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## THE LIBERTY IMPACT OF GENDER

Kingsly Alec McConnell\*

*Abstract:* Can the federal government unilaterally change your gender? In October of 2018, the *New York Times* revealed that the Trump Administration's Department of Health and Human Services was considering a new federal definition of "gender." The policy would redefine gender as a "biological, immutable condition determined by genitalia at birth." This policy places transsex people at a substantial risk of deprivation of property and speech rights, as gender implicates both property and expression. It also impedes the exercise of substantive due process rights and privileges and immunities. For example, inaccurate gender designations can hinder a transsex parent's ability to raise children, and accurate gender markers protect the right to a common calling by shielding transsex people from employment discrimination and procedural barriers.

This Comment argues that gender designations represent both a property right and a protected expression of speech. Government-issued gender designations, or gender markers, have taken on a special legal identity that is distinct from assigned or lived gender, and these markers frequently translate into discrete rights for transsex individuals. The Trump Administration's policy not only upends traditional understandings of gender under state and federal law, but also attempts to dissuade transsex people from engaging in public life, and ultimately, existing in the world. Because transsex people have a liberty interest in maintaining an accurate gender designation, the Trump Administration's redefinition is unconstitutional.

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“[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the *heart* of the existing order.” . . . It is precisely because the issue raised . . . touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority.”<sup>1</sup>

## INTRODUCTION

In October 2018, a leaked memorandum indicated that the Department of Health and Human Services (HHS) sought to redefine the legal meaning of gender.<sup>2</sup> Instead of determining gender based on modern conceptions of biology and neuroscience<sup>3</sup> or even deferring to state law on the question,<sup>4</sup> the new conception would define gender as a “biological, immutable condition determined by genitalia at birth.”<sup>5</sup> Under the policy, a gender designation listed on a birth certificate would be presumptive evidence of an individual’s gender, but the designation could ultimately be rebutted by genetic evidence.<sup>6</sup> While some individuals will justifiably

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1. *Bowers v. Hardwick*, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting) (emphasis added) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

2. Erica L. Green, Katie Benner & Robert Pear, ‘*Transgender*’ Could be Defined Out of Existence Under Trump Administration, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html> [<https://perma.cc/ZA5C-X9VX>].

3. See, e.g., Sari M. van Anders et al., *Biological Sex, Gender, and Public Policy*, 4 POL’Y INSIGHTS FROM BEHAV. & BRAIN SCI. 194, 194, 199 (2017) (“For gender/sex policy, science shows no one aspect of sex (hormones, genes, genitals, gonads) trumps others—gender identity matters most.”).

4. Delineation of gender has traditionally been left to the states. See *infra* Part I. Until this policy, the federal government has respected and deferred to state law definitions of gender; for example, all federal identification documents defer to state birth certificates for demarcations of gender, regardless of whether the state recognizes, or does not recognize, the genders of transsex people. See *infra* note 11. A federalism issue arises when the federal government steps into an area “within the authority and realm of the separate States.” *United States v. Windsor*, 570 U.S. 744, 764 (2013). When the United States Supreme Court struck down the Defense of Marriage Act (DOMA) in 2013, the Court found that the definition and regulation of domestic relationships belonged to the state’s regulatory sphere. *Id.* at 766. Like DOMA, the Trump Administration’s policy challenges a long-established state regulatory scheme. See *infra* Part I. When a state grants a corrected gender marker, it “confer[s] upon [a transsex individual] a dignity and status of immense import.” *Cf. Windsor*, 570 U.S. at 768. In contrast, the federal government’s newest policy “uses th[e] state-defined class for the opposite purpose—to impose restrictions and disabilities,” thus seeking to injure a class—transsex people—many states specifically sought to protect. *Cf. id.* at 768.

5. Green et al., *supra* note 2.

6. *Id.* It is unclear how the proposed redefinition of gender would apply to individuals whose natal phenotype and genotype do not align; for example, a cissex woman who is born with a vulva but has

be concerned with the federal government prying into their genetic information and particularized reproductive and sexual health, in the legal world, it is well settled that sex—regardless of its correlation to lived gender—is ultimately defined by government.<sup>7</sup>

Having a gender designation that accurately reflects one’s lived experience is frequently taken for granted by many cissex<sup>8</sup> people. Yet the legal paradigm is extraordinarily evident for those who live in the uncomfortable middle of an exclusionary, binary legal designation. Such binary conceptions of gender favor cissex people, particularly in effectuation of rights and liberties.<sup>9</sup>

Designating genders in ambiguous or contested scenarios was a task historically left to courts.<sup>10</sup> More recently, state legislatures have begun

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XY sex-determination chromosomes. *See, e.g.*, Miroslav Dumic et al., *Report of Fertility in a Woman with a Predominantly 46,XY Karyotype in a Family with Multiple Disorders of Sexual Development*, 93 J. CLINICAL ENDOCRINOLOGY & METABOLISM 182 (2008) (discussing the unassisted pregnancy of a cissex woman with a Y chromosome); *FAQ, Does Having a Y Chromosome Make Someone a Man?*, INTERSEX SOC’Y N. AM., [http://www.isna.org/faq/y\\_chromosome](http://www.isna.org/faq/y_chromosome) [<https://perma.cc/LRR4-6L3H>] (“[I]t is simply incorrect to think that you can tell a person’s sex just looking at whether he or she has a Y chromosome.”). If an individual’s assigned gender is recorded incorrectly on their birth certificate, they would have to rebut their gender through karyotype testing. For those like the cissex woman with a Y chromosome, she would be unable to rebut the gender designation on her birth certificate.

7. *See generally infra* Part I.

8. A cissexual or cissex person is an individual whose assigned gender matches their gender identity. *See Cissexual/Cisgender: Decentralizing the Dominant Group*, EMINISM.ORG (June 07, 2002), <http://www.eminism.org/interchange/2002/20020607-wmstl.html> [<https://perma.cc/AXW8-CFW5>] (noting that “[b]y using the term ‘cissexual’ and ‘cisgender,’ [trans activists] de-centralize the dominant group, exposing it as merely one possible alternative rather than the ‘norm’ against which trans people are defined”).

9. *See infra* Part IV.

10. *See infra* section I.A.

addressing the needs of transsex<sup>11</sup> and intersex<sup>12</sup> individuals for guaranteed changes to gender markers.<sup>13</sup> Absent policies and laws that expressly permit alterations to gender markers, transsex people are often not entitled to the benefits of legal gender. And, perhaps more crucially, they are displaced from the exercise of constitutional rights implicit in gender.<sup>14</sup>

Since an explosive New York Times article revealed the proposed policy to the public,<sup>15</sup> HHS has shifted its strategy. HHS enforces Title IX of the Education Amendments Act of 1972, which prohibits discrimination “on the basis of sex” in educational programs and activities

11. For the purposes of this Comment, I will be utilizing “transsex” to refer to individuals who have medically transitioned from one sex to another, without defining a specific form of medical transition. This Comment utilizes this narrow category of transgender people because current federal guidelines require that individuals generally undergo some form of medical transition to alter their gender designation. *See, e.g., Program Operations Manual System (POMS)*, SOC. SEC. ADMIN., <https://secure.ssa.gov/poms.nsf/lnx/0110212200> [<https://perma.cc/FLM6-QVXV>] (social security requirements); *Change of Sex Marker*, TRAVEL.STATE.GOV, U.S. DEP’T ST.—BUREAU CONSULAR AFFS., <https://travel.state.gov/content/travel/en/passports/apply-renew-passport/change-of-sex-marker.html> [<https://perma.cc/H2LJ-QPB5>] (passport requirements); *Chapter 10.22 Change of Gender Designation on Documents Issued by USCIS*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-1067/Chapter10-22.html> [<https://perma.cc/7HSK-XD2V>] (citizenship and immigration document requirements). *But see Admin. Law—Identity Records—Soc. Sec. Admin. Eliminates Surgical Requirement for Changing Trans Individuals’ Gender Markers—Soc. Sec. Admin., Program Operations Manual System, Rm 10212.200 Changing Numident Data for Reasons Other Than Name Change*, 127 HARV. L. REV. 1863 (2014) (noting that individuals may now submit amended birth certificates, a court order indicating the change of gender, or a physician’s verification of the new gender, which depending on the applicant’s location may not require any particular medical procedure). To encourage scholars to prioritize humanizing language for the LGBTQ community, I opt to use “transsex person” over “transsexual,” while acknowledging that many will not personally identify with this language.

12. An intersex person is “born with a reproductive or sexual anatomy that doesn’t seem to fit the typical definitions of female or male.” *What is Intersex?*, INTERSEX SOC’Y N. AM., [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex) [<https://perma.cc/2ZMC-UHFA>]. Because some intersex people will require alteration of their assigned gender marker to more accurately reflect their lived gender, this Comment uses transsex in an expansive form to include intersex people.

13. To date, all states except for Kansas, Ohio, and Tennessee permit transsex people to alter their gender markers. KAN. STAT. ANN. § 65-2422c (1990), *as interpreted by In re Estate of Gardiner*, 22 P.3d 1086 (Kan. Ct. App. 2001) (holding that the statute permitting minor corrections to birth certificates did not include corrections to gender based on transsex status); OHIO REV. CODE § 3705.15 (2019); TENN. CODE ANN. § 68-3-203(d) (West 2019) (“The sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery.”); *see also In re Ladrach*, 513 N.E.2d 828, 831 (Ohio Prob. Ct. 1987) (determining that the legislature did not intend gender marker alteration on the basis of transsex status by enacting its birth record statute). For a complete list of statutes, regulations, and court decisions on state gender alterations, see *Changing Birth Certificate Sex Designations: State-By-State Guidelines*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations> [<https://perma.cc/AE5L-QMPB>].

14. *See generally infra* Parts IV, V.

15. *See Green et al., supra* note 2.

funded by the federal government.<sup>16</sup> On June 14, 2019, HHS published a proposed rule to eliminate the definition of “on the basis of sex,”<sup>17</sup> which previously recognized and protected transsex individuals from discrimination in an educational setting.<sup>18</sup> Due to impending Supreme Court litigation,<sup>19</sup> the HHS has declined to finalize a new definition at this time.<sup>20</sup> This has essentially stalled any movement of the gender policy highlighted by the HHS memorandum. However, the fundamental inquiry—that is, whether federal agencies can unilaterally change a person’s gender designation—remains relevant and of deep concern to transsex people living under the Trump Administration.

This Comment argues that legal gender is an independent concept, separate from lived or experienced gender, that is translated into constitutional rights—specifically, property and speech rights—through gender markers and designations.<sup>21</sup> Even in an increasingly egalitarian society, gender remains relevant to the spaces and accommodations people occupy.<sup>22</sup> Legal gender also impacts the exercise of substantive

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16. Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846, 27,853 (June 14, 2019) (to be codified at 45 C.F.R. pts. 86, 92, 147, 155, & 156).

17. *See generally id.*

18. *Id.* at 27,856 (noting that HHS, in conjunction with the Department of Justice and Department of Education, previously took the position that “on the basis of sex” included gender identity).

