

TOWARD A FUNCTIONAL ANALYSIS OF “SEX” IN FEDERAL ANTIDISCRIMINATION LAW

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ABSTRACT

The recent struggles of transgender people to use public bathrooms that fit their gender identity amplified an interpretative difficulty that courts have addressed for decades: whether or not the term “sex” in federal antidiscrimination law includes gender identity. This article argues that this dilemma is currently unresolvable, and, therefore, the phrases “because of sex” or “on the basis of sex” in federal antidiscrimination law should be analyzed through a functionalist perspective and not a descriptive one. Current interpretations of sex offered by pro- and anti-transgender advocates are founded on narrow, biological-essentialist visions of sex that lack sufficient empirical grounding. Accordingly, this article proposes first adopting an open-ended meaning of “sex” in federal antidiscrimination law, coined “contested essentialism.” Then, the article proceeds toward a functionalist analysis of the sex-classification, inspired by the bona fide occupational qualification framework used in the employment discrimination context, to determine whether the classification is justified. The functional analysis creates a new balance between conservative and progressive interpretations of “sex” in federal antidiscrimination law by shifting the weight of legal analysis from the mere act of classification to its necessity and usefulness.

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INTRODUCTION

What is the meaning of “sex” in antidiscrimination law? Federal antidiscrimination jurisprudence characterizes “sex” in two conflicting ways. A reductionist, conservative definition of sex, sometimes called “traditional” or “plain,” views “sex” as an essentially biological phenomenon based on anatomical traits, with mutually exclusive subjects: males and females. An opposing, expansive characterization views “sex” as a fundamentally socially constructed phenomenon.

Current struggles over the use of public restrooms by transgender people,¹ and particularly the litigation of Gavin Grimm, a transgender boy who sued his high school for enforcing a policy that forbids him from using the boys’ restroom, have overbalanced the conflict between the two notions of “sex” toward the former reductionist view of sex as anatomical. Throughout the bathroom debate and the *Grimm* litigation—which elicited great public attention and close to one hundred amicus curiae briefs—both pro- and anti-transgender advocates bolstered the argument that gender is biological, non-voluntary, and unchangeable through scientific and medical evidence. I coin this current development the bio-essentialist turn in federal antidiscrimination sex jurisprudence. Although Grimm’s case was declared moot before resolution in the Supreme Court due to Grimm’s graduation, the crucial interpretative question that still hovers over federal antidiscrimination law is whether “sex” includes gender identity. In *Grimm*, both anti- and pro-transgender advocates advanced reductionist interpretations of sex. Whereas conservative advocates argued “sex” means only physical/anatomical elements, progressives argued “sex” should mean only or primarily “gender.”²

This article argues that the search for a descriptively accurate definition of “sex” in the law, based on scientific knowledge, is futile, and therefore both conservative and progressive interpretations should be rejected in favor of a functional analysis of “sex” that focuses on what “sex” *does* rather than what it *is*. Instead of reading “sex” as a noun that identifies a distinct set of people or things, a functionalist approach acknowledges the contested meaning of the term, and skips ahead to examine how the classification functions in practice.

A functionalist analysis of “sex” strikes a new balance between the conflicting models of “sex” in federal antidiscrimination law. On the one hand, it avoids the disagreement about the meaning of “sex” by interpreting it in an inclusive manner, which captures any element of sex, social or biological, without emphasizing either, thus adhering to the expansive model. On the other hand, the mere determination that a classification is because/on

¹ In this article, I use the terms “trans” and “transgender” as commonly used and explained in community and scholarly definitions. *See, e.g.*, GENNY BEEMYN, TRANSGENDER TERMINOLOGY, <https://hr.cornell.edu/sites/default/files/trans%20terms.pdf> [<https://perma.cc/W8NP-Q45M>] (“Trans, Trans*, or Transgender People: Most commonly used as an umbrella term for individuals whose gender identity and/or expression is different from the gender assigned to them at birth. Trans people include individuals who are transsexual, genderqueer, agender, androgyne, demigender, genderfluid, individuals who cross-dress or dress androgynously, and other individuals who cross or go beyond traditional gender categories.”). For other similar definitions, *see* GLAAD MEDIA REFERENCE GUIDE - TRANSGENDER, GLAAD, <https://www.glaad.org/reference/transgender> [<https://perma.cc/PJ2X-22V9>]; TRANS STUDENT EDUCATIONAL RESOURCES, <http://www.transstudent.org/definitions> [<https://perma.cc/D8UR-JTWH>].

² This paper explores the politically contingent character of the terms “sex” and “gender” in the law and therefore does not use these terms in a unified way throughout. Rather, it takes a contextual approach which presents how relevant actors negotiate the content of these categories.

the basis of “sex” does not deem it invidious per se but rather moves the analysis forward to a functionalist review that could be satisfied under different tests. Accordingly, this article suggests that a functionalist reading of sex shifts the weight of legal analysis from gatekeeping over the meaning of “sex” to the nature and effects of the discrimination itself.

PART I reviews the different models developed within Title VII doctrine to outline the borders of “sex” that represent a back and forth between sex in the expansive socially constructed approach and the restrictive biological-essentialist approach. It then moves to describe a bio-essentialist turn in Title IX doctrine illustrated in the bathroom debate and the litigation in *Grimm* by relying on court filings and close to a hundred amicus briefs submitted by interested parties in the case.

Although both pro- and anti-transgender advocates vested their hopes in some descriptions of biological sex differences, PART II argues these strategies are ill-conceived. From a descriptive point of view, although males and females are *largely* dimorphic in *some* biological elements, no current scientific theory supports a causal relationship between femininity, masculinity, and any sex biomarkers (e.g., chromosomes, genitals, gonads, hormones, brain). Accordingly, this part argues that the descriptively weak and misleading character of bio-essentialist arguments from both sides of the bathroom debate deeply challenges the moral and prescriptive weight placed upon them.

PART III offers an alternative open-ended and discretionary interpretation of “sex,” coined in this article as “contested essentialism.” After cataloging the different characteristics that both sides of the debate consider as essential to the category of “sex,” “males,” and “females,” this part argues that although there is a complete lack of agreement regarding what the constitutive elements of sex *are*, there is nevertheless wide agreement among all sides regarding the desirability of the category “sex” itself. Accordingly, this part argues that “sex” should not be restricted to either biological or social characteristics, nor to any hierarchy between them. The contested essentialism interpretation is offered as a way to mute the part of legal analysis that asks whether an action occurred on the basis of/because of sex and move, instead, toward a functionalist review of the discrimination itself.

PART IV describes the outline of a functionalist approach to interpreting on the basis/because of sex in federal antidiscrimination law and applies it to the bathroom context in Title IX. This part looks to the Bona Fide Occupational Qualification (BFOQ) framework in Title VII as a source of inspiration for the suggested functionalist analysis and draws insights from BFOQ litigation on issues of privacy and safety to guide us in a functionalist analysis of bathroom use. This part argues that the Fourth Circuit’s decision in *Grimm* illustrates the beginning of a functionalist reading of sex and ends with a preliminary discussion regarding possible complications of a functionalist analysis.

I. FEDERAL ANTIDISCRIMINATION DOCTRINE AND THE
TWO MEANINGS OF “SEX”

Federal antidiscrimination law provides protection from discrimination based on “sex,” but its doctrine depicts “sex” in multiple, sometimes conflicting ways. This part suggests that the different characterizations of “sex” in antidiscrimination law demonstrate a central tension between the view that sex is a narrow biological phenomenon, and an expanded view, which understands sex as a product of cultural, social, and political subordination. A determination toward one depiction or the other significantly influences the scope of conditions and types of plaintiffs eligible for protection, and therefore stakes are high for many political groups. This part describes three different models that have developed within Title VII doctrine to outline the borders of “sex” within the back and forth between the expansive socially constructed approach and the restrictive biological-essentialist approach. As shown, transgender litigants are traditional challengers to the meaning of “sex” in the antidiscrimination law context. This part argues, however, that the latest bathroom debate and the subsequent litigation under Title IX’s prohibition against discrimination “on the basis of sex” has led to an inflation of biological-essentialist notions of sex, which justifies a close, critical reflection.

A. *“Because of Sex” in Title VII*

Title VII, intended to fight discrimination in the workplace, states, “It shall be an unlawful employment practice for an employer to . . . discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”³ However, what does it mean to discriminate “because of sex,” and, particularly, are social manifestations of sex or gender expression included within the scope of protection given to “sex”? This question has been debated within Title VII doctrine for some decades. During the decades that have passed since Title VII was enacted, transgender litigants, cisgender women, and some cisgender men brought suits for non-conforming gender expressions that challenged courts to interpret sex over and over in their decisions, thus molding new content to the phrase “because of sex.” This section describes four major frameworks developed within Title VII doctrine, which work to expand and retract the meaning of “sex”: the plain meaning, the sex stereotyping, and the medical model and biological gender frameworks.

³ 42 U.S.C. § 2000e-2(a)(1) (1970).

1. *The “Plain” or “Traditional” Meaning*

In the first two decades that followed the enactment of Title VII, federal courts most often interpreted “sex” according to a rather reductionist understanding of its “plain meaning.”⁴ The leading case in this respect was the Seventh Circuit’s 1984 decision in *Ulane v. Eastern Airlines*, which arose when Karen Ulane, a transgender woman, was fired from her job as a pilot right after having transition surgery.⁵ Prior to its arrival to the Seventh Circuit, the case was adjudicated in the district court which interpreted the term “sex” in Title VII to determine whether Ulane was eligible for protection. Although the district court’s opinion was later reversed, it revealed an expansive understanding of sex that went beyond the narrow biological-essentialist interpretation and included aspects of identity. The district court acknowledged the lack of explanatory language in Title VII’s legislative history and asked, “[w]hat did we get when we got sex?”⁶ Judge John F. Grady stated that “there is not a shadow of a doubt that Congress never intended anything one way or the other on the question of whether the term, ‘sex,’ would include transsexuals. The matter simply was not thought of.”⁷ Yet, the judge held that “the term ‘sex,’ as used in any scientific sense and as used in the statute, can be and should be reasonably interpreted to include among its denotations the question of sexual identity, and that, therefore, transsexuals are protected by Title VII.”⁸ The court found that Eastern Airlines’ reasons for Ulane’s dismissal were pretextual and that had she not transitioned from

⁴ Ashley Attia, *Explicit Equality: The Need for Statutory Protection against Anti-Transgender Employment Discrimination*, 25 S. CAL. INTERDISC. L.J. 151, 154 (2016); see also Grossman v. Bernards Twp. Bd. of Educ., No. 74-1904, 1975 WL 302, at *4 (D.N.J. Sept. 10, 1975), *aff’d*, 538 F.2d 319 (3d Cir. 1976) (“[I]t is nevertheless apparent on the basis of the facts alleged by the plaintiff that she was discharged by the defendant school board *not* because of her status as a female, but rather because of her *change* in sex from the male to the female gender . . . In the absence of any legislative history indicating a congressional intent to include transsexuals within the language of Title VII, the Court is reluctant to ascribe any import to the term ‘sex’ other than its plain meaning.”); Powell v. Read’s, Inc., 436 F. Supp. 369, 371 (D. Md. 1977) (“In the absence of any legislative history indicating a congressional intent to include transsexuals within the language of Title VII the Court is reluctant to ascribe any import to the term ‘sex’ other than its plain meaning.”); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) (“Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of ‘sex’ in mind.”); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (“[F]or the purposes of Title VII the plain meaning must be ascribed to the term ‘sex’ in the absence of clear congressional intent to do otherwise . . . the legislative history does not show any intention to include transsexualism in Title VII.”); Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456, 457 (N.D. Cal. 1975) (“Situations involving transsexuals, homosexuals or bi-sexuals were simply not considered, and from this void the Court is not permitted to fashion its own judicial interdictions.”).

⁵ *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1082 (7th Cir. 1984). This case was preceded by *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 822 (N.D. Ill. 1983).

⁶ *Ulane*, 581 F. Supp. at 822.

⁷ *Id.* at 825.

⁸ *Id.*

male to female and changed her lifestyle accordingly, she would have not been fired.⁹

The district court’s reasoning did not center on the scientific evidence brought before the court to prove that Karen Ulane *was* a woman, but rather inferred from an Illinois statute permitting Ulane to receive a birth certificate attesting to her female sex that there was “strong evidence of a social policy in this area.”¹⁰ Judge Grady did not take the amended birth certificate as binding evidence for determining sex for the purposes of federal civil rights law but found the law was “pertinent to the question of [the] plaintiff’s sexual identity and the larger question of whether sex is a cut-and-dried matter of chromosomes.”¹¹ Because Ulane’s sex was more than a simple biological manifestation, Karen Ulane was eligible to receive Title VII protection against sex discrimination.

The interpretation of “sex” as a reflection of local social norms offered by the District Court in *Ulane* was reversed, however, by the Seventh Circuit less than a year later, when the latter put forward the “plain meaning” of sex concept, based on apparent biological and anatomical features. The opinion argued that even a sex-change operation “would not create a biological female” in terms of fertility, chromosomes, and other traditional biological markers.¹² The Seventh Circuit had a different approach to the acknowledged absence of legislative history indicating congressional intent regarding the term “sex.” The new ruling argued that Congress never meant it to apply “to anything other than the traditional concept of sex,”¹³ and, in contrast to the district court, concluded that “the words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male[.]”¹⁴

The Seventh Circuit added that, whereas the deciding judges may agree with the ideal that “sex” *should* mean more than biological males or females, such a decision could only come from Congress.¹⁵ Following the judgment, *Ulane* has often been cited by different circuits as the case that interpreted “sex” in Title VII to refer to biological, anatomical, or physiological status as male or female.¹⁶

⁹ *Id.* at 837.

¹⁰ *Id.* at 824.

¹¹ *Id.*

¹² *See Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1083 (7th Cir. 1984).

¹³ *Id.* at 1085.

¹⁴ *Id.*

¹⁵ *Id.* at 1086.

¹⁶ *Oiler v. Winn-Dixie Louisiana, Inc.*, No. CIV. A. 00-3114, 2002 WL 31098541, at *3–4 (E.D. La. Sept. 16, 2002); *see also Dobre v. Nat’l R.R. Passenger Corp. (Amtrak)*, 850 F. Supp. 284, 286 (E.D. Pa. 1993) (“The term ‘sex’ in Title VII refers to an individual’s distinguishing biological or anatomical characteristics, whereas the term ‘gender’ refers to an individual’s sexual identity. Accordingly, an employer may not discriminate against a female because she is *female*.”); *Sweet v. Mulberry Lutheran Home*, No. IP02-0320-C-H/K, 2003 WL 21525058, at *2 (S.D. Ind. June 17, 2003) (“The Seventh Circuit

2. *The “Sex Stereotyping” Expansion*

Although the Seventh Circuit’s decision in *Ulane* has not been reversed, the 1989 landmark Supreme Court decision *Price Waterhouse v. Hopkins* was a major breakthrough for the protection of transgender individuals under Title VII.¹⁷ Anne Hopkins was denied partnership at the accounting firm where she worked. Evaluations described Hopkins as “macho”¹⁸ and “aggressive”¹⁹ and suggested that she dress more femininely, wear makeup, and “take ‘a course at charm school[.]’”²⁰ The Supreme Court decided that “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”²¹ *Price Waterhouse* made gender stereotypes cognizable under the “because of sex” framework in Title VII.²²

Price Waterhouse represents a breakthrough in expanding the interpretation of the phrase “because of sex” beyond the anatomical “plain meaning” set forth in *Ulane* and other previous decisions.²³ *Price Waterhouse*’s framework was constructed within the context of a woman’s attempt to break the glass ceiling in her workplace, but also opened the door for gay men and transgender plaintiffs.²⁴ After *Price Waterhouse*, transgender plaintiffs made the argument that they faced discrimination based on attributes considered at odds with the sex assigned to them at birth and, hence, discrimination against them was “because of sex.”²⁵ In *Smith v. City of Salem*, a 2004 case concerning a transgender women firefighter whose contract was terminated subsequent to her transition, the Sixth Circuit noted that the approach presented in *Ulane* “has been eviscerated by *Price Waterhouse* [. . . , in which] the Supreme Court established that Title VII’s reference to ‘sex’ encompasses both the biological differences between men and women, and

concluded that sex meant ‘biological sex.’”); *James v. Ranch Mart Hardware, Inc.*, No. 94-2235-KHV, 1994 WL 731517, at *1 (D. Kan. Dec. 23, 1994); *Doe v. U.S. Postal Serv.*, No. CIV.A. 84-3296, 1985 WL 9446, at *2 (D.D.C. June 12, 1985).

¹⁷ *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1785 (1989).

¹⁸ *Id.* at 1782.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 1790–91.

²² *Id.* at 1786.

²³ William C. Sung, *Taking the Fight Back to Title VII: A Case for Redefining because of Sex to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 523 (2011).

²⁴ Zachary R. Herz, *Price’s Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L. J. 396, 422–28 (2014).

²⁵ See Attia, *supra* note 4, at 155; *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (notably, this is a Fourteenth Amendment case and not brought under Title VII); *Sweet v. Mulberry Lutheran Home*, No. IP02-0320-C-H/K, 2003 WL 21525058, at *2 (S.D. Ind. June 17, 2003); *Broadus v. State Farm Ins. Co.*, No. 98-4254CVCSOWECF, 2000 WL 1585257, at *4 (W.D. Mo. Oct. 11, 2000); *Oiler v. Winn-Dixie Louisiana, Inc.*, No. CIV. A. 00-3114, 2002 WL 31098541, at *1 (E.D. La. Sept. 16, 2002).

gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.”²⁶

3. *The “Medical Model” and “Biological Gender”*

Despite what might seem like a crowding out of the biological criteria of sex in Title VII after *Price Waterhouse*, sex-stereotyping theories offered only limited distance from human biology. Transgender plaintiffs, for example, were still required to establish that their gender identity was at odds with their male and female biological sex characteristics.²⁷ Accordingly, in *Smith* and other cases that applied the *Price Waterhouse* logic with regard to transgender employees, courts had to establish incongruence between the plaintiffs’ behavior and the sex they were assigned at birth.²⁸ Additionally, despite the growing protection to transgender plaintiffs under Title VII, they almost never won in the arena of bathroom use.²⁹ Employers successfully countered discrimination allegations with justifications such as the business’s need to maintain the privacy and safety of other restroom users.³⁰ In *Etsitty v. Utah*, a transgender woman bus operator who had been taking hormones and lived as a woman outside of work (but did not undergo genital related surgery) decided to extend the transition to working hours and refused to enter the male bathrooms.³¹ Following an office inquiry revealing that Etsitty still had male genitalia, her employment was terminated because of the possibility that Utah would be held liable for Etsitty’s bathroom use in public female bathrooms along her route.³² The Tenth Circuit did not accept Etsitty’s Title VII claim and concluded that Utah’s concerns were legitimate.³³

The shortcomings of the sex-stereotyping approach and the successful bathroom defense brought by employers encouraged transgender plaintiffs and advocates to craft frameworks that would make gender identity cognizable even within the “plain” or “traditional” meaning of sex in Title VII.³⁴ One prominent strategy was to promote *medical* notions of transgender identity. The medical model of pro-transgender litigation started as a successful legal strategy to help transgender plaintiffs gain access to health care services but later spread to other fields of advocacy, such as workplace discrim-

²⁶ *Smith v. City of Salem*, 378 F.3d 566, 568–69, 573 (6th Cir. 2004).

