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You Can't Take It with You: Constitutional Consequences of Interstate Gender-Identity Rulings

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YOU CAN'T TAKE IT WITH YOU: CONSTITUTIONAL CONSEQUENCES OF INTERSTATE GENDER-IDENTITY RULINGS

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Abstract: Recent U.S. decisions establishing a person's legal sex have adopted a kaleidoscope of approaches that range from the procreative (a man must be able to fertilize ovum and beget offspring, while a woman must be able to produce ova and bear offspring), to the religious (gender is immutably fixed by our Creator at birth), to the scientific (gender itself is a fact that may be established by medical and other evidence). Under current laws and state court rulings, a male-to-female transsex person is legally a woman in approximately one-half of the states and legally a man in the other half. This Article discusses the constitutional implications of these varied approaches to determining a person's legal sex. It concludes that states that refuse to recognize a transsex person's sex as indicated on an amended birth certificate from a sister state violate principles of full faith and credit and unconstitutionally infringe upon the right to travel under the Dormant Commerce Clause. In addition, when states impose tests that are based on gender stereotypes and force people to live as the sex that conflicts with their self-identified sex, they violate the Fourteenth Amendment's equal protection and substantive due process mandates.

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INTRODUCTION

> Male and female represent the two sides of the great radical dualism. But in fact they are perpetually passing into one another. Fluid hardens to solid, solid rushes to fluid. There is no wholly masculine man, no purely feminine woman. — *Margaret Fuller*[1]

When Margaret Fuller wrote about the fluidity of gender, she was obviously referring to gendered personalities and not biological or anatomical sex. Her writings in the nineteenth century were more prescient than she could have imagined. Twenty-first-century science is now confirming that biological sex may be as fluid as gender behavior. Although most people have purely male or purely female biologic traits, millions of people have a mixture of male and female attributes.[2]

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1. WOMAN IN THE NINETEENTH CENTURY (1845), *available at* http://www.gutenberg.org/dirs/etext05/woman10.txt.

2. No one knows exactly how many people's sex is ambiguous, and estimates vary widely. A recent survey of the medical literature from the last half of the twentieth century estimates that the number of people who deviate from the sexually dimorphic norm may be as high as 1–2% of live births. *See* ANNE FAUSTO-STERLING, SEXING THE BODY 53 (2000); Melanie Blackless et al., *How Sexually Dimorphic Are We? Review & Synthesis*, 12 AM. J. OF HUM. BIOLOGY 151 (2000). Another expert maintains that one of every 300 male births involves some kind of genital abnormality. SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED 135 n.4 (1998). In *In re Heilig*, 816 A.2d 68 (Md. 2003), the court cited studies estimating rates of intersex births from one per 37,000 to three per 2000. *Id.* at 79. If 1–2% of the U.S. population is intersexed, that means that the law must determine the legal sex of approximately five million people. The effect of these legal

As long as laws continue to differentiate between men and women, legal institutions will be required to determine exactly what makes a man a man and what makes a woman a woman. Answering this question has become especially critical as courts and legislatures seek to ensure that marriage remains available to only opposite-sex couples.[3]

Legal institutions could avoid establishing tests for determining who qualifies as a male or a female for purposes of marriage if they were willing to legalize same-sex marriages. If they want to continue to ban same-sex couples from marrying,[4] however, they need to grapple with this definitional problem. Thus far, state legislatures have failed to include tests for determining sex in their marriage statutes. Instead, they have left it to the courts to determine a person's legal sex when a marriage is challenged based upon a person's inability to qualify as a husband or a wife.

In response to this challenge, U.S. courts have adopted a kaleidoscope of approaches that range from the excessively restrictive (a man must be able to fertilize ovum and beget offspring, while a woman must be able to produce ova and bear offspring),[5] to the religious (gender is immutably fixed by our Creator at birth),[6] to the scientific (gender itself

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determinations is even broader because it will also affect up to five million people who seek to marry someone of ambiguous sex.

3. Congress passed the Defense of Marriage Act (DOMA) in 1996. Pub. L. No. 104-199, 110 Stat. 2419 (1996). DOMA defines marriage at the federal level as a "legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7 (2000). In addition, Congress has considered, but thus far has failed to pass, a constitutional amendment defining marriage as "consist[ing] only of the union of a man and a woman." S.J. Res. 40, 108th Cong. (2004); H.R.J. Res. 56, 108th Cong. (2003). Most state statutes define marriage as a union between a man and a woman. In addition, eighteen states have approved constitutional amendments limiting marriage to heterosexual unions and at least an additional eleven states are considering adopting such an amendment. Kaven Peterson, *Same-sex unions—a constitutional race,* STATELINE.ORG, Sept. 8, 2005, http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=20695.

4. Thus far, only one state, Massachusetts, has ruled that the state must allow same-sex couples the right to marry. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). No other court or legislature has imposed a similar requirement and most states have adopted statutes or constitutional amendments specifically banning same-sex marriage. *See infra* note 202.

5. *See In re* Estate of Gardiner (*Gardiner II*), 42 P.3d 120, 135 (Kan. 2002), *rev'g In re* Estate of Gardiner (*Gardiner I*), 22 P.3d 1086 (Kan. Ct. App. 2001) (referring to dictionary definitions of "Male" and "Female").

6. *See* Littleton v. Prange, 9 S.W.3d 223, 224, 231 (Tex. App. 1999) (finding that sex status is determined at the time the birth certificate is recorded but introducing the opinion with the following question: "[C]an a physician change the gender of a person with scalpel, drugs and counseling or is a person's gender immutably fixed by our Creator at birth?").

is a fact that may be established by medical and other evidence).[7]

In other countries, judicial and legislative acts determining whether a transsex[8] person is legally a male or a female have been much more consistent. Reversing decades of precedent, which typically resulted in discriminatory treatment of transsex people,[9] international legal institutions have begun to recognize the legal right of gender self-determination. For example, in 2002, the European Court of Human Rights ruled that states that deny transsex persons the right to be recognized as their self-identified sex violate Articles 8 and 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[10] In 2004, the European Court of Justice made a similar ruling,[11] and Great Britain, which for decades had been one of the countries that provided sparse protection to transsex persons, passed sweeping legislation to provide legal rights that recognize and protect a person's self-identified sex.[12]

As courts and legislatures in the United States adopt diverse and contradictory approaches to defining male and female, the results can be bizarre and confusing when transsex people cross state lines only to find that their legal sex has changed according to the laws of a given jurisdiction.[13] Under current legislation and state court rulings, a male-

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7. *See Heilig*, 816 A.2d at 79.

8. The term "transgendered" is typically used to refer to anyone who does not fit into clear sex and/or gender categories. It includes transsex and intersex persons, as well as cross dressers and others who cross traditional gender boundaries. For purposes of this article, the term "transsexual" or "transsex person" refers to a person whose gender identity is not congruent with his or her biological birth markers, including chromosomes, gonads, internal and external morphology, hormones, and phenotype. An intersex person is someone whose biological markers are not clearly all male or all female.

9. See, for example, *Attorney Gen. v. Kevin*, (2003) 172 F.L.R. 300 (Austl.), which rejected the holding in *In the Marriage of C. and D. (falsely called C.)*, (1979) 35 F.L.R. 340. See also *Case of I. v. United Kingdom, App. No. 25680/94*, 36 Eur. H.R. Rep. 53 (2003), and *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1, which rejected the approaches in *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (1987), *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (1990), and *Sheffield & Horsham v. United Kingdom*, 1998-V Eur. Ct. H.R. 2011.

10. *See* Case of I. v. United Kingdom, App. No. 25680/94, 36 Eur. H.R. Rep. 53 (2003); Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1.

11. Case C-117/01, K.B. v. Nat'l Health Serv. Pensions Agency, 2004 E.C.R. I-541.

12. *See* Gender Recognition Act, 2004, c. 7 (Eng.).

13. A transsex person's legal sex for purposes of marriage varies by state. See *supra* notes 109–39 and accompanying text for a more detailed discussion of the marriage cases. In addition, a person's sex within a state could vary depending upon the issue being litigated. Courts may change the test for sex depending upon the purpose for which the term is being defined. The meaning of the terms "sex," "male," and "female," have been litigated in the following areas: marriage validity,

to-female transsex person is legally a woman in approximately one-half of the states and legally a man in the other half.[14] This situation raises a myriad of complicated legal questions. For example, if a male-to-female transsex person chooses to marry a man in New Jersey[15] and a woman in Kansas,[16] could she be prosecuted for bigamy in either state? Can she file federal or state joint tax returns with both spouses? If her spouse dies, can she inherit as a surviving spouse in both states?

More important than these questions of statutory law are the complex constitutional issues that are raised by these contradictory statutes and rulings. This Article explores the constitutional implications of the varied approaches to determining a person's legal sex. Part I explains why sex determination is a complicated medical subject that legal authorities must fully understand before they create rules for determining a person's sex. Part II provides a summary of the different legislative enactments and judicial approaches to sex determination. Part III provides an in-depth analysis of the constitutional implications of these rulings under the Full Faith and Credit, Dormant Commerce, Equal Protection, and Substantive Due Process clauses. Part III then argues that the current state-by-state sex-determination approach, which results in some people's sex changing when they cross state borders, violates all of these constitutional requirements. When courts refuse to recognize an amended birth certificate from a sister state, they violate principles of full faith and credit and unconstitutionally infringe upon the right to travel under the Dormant Commerce Clause. Furthermore, when states impose sex tests that are based on gender stereotypes and force people to live as the sex that conflicts with their self-identified sex, they violate the Fourteenth Amendment's equal protection and substantive due process mandates. As the science of sex and gender continues to evolve, the critical determination of a person's sex must take into account these complex constitutional issues.

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official documents, discrimination law, equal protection law, the right to participate in athletic events as a female, the right to be housed with other females in prison, and the ability and obligation to serve in the military. For a thorough discussion of these issues, see generally Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999).

14. *See infra* Part II.B.1.

15. A male-to-female transsex person is legally a woman in New Jersey and can legally marry a man. *See* M.T. v. J.T., 355 A.2d 204, 211 (N.J. 1976).

16. A male-to-female transsex person is legally a man in Kansas and can legally marry a woman. *See Gardiner II*, 42 P.3d 120, 137 (Kan. 2002).

I. THE MEDICAL DETERMINANTS OF SEX HAVE EVOLVED TO REFLECT SCIENTIFIC DEVELOPMENTS

Until sex reassignment surgery became available in the latter part of the twentieth century, legal institutions were not asked to determine whether a person was legally a man or a woman. Although recognition of the existence of intersex persons (formerly known as hermaphrodites) dates back to ancient Greek mythology,[17] early religious tracts,[18] and English jurists from the sixteenth century,[19] legal institutions did not begin to wrestle seriously with this issue until a little more than thirty-five years ago.[20] Similarly, until medical authorities began to understand the complex nature of sexual differentiation, medical literature on sex determination was also sparse. It was during the late nineteenth century and the early twentieth century that physicians began to try to establish what makes a man a man or a woman a woman.[21]

Medical experts now recognize that at least eight attributes contribute to a person's sex. These factors include genetic or chromosomal sex, gonadal sex (reproductive sex glands), internal morphologic sex (seminal vesicles, prostate, vagina, uterus, fallopian tubes), external morphologic sex (genitalia), hormonal sex, phenotypic sex (secondary sexual features such as facial hair or breasts), assigned sex and gender of

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17. Hermaphroditus was the son of Hermes and Aphrodite. The nymph Salmacis fell in love with him and entwined her arms around him and the gods molded the two bodies together. Ovid, *Salmacis and Hermaphroditus*, *in* THE POETRY ARCHIVE, http://www.poetry-archive.com/o/salmacis_and_hermaphroditus.html (last visited Oct. 10, 2005).

18. For example, ancient Jewish texts that set forth the rules governing relationships and behaviors among Jews discuss in detail the responsibilities of "androgynos" and "hermaphrodites." Rabbi Alfred Cohen, *Tumtum and Androgynous*, J. OF HALACHA & CONTEMP. SOC'Y, Fall 1999, http://www.daat.ac.il/daat/english/journal/cohen-1.htm. An early religious tract also referred to the ability of a hermaphrodite to contract marriage. *See* Henry A. Finlay, *Sexual Identity and the Law of Nullity*, 54 AUSTRL. L.J. 115, 120 n.51 (1980) (quoting JOSEPH FREISEN, GESCHICHTE DES KANONISHEN EHERECHTS 343–45 (Tübingen, Verlag & Druck von Franz Fues 1888)).

19. In the sixteenth century, Lord Coke, in writing about the laws of intestacy, stated: "Every heire is either a male, or female, or an hermaphrodite, that is both male and female. And an hermaphrodite (which is also called *Androgynus*) shall be heire, either as male or female, according to that kind of the sexe which doth prevaile." 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 8.a (Philadelphia, Johnson, Warner & Fisher 1812).

20. The earliest and probably the most cited case involving a marriage in which one of the parties was a transsex person was decided in England in 1970. *See* Corbett v. Corbett, (1970) 2 All E.R. 33 (P.).

21. *See* ALICE D. DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX 27–28 (1998) [hereinafter DREGER, HERMAPHRODITES].

rearing, and gender identity.[22] For most people, these eight factors are congruent and sex determination is not controversial. Millions of people, however, do not have congruent sex attributes and for them sex determination becomes problematic.[23] Although medical experts now agree that these eight factors all contribute to a person's sex, the attributes that have been used to differentiate men from women have varied over time and the issue is still a matter of great controversy.[24]

A. In the Late Nineteenth and Early Twentieth Centuries, Sex Was Determined by the Gonads

During the nineteenth century, scientists understood that male and female embryos begin with the same basic sexual features. They also knew that these sex attributes begin to differentiate *in utero* and continue to differentiate after birth.[25] By the 1870s, researchers understood that the female fetus's gonads develop into ovaries, while the male fetus's gonads become testicles. In addition, they knew that all fetuses start with both Mullerian and Wolffian systems.[26] In females, the Wolffian system

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22. *See* JOHN MONEY, SEX ERRORS OF THE BODY AND RELATED SYNDROMES: A GUIDE TO COUNSELING CHILDREN, ADOLESCENTS AND THEIR FAMILIES 4 (2d ed. 1994).

23. For a thorough discussion of sexual differentiation and intersex conditions, see Greenberg, *supra* note 13, at 278–92.

24. Medicine and law are not the only disciplines that have modified their sex test over time. Since the 1960s, when the International Olympic Committee (IOC) became concerned that some male athletes were trying to compete as women, the Olympic officials performed tests to determine whether female athletes were really males. They first tested sex by having the athletes parade nude in front of a panel of gynecologists. Simon Kuper, *When Sex Not Drugs Rocked the World of Athletics*, FINANCIAL TIMES, July 31, 2004, at 12. When sex chromosomes and the means to easily test the chromosomal structure became available, the Olympic officials switched to a buccal smear. If the buccal smear showed that a female athlete's chromosomal make-up was anything other than XX, she could be barred from the competition. *See* Albert de la Chapelle, *The Use and Misuse of Sex Chromatin Screening for Gender Identification of Female Athletes*, 256 JAMA 1920, 1920–21 (1986). The Olympic organizers abandoned routine sex testing for female athletes for the 2000 games in Sydney because they recognized that it is impossible to define with certainty who is a woman and who is a man. Kuper, *supra*, at 12. In addition, the IOC now allows male-to-female transsex persons to compete as females if they meet certain criteria. Steve Nearman, *Transsexual Ruling will Haunt IOC*, WASHINGTON TIMES, Nov. 16, 2003, at C13.

25. DREGER, HERMAPHRODITES, *supra* note 21 at 34.

26. Embryos start with neutral gonads that will later differentiate and become either female (ovaries) or male (testicles). In addition, they start with two duct systems, Mullerian and Wolffian. If the fetus is XX, no hormones are released and the Mullerian ducts develop into fallopian tubes, uterus, and upper portion of vagina, and the Wolffian ducts disappear. If the fetus is XY, the gonads produce both Mullerian Duct Inhibitor, which causes the Mullerian duct to disappear, and testosterone, which causes the Wolffian ducts to develop into the epididymis, vas deferens, and seminal vesicle. ROBERT POOL, EVE'S RIB: THE BIOLOGICAL ROOTS OF SEX DIFFERENCES 67

atrophies and the Mullerian system develops into the fallopian tubes, uterus, and vagina. In males, the Mullerian system atrophies while the Wolffian system develops into the deferent canals and the prostate.[27]

Although medical experts of this era knew that a variety of anatomical criteria could be used to determine a person's sex, they decided that the gonads should be the critical marker.[28] Therefore, they declared that people with ovaries are women and people with testicles are men. This singular focus on gonadal tissue, to the exclusion of other known sex attributes, was probably influenced by the critical role that the gonads play in the reproductive process.[29] During this time, many doctors argued that the organs that are responsible for the production of the spermatozoa and the ova are what truly differentiate men from women.[30] The "Age of the Gonads" was short-lived, however, and within fifty years, the focus began to shift to another sex attribute: the genitalia.

B. In the Second Half of the Twentieth Century, Medical Experts Believed that Genitalia Determined Sex

By the middle of the twentieth century, medical experts had rejected the gonads as the "true" sex indicator and instead started to focus on the appearance of the external genitalia.[31] Before the 1950s, if a newborn emerged with ambiguous genitalia, doctors would assign a sex to the infant that they believed was most appropriate and would not otherwise surgically or hormonally alter the child.[32]

During the middle of the twentieth century, however, the idea that gender identity was based upon nurture and not nature became the conventional wisdom.[33] In other words, most doctors, sociologists, and

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(1994).

27. DREGER, HERMAPHRODITES, *supra* note 21, at 34.

28. *Id.* at 150. By the end of the nineteenth century, medical experts in Great Britain and France believed the gonads were the true indicator of a person's sex. Before that time, medical experts employed a variety of tests. *Id.* at 139–46.

29. *Id.* at 150–51.

30. *Id.* at 151.

31. Alice Domurat Dreger, *A History of Intersexuality: From the Age of Gonads to the Age of Consent*, 9 J. CLINICAL ETHICS 345, 349 (1998) [hereinafter Dreger, *History of Intersexuality*].

32. *Id.*

33. *See, e.g.*, Joan G. Hampson et al., *Hermaphroditism: Recommendations Concerning Case Management*, 4 J. CLINICAL ENDOCRINOLOGY & METABOLISM 547, 549 (1956); John Money et al., *An Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism*, 97

psychologists believed that children were born without a sense of a male or female gender and that gender identity would develop consistently with the appearance of the child's genitalia and the gender role in which the child is raised.[34] Therefore, beginning in the 1950s, the standard protocol for treating newborns with ambiguous genitalia changed to a model of surgical alteration of "unacceptable" genitalia into "normal" genitalia.

