Abstract (Summary)

[...] It is important to note the intended reach of this Article. By urging the adoption of a strict scrutiny approach to sex, this Article advocates for transgender and intersex persons as well as all those presently harmed by the narrow and rigid jurisprudence on sex - a group that includes women seeking the fundamental right to equality, including pregnant women,12 gays, lesbians and bisexuals,13 and all those who are sex identity deviant - e.g., masculine women, effeminate men, men who seek to enter female-dominated professions and women who long to work in a labor market not beholden to sex stereotyping. 14 V. The Social Construction of Sex A. in Indeed, it tracks the calls of critical race theorists for an equal protection doctrine that is more sensitive to category-types and more faithful to the anti-subordination principle first articulated by the Supreme Court.207 2.

Full Text

(20644 words)

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Sex is documented, administered, and adjudicated via a network of statutes, regulations, and administrative rules that is astronomically for both its inconsistencies and its complexity.1 Courts and agencies tasked with issuing identity documents, or determining who qualifies as a spouse for the purposes of marriage licenses or same-sex marriage bans, routinely adjudicate the question of sex - employing "common sense" approaches to determine whether a person is "male" or "female."2 For transgender persons seeking new drivers' licenses or other forms of official recognition,3 the folkways of sex can be particularly dire because courts have naturalized both the idea of binary sex and the impossibility of sex reassignment. In refusing to recognize a transgender woman as a legal woman, a Texas appeals court exclaimed, "There are some things we cannot will into being. They just are." The Kansas Supreme Court followed suit, stating: "WJe recognize that J'Noel has traveled a long and difficult road. J'Noel has undergone electrolysis, thermolysis, tracheal shave, hormone injections, extensive counseling, and reassignment surgery. Unfortunately, after all that, J'Noel remains a transsexual, and a male."5

Yet, despite our collective belief in the inevitability of sex and the categories "male" and "female," sex identities evade binary categorization and neat, tidy description even at the level of biology. Every year, thousands of infants are born intersex, with bodies that fuse the chromosomes, hormones, gonads, genitals, internal sex organs, and secondary sex characteristics typically thought to be defining of "male" and "female."6 Every year, thousands of adults also seek to change their sex - resisting the notion that sex is fixed and accurately determined at birth.7 In addition, even those who grow up secure in their identities as "male" or "female" are assigned to a sex category, not by karyotyping, but by cursory inspection of their genitals at birth, so that their anxious parents can know whether to swaddle them in a pink or blue blanket.

These phenomena challenge the very foundation of sex; indeed, as one researcher has noted, "any close study of sexual anatomy results in a loss of faith that there is a simple, 'natural' sex distinction that will not break down in the face of certain anatomical, behavioral, or philosophical challenges."9 Faced with the true complexity of sex identity and sex difference, binary sex classifications can only be viewed as a social construct that disciplines the body in ways that defy logic, compassion, and medical science.10

This Article breaks new ground by proposing a new equal protection doctrine that takes cognizance of the realities of sex, and regards sex categories as a suspect classification, not based on immutability, but on ground of sex categories' very imprecision. In arguing that sex should be accorded strict, intermediate, scrutiny, this Article takes note of the parallels between sex discrimination and race discrimination - parallels that emerge when binary sex classification is understood to be neither innate nor natural. Viewed through this lens, demanding that people be officially classified by sex is just as invidious as maintaining registries of racial composition, a now disavowed practice.11

Part I of this Article explores myths and realities of sex difference and examines how binary conceptions of sex break down. Turning to transgender and intersex identities, this Part explores the way that science and medicine manage and discipline unruly bodies in an effort to deny the pluralism of sexual identities that truly exist. It also focuses on law's complicity - examining how courts and administrative agencies have naturalized the notion of "male" and "female" and perpetuated myths of innate sex difference.

Part II urges the adoption of a new equal protection standard for sex - a constitutional doctrine that recognizes the way that the categories of male and female are socially constructed, and regards sex classifications as suspect because of their arbitrariness. Looking to equal protection case law, this Part establishes that mutability as well as immutability renders a classification suspect. In addition, it discusses how a strict scrutiny approach to sex discrimination will lead to a more robust understanding of discrimination based on gender identity and gender roles.

Part III explores the potential pitfalls of applying strict scrutiny to sex and of regarding sex classifications as presumptively invalid. Tracking the experiences of racial minorities under the Fourteenth Amendment, this Part queries whether suspect classification leads to empowerment or erasure. Does suspect classification embody an anti-subordination principle? Or is it largely symbolic - mandating a "colorblindness" and "gender-blindness" principle that prevents people from being named in the law? In Part IV, after exploring these paradoxes, this Article briefly concludes.

Throughout this Article, sex is used to refer narrowly to the terms "male" and "female" as they are used to refer to innate biological difference and a stable and coherent dichotomy. In contrast, gender is used to refer to masculinity, femininity, and social roles, as well as the terms "male" and "female," when they are voluntarily assumed as a preferred label or identity. In arguing that sex can be viewed as a social construct, this Article does not seek to deny the salience of these categories or preclude their usage for self-identification purposes any more than does the scholarship pertaining to the social construction of race. Instead, this Article questions commonplace beliefs about sex and the law's ongoing involvement in the documentation, administration and adjudication of sex identities.
Finally, it is important to note the intended reach of this Article. By urging the adoption of a strict scrutiny approach to sex, this Article advocates for transgender and intersex persons as well as all those presently harmed by the narrow and rigid jurisprudence on sex - a group that includes women seeking the fundamental right to equality, including pregnant women, 12 gays, lesbians and bisexuals, 13 and all those who are sex identity deviant - e.g., masculine women, effeminate men, who seek to enter female-dominated professions and women who long to work in a labor market not beholden to sex stereotyping. 14

V. The Social Construction of Sex

A. Myths and Realities of Sex Difference: The Assignment of Sex

Losing one's faith in sex does not require much - it is sufficient to learn how bodies become designated as "male" and "female" in the first place. Although biology textbooks instruct that men and women are reliably defined by reference to chromosomes (XX, XY); hormones; gonads (testes, ovaries); internal organs (prostates, vaginas, uteruses); external sex organs (penises, scrotums, clitorises, labia); secondary sex characteristics (hair, breasts, bone structure); and sex and gender identity, 15 physicians tasked with determining sex in newborn children rely on a much cruder indication: the appearance of the infant's genitals. 16

The process could scarcely be more arbitrary. When a child is born with a "normal" sized clitoris (less than three-eighths of an inch), 17 that infant will leave the hospital designated as a girl, irrespective of chromosomes: when a child is born with an "adequate" penis (one inch or longer and capable of penetrative sex), that infant will leave the hospital christened a boy. 18 All other infants - those with small penises, large clitorises, or internal and external morphology that conflict - will promptly find themselves on an operating table with doctors debating which course of treatment to commence. 19

The goal of medical treatment is a simplistic one: to ensure that intersex patients end up functioning heterosexuals. Indeed, medical interventions seeking to "normalize" intersex bodies traditionally breeze past the question of hormones or chromosomes (although these, too, can be misleading) 20 and focus instead on whether a body can penetrate or be penetrated. Thus, when an XY child appears incapable of penetrative sex due to an intersex condition, accidental castration, or penis size, that infant will typically be designated a "girl" 21 and subjected to feminizing procedures - e.g., clitoridectomy, clitoral reduction, vaginoplasty, vaginal dilatation, hormonal treatments, and the removal of internal sex organs if present - without regard to other indicators of sexual identity. 22 As the physician who pioneered this approach explains: "The rationale for such a program is simple: it is possible, with surgery and hormonal therapy, to habilize a baby with a grossly defective penis more effectively as a girl than a boy. . . . Vaginoplasty permits a normal sex life, whereas phalloplasty would not." 23

Although the practice of ensuring that newborns function sexually may seem befuddling or even prurient, queer theory helps explain the origins of such interest, as well as the fact that pediatric assignment of sex has only recently been questioned. 24 As Judith Butler remarks:

The mark of gender appears to "qualify" bodies as human bodies; the moment in which an infant becomes humanized is when the question, "is it a boy or girl?" is answered. Those bodily figures who do not fit into either gender fall outside the human, indeed, constitute the domain of the dehumanized and the abject against which the human itself is constituted. 25

However cosmetically successful the process of engineering legible bodies - e.g. those equipped to penetrate or be penetrated - intersex surgery often leaves its targets without the ability to reproduce or experience orgasms and sexual sensation. 26 Studies of pediatric genital surgery have also shown that the results are poor, with infants requiring an average of three to five surgical procedures, or as many as twenty-two, over the course of a lifetime. 27

In addition, genital surgeries are often performed without the consent of intersex patients. Parents often hastily agree to intersex surgeries for their children, based on a false sense of urgency created by physicians and the medical establishment. These decisions are typically made without benefit of even basic information regarding the surgical procedures, available alternatives, or possible harms. 28 Intersex children, in turn, are often denied basic information about their medical conditions and treatment histories well into their adolescent and adult lives. 29 This policy of deceit has long enjoyed the endorsement of the medical community, with leading voices in the field recommending that intersex children never be told about their medical conditions for the sake of their psychological development and wellbeing. 30

Today, these standards of practice are contradicted by copious amounts of evidence indicating that non-consensual, pediatric genital "normalization" surgery causes substantial harm. 31 Intersex children who undergo pediatric sex assignment procedures and repeated hospitalizations regularly grow up being told they have an obscure chronic illness - scarcely kinder and gentler than the truth. 32 If or when the truth is finally revealed, intersex children frequently report feeling as though they have endured assault and battery by their attending physicians. 33 In addition, normalization procedures often misfire, with intersex children growing up to desire bodies and sexual identities other than the ones they were assigned. 34 As one researcher explains, "[c]oping with this 'gender dysphoria,' as it is termed in the medical community, is very difficult for an intersexual whose genitals of the sex with which they now identify were intentionally surgically removed with their parents' consent." 35

Yet, even where doctors successfully predict the sex that an intersex child assumes as an adult, for many, feelings of deceit, betrayal, and outrage remain. 36 For these reasons, since its founding in 1993, the Intersex Society of North America (ISNA) has urged physicians to delay genital surgeries until patients are old enough to give informed consent. 37 Disputing the notion that binary sex assignment is necessary for healthy childhood development. 38

In rejecting treatment regimes bent on "normalizing" bodies, ISNA activists have also protested against their erasure and the notion that male or female is a "presupposition of humanness." 39 As ISNA pioneer Cheryl Chase notes in her candid narrative: "I could not accept that it was just or right or good to treat any person as I had been treated - my sex changed, my genitals cut up, my experience silenced and rendered invisible." 40

Indeed, because intersex surgeries are usually not motivated by medical necessity, and because they proceed without so much as the informed consent of patients, they ultimately serve a different function: disciplining the body and perpetuating the notion of binary sex for heterosexist ends. As
Disciplining the Body: Transgender Identity and the Medical Management of Sex

While intersex persons expose the constructed character of the terms male and female, transgender persons undermine the binary gender system in a different way, by shedding light on the ways that sex and gender identity can be non-corporeal - transcending the body, or at least, the sex classifications assigned at birth. This point is captured best by the sheer multitude of transgender identities. While some individuals reject their birth-assigned sex in favor of another, others reject the binary system entirely, choosing to identify as androgynous, genderqueer, gender non-conforming, two-spirit or perhaps just trans. As trans gender writer Paisley Currah notes, these two identity projects are not an "either-or proposition." Instead, they exist in dialogue - with activists challenging the practice of identity regulation in an effort to create a broader, liberatory space while using existing legal structures to harmonize their internal senses of self.

