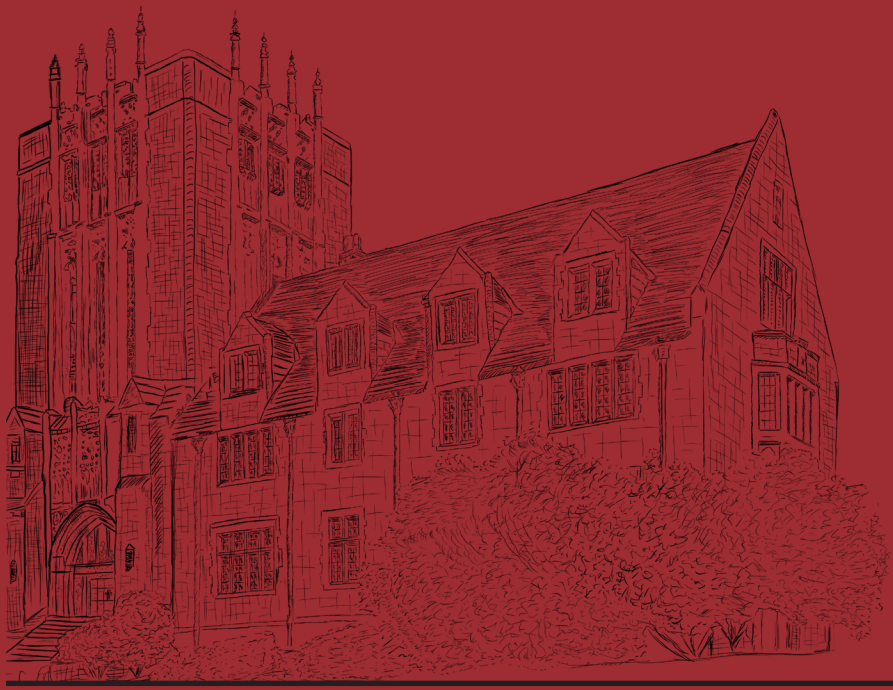
Grove City College

Journal of Law & Public Policy



Volume 16 2025

GROVE CITY COLLEGE

JOURNAL OF LAW & PUBLIC POLICY

Volume 16 2025

CONTENTS

Editor's Preface . . . . . *Roan A. Fair '26* VIII

Foreword . . . . . *Isaac J. Good '26* IX

Book Review

Where Are We Going,
Where Have We Come From?. . . . . *Jacob Sheldon Feiser '24* 1

Articles

Does IMF Loan Conditionality Promote Growth? . . . . . *Joshua C. Xu '26* 17

Sex v. Gender: How Modern Notions
of Gender Identity Destroy Sex, and
Why Courts Cannot Sidestep the Issue. . . . . *Nathan Sybrandy* 41

If It Pays, It Stays:The Economics
of Trophy Hunting. . . . . *Scott T. Cross '26 & Tamás Klein '26* 85

The *Grove City College Journal of Law & Public Policy* invites submissions of unsolicited manuscripts, which should conform to *The Bluebook: A Uniform System of Citation* (21st ed. 2020). Manuscripts should be submitted electronically in Microsoft Word™ format to LawJournal@gcc.edu.

The editors strongly prefer articles under 15,000 words in length, the equivalent of 50 *Journal* pages, including text and footnotes. The *Journal* will not publish articles exceeding 20,000 words, the equivalent of 60 *Journal* pages, except in extraordinary circumstances.

To facilitate our anonymous review process, please confine your name, affiliation, biographical information, and acknowledgements to a separate cover page. Please include the manuscript's title on the first text page.

Please use footnotes rather than endnotes. All citations and formatting should conform to the 21st edition of *The Bluebook*.

For additional information about the *Grove City College Journal of Law & Public Policy*, please email us at LawJournal@gcc.edu or visit us online at https://stuorgs2.gcc.edu/lawjournal/ or search for us at HeinOnline.

*The views expressed within these articles are those of the authors and do not necessarily reflect the policies or opinions of the *Journal*, its editors and staff, or Grove City College and its administration.

GROVE CITY COLLEGE

JOURNAL OF LAW & PUBLIC POLICY

2024-2025 Staff List

ROAN A. FAIR ‘26
Editor-in-Chief

ISAAC J. GOOD ‘26
Senior Articles Editor

GRACE K. SYKES ‘25
Junior Articles Editor

BENAIAH J. WEST ‘26
Executive Administrative Editor

JOSHUA C. XU ‘26
Executive Content Editor

GINGER M. SCHIFFMAYER ‘26
Executive Style Editor

JACOB H. REESE ‘26
Executive Citations Editor

Associate Content Editors

ABIGAIL A. BURITICA ‘27
MADYLIN M. GALBREATH ‘27
CARTER L. MANWARING ‘27
CHRISTA M. BASHINSKI ‘28

Associate Citations Editors

KEVIN D. CARR ‘25
ASHBY A. ABERNATHY ‘26
HUNTER G. BOYER ‘26
ANDREW T. GONDY ‘26
HENRY D. ZAVALICK ‘26

Associate Style Editors

DOMINIC M. PUGLISI ‘26
CLARISSA R. SCHULLER ‘26
SOPHIA R. HAHN ‘28

Faculty Advisors

Editorial Board

Grove City College

Grove City College was founded in 1876 in Grove City, Pennsylvania. The College is dedicated to providing high quality liberal arts and professional education in a Christian environment at an affordable cost. Nationally accredited and globally acclaimed, Grove City College educates students through the advancement of free enterprise, civil and religious liberty, representative government, arts and letters, and science and technology. True to its founding, the College strives to develop young leaders in areas of intellect, morality, spirituality, and society through intellectual inquiry, extensive study of the humanities, the ethical absolutes of the Ten Commandments, and Christ's moral teachings. The College advocates independence in higher education and actively demonstrates that conviction by exemplifying the American ideals of individual liberty and responsibility.

Since its inception, Grove City College has consistently been ranked among the best colleges and universities in the nation. Recent accolades include: The Princeton Review's "America's Best Value Colleges," Young America's Foundation "Top Conservative College," and U.S. News & World Report's "America's Best Colleges."

Grove City College Journal of Law & Public Policy

The *Grove City College Journal of Law & Public Policy* was organized in the fall of 2009 and is devoted to the academic discussion of law and public policy and the pursuit of scholarly research. Organized by co-founders James Van Eerden ’12, Kevin Hoffman ’11, and Steven Irwin ’12, the *Journal* was originally sponsored by the Grove City College Law Society. The unique, close-knit nature of the College’s community allows the *Journal* to feature the work of undergraduates, faculty, and alumni, together in one publication.

Nearly entirely student-managed, the *Journal* serves as an educational tool for undergraduate students to gain invaluable experience that will be helpful in graduate school and their future careers. The participation of alumni and faculty editors and the inclusion of alumni and faculty submissions add credence to the publication and allow for natural mentoring to take place. The *Journal* continues to impact educational communities around the country and can now be found in the law libraries of Akron University, Regent University, Duquesne University, the University of Pittsburgh, and Pennsylvania State University. The *Journal* has been cited in numerous academic publications and continues to be supported by a myriad of law schools, law firms, and think tanks around the nation.

EDITOR'S PREFACE

Dear Esteemed Reader,

It is my great privilege to present the 16th Volume of the *Grove City College Journal of Law and Public Policy*. Although the *Journal* faced substantially increased printing costs at the beginning of the year, our Executive Committee has worked tirelessly to secure funding for this volume and continue our mission to pursue scholarship in law and public policy.

Following the success of our 15th Anniversary Symposium, this year's editorial team prioritized connecting with Grove City alumni and our readers. We were honored to meet Alumni Award Winner, Brig. Gen. Brad Butler '76, this past fall to discuss the *Journal*'s advancement of public policy scholarship can address more public policy issues. Additionally, this spring, the *Journal* hosted the first Law Alumni Mixer at K & L Gates Pittsburgh to honor President McNulty for his years of service to Grove City College and his indispensable support of the *Journal* over the years. I would like to express my deep gratitude to Melissa McLeod, Jeff Prokavich, Jim Segerdahl '84 for their vision and willingness to make this event a reality.

The *Journal* continues to serve the campus community by promoting scholarship and providing a forum for students to develop skills for academic and professional success. This year's editorial team has blessed me with their patience and dedication to completing Vol. 16 on time. I am additionally grateful for the contributions of our associate editors and the invaluable advice and guidance of President McNulty and Dr. Caleb Verbois. It is my hope that you find the selected articles intellectually stimulating and enjoyable to read.

Roan A. Fair '26
Editor-in-Chief

FORWARD

Dear Reader,

I am honored to welcome you to Volume 16 of the *Grove City College Journal of Law and Public Policy*. It has been a privilege to work alongside my fellow members of the Executive Committee, our associate editors, and all of those responsible for the *Journal*—one of the few undergraduate peer-reviewed journals in the country. The hard work of our editors continues to serve as a testament to Grove City College's commitment scholarship that preserves the values of faith and freedom that we hold so dearly.

With each addition to *Journal*'s legacy, we are encouraged by members of the Board of Trustees to compile a volume that tackles issues encapsulating both aspects of the *Journal*'s masthead—law and public policy. Volume 16 fits within that vision and aids in thoughtful discussion of some of the most pressing issues facing the country today.

Volume 16 begins with a book review delivered by Jacob Sheldon Feiser '24. He provides insight into Johnathan O'Neill's *Originalism in American Law and Politics: A Constitutional History.* The first article, an economic analysis by Joshua C. Xu '26, explores the ability of IMF conditions to promote growth when operating within different institutional climates. The second essay, by Nathan R. Sybrandy, dissects the legal ramifications arising from the recent sex versus gender debate. Concluding the volume, Tamás Klein '26 and Scott T. Cross '26 offer an economic analysis that examines the consequences of intervention in the world of trophy hunting.

I extend much gratitude to this year's team of editors for their hard work throughout the year that has brought this publication into your hands. We hope that you find these essays to be helpful in your intellectual endeavors,

Isaac J. Good '26
Senior Articles Editor

Where Are We Going, Where Have We Come From?

Review of: ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY. By Johnathan O'Neill. Baltimore, MD: Johns Hopkins University Press. 2005.

Jacob Sheldon Feiser*

*Jacob Sheldon Feiser '24 is a graduate of Grove City College, where he studied political science, economics, history, and theology. He is a former Executive Content Editor and Symposium Chair of the Grove City College Journal of Law and Public Policy. B.A., Grove City College, summa cum laude (2024); J.D. Candidate, Georgetown University Law Center (2027). *He wishes to express thanks to Isaac Good and the editors of this Journal for their helpful comments.*

The *Book of Judges* is a striking text within the Biblical canon. Wedged between the uplifting books of *Joshua* and *Ruth* in the English ordering of the Old Testament, this narrative documents the spiritual decline of the Israelite tribes in serious and disturbing fashion. Four times throughout the last five chapters, readers are reminded, "In those days, there was no king in Israel."[1] In the first and the last instances, the text also supplies that "[e]veryone did what was right in his own eyes."[2] The message is a simple apologetic for the Israelite monarchy, but reveals a historical truth: when there is no moral and political authority by which a society may measure itself, that society slowly replaces moral coherency and political identity with the fickle whims behind contemporary (and distorted) notions of justice.

Johnathan O'Neill's *Originalism in American Law and Politics* is neither as spiritually focused nor as tragic as *Judges*, yet the intellectual history he develops maps neatly onto the Biblical theme. Effectively arguing that originalism is nothing new to the American legal project, O'Neill

1. *Judges* 17:6; 18:1; 19:1; 21:25.
2. *Id*. at 17:6; 21:25.

reveals that the decline of originalism paralleled the decline of coherent constitutional jurisprudence. O'Neill's work, certainly a type of historical apologetic, does not condemn American jurisprudence. His historical project is far more modest: an examination of the constitutional jurisprudence of "originalism as a defense of traditional understandings of legal interpretation, limited and consent-based government, and the rule of law" (p. 1). Within the popular history of originalism, birth of originalism occurred with Bork's *Neutral Principles and Some First Amendment Problems*[3] and Berger's *Government by Judiciary*,[4] or perhaps with then-Judge Scalia's speech before the Attorney General's Conference on Economic Liberties.[5] O'Neill rejects this

3. *See generally* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971).

4. *See generally* Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977). Raoul Berger and Robert Bork together pioneered the modern original-intent originalism. Yet critics were able to theoretically isolate this movement, noting the issues of competing intentions, and more foundationally, the fact that the Framers themselves rejected private intentionalism. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 214 (1980); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469, 476 (1981); *see also* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 888 (1985).

5. "As I was musing in my chambers over this perplexing problem, the room was filled with the sound of a voice - loud, though it was in a whisper - which seemed to be coming from the picture of Mount

puerile intellectual history, grounding originalism as the "natural outgrowth of the Blackstonian inheritance and the principles of social contractarianism and popular sovereignty that informed the founding" (p. 15).

Additionally, O'Neill avoids anachronistic discussion, distinguishing the modern, sophisticated, and methodologically-precise originalism(s) from antecedents. Recognizing that originalism has never existed in isolation, O'Neill puts forward three complementary and overlapping hermeneutics prevalent in the period: Textualism proper, subdivided into "clause-bound" (limiting analysis to narrow pieces of text), "structuralist" (looking at clauses in their textual context), and "purposive" (seeking to identify the ends of the clauses or text as a whole) textualisms;[6] Doc-

Sinai that we have hanging in the D.C. Circuit's Conference Room…. It said: CRITICIZE THE DOCTRINE OF ORIGINAL INTENT. The voice, I must admit, sounded a little like David Bazelon. Then again, it sounded a bit like Robert Bork. In any case, since I am rarely given these revelations, I thought that was what I should do…. I ought to campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning." Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986), *in* Original Meaning Jurisprudence: A Sourcebook 101, 102, 106 (U.S. Dep't of Just. ed., 1987).

6. In some respects, this mirrors Justice Frankfurter's own method of textual interpretation. *See* Henry J. Friendly, Benchmarks 202 (1967) (recalling Justice Frankfurter's three rules of statutory interpretation: "(1) Read the statute; (2) read the statute; (3) read the statute!").

trinalism, explained as applying standard interpretations to new sets of facts through analogy to precedents; and Structuralism proper, defined as "an appeal to the nature and relationship of the institutions created in the text" (p. 4). O'Neill also recognizes that "[t]he 'purposive' approach has a second and wider meaning, as an appeal to more abstract…theories which can supplement or override the text, its original meaning, or established doctrine" (p. 4-5). This is the Purposivism that Scalia identified and opposed during his judicial tenure.[7] Synthesizing the interpretive regime of the Colonial and Founding periods, O'Neill labels the orthodox hermeneutic "textual originalist" (p. 5), denoting

---

While repetition breeds emphasis, each command to "read the statute" also illuminates a slightly different element of reading the statute. While none of the types of Textualism proper follow the strict-constructionist model, I understand the "clause-bound" textualism to be the most akin to the wooden literalism that Justice Scalia condemned. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A Matter of Interpretation: Federal Courts and the Law 22 (Amy Gutmann ed., 1997).

7. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 18 (2012) ("Perhaps the nontextualists' favorite substitute for text is purpose. So-called purposivism, which has been called 'the basic judicial approach these days,' facilitates departure from the text in several ways."); *see also* Harris v. Commissioner, 178 F.2d 861, 864 (2d Cir. 1949) (per L. Hand, C.J.) ("It is always a dangerous business to fill in the text of a statue from its purposes.").

its natural, rather than derived, form.

O'Neill begins his book by quickly detailing the shift from textual originalism to modern judicial power, invoking the writings of, i.a., Marshall, Story, and even Taney to demonstrate the consistent hermeneutic from the time of the Founding into the Antebellum. O'Neill cites other American jurist to support the contention that textual originalism was the orthodox hermeneutic, viz., Thomas Cooley and Arthur W. Machen, Jr.'s rejection of "the nascent notion of an 'elastic' living Constitution," (p. 24), for Reconstruction and Gilded Age continuity. A limitation of this history is that O'Neill fails to explain from where that "nascent notion" arose, but does note that the Langdellian movement to systematize textual originalism into "formalism" or "classical legal thought" continued originalism into the Progressive Era. He also notes the unfortunate association of classical legal thought with economic substantive due process.[8] Ultimately, he documents how the rise of Oliver

8. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (striking down a weekly-hour maximum for bakeshop employees as beyond the scope of State police powers); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (voiding a minimum wage provision for women as a violation of due process).