Normal genitalia for boys required an "adequate" penis.[35] If doctors believed that the child had an adequate penis, the child was assigned the male role. A child without an adequate penis would be assigned the female role.[36] The penis became the essential determinant of sex because medical experts believed that a man could only be a true man if he possessed a penis that was capable of performing two acts: penetrating a vagina and being used to urinate while standing.[37] Medical technology at this time was capable of creating an "adequate" vagina (defined as one that was capable of being penetrated by an adequate penis), but the technology was not advanced enough to create a fully functional penis (one that was capable of penetrating a vagina). Therefore, surgeons would typically turn XY infants with small penises or infants with other genital ambiguity into girls.[38]

Under this protocol, some XY infants were surgically and hormonally altered and raised as girls because of the dominant belief that growing up

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BULL. JOHNS HOPKINS HOSP. 301, 309 (1955).

34. *See* Hampson et al., *supra* note 33, at 549; Money et al., *supra* note 33, at 308–09. In 1973, an article in Time Magazine stated that "conventional patterns of masculine and feminine behavior can be altered. [This study] casts doubt on the theory that major sex differences, psychological as well as anatomical, are immutably set by the genes at conception." Milton Diamond & Keith Sigmundson, *Sex Reassignment at Birth: Long-Term Review and Clinical Implications*, 151 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 298, 299 (1997) (quoting *Biological Imperatives*, TIME, Jan. 8, 1973, at 34). The study that Time Magazine was referring to was the report on the gender development of David Reimer. In 1997, the report was exposed as false. Diamond & Sigmundson use a pseudonym for David Reimer in their article. See *infra* notes 45–48 and accompanying text for a discussion of this study.

35. For a phallus to qualify as an adequate penis, most clinicians require that it be 2.5 centimeters (one inch) when stretched at birth. Alice Domurat Dreger, *A History of Intersex: From the Age of Gonads to the Age of Consent*, *in* INTERSEX IN THE AGE OF ETHICS 12 (Alice Domurat Dreger ed., 1999).

36. Alice D. Dreger, *"Ambiguous Sex"—or Ambivalent Medicine? Ethical Issues in the Treatment of Intersexuality*, HASTINGS CTR. REP., May–June 1998, at 24, 27–28 [hereinafter Dreger, *Ambiguous Sex*].

37. *Id.* at 29.

38. *See*, DREGER, HERMAPHRODITES, *supra* note 21, at 181–84; KESSLER, *supra* note 2, at 19; Dreger, *Ambiguous Sex*, *supra* note 36, at 27–28.

as a boy with an "inadequate" penis was too psychologically traumatic to risk. Some XY infants who had fully functional testicles and were therefore capable of reproducing had their ability to reproduce destroyed rather than raising them with a penis that was considered smaller than the norm.[39] XX infants with a phallus that appeared to be more similar to a penis than a clitoris were treated differently.[40] Instead of recommending that these children be raised as boys, doctors would surgically reduce the phallus to a size that they considered acceptable for a clitoris, even though the surgery might reduce or destroy the person's ability to have satisfactory sex.[41] In other words, the dominant protocol required that males be able to engage in acceptable sexual acts by penetrating a female's vagina. Females, however, had to be able to procreate if possible, even if they could not fully enjoy the act that leads to procreation.

C. *By the Turn of the Century, Scientific Developments Indicated that the Brain and Early Hormonal Influences Play a Key Role in Determining Sex*

During the latter part of the 1990s, a number of people began to question seriously the premises underlying the dominant treatment protocol for infants born with "ambiguous" genitalia. Although many in the medical community still believe that surgical and hormonal alteration of infants should be the norm,[42] many authorities, including experts in a variety of disciplines and intersex activist organizations, believe that the brain plays the primary role in determining gender self-identity. They are advocating an alternative approach to gender assignment. They have called for either a moratorium or a limitation on the use of infant genital surgery.[43] One of the primary reasons why they

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39. Dreger, *Ambiguous Sex*, *supra* note 36, at 28.

40. An acceptable clitoris is one that is less than one centimeter in length. Phalluses between one and 2.5–3 centimeters are considered unacceptable and must be surgically altered under current U.S. medical practice. ANNE FAUSTO-STERLING, SEXING THE BODY 59 (2000).

41. *Id.* at 61.

42. This model is still followed by the majority of physicians and recently received the support of the American Academy of Pediatrics. *See* Comm. on Genetics, Am. Acad. of Pediatrics, *Evaluation of the Newborn with Developmental Anomalies of the External Genitalia*, 106 PEDIATRICS 138 (2000).

43. *See, e.g.*, DREGER, HERMAPHRODITES, *supra* note 21, at 200 ("[C]hildren born intersexed can grow into adults who are comfortable with their bodies . . . ." When they reach the age of consent they should be allowed "to choose, if they so desire, surgical and hormonal treatments . . . ."); KESSLER, *supra* note 2, at 131 ("We need to consider different possibilities about how to manage

advocate a change to the current protocol is because recent studies of gender-identity development indicate that gender identity may be more dependent upon brain function and hormonal influences than the appearance of the genitalia.[44]

For example, in 1997, Milton Diamond and Keith Sigmundson published a follow-up report on David Reimer, a male infant who had been surgically altered and raised as a female after a botched circumcision in infancy irreparably harmed his penis.[45] Early reports about David indicated that he had happily adjusted to being raised as a girl, named Brenda. The earlier reports were exposed as false in the 1997 article.[46] Despite surgical and hormonal intervention and raising David as a female, David had always thought of himself as a boy. As a teen, he chose to have surgery and hormonal treatment so that he could return to living as a male.[47] In other words, despite the fact that David was told he was a girl, was raised as a girl, took female hormones, and had female genitalia and a female body, he still believed he was a boy.[48] This study and other similar reports show that gender identity is not as malleable as

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intersexuality, including the possibility of not managing it at all."); Justine M. Schober, *Feminizing Genitoplasty for Intersex*, *in* PEDIATRIC SURGERY AND UROLOGY: LONG TERM OUTCOMES 549, 556–57 (Mark D. Stringer et al., eds., 1998) (calling for extreme care in the determination); Hazel Glenn Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 MICH. J. GENDER & L. 1, 63 (2000) ("Waiting to see what the child desires is the most sensible approach . . . ."); Anne Fausto-Sterling, *The Five Sexes, Revisited*, SCIENCES, July–Aug. 2000, at 19, 21 ("[S]urgery on infants should be performed only to save the child's life or to substantially improve the child's physical well-being."); William Reiner, *To be Male or Female–That Is the Question*, 151 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 224, 225 (1997) ("In the end it is only the children themselves who can and must identify who and what they are.").

44. Other reasons that also justify calling a halt to such surgeries include: the surgeries are not medically necessary; the surgeries often result in scarring and pain; additional surgeries are often required; the surgeries often interfere with sexual satisfaction; the children often suffer from stigma and trauma by being treated as abnormal and in need of fixing; medically unnecessary surgery should not be used to relieve the anxiety of the parents of the intersex child; and the child's sense of autonomy may be harmed when she is old enough to understand the procedure and its consequences. *See* Julie A. Greenberg, *Legal Aspects of Gender Assignment*, 13 ENDOCRINOLOGIST 277 (2003).

45. *See* Diamond & Sigmundson, *supra* note 34. For a more complete story of David Reimer's life, see JOHN COLAPINTO, AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL (2000).

46. *See* Diamond & Sigmundson, *supra* note 34.

47. *Id.* at 300.

48. Sadly, David Reimer committed suicide in 2004, soon after his identical twin brother committed suicide. Colin McClelland, *Canadian Who was Born as Boy, Raised as a Girl Commits Suicide*, SEATTLE TIMES, May 13, 2004, at A-10.

was once believed.[49]

More recent studies continue to confirm that gender identity has less to do with physical attributes and more to do with brain development. In 2004, William Reiner and John Gearhart published a study tracing the gender-identity development of sixteen genetic males who were born with severe phallic inadequacy.[50] Following the dominant treatment protocol at the time, fourteen of the sixteen children were assigned the female sex and underwent surgical modification. Two were raised as males without any surgical intervention. The study indicated that the two children who were raised as males had an unambiguous male identity. Of the fourteen children raised as females, five were living as females, three were living with unclear gender identity (although two of the three had declared themselves male), and eight were living as males.[51] The researchers concluded that the appearance of the genitalia and the gender of rearing do not necessarily comport with a person's gender self-identity.[52] They found that the effect of prenatal androgens on the developing brain appears to be a major determinant of the development of a male identity.[53] They acknowledged that more research is necessary to determine the exact process that leads to gender identity because "the specific mechanisms of the development of male sex itself remain largely unknown."[54]

Two recent studies of the brains of transsex persons also indicate that gender identity has a neurobiological basis.[55] Researchers examined a portion of the brain that is understood to be sexually dimorphic.[56] They

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49. *See, e.g.*, Susan J. Bradley et al., *Experiment of Nurture: Ablatio Penis at 2 Months, Sex Reassignment at 7 Months, and a Psychosexual Follow-up in Young Adulthood*, 102 PEDIATRICS 1 (1998) (reporting on a boy who was turned into a girl at seven months who self-identifies as a bisexual female with recreational and occupational interests more typically identified with males); Bernardo Ochoa, *Trauma of the External Genitalia in Children: Amputation of the Penis and Emasculation*, 160 J. UROLOGY 1116 (1998) (describing a study of seven children in Colombia that was conducted between 1960 and 1995).

50. William G. Reiner & John P. Gearhart, *Discordant Sexual Identity in Some Genetic Males with Cloacal Exstrophy Assigned to Female Sex at Birth*, 350 NEW ENG. J. MED. 333 (2004).

51. *Id.* at 333.

52. *See id.* at 336–37.

53. *See id.* at 340.

54. *Id.*

55. Frank P.M. Kruijver et al., *Male to Female Transsexuals Have Female Neuron Numbers in the Limbic Nucleus*, 85 J. OF CLINICAL ENDOCRINOLOGY & METABOLISM 2034 (2000); Jiang-Ning Zhou et al., *A Sex Difference in the Human Brain and Its Relation to Transsexuality*, 378 NATURE 68 (1995).

56. Kruijver et al., *supra* note 55, at 2034.

found that the brains of male-to-female transsex persons were more similar to female brains than male brains.[57] The researchers concluded that sex differentiation of the brain could sometimes go in the opposite direction of the sexual development of the genitalia.[58] In other words, brain sex may not comport with genital sex due to neurobiological factors that exist during development.[59]

Based on these recent studies, a number of experts have concluded that gender identity may be formed in the womb based upon the developing brain's response to hormonal levels *in utero*.[60] There is evidence suggesting that the brain differentiates into "male" and "female" brains, just as the fetus's rudimentary sex organs differentiate into "male" and "female" genitalia.[61] Thus, some experts have rejected the dominant protocol of the late twentieth century that required genital-conforming surgery.

The scientific understanding of gender-identity formation continues to advance. The nineteenth century's singular reliance on the gonads shifted in the twentieth century to a model of a malleable gender identity that is dependent in large part on the appearance of the external genitalia. Although some experts still accept this model, recent studies indicate that the brain and early hormonal influences play a significant role in gender-identity formation. Although further studies are needed to fully understand this complex issue, current research confirms that gender identity is influenced by prenatal factors and that the eventual adult gender identity of an infant cannot necessarily be accurately predicted.

II. THE LEGAL DETERMINANTS OF SEX DO NOT ALWAYS MIRROR THE MEDICAL DEFINITIONS OF SEX

Just as the medical determinants of sex have developed over time, the legal definitions of "male" and "female" have also varied.[62] The legal

57. *Id.*

58. *See id.* at 2039–41.

59. *See* Zhou et al., *supra* note 55.

60. *See* Reiner & Gearhart, *supra* note 50, at 334.

61. *See* Diamond & Sigmundson, *supra* note 34, at 303 (quoted with approval in *In re* Heilig, 816 A.2d 68, 76 (Md. 2003).

62. This Article focuses on how sex is determined for purposes of marriage. Legal institutions may vary their test for sex determination depending upon the issue involved. For example, a person may be able to alter the sex indicated on her driver's license and passport so that the sex indicator reflects the holder's appearance, but a court may still rule that the sex legally indicated on an

sex determinants, however, have not necessarily reflected the scientific and medical advances that have enhanced our understanding of sex determination. Many legal institutions, including legislatures in more than twenty European countries, the European Court of Human Rights, the European Court of Justice, courts in Australia and New Zealand, and some state courts and legislatures in the United States, rely on scientific developments to guide them in their formation of the rules to determine legal sex. Other legal institutions, including many U.S. state courts, rely on a variety of other factors. Some recent decisions have ignored scientific developments about gender-identity formation in favor of Webster's dictionary,[63] references to God,[64] and references to older decisions that do not reflect the current understanding of sexual differentiation.[65]

A. From 1970 to 1995, the Sex Assigned at Birth Typically Determined Legal Sex

England was the first jurisdiction to rule on the issue of sex determination for purposes of marriage. The 1970 case of *Corbett v. Corbett*[66] involved a post-operative male-to-female transsex person who married a male. After only fourteen days together, the husband filed for a declaration that the marriage was void because it was an invalid same-sex marriage. The court engaged in a lengthy, in-depth analysis of the medical and psychological aspects of transsexualism and intersexuality.[67] Although the court acknowledged that medical professionals use more factors to determine the appropriate sex in which an individual should live, the court used only three factors to determine a person's sex for the purposes of marriage: chromosomes, gonads, and genitalia.[68] According to the *Corbett* court, chromosomal pattern,

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official document may be different from the person's sex for purposes of marriage. *See, e.g., Gardiner II*, 42 P.3d 120, 126, 137 (Kan. 2002). J'Noel Gardiner's birth certificate, driver's license, passport, health documents, and records at two universities indicate that J'Noel is a female, yet the Kansas Supreme Court determined that for purposes of marriage, she is a male. *Id.* at 123, 137. See Greenberg, *supra* note 13, at 308–25, for a discussion of sex determination for other purposes.

63. *See infra* notes 130–31 and accompanying text.

64. *See infra* notes 132–36 and accompanying text.

65. *See, e.g., Gardiner II*, 42 P.3d 120, 132–33 (Kan. 2002); Littleton v. Prange, 9 S.W.3d 223, 227 (Tex. App. 1999).

66. (1970) 2 All E.R. 33 (P.).

67. *Id.* at 42–46.

68. *Id.* at 44–45. In support of the test it developed, the court cited medical professionals who

gonadal sex, and genitalia define an individual's "true sex."[69] Because the transsex wife had male chromosomes (XY) at birth and at the time of the trial and male gonads (testicles) and genitals (penis) at birth, the court ruled that she was still legally a male for purposes of determining if her marriage to a man was legal.[70] The court opined that an individual's biological sex was assigned at birth and, barring an error, could not later be changed either medically or surgically.[71]

After the decision in *Corbett*, most of the courts that were asked to determine a person's legal sex for purposes of marriage followed *Corbett* and decided that transsex persons remain the sex they were assigned at birth. During the next twenty-five years, courts in New York,[72] Ohio,[73] Canada,[74] Singapore,[75] and South Africa[76] ruled that

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testified that individuals with congruent chromosomes, gonads, and genitalia are not true intersexuals if only their hormones or psychological sex are incongruent with these three factors. Other experts testified that transsexuals should be classified as intersexuals. *See id.* at 45.

69. *Id.* at 48. Until 2002, courts in England continued to apply this three-part test. *See, e.g.*, S.-T. (formerly J.) v. J., (1998) Fam. 103, 117; Rees v. United Kingdom, 106 Eur. Ct. H.R. (1987), *overruled by* Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1; Cossey v. United Kingdom, 184 Eur. Ct. H.R. (1990).

70. *Corbett*, 2 All E.R. at 48. In this case, all three factors were congruent so the court held that the respondent's sex was unambiguous. In many intersex conditions, these three factors are not congruent. The court acknowledged that its test may be difficult to apply in a case of intersexuality, and stated in dictum that greater weight should be given to genital criteria in such a case. *See id.*

71. *Id.* at 47.

72. In *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971), the court invalidated a marriage between a male and a male-to-female transsex person. It did not state which factors should be used to determine sex, but opined that "mere removal of the male organs would not, in and of itself, change a person into a true female." *Id.* at 500. Three years later, in *Frances B v. Mark B, formerly known as Marsha B.*, 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974), the court invalidated a marriage between a woman and a post-operative female-to-male transsex person. Once again, the court did not determine which factors should be used to determine sex. It held that physical incapacity for sexual relations is grounds for an annulment and determined that the transsex husband did not have the "necessary apparatus to enable defendant to function as a man for purposes of procreation." *Id.* at 717.

73. *In re* Ladrach, 513 N.E.2d 828, 832 (Ohio Prob. 1987) (holding that a post-operative male-to-female transsex person still retained male chromosomes and therefore could not marry in the female role because she was still legally a male).

74. In *C. (L.) v. C. (C.)*, [1992] 10 O.R.3d 254, a female-to-male transsex person who received hormone treatment, underwent a hysterectomy, and had her breasts surgically removed, married a woman. The court annulled the marriage and held that he could not qualify as a legal male because the external genitalia still appeared female. This decision is difficult to reconcile with the decision in *M. v. M. (A.)* [1984] 42 R.F.L. (2d) 55, 59–60 (P.E.I.), where the court held that a non-operative female-to-male transsex person who had all female attributes except her gender self-identity was male and could not legally marry a man because she had a latent inability to engage in heterosexual intercourse with a man.

75. Lim Ying v. Hiok Kian Ming Eric, [1991] SLR Lexis 184 (ruling that a person's legal sex is

post-operative transsex persons are legally the sex listed on their original birth certificate. In addition, the European Court of Human Rights held that a country's failure to allow post-operative transsex persons to marry in their self-identified gender role does not violate the Convention for the Protection of Human Rights and Fundamental Freedoms.[77]

The most disturbing ruling during this time came from a court in Australia. The case, *In the Marriage of C. and D. (falsely called C.)*,[78] involved a husband who was a true "hermaphrodite" with an XX chromosomal pattern and a combination of male and female biological aspects.[79] The couple had been married for twelve years and had raised two children, who were not the biological children of the husband.[80] The husband had undergone a number of surgeries to "correct" his external sex organs and to remove his breasts so that his external appearance would be male. The court granted the wife's petition for annulment on the grounds of mistake because she believed she was marrying a male. Although the husband had male gonads and genitalia, he had the chromosomal configuration typical of a female. Therefore, the court concluded that he was neither a male nor a female.[81]

During this time, only two jurisdictions, New Jersey[82] and New Zealand,[83] specifically rejected the *Corbett* test and used gender self-identity to determine a person's legal sex. In *M.T. v. J.T.*,[84] the New Jersey court conducted an in-depth analysis of how to determine an individual's sex for purposes of marriage. The court ruled that the post-

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established at birth and does not change based upon medical intervention).

