prior to recent appellate decisions on THCBs and restroom access adverse to transgender plaintiffs, found that transgender plaintiffs had enjoyed a high degree of success on constitutional claims in lower courts. Eyer, *Transgender Constitutional Law*, *supra* note 53, at 1424.

[55] *Skrmetti* reframes arguments made first by the Eleventh Circuit in a THCB case. *See Eknes-Tucker*, 80 F.4th at 1216–18, 1224–25, 1229–30. As this Article was undergoing final edits, the Seventh Circuit issued an opinion in accord with *Skrmetti* and *Eknes-Tucker*. *K.C.*, 2024 WL 4762732, at *12.

may define sex so as to exclude transgender children.[56] The Sixth and Tenth Circuits have recently disagreed on whether heightened scrutiny applies to laws disallowing transgender people from changing the sex designations on their birth certificates.[57] More such controversies are sure to follow. Yet legal scholarship addressing the equal protection questions now before the Supreme Court is scant.[58]

It is no exaggeration to say that these transgender rights controversies are "life-or-death" questions that deserve sustained attention.[59] But sex discrimination law has implications beyond the

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[56] Adams *ex rel.* Kasper v. Sch. Bd., 57 F.4th 791, 806 (11th Cir. 2022) (rejecting a transgender boy's challenge to a school policy excluding him from the boys' restroom). Two circuits have reached the opposite conclusion. *See* A.C. *ex rel.* M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 770 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 683 (2024); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 618–19 (4th Cir. 2020).

[57] *Compare* Fowler v. Stitt, 104 F.4th 770, 790–94 (10th Cir. 2024) (holding that a policy forbidding transgender people from changing their birth-certificate sex designations was subject to heightened scrutiny because it discriminated based on sex according to the logic of *Bostock*), *with* Gore v. Lee, 107 F.4th 548, 555 (6th Cir. 2024) (holding that a policy forbidding transgender people from changing their birth-certificate sex designations was subject to rational basis review because it "treats the sexes identically").

[58] *See, e.g.*, Katie Eyer, *Transgender Equality and* Geduldig *2.0*, 55 ARIZ. STATE L.J. 475, 505 (2023) [hereinafter Eyer, *Transgender Law and* Geduldig *2.0*] (addressing Supreme Court case law holding that pregnancy exclusions are not a form of sex discrimination); Katie Eyer, *As-Applied Equal Protection*, 59 HARV. C.R.-C.L.L. REV. 49, 59–60 (2024) [hereinafter Eyer, *As-Applied Equal Protection*] (addressing the argument that equal protection jurisprudence only allows transgender plaintiffs to demand desegregation, i.e., to request that all restrooms be all gender, and does not allow them to challenge rules that misclassify them as men or women, i.e., to request that transgender men be permitted to use men's restrooms); Erik Fredericksen, Note, *Protecting Transgender Youth After* Bostock*: Sex Classification, Sex Stereotypes, and the Future of Equal Protection*, 132 YALE L.J. 1149, 1154 (2023) (arguing that the logic of the Supreme Court's *Bostock* opinion applies to equal protection doctrine and requires heightened scrutiny of laws targeting transgender youth); Lewis A. Grossman, *Criminalizing Transgender Care*, 110 IOWA L. REV. 281, 344 (2024) (arguing that THCBs "almost certainly cannot survive any form of heightened scrutiny and may even be vulnerable under a rational basis analysis"); Holning Lau & Barbara Fedders, *Scrutinizing Transgender Healthcare Bans Through Intersex Exceptions*, 36 YALE J.L. & FEMINISM (forthcoming 2025) (manuscript at 37) (available on SSRN) (arguing that exceptions for intersex minors demonstrate that THCBs are based in "stereotyping, irrational fear, and disgust"); Katri & Sudai, *supra* note 16, at 64–76 (arguing that exceptions for intersex minors demonstrate that THCBs lack rational basis); Scott Skinner-Thompson, *Trans Animus*, 65 B.C. L. REV. 965, 969 (2024) (arguing that the "overly broad and totalizing" nature of recent laws targeting transgender people demonstrates animus that violates the Equal Protection clause); Laura Lane-Steele, *Sex-Defining Laws and Equal Protection*, 112 CALIF. L. REV. 259, 295 (2024) (arguing that equal protection doctrine requires context-specific, rather than all-purpose, definitions of sex).

[59] *See, e.g.*, Chase Strangio, *Why We're Taking the Fight for Trans Youth Health Care to the Supreme Court*, ACLU OR. (Nov. 1, 2023), https://perma.cc/N2C4-TLWG (explaining that "a wave of bills targeting gender-affirming health care for transgender people have effectively banned it for nearly one-third of transgender youth in the United States" and

LGBTQ community—many of the landmark 1970s sex discrimination cases challenged sex classifications that worked to the detriment of men who defied traditional gender roles in marriage by engaging in caregiving.[60] The idea that sex classifications are immune from judicial review if they assign men and women to supposedly separate-but-equal spheres, so long as those distinctions are ostensibly justified by biology, is a throwback to a time many thought bygone.[61] Such a rule would revive old doctrines giving a free pass to laws imposing heavier burdens on fathers than mothers to prove parental rights, programs that extend benefits to expectant mothers but not expectant fathers, and criminal laws that penalize female, but not male, toplessness, among other sex classifications still found in statute books.[62] These rules should not be immune from heightened judicial scrutiny simply because lawmakers might think they reflect biology.

This Article proceeds in three parts. Part I contributes to doctrinal debates by untangling the various strands of equal protection case law to reveal that there are no exceptions to the rule that all sex classifications require heightened scrutiny. It also explains why heightened scrutiny is vitally important to legal challenges to policies that discriminate based on sex, including those implicated in transgender rights controversies. Part II explains the theory behind the rule that all classifications trigger heightened scrutiny, as elaborated by the Roberts Court, most notably in its *SFFA* decision, building on past precedents on both race and sex. Part III identifies and refutes arguments against applying broad anticlassification rules in the sex discrimination context, including that sex, unlike race, is based in biology; that sex classifications are too ubiquitous for heightened judicial scrutiny to be sensible; that history and tradition provide reasons for courts to be less suspicious of sex classifications; and that sex

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that "[t]hese laws uproot entire families and communities, alarm doctors and medical experts, and endanger the very young people the[ ] laws claim to protect").

60 *See, e.g.*, Franklin, *Anti-Stereotyping Principle*, *supra* note 46, at 87 ("Most of [the male plaintiffs], in one way or another, rejected or failed to satisfy masculine gender norms circa 1975.").

61 *See supra* note 19 (discussing sex stereotypes in cases like *Bradwell*); Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1452, 1459 (2000) [hereinafter Case, *Constitutional Sex Discrimination Law*] ("Justice Bradley's concurrence in *Bradwell* has become the Court's favorite example of what was wrong with earlier views of relations between the sexes.").

62 *See* Courtney Megan Cahill, Feature, *Sex Equality's Irreconcilable Differences*, 132 YALE L.J. 1065, 1138–39 (2023) (cataloguing sex distinctions still drawn by legislatures and justified by recourse to sex-based biology).

classifications ought not be suspect when they affect transgender people, who are asserting novel challenges to the definition of sex and novel claims to group-based recognition. None of these arguments are reasons courts should not apply heightened scrutiny to all sex classifications.

I. ANTICLASSIFICATION DOCTRINE

This Part explains equal protection law as it pertains to sex and, in doing so, advances the argument that, as a matter of Supreme Court doctrine, facial classifications trigger heightened scrutiny regardless of other measures of disparate treatment, such as intent, effects, causation, or comparison. Lower courts that have refused to apply heightened scrutiny in transgender rights cases have done so by evading this feature of the doctrinal landscape. By describing the doctrine here, I do not endorse it as a normative matter. Rather, my argument is that taking the doctrinal landscape as a given, courts such as the Sixth, Seventh, and Eleventh Circuits are wrong in failing to apply heightened scrutiny to sex classifications when those classifications impact transgender people.

A. Heightened Scrutiny

By way of background, this Section offers a rough sketch of the doctrinal architecture for constitutional race and sex discrimination claims. I will briefly describe here what I refer to as the "back end" of the equal protection analysis—the part of the inquiry that tests the government's justifications for its actions. This Article is primarily concerned with the front end, or the "trigger": What sort of official race- or gender-based actions require heightened scrutiny under the Constitution? I address doctrine on the trigger next, in Part I.B, but an explanation of what heightened scrutiny entails is essential to setting up that argument.

The Supreme Court has evaluated equal protection challenges under a framework known as the tiers of scrutiny, which sets forth three standards of judicial review for the constitutionality of government actions.[63] Normal legislation is evaluated on the lowest tier, under a deferential standard called "rational basis review," which requires "only a rational means to serve a

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[63] *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1300–01 (2007) [hereinafter Fallon, *Strict Judicial Scrutiny*] (discussing the three "tier[s]").

legitimate end."[64] Legislation that abridges certain rights protected by the First Amendment, Due Process Clause,[65] and Equal Protection Clause[66] is evaluated on the highest tier, under a stringent standard known as "strict scrutiny."[67] With respect to the Equal Protection Clause, the Supreme Court has held that certain official classifications are "constitutionally suspect" and must therefore meet strict scrutiny.[68] Race is the "paradigm" suspect classification.[69] For almost three decades, the Supreme Court has held that all race-based classifications, even remedial ones, are subject to strict scrutiny.[70] Strict scrutiny requires that courts "ask, first, whether the racial classification is used to 'further compelling governmental interests'" and, "[s]econd, if so, . . . whether the government's use of race is 'narrowly tailored'—meaning 'necessary'—to achieve that interest."[71]

In a 1973 case, *Frontiero v. Richardson*,[72] a four-Justice plurality would have applied strict scrutiny to sex classifications.[73] But a fifth vote never materialized. Rather, in 1976, the Court held that sex classifications are constitutional if they meet a different standard: they must "serve important governmental objectives" and be "substantially related to the achievement of those objectives."[74] Moreover, the government's "justification" must be

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64 City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985).

65 U.S. CONST. amend. XIV, § 1.

66 *Id.*

67 Fallon, *Strict Judicial Scrutiny*, *supra* note 63, at 1269 (listing contexts in which the Supreme Court has applied strict scrutiny).

68 McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954)) (striking down a law that classified individuals based on race for purposes of criminalizing interracial marriage); *see also id.* (holding that racial classifications must meet "the 'most rigid scrutiny'" (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944))).

69 Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979). In addition to race, the Court has identified two other suspect classifications: alienage, *see* Graham v. Richardson, 403 U.S. 365, 372 (1971), and national origin, *see* Oyama v. California, 332 U.S. 633, 645–46 (1948).

70 *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (plurality opinion) (holding that all race-based classifications require strict scrutiny under the Fourteenth Amendment, which applies to state and local governments); *id.* at 520 (Scalia, J., concurring); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (extending *Croson* to actions taken by the federal government under the Fifth Amendment).

71 *SFFA*, 143 S. Ct. at 2162 (first quoting Grutter v. Bollinger, 539 U.S. 306, 326 (2003), and then quoting Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 311–12 (2013)).

72 411 U.S. 677 (1973).

73 *Id.* at 682, 691 (plurality opinion) (striking down a benefits program that treated female spouses of male servicemembers as presumptive dependents but required proof of dependency for male spouses of female servicemembers).

74 Craig v. Boren, 429 U.S. 190, 197, 210 (1976) (striking down a law that set a different age minimum for young men and women to purchase certain alcoholic beverages).

"exceedingly persuasive."[75] This inquiry has been referred to as an "intermediate" tier of scrutiny, although Justice Ginsburg referred to it as another form of "heightened" scrutiny.[76] Like sex, classifications based on legitimacy, meaning the marital status of a child's parents, have also been deemed "quasi-suspect"[77] classifications meriting heightened scrutiny.[78] This Article will follow the scholarly convention of referring to both strict scrutiny and the tier that applies to classifications based on sex and legitimacy as types of "heightened" scrutiny.

Apart from the sex-classification argument, there are other routes to heightened scrutiny for policies that discriminate against transgender people, and good arguments to support them. Some lower courts have held that transgender identity is a quasi-suspect class.[79] Others have reasoned that the Supreme Court's statutory holding in *Bostock v. Clayton County*[80] applies by logical necessity to the Equal Protection Clause.[81] *Bostock* held that Title VII of the Civil Rights Act of 1964,[82] which prohibits employment discrimination "because of" sex, covers lesbian, gay, and transgender employees.[83] There are strong doctrinal and

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75 Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981) (quoting *Feeney*, 442 U.S. at 273) (striking down a law that gave a husband the unilateral right to dispose of property jointly owned with his wife).

76 *See, e.g.*, Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 14 WOMEN'S RTS. L. REP. 335, 355 (1992).

77 *Cleburne Living Ctr.*, 473 U.S. at 442.

78 Trimble v. Gordon, 430 U.S. 762, 766–67, 769 (1977) (striking down a statute that barred illegitimate children from inheriting by intestate succession from their fathers based on a standard that was neither strict scrutiny nor traditional rational basis review); *see also* Clark v. Jeter, 486 U.S. 456, 461 (1988) (clarifying that "intermediate scrutiny" applies to classifications based on sex and illegitimacy).

79 *See, e.g.*, *Grimm*, 972 F.3d at 610 (holding that "transgender people constitute at least a quasi-suspect class"); Karnoski v. Trump, 926 F.3d 1180, 1201 (9th Cir. 2019) (holding that "the district court should apply a standard of review that is more than rational basis but less than strict scrutiny" to a classification based on gender identity).

80 140 S. Ct. 1731 (2020).

81 *See, e.g.*, Kadel v. Folwell, 100 F.4th 122, 153 (4th Cir. 2024) (en banc); Fowler v. Stitt, 104 F.4th 770, 788–94 (10th Cir. 2024); Hecox v. Little, 104 F.4th 1061, 1079–80 (9th Cir. 2023), *as amended* (June 14, 2024), *petition for cert. filed*, (U.S. July 11, 2024) (No. 24-38). *But see K.C.*, 2024 WL 4762732, at *9 (refusing to apply *Bostock* because it "turns on the text of Title VII"); *Skrmetti*, 83 F.4th at 484–85 (refusing to apply *Bostock* because of differences in textual language and the court's conclusion that THCBs are not based on stereotypes); Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 808 (11th Cir. 2022) (en banc) (refusing to apply *Bostock*'s logic because "the instant appeal is about schools and children—and the school is not the workplace"); Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1229 (11th Cir. 2023) ("The Equal Protection Clause contains none of the text that the Court interpreted in *Bostock*.").

82 42 U.S.C. § 2000e.

83 *Bostock*, 140 S. Ct. at 1739.

normative arguments for applying *Bostock*'s logic to the Equal Protection Clause.[84] Indeed, *Bostock*'s statutory holding rested on "but-for" principles, and the application of "but-for" principles to discrimination cases began in equal protection law.[85] However, a 6–3 conservative Supreme Court wary of potential conflicts between religious traditionalists and gender equality[86] may regard these routes, which appear to install LGBTQ identity as a new "protected class," as expressing, as a categorical matter, that the protection of LGBTQ people as a group trumps rights to religious exercise.[87] It is for this reason that this Article insists that established equal protection doctrine requires scrutiny of all sex classifications, including those that harm transgender people, without requiring that the Court recognize any new protected groups.

This Article is not concerned with whether sex classifications receive strict or merely some lower form of heightened scrutiny, because these two standards tend to converge in practice. While neither form of scrutiny is fatal, few laws survive. Since announcing that heightened scrutiny applied to sex classifications in 1976, the Supreme Court has upheld only a handful of laws under that standard. Three of those laws hinged on unique problems of proving paternity for unwed fathers;[88] one on the unique risks of teen

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84 For the arguments based on factors that the Court has considered in determining suspect class status, see *supra* note 79 (collecting cases). For an argument based on *Bostock*, see, for example, Fredericksen, *supra* note 58, at 1169–75 ("[T]he key holding of *Bostock* stems from a logical conclusion that taking sexual orientation or gender identity into account necessarily means taking sex into account. This is not a conclusion contingent on the particular text of Title VII.").

85 *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 249 (1989) (plurality opinion) (importing to Title VII a burden-shifting framework from constitutional equal protection decisions, such as *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270–71, n.21 (1977), and *Hunter v. Underwood*, 471 U.S. 222, 228 (1985), that place the burden on the defendant to show the absence of "but-for" cause).

86 Roberts Court decisions siding with religious traditionalists challenging the application of antidiscrimination rules with respect to sex and gender include *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2373 (2020); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); and *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). As a dissent put it, the Roberts Court has exhibited "zeal to secure religious rights to the nth degree." *Little Sisters*, 140 S. Ct. at 2400 (Ginsburg, J., dissenting).

87 The Court has not recognized a new suspect or quasi-suspect class since the 1970s. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 757 (2011); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 163 (2016) ("*Windsor* and *Obergefell* may be most notable for what is *not* in the opinions. . . . Justice Kennedy never (1) identified the classification at issue; (2) inquired as to whether that class is 'suspect' or 'quasi-suspect'" (emphasis in original)).

88 Nguyen v. Immigr. & Naturalization Serv., 533 U.S. 53, 62–63 (2001) (upholding an immigration law that required formal steps for unwed fathers, but not unwed mothers,

pregnancy to girls;[89] one on the military's then-existing exclusions of women from combat;[90] and one that the Court understood as operating to directly compensate women for labor-market discrimination prior to 1972.[91] These decisions, based on facts that are now outdated[92] and social understandings that now seem

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to establish parenthood, on the ground that only "[i]n the case of the mother" is a parent-child relation "verifiable" based on "hospital records and the witnesses who attest to her having given birth"); Lehr v. Robertson, 463 U.S. 248, 260 n.16, 264, 266–68 (1983) (upholding a statute that permitted biological mothers to veto adoptions automatically, based on the presumption that birth ensured a tie to the child, but required unmarried biological fathers to take some formal step to receive notice of an adoption); Parham v. Hughes, 441 U.S. 347, 355–56 (1979) (plurality opinion) (upholding a statute allowing an unmarried biological father to sue for child's wrongful death only if he took some action to demonstrate paternity, because of Georgia law on legitimation and because "[u]nlike the mother of an illegitimate child whose identity will rarely be in doubt, the identity of the father will frequently be unknown"). These cases do not pertain to the parental rights of unwed fathers with "substantial relationship[s]" with their children. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 388, 393–94 (1979) (striking down a statute denying rights to block adoptions to unwed fathers based on stereotypes about fathers as having less substantial relationships to their children than mothers).

89 Michael M. v. Superior Court, 450 U.S. 464, 470–71 (1980) (plurality opinion) (upholding a law prohibiting men from having sex with underage women on account of the potential harms of teen pregnancy). In *Michael M.*, a three-Justice plurality and concurrence by Justice Harry Blackmun failed to clarify whether the applicable standard was from *Craig*, 429 U.S. at 197, or an earlier case, *Reed v. Reed*, 404 U.S. 71 (1971), which required a "'fair and substantial relationship' to legitimate state ends." 450 U.S. at 469 (plurality opinion); *see also id.* at 483 (Blackmun, J., concurring). A concurrence by Justice Potter Stewart applied something resembling the old rational basis review. *Id.* at 479 (Stewart, J., concurring). A dissent criticized all three opinions for failing to analyze the issue in terms of the heightened scrutiny standard from *Craig*. *Id.* at 192 n.2 (Brennan, J., dissenting).

90 Rostker v. Goldberg, 453 U.S. 57, 74, 83 (1981) (upholding the all-male draft based on the then-existing, unchallenged military policy of excluding women from combat). Because courts typically treat military decisions with deference, the Court declined to clarify what standard of review applied to the case. *Id.* at 69–70; *see also* Fiallo v. Bell, 430 U.S. 787, 794 (1977) (applying a more deferential standard to classifications based on sex and illegitimacy in immigration law that implicate national security).

91 Califano v. Webster, 430 U.S. 313, 318 (1977) (upholding a provision of the Social Security Act "allowing women, who as such have been unfairly hindered from earning as much as men, to eliminate additional low-earning years from the calculation of their retirement benefits" because that provision "works directly to remedy some part of the effect of past discrimination").

92 With respect to *Rostker*, women are no longer excluded from combat, eliminating that case's rationale for excluding them from the draft. *See* Clarke, *They, Them, and Theirs*, *supra* note 52, at 980. As for *Webster*, the statutory provision in question, which was premised on then-existing discriminatory job-market conditions, was eliminated in 1972. *Webster*, 430 U.S. at 314, 320. I am less certain about how *Parham*, *Lehr*, and *Nguyen* (the "unwed fathers" cases) would come out today, but I note that since *Nguyen* was decided in 2001, artificial reproductive technologies and LGBTQ parents have unsettled the social understandings that undergirded the presumption that maternity is easy to determine while paternity is not. *See* Cahill, *supra* note 62, at 1125–28.

quaint, if not offensive,[93] would be unlikely to come out the same way today. Nor is it clear what race-based classifications can survive strict scrutiny after *SFFA*. *SFFA* refers to only three potential examples: temporary racial segregation in prisons to prevent race-based violence,[94] race-based remedies administered by institutions correcting their own race discrimination,[95] and race-based admissions by military academies.[96] Thus, both forms of heightened scrutiny will be difficult to meet. That is not to say there is no evidence that the difference in standards ever makes a difference in results.[97] But it is hard to find.[98]

However, there are important differences between rational basis review and heightened scrutiny. Under rational basis review, nonsuspect classifications may be over- and underinclusive.[99] But heightened scrutiny abhors "overbroad generalizations about the different talents, capacities, or preferences of males and

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93 *See, e.g.*, Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 14 WOMEN'S RTS. L. REP. 151, 158–59 (1992) (arguing the only coherent explanation for *Rostker* is the then-existing cultural belief that war is "quintessentially masculine," although, "[n]ot surprisingly, the Court in *Rostker* didn't come right out and say 'We've reached our cultural limits'").

With respect to the plurality opinion in *Michael M.*, all states now define statutory rape in gender-neutral terms, a reflection of changing understandings of the harms of underage sex. Carolyn Cocca, *"16 Will Get You 20": Adolescent Sexuality and Statutory Rape Laws*, *in* ADOLESCENT SEXUALITY: A HISTORICAL HANDBOOK AND GUIDE 15, 21 (Carolyn Cocca ed., 2006). For one of the many critiques of *Michael M.* and the logic it relies on as "confused, conflicted, and eroding," see Deborah Hellman, *Sex, Causation, and Algorithms: How Equal Protection Prohibits Compounding Prior Injustice*, 98 WASH. U. L. REV. 481, 500–02 (2020) [hereinafter Hellman, *Sex, Causation, and Algorithms*].

94 *SFFA*, 143 S. Ct. at 2167 (discussing Johnson v. California, 543 U.S. 499, 512–13 (2005)).

95 *See, e.g.*, *id.* (discussing Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976), and Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406, 420 (1977)).

96 *Id.* at 2166 n.4 (declining to address whether military academies may use race-based admissions "in light of the potentially distinct interests that military academies may present").

97 *Compare* Meland v. Weber, 2021 WL 6118651, at *4–8 (E.D. Cal. Dec. 27, 2021) (denying a preliminary injunction against a California law mandating gender diversity on corporate boards based on application of the intermediate scrutiny standard), *with* Crest v. Padilla, 2022 WL 1565613, at *12 (Cal. Super. Ct. May 13, 2022) (striking down that same law after trial based on the application of the strict scrutiny standard).

98 In terms of recent case law, I know of only one instance in which the difference between intermediate and strict scrutiny appeared to change the result. *See supra* note 97. *But see* Vitolo v. Guzman, 999 F.3d 353, 359 (6th Cir. 2021) (applying strict scrutiny to strike down race-based affirmative action and intermediate scrutiny to strike down gender-based affirmative action).

99 *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 216 (1982) ("A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill.").

females."[100] Heightened scrutiny is trained on the harm to the minority of excluded women or men who defy generalizations,[101] not the convenience of administering rules tailored for the majority who fit generalizations.[102] Heightened scrutiny does not permit post hoc justifications; it tests the government's actual justifications.[103] Additionally, under heightened scrutiny, the government has the burden to prove the law's justification.[104] And finally, as an historical matter, rational basis review was content to settle for conventions and traditions as legitimate government interests.[105] But under heightened scrutiny, courts are skeptical of conventions and traditions. As explained in *Sessions v. Morales-Santana*,[106] the Court's most recent constitutional sex discrimination case, government interests are judged by "*today*['s]" standards, because "new insights and societal

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[100] *See* United States v. Virginia (VMI), 518 U.S. 515, 533 (1996).

[101] *Id.* at 542 ("[T]he question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that [the Virginia Military Institute] uniquely affords.").

[102] *Rostker*, 453 U.S. at 95 (Marshall, J., dissenting) ("This Court has repeatedly stated that the administrative convenience of employing a gender classification is not an adequate constitutional justification under the *Craig v. Boren* test." (citing *Craig*, 429 U.S. at 198, and *Frontiero*, 411 U.S. at 690–91)).

[103] *See VMI*, 518 U.S. at 533 ("The justification must be genuine, not hypothesized or invented post hoc in response to litigation.").

[104] *Id.* at 533 ("The burden of justification is demanding and it rests entirely on the State.").

[105] *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464, 466–67 (1948) (upholding a law forbidding any woman from working as a bartender unless the bar was owned by her father or husband, despite women's progress toward equality, because the law was not "irrational" and "[t]he Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards"); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 893 (2012) (discussing the "'reasonableness' test in the early (and since reviled) case of *Plessy v. Ferguson*," which held that lawmakers were "at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order" (quoting Plessy v. Ferguson, 163 U.S. 537, 550 (1896))).

I say "as an historical matter" because the Court has sometimes employed what has been described as rational basis with "bite," striking down laws even under the ostensibly deferential rational basis standard. *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on A Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1, 18 (1972). But thus far, the Roberts Court has not struck down any allegedly discriminatory law based explicitly on rational basis review. Its marriage equality decisions in *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 576 U.S. 644 (2015), relied on bespoke blends of constitutional grounds, including, but not limited to, equal protection arguments. These decisions reflect the distinctive thinking of their author, then–swing Justice Anthony Kennedy, who is no longer on the Supreme Court. *See* Robinson, *supra* note 87, at 202 (arguing that Justice Kennedy's "failure to acknowledge the unusual nature of his doctrinal moves in the sexual orientation cases and to name and situate that level of scrutiny may make them particularly vulnerable to rewriting").

[106] 137 S. Ct. 1678 (2017).

understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged."[107]

To be sure, tests of the "importance" of interests and whether relationships are "substantial" are standards, not rules, and how judges might apply them to any particular controversy is never a foregone conclusion.[108] Jurists precommitted to particular outcomes can construct arguments for the success or failure of any sex classification, regardless of the level of scrutiny. Nonetheless, heightened scrutiny channels legal arguments into particular strictures, requiring that judges critically analyze the government's means and ends, assessing objective facts and evidence.[109]

To illustrate this point, consider the district court opinion in *Skrmetti* by Judge Eli Richardson, an appointee of President Donald Trump.[110] The Tennessee THCB prohibits any "medical procedure" for the purpose of affirming a minor's gender identity if that gender identity is "inconsistent with the minor's sex" as determined at birth.[111] The treatments in question, medications known as "puberty blockers" and "cross-sex hormones," are sometimes prescribed to treat pubertal children with gender dysphoria.[112] While Tennessee permitted the use of these medications to treat other conditions,[113] it determined that, with respect to

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[107] *Id.* at 1690 (emphasis in original) (quotation marks omitted) (quoting *Obergefell*, 576 U.S. at 673).

[108] *See, e.g.*, L.W. *ex rel.* Williams v. Skrmetti, 679 F. Supp. 3d 668, 710, 712 (M.D. Tenn. 2023) (noting, about the heightened scrutiny standard, that "[t]he application of such terms often is in the eye of the beholder," but that "here, it has fallen to the undersigned to be the beholder, and therefore, he must call it like he sees it"), *rev'd*, 83 F.4th 460.

[109] *Id.* ("[W]hat matters here is not the state's sincerity (a subjective matter) but rather the degree of reasonableness of the fit between such concerns and the [Tennessee THCB] (an objective matter).").

[110] *Id.* at 694–716 (granting a preliminary injunction); *see also* K.C. v. Individual Members of Med. Licensing Bd. of Ind., 677 F. Supp. 3d 802, 806–07 (S.D. Ind. 2023) (granting a preliminary injunction against a THCB in a decision by a judge appointed by President Trump), *rev'd and remanded*, 2024 WL 4762732 (7th Cir. Nov. 13, 2024).

[111] TENN. CODE ANN. § 68-33-103(a)(1)–(2) (2023); *id.* § 68-33-102(9).