Wendall Holmes's legal realism led to a revolt against the formalist orthodoxy,[9] eclipsing originalism as it had been practiced.

After the Realist Revolt[10] succeeded in reshaping Supreme Court jurisprudence, O'Neill catalogues how Thayerian-Holmesian deference developed as a replacement jurisprudence, demonstrated by the rise of Hart and Sacks's Process-Restraint School,[11] practiced routinely by

9. *See generally, e.g.*, Oliver Wendall Holmes, Jr., *The Path of Law*, 10 Harv. L. Rev. 457 (1897). *See also* Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (per Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky."). The legal realists were never a formal school of legal thought, although Holmes is recognized as an initial leader of the movement. For other realist thought, *see generally* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935); Karl Llewelyn, *Some Realism about Realism*, 44 Harv. L. Rev. 1222 (1931); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. 470 (1923).

10. This phrase refers to the period when the Four Horsemen were retiring from the Court (1936-1938), replaced by jurisprudential realists. Best evinced in the death of Federal common law through the *Erie* doctrine, *see generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), this Revolution rejected formalism for legal realism, itself replaced by legal liberalism after the fall of the Nazi regime. This interregnum, epitomized by the Warren and Burger Courts, ended with the appointment of Justice Antonin Scalia to the Court and the rise of the New Originalism. *See generally* Scalia, *supra* note 5.

11. *See generally* Henry M. Hart & Albert M. Sacks, The Legal Process (1958) (putting forward the idea of institutional competence as a reason for judicial restraint and institutional settlement, i.e., agreed-upon process, as a reason for the acceptance of substantive law in a pluralist society).

Justice Frankfurter,[12] and developed in Weschler's criticism of the *Brown*[13] opinion.[14] Yet, just as the Israelite tribes thought themselves faithful to the LORD during their prolonged periods of infidelity and depravity, O'Neill's work demonstrates that even non-originalist jurists in American history have tried to claim the weight and authority of history and original meaning. Justice Hugo Black would regularly cite original intent (though not consistently and with none of the methodological staples of originalism);[15] the Warren Court more broadly also engaged in the sloppy use of original intent as justification for non-originalist outcomes in several cases.[16] O'Neill sufficiently shows that,

12. *See, e.g.*, Adamson v. California, 332 U.S. 46, 59-69 (1947) (per Frankfurter, J., concurring) (arguing for slow and cautious selective incorporation of the Bill of Rights).

13. Brown v. Board of Education, 347 U.S. 483 (1954).

14. *See generally* Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

15. *See, e.g.*, *Adamson*, 332 U.S. at 69-92 (1947) (per Black, J., dissenting) (arguing for total incorporation).

16. *See* Brown v. Board of Education, 345 U.S. 972, 972-73 (June 8, 1953) (ordering reargument to determine whether the original meaning of the Fourteenth Amendment with respect to school segregation). Yet the *Brown* opinion said only that the original intent was "inconclusive." *Brown*, 347 U.S. at 489. *See also* Reynold v. Sims, 377 U.S. 533, 573 ("[The] Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted."). *But see* Baker v. Carr, 369 U.S. 186, 267-70, 297 (1962) (per Frankfurter, J., dissenting) (stating the originalist separation-of-pow-

even while originalism slumbered during this interregnum, Legal Liberalism still recognized the authority of text and history, even as it struggled to wield it.

The central contribution of O'Neill's work is his focus on Raoul Berger[17] and Robert Bork (each receive a dedicated chapter), documenting their shifts from a jurisprudence of Legal Process to a modern original-intent originalism. Berger's story in particular is so principal to O'Neill's work because Berger gave originalism academic voice long before judges started seriously considering originalism. Indeed, "originalism" as a term derives from critiques of Berger's work.[18] Berger and Bork were both motivated to develop a constitutional theory which would constrain judicial review in light of the Legal Liberal excesses of their day, providing an understanding for the

ers view); *Reynolds*, 377 U.S. at 624-25 (per Harlan, J., dissenting) (arguing the majority manipulated or ignored the original meaning of the Constitution); Wesbury v. Sanders, 376 U.S. 1, 20-50 (1964) (per Harlan, J., dissenting) (supplementing textual exegesis with a survey of the Philadelphia convention, the ratification debates, and the *Federalist* to demonstrate original meaning of the Constitution).

17. Before I read this text, I had always heard of Berger referred to in the same manner as the John Birch Society, as some sort of fringe, right-wing extremist; I had no idea the he was actually a New Deal Democrat who remained a political liberal all his life.

18. The term was coined in the most prominent critique of Berger. *See* Brest, *supra* note 4, at 204.

initial Legal-Process-esque defenses which characterize originalism to this day. A true intellectual history, this text does not play hagiography with Berger or his ideas, but recognizes their centrality to a movement that has long since abandoned his reformulation: "Although originalism would become a more refined and contested doctrine after Berger, his efforts ensured that it would not be quickly dismissed" (p. 132).[19]

Turning to the 1990s, O'Neill details the influence and rise of an academically-refined originalism. O'Neill also helpfully details liberal responses to originalism, including the "republic revival," the incorporation of history by liberal and leftist scholars in favor of a revived legal liberalism, and even liberal attempts at originalism. Jurisprudential *examples*, rather than jurisprudential *analyses*, of Scalia and Thomas are littered throughout this discussion. Curiously, Chief Justice Rehnquist is included amongst the originalist Justices; while Justice Rehnquist professed

19. O'Neill also demonstrates the importance of the Reagan administration, in advancing originalism into the mainstream and associating it with conservative politics. *See generally, e.g.*, Off. of Legal Pol'y, Report to Att'y Gen.: Original Meaning Jurisprudence: A Sourcebook (Mar. 12, 1987).

adherence to original intent,[20] his jurisprudence in practice was more *conservative* than it was originalist.[21] At least one former clerk to Justice O'Connor has described Rehnquist's jurisprudence as one of "sinuosity," and his record indicates a mix of pragmatism and institutionalism.[22] Helpfully, O'Neill does not limit his account to judges or legal scholars; as the name of his book suggests, O'Neill also presents and analyzes originalism in American politics, often using Senate hearings or other statements by political actors.

Another issue with this section, however, is O'Neill's near-exclusive focus on the legal-positivist strain of originalism. While it is the dominant originalist approach as exemplified by Scalia and Bork, this intellectual history hardly addresses originalism from a Straussian or natural-rights approach, prominent among scholars like the late Harry Jaffa and Justice Thomas. Since the publication

20. *See generally* William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976).

21. *Cf.* H. Jefferson Powell, *On Not Being "Not an Originalist,"* 7 U. St. Thomas L.J. 259, 273 (2009). Rehnquist is best understood as a judicial reactionary to Legal Liberalism. While his political and judicial conservatism often opposed liberal outcomes, Rehnquist's jurisprudence was theoretically undisciplined.

22. *See generally* Morrison v. Olson, 487 U.S. 654 (1988); Dickerson v. United States, 530 U.S. 428 (2000); Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003).

of O'Neill's book, the positivist/natural-law debates within originalism have only grown in importance.[23] O'Neill is not a legal philosopher, and he does not assume a role he is unqualified to hold; his humility notwithstanding, the ontological essence of originalism is a relevant topic for his text, and its absence is painfully obvious.

O'Neill's account of originalism is essentially historical in origin. Because of this, O'Neill also fails to adequately present originalism as equally philosophical, leaving a limited discussion to scholars he briefly cites. O'Neill operates under the common misapprehension of the Founding as a Lockean event (p. 2). While there was

23. *See generally, e.g.*, Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 Geo. L.J. 97 (2016) (grounding originalism in natural-law theory); William Baude, Essay, *Is Originalism Our Law?*, 115 Colum. L. Rev. 2349 (2015) (defending originalism on Hartian positivist grounds); Steven E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 Notre Dame L. Rev. 2253 (2014) (similar); Lee Strang, Originalism's Promise: A Natural Law Account of the American Constitution (2019) (arguing that positive originalism is compatible with the natural law without requiring natural-law reasoning); Hadley Arkes, Mere Natural Law: Originalism and the Anchoring Truths of the Constitution (2023) (arguing that originalism is referentially dependent on natural law); Jacob Sheldon Feiser, Note, *Originalism and Interpretive Sin*, 14 Grove City Coll. J.L. Pub. Pol'y 1 (arguing that the use of natural-law reasoning is equivalent to substantive due process). *See also* Adrian Vermeule, Common Good Constitutionalism (2022) (critiquing originalism as ineffective and outdated, articulating a jurisprudence of conservative living constitutionalism).

a Lockean element to the Founding, the continuity with the medieval common-law tradition, theological elements —primarily from the Reformed tradition—and Roman republicanism complicate that narrative. The philosophical amalgam of these interacting systems that birthed the Founding necessarily shapes one's understanding of the history; by limiting himself to a purely Lockean outlook, O'Neill misunderstands the "Blackstonian inheritance" of the originalist project.

The most striking—though hardly severe—issue with O'Neill's book is that, while he is cogent in thought, able to avoid jargon, and generally distinguishes terms with clarity, he operates from an assumption that his reader is largely familiar with the progress of American legal thought. As some students and laymen reading this review have probably already noted, O'Neill's discussion of originalist intellectual history presumes familiarity with the jurisprudential big-wigs of American history; ignorance does not prohibit understanding and appreciation for his work, though it does stunt reader engagement. Yet, O'Neill's treatment of the varied figures involved in Legal Liberal-

ism is more monolithic and amalgamated than an academic treatment should be—his text, while covering originalism in American law and politics, does not seem capable of covering the interaction between the intellectual and political history of originalism. Nonetheless, for readers interested in the topics he covers, the 59 pages of endnotes are a goldmine for continuing research and engagement with this worthwhile history.

In *Judges* 19, a Levite and his concubine encounter an old man in the town square of Gibeah. This man asks, "Where are you going? And where do you come from?"[24] O'Neill's text seeks to answer one of those questions for the originalist project. This book was written 20 years ago, and the historical basis for the originalist project is as important as ever for the on-going jurisprudential debates. Certainly, O'Neill does not prognosticate about the future of originalism. Yet the Court is now judicially conservative—unseen since the Realist Revolt, and unforeseeable in 2005. Where are we in the originalist project going? I cannot say with any more clarity than O'Neill in 2005. But

24. *Judges* 19:17.

reading this text, I know where we have come from. This is a book worth reading, not only for the law student and the Americanist, but for anyone interested in the novelty (and ephemerality) of non-originalist jurisprudence.

Does IMF Loan Conditionality Promote Growth?

Joshua C. Xu*

*Joshua C. Xu '26 is a junior Economics major at Grove City College. Joshua is the Executive Content Editor for the Grove City College Journal of Law and Public Policy, one of the captains of GCC Debate, and is secretary of the Pan Asian Association. He also is a member of ODE economics honorary.

Introduction 19

I. What is the International Monetary Fund? 20

II. Survey of the Literature 23

III. The Analytical Frameworks 30

IV. Do Conditions Work? 32

V. Policy Implications 36

Conclusion 38

Introduction

The International Monetary Fund (IMF) plays a significant role in handling international financial crises. During a crisis, the IMF loans billions to struggling countries like Greece during its 2009 debt crisis. Yet despite having 191 member countries, the United States finances $117 billion to the IMF lending quota, which is 17.46% of IMF total lending power. The United States also contributes an additional $44 billion to supplement lending programs.[1] With such a large United States contribution to the IMF, the United States ought to be certain its funds are wisely spent. Thus, I consider the question, does IMF conditionality on its lending help or hinder economic growth? Using the Ritenour framework for economic growth and Public Choice theory on bureaucracy, I find IMF conditions alone cannot create the complex array of informal institutions that sustain formal political and economic institutions. However, if informal institutions exist within a member state prior

1. Martin Weiss, Cong. Rsch. Serv., The International Monetary Fund (2022).

to the loan, conditional IMF loans provide benefits.

This article proceeds as follows. Part I deals with relevant context about the IMF. Part II surveys the economic literature on IMF loan conditionally. Part III contains the analytical frameworks used to evaluate whether conditional loans promote economic growth. Part IV adjudicates IMF loan conditionality using the frameworks. Part V gives policy implications for the US/IMF and responds to counter arguments.

I. What is the International Monetary Fund?

The IMF was established to promote international monetary stability and economic growth. Founded in 1946 as part of the Bretton Woods system, the IMF oversaw a system of fixed exchange rates pegged to the U.S. dollar. When the Gold Standard was abolished in 1971, the IMF found itself with a crisis of purpose. Thus, the IMF began to act more like a traditional credit union: the key difference being that its members are governments, not private entities. Each of its 191 members pays money into the IMF and receives services in return.

The IMF today provides three services: surveil-

lance, technical assistance, and loans. IMF surveillance monitors macroeconomic data of member states. The IMF then produces reports for each member highlighting potential risks and providing recommendations for macroeconomic policy. Technical assistance, according to the IMF website, includes "hands-on technical assistance and training, a suite of diagnostic tools and publications, and peer-learning opportunities—so countries can build sustainable and resilient institutions."[2]

IMF loans are intended to mitigate financial crises. When a member country faces a financial crisis, they can request a loan from the IMF. Crises occur for two reasons: domestic factors and external factors. "Domestic factors include inappropriate fiscal and monetary policies," and external factors include natural disasters and "large swings in commodity prices."[3] Typically, member countries request IMF loans when they can no longer finance their debt due to a crisis.[4] The IMF then extends a loan and formulates a

2. *IMF Lending*, IMF, https://www.imf.org/en/About/Factsheets/IMF-Lending (last visited Nov. 29, 2024).

3. *Id*.

4. *What is the IMF?*, Council on Foreign Relations, https://www.cfr.org/backgrounder/what-imf (last visited Nov. 29, 2024).

debt repayment scheme for the borrowing member. Because loans are intended to provide breathing room during a crisis, the IMF prices their loans at below market level rates. Often, the interest rate of an IMF loan is zero.

A common concern with IMF financing is moral hazard. Moral hazard occurs when an actor does not bear the full risk of their actions. Thus, the actor has more incentive to engage in risky behavior. In the context of lending, traditional banks combat moral hazard through interest rates or by requiring some form of collateral. Both increase the cost of engaging in risky behavior. A riskier investment carries a higher interest rate or requires more valuable collateral. The moral hazard created by the IMF follows a clear pattern: poor domestic monetary and fiscal policies trigger a financial crisis, prompting the IMF to step in and mitigate the impact. By softening the impact of harmful policies, the IMF incentivizes member governments to repeat them. Without market interest rates to correctly price risky behavior, IMF lending schemes fall prey to moral hazard. IMF lending encourages risky behavior, undermining its ultimate goal of promoting long run economic

stability and growth.

The IMF places conditions on their loans to combat moral hazard. IMF loans do not carry interest rates that correctly price risk. Instead, they attempt to mimic collateral with conditionality. IMF conditions are reforms. Conditions fall into two categories: policy reform and structural reform.[5] Policy reform is clearer, outlining specific policy actions a government must undertake in exchange for the loan. Examples include balancing the budget, removing state subsidies, removing barriers for foreign investment, and the removal of price controls.[6] Structural reforms include greater transparency, less corruption, and better governance. Ideally, better policy and stronger institutions promote economic stability and growth in the long run, reducing the need for future IMF loans.[7] Thus, conditions on IMF loans aim to combat moral hazard and promote economic growth.

