

Define to Exclude:

Comparing Historic Racial Purity Laws to Current Anti-LGBTQ+ Legislation

*By Jacqueline Spreadbury**

On March 23, 2022, Senator Marsha Blackburn, a republican from Tennessee was asking questions to then U.S. Supreme Court Nominee Ketanji Brown Jackson at her confirmation hearings. The following exchange occurred.¹

Sen. Marsha Blackburn asked, “Can you provide a definition for the word woman?”

Justice Ketanji Brown Jackson responded, “Can I provide a definition? No. I can’t.”

Sen. Marsha Blackburn interjected, “Yeah.”

Justice Ketanji Brown Jackson affirmed, “I can’t.”

Sen. Marsha Blackburn followed up with, “You can’t?”

Justice Ketanji Brown Jackson affirmed, “Not in this context. I am not a biologist.”

Sen. Marsha Blackburn inserted her own testimony by saying, “So you believe the meaning of the word woman is so unclear and controversial that you can’t give me a definition?”

Justice Ketanji Brown Jackson replied, “Senator, in my work, as a judge, what I do is I address disputes. If there is a dispute about a definition, people make arguments and I look at the law and I decide.”

Sen. Marsha Blackburn continued, “The fact that you cannot give me a straight answer about something as fundamental as what a woman is underscores the dangers of the kind of progressive education that we are hearing about.”²

* Jacqueline Spreadbury recently graduated *summa cum laude* from University of Illinois Chicago (UIC) Law School with a concentration in Critical Race and Gender Studies. She is a longstanding member of the Chicago NLG and is the Legal Observer Admin for the Chicago chapter. She recently began her legal career as a staff attorney at the Law Center for Better Housing, where she primarily focuses on eviction defense.

1 USA Today, “Sen. Blackburn asks Supreme Court nominee to define ‘woman’ | USA Today” Youtube, uploaded by USA Today (Mar. 23, 2022) <https://www.youtube.com/watch?v=BWtGzJxiONU>.

2 Senator Marsha Blackburn has never stated *why* she asked Justice Ketanji Brown Jackson to “define woman.” The Senator could have asked this question for many different reasons.

In the following weeks, Republicans from all over the country proposed various definitions for “woman,” as if it was obvious, easy to define, or ridiculous that Justice Ketanji Brown Jackson said she could not define the word. Madison Cawthorn (R-N.C.) took the House floor to say, “I never imagined that one of my sacred duties in this hallowed chamber would be explaining to the House Speaker the difference between a man and a woman,” he said, referencing House Speaker Nancy Pelosi (D-Calif.). “Take notes, Madame Speaker, I’m about to define what a woman is for you. XX chromosome, no tallywacker.”³

Rep. Marjorie Taylor Green (R-Ga) responded with her own definition. “I’m going to tell you right now what is a woman. This is an easy answer. We’re a creation of God. We came from Adam’s rib. God created us with his hands. We may be the weaker sex — we are the weaker sex — but we are our partner — we are our husband’s wife.”⁴

Sen. Josh Hawley (R-Mo.) was asked by a member of the press to “define woman” and responded with the following: “Someone who can give birth to a child, a mother, is a woman. Someone who has a uterus is a woman. It doesn’t seem that complicated to me.” The reporter followed up by asking Sen. Hawley whether a woman whose uterus was removed during a hysterectomy was still a woman. Hawley replied, “Yea, well I don’t know. Would they?”⁵ Josh Hawley then changed his definition to someone not with a uterus, but with a vagina.⁶

Republicans seemed determined to come up with a definition for this “easy” question. Because on the surface, it seems like an easy word to define—“woman.” But it’s not an easy definition. There is no one definition, one way to “define woman.”

Even if we set aside gender fluid and transgender identities for a moment, (we will return to the topic later), all of these purported definitions *still* fail. Let’s examine them one-by-one. Madison Cawthorn’s “XX chro-

Senator Blackburn might have asked this “seemingly easy” question to Justice Jackson in order to reinforce racist stereotypes. Senator Blackburn could have intended to continue pushing anti-LGBTQ rhetoric. The author does not know the intention behind why Senator Marsha Blackburn asked Justice Ketanji Brown Jackson this question.

3 David Moye, *Madison Cawthorn’s Definition Of A Woman Gets Thoroughly Mocked*, Huffington Post (Apr. 4, 2022) https://www.huffpost.com/entry/madison-cawthorn-woman-tallywacker_n_624b440ce4b0e44de9c5ae5b.

4 Monica Hess, *Republicans Thought Defining Woman Was Easy. Then They Tried.*, The Washington Post (Apr. 6, 2022) <https://www.washingtonpost.com/lifestyle/2022/04/06/republican-woman-definitions/>.

5 *Id.*

6 *Id.*

mosome, no tallywacker” definition is both underinclusive and overinclusive. First, this definition is underinclusive because it excludes anyone with Turner’s Syndrome, someone born with only one X chromosome.⁷ People with Turner’s syndrome often are assigned female at birth. Similarly, trisomy X is a condition where people have an extra X sex chromosome, so they have XXX.⁸ These people are also typically assigned female at birth. Second, Cawthorn’s definition is overinclusive because it includes people with Klinefelter Syndrome who have XXY as their chromosomes.⁹ These people have two XX chromosomes, but are typically assigned male at birth.¹⁰ Plus, there are a wide variety of intersex conditions people are born with that make this definition unworkable. Someone with 46, XX testicular disorder has two XX chromosomes, often has a uterus and ovaries, but also has external genitalia that resembles a penis.¹¹ This shows that looking to sex chromosomes is not a simple way to define “woman,” as it is both overinclusive and underinclusive.

Marjorie Taylor Green gave an unworkable, untestable definition. It is rooted in a specific religion’s definition—one many people do not subscribe to. Would Marjorie Taylor Green propose that we “test” for the presence of Adam’s rib in anyone that is a “woman?” Does Marjorie Taylor Green also think that people who are “woman” have one more rib than someone who is “man”? People, regardless of their gender, have the same number of ribs.¹² More importantly, the United States is *supposed* to be a nation with separation of church and state.¹³ Different religions likely have different definitions for man and woman. But one specific religion’s definitions should not be used to define “woman” for this entire nation.

Sen. Hawley’s definition quickly revealed its own fallacies with the

7 Turner Syndrome is a disorder caused when a person has only one x chromosome, and no second sex chromosome. People born with Turner Syndrome are assigned female at birth. People with Turner Syndrome tend to have underdeveloped characteristics typically associated with people assigned female at birth. *Turner Syndrome*, NICHD - Eunice Kennedy Shriver National Institute of Child Health and Human Development <https://www.nichd.nih.gov/health/topics/factsheets/turner>.

8 Medline Plus, *Trisomy X*, <https://medlineplus.gov/genetics/condition/trisomy-x/>.

9 Evan Los and George A Ford, *Klinefelter’s Syndrome*, National Library of Medicine (Last Updated Feb. 3, 2023) <https://www.ncbi.nlm.nih.gov/books/NBK482314/>.