Although transgender and intersex persons both complicate biological essentialism, the relationships of both communities to the medical establishment could hardly be more different. Ironically, while intersex persons receive near-immediate medical interventions, oftentimes as a matter of medical necessity, transgender persons face significant obstacles as well as steep costs when seeking gender-related care. This is not because transgender persons escape the scrutiny of medical authorities; rather, it results from the specific and invasive forms of scrutiny and regulation that occur. While intersex persons are figured to have a disorder of the body, transgender people are classified as having a disorder of the mind. As a result, transgender persons seeking gender-affirming healthcare treatment (e.g. hormones, surgery) are routinely forced to pathologize themselves. They are required to adopt a specific set of narratives about their bodies, their identities, and their childhoods in order to convince the therapists who serve as gatekeepers that they are "disordered" and therefore entitled to care.

Other courts direct their inquiry to transgender petitioners' body parts, effectively placing their genitals on trial. In Kanaras v. Kantaras, the presiding judge did precisely this - inquiring into "the appearance and function of his genitals, whether he urinated while seated or standing, and the sexual function of his body."49

Disease and disability narratives have also been crucial for transgender persons seeking to defray the near-prohibitive expenses of gender-related healthcare. With the costs of hormone treatment, sex reassignment procedures and the prerequisite mental health visits frequently exceeding $100,000, 53 without healthcare coverage, all but the most wealthy transgender people would be forced to forego treatment and the possibility of legal recognition it can usher in.54 In this capacity, private insurers and Medicaid agencies act as another set of regulatory authorities, with the former rejecting claims under broad exclusion clauses, and the latter rejecting the expenses of those who fail to establish that sex reassignment procedures are a "medical necessity," or "the only successful treatment" for gender identity disorder.

While this may encompass the story of many transgender persons, it entrenches the discourse of "disordered minds, disordered bodies" in medicine and law without enshrining any affirmative, class-based rights - for instance, the right to self-determination and self-expression, the right to medical treatment, or the right to be free from gender identity discrimination. This is no accident: rather, the gatekeeping and medicalization of transgender identity permit ongoing denial of the complexity and diversity of sex. For transgender persons, living and being recognized as one's desired sex cannot be achieved by asserting sexual autonomy; it requires pathologizing oneself instead.

C. The Legal Construction of Sex: Constructing and Adjudicating Sex Difference

Missing from this story thus far is law's key role in the construction of sex. Courts and administrative agencies make two demands of bodies - that they be legible as male or female, and that they be so designated and classified. These classification practices form part of an intricate, two-tiered, bureaucracy, with state agencies placing sex-designations on birth certificates, drivers' licenses, and other identity documents.59 Federal agencies insisting that data be collected and tabulated.60 and both state and federal authorities using sex data to enforce same-sex marriage bans and policies of intimate discrimination.61 Select combat troops for foreign wars.62 Conduct population-level surveillance for domestic wars.63 and administer complex and embedded regimes of state-sanctioned sex segregation.64

In determining which bodies are male or female, sex is adjudicated as a mixed question of fact and law, with neither self-proclaimed identity nor evidence of sex reassignment surgery wholly sufficient to confer sexual citizenship and legal personhood. Instead, courts and agencies act as fact-finders, inspecting transgender bodies, scrutinizing medical records, and collecting testimonial evidence in order to reach a final conclusion concerning who and what they are - 'male' or 'female.'

Yet, while courts are empowered to act as fact-finders, there is no consistency in the standards applied, suggesting a jurisprudence of desired outcomes. Some court cases have treated expert medical testimony as sacrosanct. For instance, in denying a transwoman's request to change her birth certificate, a New York court relied on the opinion of a physician's committee that the petitioner remained male, calling its deference "mandatory."66

However, where expediency, courts have accorded little or no weight to medical opinion. For example, in Littelton v. Prange,67 the court explicitly rejected both expert testimony and medical authorities in determining that the petitioner, a transgender widow, did not have standing to bring a wrongful death action on her husband's behalf. Voiding her marriage on grounds that it was an illegal same-sex union, the court held: "Some physicians would consider Christie a female ... Her female anatomy, however, is all man-made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied."68

Other courts direct their inquiry to transgender petitioners' body parts, effectively placing their genitals on trial. In Kanaras v. Kantaras, the presiding judge did precisely this - inquiring into "the appearance and function of his genitals, whether he urinated while seated or standing, and the sexual
Practices in which he and his wife had engaged" - when determining whether he was fit to be a custodial parent.69 Similarly, in M.T. v. J.T., a lone case upholding a transgender marriage, the court's approach was equally invasive. Before concluding that the transgender petitioner was a lawful female, the court scrutinized her vagina- determining whether it had a "good cosmetic appearance," and whether it would be "adequate for... traditional penile/vaginal intercourse."70

Still on other occasions, what courts are looking for is even more inscrutable: in In re Ladrach, it is nothing less than proof of changed chromosomes.71 In another case, it is the "ability to 'produce ova and bear offspring'" - a standard which many "real" women would fail to meet.72 The variability of standards that courts employ, coupled with the certainty that each court professes in reaching its determination,73 reveals the extent to which definitions of "male" and "female" are constructed by, and adopted as, law. Put another way, sex is revealed to possess both an ideological and ideological quality, existing as dogma as well as evidence of the creator's work - with the creator being our system of laws.74

Yet, the repeated theme of case law - that voluntary75 sex reassignment procedures do not guarantee legal personhood76 - does more than deny transgender people the satisfaction of living as their self-declared genders. Instead, in many contexts it neutralizes them, robbing them of sexual identities entirely.77 No better example exists than courts' handling of transgender civil rights claims. Whether the issue is employment discrimination, public accommodations/bathroom access or Medicaid access, courts routinely hold that discrimination against transgender persons is not discrimination on the basis of sex, but something else.78

For instance, in In re Gardner, the court posthumously voided a transgender marriage on grounds that the petitioner was a "transsexual" as opposed to an actual man or a woman. As the court stated, "The words 'sex,' 'male' and 'female' in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of 'persons of the opposite sex' contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria."80

In Underwood v. Archer Management Services, Inc., the court reached a similar conclusion, holding, "Ms. Underwood fails to allege any discrimination on the basis of her being a woman, in that she merely indicates that she was discriminated against because of her status as a transsexual. "81 Thus, in the eyes of many judges, sex reassignment surgery renders a person neither male nor female, but merely "a transsexual" - an abject status that excludes the individual from civil rights protections and, more fundamentally, from the category of the human."2

A similar line of reasoning was employed in Ulane v. Eastern Airlines, "3 a Title VII case brought by Karen Ulane, an airline pilot who was discharged after receiving sex reassignment surgery. Rejecting the petitioner's contention that she had been discriminated against on the basis of sex, the court wrote:

The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e., a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male.84

Ulane's reasoning has been relied on in a number of subsequent cases, including Etsitty v. Utah Transit Authority.85 In Etsitty, the Court of Appeals for the Tenth Circuit rebuffed a transgender woman's claims that her termination as a bus driver was impermissible sex discrimination. Citing Ulane with approval, the court ruled that transgender people did not enjoy Title VII protections, holding:

In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.86

Lest any ambiguity have been created by its statement, the court proceeded to clarify that, for transgender people, discrimination on the basis of sex never occurs, holding that, "However far Price Waterhouse reaches," employers have a nondiscriminatory justification for firing transgender employees who seek to be accommodated by company bathrooms.87

In the few instances where transgender plaintiffs have prevailed under Title VII, it is often a pyrrhic victory, gained at the expense of judicial affirmation of transgender identities. In Smith v. City of Salem, Ohio, a transgender woman who prevailed on her Title VII claim did so, not on grounds that she suffered discrimination as a female (based, perhaps, on her more masculine appearance), but instead on the grounds that she was discriminated against as a "gender non-conforming" man.89 The well-intentioned court - while vociferously objecting to the Ulane line of cases80 - nonetheless introduced petitioner by her birth name, "Jimmie L. Smith," and referred to her using male pronouns throughout.91 An identical phenomenon took place in Barnes v. City of Cincinnati92 when a transgender firefighter challenged her termination. Although the court found for the plaintiff, Phillip Barnes, not Philecia Barnes, was granted relief.93

Thus, surveying transgender rights cases demonstrates the ways in which transgender bodies remain unintelligible to the judiciary along with complex notions of sex.94 Law's reluctance to recognize transgender persons on their own terms, as real men and real women who suffer actionable discrimination, has led their legal lives to be characterized by exclusion - exclusion from federal civil rights laws, from disabilities protection, and from the United States Constitution.95 By designating which bodies and identities are deserving of protection, law's role in the construction of sex serves to define the concept of humanity itself.96

D. False Binaries: The Legal Construction of Race Throughout History

There is nothing innocent about the way that law constructs and manages sex classifications and the sex binary. Rather, the modern adjudication of sex puts courts and agencies to work in ways that resemble the administration of an earlier set of socially constructed categories: racial classifications and the racial caste system. State technologies of administration and classification were a prerequisite to chattel slavery, the Fugitive Slave Act, post-Reconstruction Black Codes, and the more modern regime of separate but equal. What appears as a sidenote in Loving v. Virginia - that state registrars were required to keep "certificates of racial composition" on file97 - reveals the true depth of state involvement in the generation of racial meanings. Binary conceptions of race were constructed by, and adopted as law, kept in public records, and placed prominently on identity
documents. As the population of immigrants and interracial Americans increased, and the color caste became less reliable, these technologies of racial classification became even more important.

Courtrooms also became sites of racial theatre. Prior to the Civil War, people regularly went to court to challenge their designation as slaves, to defend their status as free persons, or to assert clean hands when charged with aiding fugitives. Race was also litigated by immigrants seeking to qualify for citizenship101 and, after abolition, race was litigated to claim or divest inheritance, to void marriage licenses and private contracts, to determine the school district in which a child belonged and to bring accusations of reputational injury and slander.102

In many respects, the adjudication of race and sex have identical hallmarks. Foremost, courts tasked with making racial determinations classified relied on a binary paradigm; persons were either Black or White. Second, courts adopted one of two approaches: appealing to common knowledge and folk wisdom, or appealing to racialized science. In the period directly following emancipation, racial science loomed large, with states adopting the one-drop rule and theories of hypodermic to maintain racial subordination and racial difference. However, as unruly bodies - here, immigrants - began to complicate binary conceptions of race, common knowledge approaches eventually won out, and courts wholly embraced their role as factfinder. As Ian Haney López explains, this phenomenon strongly reveals the constructed character of racial classifications:

By 1909, changes in immigration demographics and in anthropological thinking combined to create contradictions between science and common knowledge. . . . Science's inability to confirm through empirical evidence that population racial beliefs that held Syrians and Asian Indians to be non-Whites should have led the courts to question whether race was a natural phenomenon. So deeply held was this belief, however, that instead of re-examining the nature of race, the courts began to disparage science.108

Law also played a generative role - mandating that racial identity be performed, while simultaneously defining race through these performances. As Ariela Gross explains, “[d]oing the things a white man or woman did became the law's working definition of what it meant to be white.” Seen through the lens of queer theory, race and sex can be viewed as having similar footing in this respect because even in the instances where they 'congeal into the most reified forms, the 'congealing' is itself an insistent and insidious practice, sustained and regulated by various social means.”110 Whatever the similarities between state regulation of race and sex throughout history, modern practices have diverged. Today, no one questions the impropriety of adjudicating racial identity, and scarcely anyone accepts the eugenics-like logic that permeated the state's efforts at achieving a coherent system of racial classifications. Furthermore, most would balk at the notion of state agencies maintaining "certificates and registries of racial composition," or having race memorialized on birth certificates as well as drivers' licenses. Given the unconscionability of state administered racial classifications, query then - why aren't sex classifications equally suspect?