[112] "Gender dysphoria" is "distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender." AM. PSYCH. ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 511 (5th ed. text rev. 2022). A diagnosis for children requires "clinically significant distress or impairment in social, school, or other important areas of functioning." *Id.* at 512.

While the Tennessee law bars surgeries as well, Judge Richardson held that the plaintiffs lacked standing to challenge that aspect of the law because they were not seeking surgeries, likely because "the medical guidelines recommend surgeries involving gonadectomy or hysterectomy only once an individual has reached eighteen years of age." *Skrmetti*, 679 F. Supp. 3d at 682.

[113] TENN. CODE ANN. § 68-33-103(b)(1)(A) (exempting medical procedures "to treat a minor's congenital defect, precocious puberty, disease, or physical injury"); *id.* § 68-33-103(b)(2) (clarifying that "disease" does not include "gender dysphoria").

gender dysphoria, "the risks outweigh the benefits."[114] Judge Richardson critically analyzed this purported state interest, evaluating the medical evidence of each potential side effect, one-by-one, and the credibility of the assertions of both sides' experts based on whether their testimony was logically consistent and supported by research or clinical experience.[115] He concluded that the treatments in question, like "virtually all medical procedures" entailed risks, but the evidence of those risks was "at best conflicting," and any risk could "be mitigated."[116] With respect to the benefits of the treatments, he found that "[t]he weight of evidence in the record suggests . . . that treatment for gender dysphoria lowers rates of depression, suicide, and additional mental health issues faced by transgender individuals."[117] Thus, Tennessee lacked any "important" interest.[118] But even assuming there was any such interest, the sex classification did not bear the required "substantial relation" to it, considering that, despite their risks, "the *exact same* drugs" are permitted to treat minors with conditions other than gender dysphoria, such as precocious puberty.[119]

Applying rational basis review, the Sixth Circuit reached the opposite conclusion.[120] In two breezy, nearly citation-free paragraphs doing no more than listing potential side effects, the Sixth Circuit asserted that "[p]lenty of rational bases exist for these laws, with or without evidence."[121] The two judges in the majority—Chief Judge Jeffrey Sutton, an appointee of President George W. Bush, and Judge Amul Thapar, an appointee of President Trump—even contributed some of their own justifications, not supplied by the state or supported by record evidence.[122] My purpose in detailing this dispute is not to advance the medical case against THCBs—that case has been better laid out by

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114 *Skrmetti*, 679 F. Supp. 3d at 701.

115 *Id.* at 700–07.

116 *Id.* at 706–07.

117 *Id.* at 708.

118 *Id.*

119 *Skrmetti*, 679 F. Supp. 3d at 710–11 (emphasis in original).

120 *Skrmetti*, 83 F.4th at 489.

121 *Id.*

122 *Id.* at 488 ("The States also could be concerned that some adolescents, say a 13-year-old, lack the capacity to consent to such a significant and potentially irreversible treatment."). This hasty objection ignored, among other things, parental-consent requirements that the Sixth Circuit was well aware of, because it also analyzed the plaintiffs' claim that the statute infringed on parental rights. *Id.* at 475. Such active judicial speculation is a hallmark of ordinary rational basis review. *See, e.g.*, Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, 487 (1955).

advocates and their physician amici in the many cases.[123] It is to demonstrate the dramatic disparity in the analysis required by rational basis review and heightened scrutiny, even when those standards are applied by judges from the same political party. This disparity goes to show the importance of the main question addressed by this Article: when heightened scrutiny, rather than rational basis review, is triggered.

B. Classification as Trigger

This Section advances an important point of doctrinal clarification: under Supreme Court case law, *all* race and sex classifications trigger heightened equal protection scrutiny. This is a rule, not a standard, and has been so for decades.[124] The distinction between facial classifications and facially neutral rules is foundational to modern equal protection doctrine. Facial classifications automatically trigger heightened scrutiny.[125] By contrast, if a law is facially neutral, meaning "the classification itself, covert or overt, is not based upon gender," then it does not automatically trigger heightened scrutiny, even if it has a disproportionate impact on men or women.[126] A challenger to a facially neutral law must show it was enacted with discriminatory intent.[127] To illustrate the distinction: a charter-school policy that requires that girls wear skirts and boys wear pants is a sex classification that must meet heightened scrutiny.[128] By contrast, a policy that requires that all children wear skirts to school is facially neutral and does not raise particular equal protection concerns—not unless it was enacted with some invidious intent, such as the intent to deter boys from enrolling in the school.

While classification alone is sufficient to trigger heightened scrutiny, I do not contend it is necessary, and there are other

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123 *See, e.g.*, Brief of Amici Curiae American Academy of Pediatrics and Additional National and State Medical and Mental Health Organizations in Support of Plaintiffs-Appellees and Affirmance, Brandt v. Rutledge, 677 F. Supp. 3d 877 (E.D. Ark. 2023) (No. 4:21-CV-00450) [hereinafter Medical Organizations Brief].

124 *See supra* notes 70, 74, and accompanying text.

125 *See Feeney*, 442 U.S. at 274; *see also* Washington v. Davis, 426 U.S. 229, 243 (1976).

126 *Feeney*, 442 U.S. at 273–74.

127 *See, e.g.*, *id.*

128 *See* Peltier v. Charter Day Sch., Inc., 37 F.4th 104, 124 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2657 (2023) ("For many years, the Supreme Court and this Court have applied a heightened level of scrutiny to sex-based classifications like [a] skirts requirement [that applied only to girls].").

triggers as well.[129] But lower courts have gone astray in ignoring facial classifications when other tests of discrimination, such as causation, similarly situated inquiries, specific intent, or group-based effects, have not been satisfied. The best exemplar is the Sixth Circuit's *Skrmetti* opinion, which proposes several new rules inconsistent with Supreme Court doctrine.[130] It asserts that unlike racial classifications, which are subjected to heightened scrutiny even if they "may be said to burden or benefit the races equally," separate-but-equal sex classifications should not receive heightened scrutiny absent a showing of discriminatory intent and disparate effects on men or women.[131] The Sixth Circuit also proposed that sex classifications trigger heightened review only when they "perpetuate[ ] invidious stereotypes or unfairly allocate[ ] benefits and burdens."[132] It concluded that THCBs are not based in "stereotyping" because their drafters were motivated by "concern about potentially irreversible medical procedures for a child."[133] *Skrmetti* thus endeavors to relocate questions about stereotypes and fairness, which are generally analyzed with care on the back end of the heightened scrutiny framework, to the front end, where it gives them credulous and cursory analysis.

This Section will explain how, as a doctrinal matter, all sex classifications trigger heightened antidiscrimination scrutiny. It will begin by extracting from the doctrine a definition of what a classification consists of at a minimum, and explaining how that definition applies to THCBs but not abortion bans, as illustrative examples. It will then explain how anticlassification rules do not require independent showings of intent, impact, causation, or that groups are similarly situated. To be sure, other measures of discrimination, such as intent, may also trigger heightened scrutiny. And it is true that causal tests have roles to play in the

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[129] One alternative trigger might be "stereotyping," which some courts have labeled as a separate theory of what constitutes a "classification," but may more appropriately be considered a type of invidious intent. *See, e.g.*, M.A.B. v. Bd. of Educ., 286 F. Supp. 3d 704, 719 (D. Md. 2018) (explaining that, in addition to being a facial classification, the policy in question "is a sex-based classification because it relies on sex-based stereotypes").

[130] *See Skrmetti*, 83 F.4th at 473–86 (creatively reinterpreting constitutional sex discrimination precedents to justify the refusal to apply heightened scrutiny to sex classifications in a THCB).

[131] *Id.* at 483 ("When laws on their face treat both sexes equally, as these laws do, a challenger must show that the State passed the law because of, not in spite of, any alleged unequal treatment." (citing *Feeney*, 442 U.S. at 274)); *cf. Eknes-Tucker*, 80 F.4th at 1228 (holding that heightened scrutiny was not required because "the statute does not establish an unequal regime for males and females").

[132] *Skrmetti*, 83 F.4th at 484.

[133] *Id.* at 485.

doctrinal architecture in terms of questions of standing, injury, and damages. As for questions about whether groups are similarly situated, they go to the back end of heightened scrutiny. But regardless of these other measures of discrimination, facial classifications trigger heightened scrutiny. The next Part will explain why this rule accords with anticlassification as a theory of equal protection.

1. Anticlassification rules defined and applied to THCBs.

Facial sex classifications are those that appear in the text of a policy and are criteria for whether the law applies. To say sex is a criterion means that whether a policy applies is conditioned on an individual's sex under some circumstances.[134] Classifications always trigger heightened scrutiny. To illustrate, this Section will explain how THCBs, but not abortion bans, are sex classifications under Supreme Court doctrine.

The Supreme Court has often, if not invariably, referred to classification as a trigger for heightened scrutiny.[135] It has used various phrases to explain what classification means, such as "official"[136] and "explicit[ ],"[137] and it has contrasted classifications

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[134] I offer this narrow definition of what, at the very least, a classification consists of. It is beyond the scope of my argument to offer an all-purpose definition of "classification" or assess whether policies that are in no way conditioned on any individual's sex may still be sex classifications.

Some courts have offered a broader formulation of the anticlassification rule: that a law classifies based on sex if its operative provisions "cannot be stated" without that concept. *See, e.g.*, Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017) (noting that a policy classifies based on sex if it "cannot be stated without referencing sex"), *abrogated on other grounds by* Ill. Republican Party v. Pritzker, 973 F.3d 760 (7th Cir. 2020).

This "cannot be stated" rule may seem to raise quandaries, such as whether civil rights laws themselves, which explicitly forbid race and sex discrimination, must survive heightened scrutiny. *Cf. Bostock*, 140 S. Ct. at 1761 (Alito, J., dissenting) (asking whether a refusal "to hire an employee with a record of sexual harassment" is sex discrimination). But courts need not determine whether this broader formulation of the anticlassification rule is correct, because the laws discussed in this Article explicitly condition their application on an individual's sex.

[135] The Court's most recent opinions are demonstrative. *See, e.g.*, *SFFA*, 143 S. Ct. at 2166 ("'Classifying and assigning' students based on their race 'requires more than . . . an amorphous end to justify it.'" (quoting Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 735 (2007))); *id.* at 2168 ("As this Court has repeatedly reaffirmed, '[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.'" (quoting Gratz v. Bollinger, 539 U.S. 244, 270 (2003))); *Morales-Santana*, 137 S. Ct. at 1689 ("[H]eightened scrutiny . . . now attends 'all gender-based classifications.'" (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136 (1994))).

[136] *VMI*, 518 U.S. at 532.

[137] *Adarand*, 515 U.S. at 213.

with policies that are "facially neutral."[138] Its paradigm examples are school admissions policies that consider race[139] or sex[140] themselves as criteria, as opposed to "facially neutral" criteria, such as being in the top 10% of a high school's graduating class[141] or meeting a uniform physical fitness standard.[142] An example of a sex classification is the "use of a gender line in determining eligibility for certain governmental entitlements."[143]

It does not matter whether a sex classification (1) is only one of many classifications that determines whether a law applies,[144] (2) applies to only some subset of men or women,[145] or (3) is embedded within another classification.[146] A rule that turns on three classifications—sex, marital status, and citizenship—is still a sex classification.[147] A law that adversely affects only men ages 18 to 21, rather than all men, is still a sex classification.[148] And a law that defines some new category, such as eligible "families," based on the sexes of members of that family, is still a sex classification.[149] The Supreme Court rejected the argument that a welfare-benefits program only for families with unemployed fathers could be characterized as treating all such "families"—sets of men, women, and children—equally.[150] Because the government's definition of eligible "families" contained an embedded sex

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138 *See, e.g.*, *id.*; *see also Nguyen*, 533 U.S. at 82–83 (O'Connor, J., dissenting) ("We have long held that the differential impact of a facially neutral law does not trigger heightened scrutiny . . . , whereas we apply heightened scrutiny to laws that facially classify individuals on the basis of their sex." (citing Washington v. Davis, 426 U.S. 229 (1976))).

139 *See supra* note 135 (discussing *SFFA*).

140 *See VMI*, 518 U.S. at 533 (discussing heightened scrutiny for "gender classifications" in a case challenging Virginia's system of sex-segregated military institutes).

141 *See, e.g.*, *Grutter*, 539 U.S. at 369 (Thomas, J., concurring in part) (mentioning "facially race-neutral 'percent plans'").

142 *Cf. VMI*, 518 U.S. at 525 (explaining that, with respect to the Virginia Military Institute's requirements, "[t]he parties agreed that '*some* women can meet the physical standards now imposed on men'").

143 *Craig*, 429 U.S. at 198.

144 *See, e.g.*, *Nguyen*, 533 U.S. at 61 (upholding, under heightened scrutiny, a law proscribing different treatment for children of unwed U.S.-citizen fathers and unwed U.S.-citizen mothers).

145 *See, e.g.*, *Craig*, 429 U.S. at 195 (discussing a law discriminating against "young males").

146 Califano v. Westcott, 443 U.S. 76, 83–84 (1979) (rejecting the argument that "the grant or denial of aid [to a family with dependent children] based on the father's unemployment necessarily affects, to an equal degree, one man, one woman, and one or more children" and holding that the law classified based on sex).

147 *Nguyen*, 533 U.S. at 61.

148 *Craig*, 429 U.S. at 195.

149 *Westcott*, 443 U.S. at 83–84.

150 *Id.*

classification, the Supreme Court subjected it to heightened scrutiny.[151] If race is any sort of criteria, even a "soft" one, then a process classifies based on race, even if racial considerations are baked into a "highly individualized, holistic review" in which factors other than race are generally determinative.[152]

The texts of THCBs straightforwardly and unavoidably classify patients by sex. These laws work by setting forth very specific definitions of sex to be applied to determine whether patients may access treatments. For example, Tennessee defines sex as "a person's immutable characteristics of the reproductive system that define the individual as male or female, as determined by anatomy and genetics existing at the time of birth."[153] It then specifies who may receive treatments based on that definition of sex. The operative provision of the law bans certain medical procedures "for the purpose of . . . [e]nabling a minor to identify with, or live as, a purported identity inconsistent with *the minor's sex*; or [t]reating purported discomfort or distress from a discordance between *the minor's sex* and asserted identity."[154]

That these laws also classify minors based on their "purported" or "asserted identit[ies]" does not change the fact that they classify based on "*the minor's sex*."[155] To be sure, some courts have held that such rules are constitutionally suspect because they classify based on "gender identity" or "transgender status."[156] But no such conclusion is required to see that THCBs also classify, on their faces, based on sex. Laws that classify based on sex cannot be immune from heightened scrutiny simply because they also turn on additional criteria other than sex.[157]

Additionally, these bans cannot be reframed as turning on neutral criteria, such as whether a procedure is being used for "transition"[158] or "gender dysphoria,"[159] because whether a

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151 *Id.*

152 *See, e.g.*, *Grutter*, 539 U.S. at 337 (subjecting a law school's admissions policy to strict scrutiny).

153 TENN. CODE ANN. § 68-33-102(9).

154 *Id.* § 68-33-103(a)(1) (emphasis added).

155 *Id.* (emphasis added).

156 *See, e.g.*, *Kadel*, 100 F.4th at 143.

157 *See, e.g.*, *supra* notes 144–52 and accompanying text.

158 *Skrmetti*, 83 F.4th at 480 (characterizing the laws as "regulat[ing] sex-transition treatments for all minors, regardless of sex"); *Eknes-Tucker*, 80 F.4th at 1227 (agreeing with the state of Alabama that its THCB "classifies on the bases of age and procedure, not sex or gender nonconformity").

159 *See* Koe v. Noggle, 688 F. Supp. 3d 1321, 1345 (N.D. Ga. 2023) (rejecting the state's argument that its THCB did not discriminate based on sex because "'any child, male or female[,] cannot obtain hormone replacement to treat gender dysphoria'" as "cosmetic"

procedure counts as for "transition"[160] or "gender dysphoria"[161] turns on "*the minor's sex*." It is not the procedures but the *patients* who have sexes that are criteria for whether or not the bans apply. The sex classification is baked into the determination of prohibited procedures, and therefore Supreme Court precedents require heightened scrutiny.[162] A legislature could not, for example, pass a law criminalizing psychotherapies and antidepressant drugs to treat "minority stress," defined as clinically significant distress experienced by members of racial minority groups who are victims of discrimination, and argue that it was not classifying based on race.[163]

This is not to say a legislature couldn't choose a facially neutral rule. For example, the Tennessee legislature could have banned breast surgeries and hormone therapies for all minors without classifying based on sex. But it did not. It banned these treatments only for patients who seek to use them in ways it regards as inconsistent with "the minor's sex."[164] Minors seeking these treatments in ways the legislature regards as consistent with their assigned sexes are permitted to do so.[165]

A legislature might attempt to ban "gender-affirming care," defined as care that aligns an individual's physical traits with their gender identity, for everyone. But no legislature has. This is likely because nontransgender people require health care for purposes indistinguishable from gender affirmation.[166] For example,

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(quoting Response in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction at 16, *Koe*, 688 F. Supp. 3d 1321 (No. 1:23-CV-02904))).

160 *See, e.g.*, TENN. CODE ANN. § 68-33-103(a)(1) (banning a "medical procedure" if it has the purpose of "[e]nabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or "[t]reating purported discomfort or distress from a discordance between the minor's sex and asserted identity").

161 *See* AM. PSYCH. ASS'N, *supra* note 112, at 511 ("Gender dysphoria" is "distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender").

162 *See supra* notes 149–51 and accompanying text (discussing *Westcott*, 443 U.S. at 86).

163 To be sure, in this example the law does not apply equally to minority and majority group members. But neither could a legislature pass a law criminalizing treatments for "interracial relationship stress"—defined as clinically significant distress experienced by members of interracial couples who are victims of discrimination—and argue that it was not classifying based on race.

164 TENN. CODE ANN. § 68-33-102.

165 *See id.* (defining "congenital defect" to include "abnormalities caused by a medically verifiable disorder of sex development"); *id.* § 68-33-103(b)(1)(A) (excluding medical procedures "to treat a minor's congenital defect"). Nearly all TCHBs exclude treatments for disorders of sex development, which are also known as intersex variations. Katri & Sudai, *supra* note 16, at 29–30.

166 *See, e.g.*, Jacob Moses, Theodore E. Schall & Lisa Campo-Engelstein, *Unjust Discrimination Between Cisgender and Transgender Gender-Affirming Care*, 176 ANNALS OF

a teen assigned male at birth may seek testosterone to treat delayed puberty that causes him distress at his appearance.[167] Minors with intersex variations are subjected to medically unnecessary genital surgeries as infants to conform their bodies to their assigned sexes, for entirely social reasons.[168] Although this is a practice condemned by human rights advocates, it is codified as permissible by THCBs.[169] To be clear, whether nontransgender minors do *in fact* seek treatments to affirm their gender identities or for entirely psychosocial reasons is not relevant to whether a law classifies based on sex, because the doctrine asks about the law *on its face*.[170] THCBs facially classify minor patients by sex.

At no point did the Sixth Circuit majority in *Skrmetti* deny that the laws at issue classified by sex,[171] and in *Eknes-Tucker v. Governor of Alabama*,[172] the Eleventh Circuit more or less admitted they did.[173] But these courts attempted to obfuscate the sex classification by emphasizing that the bans also classified by age, suggesting that the legislatures' legitimate motives of protecting children exempted the laws' sex classifications from heightened scrutiny.[174] As will be described in the next Section, however, benign motives are not relevant when a law includes a facial sex classification.[175] And whether the protection of children justifies a

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INTERNAL MED. 991, 992 (2023) (explaining that "[g]ender-affirming care routinely provided for cisgender patients is similar—in its goals and methods—to [transgender and gender-diverse] care" and offering the examples of exogenous testosterone and chest surgery).

167 Maria Camila Suarez A., Joseph M. Israeli, Eliyahu Kresch, Leon Telis & Daniel E. Nassau, *Testosterone Therapy in Children and Adolescents: To Whom, How, When?*, 34 INT'L J. IMPOTENCE RSCH. 652, 657 (2022) (explaining that in certain cases of delayed puberty "the preferred management is reassurance and watchful waiting of spontaneous initiation of puberty," but "if the patient is presenting psychosocial effects due to his appearance, testosterone should be started").

168 *See* Katri & Sudai, *supra* note 16, at 22–27.

169 *See id.* at 26, 29–31; *Mapping the Intersex Exceptions*, HUM. RTS. WATCH, https://perma.cc/PVY8-85BG.

170 *Cf. Kadel*, 100 F.4th at 153 n.26 (explaining that it was not relevant that a healthcare plan only covered mastectomies for nontransgender men if they had "breast pain or tenderness" because "there is no threshold similarly situated inquiry in the equal-protection analysis").

171 Rather, it denied that the classification amounted to "discrimination." *Skrmetti*, 83 F.4th at 480 (asserting that while sex "classification[s]" receive heightened review, "no such form of *discrimination*" had occurred (emphasis added)).

172 80 F.4th 1205 (11th Cir. 2023).

173 *See Eknes-Tucker*, 80 F.4th at 1228 ("Of course, section 4(a)(1)–(3) *discusses* sex insofar as it generally addresses treatment for discordance between biological sex and gender identity, and insofar as it identifies the applicable cross-sex hormone(s) for each sex—estrogen for males and testosterone and other androgens for females." (emphasis added)).

174 *Skrmetti*, 83 F.4th at 479–80; *Eknes-Tucker*, 80 F.4th at 1230.

175 *See supra* Part I.B.1.

sex classification is a question for the back end of heightened scrutiny. Nor does it matter that a law might classify on multiple grounds—the law in *Nguyen v. Immigration & Naturalization Service*[176] classified based on citizenship and marital status, as well as sex—but the fairness of those classifications did not render the sex classification nonsuspect.[177] Fairness is for the back end.

Another way circuit courts have evaded heightened scrutiny is by mischaracterizing the THCBs' sex classifications as mere "references,"[178] "mention[s],"[179] and "discuss[ions],"[180] suggesting they are not facial criteria that determine whether the bans apply. To be sure, there is a difference between a reference and a classification. For a law to classify based on sex, sex must play some operative role in defining the individuals to whom the law applies. A mere reference to sex that is not a criterion—for example, a statutory preamble that states that a law was designed to "promote women's health"[181]—plays no role in the statute's application and is not a sex classification. This is because the Supreme Court has never held that the *ends* of a statute must be race or gender neutral; the trigger for scrutiny is trained on the *means*.[182] As one judge put it: "If one must know the sex of a person to know whether or how a provision applies to the person, the provision draws a line based on sex."[183] Under THCBs, sex at birth determines which patients are eligible for which treatments, which counts as classification.

In support of its characterization of the THCBs' sex classifications as mere "references," *Skrmetti* made a slippery-slope argument to abortion bans, arguing that those bans also mention

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176 533 U.S. 53 (2001).

177 *Id.* at 59.

178 *K.C.*, 2024 WL 4762732, at *7.

179 *Skrmetti*, 83 F.4th at 479.

180 *Eknes-Tucker*, 80 F.4th at 1228.

181 *See* Pregnant Workers Fairness Act, Pub. L. No. 117-328, 136 Stat. 4459, 6084–89 (2022) (codified at 42 U.S.C. §§ 2000gg-1 to 2000gg-6).

182 Sonja Starr, *The Magnet-School Wars and the Future of Colorblindness*, 76 STAN. L. REV. 161, 181 (2024) ("[S]o far, the Supreme Court has not embraced ends-colorblindness.").

183 Dekker v. Weida, 679 F. Supp. 3d 1271, 1298–99 (N.D. Fla. 2023) (finding for sex discrimination plaintiffs in a bench trial in a case challenging Florida's Medicaid system's refusal to pay for treatments for gender dysphoria).

It is not the case, however, that a decision-maker must have actual knowledge of an individual's sex for a classification to be facial. *Cf. Bostock*, 140 S. Ct. at 1746 (offering a hypothetical in which "an employer's application form offered a single box to check if the applicant is either black or Catholic" and explaining that, even if the employer never learned "any particular applicant's race or religion," the employer has still engaged in discrimination "[b]y intentionally setting out a rule that makes hiring turn on race or religion").

sex, but do not trigger heightened scrutiny.[184] It offered an analogy: just as a ban on abortion, a procedure only one sex (female) can undergo, is not a facial sex classification, neither is a ban on using testosterone "*as a transition treatment*," a procedure only one sex (female) can undergo.[185] But THCBs cannot be applied without sex classifications: these laws determine what counts as "a transition treatment" based on the patient's sex.[186]

Unlike THCBs, abortion bans can easily be formulated without requiring sex classification or even referring to a patient's sex—for example, Iowa defines abortion as "the termination of a human pregnancy with the intent other than to produce a live birth or to remove a dead fetus."[187] As the Fourth Circuit has explained, unlike determining whether someone requires transition treatments, "[d]etermining whether someone requires pregnancy-related treatment . . . does not turn on or require inquiry into a protected characteristic."[188]

To be sure, abortion is defined based on pregnancy, a condition many regard as the exclusive province of the female sex. But in a footnote in a 1974 case, *Geduldig v. Aiello*,[189] the Supreme Court concluded that classifications based on pregnancy were not facial sex classifications.[190] It rejected the idea that pregnancy is necessarily a proxy for sex because "[n]ormal pregnancy is an objectively identifiable physical condition with unique characteristics."[191] THCBs, however, do not regulate any sex-specific "identifiable physical condition with unique characteristics,"[192] such as

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184 *Skrmetti*, 83 F.4th at 481 (arguing "that laws regulating 'medical procedure[s] that only one sex can undergo' ordinarily do not 'trigger heightened constitutional scrutiny'" (quoting Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2245–46 (2022))); *see also Eknes-Tucker*, 80 F.4th at 1229. For rebuttals of other variations on this argument, see Eyer, *Transgender Law and* Geduldig *2.0*, *supra* note 58, at 494–504.

185 *Skrmetti*, 83 F.4th at 481 (emphasis added).

186 *Cf.* Doe 1 v. Thornbury, 679 F. Supp. 3d 576, 583 (W.D. Ky. 2023) (distinguishing THCBs from abortion bans because, with respect to abortion bans, "the law or policy at issue did not bar access to treatment for some patients but not others depending on the patient's sex"); Kadel v. Folwell, 620 F. Supp. 3d 339, 379 (M.D.N.C. 2022) (explaining that, unlike a THCB, a law that applies to "[p]regnancy can be explained without reference to sex, gender, or transgender status"), *aff'd*, 100 F.4th 122, 153 (4th Cir. 2024) (en banc).

187 IOWA CODE ANN. § 146B.1 (West 2017). Iowa is one of several states with a law defining abortion without reference to women, females, or mothers. *See, e.g.*, S.D. CODIFIED LAWS § 34-23A-45 (2021) (defining "induced abortion" as "the intentional termination of the life of a human being in the uterus").

188 *Kadel*, 100 F.4th at 146–47.

189 417 U.S. 484 (1974).

190 *Id.* at 496 n.20 ("While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification.").

191 *Id.*

192 *Id.*

pregnancy, prostate cancer, or cervical cancer. Nor do they ban a "medical procedure only one sex can undergo,"[193] like abortions, prostate exams, or pap smears.[194] Rather, they ban generally available medications and surgeries selectively, based on sex assigned at birth. Under THCBs, whether a patient can access gonadotropin-releasing hormone analogs, estrogen, testosterone, and breast reduction or augmentation depends on whether the legislature deems that treatment appropriate for their sex.[195]

In addition to pregnancy's status as a physical condition apart from sex, *Geduldig*'s footnote also observed that the challenged program in that case, which excluded pregnancy from disability coverage, "divides potential recipients into two groups—pregnant women and nonpregnant persons."[196] It noted that, "[w]hile the first group is exclusively female, the second includes members of both sexes."[197] By this statement, however, the Court did not announce any independent rule that a sex classification must apply to every member of a protected group to trigger heightened scrutiny. Such a rule would defy later precedent and common sense.[198] For example, an employer that forbids fertile females from working in certain dangerous occupations but permits all males and infertile females to do so plainly classifies based on sex.[199] What mattered in *Geduldig* was that pregnancy is a physical condition distinct from sex, not that some women are not pregnant.[200]

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193 *Dobbs*, 142 S. Ct. at 2245.

194 *K.C.*, 677 F. Supp. 3d at 814 (observing that the laws "do not prohibit certain medical procedures in all circumstances, but only when used for gender transition, which in turn requires sex-based classifications").

195 *Id.* ("In short, without sex-based classifications, it would be impossible for [Indiana's Senate Enrolled Act] 480 to define whether a puberty-blocking or hormone treatment involved transition from one's sex (prohibited) or was in accordance with one's sex (permitted).").

196 *Geduldig*, 417 U.S. at 496 n.20.