19. *See infra* note 207; *see also* *Altitude Express, Inc. v. Zarda*, 883 F.3d 100 (2d Cir. 2018), *cert. granted*, \_\_U.S.\_\_, 139 S. Ct. 1599 (2019); *Bostock v. Clayton Cty.*, 723 F. App’x 964 (11th Cir. 2018), *cert. granted*, \_\_U.S.\_\_, 139 S. Ct. 1599 (2019).

20. Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. at 27,857.

21. Gender markers or gender designations are the delineation of gender on birth certificates and identification documents; traditionally “M” for male or “F” for female. The current trend across the United States and other developed nations is to also permit an “X” gender designation. *See* Amy Harmon, *Which Box Do You Check? Some States are Offering a Nonbinary Option*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/2019/05/29/us/nonbinary-drivers-licenses.html> [<https://perma.cc/U9DD-DH6D>]. This marker is popular with non-binary people and it is an alluring option for individuals who reject government involvement with gender entirely. This Comment does not attempt to attack the constitutionality of binary legal designations, but rather argues that the misclassification of binary transsex people under the current regime is unconstitutional. For more on non-binary gender markers and the law, *see generally* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894 (2019).

22. *See* *Kothmann v. Rosario*, 558 F. App’x 907 (11th Cir. 2014) (bathroom and locker room access in public universities); *Crosby v. Reynolds*, 763 F. Supp. 666 (D. Me. 1991) (sex-segregated prisons); *Adams v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1296–321 (M.D. Fla. 2018) (bathroom access in public schools); *Keohane v. Jones*, 328 F. Supp. 3d 1288 (N.D. Fla. 2018) (sex-segregated prisons and access to medical treatment); *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015) (bathroom and locker room access in public universities); Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 5–7 (2011) (sex-segregated sports); Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 775 (2007).

due process rights and privileges and immunities.<sup>23</sup> The Trump Administration's proposal would rescind accurate gender markers for transsex people, thus harming the property and speech interests inherent to legal gender. This Comment concludes by finding that transsex individuals have a constitutionally protected interest in an accurate gender designation.

Gender and property are already deeply intertwined.<sup>24</sup> This Comment expounds upon theoretical concepts laid forth in Cheryl I. Harris's *Whiteness as Property*, a renowned thesis on the interconnection of race and property in United States legal and social history, but with consideration of legal designations of gender.<sup>25</sup> It also draws upon Charles A. Reich's *The New Property*, which conceived an inherent connection between property, liberty, and life.<sup>26</sup> Other legal scholars have already connected heteronormativity<sup>27</sup> and cisnormativity<sup>28</sup> with property rights,<sup>29</sup> and sex and gender to property and intellectual property,<sup>30</sup> respectively. This Comment adds to the present literature by analyzing the newly leaked federal policy, which would inhibit alteration of federal gender designations and revert accurate gender designations for transsex people.<sup>31</sup> Through the lens of property law, free speech jurisprudence, and

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23. See *infra* Part IV.

24. See, e.g., Lauren Wigginton, *Heteronormative Identities as Property: Adversely Possessing Maleness and Femaleness*, 23 AM. U. J. GENDER SOC. POL'Y & L. 139, 142 (2014) (explaining that early common law allocated property rights based on gender).

25. See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993). Although *Plessy v. Ferguson* rejected the argument that whiteness was actually a property right, the United States Supreme Court stated that the outer demarcations of race "is one upon which there is a difference of opinion in the different states." 163 U.S. 537, 549, 552 (1896), *overruled by* *Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954). The Court refused to define black or white, leaving those "questions to be determined under the laws of each state." *Id.* at 552. This contrasts the federal government's proposed policy, which would supersede traditional state definitions of gender. See *supra* note 4.

26. See generally Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) [hereinafter Reich, *The New Property*].

27. Heteronormativity is defined as "of, relating to, or based on the attitude that heterosexuality is the only normal and natural expression of sexuality." *Heteronormative*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/heteronormative> [<https://perma.cc/3FLD-S2M3>].

28. Cisnormativity, or cissexual assumption, refers to concepts that erase transsex lives and experiences, wherein cissex people are presumed to be normal and transsex people abnormal. See JULIA SERANO, WHIPPING GIRL: A TRANSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY 164–70 (2007).

29. See generally Wigginton, *supra* note 24.

30. See generally Sonia K. Katyal, *The Numerus Clausus of Sex*, 84 U. CHI. L. REV. 389 (2017).

31. Green et al., *supra* note 2; Katie Benner & Robert Pear, 'Transgender' Could Be Defined Out of Existence Under Trump Administration, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html> [<https://perma.cc/ZA5C->

gender theory, this Comment contextualizes present literature with a real and impending threat to transsex people's wellbeing. It ultimately concludes that the Trump Administration's proposed policy is unconstitutional.<sup>32</sup>

First, this Comment argues that gender designations are a type of property or government-created form of wealth that are essential to life, liberty, and economic security.<sup>33</sup> Analyzing various theories of property rights, this Comment draws connections between the characteristics of property and gender designations. For transsex individuals, the constitutional implications of gender as property are profound. Inaccurate gender designations frequently implicate transsex people's substantive due process rights and privileges and immunities. For example, accurate gender designations grant many transsex people the assumption of cisness,<sup>34</sup> isolating them from transphobic attacks and discrimination.

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32. The Trump Administration's proposal raises a plethora of constitutional issues that are outside the scope of this Comment. The federal government's involvement in the collection and assessment of genetic material to decipher a "legal" gender implicates privacy law, technology law, and unreasonable searches and seizures. The proposal may also raise an equal protection inquiry, if the Trump Administration distinguishes between transsex and cissex individuals in the implementation of its new policy. It would not be surprising if the policy facially discriminated against transsex people, as the Trump Administration has relentlessly targeted transsex individuals for discrimination and erasure of legal protections. For an ongoing list of such discriminatory policies, see *The Discrimination Administration: Trump's Record of Action Against Transgender People*, NAT'L CTR. TRANSGENDER EQUAL., <https://transequality.org/the-discrimination-administration> [<https://perma.cc/GY4S-YA36>]. If property rights are attributed to gender, unilaterally changing an individual's gender marker may constitute a Fifth Amendment taking. On a state level, failure to recognize an individual's gender designation across state lines may be a violation of the full faith and credit clause. This is an ongoing question across state borders. See, e.g., *In re Marriage License for Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at \*4-5 (Ohio Ct. App. Dec. 31, 2003) (holding that an individual's birth certificate in another state may be rebutted by evidence of transsex status; also, finding that the legislative policy of Ohio was to not recognize a marriage between a transsex man and a cissex woman). Failure to recognize a transsex person's marriage is now unconstitutional with the holding of *Obergefell v. Hodges*, 576 U.S. \_\_\_, 135 S. Ct. 2584 (2015); however, the birth certificate recognition issue remains undecided. For more on the constitutional implications, see generally Julie A. Greenberg & Marybeth Herald, *You Can't Take It with You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819 (2005). The federal government's redefinition also raises a federalism concern, as all but three states purposively permit alterations of gender markers for transsex people. See *supra* note 4; *infra* note 71. While these constitutional issues are live, I leave these concerns for another day. Instead, this Comment focuses on two areas of rights that are almost certainly implicated by the government's policy. Because the policy stems from a leaked memorandum, it is unclear what the specific implementation methods would require or if it will ever come to fruition. Absent more information, this Comment targets two areas of constitutional law that stem directly from depriving transsex individuals of an accurate gender designation in nearly all circumstances: property and speech rights.

33. See *infra* Part II.

34. See *infra* section IV.A.



Further, having matching identification documents helps protect individuals from discrimination.<sup>35</sup>

Second, the Trump Administration's proposed redefinition constitutes "compelled speech," in violation of the First Amendment of the United States Constitution.<sup>36</sup> It is well-settled that the First Amendment protects both "the right to speak and the right to refrain from speaking at all."<sup>37</sup> Under the compelled speech doctrine, the federal government may not intrude on an individual's right to "decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."<sup>38</sup> The expression of assigned-gender on a birth certificate is an inaccurate and forced statement of self and identity.<sup>39</sup> Gender is thus an expression of speech.<sup>40</sup> In addition, when an individual's federal gender designation differentiates from their state gender designation or physical appearance, they are forced to disclose their transsex status to explain the discrepancy.<sup>41</sup> In some cases, even a birth certificate indicating that it was "amended" may constitute compelled speech and can interfere with First Amendment rights.<sup>42</sup>

These impacts challenge the mere existence of transsex people in legal and social society. Inaccurate gender designations affect all areas of a transsex person's life, ranging from employment and parental rights to the mere use of public facilities. Indeed, gender markers have special value compared to other forms of government-created privileges, as gender designations can impact substantive due process rights and privileges and immunities.<sup>43</sup> Due to the liberty impact of gender, this Comment finds that transsex people have a constitutional interest in maintaining an accurate gender designation, and the Trump Administration's proposed rule is unlawful.

This Comment proceeds in five Parts. Part I illustrates how courts historically dealt with gender designations on a case-by-case basis. State

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35. See *infra* section IV.B.

36. For an overview of the compelled speech doctrine and its impact on gender designations and other identifiers—primarily gender pronouns, see generally Tyler Sherman, Note, *All Employers Must Wash Their Speech Before Returning to Work: The First Amendment & Compelled Use of Employees' Preferred Gender Pronouns*, 26 WM. & MARY BILL RTS. J. 219 (2017).

37. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

38. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)).

39. See *infra* section V.B.

40. See *infra* section V.B.

41. *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1135 (D. Idaho 2018).

42. See *id.* (noting that both parties agreed that including revision history on a state birth certificate constitutes compelled speech, so the court would not address the merits of the claim).

43. See *infra* Part IV.

courts (and legislatures) created independent legal regimes for gender marker alteration, and these regimes impacted transsex people's right to marry and bring up children. Part II overviews theories of property. It considers traditional characteristics of property rights, as well as newer conceptions of wealth known as "the new property."<sup>44</sup> Part III analyzes the compelled speech doctrine under First Amendment law, considering the breadth of activities that constitute "speech." Part IV illustrates how gender markers impact substantive due process rights and privileges and immunities of transsex people, arguing that transsex people have a vested interest in retaining an accurate gender marker. Part V then combines theories of property and free speech law to delineate how gender designations implicate constitutional interests, contending that rescinding or prohibiting accurate gender designations is unconstitutional. It concludes by arguing that the Trump Administration's proposed redefinition of gender is unconstitutional.

## I. GENDER AND THE JUDICIARY

Transsex individuals have frequently appeared before courts of law to argue for recognition of their gender.<sup>45</sup> In fact, family law jurisprudence has often turned the gender of transsex individuals into a core legal inquiry.<sup>46</sup> In these cases, courts are confronted with the question: "[w]hen is a man a man, and when is a woman a woman?"<sup>47</sup> This Part will lay the historical foundation for state regulation of this question. In essence, courts "assumed the crucial task of [gender] classification, and accepted and embraced the then-current theories of [gender]," often as biological fact.<sup>48</sup> Through jurisprudence—and subsequent legislation—states have managed to develop their own respective regimes for amendments to gender markers. This means state courts frequently authorized corrections for transsex individuals, but on some occasions, they have hesitated to create public policy on gender marker alterations absent legislative or administrative help.<sup>49</sup> States have strengthened these regimes by expressly

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44. See generally Reich, *The New Property*, *supra* note 26.