²⁷ Andrew Gildea, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 92–93 (2008).

²⁸ *Id.* at 95.

²⁹ *Johnson v. Fresh Mark, Inc.*, 98 F. App’x 461, 461–62 (6th Cir. 2004); *Sturchio v. Ridge*, No. CV-03-0025-RHW, 2005 WL 1502899, at *16 (E.D. Wash. June 23, 2005).

³⁰ KIMBERLY A. YURACKO, GENDER NONCONFORMITY AND THE LAW 95–96 (2016); *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. CV-02-1531-PHX-SRB, 2006 WL 2460636, at *2, *7 (D. Ariz. Aug. 22, 2006).

³¹ *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1218–19 (10th Cir. 2007).

³² *Id.* at 1219.

³³ *Id.* at 1227.

³⁴ Jonathan L. Koenig, *Distributive Consequences of the Medical Model*, 46 HARV. C.R.-C.L. L. REV. 619, 643 (2011).

ination.³⁵ The other strategy conceptualizes gender not as a medical issue, but as a biological element located in the brain.

The medical model contends that nonconforming gender identity is a mental condition described in the Diagnostic and Statistical Manual of Mental Disorders as “Gender Identity Dysphoria” (GID).³⁶ Through the years, scholars and advocates criticized the medical model for not serving the needs of transgender people who do not present the diagnostic criteria or do not have access to medical services and diagnoses.³⁷ Another criticism was that the medical model pathologizes and stigmatizes any gender identification differing from the one assigned at birth,³⁸ legitimizes a distinction between “real” and “fake” transgender identities,³⁹ and gives doctors the discretion to decide who moves into and out of the authenticity circle.⁴⁰ Accordingly, this model may be found to be ineffective for those whose gender performance does not fully conform to expected stereotypes of the transitioned gender.⁴¹

According to Kimberly Yuracko, many cases that applied the *Price Waterhouse* sex-stereotyping framework depended on the medical model of GID and on expert testimony regarding the pain and suffering that would be caused by obliging the plaintiffs to alter their behavior and appearance to conform to stereotypes of the gender they were assigned at birth.⁴² According to Yuracko, this model has convinced courts to grant a type of status-based protection to transgender plaintiffs, maintaining that their condition is beyond their control.⁴³ In *Smith*, for example, the court applied the sex-stereotyping framework to plaintiff Jimmie L. Smith to explain his cross-dressing and feminine mannerisms, in connection with Smith’s GID diagnosis.⁴⁴ Similarly, in other instances, courts have relied on medical evidence to underscore the involuntary character of the plaintiff’s nonconforming behavior.⁴⁵

³⁵ *Id.* at 626.

³⁶ See Yvette K. W. Bourcicot & Daniel Hirotsu Woofter, *Prudent Policy: Accommodating Prisoners with Gender Dysphoria*, 12 STAN. J. C.R. & C.L. 283, 285–86 (2016).

³⁷ Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 730–35 (2005).

³⁸ *Id.* at 730–38; see also Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 16–18 (2003).

³⁹ Romeo, *supra* note 37, at 733. See also Lihi Yona, *Keepin’ It Real: Israel’s Segregation of Transgender Prisoners and the Transgender/Cisgender Binary*, 24 BUFF. J. GENDER L. & SOC. POL’Y 43, 60 (2015–16) (discussing how criteria used to identify transgender prisoners produces a “real”/“fake” distinction between transgender inmates).

⁴⁰ *Id.*; Koenig, *supra* note 34, at 627.

⁴¹ See YURACKO, *supra* note 30, at 103–04 (arguing that the diagnosis of GID was so important to “transsexual victories” that it incentivized transgender plaintiffs to downplay or reject aspects of their gender that conformed to their biological sex).

⁴² *Id.* at 92–95.

⁴³ *Id.*

⁴⁴ *Id.* at 92–93; Melinda Chow, *Smith v. City of Salem: Transgendered Jurisprudence and an Expanding Meaning of Sex Discrimination under Title VII*, 28 HARV. J.L. & GENDER 207, 212–13 (2005).

⁴⁵ See YURACKO, *supra* note 30, at 95.

Yuracko suggests that courts are willing to protect transgender plaintiffs from grooming code requirements such as hair length or presence or absence of ear studs but are unwilling to protect undiagnosed plaintiffs who do not invoke a transgender status based on a medical diagnosis.⁴⁶

The other strategy that emerged argued for a medical model for the biological basis to transgender identity.⁴⁷ In the 2006 case *Kastl v. Maricopa*, Maricopa County Community College hired Rebecca E. Kastl to teach a computer course.⁴⁸ During the summer, and after being diagnosed with GID, Kastl started transitioning to female with the use of hormones and amended her identification certificates accordingly.⁴⁹ Following a student complaint that a man was using the women’s bathrooms, Kastl was required to provide proof of sex-reassignment surgery.⁵⁰ When she failed to do so, the college refused to renew her contract.⁵¹ Kastl argued that she was “biologically female, determined in accordance with the portion of her brain that determines gender identity, her overall physiology, and as confirmed by two (2) PhD psychologists and at least one medical doctor.”⁵² Although in this case, the court did not accept that claim, variations on brain-gender and “real” biological sex arguments nevertheless persisted in other litigation efforts.⁵³ In *Schroer v. Billington*, for example, a transgender plaintiff argued that she was discriminated against as based on “sex,” using the sex-stereotyping theory and relying on a theory that gender is a biological component of sex and therefore should be protected as well.⁵⁴ *Schroer* presented evidence that in the relevant scientific community, “sex” is understood to consist of nine elements, one of which is gender identity; a scientific expert testified in support of this understanding.⁵⁵ An opposing expert disagreed and explained that the consensus among his colleagues is that gender identity is categorized under “sexuality” rather than “sex.”⁵⁶ Sex, he said, “is made up of a number of facets, each of which has a determined biologic etiology[,]” while he “[did] not believe that gender identity has a single, fixed etiology.”⁵⁷ The court in *Schroer* chose not to rule on the question of whether “gender” is

⁴⁶ *Id.* at 98.

⁴⁷ See Koenig, *supra* note 34, at 626–27 & n.51.

⁴⁸ *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. CV-02-1531-PHX-SRB, 2006 WL 2460636, at *1 (D. Ariz. Aug. 22, 2006).

⁴⁹ *Id.*

⁵⁰ *Id.* at *1–2.

⁵¹ *Id.* at *2.

⁵² *Id.*

⁵³ The court replied that although Kastl argued that scientific theory supports the notion that biological sex is determined by more than hormonal, phenotypic, and chromosomal characteristics, she failed to present any evidence to support it, nor any evidence that she was a “biological female.” See *id.* at *5–6.

⁵⁴ *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–08 (D.D.C. 2008).

⁵⁵ *Id.* at 306.

⁵⁶ *Id.*

⁵⁷ *Id.*

included in “sex” for the purpose of Title VII as the determination was not needed for the court’s opinion.⁵⁸

B. “On the Basis of Sex” in Title IX and the Bathroom Debate

Title IX is a 1972 federal law prohibiting discrimination on the basis of “sex” in all education programs that receive federal funding.⁵⁹ However, Title VII, enacted previously, was the primary law in relation to which the meaning of “sex” developed in federal legislation.⁶⁰ Accordingly, the interpretation of “on the basis of sex” in Title IX was strongly informed by courts’ interpretation of “because of sex” in Title VII and was thus similarly inconsistent.⁶¹ In 2014, however, with the growing politicization of bathroom use in schools and public arenas, more governmental, judicial, and civil actors participated in the task of interpreting “sex” within the Title IX context.⁶² Although by this time, Title VII had evolved toward a more expansive view of “sex,” transgender litigants routinely lost in the workplace when bringing lawsuits on bathroom use.⁶³ Thus, the Title VII framework did not suffice for similar challenges in the educational setting. Accordingly, this part argues that both sides were urged to focus on biological characteristics to win the bathroom debate and thus propelled the meaning of “sex” in federal antidiscrimination law toward the direction of biological essentialism. Both pro- and anti-transgender advocates accepted that “sex” is a fundamentally biological phenomenon, leading to a bio-essentialist turn.

1. *Federal Guidance*

As an exception to the nondiscrimination rule established in Title IX, sex-based segregation in bathrooms and locker rooms was formally permitted under a 1975 regulation: “A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided

⁵⁸ *Id.* at 307–08.

⁵⁹ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2012).

⁶⁰ *See infra* note 67.

⁶¹ *See infra* notes 65 and 66.

⁶² *See infra* notes 70 and 93.

⁶³ *See* YURACKO, *supra* note 30, at 96; *see also* Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 136 (2010) (arguing that transgender-inclusive nondiscrimination laws fail to remove barriers to bathroom access). For cases of failed bathrooms claims, *see, e.g.*, *Goins v. W. Grp.*, 635 N.W.2d 717, 723–25 (Minn. 2011); *Hispanic AIDS Forum v. Estate of Bruno*, 792 N.Y.S.2d 43, 47 (N.Y. App. Div. 2005); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227 (10th Cir. 2007); *Cruzan v. Minn. Pub. Sch. Sys.*, 165 F. Supp. 2d 964, 966–69 (D. Minn. 2001). *But see* *Michaels v. Akal Sec., Inc.*, No. 09-CV-01300-ZLW-CBS, 2010 WL 2573988, at *2–4 (D. Colo. June 24, 2010) (allowing a Title VII claim regarding restroom restrictions to survive a motion to dismiss under gender stereotyping theory).

for students of the other sex.”⁶⁴ The regulation does not require institutions to provide sex-segregated facilities, nor does it provide a right to such to any student; it only *permits* the program to provide sex-segregated facilities, as long as the facilities are comparable.

Until 2014, it was largely unclear how Title IX policy should accommodate the needs of transgender students to use school bathrooms. Court rulings on the meaning of “sex” under Title VII led to varying interpretations of “sex” under Title IX, sometimes including transgender plaintiffs⁶⁵ and sometimes not.⁶⁶ In 2014, however, the Obama administration started issuing interpretative directives regarding the meaning of “sex” under federal law. The attorney general issued a memo calling on the Department of Justice (DOJ) “to Include Gender Identity Under Sex Discrimination Employment Claims” and stated that the Department of Justice would “take the position in litigation that the protection of Title VII of the Civil Rights Act of 1964 extends to claims of discrimination based on an individual’s gender identity, including transgender status.”⁶⁷ Additionally, the Department of Education (DOE) began disseminating various documents to the same effect, including memos and a letter that clarified that “Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity[,]” mentioning the case of transgender students.⁶⁸ Subsequent statements referred explicitly to the issue of bathrooms and locker rooms and informed schools that, with regard to sex-segregated facilities, schools must treat transgender students in ways that are “consistent with their gender identity.”⁶⁹

⁶⁴ 34 C.F.R. § 106.33 (2012).

⁶⁵ Based on their sex as males or females, *see e.g.*, *Miles v. N.Y. Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997).

⁶⁶ *See e.g.*, *Doe v. Clark Cty. Sch. Dist.*, No. 206-CV-1074-JCM-RJJ, 2008 WL 4372872, at *4–5 (D. Nev. Sept. 17, 2008); *Johnston v. Univ. of Pittsburgh of Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 674–75 (W.D. Pa. 2015) (“Title IX does not prohibit discrimination on the basis of transgender itself because transgender is not a protected characteristic under the statute.”).

⁶⁷ OFFICE OF PUB. AFFAIRS, DEP’T OF JUSTICE, ATTORNEY GENERAL HOLDER DIRECTS DEPARTMENT TO INCLUDE GENDER IDENTITY UNDER SEX DISCRIMINATION EMPLOYMENT CLAIMS (Dec. 18, 2014), <https://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination> [<https://perma.cc/YZ46-46DW>].

⁶⁸ OFFICE FOR CIVIL RIGHTS, DEP’T OF EDUCATION, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 5 (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/2KK2-JU34>].

⁶⁹ JAMES A. FERG-CADIMA U.S. DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS, LETTER (Jan. 7, 2015), http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf [<https://perma.cc/BT33-SPSU>]; Statement of Interest of the United States at 9, 10, 14, *Grimm v. Gloucester Cty. Sch. Bd.*, 132 F.Supp.3d 736 (E.D. Va. 2015) (Civil No. 4:15cv54), <https://www.justice.gov/sites/default/files/crt/legacy/2015/07/09/gloucestersoi.pdf> [<https://perma.cc/D77X-SAT6>]; *id.* Ex. B at 2; U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., AND U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS (May 13,

The DOE defined gender identity as referring to “an individual’s internal sense of gender. A person’s gender identity may be different from or the same as the person’s sex assigned at birth.”⁷⁰ The DOE reasoned its position by relying on the expanding frameworks of “sex” in Title VII, such as those in *Price Waterhouse* and *Schroer*, to show that “an individual’s gender identity is one aspect of an individual’s sex” from a legal point of view for the purpose of federal antidiscrimination law.⁷¹ Thus, the DOE and DOJ under the Obama administration made it explicit that, in purely administrative proceedings and in any court appearances the DOE or DOJ made, the departments would take the position that to be in compliance with Title IX, schools must allow transgender students to use the bathrooms that correspond to their gender identity.

2. *Gloucester County High School Policy*

In August 2014, between his freshman and sophomore years, Gavin Grimm (G.G.) along with his mother, met with the principal and counselor of Gloucester High School, in Gloucester County Virginia, where he was studying.⁷² G.G., a teenage student in the process of transitioning from female to male, wanted to notify school officials of his condition so the school would provide support.⁷³ The school’s principal and counselor agreed to cooperate by changing the sex on G.G.’s school records from female to male and notifying teachers of the new identification.⁷⁴ At the time, both G.G. and school officials believed G.G. should not use the boys’ bathrooms but rather use the bathroom in the nurse’s office.⁷⁵ Four weeks after school started, however, G.G., who felt stigmatized by having to use a separate bathroom, asked the school’s principal for permission to use the boys’ restroom, and the principal agreed.⁷⁶ According to Gloucester High School, after G.G. started using the boys’ restrooms, parents and students made complaints concerning privacy and safety issues such as “voyeurism or sexual assault.”⁷⁷ G.G. ar-

2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [https://perma.cc/D3TH-NB4M].

⁷⁰ U.S. DEP’T OF EDUC., CIVIL RIGHTS DIVISION, & U.S. DEP’T OF JUSTICE, OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS 1 (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [https://perma.cc/4BKS-KZVH].

⁷¹ Statement of Interest of the United States at 6–7, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736 (E.D. Va. 2015) (Civil No. 4:15cv54), <https://www.justice.gov/sites/default/files/crt/legacy/2015/07/09/gloucestersoi.pdf> [https://perma.cc/D77X-SAT6].

⁷² Petition for a Writ of Certiorari at 5, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 822 F.3d 709 (2016) (No. 16-273), 2016 WL 4610979.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 5–6.

⁷⁶ *Id.* at 6.

⁷⁷ *Id.* at 6.

gued that his use of the boys’ restroom went “without incident”⁷⁸ and that any complaints arrived from the direction of angered adults who had heard of G.G.’s bathroom use.⁷⁹ In November 2014, the school’s board held a public meeting, which invited interested people to express their opinions.⁸⁰ On December 3, 2014, and before the school’s board announced its final resolution, the school issued a press release stating that it intended to designate single-stall unisex restrooms for the use of all students and take measures to increase privacy in student restrooms by adding partitions between urinals, privacy strips, and so on.⁸¹ On December 9, 2014, the school board announced its final resolution:

“It shall be the practice of the [Board] to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.”⁸²

A few days later, a lawyer named Emily T. Prince sent an email to the DOE asking for guidance regarding the school’s resolution.⁸³ The DOE answered in January 2015 saying: “Title IX . . . prohibits recipients of Federal financial assistance from discriminating on the basis of sex, *including gender identity*[.]”⁸⁴ In the meantime, G.G. refused using the separate, single-stall toilets and tried to avoid using the bathroom altogether or used the bathroom at the nurse’s office.⁸⁵

In June 2015, G.G. sued Gloucester County High School under Title IX’s prohibition against discrimination on the basis of sex for excluding him from the boys’ restrooms under the assumption that he was not a “biological male” and asked for a preliminary injunction that would require the school to allow G.G. to use the boys’ restroom.⁸⁶ The case was adjudicated in the Fourth Circuit, and was further appealed to the Supreme Court.⁸⁷ After a partial petition was granted by the Supreme Court,⁸⁸ and before the date scheduled for oral arguments, the 2016 presidential elections led to a new federal administration taking over and reversing the federal government’s

⁷⁸ Brief of Plaintiff-Appellant at 8, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016) (No. 15-2056), 2015 WL 6440329.

⁷⁹ *See id.*

⁸⁰ *Id.* at 8–9.

⁸¹ *See id.* at 10.

⁸² Petition for a Writ of Certiorari, *supra* note 72, at 6–7.

⁸³ *See id.* at 8.

⁸⁴ *Id.* at 8.

⁸⁵ *See* Brief of Plaintiff-Appellant, *supra* note 78, at 13.

⁸⁶ *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 717 (4th Cir. 2016); Complaint at ¶¶ 62–65, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736 (E.D. Va. 2015) (No. 4:15cv54), 2015 WL 4086446.

⁸⁷ Petition for a Writ of Certiorari, *supra* note 72.