197 *Id.*

198 *See, e.g.*, Eyer, *Transgender Law and* Geduldig *2.0*, *supra* note 58, at 485–86, 503 (explaining how any such rule would be "patently inconsistent with numerous contemporary Supreme Court cases"). The Ninth and Fourth Circuits have recognized this. *See Kadel*, 100 F.4th at 144–47; Hecox v. Little, 79 F.4th 1009, 1025 (9th Cir. 2023).

199 UAW v. Johnson Controls, Inc., 499 U.S. 187, 198 (1991) (holding, in a Title VII case, that an employer's policy was "facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing" before being allowed to work in jobs involving dangerous levels of lead exposure).

200 *See, e.g.*, *Kadel*, 100 F.4th at 146 (reading *Geduldig* to stand "for the simple proposition that pregnancy is an insufficiently close proxy for sex" and observing that the Court has never relied on *Geduldig*'s analysis of proxies outside the pregnancy context); Eyer, *Transgender Law and* Geduldig *2.0*, *supra* note 58, at 515 ("*Geduldig* stands only for—at most—the modest proposition that one particular proxy (pregnancy) was deemed by the

Certainly, some would argue that it is sex discrimination to single out pregnancy or other aspects of reproductive biology for special treatment. I would say they have the better of the argument.[201] So said Congress in 1978, when it amended Title VII to clarify that it regarded pregnancy discrimination to be a form of sex discrimination.[202] Legal philosophers have argued that anti-classification rules raise difficult normative questions about how sex and race are defined, and whether traits linked to those statuses, such as menstruation, pregnancy, breasts, skin color, and hair, are forbidden grounds for disparate treatment.[203] For example, is a rule that proscribes different treatment for people with XX and XY chromosomes a sex classification?[204] The Supreme Court has struggled with these "proxy" questions.[205] One distinction in the cases, sometimes explicit and sometimes implicit, is between traits that are "immutable," such as hair textures, and so ought to be protected, and those that are "mutable choice[s]," such as hair styles, and so do not merit antidiscrimination protection.[206] Pregnancy is another trait courts often regard as having

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Court insufficiently close to a protected class status (sex) to be deemed categorically facial sex discrimination.").

[201] *See, e.g.*, Clarke, *Sex Discrimination Formalism*, *supra* note 24, at 1746–57 (exploring potential sex discrimination arguments against abortion bans and discrimination based on reproductive biology in formalistic registers).

[202] 42 U.S.C. § 2000e(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth.").

[203] *See, e.g.*, Benjamin Eidelson, *Dimensional Disparate Treatment*, 95 S. CAL. L. REV. 785, 790–91 (2022) (analyzing proxy questions under a "dimensional" account that reads Title VII "to prohibit making decisions based on any facts about what a person is like in the named dimensions" such as race and sex).

[204] *See Kadel*, 100 F.4th at 149–51 (offering the hypothetical example of "[a] law that pays state employees with XX chromosomes 75 percent of what state employees with XY chromosomes"). Note that chromosomes are just one determinate of sex, and there are people with, for example, XY chromosomes and genitalia that are generally considered "female." *See, e.g.*, SARAH RICHARDSON, SEX ITSELF: THE SEARCH FOR MALE AND FEMALE IN THE HUMAN GENOME 8 (2013).

[205] *See Kadel*, 100 F.4th at 150–52 (collecting cases in which the Supreme Court has held that "proxy discrimination can be facial discrimination" without any independent showing of discriminatory motive); Eyer, *Transgender Law and* Geduldig *2.0*, *supra* note 58, at 485–86 (summarizing the Court's cases on proxies).

[206] *See, e.g.*, EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1030 (11th Cir. 2016) ("[D]iscrimination on the basis of black hair texture (an immutable characteristic) is prohibited by Title VII, while adverse action on the basis of black hairstyle (a mutable choice) is not."). I have criticized this interpretation of Title VII, which is unsupported by statutory text. *See generally* Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2 (2015) [hereinafter Clarke, *Against Immutability*].

some voluntary aspects, raising questions about whether it is on par with statuses that were assigned at birth.[207]

But THCBs do not raise proxy questions. They classify based on sex itself, not some proxy for sex or trait linked to sex. They do not classify based on an individual's chromosomes, capacity to become pregnant, or any other such sex-linked physical condition—they expressly define sex. And sex, as defined by THCBs, is "immutable," fixed at birth, and in no way a choice.[208]

One objection to this argument is that, if rules restricting transition are sex classifications, surely rules restricting marriage to unions of men and women were as well—yet *Obergefell v. Hodges*[209] did not adopt this simple and obvious line of reasoning.[210] This type of "dog that didn't bark" argument is questionable as a general matter,[211] and is particularly unhelpful when it comes

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[207] Clarke, *Against Immutability*, *supra* note 206, at 62–76 (providing doctrinal support for the argument that "beliefs that pregnancy is voluntary and a result of morally fraught sexual conduct limit equality law's reach in the pregnancy discrimination context").

[208] *See, e.g.*, TENN. CODE ANN. § 68-33-102(9) (2023) (defining sex in terms of "a person's immutable characteristics"). The argument that these laws discriminate based on "transition," which is some kind of "choice," is semantics. Whether, for example, someone seeking breast surgery is engaged in "transition" is determined based on their sex assigned at birth. To disallow breast augmentation only for those assigned male at birth is to discriminate based on an unchosen characteristic. A law that, on its face, treats individuals' choices differently depending on their sex is a sex classification—for example, the law in *Morales-Santana* treated the choices of mothers and fathers with respect to residency in the United States differently, but by distinguishing between mothers and fathers, it still classified by sex. *See* 137 S. Ct. at 1686–87.

Abortion bans do not, on their face, treat anyone's "choice" to have an abortion differently based on sex—they eliminate abortion categorically. Now as a feminist, I must hold my nose to make this argument. If we look beneath the surface, abortion bans construct and restrict "choice" in ways that many feminists would agree are problematic. *See, e.g.*, Clarke, *Sex Discrimination Formalism*, *supra* note 24, at 1756–57. But the particular doctrine I am explicating here is trained on facial classifications; it does not look very far beneath the surface.

[209] 576 U.S. 644 (2015).

[210] *Bostock*, 140 S. Ct. at 1833 (Kavanaugh, J., dissenting):

> All of the Court's cases from *Bowers* to *Romer* to *Lawrence* to *Windsor* to *Obergefell* would have been far easier to analyze and decide if sexual orientation discrimination were just a form of sex discrimination and therefore received the same heightened scrutiny as sex discrimination under the Equal Protection Clause.

It is important to note that the sex discrimination argument was embraced by many marriage-equality decisions, just not those of the U.S. Supreme Court. *See* Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2105 (2014) (collecting state and lower federal court cases).

[211] The allusion is to a Sherlock Holmes story in which Holmes deduced that a criminal must have been a familiar individual because the watchdog did not bark. *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 396 n.23 (1991) (citing ARTHUR CONAN DOYLE, *Silver Blaze*, *in* THE COMPLETE SHERLOCK HOLMES 335 (1927)). As a matter of statutory

to common law reasoning. Courts regularly select among alternative grounds for holdings based on considerations that do not reflect on the merits of foregone theories.[212] One such consideration is the principle of "incremental development of the law."[213] The Court's narrow reasoning in its gay rights cases may reflect the Burkean ambition to avoid deciding questions not before it at the time.[214] Among the many other explanations for why the sex classification argument did not have traction in same-sex marriage debates are that litigants de-emphasized the point;[215] that the argument, as it was articulated in the same-sex marriage cases, suggested that judges' own traditional marriages were rooted in gender stereotypes;[216] and that the prospect of subjecting sex classifications to heightened scrutiny in contexts such as dress codes triggered inchoate judicial anxiety about "disruption of social sex roles."[217] To the extent that these concerns sound in legal principles, they no longer apply. In any event, they do not reflect adversely on the merits of the sex-classification argument with respect to transgender rights.

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interpretation, this canon is controversial. *Id.* at 406 (Scalia, J., dissenting) ("[W]e have forcefully and explicitly rejected the Conan Doyle approach to statutory construction in the past. We are here to apply the statute, not legislative history, and certainly not the absence of legislative history.").

212 *Cf. Skrmetti*, 83 F.4th at 502 (White, J., dissenting) ("True, the Court did not specify in *Obergefell* the appropriate degree of judicial scrutiny. But the Court's silence is just that—silence.").

213 *See, e.g.*, A.C. *ex rel.* M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 769 (7th Cir. 2023).

214 Goldberg, *supra* note 210, at 2090 n.2 (discussing the role of Burkean minimalism in the marginalization of the sex discrimination argument in marriage-equality litigation).

215 *See, e.g.*, *id.* at 2121 (noting that "advocates [did] not lead with the sex-discrimination argument" in marriage-equality cases, and offering explanations including "litigation logistics, doctrine, social-movement goals, and the mindset of the lawyers and judges who frame these cases"). The "doctrinal challenges" at the time Professor Suzanne Goldberg wrote pertained to matters, like bars on military service, that no longer exist. *Id.*

216 *Id.* at 2094 ("[M]ost married judges have different-sex spouses and many may be in marriages that they see as egalitarian."). No criticism of marriages of any sort is required to agree that all sex classifications trigger heightened scrutiny today.

217 *Id.* at 2133. Goldberg went so far as to conclude that "[i]f this fear was not operative, we would likely see a more consistent set of decisions holding that jurisprudential and statutory prohibitions of sex discrimination really mean that sex-based lines cannot stand." Goldberg, *supra* note 210, at 2133. These concerns are dissipating; the Fourth Circuit has recently subjected a school dress code that required that girls wear skirts to heightened scrutiny. *Peltier*, 37 F.4th at 124. The fear that the law could abolish gender reflects "fetishization of the law's power over identity." Goldberg, *supra* note 210, at 2133. Moreover, equal protection doctrine is not aimed at abolishing gender; if a sex classification is justified by an important state interest, it survives the back end of heightened scrutiny.

2. No specific intent or group effects required.

When a law classifies based on race or sex on its face, heightened scrutiny is triggered, regardless of the specific intentions behind the classification and regardless of whether that classification has disparate effects on any particular group. Circuit courts that have reasoned differently in transgender rights cases are advancing novel propositions of law.

The Equal Protection Clause requires a showing of discriminatory intent, but when a classification is facial, that suffices to show the requisite intent.[218] If *Skrmetti* were right that valid intentions or purposes exempt sex classifications from heightened scrutiny,[219] every one of the half dozen cases in which the Court applied heightened scrutiny but upheld a sex classification would have been decided under the wrong standard.[220] For example, if *Skrmetti* were right, *Nguyen*, which involved a law justified by "our most basic biological differences," rather than sexism or stereotypes, would have been decided on rational basis review.[221] To be sure, critics of the *Nguyen* decision argue that it applied the heightened scrutiny standard with too much deference to the government's purported interests, inconsistent with past precedent.[222] Whatever the merits of these criticisms, heightened scrutiny was the standard the Court announced.[223]

If *Skrmetti* were right, *Califano v. Webster*,[224] a case involving a law with the sole purpose of "redressing our society's

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[218] *See, e.g.*, *SFFA*, 143 S. Ct. at 2165; *see also* Huq, *supra* note 25, at 1217 (explaining that the Supreme Court has treated "discriminatory intent" as "a matter of the classifications used by state actors in reaching a decision"). This is not a novel development. Huq, *supra* note 25, at 1225–26 (discussing *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880), which struck down a state statute that limited jury service to "white male persons who are twenty-one years of age" and hinged on classification, not any specific intent).

[219] *See Skrmetti*, 83 F.4th at 483 ("When laws on their face treat both sexes equally, as these laws do, a challenger must show that the State passed the law because of, not in spite of, any alleged unequal treatment." (citing *Feeney*, 442 U.S. at 274)); *id.* at 485 (asserting that heightened scrutiny does apply because "concern about potentially irreversible medical procedures for a child is not a form of stereotyping").

[220] *See supra* note 88 (collecting a half dozen cases in which the Supreme Court applied heightened scrutiny to a law it regarded as not based in invidious stereotypes or unfairly allocating benefits or burdens).

[221] *Nguyen*, 533 U.S. at 73.

[222] *See, e.g.*, Cary Franklin, *Biological Warfare: Constitutional Conflict over "Inherent Differences" Between the Sexes*, 2017 SUP. CT. REV. 169, 198 [hereinafter Franklin, *Biological Warfare*].

[223] *Nguyen*, 533 U.S. at 61 (holding that the policy in question met the standard from *VMI* and therefore declining to "decide whether some lesser degree of scrutiny pertains because the statute implicates Congress' immigration and naturalization power").

[224] 430 U.S. 313 (1977).

longstanding disparate treatment of women,"[225] would have been decided on rational basis review. But the Court applied heightened scrutiny to uphold these sex classifications.[226] The Court has struck down not just sex classifications motivated by sexist and stereotypical beliefs,[227] but also classifications justified by undisputed "statistical evidence" about gender "disparit[ies],"[228] "the goal of family stability,"[229] and "administrative convenience."[230] It has said that "even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must" meet heightened scrutiny.[231] No "benign" intention can exempt racial[232]

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[225] *Id.* at 317 (quoting Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977)) (upholding a provision of the Social Security Act advantaging women to remedy past effects of discrimination).

[226] *Nguyen*, 533 U.S. at 60–61; *Webster*, 430 U.S. at 316–17.

[227] *VMI*, 518 U.S. at 542 (holding that the Virginia Military Institute could not exclude women on the "notion" that to do so would "downgrade [the Virginia Military Institute's] stature" and "destroy" the school); Orr v. Orr, 440 U.S. 268, 279 (1979) (striking down an alimony statute that showed a "preference for an allocation of family responsibilities under which the wife plays a dependent role"); *Webster*, 430 U.S. at 317 (collecting cases refusing to allow sex classifications based on "casual assumptions that women are 'the weaker sex'").

[228] *Craig*, 429 U.S. at 198, 201 (striking down a sex classification based on statistical evidence of gender disparities in drunk-driving rates); *see also VMI*, 518 U.S. at 541 (holding sex segregation in military institutes unconstitutional despite its purported justification based on unchallenged data on "gender-based developmental differences").

[229] *Westcott*, 443 U.S. at 86 (striking down a law that provided welfare benefits upon a father's unemployment (but not a mother's) despite the state's assertion that this provision was intended to replace one that required the father's absence, rather than mere unemployment, to render the family eligible for welfare benefits, thereby eliminating the "incentive for the father to desert, or to pretend to desert, in order to make the family eligible for assistance").

[230] *Goldfarb*, 430 U.S. at 205 (reaffirming *Frontiero*, 411 U.S. 677) (striking down a benefits rule that presumed that female spouses were dependents but required proof for male spouses, and rejecting avoidance of administrative expense as a justification); *see also Kirchberg*, 450 U.S. at 459 (striking down a statute giving husbands exclusive control over disposition of community property justified by the rationale that "[o]ne of the two spouses has to be designated as the manager of the community").

[231] *Orr*, 440 U.S. at 283 (holding that "[w]here, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex"); *see also Webster*, 430 U.S. at 317 (holding that while "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective," "'the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme'").

[232] *Croson*, 488 U.S. at 490 ("The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1.").

or sex[233] classifications from heightened scrutiny. While it is true that after *SFFA*, there may be some doctrinal uncertainty about facially neutral rules designed to achieve goals such as diversity and integration,[234] there is no uncertainty about facial classifications. They trigger heightened scrutiny.

Nor is it correct that challengers to facial classifications must show disparate effects on protected groups.[235] So long as there is a classification, the Court does not require proof of the sorts of group-based harm or subordination theorized by Professor Owen Fiss.[236] Contrary to the Eleventh Circuit's suggestion,[237] the Supreme Court has outright rejected the argument that laws that are "gender-based" are exempt from heightened scrutiny if they purport to affect men and women "to an equal degree" or to cause no harm to women or men as a "class."[238] To be sure, in the absence of a facial classification, disparate treatment is sometimes proven with statistical or other such evidence.[239] But no showing of group-based harm is required if the statute classifies based on sex because the classification is the harm. In the case that first announced the heightened scrutiny standard, the Court applied that standard to a trivial sex distinction that prohibited men between the ages of 18 and 21 from buying (but not from drinking)

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[233] *VMI*, 518 U.S. at 535 ("[O]ur precedent instructs that 'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically.").

[234] *See, e.g.*, Starr, *supra* note 182, at 180–95 (discussing case law on whether heightened scrutiny is triggered by race-neutral but race-conscious policies). Sometimes the Supreme Court has "inferred classifications" in cases in which "an especially close relationship exists between the government's facially race neutral means and racially identifiable populations or interests." Stephen M. Rich, *Inferred Classifications*, 99 VA. L. REV. 1525, 1527 (2013). But this does not mean that some separate showing of discriminatory intent is required. *Id.* at 1529 ("The form of facially neutral legislation—and not just its underlying motivation—will sometimes determine the level of judicial scrutiny by supporting the inference of a racial classification.").

[235] *See supra* notes 131–32 (citing passages from *Skrmetti* suggesting that facial sex classifications must disadvantage groups in particular ways to qualify for heightened scrutiny).

[236] Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976) (advancing the principle that, under the Equal Protection Clause, legislation may not perpetuate "the subordinate position of a specially disadvantaged group").

[237] *Eknes-Tucker*, 80 F.4th at 1228 (holding that heightened scrutiny was not required because the statute does not constitute "official action that closes a door or denies opportunity to women (or to men)" (quoting *VMI*, 518 U.S. at 532)).

[238] *Westcott*, 443 U.S. at 83–84 (rejecting the argument that a financial assistance program that provided assistance to needy families only upon a father's unemployment was not subject to heightened scrutiny because the law's "gender distinction . . . does not discriminate against women as a class" and "the impact of the gender qualification is felt by family units rather than individuals").

[239] *See* Washington v. Davis, 426 U.S. 229, 241–42 (1976) (discussing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

diluted beer.[240] This can hardly be described as group-based subordination. If men ages 18 to 21 who wish to purchase diluted beer are protected against sex classification by the Equal Protection Clause, so are transgender minors seeking access to health care.

In support of its novel proposals of law, the Sixth Circuit cited the Supreme Court's decision in *Personnel Administrator of Massachusetts v. Feeney*.[241] *Feeney* was a case about a gender-neutral rule—a job-preference statute for veterans—that had a disparate impact on women, who were far less likely than men to be veterans in the 1970s.[242] In *Feeney*, the Court held that "a statute gender-neutral on its face" does not trigger heightened scrutiny unless intended to cause a disparate impact on men or women.[243] In a tweak on *Feeney*'s rule, the Sixth Circuit held that "laws [that] on their face treat both sexes equally"[244] do not trigger heightened scrutiny unless intended to cause a disparate impact. This doctrinal innovation would allow governments to create purportedly separate-but-equal offices, classrooms, and other public spaces for men and women—for convenience—with no particular scrutiny.[245] Restroom sex segregation, which courts have evaluated under heightened scrutiny,[246] would be subject to only rational basis review. Equal protection doctrine long ago recognized that the idea that the sexes may be forced into complementary-but-separate spheres requires careful judicial scrutiny.[247] The argument that *Feeney* extends to some subset of facial classifications based on sex either reflects confusion about the role of

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240 *Craig*, 429 U.S. at 198, 210 (striking down law prohibiting the sale, but not consumption, of 3.2% alcohol beer to men under 21 but allowing purchases by women at age 18).

241 442 U.S. 256 (1979).

242 *Id.* at 270–71.

243 *Id.* at 274.

244 *Skrmetti*, 83 F.4th at 483. Importantly, THCBs are only facially neutral insofar as they characterize the healthcare treatments at issue at a high level of generality—as, for example, "cross-sex" treatments. *See, e.g.*, *id.* This cannot be right, because by this logic, a legislature could forbid "cross-sex" clothing, behaviors, occupations, and family roles, all without heightened scrutiny.

245 The Supreme Court has not addressed whether single-sex education that is genuinely "separate but equal" can survive heightened scrutiny. *VMI*, 518 U.S. at 533 n.7. It affirmed, by a divided vote, a case upholding single-sex education that did not specify the standard of review. Vorchheimer v. Sch. Dist. of Phila., 532 F.2d 880, 888 (3d Cir. 1976) ("We need not decide whether this case requires application of the rational or substantial relationship tests because, using either, the result is the same."), *aff'd*, 430 U.S. 703 (1977). That Third Circuit opinion was decided prior to *Craig v. Boren*'s announcement of the heightened scrutiny standard for sex classifications. 429 U.S. 190.

246 *A.C.*, 75 F.4th at 768; *Kasper*, 57 F.4th at 803; *Grimm*, 972 F.3d at 608.

247 *See, e.g.*, Stanton v. Stanton, 421 U.S. 7, 14–15 (1975) (per curiam) (rejecting the "old notion" that "female" children are "destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas").

classifications, intent, and effects in doctrine, or is an effort to renovate equal protection's doctrinal architecture.

3. Similarly situated comparisons and but-for cause are not required.

Courts ruling against transgender rights litigants sometimes disregard sex classifications as triggers for heightened scrutiny on the theory that because men and women receive substantively similar treatment, there is no discrimination, i.e., that separate is equal. They may phrase this as a threshold requirement that a law must fail to treat "similarly situated individuals evenhandedly" to trigger heightened scrutiny.[248] In addition, some courts have refused to consider whether an individual's sex is a but-for cause of the denial of health care, reasoning that the but-for cause standard applied by the Court in *Bostock* comes from the text of Title VII and does not apply to the Equal Protection Clause.[249] But the question of whether a law classifies based on sex is distinct from these questions. THCBs and other such laws unquestionably classify based on sex.

Sorting out these contentions requires untangling three modes of reasoning, or heuristics, that courts sometimes use to identify disparate treatment: classification, similarly situated comparisons, and causation.[250] As previously discussed, facial classifications are those that appear in the text of a law and are criteria for its operation.[251] Similarly situated inquiries, by contrast, ask whether a law treats two groups differently who are alike in all relevant respects, or similarly situated, except for race or sex.[252] Causation is a third independent heuristic. It refers to race or sex as causes of disparate treatment, whether the sole cause, a but-for cause, a predominant factor, or just one

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[248] *Skrmetti*, 83 F.4th at 479 (declining to apply heightened scrutiny to sex classifications because "[t]he Tennessee and Kentucky laws treat similarly situated individuals evenhandedly").

[249] *See e.g.*, *id.* at 484–85 (contrasting Title VII's language with the Equal Protection Clause).

[250] In prior work, I introduced this distinction and traced it through lower court cases interpreting the Supreme Court's *Bostock* decision. Clarke, *Sex Discrimination Formalism*, *supra* note 24.

[251] *See supra* Part I.B.1.

[252] *See, e.g.*, Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542 (1982) [hereinafter Westen, *Empty Idea*] (discussing the ancient maxim that requires that "likes should be treated alike" and critically analyzing its role in equal protection law).

motivating factor.[253] In theory and practice, these heuristics often overlap.[254] But under Supreme Court precedent, classification alone is sufficient to trigger heightened equal protection scrutiny.

The Supreme Court has sometimes referred to the principle behind the Equal Protection Clause as something like the ancient maxim that "likes should be treated alike."[255] At one time, this maxim was the entirety of the legal rule that applied to sex classifications. In a 1948 case now relegated to sex discrimination's anticanon,[256] *Goesaert v. Cleary*,[257] the Supreme Court upheld a Michigan law that prohibited women from working as barmaids unless their husbands or fathers owned the bar.[258] It reasoned that men and women are not alike, and so the Constitution did not require that legislatures treat them the same.[259] The Court thought it was reasonable to think that female bartenders required the "protecting oversight" of their husbands or fathers, while male bartenders did not.[260] *Goesaert* is no longer good law.[261] As the Fourth Circuit has explained, decisions asking freewheeling questions about whether the sexes are similarly situated "preceded the modern tiers of scrutiny."[262]

The similarly situated inquiry imports considerations of fairness—it asks: Do the differences between two groups mean that to treat them equally requires that they be treated differently? While *Goesaert* is anticanon, this idea still has intuitive appeal. For example, should a physical-fitness test for law enforcement officers allow women to pass with fourteen pushups but require

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253 *See* Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1123 (2018) (providing a typology of motive rules).

254 *See generally* Clarke, *Sex Discrimination Formalism*, *supra* note 24.

255 Westen, *Empty Idea*, *supra* note 252, at 542 (discussing this concept of equality); *see, e.g.*, *Cleburne Living Ctr.*, 473 U.S. at 439 ("The Equal Protection Clause of the Fourteenth Amendment . . . is essentially a direction that all persons similarly situated should be treated alike.").

256 *Cf.* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011). To say a case belongs in the "anticanon" is to say it "embodies a set of propositions that all legitimate constitutional decisions must be prepared to refute." *Id.*

257 335 U.S. 464 (1948).

258 *Id.* at 465.

259 *Id.* at 466 ("[T]he Constitution does not require situations 'which are different in fact or opinion to be treated in law as though they were the same.'" (quoting Tigner v. Texas, 310 U.S 141, 147 (1940))).

260 *Id.*

261 *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 n.10 (1982) (treating *Goesaert* as anticanon); *Craig*, 429 U.S. at 210 n.23 (replacing the rule from *Goesaert* with heightened scrutiny).

262 *Kadel*, 100 F.4th at 155 (citing Giovanna Shay, *Similarly Situated*, 18 GEORGE MASON L. REV. 581, 598 (2011)).

men to complete thirty because men and women are, on average, differently situated with respect to upper body strength?[263] Whether different standards are fair depends on whether they are the appropriate means to achieve the government's ends.[264] A rule that asks, at the threshold, about whether the sexes are similarly situated might make sense in defining discrimination in a statute that does not include defenses that allow courts to engage in anything like means-ends balancing, such as Title IX.[265] But not for equal protection law. Heightened scrutiny is a two-step inquiry that includes questions about means and ends on the second step. To ask such questions on the first step is to introduce confusion and invite judicial decision-making unrestrained by facts and law.[266] When a law classifies on its face, heightened scrutiny is triggered, regardless of whether the groups are similarly situated.

There is no exception for facial classifications with "equal application" to different groups.[267] It does not matter that a racial classification might apply to members of more than one race, even at the same time in the same way. A law that penalizes both white and Black members of an interracial couple is a law that classifies

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[263] *See* Eve A. Levin, Note, *Gender-Normed Physical-Ability Tests Under Title VII*, 118 COLUM. L. REV. 567, 569–70 (2018) (criticizing *Bauer v. Lynch*, 812 F.3d 340 (4th Cir. 2016), which upheld a gender-normed, physical-fitness test for law enforcement officers under Title VII).

[264] *Cf. id.* at 577–78, 589 (arguing that the only permissible end for a gender-normed test under the text of Title VII is a "valid business justification" and criticizing the *Bauer* decision for resting on assumptions about "physiological differences" between men and women without "cit[ing] any evidence").

[265] *See, e.g.*, B.P.J. *ex rel.* Jackson v. W. Va. State Bd. of Educ., 98 F.4th 542, 563 (4th Cir.), *cert. denied*, 2024 WL 4805904 (2024) (asserting that "not every act of sex-based classification is enough to show legally relevant 'discrimination' for purposes of Title IX" and requiring a similarly situated test to show a violation of that statute). I do not hereby express any view on the appropriate test of sex discrimination under Title IX.

[266] *Id.* at 556 (rejecting a similarly situated threshold inquiry because "[t]hat is not how equal protection review works"); *see also Kadel*, 100 F.4th at 155 ("Adding a threshold similarly situated inquiry confuses the proper sequence of the analysis.").

[267] I am not the first scholar to point out that the Supreme Court's sex discrimination jurisprudence protects a noncomparative right to be treated according to criteria other than sex. *See, e.g.*, Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604, 634 (1983) (explaining *Craig v. Boren* as follows: "[T]he statute was not presumptively invalid *because* it treated men and women unequally. It was presumptively invalid because it violated the presumptive right of men not to be denied benefits or opportunities on the basis of sex." (emphasis in original)); *see also* Deborah Hellman, *Two Concepts of Discrimination*, 102 VA. L. REV. 895, 914–18 (2016) [hereinafter Hellman, *Two Concepts of Discrimination*] (describing the Supreme Court's race and sex jurisprudence as having a "noncomparative" strand). But the point seems to have been lost on some lower courts, so it bears repeating.

based on race.[268] A correctional facility's policy of putting cellmates together based on race for their first sixty days of incarceration triggers heightened scrutiny, even if it "neither benefits nor burdens one group or individual more than any other group or individual."[269] And race-based peremptory challenges trigger strict scrutiny, even if they apply equally to white and Black jurors.[270]

The same goes for sex—there is no exception to the trigger for heightened scrutiny in cases in which the sex classification provides substantively equal treatment.[271] It does not matter that a sex classification reflects some substantive notion of equal treatment based in sex differences, as in *Nguyen*, where the Court held that under heightened scrutiny, immigration authorities were justified in applying a different standard to determine paternity that reflected "the fact that a mother must be present at birth but the father need not be."[272] Whether a sex classification treats groups or individuals equally is a question for the back end of heightened scrutiny; in other words, it goes to whether the sex classification is justified as "substantially related" to "important governmental objectives."[273] As Justice Sandra Day O'Connor explained in her opinion for the Court in *Mississippi University for Women v. Hogan*,[274] "when a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny applied to determine the validity of the classification do not vary simply

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[268] *McLaughlin*, 379 U.S. at 191–92 (holding that "[j]udicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation" in a case dealing "with a classification based upon the race of the participants"); *see also* Loving v. Virginia, 388 U.S. 1, 11 (1967) ("The statutes proscribe generally accepted conduct if engaged in by members of different races."). For a response to the argument that laws against miscegenation were historically tied to white supremacy, while laws enforcing separate-but-equal sex roles with respect to LGBTQ people are not tied to male supremacy, see *infra* Part III.C.