II. Survey of the Literature

Extensive empirical work has been dedicated to

5. *IMF Conditionality*, IMF, https://www.imf.org/en/About/Factsheets/Sheets/2023/IMF-Conditionality (last visited Nov. 29, 2024).
6. *What is the IMF?*, *supra* note 4.
7. *IMF Conditionality*, *supra* note 5.

discovering whether IMF lending schemes promote growth. Those in favor of IMF loans claim conditions are effective at changing policy and strengthening institutions, resulting in economic growth. The data and methods used by various researchers differ. Many find it growth inducing for a member state to receive an IMF loan. Reichmann and Stillson,[8] Conway,[9] Dicks-Mireaux et al.,[10] and Bird and Rowlands[11] all find a positive relationship between IMF programing and output. Dreher and Walter find IMF lending reduces the likelihood of future financial crises.[12] Khan does not observe a direct correlation between output and IMF loans, but argues the stability provided by IMF conditions improve growth in the long run.[13] Przeworski and

8. Tomás Reichmann & Richard Stillson, *Experience with Programs of Balance of Payments Adjustment: Stand-By Arrangements in the Higher Tranches*, *1963-72*, 25 IMF Staff Papers 293 (1978).

9. Patrick Conway, *IMF Lending Programs: Participation and Impact*, 45 J. Dev. Econ. 365 (1994).

10. Louis Dicks-Mireaux et al., *Evaluating the Effect of IMF Lending to Low-Income Countries*, 61 J. Dev. Econ. 495 (2000).

11. Graham Bird & Dane Rowlands, *Effect of IMF Programmes on Economic Growth in Low Income Countries: An Empirical Analysis*, 53 J. Dev. Stud. 2179 (2017).

12. Axel Dreher & Stefanie Walter, *Does the IMF Help or Hurt? The Effect of IMF Programs on the Likelihood and Outcome of Currency Crises*, 38 World Dev. 1 (2010).

13. Mohsin Khan, *The Macroeconomic Effects of Fund-Supported Adjustment Programs*, 37 IMF Staff Papers 195 (1990).

Vreeland and Ruben and Conway find short term contraction due to IMF conditions, but in the long term, member states with IMF financing experience faster growth than without financing.[14] Their findings suggest that institutions were strengthened by IMF conditions on loans, spurring future growth. Mercer-Blackman and Unigovskaya examine structural reform.[15] They find that structural reform has no significant impact on growth; however, they do find compliance with IMF programs on performance criteria does lead to growth. Reasons for compliance are not found. Nsouli, Atoian, and Mourmouras find member states with stronger institutional and political environments implement IMF programs more effectively, promoting economic growth.[16] Balima and Sokolova conduct a meta-analysis examining 36 studies.[17] They find that IMF programing in-

14. Adam Przeworski & James Raymond Vreeland, *The Effect of IMF Programs on Economic Growth*, 62 J. Dev. Econ. 385 (2000); Ruben Atoyan & Patrick Conway, *Evaluating the Impact of IMF Programs: A Comparison of Matching and Instrumental-Variable Estimators*, 1 Rev. Int'l Orgs. 99 (2006).

15. Valerie Mercer-Blackman & Anna Unigovskaya, *Compliance with IMF Program Indicators and Growth in Transition Economics,* 3 Emerging Mkt. Fin. & Trade 55 (2004).

16. Saleh M. Nsouli et al., *Institutions, Program Implementation, and Macroeconomic Performance* (IMF Working Paper No. 184, 2004).

17. Hippolyte W. Balima & Anna Sokolova, *IMF Programs and Economic Growth: A Meta-Analysis*, 153 J. Dev. Econ., no. 6 (2021).

creases economic output. However, the results were messy. Further analysis showed that countries with high levels of institutional and economic development tended to experience more positive economic growth. Additionally, they found that studies authored by those with IMF affiliation were more likely to find benefit to IMF financing.

Proponents of the IMF question the degree of impact moral hazard has on member countries and argue selection bias gives the appearance of ineffective IMF lending. Lane and Phillips find little evidence to suggest that moral hazard plays a large role in subsequent financial crises of IMF members.[18] Hutchison finds sample selection bias to be the main reason why critics see IMF lending as detrimental to growth.[19]

Critics of the IMF argue IMF financing reduces growth. Bordo and Schwartz find that countries receiving IMF assistance during 1973-98 experienced worse macro-

18. Timothy D. Lane & Stephen T. Phillips, *Does IMF Financing Result in Moral Hazard?* (IMF, Working Paper No. 168, 2000).

19. Michael M. Hutchinson, *Selection Bias and the Output Costs of IMF Programs* (Econ. Pol'y Resh. Unit, Working Paper No. 15, 2004). It is interesting to note that Lane, Philips, and Hutchison all worked for the IMF when their papers were published.

economic performance in real terms.[20] Generally, they find that as interventionist safety nets become more prevalent, the incidence of financial crises increases while their severity remains unchanged. Thus, Bordo and Schwartz find evidence of moral hazard. After controlling for selection bias, their results remain robust. Hardoy uses a difference-in-difference study approach and finds IMF financing has no benefit for growth.[21] Barro and Lee and Butkiewicz and Yanikkaya find member countries would be better off if they did not participate in IMF financing.[22] Dreher finds IMF financing is overall detrimental for growth, but the conditionality on loans mitigates their negative effect on output.[23] Jorra

20. Michael D. Bordo & Anna J. Schwartz, *Measuring Real Economic Effects of Bailouts: Historical Perspectives on How Countries in Financial Distress Have Fared With and Without Bailouts*, 53 J. Monetary Econ., (Carnegie-Rochester Conf. Series on Pub. Pol'y) 81 (2000).

21. Inés Hardoy, Inst. Soc. Rsch., Effect of IMF Programmes on Growth: A Reappraisal Using the Method of Matching (2003), https://www.researchgate.net/publication/242431499_Effect_of_IMF_programmes_on_growth_A_reappraisal_using_the_method_of_matching.

22. Robert J. Barro & Jang-Wha Lee, *IMF Programs: Who is Chosen and What are the Effects?*, 52 J. Monetary Econ. 1245 (2005); James L. Butkiewicz & Halit Yanikkaya, *The Effects of IMF and World Bank Lending on Long-Run Economic Growth: An Empirical Analysis*, 33 World Dev. 371 (2005).

23. Axel Dreher, *IMF and Economic Growth: The Effects of Programs, Loans, and Compliance with Conditionality*, 34 World Dev. 769 (2006).

observes an increased chance of debt crisis after a member country receives an IMF loan, supporting the validity of moral hazard arguments.[24] Lipscy and Lee show the IMF generates moral hazard through a case study of Taiwan.[25] After Taiwan was expelled from the IMF, Taiwan increased their "precautionary international reserves" and pursued "exceptionally conservative financial policies."[26] Steinwand and Stone examine the literature on the IMF and find that studies which account for selection bias (higher quality studies) find IMF financing depresses economic output.[27] Li, Sy, and McMurray also broadly examine the literature and find most studies indicate the IMF has a negative effect on economic growth.[28]

There are a variety of theoretical arguments against IMF financing. Perhaps most famously, Joseph Stiglitz

24. Markus Jorra, *The Effect of IMF Lending on the Probability of Sovereign Debt Crises*, 31 J. Int'l Money and Fin. 709 (2012).

25. Phillip Y. Lipscy and Haillie Na-Kyung Lee, *The IMF as a Biased Global Insurance Mechanism: Asymmetrical Moral Hazard, Reserve Accumulation, and Financial Crises,*73 Int'l Org. 35 (2019).

26. *Id.*

27. Martin Steinwand and Randall Stone, *The International Monetary Fund: A Review of the Recent Evidence*, 3 Rev. Int'l Org. 123 (2008).

28. Larry Li et al., *Insights into the IMF Bailout Debate: A Review and Research Agenda*, 37 J. Pol'y Modeling 891 (2015).

in his *Globalization and Its Discontents* argues the IMF pursues the interests of the financial community, not the people.[29] He believes the IMF has strayed from its original goal, focusing too much on financial indicators and not on the actual prosperity of member country's citizens. Ultimately, Stiglitz believes that conditions the IMF imposes have been counterproductive for local populations.

Advocates of reform for the IMF wish to change the incentive structure at the IMF. Meltzer and Willett from the Independent Institute argue that most times, IMF conditionality fails to be enforced and falls prey to "mission creep."[30] Conditions must be enforced through the withdrawal of IMF financing. Because IMF bureaucrats have an incentive to "not the rock the boat" to advance their careers,[31] they do not wish to cancel any program. Those working at the IMF become "committed to the 'success' of the program."[32] Thus, conditions are not enforced and loans at the IMF fall

29. Joseph Stiglitz, Globalization and Its Discontents (2003).

30. Allan Meltzer, *What's Wrong with the IMF? What Would Be Better?*, 4 Indep. Rev. 201 (1999); Thomas Willett, *Understanding the IMF Debate*, 5 Indep. Rev. 593 (2001).

31. Willett, *supra* note 30, at 598.

32. Meltzer, *supra* note 30, at 205.

prey to moral hazard. Empirically, this claim is supported. Sachs, using the IMF 1988 review of conditionality, finds that since 1983, "the rate of compliance has been decreasing sharply, down to less than one-third compliance with program performance criteria in most recent years."[33] Both Meltzer and Willett believe the IMF can be reformed by forcing the incentives to work in favor of IMF effectiveness. Their papers suggest a variety of methods to change the incentive structures at the IMF.

Positions on the IMF range a broad spectrum due to disagreement on both the empirical and theoretical analysis of the IMF. Through the next part, I employ two theoretical frameworks that synthesize the empirical and theoretical analysis on IMF conditions.

III. The Analytical Frameworks

Ritenour provides a general theory of economic growth. He identifies four vehicles of economic progress: "the social division of labor, capital formation, technolog-

33. Jeffrey D. Sachs, *Strengthening IMF Programs in Highly Indebted Countries*, *in* The International Monetary Fund in a Multipolar World: Pulling Together 101, 107 (Cathrine Gwin & Richard E. Feinberg eds., 1989).

ical improvement, and wise entrepreneurship."[34] All four vehicles are necessary to produce progress. Therefore, the key to achieving prosperity "is to discover the institutions that allow the sources of prosperity to function."[35] Private property and sound money are those institutions. Private property allows entrepreneurs to reap what they sow, giving incentive for them to coordinate the social division of labor, undergo capital formation, and finance technological improvement. Sound money provides entrepreneurs the necessary information to produce what is most profitable.[36] For IMF financing to contribute to economic growth, it must promote either the vehicles of progress or institutions of private property and sound money.

To sustain formal institutions of private property and sound money, informal complementary institutions are necessary. Coyne describes such informal institutions as "a shared ideology and ethic of individual and private property rights, a commitment to markets and the rule of law."[37]

34. Shawn Ritenour, The Economics of Prosperity: Rethinking Economic Growth and Development 158 (2023).

35. *Id.* at 165.

36. *Id.* at 169.

37. Christopher J. Coyne, *The Institutional Prerequisites for Post-Conflict Reconstruction,* 18 Rev. Austrian Econ. 325, 325

If IMF financing can help develop those institutions, both formal and informal, then it could also be beneficial for progress.

The IMF also must contend with its bureaucracy. Mises distinguishes bureaucratic management as "the method applied in the conduct of administrative affairs the result of which has no cash value on the market."[38] It is the lack of the price system that creates bureaucratic inefficiency. Tullock's analysis of bureaucracy finds that perverse incentives and inadequate information cause the inefficiency of bureaucracy.[39] Perverse incentives include motivations like prestige or power. Together, Mises and Tullock find bureaucracy to be inefficient as it lacks the price system and thus has perverse incentives and inadequate information.

IV. Do Conditions Work?

A shallow analysis of IMF loan conditionality would assume they promote growth. IMF conditions often require the removal of price controls, removal of barriers to foreign investment, and general trade liberalization.

(2005).

38. Ludwig von Mises, Bureaucracy 47 (1944).

39. Gordon Tullock, The Politics of Bureaucracy 70, 75 (Public Affairs Press, 1965).

International trade unlocks a greater degree of the market division of labor. More foreign investment results in more capital accumulation. Would not all these types of policy reforms promote the four vehicles of growth?

Conditions require enforcement. As Meltzer and Willett emphasize, IMF conditionally lacks enforcement because of the incentives IMF workers face. In 1998, the IMF along with others promised Russia a conditional $22 billion dollar loan for their debt crisis. Russia took the loans but did not comply with the conditions.[40] The IMF continued lending as they "had a stake in reform and transformation."[41] Russia was allowed to "finance large unbalanced budgets" because of IMF lending.[42] Lack of enforcement of conditions enabled Russia's bad behavior. However, the solution is not simply "enforce the conditions" next time. The underlying incentive structure of bureaucracy is why the Russia loan project failed. And unless the IMF is privatized, its bureaucratic incentive structures will persist.[43]

40. Meltzer, *supra* note 30, at 208; Willett *supra* note 30, at 605.
41. Meltzer, *supra* note 30, at 209.
42. *Id*. at 208.
43. To be clear I am not arguing that the IMF should be privatized.

Individual policy prescriptions fail to create meaningful change without the institutions of private property and sound money. IMF lending to Russia would not have been such a disaster if Russia had the institutions to support economic liberalization. However, Russia did not have the institutional backdrop needed to allow markets to flourish.[44] There was no rule of law, and the Russian state was corrupt, leading to weak property rights enforcement. Thus, both weak IMF enforcement of conditions and Russia's lack of institutions enabled moral hazard. IMF conditionality fails to mitigate moral hazard when member states lack strong institutions.

Conversely, IMF conditionality succeeds where there are strong institutions. Empirical evidence supports this claim. As Nsouli, Atoian, and Mourmouras and Balima and Sokolova observe, if formal institutions are present before IMF financing, conditional loans tend to promote growth.[45] If IMF loans are only enforced one-third of the time and the borrowing state has poor institutions, moral

44. Meltzer, *supra* note 30, at 209.

45. Nsouli et al., *supra* note 16; Balima & Sokolova, *supra* note 17.

hazard should be expected.[46] In contrast, a country with previously established property rights is more likely to apply conditions. As Coyne emphasizes, rule of law and a shared ethic of private property sustain formal institutions.[47] Furthermore, the underlying values that promote private property are the same as those that would promote economic liberalization. Thus, countries with a shared ethic of private property would be more receptive to the removal of price controls, balancing the budget, and other policy prescriptions from the IMF. Even with poor IMF enforcement, countries with strong institutions still implement IMF conditions, mitigating the effects of moral hazard.

What about when IMF conditions attempt to create and strengthen formal institutions? Here, the importance of spontaneous order cannot be overemphasized. Coyne examines nation building by bureaucracy.[48] Nation building is an attempt to artificially establish formal institutions like democracy in a country. Coyne finds nation building fails for

46. Sachs, *supra* note 33, at 107.

47. Coyne, *supra* note 37, at 325.

48. Christopher J. Coyne, *'The Politics of Bureaucracy' and the Failure of Post-War Reconstruction*, 135 Pub. Choice 11, 21 (2008).

two reasons. First, bureaucracy creates perverse incentives leading to inefficient outcomes. Second, bureaucracy lacks the ability to create informal complementary institutions necessary for formal institutions to thrive. Those informal institutions—respect for rule of law and a shared ethic of private property—are the result of spontaneous order, they cannot be forced.

IMF loans with conditions will never instill genuine respect for private property within a nation. No amount of conditional lending will change a country's lack of commitment to the rule of law. Such respect and commitment must be generated organically. Empirically, Mercer-Blackman and Unigovskaya find IMF conditions that attempt structural reform have no impact, but policy changes do.[49] Hence, the IMF conditions that attempt to build institutions fail.

V. Policy Implications

Given the mixed empirical literature on IMF lending, coupled with failure of brute force to change institutions, the IMF should stop lending to countries with poor institutions. Such institutions necessarily come about

49. Mercer-Blackman & Unigovskaya, *supra* note 15.

through spontaneous order; they can never be forced. However, the IMF tends to be sluggish on reform and does not like to admit when it is wrong.[50] Fortunately, even though United States voting power is only about 17%, United States influence on the IMF is strong enough to motivate change.[51]

Political institutions like the IMF often require some nudging to change their action. In the past, the US pressured the IMF with public statements. In 2005, the former Under Secretary for International Affairs at the United States Department of the Treasury gave a speech accusing the IMF of being "asleep at the wheel" on matters of exchange rates.[52] Two years later, the IMF released a set of reforms to address the exchange rate issue.[53] Furthermore, Weisbrot and Johnston find that "the Treasury is the main power for policy decisions affecting low- and middle-in-

50. *See supra* Part II. As noted there, most pro IMF lending studies are from the IMF.