45. See, e.g., *Anonymous v. Weiner*, 270 N.Y.S.2d 319 (1988) (rejecting a transsex person's petition to alter the gender designation on their birth certificate); *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. Ct. 1987) (same); *K. v. Health Div., Dep't of Human Res.*, 560 P.2d 1070 (Or. 1977) (same).

46. See, e.g., *In re Heilig*, 816 A.2d 68, 86 (Md. Ct. App. 2003) (holding that Maryland courts have jurisdiction to rule upon petitions for gender marker alterations, and remanding to the trial court for a factual showing of transsex petitioner's gender).

47. *Littleton v. Prange*, 9 S.W.3d 223, 223 (Tex. App. 1999).

48. Cf. *Harris*, *supra* note 25, at 1737.

49. See, e.g., *In re Ladrach*, 513 N.E.2d at 832 (holding that "the legislature should change the statutes, if it is to be the public policy" of Ohio to permit transsex people to change their gender

permitting transsex individuals to alter gender designations. For example, today, all but three states permit alterations to individual birth certificates.<sup>50</sup> However, judicial history remains relevant to understanding how gender has been historically rooted in state regulatory power, and how this exercise of power has ultimately impacted the fundamental rights of transsex people.

The earliest published case of gender marker alteration concerning a transsex person is *Anonymous v. Weiner*.<sup>51</sup> In 1966, the Supreme Court of New York rejected a transsex woman's petition to alter her name and gender designation on her birth certificate.<sup>52</sup> Relying on statements from the Committee on Public Health of the New York Academy of Medicine, the court refused "to substitute its views for those of the administrative body."<sup>53</sup> It granted deference to the Committee, which was staunchly opposed to alterations of gender on birth certificates for transsex people on the basis that a transsex person's interest to have an accurate reflection of gender on their birth certificate was "outweighed by the public interest for protection against fraud."<sup>54</sup>

However, not even two years later, the Civil Court of the City of New York blatantly rejected this rationale by permitting a transsex woman to change her name on her birth certificate.<sup>55</sup> While a gender marker change was not at the forefront of the plaintiff's legal claim, the court explicitly rejected the scientific and legal rationale proffered by the *Weiner* Court:

This court is in complete disagreement with the conclusion reached by the [Committee on Public Health of the New York Academy of Medicine]. A [female] transsexual who submits to a sex-reassignment is anatomically and psychologically a *female in fact*. . . . It has further been stated that "male to female transsexuals are still chromosomally males while ostensibly females." Nevertheless, should the question of a person's identity be limited by the results of mere histological section or biochemical analysis, with a complete disregard for the human brain, the organ responsible for most functions and reactions,

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markers); *K.*, 560 P.2d at 1072 n.5 (holding that whether altered gender markers should be issued to transsex people "is a matter of public policy to be decided by the Oregon legislature").

50. See *infra* note 71.

51. 270 N.Y.S.2d 319 (1966).

52. *Id.* at 320, 324.

53. *Id.* at 323.

54. *Id.* at 322–23.

55. *In re Anonymous*, 293 N.Y.S.2d 834 (1968).

many so exquisite in nature, including sex orientation? I think not.<sup>56</sup>

This perception of sex, which includes a gradation of factors ranging from genotypical sex<sup>57</sup> to gender identity, is in line with modern jurisprudence on gender. Although there is no judicial consensus on the meaning of “sex,” courts in the twenty-first century have been more receptive to definitions of sex that encompass ambiguity. For instance, courts have identified up to seven factors that may be relevant in sex determination: (1) internal morphologic sex; (2) external morphologic sex; (3) gonadal sex; (4) genotypic sex; (5) hormonal sex; (6) phenotypic sex; and (7) sexual (or gender) identity.<sup>58</sup>

The role of gender designations became increasingly more complicated where marriage was involved. In 1971, *Anonymous v. Anonymous*<sup>59</sup> concerned a noncommissioned officer in the United States Army who sought a declaration of his marital status by the Supreme Court of New York. He alleged that he married his wife prior to having intimate relations with her—after which, he discovered she was transsex.<sup>60</sup> By the time of the proceedings, his wife had undergone gender confirmation surgery,<sup>61</sup> but he asked the court to declare the marriage invalid.<sup>62</sup> In finding that no marriage contract ever existed, the court determined that “[t]he law makes no provision for a ‘marriage’ between persons of the same sex.”<sup>63</sup> The court recognized that the defendant’s “sex ha[d] been changed to female by operative procedures,” but nevertheless held that “[w]hat happened to the defendant *after* the marriage ceremony is irrelevant, since the parties never lived together.”<sup>64</sup>

In this statement, the *Anonymous* Court provided an interesting caveat. The court held that the woman was legally “male” prior to her gender confirmation surgery (and thus her marriage).<sup>65</sup> However, the court’s

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56. *Id.* at 838.

57. Genotype refers to the genetic constitution of an individual, typically in reference to a particular trait or set of traits. *Genotype*, MERRIAM-WEBSTER MED. DICTIONARY, <https://www.merriam-webster.com/dictionary/genotype#medicalDictionary> [<https://perma.cc/MH5L-FP4Y>]. In this discussion, genotypic sex refers to sex as narrowly defined by the XY sex-determination system.

58. *See, e.g., In re Heilig*, 816 A.2d 68, 73 (Md. Ct. App. 2003) (noting that “[t]here is a recognized medical viewpoint that gender is not determined by any single criterion,” but that up to “seven factors may be relevant”).

59. 325 N.Y.S.2d 499 (1971).

60. *Id.* at 500.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* (emphasis added).

65. *Id.* at 499.

rationale indicates that a transsex woman who has medically transitioned prior to marriage (and who subsequently lives with her husband as a married couple) is “female” for marital purposes.<sup>66</sup>

This caveat was not actually exceptional in jurisprudence; it was similarly espoused by the Superior Court of New Jersey in *M.T. v. J.T.*<sup>67</sup> In *M.T. v. J.T.*, the court determined that a transsex woman who underwent gender confirmation surgery became “a member of the female sex for marital purposes,” and that her marriage to a man was legitimate.<sup>68</sup> Because her husband had lived with her, he was legally “obligated to support her as his wife,”<sup>69</sup> regardless of her transsex status. A notable part of the court’s analysis was the fact that both parties had lived together as husband and wife.<sup>70</sup>

To contrast, many states have had forceful histories denying recognition of transsex people’s genders.<sup>71</sup> For example, in *In re Declaratory Relief for Ladrach*,<sup>72</sup> a transsex woman’s marriage was under scrutiny because her birth certificate listed her as male.<sup>73</sup> The Probate Court of Stark County, Ohio came to the same conclusion as the court in *Anonymous v. Anonymous*; however, it based its holding on public policy and its role as a judicial, rather than legislative, entity.<sup>74</sup> The *Ladrach* Court stated: “only three states, Arizona, Louisiana and Illinois, have statutes that allow the birth record of a transsexual to be changed following sex reassignment surgery. . . . However, another twelve states have permitted a post-operative change of sex designation on birth records.”<sup>75</sup> It then concluded by deferring to the legislature: “it is this court’s opinion that the legislature should change the statutes, if it is to be

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66. *Id.* at 500.

67. 140 N.J. Super. 77 (1976).

68. *Id.* at 90.

69. *Id.*

70. *Id.* at 79, 87–88.

71. As of 2020, three states (Kansas, Ohio, and Tennessee) continue to refuse alterations of gender markers on birth certificates for transsex people. *See supra* note 13; *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1136 n.4 (D. Idaho 2018). Tennessee is the only state that explicitly forbids the alteration of gender for transsex or intersex people through gender confirmation surgery. TENN. CODE ANN. § 68-3-203(d) (West 2019) (“The sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery.”); Spade, *supra* note 22, at 735. Some states have found that denying the alteration of a gender marker based on the individual’s transsex status is a violation of the equal protection clause of the Fifth and Fourteenth Amendments. *See Barron*, 286 F. Supp. 3d at 1135.

72. 513 N.E.2d 828 (Ohio Prob. Ct. 1987).

73. *Id.* at 829.

74. *See id.* at 832.

75. *Id.* at 830 (emphasis added).

the public policy of the state of Ohio to issue marriage licenses to post-operative transsexuals.”<sup>76</sup>

In 1977, the Supreme Court of Oregon also addressed the birth certificate inquiry and found that it was likely “the intent of the legislature of Oregon that a ‘birth certificate’ [be] an historical record of the facts as they existed at the time of birth.”<sup>77</sup> Therefore, legislative authorization was necessary for the amendment of gender on a birth certificate.<sup>78</sup> In doing so, the court denied a post-operative transsex man’s<sup>79</sup> request to be listed as male and reversed the lower court’s determination that his birth certificate represent “a record of facts as they *presently exist*.”<sup>80</sup> Intriguingly, the court mentioned that Oregon law permitted issuance of a new birth certificate when the name of a child’s parent is changed,<sup>81</sup> but failed to address the fact that such an alteration would necessarily entail that a birth certificate did *not* reflect the “facts as they existed at the time of birth.”<sup>82</sup>

In *Littleton v. Prange*,<sup>83</sup> the Court of Appeals of Texas grappled with the delineation of gender for a transsex woman.<sup>84</sup> The court analyzed case precedent from various jurisdictions<sup>85</sup> and held that a transsex woman who had fully transitioned was nonetheless “male” under Texas law.<sup>86</sup> Because Texas prohibited same-sex marriages, the court declared her marriage to a man invalid.<sup>87</sup> A decade later, the Texas legislature overruled *Littleton* through passage of section 2.005 of the Texas Family Code, which provided that individuals may change their name and sex designation through court order for means of obtaining a marriage license.<sup>88</sup>

The federal government’s current policy, which allows transsex people to amend gender markers on documents, replicates most state regimes.<sup>89</sup>

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76. *Id.* at 832.

77. *K. v. Health Div., Dep’t of Human Res.*, 560 P.2d 1070, 1072 (Or. 1977).

78. *See id.* at 1071–72.

79. *Id.*

80. *Id.* at 1072 (emphasis added).

81. *Id.* at 1071.

82. *Id.* at 1072.

83. 9 S.W.3d 223 (Tex. Ct. App. 1999).

84. *Id.* at 223–24.

85. *Id.* at 226–29.

86. *Id.* at 231.

87. *Id.* at 231.

88. TEX. FAM. CODE ANN. § 2.005(b)(8) (West 2019). Texas also now permits direct alterations to birth certificates through court order. TEX. HEALTH & SAFETY CODE ANN. § 192.011 (West 2019).

89. *See supra* notes 11, 13.