VI. Resisting Arbitrary Classifications: A New Approach to Equal Protection

In Frontiero v. Richardson, the Supreme Court took one of its earliest forays into the realm of equal protection based on sex discrimination. Reviewing a statute that treated male and female service members differently with respect to dependent benefits, six justices found the statute unconstitutional under the Fourteenth Amendment. However, Justices Brennan, Douglas, White and Marshall went one step further and addressed a then novel question - the level of scrutiny to be applied. Highlighting the links between sex discrimination and racial subordination, including their historical character, the plurality concluded that strict scrutiny should apply to sex classifications, noting, "we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.”114

Three years later in Craig v. Boren, for the sake of commanding a majority, Justice Brennan abandoned the argument that sex classifications should be grouped as a suspect classification alongside those based on race and ethnicity. Striking down a statute that restricted along gender lines the sale of beer, the Court held that sex classifications were effectively "Mosi-suspect and, in the process, crafted an entirely new tier of judicial review - intermediate scrutiny.116 Since Boren, this distinction has proven more than semantic: whereas strict scrutiny renders laws that distinguish based on race presumptively invalid, intermediate scrutiny, laws that distinguish based on sex are valid so long as they are substantially related to an important government purpose. "18

In practice, this standard has proven highly deferential - implicitly adopting the view that sex differences are natural and inherent, and that some degree of differential treatment is justifiable under the Constitution. Indeed, laws that discriminate on the basis of sex are upheld by courts nearly forty percent of the time. In addition, strands of modern case law - for instance, decisions upholding child custody laws and immigration laws that give a presumption to mothers - reveal continued jurisprudential investment in the notion that men and women inhabit separate spheres.120

As Katherine Franke has written, this uncritical acceptance of "real" biological sex difference "reifies as foundational fact which is really an effect of normative gender ideology.”121 Adopting a strictly biological theory of sex has at least two harmful consequences. Foremost, it renders those with unruly and transgressive bodies - here, transgender and intersex persons - unintelligible in traditional sex equality frameworks. Secondly, it overstates the extent to which "sex" and the body are responsible for discrimination targeting cisgender.m or XX, women, while understating the pernicious importance of discrimination that occurs along gender lines. Here Franke quips: "When women are denied employment, for instance, it is not because the discriminator is thinking 'a Y chromosome is necessary in order to perform this kind of work.' Instead, fault is properly placed on the cultural practices and legal institutions that naturalize the concept of male and female, as well as the roles and scripts they may play - a phenomenon which sexes the genitals, or "transform[s] a vagina into a she."126

A. Revisiting the Road Not Taken: Why Sex Should Be Subject to Strict Scrutiny

When the full extent of the state's involvement in the construction of sex and sex difference is revealed, it becomes clear that modern sex classifications are inherently suspect. Sex is not a natural, coherent category, whether one considers chromosomes, gonads, genitals or reproductive ability. Instead, it is a category-type that ratifies, perpetuates and is fundamentally constituted by "invidious, archaic, and overbroad stereotypes" - something which the Supreme Court has recognized as a clear violation of the Equal Protection Clause time and again, irrespective of whether sex, race or ancestry is concerned.128
The modern application of intermediate scrutiny to sex discrimination claims is premised on the naturalness of sex and the coherence of binary sex categories. As the court announced in Michael M. v. Superior Ct.,

"Because the Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require "things which are different in fact . . . to be treated in law as though they were the same," this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."

However, as this Article argues, sex classifications do not operate to separate apples from oranges. Instead, they are both overinclusive and underinclusive - in many instances, separating apples from apples; and in others, denying the existence of benign variety.

Deconstructing the body has two necessary consequences. First, by demonstrating the extent to which sex difference is produced by societal expectation and state ordering, it reveals that stereotypes are at play in virtually every circumstance where the dichotomies "man" or "woman" and "male" or "female" appear in the law. Thus, absent redrawing, these classifications fall under J.E.B. v. Alabama or any number of modern precedents.

Second, the main justifications for distinguishing between race discrimination and sex discrimination disappear. These justifications have traditionally gone as follows:

"Detrimental racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated. By contrast, while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason there are differences between males and females that the Constitution necessarily recognizes. In this case, we deal with the most basic of these differences: females can become pregnant as the result of sexual intercourse; males cannot."

Citing to news stories about the recent spate of pregnant men is not even necessary to break the Court's tautology here. Instead, it is enough that, wherever sex has been distinguished from race in equal protection jurisprudence, it has been on grounds that some degree of sex difference is inherent and natural. When these presumptions fall away, and we acknowledge that the categories of "male" and "female" include XX boys and XY girls, men and women who are able to procreate and those who can't, the argument that sex discrimination should be treated to lessened scrutiny also falls apart.

As earlier sections have explained, the view that sex is socially constructed does not deny sex its social significance or materiality, nor rob people of the ability to use sex designations for the purposes of self-identification. Instead, it ejects the state from its current position as creator, administrator and arbiter of sex difference. Nor does this Article eschew identity politics or organizing premised on common identities - a move more typical of anti-essentialist approaches. Instead, with respect to the state, it argues for large-scale reclassification, insisting that, to the extent that the state adopts a theory of the body, it must truly group oranges with oranges; that is to say, sex classifications must be premised not on biology but on self-identified gender.

1. Why the Social Construction Thesis is Not Fatal to Equal Protection Claims

While other writers who have argued that sex (and sexual orientation) discrimination should be viewed as a suspect classification, they have couched their arguments on a very different premise: namely, that sex is immutable and concrete, or at least as concrete as race. This Article adopts an alternative approach: asserting that the constructed character of sex, and its mutability, provide an independent basis for finding sex classifications suspect. As this section demonstrates, while this position is perhaps controversial, it is not without support.

Equal protection taxes pertaining to racial discrimination reveal implicit acceptance of social constructionist theories. For example, in Saint Francis College v. Al-Khazraji, the Supreme Court observed,

"Clear-cut [racial] categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having" little biological significance. . . . These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature."

Rather than undermine the proposition that race classifications should be subject to strict scrutiny, social constructionist theories have seemingly bolstered it, confirming the judiciary's belief that racial classifications should be viewed with suspicion. As Donald Braman notes:

"The Court has not held - indeed, could not have held - racial status to be biological, but . . . has instead treated that status as the product of institutions that were necessarily social and political. . . . The notion that other marginalized groups must demonstrate that their status is based on a biologically immutable characteristic in order to analogize to race has created a false barrier to garnering heightened scrutiny of discriminatory classifications."

Thus, although arguments regarding the constructed character of a trait may not be fruitful in all instances, continued reliance on biological theories of sex that deny the unruliness of bodies or the complexities of sex identity is equally unfruitful. Under the social constructionist approach that this Article advocates, courts presently engaged in the practice of sizing up gaitls, gonads, and genitals in order to determine whether petitioners have been discriminated against on basis of sex will adopt less offensive forms of scrutiny - halting their search for proof of sex and looking instead to gender.

2. The Significance of Immutability
Arguing against biological immutability is not fatal to equal protection claims, either. As scholarship reveals, the belief that immutability has always been central to the equal protection jurisprudence, and that immutability is synonymous with biology, is largely a misapprehension.141 Immutability made its way into the equal protection doctrine in 1967 as a prohibition on the use of status categories unrelated to performance, merit and ability,142 and this conception of immutability is what has endured in the racial discrimination context, to the extent that it appears at all.143 Thus, in considering those who press for sexual orientation to be regarded as a suspect classification, Donald Braman notes: “a nonbiological understanding of race compels the conclusion that the immutability standard is not grounded in understandings of biological variation either.”144

Indeed, arguments regarding immutability on the basis of physical traits have not paved an avenue to heightened scrutiny as much as placed a ceiling on claims. In Michael M. v. Superior Court, the Supreme Court stated that, “while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes.”145

Something similar was at work in Cleburne v. Cleburne Living Center, when the Court heard an equal protection claim brought by a group of disabled persons.146 Holding that the claims of disabled persons were not subject to heightened scrutiny, the Court noted “[Disabled persons] are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one.”147 From there, the Court proceeded to question the very vitality of immutability analysis, stating:

...if the large and amorphous class of the mentally retarded were deemed quasisuspect ... it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities... We are reluctant to set out on that course, and we decline to do so. 148

Then, revealingly - as if to acknowledge the paradox it had created - the court cited in a footnote John Hart Ely's Democracy and Distrust, stating:

As Dean Ely has observed:

Surely one has to feel sorry for a person disabled by something he or she can't do anything about, but I'm not aware of any reason to suppose that elected officials are unusually unlikely to share that feeling. Moreover, classifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that immutability is relevant. The explanation, when one is given, is that those characteristics (unlike the one the commentator is trying to render suspect) are often relevant to legitimate purposes. At that point, there's not much left of the immutability theory, is there?149

Appropriately then, today immutability has been given diminished significance both in courts and legal commentary. As Suzanne Goldberg has critiqued, "the importance accorded to immutability as an indicia of suspectness runs contrary to the Court's own recognition that society, not nature, gives many traits their significance."150 State courts and lower federal courts have seemingly reached an identical conclusion, and recent cases in the area of sexual orientation have accorded less weight to immutability when determining the proper degree of judicial scrutiny, looking instead to other factors such as political powerlessness.151

Finally, in the contexts where immutability determinations are still required - specifically, petitions for asylum152 - the term has taken on new meanings. As the Board of Immigration Appeals explained in Acosta, immutability refers to those characteristics that "members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."153 Further, as one writer has observed, "while courts use the terms 'fundamental' and 'immutable' to describe the characteristic linking a particular social group, they have also made clear that biological innateness is not a requirement and that a characteristic may be a wholly social construct."154

Viewed in total, this Article calls for suspect classification on grounds that are wholly proper: when immutability is described in the biological sense, it is perhaps the least important criterion in determining whether a group is deserving of strict scrutiny (indeed, as Cleburne shows, it counter-indicates strict scrutiny classification); when immutability is viewed under the definition supplied by Acosta, sexual identity clearly fits as one such characteristic.

B. What's At Stake: The Final Frontiers of Sex Discrimination

Intermediate scrutiny premised on biological theories of sex has given a presumption of validity to sex discrimination, obscuring the ways that sex discrimination and sex classifications remain invidious.155 By adopting Frontiero's argument that sex classifications are inherently suspect, this Article proposes a strong prophylactic to sex discrimination's most persistent forms. This section discusses the so-called final frontiers of sex discrimination and examines how strict scrutiny may merit revisitation. The following section takes a closer look at the compelling state interests that sex discrimination may serve.