51. Voting power is directly tied to percentage of contribution.

52. Timothy D. Adams, Under Sec'y, U.S. Dep't of Treas. Int'l Affairs, Address at the Conference on IMF Reform Institute for International Economics: *The US View on IMF Reform* (Sept. 23, 2005).

53. Press Release, Executive Board, Public Information Notice: IMF Executive Board Adopts New Decision on Bilateral Surveillance Over Members' Policies, IMF Public Information Notice No. 07/69 (June 21, 2007).

come borrowing countries."[54] Low- and middle-income are the countries least likely to have the prerequisite institutions for IMF conditional loans to be effective. Hence, it is well within the ability of the United States to end IMF lending to countries with poor informal institutions.

Conclusion

IMF conditional lending promotes growth when there are prior institutions favorable to the conditions the IMF places. Conditional lending with a focus on policy bolsters the four vehicles of progress, thus promoting growth. But, if a country lacks strong institutions, conditions will not promote growth. Additionally, the IMF cannot create strong formal institutions if member states do not already have the necessary informal foundations to sustain them.

In this paper, I do not ask the question of how informal institutions can be created. That would go beyond the scope of this paper. Further research could explore that question. However, it is evident that the IMF should stop lending to countries lacking such institutions.

54. Mark Weisbrot & Jake Johnston, Ctr. Econ Pol'y Rsch., Voting Share Reform at the IMF: Will it Make a Difference? (2016).

My paper has two main implications. First, the IMF should cease its loans to countries with lacking institutions. The United States can guarantee such a change, and it should, since it provides the IMF with $161 billion. Second, policy makers ought to be aware of incentives. Both bureaucratic incentives and moral hazard undermine IMF loans and broader policymaking. Such incentives cannot be ignored without disastrous consequences.

Sex v. Gender: How Modern Notions of Gender Identity Destroy Sex, and Why Courts Cannot Sidestep the Issue

Nathan Sybrandy*

*Nathan Sybrandy is a former nurse turned law student graduating from Regent Law in May 2025. After sitting for the Idaho Bar, he will clerk at the Western District of Oklahoma. Nathan is an active member of the Blackstone Legal Fellowship, and he and his wife Gailynn will welcome their first child this fall. He is grateful for the editorial assistance of Dean Ernie Walton, Mr. Caleb Ridings, and the talented GCC Journal Staff. And as in every good and true pursuit, soli deo gloria.

Introduction 45

I. Gender and the Law 54
a. Background: Sex and Equal Protection 54
b. Transgender Status, Equal Protection, and Sex-Based Classifications 57
c. Transgender Identity as a Distinct Quasi-Suspect Group 66

II. Toward an Originalist Framework for Sex 73
a. In the Equal Protection Context, Courts Cannot Avoid Taking Sides in the Sex v. Gender Debate 74
b. Gore v. Lee Illustrates the Need for an Originalist Doctrine of Sex 77

Conclusion 81

± Generative AI tools were utilized in the editing of this paper for clarity and style. However, no part of the substantive drafting or research utilized such tools.

The Supreme Court's impending decision in *United States v. Skrmetti* forces two reckonings. First: Does 'sex' under the Fourteenth Amendment's Equal Protection Clause mean biological reality or gender identity?[1] And second: What is 'gender identity?' The Court will decide these questions one way or the other. Less certain is whether the Justices will admit that they're picking a side and explain why. Of course, strictly speaking the outcome hinges on scrutiny—there is no binding precedent guiding the level of scrutiny applied to transgender classifications. Yet, it all comes down to how one understands the history and definitions of 'sex' and 'gender.'

Who can tell us the answers to these pressing questions? Courts striking down laws restricting the use of sex-transitioning medical treatments in minors have a clear answer: Listen to the experts. And not just any experts—listen to the ones who run industry groups and file as amici. In contrast, courts *upholding* the constitutionality of these laws have pretended there is no controversy. Part of this

1. L.W. v. Skrmetti, 73 F.4th 408 (6th Cir. 2023), *cert. granted sub nom.* United States v. Skrmetti, No. 23-477, 2024 U.S. LEXIS 2780 (June 24, 2024).

is originalist virtue: the word 'sex' has a plain meaning, and 'gender' is simply its colloquial synonym. No analysis needed, right?

Wrong. The inescapable fact is that many powerful academics, activists, and policymakers ascribe to the notion that 'gender identity' is a defining element of sex, apart from biology. Is it 'principled' for originalists to ignore this rift and soldier on with the traditional definition? Not when prominent nationwide institutions contradict the previously plain meaning of sex. Originalists need merely do what they always do: Let history and tradition tell us what 'sex' means under the Fourteenth Amendment. And then *write it down*.

This Note dissects the legal consequences of confusion on sex versus gender. Part I maps the current terrain: first exploring foundational cases establishing sex as a quasi-suspect class, then exploring a split of appellate approaches, one of which ties 'gender identity' to sex, and another that construes it as its own quasi-suspect group. Part II argues that dodging the question of whether gender identity defines sex will leave lower courts floundering.

Courts must reject the 'gender identity defines sex' proposition explicitly—principled originalism demands it.

Introduction

Gender's transition from literary term to psychological construct started with the writings of the mid-twentieth century psychiatrists Robert Stoller and John Money.[2] The purported psychosocial construction of gender caused some to argue that it is subject to change in response to sociocultural cues.[3] Strangely, today's progressive legal arguments hold the opposite: that "gender identity" is an immutable characteristic present from birth.[4] After all, violations of fundamental rights usually involve something that the alleged victim cannot change, like one's sex or race.[5]

The degree to which the Nation has fractured on the gender debate cannot be understated. Recent political leaders have called the fight for "transgender equality"[6] the

2. Alex Byrne, Trouble with Gender 35–38, 40–43 (2024).

3. *Id.* at 44 ("[S]pecifically, there is a social ingredient to being a woman, just as there is a social ingredient to being a princess, a widow, or an actress.").

4. M. Dru Levasseur, *Gender Identity Defines Sex*, 39 Vt. L. Rev. 943, 956 (2015) ("[T]reatment [of gender dysphoria]. . . is focused on affirming people in their true sex—their gender identity—socially, medically, and legally.").

5. *Id.*

6. Throughout this Note, the term "transgender" is typically used

"civil rights movement of our time."[7] To be sure, individuals desiring to present as the opposite sex have existed throughout written history, and they deserve dignity and respect. But it is only in recent years that the words "sex" and "gender" have become conflated.[8] And the latter constantly eludes stable definition. Beyond conflation, many scholars now construe a certain sense of gender—"gender identity"—as the *defining factor* of one's sex.[9] And—activists argue—because gender identity defines sex, transgender status is itself a sex-based classification subject to heightened scrutiny. Or in the alternative, gender identity

to describe individuals professing an internal sense that they belong to the opposite sex. However, as this Note explores layered linguistic complexities regarding sex and gender, the reader will need to use context to ensure he or she keeps in mind the correct definition at the correct time.

7. Joe Biden (@JoeBiden), X, (Jan. 25, 2020, 1:20 PM), https://x.com/joebiden/status/1221135646107955200. Kamala Harris has echoed similar sentiments. Vice President Kamala Harris (@VP), X, (Apr. 8, 2017, 2:24 PM), https://x.com/VP/status/850776291100024832.

8. In the late first century AD, Seneca of Rome wrote of young men he observed "curling the hair, lightening the voice to the caressing sounds of a woman, competing with women in physical delicacy, and adorning themselves with filthy elegance." Kelly Olson, *Masculinity, Appearance, and Sexuality: Dandies in Roman Antiquity*, 23 J. Hist. of Sexuality 182 (2014).

9. *See* Kelsey M. Pittman, Note, *The Divergence of Binary Sex and the Transgender*, 12 Liberty U. L. Rev. 761 (2018) (writing on the conflation of sex and gender terminology within Title IX bathroom access controversies).

is so immutable and unchanging that it qualifies as its own distinct quasi-suspect group, deserving of heightened scrutiny.

Apart from the narrow statutory construction in *Bostock v. Clayton County*,[10] the Supreme Court has construed biological sex, and not gender, as an immutable characteristic, subject to intermediate scrutiny as a quasi-suspect group.[11] Without the "element of sex" argument, any decision applying heightened scrutiny to transgender identity would contradict the very reason sex is a quasi-suspect group.[12] Yet even as experts contend gender

10. 590 U.S. 644 (2020). And even then, *Bostock* insists it treats sex as "biological distinctions between male and female." *Id.* And elsewhere, Justice Gorsuch has called it "implausible" to assert that that the operative words of Title VII and the Equal Protection Clause "mean the same thing," because they are "such differently worded provisions." Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 308 (2023) (Gorsuch, J., concurring).

11. The Court has frequently used the term "gender" in its sex discrimination cases, but it has used the term in its sense as a pure synonym for biological sex. *See e.g.,* United States v. Virginia, 518 U.S. 515 (1996).

12. The malleable nature of "gender" has created scenarios where multiple senses of "gender" are used within the same document, resulting in circular definitions in works as prominent as the Yogyakarta Principles. Byrne, *supra* note 2, at 107. The other "senses" of gender apart from its function as a synonym for sex include (1) "gender as femininity/masculinity," (2) "gender as sex-typed social roles," (3) "gender as identity," and (4) "gender as man/woman." *Id.* at 36, 38, 40, 43, 47; *see also* Kathleen Stock, Material Girls 39–41 (2022) (proposing a similar set of definitions for gender).

identity is immutable, the *same* individuals admit gender identity is subject to social influence,[13] even going so far as to call it "self-identity."[14]

Abroad, the medical approach to gender identity has

13. One example: Gender expert and clinical psychologist Diane Ehrensaft has stated gender identity is *not* immutable myriad times in her three books on the subject. Diane Ehrensaft, Gender Born, Gender Made 209 (2011) ("[Gender] is a lifelong, evolutionary process for us all."); Diane Ehrensaft, The Gender Creative Child 57–58 (2016) ("[S]ome of what we will look at about gender . . . . is heavily weighted on the nurture end."); Diane Ehrensaft & Michelle Jurkiewicz, Gender Explained, 92 (2024) ("[A]n individual's gender web is made up of various threads drawn from nature, nurture, and culture."). Yet, Ehrensaft *also* declared under oath, "a person's gender identity is an innate, effectively immutable characteristic." Declaration of Diane Ehrensaft, Ph.D. at ¶¶ 25–26, 39, Adams v. Sch. Bd. of St. Johns Cnty., 318 F. Supp. 3d 1293 (M.D. Fla. July 19, 2017) (No. 17-cv-739), *rev'd*, 57 F.4th 791 (11th Cir. 2022).

14. Levasseur, *supra* note 4, at 943, 954. ("[Gender affirming] treatment . . . alters the mutable primary and secondary sex characteristics to match the core self-identity, rather than alter the fixed, core gender identity."). Further, this prominent trans-rights attorney claims that "[s]egregating so-called 'real' or tangible sex characteristics using coded language, such as 'physical,' 'anatomical,' 'biological,' or 'genetic,'—from so-called 'imaginary' or intangible or psychological characteristics like 'gender identity' or 'self-identity,' reflects a fundamental misunderstanding of sex." *Id.* at 982. As Professor Kathleen Stock puts it, "Gender identity theory doesn't just say that gender identity exists, is fundamental to human beings, and should be legally and politically protected. It also says that biological sex is irrelevant and needs no such legal protection." Stock, *supra* note 12, at 45.

reversed itself. Finland,[15] England,[16] Wales,[17] Scotland,[18] Denmark,[19] Norway,[20] and Sweden[21] have restricted 'gender affirming care' in minors. These countries are following the science: the most reliable data show no benefit from surgical interventions.[22] Another recent large retrospective

15. *One Year Since Finland Broke with WPATH "Standards of Care,"* Soc'y for Evidence Based Gender Medicine (July 2, 2021), https://segm.org/Finland_deviates_from_WPATH_prioritizing_psychotherapy_no_surgery_for_minors [perma.cc/F5DC-J434].

16. *Clinical Policy: Puberty Suppressing Hormones (PSH) for Children and Young People Who Have Gender Incongruence/Gender Dysphoria*, NHS England (Mar. 12, 2024), https://bit.ly/3AcNl7Q [perma.cc/Z4ZF-9UKV].

17. Lydia Royce, *Under 18s in Wales Won't Be Prescribed Puberty Blockers, Says Welsh Government*, Wales Online (Apr. 22, 2024, 2:52 PM), https://www.walesonline.co.uk/news/health/under-18s-wont-prescribed-puberty-29039035 [perma.cc/P8FJ-995K].

18. Mary McCool, *Scotland's Under-18s Gender Clinic Pauses Puberty Blockers*, BBC (Apr. 18, 2024), https://www.bbc.com/news/uk-scotland-68844119 [perma.cc/XR9E-EARR].

19. *Denmark Joins the List of Countries That Have Sharply Restricted Youth Gender Transitions*, Soc'y for Evidence Based Gender Medicine (Aug. 17, 2023), https://segm.org/Denmark-sharply-restricts-youth-gender-transitions [perma.cc/3NVF-95XZ].

20. Rose Kelleher, *Norway Takes a Step Forward in Ending "Experiment" in Youth Gender Medicine*, Genspect, https://genspect.org/norway-takes-a-step-forward-in-ending-experiment-in-youth-gender-medicine/ [perma.cc/4A9B-GAKP] ("An independent investigating body in Norway has called the use of puberty blockers, cross-sex hormones and surgeries in young people 'experimental' and recommended that the authorities restrict such treatments . . . .").

21. *Id*. ("Sweden has made the decision to no longer offer gender transition to minors outside of research settings, and restricted eligibility to the 'classic' early childhood onset of gender dysphoria. All others are to be treated with psychosocial support and psychotherapy, with a focus on accepting and thriving in natal puberty.").

22. Cecilia Dhejne et al., *Long-Term Follow-Up of Transsex-*

cohort study suggests individuals who undergo 'gender affirming' surgery are twelve times more likely to attempt suicide than the general population.[23] Evidence also suggests that puberty blockers, far from being an opportunity to "wait and see," are a one-way street to cross-sex hormones, which carry significant health risks of their own, like sterility.[24] Moreover, a massive surge in patients presenting with gender dysphoria, particularly among pre- and peri-pubescent females, has raised concerns about the influence of increased social media use and social contagion.[25]

ual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden, 6 PLOS ONE, no. 2, Feb. 22, 2011, at 1, https://journals.plos.org/ plosone/article?id=10.1371/journal.pone.0016885 [perma.cc/25C9-6QTB] (retrospective, multi-decade cohort study finding no benefit to mental health or all-cause mortality after surgical transition). Long-term retrospective cohort studies are the most persuasive forms of evidence in research areas where, as here, randomized controlled trials are impractical or unethical. To date, this study is the only one of its kind, and thus it is the best available evidence.

23. John J. Straub et al., *Risk of Suicide and Self-Harm Following Gender-Affirmation Surgery*, CUREUS (Apr. 2, 2024), https://pmc.ncbi.nlm.nih.gov/articles/PMC11063965/ [perma.cc/JT37-R5CW]. However, as the paper itself notes, retrospective studies cannot establish causation. *Id*.

24. *See*, *e.g.*, Maria Baldassarre et al., *Effects of Long-term High Dose Testosterone Administration on Vaginal Epithelium Structure and Estrogen Receptor -α and -β Expression of Young Women*, 25 INT. J. OF IMPOTENCE RESEARCH 172–77 (2013), https://bit.ly/3Xh7VwC [perma.cc/4NA8-S4BL].

25. Brown University researcher Dr. Lisa Littman began studying this trend in the late 2010s, suspecting that the sudden change in sex ratio may have been influenced in part by peer contagion via social

Yet, state laws attempting to curtail these treatments in minors have faced myriad legal challenges.[26] So far, courts examining challenges against such laws have failed to identify or rebut the ideological presuppositions underlying the linguistic drift around sex and gender. Even where the courts have reaffirmed biological sex as an immutable trait distinct from gender identity, they have not explicitly confronted or repudiated the argument that gender identity defines sex.[27] This argument can only be ignored for so long, as modern gender orthodoxy continues to gain acceptance in certain cultural spheres. In some cases, this cultural influence shows itself through the court's baseline, unnoticed presupposition that gender identity indeed defines sex.[28]

media. Lisa Littman, *Parent Reports of Adolescents and Young Adults Perceived to Show Signs of a Rapid Onset of Gender Dysphoria*, PLOS ONE, Aug. 16, 2018, at 2, https://journals.plos.org/ plosone/article/ file?id=10.1371/journal.pone.0202330&type=printable [https://bit.ly/3yI5YAd].