10 *Id.*

11 Medline Plus, *Intersex*, <https://medlineplus.gov/ency/article/001669.htm>; see also 46, *XX testicular disorder of sex development*, Genetic and Rare Diseases Information Center <https://rarediseases.info.nih.gov/diseases/399/46xx-testicular-disorder-of-sex-development>.

12 Healthline, *How Many Ribs Do Men Have*, <https://www.healthline.com/health/bone-health/how-many-ribs-do-men-have#takeaway>.

13 Erwin Chemerinsky, *Why Church and State Should be Separate*, 49 Wm. & Mary L. Rev. 6, (May 1, 2008) <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1164&context=wmlr>.

reporter's follow-up question. Women who have undergone a hysterectomy do not lose their gender identity. Plus, there are many people who do not have a uterus (for a plethora of reasons) that are women. Someone with a chromosomal syndrome discussed above might not be born with a uterus but is still nonetheless a woman.¹⁴ Many people are women but not mothers, and some women cannot give birth because of infertility. Hawley's new definition—women are people with vaginas—includes people who have had feminizing genital surgery. These are the same people that Josh Hawley likely aimed to exclude from his definition.

Gender identity is a deeply personal question. It is outside the scope of a single all-inclusive definition. Because no matter what definition someone comes up with for “woman,” it will not be fully inclusive. Instead, the best way to find out if someone is a woman is simply to ask them. Let each person define for themselves whether they are a woman or not.

Yet, none of the Republican politicians discussed above gave definitions of “woman” because they were deeply interested in defining this complex term. Instead, they are far more interested in the rhetoric that a question like “define woman” invokes. They are interested in promoting the culture war against LGBTQ+¹⁵ identities and the wave of repression against women happening in the United States right now. They are not interested in a definition of “woman” to further our understanding of gender, with all its complexities. These politicians are interested in defining a woman so LGBTQ+ identities can be excluded from fundamental rights—“gender purity laws.”

Part One of this paper looks at the historical racial purity laws of the United States. Part One explores the role of defining race for the purpose of exclusion and how The Supreme Court decided constitutional questions about these racial purity laws. Part Two of this paper examines the current anti-LGBTQ+ laws; specifically, it explores how legislators define gender in legislation, for the purpose of excluding LGBTQ+ identities. Part Three of this paper compares historic racial purity laws to today's gender purity laws and highlights many similarities. Part Four looks to the current issue of constitutional protection for LGBTQ+ identities and advocates for declaring all gender purity laws as unconstitutional.

¹⁴ *Intersex*, *supra* note 11.

¹⁵ LGBTQ+ will be used throughout this paper. Some people prefer to use LGBTQQ and others advocate for A, I, and P to be included. For sake of consistency, this paper will use LGBTQ+. There are many more terms that LGBTQ+ does not include in its acronym. That is why the + designation is used. This is by no means meant to exclude anyone who identifies with a gender and/or sexual orientation that is not represented with the LGBTQ+ acronym.

I. Racial Purity Laws of the 1800s and 1900s.

A. Laws Require Definitions

For most legislation in the United States, terms need to be defined in the law. Usually, a bill or law starts with a section defining each key term. When laws look to exclude a group or identity, the legislators first must define that group or identity. If a law looks to exclude someone based on race, the law must first define race. Similarly, if a law looks to exclude someone based on gender, the law must first define gender. Historically, racial purity laws looked to exclude people based on race. The law makers had to define race: define white; non-white; and how one proved their race. Today, as discussed in Part Two, laws are seeking to define gender in order to exclude.

B. Defining Race to Exclude

Racial purity laws were historic laws throughout the United States that excluded people who were deemed “non-white.” Almost every state during the 1800s and early 1900s had racial purity laws.¹⁶ Six states even had racial purity laws embedded into their state constitutions.¹⁷ All of these laws all operated in similar ways. The legislation defined how “pure”¹⁸ one had to be in order to be “white” and participate in many aspects of society. Also known as Eugenics Laws or anti-miscegenation laws, these laws defined people by their race.¹⁹ If one was not “pure” enough—pure meaning white—then they were excluded. Laws prohibited owning land,²⁰ interracial marriage,²¹ immigration, and citizenship²² for people the law deemed “non-white”. Many Jim Crow laws also defined race in order to exclude. These laws enforced racial segregation by dictating what bathroom, drinking fountain, seat on the bus, and school one could use.²³ If one fit the definition of “non-white” they were excluded from participation in society. However, in order to exclude based on race, states had to first define race—including a test for who belongs and

16 Judy Scales-Trent, *Racial Purity Laws in the United States and German*, The John Hopkins University Free Press Vol. 23, Number 2 (May 2001) <https://muse.jhu.edu/article/13774>.

17 Paul Lombardo, *Eugenics Laws Against Race Mixing*, Doland DNA Learning Center, <http://www.eugenicsarchive.org/html/eugenics/essay7text.html>.

18 Pure means white. Whiteness was always considered the “pure” race while all other races were by definition “not white.”

19 Lombardo, *supra* note 17.

20 Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America*, Liveright (2017).

21 Kevin Noble Maillard, *The Pocahontas Exception: The Exemption to American Indian Ancestry and Racial Purity Laws*, Michigan Journal of Race and Law Vol 12 (2007) <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1115&context=mjrl>.

22 Scales-Trent, *supra* note 16 at 269.

23 This is not an extensive list. Jim Crow laws affected nearly every aspect of society.

who does not.

C. How States Defined Race

“In 1866, the Virginia legislature stated that ‘every person having one-fourth or more [Black] blood shall be deemed a colored person.’”²⁴ Virginia later changed the definition in the Racial Act of 1924, which defined a person of color as someone with one-sixteenth or more [Black] blood, while a white person had no trace of non-white blood.²⁵ This definition quickly led to another issue in Virginia: What about someone who was less than one-sixteenth African American but also did not have “no-trace” of non-white blood? Virginia redefined the law to say that anyone having “any ascertainable degree of [Black] blood, or who is descended on the part of the father or mother from negro ancestors, without reference to or limit of time or number of generations removed ...” This concept became popularly known as the “one drop rule.”²⁶ This definition then led to another issue: what “race” are Native Americans? Virginia went on to adopt a new definition two years later; “members of Indian tribes living on reservations allotted them by the Commonwealth of Virginia having one-fourth or more Indian blood and less than one-sixteenth of [Black] blood shall be deemed tribal [Native Americans] so long as they are domiciled on said reservations.”²⁷

In 1924, Altha Sorrells wanted to marry Robert Painter, a white man, in Virginia. The state clerk refused to issue the marriage license because the clerk deemed Sorrells “not-white.” “Sorells had the burden to prove that she was not Negro—that is according to the trial judge, she had to prove the nonexistence of “alien strain” over the previous twenty-five generations.”²⁸ Other states came up with their own ways to define race. “In North Carolina, for example, a person was “colored” if he had “any visible admixture of black blood”; in Ohio, the standard was “the preponderance of blood”; and in Michigan, as in Virginia, “the preponderance of white blood must only be in the proposition of three fourths.””²⁹

Virginia, in 1853, required by law that the color of the child be put on each birth certificate “to preserve the racial integrity” of the white race. It became illegal to *not* put the color of the child on the birth certificate. This was to ensure that moving forward, the state knew the race of every person.