76. In *W. v. W.* 1976 (2) SA 308 (W.L.D.) at 313–14, the court voided a marriage between a male and a post-operative male-to-female transsex person. Even though the marriage had been consummated, the court held that the wife had only "artificial" attributes of a woman and was therefore only a "pseudo-type of woman" who could not marry a man.

77. *See* Sheffield & Horsham v. United Kingdom, 1998-V Eur. Ct. H.R. 2011; Cossey v. United Kingdom, 184 Eur. Ct. H.R. (1990); Rees v. United Kingdom, 106 Eur. Ct. H.R. (1987), *overruled by* Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1.

78. (1979) 35 F.L.R. 340, *overruled by* Attorney Gen. v. Kevin (2003) 172 F.L.R. 300.

79. *Id.* at 342.

80. *Id.* at 341.

81. *Id.* at 345. The court stated: "I am satisfied on the evidence that the husband was neither man nor woman but was a combination of both, and a marriage in the true sense of the word . . . could not have taken place and does not exist." *Id.* As a non-man/non-woman, the implication of this court's holding is that he could not marry anyone at all.

82. M.T. v. J.T., 355 A.2d 204 (N.J. 1976).

83. Attorney Gen. v. Otahuhu Family Court, [1991] 1 N.Z.L.R. 603 (H.C.).

84. 355 A.2d 204 (N.J. 1976).

operative male-to-female wife was a woman for purposes of determining the validity of the marriage.[85] The court acknowledged that several criteria might be relevant in determining an individual's sex.[86] It also declared that in most instances external genitalia might be the most significant determinant of sex classification at birth.[87] The court distinguished sex classification at birth from other areas and found that for purposes such as public records, service in the military, participation in athletic competitions, and eligibility for certain kinds of employment, other tests in addition to genitalia may also be important.[88] The court decided that the most humane and accurate test for "true sex" for purposes of marriage would be to analyze both anatomy and gender identity.[89] If the genitalia conform to a person's gender identity, psyche, or psychological sex, then that will be the true sex for purposes of marriage.[90]

Similarly, in *Attorney General v. Otahuhu Family Court*,[91] the High Court of Wellington in New Zealand ruled that, for purposes of marriage, post-operative transsex persons acquire their post-operative sex. The court recognized that marital law in New Zealand had shifted away from focusing on sexual activity and now placed more emphasis on the psychological and social aspects of sex.[92] The court criticized the *Corbett* decision for its emphasis on chromosomes, genitalia, and gonads as well as for its failure to recognize the overriding importance of social and psychological factors.[93]

B. Currently, Sex Determinants Vary by State

A number of jurisdictions allow amendments to the sex indicated on a birth certificate. In some jurisdictions, legislatures have adopted statutes allowing persons whose gender identity does not match the sex indicated on their birth certificates to amend the sex indicated on their birth

85. *See id.* at 208–10.

86. *See id.* at 208–09.

87. *Id.* at 208.

88. *Id.* at 209.

89. *See id.*

90. *Id.* According to this court, because sexual capacity is necessary for consummation of a marriage, the genitalia must be capable of sexual intercourse. *Id.*

91. [1991] 1 N.Z.L.R. 603 (H.C.).

92. *Id.* at 606.

93. *Id.* at 607.

records. In the absence of such a controlling statute, courts have rendered contradictory opinions. Some courts have reviewed the scientific literature and placed the greatest emphasis on "brain sex" or gender identity. Other courts have continued to follow the earlier decisions and have chosen to ignore the importance of gender self-identity and the scientific evidence in their rulings.

1. Twenty-Five Jurisdictions Have Adopted Statutes Allowing Transsex Persons to Amend the Sex on Their Birth Records

In the United States, twenty-four states and the District of Columbia have adopted statutes that specifically allow transsex persons to amend their official documents to reflect their self-identified sex.[94] Most of these states require proof of a surgical sex modification.[95] In addition to these twenty-four states, another four states, Kansas, Maine, Nevada, and New York, have not passed legislation, but will issue amended birth certificates after surgery through an administrative process.[96]

Other jurisdictions have adopted statutes allowing modifications to the birth record, but it is unclear in these jurisdictions whether the statute authorizes an amendment to the birth record following gender-modification surgery. Eighteen states have general statutes authorizing birth certificate amendments, including a change to the "sex" designation.[97] Although these statutes could be interpreted to include

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94. *See* ALA. CODE § 22-9A-19(d) (Supp. 2004); ARIZ. REV. STAT. ANN. § 36-337 (Supp. 2005); ARK. CODE ANN. § 20-18-307(d) (Supp. 2005); CAL. HEALTH & SAFETY CODE §§ 103425, 103430 (West 1996); COLO. REV. STAT. ANN. § 25-2-115(4) (West 2005); CONN. GEN. STAT. ANN. § 19a-42 (West Supp. 2005); D.C. CODE § 7-217(d) (2001); GA. CODE ANN. § 31-10-23(e) (Supp. 2005); HAW. REV. STAT. ANN. § 338-17.7(a)(4)(B) (LexisNexis 2004); 410 ILL. COMP. STAT. ANN. § 535/17(1)(d) (West Supp. 2005); IOWA CODE ANN. § 144.23(3) (West Supp. 2005); KY. REV. STAT. ANN. § 213.121(5) (West 1990); LA. REV. STAT. ANN. § 40:62 (Supp. 2005); MD. CODE ANN., HEALTH–GEN. § 4-214(5) (LexisNexis 1995); MASS. ANN. LAWS ch. 46, § 13 (LexisNexis Supp. 2005); MICH. COMP. LAWS ANN. § 333.2831 (West 2001); MO. ANN. STAT. § 193.215(9) (West 2004); NEB. REV. STAT. ANN. § 71-604.01 (LexisNexis Supp. 2004); N.J. STAT. ANN. § 26:8-40.12(a) (West 1996); N.M. STAT. ANN. § 24-14-25(D) (LexisNexis Supp. 2004); N.C. GEN. STAT. § 130A-118(b)(4) (2003); OR. REV. STAT. ANN. § 432.235(4) (West Supp. 2005); UTAH CODE ANN. § 26-2-11 (West Supp. 2005); VA. CODE ANN. § 32.1-269(E) (Supp. 2005); WIS. STAT. ANN. § 69.15(1) (West Supp. 2004).

95. Some states may allow other treatments or medical procedures. *See, e.g.*, IOWA CODE ANN. § 144.23(3); UTAH CODE ANN. § 26-2-11; VA. CODE ANN. § 32.1-269(E).

96. *See* Lambda Legal, Amending Birth Certificates to Reflect Your Correct Sex, http://lambdalegal.com/ (search "Amending Birth Certificates") (last visited Oct. 10, 2005).

97. ALASKA STAT. § 18.50.320 (2004); DEL. CODE ANN. tit. 16, § 3131 (2003); FLA. STAT. ANN. § 382.016 (West 2002); IND. CODE § 16-37-2-10 (2004); MINN. STAT. ANN. § 144.218(4) (West 2005); MISS. CODE ANN. § 41-57-21 (West 1999); MONT. CODE ANN. § 50-15-204 (2003); N.H.

post-surgical sex modification amendments, a court in Texas, interpreted its state's birth certificate amendment statute to be limited to amendments for "inaccuracies" in the original recording and not inaccuracies due to later changes of sex.[98] Finally, only one state, Tennessee, has adopted legislation specifically forbidding a change to the birth certificate to accommodate the results of sex-modification surgery.[99]

In sum, one U.S. state legislature specifically bans a legal change of sex. Twenty-nine U.S. jurisdictions (twenty-eight states plus the District of Columbia) specifically authorize a legal sex change for transsex persons by statute or administrative ruling. In the remaining twenty-two states, which have no legislation or only a general birth certificate amendment statute, the determination of legal sex for the purposes of marriage is left to the courts.

2. *Courts Differ as to the Factors that Determine Sex*

Recent court decisions determining sex for purposes of marriage have adopted a variety of approaches. Most jurisdictions outside of the United States have rejected the outdated tests used in earlier judicial decisions and have focused on the scientific literature and the importance of brain sex to the development of gender identity.[100] A number of lower courts in the United States have also followed this approach, but most of these

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REV. STAT. ANN. § 126:23-a (2003); N.D. CENT. CODE § 23-02.1-25 (2002); OKLA. STAT. ANN. tit. 63, § 1-321 (West 2004); 35 PA. STAT. ANN. § 450.603 (West 2003); R.I. GEN. LAWS § 23-3-21 (2003); S.C. CODE ANN. § 44-63-150 (2002); S.D. CODIFIED LAWS § 34-25-51 (2004); TEX. HEALTH & SAFETY CODE ANN. §§ 191.028, 192.011 (Vernon 2001); VT. STAT. ANN. tit. 18, § 5075 (2000); W. VA. CODE ANN. § 16-5-24 (LexisNexis 2001); WYO. STAT. ANN. § 35-1-424 (2005).

98. In *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999), the Texas Court of Appeals ignored the ruling of a trial court that allowed a post-operative male-to-female transsex person to amend her birth certificate pursuant to the statute. The court decided that the male sex designation at birth was true and accurate. It chose to ignore the trial court ruling because it decided that the trial court's role was purely ministerial and did not involve fact-finding or considerations of the public policy involved. *Id.*

99. *See* TENN. CODE ANN. § 68-3-203(d) (2001).

100. *See, e.g.*, Attorney Gen. v. Kevin (2003) 172 F.L.R. 300 (Austl.), *overruling* In the Marriage of C. and D. (falsely called C.) (1979) 35 F.L.R. 340. Twenty-one European countries permit post-operative transsex persons to change their legal sex and marry in their self-identified gender role. The European Court of Human Rights identified twenty countries in 2002. Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1. Since that time, the Parliament of Great Britain approved similar legislation, Gender Recognition Act, 2004, c. 7 (Eng.), so that post-operative transsex persons are now treated as their post-operative sex in twenty-one European nations.

cases have been reversed on appeal.[101]

In 2002, the European Court of Human Rights specifically rejected its earlier decisions[102] that had relied on an outdated understanding of gender-identity formation.[103] Similarly, in 2003, an Australian court specifically rejected the approach it had taken in its earlier decision.[104] In determining that a female-to-male transsex person was a male for purposes of marriage, the Australian court held that the plain meaning of the word male includes a post-operative female-to-male transsexual.[105] Given the recent scientific evidence on gender-identity formation, the Australian court concluded that the fact that a person's eventual gender identity "cannot be physically determined at birth seems to us to present a strong argument . . . that any determination at that stage is not and should not be immutable."[106] Courts in England followed *Corbett* for thirty-five years,[107] until Parliament adopted legislation in 2004 that treats transsex persons as their self-identified sex for all purposes.[108]

Developments in United States courts have generally followed the opposite path of the courts of other countries. During the past decade, the issue of the validity of a marriage in which one of the parties is a transsex person has been litigated in courts in California, Florida,

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101. *See infra* notes 109–20 and accompanying text.

102. In *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (1986), *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (1990), and *Sheffield & Horsham v. United Kingdom*, 1998-V Eur. Ct. H.R. 2011, the European Court of Human Rights (ECHR) ruled that a country's failure to allow a post-operative transsex person to marry as her self-identified sex does not violate Articles 8 and 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In 2002, the ECHR rejected the approach taken in these cases and found that such rulings violate Articles 8 and 12. Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1.

103. *See* I. v. United Kingdom [Eur. Ct of H.R. 2002] 36 E.H.R.R. 53; Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1.

104. See *supra* notes 78–81 and accompanying text for a thorough discussion of the earlier case, *In the Marriage of C. and D. (falsely called C.)* (1979) 35 F.L.R. 340, *overruled by* Attorney Gen. v. Kevin (2003) 172 F.L.R. 300.

105. *Kevin*, 172 F.L.R. at 364.

106. *Id.* at 348.

107. The most recent decision from England to follow *Corbett* is *Bellinger v. Bellinger*, (2003) 2 All E.R. 593 (H.L.) (appeal taken from A.C.). At the time *Bellinger* was decided, the English Parliament had already started to consider the issue. The *Bellinger* court believed that whether a transsex person's legal sex could be changed was a matter properly before the Parliament and should not be decided by the court.

108. *See* Gender Recognition Act, 2004, c. 7 (Eng.).

Kansas, Ohio, and Texas. The California[109] and Florida[110] trial courts held that post-operative transsex persons acquire their self-identified sex as their legal sex. The California trial court decision was not appealed, but the Florida case was reversed on appeal.[111] In addition, the Kansas Court of Appeals ruled that sex determination should include self-identified sex as a factor, but this decision was also reversed on appeal.[112] The Supreme Court of Kansas,[113] the Court of Appeals of Florida,[114] the Court of Appeals of Texas,[115] and the Court of Appeals of Ohio[116] all ruled that for purposes of marriage, transsex persons remain forever the sex that was assigned to them at birth.

U.S. courts that allowed transsex persons to marry in their self-identified gender role used reasoning that was very similar to the approaches taken in the decisions in other countries. In detailed opinions, the Florida trial court[117] and the Kansas Court of Appeals[118] conducted a thorough review of the medical and legal literature on transsexualism. Both courts rejected earlier sex-determination decisions that followed *Corbett.*[119] The Kansas court rejected the earlier decisions as "a rigid and simplistic approach to issues that are far more complex than addressed."[120]

Most U.S. appellate courts that have addressed the issue, however, have not allowed transsex persons to marry in their self-identified gender role. These courts rejected scientific advances and reached the same

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109. *See Transgender Ruling*, L.A. DAILY J., Nov. 26, 1997, at 1 (reporting denial of summary judgment motion by Superior Court judge in *Vecchione v. Vecchione*, Civ. No 96D003769).

110. *See In re* Marriage of Kantaras v. Kantaras (*Kantaras I*), No. 98-5375CA (Fla. Cir. Ct., Feb. 21, 2003), http://www.transgenderlaw.org/cases/kantarasopinion.pdf, *rev'd*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

111. Kantaras v. Kantaras (*Kantaras II*), 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

112. *Gardiner I*, 22 P.3d 1086, 1110 (Kan. Ct. App. 2001), *rev'd*, 42 P.3d 120 (Kan. 2002).

113. *Gardiner II*, 42 P.3d at 214.

114. *Kantaras II*, 884 So. 2d at 161.

115. Littleton v. Prange, 9 S.W.3d 223, 230–31 (Tex. App. 1999).

116. *In re* Nash, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, *9 (Ohio Ct. App. Dec. 31, 2003).

117. *See Kantaras I*, No. 98-5375CA (Fla. Cir. Ct., Feb. 21, 2003), http://www.transgenderlaw.org/cases/kantarasopinion.pdf, *rev'd*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

118. *See Gardiner I*, 22 P.3d 1086 (Kan. Ct. App. 2001), *rev'd*, 42 P.3d 120 (Kan. 2002).

119. *Id.* at 1110; *Kantaras I*, No. 98-5375CA, at 766–71 (Fla. Cir. Ct., Feb. 21, 2003), http://www.transgenderlaw.org/cases/kantarasopinion.pdf, *rev'd*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

120. *Gardiner I*, 22 P.3d at 1110.

conclusion as the *Corbett* court for a number of reasons. They relied on the plain meaning rule,[121] used religious rhetoric,[122] or expressed a desire to defer to the legislature.[123]

A number of courts have relied on rules of statutory construction, in particular the plain meaning rule, to determine the legislative intent behind statutes that limit marriage to one man and one woman. Although some courts have relied on the plain meaning rule to determine who is a man and who is a woman, reliance on this rule has led to contradictory results. For example, the Australian Court of Appeals[124] and the Florida trial court[125] believed that the plain and ordinary meaning of the word "male" encompassed a post-operative female-to-male transsexual.[126] Courts in Ohio,[127] Kansas,[128] and Florida,[129] however, found that the plain meaning of the terms "male" and "female" could be found in the dictionary. The Kansas Supreme Court quoted Webster's dictionary and determined that "'[m]ale' is defined as 'designating or of the sex that fertilizes the ovum and begets offspring: opposed to *female*.' 'Female' is defined as 'designating or of the sex that produces ova and bears offspring: opposed to *male*.'"[130] In other words, these courts have implied that those who cannot fertilize and beget are not true men and those who cannot produce ova and bear offspring are not true women.[131]

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121. *See, e.g.*, *Gardiner II*, 42 P.3d at 135; *Nash*, 2003 WL 23097095, at *6. The plain meaning rule generally assumes that words should be interpreted in accordance with their common usage and meaning.

122. *See, e.g.*, Littleton v. Prange, 9 S.W.3d 223, 230 (Tex. App. 1999).

123. *See, e.g.*, *id.* at 224; *Gardiner II*, 42 P.3d at 136; *Nash*, 2003 WL 23097095, at *6; *Kantaras II*, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004).

124. Attorney-General v. Kevin (2003) 172 F.L.R. 300.

125. *Kantaras I*, No. 98-5375CA, at 795 (Fla. Cir. Ct., Feb. 21, 2003), http://www.transgenderlaw.org/cases/kantarasopinion.pdf, *rev'd*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

126. *Kevin*, 172 F.L.R. at 364 ("[T]he words man and woman when used in legislation have their ordinary contemporary meaning .... That meaning includes post-operative transsexuals as men and/or women in accordance with their sexual reassignment.") (citations omitted).

127. *Nash*, 2003 WL 23097095, at *6.

128. *Gardiner II*, 42 P.3d at 135.

129. *Kantaras II*, 884 So. 2d 155, 159 (Fla. Dist. Ct. App. 2004).

130. *Gardiner II*, 42 P.3d at 135 (emphasis in original).

131. These definitions may come as a big shock to the millions of people who cannot bear or beget. Infertility affects approximately 6.1 million women and their partners in the U.S., which is about 10% of the reproductive-age population. NAT'L CTR. FOR HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL & PREVENTION, 1997 FACT SHEET–NEW REPORT DOCUMENTS TRENDS IN CHILDBEARING, REPRODUCTIVE HEALTH, *available at* http://www.cdc.gov/nchs/pressroom/97facts/nsfgfact.htm (last visited Oct. 10, 2005).

Some judges also rejected scientific literature and instead utilized religious rhetoric to support their decision.[132] The Texas Court of Appeals recognized that sex determination involves profound philosophical,[133] metaphysical,[134] and policy concerns.[135] Despite these profound concerns, the court phrased the legal question as: "[C]an a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?"[136] Ultimately, the court decided that transsex persons must remain the sex assigned to them at birth.[137]

Finally, all the recent decisions in which courts refused to allow transsex persons to legally adopt their post-operative sex were grounded in a finding that the courts did not have the power to determine the test for legal sex in the face of legislative inaction.[138] Although the legislative histories in these jurisdictions indicate that the legislatures had not considered or discussed the issue of sex determination for transsex persons, these courts decided that legislative silence is equivalent to legislative disapproval.[139]

Although courts and legislatures outside of the United States are now ruling that transsex persons should be treated legally as their post-operative sex, courts within the United States have failed to follow their lead.[140] Although some U.S. courts and jurists may consider international views to some degree,[141] others consider international

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132. *See, e.g.*, Littleton v. Prange, 9 S.W.3d 223, 224 (Tex. App. 1999).