26. *See infra* Part I.B, I.C.

27. *See, e.g.,* Gore v. Lee, 107 F.4th 548, 2024 U.S. App. LEXIS 17135 (6th Cir. 2024) (refuting the assertion that gender identity defines sex using implicit legislative fact finding rather than explicit analysis).

28. *See, e.g.*, T.A.B. v. Talbot Cnty., 286 F. Supp. 3d 704, 708 (D. Md. 2018) (lacking analysis of the circular and conflicting definitions of "gender," "gender identity," and "birth sex"). Meanwhile, academics and activists promoting modern gender orthodoxy are transparent about the anti-scientific, explicitly political—even revolutionary—motiva-

The "gender identity defines sex" formulation reverses traditional understandings of biological reality: the corporeal reality of sex is now mutable, while the mind is not. It is now one's body, not one's psyche, that must be aligned with one's "true" sex, as defined by gender identity. This realignment is surgical, irreversible, and executed with minimal guardrails.[29] Such procedures risk sterility on insufficient evidence of positive, lasting change,[30] and ignore how social contagion impacts transgender presentation.[31]

Regardless, the Supreme Court's conservative

tions behind their work. *See, e.g.,* Andrea Long Chu, *Freedom of Sex: The Moral Case for Letting Trans Kids Change Their Bodies*, New York Magazine (Mar. 11, 2024), https:/nymag.com/intelligencer/article/trans-rights-biological-sex-gender-judith-butler.html [https://bit.ly/4foMJfh] (advocating for "sex itself as a site of freedom," and extending that supposed freedom to children as a "politically disenfranchised" group).

29. Lisa Nainggolan, *WPATH Removes Age Limits From Transgender Treatment Guidelines*, Medscape (Sept. 16, 2022), https://www.medscape.com/viewarticle/980935?form=fpf; Jonathan Kay, *An Interview With Lisa Littman, Who Coined the Term 'Rapid Onset Gender Dysphoria'*, Quillette, (Mar. 19, 2019), https://quillette.com/2019/03/19/an-interview-with-lisa-littman-who-coined-the-term-rapid-onset-gender-dysphoria/ ("[Clinicians were] only interested in fast-tracking gender-affirmation and transition and were resistant to even evaluating the child's pre-existing and current mental health issues."); Abigail Shrier, Irreversible Damage 156 (2021).

30. *See* Maria Baldassarre et al., *supra* note 24; *see also* Dhejne et al., *supra* note 22 (showing no long-term benefit in surgical interventions).

31. *See* Littman, *supra* note 25, at 2 (examining social contagion impacts on Rapid Onset Gender Dysphoria).

majority has shown a clear preference for judicial restraint, and it is likely to use this approach in resolving *Skrmetti* and the rest of the state ban cases.[32] This makes it less likely that the Court will provide an explicit historical or scientific framework to analyze controversial and conflicting definitions of sex. Thus far, lower courts that have asserted the immutability of sex have only implicitly rejected the "gender identity defines sex" argument.[33] Going forward, lower courts must provide active judicial engagement to re-establish and preserve the robust history and tradition undergirding the immutable nature of sex, apart from gender identity.[34] We need an originalist doctrine of sex.

32. *See Bostock v. Clayton Cnty*, 590 U.S. 644, 655 (2020) (declining to analyze differences in the parties' proffered definitions of sex "because nothing in our approach to these cases turns on the outcome of the parties' debate . . . ."); *see also* Washington State Grange v. Washington State Republican Party, 552 U. S. 442, 450 (2008) (describing the "fundamental principle of judicial restraint" not to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.").

33. *See infra* Part II.

34. "History" in this context includes naturalist, philosophical, and proto-scientific observations on sex, including ancient Greek and Biblical viewpoints. Sex goes to the heart of who we are and for what purpose we exist. Abigail Favale, The Genesis of Gender 34–35 (2022) (contrasting the complementarian Genesis account of sex with contemporaneous Platonic accounts casting womanhood as a moral downgrade from manhood); Aristotle, *Generation of Animals, in* 2 The Complete Works of Aristotle, at I.2.716a 13–14 (Jonathan Barnes, ed., Arthur Platt, trans., 1995) ("[B]y a male animal we mean

I. Gender and the Law

How have novel theories of gender and sex impacted legal analysis of whether to apply heightened scrutiny to laws affecting transgender identified persons? Answering this critical question requires an account of the current state of the law applying equal protection rights to cases challenging state child transition bans.[35] The various approaches will be analyzed and critiqued.

a. Background: Sex and Equal Protection

The Fourteenth Amendment's Equal Protection Clause prohibits a state from denying "to any person within its jurisdiction the equal protection of the laws."[36] The Court has long held that this "requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions . . . ."[37] And when a law treats

that which generates in another, and by a female that which generates in itself.").

35. Cases regarding bathroom access have also analyzed potential privacy rights. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 627–37 (4th Cir. 2020) (Niemeyer, J., dissenting) (grounding arguments in privacy); *see also* Pittman, *supra* note 9 (reviewing Judge Niemeyer's dissent in *Grimm*, its argument for privacy rights, and its implications for the definitions of sex and gender identity). Other appellate cases have examined Free Exercise rights. Parents for Privacy v. Barr, 949 F.3d 1210, 1234 (9th Cir. 2020).

36. U.S. Const. amend. XIV, § 1.

37. Hayes v. Missouri, 120 U.S. 68, 71–72 (1887).

comparable parties differently, the government must proffer a "rational reason for the difference."[38]

Sometimes, the Constitution demands more than a "rational reason." In 1973's *Frontiero v. Richardson*, the Court examined a law prohibiting women with non-dependent spouses from receiving certain military benefits.[39] The plurality applied "close judicial scrutiny," marking the first application of heightened scrutiny to sex as a suspect class.[40] The applicability of *Frontiero* is limited as it was decided on the Fifth Amendment's Due Process Clause, not the Fourteenth Amendment's Equal Protection Clause.[41] However, the *Frontiero* plurality specifically noted: "Sex is an immutable characteristic determined by accident of birth."[42]

Three years later, in *Craig v. Boren*, the Court would back away from *Frontiero*'s application of strict scrutiny to sex-based classifications.[43] On Equal Protection grounds, the Court struck down an Oklahoma statute that

38. Engquist v. Or. Dep't of Agric., 553 U.S. 591, 602 (2008).
39. 411 U.S. 677 (1973) (plurality opinion).
40. *Id.* at 682.
41. *Id.* at 691.
42. *Id.* at 686.
43. 429 U.S. 190, 219 (1976) (Rehnquist, J., dissenting).

banned men under twenty-one from consuming the state's regulated 3.2% ABV beer but allowed women over eighteen to consume the same beverage.[44] The Court applied a novel "intermediate scrutiny" standard, holding the law unconstitutional because while traffic safety was an "important government interest," the intervention was not "substantially related" to that interest..[45]

In 1996, scrutiny for sex-based classifications was modified again in *United States v. Virginia*.[46] The Court found that Virginia's maintenance of the "Virginia Military Institute" ("VMI") as a single sex educational institution violated the Equal Protection Clause.[47] Justice Ginsberg, writing for the Court, acknowledged that "[p]hysical differences between men and women . . . are enduring."[48] But the Court found those differences inapplicable, reasoning that Virginia's justifications in maintaining a single-sex institution could not outweigh the ongoing prejudice women experienced by being shut out of VMI's vast alumni net-

44. *Id.*
45. *Id.*
46. 518 U.S. 515 (1996).
47. *Id.* at 519.
48. *Id.* at 533.

works and connections.[49] In finding VMI's single-sex status unconstitutional, the Court augmented its intermediate scrutiny test from *Boren*, holding that laws creating sex-based classifications must have an "exceedingly persuasive justification."[50] This new standard appeared to make intermediate scrutiny stronger than it was previously thought to be.[51]

b. Transgender Status, Equal Protection, and Sex-Based Classifications

Circuits are split on whether laws banning minors from receiving puberty blockers, cross-sex hormones, or sex-reassignment surgeries discriminate on the basis of sex in violation of the Equal Protection Clause.[52] Equal protection analyses in the State Ban Cases have focused little on whether discrimination based on "gender identity" enables a claim of sex-based discrimination. Rather, courts have tended to construed laws regulating sex-linked medical procedures as inherently discriminating based on sex.

49. *Id.* at 527.
50. *Id.* at 533.
51. *Id.* at 529–30.
52. *Compare* Eknes-Tucker v. Alabama, 80 F.4th 1205 (11th Cir. 2023), *with* Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022).

1. *Brandt v. Rutledge*: Ignoring the Defining Lens of Sex

In *Brandt v. Rutledge*, the United States Court of Appeals for the Eighth Circuit held that Arkansas's ban on "gender transition procedures"[53] for minors commits sex-based discrimination, because "under the Act, medical procedures that are permitted for a minor of one sex are prohibited for a minor of another sex."[54] But the court manufactured this discrimination: It construed "medical procedures" in absolute physical terms like "testosterone" or "mastectomy," divorced from their sex-transitioning effects. In adopting this divorced construction, the *Brandt* court ignored the category-defining nature of sex.[55]

On its own terms, *Brandt*'s concrete construction conflicts with the fact that neither testosterone nor estrogen

53. Here, the State of Arkansas implicitly used the word "Gender" in its sense as a direct synonym for "Sex."

54. *Brandt*, 47 F.4th at 669.

55. Byrne, *supra* note 2, at 67 (2024) ("[The hormonal] variable[] of sex *relies on* the simple categories of *male* and *female*."). This contrasts with the reasoning in *Craig v. Boren*, where men were denied access to alcoholic beverages, but women of the same age were not. Although the Court entertained arguments that men are affected by alcohol differently than women, it ultimately held the two were similarly situated. And on its face, alcohol has similar effects in men and women, unlike testosterone and estrogen.

are inherently "cross-sex" hormones. Rather, certain *doses* of sex hormones are "cross-sex." Males have endogenous levels of estrogen,[56] and females have endogenous levels of testosterone.[57] Hormones are only "cross-sex" in relation to the normal levels found in each sex. No physician could ever prescribe a "cross-sex" hormone dose without prior knowledge of the patient's natural hormone levels. That prior knowledge only comes from the binary nature of sex.

For a fair comparison, consider a fallacy sometimes exhibited by *opponents* of puberty blockers in children. Such individuals occasionally attack the puberty-blocking drug, Lupron, as a "chemical castration" drug.[58] But Lupron is only capable of chemical castration at extremely high doses—much higher doses than those administered to children seeking to avoid natural puberty.[59] Hypothetically, a

56. Tim Jewell, *Estrogen in Men*, Healthline (Mar. 16, 2023), https://www.healthline.com/health/estrogen-in-men [https://bit.ly/4d6T-gtH].

57. Kiara Anthony, *High Testosterone Levels in Women*, Healthline (Feb. 6, 2023), https://www.healthline.com/health/high-testosterone-in-women [https://bit.ly/4d7le8l].

58. Matt Walsh, *The Fight Against Child Mutilation Makes It To The Supreme Court*, Daily Wire, (Jun. 25, 2024), https://www.dailywire.com/news/the-fight-against-child-mutilation-makes-it-to-the-supreme-court.

59. Lupron dose levels given to children to delay puberty are not similar to the dose levels historically used to perform unethical "chem-

male child receiving puberty blockers, and another male of any age being chemically castrated would not be similarly situated to one another, because of the inherent difference in risks and therapeutic effects of the same drug.

Likewise, because of "enduring" "physical differences between men and women,"[60] the two sexes are not similarly situated in relation to their ability to "be prescribed testosterone" or estrogen, or to receive any other variety of puberty blockade or sex-reassignment surgery.[61] Again, this is because of the inherent differences between men and women in risks and therapeutic effects brought about via the same drug.

The Court also engaged with this issue in *Dobbs v.*

ical castrations" on prisoners. That said, there is evidence that use of puberty blockers at "normal" levels (the same levels used to prevent precocious puberty) can impact fertility, as can cross-sex hormones. Philip J. Cheng, et al., *Fertility Concerns of the Transgender Patient*, 8 Translational Andrology and Urology 209 (2019), https://pubmed.ncbi.nlm.nih.gov/31380227/ (finding increased risk for infertility associated with puberty blockers or cross-sex hormones in children). Use of puberty blockers in children has also been shown to negatively impact neuropsychological functioning and bone health, and studies suggest use of puberty blockers over "watchful waiting" creates a one-way track to cross-sex hormones, rather than functioning as a "pause button." *Puberty Blockers*, Stats for Gender, (Aug. 5, 2024) https://statsforgender.org/puberty-blockers/ [https://bit.ly/3LUxJrW] (collecting scientific studies).

60. United States v. Virginia, 518 U.S. at 533 (1996).

61. *Brandt*, 47 F.4th at 669.

Jackson Women's Health Organization: "[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against the members of one sex or the other.'"[62] Only males can undergo "cross-sex" hormone therapy via estrogen—females physically cannot. And only females can undergo "gender affirmation surgery" via mastectomy—males physically cannot.

In response to the State of Arkansas raising similar arguments,[63] the court in *Brandt* replied, "The biological sex of the minor patient is the basis on which the law distinguishes between those who may receive certain types of medical care and those who may not. The Act is therefore subject to heightened scrutiny."[64] The court in *Brandt* of-

62. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236 (2022) (quoting Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974)).

63. The State of Arkansas did not raise the quote from *Dobbs*, because that decision had not yet been released.

64. *Brandt*, 47 F.4th at 670. The court did not acknowledge or address the plaintiffs' own, tautological definition of gender identity: "'Gender identity' refers to a person's internal, innate, and immutable sense of belonging to a particular gender." Complaint at 23, Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. May 5, 2021) (No. 21-cv-450). In fact, nowhere did the court even mention the phrase "gender identity." *Brandt*, 47 F.4th at 667.

fered no further analysis or justification for its construction of the phrases "medical care" or "medical procedures."[65] By analyzing Arkansas's law in concrete chemical and physical terms, rather than with descriptions of therapeutic effect, the court denied the existence of "inherent differences between men and women."[66]

2. *Bostock* displays Similar Reasoning to *Brandt* in its Denial of Sex as Categorically Imperative

The Supreme Court in *Bostock v. Clayton County* displayed similar reasoning, albeit in a Title VII context.[67] The Court considered whether employment discrimination "because of" gender identity or sexual orientation constituted a sex-based classification for Title VII purposes.[68] *Bostock* held that discrimination based on homosexuality or gender identity were both illegal acts of "sex-based" discrimination for purposes of Title VII.[69] The Court wrote:

> Consider, for example, an employer with two employees, both of whom are *attracted to men*. The two individuals are, to the

65. *Brandt*, 47 F.4th at 669.

66. United States v. Virginia, 518 U.S. 515, 533 (1996).

67. 590 U.S. 644 (2020). Since the case analyzed Title VII, the Court did not address Equal Protection Clause issues.

68. *Id*. at 661.

69. *Id*. at 652.

> employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is *attracted to men*, the employer discriminates against him for traits or actions it tolerates in his female colleague.[70]

The Court commits the same category error as the *Brandt* court. "Attracted to men" is an altogether different trait when attached to a woman versus a man. The clashing moral, social, sexual, and medical implications distinguish the traits. One struggles to conceive of a phrase with meanings more discordant in their opposite-sex applications than "attracted to men."