⁸⁸ *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369 (2016).

position on the issue. Under the new Trump administration, the DOJ and DOE issued letters rescinding the agencies' previous interpretations of "sex" in federal policy and leaving the question open at this point, "in order to further and more completely consider the legal issues involved."⁸⁹ Following the new administration's statements, the Supreme Court decided to send the case back to the Fourth Circuit for reconsideration.⁹⁰ Following this development, the Fourth Circuit Court vacated the injunction ordering G.G. to gain access to the boys' bathrooms at his school.⁹¹ In light of G.G.'s graduation in June 2017, the Fourth Circuit remanded the case to the district court to resolve whether the case has become moot.⁹²

3. *Amicus Curiae Briefs and the Bio-Essentialist Turn*

Although the passage of time and change of circumstances freed authorities from having to confront the principal questions in *Grimm*, the case nevertheless left a strong mark on the character of pro- and anti-transgender advocacy, pushing both sides in the direction of biological essentialism, thus pumping new blood into the narrow biological perception of "sex" in federal antidiscrimination doctrine. Despite the contrasting moral groundings of pro- and anti-transgender advocates, the bathroom debate led both sides to forge essentialist claims that ask to establish causation between some type of body form and a perceived gender behavior that can be anticipated, legitimized, and policed. This part reviews the positions presented in close to one hundred amicus curiae briefs submitted to the courts that ruled in *Grimm*. Amici consisted of nonprofit organizations representing various interest groups (feminists, civil rights, etc.), academics and research centers, religious leaders, professional medical associations, educators, security personnel, companies, cities, states, retired members of Congress, current executive officials, parents, and students.⁹³ The briefs represented a range of political orientations and interests. The notion that biological, anatomical, etiological, and inner traits somehow determine the level of femininity or masculinity has been vocalized by both conservatives and progressives as a way to win

⁸⁹ U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, & U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER 1 (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [<https://perma.cc/GZZ9-J6V9>].

⁹⁰ *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239, 1239 (2017).

⁹¹ *G. G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 729 (4th Cir. 2016).

⁹² *Grimm v. Gloucester Cty. Sch. Bd.*, 869 F.3d 286, 290–291 (4th Cir. 2017).

⁹³ See generally Docket, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No. 16-273); Docket, *G.G. v. Gloucester Cty. Sch. Bd.*, 654 Fed. Appx. 606 (4th Cir. 2016) (No. 16-1733); Docket, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016) (No. 15-2056).

legal support. For conservatives, sex means only anatomic/physical characteristics. For some progressives, sex is a product of biological gender.⁹⁴

a. Conservative Biological Essentialism – Sex Means Only Physical and Anatomical Sex and Not Gender

Conservative arguments echo the notion that society has historically considered only anatomical and physical differences when referring to sex: “Society has always recognized the innate differences between men and women and respected those differences by providing separate facilities for showering, changing, and using the restroom.”⁹⁵ According to this view, the legal move to include gender identity within the meaning of sex is a novel development that runs counter to accepted societal norms and customs: “How can ‘sex,’ as in biological sex, suddenly mean ‘gender identity,’ which we’ve been told all along isn’t related to biological sex? But people—and corporations—accept this without batting an eye.”⁹⁶

In conservative depictions of male-female differences, such a distinction is an objective reality, independent of any ideology or social values. Accordingly, amicus briefs submitted in favor of Gloucester High School express the position that sex is composed of internal and external anatomy, of reproductive organs, and of functionality, whereas gender has no bearing on one’s sex.⁹⁷ Interestingly, because this approach is constantly threatened

⁹⁴ Whereas briefs submitted in favor of Gloucester High School were consistent in their reliance on biological essentialism, amicus briefs submitted in favor of G.G. supported the inclusion of transgender people by identifying the group of transgender persons in multiple ways, social and biological alike. *Compare infra*, note 97 (selected briefs in favor of Gloucester County School that illustrate the position of sex as an exclusively biological/natural phenomenon), with Brief of Presiding Bishop of the Episcopal Church and President of the House of Deputies of the Episcopal Church et. al as Amici Curiae, Gloucester County School Board v. G.G., 2017 WL 929682 (U.S.) (U.S., 2017) (promoting an argument in favor of G.G. based on “human dignity”) and Brief for Respondent, Professor Terry S. Kogan as Amicus Curiae supporting respondent, Gloucester County School Board v. G.G., 2017 WL 1057276 (U.S.) (U.S., 2017) (promoting an argument in favor of G.G. based on the history of the separate spheres ideology and on the social construction of gender), and Brief for Respondent, Scholars Who Study the Transgender Population as Amici Curiae supporting respondent, Gloucester County School Board v. G.G., 2017 WL 1057277 (U.S.), 9 (U.S., 2017) (promoting an argument in favor of G.G. based on the shared life experience of transgender persons who suffer from pervasive stigmatization and discrimination).

⁹⁵ Marissa Mayer, *Why South Carolina’s Bathroom Bill Has Little to Do with Transgender People*, ALLIANCE DEFENDING FREEDOM BLOG (Apr. 15, 2016), www.adflegal.org/detailspages/blog-details/allianceedge/2016/04/15/why-south-carolina’s-bathroom-bill-has-little-to-do-with-transgender-people [https://perma.cc/FWG6-7JES]. For a statement from Matt Sharp, Legal Counsel on behalf of Alliance Defending Freedom (ADF), defending a similar bathroom bill in South Dakota, *see id.*

⁹⁶ Jane Clark, *The New Sexual Ideology Wins Another Skirmish*, NAT’L REV. (Apr. 22, 2016), <http://www.nationalreview.com/article/434410/transgender-bathroom-madness> [https://perma.cc/5THB-3VYY].

⁹⁷ *See, e.g.*, Brief of Amici Curiae Dr. Paul R. McHugh, M.D., Dr. Paul Hruz, M.D., Ph.D., and Dr. Lawrence S. Mayer, Ph.D. in Support of Petitioner at 6, Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 219355

by bio-technological developments and newly possible alterations to people's bodies and reproductive capacities, conservatives have tried to solidify their position by adding functional characteristics, such as that a person has to function in ways expected by society of males and females (produce sperm or ovulate).⁹⁸

This conservative rhetoric, however, suggests that biology is not only a valid description of reality but also a prescription for how it *ought* to be. In a joint amicus curiae brief in support of Gloucester County High School, the Women's Liberation Front (WoLF), a radical feminist organization "dedicated to the liberation of women by ending male violence," and the Family Policy Alliance (FPA), a Christian organization promoting family values and religious freedom admitted that although their members may disagree on much, they share concerns regarding issues such as prostitution, pornography, and now the redefining of "sex" to include "gender identity."⁹⁹ When elaborating on the different sources of morality underpinning their shared position, WoLF's representative said that "the notion that humans are sexually dimorphic mammals is not a conservative argument, it's not a liberal argument, it's not even a political argument at all, it's basic biology and it matters in terms of defining women and girls as a legal category worthy of civil rights protections."¹⁰⁰ FPA's representative, however, explains that "from our point of view God made male and female, both in his image, and that's why with your help we will always oppose any efforts to erase either

("While *sex* is binary and objective, determined fundamentally by one's chromosomal constitution, and ultimately clearly defined reproductive capacities, *gender* is a subjective sense of a social role generated by cultural norms."); Brief Amicus Curiae of Eagle Forum Education & Legal Defense Fund in Support of Petitioner at 32, Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 167304 ("Because sex is a biological characteristic, and gender is not, G.G. cannot prevail on a statutory claim."); Brief of Amici Curiae the State of West Virginia, 20 Other States, and the Governors of Kentucky and Maine Supporting Petitioner at 17, Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 167311 ("At the time of Title IX's passage in 1972, dictionaries defined sex as a biological category based principally on physical anatomy . . . and this physiological understanding prevailed in every prior case to consider the question of restrooms.").

⁹⁸ Brief Amicus Curiae of Public Advocate of the United States, U.S. Justice Foundation, and Conservative Legal Defense and Education Fund in Support of Petitioner at 10-17, Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 192454 ("The man's sexual function is to be a male and to reproduce in that function, while a woman's sexual function is to be a female and to reproduce in that function. While each may alter the external appearance of their sex, one cannot change the 'function' of their sex.").

⁹⁹ Brief of Amici Curiae Women's Liberation Front and Family Policy Alliance in Support of Petitioner at 1, Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 192762 ("Pro-family Christians and radical feminists may not agree about much, but they agree that redefining 'sex' to mean 'gender identity' is a truly fundamental shift in American law and society.").

¹⁰⁰ Family Policy Alliance, *Unlikely Allies for Privacy and Safety*, YOUTUBE (Jan. 9, 2017), https://www.youtube.com/watch?v=84zEJS_8KD4 [<https://perma.cc/X6XM-QMNU>].

sex from the law.”¹⁰¹ The partnership between WoLF and FPA demonstrates the intertwining of biology and morals in justifying regulation of sex and sex discrimination. Radical feminist arguments for separation grounded on a biological imperative strongly echoes the FPA reliance on religious imperatives.

The conservative position also attaches an immutable character to sex as an epistemic category. This means that if a person undergoes a sex-change operation, his/her sex is nevertheless unchanged: “A male may have the appearance of a vagina (or even a breast augmentation), but he does not have a uterus, Fallopian tubes, and ovaries. He does not ovulate, and he does not menstruate. If his blood is tested, he is still genetically male[,]”¹⁰² and vice versa: “Likewise, while a female may have prosthetic testes, and a flap of skin representing a penis through which urination is possible by way of a lengthened urethra, the prosthetic testes are not real and do not, never did, and never will produce sperm. Moreover, she is not capable of producing semen, and does not have an epididymis, spermatic cords and ductus deferens, seminal vesicles, a prostate gland, or an ejaculatory duct. And, of course, if her blood were tested, she is still genetically female.”¹⁰³

Because of the seemingly timeless and objective nature of biological sex differences, male and female anatomy are understood to be the nexus of societal norms concerning sex. As could be expected, this position suggests that differences between males and females have a direct effect on the safety, modesty, and privacy interests of bathroom users. In *Grimm*, for example, Judge Paul V. Niemeyer, who supported the Gloucester County High School policy and dissented in part, drew a direct line from biological differences to interests of privacy and security: “This holding completely tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes . . . [and on] demands inherent in human nature.”¹⁰⁴ The judge distinguishes sex from race or national origin, arguing that “such privacy was and remains necessary because of the inherent “[p]hysical differences between men and women,” which, as the Supreme Court explained, are “enduring” and render “the two sexes . . . not fungible.”¹⁰⁵ In other words, according to the conservative stance, privacy, safety and modesty are a direct output of anatomical differences between males and females—as made by nature, commended by their biology, and accepted throughout history and cultures.

¹⁰¹ *Id.*

¹⁰² Brief Amicus Curiae of Public Advocate of the United States, U.S. Justice Foundation, and Conservative Legal Defense and Education Fund in Support of Petitioner at 16, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 192454.

¹⁰³ *Id.*

¹⁰⁴ *G.G. ex rel. Grimm v. Gloucester County Sch. Bd.*, 822 F.3d 709, 730–31 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part).

¹⁰⁵ *Id.* at 735.

b. Progressive Biological Essentialism – Sex Means Only/Primarily Gender

Transgender and nonconforming people have articulated a multitude of diverse theoretical approaches and lived experiences with respect to their gender identity.¹⁰⁶ In past decades, substantial scholarship in transgender and queer studies promoted a variety of non-essentialist narratives of sex and gender,¹⁰⁷ which were rebutted and criticized by transgender scholars and individuals who expressed complex relationships to their bodies and to authenticity.¹⁰⁸ The progressive argument describing gender as biological, however, may be a legal strategy evaluated as most effective or necessary to win discrimination cases in courts.¹⁰⁹ When conservative lawmakers shifted their language from “sex” to “biological sex” in the hope of carving gender identity out from the scope of antidiscrimination protections, progressive advocates countered with the argument that even within the biological framework, gender cannot be separated from “biological sex,” because gender *is* biological. This line of reasoning maintains that gender identity is a biological component of sex, relying primarily on a theory that relates gender identity to the brain. For example, the attorney who represented G.G. for the American Civil Liberties Union’s LGBT & AIDS Project argued in a radio debate that “evidence shows that gender identity has biological roots and is just as much determined by neurobiology as by anything else, so biological sex and gender identity are not different things.”¹¹⁰ Some amicus

¹⁰⁶ See, e.g., DAVID VALENTINE, *IMAGINING TRANSGENDER: AN ETHNOGRAPHY OF A CATEGORY* 105 (2007).

¹⁰⁷ See, e.g., Spade, *supra* note 38, at 24–26. For more on gender as a performative act, see Ido Katri, *The Banishment of Isaac: Racial Signifiers of Gender Performance*, 68 U. TORONTO L.J. 118, 126–27 (2018). For more on gender as a constructed subjectivity, see Sally Hines, *What’s the Difference? Bringing Particularity to Queer Studies of Transgender*, 15 J. GENDER STUD. 49, 52–53 (2006).

¹⁰⁸ See, e.g., JAY PROSSER, *SECOND SKINS: THE BODY NARRATIVES OF TRANSEXUALITY* 6–12 (1998). For a survey asking 6,450 transgender and gender nonconforming people to describe their gender, see Jack Harrison, Jaime Grant & Jody L. Herman, *A Gender Not Listed Here: Genderqueers, Gender Rebels, and Otherwise in the National Transgender Discrimination Survey*, LGBTQ PUB. POL’Y J. 13, 20 (2012). For another important source documenting individual transgender narratives, see *Transgender Oral History Project*, UMEDIA ARCHIVE, <https://umedia.lib.umn.edu/taxonomy/term/946> [<https://perma.cc/FWE9-JSRS>].

¹⁰⁹ Although the biological gender narrative likely represents life experiences of some transgender individuals and advocates, biological gender arguments may also be understood as a type of “strategic essentialism” which addresses the need of minorities to represent themselves in an essentialist and simplified manner in order to achieve political gains. See *Strategic essentialism*, A DICTIONARY OF CRITICAL THEORY (2d ed. 2018), <http://www.oxfordreference.com/view/10.1093/acref/9780198794790.001.0001/acref-9780198794790-e-669> [<https://perma.cc/4V5H-KFT5>]. In any case, the critique of the bio-essentialist turn is therefore directed towards the “effectiveness” of the turn in legal terms, rather than to its capacity or authority to describe transgender life narratives.

¹¹⁰ NAT’L CONSTITUTIONAL CTR., *We the People: Debating the Laws Regulating Bathroom Use and Gender*, PODBEAN (May 5, 2016), <https://www.podbean.com/media/share/dir-49yr3-1843481> [<https://perma.cc/F33K-V2BT>].

briefs also suggested a bio-essentialist argument that gender should serve as the only essential characteristic of “sex or at least a prominent characteristic of “sex” because gender identity is an objective biological criterion, one supported by medical professionals and scientific literature.¹¹¹

The biological gender argument manifests itself in various forms. The Title IX instantiations build on reasoning from the Title VII context and follow a similar vein. For example, the original complaint filed against Gloucester County School Board’s policy depended heavily on the medical model and robust medical testimony regarding the nature of GID and the accepted standard of care.¹¹² In the expert opinion brought on behalf of G.G., the doctor asserted, “Gender identity is an innate and immutable aspect of personality that is firmly established by age four.”¹¹³ In the appeal to the Fourth Circuit, Grimm’s advocate explained that the advocate was using the term “sex assigned at birth” instead of “biological sex” because “research indicates that gender identity is itself rooted in biology, [and thus] the term ‘biological sex’ does not accurately distinguish between gender identity and sex assigned at birth.”¹¹⁴ This distinction, in turn, enabled G.G.’s advocates to argue that G.G.’s gender identity *was* his biological sex. Building on the legacy of Title VII jurisprudence, the notion that gender identity is rooted in biology has obvious merits, primarily the capacity to advance the idea that nonconforming gender identity is unchangeable and therefore should be protected under federal law protecting individuals from discrimination based on sex.¹¹⁵ While the biological gender argument has enjoyed some traction in scientific literature,¹¹⁶ and had already been proclaimed in some Title VII cases,¹¹⁷ G.G.’s case demonstrates that advocates arguing in the Title IX context find this argument particularly compelling.

Courts and legislators have continued to perceive bathrooms as the last bastion of traditional sex norms wherein biological differences would remain

¹¹¹ See, e.g., Brief of The World Professional Association for Transgender Health et al. as Amici Curiae in Support of Appellant at 13–14, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729 (4th Cir. 2017) (No. 15-2056), 2015 WL 6724594; Brief of interACT: Advocates for Intersex Youth, et al., as Amici Curiae Supporting Respondent at 37, *Gloucester Cty. Sch. Bd. v. G.G.*, 2017 WL 930053 (U.S. 2017) (No. 16-273); Brief of Liberty, Life, and Law Foundation, *wethepeopleinorder.com* et al. as Amici Curiae, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No.16-273), 2016 WL 5390656, at *11.

¹¹² Complaint at 1–4, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736 (E.D. Va. 2015) (No. 4:15cv54), 2015 WL 4086446.

¹¹³ Corrected Expert Declaration of Randi Ettner, Ph.D, at 3, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736 (E.D. Va. 2015) (No. 4:15cv54), 2015 WL 11232703.

¹¹⁴ Brief of Plaintiff-Appellant, *supra* note 78, at n.3.

¹¹⁵ See YURACKO, *supra* note 30, at 98–99.

¹¹⁶ See, e.g., *id.* at 110; see also *infra* Part III.

¹¹⁷ See, e.g., *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. CV-02-1531-PHX-SRB, 2006 WL 2460636, at *2 (D. Ariz. Aug. 22, 2006).

relevant.¹¹⁸ Because Title IX litigation took the bathroom challenge head-on, advocates made stronger claims regarding the connection between the natural body and nonconforming gender identity, basically asserting that gender is biological.¹¹⁹ Biological gender arguments are becoming more common even among seemingly neutral actors. In fact, a lawsuit filed by the former Obama administration to challenge North Carolina's HB2 law that restricted the use of public bathrooms to people of the same "biological sex" claimed: "Although there is not yet one definitive explanation for what determines gender identity, biological factors, most notably sexual differentiation in the brain, have a role in gender identity development."¹²⁰

c. *The Bio-Essentialist Turn*

The latest bathroom debate marks a meaningful moment that requires critical observation. Whereas Title VII doctrine gradually shifted back and forth between the expansive social view of sex and the narrow biological view, the bathroom debate and Title IX litigation have led to the latter manifestation of "sex" gaining traction and to locating maleness and femaleness within biological characteristics. Biological arguments are currently presented by both sides to the debate and have not played a prominent role in courts' reasonings generally,¹²¹ or in the bathroom debate.¹²² Nevertheless,

¹¹⁸ *Id.* at 140–42. Segregated bathrooms were consistently justified by a general fear of crime, as a measure necessary to prevent gender fraud, maintain heteronormativity, and enforce sex stereotypes. *Id.* at 143–44. For a review of the empirical data regarding the harm, fear of crime, and risk arguments often brought against bathroom inclusion, see Robin Fretwell Wilson, *The Nonsense About Bathrooms: How Purported Concerns Over Safety Block LGBT Nondiscrimination Laws and Obscure Real Religious Liberty Concerns*, 20 LEWIS & CLARK L. REV. 1373, 1400–05 (2017).