²⁴ Scales-Trent, *supra* note 16 at 265.

²⁵ Brendan Wolfe, *Racial Integrity Laws (1924-1930)*, Encyclopedia Virginia, <https://encyclopediaivirginia.org/entries/racial-integrity-laws-1924-1930/>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Scales-Trent, *supra* note 16 at 278.

²⁹ *Id.* at 282.

This racial designation allowed for easier enforcement of racial purity laws.

D. Internal Identity Versus External Definition

Trying to define race will almost certainly lead to overinclusive or underinclusive definitions. First, people are not just white, person of color, or Native American. People who were kidnapped from Africa and forced into slavery in the United States did not originally see themselves as Black or person of color but instead Yoruba, Ibo, Akan, Mende, Wolof, Fon, Dinka, Bakongo, Temme, Angolan, or Malika, to name a few.³⁰ “Blackness” was *externally* put upon people as an identity, in order for those in power to easily identify and control.³¹ Of course, plenty of other people see themselves as a race other than white, person of color, and/or Native American. However, the state was not interested in defining people based on their *internal* identities for racial purity laws. Instead, the state looked to define people based on external definitions created in order to control and exclude. Plus, deducing all the complexities of race to a binary was convenient for these laws. Instead of laws looking to how people *actually* identify with race, legislators created a test for a white/“non-white” binary. Then, people were excluded solely based on external definitions, not internal identities.

These definitions for race were never meant to be inclusive of all variations of people’s racial identities. In fact, the state could care less about how someone self-identified.³² It did not matter to the state how someone internally defined their identity—to the state someone was “white/pure” or “non-white.” The state’s purpose was to externally define race in order to control and exclude those who were not defined as white.

E. The Constitutionality of Racial Purity Laws

For most of this country’s existence, racial purity laws were considered constitutional. Federal laws enacted in 1790 stated that only white people could be citizens.³³ It did not matter what definition each state used to define “white” or each race. Each state could have slightly different definitions for race, because The Supreme Court deferred to the state for the definition of race.³⁴ The Supreme Court affirmed this in *Dred Scott*, when The Court ruled that a Black person could not be a citizen.³⁵ This ruling was consistent with the laws at that time, holding that Black people were not able to be citizens worthy of full inclusion in society.

³⁰ *Id.* at 261.

³¹ *Id.*

³² Scales-Trent, *supra* note 16.

³³ *Id.* at 269.

³⁴ *Id.* at 282.

³⁵ *Dred Scott v. Sanford*. 60 U.S. 393 (1857).

This remained valid until the ratification of the Fourteenth Amendment in 1866, which extended citizenship to “persons of African nativity or African descent.”³⁶ However, this did not stop those in power from defining race for the purpose of discrimination and exclusion. The Supreme Court created the separate but equal doctrine with its ruling in *Plessy v. Ferguson*,³⁷ a mere thirty years after the Fourteenth Amendment. States could continue to define people by race for the purpose of separation: separate railcars, bathrooms, water fountains, schools, parks, and more. States continued to create laws, even after the Fourteenth Amendment, to define race for the purpose of separation and exclusion.³⁸

The Supreme Court would continue to define race for the purpose of exclusion into the 1900s. In *Ozawa v. United States*, The Court decided that “white” meant members of the Caucasian race and had nothing to do with color.³⁹ Three months later, The Court was called to decide if someone from India was “white,” based off the *Ozawa* decision. In an about-face, The Supreme Court quickly changed the definition of “white person” from Caucasian to whatever is “the understanding of the common man.”⁴⁰ The Court, in *United States v. Bhagat Singh Thind*, went on to say:

It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today. . . . We venture to think that the average well informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogenous elements.⁴¹

The new test from The Supreme Court became one of assimilation—do white people think you are white? If so, then you can be white.

Laws defining race for the purpose of exclusion were fundamental to the United States for most of this country’s existence. It was not until *Shelly v. Kramer* that The Supreme Court struck down a facially racist restrictive law.⁴² Here, The Court held that racially restrictive covenants in deeds to property

36 See footnote 28 from Scales-Trent, *supra* note 16 at 269. U.S. Const. amend XIV.

37 *Plessy v. Ferguson*, 163 U.S. 537 (1896).

38 Wolfe *supra* note 25.

39 Scales-Trent, *supra* note 16 at 288. See also, *Ozawa v. United States*, 260 U.S. 178 (1922).

40 *United States v. Bhagat Singh Thind*, 261 U.S. 204, 214-215 (1923).

41 *United States v. Bhagat Singh Thind*, 261 U.S. 204, 214-215 (1923). See also Scales-Trent, *supra*. at 288.

42 *Shelly v. Kraemer*, 334 U.S. 1 (1948).

are unenforceable. Then, the landmark *Brown v. Board*⁴³ decision came down in 1954 and struck down segregation, in the realm of schools. Thirteen years later, in another landmark decision, *Loving v. Virginia*, The Supreme Court finally deemed racial purity laws unconstitutional. Specifically, Virginia's law against interracial marriage was unconstitutional because Virginia's racial purity laws violated the Due Process and Equal Protection Clauses of the 14th Amendment.⁴⁴ However, in the time leading up to the *Loving v. Virginia* ruling, twenty-nine states had laws defining race in order to exclude.⁴⁵ Over half the states had laws prohibiting interracial marriage at the time of *Loving v. Virginia*.⁴⁶ Some of these laws remained on the books well after the *Loving* decision, and Louisiana had laws defining race for the purpose of exclusion up until 1993.⁴⁷ It took The Supreme Court 177 years to declare racial purity laws unconstitutional, 99 years after the Fourteenth Amendment was ratified.

II. Anti-LGBTQ+ Laws of Today Are Gender Purity Laws

All across America, legislators are introducing bills targeting LGBTQ+ identities, especially LGBTQ+ youth. A year ago, Arkansas passed the SAFE act, prohibiting gender-affirming care in LGBTQ+ youth.⁴⁸ Both Carolinas have similar bills pending.⁴⁹ Florida recently passed the “Don’t Say Gay” law, which prohibits discussion of LGBTQ+ identities in elementary schools.⁵⁰ Alabama has a similar bill pending Governor’s signature.⁵¹ Legislators in Ohio are trying to pass a law that prohibits transgender athletes from participating in youth sports.⁵² Twenty-eight other states have introduced similar bills.⁵³ South Dakota legislators recently tried to pass a law so students could sue school officials if people were using a bathroom that did not match their assigned gender at birth.⁵⁴ Oklahoma passed a very similar law, prohibiting children from using a bathroom in a school that does not match

43 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

44 *Loving v. Virginia*, 388 US 1 (1967).