Yet the Court in *Bostock* treated "attracted to men" as a static trait label–like "conscientious" or "orderly"—which are cleanly applied to men or women without altering the nature of the trait. But the information communicated by the trait, "attracted to men," changes depending on the sex of the trait holder, as does the therapeutic effect of sex hormones. It is impossible for a male person and a female person to both hold the same type of "attracted to men" trait; each of the two holds a distinct trait which, al-

70. *Id*. at 660.

though spelled identically to the other's, could not be more different.[71]

3. *Eknes-Tucker* and *Skrmetti's* Approaches to Sex-based Equal Protection Imply Adherence to Traditional Definitions

The Eleventh Circuit in *Eknes-Tucker v. Governor of Alabama*[72] and the Sixth Circuit in *L.W. v. Skrmetti*[73] took a different approach. There, the courts stated plainly, "[Tennessee's] prohibition does not prefer one sex to the detriment of the other"[74] and "[Alabama's] statute does not establish an unequal regime for males and females."[75] This language points directly to *United States v. Virginia*'s application of heightened scrutiny for sex-based classifica-

71. Fortunately, the Court has since signaled that it will not necessarily apply *Bostoc*k's causation analysis in a Fourteenth Amendment context. Students for Fair Admissions, Inc. v. Presidents and Fellows of Harvard Coll., 600 U.S. 181, 308 (2023) (Gorsuch, J., concurring). *See also* Dominic Bayer, *Child Gender Transition Bans and the Constitution: The Equal Protection Clause and* Bostock, 3 Regent U. L. Rev. Pro Tempore 1, 3 (2022) (distinguishing the reasoning in *Bostock* from the Equal Protection Clause and arguing the Court will not apply *Bostock*'s causation analysis to the state ban cases) [https://bit.ly/3XjzR3g].

72. 80 F.4th 1205 (11th Cir. 2023) (granting stay of injunction against Alabama's state ban).

73. 73 F.4th 408 (6th Cir. 2023) (granting stay of injunction against Tennessee's state ban).

74. *Skrmetti*, 73 F.4th at 419.

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

tions—that the equal protection clause prohibits "official action that closes a door or denies opportunity to women (or to men)."[76]

Addressing the reasoning in *Brandt*, the court in *Skrmetti* asked rhetorically, "[Tennessee's] Act mentions the word 'sex' . . . [but] how could it not?"[77] The court acknowledged that sex is the validating category by which we understand hormones to be cross-sex: "[t]he reality that the drugs' effects correspond to sex . . . and that Tennessee regulates them does not require skeptical scrutiny."[78]

Likewise, the court in *Eknes-Tucker* reasoned, "cross-sex hormone treatments for gender dysphoria are different for males and for females because of biological differences between males and females."[79] The court further stated it was "difficult to imagine how a state might regulate the use of puberty blockers and cross-sex hormones for the relevant purposes in specific terms without referencing sex in some way."[80]

---

76. 518 U.S. 515, 532 (1996).
77. *Skrmetti*, 73 F.4th at 419.
78. *Id.*
79. *Eknes-Tucker*, 80 F.4th at 1228.
80. *Id*.

c. Transgender Identity as a Distinct Quasi-Suspect Group

In addition to sex-based classification arguments, many plaintiffs also allege that transgender status stands as its own "quasi-suspect" group.[81] The Supreme Court has recognized two of these "quasi-suspect" groups: sex and illegitimacy.[82] But in recent decades, the Court has repeatedly declined to recognize new quasi-suspect groups, notably declining to extend the doctrine to age,[83] mental disability,[84] or sexual orientation.[85] However, some courts have treated transgender persons as a suspect class, including the Fourth and Ninth Circuits.[86]

When deciding whether a group is "quasi suspect," courts examine four factors: (1) whether the group has been subject to discrimination in the past;[87] (2) whether any of

81. *Skrmetti*, 73 F.4th at 419; *Eknes-Tucker*, 80 F.4th at 1227; *Brandt*, 47 F.4th at 670 n.4.

82. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985).

83. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam).

84. *Cleburne*, 473 U.S. at 442.

85. Romer v. Evans, 517 U.S. 620, 632–33 (1996); Obergefell v. Hodges, 576 U.S. 644 (2015).

86. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 608 (4th Cir. 2020); Karnoski v. Trump, 926 F.3d 1180, 1200 (9th Cir. 2019).

87. Bowen v. Gilliard, 483 U.S. 587, 602 (1987).

the defining characteristics relate to one's ability to contribute to society;[88] (3) whether the group lacks political power;[89] and (4) whether membership in the group can be defined by "obvious, immutable, or distinguishing characteristics that define them as a discrete group."[90]

None of the factors are dispositive, but immutability stands out.[91] The idea of protecting a class without "immutable" characteristics may strike the reader as somewhat strange.[92] By that logic, Mormons, Hutterites, Quakers, and other religious minorities would arguably qualify for quasi-suspect group status. Catholics could also make a case for membership. The combinatorial explosiveness of this formula illustrates why the Court has been hesitant to

88. *Cleburne*, 473 U.S. at 440–41.

89. *Bowen*, 483 U.S. at 602.

90. *Id*.

91. For purposes of this Note, quasi-suspect group factor analysis will focus on immutability, which is the factor most directly related to the subject of the Note: conflation of sex and gender. The author holds little doubt that transsexual and transgender individuals have faced discrimination, even marginalization. But this complex history lies well beyond the scope of this Note.

92. It also recently struck the Sixth Circuit as strange: "The Supreme Court 'has never defined a suspect or quasi-suspect class on anything other than a trait that is definitively ascertainable at the moment of birth.' Gender identity does not meet that criterion." Gore v. Lee, 107 F.4th 548, 2024 U.S. App. LEXIS 17135, at *19 (6th Cir. 2024) (quoting Ondo v. City of Cleveland, 795 F.3d 597 (6th Cir. 2015)).

expand the doctrine, especially when "the States are currently engaged in serious, thoughtful examinations" of contentious political issues.[93] The two recognized quasi-suspect groups—sex and illegitimacy—are both immutable group memberships, at least for now.[94] Conversely, recent conceptions of transgender identity are less discrete and include demographics that are often subject to the effects of social contagion.[95]

93. Washington v. Glucksberg, 521 U.S. 702, 719 (1997).

94. To treat transgender status as a 'sex-based' classification would nullify the rationale behind sex being a quasi-suspect group in the first instance. We witness similar dynamics in the Title IX space. *See* Seth Lucas, Note, *Equality on What Basis? Evaluating Title IX's Requirements in the Transgender Context*, 31 Geo. Mason L. Rev. 391, 410–11 (2023) (arguing *Bostock*'s logic should not apply in the Title IX context because the decision "explicitly treated gender identity and sex as concepts that exist independent of each other").

95. Moreover, the laws at issue here deal not with transgender individuals as a whole, but with *children*, many of whom present from a novel demographic that appears quite distinct from traditional presentations of transsexual and transgender identification recorded throughout history. *See, e.g.*, *The Profile of People Seeking Transition Has Shifted Drastically, From Overwhelmingly Middle-Aged Males to Predominantly Adolescent Females*, Stats for Gender, https://statsforgender.org/wp-content/uploads/2021/10/The-profile-of-people-seeking-transition-has-shifted-drastically.pdf [https://bit.ly/3LTGouK] ("A 2017 paper notes that 'in adolescents, there has been a recent inversion in the sex ratio from one favouring birth-assigned males to one favouring birth-assigned females.' By contrast, over 90% of transsexual adults in the 1960s were male." (first quoting Kenneth Zucker, *Epidemiology of Gender Dysphoria and Transgender Identity*, 14 Sexual Health 404 (2017) then citing Women and Equalities Committee, Transgender Equality, 2015 HC 390, at TRA0149 (UK))).

The closest case on point for quasi-suspect group analysis is *Grimm v. Gloucester County School Board*, which dealt with a school district's bathroom access policy being based on what the district called "biological gender."[96] The court in *Grimm* cited the amici statements of national mental health and psychiatric organizations for the proposition that being transgender "is as natural and immutable as being cisgender."[97] On these grounds, among others, the court in *Grimm* treated transgender status as a distinct quasi-suspect class, applied intermediate scrutiny, and struck down the district's bathroom access policy as violating equal protection.[98]

Indeed, even so prominent an organization as the American Psychological Association endorsed the immutability of gender identity as amici in *Grimm*.[99] Citing such respected national bodies of medical expertise appears persuasive, and several district courts have shown disdain

96. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 608 (4th Cir. 2020).

97. *Id.* at 612–13.

98. *Id.* at 608, 613.

99. Brief of Amici Curiae Medical, Public Health, and Mental Health Organizations at 7, *Grimm*, 972 F.3d 586 (4th Cir. 2020) (No. 19-1952), 2019 WL 6341094.

for arguments questioning these bodies' ideological neutrality.[100] But ideological activists in the transgender debate have repeatedly used social pressure tactics to block the publishing of scientific research that is unfavorable to activists' political preferences.[101] This pressure has even come from the national organizations themselves.[102] Moreover,

---

100. Doe v. Ladapo, 676 F. Supp. 3d 1205, 1223 (N.D. Fla. 2023) ("Even so, it is fanciful to believe that all the many medical associations who have endorsed gender-affirming care, or who have spoken out or joined an amicus brief supporting the plaintiffs in this litigation, have so readily sold their patients down the river."); *see also* Doe v. Thornbury, 2023 U.S. Dist. LEXIS 111390, at *15 n.6 (W.D. Ky. June 28, 2023) ("The Attorney General's reference to an assumed 'ideological takeover' of the major medical organizations is similarly baseless." (internal citations omitted)).

101. *Springer to Retract a Key Paper in Response to Activist Demands*, Soc'y for Evidence Based Gender Medicine (Jun. 10, 2023), https://segm.org/retraction-of-key-publication-in-response-to-activist-pressures [https://bit.ly/3yuUnnN]; Stephen Gliske, *Journal Retracts Paper on Gender Dysphoria After 900 Critics Petition*, Retraction Watch (Apr. 30, 2020), https://retractionwatch.com/2020/04/30/journal-retracts-paper-on-gender-dysphoria-after-900-critics-petition/ [https://bit.ly/3Yt2Gv3]; Kara Grant, *Brain Imaging Study Paused After LGBTQ+ Advocates Complain*, Medpage Today (Mar. 1, 2021), https://www.medpagetoday.com/special-reports/exclusives/91423 [https://bit.ly/4dugSbh]; Meredith Wadman, *New Paper Ignites Storm Over Whether Teens Experience 'Rapid Onset' of Transgender Identity*, Science (Aug. 30, 2018), https://www.science.org/content/article/new-paper-ignites-storm-over-whether-teens-experience-rapid-onset-transgender-identity [https://bit.ly/4fsY9i5].

102. *Research Into Trans Medicine Has Been Manipulated*, The Economist (Jun. 29, 2024), https://www.economist.com/united-states/2024/06/27/research-into-trans-medicine-has-been-manipulated [https://bit.ly/4dcwuR2].

the current state of expert opinion is far from uniform.[103] Even if there was an "expert consensus," consensus is often wrong,[104] sometimes with disastrous consequences.[105]

All told, courts today encounter the same state of conflicting expert opinion regarding transgender identity as they did in 1977:

> "[T]here is no generally accepted definition of the term transsexual. Psychiatric judgments . . . have varied from the opinion that a request for a sex change is a sign of severe psychopathology to the opinion that these persons are psychologically normal but misclassified as to gender so that any psychological condition is the direct result of physical misclassification. These views reflect the many different opinions on the origin and development of transsexualism. Some feel that transsexual identification arises from psychosocial learning and others feel that the condition comes from inherited

103. *Compare Eknes-Tucker*, 80 F.4th at 1215 (plaintiffs' experts describing gender as "hardwired" and likening the puberty blockers and hormone ban to "removing somebody's cancer treatment . . . ."), *with id*. at 1217 (state's expert asserting the evidence on puberty blockers and hormones is "the lowest quality of evidence" and that gender dysphoria should be treated with the "watchful waiting approach").

104. Vinay Prasad & Adam Cifu, *Medical Reversal*, 84 Yale J. Biology & Med. 471, 472–73 (2011) (listing examples of reversals in previous professional consensus views).

105. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough." (internal citation omitted)).

or genetic causes."[106]

Skrmetti and *Eknes-Tucker* both cast doubt on whether transgender status is a distinct quasi-suspect group apart from sex. The court in *Skrmetti* stated, "The bar for recognizing a new quasi-suspect class, moreover, is a high one," pointing to the paucity of new classifications in the past forty years.[107] That judicial "hesitancy" to expand the classification "makes sense here," because "[g]ender identity and gender dysphoria pose vexing line-drawing dilemmas for legislatures."[108]

Likewise, the court in *Eknes-Tucker* stated, "we have grave doubt that transgender persons constitute a distinct quasi-suspect class."[109] Even if transgender status did comprise a quasi-suspect class, heightened scrutiny would only apply to laws that regulate "a medical procedure that only one sex can undergo" where the law is shown to be a "mere pretex[t] designed to effect an invidious discrimina-

106. Holloway v. Arthur Anderson & Co., 566 F.2d 659, 662 n.3 (9th Cir. 1977).

107. *Skrmetti*, 73 F.4th at 420.

108. *Id.*

109. *Eknes-Tucker*, 80 F.4th, at 1230 (quoting *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty*, 57 F.4th 791, 801, 803 n.5 (11th Cir. 2022)).

tion."[110]

II. Toward an Originalist Framework for Sex

Should the Supreme Court uphold Tennessee's ban in *Skrmetti*, the Court will likely use the narrowest possible grounds for its ruling—avoiding explicit rejection of the "gender identity defines sex" formulation if possible.[111] The panel majorities in *Skrmetti* and *Eknes-Tucker* attempted to do this,[112] as did the majority in the Sixth Circuit's recent decision in *Gore v. Lee*, which upheld Tennessee's prohibition on birth certificate sex designation changes based only on gender identity.[113] This section will briefly review advantages and disadvantages of this restrained approach, arguing via *Gore v. Lee* that such an approach will undercut

110. *Eknes-Tucker*, 80 F.4th, at 1230.

111. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 n.3 (2017) ("This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."); Trump v. Anderson, 601 U.S. 100, 117 (2024) (Barrett, J., concurring) ("[W]ritings on the Court should turn the national temperature down, not up."); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 353 (2022) (Roberts, C.J., concurring in judgment) ("Following [the] 'fundamental principle of judicial restraint,' we should begin with the narrowest basis for disposition, proceeding to consider a broader one only if necessary to resolve the case at hand." (quoting *Washington State Grange*, 552 U.S. at 450)).

112. *Skrmetti*, 73 F.4th at 419; *Eknes-Tucker*, 80 F.4th at 1228.

113. Gore v. Lee, 107 F.4th 548, 2024 U.S. App. LEXIS 17135 (6th Cir. 2024).

the effectiveness of the Court's ruling, while doing little to preserve the appearance of restraint.

a. In the Equal Protection Context, Courts Cannot Avoid Taking Sides in the Sex v. Gender Debate

In the name of avoiding politicization, the Supreme Court may attempt to sidestep the "gender identity defines sex" contention by simply not confronting it, as did the panels in *Skrmetti*, *Eknes-Tucker*, and *Lee*.[114] These cases didn't actually *avoid* the contention—they just moved their rejection to the realm of implicit judicial legislative fact finding.[115] These cases did take sides—they just pretended there was no 'side' to take.

Consider a contrasting case where the court in question *didn't* have to take sides on a matter of sexual politics:

114. *Skrmetti*, 73 F.4th at 419; *Eknes-Tucker*, 80 F.4th at 1228; *Lee*, 2024 U.S. App. LEXIS 17135, at *15.

115. Many readers will be familiar with the concept of a judge taking "judicial notice" of some fact not reasonably in dispute—like the weather forecast on a given day. Less well known is the concept of taking judicial notice of a *legislative* fact. Due to the slipperiness of the concept, even a prominent treatise defines legislative facts by resort to illustration. Charles Alan Wright & Arthur R. Miller, 21B Federal Practice and Procedure § 5103.2 (2d ed. Apr. 2023). An appellate court recently defined them as "established truths, facts or pronouncements that do not change from case to case but apply universally." Robinson v. Liberty Mut. Ins. Co., 958 F.3d 1137 (2020) (internal quotation omitted) (quoting W. Ala. Women's Ctr. v. Williamson, 900 F.3d 1310, 1316 (11th Cir. 2018)).