133. *See id.* at 224.

134. *See id.* at 231.

135. *See id.* at 230.

136. *See id.* at 224.

137. *See id.* at 231.

138. *See Kantaras II*, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004); *Gardiner II*, 42 P.3d 120, 136 (Kan. 2002); *In re* Nash, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at *6 (Ohio Ct. App. Dec. 31, 2003); *Littleton*, 9 S.W.3d at 230.

139. *See Kantaras II*, 884 So. 2d at 161; *Gardiner II*, 42 P.3d at 136; *Nash*, 2003 WL 23097095, at *6; *Littleton*, 9 S.W.3d at 230.

140. United States courts are not bound by decisions outside of the United States, nor are they obligated to follow the European Court of Human Rights' interpretation of a Convention to which the United States is not a signatory. Similarly, Australia is not bound by those Conventions, but when faced with a similar issue, an Australian court noted that the changing views in the international community commanded attention. Attorney Gen. v. Kevin (2003) 172 F.L.R. 300, 353 (noting that failure to recognize the post-operative sex of a transsex person would be adoption of a position of "international isolation").

141. *See, e.g.*, Roper v. Simmons, ____ U.S. ____, 125 S. Ct. 1183, 1200 (Mar. 1, 2005) (opinion of Kennedy, J.) ("It is proper that we acknowledge the overwhelming weight of international

isolation to be irrelevant.[142] Even ignoring international opinion,[143] however, the current treatment of transsex persons by U.S. courts raises serious constitutional concerns in a number of areas.

III. THE CONSTITUTIONAL IMPLICATIONS OF SEX-DETERMINATION RULINGS

Transsex, and possibly intersex, individuals are legally considered male in about one-half of the states and legally considered female in the other half.[144] Thus, as transsex people cross state lines, their legal sex changes and whom they are entitled to marry legally also transforms.[145] These state sex-determination rulings implicate a number of constitutional provisions and raise several issues:

- Must a state's determination of legal sex be recognized by a sister state under the Full Faith and Credit Clause?

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opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."); Lawrence v. Texas, 539 U.S. 558, 576 (2003) (opinion of Kennedy, J.) ("Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct."); Atkins v. Virginia, 536 U.S. 304, 317 n.21 (2002) (opinion of Stevens, J.) ("Within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."); *see also* Ruth Bader Ginsburg, *Looking Beyond Our Border: The Value of a Comparative Constitutional Adjudication*, 40 IDAHO L. REV. 1 (2003). *But see Atkins*, 536 U.S. at 347 (Scalia, J., dissenting) ("Equally irrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people.").

142. As Justice Antonin Scalia recently stated in the context of the *Lawrence* majority's note of international opinion on the subject of sexual privacy rights, "[t]he Court's discussion of these foreign views . . . is . . . meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.'" *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (quoting Foster v. Florida, 537 U.S. 990 n. (2002) (Thomas, J., concurring)).

143. Countries other than progressive European countries have also changed their attitude toward sex determination. For example, Iran's Islamic government, which for decades discriminated against transsex persons, is now recognizing people with sexual-identity disorders and allowing sex modification surgery and issuing new birth certificates to those who have transitioned. Some Muslim clerics, who dominate the judiciary in Iran, are recommending sex-change operations to those whose gender identity does not comport with the sex assigned to them at birth. *See* Nazila Fathi, *Sex Changes are Gaining Acceptance in Iran*, INT'L HERALD TRIB., Aug. 3, 2004, at 2.

144. *See supra* Part II.B.1. Thus far, no court has determined whether the legal sex of an intersex person can be changed if her adult gender identity does not comport with the sex assigned to her at birth.

145. Currently, there is only one state, Massachusetts, where legal sex is irrelevant because the state recognizes a person's right to marry either a woman or a man. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

- Do contradictory sex-determination rulings that require transsex persons to alter their legal sex as they cross state borders impinge on their right to travel freely under the Dormant Commerce Clause?
- Do state sex-classification systems that rely on chromosomes, the ability to reproduce, or sex stereotypes violate the Equal Protection Clause?
- Does a state's failure to recognize a post-operative transsex person's self-identified sex as her legal sex violate her right to substantive due process?

These fundamental constitutional questions are discussed in the remainder of this Article.

A. The Full Faith and Credit Clause Requires States to Recognize the Sex of Transsex Persons as Indicated on Their Amended Birth Records

Immediately after being pulled from the womb, before fingers and toes are counted, an infant's genitals are examined to determine whether the child is a boy or a girl. This determination, made by a doctor or midwife, controls the sex that will be listed on the infant's birth certificate.[146] The sex assigned at birth is correct for the vast majority of people. For a significant number of infants, however, the assignment may not reflect the child's gender identity for two reasons: the infant may have an unidentified intersex condition, or the assigned sex may not match the person's gender self-identity.[147]

Transsex people who are living in their self-identified gender roles typically seek to amend the sex indicated on their birth certificates so that their birth records will comport with their identities. Amendments to birth records require government approval. As indicated in Part II.B.1 more than half of the states have adopted procedures that allow transsex persons to amend the sex indicated on their birth certificates.[148] When people with amended birth records travel to other states, they reasonably expect that those states will consider them the sex indicated on their official birth records. In some circumstances, however, states have refused to recognize a transsex person's legal sex as indicated on the amended birth record from a sister state. This refusal violates

146. Dreger, *Ambiguous Sex*, *supra* note 36, at 27–28.

147. Reiner & Gearhart, *supra* note 50, at 336.

148. *See supra* note 94 and accompanying text.

constitutional principles of full faith and credit.

1. When a Female from Wisconsin Travels to Kansas, the Full Faith and Credit Clause Precludes Kansas from Treating Her as a Male

When J'Noel Gardiner was born, she was identified as a male on her Wisconsin birth certificate.[149] After undergoing surgical and hormonal treatment, J'Noel applied to have the sex on her birth certificate amended to indicate that she is a female; the State of Wisconsin approved the amendment. By virtue of this amendment, if J'Noel had married a man in Wisconsin, Wisconsin would have treated them as a heterosexual couple, entitled to all the state and federal benefits provided to legally married couples.[150] As long as J'Noel and her husband never left the state of Wisconsin, they could be confident that they would be treated as all other heterosexual couples were treated. If, however, they decided to move to a different state, they could not be certain that another state would recognize that J'Noel was a female, as indicated on her amended birth certificate. If a sister state refused to acknowledge that J'Noel was a female, J'Noel would be considered a male, and her marriage to her husband might be considered an illegal same-sex union.

Courts in Kansas,[151] Florida,[152] and Ohio[153] have reached this precise result. Courts in each of these states have declared that transsex persons cannot legally marry as the sex that comports with their self-identities and their amended birth records. Thus, when a person such as J'Noel travels across state lines, she puts into jeopardy more than one thousand federal benefits,[154] as well as a myriad of state rights,[155] that are granted

149. *Gardiner I*, 22 P.3d 1086, 1091 (Kan. Ct. App. 2001), *rev'd*, 42 P.3d 120 (Kan. 2002).

150. *See* WIS. STAT. ANN. § 69.15(4) (West Supp. 2004) (providing for a change of sex on the Wisconsin birth record after a "surgical sex-change procedure").

151. *Gardiner II*, 42 P.3d at 214.

152. *Kantaras II*, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004).

153. *In re* Nash, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at *9 (Ohio Ct. App. Dec. 31, 2003).

154. "Federal Benefits" may be a bit of a misnomer because not all federal laws that apply only to married couples are necessarily beneficial. The most prominent benefits of marriage relate to tax, veteran, social security, and private-employee benefits that are limited to married couples under federal laws. *See* JOSHUA K. BAKER, 1,000 FEDERAL BENEFITS OF MARRIAGE? AN ANALYSIS OF THE 1997 GAO REPORT (2004), http://www.marriagedebate.com/pdf/iMAPP.GAO.pdf.

155. These rights include the ability to inherit, make end-of-life decisions for a spouse, sue for wrongful death, claim spousal immunity, and seek spousal and child support in the event the relationship terminates. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955–57 (Mass. 2003) (detailing marital benefits).

to married couples. In addition, even if J'Noel does not marry, if she moves to a state that does not recognize that her sex was legally amended, she will be treated as a man for legal purposes.[156]

The Full Faith and Credit Clause of the United States Constitution requires states to honor the judicial pronouncements of other states.[157] A final judgment in one state, if rendered by a court with proper jurisdiction, must be recognized in every other state.[158] The Full Faith and Credit Clause is intended to "alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation."[159]

For full faith and credit purposes, courts have drawn a distinction between judgments and acts or records.[160] Sister state judgments are entitled to complete deference. The forum state cannot refuse to recognize a judgment from a sister state court if the sister state court had jurisdiction. The forum state must give full faith and credit to the judgment even if it violates the forum state's public policy. U.S. Supreme Court decisions do not support a public policy exception to the full faith and credit states must afford judgments.[161]

Acts and records of other states, on the other hand, are accorded less deference, presenting instead a choice of law question. The Full Faith and Credit Clause does not require a state to defer to a sister state's legislative acts or records if recognition would violate a strong public policy of the forum state.[162] Full faith and credit does not require states to subvert their own public policy, as expressed in their statutes, to the public policy of another state.[163]

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156. Although very few laws in the United States treat males and females differently, some distinctions remain. For example, the federal Military Selective Service Act, 50 U.S.C. app. §§ 451–473 (2000), requires only men to register with the Selective Service System.

157. The clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

158. Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998).

159. *Id.* at 232 (quoting Milwaukee County v. M.E. White Co., 196 U.S. 268, 277 (1935)).

160. *Id.* at 233.

161. *Id.* at 233–34 (noting that the lower court "misread our precedent" by "assuming the existence of a ubiquitous 'public policy exception'" and emphasizing that past Supreme Court decisions "support no roving 'public policy exception' to the full faith and credit due judgments").

162. *Id.* at 233.

163. *Id.* This right of the forum state is limited to situations in which the forum state has sufficient contacts. Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981).

Therefore, whether a state should be required to recognize a transsex person's "amended" sex, may depend upon whether the sex amendment is accorded the weight of a judgment, entitled to total deference, or merely a record or act, subject to the public policy exception. The resolution of this issue may turn in large part on the statute authorizing the amendment to birth certificates. Some states require a court order to amend a birth certificate.[164] Other states, however, allow the birth certificate to be amended when the applicant provides adequate documentation, usually in the form of a physician's affidavit, to the agency in charge of amending records.[165]

2. *Court-Ordered Amendments to Birth Certificates Are Entitled to Full Faith and Credit in Sister States*

Although judgments are entitled to full faith and credit, the fact that a court issues an order authorizing an amendment to a birth certificate does not necessarily mean that the order is equivalent to a judgment entitled to full faith and credit. The Second Restatement of the Conflict of Laws provides four factors to determine whether a judicial action is entitled to full faith and credit. A judicial action is valid and entitled to full faith and credit if: (1) the state rendering the decision has jurisdiction over the parties; (2) the proceeding provides for a reasonable method of notification and a reasonable opportunity to be heard; (3) the court rendering the judgment has subject matter jurisdiction; and (4) the parties comply with the formalities of the rendering state.[166]

Hearings to determine whether a court will authorize an amendment to the sex indicated on a birth certificate meet these requirements for full faith and credit. In the typical case, the last two requirements (a

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164. *See* ALA. CODE, § 22-9A-19(d) (Supp. 2004); ARK. CODE ANN. § 20-18-307(d) (Supp. 2005); CAL. HEALTH & SAFETY CODE. §§ 103425, 103430 (West 1996); COLO. REV. STAT. ANN. § 25-2-115(4) (West 2005); D.C. CODE ANN. § 7-217(d) (2001); GA. CODE ANN. § 31-10-23(e) (Supp. 2005); LA. REV. STAT. ANN. § 40:62 (Supp. 2005); MO. ANN. STAT. § 193.215(9) (West 2004); NEB. REV. STAT. ANN. § 71-604.01 (LexisNexis Supp. 2004); N.J. STAT. ANN. § 26:8-40.12(a) (West 1996); N.M. STAT. ANN. § 24-14-25(D) (LexisNexis Supp. 2004); OR. REV. STAT. ANN. § 432.235(4) (West Supp. 2005); UTAH CODE ANN. § 26-2-11 (West Supp. 2005); VA. CODE ANN. § 32.1-269(E) (Supp. 2005); WIS. STAT. ANN. § 69.15(1) (West Supp. 2004).

165. *See* ARIZ. REV. STAT. ANN. § 36-337(A)(3) (Supp. 2005); HAW. REV. STAT. ANN. § 338-17.7(a)(4)(B) (LexisNexis 2004); 410 ILL. COMP. STAT. ANN. § 535/17(1)(d) (West Supp. 2005); IOWA CODE ANN. § 144.23(3) (West Supp. 2005); MASS. ANN. LAWS ch. 46, § 13(e) (LexisNexis Supp. 2005); MICH. COMP. LAWS ANN. § 333.2831 (West 2001); MISS. CODE ANN. § 41-57-21 (West 1999); N.C. GEN. STAT. § 130A-118(b)(4) (2003).

166. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92 (1971).

competent court and compliance with proper procedures) will be satisfied. Thus, in the usual case, two issues may arise. First, the court must determine whether the sister state had the power to render the decision. Second, the court must decide whether the person contesting the decision has standing to challenge the earlier decision because she neither received notice of, nor had an opportunity to be heard in, the birth certificate amendment proceeding.

If granted such authority by the legislature, a court in the state that issued the birth certificate has jurisdiction to grant an order amending that certificate. A different result may be reached if the state that ordered the change to the birth certificate did not have power over the agency that is responsible for maintaining the birth records. For example, in *In re Heilig*,[167] a male-to-female transsex person sought a change of name and sex from a court in Maryland, her current residence. Janet Heilig was born in Pennsylvania, so the Maryland court did not have jurisdiction over the agency responsible for keeping birth records in Pennsylvania.[168] Therefore, the Maryland court could not order a change to the birth certificate itself. The court ruled, however, that it had jurisdiction to issue an order changing Ms. Heilig's sex.[169] If Ms. Heilig's sex becomes an issue in a proceeding outside of Maryland, the forum court could refuse to grant full faith and credit to the Maryland court order. It could find that only the birth state has the power to amend a person's legal sex status and that the Maryland court lacked proper jurisdiction to determine Ms. Heilig's legal sex for any purpose outside the state of Maryland.

The second requirement, that the proceeding provides for notice and a reasonable opportunity to be heard, may also be problematic. The hearing to change a person's legal sex is not pro forma; it requires the petitioner to present evidence justifying a legal sex change and allows those with an opposing interest to contest the change.[170] A person who was not given notice and an opportunity to be heard in the initial

167. 816 A.2d 68 (Md. 2003).

168. *Id.* at 84.

169. *Id.* at 84–85 ("The jurisdiction of Maryland courts is not limited by the birthplace of the parties seeking relief, however, so by recognizing the authority of the Circuit Courts to enter gender-change declarations with respect to persons born in Maryland, it necessarily recognizes as well their jurisdiction to enter such orders on behalf of anyone properly before the court.").

170. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 103430 (West 1996) ("[O]bjections may be filed by any person who can, in those objections, show to the court good reason against the change of birth certificate. At the hearing, the court may examine on oath the petitioner, and any other person having knowledge of facts relevant to the application.").

proceeding, however, could later seek to challenge the validity of the judgment because judgments are typically not res judicata against nonparties to the original proceeding.

Although most judgments are res judicata against only participants in the original proceeding, determinations of a person's legal status typically are binding on nonparties.[171] The Restatement of the Conflict of Laws defines "status" as a legal personal relationship, not temporary in its nature.[172] Although status usually refers to a legal relationship to another person, such as husband-wife and parent-child, it may also include an individual permanent condition created by law.[173] The law typically requires that third persons refrain from disturbing another person's legal status because the "legal establishment of status is a socially important element of the legal order."[174] Thus, divorce decrees,[175] adoption orders,[176] and court determinations establishing a child's paternity[177] typically are accorded full faith and credit and are considered res judicata even against those who were not party to the

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171. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 119 cmt. d (1934) ("The concern of third persons in a status is indicated by the legal requirement that they must take it into account and refrain from disturbing it.").

172. *Id.* Status is not defined in the Second Restatement.

173. *See id.* § 119 cmt. a.

174. *Id.* § 119 cmt. c.

175. *See, e.g.*, Williams v. North Carolina, 325 U.S. 226, 232 (1945) ("What is true is that all the world need not be present before a court granting the [divorce] decree and yet it must be respected by the other forty-seven States . . . .").

176. *See, e.g.*, Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes that Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751, 752 (2003) ("[A] valid, final adoption decree rendered in one state establishing a parent-child relationship between the adoptive parent(s) and the adoptive child(ren) must be recognized in every other state as equally valid as an adoption decree rendered in that other state."); Robert G. Spector, *The Unconstitutionality of Oklahoma's Statute Denying Recognition to Adoptions by Same-Sex Couples from Other States*, 40 TULSA L. REV. 467, 475 (2005) ("[A]doption decrees and orders setting aside adoptions are final judgments and are no more modifiable than a contract, tort, or other judgment of a court. As such, a decree of adoption is entitled to the same full faith and credit protection as those judgments."); Ralph U. Whitten, *Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases*, 31 CAP. U. L. REV. 803, 841 (2003) ("There is no question that states must give effect to the valid adoption judgments of other states.").

177. *See, e.g.*, Schaffer v. Overby, 613 So. 2d 128, 129 (Fla. Dist. Ct. App. 1993) (ruling that a Florida trial court was bound by full faith and credit and res judicata principles to honor a California paternity decree and could not reopen the paternity issue); Ely v. DeRosier, 459 A.2d 280, 282 (N.H. 1983) ("If the issue of paternity already has been determined against the defendant in another jurisdiction, such a judgment is deemed *res judicata* and generally will be afforded full faith and credit . . . .").

proceeding.[178] Similarly, when a transsex person's legal sex status is properly changed, third parties should not have standing to challenge the legal change in status.

Further, states are required to grant the same rights to a person with an amended legal status from another state that they grant to an individual who has not amended her legal status. In other words, a court in Kansas could not rule that it is recognizing an adoption order from Wisconsin, but rule that the adoption order only changes the person's status to a legally adopted child in Wisconsin, but not in Kansas. Similarly, Kansas should not be able to rule that a male-to-female transsex person is entitled to the rights of a female in Wisconsin, but is granted the rights of a male in Kansas. A person's status is ascertained by the law of the domicile that created the status, unless such status in inconsistent with local law and policy.[179] Judicial orders amending the sex indicated on the birth certificate should be granted the same respect as other legal status change orders, such as divorce decrees, adoption orders, and paternity determinations. When a birth certificate is amended pursuant to a properly issued court decree, every other state should recognize the amended legal sex status.