[269] *Johnson*, 543 U.S. at 506 (quoting Brief for the Respondents at 16, *Johnson*, 543 U.S. 499 (No. 03-636)).

[270] Powers v. Ohio, 499 U.S. 400, 410 (1991) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.").

[271] In *J.E.B. v. Alabama ex rel. T.B.*, the Supreme Court held that a prosecutor could not use peremptory strikes to exclude men from a jury based on their sex. 511 U.S. at 129. In dissent, Justice Antonin Scalia argued that "the system as a whole is evenhanded" because "for every man struck by the government petitioner's own lawyer struck a woman." *Id.* at 159–60 (Scalia, J., dissenting). But the majority rejected the argument that there was no discrimination because both sides could use their "peremptory challenges in an equally discriminatory fashion." *Id.* at 142 n.13 (majority opinion). This was because "[t]he exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system." *Id.*

[272] *Nguyen*, 533 U.S. at 73.

[273] *See, e.g.*, *id.* at 60.

[274] 458 U.S. 718 (1982).

because the objective appears acceptable to individual Members of the Court."[275]

If heightened scrutiny were only triggered by some sort of abstract violation of principles of evenhandedness or neutrality, the entire line of sex discrimination precedents, from *Craig v. Boren*[276] on, would have been rational-basis-review cases. To be sure, there are some cases in this line, such as the plurality opinion in *Michael M. v. Superior Court*,[277] that critics contend can be explained by an inquiry that asks whether men and women are similarly situated.[278] But that is not how the majority of the Court has ever explained them.[279] And certainly, facially neutral rules that are not applied in evenhanded ways might also trigger constitutional concern.[280] But if a lack of evenhandedness were required even if rules classify based on race, every affirmative-action case would have reasoned differently. *SFFA* would have stated that strict scrutiny was required due to statistical proof that candidates from different racial groups with similar test scores, grades, personal essays, and recommendation letters did not receive offers of admission at the same rates. But it did not.[281] Instead, it is replete with references to classification as the trigger for strict scrutiny.[282]

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[275] *Id.* at 724 n.9 (striking down a nursing school's refusal to admit men ostensibly for purposes of remedying discrimination against women).

[276] 429 U.S. 190 (1976).

[277] 450 U.S. 464 (1980).

[278] *See, e.g.*, Franklin, *Biological Warfare*, *supra* note 222, at 179 (arguing that, in *Michael M.*, the plurality "simply applied a rational basis standard without acknowledging the downward departure"); Williams, *supra* note 93, at 156–57 (arguing that *Michael M.* and *Rostker* muddled the standard as a way to "rationalize" outcomes that were "foregone conclusions" as a result of political concerns).

[279] Heightened scrutiny for sex classifications is now the rule. *Morales-Santana*, 137 S. Ct. at 1689–90; *see supra* notes 87–93 and accompanying text (describing the evolution of the doctrine toward this rule).

[280] *See, e.g.*, *Feeney*, 442 U.S. at 273–74.

[281] The text of the opinion refers to just one statistic, and only as part of the back end of the strict scrutiny analysis, not the trigger. *SFFA*, 143 S. Ct. at 2168 (holding that, under strict scrutiny, race may not be a "minus factor" in an admissions process, and "the First Circuit found that Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard"). It addressed statistics on the rates of admission of supposedly "similarly situated" Black and Asian American applicants to UNC only in footnotes responding to Justice Ketanji Brown Jackson's dissent. *Id.* at 2156 n.1, 2169 n.6.

[282] *Id.* at 2161, 2165–66, 2168–69, 2173. Neutrality in the abstract is difficult: scholars of race and religion have pointed to the indeterminacy and complications of legal definitions of "neutrality." *See, e.g.*, Issa Kohler-Hausmann, *What Did* SFFA *Ban? Acting on the Basis of Race and Treating People as Equals*, 66 ARIZ. L. REV. 305, 306–08 (2024) (arguing that "nobody knows what, precisely, has been banned by the Court's decision in *SFFA v. Harvard*" due to "hard questions" raised by the concept of "race neutrality");

Contrary to five decades of Supreme Court case law, the Sixth Circuit asserted that a sex classification "that treats individuals 'evenhandedly'—that treats like people alike—does not trigger heightened review."[283] This idea is also behind the Sixth Circuit's assertion that no sex discrimination was afoot because the plaintiffs asked that puberty blockers—the same drugs—be available to both "gender-transitioning boys and girls."[284] There is a logical problem with the group-based comparison that the Sixth Circuit sets up: under the Sixth Circuit's test, a school would be permitted to punish "all gender-nonconforming boys and girls" by, for example, giving detention to all boys who cheerlead and all girls who play football, without triggering heightened scrutiny. On the Sixth Circuit's rule, heightened scrutiny is triggered by a classification only if a court concludes the two classified groups are similarly situated. For the Sixth Circuit, transgender and nontransgender children are not similarly situated due to biology; for my hypothetical school, gender-nonconforming and gender-conforming athletes are not similarly situated, also due to biology. It is no answer that one context involves medical care and the other education. There is no precedent carving out medical care as exceptional under the Equal Protection Clause; whether medicine justifies a classification is a back-end question.[285] It is no answer that transgender children seek puberty blockers for a "psychological disorder" while nontransgender children seek them for "congenital" ones.[286] Whether this is a distinction that

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Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999 (1990) (arguing that anticlassification rules are but one of many definitions of religious neutrality). But if the classification is facial, the doctrine defers these problems to the back end of the heightened scrutiny analysis.

283 *Skrmetti*, 83 F.4th at 479 ("The Tennessee and Kentucky laws treat similarly situated individuals evenhandedly. And that is true however one characterizes the alleged classifications in the law, whether as premised on age, medical condition, or sex."). The only support *Skrmetti* could find for this proposition was from a case involving no suspect or quasi-suspect classifications. 83 F.4th at 479 (citing Vacco v. Quill, 521 U.S. 793, 800 (1997)).

284 *Skrmetti*, 83 F.4th at 483 (arguing this demonstrates that plaintiffs "do not ask the States to equalize treatment options by making a procedure given to one sex available to the other"). *But see* Doe v. Ladapo, 2024 WL 2947123, at *14 (N.D. Fla. June 11, 2024) (arguing that, under a TCHB, for a physician to know whether a child may be treated with puberty blockers, the physician must know "if the child is transgender, because the statute prohibits [puberty blockers] only for transgender children, not for anyone else").

285 *Cf. Ladapo*, 2024 WL 2947123, at *13 (refuting the Eleventh Circuit's contention that principles from equal protection cases in the employment context do not apply to "medical care" because "the court did not explain why that affected the level of scrutiny, rather than the separate question of whether the treatment at issue survived the appropriate scrutiny").

286 *See, e.g.*, *Kadel*, 100 F.4th at 188 (Richardson, J., dissenting) (asserting, with an exclamation point rather than evidentiary or other support, that a person needing a

matters with respect to the state's asserted interest in children's health must be addressed with reference to evidence.

There are distinct questions about the extent to which discriminatory treatment caused a plaintiff's injury. Different causal standards, such as motivating factor,[287] predominant factor,[288] and but-for cause,[289] are employed in different corners of antidiscrimination law. Questions of causation may go to whether a plaintiff has suffered injury,[290] may be a prerequisite for standing,[291] and may pertain to whether the plaintiff is entitled to particular forms of relief.[292] In the absence of a facial classification, the Supreme Court has endorsed a burden-shifting test that allows plaintiffs to demonstrate injury by showing discrimination was a "motivating factor."[293] But in facial classification cases, the Supreme Court has construed injury and standing loosely,[294] accepting arguments about lost opportunities to compete without requiring proof that the plaintiff would have received any benefit in the absence of the classification, or that it was even a motivating factor.[295]

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vaginoplasty due to a "congenital defect" and one needing a vaginoplasty due to "a diagnosed psychological disorder" "are not the same!").

[287] *See, e.g.*, Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003) (discussing the "motivating factor" standard and burden-shifting analysis applicable under the 1991 amendments to Title VII (quoting 42 U.S.C. § 2000e-2(m))).

[288] *See, e.g.*, Allen v. Milligan, 143 S. Ct. 1487, 1511 (2023) (discussing the "predominant factor" standard applicable under § 2 of the Voting Rights Act).

[289] *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009) (discussing the but-for cause standard applicable to the Age Discrimination in Employment Act).

[290] *See, e.g.*, *Arlington Heights*, 429 U.S. at 270 n.21 (holding that, in an equal protection challenge to a law motivated by discriminatory purpose, if the government established the absence of but-for cause, the plaintiff could "no longer fairly [ ] attribute the injury complained of to improper consideration of a discriminatory purpose").

[291] *See, e.g.*, Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18, 25 (2023) (Thomas, J., concurring) (discussing questions of standing and injury under discrimination statutes).

[292] *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (discussing the principle, under Title VII, that "persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination" (quoting 118 CONG. REC. 7168 (1972))).

[293] *Arlington Heights*, 429 U.S. at 270 n.21 (setting forth a burden-shifting framework in which challengers have the "burden of proving that discriminatory purpose was a motivating factor," and then the burden shifts to government of "establishing that the same decision would have resulted even had the impermissible purpose not been considered," in other words, the absence of but-for cause (discussing Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 274 (1977))); *see also Hunter*, 471 U.S. at 228 (applying this standard in another equal protection case).

[294] *Adarand*, 515 U.S. at 211. The injury in cases of this kind is that a "discriminatory classification prevent[s] the plaintiff from competing on an equal footing." Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 667 (1993).

[295] *Ne. Fla. Chapter of Associated Gen. Contractors of Am.*, 508 U.S. at 666:

In the equal protection context, the Supreme Court has treated causal questions, which go to injury, as separate from classification ones, which go to the standard of review.[296] In *Orr v. Orr*,[297] a case challenging an Alabama law that imposed alimony obligations on men but not women, the Supreme Court utilized counterfactual causal reasoning to determine that Mr. Orr had standing—specifically, it reasoned that the law subjected him to a burden "he would not bear were he female,"[298]—even though Alabama could very well have fixed the constitutional infirmity by applying alimony obligations to men and women alike, leaving Mr. Orr no better off financially.[299] But when it came to the question of whether heightened scrutiny was triggered, the *Orr* Court did not ask causal questions; it asked whether the law, on its face, classified based on sex.[300]

Even if not required to trigger heightened scrutiny, causal arguments may show discrimination. The Supreme Court's Title VII decision, *Bostock v. Clayton County*, advanced a theory of the meaning of discrimination based on the counterfactual logic of "but-for causation"[301]: that "if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred."[302] The opinion offered the example of an employee who introduces their manager to "Susan, the

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> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.

296 For explanation of the distinction between but-for cause and anticlassification rules, see Clarke, *Sex Discrimination Formalism*, *supra* note 24, at 1716–22.

297 440 U.S. 268 (1979).

298 *Id.* at 273:

> There is no question but that Mr. Orr bears a burden he would not bear were he female. The issue is highlighted, although not altered, by transposing it to the sphere of race. There is no doubt that a state law imposing alimony obligations on blacks but not whites could be challenged by a black who was required to pay.

299 *Id.* at 272.

300 *Id.* at 276–78 (explaining that the law expressly "'provides that different treatment be accorded . . . on the basis of . . . sex'" (alterations in original) (quoting *Reed*, 404 U.S. at 75).

301 140 S. Ct. at 1737. *Bostock* also announced a rule forbidding sex classification. *See, e.g.*, *id.* at 1746:

> Suppose an employer's application form offered a single box to check if the applicant is either black or Catholic. If the employer refuses to hire anyone who checks that box, would we conclude the employer has complied with Title VII, so long as it studiously avoids learning any particular applicant's race or religion? Of course not.

302 *Id.* at 1741–42.

employee's wife."[303] If the answer to the question, "will that employee be fired?" depends on whether the employee "is a man or a woman," then sex discrimination has occurred.[304] On the but-for theory, an official policy that classifies employees based on whether they are straight or gay, transgender or not, is, by logical necessity, a form of sex discrimination.[305] Unless logic applies only to statutory and not constitutional contexts, there is no basis for refusing to extend *Bostock* to the Equal Protection Clause.[306]

But some conservative jurists are wary of this argument due to its implications[307] and the sense that constitutional interpretation is based on enduring principles rather than legal formalism.[308] For these reasons, this Article endeavors to offer a more robust argument, based in the principles articulated in the Roberts Court's equal protection jurisprudence, as discussed in Part II.

II. ANTICLASSIFICATION THEORY

What principles might support doctrine requiring that judges apply heightened scrutiny to all sex classifications, including those that restrict the rights of transgender people? *Skrmetti* asserted there was no such principle; that, to the contrary, principled constitutional adjudication required judicial restraint. Before analyzing the law applicable to the case, Chief Judge Sutton's opinion devoted two pages to "headwinds" impeding transgender children in their pursuit of constitutional rights.[309] Noting the recent flurry of state-legislative activity on transgender health care, he opined that "[p]rohibiting citizens and legislatures from offering their perspectives on high-stakes medical policies, in which compassion for the child points in both directions, is not something life-tenured federal judges should do without a clear warrant in the Constitution."[310]

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303 *Id.* at 1742–43.

304 *Id.*

305 *Bostock*, 140 S. Ct. at 1745–46.

306 While this Article is not focused on the *Bostock* argument, I offer some support for it. *See supra* note 85 and accompanying text; *see also* Fredericksen, *supra* note 58.

307 *See supra* note 86 and accompanying text (discussing concerns about the impact of LGBTQ antidiscrimination laws on religious traditionalists).

308 *Skrmetti*, 83 F.4th at 485 (citing, in support of its refusal to extend *Bostock* to the Equal Protection Clause, the Supreme Court's instruction: "'[W]e must never forget that it is a constitution,' not a statute, 'we are expounding.'" (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819))).

309 *Skrmetti*, 83 F.4th at 471; *see id.* at 471–72.

310 *Id.* at 472; *see also* Kadel v. Folwell, 100 F.4th 122, 193 (4th Cir. 2024) (en banc) (Wilkinson, J., dissenting) ("Plaintiffs envision an Equal Protection Clause that is dogmatic and inflexible, one that leaves little room for a national dialogue about relatively

One theory of judicial review might posit that the Constitution requires life-tenured federal judges, who are, in theory, insulated from political pressures, to add their voices to public debates when a majority decides to regulate a medical procedure by selectively denying it to a politically powerless minority, like transgender children.[311] Professor John Hart Ely famously argued that defects in the political process justified judicial review of legislative action.[312] On this theory, judicial review might be required to protect a "discrete and insular minority" from the vagaries of the majoritarian political process.[313] But this is beside the point. The Court has not treated "discreteness and insularity" as "necessary preconditions to a holding that a particular classification is invidious."[314] Nor has it endorsed "a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process."[315]

Rather than make any political-process argument, the Roberts Court has endorsed judicial review in the affirmative-action context for reasons related to the problems of classifications. This Part draws out the anticlassification principles that support judicial review from the Roberts Court's equal protection jurisprudence, most recently in its *SFFA* decision, and explains how those principles also run through cases applying heightened scrutiny to all sex classifications. Part II.A will begin by describing anticlassification principles in broad strokes, explaining the values that undergird this set of equal protection cases generally. This Part aims to articulate values at a high level, not to make a doctrinal argument. It identifies key principles through a close

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novel treatments with substantial medical and moral implications."). *But see* Poe v. Labrador, 709 F. Supp. 3d 1169, 1178 (D. Idaho 2023) ("The authors of the Fourteenth Amendment fully understood and intended that the amendment would prevent state legislatures from passing laws that denied equal protection of the laws or invaded the fundamental rights of the people.").

311 *See, e.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 613 (4th Cir. 2020) (observing that, as "approximately 0.6% of the adult population," with almost no representatives in any branch of government, "[t]ransgender people constitute a minority that has not yet been able to meaningfully vindicate their rights through the political process").

312 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 135–79 (1980).

313 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

314 Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978) (Powell, J.).

315 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) (plurality opinion); *see, e.g.*, Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 308 (1991) ("[T]he Court never did explain why males were entitled to extraordinary judicial protection—an explanation that, at least on a political process view of equal protection, would have been virtually impossible to produce.").

reading of the Court's reasoning with respect to both the front and back ends of heightened scrutiny. Part II.B will then ask what these principles mean for the question of judicial review, in other words, which types of classifications trigger heightened scrutiny. It argues that anticlassification ideals require judicial review of all racial and sex classifications.

This Part's goal is to sketch out anticlassification theory as a positive matter, not to defend it as a normative theory.

A. Anticlassification Principles

Equal protection theory has long been described as a contest between anticlassification, which aspires to eliminate all racial classification and remake American society as "colorblind[ ],"[316] and antisubordination, which aspires to reform practices "that enforce the secondary social status of historically oppressed groups," including through the use of race-conscious means.[317] *SFFA*, like many equal protection decisions before it, quotes Justice John Marshall Harlan's famous statement, in dissent in *Plessy v. Ferguson*,[318] that "[o]ur Constitution is color-blind."[319] The Supreme Court's equal protection jurisprudence has long been criticized for reflecting a misguided,[320] if not reactionary,[321] version of the colorblindness ideal.

However, the anticlassification approach advanced by the Roberts Court is not literal colorblindness. Rather, as Professor Julie Suk has remarked, colorblindness in the United States was always "a metaphor."[322] To be sure, one theme of the Court's past

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316 *See, e.g.*, Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1783 (2012) [hereinafter Haney-López, *Intentional Blindness*] ("Colorblindness today applies when a government actor explicitly employs a racial classification.").

317 *See, e.g.*, Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9 (2003); *see also* Fiss, *supra* note 236, at 157.

318 163 U.S. 537 (1896).

319 *SFFA*, 143 S. Ct. at 2177 (Thomas, J., concurring) (quoting Plessy v. Ferguson, 163 U.S. at 559 (Harlan, J., dissenting)).

320 *See, e.g.*, Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 68 (1991) ("Whatever the validity in 1896 of Justice Harlan's comment in *Plessy*—that 'our Constitution is . . . color-blind'—the concept is inadequate to deal with today's racially stratified, culturally diverse, and economically divided nation.").

321 *See, e.g.*, Haney-López, *A Nation of Minorities*, *supra* note 45, at 987–88 (calling the principle "reactionary").

322 Julie Chi-Hye Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMPAR. L. 295, 338 (2007) [hereinafter Suk, *Equal by Comparison*] ("When Americans dream of a utopian future in which white and black children hold hands, the dream does not require the actual inability to notice the difference between the

race-based equal protection cases has been that group-based divisions are corrosive to the polity.[323] But this theme did not feature prominently in *SFFA*.[324] In any event, the aspiration of American equal protection jurisprudence is not to abolish race as a social category.[325] Unlike France, for example, the United States does not bar collection of data on racial disparities, criminalize discrimination, or ban hate speech.[326] *SFFA* cannot be fairly read to prohibit race consciousness or to aspire to any such social project.[327]

Rather than literal colorblindness, the Roberts Court's equal protection cases aim to avoid (1) dignitary harms from official classifications that impose constraining racial and gender stereotypes and (2) material harms from unfair distributions of opportunities based on race and sex rather than individual desert.[328]

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black and white child. Americans have never aspired to this literalization of race-blindness as the French have.").

[323] *See, e.g.*, Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1295–99 (2011) (discussing how the Court's past swing Justices, such as Justice O'Connor, "interpret[ed] equal protection so as to promote social cohesion and to avoid racial arrangements that balkanize").

[324] In *SFFA*, Justice Clarence Thomas most clearly articulated this concern. *SFFA*, 143 S. Ct. at 2201–02 (Thomas, J., concurring) (arguing that affirmative-action policies "increasingly encourage our Nation's youth to view racial differences as important and segregation as routine" and "are leading to increasing racial polarization and friction"). The majority opinion contains only traces of this idea. *Id.* at 2165 (majority opinion) (expressing concern that the persistence of affirmative action would lead to "a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life," a quote from Nathaniel L. Nathanson & Casimir J. Bartnik, *The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools*, 58 CHI. BAR REC. 282, 293 (1977), in Justice O'Connor's opinion in *Grutter v. Bollinger*, 539 U.S. 306, 342–43 (2003)); *see also SFFA*, 143 S. Ct. at 2173 (cautioning that permitting "past societal discrimination" to "serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group" (quoting *Croson*, 488 U.S. at 505)).

[325] *Cf.* B.R. Ambedkar, ANNIHILATION OF CASTE: THE ANNOTATED CRITICAL EDITION (S. Anand ed., 2014) (advocating for the annihilation of the Hindu caste system in India).

[326] Suk, *Equal by Comparison*, *supra* note 322, at 304, 306 (discussing these features of French antidiscrimination law).

[327] *See, e.g.*, Benjamin Eidelson & Deborah Hellman, *Unreflective Disequilibrium: Race-Conscious Admissions After* SFFA, 4 AM. J.L. & EQUAL. 295, 296 (2024) ("[D]espite its sometimes strident rhetoric, there were certain forms of race-consciousness that *even the majority [in SFFA] did not want to condemn*." (emphasis in original)).

[328] These values track the Court's two main reasons for striking down the affirmative-action plans at Harvard and UNC: the use of race "as a stereotype" and the use of race as a "negative" factor for white and Asian American applicants. *SFFA*, 143 S. Ct. at 2167–68; *id.* ("University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end.").

The Court also complained that the universities' race-based affirmative-action plans had no "end point." *Id.* at 2173. This, however, was not about the dream of a future colorblind America. Rather, it was to defend the opinion against the charge that it violated principles of stare decisis by overruling *Grutter*, 539 U.S. 306, which had upheld a

Paramount is the principle of individual autonomy. This Section will trace these ideas through the Court's interrelated race and sex discrimination cases, with a focus on *SFFA*.

While this Section articulates anticlassification principles, it is not focused on locating them in the doctrinal architecture. These principles come into play at both the front and back end of heightened scrutiny. In the next Section, I will explain how anticlassification theory supports the argument that all facial classifications based on race and sex ought to trigger heightened scrutiny.

1. Antistereotyping.

The key principle that undergirds the Supreme Court's anticlassification theory is concern about the official imposition of racial and gender stereotypes. As the Court reiterated in *SFFA*: "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, *sexual* or national class."[329] The Court has described the values at stake in terms of equal dignity. Its cases support the notion that government may not engage in race or gender stereotyping, because to do so expresses disrespect for individual autonomy: each person's own life-defining choices.[330]

The primary problem with race-based admissions at Harvard and the University of North Carolina (UNC), according to *SFFA*, was "illegitimate . . . stereotyp[ing]."[331] The Court explained that these programs assumed "that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin."[332] The Court criticized the five racial

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materially indistinguishable affirmative-action plan twenty years prior. *SFFA*, 143 S. Ct. at 2174 ("*Grutter* . . . emphasized—not once or twice, but at least six separate times—that race-based admissions programs 'must have reasonable durational limits.'"); *id.* at 2221–25 (Kavanaugh, J., concurring) (restating this argument). If *Grutter* insisted on an end point for race-based affirmative action, then, the argument goes, it was not inconsistent with stare decisis for the Court to strike down a materially similar plan in *SFFA* two decades later. *See id.*

329 *SFFA*, 143 S. Ct. at 2172 (emphasis added) (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)).

330 *Cf.* JOSEPH RAZ, THE MORALITY OF FREEDOM 370 (1986) ("The autonomous person is part author of his life.").

331 *SFFA*, 143 S. Ct. at 2165 (quoting *Croson*, 488 U.S. at 493 (plurality opinion)); *see also* Eidelson, *Respect, Individualism*, *supra* note 25, at 1626–30 (tracing this concept of stereotyping through the Court's race cases).

332 *SFFA*, 143 S. Ct. at 2176.

categories[333] the universities had chosen to measure as "overbroad," "underinclusive," and treating the students in each category as fungible.[334] The universities' diversity rationales lent themselves to stereotyping by presuming "that minority students always (or even consistently) express some characteristic minority viewpoint on any issue"[335] or that "a [B]lack student can usually bring something that a white person cannot offer."[336] The Court bristled at the assumption that "members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike."[337]

These concerns resonate with the Court's constitutional sex discrimination cases, which have focused on the impermissibility of "overbroad generalizations about the different talents, capacities, or preferences of males and females."[338] In *United States v. Virginia* (*VMI*),[339] Virginia's expert witness had testified that military institutes should be sex segregated as a result of "gender-based developmental differences": specifically, that "[m]ales" thrive in atmospheres that are "adversative[ ]," while "[f]emales" do better in atmospheres that are "cooperative."[340] While acknowledging there were exceptions to these generalizations, the expert testified that "educational experiences must be designed 'around the rule,' . . . not 'around the exception.'"[341] The Court rejected this justification. It held that "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."[342] It also noted that

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333 Those categories are "(1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American." *Id.* at 2167.

334 *Id.* ("[B]y grouping together all Asian students, for instance, respondents are apparently uninterested in whether South Asian or East Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other.").

335 *Id.* at 2169 (quoting *Grutter*, 539 U.S. at 333).

336 *Id.* at 2164 (quoting *Bakke*, 438 U.S. at 316 (Powell, J.)).

337 *SFFA*, 143 S. Ct. at 2170 (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993)).

338 United States v. Virginia (VMI), 518 U.S. 515, 533 (1996). This Article does not contend that anticlassification principles are the only operative ones. *VMI* also announced "that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *Id.* at 532.

339 518 U.S. 515 (1996).

340 *Id.* at 541; *see also id.* (noting that the government did not challenge Virginia's "expert witness estimation on average capacities or preferences of men and women").

341 *Id.*

342 *Id.* at 550 (emphasis in original).

Virginia had not "asserted that [the Virginia Military Institute's] method of education suits most men."[343]

Rejection of stereotypes does not require "blindness"; it requires respect for individual autonomy. *SFFA* does not mean, for example, that schools must redact all racial identifiers from applications; it does not require anything like orchestra auditions in which musicians play behind screens to mask their demographic characteristics.[344] Rather, universities may "consider[ ] an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[345] But "[a] benefit to a student who overcame racial discrimination . . . must be tied to that student's courage and determination."[346] Stereotyping means acting based on "race qua race" or "race for race's sake."[347] By this, the Chief Justice meant that race could not be a proxy for other attributes—an admissions process must measure those other attributes in and of themselves.[348] This has long been an operative principle in sex discrimination law.[349] In the "law of sex discrimination, 'stereotype' has become a term of art by which is simply meant any imperfect proxy, any overbroad generalization."[350] *SFFA* is consistent with this rule.

But what is wrong with overbroad generalizations? The problem is not that race- or gender-based stereotypes are incorrect as a descriptive matter.[351] Many generalizations are generally true. With respect to military institutes, women were less interested than men in the "adversative" model of education offered at the Virginia Military Institute.[352] With respect to affirmative action,

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343 *VMI*, 518 U.S. at 550.

344 Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 716, 720 (2000).

345 *SFFA*, 143 S. Ct. at 2175–76.

346 *Id.* at 2176.

347 *Id.* at 2170.

348 *Id.* at 2176 (holding that, in admissions processes, each individual "must be treated based on his or her experiences as an individual—not on the basis of race").

349 Case, *Constitutional Sex Discrimination Law*, *supra* note 61, at 1449–50 (summarizing the Court's early sex discrimination cases as allowing only those sex classifications that "embodied a proxy that was overwhelmingly, though not perfectly, accurate"); *see also* FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 152 (2003) (interpreting *VMI* to hold that "overbroad" means "essentially all nonuniversal generalizations about differences between men and women").

350 Case, *Constitutional Sex Discrimination Law*, *supra* note 61, at 1449.

351 *See, e.g.*, SCHAUER, *supra* note 349, at 152 (explaining that equal protection law "condemn[s] even statistically relevant generalizations").