¹¹⁹ An example of the pro-transgender bio-essentialist argument, also cited in G.G.'s court filings, is an article arguing that "gender identity must be given the most weight because it is, in fact, 'biological' and considered the primary determinant of an individual's sex." M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 947 (2015). The article further bolsters the notion that courts would be willing to provide such protection if advocates convinced them, with the help of expert testimony, that gender identity is biologically driven and not a choice. *Id.* at 987.

¹²⁰ *United States v. North Carolina*, No. 1:16-cv-00425, 2016 WL 2730796, at ¶ 33 (May 9, 2016 M.D.N.C.).

¹²¹ According to Professor Jessica Clarke, status-based arguments are gradually receding into the background in the context of sex discrimination. Clarke maintains that dissatisfaction with the asymmetrical protections given to LGBT plaintiffs led courts to move away from protections based on immutability or status toward frameworks targeting wrongful classifications that project a social stigma onto the specified classes. Jessica A. Clarke, *Frontiers of Sex Discrimination Law*, 115 MICH. L. REV. 809, 824–25 (2017).

¹²² In G.G.'s case for example, the status protection was not a crucial component in the reasoning that informed either court decision. Advocates argued that legal protections from sex-based discrimination had never been about biology alone but have always included protection from gender stereotyping and other behavioral components. G.G.'s complaint argued that the 14th Amendment's Equal Protection Clause protects from both "biological differences" and "gender nonconformity," as does Title IX. Complaint at ¶¶ 53, 62, G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736 (E.D. Va. 2015) (No. 4:15cv54), 2015 WL 4086446. These claims resurfaced in G.G.'s appeal to

persistent advocacy along the bio-essentialism line may drive courts to adopt its reasoning in future decisions.

The recent centering of the debate over the meaning of “sex” on bathroom use has generated a flood of biological-essentialist arguments that threaten to make their way into judicial decision’s ratio—as has in fact occurred with the recent equal protection case, *Evancho v. Pine-Richland*. Three transgender students filed the *Evancho* lawsuit to challenge a school board’s resolution requiring students to use “either the facilities that correspond to their biological sex or unisex facilities.”¹²³ The judge issued an equal protection ruling in favor of the students based on their suspect class status and applied intermediate scrutiny, finding that “as a class, they exhibit immutable or distinguishing characteristics that define them,”¹²⁴ and “[m]oreover, as to these Plaintiffs, gender identity is entirely akin to ‘sex’ as that term has been customarily used in the Equal Protection analysis. It is deeply ingrained and inherent in their very beings. Like ‘sex,’ as to these Plaintiffs, gender identity is neither transitory nor temporary.”¹²⁵ Although this ruling was made within an equal protection framework, it may indicate similar developments for Title IX or VII doctrine as well.

II. FALSE HOPES: THE CONTESTED SCIENCE OF BIOLOGICAL SEX DIFFERENCES

This section challenges the narrow manifestations of sex and gender presented by pro- and anti-transgender advocates in the bathroom context and argues that resorting to biology as a way to win legal support is an unsound strategy with insufficient empirical support. In support of this view, it presents evidence from contemporary scientific literature regarding sex differences, together with insights from historical literature tracing the development of theories about sex differences in the fields of genetics, anatomy (focusing on genitals and gonads), and brain science. This evidence suggests that there is no single biological criterion that distinguishes between males and females, and more importantly, none of the recognized biological sex characteristics (e.g., chromosomes, gonads, brain) predict any

the Fourth Circuit, where G.G. cited references from the Title VII context. *See* Brief of Plaintiff-Appellant at 21–22, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016) (No. 15-2056), 2015 WL 6440329. When responding to Writ of Certiorari, G.G. combated the school’s use of dictionaries to strengthen the “plain meaning” of sex interpretation by pointing to other dictionary definitions, including the OED Online and Webster’s Seventh New Collegiate Dictionary 795 (1970), both of which included behavioral, non-anatomical components. *See* Brief for Respondent at 43, 43 n.27, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 766063.

¹²³ *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 273 n.4 (W.D. Pa. 2017).

¹²⁴ *Id.* at 288.

¹²⁵ *Id.* at 288–89.

particular gender expression. Current scientific literature explicitly admits that there is no biological criterion known to instigate particular gender identification. These insights reveal the descriptively weak character of biology-based arguments made by both sides in the bathroom debate and deeply challenge the moral weight placed upon such arguments.

A. *Chromosomal and Genetic Sex*

“There are only two things that make me a man and they are my X chromosome and my Y chromosome. . . . the fact that some people do not live in reality or that some wish reality were not true, does not entitle them to a special bathroom in a public university.”¹²⁶

The theory of X and Y as sex chromosomes was developed in the early twentieth century and implied that femaleness and maleness are separate, different routes of development.¹²⁷ Many decades of research using this framework did not produce any workable theory until 1959, when it was discovered that the existence of a Y chromosome is crucial for the development of testes.¹²⁸ This discovery generated the hypothesis casting the Y chromosome as the biological seat of maleness.¹²⁹

But the Y chromosome was not very successful at separating biological males and females, as some biological essentialists hoped. Researchers Andrew Sinclair and Peter Goodfellow discovered in 1990 that the important part on the Y chromosome, responsible for the development of male gonads, was a gene called SRY. Geneticists referred to SRY as one of “the master switches,” presumed in the human genome to determine sex.¹³⁰ However, geneticists later discovered that the SRY gene doesn’t work in isolation and that it interacts with other genes (e.g., DAX1, SOX9, and WNT4) not located on the Y chromosome.¹³¹ These genes also influence the development of reproductive organs like ovaries and testes, as well as the morphology of genitalia.¹³² As of today, we know of 25 genes that influence sex development in different ways.¹³³

¹²⁶ Olga Gershenson, *The Restroom Revolution: Unisex Toilets and Campus Politics*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 200* (Harvey, Molotch, Laura & Noren eds., 2010).

¹²⁷ SARAH S. RICHARDSON, *SEX ITSELF: THE SEARCH FOR MALE AND FEMALE IN THE HUMAN GENOME* 34–37 (2013).

¹²⁸ *Id.* at 77.

¹²⁹ *Id.* at 81–83.

¹³⁰ *Id.* at 128–30.

¹³¹ *Id.* at 136.

¹³² Bob Beale, *The Sexes: New Insights into the X and Y Chromosomes*, *THE SCIENTIST* (July 23, 2001), <http://www.the-scientist.com/?articles.view/articleNo/13499/title/The-Sexes—New-Insights-into-the-X-and-Y-Chromosomes> [https://perma.cc/NFT9-TW3W].

¹³³ Andrea Ford, *Sex Biology Redefined: Genes Don’t Indicate Binary Sexes*, *SCOPE BLOG* (Feb. 24, 2015), <http://scopeblog.stanford.edu/2015/02/24/sex-biology-redefined->

Sinclair explains that SRY’s discovery was possible thanks to four patients whose chromosomes were tested for fertility problems and were found to be chromosomally XX females, but with a small fragment of the Y chromosome and the SRY gene tracked to their X chromosome.¹³⁴ This was enough to make them develop as anatomical males with testes.¹³⁵ In 1994, a team led by Eric Vilain, one of the most prominent geneticists in the field of sex differentiation, discovered that males can develop even without the SRY gene through choreography between various genetic elements that have the capacity to encourage or repress maleness.¹³⁶ Regardless of the SRY gene, there are various patterns of chromosomes that divert from the XX/XY dichotomy, as with Klinefelter syndrome, in which individuals assigned to male present an “extra” X chromosome (XXY instead of XY),¹³⁷ or Turner syndrome, in which individuals assigned to female are “missing” or possess an “incomplete” X chromosome.¹³⁸ Numbers of non-typical sex development can range from 1:4,500 to 1:100 of live births, depending on the definition of “non-typical” used.¹³⁹

As we learn more about the complexity of genetic and chromosomal choreography in the creation of human sex, scientists are increasingly talking about sex differentiation as a spectrum rather than a binary.¹⁴⁰ Genetic studies from the past two decades demonstrate that sex differentiation is more of a process joining together several genes that operate in a balance, rather than a “switch” turned on by the existence of one gene.¹⁴¹

All of this means that identifying maleness with the Y chromosome is anachronistic and descriptively weak. First, because the SRY gene located on the Y chromosome doesn’t function as the promised sex master-switch, but rather was revealed to be more of a team player, contingent on interaction with other genes. Second, because in a variety of cases, the XX/XY dichotomy does not result in the development of regular testes/ovaries, *a fortiori* in cases that divert from the XX/XY pattern.

genes-dont-indicate-binary-sexes/#sthash.9W2oMXo9.dpuf [https://perma.cc/34A7-HH2N].

¹³⁴ Beale, *supra* note 132.

¹³⁵ *Id.*

¹³⁶ Sally Lehrman, *Going Beyond X and Y*, SCI. AM. (June 1, 2007), <http://www.scientificamerican.com/article/going-beyond-x-and-y/> [https://perma.cc/8B2Q-4D6D].

¹³⁷ NAT’L INST. OF CHILD HEALTH & HUM. DEV., *Klinefelter’s Syndrome*, MEDLINEPLUS, <https://medlineplus.gov/klinefelterssyndrome.html> [https://perma.cc/VA8Q-AXYT].

¹³⁸ NAT’L INST. OF CHILD HEALTH & HUM. DEV., *Turner Syndrome*, MEDLINEPLUS, <https://medlineplus.gov/turnersyndrome.html> [https://perma.cc/T8AF-DHNJ].

¹³⁹ Lehrman, *supra* note 136 (“Genital ambiguity occurs in an estimated one in 4,500 births, and problems such as undescended testes happen in one in 100.”).

¹⁴⁰ Ford, *supra* note 133.

¹⁴¹ Claire Ainsworth, *Sex Redefined*, 518 NATURE 288 (Feb. 18, 2015), <http://www.nature.com/news/sex-redefined-1.16943> [https://perma.cc/2AP5-7J98].

B. Genital and Gonadal Sex

“Its [sic] this simple: If you have a penis then use the men’s room. If you do not have a penis then use the women’s room.”¹⁴²

Genitals are an important indicator of biological sex differences. They are among the first things that medical professionals look at in the prenatal and the postnatal stages to determine the baby’s sex, and they also serve as a symbol of sex differences in popular culture—boys have penises and girls have vaginas. But human sexual development was never neatly categorized into distinct groups of female and male, and instead presented intermediate categories of sex classification.

In the nineteenth century, human sexual anatomy (mainly gonads and genitals) was divided into five categories: “ordinary” males and females, pseudo-hermaphrodite males and females, and true hermaphrodites.¹⁴³ Male and female pseudo-hermaphrodites were people who displayed ambiguous genitalia with the presence of either testes or ovaries, whereas true hermaphrodites displayed a mixture of testicular and ovarian gonadal tissues.¹⁴⁴ Classification of people with ambiguous sex as males or females occurred according to the current dominant indicator. For example, during the late 19th century in Europe, gonads were the prominent indicator determining sex.¹⁴⁵ However, beginning in the mid-twentieth century, developments in urological surgery that enabled physicians to cosmetically change the appearance of genitals to look more “normal,” made genitals a primary criterion according to which sex was determined.¹⁴⁶ But neither gonads nor genitals ever served as the sole criterion of biological sex, and in fact, many other factors are today known to cause the appearance of unusual genitals, such as chromosomes, hormones, and genes.¹⁴⁷ In 2006, the medical establishment abandoned the hermaphrodite terminology during a medical conference that introduced the new term DSD (Disorders of Sex Development) to indicate the range of conditions that diverge from the ordinary male and female sexual dimorphic model.¹⁴⁸

¹⁴² See Gershenson, *supra* note 126, at 201.

¹⁴³ Eric Vilain et al., *We Used to Call Them Hermaphrodites*, 9 GENETICS MED. 65 (2007).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ ALICE DOMURAT DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX 145 (1998); ELIZABETH REIS, BODIES IN DOUBT: AN AMERICAN HISTORY OF INTERSEX 45–54 (2009). For the contemporary Intersex rights movement legal struggle against the practice of surgical normalization, see generally Maayan Sudai, *Revisiting the Limits of Professional Autonomy: The Intersex Rights Movement’s Path to De-Medicalization*, 41 HARV. J.L. & GENDER 1, 54 (2018).

¹⁴⁷ Vilain, *supra* note 143, at 65.

¹⁴⁸ *Id.* at 66.

The frequency of non-dimorphic conditions (or DSD) is highly controversial among scientists.¹⁴⁹ For example, a recently issued United Nations Fact Sheet about Intersex (a term used by social activists and some patients to describe the condition) estimates between 0.05% and 1.7% of live births classify as DSD or intersex;¹⁵⁰ however, more radical estimations are as high as 4%.¹⁵¹ The fluctuation in figures is caused by differences in defining what counts as a deviation from the male or female norms. A group of researchers from Brown University tried to answer this exact question by surveying medical literature from 1955 until 2000 that reported deviations from typical male and female identification.¹⁵² To simplify, the main criteria the researchers used to define males and females were the gonads (testes or ovaries), genitals (penis or vagina and clitoris), and chromosomes (XX or XY).¹⁵³ The researchers concluded that “approximately 1.7% of all live births do not conform to the platonic ideal of absolute sex chromosome, gonadal, genital and hormonal dimorphism.”¹⁵⁴ The researchers also concluded that the frequency of individuals who receive corrective genital surgery is 0.08–1.62% of live births. Applying these figures to the current U.S. population means that almost 5.5 million people in the country deviate from the typical male and female patterns.¹⁵⁵ The frequency of normalizing surgeries for “ambiguous genitalia” was recently estimated in hundreds per year in the United States.¹⁵⁶

But how can genitals be confused or unclear? The male/female polarization consists of a middle ground with endless combinations of biological sex features, which in turn influence the anatomy of genitalia. What we recognize as “genital sex,” or the external display of penis and scrotum or vagina and clitoris, is preceded by stages that occur in the prenatal sexual differentiation period. To shorten and simplify, and assuming everything happens as expected, the fertilized egg’s chromosomes (XX/XY) determine

¹⁴⁹ See, e.g., Leonard Sax, *How Common Is Intersex? A Response to Anne Fausto-Sterling*, 39(3) J. SEX RES. 174 (2002) (a dispute between Anne Fausto-Sterling, who claims the rate is 1.7%, and Leonard Sax, who argues that the rate is less than 0.02%).

¹⁵⁰ *Intersex Fact Sheet*, FREE AND EQUAL UNITED NATIONS FOR LGBT EQUALITY, http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/FactSheets/UNFE_FactSheet_Intersex_EN.pdf [<https://perma.cc/QLS4-TUKG>].

¹⁵¹ Kate Haas, *Who Will Make Room For The Intersexed?*, 30 AM. J.L. & MED. 41, 41 (2004).

¹⁵² Melanie Blackless et. al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOL. 151, 151 (2000).

¹⁵³ *Id.* at 161.

¹⁵⁴ *Id.*

¹⁵⁵ I multiplied the 1.7% figure with the official estimated American population as reported by the United States Census Bureau in 2017. See UNITED STATES CENSUS BUREAU, QUICKFACTS UNITED STATES, <https://www.census.gov/quickfacts/table/PST045215/00> [<https://perma.cc/4L3R-63PB>].

¹⁵⁶ Lehrman, *supra* note 136; Sara Reardon, *The Spectrum of Sex Development: Eric Vilain and the Intersex Controversy*, NATURE (May 10, 2016), <http://www.nature.com/news/the-spectrum-of-sex-development-eric-vilain-and-the-intersex-controversy-1.19873> [<https://perma.cc/CK6M-3RJ8>].

the development of gonads (testes/ovaries), which then produce hormones (testosterone, estrogen, and progesterone) that direct the development of later internal and external genitalia and secondary sex features.¹⁵⁷ In other words, the genitals develop only after certain processes take place during the undifferentiated stage. Twenty-eight days from conception, embryos are identical except for their chromosomal difference.¹⁵⁸ By the seventh week, a basic structure of the reproductive system starts to form, at which point the embryo has a pair of bipotential gonads.¹⁵⁹ Only after the bipotential gonads form into testes or ovaries and produce sex hormones do genitals start to take shape according to the dimorphic model of genital sex.¹⁶⁰ Generally, at twelve weeks after conception, the genital sex will already be apparent on the fetus.¹⁶¹

From the (very) simplified explanation above, we learn that males and females' reproductive systems develop from a shared origin. In fact, male and female reproductive systems are homologous organs, meaning that although they become anatomically different, their origin is the same.¹⁶² In the human reproductive system, the testes are homologues to the ovaries, the penis to the clitoris, and the scrotum to the outer labia. It is in this way that the same original organs develop differently.¹⁶³

The shared anatomical departure point illustrates the feasibility of an unclear condition mixing male/female anatomical elements. Because the separate development of males and females is contingent on so many variables, any alteration in the process could lead to atypical genital development. As Anne Fausto-Sterling, biology professor from Brown University, argued: "With all this bipotentiality going around, the fog surrounding the birth of infants with mixed sex may have begun to lift. All that needs to happen is that something out of the ordinary switches or derails the process of sexual development at one of the levels from chromosomal to genital sex."¹⁶⁴ This also helps clarify why DSD or intersex people never have *two* sets of genitals (as some tend to report), but only one set that is not clearly differentiated.¹⁶⁵

Moreover, the fact that genitals look "normal" does not indicate that the process leading to their development unfolded according to the "master plan" for biological males and females. Take for example AIS (Androgen

¹⁵⁷ ANNE FAUSTO-STERLING, *SEX/GENDER: BIOLOGY IN A SOCIAL WORLD* 20–23 (2012).

¹⁵⁸ JANET SHIBLEY HYDE, *UNDERSTANDING HUMAN SEXUALITY* 93 (113th ed. 2016).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 94.

¹⁶³ *Id.*

¹⁶⁴ FAUSTO-STERLING, *supra* note 157, at 23.

¹⁶⁵ Alice Dreger, *When To Do Surgery On A Child With 'Both' Genitalia*, *THE ATLANTIC* (May 16, 2013), <http://www.theatlantic.com/health/archive/2013/05/when-to-do-surgery-on-a-child-with-both-Genitalia/275884/> [<https://perma.cc/JX5W-GWSN>].