The need to recognize a divorce, adoption, or paternity decree from a sister state is born of intensely practical considerations. If states fail to recognize a change in legal status made in another state, a tangled web

178. If a judicial decision alters the legal relationship between the person seeking to challenge the status change and the person whose status has been changed, the rule is different. For example, if a biological father does not receive notice and an opportunity to be heard in an adoption proceeding, due process requires that he have standing to challenge the order that changed his legal status with his biological child, but even this right is not absolute. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 262–65 (1983) (rejecting putative father's claim that he was entitled to special notice of an adoption proceeding because the court and the mother knew that he had filed an affiliation proceeding in another court.) Thus far, when third parties have challenged an earlier sex-determination ruling, the earlier ruling has not affected their legal status in relationship to the person whose sex has been amended. *See, e.g., Gardiner II*, 42 P.3d 120, 121–22 (Kan. 2002) (allowing stepson to challenge stepmother's legal status as a woman and a wife entitled to inherit from decedent's estate); Littleton v. Prange, 9 S.W.3d 223, 225 (Tex. App. 1999) (dismissing wrongful death claim brought by transsex wife against husband's doctor when doctor challenged the plaintiff's amended sex and thus the validity of her marriage). Because the proceeding that granted the sex change did not affect their legal status, these third parties should be treated the same way as challengers to other status change determinations and should not be able to challenge the status change. Third parties challenging the validity of a marriage typically have not had their requests granted. *See* Patrick J. Borchers, Baker v. General Motors*: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 156–57 (1998).

179. Watson v. Watson, 67 S.E.2d 704, 708 (Ga. 1951); Barrett v. Delmore, 54 N.E.2d 789, 792–94 (Ohio 1944); Estate of Dreer, 173 A.2d 102, 106 (Pa. 1961); Martinez v. Gutierrez, 66 S.W.2d 678, 708 (Tex. Comm'n App. 1933).

of status issues could result, leaving the parties and those close to them in a legal and personal quagmire. When judicial proceedings involve issues that are a matter of intimate concern and touch the basic interests of society, other states should accord these judicial findings great deference.[180] When states create a new legal status, public policy concerns should weigh in favor of finding that status to be the same in all jurisdictions. Otherwise, critical issues of parental status, support obligations, and inheritance rights could be the subject of litigation, upsetting the reasonable expectations of parties to a given relationship. The same public policy reasons that support the rule that sister states must recognize each other's divorce, adoption, and paternity decrees apply to court orders establishing a person's sex. Allowing a person's marital, familial, or sex status—and corresponding rights—to vary as a person travels between states would violate the purpose underlying the Full Faith and Credit Clause and profoundly affect personal rights of the deepest significance.

3. *Amendments to Birth Certificates Granted Without a Court Order Are Entitled to Recognition Unless a State Legislature Has Articulated a Strong Public Policy Against Recognition*

If an administrative official exercises her discretion and amends the sex designated on an individual's birth certificate, full faith and credit principles do not automatically require recognition by a sister state.[181] Although the person authorizing the amendment must determine whether the statutory requirements are met, this act is likely a ministerial act, not entitled to the same deference under full faith and credit principles as an amendment ordered by a court after a full judicial proceeding.[182] Typically, the forum state grants full faith and credit to a sister state's acts and records, unless doing so would violate the forum state's strong

180. *See Williams*, 325 U.S. at 230.

181. Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 494 (2003) (noting that recognition of sister state judgments is exacting, while recognition of a sister state's statute is less demanding); Baker v. Gen. Motors Corp., 522 U.S. 222, 232 (1998) ("Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments.").

182. A court may choose to ignore an amended birth certificate issued by an administrator in its own state if it finds that the administrator failed to gather the facts necessary to justify such an amendment. *See, e.g.*, *In re* Marriage of Simmons, 825 N.E.2d 303, 310 (Ill. App. Ct. 2005) (refusing to recognize that a female-to-male transsex person with an amended birth certificate was legally male for purposes of marriage because of the absence of adequate fact finding).

public policy.[183] Full faith and credit principles do not require states to subordinate their public policy to the public policy of a sister state.[184] Recognition of a sister state's laws and acts are resolved under traditional conflict of laws principles.[185] Thus far, only two cases involving an amendment to the sex designation on the birth certificate have discussed full faith and credit or conflict of law principles.[186] One of these cases has been overruled, and neither provides a careful in-depth analysis of the legal principles involved.[187]

Although few courts or scholars have analyzed the conflict of laws principles applicable to birth certificate amendments, courts and legal experts have fully explored the implications of sister-state recognition of marriage licenses. Although a marriage certificate is not accorded the same presumption of validity as a judicial proceeding,[188] a marriage, valid where celebrated, is valid everywhere unless it is "obnoxious"[189] to an important public policy of the forum state[190] and the couple married in the sister state to evade their domicile's stricter marriage rules.[191] Even in marriage-evasion cases, however, courts have tended to refuse to invalidate the marriage if the invalidation is sought by someone other than the parties to the marriage.[192]

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183. *Franchise Tax Bd.*, 538 U.S. at 494; *Baker*, 522 U.S. at 233.

184. *Franchise Tax Bd.*, 538 U.S. at 494; *Baker*, 522 U.S. at 233.

185. Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 923 (1998).

186. *See Gardiner I*, 22 P.3d 1086, 1107–09 (Kan. Ct. App. 2001), *rev'd*, 42 P.3d 120 (Kan. 2002); *In re* Nash, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at *4–9 (Ohio Ct. App. Dec. 31, 2003).

187. For a complete discussion of the flawed reasoning in these cases, see Julie A. Greenberg, *When Is a Same-Sex Marriage Legal? Full Faith and Credit and Sex Determination*, 38 CREIGHTON L. REV 289, 302–05 (2005).

188. *See, e.g.*, Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1, 25 (2000); Borchers, *supra* note 178, at 179; Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L. J. 1965, 1976 (1997).

189. Griffin v. McCoach, 313 U.S. 498, 507 (1941).

190. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) & notes (1971) ("A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage."); Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1094–96.

191. Koppelman, *supra* note 185, at 961.

192. Borchers, *supra* note 178, at 156 ("Third parties challenging the validity of a marriage—usually after one of the spouses has died in the hopes of cutting off the living spouse's inheritance

In the marriage choice of law cases, courts have balanced the interests of the forum state in enforcing its own public policy, the interests of the sister state in having its marriages recognized, and the interest of the couple in having their marriage recognized wherever they may travel or live.[193] When they conduct this balancing, however, courts rarely invalidate a marriage based on choice of law principles. The only exceptions that courts have cited involve incest, age, polygamy, and miscegenation restrictions, but even these exceptions rarely have caused a court to refuse to recognize the marriage.[194] Furthermore, the public policy exception to the marriage validity presumption has been shrinking for a long time, in part due to judicial recognition that couples who reasonably regard themselves as married should have their expectations respected.[195] Opposite-sex couples can reasonably expect their marriages to be recognized wherever they may travel, given the universal legality of their unions. Similarly, transsex people with amended birth certificates from their birth states should be able to expect that their birth certificates will be recognized when they enter another state. If they have married in the sex role that matches the sex indicated on their birth certificates and consider themselves a spouse in an opposite-sex marriage, such an expectation is reasonable.[196]

The U.S. Supreme Court has recognized the importance of the need for stability and certainty in family relationships. As the Court stated in *Williams v. North Carolina*:[197]

> [I]f one is lawfully divorced and remarried in Nevada and still married to the first spouse in North Carolina, . . . a man would have two wives, a wife two husbands. . . . Each would be a bigamist for living in one state with the only one with whom the other state would permit him lawfully to live. Children of the second marriage would be bastards in one state but legitimate in the other. . . . These intensely practical considerations emphasize for us the essential function of the full faith and credit clause in

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rights—have normally faced an uphill battle.").

193. Koppelman, *supra* note 185, at 923.

194. *Id.* at 945–49.

195. *Id.* at 944–46.

196. This same presumption would not be applicable to same-sex marriages. Only one state, Massachusetts, allows same-sex marriages; many states have adopted mini-DOMAs explicitly prohibiting same-sex marriage. *See infra* note 202. Thus, same-sex couples married in Massachusetts could not reasonably expect their marriages to be valid outside of Massachusetts.

197. 317 U.S. 287 (1942).

> substituting a command for the former principles of comity and in altering the "status of the several states as independent foreign sovereignties" by making them "integral parts of a single nation."[198]

A forum state's recognition of an administrative agency's order to amend the sex indicated on a birth certificate should be treated in the same manner as courts currently treat marriage licenses. In other words, absent a strongly articulated public policy, the sex indicated on an individual's birth certificate should be recognized by all states as the person's legal sex. As indicated in Part II.B.1, twenty-nine jurisdictions (twenty-eight states plus the District of Columbia) have articulated a public policy that favors recognition of a legal sex change after a medical procedure.[199] Twenty-two states have no relevant legislation or have only a general birth-certificate-amendment statute that does not specifically address sex modifications.[200] Only one state, Tennessee, has a clearly articulated public policy against allowing the sex on the birth certificate to be modified.[201] Legislative inaction does not indicate a clearly articulated public policy because, by its nature, legislative reasoning for inaction is neither clear nor articulated but rather a product of ambiguous and inexplicable rationales. Thus, Tennessee is the only state that could legitimately refuse to recognize an amended birth certificate from a sister state based upon a clearly articulated public policy.[202] Therefore, when a transsex person's birth certificate reflects her self-identified gender, all states, excluding Tennessee, should accord her the legal rights that comport with the sex indicated on her amended birth certificate.

In sum, when the birth state allows a transsex person to amend the sex

198. *Id.* at 299–302 (citations omitted).

199. *See supra* notes 94–96 and accompanying text.

200. *See supra* note 97 and accompanying text.

201. *See* TENN. CODE ANN. § 68-3-203(d) (2001).

202. This situation contrasts sharply with state policy toward same-sex marriage where forty-three states (forty-two by statute or constitutional amendment and one by court ruling) have expressly stated their policy against same-sex marriages. The following states ban same-sex marriage: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin (via state supreme court ruling), and Wyoming. *See* Kavan Peterson, *50-state rundown on gay marriage laws*, STATELINE.ORG, Feb. 9, 2005, http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15966.

designated on her birth certificate, principles of full faith and credit and conflict of laws require sister states to recognize the amended sex. If the amendment is authorized by a court order, the court order should be treated in the same manner as adoption, divorce, and paternity decrees; it should be accorded full faith and credit. Even if the amended birth certificate is considered only an act or record, it should be treated the same way that marriage licenses are treated; it should be recognized in all states, with the possible exception of Tennessee, the only state that has a clearly articulated public policy against such recognition.[203]

B. The Right to Travel Protects the Right of Transsex Persons to Enter Another State and Have Their Sex Designations Recognized

One of the core rights embedded in the United States Constitution is the right to travel freely within the union.[204] When states create conflicting definitions of male and female, a transsex person's ability to move freely from one state to another may be unconstitutionally impeded. In approximately one-half of the states, transsex persons can amend the sex indicated on their birth record and legally live in their self-identified gender role.[205] A state that requires a transsex person moving to or through the state to relinquish her legal sex, as evidenced on her amended birth certificate, unconstitutionally infringes upon her ability to exercise her fundamental right to travel.[206] Specifically, under

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203. The court should focus its inquiry on the state's policy regarding amending birth certificates and not its public policy regarding same-sex marriage, as the court did in *In re Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at *9 (Ohio Ct. App. Dec. 31, 2003). In *Nash*, an Ohio court refused to recognize Jacob Nash's amended birth certificate from Massachusetts indicating Jacob's sex as male. The court, however, did not refer to its public policy regarding sex amendments. Instead, it referred to the strong public policy in Ohio against same-sex marriages. *Id.* at *6. Although Jacob Nash's birth certificate indicated that he was a male, the court concluded that it did not have to issue the marriage license to a "same-sex" couple, thus implying that Jacob is legally a female. *Id.* at *9. The Ohio court's reasoning on this issue was circular. Jacob was seeking a same-sex marriage only if he was a female who wanted to marry another female. Whether he is legally a female depends upon how a state ascertains a person's sex. Ohio's articulated public policy against same-sex marriage cannot be used to establish Jacob's sex. Only an articulated public policy against allowing sex modifications to the original birth certificate could be used to rebut the information in the birth certificate indicating that Jacob is a male.

204. *See* Saenz v. Roe, 526 U.S. 489, 498 (1999) (striking down a state limitation on welfare benefits to new residents of the state).

205. *See supra* note 94 and accompanying text.

206. We are a society whose citizens are often on the move, changing locations and residences for business or personal reasons. *See* JASON SCHACHTER, U.S. CENSUS BUREAU, P23-204, CURRENT POPULATION REPORTS: WHY PEOPLE MOVE: EXPLORING THE MARCH 2000 CURRENT POPULATION SURVEY 2 (2001), *available at* http://www.census.gov/prod/2001pubs/p23-204.pdf.

the Dormant Commerce Clause, a state may not condition entry to that state on the surrender of one's sex designation. Where state rules of sex determination unduly burden commerce through a lack of uniformity, the state rules must give way to the national interest in the smooth movement of commerce.

For example, Wisconsin amended the birth certificate of J'Noel Gardiner, a male-to-female transsex person, to indicate that J'Noel is a female and thus could legally marry a male in Wisconsin.[207] As long as J'Noel and her husband stay in Wisconsin, J'Noel's status as a married woman is secure and stable. Travel beyond Wisconsin's borders, however, carries the risk that another state will not recognize the sex indicated on J'Noel's amended birth certificate. If a sister state refuses to acknowledge the amendment, J'Noel will be considered a male, and her marriage to her husband would be considered an illegal same-sex union.[208] In addition, if they have children, the legal relationship to their children may change. Thus, a move to a different state may exact a heavy toll on J'Noel and her family. Even traveling through another state may be risky. For example, if J'Noel and her husband were involved in an automobile accident in a state that refuses to recognize her amended birth certificate, her right to recover under a wrongful death or loss of consortium statute, which only extends rights to married couples, could be affected.[209] The risks that a transsex person and her spouse take in traveling through or moving to another state are grave and the consequences serious enough to hinder travel.

1. *The Right-to-Travel Framework Limits the Ability of States to Impede Free Movement*

The right to travel throughout the United States has been recognized as a basic right under the Constitution, protected by a number of specific provisions (e.g., the Citizenship Clause, the Privilege and Immunities Clause, and the Dormant Commerce Clause) as well as the structure of

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207. *Gardiner I*, 22 P.3d 1086, 1092 (Kan. Ct. App. 2001), *rev'd*, 42 P.3d 120 (Kan. 2002).

208. This result has occurred in a number of recent cases. *See, e.g.*, *Gardiner II*, 42 P.3d at 136–37; *Kantaras II*, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004); *In re* Nash, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at *9 (Ohio Ct. App. Dec. 31, 2003).

209. See, for example, *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999), where a Texas court denied a male-to-female transsex wife the right to recover under a wrongful death statute because the court determined that her seven-year marriage, which was performed in Kentucky, did not qualify her as a wife entitled to recover under the statute.

the Constitution.[210] Although the Constitution provides a framework that allows the states to govern with some independence, it also recognizes the need to reign in differences that hinder free movement and have the potential to fragment the union into fifty different fiefdoms. Tension between the states and the national government runs throughout the history of the union and still shadows constitutional interpretation.[211] One clarifying moment in the debate came with the passage of the Citizenship Clause of the Fourteenth Amendment that established our national citizenship as primary. Effectively overruling *Dred Scott v. Sandford*,[212] the Citizenship Clause ended a critical controversy among the states, which helped ignite the Civil War. It provides that persons born or naturalized in the United States are primarily citizens of the United States, and secondarily citizens "of the State wherein they reside."[213] Union citizenship is predominant and state citizenship derivative. The principles underlying the right to travel preserve the value of our national citizenship, recognizing that at some points the self-interest of individual states might be to set up barriers to entry. Preserving the right to travel requires that these barriers be declared unconstitutional.

The Supreme Court's recent decision in *Saenz v. Roe*[214] reiterated the importance of the right to travel.[215] The *Saenz* majority proclaimed that "[i]t is a privilege of citizenship of the United States, protected from state abridgment, to enter any State of the Union, either for temporary

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210. United States v. Guest, 383 U.S. 745, 757–58 (1966); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 48–49 (1867).

211. Recent Commerce Clause decisions have reflected this tension. *See* Printz v. United States, 521 U.S. 898, 935 (1997) (striking down a federal statute "commanding" state law enforcement officers to carry out tasks under federal gun control law); United States v. Lopez, 514 U.S. 549, 551 (1995) (invalidating the exercise of congressional Commerce Clause authority to ban guns near school zones); New York v. United States, 505 U.S. 144, 149 (1992) (prohibiting the federal government from commanding state legislatures to pass laws).

212. 60 U.S. (19 How.) 393 (1856).

213. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."); Hague v. Comm. For Indus. Org., 307 U.S. 496, 510 (1939) (opinion of Roberts, J.) ("The first sentence of the Amendment settled the old controversy as to citizenship . . . . Thenceforward citizenship of the United States became primary and citizenship of a State secondary.").

214. 526 U.S. 489 (1999).

215. *Id.* at 498 (striking down a state limitation on welfare benefits to new residents of the state).

sojourn or for the establishment of permanent residence."[216] This free access is "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[217]

The right to travel limits the ability of the states to place direct or indirect barriers on free movement in at least three ways.[218] The Dormant Commerce Clause protects a citizen's right to enter or leave a state. The Privileges or Immunities Clause of the Fourteenth Amendment ensures that states cannot treat new residents as less than full members of a state's community. Finally, the Privileges and Immunities Clause of Article IV protects the rights of visitors to a state. Each aspect of protection is important to disabling barriers to travel. Separately, these constitutional provisions protect different aspects of the right to move freely within the union, and together they reinforce the notion of one union and require the recognition of a citizen's sex designation as established by a sister state.

No state has ever sought to impose different sex-determination rules on its citizens as opposed to travelers or newly arrived citizens; therefore, the privileges and immunities restrictions on travel are not currently an issue in the sex-determination cases. A number of recent decisions, however, have placed burdens upon a transsex person's ability to move to another state because such a move would require the person to alter her legal status as a male or female. Thus, the next section examines whether sex-determination rulings that condition entry into the state upon a legal change of sex unconstitutionally infringe on the right to travel.

2. *The Dormant Commerce Clause Requires States to Respect the Sex Designation on a Properly Issued Birth Certificate from a Sister State*

The Court has reaffirmed a right to travel "'not found in the text of the Constitution,'" yet "firmly embedded in our jurisprudence."[219] The most general guarantee of the right of travel is "the right to go from one place to another, including the right to cross state borders while en

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216. *Id.* at 511 n.27 (quoting Edwards v. California, 314 U.S. 160, 183 (1941) (Jackson, J., concurring)).