352 *See supra* note 340. This was likely true, whether the reasons were indeed "developmental differences," as Virginia's expert contended, or the perception that the Virginia Military Institute was hostile to women. *VMI*, 518 U.S. at 541.

it is implausible to imagine that the same mix of viewpoints on social and political issues would be found in an all-white student body, an all nonwhite one, and a racially diverse one. The primary problem with racial and gender stereotypes is not that they are inaccurate and therefore fail to achieve institutional goals.

Rather, the problem is that stereotypes are official expectations of group-based conformity inconsistent with the autonomy of every person to define their own character.[353] As the Court explained in *SFFA*: "[I]t demeans the *dignity* and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[354] The Court has said the same of sex classifications that set different expectations for husbands and wives: "These classifications denied the equal dignity of men and women."[355] To be sure, these classifications made husbands heads of families and wives subordinate.[356] But by "dignity," the Court does not mean only "subordination" in the sense of perpetuating the second-class status of a historically marginalized group.[357] Its concern extends to those at the privileged ends of social hierarchies such as race and gender. Nor could the Court be making any sort of empirical claim about psychological harms of classifications, which would depend on context.[358]

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[353] I reiterate that this individualistic account is the Supreme Court's, not mine. But its results may, in some cases, be consistent with a thicker account of the problem of sex stereotyping. *See, e.g.*, Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1815–16 (1990) (explaining the problem of sex stereotyping in "organizational structures and cultures in the workplace" that disempower men and women from "aspiring to and succeeding in" jobs traditionally occupied by the other sex).

[354] *SFFA*, 143 S. Ct. at 2170 (emphasis added) (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)).

[355] *Obergefell*, 576 U.S. at 673–74 ("Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage."). The Court has described the harm of sex stereotypes with terms like "denigration." *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975) (holding that even a well-founded, sex-based "generalization" "cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support").

[356] *Obergefell*, 576 U.S. at 674 (quoting GA. CODE ANN. § 53-501 (1935)):

> One State's law, for example, provided in 1971 that "the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit."

[357] *See, e.g.*, Fiss, *supra* note 236, at 157.

[358] *See* Huq, *supra* note 25, at 1254 ("Not all members of the polity feel demeaned when a racial, ethnic, or religious classification is deployed. Some, to the contrary, feel

Rather, the concern with dignity is fundamentally about whether state action respects individual autonomy. As Professor Benjamin Eidelson has explained, the argument here is one from principles of "individuality"—"race-based differential treatment is at odds with proper respect for a person's standing *as* a person, because it treats her as a mere instance of an unchosen racial type instead."[359] In other words, "race-based state actions show a fundamental kind of disrespect for each person's standing as an autonomous, self-defining individual."[360] In the context of gender, the Supreme Court's antistereotyping principle abhors state action that insists that men and women conform to gender roles, rather than defining their personalities for themselves.[361] Professor Mary Anne Case has summarized: "[T]hanks in no small part to Ginsburg, the Supreme Court now sees legally enforced fixed sex roles, in marriage and elsewhere, as a threat to the full dignity and personhood of both men and women."[362]

This account is affirmed by *SFFA*'s reiteration that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a *free people* whose institutions are founded upon the doctrine of equality."[363] Social orders based on race and sex offend a free people not just because they subordinate some groups to others, but also because they assign social roles arbitrarily, disregarding and limiting an individual's freedom to chart their own life's course.[364] The Court has struck down sex

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immense pride. . . . Where it is a source of identification, belonging, and self-respect, such labels have a range of use beyond disparagement.").

359 Eidelson, *Respect, Individualism*, *supra* note 25, at 1603 (emphasis in original).

360 *Id.*; *see id.* at 1606 (arguing that "'treating people as individuals' is not just a slogan for, or otherwise synonymous with, colorblindness; rather, it is a recognizable moral norm with distinct, if uncertain, content" and referring to antecedents of this idea in the liberal theories of philosophers Ronald Dworkin and Immanuel Kant). Eidelson has argued, however, contra *SFFA*, that "in a society characterized by racial bias, attending to race will often be necessary to treating a person respectfully as an individual—because race will mediate evidential connections between her record of choices or achievements and what the Court calls 'her own essential qualities.'" *Id.* at 1607.

361 Hellman, *Two Concepts of Discrimination*, *supra* note 267, at 920 ("The antistereotyping principle found in sex discrimination cases rests on the view that each person (male or female) has an independent, noncomparative right to define his or her gender identity for him or herself.").

362 Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1207 (2010) [hereinafter Case, *What Feminists Have to Lose*].

363 *SFFA*, 143 S. Ct. at 2162 (emphasis added) (quoting *Rice*, 528 U.S. at 517).

364 Professor Case explained:

> Imagine, for example, a society with two castes, not upper and lower, not Brahmin and untouchable, but priest and warrior. The two castes are equal in status, but radically different in role. Those born into the priest caste are limited

classifications with origins in the stereotypical view that "the female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[365] It has held that heightened scrutiny must be "applied free of fixed notions concerning the roles and abilities of males and females."[366] Women cannot be prohibited from choosing occupations like bartending on the assumption that the job is fraught with dangers they cannot handle on their own.[367] And neither can men be excluded from the job of nursing on the assumption that it is work better reserved for women.[368]

Transgender rights claims take aim at compulsory sex roles as well, extending the argument to government action that enforces fixed assignments of all individuals to "male" and "female" categories at birth.[369] Scholars of transgender history and politics have elaborated on these principles.[370] As historian Susan Stryker has said, while "[b]odily differences are real, and they set us on different trajectories in life," those differences "need not determine everything about us," and people should be able to "take meaningful actions to change our paths, including reassigning ourselves."[371] And in the words of political theorist Paisley Currah, legal assignments of transgender people to categories based on assumptions about their biology fail to "celebrate[ ] individuals as authors of their own lives."[372] These claims resonate

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> to the role of priest even if they would rather fight than pray, and vice versa. Is such a division consistent with the American Constitution? I do not think so.

Case, *Constitutional Sex Discrimination Law*, *supra* note 61, at 1476.

365 Stanton v. Stanton, 421 U.S. 7, 14–15 (1975).

366 *Hogan*, 458 U.S. at 724–25.

367 *Id.* at 725 n.10 (discussing *Goesaert*, 335 U.S. at 466).

368 *Id.* at 725; *see also id.* at 729 ("[Mississippi University for Women's] policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job.").

369 *See, e.g.*, LESLIE FEINBERG, TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO RUPAUL, at xi (1996) (discussing arguments on behalf of "diverse communities" of people asserting "the right of each individual to define themselves" with respect to gender); *id.* at 166 (appending the International Bill of Gender Rights adopted in 1995 by the International Conference on Transgender Law and Employment Policy, which declared: "It is fundamental that individuals have the right to define, and to redefine as their lives unfold, their own gender identities, without regard to chromosomal sex, genitalia, assigned birth sex, or initial gender role").

370 I have discussed these arguments previously. Clarke, *Sex Assigned at Birth*, *supra* note 53, at 1860–64 (collecting arguments for transgender rights invoking autonomy and equality).

371 SUSAN STRYKER, TRANSGENDER HISTORY: THE ROOTS OF TODAY'S REVOLUTION 12 (2d ed. 2017).

372 Paisley Currah, *The Transgender Rights Imaginary*, 4 GEO. J. GENDER & L. 705, 718 (2003) (arguing against the theoretical conflict between legal claims seeking

with the Court's critical approach to state-enforced stereotyping as a matter of dignity and respect for individual autonomy.

2. Fair distributions.

To add injury to insult, racial and sex classifications are generally unfair bases for imposing burdens or denying benefits, or opportunities to compete for benefits. This is a problem of material rather than dignitary harm. Thus, the Court in *SFFA* reasoned that it was impermissible for universities to use race as a "plus factor" for some students, because, in a "zero-sum" situation,[373] that would mean, by necessity, that race would be a minus factor for others.[374] *SFFA* borrowed a statement of principle from an advocate in *Brown v. Board of Education*[375]: "[N]o State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens."[376] This points to another theme of the Roberts Court's equal protection jurisprudence: that distributing opportunities based on traits like race and sex is unfair because individuals are not responsible for those traits.[377]

Prior to *SFFA*, the Court had articulated a distinction between permissible uses of race in admissions programs "as only one factor among many" and impermissible reliance on race in a "mechanical" way that fails to give the circumstances of each case

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reclassification for transgender people and disestablishment of regimes distributing resources on the basis of sex).

373 *SFFA*, 143 S. Ct. at 2169.

374 *Id.* at 2165. Although the Court emphasized that the universities "acknowledge race is determinative for at least some—if not many—of the students they admit," *id.* at 2169, the number of affected students is immaterial. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 734 (2007) (plurality opinion) (striking down a racial classification that had "only a minimal effect on the assignment of students" and noting "the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications").

375 347 U.S. 483 (1954).

376 *SFFA*, 143 S. Ct. at 2160 (quoting Transcript of Oral Argument at 7, *Brown*, 347 U.S. 483 (No. 8)).

377 I would not construct an ideal equal protection theory around this value, and I have argued considerations of immutability cannot limit the text of antidiscrimination statutes. *See* Clarke, *Against Immutability*, *supra* note 206, at 9–10. For another critical perspective, see Angela Onwuachi-Willig, *Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192, 202 (2023) (arguing that the *SFFA* opinion "reveals an unawareness about the unearned advantages that may come to white individuals simply as a result of their race in the admissions process"). But my project here is not to construct my own ideal theory of equal protection.

individualized consideration.[378] By contrast, *SFFA* calls into question any use of race as a factor when opportunities are limited. The problem with race as a "minus" in an admissions system is that it "unduly harm[s] nonminority applicants" who are "innocent persons competing for the benefit."[379] Although the universities administering affirmative action justified their plans as furthering the interest in diversity, the reference to "innocence" suggests the Court might be toggling between taking the asserted diversity interest at face value and viewing it as camouflage for another aim: "remedying . . . the effects of 'societal discrimination.'"[380] In his concurrence, Justice Clarence Thomas asserted that the majority saw the universities' diversity arguments "for what they are: a remedial rationale in disguise."[381]

Unlike affirmative action as a remedy for an institution's own discrimination, which is permitted,[382] under the Court's jurisprudence, remedying societal discrimination cannot justify affirmative action. This is because the Court conceives of affirmative action as constrained by principles of corrective justice, which limit relief to discrete wrongs proximately caused by one party against another.[383] On this topic, *SFFA* quoted Justice Lewis Powell's influential view that "societal discrimination" is "an amorphous concept of injury that may be ageless in its reach into the past."[384] Whatever might be said of the merits of racial redistribution, on this principle, universities cannot impose the costs of that project on white and Asian students passed over for admission.[385] Justice

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[378] *See, e.g.*, *Parents Involved*, 551 U.S. at 789, 793 (Kennedy, J., concurring) (distinguishing the use of race as a "mechanical" tiebreaking factor for school placement from a process that would consider "a whole range of [student] talents and school needs with race as just one consideration" (discussing *Grutter*, 539 U.S. at 341)). Justice Anthony Kennedy provided the fifth vote and controlling opinion in *Parents Involved*.

[379] *SFFA*, 143 S. Ct. at 2165 (quoting *Grutter*, 539 U.S. at 341). Justice Thomas put the point more pugnaciously: "Harvard and UNC ask us to blind ourselves to the burdens imposed on the millions of innocent applicants denied admission because of their membership in a currently disfavored race." *Id.* at 2193 (Thomas, J., concurring).

[380] *Id.* at 2163 (majority opinion) (quoting *Bakke*, 438 U.S. at 307 (Powell, J.)).

[381] *Id.* at 2192 (Thomas, J., concurring).

[382] *Id.* at 2162 (majority opinion) (stating that "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" is a "compelling interest[ ]").

[383] *See, e.g.*, IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE 159–60 (2000) (discussing Justice Lewis Powell's view that "[a]ffirmative action is constitutional . . . when the discrimination being remedied is specific, identifiable, and broadly institutional" as an application of principles of corrective justice).

[384] *SFFA*, 143 S. Ct. at 2173 (quoting *Bakke*, 438 U.S. at 307 (Powell, J.)).

[385] *Id.* (noting that societal discrimination cannot "justify a [racial] classification that imposes disadvantages upon persons . . . who bear no responsibility for whatever harm the beneficiaries of the [race-based] admissions program are thought to have suffered"

Thomas's concurrence articulated this popular sentiment: "Today's 17-year-olds, after all, did not live through the Jim Crow era, enact or enforce segregation laws, or take any action to oppress or enslave the victims of the past."[386]

This concern is a variation on the theme of individual responsibility, which is sometimes mentioned in the Court's equal protection jurisprudence in terms of "immutability."[387] The Court's plurality opinion in *Frontiero v. Richardson*, which would have applied strict scrutiny to sex classifications, reasoned:

> [S]ince 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."[388]

Frontiero's quotation is from *Weber v. Aetna Casualty & Surety Co.*,[389] a case about illegitimacy, a classification that would later be promoted to quasi-suspect status, like sex.[390] Justice Powell, the author of the majority opinion in *Weber*, observed that "[t]he status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust."[391] Due to the social mores of the time, "hapless children" born to unwed parents often "suffered" "social

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(quoting *Bakke*, 438 U.S. at 310 (Powell, J.))). *But see* Julie Suk, *Discrimination and Affirmative Action*, *in* ROUTLEDGE HANDBOOK OF THE ETHICS OF DISCRIMINATION 394, 400, 404 (Kasper Lippert-Rasmussen ed., 2017) (arguing the harm of affirmative action is "morally analogous to takings, not to discrimination").

386 *SFFA*, 143 S. Ct. at 2200 (Thomas, J., concurring).

387 *See* Clarke, *Against Immutability*, *supra* note 206, at 14–18 (discussing the Supreme Court's theory of "immutability" and the "moral theories of egalitarianism that might support it").

388 *Frontiero*, 411 U.S. at 686 (plurality opinion) (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)). Sex is different from other immutable characteristics that the Constitution gives no special scrutiny to, such as "intelligence or physical disability," because it "frequently bears no relation to ability to perform or contribute to society," and sex classifications "often have the effect of invidiously relegating the entire class of females to inferior legal status." *Id.* at 686–87. The *Frontiero* plurality also discussed the nation's "long and unfortunate history of sex discrimination," *id.* at 684; "the high visibility of the sex characteristic," *id.* at 686; the continued, "pervasive" nature of sex discrimination, *id.*; and Congress's conclusion "that classifications based upon sex are inherently invidious," *Frontiero*, 411 U.S. at 687–88.

389 406 U.S. 164 (1972).

390 *See supra* note 78 and accompanying text.

391 *Weber*, 406 U.S. at 175.

opprobrium."[392] While the Court was "powerless" to bring about change to this cruel social norm, it was able to "strike down discriminatory laws relating to status of birth."[393] Illegitimacy and sex, as statuses assigned at birth that bear no relationship to individual responsibility, but have historically been treated as though they do, are subjected to heightened scrutiny.

Equal protection doctrine, however, does not embrace any principle that would level out all advantages at birth, or require fairness as a general matter, in government benefits programs, college admissions, or otherwise.[394] Importantly, the Court's emphasis in *SFFA* is on a certain vision of individual autonomy—not equality, neutrality, or merit in the abstract.[395] If abstract equality were the touchstone, universities would not be permitted to give a boost to, for example, children of donors and legacies.[396] Yet, *SFFA* is clear that universities may treat students differently on the bases of myriad considerations, such as whether "they are from a city or from a suburb, or . . . they play the violin poorly or well."[397] The reason universities may not classify students according to race is because it is "a criterion barred to the Government by history and the Constitution."[398]

Sex and illegitimacy are also such criteria.[399] As the Court put it in its most recent case on sex classifications, the problem with "overbroad generalizations" about sex is that they "have a constraining impact, descriptive though they may be of the way many people still order their lives."[400] The Court has described the infringements on women's autonomy with the metaphor of a "cage": how laws based in an "attitude of 'romantic paternalism' . . . put

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[392] *Id.* at 176.

[393] *Id.* at 175–76.

[394] Any such thing would be impossible without radical and authoritarian change to the family. *See, e.g.*, JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY 50 (2014) ("Parental advantages make the principle of fair life chances impossible to achieve.").

[395] *Cf.* Eidelson, *Respect, Individualism*, *supra* note 25, at 1623 (discussing strands of Justice Powell's logic in his *Bakke* concurrence that reflect a "requirement formally rooted in claims about accuracy, fairness, and instrumental rationality" and contrasting them with "the larger thrust of the Court's case law over the past few decades").

[396] *See SFFA*, 143 S. Ct. at 2215 (Gorsuch, J., concurring) (noting that "athletes and the children of donors, alumni, and faculty—groups that together 'make up less than 5% of applicants to Harvard'—constitute 'around 30% of the applicants admitted each year'" (quoting Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 171 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141)).

[397] *Id.* at 2170 (majority opinion).

[398] *Id.* (quoting *Miller*, 515 U.S. at 911–12).

[399] *See supra* notes 74–78 and accompanying text.

[400] *Morales-Santana*, 137 S. Ct. at 1692–93.

women, not on a pedestal, but in a cage."[401] Women and men are both harmed. To distribute benefits "in reliance on '[s]tereotypes about women's domestic roles' . . . may 'creat[e] a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver.' Correspondingly, such laws may disserve men who exercise responsibility for raising their children."[402] The distribution of benefits and burdens based on sex roles, assigned at birth, threatens the autonomy of every individual to determine how to live their own life, in terms of career, family, relationships, and, for transgender people, their very identities, which they may or may not define according to conventional binary categories.[403]

Thus, classifications based on sex and illegitimacy, like those based on race, national origin, and alienage, are suspect because they have historically been the bases for troubling infringements on individual autonomy.

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Rather than the mere formalistic insistence that the Constitution requires literal colorblindness, the Supreme Court has articulated a set of principles related to individual autonomy that undergird much of its recent equal protection jurisprudence. The Court regards racial and gender stereotypes as insults to dignity in that they fail to respect every person's autonomous choices to develop their own personality and character. While the Equal Protection Clause does not require that every individual, at all times, be judged on their own merits, it does prohibit gender and racial stereotypes because of their long history as pervasive barriers to individual autonomy. The Supreme Court regards distributions of benefits, burdens, and opportunities based on race and sex to be presumptively unfair, as race and sex are not characteristics that bear any relationship to an individual's autonomous choices. Thus, this theory is not about protection of groups; it is strongly suspicious of sex- and race- based social divisions. "Equal

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401 J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 133 (1994) (quoting *Frontiero*, 411 U.S. at 684 (plurality opinion)).

402 *Morales-Santana*, 137 S. Ct. at 1693 (quoting Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 736 (2003)).

403 *See, e.g.*, Clarke, *They, Them, and Theirs*, *supra* note 52, at 905–10 (discussing the diverse array of gender identities outside binary categories).

Protection," on this theory, is trained on the "*person*,"[404] and the cases protect the right to be unorthodox: to defy race- and sex-based generalizations.

B. Justifying Classifications as Triggers

The principles that run through the Roberts Court's equal protection cases help explain why classifications based on race and sex, without more, are triggers for judicial oversight of decision-making by the political branches, state governments, and other actors that must comply with the Equal Protection Clause. Racial and sex classifications trigger heightened scrutiny because facial classifications overtly express the salience of race and sex characteristics to official decision-making, which threatens individual autonomy. This is so, even absent any particular intent, negative effects, comparative mistreatment at the group level, or individual harm. Additionally, racial and sex classifications are red flags that signal that something was amiss in the decision-making process. The Supreme Court has made clear that racial and sex classifications therefore trigger heightened scrutiny—as a rule, not a standard. It is not for lower court judges to assess, based on their own normative sensibilities, whether the "harms" of sex classifications are serious enough to necessitate heightened review.[405] The Constitution requires heightened scrutiny in all instances in which sex factors in. Whether a sex classification is normatively justified is a matter to be tested on the back end of heightened scrutiny. Allowing judges to pick and choose among sex classifications that trigger heightened scrutiny leads to decision-making that is less thorough, accountable, and legitimate.

1. Dangers.

On the Court's anticlassification theory, judicial supervision is required due to the harms of racial and sex classifications. In *SFFA*, the Court explained that it had held "all 'racial classifications, however compelling their goals,'" were "dangerous."[406] The

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404 *See, e.g.*, *Croson*, 488 U.S. at 493 (plurality opinion) (adding emphasis to "any person" in quoting the Equal Protection Clause's command that "[n]o State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws").

405 *Contra Skrmetti*, 83 F.4th at 484 (proposing that the "harms" of sex classifications "and the necessity of heightened review[ ] will not be present every time that sex factors into a government decision").

406 *SFFA*, 143 S. Ct. at 2165 (quoting *Grutter*, 539 U.S. at 342).

Roberts Court has also reiterated that all sex classifications require heightened review.[407] This is because of the "long and unfortunate history of sex discrimination" carried out through de jure sex distinctions.[408] All classifications trigger heightened scrutiny because they threaten to disrespect individual autonomy. The Court has sometimes described the problems with classifications in probabilistic language, suggesting it regards the harms as risks that classifications will have certain social consequences. At other times, its opinions are consistent with an "expressive" theory that regards classifications as problems due to the principles they express, regardless of "the causal consequences of the laws" or "material injuries to specific individuals."[409] On either theory of the harm, as a rule, classifications trigger heightened scrutiny.

To say a classification is "facial" is to say it is transparent: in the very text of the rule, undenied, and clear to everyone. Oklahoma allowed young women, but not young men, to buy watered-down beer.[410] Harvard and UNC openly considered race as a factor in admissions.[411] Tennessee defines sex as a status determined at birth, and bars specific hormones and surgical treatments if a patient's gender identity is inconsistent with that sex.[412] These classifications are official in that they are imbued with state authority. Facial classifications are uniquely harmful because they constitute official endorsement of assumptions of racial and sexual differences—assumptions that may disrespect individual autonomy—particularly when backed by the state's power and authority. Because of the history of racial and sex classifications, this risk attends even banal classifications.[413] For this reason, when a law classifies, courts must carefully examine legislative purposes and the fit between means and ends.

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407 *See, e.g.*, *Morales-Santana*, 137 S. Ct. 1689–90 (discussing the Court's "post-1970 decisions" on "heightened review" for all sex classifications).

408 *J.E.B.*, 511 U.S. at 136 (quoting *Frontiero*, 411 U.S. at 684 (plurality opinion)) (explaining that it is "history which warrants the heightened scrutiny we afford all gender-based classifications today").

409 Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1542 (2000); *see also* Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 3 (2000) (advancing a theory of equal protection that "calls attention to what a law expresses . . . or what meaning it conveys").

410 *Craig*, 429 U.S. at 192.

411 *See SFFA*, 143 S. Ct. at 2154.

412 TENN. CODE ANN. § 68-33-103(a)(1)–(2); *id.* § 68-33-102(9).

413 *See, e.g.*, *Craig*, 429 U.S. at 197–99.

Equal protection doctrine has long been concerned with the message that official actions based on race convey to citizens.[414] As Professors Elizbeth Anderson and Richard Pildes have explained, in the years after *Brown*, for example, the Court struck down numerous instances of racial segregation in public spaces, not because of evidence that separate-but-equal forms of segregation caused harm to individuals or had detrimental social consequences, but rather because of the fact of segregation branded a racial group as inferior.[415] Consistent with this understanding, the *SFFA* decision devotes three pages to listing race-based classifications struck down from 1954 to 1984.[416] As the Court put it in *SFFA*, its cases recognize a principle: that the "inevitable truth of the Fourteenth Amendment" is that "[s]eparate cannot be equal."[417]

As should be clear from *SFFA*, the Supreme Court does not regard only messages of racial or sexual inferiority to be constitutionally problematic.[418] Even the "too cavalier" use of racial classifications raises constitutional problems.[419] In an early case on classifications with remedial justifications, Justice William Brennan explained: "[A]n explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs."[420] History also imbues sex classifications with dangerous

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414 Anderson & Pildes, *supra* note 409, at 1541; Siegel, *Equality Divided*, *supra* note 45, at 46 (discussing how, in the Court's affirmative-action cases, beginning with Justice Powell's opinion in *Bakke*, "'appearance'—that is, how citizens perceive government action—matters" (quoting Bakke, 438 U.S. at 319 n.53 (Powell, J.))).

415 Anderson & Pildes, *supra* note 409, at 1543 (explaining that "[i]n the series of summary affirmances after *Brown*, the Court held segregation unconstitutional in every public space, including parks, swimming pools, buses, beaches, and golf courses, without any purported proof of the types of cultural or personal effects gestured at in *Brown*'s famous" statement "that racial segregation 'generates a feeling of inferiority' in black children's minds" (quoting *Brown*, 347 U.S. at 495)). In these contexts, harms to individuals are irrelevant. *Id.* at 1543 ("The State is not justified in heaping indignities on people just because they can 'take it.'").

416 *SFFA*, 143 S. Ct. at 2159–62.

417 *Id.* at 2160 ("[E]ven racial distinctions that were argued to have no palpable effect worked to subordinate the afflicted students."). *SFFA* quoted *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637, 640–42 (1950), for the proposition that policies of segregation "signify that the State . . . sets [petitioner] apart from the other students." *SFFA*, 143 S. Ct. at 2160 (alteration in original).

418 Anderson & Pildes, *supra* note 409, at 1537–38 (explaining that since 1975, the Supreme Court has recognized "expressive concerns with the use of race" other than "issues of stigma and second class citizenship" that have received little scholarly attention).

419 *Id.* at 1538–39.

420 United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part) (citing John Kaplan, *Equal Justice in an Unequal World:*

meanings and cautions against their cavalier use. In *Reed v. Reed*,[421] a 1971 case, the Supreme Court rejected the state's theory that preferring men over women as administrators of estates was simply a convenient way to avoid family squabbles,[422] akin to a coin flip; later cases clarified all sex classifications are subject to heightened scrutiny, even those with ostensibly neutral purposes and social meanings.[423]

The evolution of the Supreme Court's affirmative-action jurisprudence evinces deep concern with what is expressed by the use of racial classification as a "means" to achieve ends such as integration.[424] In the 2007 case *Parents Involved in Community Schools v. Seattle School District No. 1*,[425] the Court held that school districts could not use race as a tiebreaking factor in assigning students to schools.[426] In his controlling opinion in that case, Justice Anthony Kennedy objected to "a classification that tells each student he or she is to be defined by race," "official labels proclaiming the race of all persons in a broad class of citizens," and the "[r]eduction of an individual to an assigned racial identity."[427] He faulted the school policies at issue for "[a]ssigning to each student a personal designation according to a crude system of individual racial classifications" that lumped all students into two broad categories: white and nonwhite.[428] In *SFFA*, the Court endorsed Justice Kennedy's understanding of the harms of racial classifications, as insults to individual dignity, and it faulted the universities for their uses of blunt categories, but it departed from his view that such classifications could be justified

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Equality for the Negro—The Problem of Special Treatment, 61 NW. U. L. REV. 363, 379–80 (1966)); *see also* Fullilove v. Klutznick, 448 U.S. 448, 532 (1980) (Stewart, J., dissenting):

> [B]y making race a relevant criterion, . . . the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race—rather than according to merit or ability—and that people can, and perhaps should, view themselves and others in terms of their racial characteristics.

421 404 U.S. 71 (1971).

422 *Id.* at 77.

423 *See supra* note 230 (collecting cases).

424 Siegel, *Equality Divided*, *supra* note 45, at 45 (describing Justice Kennedy's concerns in *Parents Involved* as "intently focused on the beliefs about race that citizens internalize in their interactions with the state").

425 551 U.S. 701 (2007).

426 *Id.* at 790 (Kennedy, J., concurring).

427 *Id.* at 782, 789, 795.

428 *Id.* at 789.

if race was but one component of an individualized evaluation.[429] Regardless of whether some types of racial classifications might be justified, all facial classifications, whether plus factors, minus factors, soft components of holistic analyses, tiebreakers, quotas, set asides, or otherwise, have long required heightened scrutiny.[430]

The Court's sex discrimination cases also highlight ways that classifications express harmful messages about sex roles, whether those injured are women or men. In *Orr v. Orr*, for example, a 1979 case striking down an Alabama statute that required husbands but not wives to pay alimony, the Court held that "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection."[431] The Court described the effects of sex classifications as "self-fulfilling prophec[ies],"[432] as when a policy excluding men from nursing school "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."[433]

Facial classifications invariably express the salience of race and sex for official purposes, characteristics which have historically pervaded the statute books, imposing limitations on individual autonomy and opportunity.[434] Some may be justified. But all trigger heightened scrutiny.

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[429] *Compare id.* at 790 (concluding it would have been permissible for schools to conduct "a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component"), *with SFFA*, 143 S. Ct. at 2165 (rejecting the use of race as a "plus" because every plus factor for some students in a zero-sum game is a minus factor for other students).