Otto v. City of Boca Raton, an Eleventh Circuit case invalidating a ban on so-called "conversion therapy" for sexual orientation.[116] The court found the City of Boca Raton's ban on conversion therapy violated the Free Speech Clause of the First Amendment.[117] The court in *Otto* directly addressed the issue of professional consensus, contrasting how a hypothetical therapy ban based on the *old* professional consensus (which until 1987 classified homosexuality as a mental illness) would be abhorred under the current professional consensus.[118] In the court's words: "Neutral principles work both ways . . . . Professional opinions and cultural attitudes may have changed, but the First Amendment has not."[119]

In *Otto*, the definition of "free speech" was not the subject of professional opinion—therefore the principle could remain neutral.[120] But in the State Ban Cases, the definition of "sex"—and thus the definition of "equal protection"—is the subject of professional opinion. And courts

116. Otto v. City of Boca Raton, 981 F.3d 854, 859 (11th Cir. 2020).

117. *Id.*

118. *Id*. at 869–70.

119. *Id.* at 870.

120. *Id*. at 868–70.

do not permit expert witnesses to testify on the law—Judges decide what is the law.[121] Little if any neutral ground remains.

Beyond the impossibility of neutrality, the "sidestep" approach leaves courts without a framework to understand sex, gender, and identity. This isn't just a problem with cases *rejecting* the "gender identity defines sex" formulation. The *Brandt* decision displayed the same implicit legislative fact finding undergirding its judicial interpretations of what constitutes "sex," and therefore, what it means to discriminate on the basis of "sex."[122] And ignoring sex differences risks "making the guarantee of equal protection superficial."[123]

Future district and appellate court decisions addressing sex and gender issues should endeavor to create an originalist account of sex. Doing so would not require courts to take sides in scientific debates, because "sex"

121. United States v. Jungles, 903 F.2d 468 (7th Cir. 1990) (holding the trial court did not err in excluding expert testimony that consisted of "a recitation of legal principles"); Specht v. Jensen, 853 F.2d 805 (10th Cir. 1988) (holding the trial court erred in allowing an expert witness's "array of legal conclusions touching upon nearly every element of the plaintiff's burden of proof").

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

123. Pavan v. Smith, 582 U.S. 563, 586 (2017).

roots itself beyond the whims of modern biology.[124] Few lexical universals exist among the more than 7000 languages spoken on earth, yet the concepts of "man," "woman," "child," and "mother" find their way into every single one of them.[125] If there is one concept deeply rooted in history and tradition, it is sex,[126] as it goes to the core of what it means to be—and to become—human.[127]

b. Gore v. Lee Illustrates the Need for an Originalist Doctrine of Sex

Gore v. Lee, a recent decision of the Sixth Circuit, illustrates the need to directly refute the assertion that gender identity defines sex. *Lee* addressed challenges to

124. This is not to suggest that biology is characterized by whimsicality. The point is that definitions of "man" and "woman" or "male" and "female" are not pure matters of cutting-edge scientific inference. These definitions are subject to arguments from philosophy, history, and tradition. Abigail Favale, The Genesis of Gender 124 (2022); Alex Byrne, Trouble with Gender 58–59 (2024); Bronwyn C. Morrish & Andrew H. Sinclair, *Vertebrate Sex Determination: Many Means to an End*, 124 Reproduction 447–57 (2002); Dagmar Wilhelm et al., *Sex Determination and Gonadal Development in Mammals*, 87 Physiological Revs. 1 (2008); *see also* Gerard V. Bradley, *Moral Truth and Constitutional Conservatism*, 81 La. L. Rev 1318, 1390 n.249 (2021) (providing a thorough list of sources).

125. Alex Byrne, Trouble with Gender 89 (2024).

126. The tradition of separating intimate spaces on the basis of sex goes back "as far as written history will take us." W. Burlette Carter, *Sexism in the "Bathroom Debates:" How Bathrooms Really Became Separated by Sex*, 37 Yale L. & Pol'y Rev. 227, 287–88 (2018).

127. *See supra* note 35.

Tennessee's law prohibiting individuals from changing, based on gender identity, the sex designation on one's birth certificate.[128] The court held that Tennessee's law did not violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment.[129]

The plaintiffs in *Lee* asserted that "the intersection of 'sex,' 'biological sex,' and 'gender'" was an unresolved matter of disputed fact at the district court.[130] Implicitly, the plaintiffs hoped to make the definition of "sex" a matter subject to factual findings by the trial court. The court in *Lee* refused to validate the plaintiffs' characterization: "[T]his case does not turn on shifting and disputed facts . . . . Plaintiffs' position 'ultimately boil[s] down to' a demand that the Federal Constitution requires Tennessee to use 'sex' to refer to gender identity on all state documents."[131]

The *Lee* court's approach here has its advantages—and it resulted in a clear and succinct opinion with robust

128. Gore v. Lee, 107 F.4th 548, 2024 U.S. App. LEXIS 17135 (6th Cir. 2024).

129. *Lee*, 2024 U.S. App. LEXIS 17135, at *41.

130. *Id*. at *15.

131. *Id*.

analytical reasoning. Courts need not "accept as truth conflicting pleadings . . . that would render a claim incoherent, or that are contradicted . . . by facts of which the court may take judicial notice."[132] And courts necessarily take judicial notice of legislative facts: "[E]stablished truths, facts or pronouncements that do not change from case to case but apply universally."[133]

But *implicitly* asserting the immutability of sex without addressing the underlying contention of the plaintiffs leaves *Lee*'s majority opinion vulnerable when contrasted with the dissent's arguments on the definition of gender identity. In dissent, Judge White cited authoritative-appearing practice guidelines from the Endocrine Society—the leading professional organization of board-certi-

132. Williams v. CitiMortgage, Inc., 498 F. App'x 532, 536 (6th Cir. 2012).

133. Robinson v. Liberty Mut. Ins. Co., 958 F.3d 1137 (2020) (internal quotation omitted) (quoting W. Ala. Women's Ctr. v. Williamson, 900 F.3d 1310, 1316 (11th Cir. 2018)); *see also* Charles Alan Wright & Arthur R. Miller, 21B Federal Practice and Procedure § 5103.2 (2d ed. Apr. 2023); Kenneth Culp Davis, *Judicial Notice*, 55 Colum. L. Rev. 945, 952–53 (1955) ("The exceedingly practical difference between legislative and adjudicative facts is that, apart from facts properly noticed, the tribunal's findings of adjudicative facts must be supported by evidence, but findings or assumptions of legislative facts need not, frequently are not, and sometimes cannot be supported by evidence.").

fied Endocrinologists in the United States.[134]

In addition to a nuanced consideration of the reliability of professional organizations like the Endocrine Society,[135] courts must undertake a fulsome originalist analysis. What does "sex" mean to the Fourteenth Amendment? The *Lee* court did perform a small part of this analysis when it addressed the Due Process Clause: "By the time the States ratified the Fourteenth Amendment, modern birth-registration systems were just getting underway in the States . . . . The concept of 'gender identity' did not enter the English lexicon until the 1960s."[136]

Yet, this analysis is insufficient to address the underlying progressive legal argument.[137] The progressive con-

134. *Lee*, 2024 U.S. App. LEXIS 17135, at *44 n.1 (White, J., dissenting).

135. *See* Otto v. City of Boca Raton, 981 F.3d 854, 869 (11th Cir. 2020) ("[The positions of professional organizations] cannot define the boundaries of constitutional rights. They may hit the right mark—but they may also miss it. Sometimes by a wide margin, too. It is not uncommon for professional organizations to do an about-face in response to new evidence or new attitudes . . . ."); *see also supra* notes 107–108 and accompanying text (examining medical reversals).

136. *Lee*, 2024 U.S. App. LEXIS 17135, at *30.

137. The Author offers this critique while meaning no disrespect toward the accomplished and revered jurist who authored the opinions in *Lee* and *Skrmetti*, the Honorable Chief Judge Sutton of the Sixth Circuit Court of Appeals. Judge Sutton is a respected originalist who has inspired generations of originalist thinkers, particularly in the realm of State Constitutional Law. *See generally* Jeffrey S. Sutton, Who De-

tention goes something like this:

> Sex has always existed, but like most things in our world, we've continued to learn more about it through scientific inquiry, and science (or our version of it) tells us that gender identity is the defining factor behind one's sex. Therefore, when the Equal Protection Clause protects sex, it in fact protects gender identity. Sex didn't change—we simply came to a more accurate understanding of what informs and builds sex.[138]

Without a critique of its merits, this argument sounds powerful. It rhymes with originalist arguments regarding whether the Second Amendment protects the right to own more than a musket: The Second Amendment didn't change—our understanding of the common man's typical armaments changed.[139] The "gender identity defines sex" argument demands explicit refutation.

Conclusion

Contemporary conflations of sex and gender iden-

cides?: States as Laboratories of Constitutional Experimentation (2022) (advocating for an originalist focus on developing constitutional law at the State level).

138. The author offers this faux-quotation as a summation of the legal argument from the "gender identity defines sex" side.

139. Stated more precisely: Samuel Colt (inventor of the Colt 1911) and John Money had a lot in common—both developed technologies (in Money's case, a psychotechnology) that revolutionized their respective fields. Colt's innovations expanded our understanding of the common man's weaponry. And Money's innovations purport to expand our understanding of sex.

tity threaten to nullify sex itself. These conflations found their genesis in the overall psychologization of mind through Sigmund Freud, and his successors John Money and Robert Stoller. Both Stoller and Money located "gender" as one's discrete sense of being male or female, as applied to individuals with disorders of sex development. As gender continued to gain supremacy over sex, psychological interpretations of gender moved away from conceptualizations of mismatched gender and sex as psychopathology and toward gender identity as an immutable characteristic, even the defining trait of sex.

As transgender identification rose and trans rights issues roiled courts and legislatures, the legal and political necessity of intertwining sex and gender became apparent. The resultant theory—that gender identity defines sex—contrasts with equally-popular contentions from the trans rights crowd that gender is *not* immutable, but in fact consists of self-identity and a universal right to determine one's sex.

Equal Protection Clause jurisprudence, meanwhile, has long acknowledged "immutable" and "inherent" differ-

ences between men and women. But those differences have been subject to shifting and conflicting definitions. Some courts have implicitly adopted the "gender identity" formulation by interpreting phrases like "medical procedures" through concrete terms, rather than sex-relative ones. Other judges have explicitly adopted the idea that "gender identity defines sex." Meanwhile, courts asserting the immutability of sex apart from gender identity have done so only implicitly.

In deciding *Skrmetti*, the Supreme Court appears unlikely to change that trend with a doctrinal framework for understanding the true definition of sex in contrast to gender identity.[140] Moving forward, lower courts will need to take the argument seriously and develop an enduring originalist definition of sex, rooted in history and tradition. Because if the ideologues are correct, gender identity *does* define sex. Courts seeking to avoid a judicial remake of human civilization must be willing to reach and examine the merits of this argument with engaged originalism.

140. Should this prognostication be proven wrong, none will be more thrilled than the Author.

If It Pays, It Stays: The Economics of Trophy Hunting

Scott T. Cross & Tamás Klein*

** Scott T. Cross '26 is an economics and music student in his junior year. He is Vice President of the Grove City College Mises Society, a member of the ODE international honors society in economics, and a Fellow at the Institute for Faith and Freedom. After his graduation, Scott will pursue a Ph.D. in economics.*
Tamás Klein '26 is a Hungarian paleolibertarian and economics student at Grove City College. He was a 2024 apprentice at the Mises Institute and currently serves as President of the Mises Society at Grove City College. Occasionally, he trades his books for a rifle, indulging his passion for hunting.

Introduction 87

I. The Economics of Trophy Hunting 89
a. Arguments Against Trophy Hunting 89
b. The Effects of Different Institutional Arrangements on Economic Incentives 92

II. Proposed Alternatives to Trophy Hunting 101
a. Photo Safaris 101
b. Dehorning 102

Conclusion 104

± We are grateful to Norbert Filemon, researcher at the Axioma Center, whose 2021 YouTube video on the topic originally inspired us to write this paper, as well as to Dr. Caleb S. Fuller, for his insightful comments and suggestions. All the remaining errors are our own.

Introduction

According to the Society for the Prevention of Cruelty to Animals (SPCA), trophy hunting can be defined as "the hunting of wild animals for sport," where "usually, the animal is stuffed, or a body part is kept for display."[1] This "part" of the animal is kept as a treasured memento by the hunter, who treats it as a trophy and a symbol of his fortitude and skill as a hunter. Trophy hunting has been part of human culture for millennia and serves as a reminder of the experiences that the hunters partook in.[2] Although the meat and fur of the animal are almost always used, claiming the animal's "trophy" is the primary prize of the hunt. The prevailing belief among most ordinary people, influencers, and many intellectuals is that iconic African species like elephants, lions, and rhinos are facing extinction due in large part to trophy hunting by wealthy Westerners, particularly Americans. However, the truth is more complex, and recent examinations have brought these assertions into question.[3]

1. *Trophy Hunting Defined*, SPCA Int'l, https://www.spcai.org/take-action/trophy-hunting/trophy-hunting-defined (last visited Apr. 9, 2025).

2. Pervaze A. Sheikh, Cong. Rsch. Serv., International Trophy Hunting (2019).

3. The Economist, *Why Trophy Hunting Helps Protect Animals*,

Undeniably, Africa's once abundant and diverse wildlife has suffered significant declines. Just over a century ago, the elephant population stood at 10 million; in 2016, it was barely over 415,000.[4] Similarly, lion numbers dropped by 43% in just 21 years until 2015, and the black rhino plummeted tremendously.[5] It is also true that the United States imports more African trophies than any other country.[6]

We examine whether state bans on trophy hunting in Africa fulfill their stated purpose of promoting conservation efforts. Meanwhile, we will also examine the cost of such policies to the economy and, thus, to local communities. Our research demonstrates that regulations on trophy

---

YouTube (May 29, 2021), https://www.youtube.com/watch?v=9y7Y-FjisSTg.

4. C.R. Thoules et al., Int'l Union for the Conservation of Nature, African Elephant Status Report (2016), SSC-OP-060_A.pdf.

5. Petro Kotzé, *Return of the Lions: Large Protected Areas in Africa Attract Apex Predator*, Mongabay (June 13, 2023), https://news.mongabay.com/2023/06/return-of-the-lions-large-protected-areas-in-africa-attract-apex-predator/; Hannah Ritchie, *The State of the World's Rhino Population*, Our World in Data (Nov. 30, 2022), https://ourworldindata.org/rhino-populations.

6. *U.S. Trophy Hunting by the Numbers*, The Humane Soc'y, https://humaneaction.org/sites/default/files/2022-01/U.S.%20Trophy%20hunting%20by%20the%20numbers_Jan%202022_0.pdf (last visited Apr. 4, 2024).

hunting not only fail to fulfill their stated ends, but they negatively affect conservation efforts, as well as the African economy and, thus, local communities. We will argue that, with the correct institutional arrangements, trophy hunting can and does serve as the primary force behind the conservation of endangered animals.

I. The Economics of Trophy Hunting

a. Arguments Against Trophy Hunting

In 2018, Tess Thompson Talley, a trophy hunter from Kentucky, posted a picture on Facebook of a giraffe she shot in Africa.[7] Even though the harvest happened as part of a conservation effort, where the animal in question was already too old to reproduce (and as such soon would have been ripped apart by lions or other predators anyways) and had killed two younger giraffes that could have passed on their genes, the usual outrage ensued.[8] Among the many who commented was the American actress Debra Messing,

7. *Tess Thompson Talley: Outrage Over Image of US Hunter with Giraffe She Shot Dead*, The Week (July 3, 2018), https://theweek.com/94746/tess-thompson-talley-outrage-over-image-of-us-hunter-with-giraffe-she-shot-dead.

8. *American Woman Who Killed Giraffe Says It Was Part of a Conservation Effort*, CBS (July 3, 2018), https://www.cbsnews.com/news/giraffe-killed-by-american-woman-tess-thompson-talley-sparks-outrage/.

calling Talley a "vile, amoral, heartless, selfish murderer."[9] These remarks demonstrate the general sentiment towards trophy hunting, with many routinely criticizing the practice, proclaiming that it is cruel, leads to the extinction of many exotic animals, and, as such, is untenable for societies to allow, calling for a ban on trophy hunting and the importation of trophies.