Insensitivity Syndrome), which leads to the development of highly feminized genitalia in genetic boys (XY) due to resistance to the influence of male hormones,¹⁶⁶ or CAH (Congenital Adrenal Hyperplasia), in which genetic females (XX) may develop highly masculinized genitals due to production of high levels of androgen, a male sex hormone.¹⁶⁷ What should the existence of an in-between tell us about the margins? Whatever the figure of DSD/Intersex frequency is, the important realization that has emerged is the existence of a middle terrain. Male and female categories are not two parallel roots of development that never meet but should rather be understood as two ends of a spectrum departing from a shared point.¹⁶⁸

C. *Brain Sex*

“Although there is not yet one definitive explanation for what determines gender identity, recent research points to the influence of biological factors, most notably the role of sex differentiation in the brain in gender identity development.”¹⁶⁹

Pro-transgender advocates often present the claim that gender identity has biological roots in the human brain. The theory connecting brain organization and sex differences in mammals began in the 1960s, after a series of experiments involving rats that were injected with sex hormones in the first days after birth to examine the relationship between exposure to sex hormones and brain differences.¹⁷⁰

To test this hypothesis, female rats were injected with testosterone, and male rats were injected with female sex hormones or castrated to prevent the production of male hormones.¹⁷¹ The findings suggested that injected female rats mimicked “masculine” behaviors in sexual activity (mounting and motions that accompany ejaculations), whereas castrated/injected male rats presented the “feminine” mirror behavior in sexual activity (assuming a receptive position).¹⁷² The scientists argued that because all behavioral changes

¹⁶⁶ Chad Haldeman-Englert, *Androgen Insensitivity Syndrome*, MEDLINEPLUS (Sept. 11, 2014), <https://www.nlm.nih.gov/medlineplus/ency/article/001180.htm> [<https://perma.cc/FQQ9-3R4Q>].

¹⁶⁷ *Congenital adrenal hyperplasia*, MEDLINEPLUS (Oct. 27, 2015), <https://www.nlm.nih.gov/medlineplus/ency/article/000411.htm> [<https://perma.cc/NCE6-JKPY>].

¹⁶⁸ Ainsworth, *supra* note 141.

¹⁶⁹ This is LAMBDA’s official position in a civil action against the Secretary of State and the Director of the Colorado Passport Agency for the United States Department of State concerning their refusal to register Dana Alix Zzyym, an intersex individual, as neither male nor female. *See* Complaint for Declaratory, Injunctive and Other Relief, Dana Alix Zzyym v. John F. Kerry, 220 F. Supp. 3d 1106 (D. Colo. 2015) (No. 1:15-cv-2362), 2015 WL 6449495. This position is also presented on LAMBDA’s site. *See Intersex 101*, LAMBA LEGAL (Oct. 26, 2015), www.lambdalegal.org/blog/20151026_intersex-101 [<https://perma.cc/8MDT-M9EE>].

¹⁷⁰ Seymour Levine, *Sex Differences in the Brain*, 214 SCI. AM. 84, 87 (1966).

¹⁷¹ *Id.* at 87–88.

¹⁷² *Id.* at 88.

demonstrated by rats indicated the involvement of the nervous system reacting to testosterone, there is “little doubt that testosterone could determine the sexual differentiation of the brain in the first few days after birth.”¹⁷³

The following decades yielded research leading to the development of a theory connecting brain organization to sex differences under the assumption that during fetal development, sex hormones “organize the brain for gender, including patterns of sexuality, cognition, temperament, interests, and mental health that are considered ‘masculine’ or ‘feminine.’”¹⁷⁴ Reports in *Scientific American* from 1992 and 2002 suggested that, “the effects of sex hormones on brain organization occur so early in life that from the start the environment is acting on differently wired brains in boys and girls.”¹⁷⁵ According to the reports, the area in the brain that regulates reproductive behavior in humans is the hypothalamus, suggesting that “[e]ven sexual orientation and gender identity have been related to anatomical variation in the hypothalamus.”¹⁷⁶ The case of Congenital Adrenal Hyperplasia (CAH) was presented as prominent evidence from the human domain of the effects of early exposure of females to excess male hormones in prenatal or neonatal stages.¹⁷⁷ Research conducted on the behavior of girls with CAH indicated that they preferred more “masculine” toys like cars and made play and activity choices more similar to those of their sibling brothers than their sibling sisters.¹⁷⁸ Accordingly, the research concluded that because it is likely that parents treated CAH girls and their unaffected girls the same, their different preferences are a result of CAH girls’ early hormonal exposure.¹⁷⁹

Although today brain organization theory and brain sexual dimorphism are well-established scientific fields of research, neuroscientists and science researchers provide contrasting scientific evidence that challenges the notion that early exposure to testosterone is the cause of “masculine” behavior in females.¹⁸⁰ To start with evidence related to girls with CAH, Professor Jordan-Young, author of the book *Brain Storm: The Flaws in the Science of Sex Differences*, surveyed all brain organization theory research on CAH girls from 1967 to mid-2010.¹⁸¹ Jordan-Young found that existing research con-

¹⁷³ *Id.*

¹⁷⁴ Rebecca M. Jordan-Young, *Hormones, Context, and “Brain Gender”: A Review of Evidence from Congenital Adrenal Hyperplasia*, 74 *SOC. SCI. MED.* 1738, 1738 (2012).

¹⁷⁵ Doreen Kimura, *Sex Differences in the Brain*, 267 *SCI. AM.* 119, 119 (1992) [hereinafter Kimura I]; Doreen Kimura, *Sex Differences in the Brain*, 12 *SCI. AM.* 32, 32 (2002) [hereinafter Kimura II].

¹⁷⁶ Kimura II, *supra* note 175, at 33.

¹⁷⁷ Congenital Adrenal Hyperplasia is a condition in which the adrenal gland produces high androgen levels (also known as a type of male sex hormone), that can, in severe cases, cause girls to present masculinized genitals. See Haldeman-Englert, *supra* note 166.

¹⁷⁸ Kimura II, *supra* note 175, at 35.

¹⁷⁹ *Id.*

¹⁸⁰ See Jordan-Young, *supra* note 174, at 1739.

¹⁸¹ *Id.*

sistently neglects alternative post-natal factors that are more likely to cause CAH girls to demonstrate so-called “masculine” behavior patterns than early exposure to testosterone. Jordan-Young points to different elements that may incentivize or create expectations for CAH girls to demonstrate “masculine” behavior. These include the range of physiological effects of CAH that are observable by others and usually attributed to males, the effects of intensive medical surveillance of their sexuality and gender, the influence of their genital morphology on psychosexual development, and expectations of masculinization that influence not only the development of gender identity but also the way the behavior of girls with CAH is perceived by others.¹⁸² Professor Jordan-Young concludes that brain organization theory serves as an “interpretative frame” that obscures more observable and proximate explanations.¹⁸³ Her research uncovers the methodological weaknesses of current brain organization theory.¹⁸⁴

Other researchers have also poked holes in the wall of brain sex dimorphism research, with more reports explaining how conclusions about differences in male and female brain structures, previously thought of as determined by “nature,” are challenged by evidence indicating that “nurture”—socialization and gender expectations—shape the brain and contribute to observable differences.¹⁸⁵ Lise Eliot, an Associate Professor of Neuroscience, argues that, although boys’ and girls’ brains are not the same, “new work shows just how wrong it is to assume that all gender differences are ‘hardwired[.]’”¹⁸⁶ In a report from 2016, Eliot suggested that despite the desire to explain differences between boys and girls in neurological science, “researchers have found very few notable differences between boys’ and girls’ brains, and even some of the widely claimed differences between adult men’s and women’s brains [. . .] have not held up to rigorous research.”¹⁸⁷ Eliot undermines our capacity to explain differences between boys and girls based on biology: “Most sex differences start out small—as mere biases in temperament and play style—but are amplified as children’s pink- or blue-tinted brains meet our gender-infused culture[.]”¹⁸⁸ Recently, more voices from within the medical community, started directly negating the “born this way” argument raised by LGBT advocates regarding the immutability and hard-wired character of their gender identity.¹⁸⁹

This skepticism is taken even farther by Professor Daphna Joel and other researchers from Tel Aviv University, who tested the brain dimorphism

¹⁸² *Id.* at 1739–41.

¹⁸³ *Id.* at 1742.

¹⁸⁴ *Id.* at 1742–43.

¹⁸⁵ Lise Eliot, *Girl Brain, Boy Brain?*, SCIENTIFIC AMERICAN (Sept. 8, 2009), <http://www.scientificamerican.com/article/girl-brain-boy-brain> [<https://perma.cc/7F3D-5TL9>].

¹⁸⁶ *Id.*

¹⁸⁷ Lise Eliot, *The Truth About Boys and Girls*, 25 SCI. AM. 64, 66 (2016).

¹⁸⁸ *Id.* at 67.

¹⁸⁹ Tia Powell, Sophia Shapiro & Ed Stein, *Transgender Rights as Human Rights*, 18 AMA J. ETHICS 1126, 1127 (2016).

theory by scanning more than 1,400 human brains.¹⁹⁰ The researchers found that various documented differences between male and female brain structure do not comprise a valid scientific distinction of the human brain into separate categories.¹⁹¹ As an alternative, they offered the “brain mosaic” approach, suggesting that every brain is comprised of a combination of “female” and “male” characteristics in a way that exposes huge overlaps and heterogeneity in brain structure and associated traits, attitudes, and behaviors.¹⁹²

Notably, the abovementioned skepticism regarding brain dimorphism and organization theory isn’t new, and it comes as no surprise to those who advocate for such theories. In fact, the reports in *Scientific American* that were cited earlier favoring brain organization theory admit that with respect to cognition tests, for example, “men and women overlap enormously,” and that although some skills present large differences, “[o]n the whole, variation between men and women tends to be smaller than deviations within each sex[.]”¹⁹³ Putting other disagreements aside, it is far from accepted that gender identity has biological roots in brain structure, as some pro-transgender advocates suggest. Even geneticist Eric Vilain (previously mentioned for supporting the model of male and female brains), when asked, “Do you think this difference in gene expression in the brain explains anything about gender identity?” answered: “About identity, it says nothing [yet] . . . They’re certainly good candidates to look at to be influencing gender identity, but they’re just good[]candidates.”¹⁹⁴

In one recent study, brain researchers have conducted experiments using MRI scans to examine brains of transgender people in the area of white matter, some of which is considered a sex-dimorphic region in the brain.¹⁹⁵ They found that the brains of “untreated” female-to-male transgender individuals shared more structural similarities with the brains of males than the

¹⁹⁰ Daphna Joel, et al., *Sex Beyond the Genitalia: The Human Brain Mosaic*, 112 *PROC. NATL. ACAD. SCI. USA* 15468, 15468 (2015).

¹⁹¹ *Id.*; Joel, Hänggi & Pool, *Reply to Glezerman: Why Differences Between Brains of Females and Brains of Males Do Not ‘Add Up’ to Create Two Types of Brains*, 113 *PROC. NATL. ACAD. SCI. USA* 15468 (2016), http://people.socsci.tau.ac.il/mu/daphna/joel/files/2016/03/Joel_PNAS2016_reply_to_Glezerman.pdf [<https://perma.cc/EQE5-EEMZ>]; Joel, *Genetic-Gonadal-Genitals Sex (3G-sex) and the Misconception of Brain and Gender, or Why 3G-Males and 3G-Females Have Intersex Brain and Intersex Gender*, 3 *BIOLOGY OF SEX DIFFERENCES* 27 (2012).

¹⁹² Joel, *supra* note 191. The Joel study and concept of brain mosaic has been strongly resisted by some in the scientific community. See generally Marco Del Giudice et al., *Method Systematically Fails to Detect Large, Consistent Sex Differences*, 113 *PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES* E1965 (2016).

¹⁹³ See Kimura II, *supra* note 175, at 34.

¹⁹⁴ Sally Lehrman, *When a Person Is Neither XX nor XY: A Q&A with Geneticist Eric Vilain*, *SCI. AM.* (May 30, 2007), <http://www.scientificamerican.com/article/q-a-mixed-sex-biology> [<https://perma.cc/8SUC-JBMH>].

¹⁹⁵ Giuseppina Rametti et al., *White Matter Microstructure in Female to Male Transsexuals Before Cross-Sex Hormonal Treatment. A Diffusion Tensor Imaging Study*, 45 *J. PSYCHIATRIC RES.* 199, 199 (2011).

brains of females.¹⁹⁶ Although these experiments are few, the headlines on the topic suggest risky interpretations and hasty conclusions.¹⁹⁷ For example psychologist Antonio Guillamon talks about a “unique kind of brain” reserved for transgender people—one that is different from the brains of males and females.¹⁹⁸ It seems that it will not take long before more research testing this statement-hypothesis is conducted.

To conclude, brain dimorphism theory is a logical extension of the sex dimorphism model, attempting to locate differences between males and females in their bodies or brains. In the domain of brain research, this is particularly hard, due to the flexibility and responsiveness of the brain to life experiences, making the nature/nurture complication almost impossible to untangle. In any case, even supporters of the model agree that evidence collected thus far does not suggest that gender identity is hardwired in the brain.

III. WHAT’S LEFT OF “BECAUSE OF SEX” IN THE WAKE OF THE BATHROOM DEBATE?

Although the debate around bathrooms is known primarily as a struggle between pro- and anti-transgender advocates on a heated civil rights issue,¹⁹⁹ it tapped into the ongoing tension between the two manifestations of “sex” in Title XI and VII doctrine discussed in Part I and entangled the transgender fight in a larger epistemic dispute regarding the meaning of “sex,” “male,” and “female.” What is now at stake is not only the extent of accommodations that should be provided to transgender people but also the nature and definition of sex itself, of males and females. Similar to accusations made against gay advocates for trying to change the notion of marriage for everyone else,²⁰⁰ the bathroom debate generated a similar response in which the transgender community is accused of trying to change for everyone the meaning of “sex” in the law.²⁰¹

This part will not attempt to claim what “sex” really is or ought to be. It does, however, place the current pro- and anti-transgender clash within the greater debate over the definition of sex in federal antidiscrimination law, and makes some broader observations regarding a possible way to move forward in developing the doctrine. This part argues that “because of sex” should not be interpreted by courts to mean only gender identity or even

¹⁹⁶ *Id.*

¹⁹⁷ See, e.g., Francine Russo, *Is There Something Unique about the Transgender Brain?*, SCI. AM. (Jan. 1, 2016), <https://www.scientificamerican.com/article/is-there-something-unique-about-the-transgender-brain/> [<https://perma.cc/U8TD-W6XW>].

¹⁹⁸ *Id.*

¹⁹⁹ Katy Steinmetz, *The Transgender Tipping Point*, TIME (May 29, 2014), <http://time.com/135480/transgender-tipping-point/> [<https://perma.cc/8PPZ-EUXA>].

²⁰⁰ Libby Adler, *Just the Facts: The Perils of Expert Testimony and Findings of Fact in Gay Rights Litigation*, 7 HARV. UNBOUND J. OF LEGAL L. 1, 19 (2011) (citing concerns of some that a “greedy minority is trying to change marriage for everyone else”).

²⁰¹ See, e.g., Clark, *supra* note 96.

necessarily include gender identity, but rather that the definition of “sex” for the purpose of Title XI and Title VII is better left open-ended and discretionary. The offered position is called “contested essentialism,” and it is committed to the existence of difference between males and females but is not committed to any particular form of masculinity and femininity or to the origin of sex and gender. The offered contested essentialism position is justified as serving a more accurate representation of “sex” from both the perspective of scientific theory and from a political point of view of the conflicting definitions.

A. *The Different Shades of Constructivism and Essentialism*

Essentialists and constructivists have more in common than we tend to say. To rearticulate the contours of “sex” in light of the socially constructed versus biological essentialist visions of “sex” in federal antidiscrimination law, I will draw from the work of Janet Halley on gay activism and the essentialist/constructivist impasse.²⁰² Gay advocates assumed that a series of scientific reports published in the 1990s supporting the hypothesis that sexual orientation has biological origins would help make the argument that sexual orientation is immutable, thereby compelling judges to elevate gay men and lesbians to the level of a suspect class under the Equal Protection Clause (EPC).²⁰³ This development changed the landscape of pro-gay advocacy in legal culture of the time and created an essentialist-constructivist split within the gay and lesbian constituency—between those who embraced the hypothesis offering them a stable, natural, and distinct identity and those who rejected it.²⁰⁴ As Halley demonstrates, however, the essentialist-constructivist impasse in advocacy was not insurmountable.²⁰⁵ Halley’s method of dismantling each position on the constructivist/essentialist axis to its core convictions and finding a common ground among them can inspire the search to define the contours of “sex” by crystalizing the points of agreements and disagreements more accurately.

In “Coming to Terms with Essentialism and Constructivism,” Halley takes us through a catalog of approaches to these positions.²⁰⁶ Starting with essentialism, Halley asks that we distinguish between essentialism and biological causation: “Essentialism assumes at minimum that a pure and perfect definition of a particular thing can be found.”²⁰⁷ The “thing” has a perfect list of constitutive characteristics that make it (and other objects that qualify the same characteristics) the same “thing.” However, within the list of char-

²⁰² Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 504–06 (1994).

²⁰³ *Id.* at 504.

²⁰⁴ *Id.* at 505.

²⁰⁵ *Id.* at 506.

²⁰⁶ *Id.* at 547.

