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

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± 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]

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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,

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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.