[430] *See, e.g.*, Siegel, *Equality Divided*, *supra* note 45, at 29–46 (discussing the evolution of the Court's justifications for strict scrutiny for remedial race-based classifications, from an interest in protecting white majority group members, to concerns about harms of stigma for Black beneficiaries, to the Roberts Court's emphasis on abstract "individual dignity interests and common goods in avoiding balkanization").

[431] *Orr*, 440 U.S. at 283; *see also J.E.B.*, 511 U.S. at 140 ("When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women.").

[432] *See Hogan*, 458 U.S. at 730.

[433] *Id.*

[434] *See, e.g.*, *Frontiero*, 411 U.S. at 685 (plurality opinion) (discussing how, as a result of discriminatory notions, "our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, 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").

2. Distrust.

A second reason all racial and sex classifications trigger heightened scrutiny is that, when decision-makers choose to openly employ these criteria, it signals that something is amiss with the decision-making process.[435] American history instructs that racial and sex classifications are too often unsound, reflecting prejudice, stereotypes, unfair generalizations, and other illegitimate motives. For this reason, the Fourteenth Amendment requires that courts suspend normal deference.

The Court has articulated its reasons for suspension of deference in a series of cases, on both racial and sex classifications, for decades. For example, in a 1975 case, *Weinberger v. Wiesenfeld*,[436] a widower brought a challenge to a provision of the Social Security Act providing benefits to widows with children, but not widowers with children.[437] In that case, the Court refused to defer to the government's assertion that the law was "reasonably designed to offset the adverse economic situation of women" in light of discrimination against women in the workplace.[438] It held that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[439] The reason, as Justice Brennan argued in an earlier case, is that "gender-based classifications too often have been inexcusably utilized to stereotype and stigmatize politically powerless segments of society."[440] Professor Michael Klarman has explained the theory underlying judicial review here as related to "legislative inputs": it "directs judicial review towards purging legislative decisionmaking of

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435 Klarman, *supra* note 315, at 311 (explaining that the theory of judicial review running through the Court's modern equal protection jurisprudence is "the notion that certain characteristics, of which race is the prototype, should be simply irrelevant to all, or almost all, governmental decisionmaking, regardless of whether groups bearing those characteristics are capable of protecting themselves politically").

436 420 U.S. 636 (1975).

437 *Id.* at 653.

438 *Id.* at 646 (quotation marks omitted) (quoting Brief for Appellant at 14, *Weinberger*, 420 U.S. 636 (No. 73-1892)).

439 *Id.* at 648. The Court concluded the law was meant to "enabl[e] the surviving parent to remain at home to care for a child" and that it was therefore irrational to exclude widowers with minor children. *Id.* at 651. Other sex classification cases applying this rule include *VMI*, 518 U.S. at 535; *Hogan*, 458 U.S. at 728; and *Califano v. Goldfarb*, 430 U.S. 199, 212 (1977).

440 Kahn v. Shevin, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting). *Kahn* upheld a $500 Florida tax exemption for widows, but not widowers, justified as a remedy for discrimination against women. *Id.* at 351 (majority opinion).

certain considerations."[441] Because the Constitution forbids legislation "contaminated by stereotypical thinking"[442] about sex roles, courts must scrutinize justifications for sex classifications. They cannot take a decision-maker's assertions of legitimate purposes for granted.

The Court has elaborated on this concept in its race cases, in which it has held that judicial review is required because "[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category."[443] In *City of Richmond v. J.A. Croson Co.*,[444] a 1989 case striking down an instance of race-based affirmative action, the Court explained that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race" and determine whether classifications are in fact "benign" or based in impermissible motives.[445] Because racial classification is "a highly suspect tool," it must serve a "compelling goal," and "the means chosen [must] 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."[446] For similar reasons, the Roberts Court refused to extend deference to the university-defendants in *SFFA*.[447] It rejected the dissent's suggestion that a lower standard of review apply as inconsistent with "fidelity to history."[448]

Racial and sex classifications have historically pointed to something amiss in the legislative process, and the Equal Protection Clause thus requires closer judicial oversight to determine whether that is the case.

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441 Klarman, *supra* note 315, at 284–85.

442 *Id.* at 308.

443 Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (holding that a family court could not deny child custody to a parent because of that parent's interracial relationship).

444 488 U.S. 469 (1989).

445 *Id.* at 493 (plurality opinion) ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."). This "smoking out" concern continues to apply after *SFFA*, because there remain permissible racial classifications, such as those that directly remedy an institution's own discrimination. *See, e.g.*, *SFFA*, 143 S. Ct. at 2167.

446 *Croson*, 488 U.S. at 493 (plurality opinion).

447 *SFFA*, 143 S. Ct. at 2168 (explaining "we have been unmistakably clear that any deference must exist 'within constitutionally prescribed limits,' and that 'deference does not imply abandonment or abdication of judicial review'" (quoting Miller-El v. Cockrell, 537 U.S. 322, 340 (2003))).

448 *SFFA*, 143 S. Ct. at 2168 n.5.

3. Legitimacy (and hydraulics).

A final argument for all classifications as triggers is perhaps uniquely applicable to heightened scrutiny with respect to sex. The argument is that a broad rule that all sex classifications trigger heightened scrutiny—regardless of intent, effects, comparisons, or causation—channels disputes over sex and gender from the front to the back end of heightened scrutiny. On the front end, courts engage in sterile, abstract, and formalistic debates about the definition of "discrimination." On the back end, state actors must articulate the important interests that justified their sex classifications, and courts must test them for fit between means and ends. To be sure, the back end is a set of standards, not hard constraints.[449] But from the perspective of judicial legitimacy, accountability, and transparency, decisions on the back end are preferable to logical parsing of the meaning of discrimination on the front end to exclude certain sex classifications from heightened scrutiny.

Whether a law counts as a facial classification and triggers heightened scrutiny is a relatively bright-line rule, and a broad one.[450] While judges may have difficulty identifying discriminatory intent[451] and effects,[452] facial classifications appear in texts. Textual analysis is an interpretive method familiar to judges, and it is unsurprising that anticlassification rules have risen to prominence alongside textualism.[453] Whether a law requires that individuals be classified by sex is not generally a hard-to-apply rule.[454]

It is a standard critique of legal formalism that abstract legal rules turn out, in many cases, to be indeterminate, leaving discretion for judges to pick winners and losers based on their own political, ideological, and other background beliefs.[455] Judges then

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449 *See supra* notes 108–09 and accompanying text.

450 Areas of indeterminacy pertain to whether traits linked to sex count as sex—questions not implicated in the transgender rights cases discussed in this Article. *See supra* note 203 and accompanying text.

451 *See, e.g.*, Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 539 (2016) (discussing doctrinal, conceptual, and normative difficulties with judicial efforts to identify forbidden intentions).

452 *See, e.g.*, Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 738–43 (2006).

453 *See* Clarke, *Sex Discrimination Formalism*, *supra* note 24, at 1770.

454 *See supra* Part I.B.1.

455 Clarke, *Sex Discrimination Formalism*, *supra* note 24, 1787–94 (collecting sources leveling this critique against sex discrimination law and offering further illustrations). Recent criticisms of formalistic reasoning in sex discrimination cases have focused on *Bostock*'s but-for causation rule and textualism. *See, e.g.*, Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 123 [hereinafter Franklin, *Living Textualism*]; Robin Dembroff,

point to hard rules as evidence that they were constrained by the law, denying accountability for their unforced moves, and rendering judicial decision-making less transparent and democratic.[456] One reason the Supreme Court's anticlassification jurisprudence, with respect to race, has been criticized as formalistic, to the extent of fetishizing classifications,[457] is the assumption that strict scrutiny is "fatal in fact"; in other words, that once the Court identifies a racial classification, it is automatically struck down.[458] Whatever the merits of this argument with respect to race, gender is subject to a lower form of heightened scrutiny. While the Supreme Court has found few laws that survive heightened scrutiny,[459] it has not applied that standard to strike down sex classifications in a rote or automatic way. *VMI*, for example, engaged in detail with the actual purposes for the state's sex segregation of military institutes, carefully analyzing the history and social context,[460] and testing the state's arguments that admitting women would "destroy" its "adversative method of training."[461]

Lower court cases concluding that certain sex classifications do not count as discrimination that would trigger heightened scrutiny are, however, rightly criticized as engaged in empty manipulation of formal categories while denying accountability for that manipulation. The *Skrmetti* majority opinion, for example, twists itself through formalistic distinctions, with repeated references to legitimate legislative intentions to protect minors,[462] the ban's lack of an impact on men or women as groups,[463] and the

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Issa Kohler-Hausmann & Elise Sugarman, *What Taylor Swift and Beyoncé Teach Us About Sex and Causes*, 169 U. PA. L. REV. ONLINE 1, 10, 11 (2020).

456 *Cf.* Franklin, *Living Textualism*, *supra* note 455, at 169 ("By denying that it was consulting anything other than the text of Title VII, the Court sought to position itself as a wholly independent and autonomous actor: outside politics, above democratic debate, and impervious to legal and social change.").

457 *See supra* note 37 and accompanying text.

458 *See, e.g.*, Haney-López, *Intentional Blindness*, *supra* note 316, at 1866 (discussing the Court's refusal to abide by Justice Marshall's "admonition . . . that '[remedial] programs should not be subjected to conventional strict scrutiny—scrutiny that is strict in theory, but fatal in fact.'" (quotation marks omitted) (quoting *Croson*, 488 U.S. at 552 (Marshall, J., dissenting))).

459 *See supra* notes 88–93 (collecting and discussing cases).

460 *VMI*, 518 U.S. at 536–40.

461 *Id.* at 540–46.

462 *See, e.g.*, *Skrmetti*, 83 F.4th at 480 ("A key distinction in the laws turns on age."); *id.* ("This reasonable approach—waiting to use potentially irreversible treatments until the child becomes an adult—also satisfies the deferential review."); *id.* at 480–81 (arguing that "by limiting access to sex-transition treatments to 'all' children" the law does not violate equal protection).

463 *See, e.g.*, *id.* at 482–83 (acknowledging that "[s]tates may not permit sex-based discrimination, we appreciate, on the assumption that men as a group and women as a

fact that both transgender boys and girls were denied the same puberty blocking drugs.[464] This all to avoid giving any critical scrutiny to the legislatures' purported important interest in protecting children.[465]

Perhaps, even if it had applied heightened scrutiny, the *Skrmetti* court would have reached the same result. Indeed, a cynic might argue that, if courts are required to apply heightened scrutiny to more forms of discrimination, there will be hydraulic effects on how they interpret what heightened scrutiny entails, leading to more cases surviving. My argument, however, is not about which standard achieves reliable results for one or another side. It is that heightened scrutiny directs judicial decision-making into more accountable channels than questions about the logical meaning of discrimination. Even a court applying heightened scrutiny in a perfunctory way,[466] as the Eleventh Circuit did in *Adams ex rel. Kasper v. School Board of St. Johns County*,[467] a case holding that sex-segregated restrooms met heightened scrutiny, had to articulate arguments about how excluding transgender boys from the boys' restroom protected the privacy expectations of certain "students and parents"[468] by reflecting their presumably legitimate beliefs that a transgender boy is, in reality, a "biological girl" who does not belong in the boys' restroom.[469] This argument,

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group would be disadvantaged to a similar degree," but nonetheless holding that this rule applies differently in race and sex cases to inoculate laws that "on their face treat both sexes equally, as these laws do"); *id.* at 480 (arguing that the law does not "prefer one sex over the other," "include one sex and exclude the other," or "bestow benefits or burdens based on sex").

464 *See, e.g.*, *Skrmetti*, 83 F.4th at 483 ("In contrast to cross-sex hormones, puberty blockers involve the same drug used equally by gender-transitioning boys and girls.").

465 *See id.* at 485–86 (distinguishing circuit precedents holding that it was a violation of the Equal Protection Clause to apply sex stereotypes to transgender people because those cases were about "claims about discrimination over dress or appearance" rather than "potentially irreversible medical procedures for a child"). The Sixth Circuit also suggested these decisions were incorrect but did not claim to overrule them. *Id.* at 485.

466 I criticize this case's sleight of hand with respect to the real policy to be subjected to heightened scrutiny *infra* Part III.D.1.

467 57 F.4th 791 (11th Cir. 2022).

468 *Adams*, 57 F.4th at 804, 806 ("[S]tudents and parents objected to any bathroom policy that would commingle the sexes out of privacy concerns, among others.").

469 *Id.* at 806–07 (rejecting the argument that the beliefs of community members that transgender boys are "girls" who upset the community's privacy expectations in the boys' restroom are akin to the views of segregationists in the 1960s that the presence of Black people in "white" restrooms upset the community's privacy expectations). To be sure, the Eleventh Circuit majority was forced to articulate its premises only as a result of probing arguments raised in a sharp dissent by Judge Jill Pryor. *Id.* at 806. But it would have had little reason to respond to these arguments, which pertained to the application of heightened scrutiny, if it had applied rational basis review.

at least, addresses the real stakes of the conflict and clarifies where the Eleventh Circuit stands ideologically.

Decisions about the shape of the trigger transmute controversies over sex and equal protection into arguments about dictionary definitions, logic puzzles, and slippery slopes[470]—mismatches for the principles at stake. This is, perhaps, why the *Skrmetti* majority was compelled to preface its legal analysis with a frank admission that it had made a pragmatic decision to refrain from involving itself in a controversy it regarded as too political.[471] The Court's equal protection jurisprudence, however, does not permit this sort of abstention.

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It bears repeating that my effort here is to distill a theory of equal protection from Roberts Court jurisprudence. I do not contend that this theory is the only possible interpretation of the Equal Protection Clause, that it is one best supported by the Constitution's text and history, or that it is the theory I would come up with if left to devise one based on my own political philosophy. I do not contend that antisubordination or other group-based theories and arguments had or have no role to play in Roberts Court jurisprudence—I contend only that they do not limit the rule that all sex classifications trigger heightened scrutiny. My argument, to be further elaborated below, is that if we take anticlassification theory seriously, there is no principled basis for failing to give heightened scrutiny to sex classifications that target transgender people.

Critics may fear that to take anticlassification seriously, as a theoretical matter, "legitimat[es]" that theory and eliminates the possibility of other visions of equal protection, such as those

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[470] *See, e.g.*, *Kadel*, 100 F.4th at 142 (declining to resolve controversies raised by the parties over questions such as "Is a procedure defined by the diagnosis it treats or simply by what happens in the operating room? Is removing a patient's breasts to treat cancer the same procedure as removing a patient's breasts to treat gender dysphoria?"). Such quandaries are endemic to this type of inquiry. *See, e.g.,* Clarke, *Sex Discrimination Formalism*, *supra* note 24, at 1787–90 (summarizing scholarship criticizing but-for tests as raising indeterminate questions); *id.* at 1791–94 (explaining how threshold similarly situated inquiries entail the determination of difficult normative questions but allow judges to evade responsibility for those determinations).

[471] *Skrmetti*, 83 F.4th at 471–72 (declining to offer any judicial input on the constitutionality of particular forms of regulation of transgender health care after reflecting that "[g]iven the high stakes of these nascent policy deliberations—the long-term health of children facing gender dysphoria—sound government usually benefits from more rather than less debate, more rather than less input, more rather than less consideration of fair-minded policy approaches").

focused on antisubordination.[472] But neglecting to advance anticlassification arguments for transgender rights will not persuade a 6–3 conservative Supreme Court to adopt antisubordination theories.[473] There is no reason judicial decisions[474] and scholarship that reveal the malleability of anticlassification theory and show how, if taken seriously, it should bend toward progressive projects, cannot coexist with critique of anticlassification principles and political projects directed at a radically different vision of equal protection.[475] To unpack the Supreme Court's anticlassification theory, and point out what it would mean to take it seriously, is not to legitimate that theory or eliminate space for critique.

III. AGAINST EXCEPTIONS TO ANTICLASSIFICATION RULES FOR SEX

The rule that *all* classifications trigger heightened scrutiny, regardless of their asserted purposes, functions, meanings, or effects, comes from the Supreme Court's interrelated sex and race cases. Sex defined as genitalia at birth[476] is like race defined as skin color—traits that should not inform decisions about an individual's character, personality, or choices. This rule is consistent with the overarching themes of the Roberts Court's equal protection jurisprudence: the right to define one's own life free of invidious stereotypes and fair distributions of opportunities. Classifications are suspect because they assert the official salience of group divisions in dangerous ways and signal that the legislative

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[472] *Cf.* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1334 (1988) (explaining the claim of critical legal scholars that "the extension of rights, although perhaps energizing political struggle or producing apparent victories in the short run, as ultimately legitimating the very racial inequality and oppression that such extension purports to remedy").

[473] *See, e.g.*, *SFFA*, 143 S. Ct. at 2185 (Thomas, J., concurring) (rejecting the "'antisubordination' view of the Fourteenth Amendment" on the ground that it "lacks any basis in the original meaning of the Fourteenth Amendment").

[474] *See, e.g.*, Corbitt v. Taylor, 513 F. Supp. 3d 1309, 1314 (M.D. Ala. 2021) (quoting Justice Clarence Thomas's views on the problems with state-enforced racial classifications in support of the rights of transgender plaintiffs to change the sex designations on their identity documents), *rev'd sub nom.* Corbitt v. Sec'y of Ala. L. Enf't Agency, 115 F.4th 1335 (11th Cir. 2024). Judge Myron H. Thompson, author of this opinion, is a Carter appointee and "champion of civil rights history" who has decided landmark cases on "desegregation, prison and voting systems, and women's rights." *Myron H. Thompson '69 B.A., '72 J.D.*, YALE 2022, https://perma.cc/VTX7-89SH.

[475] For an example, see generally MacKinnon & Crenshaw, *supra* note 36 (advocating a constitutional amendment).

[476] *See* Clarke, *Sex Assigned at Birth*, *supra* note 53, at 1848 (compiling state-law definitions of sex, many of which refer to the sex on the original birth certificate, which is determined based on genitalia at birth).

process has gone amiss. The only doctrinal difference between race and sex is that sex classifications have never been held to strict scrutiny.

What then could suggest to a court of appeals that not all sex classifications trigger heightened scrutiny?[477] Why would some set of sex classifications that lawmakers assert treat the sexes equally be exempt from heightened scrutiny designed to test that assertion and assess the fit between means and ends? In implicit acknowledgment that THCBs classify by sex, the Sixth Circuit asserted that the "regulation lacks any of the hallmarks of sex discrimination" and "does not trigger any traditional equal protection concerns."[478]

THCBs and other rules curtailing the rights of transgender people implicate the heartland of equal protection concern: these laws classify people based on the sex they were assigned at birth, and based on that classification, limit their autonomy to live in accord with their own personalities and characters, restrict their access to goods and opportunities, and constitute them as an outsider group.[479] Laws targeting transgender children treat them as "simply components of a . . . sexual . . . class,"[480] as "biological females" or "biological males" rather than individuals. They reflect "fixed notions concerning the roles and abilities of males and females"[481] and impose "a classification that tells each [child] he or she is to be defined by [sex assigned at birth]" rather than who that child, their parents, and their doctors say they are.[482] These laws impose a "crude system" that lumps all individuals into two broad categories[483]: "biological male" and "biological female." Whether healthcare, restroom, and other restrictions are justified because the people in question are minors, or due to the important interests of institutions or third parties, are matters to be carefully

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477 *See supra* note 6 (discussing *Skrmetti*, 83 F.4th at 483).

478 *Skrmetti*, 83 F.4th at 480.

479 *See, e.g.*, Kadel v. Folwell, 100 F.4th 122, 153 (4th Cir. 2024) (en banc) (holding that "conditioning access to these surgeries based on a patient's sex assigned at birth stems from gender stereotypes about how men or women should present"); *Skrmetti*, 83 F.4th at 499–500 (White, J., dissenting) (concluding that THCBs "condition the availability of procedures on a minor's conformity with societal expectations associated with the minor's assigned sex," specifically, "how society expects boys and girls to appear").

480 *SFFA*, 143 S. Ct. at 2172 (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)).

481 *Hogan*, 458 U.S. at 725.

482 *Cf. Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring) (critiquing systems that do this based on race).

483 *Id.* at 789.

scrutinized by courts. The principles that underly the Roberts Court's equal protection jurisprudence require nothing less.

This Part will collect and rebut potential reasons for treating sex classifications and transgender people as exceptions to anti-classification rules. The primary argument for treating sex as exceptional is based in biology. A second argument is about practical or slippery-slope consequences: the sense among some judges that sex classifications remain so ubiquitous in American law that it would be onerous to subject them all to heightened scrutiny. A third argument is that unlike racial classifications, sex does not occupy the same privileged place in our constitutional history and traditions. And a final set of arguments relate to transgender people—that the Equal Protection Clause has nothing to say about how states define who counts as male or female, and that heightened scrutiny does not apply to supposedly novel social groups like transgender people. None of these arguments warrant exceptions to the rule that all sex classifications trigger heightened scrutiny.

A. Biology?

Differences in the biology of race and sex do not and should not create an exception to the rule that all sex classifications trigger heightened scrutiny. There are three possible biology-based arguments: (1) that laws reflecting biology do not classify, but rather merely reflect classifications found in nature; (2) that unlike racial differences, sex differences are real and not socially constructed stereotypes, so it is presumptively legitimate to legislate based on sex differences; and (3) that classifications based on biological differences are not inherently demeaning, and so do not trigger equal protection concern. To accept any of these arguments would be to decimate constitutional sex discrimination law and the legacy of the late Justice Ruth Bader Ginsburg.

In its effort to evade heightened scrutiny, the Sixth Circuit attempted to relocate the sex classifications drawn by the Tennessee legislature outside the law, in nature, explaining that "[i]t is true that, by the nature of their biological sex, children seeking to transition use distinct hormones for distinct changes."[484] The court's appeal to nature seems to suggest that

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[484] *Skrmetti*, 83 F.4th at 481; *see also Eknes-Tucker*, 80 F.4th at 1229 ("To be sure, section 4(a)(1)–(3) restricts a specific course of medical treatment that, by the nature of things, only gender nonconforming individuals may receive.").

lawmakers are innocent of sex classification.[485] This explains the court's protest that "[t]he Acts mention the word 'sex,' true. But how could they not?"[486] It also explains the court's reference to "biological sex" as "a lasting feature of the human condition."[487] But nothing in nature required the Tennessee legislature to pass a law allowing only those people it defines as "male" at birth to take testosterone for purposes of affirming their gender identities. The texts of THCBs classify based on sex: they allow the same treatments (for example, puberty blockers or breast surgery) for the same purpose (gender affirmation) so long as the patient is affirming a gender identity the legislature has decided is consistent with the sex they were assigned at birth.[488] Whether nature justifies these laws is a question for the back end of heightened scrutiny.

The Sixth Circuit also asserted that, unlike racial differences, some "[gender] differences" are not "stereotypes."[489] Courts resisting transgender rights often assert something along the lines of the slogan that "biology is not a stereotype": the Eleventh Circuit, for example, held that a THCB "does not further any particular gender stereotype" and "simply reflects biological differences."[490] These judges are advancing a novel argument—that whether a

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[485] *Cf.* Elizabeth F. Emens, *Against Nature*, 52 NOMOS 293, 294 (2012) (discussing a genre of argument from "*guiltless nature*, the idea that nature need not be changed because it is no one's fault" (emphasis in original)); Hellman, *Sex, Causation, and Algorithms*, *supra* note 93, at 499 ("If [ ] the sex-based classification tracks biological differences, then nature rather than culture is the cause of the differences, or so one might think.").

A more sophisticated version of this argument might be that classifications that reflect biology, rather than a history of discrimination, do not compound injustice and therefore do not require heightened scrutiny. *See id.* at 506. But the Equal Protection Clause does not forbid mere compounding of injustices; it reflects a principle respecting individual autonomy against certain forms of classification that are suspect due to their history. *See supra* Part II.A.

[486] Skrmetti, 83 F.4th at 482.

[487] *Id.* at 481. For an argument that reliance on the category of "biological sex" in debates over transgender rights is a contested ideological position, not one required by science, see Clarke, *Sex Assigned at Birth*, *supra* note 53.

[488] *See supra* notes 111–13 and accompanying text (quoting the Tennessee statute).

[489] *Skrmetti*, 83 F.4th at 483. This is, I think, what the Sixth Circuit was getting at when it supported the point by citing *Nguyen* for the proposition that "[m]echanistic classification of all [gender] differences as stereotypes would operate to obscure those misconceptions and prejudices that are real." *Id.* (quoting *Nguyen*, 533 U.S. at 73). The Sixth Circuit failed to acknowledge that *Nguyen* applied heightened review. *Nguyen*, 533 U.S. at 60.

[490] *Eknes-Tucker*, 80 F.4th at 1229–30; *see also Kadel*, 100 F.4th at 175–76 (Richardson, J., dissenting) ("The different coverage accorded to treatments for different diagnoses is therefore based on medical judgment of biological reality, which is 'not a stereotype.'" (quoting *Nguyen*, 533 U.S. at 68)).

sex classification is based on a stereotype is tested on the front end rather than the back end of heightened scrutiny.[491]

To be sure, there are differences between racial and sex classifications that equal protection doctrine accounts for on the back end of the standard of review.[492] In a much-discussed passage in *VMI*, the Court noted that "supposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications," but "[p]hysical differences between men and women . . . are enduring."[493] Justice Ginsburg continued: "'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."[494] The Court did not elaborate on what "celebration" of "inherent differences" might entail, other than an oblique citation to a page from a Title VII case describing a law that required reinstatement of women after pregnancy leave.[495] It suggested that such a law, to the extent it qualified as a "sex classification,"[496] would survive heightened scrutiny insofar as it is "used to . . .

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[491] *Skrmetti*, 83 F.4th at 484 (interpreting Supreme Court precedent to establish that heightened scrutiny does not apply unless a sex classification "perpetuates invidious stereotypes or unfairly allocates benefits and burdens").

[492] *VMI*, 518 U.S. at 533 (noting that "[t]he heightened review standard our precedent establishes does not make sex a proscribed classification" because sex, unlike race, entails "[p]hysical differences").

[493] *Id.* (citing Loving v. Virginia, 388 U.S. 1 (1967)).

[494] *Id.*

[495] *Id.* (citing Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987)). Elsewhere, the *VMI* opinion suggested it would not be problematic for the Virginia Military Institute to make "alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs." *Id.* at 550 n.19. It did not specify whether alterations to living arrangements would have to be universal, i.e., giving each cadet their own private space, or separate barracks for women. With respect to physical-fitness standards, it suggested "adjustments" to standards due to differences in women's physiology would be "manageable." *Id.* It did not assert such differential standards would be exempt from heightened scrutiny, nor did it address how standards would apply to transgender individuals. In the context of women's sports, which are justified by average physiological differences between men and women, courts have applied heightened scrutiny. *See infra* note 526.

[496] *VMI*, 518 U.S. at 533. The Court had held that pregnancy classifications are not sex classifications, for purposes of the Equal Protection Clause and Title VII, which prompted Congress to amend Title VII to clarify that certain forms of pregnancy discrimination are sex discrimination, at least for purposes of that statute. *Cal. Fed. Sav. & Loan Ass'n*, 479 U.S. at 277 & n.5. Justice Ginsburg recognized a "paradox" here: "[U]nder the law the Burger Court created, pregnancy discrimination does not count as sex discrimination, yet pregnancy is, in some instances, deemed to be a fundamental difference between the sexes that gives the state a legitimate reason to treat men and women differently." Franklin, *Biological Warfare*, *supra* note 222, at 180. "[I]n both circumstances, the Court steps back and allows the state greater leeway to regulate because pregnancy is involved." *Id.* Pregnancy is not involved in the transgender rights cases discussed in this Article.

'promot[e] equal [ ] opportunity.'"[497] As Professor Cary Franklin has explained, this reference to pregnancy reflects that "reproductive biology" is "perhaps the sole remaining site of legally cognizable 'inherent differences' between the sexes."[498]

That does not mean that regulations, even constitutionally acceptable ones, should get a free pass because they reflect differences in reproductive biology—they must meet heightened scrutiny, as the rule at issue in *Nguyen*, which drew distinctions between men and women based on reproductive biology, did.[499] If courts were to decline to apply heightened scrutiny to any sex classification premised on biological difference, they would not be able to determine whether biological justifications are "acting as smokescreens, obscuring a set of social judgments inconsistent with contemporary equal protection principles."[500]

To give sex classifications based in biology a free pass would eviscerate a half century of equal protection law that protects the right to gender equality. Biology has long been a primary justification for the ideology of "separate spheres," which posits that women are destined for domesticity and men for public life.[501] Justice Joseph Bradley's concurrence in *Bradwell v. Illinois*,[502] an 1873 case justifying the exclusion of women from the practice of law, averred to "nature herself" as requiring "a wide difference in the respective spheres and destinies of man and woman."[503] The Sixth Circuit's reference to the "human condition" as authority for recognizing sex differences echoes Justice Bradley's reference to "the general constitution of things."[504] In 1908, the Supreme Court's decision in *Muller v. Oregon*[505] referred to "woman's physical structure" and "maternal functions" as justifications for laws

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497 *VMI*, 518 U.S. at 533.