45 Scales-Trent, *supra* note 16 at 283.

46 *Id.*

47 *Id.*

48 2021 Ark. ALS 626, 2021 Ark. Acts 626, 2021 Ark. HB 1570.

49 2021 N.C. Senate Bill DRS45274-NB-92, 2021 S.C. House Bill 4047.

50 2022 Fl. ALS 22 , 2022 Fla. Laws ch. 22 , 2022 Fla. HB 1557.

51 2022 Ala. House Bill 322.

52 Jo Ingles, *Bill to stop transgender athletes from participating in girls sports passes the Ohio House*, WKSU Public Radio News for Northeast Ohio, (Jun. 2, 2022) <https://www.wksu.org/government-politics/2022-06-02/bill-to-stop-transgender-athletes-from-participating-in-girls-sports-passes-the-ohio-house>.

53 *Legislation Affecting LGBTQ Rights Across the Country*, American Civil Liberties Union, (last updated Jul. 1, 2022) <https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country>.

54 2022 Bill Text SD H.B. 1005.

their assigned sex at birth.⁵⁵ Mississippi and South Carolina also have similar bills pending.⁵⁶ All of these bills and law have similarities to them: they mistakenly use sex to define gender in order to exclude.

A. Sex Versus Gender

Sex and gender are not the same. Sex refers to someone's biological attributes including chromosomes, gene expression, hormone levels, and reproductive anatomy.⁵⁷ Sex is typically what is assigned at birth.⁵⁸ However, someone's sex assigned at birth automatically becomes their gender assigned at birth. Gender refers to socially constructed roles, behaviors, expression and identities.⁵⁹ Gender has nothing to do with biological attributes, although biological attributes can contribute to how society socially construes someone's gender. However, societal construction of gender alone is not

enough to create a person's gender. Instead, it is about how one identifies in this world, and how they choose to present themselves. Gender is both an internal identity for how one sees themselves and an external identity for how they express themselves.

B. Using Sex to Define Gender

The anti-LGBTQ+ bills discussed above have another similarity—none of them make any distinction between sex and gender. Instead, these bills use definitions of sex in order to exclude gender identities. They look to biological differences used to assign sex at birth, then dictate that the sex assigned at birth *must* be that person's gender identity. The politicians writing and advocating for these bills are not trying to understand the difference between sex and gender, nor are they grappling with the complexities of gender identity.

Oklahoma, for the purpose of policing which bathroom people use, defines sex as, “the physical condition of being male or female, as identified at birth by that individual's anatomy.”⁶⁰ Similarly, South Dakota defines sex as “a person's immutable, biological sex, as determined by the person's

55 2022 OK. ALS 323, 2022 OK. Laws 323, 2022 OK. Ch. 323, 2021 OK. SB 615.

56 2022 Miss. Senate Bill 1164, 2022 S.D. House Bill 1005.

57 *Sex and Gender Identity*, Planned Parenthood, <https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity>. See also, *What is Gender? What is Sex?*, Canadian Institute of Health Research, (Apr. 28, 2020) <https://cihr-irsc.gc.ca/e/48642.html>.

58 Sex is assigned at birth for babies born without intersex conditions, conditions that affect the reproductive system, or conditions of the sex chromosomes. But as discussed above, there are conditions that can cause one's sex assigned at birth to be misaligned, and there are also conditions that do not fix the sex binary.

59 *Id.*

60 2022 Okl. Senate Bill 1164.

genetics and anatomy existing at the time of the person's birth."⁶¹ The South Dakota bill makes zero mention of the word gender, only looking to one's sex at birth to dictate which bathroom one can use. North Carolina states, "the sex of a person is the biological state of being female or male, based on sex organs, chromosomes, and endogenous hormone profiles, and is genetically encoded into a person at the moment of conception, and it cannot be changed."⁶² Similarly, South Carolina in a bill to prevent "alter[ing] the appearance of the minor's gender" defines gender as "sex which means the biological state of being male or female, based on the individual's sex organs, chromosomes, and endogenous hormone profile."⁶³

C. Internal Identity Versus External Definition

Someone might be externally defined as male/female; yet, their internal gender identity does not match that external designation. Transgender "is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth."⁶⁴ Gender identity "refers to a person's internal sense of being male, female or something else; gender expression refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice or body characteristics."⁶⁵ People identify as "transgender" when their external sexual identity assigned at birth is opposite of their internal gender identity. People identify as genderfluid, nonbinary, or gender nonconforming when their gender identity does not match their sex identity assigned at birth, nor does their gender identity fit into simply "male" or "female" binaries.

D. Legislators Using Sex to Exclude Gender Identities

Collectively, these bills and laws discussed above use sex for excluding LGBTQ+ gender identities. They use an external definition of sex, specifically sex assigned at birth, to dictate what someone's internal gender identity *must* be. These bills and laws impose that only people whose gender identity match their sex assigned at birth get to participate. It is erasure of gender identity, in favor of having some quick "test" for these gender purity laws. Because everyone is assigned male or female at birth, these bills and laws can use that designation to define gender in order to exclude. Legislators are using the false binary definition of sex to exclude LGBTQ+ gender identities.

61 2022 S.D. House Bill 1005.

62 2021 N.C. Senate Bill DRS45273-NB-92.

63 2022 S.C. House Bill 4047.

64 *What Does Transgender Mean?*, American Psychological Association (2014) <https://www.apa.org/topics/lgbtq/transgender>.

65 *Id.*

For example, many of the bathroom laws say that people can only use the bathroom that matches their sex that was assigned at birth. It does not take into account the complexities of gender identity, and the politicians who are seeking to exclude LGBTQ+ identities in these binary definitions are not interested in grappling with the complexities. Instead, it draws a simple test in order to exclude; does your gender identity match the sex assigned at birth? Either someone is “male” or “female” and that was determined the moment one was born. It is a quick and easy test for the purpose of excluding gender identity. This is exactly how these laws operate.

The Ohio bill to exclude children from sports says that only a child whose sex was designated female at birth can participate in girls’ sports.⁶⁶ If the child is accused of having a gender identity that is not the same as what was assigned at birth, then the child must undergo an examination of their genitalia and reproductive organs to determine if they can participate in sports.⁶⁷ If there are any discrepancies, then the child cannot participate. Here, the legislature has created a literal test to determine how “female” one is, and if the child does not meet that test, they do not get to participate. Besides excluding children who are genderfluid and/or trans, this law can also exclude girls who are intersex. For example, children born with Turner’s Syndrome often do not have fully developed reproductive organs. Are they not allowed to play sports?