State jurisprudence on gender alteration helps demonstrate the extreme consequences of the Trump Administration's proposed policy, as the policy would usurp the state's historic authority to define gender. Overall, state courts have a long history of grappling with the gender designations of transsex people. Without guidance in the twentieth century, courts have had to weigh the rights of transsex individuals, the testimony of medical experts, and the court's role as a neutral arbitrator rather than a policy maker. In many of these cases, gender has been better addressed by state legislatures stepping in and delineating how gender markers may be altered in the first place.<sup>90</sup>

## II. THEORIES OF PROPERTY RIGHTS

Property is nothing but the basis of expectation[] . . . consist[ing] in an established expectation, in the persuasion of being able to draw such and such advantage from the thing possessed. . . . This theory does not suggest that all value or all expectations give rise to property, but those expectations in tangible or intangible things which are valued and protected by the law *are property*.<sup>91</sup>

There is no universally accepted definition of property. Therefore, this Part will overview some of the various conceptions of property and highlight the main attributes among those differing theories. It begins by overviews traditional theories of property. Then it will extrapolate on "new property" rights, which are government-created forms of wealth or privilege that sit outside the traditional conception of property.<sup>92</sup> As Charles Reich notes, these privileges are important to the exercise of liberty<sup>93</sup> and should be explicitly recognized as rights.<sup>94</sup> Gender provides access to bathrooms and locker rooms in public schools<sup>95</sup> and

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90. See *supra* note 13.

91. Harris, *supra* note 25, at 1729 (emphasis added) (internal quotation marks omitted).

92. See Reich, *The New Property*, *supra* note 26, at 785–87.

93. See generally Charles A. Reich, *The Liberty Impact of the New Property*, 31 WM. & MARY L. REV. 295 (1990) [hereinafter Reich, *The Liberty Impact*].

94. Reich, *The New Property*, *supra* note 26, at 785–86.

95. See *Adams v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1296–1321 (M.D. Fla. 2018); see also Spade, *supra* note 22, at 775.

95. Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 379, 391–99 (2013) ("Policies that provide transgender people with identity documents that match their gender identity give them a better chance to live life in their gender, and avoid bias, discrimination, and violence in the areas most critical to quality of life, such as employment, housing, and education.").

universities,<sup>96</sup> participation in sex-segregated sports,<sup>97</sup> ultimate placement in sex-segregated prisons,<sup>98</sup> subsequent access to healthcare in prison,<sup>99</sup> and even fundamental rights.<sup>100</sup> Both overarching theories support the premise that gender *is* property.<sup>101</sup>

### A. *Traditional Property*

Broadly speaking, property is simply an entitlement “protected by formal legal institutions.”<sup>102</sup> There are many factors that differentiate property from other forms of rights or claims, but the most defining is the right to exclude.<sup>103</sup> For example, English jurist William Blackstone defined property as the “sole and despotic dominion which one man claims and exercises over the external things of the world, *in total exclusion* of the right of any other individual in the universe.”<sup>104</sup> This profound description makes the right to exclude others a sufficient and conditional aspect of property. The idea that the right to exclude is of fundamental importance to property is known as the single-variable essentialist interpretation.<sup>105</sup>

However, property may be more encompassing than the mere right to exclude. A separate school of thought, known as multiple-variable essentialism,<sup>106</sup> perceives property as a “bundle of sticks,” with the right to exclude constituting merely one “stick” in a collection of rights and privileges.<sup>107</sup>

Yet another conception of property is nominalism, which “views property as a purely conventional concept with no fixed meaning.”<sup>108</sup>

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96. See *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015).

97. Buzuvis, *supra* note 22, at 5–7.

98. See *Crosby v. Reynolds*, 763 F. Supp. 666 (D. Me. 1991) (sex-segregated prisons).

99. See *Kothmann v. Rosario*, 558 F. App'x 907 (11th Cir. 2014) (same); *Keohane v. Jones*, 328 F. Supp. 3d 1288 (N.D. Fla. 2018) (sex-segregated prisons and access to medical treatment);

100. See *generally infra* Part IV.

101. See *infra* section V.A.

102. THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY* 3 (2010) (ebook).

103. *Kaiser Aetna v. United States*, 444 U.S. 164, 176–80 (1979) (“[W]e hold that the ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.”).

104. 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 2 (1766) (emphasis added).

105. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 734 (1998).

106. *Id.* at 734.

107. MERRILL & SMITH, *supra* note 102, at 5.

108. Merrill, *supra* note 105, at 737.



Under nominalism, property is not dependent or reliant on the right to exclude, and the government can label just about anything as property.<sup>109</sup> Like multiple-variable essentialism, nominalism comprises a “bundle of sticks,” but it has no explicit, identifiable constituents.<sup>110</sup> The United States Supreme Court has described property’s “bundle of sticks” just as vaguely: it is “a collection of individual rights which, in certain combinations, constitute property.”<sup>111</sup>

Consequently, there is no firm consensus on the definition of property, or even how central the right to exclude is in evaluating property interests.<sup>112</sup> “A legal system can label property as anything it wants to,” dependent on the social values and beliefs of its society.<sup>113</sup> Yet, even absent a universally accepted definition, scholars agree that property must have certain characteristics.<sup>114</sup> For purposes of this Comment, I consider the right to exclude as a persuasive element of property, in conjunction with the right to possess, the right to use, and the right to transfer.<sup>115</sup>

### B. *The New Property*

In contrast to traditional theories of property, “new property” concerns government-created forms of wealth that society finds valuable. Charles Reich’s 1964 law review article *The New Property* first highlighted the distinction between traditional property and “new property.”<sup>116</sup> Reich differentiated between traditional wealth, which is created by culture and society, and property, which is created by law.<sup>117</sup> Occupational licenses, driver’s licenses, franchises, benefits, subsidies, use of public resources, and contracts are all examples of government-created wealth—or what he coined “the new property.”<sup>118</sup> Today, according to Reich, the new property is “the rule rather than the exception.”<sup>119</sup>

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109. *Id.*

110. *Id.*

111. *United States v. Craft*, 535 U.S. 274, 278 (2002).

112. Merrill, *supra* note 105, at 734. *But see* *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (finding that the right to exclude is a fundamental element of property).

113. Merrill, *supra* note 105, at 737.

114. Francisco J. Morales, Comment, *The Property Matrix: An Analytical Tool to Answer the Question, “Is This Property?”*, 161 U. PENN. L. REV. 1125, 1128–29 (2013).

115. See JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 4–5 (2d ed. 2007) (“[T]he most important sticks in the bundle are: (1) the right to exclude; (2) the right to transfer; and (3) the right to possess and use.”).

116. See generally Reich, *The New Property*, *supra* note 26.

117. *Id.* at 733.

118. *Id.* at 734–37.

119. Reich, *The Liberty Impact*, *supra* note 93, at 296. Although states have frequently used the

Reich also notes that courts are more likely to protect privileges that “are intimately bound up with the individual’s freedom to earn a living.”<sup>120</sup> Several Supreme Court justices have opined that some government-created privileges may have more value than other forms of traditional property, as they implicate these liberty interests.<sup>121</sup> Justice Black opined that, for a physician, the right to practice medicine is “a very precious part of . . . liberty . . . . It may mean more than any property,”<sup>122</sup> as it pertains to the pursuit of a common calling. Similarly, Justice Douglas highlighted government payrolls, defense and highway contracts, subsidies to air carriers and railroads, disbursements for scientific research, and television and radio licenses as examples of “new property,” which “directly or indirectly implicate the *home life* of the recipients.”<sup>123</sup>

Under Reich’s theory, “the law continues to treat forms of wealth that have become essentials as mere *privileges*,”<sup>124</sup> even though more and more of an individual’s wealth “takes the form of rights or status rather than of tangible goods” or property.<sup>125</sup> For example, it is commonly understood that there is no right to operate a motor vehicle; rather, it is a privilege subject to state regulation.<sup>126</sup> But individuals who use motor vehicles to earn a livelihood have a particular property interest in retaining their driver’s licenses.<sup>127</sup>

Another illustration is the right to marry. Marriage is a government-created privilege<sup>128</sup> and also a fundamental right under both equal

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new property privileges that Reich discusses to advance civil rights causes, see, for example, *Licensing Agencies: Race in Application Forms—California*, 6 RACE REL. L. REP. 658 (1960), the proposed federal memorandum is fundamentally opposed to such a concept—instead, the policy maliciously brandishes gender markers as a limiting principle on transsex people’s lives.

120. Reich, *The New Property*, *supra* note 26, at 741.

121. See *Wyman v. James*, 400 U.S. 309, 326–27 (1971) (Douglas, J., dissenting); *Barsky v. Bd. of Regents of Univ.*, 347 U.S. 442, 459 (1954) (Black, J., dissenting); see also Reich, *The Liberty Impact*, *supra* note 93, at 305–06.

122. *Barsky*, 347 U.S. at 459.

123. *Wyman*, 400 U.S. at 326–27.

124. Reich, *The Liberty Impact*, *supra* note 93, at 298 (emphasis added).

125. Reich, *The New Property*, *supra* note 26, at 738.

126. *Id.* at 740.

127. See *id.* at 740–42.

128. The Constitution is traditionally understood to protect “negative rights”—that is, rights that restrain the actions of government “to protect individual autonomy and personhood.” Rachel A. Washburn, *Freedom of Marriage: An Analysis of Positive and Negative Rights*, 8 WASH. U. JURIS. REV. 87, 95, 104 (2015). However, *Obergefell v. Hodges* arguably acknowledged a fundamental right that “ensures active protection by the federal government,” indicating that marriage has the characteristics of both a positive and negative right. *Id.* at 104–05. A positive right is one where there is “dependence on the judicial state” to exercise it. *Id.* at 105.

protection and due process jurisprudence.<sup>129</sup> Once individuals are married, they have a negative right to retain their marriage, as it is interpreted as a property interest.<sup>130</sup> In theory, if a state were to stop issuing marriage licenses, it would likely violate the equal protection clause unless it also rescinds all previously issued marriage licenses.<sup>131</sup> However, it is highly unlikely that marriage licenses could be rescinded if the government stopped affirmatively offering marriage, as courts have “unanimously treated the changes in law as prospective *only*, typically concluding that pre-existing marriages [are] a sort of vested property right.”<sup>132</sup> In short, “there is a separate substantive due process right to *retain* the status and attendant property interests once lawfully attained.”<sup>133</sup> A similar analogy can be drawn to gender markers: once an amended marker is granted, transsex individuals have an interest to retain the marker and its attendant property interests.

Synthesizing competing theories, property is, essentially, what the law will draw boundaries for, which enforce (or reorder) the existing regime of power.<sup>134</sup> When it comes to gender, individuals have a property interest in maintaining an accurate gender marker, as gender exhibits qualities of traditional property. At a minimum, gender designations are examples of government-created licenses that society imbues with meaning and value. Under both scenarios, gender *is* property, and a transsex individual has a

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129. See *Obergefell v. Hodges*, 576 U.S. \_\_\_, 135 S. Ct. 2584 (2015) (“[T]he Court has long held the right to marry is protected by the Constitution.”); *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (“[O]ur past decisions make clear that the right to marry is of fundamental importance . . . .”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942))); *id.* at 12 (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”); see also Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1386–91 (2010).