1. Identity Documents and Sex Classifications

Sex is presently assigned at birth, memorialized on birth certificates and displayed prominently on identity documents and public records. Under Public Records laws and the REAL ID Act, this use of sex categorizations has gone from casual to mandatory, making the binary classification of bodies a state imperative.156 Under strict scrutiny, this practice of compulsory designation would yield to a regime where sexual identity, like race, would be removed from identity documents and only be voluntarily reported.157 By disabling state technologies of sex designation and administration, both the transgender and intersex communities would enjoy greater liberatory space. Transgender people who wish to pursue medical transitions would be able do so without legal necessity, and SRS would cease to be a precondition to gender-affirming identity documents and legal personhood.

Meanwhile, intersex persons would benefit from a cultural shift: since doctors would no longer have to rush to make sex determinations on birth certificates, the crisis model of intersex healthcare management would cede.158 The current goals of intersex management - engineering bodies that are capable of heterosexual sex - might also be called into question, much like the strands of science that served explicitly racialized ends. 159
Although transgender people experience overt forms of discrimination in the work place, most courts have found that it is not discrimination based on sex, but something else. The exclusion of transgender people from the ambit of Title VII and the Equal Protection Clause has contributed to a nationwide transgender unemployment rate estimated at seventy percent. The difficulties faced by transgender people searching for legitimate work fuels entry into “criminalized economies” - introducing the threat of incarceration in single-sex facilities based on birth-assigned sex, not self-identified gender.

Under a new jurisprudence on equal protection, sex would be freed from the stranglehold of outdated notions of “real women” and “real men” to the benefit of transgender people as well as all those who are sexual identity-deviant. Courts hearing employment discrimination cases would scrutinize whether compulsory performances of gender are being demanded of the body, and whether bodies are being disciplined to conform with societal expectations of masculine and feminine, and male and female. As such, sex and gender will cease to have divergent meanings in the Equal Protection and Title VII context, and courts will come to acknowledge what scholars like Butler and Franke suspected all along - that gender sexes the body.

3. Sex-Segregated Facilities

a. Bathrooms

The vast majority of public restrooms are currently single-sex - a policy which disadvantages transgender and gender-nonconforming persons, as well as disabled individuals and parents with young children. Strict scrutiny would require states to smoke out the justifications for these architectures of sex difference and ensure that the means fits snugly with the goal.

b. Prisons

Under a strict scrutiny approach, the government would be forced to revisit its incarceration policies. As the court has held in the context of race, “[t]he right not to be discriminated against based on one’s race ... is not a right that need necessarily be compromised for the sake of proper prison administration.” Therefore, state governments and federal agencies seeking to maintain sex-segregated facilities would have to provide a compelling justification beyond mere administrative.

c. Schools

Strict scrutiny would also apply to the handful of sex-segregated public schools - ninety-one schools in all, along with five-hundred forty other schools offering sex-segregated programming - that have sprung up across the country since United States v. Virginia with the implicit endorsement of the Supreme Court. Suspect classification would not necessarily spell an end to these programs; however, it would require states to revisit both the classifications used and the purposes served. Any program that relies on a strictly biological notion of sex identity would be expected to embrace a model premised instead on gender expression and voluntary identification.

d. The Military

Applying strict scrutiny to sex classifications would also challenge the precedent of Rostker v. Goldberg, a peculiar case upholding the military’s exclusion of women from the selective draft due to the military’s adherence to an even more invidious form of discrimination - exclusion from the ranks of combat forces. By demanding that a compelling state interest be shown, sex-segregation policies such as these would cease to be self-perpetuating and self-reinforcing.

C. Compelling State Interests: Babies and Bathrooms

Having identified key areas where sex difference and sex classifications remain inscribed in the law, this section examines the state interests that might provide a compelling justification.

1. Rape Prevention

The prevention of rape and sexual assault is a state interest that implicates two existing regimes of sex-segregation: prisons and bathrooms. Rape prevention is a compelling interest in all conventional senses of the term; thus, the question becomes whether current practices of sex-segregation are a narrowly tailored remedy that serve this end.

a. Prisons

In the case of prisons, serious doubts emerge as to efficacy and fit. Current incarceration policies place transgender women in men’s facilities, irrespective of whether they have begun medical transition - a practice which has led to rape, sexual assault and forced prostitution. Current incarceration policies also leave countless others vulnerable. Given both the demands of strict scrutiny and the extent to which current policies systematically fail, states would have the onus of ensuring that the classifications they employ are neither overinclusive nor underinclusive. At minimum, this would likely mean that gender, not genitals, be used to determine prisoner placement. Thus, when a person’s subjective gender identity is female, placement would be proper with other self-identified females. In addition, such states would be expected to devise policies that address rape and vulnerability in facilities solely housing cisgender men.

Requiring more rigorous interrogation of incarceration policies would also encourage policymakers to revisit key assumptions. Sex-segregated prisons are viewed as a fixture in our system of corrections partially because of their ubiquity. Yet, as Dean Spade points out, this notion belies American history: the earliest American prisons were co-ed facilities, and today, state experimentation with integrated prisons has shown...
encouraging results, with decreased rates of violence, sexual assault and recidivism being reported across the board. 177 Co-ed incarceration programs, or "co-corrections", relies on an entirely different model of prison administration than the current system, which carelessly deposits transgender women into all-male prisons, and its successes raise the question of what goals, if any, sex-segregation actually achieves. 178 This bolsters research that suggests the quality of inmate supervision is in fact the better indicator of the vulnerability that persons will experience behind bars. 179

b. Bathrooms

Although sex-segregated bathrooms ostensibly serve the goal of rape prevention, they, too, may be viewed as fatally overand under-inclusive. As Terry Kogan explains, the origins of single-sex bathrooms are far from benign; instead, they reflect the logic of separate spheres, and were designed to provide a public "haven to protect the weaker body of the woman worker" and to "protect and vindicate social morality." 180 Given the architectural flaws of single-sex toilets - their inconvenience to transgender persons and to families, and their inability to accommodate the disabled, particularly when they assist the requirements of other persons - and the architectural alternatives that could be readily designed, the tailoring and fit of sex-segregated bathrooms seem questionable. In lieu of strict sex-segregation, governments could build more unisex bathrooms and solicit proposals for new restroom designs that better accommodate a wide range of bodies. One small design innovation that could serve the end of rape prevention is giving restrooms more public space - for instance, placing stalls in corridors instead of an enclosed room, and ensuring that good lighting, large aisles, and clear exits are present. 181

2. National Security and Fraud

Under a strict scrutiny approach, restrictive identity document policies will be properly understood to thwart the very ends they pursue. Although restrictions on the issuance of new identity documents are typically justified as a measure to prevent fraud, they actually enable fraud by forcing increasingly large populations of transgender people to live "off paper," without drivers' licenses, birth certificates, passports, or other documents that can confirm their names or identities. 182 As an identifier on passports and drivers' licenses, sex classifications are also fatally imprecise: given the sheer variety of bodies (e.g., stocky, lanky, curvy, flat-chested) and genders (e.g., masculine, feminine, androgynous) that exist, sex classifications only operate as a reliable identification tool when accompanied by a demand for specific performances of gender - that is, stereotypical performances of gender and dress that make the body legible as male or female. Under strict scrutiny, the use of such coercive classifications is simply unsupportable. 183

Finally, even when the state pursues what is undoubtedly its compelling interest in national security, there is no reason why sex classifications should be treated differently than race. Although race remains a powerful descriptor and visual cue, no serious argument has been made to begin including racial data on passports, birth certificates or drivers' licenses. This is true even with the passage of the REAL ID Act. As one scholar explains, "race or skin color is not required under the REAL ID Act, ostensibly because legal determinations should not be made based on those criteria." 184 In the end, the state cannot make use of a suspect classification like race or sex for "mere administrative convenience," particularly given the existence of other, more reliable identifiers - fingerprints and retinal data being just two examples. 185

3. The State Interest in Procreation

To the extent that sex classifications are incorporated into same-sex marriage bans, 186 states may try to claim that sex classifications serve the compelling state interest of ensuring procreation and child development. 187 As scholars have pointed out, however, these arguments quickly collapse in the face of the infertility rates that exist among cisgender women and heterosexual couples; the constitutional protection afforded to the decision not to procreate; and the degree to which dysfunctional child-rearing by heterosexual couples has led to state interventions and a widening web of LGBTQ caregiving. 188 Therefore, even if the state's interest in procreation and stable child-rearing is viewed as compelling, existing sex classifications do not advance this interest, and serious redrawing is needed.

VII. STRICT SCRUTINY, LINKED FATE: TOWARD A GENDER BLIND CONSTITUTION?

The equal protection doctrine is steeped in a long tradition of analogy. 189 Following in this tradition, this Article has relied on several such metaphors. First, this Article reviewed the history of racial regulation and racial classification in the United States in order to suggest the impropriety of such ongoing practice with respect to sex, critiquing the state's role in the construction and administration of identity. Second, this Article highlighted the more nuanced understanding of race that appears in the modern equal protection doctrine, using it to argue that courts are starting to adopt social constructionist theories of identity, and that these theories increase, rather than decrease, the extent to which relevant classifications are deserving of scrutiny.

Until now, however, this Article has not addressed the experiences of racial minorities under the regime of strict scrutiny - perhaps the most fertile grounds for comparison. As this section will show, recent developments in the equal protection doctrine for racial classification suggest some of the perils of suspect classification that transgender and cisgender persons can expect to face. However, instead of reaching a definitive conclusion as to whether suspect classification will be wholly beneficial, it ends with a question: What does the Fourteenth Amendment guarantee at its core, and to what extent does it embody principles of anti-subordination?

A. Empowerment or Erasure? The Experience of Racial Minorities with the Fourteenth Amendment

For racial minorities, the experience of strict scrutiny has been bittersweet. In 1954, the Supreme Court began its modern crusade against racial discrimination with a thunderclap, overruling the doctrine of separate but equal and striking down one of the largest edifices of racial inferiority, racially segregated public schools. 190 In the thirty years that followed, more barriers fell under the court's searching gaze as Jim Crow laws were attacked in the areas of busing, public parks, restrooms, interracial cohabitation, and finally, marriage. 191

Today, however, this work is being carefully undone. Nowhere is this more apparent than in the place where it all began: segregated public schools. Today, Brown v. Board, the precedent which called for the dismantling of racially segregated schools, has become a buttress against affirmative action programs designed to equalize educational opportunities. Citing to Brown, the Supreme Court has twice-held that racial classifications cannot be used
to achieve racial balance in schools or remedy past discrimination. Thus, instead of ensuring minorities access to a quality public education for purposes of empowerment, the state's only compelling interest in this domain is pursuing diversity with the end that "classroom discussion [become] livelier, more spirited, and simply more enlightening and interesting," and that (ostensibly non-minory) students gain "exposure to widely diverse people, cultures, ideas and viewpoints."193

In a parallel move, recent Supreme Court cases have blurred the line between the benign and invidious use of racial classifications, subjecting each and every use to strict scrutiny and a presumption of invalidity. 194 Critiques of the Court's new "color-blindness" doctrine have been vociferous, with some scholars calling for the abrogation of strict scrutiny all together.195 Minorities' discontentment with "life under strict scrutiny" raises important questions for all other groups seeking increased protections under the Equal Protection Doctrine, including transgender persons, as well as lesbians, bisexuals and gays seeking to have strict scrutiny accorded to sexual orientation discrimination.