E. Gender Purity Laws

Gender is far too complicated to fit into a single definition, because gender is also deeply personal. Instead, legislators, for purposes of excluding LGBTQ+ identities, look to deducing gender to a binary—male or female—and this *must* be based on sex assigned at birth. This way, the definition is simple. But having laws that define gender (or replace gender with sex) for the purpose of excluding people from participation are harmful, hateful, and transphobic. They are gender purity laws. They are laws to separate those

66 Samantha Hendrickson, *Ohio House passes bans on transgender student athletes and gender-affirming care for minors*, AP Press (Jun 21, 2022) <https://apnews.com/article/ohio-gender-care-ban-transgender-sports-52136dfab6b29cca547d7e97f0b7c715>; 2022 Ohio H.B. 151 (Note, the portion of the bill that required a genital exam for children who were accused of having a gender identity different from the sex assigned at birth was amended after much public backlash and replaced with a requirement that the child would have to show their birth certificate.).

67 These types of genital exams for female athletes are not new. Compulsory sex testing of female athletes was introduced at the European Athletes Championships in 1966, via an external examination of female athletes. Sexual testing was added to the Olympics in 1968 and continued through 1998. See James L Rupert, *Genitals to Genes: The History and Biology of Gender Verification in the Olympics*, *Canadian Bulletin of Medical History* 2011 28:2, 339-365.

“pure enough” in their gender identity and allow them to participate in society while excluding anyone who isn’t “pure” in their gender identity. These operate similar to the racial purity laws of the 1800s and 1900s throughout the United States, and those similarities are discussed below in Part Three. For racial purity laws of the past or gender purity laws of today, the first step for excluding a group is through legally defining the group.⁶⁸ It is crucial that these definitions imposed are external definitions placed on someone’s identity. Legislators are not using definitions that people create for their own self-identity but definitions that the state place upon people—external definitions, not internal ways to self-identity.

“How else will the state know whom to favor and whom to target if group membership is not clearly defined?”⁶⁹ People in power are creating these definitions to create opportunities for the law to discriminate against and promote hatred of LGBTQ+ identities. Laws need to have definitions, but politicians are not struggling with these complex definitions for narrow areas of laws where sex might matter, but instead are intentionally creating definitions to exclude LGBTQ+ identities from participation in society. By doing so, they are saying that certain people “fit,” to the exclusion of others. If someone identifies as transgender, gender-nonconforming, genderqueer, genderfluid, or any other gender identity that is not clearly defined in these binary definitions, then these people are excluded from participation under these gender purity laws.

III. Similarities Between Historic Racial Purity Laws and Gender Purity Laws

A. Race and Gender as Social Constructs

Race and gender are social constructs⁷⁰ used to classify and control people. However, there are some key differences that need to be discussed between race and gender. A Black person in this county will usually have a child that is seen as Black in society, but a female will not always give birth to

⁶⁸ Scales-Trent, *supra* note 16 at 264.

⁶⁹ Scales-Trent, *supra* note at 276.

⁷⁰ This paper’s purpose is not to argue that race and gender are social constructs. This is taken as a starting point. There is a lot of scholarship on race and gender as social constructs. For more on race as a social construct, see Ta-Nehisi Coates, *What We Mean When We Say ‘Race is a Social Construct’*, The Atlantic (May 15, 2013) <https://www.theatlantic.com/national/archive/2013/05/what-we-mean-when-we-say-race-is-a-social-construct/275872/>. For more on gender as a social construct, see Amy Wilson, *The Social Construct of Gender*, University of North Carolina at Pembroke (Oct. 2019). https://www.researchgate.net/publication/354193145_The_Social_Construct_of_Gender. See also, John S. Mahoney Jr. and Paul G. Kooistra, *Policing the Races: Attempts to Enforce Racial Purity in Virginia (1630-1930)*, Virginia Commonwealth University (1995) https://scholarscompass.vcu.edu/wilder_pubs/3/.

a female. Many transphobic people, like Matt Walsh in “What Is A Woman” argue that because transgender is an identity, transracial must also be.⁷¹ This is a fallacy. Race is a social construct.⁷² Race is not inherently hereditary. However, race is socially constructed to mean differences in the amount of melanin people’s skin produces. The amount of melanin that someone’s skin produces is controlled by genetic makeup, and genetic makeup is hereditary. So, race is not hereditary per se, but is passed down because of the way the United States socially constructs race.

Compare this with sex and gender. Neither sex nor gender is passed down. A person giving birth typically has a 50% chance of having a child assigned female at birth versus a child assigned male at birth. What someone is assigned at birth is reflective of their sex. Each person born has about a 50% chance of being socially constructed to have one of two gender identities at birth, but this is not inclusive of all gender identities. However, when a Black person gives birth to a child, that child is usually socially construed as “Black.” Therefore, while race and gender are both social constructs, they operate in different ways. It is from this difference that transracial is not an identity, but transgender is.⁷³

B. Deducing Complicated Internal Identities to Binaries

Both the racial purity laws of the past and gender purity laws of today operate by creating external binaries and forcing them onto people’s identities. As discussed in Part One, someone’s internal identity for race can fully reject the white/“non-white” or white/Black binary racial purity laws used. Instead, someone who is externally deemed “Black” by the state could have an internal identity with a specific tribal lineage, nationality, or ancestry other than “Black.” But the state used the external definition of “white” and “non-white/Black” to replace the complexities of individuals’ racial identities.⁷⁴

71 Matt Walsh also uses trans-animal (meaning that humans can choose to identify as non-human) and/or transability (meaning someone without a disability identifies with a disability) as a means to discredit transgender as an identity. These are also false analogies because everyone born of a human is a human (there is no variety in the “human” descriptor). Human is not a social construct. Disability is not an identity born from social constructs but instead is a way to explain someone’s limitation on full ability to do a certain action. Therefore, both trans-animal and trans-ability are not a thing.

72 Coates, *supra* note 70.

73 There are some people who use the term trans-racial to explain a specific lived experience. People of color who were adopted by white families and raised in an all-white culture sometime use this term. The child grows up in a white culture, absent exposure to cultures and communities that reflect their race. This use of the term is outside the scope of this paper.

74 Because many people were kidnapped from their homeland and forced into slavery, their lineage and ancestry have been tragically lost for many.

Similarly, legislators today are deducing the complexities of gender identity to a simple binary. People must be either “male” or “female.” That identity is externally defined and assigned at birth. For these gender purity laws, that external identity cannot change despite how one internally identifies. These laws deduce all of the complexities of gender identity to a simple externally defined binary—male/female. Under these gender purity laws, someone can fully reject the gender identity the state is imposing on them, but nevertheless is controlled by that external definition.

C. Justifying Racial Purity Laws and Gender Purity Laws

Historically, people gave two justifications for the need of racial purity laws: religion and *actual* biological differences resulting in the inferiority of the “non-white” race. These are the same justifications used today with gender purity laws.