²⁰⁷ *Id.*

acteristics, or essence if you will, it is not mandatory that the constitutive characteristics be natural or biological in any sense: “Any attribution of an irreducible, constitutive characteristic to a person or thing attributes to it an essence . . . Attribution of a *natural* essence, then, is but one kind of essentialism.”²⁰⁸ Accordingly, Halley distinguishes between strong essentialism, committed to a *natural* source of the constitutive characteristics, and weak essentialism, which is committed to the notion of essence (a perfect list of constitutive characteristics) but not to its sources.²⁰⁹ Halley continues to show us how in all versions of essentialism, both strong and weak, there exists a social and cultural aspect that cannot be avoided, in all but a few cases.²¹⁰ For weak essentialists, we see that although the list of characteristics is “perfect” in the sense that it has no redundant or missing elements, it does not impose that the defined subject be “unchangeable.”²¹¹ It only means that if it changes, then it is no longer of the same essence.²¹² For example, if a lesbian suddenly finds herself romantically attracted to men, she may have that, but she is no longer a lesbian (assuming that a lack of attraction to men was on the list of constitutive characteristics). For strong essentialism, Halley shows that the commitment to a natural source of identifying characteristics does not make *everything* that is natural also essential.²¹³ For instance, although freckles and hair color are natural, they are not necessarily essential for the definition of sex, sexual orientation, and so on.²¹⁴ That analysis eventually demonstrates that for all essentialists both weak and strong, there is an immanent social-cultural aspect, one responsible for the selection of the constitutive characteristics.²¹⁵

This analysis is extremely relevant for the redefinition of sex, males, and females within the bathroom debate. It demonstrates that for weak essentialists, transition between groups is possible—as one person sheds some characteristics and wears others (e.g., by taking hormones or changing one’s name in identification documents). In addition, it shows that for all essentialists, the question of *what* are the constitutive essential characteristics of “males” and “females” is not predetermined but remains open for discussion and negotiation. A strong manifestation of this point can be made when looking at anti-transgender bathroom bills legislated by different states to regulate entrance of people to public bathrooms according to their “biological sex.”

Although all state legislators expressed a biological essentialist position with respect to category of “sex,” they nevertheless differed in their list of

²⁰⁸ *Id.* at 547–48.

²⁰⁹ *Id.* at 548.

²¹⁰ *Id.* at 548–49.

²¹¹ *Id.* at 549.

²¹² *Id.*

²¹³ *Id.* at 548.

²¹⁴ *Id.*

²¹⁵ *Id.* at 548–49.

constitutive elements, thereby demonstrating the social aspects existing even within a biological-essentialist approach. Bill proposers appear to regard “biological sex” as a stable, coherent, organizing criterion; however, a random collection of fourteen bathroom bills reveals that legislators’ definitions of “biological sex” vary substantially from state to state. Definitions consist of a combination of elements such as “physical condition,” the sex “assigned at birth,” “genes,” and “chromosomes” taken either jointly or individually to determine a person’s biological sex.

	“Physical condition”/ “anatomy”	“Birth certificate”/ “as identified at birth”	A “person’s chromosomes”	“Genetics”	Other: “as biologically defined”/ “immutable biological sex”/ “as objectively determined”
North Carolina ²¹⁶	X	X			
South Dakota ²¹⁷	X	X	X		
Minnesota ²¹⁸					X
Alabama ²¹⁹	X	X			
Illinois ²²⁰	X	X	X		
Indiana ²²¹	X	X	X		
Indiana ²²²		X	X		
Missouri ²²³	X	X	X		
Kansas ²²⁴	X	X	X		
Mississippi ²²⁵	X	X		X	X
Tennessee ²²⁶		X			

²¹⁶ H.B. 2, Gen. Assembly (N.C. 2016), *available at* <http://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v1.pdf> [<https://perma.cc/7KTJ-WXQZ>].

²¹⁷ H.B. 1008, Legis. Assembly (S.D. 2016), *available at* <http://sdlegislature.gov/docs/legsession/2016/Bills/HB1008HST.pdf> [<https://perma.cc/5YCG-7TCE>].

²¹⁸ H.F. 3396, HR(D) (Minn. 2016), *available at* <http://wdoc.house.leg.state.mn.us/leg/LS89/HF3396.0.pdf> [<https://perma.cc/T3DG-ZAUG>].

²¹⁹ Oxford, Ala., Bathroom or Changing Facility Ordinance (2016), (repealed 2016), *available at* <http://www.oxfordalabama.org/Sites/Oxford/Documents/City%20Clerk/OR-DINANCE-Multiple%20Occupancy%20Bathroom%20or%20Changing%20Facilities.pdf> [<https://perma.cc/7GFX-W8G9>].

²²⁰ H.B. 4474, 99th Leg. (Ill. 2015–2016), *available at* <http://www.ilga.gov/legislation/99/HB/PDF/09900HB4474lv.pdf> [<https://perma.cc/4XMX-E8W8>].

²²¹ S.B. 35, 119th Leg. (Ind. 2016), *available at* <http://iga.in.gov/static-documents/b/2/b/c/b2bc65f9/SB0035.01.INTR.pdf> [<https://perma.cc/Y97M-NQLA>].

²²² H.B. 1079, 119th Leg. (Ind. 2016), *available at* <http://iga.in.gov/static-documents/5/6/c/1/56c121df/HB1079.01.INTR.pdf> [<https://perma.cc/W7SR-U3B2>].

²²³ H.B. 1624, 98th Leg. (Mo. 2016), *available at* <http://www.house.mo.gov/billtracking/bills161/billpdf/intro/HB1624I.PDF> [<https://perma.cc/A39M-747N>].

²²⁴ S.B. 513, (Kan. 2016), *available at* http://www.kslegislature.org/li/b2015_16/measure/documents/sb513_00_0000.pdf [<https://perma.cc/8GYM-GQP6>].

²²⁵ H.B. 1523, (Miss. 2016), *available at* <http://billstatus.ls.state.ms.us/documents/2016/pdf/HB/1500-1599/HB1523PS.pdf> [<https://perma.cc/7JWH-4KW9>].

²²⁶ H.B. 2414, Gen. Assembly (Tenn. 2015–2016), *available at* https://www.google.co.il/webhp?sourceid=chrome-instant&rlz=1C1CHWA_

Wisconsin ²²⁷	X	X	X		
Oklahoma ²²⁸	X	X			
Virginia ²²⁹	X				

For constructivism, Halley explains that they differ from each other along two axes: “who or what does the constructing, and who or what gets constructed.”²³⁰ All of the various forms of constructivism that exist present a causal theory between “culture” and the subject.²³¹ Halley shows, however, that most constructivist approaches do not negate the existence of a category or even an essence per se: “[C]onstructivism claims that important features of human beings and our world are contingent, historical products of human activity and interaction, but it does not claim that anything it describes as socially constructed would be easy, or even possible, to change.”²³² In the sexuality context, “[C]onstructivists ‘differ in their willingness to imagine *what* was constructed’[.]”²³³ Whereas those who have adopted the Foucauldian approach take all to be constructed and dissolve categories like sex, gender, and sexuality into their discursive constitutive mechanisms, most constructivists maintain the idea that sexuality is limited by an inherent sexual impulse (with varying degrees) manifested through identity, community culture, romantic object-choice, and so on.²³⁴

Applying this insight to the bathroom context reveals that even groups that are less committed to the biological hypothesis of gender identity, and groups not committed to the sex binary such as gender non-conforming people, there is no negation of the very category of sex or of males and females. Quite the contrary in fact. G.G. and amici are committed to the culture of these categories and, similar to cisgender women, depend on them politically.

Given that essentialism involves a cultural-social aspect of choosing the constitutive elements of the group, and that most constructivists do not deny the existence of a group but are mostly divided on what and how much is constructed, Halley shows that the premise that considers essentialism/constructivism to be mutually exclusive should be rejected.²³⁵ In context of gay rights, Halley tells us that “[i]n all but its strongest forms, constructivism

enCA661CA661&ion=1&espv=2&ie=UTF-8#q=house%20bill%202414%20tennessee [https://perma.cc/GJT7-FX37].

²²⁷ A.B. 469, (Wis. 2015), available at <http://docs.legis.wisconsin.gov/2015/related/proposals/ab469> [https://perma.cc/C33T-YNWA].

²²⁸ S.B. 1323, 55th Leg. (Okla. 2016), available at http://webserver1.lsb.state.ok.us/cf_pdf/2015-16%20int/sb/sb1323%20int.pdf [https://perma.cc/WQY8-5BP7].

²²⁹ H.B. 663, Gen. Assembly (Va. 2016), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?161ûl+HB663> [https://perma.cc/9YJW-39MQ].

²³⁰ Halley, *supra* note 202, at 550.

²³¹ *Id.* at 552.

²³² *Id.*

²³³ *Id.* at 556.

²³⁴ *Id.*

²³⁵ *Id.* at 553.

already coheres with . . . weak essentialism.”²³⁶ From that perspective, the constructivist/essentialist impasse can also be understood as a disagreement regarding the constitutive elements of males and females, regardless of their source, cultural or biological (and the list can get very long).²³⁷ This insight helps reframe the clash between sex essentialists and constructivists as a fight regarding the exact list of constitutive elements of males and females.

B. Why “Sex” Cannot Exclusively Mean “Gender”

Realizing that the disagreement is actually a struggle over the meaning of sex, we can move to examine more specifically the different elements in the perfect list of sex characteristics that are in dispute. The most troubling divisive element on the list is gender (in its various meanings). Should a self-proclaimed gender identity serve the ultimate conclusive indicator of “sex” in federal antidiscrimination law? In other words, the remaining question after the bathroom debate is whether gender *is* the ultimate, primary characteristic that constitutes sex. This article argues that the answer is no, as “sex” is not a fixed category with a perfect list of essential characteristics. Accordingly, the elevation of one element over others, such as interpreting sex to mean only gender, or only biological characters, creates the risk of discrimination on the basis of elements that are not on the constitutive list, such as genitalia.

This point was made in *Grimm*. Dissenting in part, Judge Niemeyer said that it is unclear whether G.G. is asking that “sex” in Title IX “refers (1) to *both* biological sex *and* gender identity; (2) to *either* biological sex *or* gender identity; or (3) to *only* ‘gender identity.’”²³⁸ In their Petition for a Writ of Certiorari to the Supreme Court, Gloucester County School Board’s lawyers challenged the third option by highlighting the possible absurd implications of interpreting “sex” to mean *only* gender.²³⁹ The argument shines a light on a possible outcome of the suggested interpretation: a prohibition on discriminating based on sex, understood to mean just gender, provides an implied permission to discriminate based on biological sex or

²³⁶ *Id.* at 556.

²³⁷ Courts tend to rely on medical classifications considering seven different indicators: (1) sex chromosomes (XX for females or XY for males), (2) gonads (ovaries or testes), (3) sex hormones (estrogen or androgen predominance), (4) internal reproductive organs (uterus and ovaries or sperm ducts), (5) external genitalia (clitoris and labia or penis and scrotum), (6) secondary sex characteristics (presence of breasts, body hair distribution), and (7) psychological sex (or gender identity). See Tey Meadow, “A Rose is a Rose”: *On Producing Legal Gender Classifications*, 24 *GEND. & SOC.* 814, 824 (2010).

²³⁸ G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 737 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part). Judge Niemeyer’s point was restated in later briefs by amici. See, e.g., Brief of Liberty, Life, and Law Foundation, *wethepeopleinorder.com et al. as Amici Curiae, Gloucester Cty. Sch. Bd. v. G.G. ex rel Grimm*, 137 S. Ct. 1239 (2017) (No.16-273), 2016 WL 5390656, at *11.

²³⁹ Gloucester Cty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (2017) (No. 16-273), 2016 WL 4610979, at *37.

other characteristics that people associate with sex.²⁴⁰ This could lead to the absurd outcome in which it is forbidden to exclude students from math class based on their gender identity but not forbidden to exclude them based on their genitals, penises, and vaginas.

Women’s organizations made a related argument that the interpretation of sex to mean only gender would put at risk designated remedial funds provided to support women:

If any man becomes eligible for the millions of dollars in female-only scholarships at Title IX institutions merely by “identifying” as a woman, then many will do just that. For women, this means the loss of an indispensable tool in their struggle to achieve equality in education.²⁴¹

This expresses a material feminist concern arising from diluting current court protection over “classic” sex-based discrimination for women and the loss of privileges such as affirmative action or funds given to women based on sex.²⁴² In the abstract, this argument stems from anti-subordination theory and is concerned with the potential loss to the law’s primary beneficiaries of their hard-won privileges. Concretely, the argument contends that it would be harder to recognize discrimination when the protected group is open-ended and fluid and that members of a marginalized group should not have to share remedial privileges with those who may arrive from possibly privileged backgrounds.²⁴³

Leading antidiscrimination theorist Jessica Clarke argues that firm gatekeeping tests applied by courts in the context of antidiscrimination law goes against the central normative theories of antidiscrimination law.²⁴⁴

²⁴⁰ *Id.*

²⁴¹ Brief of Amici Curiae Women’s Liberation Front and Family Policy Alliance in Support of Petitioner at 3, Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 192762.

²⁴² See, e.g., examples of funds designated for women in education, *id.* at 11–13.

²⁴³ For two opposing perspectives on the inclusion of transgender women in the category of women, see Rose Dammu, *Trans Women & the Myth of Male Privilege*, OUT (Mar. 15, 2017), <https://www.out.com/news-opinion/2017/3/15/trans-women-myth-male-privilege> [<https://perma.cc/FAP2-PLQJ>]; Jenni Murray, *Be trans, be proud — but don’t call yourself a “real woman,”* THE SUNDAY TIMES, at 14–19 (Mar. 5, 2017).

²⁴⁴ Jessica E. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV 101, 104, 109 (2017). From an anti-essentialist perspective, class gatekeeping is problematic because it assumes fixed and unconditioned, often natural boundaries of group qualification, an assumption that, in reality, does not hold for vast categories of protected classes. *Id.* at 145–47. In addition, it leads to a deep tension and conflicting determinations of group-belonging between the individual and the court. *Id.* Anti-essentialists may nonetheless accept that in some cases, group classifications may be necessary to serve the ends of antidiscrimination, such as the collection of quantitative data about race and gender or affirmative action; however, from an anti-essentialist perspective, there is no necessity for class gatekeeping. *Id.* at 147–148. The goal of antidiscrimination, according to the anti-essentialist view, is to undermine systemic social stereotypes, regardless of who their victims were in a particular event. *Id.* at 147–51. For the rest of Clarke’s elaborated analysis on the tension between protected class gatekeeping and normative theories of antidis-

Clarke claims that although American equality law must recognize social groups and classes to understand how group-based discrimination operates, the bearer of rights envisioned by discrimination law is not the group but the individual, with the aspiration of social change rather than group protection.²⁴⁵ Clarke's argument provides a normative justification for looser class categories. On the one hand, this may be disturbing for women who are worried about their class being accessed uncontrollably. On the other hand, Clarke's argument would also go against the idea of interpreting sex to mean only or primarily gender. Clarke's argument recognizes the complex interplay among different essential characteristics of protected classes. Exactly because of that complexity, Clarke tells us that we should focus on the nature of discrimination rather than on defining its victim. For this reason and others expressed earlier, this article suggests that a formalization of gender identity as the primary or ultimate indicator of "sex" in Title IX and VII is not a worthy path to pursue. Instead, the next part, which interprets "sex" in an inclusive, discretionary, and open-ended way, is a step toward shifting the clash from the very definition of "sex" toward the nature and purpose of discrimination.

*C. Contested Essentialism – Sex Is Composed of Different Elements,
Among Which Is Gender*

What could be a possible interpretation of "sex" in federal antidiscrimination law that would include but not place a priority on any of the constructivists' or essentialists' different manifestations of "sex"? This article suggests adopting the position, one already employed in courts, wherein gender identity is but one constitutive element of sex, among others, without imposing a hierarchy among characteristics on the list or descriptive assertions regarding their origins. I call this approach "contested essentialism" to signify the idea that virtually all participating members express faith in the *existence* of categories themselves: males and females, with changing levels of normative commitment to preserve them. Yet, because the list of essential characteristics that constitute the perfect male or female is not widely agreed upon, particularly on the subject of each component's specific gravity in relation to others, for instance, how important is gender compared with genitals in case of a conflict? The definition remains contested on an empirical level, contextual according to the legal dispute, reflective of political interests, and in large part, discretionary.

In practice, "sex" could mean biological sex, gender identity, or both. The notion that gender identity is but one element that should be included in the list of essential characteristics of "sex" is widely expressed among pro-

crimination law, anti-classification, anti-essentialism, anti-balkanization, and anti-subordination, see *id.* at 143–61.

²⁴⁵ *Id.* at 141.

trans advocates.²⁴⁶ Supporters of this approach usually rely on legal tradition and precedents for support²⁴⁷ and argue that gender identity is a component of sex, regardless of that the origin of gender identity.²⁴⁸ Strong constructivist approaches admit an “internal impulse” and that gender identity is probably more than a reflection of mere social norms and ideals, but do not commit to any explanation whatsoever.²⁴⁹ This position could also appeal to some moderate conservatives.²⁵⁰

The contested essentialism interpretation does not provide answers to the substantive question of what the essence of males and females is, nor does this interpretation purport to state a list of the essential characteristics, or their respective strengths. It also does not guide courts regarding when to use biological sex characteristics, gender identity, or both. The approach is discretionary and leaves space for several versions of “sex” to coexist.²⁵¹

²⁴⁶ See, e.g., Brief for the Equality Federation in Support of Respondent at 10, Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 836842 (“Both medical science and courts have recognized that a variety of characteristics—including gender identity—collectively make up a person’s sex . . . A person’s sex includes that person’s gender identity, lived experience, and interactions with others, just as it may include various other characteristics . . . Moreover, while the exact cause of a person’s gender identity is not known, medical science recognizes that it has a biological component.”).

²⁴⁷ Brief of Amici Curiae Impact Fund, Bay Area Lawyers for Individual Freedom (BALIF), and 45 Bar Associations and Non-Profit Legal and Advocacy Organizations in Support of Respondent Brief of Amici Curiae at 21, Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 929683 (quoting Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir. 2000) (“Because gender identity is a component of sex, discrimination against a transgender person – who is defined as such precisely because his or her gender identity does not match the sex given to the person at birth – constitutes sex discrimination. In *Schwenk*, the Ninth Circuit recognized that ‘sex’ includes an individual’s ‘sexual identity’ or, as more commonly known, ‘gender . . . identity.’”)).

²⁴⁸ *Id.* at 22 (After comprehensively reviewing scientific literature regarding biological origins of gender identity, including studies of neuroanatomy and genetic factors, the amici say, “It is thus a mistake to make broad assumptions about what precisely constitutes ‘biological gender.’ In any event, case law already shows that gender identity is a component of ‘sex,’ no matter what its origins.”).

²⁴⁹ See, e.g., Brief of Amici Curiae The World Professional Association for Transgender Health, Pediatric Endocrine Society, et al., in Support of Appellant at 13, G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 853 F.3d 729 (4th Cir. 2017) (No. 15-2056), 2015 WL 6724594 (“Although not all the factors that contribute to the formation of one’s gender identity are fully understood, it is generally accepted that gender identity has an innate component. It is not simply a reflection of social gender norms and cultural ideas about what it means to be male or female, though these norms and ideas play a role.”).