If suspect classification prevents people from being named in the law for invidious as well as beneficial purposes, then with respect to principles of anti-subordination, strict scrutiny is arguably more expressive than protective. However, the fact that strict scrutiny is expressive does not mean that it is toothless. Instead, it implies that LGBTQ and feminist activists fighting for suspect classification may be acting against interest, pursuing a symbolic goal that ultimately prevents the more instrumental use of law.198 Although these concerns are numerous enough to deserve separate academic consideration,199 the following section examines the merits and drawbacks of strict scrutiny for sex discrimination with respect to a few key areas.

B. Paradoxes of Anti-Discrimination: Toward a Gender-blind Constitution?

As Part III A reveals, in the racial discrimination context, the equal protection clause has been a site of paradoxes. What began as a jurisprudence bent on eradicating "measures designed to maintain White Supremacy."200 has morphed into a doctrine that assails the use of most race conscious remedies.201 If strict scrutiny would similarly call for a doctrine of "genderblindness," then intermediate scrutiny- or living in the shadow of law - may present welcome opportunities.202 To explore these issues further, the following section takes a brief and speculative look at how women's protective legislation will fare under strict scrutiny.

1. Unintended Consequences: The Status of Women's Protective Legislation

For the traditional constituents of sex antidiscrimination law - cisgender women - women's protective legislation such as maternity leave laws and the Violence Against Women Act (VAWA) are arguably the equivalent of affirmative action programs, in the sense that they were designed to serve a remedial function. Thus, one way of gauging the desirability and undesirability of strict scrutiny is seeing how these laws perform under the regime.

In the case of maternity leave laws, the application of strict scrutiny would have a clearly desirable effect - unseating the precedent of Geduldig v. Aiello.203 A case which declared that pregnancy discrimination was not a form of sex discrimination. Turning toward a more robust doctrine on sex discrimination would eradicate this distinction by highlighting the ways that pregnancy, like gender, sexes the body.204 Recognizing pregnancy discrimination as an instance of sex discrimination would have an immediate benefit for sex discrimination's traditional constituents, cisgender women seeking equal opportunities and equal consideration in the workplace, particularly after becoming mothers.

However, with the benefits of strict scrutiny would also come a burden of greater semantic precision, and terms used in family leave statutes would have to be drawn more carefully to survive the presumption of invalidity presently accorded to suspect classifications. Thus, instead of extending medical leave to expecting mothers, states would have to provide benefits to all those who take primary responsibility for nurturing children and providing caregiving.205 expanding the web of beneficiaries to include pregnant women as well as the men who occasionally conceive,206 adoptive parents, and families who expand through the use of surrogates.

The status of VAWA in its current form is perhaps a more complex issue; and it is one that highlights the need for ongoing study of the equal protection doctrine, and consideration of how statutes designed to achieve anti-subordination might nonetheless serve compelling state interests. Indeed, it tracks the calls of critical race theorists for an equal protection doctrine that is more sensitive to category-types and more faithful to the anti-subordination principle first articulated by the Supreme Court.207

2. Transgender and Intersex Struggles: The Work that Will Remain

Rejuvenating the equal protection doctrine for sex will not displace the need for other rights-based approaches. The equal protection clause will not come to the aid of transgender persons seeking state assistance for their SRS procedures; to achieve these ends, an affirmative right to healthcare based approaches. The equal protection clause will not come to the aid of transgender persons seeking state assistance for their SRS procedures; to achieve these ends, an affirmative right to healthcare and Medicaid coverage may well be needed.208 Similarly, equal protection, by its own force, will not dismantle all of the intersex management practices that take place in private hospitals; although it will eradicate the crisis-framework, and the practice of rushing to judgment and assigning sex for the purposes of birth certificates. To the extent that intersex advocates seek stronger mechanisms of discrimination - for instance, a retooled doctrine of informed consent, or a regime of civil and criminal sanctions for doctors who perform nonconsensual pediatric surgeries - legislative advocacy may be needed.

CONCLUSION

As this Article maintains, the mutability and incoherence of sex as a category, it is best understood as a socially constructed and arbitrary classification. Under the equal protection analysis that has evolved in the racial discrimination context - one which has viewed the constructed character of race as a sign of its irrelevance - there is ample ground for sex categories to be subjected to strict scrutiny. The use of more searching forms of scrutiny will advance the interests of transgender, intersex, and cisgender men and women by "defusing" the power of gender as a mechanism of discrimination.209

Yet, in the racial discrimination context, the equal protection clause has also been a site of paradoxes: what began as a jurisprudence bent on eradicating "measures designed to maintain White Supremacy."210 has morphed into a doctrine that assails the use of most race-conscious remedies.211 Thus, this Article is sensitive to the critiques of tiered scrutiny that caution hesitation. As the emergence of the "color-blindness" doctrine suggests, serious consideration must be given as to whether strict scrutiny continues to embody anti-subordination principles and create an
emancipatory space. If strict scrutiny spells "genderblindness," then it may be necessary to acknowledge that being named in the law through suspect classification is more expressive than protective, and to abandon it as a movement goal altogether.212

However, until that day, building on the promise of Frontiero v. Richardson, and the robust vision of equal protection as a mechanism for anti-subordination espoused by early cases like Loving v. Virginia, sex discrimination and the state's involvement in the construction, administration, and adjudication of sex difference should be regarded as inherently suspect and subjected to the most rigorous forms of scrutiny.

[Footnote]
2 See, e.g., Littleton v. Prange, 9 S.W.3d 223, 223-24 (Tex. Cl. App. 1999). This Article questions the notion of binary gender. For this reason, the terms "male" and "female" appear in quotation whenever they are used or presented in a way that appears to "occupy the field." This is not to discount the everyday significance of sex, or the deeper meaning and significance of gender. Accordingly, this Article does not challenge the social materiality of sex, only its (binary) biological reality. Queer theorists and anti-essentialist feminists adopt a similar approach. See JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE Subversion of Identity 43 (1990).

[Footnote]
4 Littleton, 95.W.3d at 231.
5 Gardiner, 42 P.3d at 137 (emphasis added).

[Footnote]
6 See, e.g., Julie A. Greenberg, Defining Male and Female: Intersexuality and the Collision Between Law and Biology, 41 Ariz. L. Rev. 265, 278-59 (1999) (describing the array of intersex conditions, which include some that manifest at birth, and others during puberty). Though estimates differ, intersex conditions occur at a rate as high as 2 in 1,000 live births. See Anne FaustoSterling, Sexing the Body: Gender Politics and the Construction of Sexuality 51 (2000) (estimating prevalence at 1.7%).

Recently, practitioners have begun using the phrase "disorders of sexual development" and "disorders of sexual differentiation" to describe intersex conditions as part of an effort to decrease stigma in society and within the medical profession. See, e.g., Alice D. Dreger, Cheryl Chase et al., Changing the Nomenclature/Taxonomy for Intersex: A Scientific and Clinical Rationale, 18 J. Pediatric Endocrinology & Metabolism 729 (2005); I.A. Hughes et al., Consensus Statement on Management of Intersex Disorders, 91 ARCHIVES OF Disease in Child. 554 (2006); Elizabeth Reis, Divergence or Disorder? The Politics of Naming Intersex, 50 PERSPECTIVES in Biology & Med. 535 (2007).
7 Dylan Vade, Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That is More Inclusive of Transgender People, 1 MICH. J. Gender & L. 253, 264-72 (2005) (describing the diversity of sexual identities).
8 A karyotype is a test used to identify a person's chromosomal makeup. See Hughes et al., supra note 6, at 556.

[Footnote]
9 See Alice D. Dreger, "Ambiguous Sex" - or Ambivalent Medicine? Ethical Issues in the Treatment of Intersexuality, 28 HASTINGS Ctr. Rep. 24, 26 (1998) [hereinafter Dreger, Ambiguous Sex]. For a similar view, see generally Suzanne J. Kessler, The Medical Construction of Gender: Case Management of Intersexed Infants, 16 SIGNS 3, 4 (1990) (questioning whether "female and male are biological givens compelling a culture of two genders"); and FaustoSterling, supra note 5, at 8 ("Since intersexuality is quite literally embodied by both sexes, they weaken claims about sexual difference.").

10 Drawing a more powerful metaphor, one scholar has likened sex to a religious belief. See David Cruz, Disestablishing Sex as a Religious Belief, 16 SIGNS 3, 4 (1990) (questioning whether "female and male are biological givens compelling a culture of two genders"); and FaustoSterling, supra note 5, at 8 ("Since intersexuality is quite literally embodied by both sexes, they weaken claims about sexual difference.").

19 See Fausto-Sterling, supra note 6, at 71-73 (discussing physician's efforts to ensure that intersex infants grow up heterosexual... not homosexual); Cheryl Chase, Hermaphrodites with Attitude: Mapping the Emergence of Intersex Political Activism, GLO: Lesbian & Gay Stud., Vol 4.2, 189, 191 (1998) [hereinafter Chase, Hermaphrodites with Attitude] (giving an intimate account of this process of rendering a child "penetrable"). Intersex surgeries are frequently commenced within days or hours of a child's birth. For one account, see Laura Hermer, Paradigms Revised: Intersex Children, Bioethics & The Law, 1 1 Annals of Health L. 1 95, 1 95 (2002).

20 See Kate Haas, Who Will Make Room for the Intersexed?, 30 Am. J. L. & Med. 41, 42 (2004) ("The medical community's current practice focuses solely on genital appearance, discounting the fact that chromosomes also affect individuals' gender identities and personalities."); see also Greenberg, supra note 6, at 281 (reporting that in addition to forty-six XXXY children, children have been born with chromosomes ranging from XXX, XXY, XXXX, YYXY, YYXXY, XYYY to XO). Two of the most common intersex conditions, Congenital Adrenal Hyperplasia (CAH) and Androgen Insensitivity Syndrome-complete or Partial (CAIS or PAIS), are caused by increased production of, or alternatively, decreased receptivity to hormones. Id. at 286-88.

21 See Nancy Ehrenreich & Mark Barr, Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices", 40 HARV. C.R. & L. Rev. 71, 125-26 (2000) (estimating that "ninety percent of [genital] surgery is aimed at changing the intersex child into a girl"); see also Fausto-Sterling, supra note 6, at 57. However, this trend is likely to change as techniques for "masculinizing" intersex children are perfected - a burgeoning area of medical practice that Anne Fausto-Sterling has coyly described as an "obsession with penis-building." Id. at 63.

[Footnote]
22 As one author explains: "Before assigning a gender, doctors usually determine the baby's chromosome pattern and internal reproductive organs (including the gonads, which will be the source of hormones that influence later development of secondary sex characteristics), and examine the external genitalia. However, none of these factors is determinative in assigning a gender." Anne Tamar-Mattis, Exceptions to the Rule: Curing the Law s Failure to Protect Intersex Infants, 2 1 Berkeley J. Gender L. & Just. 59, 66 (2006).