1. Biological Differences

[No] state seemed particularly troubled by the confusion between “race” as a fixed biological category, and “race” as a category which society could change at will [meaning it was a social construct]. There was a desire to target some people for oppression, a desire to legitimize this act through legislation, and a simultaneous desire to hide the cruel purpose behind so-called biological imperatives. In a sense, [all] states were claiming that it was Nature, not them, who was creating these differences: [The State’s] hands were clean.⁷⁵

For centuries, states and legislators justified racial purity laws because they claimed it was part of biology; society must have racial purity laws to prevent contamination of the “superior race”. People justified racial purity laws because of “innate biological differences.” Except, this is false. It is widely known there is no superior or inferior race when it comes to biology.⁷⁶ There is no *biological* difference between people of different races. Instead, race is a social construct used for power and control.

One can immediately see that states are trying to redefine a social construct as a biological reality. If these groups really are different biologically from one another,

⁷⁵ Scales-Trent, *supra* note 16 at 271.

⁷⁶ The laws and history of this country lead to intentional, systemic, and disparate impact racism that permeates throughout all aspects of life. Plus, the United States has a growing number of groups that are openly white supremacists. This continues to enforce racial oppression. The author is not discrediting this whatsoever, just pointing out that it is not from an “innate biological difference” but a culture rooted in racism.

then state-created “differences” gain scientific legitimacy. This “scientific” foundation justifies treating certain groups in different and oppressive ways and takes away any sense of guilt. “These people are simply not like us”⁷⁷

Today, we have the same thing happening with gender. People say gender is an innate biological condition. They use this “biological difference” to exclude people whose gender identity do not match the gender assigned at birth. They cite these “biological differences” to “protect” people whose gender identity *matches* the one assigned at birth. Politicians say that young girls need protecting from people whose identify is not congruent with the gender they were assigned at birth. These politicians cite “biological differences” to give scientific legitimacy to their hateful exclusion of certain gender identities. Ohio says that young children who do not identify with the gender they were assigned at birth can no longer play in sports, because of biological differences.⁷⁸ Numerous states say that children who do not identify with their gender assigned at birth cannot even use the bathroom or locker room at school. Yet only sixty years ago, people were excluded from using a bathroom or playing sports based on “biological differences” in race.

2. Religious Freedom

Religions that invoke their beliefs to justify white supremacy are on-the-fringes today. However, mainstream religion in the United States was historically used to justify racism.⁷⁹

*“Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”*⁸⁰

— Judge Leon M. Bazile, January 6, 1959

Pastors of mainstream Christian-based religions would regularly use the bible to justify slavery, Jim Crow, and segregation.⁸¹ White Christians

⁷⁷ Scales-Trent, *supra* note 16 at 299.

⁷⁸ Ingles, *supra* note 52.

⁷⁹ Ian Millhiser, *When Religious Liberty was used to Justify Racism Instead of Homophobia*, Think Progress (Feb. 12, 2014) <https://archive.thinkprogress.org/when-religious-liberty-was-used-to-justify-racism-instead-of-homophobia-67bc973c4042/>.

⁸⁰ *Id.*

⁸¹ Tom Gjelten, *White Supremacist Ideas Have Historical Roots in U.S. Christianity*, NPR, (July 22, 2020) <https://www.npr.org/2020/07/01/883115867/white-supremacist-ideas-have-historical-roots-in-u-s-christianity>.

said they *must* have racial purity laws because of their religion—that God demanded the separation of races. James Henry Thornwell, a Harvard-educated pastor told his congregation that “the relation of master and slave stands on the same foot with the other relations of life. In itself, it is not inconsistent with the will of God. It is not sinful.”⁸²

These ideas were not from extremist religious groups, like the white supremacist sect of the Asatru religion seen in the United States today.⁸³ Instead, they were widely popular among white Christians throughout the history of the United States, especially in the Southern Baptist Church, Methodist Episcopal Church, and the Southern Presbyterian Church.^{84 85} Religion was used to defend the need for racial purity laws everywhere.⁸⁶ According to many white Christians in history, God demanded these racial purity laws, and they were simply invoking their “freedom of religion.” As recent as 1983, The Supreme Court was considering whether religious freedom was a defense to excluding people based on race.⁸⁷ Luckily in *Bob Jones University v. United States*, The Supreme Court rejected this defense for racial discrimination.⁸⁸

Today, religion is invoked to justify the oppression and exclusion of LGBTQ+ identities. People invoke God, the Bible, and their religion for why LGBTQ+ people cannot have the same rights. In fact, politicians have invoked religion to justify these gender purity laws. Wide-spread hatred of LGBTQ+ identities based on religious freedom is everywhere in America today.⁸⁹ In fact, many religious people are *proud* of how their religion supports

82 *Id.*

83 The Asatru religion claims that a tenant of its religion is the superiority of the white race and use religious “doctrine” to justify racist beliefs. Only white people who can prove their ancestry is “purely white European” can be a part of this church. For more see Jack Jenkins, *The New Religion of Choice for White Supremacists*, Think Progress (Nov 13, 2015) <https://archive.thinkprogress.org/the-new-religion-of-choice-for-white-supremacists-8af2a69a3440/>.

84 *Religion, Race, and Racism: A (very) Brief History*, Department of Religious Studies, University of Pittsburgh, (Jun. 1, 2020) <https://www.religiousstudies.pitt.edu/resources-social-action/religion-race-and-racism-very-brief-introduction>.

85 Not all Christians in the United States history held these racist views. There were many Christians that rejected this, one example being the Quakers.

86 Bailey AK, Snedker KA. Practicing What They Preach? Lynching and Religion in the American South, 1890 - 1929. *AJS*. 2011 Nov;117(3):10.1086/661985. doi: 10.1086/661985. PMID: 24327771; PMCID: PMC3856205.

87 *Bob Jones University v. United States*, 461 U.S. 574 (1983).

88 *Bob Jones University v. United States*, 461 U.S. 574 (1983).

89 Again, not *all* religious people push for the oppression and exclusion of LGBTQ+ identities. There are many churches and religious people that actively support LGBTQ+ rights and include LGBTQ+ identities in their religion. The point here is how mainstream the hatred of LGBTQ+ identities are in religion today in America and how often people invoke

and justifies their hatred of LGBTQ+ people—that their religion demands they are hateful towards LGBTQ+ people.⁹⁰

There are many bills and laws that allow people to *legally* discriminate against LGBTQ+ identities because of “religious freedom.” A bill in Massachusetts aims to protect any person who discriminates based off of LGBTQ+ status, in the name of religious freedom.⁹¹ Bills recently signed into law in Montana and South Dakota extend protection to those who discriminate based on religious freedom.⁹² Many other states have similar bills currently pending that will also extend protection to those people who discriminate based on LGBTQ+ status, while simultaneously excluding LGBTQ+ people from participation in society. All in the name of religion.

The justification of these hateful anti-LGBTQ+ laws are the same as the racial purity laws a century ago—biology and religion. Politicians and legislators are repeating the same oppressive hatred today, with the same justifications, but now the primary target are LGBTQ+ folks, with gender purity laws.