217. *Id.* at 511 (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935)).

218. *Id.* at 500–04.

219. *Id.* at 498 (quoting United States v. Guest, 383 U.S. 745, 757 (1966)).

route."[220] Although various Constitutional provisions protect the general right to travel within the United States, the principles of the Dormant Commerce Clause provide the basic guarantees of free access that should protect transsex persons who wish to move from one state to another. Congress's Article I, Section 8 commerce power, which affirmatively authorizes Congress to regulate commerce "among the several States,"[221] contains a complementary limitation on state power. Even when Congress has refrained from legislating on a subject, the courts may invoke the "dormant" component of the Commerce Clause to preempt state laws that unduly burden interstate commerce.[222] Generally, two basic types of issues provoke Dormant Commerce Clause problems: protectionist state legislation that discriminates against out-of-state interests[223] and even-handed state statutes that unduly burden commerce.[224] More specifically, the Supreme Court has held that the Dormant Commerce Clause prevents states from formulating different rules if those differences will impede commerce because of inconsistency in regulation.[225] If uniformity is necessary, the Dormant Commerce Clause forbids conflicting laws. Inconsistent definitions of "female" and "male"—definitions that cause a person's sex to vary from one state to the next—impede the ability to travel between states and provide a classic case study of the need for uniform regulation.

Interstate travel by individuals is "commerce" for the purpose of the

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220. *Id.* at 500.

221. U.S. CONST. art. I, § 8, cl. 3.

222. Edwards v. California, 314 U.S. 160, 172–73, 176 (1941).

223. In situations such as these, the Court has ruled that such protectionist legislation will be subject to "the strictest scrutiny." Hughes v. Oklahoma, 441 U.S. 322, 337 (1979). Most discriminatory statutes are found unconstitutional under this restrictive standard, a "virtually *per se* rule of invalidity." Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). *But see* Maine v. Taylor, 477 U.S. 131, 151 (1986) (upholding a ban on the importation of bait fish after finding that this "legitimate local purpose" could be achieved through no less restrictive alternative).

224. *Philadelphia*, 437 U.S. at 624 ("Where the statute regulates evenhandedly . . . it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.") (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

225. *See, e.g.*, Healy v. Beer Inst., 491 U.S. 324, 337 (1989) (state statute that required out-of-state beer shippers to affirm that their posted prices are no higher than the prices in the bordering states had impermissible extra-territorial effect on commerce); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 583–84 (1986) (statute that required liquor sellers to set price that was no higher than lowest price charged in the United States regulated out-of-state transactions in violation of commerce clause); Kassel v. Consol. Freightways Corp., 450 U.S. 662, 678-79 (1981) (striking down Iowa law that limited truck length as placing disproportionate burden on out-of-state residents and businesses).

Dormant Commerce Clause.[226] The Supreme Court vindicated this right in *Edwards v. California*.[227] In striking down a California statute that made it a misdemeanor to bring an indigent nonresident into the state, the Court found that the California law placed an unconstitutional burden on interstate commerce.[228] California charged the defendant with the crime of transporting his unemployed brother-in-law from Texas into California.[229] California defended its action on the basis that the brother-in-law was an undesirable, a pauper, and a "moral pestilence."[230] The Supreme Court rejected the state's assertions that it could protect its borders from citizens it considered unfavorable additions, finding that such a right would not only invite retaliatory measures, but that "it would be a virtual impossibility for migrants and those who transport them to acquaint themselves with the peculiar rules of admission of many States."[231]

If a state law or regulation does not target out-of-state commerce, but still affects interstate commerce, the courts apply a balancing test: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[232] States that refuse to recognize a sister state's sex designation do not stop commerce at the borders, as did the law in *Edwards*. Rather, by refusing to recognize amended birth certificates, a state impedes the flow of commerce by making it less likely that individuals will cross into the state. Applied to transsex individuals, if a transsex person is living as a female in one state and has married a man, moving could put the marriage in jeopardy, as well as her right to custody of her children. If not married, she would be barred from marrying a man and would be limited to marrying another female in the

226. *See Edwards*, 314 U.S. at 172 ("[I]t is settled beyond question that the transportation of persons is 'commerce,' within the meaning of [the Commerce Clause]."); Camps Newfound/ Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 584 (1997) ("In determining whether the transportation of persons is 'commerce,' we noted [in *Edwards*] that '[i]t is immaterial whether or not the transportation is commercial in character.'" (citation omitted)).

227. 314 U.S. 160, 174 (1941).

228. *Id.* at 177.

229. *Id.* at 170–71.

230. *Id.* at 177.

231. *Id.* at 176.

232. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

new state. In addition, while in the new state, all identity documents, such as her driver's license, would be inconsistent with her physical appearance and self-identity. Requiring transsex persons to alter their legal sex and marital status to exercise their right to travel has the same effect as prohibiting entry. It is certainly more onerous than taxing the entry across the border, which the Supreme Court has found to be unacceptable.[233]

For example, when J'Noel Gardiner, a male-to-female transsex person with a birth certificate that indicates her sex is female, decides to move from Wisconsin to Kansas, the price imposed by Kansas is that she must enter as a male and not a female.[234] Even though her physical appearance is female, she identifies and dresses as a female, and her Wisconsin identity documents indicate that she is a female, travel to Kansas effectively requires that she assume the identity of a male. Given the consequences this requirement would impose on both her private and public life, relocation to Kansas is essentially impossible for J'Noel.

In addition, the Supreme Court has struck down state legislation if contradictory state statutes unduly burden commerce in areas where uniformity is necessary.[235] If uniformity is essential, a state may not interpose its own local rules.[236] The Supreme Court has acknowledged that application of this principle of uniformity is imprecise and the results in each case will be fact-specific.[237] For transsex persons who want to cross state lines, the question for the court would be whether the forum state's imposition of its own sex-determination rule, which contradicts the sex established in the birth state, impermissibly undermines uniformity and thus burdens the right of transsex persons to travel under the Dormant Commerce Clause.

No court has addressed this issue in relation to sex determination. The Supreme Court, however, has addressed an analogous scenario in terms of race. In *Morgan v. Virginia*,[238] the Court found a regulation requiring bus passengers to separate by race so that members of different races did not occupy contiguous seats violated the Commerce Clause.[239] The

233. *See* Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 39 (1867) (striking down a Nevada tax "upon every person leaving the State" by a common carrier).

234. *See Gardiner II*, 42 P.3d 120, 137 (Kan. 2002).

235. *See* Morgan v. Virginia, 328 U.S. 373, 377 (1946).

236. *Id.*

237. *Id.* at 377–78.

238. 328 U.S. 373 (1946).

239. *Id.* at 386.

Virginia statute that required this racial segregation also required that passengers move seats during their journey if the ratio of "coloreds" to "whites" on the bus changed, necessitating a shift in the size of the "colored" and "white" sections.[240] The Court invalidated the regulation under the Dormant Commerce Clause,[241] noting that the need for uniformity on the issue arose, in part, from the difficulty of defining a person's race and from the myriad of different requirements in states concerning separation by racial groups on public carriers.[242]

The lack of a uniform definition of male and female, combined with the variety of state regulations governing amendments of birth records, makes this situation similar to, but significantly more compelling than, the facts in *Morgan*. In *Morgan*, the Supreme Court balanced Virginia's need to exercise its local police power in separating the races with the need for national uniformity in the regulation of interstate travel. The court invalidated the Virginia statute and concluded that seating arrangements on common carriers crossing state lines "require a single, uniform rule to promote and protect national travel."[243] The burden in sex-determination rulings far surpasses the simple burden to change seats; these rulings force transsex persons to change their legal sex and potentially their marital status as a condition of entry into a state. The right to maintain a legally established sex designation is part of the ability to travel to other jurisdictions. A person's sex is an inextricable part of the person's identity, and an attempt to disenfranchise persons of their identity is akin to fencing them out of a state. On balance, the state's interest in maintaining its own local sex determination rules must succumb to a person's constitutionally protected right to cross state lines.

C. *A State Violates the Equal Protection Clause if It Imposes a Sex-Classification System that Relies on Chromosomes, the Ability to Reproduce, or Gender Stereotypes*

When a state determines whether a marriage between a male and a male-to-female transsex person is a legal heterosexual marriage or an illegal same-sex union, the state must establish a test for determining the

240. *Id.* at 381.

241. This decision predated *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), where the Court ruled that such "separate but equal" accommodations violated the right to equal protection.

242. *Morgan*, 328 U.S. at 380–81.

243. *Id.* at 386.

wife's legal sex.[244] When it establishes the factors that distinguish "males" from "females," the state is creating a sex-based classification system because (1) it is treating men and women differently and (2) it is establishing the rules that determine whether a person is either male or female and thus qualified for the state-created right.[245] A state system establishing the factors that control whether a person is male or female is equivalent to a state classification system establishing a person's race. State-created racial classification systems that required anyone with "any Negro blood" to sit in the back of the bus,[246] or prohibited that person from marrying someone who was legally "white," would be unconstitutional under the Equal Protection Clause.[247] Similarly, sex-classification systems may also violate the Fourteenth Amendment's equal protection command. Under the Equal Protection Clause, a sex-classification system that rejects scientific developments in favor of sex or gender stereotypes should be declared unconstitutional because the state can neither articulate an important state interest to support its system nor prove a substantial relationship between the state's interest and the means it uses to accomplish that interest.[248]

1. *The Equal Protection Clause Framework Requires a State's Definitions of Male and Female to Be Substantially Related to an Exceedingly Persuasive State Interest*

Courts subject most legislative classifications to the minimalist

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244. The discussion in this section applies with equal force to female-to-male transsex persons. For simplicity and clarity, the analysis will focus on male-to-female transsex persons.

245. An analysis of the scenario presented to the court in *Gardiner II*, 42 P.3d 120, 135 (Kan. 2002), will aid in the understanding of why these determinations are sex-based. J'Noel Gardiner is a male-to-female transsex person whose Wisconsin birth certificate was amended to indicate she is a female. When J'Noel wanted Kansas to recognize her Wisconsin birth certificate and treat her as a female for purposes of determining the validity of her marriage, the Kansas Supreme Court refused. If instead the Kansas Supreme Court had been asked to determine the legal sex of a woman named Jennifer born in Wisconsin and identified as a female at birth, Kansas would recognize her status as a female. In both cases, Kansas is creating a rule to establish the legal sex of Jennifer and J'Noel. It is thus creating a sex-based classification system that is valid only if it satisfies intermediate scrutiny.

246. *See Morgan*, 328 U.S. at 381.

247. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).

248. Even accurate stereotypes cannot be used to justify the state's interest when the state seeks to bar individuals from opportunities based on gender "tendencies." *See* United States v. Virginia, 518 U.S. 515, 541–42 (1996) (holding that equal protection principles, as applied to gender classifications, mean state actors may not rely on overbroad generalizations about men and women).

rational basis review under the Equal Protection Clause.[249] Under this level of judicial scrutiny, a challenger must prove that the state did not have a legitimate governmental objective or that the state failed to use rational means to achieve a legitimate objective.[250] The Supreme Court has sanctioned the application of heightened scrutiny in two different scenarios: when the discrimination involves a suspect classification, and when the discrimination significantly burdens a fundamental right.[251] Courts subject governmental classifications based upon race and national origin, and state classifications based on alienage, to strict scrutiny.[252] Under strict scrutiny, the government must establish that it is using narrowly tailored measures to further compelling governmental interests.[253] Few governmental actions can survive strict scrutiny.[254] Gender classifications, however, are subject to an intermediate level of review, falling somewhere between the demanding requirements of strict scrutiny and the permissiveness of rational basis review.[255] The government must prove an exceedingly persuasive justification for its system, and the means it uses must be substantially related to an important government goal.[256]

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249. *See* Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976).

250. *See* Heller v. Doe, 509 U.S. 312, 319–20 (1993); FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313–14 (1993); Williamson v. Lee Optical, 348 U.S. 483, 488 (1955).

251. *See Murgia*, 427 U.S. at 312; Shapiro v. Thompson, 394 U.S. 618, 634 (1969). Thus far, the Court has treated the right to interstate travel, *id.* at 629–31, the right to marry, Zablocki v. Redhail, 434 U.S. 374, 384 (1978), and the right to vote, Reynolds v. Sims, 377 U.S. 533, 561–64 (1964), as fundamental rights subject to strict scrutiny. Because state sex-classification systems also burden the fundamental rights to marry and to travel, they should be subjected to strict scrutiny.

252. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion).

253. *See* Gratz v. Bollinger, 539 U.S. 244, 270 (2003).

254. Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (noting that scrutiny that is strict in theory is usually fatal in fact).

255. United States v. Virginia, 518 U.S. 515, 523–24 (1996); Miss. Univ. v. Hogan, 458 U.S. 718, 723–24 (1982).

256. The Supreme Court settled on intermediate review after initially applying only rational basis review to gender classifications. *See* Reed v. Reed, 404 U.S. 71, 76 (1971) ("A [gender] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.") (internal quotations omitted). Only four justices ultimately adopted the position that gender classifications should be subject to strict scrutiny. *Frontiero*, 411 U.S. at 688 (plurality opinion) ("Classifications based on sex, like classifications based on race, alienage, or national origin, are inherently suspect and must therefore be subjected to strict judicial scrutiny."). Intermediate scrutiny surfaced as a standard in *Craig v. Boren*, 429 U.S. 190, 197 (1976). The Supreme Court confirmed intermediate scrutiny as the appropriate standard in *Virginia*,

The purpose of the Equal Protection Clause is to ensure that the government does not subject its citizens to arbitrary classifications.[257] In the early cases brought by transsex persons, the courts limited their analysis to determining whether individuals who "change their sex" are entitled to a heightened level of scrutiny as a suspect class.[258] The appropriate level of scrutiny to apply should not be based upon whether people who "change their sex" have been determined to be a "suspect group." It should be based upon whether the state is creating a suspect "sex-based" classification system. For example, if a state determines that a person with female-appearing genitalia and breasts is a male because she has XY chromosomes, the state's definition of "female" must survive intermediate scrutiny. That is, the state must establish an exceedingly persuasive justification for its classification system,[259] and the chosen definition may not be based on administrative convenience or stereotypes of what it means to be a "real" woman.[260]

2. *A State's Interests in Refusing to Recognize a Transsex Person's Postoperative Sex Fail to Pass Constitutional Muster*

Governmental benefits that differentiate based upon sex remain in only two significant areas: military rules,[261] and marriage restrictions.[262] Although states may have the power to limit marriage to one man and one woman, the state's test for determining whether a person is legally a male or a female must be able to withstand scrutiny under the Equal Protection Clause. The state must articulate an important interest for its sex-classification system and prove that a substantial relationship exists between that interest and the means used to accomplish the governmental goal. States that have refused to treat post-operative transsex persons as their self-identified sex have relied on several purported state interests to justify their rulings: (1) the state's public

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518 U.S. at 524.

257. *Cleburne*, 473 U.S. at 446; *Frontiero*, 411 U.S. at 683; *Reed*, 404 U.S. at 76.

258. *See, e.g.*, Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663 (9th Cir. 1977); Doe v. Postal Serv., No. CIV.A.84-3296, 1985 WL 9446, at *4 (D.D.C. Jun. 12, 1985); Terry v. EEOC, No. CIV.A.80-C-408, 1980 WL 334, at *3 (E.D. Wis. Dec. 10, 1980).

259. *Virginia*, 518 U.S. at 524.

260. *Id.* at 541.

261. The federal Military Selective Service Act, 50 U.S.C. app. §§ 451–473 (2000), requires only men to register with the Selective Service System.

262. *See supra* note 3.

policy against same-sex marriage;[263] (2) a post-operative transsex person's inability to reproduce;[264] (3) a state's inability to change the sex fixed by God;[265] (4) the need to protect the public from fraud;[266] and (5) the desire to discourage "psychologically ill persons" from engaging in sex changes.[267]

Although few courts have expressly articulated that their public policy against same-sex marriages justifies their refusal to recognize a post-operative transsex person's self-identified sex, it may be one of the unstated underlying reasons for these rulings. At least one court has expressly used its view on same-sex marriage to justify denying a female-to-male transsex person the right to marry as a man.[268] In *In re Nash*,[269] Jacob Nash's birth certificate indicated that he was a male, but the Ohio Court of Appeals concluded that it was not obligated to issue a marriage license to Jacob and his future wife because it would be issuing a marriage license to a same-sex couple.[270]

In other words, the Ohio court decided to ignore Jacob's amended birth certificate and determined that Jacob was female. The court did not carefully consider this critical determination. Instead, the Ohio court engaged in circular reasoning. The court cannot use a public policy against same-sex marriage to invalidate a marriage until after it determines the sex of the parties.[271] Jacob's marriage is a same-sex marriage only if he is legally a woman. Whether Jacob is a man or a woman for purposes of marriage depends upon how the state determines a person's sex. Thus, Ohio's public policy against same-sex marriage should not be used to determine Jacob's sex.

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263. *See In re* Nash, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at *6 (Ohio Ct. App. Dec. 31, 2003).

264. *See Gardiner II*, 42 P.3d 120, 135 (Kan. 2002); *Nash*, 2003 WL 23097095, at *6.

265. *See* Littleton v. Prange, 9 S.W.3d 223, 223–24 (Tex. App. 1999).

266. *See* Anonymous v. Weiner, 270 N.Y.S.2d 319, 322 (N.Y. Sup. Ct. 1966).

267. *See id.*; *see also* Hartin v. Dir. of the Bureau of Records, 347 N.Y.S.2d 515, 518 (N.Y. Sup. Ct. 1973).

268. *Nash*, 2003 WL 23097095, at *6.

269. Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095 (Ohio Ct. App. Dec. 31, 2003).

270. *Id.* at *9.

271. The flaw in the court's logic may be illustrated more clearly in a case involving racial marriage restrictions. If a married couple claimed that they were both black and thus legally married in a jurisdiction that banned interracial marriage, the court could not rely on its public policy in favor of same-race marriages to determine that the husband or wife is legally white. It must first determine the legal race of the husband and wife before it can rely on its public policy against mixed-race marriages.

A number of courts have focused on the inability of post-operative transsex persons to produce offspring to invalidate their marriages.[272] These courts have created sex-classification systems by relying on dictionary definitions of sex that provide that males are the sex that fertilize the ovum and beget offspring and females are the sex that produce ova and bear offspring.[273] This justification is unlikely to survive even rational relationship review under the Equal Protection Clause because no state requires proof of fertility as a condition of marriage. Furthermore, because post-operative transsex persons can neither bear nor beget, reliance upon the ability to reproduce implies that transsex persons are neither male nor female and thus would be barred from marrying anyone. Denying transsex persons the right to marry because of their infertility violates their fundamental right to marry.[274]

A Texas court refused to treat a male-to-female transsex person as a woman by ruling that medicine and law cannot change the sex that was "immutably fixed by our Creator at birth."[275] State actions based solely upon religious justifications are unconstitutional.[276] States cannot use religion to justify their actions in the absence of a neutral secular basis for their decisions.[277] The Texas decision reflects a deeply rooted belief in an unchangeable binary conception of sex. This belief conflicts with the current science, and, at least under the Equal Protection Clause, cannot receive sanctuary based on faith and vague religious references.[278]

Some courts have been concerned that allowing transsex people to amend the sex indicated on their birth record could result in fraud. No

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272. *See, e.g.*, *Kantaras II*, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004); *Nash*, 2003 WL 23097095, at *9; *Gardiner I*, 22 P.3d 1086 (Kan. Ct. App. 2001), *rev'd*, 42 P.3d 120, 135 (Kan. 2002).