23 John Money, Abhlati Penis: Normal Male Infant Sex- Reassigned as a Girl, Archives of Sexual Behavior, Vol 4 1 65, at 66 (1975) [hereinafter Money, Abhlati Penis]; see also Chase, Hermaphrodites with Attitude, supra note 19, at 192 (noting "Members of the Johns Hopkins intersex team have justified female assignment by saying, "You can make a hole, but you can't build a pole"). (citing Melissa Hendrick), Is It a Boy or a Girl?, JOHNS HOPKINS MAG., Nov. 1993, at 10-16).


Engendering Sex: Birth Certificates, Biology and the Body in means of determining sex assignment

Angelo-American Law, 12 Cardozo J.L. & Gender 213 (2005) (advocating for lived gender as a

[Footnote]
25 Butler, supra note 2, at 142. Judith Butler, Michel Foucault, and Thomas Laqueur pioneered the modern effort to queer sex categories.

26 See Chase, Hermaphrodites with Attitude, supra note 19, at 192. Ehrenreich & Barr also make this point, noting: [P]hysicians take great care (and cause great suffering to the intersex children, as detailed above) to construct vaginas so

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28 See generally Hazel Glenn Beh & Milton Diamond, An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitilia?, 7 MICH. J. Gender L. & 1, 42-47 (2000) (discussing gaps in "parental" informed consent); Sara R. Benson, Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed, 1 2 Cardozo J.L. & Gender 3 1, 37 (2005); Tamar Mattis, supra note 22, at 64. Ehrenreich & Barr also make this point, noting: [P]hysicians take great care (and cause great suffering to the intersex children, as detailed above) to construct vaginas so

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31 Dreger, Ambiguous Sex, supra note 9, at 32 (stating "clearly, the notion that deception or selective truth

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Physicians take great care (and cause great suffering to the intersex children, as detailed above) to construct vaginas so

[Footnote]
32 Cheryl Chase was admitted to the hospital on pretense that she needed a hernia operation. See Fausto-Sterling, supra note 6, at 80. For Chase's stirring account, see Chase, Hermaphrodites with Attitude, supra note 19, at 194.

33 See Chase, Hermaphrodites with Attitude, supra note 19, at 194-96.

34 The movement to non-consensual medical interventions gained momentum from the well-documented story of David Reimer, or John/Joan, an XY girl whose genital surgery was championed by John Money as a successful medical intervention. See Money, Abhlati Penis, supra note 23, at 86-71 (discussing case study). David's lifelong identification as "male" led him to transition - despite a lack of upfront disclosure about the initial sex assignment procedures he had been subjected to. See John Colapinto, As Nature Made Him: The Boy Who Was Raised as a Girl 143-50, 212-13 (2000); Haas,supra note 20, at 46 (noting that David Reimer was "certain that he was not a girl, despite being deceived by his doctor and his family"); David eventually committed suicide - due in large part to the plethora of medical decisions that had been made without his consent. See John Colapinto, Gender Gap: What Were the Real Reasons Behind David Reimer's Suicide?, Slate., June 3, 2004, http://slate.msn.com/id/2101676; Hazel Glenn Beh & Milton Diamond, David Reimer's Legacy: Limiting Parental Discretion, 12 Cardozo J.L. & Gender 213 (2005) (discussing David Reimer's suicide and encouraging an end to parental consent to surgery that "normalizes" genitalia in infancy).

35 Kamar-Ford, supra note 29, at 484.
the women testify:

All the things my body might have grown to do, all the possibilities, went down the hall with my amputated clitoris to the pathology department. The rest of me went to the recovery room - I'm still recovering...

I am horrified by what has been done to me and by the conspiracy of silence and lies. I am filled with grief and rage, but also relief finally to believe that maybe I am not the only one.

Chase, Hermaphrodites with Attitude, supra note 19, at 197. Indeed, as one author points out, "[t]he strongest argument against genital-normalizing surgery on infants is that every sex-person who has spoken publicly on the subject has spoken against surgery." Tamar-Maiss, supra note 22, at 67.


38 See Emily A. Bishop, Note, A Child's Expertise: Establishing Statutory Protection for Intersexed Children Who Reject Their Gender of Assignment, 82 N.Y.U. L. Rev. 531, 537 (2007) ("Evidence of healthy psychosocial development in intersexed children who have not had surgery... calls into question the necessity and wisdom of the procedures"); (internal citations omitted); see also Benson, supra note 29; Ricci, supra note 24, at 333 (arguing that sex assignment can be delayed until puberty).


[Footnote]

40 Chase, Hermaphrodites with Attitude, supra note 19, at 195 (emphasis added).

41 Id. at 204.


43 Paisley Currah, 77Transgender Rights Imaginary, 4 Geo. J. Gender & L. 705, 705 (2003). Nor should advocating for the disestablishment of gender require abandoning the pursuit of gender appropriate identity documents or health care. Through the use of discrete legal claims, id. at 716-17.

46 I use the term "biological essentialism" to refer to those theories that regard "male" and "female" as stable, concrete and legible categories, frequently defined with reference to genitalia.

47 For a thoughtful exposition of these issues, see, e.g., Ben-Asher, supra note 17, at 90 (explaining "Intersex and transsex politics are now at odds with each other... the two social movements are supported by opposing medical structures and refute each other's medically based narratives"); Butler, Doing Justice to Someone, supra note 39, at 626 ("Another paradox that emerges here is the place of sharp machin... of the technological, in debates on intersexuality and transsexuality").

48 As Chase explains:

More than one ISNA member has discovered that surgeons actually operated on their genitals at no charge. The medical establishment's fascination with its own power to change sex and its drive to rescue parents from their intersex children are so strong that heroic interventions are delivered without regard to the capitalistic model that ordinarily governs medical services.

Chase, Hermaphrodites with Attitude, supra note 19, at 203. This is ironic, of course, because sex (re)assignment surgeries (SRS) procedures here are undeclared and nonconsensual. A further irony - although transgender persons already have great difficulty securing legal recognition following their sex change surgeries, intersex changes are not as well publicized and receive far less attention. In many cases, the genital changes are as the result of harsh surgical protocols to "correct" rather than to enhance. See Corbev v. Corbbct, [1970] 2 Eng. Rep. 373, 2 W.L.R. 1306, available at http://www.pfc.org.uk/node/319 (refusing to recognize physician as a legal woman after determining they were transgender, not intersexual); see also Littletow v. Prange, 9 S.W.3d 232, 232 (Tex. Ct. App. 1999) (Angel, J., concurring) (finding that transgender patient could not truly transition into a woman but "expressing] no opinion" about how intersex petitioners should be treated).

49 Gender Identity Disorder (GID) was first classified as a mental disorder by the American Psychiatric Association in 1980. In DSM-III, it appeared under the heading "Transsexualism," and today in the Fourth Edition of the manual, it remains prominently listed as a mental disorder. See Task Force on DSM-IV, American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, § 302.85 (4th cd. rev. 2000). Homosexuality originally appeared as a mental disorder as well, but it was removed after the second printing. Task Force on DSM-II, American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (2d ed. 1974). This terminology has been soundly critiqued. See, e.g., GID Reform, http://www.gidrcform.org/index.html (last visited May 1, 2011). Perhaps heeding the cries of activists, under proposed revisions for the DSM, Gender Identity Disorder would be reclassified and termed as "Gender Incongruence" instead. See Task Force On DSM-V, American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders- Proposed Revisions (DSM-V), § 302.85, available at http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?tid=482.

50 A diagnosis of GID is generally a prerequisite for accessing nearly all forms of care. Dean Spade, Resisting Medicine, Re/modeling Gender, 18 Berkeley Women's L.J. 15, 19-23 (2003) [hereinafter Spade, Resisting Medicine] (discussing how accessing care requires successfully "passing as a transsexual"); see also Carolyn Grose, A Persistent Critique: Constructing Client's Stories, 12 Clinical L. Rev. 329, 340-43 (2006) (discussing the 1979 Harry Benjamin International Gender Dysphoria Association Standards of Care). From there, transgender persons were traditionally expected to complete a "transgender sexual transition model" that ordinarily governs medical services. See Corbev v. Corbbct, supra note 19, at 203. This is ironic, of course, because sex (re)assignment surgeries (SRS) procedures here are undeclared and nonconsensual. A further irony - although transgender persons already have great difficulty securing legal recognition following their sex change surgeries, intersex changes are not as well publicized and receive far less attention. In many cases, the genital changes are as the result of harsh surgical protocols to "correct" rather than to enhance. See Corbev v. Corbbct, [1970] 2 Eng. Rep. 373, 2 W.L.R. 1306, available at http://www.pfc.org.uk/node/319 (refusing to recognize physician as a legal woman after determining they were transgender, not intersexual); see also Littletow v. Prange, 9 S.W.3d 232, 232 (Tex. Ct. App. 1999) (Angel, J., concurring) (finding that transgender patient could not truly transition into a woman but "expressing] no opinion" about how intersex petitioners should be treated).

51 Stephanie Markowitz, C as the target gender while continuing hormone therapy. The procedures and operations themselves, can add up to $50,000 and so

Before SRS can even take place, the transsexual must typically undergo at least two years of preparation and extreme time


53 As one author explains, Before SRS can even take place, the transsexual must typically undergo at least two years of preparation and extreme time-consuming and financial commitments. Three months of psychotherapy are required to obtain an evaluation for hormone therapy and one or two years spent living twenty-four hours a day as the target gender while continuing hormone therapy. The procedures and operations themselves, can add up to $50,000 and sometimes more than $100,000.

Stephanie Markowitz, Change of Sex Designation on Transsexuals' Birth Certificates: Public Policy and Equal Protection, 14 CARDOZO J.L. & GENDER 705, 709 (2008) (internal citations omitted) ("estimating costs of care for transgender women"); see also Ben-Asher, supra note 17, at 56 ("The high costs of sex change surgery, which may exceed $100,000, turn the Medicaid program into a gatekeeper of the legal recognition of transsexuals."); For female-to-male transgender persons, costs may be lower, as surgical intervention may be limited to chest or "top" surgery. See Patricia A. Cain, Stories From The Gender Garden: Transsexuals And Anti-Discrimination Law, 75 DENV. U. L. Rev. 1321, 1334 n. 59 (1998). But compare this to Cheryl Chase's account of intersex surgery, which are often provided for free. Chase, Hermaphrodites with Attitude, supra note 19, at 203.
Reassignment Treatment, 31


Reassignment Treatment, 31

[Footnote] 59 See generally Spade, Documenting Gender, supra note 1, at 737-91 (discussing areas of the law where gender classification is presently required).

60 Spade, Documenting Gender, supra note 1, at 797-800 (discussing the REAL ID Act of 2005, Pub. L. No. 109-13, 1 19 Stat. 23 1 (2005), a statute which requires states to display gender identity information on drivers' licenses for socialized national security purposes); see also McGrath, supra note 1, at 389-99 (same) (noting "[n]o state has yet to adopt a gender-neutral driver's license of identification card. The REAL ID Act precludes any state's efforts to do so.").


63 See, e.g., Spade, Documenting Gender, supra note 1, at 797-800.

64 See David S. Cohen, The Stubborn Persistence of Sex Segregation, Colum. J. Gender L. (forthcoming 2011) (documenting the myriad forms of sex discrimination that remain lawful); on file with author.