130. Peter Nicolas, *Fundamental Rights in a Post-Obergefell World*, 27 YALE J.L. & FEMINISM 331, 359 (2016).

131. *Id.* at 360.

132. *Id.* (emphasis added). Note, however, that marriage is a substantive due process right under the Fifth and Fourteenth Amendments. See *supra* note 129 and accompanying text. This example is therefore distinctive in that marriage has been declared “fundamental,” while a gender designation, or a right to a correct gender designation, has not. *Turner v. Safley*, 482 U.S. 78, 95 (1987) (“[T]he decision to marry is a fundamental right under *Zablocki v. Redhail* and *Loving v. Virginia*.”) (citations omitted). However, if the “negative rights associated with marriage evaporated,” state governments could technically remove themselves from issuing marriage licenses altogether. Nicolas, *supra* note 130, at 358–59. Nicolas argues it likely evaporated under *Lawrence v. Texas*, 539 U.S. 558 (2003). *Id.* at 355. In that situation, the same property and due process inquiry would likely arise.

133. *Id.* at 360.

134. Harris, *supra* note 25, at 1730.

constitutional interest in maintaining the property rights attendant to their gender.

### III. COMPELLED SPEECH DOCTRINE

Gender is also a form of speech protected by the First Amendment of the United States Constitution.<sup>135</sup> The First Amendment states that federal and state governments “shall make no law . . . abridging the freedom of speech.”<sup>136</sup> The Supreme Court has interpreted the First Amendment to protect both the right to speak and the right to refrain from speaking.<sup>137</sup> The compelled speech doctrine states that the government may not require expression or utterance of a specific message, nor may it stifle speech on account of its message.<sup>138</sup> Thus, the First Amendment protects individuals from forced expression of an ideology that they find personally unacceptable.<sup>139</sup>

At its heart, the First Amendment provides “that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”<sup>140</sup> Crucially, the prohibition against compelled speech encompasses all speech, not just ideological and political speech.<sup>141</sup> Because the principle underlying the compelled speech doctrine is to protect “freedom of mind,”<sup>142</sup> the compelled speech doctrine

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135. See, e.g., *Zaleska v. Cnty. of Sullivan*, N.Y., 316 F.3d 314, 320 (2d Cir. 2003) (recognizing that a trans “high school student’s decision to wear traditionally female clothes to school as an expression of female gender identity [is] protected speech”); *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. Civ.02–1531PHX–SRB, 2004 WL 2008954, at \*9 (D. Ariz. June 3, 2004) (finding that a transsex woman’s expression of gender is a kind of speech directed to the public); *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at \*3 (Mass. Super. Ct. Oct. 11, 2000), *aff’d sub nom Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000); *Grzywna ex rel. Doe v. Schenectady Cent. Sch. Dist.*, 489 F. Supp. 2d 139, 144 (N.D.N.Y. 2006) (holding that patriotic accessorization of outfits constituted “speech”); *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 701 F. Supp. 2d 863, 882–83 (S.D. Tex. 2009) (holding that a Native American male student’s braids were communicative enough to constitute “speech”); see also *Danielle Weatherby, From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. REV. L. & SOC. CHANGE 89, 131 (2015) (arguing that use of gendered restrooms is speech itself).

136. U.S. CONST. amend. I.

137. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

138. See *id.* at 717.

139. *Id.* at 715.

140. *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 213 (2013) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)).

141. *Frudden v. Pilling*, 742 F.3d 1199, 1206 (9th Cir. 2014).

142. *Laurent Sacharoff, Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 332 (2008).

has been interpreted liberally.<sup>143</sup> The Supreme Court has held three general categories of compelled speech to be unconstitutional: (1) government action that forces a private speaker to propagate a particular message chosen by the government;<sup>144</sup> (2) government action that forces a private speaker to accommodate or include another private speaker's message;<sup>145</sup> and (3) government action that forces an individual to subsidize or contribute to an organization that engages in speech the individual opposes.<sup>146</sup>

The compelled speech doctrine was first developed in *West Virginia State Board of Education v. Barnette*,<sup>147</sup> which represents the first prohibited category of compelled speech.<sup>148</sup> *Barnette* concerned a West Virginia resolution that required school children to recite the pledge of allegiance and perform a stiff-arm salute to the flag of the United States.<sup>149</sup> Refusal to salute meant expulsion from school, and even criminal prosecution of parents due to child delinquency.<sup>150</sup> In striking down the resolution, the Court found that flag salutes and symbolic gestures were a "form of utterance" and a "way of communicating ideas."<sup>151</sup>

After *Barnette*, the Supreme Court continued to expand the compelled speech doctrine. In *Miami Herald Publishing Co. v. Tornillo*,<sup>152</sup> the Court established the second category of compelled speech. *Tornillo* concerned Florida's "right-to-reply" statute, which required newspapers to provide a platform for response—free of cost—to political candidates if the newspaper had attacked their "personal character."<sup>153</sup> The Court held that Florida engaged in content discrimination by coercing newspapers into

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143. *See id.*

144. *See Wooley*, 430 U.S. at 717; *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

145. *See Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 581 (1995); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 12–16 (1986); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

146. *See United States v. United Foods*, 533 U.S. 405, 413 (2001); *Abood v. Detroit Bd. of Educ.* 431 U.S. 209 (1977), *overruled in part by Janus v. Am. Fed'n of State, County, and Mun. Emps., Council 31*, 585 U.S. \_\_\_, 138 S. Ct. 2448 (2018) (striking down part of *Abood* on a more expansive interpretation of the First Amendment's compelled speech doctrine).

147. 319 U.S. 624 (1943).

148. *Id.*

149. *Id.* at 628–29.

150. *Id.* at 629–30.

151. *Id.* at 632.

152. 418 U.S. 241 (1974).

153. *Id.* at 244.

providing such a platform,<sup>154</sup> and that the government could not force individuals to provide a platform for a particular message.<sup>155</sup>

The last category of compelled speech, known as compelled subsidy, concerns government actions that force individuals to subsidize or partake in speech with which they disagree. It has seen recent expansion. In a 2018 employment law case, the Supreme Court held that public-sector employers may not require non-member employees of a union to pay “agency fees,” which are a portion of union dues that cover only germane activities, unrelated to the union’s political or ideological projects.<sup>156</sup> The Court found that the state’s agency fees violated the First Amendment as it subsidized the speech of other, private speakers—even when it funded activity with no specified political or ideological message.<sup>157</sup>

The Supreme Court has also struck down laws that require dissemination of a speaker’s identity, which falls under the first category of compelled speech concerning mandated expression of particular content. For instance, the Court has invalidated a law that required identification of the distributor of any handbill<sup>158</sup> as well as a law that prohibited circulation of anonymous leaflets in relation to political campaigns.<sup>159</sup> In both of these cases, the government could not force individuals to disclose personal and sensitive information. In contrast, the Court in *Doe v. Reed*<sup>160</sup> refused to invalidate a Washington State statute that required disclosure of the names and addresses of individuals who signed referendum ballot petitions, in part because of the State’s legitimate interest in preserving electoral integrity.<sup>161</sup> The Court did, however, hint that a narrower holding may be necessary in a case where a plaintiff can show “a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals.”<sup>162</sup>

The Trump Administration’s new gender policy implicates the First Amendment’s compelled speech doctrine because the federal government assigns an expression of speech to each individual—their gender—which

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154. *Id.* at 254, 258.

155. *Id.* at 258.

156. *Janus v. Am. Fed’n of State, Cty., and Mun. Emps., Council 31*, 585 U.S. \_\_\_, 138 S. Ct. 2448, 2455–56, 2460–61 (2018).

157. *Id.* at 2464, 2478.

158. *Talley v. California*, 362 U.S. 60 (1960) (finding the ordinance “void on its face”).

159. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995).

160. 561 U.S. 186 (2010).

161. *Id.*

162. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976); *see also Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 368–69 (2010).

the individual must then disseminate every time they show identification. In many cases, this dissemination requires additional compelled speech to explain the discrepancy between their lived gender and marked gender, which frequently places transsex people in danger of harassment or discrimination.<sup>163</sup> This scenario inevitably arises under the Trump Administration's proposal, and it constitutes government-compelled speech.

#### IV. GENDER AND FUNDAMENTAL RIGHTS

Gender protects fundamental rights enshrined by the Due Process Clause and Privileges and Immunities Clause of the United States Constitution. To begin, the Due Process Clause protects individuals from deprivation of "life, liberty, or property, without due process of law."<sup>164</sup> It has been interpreted to have both procedural and substantive components.<sup>165</sup> This Comment will overview its substantive component, which protects certain fundamental rights. In addition, the Privileges and Immunities Clause of Article IV, Section 2 provides that "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."<sup>166</sup> Privileges and immunities are interpreted as rights granted by federal citizenship—sometimes stemming from natural law, state and federal law, or the Bill of Rights.<sup>167</sup> This Part will demonstrate that gender designations influence the exercise of substantive due process rights and privileges and immunities. Thus, accurate gender designations are pivotal to protecting the liberty interests of transsex people.

##### A. *Substantive Due Process Rights*

Since 1937,<sup>168</sup> the Supreme Court has discerned two primary categories of substantive due process rights: those that are enumerated against state

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163. See *infra* section IV.B.

164. U.S. CONST. amend. V; see also U.S. CONST. amend. XIV.

165. E. THOMAS SULLIVAN & TONI M. MASSARO, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW 38, 47 (2013); RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION I (2004).

166. U.S. CONST. art. IV, § 2, cl. 1.

167. Thomas H. Burrell, *A Story of Privileges and Immunities: From Medieval Concept to the Colonies and United States Constitution*, 34 CAMPBELL L. REV. 7, 8 (2011); Note, *Congress's Power to Define the Privileges and Immunities of Citizenship*, 128 HARV. L. REV. 1206, 1206–07 (2015); see also *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring); CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM 74–75 (1997); Akhil R. Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 (2001).

168. In 1937, the United States Supreme Court decided *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). This case ended the infamous *Lochner* era, in which the Court regularly struck down

and federal governments through the Bill of Rights and Fourteenth Amendment, and those that are unenumerated fundamental rights implicit in due process liberty.<sup>169</sup> The latter category is frequently implicated by gender. For example, as previously illustrated, a transsex person’s ability to exercise their right to marry was historically dependent on legal determination of gender.<sup>170</sup> This section will continue this discussion by examining disparities in the realm of parentage, demonstrating that legal gender has an enduring role in the exercise of substantive due process rights.

An individual’s gender designation may impinge on the liberty interest of parents “in the care, custody, and control of their children.”<sup>171</sup> Since *Meyer v. Nebraska*,<sup>172</sup> the right to have children has been considered fundamental and protected by the substantive component of the Due Process Clause.<sup>173</sup> States still differentiate parentage rights on the basis of gender—for example, in issuing the names and respective rights of “mothers” and “fathers”—and therefore a proper gender designation is critical.<sup>174</sup> Since states continue to differentiate parental rights based on gender, a transsex person’s gender designation may impinge on the liberty interest of parents in bringing up children.