The common views on trophy hunting are generally very negative, with many perceiving it as harmful to wildlife populations, driving the extinction of many species. They view trophy hunting as an activity driven by nothing more than ego and luxury.[10] Although there is much anger and condemnation of the practice of trophy hunting, the layperson is often rendered unable to give reasons other than his personal distaste for the practice as to why precisely the operation ought to be denounced.[11]

A more sophisticated economic argument against trophy hunting can be seen from certain environmentalists.

9. Debra Messing, Facebook (June 26, 2018), https://www.facebook.com/DebraMessing/posts/tess-thompson-talley-from-nippa-kentuc ky-is-a-disgusting-vile-amoral-heartless-s/1403664853068652/.

10. Alastair S. Gunn, *Environmental Ethics and Trophy Hunting*, 6 Ethics and the Env't 68, 68–95 (2001).

11. Messing, *supra* note 9.

These critics have stated that, with trophy hunting, there "is the potential [of a] slippery slope to certain species extinctions."[12] Essentially, what these environmentalists argue is that if hunters kill and harvest the animals in question, there will be fewer of those specific animals; translating their argument to the language of economics will result in a shift in the supply curve of those animals to the left.

This supply shift to the left, *ceteris paribus*, entails a higher price for the animals, meaning that the monetary cost associated with engaging in trophy hunting will be higher than it was before the leftward supply shift. In their analysis, people worry that, as different animals are hunted and their populations decrease, the leftward shift in supply will make the animals more valuable as trophies, incentivizing further killing of the animals until the beasts in question are hunted to extinction, eliminating them completely.[13]

Furthermore, everything in the ecosystem is in-

12. Chris Russell, *Trophy Hunting: The Good and the Bad*, A Struggling Planet (Aug. 15, 2018), https://astrugglingplanet.wordpress.com/2018/08/15/trophy-hunting-the-good-and-the-bad/.

13. Richard J. Hall et al., *Endangering the Endangered: The Effects of Perceived Rarity on Species Exploitation*, 22 Conservation Biology 517 (2008).

terrelated with everything else.[14] If trophy hunting is left unregulated and falls into the forecasted slippery slope, this will cause ripple effects throughout the entire ecological structure, causing further extinctions.[15] As a result, various members of the public petition states to step in and protect endangered creatures from the malice of man by designating certain animals as protected, prohibiting them from being hunted, nationalizing lands where hunting takes place, and banning the trade of trophies.

b. The Effects of Different Institutional Arrangements on Economic Incentives

1. No Ownership: Tragedy of The Commons

The term "tragedy of the commons," which was first used in 1968 by the American ecologist Garrett Hardin, is a concept that describes the depletion of shared resources when individuals act in their own self-interest with unowned property without considering the long-term conse-

14. Jonathan D. Phillips, *Why Everything is Connected to Everything Else*, 54-55 Ecological complexity, no. 10105, 2023 at 1.

15. Robert J. Knell & Carlos Martínez-Ruiz, *Selective Harvest Focused on Sexual Signal Traits Can Lead to Extinction Under Directional Environmental Change*, 284 Proc. of the Royal Soc'y B, no. 1868, 2017 at 1.

quences for the group as a whole.[16] It occurs when private property is absent, implying that individuals do not need to bear the total cost of their actions. Thus, they are incentivized to simply exploit the resource as much as possible for the most gain before their competitors exploit the resource first.[17]

When applied to trophy hunting and the potential extinction of animals, the tragedy of the commons becomes evident, and the concerns of some of the economic arguments against trophy hunting look reasonable. Trophy hunting often operates within a system where wildlife resources are considered a common pool.[18] In many cases, hunting rights are not exclusive to one individual or entity but rather open to multiple hunters or outfitters. This system of public property sets the stage for overexploitation, as each participant seeks to maximize their own gain without having to bear the full cost of their actions or considering the impact on the overall population of the targeted species.

16. Garret Hardin, *The Tragedy of the Commons*, 162 Sci. 1243, 1243–48 (1968).

17. Armen Alchian, *Property Rights*, EconLib, https://www.econlib.org/library/Enc/PropertyRights.html (last visited Apr. 8, 2024).

18. Fred Nelson et al., *Trophy Hunting and Lion Conservation: A Question of Governance?*, 47 Oryx 501, 501–09 (2013).

Thus, as the territory is a public pasture, without shooting fees charged by landowners, the cost of hunting is practically negligible, so people will exploit the territory until game is driven close to extinction. Since the purpose of trophy hunting is to serve as an indication of the hunter's ability, and, as such, is often a subject of boasting in hunting circles, the heightened value that comes from the fact that attaining the trophy is rarer would serve as a further indication of the hunter's prowess, as it would demonstrate he can get a trophy, that others in the future may be unable to.

As these trophies become more and more rare, the demand for them often shifts to the right, as they become stronger and stronger status symbols. In the same way that what are known as prestige goods, such as limited edition designer clothing, cause more people to buy them as they become more rare, the heightened desirability of certain animals as hunting trophies would lead to additional hunters joining the hunt, further reducing the various trophy species. Assuming this practice continues long enough without someone claiming ownership over that land, the specific

animal breeds can be driven to eventual extinction.

2. Private Ownership

Land privatization offers a potential solution to the tragedy of the commons as it relates to trophy hunting. As one economist points out, "the problem is that the areas where overproduction does exist are precisely those where the built-in market mechanism has been prevented from operating by the force of government."[19] Just like in a market economy where rare Louis Vuitton bags do not get consumed into "extinction," exotic game animals do not have to either with the proper institutional arrangements that provide adequate incentives for the efficient protection and production of these goods. We argue that most often, what actually pushes animals toward extinction is not legal trophy hunting but poaching. This poaching is often done for meat by locals who take advantage of the tragedy of the commons and try to harvest as much as possible on the public lands before others get to the large game first.

However, by making game animals valuable to certain people through privatization, who can then sell the

19. Murray N. Rothbard, Egalitarianism as a Revolt Against Nature and Other Essays 183 (2nd ed. 2000).

hunting rights of those animals for profit to rich Westerners, the owner of that hunting territory will be incentivized to hire people who protect those animals from poachers.

An example of this is outlined by Béla Hidvégi, founder of the Hunting Museum in Keszthely, Hungary.[20] He explained: "If we don't preserve game, then there will be no game; and then there's nothing to hunt for. It is logical, is it not?" Indeed it is, trophy hunting capitalized game animals, such as the "big five" (African elephant, lion, leopard, rhinoceros, and Cape buffalo), that are on the bucket list for most trophy hunters. Hidvégi continued: "Look at what happened in Kenya, where hunting was banned in 1977. Since then, game has decreased by 60–70 percent. Why? Because where there's hunting, there's hunting territory. And hunting territories have lords who protect them from poachers."

Hunting is an expensive hobby, as it involves not only equipment but also high shooting fees charged by landowners. An elephant quota starts at $10,000 and can cost up to $70,000, while a lion's price ranges from

20. Axioma, *Miért Jó a Vadnak a Vadászat?*, YouTube (Sept. 23, 2021), https://www.youtube.com/watch?v=MJN-wzAuTTQ.

$55,500 to $100,000.[21] Thus, game becomes valuable, and what is valuable is preserved. Sustainable hunting is a huge business opportunity for landowners and local communities alike, greatly benefiting African economies.

An empirical example of how this system works can be seen in Mozambique, in the picturesque Zambezi Delta. This is Mark Haldane's hunting ground, where in 1995 there were 1,200 Cape buffaloes; thanks to sustainable hunting, there are now 25,000, while hunters annually supply 18 tons of game meat to local villages, allowing them to operate an effective anti-poaching unit with the revenue.[22]

3. Public Ownership, Economic Calculation, and Ownership Competence

One of the public policies enacted in Africa as a proposed solution to the problem of saving the assorted endangered animals has been the seizure of property by governments to manage game similarly to private hunting terri-

21. *Elephant Hunting Trips*, Book Your Hunt, https://www.bookyourhunt.com/en/elephant-hunting (last visited Apr. 10, 2024); *Lion Hunts in Africa*, Discount Afr. Hunts, https://www.discountafricanhunts.com/hunts/species/dangerous-game-hunts/lion-hunts.html (last visited Apr. 9, 2024).

22. Béla Hidvégi Hunting Foundation, *A Conservationist's Cry*, YouTube (Dec. 19, 2018), https://www.youtube.com/watch?v=wPC-J81gzQDw.

tories, but not for profit, but in the interest of the animals.[23] State-owned territories vary significantly from one country to another in their approach to wildlife management. Some countries have implemented laws that limit how private hunting territories ought to be managed, some lease out territories for a given period of time to private parties to manage, and some created bureaucratic systems trying to copy private hunting grounds, with the state charging fees for hunting and trying to manage game. Others, such as Kenya, established full sanctuaries where hunting is completely prohibited in order to protect wildlife.[24]

Although from the point of view of conservation, these systems are often superior to a true tragedy of the commons, regardless of which system is instituted on the public lands, it will still be plagued by inefficiency. Since the lands are not privately owned, the public authorities are not able to engage in economic calculation and "are in-

23. Int'l Union for Conservation of Nature E. and S. Reg'l Off., *The State of Protected and Conserved Areas in Eastern and Southern Africa: Tanzania Country Profile*, *in* State of Protected and Conserved Areas Report Series No. 1. 131, 131–33 (2020).

24. Brent Lovelock, Tourism and the Consumption of Wildlife: Hunting, Shooting, and Sport Fishing 15 (2007).

clined to deviate from the profit system."[25]

Economist Peter G. Klein, writing in conjunction with several other academics, outlines a relevant theory known as "ownership competence," which can be used to further demonstrate the optimal nature of private property as a solution. This is the idea that certain people are better at owning certain goods and assets than others and that there is a spectrum of competence when it comes to ownership. Klein explains that ownership competence is "the skills with which asset owners exercise matching, governance, and timing competence."[26] Although, in accordance with the classical definition of ownership, by owning property, an individual has the right to use, enjoy the profits of, or sell that good, asset owners must then determine "what to own, how to own, and when to own."[27] By exercising superior proficiency in assessing these three questions, the owner is able to give rise to increased value and profit because he is utilizing the goods in a more efficient manner compared to individuals who lacks ownership competence.

25. Ludwig von Mises, Bureaucracy 59 (1994).

26. Nicolai J. Foss et al., *Ownership Competence*, 42 Strategic Mgmt. J. 302, 309 (2020).

27. *Id*.

Klein's insight has interesting implications for African animal conservation, particularly regarding various public policy decisions that pervert the idea of private ownership. When individuals are prevented from owning either the land that game animals live on or the game animals themselves, it prevents entrepreneurs from accurately being able to answer any of the three questions outlined by Klein regarding ownership competence; they are unable to determine what, how, or when to own the goods as these policies prevent them from doing so.[28]

This implies that, since the entrepreneurs are unable to engage in the necessary calculation required to promote ownership competence, the result is ownership incompetence. Assets are not used to pursue their most efficient ends because the owners are either prevented from discovering the ends or prevented from pursuing them.[29] In this instance, the goods, endangered game animals, are consequently subject to waste. Animals that could have served a higher-valued end (such as expensive trophy hunting by

28. *See generally id*.

29. Ludwig von Mises, Economic Calculation in the Socialist Commonwealth (S. Adler trans., Ludwig von Mises Inst. 1990) (1920).

Westerners) are instead misallocated in a way that they are inefficiently used to serve lower-valued ends (such as consumption as food by local poachers or sold for trophy hunters at non-market prices). Thus, although these policies are instituted with the intention of preserving and saving the endangered creatures in Africa, they actually lead to their waste as a species.

II. Proposed Alternatives to Trophy Hunting

a. Photo Safaris

After all this, the question arises: is there no other way to convince people to value and thus protect the game animals? Tourism has been presented as a desirable alternative; however, according to Dr. Amy Dickman, a biologist at the University of Oxford, photo safaris only work in countries that are safe, have good infrastructure, have a low risk of disease, and offer abundant, beautiful wildlife and landscape.[30] Unfortunately, many of these conditions are clearly not met on much of the African continent.

Furthermore, if photo safaris were truly the "best"

30. Robin Hurt, *Safari Hunting, Conservation and Sustainability*, Conservation Frontlines (Oct. 1, 2019), https://www.conservation-frontlines.org/2019/10/safari-hunting-conservation-and-sustainability/.

option, they would have presented themselves as the most profitable option to be pursued by private parties in the free market, and we would see them naturally outcompeting hunting territories. Since they have not, existing trophy hunting is demonstratively more profitable; land and animals are efficiently allocated for trophy hunting rather than photo safaris.

b. Dehorning

Another proposed alternative to trophy hunting is dehorning. This practice involves removing the horns of rhinoceros and other animals to reduce their attractiveness to poachers, who, according to its proponents, often kill the animal for its horn. As the economist Douglas W. Allen put it in his paper, "The Rhino's Horn," this is an attempt "to lower the gross value of the asset [rhino] as a possible method of maintaining the private property right."[31]

This strategy is very problematic; firstly, it can only work with certain animals, such as rhinos and elephants, but not with other trophy games that do not have horns,

31. Douglas Allen, *The Rhino's Horn: Incomplete Property Rights and the Optimal Value of an Asset*, 31 J. Legal Stud. 339, 339 (2002).

such as lions and leopards. Furthermore, although it is true that trophy hunters value rhinos for their trophies (horns), it is not true that they are valued for the same reason by poachers. If they were, poachers would simply dehorn the rhinos, as getting veterinary anesthetics and a saw is a lot easier than smuggling illegal weapons, but poaching is not done mainly for trophies. In agreement with the testimony of many locals, we argue that poaching is done by local communities for two reasons: firstly, for food, and secondly, because these animals are extremely dangerous, so villagers will not tolerate them near their communities unless they are incentivized to do so.

From Westerners, there is not that big of a demand for rhino horns either; although it certainly has some useful purposes, the significant demand is for a hunting experience that will result in a horn as a trophy to serve as a memory from that hunt, not just a horn that someone else acquired. The lack of empirical evidence in favor of dehorning also seems to confirm our logical theory of why poaching is not done primarily for the horn.

Dr. Allen also admits the lack of evidence and cites

a study stating that "[t]here is debate among conservation biologists on how effective dehorning has been. No definitive answer has been reached yet, in part because tracking dehorned rhinos is difficult, sample sizes are small, and nations have changed enforcement policies over time."[32] Moreover, we only see this practice being done by governments, not by the owners of private hunting territories. Thus, dehorning is clearly not an alternative to trophy hunting, either, when it comes to conservation.

Conclusion

In conclusion, our research has shown that contrary to common perceptions, trophy hunting is not the primary threat to endangered game species; rather, it is public policy, more specifically, the lack of private property rights, that exacerbates the difficulties of conservation. Our analysis demonstrates that state bans on trophy hunting fail to achieve their stated objective of promoting conservation efforts. Instead, they exacerbate the problem by creating conditions ripe for the tragedy of the commons, leading to

32. *Id.* at 349 n.26 (citing Janet L. Rachlow & Joel Berger, *Conservation Implications of Patterns of Horn Regeneration in Dehorned White Rhinos*, 11 J. Soc'y for Conservation Biology 84 (1997)).

the overexploitation of wildlife. By contrast, privatization and the establishment of private hunting territories offer a viable solution to the problem of de-naturalization in Africa, as privatization incentivizes landowners to protect game animals from poaching, thus fostering sustainable hunting practices that benefit both conservation efforts and local economies.

Moreover, proposed alternatives to private trophy hunting, such as state-managed hunting territories or photo safaris and dehorning, cannot serve as sufficient substitutes for trophy hunting, as governments cannot engage in meaningful economic calculation, lacks the right incentives, as well as ownership competence, while photo safaris are not feasible in regions lacking safety, infrastructure, abundant wildlife, and beautiful landscapes, and dehorning fails to address the underlying issues driving poaching and is not effective across all species. Thus, we conclude that bans on trophy hunting not only do not fulfill their stated ends, but the end of trophy hunting would have devastating effects on wildlife.