D. Making Identities Illegal

To prevent “racial contamination”, racial purity laws prohibited any racial mixing in society. People would be incarcerated or sentenced to terms of indentured servitude for violating racial purity laws. In Virginia, people faced imprisonment for marrying someone of a different race.⁹³ White women had to pay a fine or were incarcerated for five years if they gave birth to a child of color.⁹⁴ This law did not apply to Black women, because Black women could not give birth to a white child. White men and white women faced a six-month prison sentence if they married someone who was “non-white.”⁹⁵ The length of the prison sentence became increasingly longer as racial purity laws became stronger.⁹⁶

religion to justify hatred.

90 “*All We Want Is Equality*” *Religious Exemptions and Discrimination Against LGBTQ People in The United States*, Human Rights Watch, (Feb. 19, 2018) <https://www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt-people>.

91 2021 Mass. HB 3468 <file:///C:/Users/jmspr/Downloads/H1536.pdf>.

92 2021 Mt. SB 215, http://laws.leg.mt.gov/legprd/law0210W%24BSIV.ActionQuery?P_BILL_DFT_NO5=LC2836&Z_ACTION=Find&P_Sess=20211, 2021 S.D. SB 124 <https://sdlegislature.gov/Session/Bill/22127/214181>.

93 Scales-Trent, *supra* note 16 at 272.

94 *Id.*

95 *Id.*

96 *Id.*

Similarity, legislators today are trying to criminalize gender non-conforming identities and those who affirm people's gender identity. There is legislation that criminalizes parents and doctors who give youth gender-affirming healthcare. Arkansas created a law that prohibited children from receiving puberty blockers, criminalizing those who give children access to such treatment.⁹⁷ Texas has directed Child Protective Services to investigate parents for "abuse" if they affirm their child's gender, if that gender identity is not the same as the one assigned at birth.⁹⁸ Alabama made it a felony, punishable up to ten years in prison to give gender-affirming medication.⁹⁹ Collectively, all of these anti-LGBTQ+ laws lead to the marginalization and criminalization of people whose gender identity is incongruent with the one assigned at birth.¹⁰⁰

E. Exclusion

The first step for exclusion is for those in power to define the group. Then, those in power can enact laws to exclude based on that definition, giving more rights and privileges to those who are included. Those in power routinely change laws and definitions of various identities as the need to exclude changes.¹⁰¹ In the first four hundred years of this country, the focus was exclusion based on race. Now, the focus is exclusion based on gender identity. The racial purity laws of the past two centuries and the gender purity laws of today exclude many people from society. They prevent identities from flourishing by conditioning people to only exist in binaries that are defined into laws: male/female and/or white/non-white.

⁹⁷ 2021 Ark. ALS 626, 2021 Ark. Acts 626, 2021 Ark. HB 1570.

⁹⁸ Anne M. Coughlin and Naomi Cahn, *Texas is Trampling Parents' Rights In Its Investigations of Trans Kids*, The Washington Post, (Apr. 8, 2022) <https://www.washingtonpost.com/outlook/2022/04/08/texas-transgender-family-law/>.

⁹⁹ *A Judge Blocks Part of an Alabama Law that Criminalizes Gender-Affirming Medication*, The Associated Press with National Public Radio, (May 14, 2022) <https://www.npr.org/2022/05/14/1098947193/a-judge-blocks-part-of-an-alabama-law-that-criminalizes-gender-affirming-medication>.

¹⁰⁰ *Quick Guide to the Criminalization of Transgender and Gender Non-Conforming People*, Transformative Justice Law Project of Illinois, <https://www.prisonlegalnews.org/media/publications/Guide%20to%20Criminalization%20of%20Trans%20%26%20Gender%20Non-Conforming%20People%20Transformative%20Justice%20Law%20Proj.%20of%20IL.pdf>.

¹⁰¹ One example of this is when the Federal Government passed the General Allotment Act. Before this, Native American was often designated as people have one-fourth or more "Native American blood." However, this act gave land to Native Americans, so the government changed the definition of Native American to those people having one-half or more "Native American blood" so they did not have to give away so much land. For more see M. Annette Jaimes, *Federal Indian Identification Policy: A Usurpation of Indigenous Sovereignty in North America*, *Native Americans and Public Policy*, 116-117 (1992).

1. Ways States Exclude

Years ago, non-white children were prohibited from participating in sports¹⁰², playing at the playground¹⁰³, going to school¹⁰⁴, accessing healthcare,¹⁰⁵ or using the same bathroom.¹⁰⁶ White schools taught the supremacy of white people. Today, legislation is targeting LGBTQ+ people with similar exclusions: not participating in sports;¹⁰⁷ not being able to use the bathroom;¹⁰⁸ prohibiting access to healthcare;¹⁰⁹ prohibiting books on gender identity;¹¹⁰ prohibiting anyone from changing their state-designated gender;¹¹¹ prohibiting preferred pronouns;¹¹² or making it illegal to show respect to trans and gender-nonconforming people.¹¹³ In fact, schools today have even forbid the teaching of gender identities other than cisgender.¹¹⁴

2. The Burden of Proof for Excluding

For both racial purity laws and gender purity laws, the burden of proof is on the person being excluded to prove that they in fact belong.¹¹⁵ Under racial purity laws, people who were accused of being “non-white” had to prove through their lineage and genealogy that they were, in fact, “white” and “pure”.¹¹⁶ Those excluded would have to find witnesses who could testify in court about how “white” their relatives were. Different laws would require different levels of “purity.” For example, some laws excluded people if they were one-fourth “non-white.”¹¹⁷ Virginia excluded anyone who

102 *Jim Crow Laws*, National Park Services, https://www.nps.gov/malu/learn/education/jim_crow_laws.htm.

103 *Id.*

104 *What Was Jim Crow*, Jim Crow Museum, Ferris State University, <https://www.ferris.edu/HTMLS/news/jimcrow/what.htm>.

105 *Id.*

106 *Id.*

107 Ingles, *supra* note 52.

108 2022 Bill Text SD H.B. 1005.

109 2021 Ark. ALS 626, 2021 Ark. Acts 626, 2021 Ark. HB 1570, 2021 Ken. HB 336 <https://apps.legislature.ky.gov/record/21RS/hb336.html>.

110 2022 Ok. SB 1142 http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20INT/SB/SB1142%20INT.PDF.

111 2021 S.D. HB 1076 <https://mylrc.sdlegislature.gov/api/Documents/212531.pdf>.

112 2021 Ark. HB1749 <https://www.arkleg.state.ar.us/Bills/Detail?id=HB1749&ddBienniumSession=2021%2F2021R&Search=>.

113 2022 N.D. HB 1476 <https://www.ndlegis.gov/assembly/67-2021/bill-actions/ba1476.html>.

114 2022 Fl. ALS 22, 2022 Fla. Laws ch. 22, 2022 Fla. HB 1557, 2021 Iowa Senate File 167 <https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=SF%20167&v=i>.

115 Scales-Trent, *supra* note 16 at 262.

116 *Id.* at 262-263.

117 *Id.* at 265.

could not prove their ancestry, going back twenty-five generations, were all white.¹¹⁸ The burden of proof was always on those initially excluded to prove their “whiteness.”