498 Franklin, *Biological Warfare*, *supra note* 222, at 172 n.13 ("The Court has never specified exactly what counts as an 'inherent difference' between the sexes. But the only 'inherent differences' it has recognized, since it began to accord heightened scrutiny to sex-based state action, have involved reproductive biology."); *see also supra* notes 88–89.

499 *Nguyen*, 533 U.S. at 60–61. While the Court's divided opinion in *Michael M.* lacked clarity on the precise standard of review, the position that rational basis review applies did not have five votes. *See supra* note 89.

500 *See* Franklin, *Biological Warfare*, *supra* note 222, at 176.

501 *See, e.g.*, *id.* at 178; *see also* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 957 (1984) ("[H]istorically, biology provided a central justification for the subjugation of women.").

502 83 U.S. (16 Wall.) 130 (1872).

503 *Id.* at 141–42 (Bradley, J., concurring).

504 *Id.*

505 208 U.S. 412 (1908).

limiting her working hours.[506] In the 1970s, feminist advocates succeeded in persuading courts that the notion of "separate spheres" was based in ideology, not biology,[507] and that the Constitution required reform to "the legal structure that made biology destiny."[508]

One possible argument for the assertion that laws based in biological sex differences should not trigger heightened scrutiny could be that because these laws point to biological truths, rather than myths or overbroad generalizations about differences between men and women, they trigger no equal protection concerns. This argument makes mistakes of logic and constitutional principle. As a matter of logic, whether or not a law reflecting biological differences overgeneralizes depends on any number of contextual questions, such as the purpose the sex classification serves.[509] To be sure, on one "biological" definition of "female," only females are capable of pregnancy, but that does not mean females can therefore be excluded from the practice of law.[510] On one "biological" definition of "mothers," only mothers gestate children. But that does not mean immigration law may presume mothers confer U.S. citizenship on children if they have resided in the United States for one year while fathers only do so after five years of U.S. residency.[511] On one "biological" definition of "female," only females can "transition" using testosterone. That does not mean that females should be banned from taking testosterone.

Nor does it mean that a ban would not be based on a stereotype about what it means for "female" bodies to develop

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506 *Id.* at 421.

507 Franklin, *Biological Warfare*, *supra* note 222, at 178:

> Advocates of sex equality argued that much of what looked natural when it came to the sexes was actually socially constructed: it was not biology that required women to serve as the center of home and family life, but rather a vast apparatus of laws and customs that constrained them from straying too far outside those domains.

508 Law, *supra* note 501, at 1039.

509 *Cf.* Hellman, *Sex, Causation, and Algorithms*, *supra* note 93, at 500 ("Biological etiology does not ensure that the fit between the sex-based classification and its target is perfect."); *id.* ("On one thought, because the biological is natural, correlations between sex and a proxy trait grounded in biology cannot yield archaic cultural generalizations. In practice, however, the biological and the cultural are often intertwined so that one cannot easily separate the contribution each makes.").

510 *See supra* notes 501–04 (discussing Bradwell v. Ill., 83 U.S. (16 Wall.) 130, 141–42 (1872) (Bradley, J., concurring)).

511 *Morales-Santana*, 137 S. Ct. at 1694–96 (holding that this biological justification did not support an additional four-year residency requirement for unwed-citizen fathers, but not mothers).

"naturally,"[512] how "females" should look and feel,[513] and what "females" should do with their bodies.[514] As Professor Deborah Hellman has explained, "that a difference is grounded in biology . . . fails to guarantee that the use of the sex-based classification will not constrain freedom in morally problematic ways . . . . This is so because society chooses how it responds to biological difference."[515] As a matter of constitutional principle, the problem with sex stereotypes is not just that they may be overbroad generalizations, it is that they are "cages," assigning people to particular roles in life, often at birth.[516] It offends individual autonomy for a legislature to forbid medical treatments based on assignments made at birth, rather than respecting an individual's own character and choices.[517] Whether such bans might nonetheless be justified for reasons related to safety is a question courts must attend to with heightened scrutiny.

Another potential argument for a biology exception to the rule that all sex classifications require heightened scrutiny is that

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[512] *See, e.g.*, L.W. *ex rel.* Willliams v. Skrmetti, 679 F. Supp. 3d 668, 702 (M.D. Tenn. June 28, 2023):

> It is feasible that one might assume that because these procedures are intended to have the treated minor's body do something that it otherwise would not do (rather than allow the body to function in a purportedly "natural" manner), the procedure must be "bad" or "harmful" to the minor. But assumptions are not a sufficient evidentiary basis on which to resolve a motion for a preliminary injunction.

See also Sherry F. Colb & Michael C. Dorf, Mandating Nature's Course (Sept. 14, 2023) (Cornell L. Sch. Legal Stud. Rsch. Paper Series) (available on SSRN) (rebutting arguments against banning forms of health care in the name of allowing "nature" to take its course).

[513] *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (plurality opinion) (discussing, as an example of a comment evincing impermissible sex stereotyping under Title VII, the advice to a woman accountant to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry").

[514] *See, e.g.*, *Muller*, 208 U.S. at 421:

> [The challenged law, which limits women's, but not men's, working hours is justified because] continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

[515] Hellman, *Sex, Causation, and Algorithms*, *supra* note 93, at 501.

[516] *See, e.g.*, *supra* note 401–02 (discussing J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 133 (1994).

[517] This principle need not be inconsistent with the belief that "biological sex" is a real, fixed, binary, immutable phenomenon. *See* Koe v. Noggle, 688 F. Supp. 3d 1321, 1347 n.21 (N.D. Ga. 2023) (arguing that the rule against sex stereotypes in the context of transgender people "is not about unsettling the meaning of 'sex,' but about how state action that specifically burdens those who do not sufficiently play the part expected of their sex—those, like transgender people, who do not 'conform'—is subject to heightened scrutiny").

recognition of biological differences implies no disrespect. In *Skrmetti*, the Sixth Circuit asserted that "[r]ecognizing and respecting biological sex differences does not amount to stereotyping," paraphrasing *VMI*'s statement about "physical differences" between men and women that are "enduring."[518] But whether a legislative invocation of sex differences is a form of respectful "celebration," as in the affirmative-action and pregnancy-antidiscrimination contexts referenced in *VMI*,[519] or is a form of harmful disrespect, depends on the circumstances.[520]

Equal protection law rightfully regards all assertions of biological sex difference with suspicion. As every child learns in the schoolyard (or perhaps online), biological sex differences are routinely invoked to demean, insult, and disrespect others.[521] Assumptions about sex differences, at the very least, risk disrespecting those individuals whose biology defies general rules. There is an exception to every biological generalization about "males" and "females": many people considered "female," for example, are not capable of pregnancy. Not just that, but there are many people whose chromosomes, genitalia, hormones, secondary sex characteristics, and other biological markers of sex defy social and medical expectations for "male" and "female" bodies.[522] This is why *VMI* did not exempt the remedial policies Justice Ginsburg regarded as celebrating sex differences from heightened scrutiny.[523]

As a matter of the social reality of transgender children, it is utterly implausible to think that assertions of "inherent differences" based in reproductive biology cannot be insults to dignity.

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[518] *Skrmetti*, 83 F.4th at 486 (quoting *VMI*, 518 U.S. at 533). The Sixth Circuit's description of these differences as "biological" rather than "physical" seems to be an attempt to invoke scientific authority rather than common knowledge. *Id.*

[519] *VMI*, 518 U.S. 533 (citing an affirmative-action case, *Webster*, 430 U.S. at 320, and a pregnancy antidiscrimination case, *Guerra*, 479 U.S. at 289, as the only two examples of laws that do not denigrate on the basis of "inherent differences" between the sexes).

[520] *See* Hellman, *Sex, Causation, and Algorithms*, *supra* note 93, at 501 ("[A] failure to respond to biological differences in a morally appropriate way may be denigrating.").

[521] *See, e.g.*, Clarke, *Sex Assigned at Birth*, *supra* note 53, at 1864–70 (explaining how bodily differences pertaining to reproduction and sexual intimacy are frequent targets for assaults on dignity).

[522] *See, e.g.*, Katrina Karkazis, Rebecca Jordan-Young, Georgiann Davis & Silvia Camporesi, *Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes*, 12 AM. J. BIOETHICS 3, 6 (2012) ("There are many biological markers of sex but none is decisive: that is, none is actually present in *all* people labeled male or female." (emphasis in original)); *see also* Clarke, *Sex Assigned at Birth*, *supra* note 53, at 1852–59.

[523] And it is uncertain whether gender-based affirmative action premised on diversity rationales will survive *SFFA*. *Cf. supra* notes 97–98 (discussing pre-*SFFA* precedents on gender-based affirmative action).

To the contrary, insistences on "inherent differences" between, for example, transgender girls and other girls are, unfortunately, a common mode of exclusion, harassment, and discrimination, and even a justification for violence.[524] In this respect, transgender children are not exceptional; biological sex characteristics are often bases for denigrations of dignity, as people regard their genitalia as quintessentially private.[525]

Under the jurisprudence of the Roberts Court, heightened scrutiny extends to all sex classifications. There is no threshold determination of whether the classification is true or false, biological or social, celebration or insult. Whether biology might justify different treatment in some contexts, such as in women's sporting events, is a question that courts must and do attend to with heightened scrutiny.[526]

B. Ubiquity?

Another argument is that, unlike racial classifications, sex classifications are ubiquitous and generally banal, such that it would be absurd to subject them all to heightened equal protection scrutiny. Those making this argument might point to routine practices of government sex classification, as with identification, data collection, restrooms, and public nudity laws. *Skrmetti* extends this point to health law, arguing that myriad health regulations classify based on sex.[527] Some of these purported slippery-slope problems reflect misunderstandings about discrimination law. Others are sex classifications that are appropriately addressed by heightened scrutiny.

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[524] *See, e.g.*, Talia Mae Bettcher, *Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion*, 22 HYPATIA 43, 47–50 (2007) (discussing biased views of transgender people as "deceivers" concealing the truth about their "real[ ]" sexes, and the role of such views in incidents of transphobic violence).

[525] *See* Clarke, *Sex Assigned at Birth*, *supra* note 53, at 1864–70 (discussing the connection between genitalia and sexual intimacy and reproduction, spheres of life regarded as private).

[526] *See, e.g.*, B.P.J. *ex rel.* Jackson v. W. Va. State Bd. of Educ., 98 F.4th 542, 561 (4th Cir. 2024) (holding that heightened scrutiny applied and directing the district court to address the question whether "[e]ven without undergoing Tanner 2 stage puberty, do people whose sex is assigned as male at birth enjoy a meaningful competitive athletic advantage over cisgender girls?"); Hecox v. Little, 79 F.4th 1009, 1027–33 (9th Cir. 2023) (affirming a district court's grant of a preliminary injunction against an Idaho law barring transgender women from women's sports, reasoning that "the record in this case does not ineluctably lead to the conclusion that all transgender women, including those like [the plaintiff] who have gone through hormone therapy, have a physiological advantage over cisgender woman").

[527] *Skrmetti*, 83 F.4th at 482.

As an initial matter, differences between race and sex in terms of the ubiquity of classifications are overstated. Classifications based on race, and its close cousins, alienage and national origin, were once quite ubiquitous, filling hundreds of pages in the statute books.[528] No longer. After marriage equality, legal classifications based on sex are also dwindling to a small set of contexts.[529]

Skrmetti argues that "[i]f any reference to sex in a statute dictated heightened review, virtually all abortion laws would require heightened review,"[530] as well as laws, for example, "criminalizing 'female genital mutilation'"[531] or "regulating in-vitro fertilization."[532] Yet not all references to sex are classifications in the sense of criteria—no one need be classified by sex to ban the use of public funds for abortion while allowing it for in-vitro fertilization.[533] Such laws do not implicate the anticlassification values underlying the Court's equal protection doctrine in the same way as affirmative-action programs that label and sort students by race, or THCBs that label and sort patients by sex.

However, a law criminalizing "female" genital mutilation does require sex classification to the extent that it requires a determination of whether the individual is male or female.[534] Such a law raises questions about differences between "female" genital mutilation and "male" circumcision. It is not absurd to suggest that such a law would be subject to equal protection challenge, even if such a challenge would not be likely to prevail. The question has been a topic of genuine public debate, implicating not just concerns about sex, but also medical ethics and cultural imperialism.[535]

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528 *See generally* STATES' LAWS ON RACE AND COLOR (Pauli Murray ed., 1950) (compiling state laws and local ordinances mandating racial segregation, with notes and histories, as well as other legal sources, in a 776-page volume).

529 Clarke, *They, Them, and Theirs*, *supra* note 52, at 945–90 (discussing remaining contexts in which laws classify by sex and legal challenges to those regimes).

530 *Skrmetti*, 83 F.4th at 482 (citing Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2285–2300 (2022)).

531 *Id.* (citing 18 U.S.C. § 116(a)(1)).

532 *Id.* (citing KY. REV. STAT. ANN. § 311.715(2) (West 2022)).

533 *See* KY. REV. STAT. ANN. § 311.715(2) (doing this without classifying anyone by sex); *supra* notes 179–83 and accompanying text (discussing the difference between a reference and a classification).

534 18 U.S.C. § 116(a)(1) (defining "female genital mutilation" to "mean any procedure performed for non-medical reasons that involves partial or total removal of, or other injury to, the external female genitalia," including certain specified procedures).

535 *See, e.g.*, Sohail Wahedi, *The Health Law Implications of Ritual Circumcisions*, 22 QUINNIPIAC HEALTH L.J. 209, 212, 214 (2019) (discussing the debate over the "impunity of ritual male circumcision" and "double standards," and arguing that consideration of the medical purposes and health risks of the two procedures explains differences in legal treatment).

This example hardly suggests the statute books are full of health laws that turn on sex classifications; perhaps the reference to "genital mutilation" was meant to flag a concern about where puberty blockers and hormones might lead.[536] But any debate over circumcision versus mutilation is not relevant to the one over health care for transgender children. Genital surgeries are not at issue in *Skrmetti*, because they are not generally permitted for transgender minors under current healthcare guidelines.[537] Moreover, unlike THCBs, the federal ban on "female genital mutilation"[538] applies only to procedures performed for "non-medical reasons"[539] and has an exception for procedures "necessary to the health of the person on whom it is performed."[540] The forms of health care for transgender minors at issue in the current litigation are considered medically necessary in appropriate cases by the mainstream medical establishment.[541] Yet they have been outright banned by many states.[542]

Some forms of classification are indeed ubiquitous, such as government data collection, based not just on sex but also race. But identities are generally self-reported rather than assigned,[543] and data is deindividualized to avoid causing individual injury.[544] By contrast, state laws that do not allow transgender people to change the sex designations on official identification documents, like birth certificates, can cause injury by forcibly outing them as transgender

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536 *See, e.g.*, Doe v. Ladapo, 2024 WL 2947123, at *18 (N.D. Fla. June 11, 2024) (explaining how the sponsor of a Florida THCB invented concerns about "mutilation," even though "the record included no evidence that any Florida child had ever been castrated or mutilated, that the plaintiffs asserted no right to be so treated, and that the preliminary injunction did not address surgery at all").

537 *See, e.g.*, *Skrmetti*, 679 F. Supp. 3d at 682.

538 18 U.S.C. § 116.

539 *Id.* § 116(e).

540 *Id.* § 116(b)(1).

541 *See, e.g.*, Medical Organizations Brief, *supra* note 123, at 5.

542 *Id.*

543 Laura Lane-Steele, *Adjudicating Identity*, 9 TEX. A&M L. REV. 267, 280 (2022) ("[N]o matter the purpose for which the identity data is used, identity is determined almost exclusively by self-identification."); *see also* Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1520–27 (2014) (discussing a shift in governmental data-collection efforts toward racial self-identification).

544 *See, e.g.*, Stacey A. Tovino, *Not So Private*, 71 DUKE L.J. 985, 990 (2022) (explaining that "many health laws restrict the use and disclosure of identifiable health data but support the use and disclosure of de-identified data," and offering critique and suggestions for reform).

and subjecting them to hostility.[545] Accordingly, several courts have appropriately tested those laws under heightened scrutiny.[546]

Another seemingly banal topic that may occur to judges as problematically different in the sex-classification context is restrooms.[547] This sort of "potty problem" was an objection to the Equal Rights Amendment in the 1970s,[548] even though the Court had already begun striking down sex classifications under the Equal Protection Clause.[549] Justice Ginsburg noted that, when it passed the Equal Rights Amendment, Congress thought it "would coexist peacefully with separate public restrooms, separate sleeping and bathroom facilities for male and female military personnel and prisoners."[550] The reason, however, is not that such practices do not violate anticlassification rules or principles. Rather, Justice Ginsburg speculated that "[p]erhaps Congress found it hard to conceive of a plaintiff litigating the issue, or of a judge who would find man or woman harmed by that limited separation."[551] As a result of the transgender rights movement, that is no longer the case. Courts now interpret the Equal Protection Clause to require heightened scrutiny when transgender students

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[545] *See, e.g.*, Fowler v. Stitt, 104 F.4th 770, 779–80 (10th Cir. 2024) (explaining that transgender plaintiffs unable to change the sex discrimination markers on their birth certificates "have all experienced discrimination and hostility when others have learned they are transgender" and "have all experienced hostility when presenting identity documents that conflict with their gender identity").

[546] *See, e.g.*, *id.* at 795 (holding that a policy forbidding transgender people from changing their birth-certificate sex designations failed both rational basis review and heightened scrutiny where plaintiffs "merely want amended birth certificates for their own use that do not require any changes to the original records kept by the state"); Ray v. McCloud, 507 F. Supp. 3d 925, 938–39 (S.D. Ohio 2020) (holding that an Ohio law that prohibited changes to the gender markers on birth certificates failed heightened scrutiny because its justifications were "thinly veiled post-hoc rationales to deflect from the discriminatory impact of the Policy"); Morris v. Pompeo, 706 F. Supp. 3d 1074, 1086 (D. Nev. 2020) (granting the plaintiff's motion for summary judgment on his claim that the State Department's policy of requiring a letter from a physician, rather than another medical professional, to change the sex designation on a passport violated the Equal Protection Clause because it did not meet heightened scrutiny as applied to the plaintiff). *But see* Corbitt v. Sec'y of Ala. L. Enf't Agency, 115 F.4th 1335, 1337 (11th Cir. 2024) (holding that a policy forbidding transgender people from changing their birth-certificate sex designations was subject to rational basis review); Gore v. Lee, 107 F.4th 548, 558 (6th Cir. 2024) (same).

[547] *See, e.g.*, *Skrmetti*, 83 F.4th at 484 (raising restroom concerns).

[548] Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 164, 175.

[549] *Id.* at 174 ("Yes, the job of revising outmoded sex-based laws could be done without an ERA.").

[550] *Id.* at 175 (discussing S. REP. NO. 92-689 (1972)).

[551] *Id.*

are injured by sex classifications that exclude them from the restrooms consistent with their gender identities.[552]

A last horrible at the bottom of the slippery slope pertains to public nudity laws.[553] The argument here is that law can reasonably reflect traditional social norms about privacy and obscenity that differentiate between men's and women's bodies. For example, in the run up to the *Bostock* decision, one judge asked, "what of a pool facility that requires different styles of bathing suit for male and female lifeguards?"[554] This argument was no barrier to the Court's decision to take but-for and anticlassification ideas seriously in *Bostock*. With respect to the Equal Protection Clause, the trend is for courts to apply heightened scrutiny to public nudity laws that, for example, allow men but not women to bear their chests.[555] On the back end, courts debate whether such sex classifications serve important purposes of "promoting traditional moral norms and public order"[556] or "boil[ ] down to a desire to perpetuate a stereotype that female breasts are primarily the objects of desire, and male breasts are not."[557]

Slippery-slope arguments presume that heightened scrutiny is insensible, with a back end full of rigid rules that provide no guardrails for judges to avoid detriment to important government interests. That is not the case.[558]

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552 *See supra* note 56 (collecting circuit court cases applying heightened scrutiny to both uphold and strike down policies excluding transgender boys from boys' facilities).

553 *See, e.g.*, Cahill, *supra* note 62, at 1138–43 (arguing for "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 for sex (and transgender) discrimination"); Hellman, *Sex, Causation, and Algorithms*, *supra* note 93, at 504–05 (discussing equal protection litigation over public nudity laws).

554 Zarda v. Altitude Express, Inc., 883 F.3d 100, 150 (2d Cir. 2018) (Lynch, J., dissenting), *aff'd sub nom.* Bostock v. Clayton County, 140 S. Ct. 1731 (2020). Judge Gerard Lynch also asked if an employer who "required both male and female lifeguards to wear a uniform consisting only of trunks would violate Title VII." *Id.* This is a practice that would likely constitute harassment under Title VII, a doctrine that takes account of social realities. *See* Ann C. McGinley, *Trouble in Sin City: Protecting Sexy Workers' Civil Rights*, 23 STAN. L. & POL'Y REV. 253, 270–71 (2012) (discussing employer liability for "sexy" workplace attire requirements that result in sexual harassment from customers, and the potential bona fide occupational qualification defense under Title VII).

555 *See, e.g.*, Tagami v. City of Chicago, 875 F.3d 375, 377 (7th Cir. 2017) (holding that such a law is a sex-based classification that survived heightened review).

556 *Id.* at 379.

557 *Id.* at 382 (Rovner, J., dissenting).

558 *See, e.g.*, *VMI*, 518 U.S. at 532–33, 532 n.6 (explaining that while there is a "'strong presumption that gender classifications are invalid,'" "[t]he heightened review standard our precedent establishes does not make sex a proscribed classification," and neither, for that matter, is strict scrutiny necessarily fatal (quoting *J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring))).

C. History and Tradition?

Another possible argument for refusing to extend heightened scrutiny to all sex classifications could come from history and tradition. This argument might take different forms. One is that the Equal Protection Clause is limited to rights that would have been protected at the time of its enactment, or analogous rights. Another is that the history of racial subordination provides unique reasons to be skeptical of all race-based classifications, while not all sex-based classifications were historically tied to sexism. And a final argument is that due to the centrality of struggles for racial justice to American history, the Equal Protection Clause allows more exceptions to the principle of gender equality, or perhaps does not protect that principle at all. These arguments are deeply threatening to the American civil rights tradition.

In *Skrmetti*, the Sixth Circuit flirted with the argument that history and tradition limit the reach of the rights protected by the Equal Protection Clause. In that case, the plaintiffs had brought two claims, one under the Due Process Clause, arguing that parents have the right to choose healthcare treatments approved by the medical profession for their children, and another under the Equal Protection Clause.[559] Lumping the equal protection and due process arguments together, the Sixth Circuit asserted that the plaintiffs "do not argue that the original fixed meaning of the due process or equal protection guarantees covers these claims."[560] Citing *Washington v. Glucksberg*,[561] a due process case about aid in dying to those with terminal illnesses, *Skrmetti* asserted that "[c]onstitutionalizing new areas of American life is not something federal courts should do lightly, particularly when 'the States are currently engaged in serious, thoughtful' debates about the issue."[562] The Sixth Circuit had not applied heightened scrutiny, so it was unclear how it had assessed the caliber of the legislative debates.[563] The references to *Glucksberg*, and its descendent *Dobbs v. Jackson Women's Health Organization*,[564] associate

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559 *Skrmetti*, 83 F.4th at 472, 480.

560 *Id.* at 471.

561 521 U.S. 702 (1997).

562 *Skrmetti*, 83 F.4th at 471 (quoting *Glucksberg*, 521 U.S. at 719).

563 *But see* Skinner-Thompson, *supra* note 58, at 16 (collecting evidence that THCBs were motivated by impermissible animus against transgender youth).

564 142 S. Ct. 2228 (2022).

transgender health care, which saves lives,[565] with controversial practices that some argue are akin to killing.[566]

With respect to the Equal Protection Clause, sex classifications cannot be evaluated with history and tradition as benchmarks. Otherwise, legislatures would still be permitted to exclude women from jobs as lawyers and bartenders, to keep men out of nursing school, and to provide widow's but not widower's benefits. As the Roberts Court reiterated in 2017 in *Morales-Santana*, "in interpreting the [e]qual [p]rotection [guarantee], [we have] recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged."[567] *Dobbs*[568] and *Glucksberg* did not suggest, nor could they, that the "original meaning" of the words "equal protection" can be circumscribed to contexts familiar to our history and tradition.[569] If that were right, *Brown* was wrong.[570] *Brown* applied the Equal Protection Clause to segregated public schools, although nothing resembling the modern public education system existed in 1868.[571] That synthetic hormones are products of twentieth-century medicine is not a reason the Equal Protection Clause would permit state legislatures to limit who may use them based on sex assigned at birth.

Another argument from history against transgender rights is that separate-but-formally-equal sex classifications, unlike racial ones, are not discriminatory.[572] In his *Bostock* dissent, Justice

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565 *See, e.g.*, Medical Organizations Brief, *supra* note 123, at 16 ("Several studies have found that hormone therapy . . . is associated with reductions in the rate of suicide attempts and significant improvement in quality of life.").

566 *But see Dobbs*, 142 S. Ct. at 2258 (insisting that its holding be "sharply distinguishe[d]" from due process cases involving "a broader right to autonomy and to define one's 'concept of existence'" that do not implicate the destruction of "life" or "potential life" (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992))).

567 *Morales-Santana*, 137 S. Ct. at 1690 (quotation marks omitted) (quoting *Obergefell*, 576 U.S. at 673).

568 No equal protection claim was raised in *Dobbs*, but the Court asserted it was "squarely foreclosed by our precedents" in any event. 142. S. Ct. at 2245 (stating, in dicta, that absent a showing of animus, "a State's regulation of abortion is not a sex-based classification").

569 *Dobbs*, 142 S. Ct. at 2282–83 (reasoning that the Due Process Clause of the Fourteenth Amendment protects only rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty" (quotation marks omitted) (quoting *Glucksberg*, 521 U.S. at 720–21)).

570 *Brown*, 347 U.S. at 492–93 ("In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation.").

571 *Id.* at 490 ("Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent.").

572 *See supra* note 268 and accompanying text.

Samuel Alito rejected an analogy between discrimination based on interracial and same-sex relationships, asserting that, while opposition to interracial marriage was grounded in "bigotry," opposition to same-sex relationships was "not historically tied to a project that aims to subjugate either men or women."[573] Perhaps the same could be said of laws limiting transgender rights—that they do not aim to subjugate men or women. This argument is wrong as a matter of doctrine, history, and principle. As a matter of doctrine, bigotry is not a prerequisite for heightened scrutiny, neither for race nor sex.[574] The first Supreme Court case to strike down a ban on interracial marriage, *McLaughlin v. Florida*,[575] was squarely focused on the problems with all "official" "racial classifications," even those that treat the races in formally equal ways.[576] While *Loving v. Virginia*[577] referred to the problem with these laws as their being "measures designed to maintain White Supremacy," this was the reason the laws failed heightened scrutiny, not the reason they triggered it.[578] As a matter of history, opposition to same-sex relationships and transgender rights is indisputably based in enforcement of traditional gender roles of exactly the sort that equal protection doctrine does not permit—gender roles which have historically subjugated women.[579] And as a matter of principle, antisubjugation is not the guiding light of the Roberts Court's Equal Protection jurisprudence—it is individual autonomy.[580]

Another potential argument is that race has pride of place in our constitutional tradition, and its importance justifies further impairment of the principle of sex equality beyond the Court's

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573 *Bostock*, 140 S. Ct. at 1765 (Alito, J., dissenting).

574 *See supra* Part I.B.1; McLaughlin v. Florida, 379 U.S. 184, 191–93 (1964).

575 379 U.S. 184 (1964).

576 *Id.* at 191–92 ("Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation."). *McLaughlin* says nothing of bigotry; it is about classifications.

577 388 U.S. 1 (1967).

578 *Id.* at 11 (disputing the state's interest in "White Supremacy" in a paragraph explaining why there was "patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification").

579 *See, e.g.*, Case, *What Feminists Have to Lose*, *supra* note 362, at 1233 (citing statements by opponents of same-sex marriage to make clear that "a history of denying the full personhood of married women and a continued commitment to traditional fixed sex roles outside the bedroom, not just aversion to homosexuality" fueled arguments against marriage equality); Franklin, *Living Textualism*, *supra* note 455, at 185–89 (explaining the argument that the "sex-based social hierarchy depends on sex-differentiated sex and family roles for men and women, and gay and transgender people are perceived as threats to this traditional sex-role system").