²⁵⁰ One amici brief submitted in favor of Gloucester County School had also agreed that gender identity *might* be taken into account within the sex stereotype theory, as long as it is considered among biological characteristics. See Amici Curiae Brief of the States of South Carolina, West Virginia, Arizona and Mississippi and the Governors of Maine and North Carolina in Support of Defendant-Appellee at 3, G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 853 F.3d 729 (4th Cir. 2017) (No. 15-2056), 2015 WL 7749913 (“At most, gender can combine with differential treatment of the sexes to prove sex discrimination, but gender alone cannot make out a Title IX violation where there is no disparate treatment based on biological sex.”).

²⁵¹ The idea of moving away from a unified definition of sex in the law toward a context-led approach to sex differences was forcefully made in a recently published arti-

Though this might be seen as a weakness, its lack of singular meaning is actually a more accurate reflection of the current state of disagreement on a critical evolving question that neither modern science nor legal doctrine knows how to answer. It also allows pro-transgender advocates an option to argue from a contested essentialist position that avoids exclusive biological essentialism. Neglecting the *exclusive* biological essentialism theory, while maintaining the possibility of using biological elements some of the time, also relieves some of the concerns from a complete constructivist approach that has the potential to be exploited manipulatively against protected constituencies, such as cisgender women and others. In a sense, the contested essentialism interpretation is an agreement to disagree with the hope of silencing the ontological debate regarding what sex is and of shifting argumentative weight toward a substantive examination of the nature of discrimination as suggested by Clarke. The next part demonstrates how a contested essentialist approach to sex/gender could be used to conduct a functionalist analysis in the context of bathroom use and might be employed in other contexts as well.

IV. FROM ONTOLOGY TO PURPOSE: A FUNCTIONAL ANALYSIS OF “ON THE BASIS OF SEX”

Considering that “sex” is a category with deeply disputed meanings, and that neither legal nor scientific expertise is currently capable of providing a satisfying definition, this part argues that the phrase “on the basis of sex” in Title IX cases should be read through a functionalist perspective. Although not a magic solution, a functionalist perspective avoids the necessity to determine what sex *is* and focuses on what sex *does*—the function it serves, in the eyes of the discriminator. The contested essentialism approach offered in the third part opens up the definition of “sex” to include all sorts of characteristics people see as essential, recognizing that discrimination is caused by a complex interplay among these characteristics and the lack of sufficient empirical support for any other essentialist theory. The application of an inclusive interpretation of sex helps skip over the legal analysis of what “sex” is and moves toward a legal analysis of the discrimination itself from a functionalist perspective. This article looks to the Bona Fide Occupational Qualification (BFOQ) framework in Title VII, which allows for a more nuanced examination of discriminatory employment policies, as a source of inspiration for the suggested functionalist analysis. After drawing insights from BFOQ litigation on issues of privacy and safety, this part con-

cle by Jessica Clarke, who examined how existing legal regulatory mechanisms can be used to accommodate gender non-binary people. “Determining which legal model is optimal requires investigation of the interests at stake in binary sex or gender, and will therefore depend on context. Any definition of sex or gender should be tailored to serve the purposes of regulation.” Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 945 (2019).

cludes with a brief discussion of possible risks and complications that this approach might introduce.

A. *The Bona Fide Occupational Qualification Analysis*

Whereas advocates from both sides of the bathroom debate placed a great deal of weight on interpreting the classification of “sex” to include their particular version of essential characteristics, I suggest shifting the discussion to focus on the quality of the classification itself rather than on whether the subject belongs to a protected class. This move is no stranger to antidiscrimination doctrine, which includes different mechanisms, intended to examine the relationship between the means (a class-based classification) and its ends (the social or private objective it seeks to achieve).²⁵² A functionalist reading of “because of sex” proposes making a similar shift; instead of debating over whether the plaintiff is a true male or female or over the real meaning of sex or gender, the focus of examination should be the reasonableness of the relationship between the discriminatory act and the objective that the act sought to achieve.

Because Title VII is a strong interpretative source for Title IX, it makes sense to identify a “functionalist” mechanism in Title VII and to follow its logic of operation as an interpretative source.²⁵³ One such important mechanism is the BFOQ defense, which serves as one major exception to the general antidiscrimination principle. Put simply, an employer may rely on a forbidden criterion when it is closely related to the ability to do the job.²⁵⁴ The BFOQ applies to suspect characteristics such as religion, sex, or national origin,²⁵⁵ but there can be others.²⁵⁶

²⁵² See, e.g., Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449, 449–51 (1988) (discussing levels of means-end scrutiny).

²⁵³ See DEP’T OF JUSTICE, OVERVIEW OF TITLE IX: INTERPLAY WITH TITLE VI, SECTION 504, TITLE VII, AND THE FOURTEENTH AMENDMENT, <http://www.justice.gov/crt/title-ix#I> [<http://perma.cc/47gh-5xuk>] (“Because of this close connection between the statutes, Title VI legal precedent provides some important guidance for the application of Title IX.”).

²⁵⁴ STEVEN L. WILLBORN, EMPLOYMENT LAW: CASES AND MATERIALS 436 (5th ed. 2012).

²⁵⁵ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e)(1) (1988) (“It shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .”).

²⁵⁶ For example, when an employer uses age as a proxy for safe operation. See *Western Air Lines, Inc. v. Criswell*, 105 S. Ct. 2743, 2752 (1985) (“Alternatively, the employer could establish that age was a legitimate proxy for the safety-related job qualifications by proving that it is impossible or highly impractical to deal with the older employees on an individualized basis.”) (internal quotations omitted).

In the context of sex, courts interpret the BFOQ defense narrowly²⁵⁷ and follow three main steps. The first is an objective rationality test, which requires that the employer have a *basis in fact* to believe that the sex discrimination is *reasonably necessary* to the normal operation of the business and “not merely reasonable or convenient.”²⁵⁸ The second is an essence test and requires that the “*essence* of the business operation would be undermined by not hiring members of one sex exclusively.”²⁵⁹ The third is a necessity test, which requires the employer to show there were no alternative means to achieve the objectives without sex discrimination.²⁶⁰ Clearly, when directors seek to cast an actor or actress for a specific role, they have an easier time successfully crossing the three-step threshold; however, what about jobs for which sex characteristics play less of a clear role with respect to the essential characteristics of the job?

Courts have recognized five categories in which policies that discriminate on the basis of sex received a BFOQ defense: (1) jobs requiring authenticity or genuineness in representation, (2) sex appeal, (3) psychosexual requirements, (4) privacy, and (5) the maintenance of prison security.²⁶¹ Accordingly, judicial experience and analysis of the BFOQ defense can help guide functionalist thinking about issues that continually arise in the bathroom context: safety and privacy.

1. *Safety of Females in Prisons*

Discussions of safety under the BFOQ framework have illustrated a paternalistic impulse that seeks to protect women’s welfare, fertility, and so on.²⁶² Similarly, women’s hygiene and physical vulnerability were also foundational justifications for the creation of sex-segregated bathrooms.²⁶³ These types of justifications illustrate the slippery line between *protection* and *discrimination*, which was redrawn constantly throughout the last century.²⁶⁴

²⁵⁷ See, e.g., *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991) (“The BFOQ defense is written narrowly, and this Court has read it narrowly.”).

²⁵⁸ See, e.g., *Everson v. Mich. Dep’t of Corr.*, 391 F.3d 737, 748 (6th Cir. 2004).

²⁵⁹ See *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971).

²⁶⁰ See *Reed v. Cty. of Casey*, 184 F.3d 597, 600 (6th Cir. 1999) (“Defendant Casey County has the burden of establishing that no reasonable alternatives existed other than transferring the plaintiff to the third shift.”).

²⁶¹ See Michael L. Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025, 1059 (1976).

²⁶² See e.g., *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 204–06 (1991); *Everts v. Sushi Brokers LLC*, 247 F. Supp. 3d 1075, 1078 (D. Ariz. 2017); *E.E.O.C. v. Catholic Healthcare W.*, 530 F. Supp. 2d 1096, 1105 (C.D. Cal. 2008).

²⁶³ See Terry S. Kogan, *Sex Separation - The Cure-All for Victorian Social Anxiety, in TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING* 156–57 (Harvey, Molotch, Laura & Noren eds., 2010).

²⁶⁴ See Tracy E. Higgins, “*By Reason of Their Sex*”: *Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536, 1542–47 (1995).

Women who were consistently excluded from the public sphere through protective justifications, were gradually included in the public sphere in antidiscrimination measures when authorities revoked claims about women’s vulnerabilities.²⁶⁵

Similar issues arose in a class action suit filed against an employer who barred all women workers, except for those who proved they were not fertile, from jobs that involved possible exposure to high levels of lead that could potentially harm a fetus.²⁶⁶ The Supreme Court did not accept the employer’s BFOQ defense, explaining that the term “occupational” refers to “qualifications that affect an employee’s ability to do the job.”²⁶⁷ The qualification can be reasonably necessary only if it limits the ability of the worker to perform the job, which was not the case.²⁶⁸ Protectionist justifications regarding the welfare of future generations or the procreation capacity of female workers were rejected as being unrelated to the essence of the job.²⁶⁹ This case demonstrates that the “essence test” can take us a long way in exposing protectionist assumptions without having to deny or argue over the reproductive capabilities of women. The approach is more inclined to examine the relationship between the means and the ends. Similarly, whereas biological characteristics may be found relevant to some forms of labor, it can still be found irrelevant for other forms.

Another more common strand of the safety justification is the need to protect women from the risk of sexual assault. The fear of male aggression has long played an important role in shaping the public space and the position of women within it.²⁷⁰ Justifications for sex-segregated spaces are often grounded on the need to protect women and girls from sex predators.²⁷¹ This has also been a strong and recurring argument arising in both conservative

²⁶⁵ *Id.* at 1549–50.

²⁶⁶ *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 192 (1991).

²⁶⁷ *Id.* at 201.

²⁶⁸ *See id.* at 204.

²⁶⁹ *See id.* at 206 (“[P]rofessed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility. Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents.”).

²⁷⁰ *See* Rachel H. Pain, *Social Geographies of Women’s Fear of Crime*, 22 *TRANSACTIONS OF THE INST. OF BRITISH GEOGRAPHERS* 231, 234–36 (1997); Per E. Gustafson, *Gender Differences in Risk Perception: Theoretical and Methodological Perspectives*, 18 *RISK ANALYSIS* 805, 810 (1998). For the proliferation of women-only spaces, *see* Marc Lacey, *On Single-Sex Buses, Relief from Unwanted Contact*, *N.Y. TIMES* (Feb. 11, 2008), <http://www.nytimes.com/2008/02/11/world/americas/11mexico.html> [https://perma.cc/ZV2E-ASFJ]; Priyanka Roy & Saionee Chakraborty, *Life in a Ladies’ Metro*, *TELEGRAPH* (Sep. 7, 2008), https://www.telegraphindia.com/1080907/jsp/calcutta/story_9796361.jsp [https://perma.cc/4YCU-QZHH].

²⁷¹ The safe-space ideal has received virtual expression in the creation of closed groups on social media. *See* Susan Herring et al., *Searching for Safety Online: Managing “Trolling” in a Feminist Forum*, 18 *THE INFORMATION SOCIETY* 371, 373 (2002).

and feminist briefs in *Grimm*.²⁷² The prominent claim in this respect is not that transgender students are more inclined to be violent in bathrooms, a claim that has no empirical grounding.²⁷³ The argument says that the proposed policy provides no safeguards from male predators entering females' bathrooms: "[W]omen will lose their physical privacy and face an increased risk of sexual assault. This redefinition allows *any* man to justify his presence in *any* women-only space simply by uttering the magic words: 'I identify as a woman.'" ²⁷⁴ Some sexual assault victims expressed a similar sentiment when arguing that their well-being is endangered by the possibility of running into a biological male in bathrooms.²⁷⁵

The fear of male sexual aggression is extensively discussed in the context of prison employment decisions.²⁷⁶ Case law demonstrates that the functionalist intuition embedded within the BFOQ analysis framework leaves room for a specified and particular examination of the hiring policy with respect to the special conditions of the job and risks the job poses.²⁷⁷ Accordingly, court decisions analyzing similar questions did not produce uniform restrictions or permissions.²⁷⁸ Therefore, we might find decisions that uphold

²⁷² See Brief of Amici Curiae Women's Liberation Front and Family Policy Alliance in Support of Petitioner at 2, Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 192762; see also Brief for Petitioner, Public Safety Experts Amici Curiae Supporting Petitioner at 9 and 13, Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 104592 ("Male sex offenders are likely to engage in harmful exhibitionism and voyeurism . . . Substantial evidence shows documented sex offenses taking place in gender-identity-based access facilities.").

²⁷³ For a review of the empirical data regarding the harm, fear of crime, and risk arguments often brought against bathroom inclusion, see Robin Fretwell Wilson, *The Nonsense About Bathrooms: How Purported Concerns over Safety Block LGBT Nondiscrimination Laws and Obscure Real Religious Liberty Concerns*, 20 LEWIS & CLARK L. REV. 1337, 1400-04 (2017).

²⁷⁴ Brief of Amici Curiae Women's Liberation Front and Family Policy Alliance in Support of Petitioner at 2, Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 192762.

²⁷⁵ For testimony of women reacting to the possibility of encountering a biological male in bathrooms, see, e.g., Brief for Neither Party at 11, Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 74871 ("Recently, while exiting a stall in a public women's restroom, I encountered a biological male. While the man was polite and left without incident, I suffered extreme fear, embarrassment, and anxiety as a result of the encounter.").

²⁷⁶ See, e.g., Westchester Cty. Corr. v. Cty. of Westchester, 346 F. Supp. 2d 527, 535 (S.D.N.Y. 2004); *Everson v. Mich. Dep't of Corr.*, 391 F.3d 737, 742 (6th Cir. 2004); *Torres v. Wisconsin Dep't of Health & Soc. Servs.*, 859 F.2d 1523, 1530 (7th Cir. 1988); *Reese v. Mich. Dep't of Corr.*, No. 08-10261, 2009 WL 799173, at *8-11 (E.D. Mich. Mar. 24, 2009); *Ambat v. City of San Francisco*, 757 F.3d 1017, 1028 (9th Cir. 2014); *Teamsters Local Union No. 117 v. Washington Dep't of Corr.*, 789 F.3d 979, 981 (9th Cir. 2015).

²⁷⁷ See, e.g., *Everson v. Mich. Dep't of Corr.*, 391 F.3d 737, 759 (6th Cir. 2004).

²⁷⁸ See, e.g., *Reese v. Mich. Dep't of Corr.*, No. 08-10261, 2009 WL 799173, at *13 (E.D. Mich. Mar. 24, 2009) ("[T]he Court notes that the BFOQ defense generally requires a 'case-by-case' analysis and that *Everson* itself was decided only after a full bench trial . . . The Sixth Circuit clearly did not intend *Everson* to act as a blanket future

or reject sex-based hiring policies in both male and female prisons interchangeably.

The Nevada Department of Corrections (NDOC) excluded men from the correctional lieutenant positions in a female facility, alleging a BFOQ defense.²⁷⁹ According to the general inspector’s report that was also covered in the media, the Southern Nevada Women’s Correctional Facility had become an “uninhibited sexual environment” with sexual relationships and bargains between female inmates and male guards.²⁸⁰ To mitigate the bad publicity, this facility and three others were staffed with mostly female guards. The job posting for correctional lieutenant stated, “[O]nly female applicants will be accepted for these positions[.]”²⁸¹ The NDOC director offered justifications for the exclusion of men from the position, including that male lieutenants created a “real risk” of sexual assault against female inmates and were likely to condone sexual assaults by peer male lieutenants, whereas females were more inclined to “monitor and discipline the wrongful conduct of correctional subordinates” by nature of their womanhood.²⁸²

The court did not accept these theories, first because NDOC failed to show that “all or nearly all” men would tolerate sexual abuse of inmates by their peers and second because there was no “basis in fact” to show that guards were more likely to sexually abuse women.²⁸³ All theories, the court said, were non-proven and based on invidious stereotypes.²⁸⁴ The court differentiated this case from *Dothard*, a Supreme Court decision upholding a BFOQ decision to hire males only for a prison guard position.²⁸⁵ In *Dothard* the prison environment suffered from extreme levels of violence, significant physical interaction of inmates with guards, and an inmate population consisting substantially of sex offenders, leading the court to conclude that “sex was related to the guard’s ability to do the job—maintaining prison security.”²⁸⁶ The prison met the burden of showing “a high correlation between sex and ability to perform job functions.”²⁸⁷ The court in Nevada, however, concluded that the theories offered by NDOC were based on unsupported stereotypes regarding males inherent “apt to sexually abuse or condone sexual abuse of female inmates.”²⁸⁸ Accordingly, because a BFOQ policy could be justified only through “objective, verifiable requirements [that] concern

authorization for the MDOC to proscribe males from filling positions at its female prisons.”).

²⁷⁹ *Breiner v. Nevada Dep’t of Corr.*, 610 F.3d 1202, 1204–05 (9th Cir. 2010).

²⁸⁰ *Id.*

²⁸¹ *Id.* at 1205.

²⁸² *Id.* at 1210–11.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 1211–15.

²⁸⁶ *Id.* at 1211–12 (quoting *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 202 (1991)).

²⁸⁷ *Id.* at 1213 (quoting *Johnson Controls*, 499 U.S. at 202).

²⁸⁸ *Id.* at 1215–16.

job-related skills and aptitudes,”²⁸⁹ NDOC’s discriminating policy could not be upheld.

The ability to arrive at different conclusions on principally similar issues is possible due to the sensitivity of the BFOQ framework to particular circumstances. Despite the requirement for objective evidence, the BFOQ mechanism leaves much room for subjectivity. First, the judge must consider the “particular circumstances of the individual employer, and not simply rely on generalizations about an industry or a group of employers.”²⁹⁰ Second, the judge has the discretion and capacity to rely on different types of evidence, both generalized expert findings and more particular experiences and estimations of personnel from the facility itself.²⁹¹ Accordingly, although a women-only hiring policy for a female facility was not a BFOQ in NDOC, it was nevertheless accepted as a BFOQ in *Everson v. Michigan*, in which the position required observing inmates in the showers and toilets and where the risk of abuse was shown to be reasonably calculated and based on past allegations.²⁹²

2. *Privacy of Patients*

The conservative argument against a gender-based bathroom rule asks that children are not exposed to the opposite sex’s genitals: “[T]hese facilities are separated based on sex because we do not want our children exposed, when they are showering or undressing, to individuals with the *anatomical features*—in particular, the reproductive organs—of the opposite sex.”²⁹³

The privacy of body parts was recognized as an interest that justified providing a BFOQ defense, for example, when filling nursing positions.²⁹⁴ A male nurse established a *prima facie* case of discrimination after he was denied a position at a retirement home.²⁹⁵ The court accepted the retirement home’s BFOQ defense based on the privacy rights of its guests, as 22 out of 30 guests were females whom the home believed would refuse to have their personal needs attended to by a male nurse’s aide, and because some of the guests had testified that they would leave the facility if they were attended to by male nurses.²⁹⁶ One of the additional steps examined within the privacy context is whether the employer was able “to avoid the conflict between the

²⁸⁹ *Id.* (quoting *Johnson Controls*, 499 U.S. at 201).