Gender is significant in the common law presumption of parenthood.<sup>175</sup> Most states continue to presume that the “biological” father of a child is the husband of a woman who gives birth.<sup>176</sup> In terms of the presumption of parenthood, “the law is not settled . . . [on] circumstances under which the presumption can be resettled.”<sup>177</sup> While the presumption of legitimacy

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social and economic legislation on the grounds that such laws interfered with liberty of contract. *See, e.g., Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) (holding that federal legislation that established a minimum wage for women and children was unconstitutional); *Lochner v. New York*, 198 U.S. 45 (1905) (holding that state legislation that limited weekly working hours for bakers was unconstitutional). This set forth a new era of due process jurisprudence, in which rights must be “sufficiently ‘fundamental’ to trigger elevated judicial scrutiny.” *See SULLIVAN & MASSARO, supra* note 165, at 48–50.

169. SULLIVAN & MASSARO, *supra* note 165, at 51.

170. *See supra* Part I.

171. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

172. 262 U.S. 390, 399 (1923).

173. *See generally Skinner v. Oklahoma*, 316 U.S. 535 (1942).

174. Melanie B. Jacobs, *Parental Parity: Intentional Parenthood’s Promise*, 64 *BUFF. L. REV.* 465, 478 (2016).

175. *Id.*

176. AM. CIVIL LIBERTIES UNION & NAT’L CTR. FOR TRANSGENDER EQUAL., *PROTECTING THE RIGHTS OF TRANSGENDER PARENTS AND THEIR CHILDREN: A GUIDE FOR PARENTS AND LAWYERS* 17 (2013), [hereinafter *Rights of Transgender Parents*] [https://www.aclu.org/files/assets/aclu-tg\\_parenting\\_guide.pdf](https://www.aclu.org/files/assets/aclu-tg_parenting_guide.pdf) [<https://perma.cc/DTP2-HZMK>].

177. *Id.* at 18.



for married individuals “is one of the most firmly-established and persuasive precepts known in law,”<sup>178</sup> it fails to properly entitle transsex individuals to parentage rights. The marital presumption, generally, dictates that a man married to a woman who gives birth is the presumptive biological father.<sup>179</sup> The United States Supreme Court has recently casted doubt on this traditional structure, holding that same-sex couples need to be granted the same benefits of marriage—including the parental presumption—as opposite-sex couples.<sup>180</sup> However, states continue to differentiate between “biological” parents and other parents in some respects.<sup>181</sup> For instance, several states continue to delineate that “the marital presumption serves as a proxy for biological parenthood.”<sup>182</sup> When an individual’s gender marker is accurate, they are entitled to the same presumption as a cissex individual of their gender.<sup>183</sup> Therefore, an accurate gender designation is important to parents seeking to utilize the marital presumption.

However, it should be noted that an accurate gender marker does not assure that a transsex person will obtain and retain parental rights. The rights of a transsex person to parenthood are often, and unfortunately, implicated when that individual is discovered to be transsex, and the state subsequently revokes parental rights based, at least in part, on gender identity.<sup>184</sup> Even transsex parents of biological children are at risk of having their parental rights challenged if “they used assisted reproduction.”<sup>185</sup> In these cases, individuals are best able to conceal their transsex status when their gender marker matches their external presentation of gender.

Courts have discriminated against transsex parents solely because they are transsex. In *In re Marriage of Simmons*,<sup>186</sup> for instance, a transsex man’s marriage to a woman was invalidated, and his parental rights reversed, even though his birth certificate accurately listed his male

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178. *Baker v. Baker*, 582 S.E.2d 102, 103 (2003).

179. Jacobs, *supra* note 174, at 478; Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 317 (1990).

180. *Pavan v. Smith*, 582 U.S. \_\_\_, 137 S. Ct. 2075, 2078 (2017).

181. For an overview on how the law continues to differentiate between “biological” and social parents, often to the disability of LGBTQ parents, see Douglas Nejaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2264–65, 2323–26 (2017).

182. *Id.* at 2295–96.

183. It should be noted that gay couples are also left out of the marital presumption in these states. *Id.* Therefore, gay transsex people would not benefit from an accurate gender designation.

184. *See infra* Part I.

185. *Rights of Transgender Parents*, *supra* note 176, at 18.

186. 825 N.E.2d 303 (Ill. App. Ct. 2005).

gender.<sup>187</sup> The same occurred in *Kantaros v. Kantaras*,<sup>188</sup> where a Florida court found that a “postoperative female-to-male transsexual person [could not] validly marry a female.”<sup>189</sup> In the latter case, the court withheld opinion of the legal status of the children for a trial court to examine on remand.<sup>190</sup>

Judicial knowledge of an individual’s transness, as revealed by a conflicting, incorrect gender marker, implicates the right to care, custody, and control of children. In *J.L.S. v. D.K.S.*,<sup>191</sup> two parents—a cissex and transsex woman—appealed from a decree of dissolution of their marriage. The cissex mother alleged that the transsex mother had “adopted a lifestyle such that it would be extremely harmful to [their] minor children,” and to preserve the best interests of the minor children, only the cissex mother should have visitation and custody.<sup>192</sup> While the trial court issued visitation and temporary custody to the transsex mother, the Court of Appeals of Missouri reversed and awarded sole custody to the cissex mother, finding that “the overwhelming evidence indicates that the parties now do not share any commonality of beliefs regarding the raising of the minor children.”<sup>193</sup> The court found that the transsex mother’s gender identity, among other things, was evidence that the parents did not have a “commonality of beliefs concerning parental decisions.”<sup>194</sup>

Such decisions are not a relic of antiquity.<sup>195</sup> In 2007, a Washington Court of Appeals determined that a transsex parent should not have primary custody over a child because the “impact of [the parent’s] gender reassignment surgery on the children is unknown.”<sup>196</sup> In the most extreme

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187. *Id.* at 307.

188. 884 So.2d 155 (Fla. Ct. App. 2004).

189. *Id.* at 155.

190. *Id.* at 161.

191. 943 S.W.2d 766 (Miss. Ct. Ap. 1997). *But see* *Christian v. Randall*, 516 P.2d 132, 132–33 (Colo. Ct. App. 1973) (holding that a transsex man’s transition was not “sufficient evidence” to find that a custody transfer was in the best interests of the children); *In re Marriage of D.F.D. and D.G.D.*, 862 P.2d 368, 375 (Mont. 1993) (reversing a trial court’s determination that a transsex mother’s transness would be irreparably harmful to her son, holding that the conclusion was unsupported by evidence).

192. *J.L.S.*, 943 S.W.2d at 770.

193. *Id.* at 774.

194. *Id.* at 774–45.

195. Helen Y. Chang, *My Father is a Woman, Oh No!: The Failure of the Courts to Uphold Individual Substantive Due Process Rights for Transgender Parents Under the Guise of the Best Interest of the Child*, 43 SANTA CLARA L. REV. 649, 651 (2003).

196. *Magnuson v. Magnuson*, 141 Wash. App. 347, 350, 170 P.3d 65, 66 (Wash. Ct. App. 2007); *see also* *Cisek v. Cisek*, No. 80 C.A. 113, 1982 WL 6161, \*1–2 (Ohio Ct. App. July 20, 1982) (“[T]he transsexualism of the [parent] would have a sociopathic affect [sic] on the child . . . without appropriate intervention.”).

cases, courts have completely severed the parent-child relationship because the parent was transsex. For instance, a Kentucky Court of Appeals in 2007 terminated the parent-child relationship of one transsex mother because of her gender identity and its purported effect on the child.<sup>197</sup> According to a 2011 national survey, 13% of parent respondents reported that “courts limited or stopped relationships with children due to their transgender identity or gender non-conformity.”<sup>198</sup>

Another unfortunate reality for transsex parents rearing children is that courts have not hesitated to compel individuals to adhere to gender stereotypes, often in express conflict with their gender.<sup>199</sup> For example, child custody orders may require transsex parents to perform or express gender in a certain way to maintain parental rights.<sup>200</sup> Specifically, a transsex parent may be required conceal their gender identity from their child whenever the court determines it is “necessary to protect the child from harm.”<sup>201</sup> Such orders stem from transphobic and unfounded notions about the inherent harm a parent’s transition can have on children.<sup>202</sup> Court orders that demand expression of a specific gender directly impact a transsex person’s ability to raise their children, and they also likely implicate the First Amendment, as gender expression is a form of personal speech.<sup>203</sup>

### B. *Privileges and Immunities*

Gender also implicates liberties protected by the Privileges and Immunities Clause. An inaccurate gender designation restricts an

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197. *M.B. v. D.W.*, 236 S.W.3d 31, 35, 38 (Ky. Ct. App. 2007).

198. JAMIE M. GRANT, LISA A. MOTTET & JUSTIN TANIS, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 88* (2011), [https://www.transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf) [<http://perma.cc/QT3Y-ZC45>] (“Courts limited or stopped relationships with children for 13% of respondents, with Black, Asian, and multiracial respondents experiencing higher rates of court interference.” (emphasis omitted)); Beth A. Haines et al., *Making Trans Parents Visible: Intersectionality of Trans and Parenting Identities*, 24 *FEMINISM & PSYCHOL.* 238, 239 (2014).

199. *See infra* notes 200, 201.

200. Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 *WM. & MARY J. WOMEN & L.* 187, 217 (2013).

201. *Rights of Transgender Parents*, *supra* note 176, at 7, 16. Courts have considered the concealment of transsex identity to be a relevant factor in determining parental rights. *See P.L.W. v. T.R.W.*, 890 S.W.2d 688, 690 (Mo. Ct. App. 1994) (noting that transsex parent did not present at their actual gender in front of the child); *In re the Marriage of D.F.D. and D.G.D.*, 862 P.2d 368 (Mont. 1993) (same).

202. *See* Jayke Pyne, Greta Bauer & Kaitlin Bradley, *Transphobia and Other Stressors Impacting Trans Parents*, 11 *J. GLBT FAM. STUD.* 107, 108 (2015).

203. *See infra* section V.B.

individual's liberty interest to pursue an occupation or common calling. This is what the *Lochner*-era Supreme Court infamously referred to as "the right of the citizen . . . to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation."<sup>204</sup> Originally thought to be protected by the substantive component of the Due Process Clause, the right to pursue a common calling is now interpreted under the Privileges and Immunities Clause.<sup>205</sup> The Trump Administration's policy threatens transsex people's right to earn a livelihood in that it exposes transsex individuals to employment discrimination, and potentially, procedural disqualification from employment for having a mismatched gender designation.<sup>206</sup>

Transsex people are frequently subjected to employment discrimination, and, in some circuits, receive no protection from termination based on their gender identity.<sup>207</sup> When an employee is forced

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204. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

205. *McBurney v. Young*, 569 U.S. 221, 227 (2013); *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978). See also generally Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J. L. & PUB. POL'Y 5 (2012).