580 *See supra* Part II.

assignment of sex to a lower tier of scrutiny. But where would this argument stop? The Supreme Court has wisely[581] resisted any project that would ask, for example, "whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of our Nation's history."[582] Rather, it has held that "[i]t is necessary only to acknowledge that 'our Nation has had a long and unfortunate history of sex discrimination,' a history which warrants the heightened scrutiny we afford *all* gender-based classifications today."[583] If this precedent is not safe from retrenchment in the name of original meaning, then what part of the Constitution's guarantee of sex equality, save the Nineteenth Amendment, is?[584]

D. Transgender People Are Different?

A last set of potential arguments against applying heightened scrutiny to all sex classifications is that there is something novel about the particular claims raised by transgender litigants that renders heightened scrutiny inappropriate. This is an implicit premise in *Skrmetti*'s reasoning: that because none of the Supreme Court's past gender discrimination cases involved transgender plaintiffs, the doctrine should be cabined to exclude them.[585] One argument in favor of this move is that the Supreme Court has never scrutinized how state actors define membership in a suspect class; rather, its cases pertain only to whether class distinctions are permitted, not who is in and who is out. This distinction without a difference is fundamentally contrary to anti-classification principles.[586] A second argument is that, as a novel

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581 *Cf.* Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1057 (2014) (arguing against "ranking forms of oppression because such claims tend to be divisive and are not compelled by precedent").

582 *J.E.B.*, 511 U.S. at 136.

583 *Id.* (emphasis added) (quoting *Frontiero*, 411 U.S. at 685 (plurality opinion)).

584 *Cf.* Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431, 453 (2014) ("Were [women] a part of We the People in any meaningful sense in the framing of the original Constitution and post-Civil War Amendments?"); Joy Milligan & Bertrall L. Ross II, *We (Who Are Not) the People: Interpreting the Undemocratic Constitution*, 102 TEX. L. REV. 305, 309–10 (2023) (arguing that "[t]he Constitution . . . suffers from serious democratic flaws based on its dual procedural and substantive exclusion of racial minorities and women," exclusions that can be "ameliorate[d]" or "exacerbate[d]" by "[m]ethods of [ ] interpretation").

585 *Skrmetti*, 83 F.4th at 483–84 (arguing that all of the Supreme Court's gender discrimination cases are distinguishable because, in addition to classifications, they involved comparative or group-based harms to men or women).

586 An alternative way to characterize this argument is as precluding the possibility of as-applied equal protection challenges. For an argument that "not only are as-applied

social group, transgender people are not protected by sex discrimination law, which applies only to men and women as traditionally defined. This argument misunderstands anticlassification doctrine and principles, which are about the individual right not to be classified based on sex.

1. No heightened scrutiny for class definitions?

In *Adams ex rel. Kasper v. School Board of St. Johns County*, the Eleventh Circuit Court of Appeals, sitting en banc, rejected a transgender boy's challenge to a school-district policy that would not permit him to use the boys' restroom.[587] That case did apply heightened scrutiny, but only to the school's policy of separating restrooms based on sex,[588] not to the school's policy of defining sex based on birth assignment.[589] This was sleight of hand because the plaintiff had not demanded that all school restrooms be all-gender or that school officials enforce no rules about who could use what restroom.[590] Rather than scrutinizing the school's definition of sex, the Eleventh Circuit asserted that the Supreme Court defines sex, for all purposes, as an "immutable" trait assigned at birth.[591] This is a misreading of the plurality opinion in *Frontiero*, but more importantly, any such definition would run contrary to anticlassification doctrine and principles. Definitions of suspect class membership must meet heightened scrutiny.[592]

Equal Protection claims cognizable, but indeed that the availability of as-applied assessment of individual circumstances is a defining feature of intermediate scrutiny," see Katie Eyer, *As-Applied Equal Protection*, *supra* note 58, at 51.

587 *Kasper*, 57 F.4th at 796.

588 *Id.* at 804–05.

589 *Id.* at 797 (giving no critical consideration to the fact that "the School Board distinguishes between boys and girls on the basis of biological sex—which the School Board determines by reference to various documents, including birth certificates, that students submit when they first enroll in the School District" in determining restroom eligibility).

590 *Id.* at 832 (Jill Pryor, J., dissenting) ("Adams has consistently agreed throughout the pendency of this case . . . that sex-separated bathrooms are lawful.").

591 *Id.* at 807 (majority opinion).

592 One Second Circuit case holds to the contrary. *See* Jana-Rock Const., Inc. v. N.Y. State Dep't of Econ. Dev., 438 F.3d 195, 209 (2d Cir. 2006) (applying rational basis review to uphold an affirmative-action plan's definition of "Hispanic" to exclude people of Spanish national origin). That court reasoned that all definitions of racial categories are, to some extent, problematic. *Id.* at 210–11 ("It will always exclude persons who have individually suffered past discrimination and include those who have not . . . . Strict scrutiny cannot solve this problem."). This decision is inconsistent with the Supreme Court's more recent affirmative-action jurisprudence. *See SFFA*, 143 S. Ct. at 2168 (analyzing whether a program was "underinclusive" as a component of narrow tailoring). It was an outlier even in 2006. *See Jana-Rock Const., Inc.*, 438 F.3d at 208 (noting that "at least four of our sister circuits have employed *Croson*'s analysis of overinclusiveness to strike down state and local affirmative-action programs that included more racial and ethnic groups than necessary").

SFFA demonstrates that, even if the Supreme Court found a context in which race-based classifications might serve a compelling governmental interest, such as remedying an institution's own discrimination, it would not permit that institution to use racial classifications that were not narrowly tailored to achieve that remedy. Class definitions in and of themselves can disrespect individual autonomy,[593] requiring particular scrutiny. In *SFFA*, the Court criticized the six racial categories that universities employed: "(1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American," which it called "imprecise."[594] It noted the category "Asian" was "overbroad," and that by using this overbroad category, the universities treated South Asians and East Asians as fungible.[595] It criticized the category "Hispanic" as "arbitrary or undefined,"[596] and noted it too created a fungibility problem: the universities "would apparently prefer a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply because the former contains more Hispanic students than the latter," despite the lack of an explanation for how this would contribute to the supposed goal of diversity.[597] And the Court found the categories used by UNC to be "underinclusive" because counsel could not explain how to categorize students from "Jordan, Iraq, Iran, [and] Egypt."[598]

Supreme Court doctrine and anticlassification theories provide no support for refusals to scrutinize definitions of race or sex as "immutable."[599] To be sure, the plurality opinion in *Frontiero v.*

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593 *See, e.g.*, *supra* notes 424–30 and accompanying text (discussing the critique of "crude" racial classifications in *Parents Involved*, 551 U.S. at 789–90 (Kennedy, J., concurring)).

594 *SFFA*, 143 S. Ct. at 2167. Justice Neil Gorsuch's concurrence criticized these categories for their origins in "[a] federal interagency commission" that "devised this scheme of classifications in the 1970s to facilitate data collection" without considering "any input from anthropologists, sociologists, ethnologists, or other experts." *Id.* at 2210 (Gorsuch, J., concurring) (quoting Brief of Professor David E. Bernstein as Amicus Curiae in Support of Petitioner at 3, *SFFA*, 143 S. Ct. 2141 (Nos. 20-1199, 21-707)).

595 *Id.* at 2167 (majority opinion); *id.* at 2210 (Gorsuch, J., concurring) (criticizing the "Asian" category as based in "stereotypes" because it "sweeps into one pile East Asians (e.g., Chinese, Korean, Japanese) and South Asians (e.g., Indian, Pakistani, Bangladeshi), even though together they constitute about 60% of the world's population").

596 *Id.* at 2168 (majority opinion); *SFFA*, 143 S. Ct. at 2210 (Gorsuch, J., concurring).

597 *Id.* at 2168 (majority opinion).

598 *Id.* (quoting Justice Gorsuch's question at oral argument, Transcript of Oral Argument at 107, *SFFA*, 143 S. Ct. 2141 (No. 21-707)); *id.* at 2210–11 (Gorsuch, J., concurring) (arguing that the "White" category "embraces an Iraqi or Ukrainian refugee as much as a member of the British royal family").

599 For another scholarly account of the doctrine supporting this argument, see Naomi Schoenbaum, *Rethinking Sex as Biology Under Equal Protection*, 58 U.C. DAVIS L. REV.

Richardson stated that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."[600] This does not mean a public institution that acknowledged its own recent race discrimination and sought to remedy it with a settlement fund could define all potential beneficiaries as "biological whites" or "biological Blacks" based on DNA tests administered by 23andMe.[601] An individual perceived by the discriminating institution to be a member of a racial minority group, due to appearance, but whose DNA test placed him in the "white" category, should be able to bring an equal protection challenge to the DNA-based definition. That individual should not be required to challenge the entire premise of the remedial program; the injury is caused by the DNA-based definition. For the same reason, transgender students challenging the definition of sex used to segregate restrooms should not be forced to challenge the entire premise of restroom sex segregation. Instead, they must be permitted to challenge the definition of sex as assigned at birth, and to argue that it is not sufficiently related to the government's asserted safety and privacy interests. As the Fourth Circuit put it: "[E]ven when lines may—or must—be drawn, the Constitution limits how and where they may fall."[602]

To be sure, heightened scrutiny, unlike strict scrutiny, requires that the definition of sex be "substantially related," not "narrowly tailored," to meet the government interest. But this does not mean it escapes heightened scrutiny or need not be genuine. In a footnote in *Kasper*, the Eleventh Circuit asserted that because restroom segregation is all about "biology," what mattered was that "[t]hroughout the pendency of this case, [plaintiff Drew] Adams remained both biologically and anatomically identical to biological females—not males."[603] By this, the court was

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905, 943–53 (2024) (interpreting *Frontiero* and advancing the argument that "the biology of sex was not a significant—or any—presence at the inception of constitutional sex equality jurisprudence").

600 *Kasper*, 57 F.4th at 807 (quoting *Frontiero*, 411 U.S. at 686).

601 *But see* Trina Jones & Jessica L. Roberts, *Genetic Race? DNA Ancestry Tests, Racial Identity, and the Law*, 120 COLUM. L. REV. 1929, 1945–47 (2020) (explaining how DNA ancestry tests "may fail to accurately predict a person's genetic ancestry," and even if they could, "it would still be a mistake to conflate those results with race").

602 *B.P.J.*, 98 F.4th at 555–57 (holding, in a case involving the exclusion of a transgender girl from girls' sports, that the law's provision that "[a] person's male-ness or female-ness must be determined 'based solely on the individual's reproductive biology and genetics at birth'" could be subjected to heightened scrutiny without challenging the provision permitting separate "female" teams (quoting W. VA. CODE ANN. § 18-2-25d(b)(1) (West 2024))).

603 *Kasper*, 57 F.4th at 803 n.6.

referring to the fact that Adams had not had genital surgery, although he had undergone breast surgery and hormonal therapy.[604] If disputes over who counts as a member of a racial minority group strike some Supreme Court Justices as "unseemly," surely this discussion should as well.[605] What precisely Adams's genitals had to do with other boys' privacy in the boys' restroom, the court did not explain, other than to say that without some bright-line rule defining children as male and female, the school thought it would run into problems with "gender fluidity."[606] The court described "gender fluidity" as "the practice . . . in which some individuals claim to change gender identities associated with the male and female sexes and thereby treat sex as a mutable characteristic."[607] Perhaps because the Eleventh Circuit characterized Adams's claim as a challenge to all sex segregated restrooms, whether the school's purported concern about "gender fluidity" was genuine received less critical attention than it deserved.[608]

That definitions of sex must be scrutinized has been obvious to some courts analyzing equal protection challenges to government practices of sex classification with respect to identity documents.[609] The very premise of sex classifications, as applied to the individual, offends anticlassification values. As the district court in *Corbitt v. Taylor*[610] explained in striking down an Alabama rule requiring genital surgeries before a transgender person was permitted to change the sex designation on their drivers' license, "[a]ll state actions that classify people by sex are subject to the same intermediate scrutiny."[611] In that case, the sex classification was "imposed by the State," through a policy that "sets the criteria by which [the State] channels people into its sex classifications," "denying the women who are plaintiffs in this case the

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604 *Id.* at 798 (noting that Adams had undergone hormone therapy and breast surgery, but "[b]ecause Adams was still just a teenager who had not yet reached the age of maturity, Adams could not undergo additional surgeries to rework external genitalia").

605 *SFFA*, 143 S. Ct. at 2211 (Gorsuch, J., concurring) (complaining that affirmative action results in "unseemly disputes about whether someone is really a member of a certain racial or ethnic group").

606 *Kasper*, 57 F.4th at 803 n.6.

607 *Id.*

608 *Id.* at 859 (Jill Pryor, J., dissenting) ("The School District's bathroom policy categorically bans only transgender students—defined as those who 'consistently, persistently, and insistently' identify as one gender—from using the restroom that matches their gender identity . . . . By its plain terms, the policy simply does not apply to gender fluid individuals.").

609 *See supra* note 546.

610 513 F. Supp. 3d 1309 (M.D. Ala. 2021), *rev'd sub nom.* Corbitt v. Sec'y of Ala. L. Enf't Agency, 115 F.4th 1335 (11th Cir. 2024).

611 *Id.* at 1314.

ability to decide their sex for themselves instead of being told who they are by the State."[612]

The Eleventh Circuit, in what was perhaps a deliberately obtuse effort to understand what the *Frontiero* plurality meant by "immutable," looked the term up in a dictionary to decide it meant "unchangeable."[613] But in explaining that "sex" is an "immutable" characteristic like race, Justice Brennan did not define sex or race as "unchangeable."[614] Rather, the *Frontiero* plurality was remarking on the harms of static impositions of identity classifications by the state. Its invocation of the philosophical notion of an "accident of birth"[615] is connected to anticlassification theory: that to classify people on the basis of birth assignments, such as sex, national origin, and legitimacy, is to offend principles of individual autonomy and responsibility.[616] As a matter of social reality, racial passing occurs, transgender people exist, and "illegitimate" children can be legitimized. That does not make classifications assigned at birth, which bear no relationship to an individual's own life choices, any less subject to heightened scrutiny.[617] The *Frontiero* plurality's reference to immutability underscores the reason state definitions of sex based solely on birth assignments—such as those employed by the school district against Adams—are particularly offensive to the values underlying the Equal Protection Clause and require an "exceedingly persuasive justification."[618]

An implicit premise of resistance to transgender rights is that they require something novel: recognition of the primacy of gender identity over "biological sex" and acceptance of a transgender woman's claim to being a woman, or a transgender man's claim to being a man, for all purposes. The Roberts Court's equal

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612 *Id.* at 1315.

613 *Kasper*, 57 F.4th at 807 (citing *Immutable*, OXFORD ENGLISH DICTIONARY (2d ed. 1989)).

614 A search for scientific consensus on any definition of sex as some set of immutable traits would prove unavailing. *See, e.g.*, Sarah Richardson, *Transphobia, Cloaked in Science*, L.A. REV. OF BOOKS BLOG (Nov. 8, 2018), https://perma.cc/CWD4-FE24 ("Decades of research across scientific disciplines have built an understanding of human sex as a multidimensional trait with biological and social components that can vary over the life course.").

615 *See* Clarke, *Against Immutability*, *supra* note 206, at 14–18 (discussing the theory behind the Supreme Court's invocations of immutability and noting that "[t]he phrase 'accident of birth' has a long philosophical pedigree, and was an important theme in the writing of John Stuart Mill on sex and race equality in the nineteenth century").

616 *See supra* notes 388–89 and accompanying text (discussing *Frontiero*, 411 U.S. at 686 (quoting *Weber*, 406 U.S. at 175)).

617 *Weber*, 406 U.S. at 175.

618 *Morales-Santana*, 137 S. Ct. at 1690 (quotation marks omitted) (quoting *VMI*, 518 U.S. at 531).

protection doctrine, for better or worse, offers little help to those staking abstract political claims to group-based recognition.[619] This, however, is no barrier to the transgender rights claims discussed in this Article. To resolve these claims, courts need not address metaphysical questions about who is a "woman";[620] equal protection law requires only that whatever definition is chosen by a legislature be substantially related to important ends.

2. No heightened scrutiny for novel classes?

A final argument is that the Supreme Court's sex discrimination jurisprudence has only ever protected nontransgender men and women and does not extend to individuals seeking what is really a claim based on transgender group status—a unique status supported by a distinct social movement and history. For example, one court seems to have reasoned that, while formally, transgender people make arguments against sex classification, in substance, they seek recognition as a new quasi-suspect class.[621] Because the court regarded the "canon" of new suspect class statuses to be "closed," it rejected the transgender plaintiffs' claim.[622] This argument defies the principle, enshrined in the text of the Equal Protection Clause, that the right to equality extends to "*any person*."[623]

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619 For critical perspectives on claims to group-based recognition and rights to gender identity, see Noa Ben-Asher, *Transforming Legal Sex*, 102 N.C. L. REV. 335, 342 (2024) (calling "for advocacy for transgender lives that is less reliant on medical expertise about the scientific truth of sexual difference, and more reliant on the societal value of gender diversity and the future existence of transgender children and adults"); Ido Katri, *Transitions in Sex Reclassification Law*, 70 UCLA L. REV. 636, 640 (2023) (arguing "that even the most expansive framework for reclassification fails to address the pervasive harm caused by the initial act of assigning sex at birth").

620 *See, e.g.*, Lane-Steele, *supra* note 58, at 1 (discussing Republican Senator Marsha Blackburn's request that Justice Ketanji Brown Jackson define "woman" at her confirmation hearing and criticizing the view that there is some out-of-context definition that would be legally relevant).

621 I think this is the best articulation of the argument, although the district court put it in a less persuasive way. *See* Fowler v. Stitt, 676 F. Supp. 3d 1094, 1123–24 (N.D. Okla. 2023) (ignoring the plaintiffs' sex discrimination argument on the ground that the Equal Protection Clause protects "suspect classes" rather than prohibiting "suspect classifications," and concluding that transgender people are not a suspect class), *rev'd*, 104 F.4th 770 (10th Cir. 2024).

622 *Id.* at 1123 (quoting Yoshino, *supra* note 87, at 757–58); *id.* ("As it currently stands, there is no indication that the Supreme Court is willing to extend heightened scrutiny to any other classifications.").

623 *See, e.g.*, *Croson*, 488 U.S. at 493 (emphasizing these words in the Fourteenth Amendment); *id.* ("As this Court has noted in the past, the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.'" (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948))).

As the Court's cases repeat, the Equal Protection Clause protects "*persons*, not *groups*";[624] it is "universal in [its] application";[625] and it abhors classifications.[626] Consistent with its concern about what classifications communicate to citizens and the polity about individual autonomy and the irrelevance of group-based differences, class membership does not matter to the doctrine. In *SFFA*, the Court noted it had extended the Equal Protection Clause to "aliens and subjects of the Emperor of China,"[627] "a native of Austria,"[628] and a "Celtic Irishmen."[629] The *SFFA* decision itself nowhere mentions the racial identities of the fifty-one members of that organization.[630] In other cases too, the Court has not bothered to specify the racial identities of challengers to affirmative-action policies, referring, for example, to "nonminority teachers."[631] In *McLaughlin*, *Loving*, and *Palmore*, the Court enforced the guarantee of equal protection on behalf of interracial families.[632] Justice Neil Gorsuch concurred in *SFFA* to argue that as a result of America's "increasingly multicultural" families, efforts to classify by race had become "only more incoherent with time."[633] Neither has the Court been careful about class membership in cases involving sex discrimination. In *Craig*, the challengers to the sex classification were liquor sellers,

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624 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (emphasis in original); *see also Parents Involved*, 551 U.S. at 743 (plurality opinion).

625 *SFFA*, 143 S. Ct. at 2162 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)); *id.* ("For '[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.'" (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289–90 (1978) (Powell, J.))).

626 *Id.* at 2159 (quoting *Yick Wo*, 118 U.S. at 368–69) ("'[T]he broad and benign provisions of the Fourteenth Amendment' apply 'to all persons,' . . . ; it is 'hostility to . . . race and nationality' 'which in the eye of the law is not justified.'").

627 *Id.* (quoting *Yick Wo*, 118 U.S. at 368).

628 *Id.* (quoting Truax v. Raich, 239 U.S. 33, 36 (1915)).

629 *Id.* (quoting Strauder v. West Virginia, 100 U.S. 303, 308–09 (1879)).

630 *SFFA*, 143 S. Ct. at 2158 (mentioning the fifty-one members).

631 Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 272 (1986); *see also Adarand Constructors, Inc.*, 515 U.S. at 205 (referring to a petitioner that was a small business not owned by "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities").

632 *See generally* Palmore v. Sidoti, 466 U.S. 429 (1984); *Loving*, 388 U.S. 1; *McLaughlin*, 379 U.S. 184.

633 *SFFA*, 143 S. Ct. at 2211 (Gorsuch, J., concurring).

although the classification affected "young males."[634] In *Nguyen* and *Morales-Santana*, they were U.S.-citizen fathers.[635]

Nor does equal protection doctrine extend only to those who might be said to be the constituencies of particular social movements that managed, through organizing and legal advocacy, to defeat their exclusions from our constitutional tradition.[636] In his dissent in *Bostock*, Justice Brett Kavanaugh quipped that "Seneca Falls was not Stonewall" to argue that the "women's rights movement" that pressed for the inclusion of "sex" in Title VII in 1964 was not, as a "matter of history and sociology," the same as the "gay rights movement" now arguing for sexual orientation equality.[637] Whatever might be said of this point with respect to Title VII (the majority was not persuaded), the evolution of sex equality law under the Equal Protection Clause demonstrates not just a narrow concern with women's rights, but rather a broader vision of autonomy for all people to live their lives "free of fixed notions concerning the roles and abilities of males and females."[638] On this vision, law may not enforce the social expectations that, for example, men be breadwinners and women caretakers. Every person may define their own life without government-imposed constraints based on sex. The set of transgender rights arguments discussed in this Article asserts the same freedom, against the very imposition of the labels "male" and "female" based on sex assigned at birth, and all the expectations that go with them.[639]

The transgender rights claims discussed in this Article do not require recognition of any social group; they take aim at a form of sex classification—based on the supposed characteristic

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634 *Craig*, 429 U.S. at 195 (noting that "young males" are the group harmed, although liquor sellers have standing).

635 *Morales-Santana*, 137 S. Ct. at 1689 (holding that a son had third party standing to assert his "father's right to equal protection"); *Nguyen*, 533 U.S. at 58 ("The father is before the Court in this case; and, as all agree he has standing to raise the constitutional claim.").

636 Illegitimacy, the other characteristic afforded quasi-suspect class status, has become ever more a relic, not a source of individual or group identity or social organization; this does not mean legitimacy-based classifications are no longer quasi-suspect. *Cf.* Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 347, 347–48 (2012) (discussing the case of illegitimacy as a lesson in how "law, as one aspect of the broader culture, constructs identity").

637 *Bostock*, 140 S. Ct. at 1828–29 (Kavanaugh, J., dissenting). Justice Kavanaugh's dissent did not address transgender rights arguments.

638 *Hogan*, 458 U.S. at 725.

639 *See, e.g.*, Clarke, *Sex Assigned at Birth*, *supra* note 53, at 1860–64 (discussing how certain transgender rights theorists articulated claims to autonomy and equality via a shift to critique of "sex assigned at birth").

"biological sex"—that has long been a basis for constitutional concern. They ask courts to scrutinize uses of that category for the fit between means and ends. These claims may seem different from the claims of the women and men that came before them because of implicit beliefs that transgender women, for example, are not really the same as other women.[640] The "reality" of a social group is not germane to anticlassification principles: anticlassification principles are about being one's own person. To the extent that rules classify based on attributes like sex, which have historically been the basis for typecasting people into fixed social roles, they must be tested to determine the reality of their justifications instead. This rule applies whether the challenger is a young man, a U.S.-citizen father, a lesbian, a transgender person, or an individual who identifies as queer, nonbinary, or not a man.

While the labels for some sex and gender identities today may seem novel, examples of people living lives that do not match modern expectations for the "female" and "male" categories can be found through history.[641] What is novel is the unprecedented backlash and wave of laws targeting transgender people under the banner of "biological sex."[642] Transgender people, in particular, have long brought legal claims asserting their rights to freedom from sex discrimination, only to have them denied on the basis of open hostility and prejudice.[643] There is no excuse, in the

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640 *See* Robin Dembroff, *Real Talk on the Metaphysics of Gender*, 46 PHIL. TOPICS 21, 22 (2018) (discussing the "Real Gender assumption": the belief that "someone should be classified as a man only if they 'really are' a man—that is, only if *man* is a recognized gender, and they meet its membership conditions," which is frequently deployed to dismiss "various gender identities" (emphasis in original)); *see also* HEATH FOGG DAVIS, BEYOND TRANS: DOES GENDER MATTER? 11 (2017) (discussing discrimination based on "judgments about who does and does not belong in the sex categories of male or female").

641 *See, e.g.*, JEN MANION, FEMALE HUSBANDS: A TRANS HISTORY 6 (2020) ("Anyone reading old newspapers with some frequency will eventually run into one or more accounts of people transing gender."); *id.* at 2 (discussing "female husbands" in the United States and United Kingdom from the mid-1700s through early 1900s, who were "people assigned female at birth" who "chose to trans gender and live fully as men"); *see also* Gilbert Herdt, *Introduction* to THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY 21, 21 (Gilbert Herdt ed., 1994) (arguing that persons who "transcend the categories of male and female, masculine and feminine, as these have been understood in Western culture since at least the later nineteenth century" "are more common in the human condition than was once thought").

642 Clarke, *Sex Assigned at Birth*, *supra* note 53, at 1825 (describing how "[i]n the wake of *Bostock*, there has been an unprecedented onslaught of federal and state legislation aimed at curtailing transgender rights, almost all of it directly invoking the idea of 'biological sex,'" a term that rose to prominence in the service of projects of LGBTQ exclusion).

643 *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, 91–98 (2019) (explaining how, in the 1970s, "courts invented limiting principles" to constrain discrimination law so

jurisprudence of the Roberts Court, for continuing to leave them outside the Constitution's guarantee of equal protection.

CONCLUSION

This Article aims to intervene in an urgent debate about equal protection doctrine, with tremendous stakes not just for transgender children and their families, but also for LGBTQ people more broadly, and for the rights of all people to define their own lives free from the enforcement of sex-based expectations by the state. It argues that, under the Roberts Court's equal protection doctrine, all sex classifications require heightened scrutiny. There is no difference between race and sex in terms of what sorts of classifications trigger heightened scrutiny—all of them do. This broad anticlassification rule is supported by the principle that the Equal Protection Clause protects a right against racial and sex classification in favor of individual respect, dignity, and autonomy. The Court's jurisprudence gives no reason to deny that right to transgender people. And it gives no reason to revive the deference to legislatures and educational institutions it has denied with respect to affirmative action.

The argument advanced in this Article may strike civil rights scholars as hollow. Since the 1980s, progressive scholars have criticized legal analogies between race and sex as "crabbed, cooptable, and constraining."[644] Anticlassification, it is said, has proven deficient to address the challenges of racial injustice and structural inequality, and, translated over to gender, it fails to achieve meaningful substantive change. It has been stripped of any means to ensure reproductive justice, it lacks a vision of women and LGBTQ people as full and equal citizens, and it cannot account for the intersections of systems of marginalization that compound to the detriment of our society's worst off.

Whatever the limits of anticlassification arguments as a long-term social movement strategy, in the short term, civil rights scholars cannot allow the novel premise that some sex classifications are immune from heightened scrutiny to go unchallenged. This Article endeavors to intervene in an urgent doctrinal debate

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as to avoid covering "people they labeled 'transsexuals'" who were believed to have "moral failings and dangerous mental illnesses"); *id.* (discussing *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 n.3 (9th Cir. 1977), a Title VII and Equal Protection case in which the court "noted that some psychiatrists regarded 'a request for a sex change' to be 'a sign of severe psychopathology'").

644 MAYERI, *supra* note 50, at 226.

to avoid backsliding on the landmark achievements of constitutional sex discrimination law, limited though they may be.

Critics may contend that the doctrinal "innovation[s]" of the Supreme Court's affirmative-action jurisprudence were made to center "white people's feelings of aggrievement"[645] and cannot be harnessed for purposes such as transgender rights. I am hopeful that this proves to be untrue, and that in cases on transgender rights, the Court will not limit its anticlassification principles to only those contexts in which they benefit majority-group members. But I acknowledge the possibilities that politics and ideology predetermine the outcomes of legal disputes over affirmative action and transgender rights, and that this Article's constitutional arguments are tilting at windmills. If so, then I hope to expose this dynamic, adding to the extensive body of scholarly criticism of the Court's anticlassification theory, and supporting calls for reform of the judiciary and political mobilization for broader visions of gender and racial justice.

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[645] Bridges, *supra* note 45, at 139–40.