²⁹⁰ *Everson v. Mich. Dep’t of Corr.*, 391 F.3d 737, 760 (6th Cir. 2004).

²⁹¹ *Id.* (quoting *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 132 (3d Cir. 1996) (“[A]ppraisals need not be based on objective, empirical evidence, and common sense and deference to experts in the field may be used’ to establish a BFOQ.”)).

²⁹² *Everson*, 391 F.3d at 755–59.

²⁹³ Brief of Amicus Curiae William J. Bennett in Support of Petitioner at 21, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 167309.

²⁹⁴ *See, e.g., Fesel v. Masonic Home of Del.*, 447 F. Supp. 1346, 1352-53 (D. Del. 1978).

²⁹⁵ *Id.* at 1349.

²⁹⁶ *Id.* at 1352.

privacy rights of the customers and the nondiscrimination principle of Title VII by selective job responsibilities rather than total exclusion of members of one sex.”²⁹⁷ The court accepted the retirement home’s argument, that due to the disproportionate number of female guests in the facility, and because shifts were composed of one to two nurses, hiring male nurses was not feasible.²⁹⁸

Similar to safety and its attendant concerns, privacy is not taken at face value. The process of scrutiny for privacy issues can begin by examining the extent to which workers will need to be in physical contact with clients/patients, especially when they are undressed. For example, a female child-care specialist at Southwood Psychiatric Hospital filed a Title VII claim because she was placed in the undesirable night shift to fulfill the objective of a gender-balanced staff.²⁹⁹ The court upheld Southwood’s BFOQ defense, partly because some of the patients were adolescents who could discuss more freely with a staff member of their own sex questions of “hygiene, menstrual, and sexuality concerns.”³⁰⁰ Additionally, “[c]hild patients often must be accompanied to the bathroom, and sometimes must be bathed.”³⁰¹ Similar judicial inquiries were applied in other contexts that addressed privacy-based BFOQ defenses, such as in prisons, in locker rooms, sales positions requiring the fitting and measuring of customers for clothing, and so on.³⁰²

B. Back to Bathrooms: Applying a Functional Perspective

In this section, I argue that a functionalist examination of “on the basis of sex” in the spirit of the BFOQ framework is possible within existing Title IX framework and without having to decide what “sex” *really* is. In order to establish a case of discrimination under Title IX a plaintiff has to demonstrate that (1) the student was subjected to discrimination in an educational activity or program that receives Federal funding (2) the discrimination was “on the basis of sex” and (3) the discrimination caused harm.³⁰³ A functional approach would cast a wide net over policies, possibly “on the basis of sex” but will not stop there. Instead, it will continue with the review process in spirit of the BFOQ approach to examine privacy and safety concerns. This approach will make the “because of sex” test easier to fulfil in some ways (because it casts a wide net using the phrase “sex” in the law in accordance with the contested essentialism approach); but also, harder to fulfil in some

²⁹⁷ *Id.* at 1351.

²⁹⁸ *Id.* at 1353.

²⁹⁹ *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 130 (3d Cir. 1996).

³⁰⁰ *Id.* at 133.

³⁰¹ *Id.*

³⁰² *Sirota*, *supra* note 261, at 1061–64.

³⁰³ *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty., Fla.*, 318 F. Supp. 3d 1293, 1320 (M.D. Fla. 2018).

ways (because showing that a policy discriminates on the basis of sex/gender would not satisfy the review, but only shift the burden to schools to justify their policy). The “because of sex” test could be comprised of two questions:

1. *Is the Bathroom Policy Discriminating “on the basis of sex”?*

Based on my critic of the epistemic disagreement over the meaning of sex between politically opposing groups, I argued in this paper that this test should be easy to satisfy. Despite the lack of disagreement, there are a number of ways to reach to the conclusion that a school bathroom policy is discriminating “because of sex” in the legal sense.

First, when an educational program designs a policy that relies on one of the exemptions to Title IX’s sex antidiscrimination rule, it also expressly admits to the use of “sex” as a classification mechanism. Exemptions to the sex antidiscrimination rule exist in Title IX in many fields, such as single-sex admissions policies and membership policies of certain university-based social fraternities and sororities, the Girl and Boy Scouts, and other such single-sex organizations.³⁰⁴ Accordingly, because Gloucester County School Board justifies its policy relying on the 1975 statutory permission to discriminate in bathrooms and lockers based on “sex,” the policy can be considered to be “on the basis of sex,” regardless of whether both sides to the lawsuit agree on the meaning of sex.

The second, more elusive case, is where the program or educator does not admit to discriminating “on the basis of sex” but rather denies that any “suspect” quality is guiding the classification made by the school/educator. However, in this case, too, there is a route to concluding it was on the basis of sex without having to agree on what “sex” *is*. By requesting the school/educator to specify the exact qualities that it uses for its classification, the court could examine whether or not the classification is indeed “on the basis of sex.” For example, if the policy separates students into classes based on their academic progress, it is likely not discrimination on the basis of sex. But if it separates students based on the existence of body parts, their shape, or any of the essential characteristics in the non-agreed-upon list of what constitutes sex, then it doesn’t matter whether the educational program calls it “sex.” For example, although Gloucester County School Board used the phrase “biological gender” without explaining what it means,³⁰⁵ in practice,

³⁰⁴ *Synopsis of Legislative History and Purpose of Title IX*, DEP’T OF JUSTICE, <https://www.justice.gov/crt/title-ix#2.%C2%A0%C2%A0> [<https://perma.cc/BY8Z-T9LE>]. Recently, the Boy Scouts of America opened membership to transgender boys. See Katie Zezima, *Boy Scouts of America will allow transgender children to join*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/01/30/boy-scouts-of-america-will-allow-transgender-children-to-join/?utm_term=.6b690bfd2b8c [<https://perma.cc/627F-WJUA>].

³⁰⁵ *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 716 (4th Cir. 2016). (“It shall be the practice of the GCPS to provide male and female restroom and

the policy was probably intended to classify students according to anatomical sex characteristics, as can be learned from court filings by the school board, homing in on G.G.’s anatomical shape.³⁰⁶ In the Title VII context, explicit discrimination on the basis of “gender” is actually enough to be considered facial discrimination on the basis of “sex”;³⁰⁷ however, a simple reading of the policy beyond its title and analyzing the respondent’s full explanation would allow a court to understand whether the respondent was actually targeting “sex” in its flexible and non-agreed-upon meaning.

A third way, emerging from recent case law in which transgender students challenge school bathroom policies suggest that the “because of sex” test has already been somewhat eased. Instead of diving into the interpretative controversy regarding the meaning of “sex” in Title IX and taking a position on whether it includes gender identity, courts that are confronted with the question slightly reframe it. Usually discussing the question under a motion for injunctive relief filed by the student asking to inhibit the enforcement of discriminating bathroom policies, Courts look at whether the challenged bathroom policy violates Title IX by discriminating transgender students on the basis of sex.³⁰⁸ Put differently, instead of deciding if the word “sex” in Title IX includes gender, they are interested in whether Title IX protects transgender students from discrimination. Given the lack of consensus regarding the meaning of sex in Title IX, courts seem to be satisfied by the *possibility* that transgender students are protected from discrimination under Title IX based on their trans status and/or sex-stereotyping theory, and therefore, a policy that requires trans students to use bathrooms separated based on biological sex, satisfies the “on the basis of sex” test.³⁰⁹

locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.”).

³⁰⁶ See, e.g., Gloucester Cty. Sch. Bd.’s Reply Br. in Supp. of Mot. to Dismiss at 1, 5–7, G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd. (E.D. Va. 2015) (No. 4:15-cv-00054-RGD-TEM), 2015 WL 52778. “Anatomical characteristics” are often intercepted to address genitalia. One brief supporting Gloucester School for example, argued that genitals were only one criterion among others such as functionality of reproductive organ. See Brief of Transgender Students and Allies as Amicus Curiae at 14–15, Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 192454.

³⁰⁷ See Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 132 (3d Cir. 1996) (“When open and explicit use of gender is employed, as is the case here, the systematic discrimination is in effect ‘admitted’ by the employer, and the case will turn on whether such overt disparate treatment is for some reason justified under Title VII.”).

³⁰⁸ See, e.g., Adams by & through Kasper v. Sch. Bd. of St. Johns Cty., Fla., 318 F. Supp. 3d 1293, 1320–21 (M.D. Fla. 2018) (“as in a number of other cases where transgender students have raised Title IX challenges to their school’s bathroom policies, the issue here is whether the bathroom policy which excludes Adams from the boys’ restroom based on his transgender status is discrimination “on the basis of sex” as used in Title IX and its implementing regulations.”).

³⁰⁹ *Id.*; see also Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1050 (7th Cir. 2017), cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker, 138 S. Ct. 1260 (2018) (finding that the Title IX claim likely to succeed on merits based on sex-stereotyping

2. *Is the Bathroom Policy Nevertheless Justified?*

If a policy is found to be “on the basis of sex,” a functionalist reading would move on to analyze the policy, rather than declare that the policy is illegitimate. The BFOQ framework suggests tests that check the strength and rationality of the relationship between the objectives of the policy and the particular essential characteristic identified by the alleged discriminator. The BFOQ framework also requires rigorous standards of proof to demonstrate necessity, and lack of alternatives.

Although toilets and bathrooms are traditional “safe havens” of protected privacy rights, the functionalist approach applied in the BFOQ framework provides tools with which to examine how safety and privacy are affected. In the bathroom context, the framework tells us to inquire what, if any, is the level of exposure in the relevant bathroom facility, what evidence do we have to demonstrate how people will react to sharing a bathroom with a transgender student, and are there alternatives to imposing complete exclusion? School management literature on bathroom design from recent years describes a trend toward more privacy in bathrooms and locker rooms and the elimination of “bank” or “gang” bathrooms in schools.³¹⁰ Efforts to provide more privacy in the design of school bathrooms suggests that privacy levels are fluctuating among schools, with encouraging prospects for those who care about individual privacy. In fact, the Gloucester School Board announced it is taking similar measures at its own school: “the Board announced a series of updates to the school’s restrooms to improve general privacy for all students, including adding or expanding partitions between urinals in male restrooms, adding privacy strips to the doors of stalls in all restrooms, and constructing single-stall unisex restrooms available to all students.”³¹¹ That means that a bathroom policy could be examined more nar-

theory); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 712 (D. Md. 2018) (finding that the Title IX claim is likely to succeed on merits based on ‘transgender status’); *A.H. by Handling v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 328–30 (M.D. Pa. 2017) (finding that the Title IX claim is likely to succeed on merits based on sex-stereotyping theory and past Title VII sex jurisprudence doctrine); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 715 (D. Md. 2018) (finding that the Title IX claim is likely to succeed on merits based on sex-stereotyping theory and transgender status, but unlikely to pass the irreparable harm test); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ.*, 208 F. Supp. 3d 850, 870 (S.D. Ohio 2016) (finding that the Title IX claim is likely to succeed on merits based on sex-stereotyping theory, transgender status, and ambiguity of meaning of sex in Title IX).

³¹⁰ Ellen Kollie, *Best Design for Restrooms, Locker Rooms*, 53 SCH. PLAN. & MGMT. 20, 23 (Jul. 2014); Ellen Kollie, *Rethinking Restroom, Shower Room and Locker Room Design*, 56 SCH. PLAN. & MGMT. 28, 31 (May 2017).

³¹¹ *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 716 (4th Cir. 2016); Amici curia briefs also proposed that accommodating privacy needs of transgender students would enhance privacy for *all* students, *see* Brief of Amici Curiae School Administrators from California, District of Columbia, Florida, Illinois, Kentucky, Massachusetts, Minnesota, New York, Oregon, Washington, and Wisconsin at 21–26, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729 (4th Cir. 2017) (No. 15-2056), 2015 WL 6585235; Brief of Amicus Curiae David Boyle at 4–6, *Gloucester Cty. Sch. Bd.*

rowly based on particular privacy conditions in bathrooms around the country, and according to the guiding questions laid out in the BFOQ court discussions: what is the level of exposure inside bathrooms? how sufficient are partitions between bathroom stalls/lockers? are there reasonable alternatives for students who wish to avoid exposure to others/of themselves? and so on.

These types of inquiries can also guide questions of safety. The BFOQ framework requires that employers support their claim of a risk of sexual assaults empirically and convincingly, and not rely on general statistics or theoretical potential of abuse. One could, for example, look at the experience collected from any schools in the area that adopted a transgender inclusive bathroom policy to assess if there is an actual risk to violent incidents, voyeurism or sexual assault in schools with similar conditions. Another good source for evidence, could be the experience collected in the school under review, if a transgender inclusive bathroom policy was in place for some time before it was challenged in court. If during that period, safety or privacy concerns did not materialize into problems, that can indicate that the concern is not grounded enough to justify the policy. Of course, the review can lead to different outcomes. For example, if there are strong evidence demonstrating likelihood to violent incidents; or lack of single-stall alternatives for either transgender or cisgender students; or bathrooms built or located in such a way that complicates providing assistance to vulnerable students in case of need, may be found to justify a discriminating policy at a school. Assuming that a claim of risk is sufficiently presented, the next step of the inquiry should ask whether the exclusionary policy indeed decreases the risk to sexual assault and whether there are any alternative paths to this goal, to assure that it is reasonably necessary, rational, and proportionate. Applying such a review process, I presume, would make it very hard for schools to justify a transgender non-inclusive bathroom policy, but not impossible. While the bar for proof is set high, the review process nevertheless provides schools with an opportunity to justify their policy and succeed if done convincingly.

3. *Foreseeable Complications with a Functionalist Approach*

The BFOQ framework attempts to strike a balance between two somewhat contradictory approaches. On the one hand it gives employers an opportunity to justify a discriminating policy based on their professional

v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 344432; Brief of interACT: Advocates for Intersex Youth, et al., as Amici Curiae, Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 930053; Brief of Transgender Students and Allies as Amici Curiae at 8, Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 836840; Brief for the City and County of San Francisco, the City of New York et al. as Amici Curiae at 3, Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 1057280.

knowledge and experience in the particular institution, giving strong weight to specific circumstances and estimations of local decision-makers; but on the other hand, it also requires employers to defend discriminating policies through objective and empirically grounded evidence about risk and probability of harm. The coexistence of these two authorities leaves much room for judicial discretion and unpredictability regarding which side of this double-edged sword will strike.

From the discretionary point of view, the functionalist approach offered here shifts much of the critical weight from the mere act of classification to the effects of the classification. This could mean good and bad news for both sides. Potential plaintiffs would not only have to demonstrate that they were discriminated against on the basis of sex simply by pointing to one of the essential characteristics, for instance, a policy that discriminates based on genital anatomy or secondary sex characteristics. The policy will also need to fail a functionality test. For that matter, schools with only “gang-style” bathrooms, which provide no single-stall options—with demonstrated material risks of harm caused by hostile students or others—may have these circumstances calculated within a functionalist review and uphold a policy requiring students to use bathrooms according to “biological sex.”

On the other hand, the BFOQ test imposes a heavy burden on schools to meet stringent evidentiary tests which schools would need to overcome to uphold policies that discriminate based on a suspect quality or characteristic. Nevertheless, this concern is alleviated by the relatively substantial space for particular circumstances and local context within the necessity and essence tests, which provide educators much leverage to assert their claims powerfully. In the prison context, for example, we saw that institutions are capable of rising to the high standard of proof, and that case results have been unpredictable and non-uniform, sometimes upholding the discriminatory policy. As demonstrated in the BFOQ doctrine, when addressing privacy and safety concerns, there are no blanket rules.

As a result, one may imagine the risk of further inflating the weight of experts and statisticians in the process, suggesting there is a “correct” and “rational” answer to any case, whereas a judicial decision, particularly on such matters, is fundamentally normative, as it distributes discomfort and adjustment costs between different groups. The act of blurring political positions via the authority of scientists and experts is currently occurring within the debate regarding the meaning of “sex.” Similarly, a framework that seeks strong empirical objective evidence to prove risk or necessity may just be shifting the experts’ authority from one set of questions to a different one, such as the questions of harm, risk, and probability. More important, however, is that expert authority is constantly used to depoliticize value judgments and to make them appear neutral and objective. A successful application of a functionalist approach would utilize expert opinions to gain a reliable fact-based description of how things *are* in order to make an independent and better-informed judicial decision regarding how things *ought* to

be—and it would not conflate the two objectives by delegating experts to the latter question as well.

CONCLUSION

Federal sex antidiscrimination doctrine was never clear about what “sex” actually means, not when Title VII or Title IX were enacted nor when courts interpreted the meaning of “sex” under both statutes. Within legal efforts to construct the meaning of “sex,” interest groups tried to shape the term based on their own agendas, whereas medical and scientific expertise failed to draw solid distinctions between the two sexes/genders, allowing conflicting versions to take root within vast populations. But even if we *knew* what constitutes maleness and femaleness to a high degree of certainty, would that even matter for the purpose of fighting wrongful discrimination and bias?

With “sex” having such a diffuse and unstable meaning among communities and individuals who are both victims and agents of discrimination, this article has offered to neglect the definitional project focused on “sex” in favor of a functionalist project, one that focuses on the results of classification rather than on the classification itself. Against the current bio-essentialist turn in federal antidiscrimination law, caused by the explosion in bathroom litigation and advocacy under Title IX since 2014, this article has offered that “sex” should be interpreted expansively to include what people in general think it means, including biological and sociological characteristics and conditions alike, without placing a priority on one approach over the other. Such a definition would be flexible enough to capture how people use “sex” in their lives in order to bring that use under substantive scrutiny, which can be satisfied or troubled according to the particular context. Although the offered “contested essentialism” interpretation of sex opens the “sex” category to all types of plaintiffs and conditions, it is nevertheless committed to the existence of the category of sex itself, thus leaving room in theory and in practice to recognize differences when relevant and necessary.