206. One crucial and cautionary point on the Privileges and Immunities Clause should be noted. The United States Supreme Court has never incorporated the clause against the federal government. The Court has repeatedly struck down *state* laws that discriminate against rights and liberties recognized under the clause. See, e.g., *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (holding that an Alaskan statute that required in-state oil and gas companies to give state residents a hiring preference to be unconstitutional); *Toomer v. Witsell*, 334 U.S. 385 (1948) (holding that a South Carolina statute that required a non-resident to pay one-hundred times as much as a resident for a shrimping license was unconstitutional). The Fourteenth Amendment clearly incorporates the Privileges and Immunities Clause against state governments, U.S. CONST. amend. XIV; however, Article IV, section 2 has not been interpreted to restrict federal power. See, e.g., *Pollack v. Duff*, 793 F.3d 34, 44 (2015) ("[W]e think the weight of the evidence indicates the Privileges and Immunities Clause was not originally understood as a limitation upon the authority of the federal government."); *Nehme v. INS*, 252 F.3d 415, 430 n.18 (5th Cir. 2001) ("[T]he Privileges and Immunities Clause [of Article IV] protects citizens of one state from abuses by other states, and does not address powers, such as the granting of citizenship, of the federal government."); *Cramer v. Skinner*, 931 F.2d 1020, 1030 n.7 (5th Cir.1991) ("While we have held that state legislation may violate the privileges and immunities clause of article IV if it unjustifiably denies the right to travel, that clause applies only to state legislation and does not govern federal statutes."); *Nevada v. Watkins*, 914 F.2d 1545, 1555 (9th Cir. 1990) ("[T]he Privileges and Immunities Clause [of Article IV] has been construed as a limitation on the powers of the States, not on the powers of the federal government."); *Hawes v. Club Ecuestre El Comandante*, 535 F.2d 140, 145 (1st Cir. 1976) ("Article IV, § 2 is a limitation on powers of states and in no way affects the powers of a federal district court."). Because of the lack of incorporation, the impacts of gender on privileges and immunities appears less compelling than its impacts on substantive due process rights. This Comment nonetheless highlights them because they are fundamental rights enshrined in the United States Constitution, to which every individual has an interest in exercising.

207. However, the United States Supreme Court recently granted certiorari on the issue of whether transsex people are protected under Title VII of the Civil Rights Act of 1964, which will determine whether transsex people may have their employment terminated on account of gender identity; and, potentially, whether cissex people must conform to gender stereotypes to retain employment. *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 1599 (Mem.) (Apr. 22, 2019).

to disclose their identity due to a mismatched document, they are placing themselves at both physical and economic risk. The numbers are alarming. More than three-fourths of transgender people have reported some form of workplace discrimination, and “one in four transgender people have lost a job due to bias.”<sup>208</sup> The misidentification of a transsex person’s gender can also create a “stigma” or “disability” that forecloses employment opportunities whenever a transsex person has to “out” themselves.<sup>209</sup> Forced outing may stigmatize an individual and “seriously damage [their] standing and associations in [their] community.”<sup>210</sup> This is particularly alarming, as the larger transgender community already has an unemployment rate of up to 70%.<sup>211</sup>

In addition, if an individual’s identification card (“ID”) does not accurately reflect their gender, they may face difficulty obtaining or maintaining employment.<sup>212</sup> A legitimate ID is necessary for most legal employment in the United States.<sup>213</sup> Some states require that an individual’s federal gender marker match state records before issuance of a state ID.<sup>214</sup> In this situation, if a transsex man is seeking an ID from the state, his state gender marker must match the one listed on his federal documents.<sup>215</sup> The federal government has utilized a similar tactic that can preclude employment. For example, the Social Security Administration (“SSA”) used a technique called “gender matching” for public sector employees until 2011, which required that a person’s gender designation in the Social Security database match that indicated on a work application.<sup>216</sup> The SSA recently resumed issuing “no-match” letters in 2019 for employee’s names and Social Security numbers, and notices may be triggered by “typographical errors, unreported name changes, and

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208. *Employment*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues/employment> [<https://perma.cc/PJ9W-686P>].

209. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 573 (1972).

210. *Id.*

211. Spade, *supra* note 75, at 751–52.

212. *Id.*

213. *See I-9, Employment Verification*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-9> [<https://perma.cc/VAS3-TJUJ>].

214. Spade, *supra* note 75, at 737–38.

215. *See id.*

216. *Know Your Rights – Social Security*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/know-your-rights/social-security> [<https://perma.cc/WH7H-YMVS>] (“What About ‘No-Match Letters’? Will My SSA Record Out Me on the Job or Elsewhere?”); Waymon Hudson, *Social Security Ends “Gender No-Match” Letters for Employees*, HUFFINGTON POST (Nov. 21, 2011), [https://www.huffpost.com/entry/social-security-ends-gender-no-match\\_b\\_966654](https://www.huffpost.com/entry/social-security-ends-gender-no-match_b_966654) [<https://perma.cc/3H28-K64J>].

inaccurate or incomplete employer records.”<sup>217</sup> Like occupational and professional licenses, federal benefits, and drivers’ licenses, inaccurate gender designations impinge on a transsex person’s ability to earn a living, which is a particularly sensitive liberty interest.<sup>218</sup> Gender designations thus have a profound impact on many aspects of a transsex person’s life.<sup>219</sup>

Overall, the effectuation of substantive due process rights and privileges and immunities are influenced by gender designations, and sometimes, transsex status itself. In the realm of parentage and employment, gender markers remain regrettably relevant. The impact of gender may go largely unseen by cissex individuals, because a proper gender designation offers them effortless access to facilities and accommodations.<sup>220</sup> However, the impacts are significant enough to inhibit, or preclude entirely, exercise of fundamental rights. In such scenarios, transsex people with accurate gender designations are better able to conceal their transsex status and protect their liberty interests. As the next Part will show, legal gender not only tangentially impacts fundamental rights, but is a right in and of itself.

## V. THE LIBERTY IMPACT OF GENDER

This Part contends that gender is a property right and protected form of speech. Section A first illustrates how gender exhibits characteristics of both traditional property and “new property,” finding that transsex individuals have a property interest in retaining accurate gender

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Employer Correction Request Notices (EDCOR), SOC. SEC. ADMIN., <https://www.ssa.gov/employeer/notices.html> [<https://perma.cc/798P-RD66>]; Laura D. Francis, *Social Security No-Match Letters Causing Concern (Corrected)*, DAILY LABOR REPORT (May 7, 2019), <https://news.bloomberglaw.com/daily-labor-report/social-security-no-match-letters-worry-immigrants-bosses> [<https://perma.cc/A3FJ-8YG3>].

218. Reich, *supra* note 26, at 740–42.

219. Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 398 (2013); Spade, *supra* note 75, at 775; *supra* Part IV.

220. This claim should be caveated by the fact that some cissex and non-intersex people face similar hurdles and occasionally violence for not adhering to heteronormativity or cismativity. *See, e.g.*, Reginald Hardwick, *Man Follows Woman Into Restroom Over ‘Perceived’ Gender*, NBCDFW (May 1, 2016, 10:21 PM), <https://www.nbcdfw.com/news/local/Man-Follows-Woman-Into-Restroom-Over-Perceived-Gender-377761441.html> [<https://perma.cc/PP57-VVCY>]; Matt DeRienzo, *Woman Mistaken for Transgender Harassed in Walmart Bathroom*, NEWS TIMES (May 16, 2016, 3:50 PM) [<https://perma.cc/UDG3-VUKV>]; Mitch Kellaway, *Woman Sues Restaurant that Ejected Her from Bathroom for Looking ‘Like a Man.’* ADVOCATE (June 17, 2015, 7:26 AM), <https://www.advocate.com/business/2015/06/17/detroit-woman-kicked-out-restaurant-bathroom-looking-man-sues> [<https://perma.cc/R8D8-4MR8>].

designations. Section B then establishes that inaccurate gender designations are independently unconstitutional under the compelled speech doctrine of the First Amendment. The way that gender manifests itself through property and speech rights indicates that people have a constitutional interest in maintaining an accurate gender designation. Therefore, the Trump Administration's policy impermissibly deprives transsex individuals of their right to an accurate gender designation.

#### A. *Gender as Property*

Gender constitutes a property right, under traditional conceptions of property and government-created privileges known as “new property.” Depending on the school of thought, gender may encompass all or some of traditional property's characteristics. Property rights have been described as a “bundle of sticks,” which typically includes the right to exclude,<sup>221</sup> and the capability of possession, use, and transfer.<sup>222</sup> This section will overview common conceptions of property and illustrate how institutions perpetuate and protect the legal identity of gender.

First, gender markers contain a core aspect of property: the ability to exclude. Maleness and femaleness are distinct categories, constructed as a legal identity by state governments,<sup>223</sup> to which members of each category exclude one another. Typically, only men may have a “male” designation, and only women have a “female” designation. Therefore, for a gender designation to have any value, it must exclude others—specifically, people of other genders, or perhaps those that do not conform to heteronormativity.<sup>224</sup> This allows the designation of “male” or “female” to have tangible use in society.

Gender also occupies the property trait of possession. Individuals may “possess” their gender by adhering to heteronormative<sup>225</sup> conceptions of that gender.<sup>226</sup> This possession includes the right to use and enjoyment, as gender “is something that can both be experienced and deployed as a resource.”<sup>227</sup> For example, adhering to traditional markers of the male gender allows someone to—at least briefly—possess maleness and reap

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221. On the right to exclude, see generally Merrill, *supra* note 105.

222. On possession, use, and transfer, see Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 879–881 (2013).

223. See *supra* Part I.

224. Wigginton, *supra* note 24, at 151 (noting that “the law endows the holders of heteronormative identities with all the rights in the ‘bundle of sticks’”).

225. See *supra* note 27.

226. Wigginton, *supra* note 24 **Error! Bookmark not defined.**, at 145.

227. Harris, *supra* note 25, at 1734.

reward from the gender's presentation. Although the federal government may not enforce gender stereotypes upon people,<sup>228</sup> the value of gender markers comes from people's ability to adequately *possess* the gender designation—that is, to “pass”<sup>229</sup> as the gender they are designated. For a gender marker “to have any value, its holder's appearance must match that marker.”<sup>230</sup> Therefore, when an individual passes as their gender, they are taking advantage of the privileges associated with maleness and femaleness.<sup>231</sup>

Lastly, gender may be transferred. The most obvious example of transfer is from the genetic parent-child link.<sup>232</sup> Genetic sex is ultimately inherited from genetic parents<sup>233</sup> and neurological sex is theorized to be influenced by genetic factors.<sup>234</sup> Some studies indicate that gender identity is also influenced by hormones, which similarly derive from parents—meaning that an individual's gender is ultimately transferred through biological factors from parent to child.<sup>235</sup> The law facilitates this transfer by requiring medical practitioners to designate a gender marker “as soon as possible” after a child's birth.<sup>236</sup> Beyond genetic factors, gender may also be transferred by the imposition and social conditioning of gender

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228. See Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297 (2012) (delineating the causes of action under federal statutes for unconstitutional gender stereotyping); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 91 (2010) (explaining the constitutional jurisprudence prohibiting gender stereotyping that emerged in the 1970s).