65 Sex reassignment surgery (SRS) is generally regarded as a necessary but insufficient condition for legal recognition. That is to say, although SRS itself is not conclusive of legal personhood, recognition is never accorded on basis of self-declared identity alone. See In re Heilig, 816 A.2d 68, 86-87 (Md. 2003) (according recognition to transgender persons who undergo SRS procedures that are "permanent and irreversible"). For a critique that the requirement of medical intervention unduly burdens transgender persons who are poor or genderqueer, see Romeo, supra note 52, at 73 1-36, 739 (advocating for a new approach).


68 Id. at 230-31 (emphasis added).

[Footnote] 69 See Romeo, supra note 52, at 727-28 (citing Kantaras v. Kantaras, No. 98-5375CA, at *47-51 (Fla. Cir. Ct. Feb. 21, 2003)), Although Kantaras was eventually awarded custody, the judge's final opinion was eight hundred pages long and presented detailed factual findings, including the finding that Michael Kantaras was legally male. See Nat'l Ctr. for Lesbian Rts., supra note 3.

70 M. T. v. J. T., 355 A.2d 204, 206 (N.J. Super. Ct. App. Div. 1976). The court ultimately held that marriages of "postoperative transsexuals" would be recognized, provided that "by virtue of medical treatment, [they] thereby possessed of the full capacity to function sexually as a male or female[.]" Id. at 211. For a case with the same reasoning but different result, see Corbett v. Corbett [1970] 2 Eng. Rep. 373, 2 W.L.R. 1306 (scrutinizing the length of a "so-called artificial vagina").


72 In re Gardiner, 42 P.3d 120, 1 35 (Kan. 2002); see also Terry S. Kogan, Transsexuals, Intersexuals, and Same-Sex Marriage, 18 BYU J. PUB. L. 371, 378 (2004) (discussing how capacity for procreation is not necessary to determining who can marry).

73 Littlton, 9 S.W.3d at 223-24 (rejecting SRS, doctor's notes, and medical records as competent evidence of sex identity, and instead deeming "schoolchildren" as the proper adjudicators of sex determinations).

[Footnote] 74 See generally Cruz, supra note 10, at 1003-05 (comparing sex classifications to religion and noting their ideological character). For a rhetorical slip, see Littleton, 9 S.W.3d at 23 1 ("Christie [Littleton] was created and born a male.").

75 Here, important contrast is drawn between the experience of transgender persons and that of intersex persons who are the recipients of nonconsensual sex assignment surgery.

76 See Littleton, 9 S.W.3d at 231. Although Kantaras, Gardiner, and Littleton are especially notorious, the modern administrative state polices sex in a manner that is equally insidious. See Spade, Documenting Gender, supra note 1, at 759.

77 Abigail W. Lloyd, Defining the Human: Are Transgendered People Strangers to the Law?, 20 Berkeley J. Gender L. & Just. 150, 154 (2005) (lamenting "[n]o matter how a transgender plaintiff articulates his injury, he is likely to encounter a court that draws a line in a way that makes him a stranger to all of the laws that
could protect him.

78 Seemingly perplexed by the phenomenon, one article on transgender people begins with a question: "Why is it that our jurisprudence has developed a notion of sex, gender, and sexual orientation that completely excludes transgender or transsexual persons? Are transsexual persons neither male nor female under the law, and thus undeserving of protections that are available for men and for women?" Cain, supra note 53, at 1324.

79 42 P.3d 120 (Kan. 2002).

[Footnote]
80 Id. at 135 (emphasis added).
82 Id. at 1084, 1085; see also Butler, supra note 2, at 142. For two thoughtful expositions on transgender lives and judicial rhetoric, see Susan Etta Keller, Operations of Legal Rhetoric: Examining Transsexual and Judicial Sexuality, 34 Harv. C.R.-C.L. L. Rev. 329, 344-46 (1999) (discussing Ulane, infra note 83); and Janine M. d’Cunha, Our Transgressions: The Legal System’s Role with Providing Equal Protection to Transgender and Transsexual People, 71 UMKC L. Rev. 507 (2002).
83 742 F.2d 1081 (7th Cir. 1984).

[Footnote]
84 Id. at 1085 (emphasis added).
85 502 F.3d 1215 (10th Cir. 2007).
86 Id. at 1222.
87 Id. at 1224.

[Footnote]
88 378 F.3d 566 (6th Cir. 2004).
89 Id. at 572 (Finding prima facie discrimination under Price Waterhouse because petitioner "did not conform with ... sex stereotypes of how a man should look and behave").
90 Indeed, as the Court bravely held, "Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity." id. at 575.
91 Id. at 567.
92 401 F.3d 729, 733 (6th Cir. 2005).
93 Analysis of successful cases also reveals the extent to which discourses on disability have become a necessity for plaintiffs. In Smith and Barnes, Appellate counsel endorsed the gender non-conformity theory and used male pronouns to describe the transgender plaintiffs, albeit grudgingly. See Smith, 378 F.3d at 572 (discussing gender non-conformity theory raised in the complaint); see also Final Brief for Plaintiff-Appellee, Barnes v. City of Cincinnati, 40 1 F.3d 729 (6th Cir. 2005) (No. 03-4 1 1 0) 2004 WL 578 0 263, at * 1 n. 1 (stating "the City chose to use Philip and male pronouns in its brief. So as not to confuse this Court, Plaintiff will follow suit"). For more discussion about the ironies of using trans-unfriendly rhetoric to advance transgender rights claims, see Spade, Resisting Medicine, supra note 50, at 33-35; see also Jeannie Chung, Identity or Condition: The Theory and Practice of Applying State Disability Laws to Transgender Individuals, COLUM. J. GENDER & L. (forthcoming 20 1 1 ).

[Footnote]
94 Notable exceptions are Schroer v. Billington, 424 F. Supp.2d 203 (D.D.C. 2006), which ruled favorably on a transgender petitioner's employment discrimination claims without compromising her female identity; and O'Donnabhan v. Com'r of Internal Revenue, 134 TC. 34, 2010 WL 364206 (U.S. Tax Ct. Feb. 2, 2010), where a tax court used gender-appropriate pronouns when ruling that a transgender woman's SRS expenses were a taxable-deductible expense.
95 Liberal state legislatures have been the primary protectors of transgender persons in the workplace. See, e.g., Paisley Currah & Shannon Minter, Unprincipled Exclusions: The Struggle To Achieve Judicial And Legislative Equality For Transgender And Transsexual People, 7 WM. & MARY J. WOMEN & L. 37 (2000) (discussing civil rights statutes that protect and exclude on grounds of gender identity); Marvin Dunson III, Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law, 22 BERKELEY J. EMP. & LAB. L. 465, 486-94 (2001) (discussing state ordinances).
96 Given transgender people's status as legal outsiders, and outsiders to the category of "the human," see Butler, supra note 2, at 142, it should come as no surprise that they experience profound forms of societal marginalization. For a discussion on how unemployment and incarceration affects the lives of transgender people, see Part II.B, infra; see also Currah & Minter, supra note 95, at 38-40 (observing that law's disregard for transgender people calls into question their very humanity).

[Footnote]

[Footnote]
101 HANEY LÓPEZ, supra note 43, 56-78 (discussing Ozawa v. United States, 260 U.S. 178 (1922), and United States v. Thind, 261 U.S. 204 (1923)).
102 Gross, supra note 100, at 120-21.
104 See HANEY LÓPEZ, supra note 43, at 35-67 (discussing the use of racial binaries in the racial prerequisite cases); People v. Hall, 4 Cal. 399 (1854) (concluding that Chinese people were not White, and were therefore barred from giving in-court testimony); Rice v. Gong Lum, 104 So. 105 (Miss. 1925), aff'd 275 U.S. 76 (1927) (concluding that Chinese persons should be sent to segregated Negro schools). Interestingly, while courts remained mired in binary conceptions of race, from an early point the federal census took a different approach. See Kenneth E. Payson, Comment, Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People, 84 Calif. L. Rev. 1233, 1252 (1996) (noting that between 1850 and 1870, Mulatto, Indian, Chinese and Japanese all appeared as boxes on the federal census). In 1920, however, the United States Census ceased counting Mulattos as a separate group - officially adopting the

105 Haney López, supra note 43, at 6-7; see also United States v. Thind, 261 U.S. 204, 208 (1923) (defining white person as "words of common speech and not of scientific origin").

[Footnote]
106 Hickman, supra note 1, at 1163, 1173-81.
107 This is not unlike Littleton and In Re Gardiner, which rejected medical testimony. See supra notes 67-79, and accompanying text.
109 Gross, supra note 100, at 1 12.
110 Butler, supra note 2, at 43 (discussing gender in a manner that permits comparison).

[Footnote]
111 Although a 1994 study observed many instances where race continues to be administered, the past fifteen years have witnessed even further retreat. See Christopher A. Ford, Administering Identity: The Determination of "Race " in Race-Conscious Law, 82 Calif. L. REV. 1231, 1258 (1994) (documenting instances where race is still administered).
113 IdW. at 688, 690-91.
114 Id. at 688; see also McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (stating that racial classifications are “constitutionally suspect and subject to the most rigid scrutiny” (internal citations omitted)).

[Footnote]
116 Id. at 197 (articulating the standard for intermediate scrutiny); id. at 211 n. 1 (Powell, J., concurring) (describing it as a "middle-tier" approach); see also Clark v. Jeter, 486 U.S. 456, 461 (1988) (“Classifications based on race or national origin, and classifications affecting fundamental rights, arc given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or legitimacy.”) (internal citations omitted).
117 See McLaughlin, 379 U.S. at 192 (calling racial classifications "constitutionally suspect"); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (stating that a compelling governmental interest must be shown). For a lengthy discussion of critiques of strict scrutiny, see Part III, infra.
118 Boren, 429 U.S. at 197-98. In Mississippi University for Women v. Hogan, 458 U.S. 718 (1982), and United States v. Virginia,57 U.S. 515 (1996), stronger wording was used. See, e.g., Virginia, 5 1 8 U.S. at 53 1 ("Parties who seek to defend gender-based governmental action must demonstrate an 'exceedingly persuasive justification' for that action."). However, the use of this rhetoric has not altered the applicable standard.

[Footnote]
121 Franke, The Central Mistake, supra note 14, at 2 (emphasis removed).
122 Id. at 70-74 (discussing the ptr-enlightenment view that "men and women were merely variations on the same human body," and Plato’s belief in three sexes)) (citing Thomas Laqueur, Making Sex: Body and Gender from the Greeks to Freud 8-10 (1990)). Franke also cites transgender discrimination cases as evidence of the flaws in the modern approach. Id.
124 Franke, The Central Mistake, supra note 14, at 40 (calling biology and genitals "false proxies").

[Footnote]
125 Id. at 59.
126 Id. at 39-40 (emphasis in original). Franke adopts the theory that sexual identities are best viewed as performed.
127 See Parts I A and I B, supra.
128 Craig v. Boren, 429 U.S. 190, 198 (1976) (“Hence, ‘archaic and overbroad’ generalizations . . . [cannot] justify use of a gender line in determining eligibility for certain governmental entitlements.”) (internal citations omitted) (summarizing case law); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 130 (1994) (“Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.”); Rice v. Cayetano, 528 U.S. 495, 517 (2000) (“One of the principal reasons race is treated as a forbidden classification is that it demeanes the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.”).