273. *Gardiner II*, 42 P.3d at 135; *Kantaras II*, 884 So. 2d at 159; *Nash*, 2003 WL 23097095, at *6.

274. *Cf.* Zablocki v. Redhail, 434 U.S. 374, 384 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967).

275. Littleton v. Prange, 9 S.W.3d 223, 224, 231 (Tex. App. 1999).

276. *See* Webster v. Reprod. Health Serv., 492 U.S. 490, 566 (1989) (Stevens, J., concurring in part and dissenting in part); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983); Gillette v. United States, 401 U.S. 437, 452 (1971).

277. *See* McCreary County, Ky. v. ACLU of Ky., ____ U.S. ____, 125 S. Ct. 2722, 2745 (Jun. 27, 2005) (upholding injunction against display of Ten Commandments at courthouse, noting that "[t]his is no time to deny the prudence of understanding the Establishment Clause to require the Government to stay neutral on religious belief, which is reserved for the conscience of the individual").

278. *Id.*

recent decisions have relied on this justification, but in 1966, a New York court denied a transsex person the ability to amend the sex on her birth certificate, citing the need to protect the public from fraud.[279] Only two years later, another New York court rejected this justification, noting that the possibility of "so-called fraud" exists, if at all, largely if a post-operative female who presents as a female is classified as a male.[280] No court has relied on a fraud justification since 1966, perhaps because no evidence of a fraud problem has emerged beyond the amorphous fear expressed by the New York court. Courts that have considered the issue have probably rejected the argument—an argument more ironic than convincing—that preventing fraud would be accomplished by forcing people with a female appearance (and possibly female-appearing genitalia) to carry identification documents (e.g., a driver's license) that indicate that they are male.

The final reason that courts have mentioned is that the legal system should not be used to help "psychologically ill persons"[281] resolve their "unhappy mental state."[282] Courts have not used this justification since 1973 and because of developments in medical science should not use it today. Medical experts agree that transsexuality is not merely a "mental state."[283] In fact, recent studies support the finding that transsexuality has a biological basis.[284] More important, standard medical protocol recognizes that there is no "cure" for transsexuality.[285] Neither counseling nor medication will lead a person to conclude that he actually identifies as the gender assigned to him at birth. A majority of medical experts currently recommend that transsex individuals live in their self-identified gender role.[286]

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279. Anonymous v. Weiner, 270 N.Y.S.2d 319, 322 (N.Y. Sup. Ct. 1966) (affirming rejection of request for change in birth certificate because "[t]he desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud").

280. *See In re* Anonymous, 293 N.Y.S.2d 834, 838 (N.Y. Civ. Ct. 1968).

281. *Weiner*, 270 N.Y.S.2d at 322.

282. Hartin v. Dir. of the Bureau of Records, 347 N.Y.S.2d 515, 518 (N.Y. Sup. Ct. 1973).

283. *See supra* note 55.

284. *Id.*

285. The Harry Benjamin International Gender Dysphoria Association (HBIGDA) has established international standards for the treatment of transsexuality. *See* HBIGDA Standards of Care, 6th Version, http://www.hbigda.org/soc.htm (last visited Oct. 10, 2005).

286. *In re* Heilig, 816 A.2d 68, 78 (Md. 2003) ("Although psychotherapy may help the transsexual deal with the psychological difficulties of transsexualism, courts have recognized that psychotherapy is not a 'cure' for transsexualism. Because transsexualism is universally recognized as inherent, rather than chosen, psychotherapy will never succeed in 'curing' the patient . . . . Consequently, it has been found that attempts to treat the true adult transsexual

In sum, the reasons states have advanced to justify a sex-classification system that focuses exclusively on chromosomal analysis or the ability to reproduce in lieu of any other factors are unconvincing and logically unsound. Furthermore, they could not withstand Equal Protection scrutiny because they are neither compelling nor exceedingly persuasive. Finally, the legitimacy of using these factors is questionable given the current scientific understanding of the development of gender-identity formation.

3. *Sex-Classification Systems that Rely on Chromosomal Analysis or Ability to Reproduce Violate the Equal Protection Clause Under Any Standard of Review*

In the unlikely event that a court finds that any of the state interests discussed above are valid, the court must still examine the means used to accomplish the governmental goal.[287] In other words, to be constitutional under the Equal Protection Clause, the state must prove that using chromosomes or the ability to reproduce as determinative factors accomplishes the goal the state is trying to achieve. Defining the terms "male" and "female" based on inaccurate and misleading criteria does not further opposite-sex marriage,[288] is inconsistent with the state allowing other infertile couples to marry, does not prevent fraud, and does not promote psychological well being. Thus, barring transsex persons from marrying in their self-identified gender role bears no relationship to the articulated state interests and must fail under all levels of judicial scrutiny

Furthermore, when a state determines that it will classify only those individuals who are able to bear children[289] or who have XX

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psychotherapeutically have consistently met with failure.") (citation omitted).

287. For purposes of this analysis, this section presumes that the state has a valid interest in engaging in sex assignment.

288. For example, jurisdictions that have ruled that post-operative male-to-female transsex persons are still males for the purposes of marriage are allowing post-operative male-to-female transsex persons to marry women. In other words, two individuals who both appear to be women (even when they are undressed) are now legally allowed to marry in these jurisdictions. *See* Cris Beam, *For Better or For Worse?*, OUT, May 2000, at 60, 64; Jilly Beattie & Sara Lain, *The Wedding with Two Brides . . . and One Is a Man!; Lesbian Lovers Both Wear a Dress for Britain's Weirdest-Ever Marriage*, THE PEOPLE, June 11, 1995, at 2; Afi-Odelia E. Scruggs, *Tying Legalities into Tangled Knot*, PLAIN DEALER (Cleveland), Oct. 7, 1996, at 1B; Michael Vigh, *Transsexual Weds Woman in Legally Recognized Union*, SALT LAKE TRIB., Feb. 5, 1999, at 1C.

289. *See, e.g.*, *Gardiner II*, 42 P.3d 120, 135 (Kan. 2002).

chromosomes[290] as women, it is engaging in impermissible sex stereotyping about what it means to be a "real" woman.[291] These and other biologic tests ignore scientific studies that establish that sex features are not binary and many people have incongruent sex attributes.[292] Ability to reproduce and chromosomal structure are not more valid indicators of a person's sex than any other anatomical or physiological factors. For example, if a state adopted a test for the determination of sex that defined men according to the size of their penises and women according to the size of their breasts, it would undoubtedly fail even the rational basis test. Although chromosomal make-up and ability to reproduce[293] may be less variable than penis and breast size, these indicators still evidence that courts are relying on stereotypes to establish sex. Classification systems based upon unsound stereotypes do not qualify as an exceedingly persuasive justification and thus fail to meet constitutional muster.[294]

Even if a court were to determine that rational basis review is appropriate, states that have excluded scientific advances in understanding sex and gender-identity formation in favor of tests based solely on reproductive capacity or chromosomal structure would not pass rational basis scrutiny under recent Supreme Court equal protection jurisprudence. The Court's decision in *Romer v. Evans*[295] suggests that, when using rational basis review to examine laws purporting to violate the constitution, the Supreme Court may be moving toward affording greater protection to sexual minorities. *Romer* involved discrimination

290. *See, e.g.*, Littleton v. Prange, 9 S.W.3d 223, 230 (Tex. App. 1999).

291. Decisions based upon sex stereotyping are impermissible under the Equal Protection Clause, as well as under Title VII. 42 U.S.C. § 2000e-2(a) (2000). Discrimination claims are more often brought under Title VII than the Equal Protection Clause because employers traditionally discriminate on this basis more than the government. Although early Title VII actions allowed employers to discriminate against their transgendered employees, *see, e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748 (8th Cir. 1982); Holloway v. Arthur Anderson & Co., 566 F.2d 659 (9th Cir. 1977), most recent decisions recognize that discrimination against transsex persons is an impermissible form of sex stereotyping discrimination, *see, e.g.*, Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004); Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000). Courts resolving equal protection claims should reach a similar conclusion and not allow states to rely on sex stereotypes when they establish the rules for determining legal sex.

292. *See supra* notes 45–61 and accompanying text.

293. In the U.S., approximately 6.1 million adults, or about 10% of the reproductive age population, are infertile. *See* NAT'L CTR. FOR HEALTH STATISTICS, *supra* note 131.

294. *See* United States v. Virginia, 518 U.S. 515, 524 (1996).

295. 517 U.S. 620 (1996).

against gays and lesbians.[296] Although the Court avoided a specific ruling that laws that classify people by their sexual orientation should receive heightened scrutiny, the Court's rationale in *Romer* may provide transsex persons and other sexual minorities with greater protection.

In *Romer*, Colorado citizens voted to amend the Colorado Constitution to preclude all legislative, executive, or judicial action designed to protect the status of persons based on their sexual orientation, conduct, practices, or relationships.[297] The Supreme Court found that this amendment violated the Equal Protection Clause because it imposed a broad and undifferentiated disability on a single group.[298] Furthermore, the Court found that the amendment was motivated by animus toward a particular group and lacked a rational relationship to legitimate state interests.[299] The Court stated: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[300]

Even under the lowest standard of review, states that refuse to recognize transsex persons as their self-identified sex may violate equal protection guarantees. When a state defines "male" and "female" in a way that is contrary to current science and visits a broad disability on transsex persons, the state's action appears to evidence a bare "desire to harm a politically unpopular group."[301] Furthermore, the state cannot justify its decision on its public policy disfavoring same-sex marriages because the resulting sex-determination ruling in effect sanctions what appears to be a same-sex marriage. For example, if a state allows J'Noel

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296. *Id.* at 629–31.

297. *Id.* at 622–24.

298. *Id.* at 635–36.

299. *Id.* at 635.

300. *Id.* at 634 (emphasis in original) (citation omitted). *Romer* could be considered to be sui generis given the breadth of the discrimination imposed by the legislation. In *Lawrence*, the Supreme Court confronted a narrower statute that criminalized same-sex sodomy. 539 U.S. 558, 563–64 (2003). The Court decided the statute violated substantive due process principles and declined to rule on the narrower issue of whether the statute would also violate the Equal Protection Clause. *Id.* at 574–75. Justice Sandra Day O'Connor, in her concurring opinion, found that the law was unconstitutional on equal protection grounds for two reasons. First, the law evidenced a desire to harm a politically unpopular group and therefore required a more searching form of rational basis review. *Id.* at 580 (O'Connor, J., concurring). Second, the challenged legislation inhibited personal relationships. *Id.* ("We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships.").

301. *Romer*, 517 U.S. at 634 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

Gardiner, a male-to-female transsex person with breasts and female-appearing genitalia, to marry another woman, most of society would conclude that the relationship appears to be a same-sex union.[302] Thus, no rational relationship exists between a state sex-classification system that relies solely on chromosomes or ability to reproduce and its interest in limiting marriage to opposite-sex couples.

If a state bans same-sex marriages, refusing to allow transsex persons to marry in the gender role in which they live indicates that the state action is based solely on an irrational animus against a discrete group—transsex people. When a state denies transsex persons the right to marry in their self-identified gender role, the state is inhibiting personal relationships, and the denial suggests the intent to deny equal protection to a politically unpopular group. This type of animus has led the Supreme Court to strike down laws even under a rational basis level of review, concluding, for example, that the bare "desire to harm a politically unpopular group" was not a legitimate interest when it involved hippies,[303] the mentally retarded,[304] or gays and lesbians.[305] Limiting transsex persons to what is essentially a same-sex marriage appears "not to further a proper legislative end but to make them unequal to everyone else."[306]

In sum, the rational basis test the Court applied in *Romer*, a case involving discrimination against a different sexual minority group, supports a finding that state classification systems that discriminate against individuals who fail to conform to chromosomal or reproductive gender norms are unconstitutional even under rational relationship review. If these state classifications fail to survive rational basis review, they would fail, of course, under any heightened level of scrutiny.

D. *The Principles of Substantive Due Process Require States to Refrain from Imposing Unwarranted Burdens on People Based on Their Gender Identities*

When a state insists on treating transsex persons as the sex assigned to

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302. After the Texas court's decision in *Littleton,* two women, who to all outward appearances appear female, can now legally marry. *See, e.g.*, Todd Ackerman, *Marriage, a changing union? Transsexual wedding shows gender can be a complex issue*, HOUSTON CHRON., Sept. 17, 2000, at 1.

303. *See, e.g., Moreno*, 413 U.S. at 534.

304. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985).

305. *See, e.g., Romer*, 517 U.S. at 635.

306. *Id.*

them at birth rather than the sex that comports with the gender role in which they live, it is imposing significant burdens on their private and public lives.[307] If a state refuses to recognize an amended birth certificate, it is requiring a transsex person who identifies as a female and whose outward appearance is female to marry only another female and to carry identity documents that indicate she is a male.[308] In effect, the state would be requiring her to abandon her gender identity.[309] Whether the state's action can withstand scrutiny under a substantive due process analysis is questionable.

The Supreme Court has linked, directly and indirectly, the right to substantive due process to the right of consenting adults to engage in private sexual acts.[310] No reported decision of any court, however, discusses whether gender identity is entitled to the same protection as private sexual acts. When courts are eventually asked to make this determination, they will be faced with a complicated task, given the ambiguous Supreme Court decisions about the parameters of the right to substantive due process. The transformation of the doctrine of substantive due process from a broad right of privacy to a narrow guarantee of specific, traditional majoritarian-protected rights has limited the doctrine. The Supreme Court's most recent statements in

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307. When states recognize amended birth certificates under some circumstances but refuse to acknowledge the amended birth certificates of transsex persons, they are imposing a burden on this group that they do not impose on any other group. When birth certificates are amended after adoptions or paternity determinations, they are uniformly recognized. *See supra* notes 176–78 and accompanying text.

308. The collateral consequences of a sex determination may be far reaching. In addition to marital issues, it may also affect: pension or insurance rights; employment issues; the effect of criminal laws in which gender is an element; the right to medical treatment, work and housing assignment when serving in the military or confined as part of a civil or criminal proceeding; and the right to participate in certain sports. *See generally* Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1; *see also* Melissa Aubin, *Defying Classification: Intestacy Issues for Transsexual Surviving Spouses*, 82 OR. L. REV. 1155, 1190 (2003).

309. The Ninth Circuit has held that requiring a person to abandon her gender identity is untenable. Hernandez-Montiel v. INS., 225 F.3d 1084, 1093 (9th Cir. 2000) ("[S]exual identity [is] immutable [and] so fundamental to one's identity that a person should not be required to abandon [it].").

310. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. . . . Their right to liberty under the Due Process Clause gives them the full right to engage in [private sexual] conduct without intervention of the government."); Roe v. Wade, 410 U.S. 113, 153 (1973) (finding a right to terminate pregnancy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (striking down law criminalizing distribution of contraceptives); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (striking down law criminalizing the use of contraceptives based on marital privacy).

Lawrence v. Texas,[311] however, support the conclusion that states that refuse to recognize a legal change of sex from another jurisdiction violate a transsex person's right to substantive due process.

1. The Supreme Court's Substantive Due Process Rulings Are Complex, Controversial, and Convoluted

The Supreme Court expanded the doctrine of substantive due process several decades ago when it used this constitutional theory to prevent a state from banning the sale of contraceptives. In *Griswold v. Connecticut*,[312] the Court held that a constitutional privacy interest, within the confines of the Due Process Clause, protected a married couple's use of birth control.[313] In *Griswold*, the Court relied heavily on the existence of a marital relationship,[314] but seven years later, in *Eisenstadt v. Baird*,[315] the Court extended this constitutional privacy interest in access to contraception to unmarried persons.[316] Although the Supreme Court made a relatively quick jump from married to unmarried persons, the protection it afforded sexual privacy was linked to procreation: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[317] The Court continued to focus on procreation interests when it considered a woman's right to seek an abortion in *Roe v. Wade*.[318] In *Roe*, the Court held that the right of privacy encompassed a woman's right to choose to have an abortion under some circumstances.[319]

When the Supreme Court decided *Washington v. Glucksberg*,[320] substantive due process was settling into a pattern of regression from the

311. 539 U.S. 558 (2003).

312. 381 U.S. 479 (1965).

313. *Id.* at 485–86.

314. *Id.*

315. 405 U.S. 438 (1972).

316. *Id.* at 453.

317. *See id.* (emphasis in original). *See also* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (striking down, on equal protection grounds, a criminal statute authorizing the sterilization of thrice-convicted felons, declaring that "[m]arriage and procreation are fundamental to the very existence and survival of the race").

318. 410 U.S. 113, 153 (1973).

319. *Id.* at 164.

320. 521 U.S. 702 (1997).

protection of privacy interests in *Roe*.[321] Before the Court would accept a right as fundamental, it required the right to be carefully described.[322] Then the Court would find the right to be fundamental only if the specifically described right was so deeply rooted in this nation's history and traditions and so "implicit in the concept of ordered liberty," that "neither liberty nor justice would exist if [it] were sacrificed."[323] Given the severity of this test, few rights would be likely to make it through the judicial ordeal for a number of reasons.

First, courts could narrowly interpret rights already declared fundamental under past Supreme Court decisions to restrain their reach.[324] For example, although the right to marry is frequently referred to as a fundamental right,[325] that assertion provides little protection to gays and lesbians. Courts can easily limit the right by shrinking the meaning to "a right to marry a person of the opposite sex,"[326] even though courts do not impose the same microscopic limitations across the board.[327] Thus, as courts reframe the question, the protection afforded any particular fundamental right declines. This technique honors creative word framing more than legal reasoning.

Second, the focus on history and tradition limits protection to rights that have been endorsed by majorities over time, undercutting the notion that protection from majority rule in certain circumstances is the point of any constitutional right.[328] Moreover, whether the Court examines a

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321. *See id.* at 720–21.

322. *See id.* at 721.

323. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).

324. Rights treated as fundamental include: the right to privacy, which includes the right to use contraceptives, Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (married persons); Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972) (extending right to contraceptives to unmarried persons), the right to an abortion, although the state can make obtaining an abortion difficult, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992), the right to refuse medical treatment under some circumstances, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990), and the right to guide and control children, Troxel v. Granville, 530 U.S. 57, 70, 75 (2000); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399–403 (1923).

325. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 95–97 (1987); Zablocki v. Redhail, 434 U.S. 374, 384 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

326. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 57–58 (Haw. 1993); Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. 1973); Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971).

327. For example, the Court phrased the right to marry broadly when it invalidated a criminal statue requiring court approval for the marriage of any parent having child support obligations. *Zablocki*, 434 U.S. at 374; *see also Turner*, 482 U.S. at 97 (invalidating a regulation prohibiting inmates from marrying without prison superintendent approval).

328. *See generally* Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*,

general history or tradition (the right to procreate) or a specific history or tradition (the right to procreate outside of a marriage) will likely alter the outcome. In addition, whether the Court views history and traditions as static or evolving will similarly alter the result. For example, in *Bowers v. Hardwick*,[329] the Court emphasized the historical roots of bans on sodomy rather than analyzing the significance of the fact that, at the time, over half the states had repealed their sodomy laws.[330] In *Lawrence*, however, the Court focused on the importance of the evolving and changing nature of our laws to determine those rights that should be protected under substantive due process.[331] Courts that analyze only historical understandings of gender role and identity formation will reach significantly different conclusions from courts that include developing scientific advances in their analysis.[332]

In sum, until *Lawrence*, the substantive due process doctrine seemed drained of substance through the adoption of a highly restrictive test for determining fundamental rights.[333] Courts further weakened the doctrine by trimming those fundamental rights already granted.[334] The substantive due process doctrine seemed to offer little hope for protection of the rights of sexual minorities subjected to discrimination.

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57 U. MIAMI L. REV. 101 (2002) (criticizing the use of tradition as a part of a fundamental rights analysis because it legitimizes past discrimination, limits the protections of the Fourteenth Amendment, supplies a malleable standard, and perpetuates discrimination).

329. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

330. *Id.* at 192–93.

331. *Lawrence*, 539 U.S. at 571–72.

332. *Compare* Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999) (ruling that a post-operative male-to-female transsex person should be treated as a man because the court believed that only "our Creator" can decide a person's sex), *with In re* Heilig, 816 A.2d 68, 79 (Md. 2003) (reaching the opposite conclusion after tracing scientific developments that have enhanced our understanding of gender formation).

333. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

334. *See id.* (finding no fundamental right of the terminally ill to determine the manner and circumstances of death); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992) (expanding situations where the government may limit a woman's right to have an abortion); Michael H. v. Gerald D., 491 U.S. 110, 127 (1989) (finding biological father does not have a fundamental right to a relationship with biological child when the biological mother is married and her husband chooses to raise the daughter as his own). *But see* Troxel v. Granville, 530 U.S. 57, 75 (2000) (holding that there is a fundamental right of parents to make decisions regarding their child's care, custody, and control).

2. *The* Lawrence *Decision Supports a Finding of a Protected Liberty Interest in a Person's Gender Identity*

In *Lawrence*, the Supreme Court struck down a Texas statute criminalizing same-sex sodomy.[335] The Court overruled its previous decision in *Bowers*, which had upheld a similar state statute against a constitutional challenge less than twenty years earlier.[336] Although *Lawrence* expels *Bowers* from the constitutional ranks, the decision jumbled the principles that govern substantive due process. The *Lawrence* Court adopted neither of the options that substantive due process seemed to offer at the time. It did not rule that the right in question was "fundamental" and strike down the statute under a strict scrutiny standard; nor did it specifically uphold the statute under a rational basis test, even though it used language like "legitimate state interest," a phrase typically reserved for statutes that are upheld under rational basis review.[337] Instead, the court utilized rational basis language, but struck down the statute as if it were subject to strict scrutiny. In other words, it employed "rational basis with bite," a muddled level of review where the Supreme Court claims to be applying the rational basis standard, and often even recites the words of the test,[338] but the reasoning and results resemble the more exacting standard required by intermediate scrutiny.[339]

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335. *Lawrence*, 539 U.S. at 562.

336. *Id.* at 578 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

337. *Id.* ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."); *see* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 601 (2d ed. 2002) ("The Court has made it clear that economic regulations . . . will be upheld when challenged under the due process clause so long as they are rationally related to serve a legitimate government purpose.").

338. *See* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–22 (1972) (describing a level of equal protection scrutiny labeled "mere rationality" by the Supreme Court, but applied with a more searching judicial inquiry into the legislative means and ends than the traditional and deferential "toothless" rational basis review).

339. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (finding state's zoning provision regarding housing for the mentally retarded failed rational relationship review because it was based "on an irrational prejudice against the mentally retarded"); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (striking down regulation, on equal protection grounds, based on impermissible animosity towards hippies and their communes). *But see* Williamson v. Lee Optical, 348 U.S. 483, 487–90 (1955) (upholding legislation under classic deferential rational basis review). *See generally* Jeremy Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769 (2005).

In *Lawrence*, the Court focused more on the concept of "liberty" as opposed to "fundamental rights." The Court emphasized that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions."[340] In addition to this broad endorsement of individual self-expression, the *Lawrence* decision also quoted expansive language from an earlier opinion that upheld a right of privacy in a woman's decision about whether to terminate her pregnancy.[341]

This endorsement of personal autonomy[342] was mixed with limiting language. It applied only to consenting adults[343] in private spaces.[344] Nevertheless, the central point of *Lawrence* is that the Court is willing to afford constitutional protection to some "intimate and personal choices,"[345] including the right to engage in sexual behavior with a same-sex partner. Throughout the opinion, the Court emphasized the importance of protecting a person's right to choose and downplayed the government's interest in protecting morality. The Court emphasized that the government is required to respect "private lives," and not "control [a person's] destiny" by making private sexual conduct a crime.[346]

Finally, the Court divorced the liberty interest in sexual privacy from the right to procreate. At issue in *Lawrence* was the right to privacy in a consensual sexual relationship—one that does not have procreation as any part of its purpose.[347] The Court created a realm of privacy with regard to sexuality, unrelated to reproductive and bodily integrity issues

340. *Lawrence*, 539 U.S. at 562.

341. "Matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Lawrence*, 539 U.S. at 574 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

342. For example, the *Lawrence* opinion opens with the following general statement:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

Id. at 562.

343. *Id.*

344. *Id.* at 567.

345. *Id.* at 578.

346. *Id.*

347. *Id.*

such as contraceptives or abortion. Focusing on personal identity, and specifically sexual identity, the *Lawrence* majority found a constitutionally protected liberty interest that should occupy a space protected from unjustified state intrusion.[348]

3. *The* Lawrence *Decision Protects a Right to Privacy, but Under a Standard of Review that Is Neither Strict Scrutiny nor Rational Basis*

Lawrence abandoned the rigid *Glucksberg* framework that severely limited constitutional protection of privacy interests. What replaces that analysis is unclear. Although the Court did not explicitly declare that the conduct examined in *Lawrence* constituted a fundamental right, it relied on other cases in which fundamental rights were established or recognized, such as *Roe*. In addition, the Court carefully avoided the buzzwords that would indicate it was applying heightened scrutiny. Instead, it utilized the traditional rational relationship terminology of "legitimate" state interest,[349] which should have led to the statute being upheld.[350] The Court appeared to place the burden on Texas to prove the legitimacy of the law, a burden typically not imposed under rational basis review.[351]

By applying neither traditional strict scrutiny nor traditional rational basis review, the Supreme Court retained the option to decide in the future, on a case-by-case basis, whether a protected liberty interest exists. It could apply the standard rational relationship review in cases in which it does not want to extend the liberty interest. Alternatively, it could apply the more amorphous *Lawrence* standard when it does want to extend the interest.

At a minimum, *Lawrence* indicates that the binary choice between a fundamental rights analysis and rational basis review is sometimes inappropriate in the substantive due process arena. Although the opinion

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348. *Id.* ("The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.").

349. *Id.*

350. *Id.* ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."); *see* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 601 (2d ed. 2002) ("The Court has made it clear that economic regulations . . . will be upheld when challenged under the due process clause so long as they are rationally related to serve a legitimate government purpose.").

351. *See Lawrence*, 539 U.S. at 578.

is imprecise, the balancing of the state interest and the individual interest is reminiscent of earlier substantive due process cases.[352] The state and individual interests are different from those in the earlier cases and, in several ways, *Lawrence* presents a novel assessment of these interests. By divorcing the right to privacy from the right to make procreative decisions, *Lawrence* implicitly expands substantive due process protection. *Lawrence* moves closer to recognizing that sexual identities are not inextricably linked to procreative abilities. The majority opinion recognizes sexual expression, without the life commitments of childbearing.[353]

In other words, because *Lawrence* does not involve the right to procreate, where life and bodily integrity are at stake, the Court could have characterized the individual interest as less weighty.[354] Yet the Court imbued the right to engage in private consensual acts with substantial importance. It recognized the intimate nature of self-expression unconnected to the potential results or consequences of the activity.[355]

On the other hand, because *Lawrence* involves a balancing of the individual's interest against the state's interest, *Lawrence* could be viewed as only a minor shift in the outer parameters of substantive due process doctrine. The state's interest in *Lawrence*—morality—is amorphous compared to the specific state interests in protecting maternal health or life that were involved in the abortion and contraception cases. The absence of any significant state interest, and the Court's willingness to limit the ability of states to invoke morality with regard to some types of sexual expression, may mean that the state's burden is more than minimal in justifying infringements on private sexual expression. The level of the burden, however, remains an open question.

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352. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).

353. *Lawrence*, 539 U.S. at 578.

354. *Cf. Casey*, 505 U.S. at 852; Roe v. Wade, 410 U.S. 113, 153 (1973).

355. This development in itself is not unprecedented. Even before *Lawrence*, the Supreme Court had held that the state could not prevent prisoners from marrying, a situation where their confinement limited their ability to procreate. *See* Turner v. Safley, 482 U.S. 78, 95–97 (1987). The Supreme Court came close to sanctioning a limited "right to sex," by protecting a person's interest in sexual expression from majority rule. *See generally* David B. Cruz, *"The Sexual Freedom Cases"? Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299 (2000). The Massachusetts Supreme Judicial Court also rejected the tie to procreation in striking down Massachusetts's exclusion of same-sex marriage. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961–64 (Mass. 2003).

4. *The Right to Gender Self-Identity Should Be Protected Under* Lawrence

Whether a state is violating a transsex person's substantive due process rights when it continues to define her legal rights based on the sex assigned at birth, instead of her self-identity as indicated on her amended birth certificate, requires a careful study of the exact parameters of *Lawrence*. First, the right to gender self-identity must be compared with the right to engage in private sexual acts. Second, the state's interest in criminalizing sexual conduct must be compared to the state's interest in limiting a person's right to be recognized legally as the sex that comports with her gender self-identity. Finally, the *Lawrence* Court's explicit statements regarding the limitations of its decision need to be examined to determine whether these limitations would apply to a state's power to dictate a person's legal sex. A comparison of these different claims demonstrates that gender identity is as intimate a choice as one's sexual partner. In addition, the state's interests in asserting its need to force gender conformity are as weak as the morality justification in *Lawrence*.

If the broad rhetoric in *Lawrence* is applied in future cases, the right of transsex persons to gender self-identity should be protected at least as much as the right to engage in private sexual acts. The Supreme Court stated in *Lawrence* that "[m]atters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[356] It is difficult to imagine that one's gender identity is not within the core of the concept of an "intimate and personal choice."[357] If the choice of one's sexual partner is considered one of the most intimate and personal choices a person can make, then a person's choice to live in the sex role that matches her self-identity must also be included.[358]

The state interest involved in *Lawrence*—morality—is not the same as the state interests asserted in the cases that effectively force transsex persons to conform their lives to the sex assigned to them at birth. The state interest asserted in these cases, however, may be just as nebulous as

356. *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851).

357. *Id.*

358. A person's sexual identity is "immutable" and "so fundamental to one's identity that a person should not be required to abandon [it]." Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000).

the state's interest in dictating private adult sexuality. The state justifications that courts have asserted thus far when refusing to recognize a transsex person's amended sex include: (1) the state's interest in banning same-sex marriage; (2) the inability of post-operative transsex persons to reproduce; (3) the inability of a state to change the sex fixed by God; (4) the need to protect the public from fraud; and (5) the desire to discourage "psychologically ill persons" from engaging in sex changes.[359] For the same reasons that these state interests do not justify differential treatment under the Equal Protection Clause, they cannot be used to support an infringement of a person's right to substantive due process.[360] None could survive a heightened scrutiny standard, and as discussed in Part III.C they should not survive even under rational basis review.

In *Lawrence*, the Court carefully limited the scope of its decision.[361] Other courts could use this limiting language to justify a decision to exclude the right to gender self-identity from protection under the substantive due process doctrine. Although the Supreme Court declared that the protected liberty interest includes the right to engage in private adult sexual expression,[362] the Court differentiated between criminal charges,[363] with their potential for discrimination and stigmatizing effects that infringe on "the dignity of the persons charged,"[364] and formal state "recognition [of] any relationship that homosexual persons seek to enter."[365] Thus, the Court carved out same-sex marriage and military discrimination from explicit coverage. Nothing in the Court's language in *Lawrence*, however, explicitly states that they may be excluded from coverage in the future.

Lawrence involved a criminal prosecution, while the transsex cases involve the denial of state-controlled rights (marriage and birth certificates), but these are rights over which the state maintains a monopoly. One of the problems with comparing the imposition of a stigma (criminalizing the conduct) with withholding a benefit (civil marriage and the ability to amend a birth certificate) is that the

359. *See supra* notes 263–67 and accompanying text.

360. *See supra* notes 263–306 and accompanying text.

361. *Lawrence*, 539 U.S. at 578.

362. *Id.* at 567.

363. *Id.*

364. *Id.* at 575.

365. *Id.* at 578.

difference is in the characterization or label, while the results are often indistinguishable. For example, while criminalizing sodomy stigmatizes the conduct, the fact that prosecutions were rare made the stigma close to symbolic, leading to no real consequences to a person's daily life. On the other hand, the withholding of the numerous benefits that society confers on married persons—emotional, tax, social, and legal—effectively means that the withholding of this benefit inflicts not only a stigma, but also a real and important penalty on those persons who cannot partake of it.[366] As the Massachusetts Supreme Judicial Court has noted, fencing out sexual minorities from marriage imposes the "stigma of exclusion."[367]

The *Lawrence* majority also seemed concerned about drawing a distinction between private and public conduct.[368] The Court limited the right of the state to interfere in conduct that occurred in private, as opposed to a public event, such as state-sanctioned same-sex marriage. Where only sexual acts are concerned, perhaps this distinction makes some sense. Relationships between same-sex individuals, like those between opposite-sex individuals, however, do not easily fit into these separate components. They naturally and routinely spill over into the public sphere. Personal relationships implicate employment, credit rating, parenting options, and a host of other activities. Furthermore, a distinction between private and public with regard to gender identity cannot be maintained. Sexual acts—at issue in *Lawrence*—are generally kept private in our society; a person's gender identity is generally on public display. Gender identity, like personality, permeates a person's existence.[369] It is not a coat that can be taken off as people cross their front door.

Although *Lawrence* fails to provide clear answers to any future substantive due process questions, even a narrow reading of *Lawrence* should result in protecting a transsex person's right to gender self-determination. If, as the Court in *Lawrence* implies, choosing a sexual

366. This Article does not discuss the issue of whether marriage is a good idea or should be abolished. For this discussion, see generally Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27 (1996); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535 (1993); Dianne Post, *Why Marriage Should Be Abolished*, 18 WOMEN'S RTS. L. REP. 283 (1997).

367. Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004).

368. *Lawrence*, 539 U.S. at 560.

369. *See* Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000).

partner is considered to be one of the most intimate and personal choices a person can make, being able to live in the appropriate gender role should be similarly protected. Allowing the state to determine the gender role in which people must live undermines a person's right to personal dignity and autonomy that cannot be neatly separated into public and private spheres. The asserted state interests do not meet the requirements of heightened scrutiny and are arguably not even legitimate reasons under the *Lawrence* standard. Accordingly, states that refuse to recognize a transsex person's amended sex are inflicting a broad public stigma on protected private decisions; such a state-imposed stigma may violate a person's right to substantive due process under *Lawrence.*

CONCLUSION

For many, the idea of male and female as discrete and easily defined categories is a deeply ingrained concept that reflects a comfortable binary simplicity. Scientific advances, however, colorfully complicate what, for many, is a black and white picture. Moreover, medical technology has made it difficult to ignore that, to some extent, male and female are fluid categories. Medical experts acknowledge that gender-identity formation is more complex than once believed, may be controlled by prenatal influences, and may not be subject to modification. For transsex persons, medicine has provided some solutions for those who choose to pursue them. Medical and psychological experts believe that the body's sexual attributes can be altered to conform to a person's "brain" sex; conversely, no effective treatment exists to alter the "brain" sex so that it conforms to anatomical sex. Thus, when transsex persons undergo medical treatment to conform their sexual anatomy to their self-identity, they have chosen a fundamental life-altering event that changes their status forever. By providing the technology and means to alter anatomical sex, science has acknowledged the problem and provided a solution.

The law's response to these scientific and medical advances has been less than optimal. Although most European nations and approximately half of the U.S. states have recognized these scientific developments and allow transsex persons to amend their birth records, a number of states have insisted that transsex persons must legally remain the sex assigned to them at birth. Although this approach may not be enlightened, nothing in the U.S. Constitution or federal law dictates the manner in which a state can determine its citizens' sex. If, however, a state's sex test infringes upon a person's constitutionally protected rights, the state's

interest in defining sex must yield.

States that continue to define sex based upon a person's chromosomes or ability to reproduce may violate four constitutional mandates. First, if a state refuses to recognize a validly amended birth certificate from a sister state, the refusal violates the state's obligations under the Full Faith and Credit Clause and unconstitutionally infringes on the right to travel. Even if a state has control over the birth certificate because the person was born within that state, refusal to amend the birth record of an intersex or transsex person may violate the Fourteenth Amendment's equal protection and substantive due process commands. If a state imposes a sex test that is based upon stereotyped notions of what it means to be male or female, that test results in gender discrimination that may violate the Equal Protection Clause. Furthermore, if a state forces people to live in the gender role that does not comport with their own sense of self, this imposition undermines their right to personal dignity and autonomy and thus violates their right to substantive due process.

Courts have been issuing sex-determination rulings for thirty-five years. During this relatively short time, they have created a variety of tests to determine sex. These contradictory sex-determination tests have created an absurd situation: as people cross state lines their legal sex, marital status, and parental status may all change. Thus far, no court has carefully examined whether these contradictory rulings can withstand constitutional scrutiny. As science continues to advance our understanding of sex and gender-identity formation and as medicine continues to create new technologies to modify sexual attributes, litigation on this critical issue will continue. If legal institutions continue to differentiate between men and women and states remain in the business of establishing people's legal sex, then courts can no longer ignore these thorny constitutional questions.