229. “Passing” generally refers to “a transgender person's ability to be correctly perceived as the gender they identify as.” Jae A. Lee, *What Does “Passing” Mean in Terms of Transgender People?*, HUFFINGTON POST (June 10, 2017), [https://www.huffingtonpost.com/entry/what-does-passing-mean-within-the-transgender-community\\_us\\_593b85e9e4b014ae8c69e099](https://www.huffingtonpost.com/entry/what-does-passing-mean-within-the-transgender-community_us_593b85e9e4b014ae8c69e099) [<https://perma.cc/5WCF-67N3>]. However, cissex people may also not “pass” if they do not conform to heteronormative conceptions of gender. As a result, both transsex and cissex people find value in sufficiently “possessing” their genders. See, e.g., *supra* note 220.

230. Wigginton, *supra* note 24, at 150.

231. Harris, *supra* note 19, under “right to use and enjoyment.”

232. Cf. Wigginton, *supra* note 24, at 148.

233. *Id.*

234. Arthur P. Arnold, *Sex Chromosomes and Brain Gender*, 5 NATURE REVIEWS NEUROSCIENCE 701 (2004) (arguing that “[g]enes on the sex chromosomes probably determine the gender (sexually dimorphic phenotype) of the brain in two ways: by acting on the gonads to induce sex differences in levels of gonadal secretions that have sex-specific effects on the brain, and by acting in the brain itself to differentiate XX and XY brain cells”).

235. Stuart Tobet et al., *Brain Sex Differences and Hormone Influences: A Moving Experience?*, 21 J. NEUROENDOCRINOLOGY 1 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2669491/pdf/nihms-99144.pdf> [<https://perma.cc/D5TE-A23A>] (“Both genetic and hormonal factors likely contribute to physiological mechanisms in development to generate the ontogeny of sexual dimorphisms in brain.”).

236. Wigginton, *supra* note 24, at 150.



stereotypes. For instance, “most children will be born to heterosexual [and cissex] parents, many of whom will maintain roles consistent with the dimensions of maleness or femaleness.”<sup>237</sup> This is a transfer of gender’s most utilized mechanisms of possession and use: stereotyping. Studies have suggested that children who conform to gender stereotypes are less likely than their non-stereotypic peers to face physical, verbal, and peer-reported aggression,<sup>238</sup> as well as social exclusion.<sup>239</sup> Conformity with gender stereotypes thus provides an individual with the best tools to utilize gender’s property interests in society. As a result, gender has traditional characteristics of property, because individuals may exclude others from their gender designation and possess, use, and transfer gender.

Gender designations are also exceptionally similar in character and function to “new property.” This is evident by how an accurate gender designation impacts the exercise of substantive due process rights and privileges and immunities.<sup>240</sup> Individuals may use their gender designation to exercise certain rights and benefits; indeed, gender designations were historically used to prevent transsex people from exercising their substantive due process rights.<sup>241</sup> Although some examples are now archaic, such as the right to marry,<sup>242</sup> gender still has an important influence on fundamental rights.<sup>243</sup> For example, there is a close link between gender’s *use* and its stereotyping mechanisms. Individuals who *possess* femaleness may *use* femaleness to “gain custody of children via courts’ presumption of maternal custody.”<sup>244</sup> The use of gender in this scenario implicates the fundamental right to rear children. In contrast, maleness has traditionally been used to acquire higher wages<sup>245</sup> and positions of power.<sup>246</sup>

The Trump memorandum serves as an example of the federal government characterizing social essentials—such as having a gender marker congruent with one’s identity and lived experience—as a mere “privilege” to be granted or rescinded by the government. In reality,

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237. *Id.* at 149.

238. Laura Aspenlieder et al., *Gender Nonconformity and Peer Victimization in Pre- and Early Adolescence*, 3 EURO. J. DEVELOPMENTAL SCI. 3, 3–16 (2009).

239. Melanie Killen & Charles Stangor, *Children’s Social Reasoning About Inclusion and Exclusion in Gender and Race Peer Group Contexts*, 72 CHILD DEV. 174, 174–86 (2001).

240. *See supra* Part IV.

241. *See supra* Part IV.

242. *See supra* note 32 (concerning the right to marry after *Obergefell*).

243. *See supra* Part IV.

244. Wigginton, *supra* note 24, at 147.

245. *Id.* at 146.

246. Every president of the United States has been male; additionally, approximately 81% of congressional members are male. *Id.*

gender designations have taken on a form of usable property, embedded and legitimized by law. Whether it is conceived under the traditional property model, or the more encompassing government-created form of wealth, gender *is* property. Because of these property interests, transsex people have a vested interest in maintaining an accurate gender designation.

### B. *Gender as Speech*

In addition to the property interests inherent to gender, gender designations act as an expression of gender *identity*, which is itself a form of speech. The Trump Administration's proposal would rubberstamp a gender on every individual, based on initial gender assignment at birth. For transsex people, the marker would directly conflict with their lived experience and personal identification. Both the presentation of an incorrect gender marker, and the disclosure that a marker is "amended," are examples of compelled speech that is impermissible under the First Amendment. Incorrect gender markers force transsex individuals to disclose that they are a different gender than indicated and force individuals to "out" themselves as transsex to explain the discrepancy. For instance, transsex people may be accused of identity theft for presenting an obviously conflicting identification document.<sup>247</sup> Both disclosure of their actual gender and transsex status deprives transsex individuals of their right to "decide for [themselves] the ideas and beliefs deserving of expression, consideration, and adherence."<sup>248</sup>

When individuals present identification documents with gender markers, it is to answer the fundamental question: "Who are you?"<sup>249</sup> Under the Trump Administration's policy, transsex individuals are forced to propagate a message that they fundamentally disagree with: that their gender is what the federal government indicates, rather than what their neurological biology or lived experience dictates it is. The First Amendment forbids federal and state governments from "telling people what they must say"<sup>250</sup>—especially with regards to speech that touches

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247. See, e.g., Cat Reid, *Lawsuit Challenges Kansas Birth Certificate Policy for Transgender People*, KSHB (Oct. 15, 2018), <https://www.kshb.com/news/local-news/lawsuit-challenges-kansas-birth-certificate-policy> [<https://perma.cc/38NT-TY43>] (explaining that one of the plaintiffs challenging Kansas' birth certificate policy, which does not permit gender marker alterations, has been accused of identity theft for presenting an identification document with an inaccurate gender).

248. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994)).

249. Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, *F.V. v. Barron*, 286 F. Supp. 3d 1131 (D. Idaho 2018) (No. 1:17-cv-00170-CWD), 2017 WL 10398823, at \*11.

250. *Agency for Int'l Dev.*, 570 U.S. at 213.

the heart as closely as gender identity. The policy would use citizens as a “mouthpiece[ ] for official orthodoxy,”<sup>251</sup> in that it would force individuals to express a gender that is at odds with personal identity, experience, and frequently, science.<sup>252</sup> Consequently, forced expression of gender through an inaccurate gender designation impinges on the First Amendment.

Importantly, the damages that stem from compelled speech of gender cannot be mitigated. A transsex person can typically disclaim an inaccurate gender marker, such as by disclosing that they are transsex. However, transsex people face physical, verbal, and sexual harassment and discrimination in housing and employment based on their transsex status.<sup>253</sup> Forced disclosure of an individual’s transsex status places them in unnecessary danger of discrimination and harassment.<sup>254</sup> For example, the 2015 United States Transgender Survey indicates that 46% of transgender participants were verbally harassed in the last year, and one-in-ten individuals were physically attacked, based on their gender identity.<sup>255</sup> These devastating numbers are in addition to the discriminatory risk transsex people face in employment and housing.<sup>256</sup>

A transsex person’s ability to mitigate damages from compelled speech would therefore rely on placing themselves in the more difficult situation of having to “out” themselves and face subsequent stigma, harassment, and discrimination. Even absent transphobia and the social impact of being “outed” as a transsex person, an individual’s transsex status is deeply personal and private information that deserves First Amendment protection in its own right. As the Second Circuit stated: “The excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate.”<sup>257</sup> An individual’s transsex status is speech that an individual has a right to keep private against coerced disclosure. Under the Trump Administration’s redefinition of gender, disclosure may be required in

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251. KATHLEEN M. SULLIVAN & NOAH FELDMAN, *FIRST AMENDMENT LAW* 435 (5th ed. 2013).

252. *See supra* notes 3, 234, 235.

253. *See supra* section IV.C.

254. *See, e.g.*, *Powell v. Schriver*, 175 F.3d 107, 111–12 (2d Cir. 1999) (“It is . . . obvious that an individual who reveals that she is a transsexual ‘potentially exposes herself . . . to discrimination and intolerance.’”).

255. JAMES, S. E. ET AL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY*, NATIONAL CENTER FOR TRANSGENDER EQUALITY 13 (2016), <https://www.transgender.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF> [<https://perma.cc/R286-VVXG>].

256. *Id.* at 152–55; 176–80 (“Nearly one-quarter (23%) of respondents experienced some form of housing discrimination in the past year, such as being evicted from their home or denied a home or apartment because of being transgender.”).

257. *Powell*, 175 F.3d at 111.

almost all circumstances where an individual's gender marker conflicts with their gender presentation.

At a minimum, an individual's transsex status is protected by the prohibition against forced disclosure of a speaker's identity. An individual's transsex status is part of their identity—their gender identity. Like dissemination of speaker identity for the distributor of a handbill<sup>258</sup> or political leaflets,<sup>259</sup> the government cannot force individuals to disclose sensitive and personal information. The harm is compounded when considering the frequency that individuals must present identification documents. A transsex person is likely further protected by *Doe v. Reed*'s dicta on threats and harassment; this is because transsex people can likely prove that compelled disclosure of their transness will “subject them to threats, harassment, or reprisals.”<sup>260</sup> Therefore, special consideration should be given to transsex individuals, as a mismatched gender marker would frequently force them to disclose their transness, and may even place them in danger from a discriminatory world.

## CONCLUSION

The Trump Administration's policy raises concerns on the extent of federal power to control, coerce, and categorize people based on gender, absent individual consent or acquiescence. The federal government's proposed policy, which demands an assigned, binary gender for every individual, will place tremendous burdens on transsex people and will even occasionally place burdens on cissex people. The Trump Administration's redefinition undermines a transsex person's property and speech rights inherent to their gender designation, which in turn implicate substantive due process rights and privileges and immunities. Because of the fundamental rights threatened, the Trump Administration's redefinition of gender does not pass constitutional muster. And beyond the rights both enumerated and unenumerated by the United States Constitution, legal gender touches the heart of every individual's life. Depriving transsex people of an accurate gender designation attempts to dissuade transsex people from engaging in public life, and ultimately, existing in the world.

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258. *Talley v. California*, 362 U.S. 60, 65 (1960) (finding the ordinance “void on its face”).

259. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

260. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976); *see also* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 368–69 (2010).