[Footnote]
130 51 1 U.S. at 130 (discussing equal protection standard).

[Footnote]
131 Michael M., 450 U.S. at 478 (internal citations omitted) (emphasis added).

[Footnote]
133 Another way of reaching the same conclusion is tracing the evolution of Fourteenth Amendment jurisprudence and the pertinent classes through cases like
United States v. Carretone Products, 304 US 144, 152 n.4 (1938), San Antonio School District v. Rodriguez, 411 U.S. 1, 28 (1973), Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). Discussing the extent to which sex discrimination warrants heightened scrutiny, the Court in J.E.B. v. Alabama ex rel. TB., 511 U.S. 127 (1994), aptly notes: "We need not determine, however, whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of our Nation's history. It is necessary only to acknowledge that 'our Nation has had a long and unfortunate history of sex discrimination.'" Id. at 136 (internal citations omitted).


[Footnote] 136 481 U.S. 604, 610 n.4 (1987) (internal citations omitted). Other commentators have noted this as well. (See Suzanne B. Goldberg, Equality without Tiers, 77 S. CAL. L. Rev. 481, 486 n.22 [2004] [hereinafter Goldberg, Equality without Tiers] (noting "'[t]he Court has recognized that the significance accorded to race in American society may be socially constructed")).

137 Al-Khazrajy, 48 1 U.S at 610 n.4.


139 Goldberg, On Making Anti-Essentialist Arguments, supra note 134, at 657-59 (questioning whether the claims of groups that lack visibility - e.g., ethnicity and sexual orientation - would be susceptible to this analysis).

140 This responds to the concern some commentators have expressed that anti-essentialist arguments will complicate the merits determination in discrimination cases and invite fact-finding on subjects well outside the court's expertise. See id. at 636-37; 641-42. However, as cases like Littleton and Gardiner have shown, presently there is no shortage of judicial fact-finding on issues related to sex.

141 Braman, supra note 138, at 1378.

[Footnote] 142 Id. at 1448-50 (citing Developments in the Law - Equal Protection, 82 Harv. L. Rev. 1065 (1969)). Developments in the Law was cited to with approval in Frontiere v. Richardson, 41 1 U.S. 677, 686 n.18 (1973), the first case to use immutability language.

143 Indeed, arguments regarding immutability on the basis of physical traits have not paved an avenue to heightened scrutiny as much as placed a ceiling on claims. See Michael M. v. Superior Ct., 450 U.S. 464, 468 (1981) (noting that the Equal Protection Clause does not require "things which arc different in fact . . . to be treated in law as though they were the same"); see also id. at 478 (Stevens, J., concurring) ("[W]hile detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there arc differences between males and females that the Constitution necessarily recognizes."). Something similar was at work in Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985), when the Court ruled that disabled persons were not a quasi-suspect class. See id. at 442 (["Disabled persons] arc thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one").

144 Braman, supra note 1 38, at 1 38 1.

145 See Michael M., 450 U.S. at 478 (Stevens, J., concurring); see also id. at 468.


[Footnote] 147 Id. at 442.

148 Id. at 445.

149 Id. at 442 n. 10 (citing John Hart Ely, Democracy and Distrust 190 (1 980) (emphasis in original)).

[Footnote] 150 Goldberg, Equality without Tiers, supra note 136, at 505-06.

151 Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 429, 432 (Conn. 2008) (rejecting immutability as an equal protection requirement); see also Tanner v. Or. Health Sciences Univ., 97! P.2d 435, 446-47 (Or. Ct. App. 1998) {concurring (arguing that the Constitution does not require a compelling state interest instead). Although these cases arise under state constitutions, in many respects their analysis is identical. See Kerrigan, 957 A.2d at 432 ("We there apply the same three-tiered equal protection methodology that is applied under the federal equal protection clause for purposes of our state constitution.").


154 Hinger, supra note 152, at 374 (internal citations omitted).

[Footnote] 155 Balder et al., supra note 1 19, at 249.

156 See, e.g., Reilly, supra note 24, at 319 (discussing birth certificate requirements); Spade, Documenting Gender, supra note 1, 797-800 (discussing REAL ID); McGrath, supra 1 (same).

[Footnote] 157 See Anderson v. Martin, 375 U.S. 399 (1964) (holding that the compulsory designation of race on ballots is unconstitutional under the Equal Protection Clause); Reilly, supra note 24, at 316-17 ("[t]he race of the child is not collected, because race is understood to be a part of identity that can only be self-reported."). (contrasting public records for race and sex).

158 See American Academy of Pediatrics, supra note 18, at 138 (recommending a treatment protocol for dealing with the "social emergency" of intersex births).

159 Haney López, supra note 98, at 20-25 (discussing the abandonment of racial science in law as well as society at large).


161 Spade, Documenting Gender, supra note 1, at 751-52.

[Footnote] 162 See Tarzwell, supra note 58, at 175-76; see also Darren Rosconblum. "Trapped" In Sing Sing: Transgendered Prisoners Caught in the Gender Binarism, 6 Mich. J. Gender & L. 499, 501 (2000) (describing the harms of prison placement policies for transgender persons). Police profiling of males-to-female transgender women - on city streets and in public space - exerts an independent effect, with many falling subject to police harassment and baseless arrests for solicitation. Shield, supra note 58, at 377 (reporting on high rates of arrest). In addition, many transgender persons are routed to prisons when sexsegregated "alternatives to incarceration" programs refuse to accept them. Spade, Documenting Gender, supra note 1, at 757-58.
163 I use this term to include transgender persons as well as the effeminate men and feminine women whose plight scholars have called attention to. See Case, supra note 14, at 61-75 (discussing effeminate men and feminine women); Render, supra note 14, at 99-103 (discussing feminine women).

164 Since many employment discrimination cases lack a state actor, the primary effect of strict scrutiny will be to diminish the imaginary division between sex and gender discrimination, making transgender discrimination claims more cognizable.

[Footnote]
167 See Part II.C, infra, for a discussion of compelling state interests.

169 See Part II.C, infra.

171 If courts wished to accord deference to the military policy, this could be done through traditional prudential mechanisms: the political question doctrine and separation of powers.


174 Roscnblum, supra note 162, at 523-29 (arguing for an end to genital based placement); Tarzwll, supra note 58, at 214 n.225 (recommending that transgender women be placed with women and transgender men be placed in a facility for vulnerable men).
175 To ensure that "prevention of rape" is not merely pretext, I argue that the law requires a symmetrical approach that addresses both "male" and "female" vulnerabilities.
176 Spade, Documenting Gender, supra note 1, at 780-81 (discussing early prisons).

177 Id. at 811-12 (discussing co-corrections).
178 See id. at 813 (posing a similar question).
180 Kogan, supra note 165, at 41-50 (explaining that the law mandated separate toilets, as well as separate lunch facilities and recreational spaces, to achieve the ends of privacy and modesty).

181 For this insight, I thank Stuti Desai.
182 See generally Spade, Documenting Gender, supra note 1 (discussing the effects of onerous and oftentimes conflicting gender reclassification policies).
183 For an interesting exposition in the race context, see Tseiming Yang, Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, the Census, and A Color-Blind Society, 11 Mich. J. Race & L. 367, 382-88, 392 (2006) (noting that "[w]ithout a consensus about the specific content, both meaning and boundaries, of racial categories, assertions about racial identity are impossible to evaluate in a rational fashion").

184 McGrath, supra note I, at 404 (added emphasis).
185 Id. at 404-05.
186 This Article leaves the probable effect of heightened scrutiny on sexual orientation discrimination for another day. However, it regards with approval caselaw and scholarship which has laid the groundwork for thinking of sexual orientation discrimination as an instance of sex discrimination, see, e.g., Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination, 69 N.Y.U. L. Rev. 197 (1994); or independently meriting heightened scrutiny, see, e.g., Carol Steikor, Note, 77 Harv. L. Rev. 1285 (1984). See also Perry v. Schwarzenegger, 754 F. Supp. 2d 921, 92697 (N.D. Cal. 2010) (concluding that laws which discriminate on the basis of sexual orientation discriminate on the basis of "sex," but that sexual orientation discrimination independently warrants heightened scrutiny).
187 For a sampling of these arguments, see Defendant-Intervenors' Answer to Questions for Closing Argument, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 08- CV-2292 VRW) (discussing the state interests that support the California gay marriage ban).


193 Grutter, 539 U.S. at 330.
[Footnote]
195 Parents Involved, 551 U.S. at 770-72 (Thomas, J., concurring) (arguing for a color-blind Constitution).
197 Id.
198 Consider the example of public schools. Presently there are several dozen single sex public schools as well as schools that are specially designed for LGBTQ students. Under intermediate and rational basis scrutiny, these programs easily evade review. See, e.g., Cohen, supra note 64. As Parents Involved suggests, under strict scrutiny these and other programs that were sex or sexual orientation conscious would likely be struck down.
199 In a future paper, I hope to unpack the social significance of strict scrutiny for disadvantaged minority groups and disentangle it from the legal significance - analyzing why attaining suspect classification continues to be a movement goal.

[Footnote]

[Footnote]
203 417 U.S. 484 (1974) (holding that pregnancy discrimination is not a constitutional violation); see also Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (extending Geduldig to Title VII). Although Geduldig can be read to suggest that interrogating sex categories necessarily ratchets equal protection down, id. at 497 n.20, this Article's position is that Geduldig makes a category mistake - overlooking the way that pregnancy, like gender, sexes the body.
204 The Pregnancy Discrimination Act of 1978 (“PDA”), 42 U.S.C. § 2000e(k) (2010), passed in response to Gilbert and Geduldig, makes pregnancy discrimination a violation of federal statutory law. However, had sex been initially regarded as a suspect classification, it is unlikely that pregnancy discrimination would have ever withstood judicial scrutiny. See Rachel Wolcott, Constitutional Law What "Choice" Do They Have?: Protecting Pregnant Minors' Reproductive Rights Using State Constitutions, 1999 SUPRM. AM. L. 129, 164-66 (expressing one such view).
206 See supra note 1 32 (discussing pregnant men).

[Footnote]
207 See generally Critical Race Theory: The Key Writings that FORMED the Movement (Kimberlé Crenshaw et al. eds., 1996).
208 See Ben-Ashcr, supra note 17, at 96 (calling for “affirmative government action that facilitates an individual's pursuit of freedom”).

[Footnote]
212 See, e.g., Goldberg, Equality without Tiers, supra note 136, at 527-58 (recommending a unitary approach). For yet another alternative - living under the shadow of law, see Franke, Domesticated Liberty, supra note 202, at 1425-26 (discussing the promise and possibility of law-free zones).

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M.D., Columbia Law School; BA., Yale University; Editor-in-Chief, Columbia Journal of Gender & Law, 2009-2010. For their helpful comments and insights, and for encouraging me to think critically about gender justice, I would like to thank Katherine Franke, Noa Ben Ashcr, Caroline Bettinger-Lopez, Kendall Thomas, Dean Spade, Scot Loren Moore, as well as Laura Stafford and the board and staff of JGL.