Similarly, people accused of being anything other than cisgender carry the burden of proof. They must show they are cisgender, or face exclusion. Different laws have different tests to prove one’s “pureness” of male or female. Some tests simply look to whether the person “passes” as male or female. However, the Ohio bill that aims to exclude transgender youth from participation in sports requires that anyone whose “sex is in dispute” to undergo an examination. The child must go to a doctor, who will perform and examination, to determine the child’s gender. This determination must be based on “1. The participant’s internal and external reproductive anatomy; 2. The participant’s normal endogenously produced levels of testosterone; and 3. Analysis of the participant’s genetic makeup.”¹¹⁹ The child holds the burden to prove they are “female-enough” in order to play sports through a physical examination of their genitalia. Just like the racial purity laws, these gender purity laws require those being excluded to prove their “pureness” in their gender.

IV. Extending Constitutional Protection to LGBTQ+ People

A. Constitutional Rights Expanding

The Constitution has been around for 238 years, but for the first 178 years, The Supreme Court deemed racial purity laws constitutional. Now, states cannot have openly explicit racial purity laws, which is great progress towards equality. But it was not a specific Constitutional Amendment that made those changes; instead, it was The Supreme Court finally expanding rights by striking down racial purity laws. The Supreme Court has in the past eighty years moved to be somewhat more inclusive, by extending constitutional rights to people regardless of race.¹²⁰ Today, courts apply strict scrutiny to facially racially restrictive laws and almost always strike those laws down.¹²¹ The courts do not allow these racially restrictive laws to stand

¹¹⁸ *Id.* at 278.

¹¹⁹ 2022 Ohio Sub House Bill 151, also known as “Save Woman’s Sports Act”.

¹²⁰ Facially neutral laws with a disparate impact are still often upheld by The Supreme Court. This continues to have racist impacts and implications in society. These effects are rampant and widespread. However, the effect of these rulings are outside the scope of this paper. This paper is examining the constitutionality of racial purity laws of the past and gender purity laws of today, both of which are facially discriminatory.

¹²¹ There have been a few times where courts have upheld facially racially restrictive laws because they have survived strict scrutiny. The compelling government interest is almost always repairing old wrongs, like in *Brown v. Board of Education 2*, 349 U.S. 294 (1955).

because of biology or religion, the two main arguments used to uphold those laws in the past.

B. The Questionable Constitutionality of Gender Purity Laws

The Supreme Court has not explicitly extended constitutional rights and protections to LGBTQ+ identities. This gives space for legislatures all across this country to pass and enforce gender purity laws. The Court extended the right for people to engage in consensual sexual activity in *Lawrence v. Texas*, but this ruling was grounded in the right to privacy, not the rights of LGBTQ+ people as a protected class.¹²² Later, The Supreme Court ruled that the right to gay marriage is protected under the 14th Amendment in *Obergefell v. Hodges*.¹²³ But this case does not explicitly extend constitutional protections to LGBTQ+ people. It does not hold LGBTQ+ as a protected identity, nor does its reach and application make these gender purity laws unconstitutional. Chief Justice Robert's scathing dissent in *Obergefell* is telling—he argues that the Constitution does *not* protect LGBTQ+ people nor their right to marriage.

Bostock v. Clayton County is the closest The Supreme Court has ruled regarding constitutional rights and protection of LGBTQ+ people.¹²⁴ Here, The Supreme Court ruled that Title VII prohibits employer's discrimination based on sexual orientation or gender identity, because both are discrimination based on sex. However, even this case falls short of recognizing LGBTQ+ as a protected identity. Instead, this case is grounded in Title VII of the Civil Rights Act,¹²⁵ not extending constitutional protections to LGBTQ+ identities. Plus, The Supreme Court has not been consistent in protecting LGBTQ+ people against discrimination.

There have been two recent decisions where The Supreme Court ruled on very narrow terms. The Court has avoided the question as to whether LGBTQ+ identities are a protected class. First, in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, the Court avoided the question of whether LGBTQ+ identities are a protected class and instead ruled that the Civil Rights Commission was animus towards the cakeshop based on very specific facts.¹²⁶ Similarly, in *Fulton v. City of Philadelphia*, the Court once again dodged extending LGBTQ+ rights by ruling that the city was being animus

122 *Lawrence v. Texas*, 539 U.S. 558 (2003). This explicitly overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986) which had upheld sodomy laws and denied any protection to LGBTQ+ people.

123 *Obergefell v. Hodges*, 574 U.S. 1118 (2015).

124 *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

125 42 U.S.C.S. §2000e-2(a)(1).

126 *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

towards Catholic Charity Services by not giving it an exemption.¹²⁷

But these two cases reveal something more telling; in both cases, the Petitioners alleged that it was their *religious freedom* that requires them to discriminate based on LGBTQ+ status. Masterpiece Cakeshop refuses to bake cakes for gay weddings, and this is allowed for now. Catholic Charity Services actively prevents LGBTQ+ people from becoming foster parents, because of its own religious beliefs. Very recently, the Supreme Court just upheld someone's right to discriminate against LGBTQ+ identities based on "religious freedoms" in *303 Creative*.¹²⁸ Plus, many states like Iowa, are trying to remove gender identity as a protected class under the Iowa Civil Rights Act, in the name of religious freedom.¹²⁹

V. Conclusion—Been There, Done That

For years, this country enforced racial purity laws, citing innate biological differences and religion. Today, this country is currently enforcing gender purity laws, citing the exact same reasons. One of these has been held unconstitutional, one has not. But from a zoomed-out perspective, these laws operate very similarly. Those in power are defining innate identities, based on a social construct, for the purpose of exclusion. They are externally defining identities through binaries instead of allowing identities to flourish with all of their complexities. Hopefully, enough people can see these similarities and "learn from history." Because this country desperately needs to not repeat itself with more "purity laws" based on identity.

Or maybe this is exactly what the United States does: define to exclude. Maybe the underlying values of the United States have never changed; that it's acceptable to discriminate based on identity as long as one can defend that discrimination through "innate biology" and "religious freedom." Up until recently, only white meant full citizenship. Only man meant full citizenship. And today, under many of these gender purity laws, only cisgender means full citizenship.

Advocates can argue that LGBTQ+ identities should be a recognized protected class, but that likely will not pass the "deeply rooted in history and tradition" standard that the majority on today's Supreme Court adhere to. Advocates can argue that governmental discrimination by identity in education, healthcare, sports, and bathrooms each would only receive rational basis review, but collectively demand higher scrutiny—similar to the argument in

¹²⁷ *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021).

¹²⁸ *303 Creative v. Elenis*, 600 U.S. ____ (2023).

¹²⁹ 2021 Iowa House File 272 <https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=HF%20272&v=i>.

Plyler v. Doe.¹³⁰ But advocates should also argue that these gender purity laws operate in the same way as racial purity laws—they define to exclude based on an identity. Advocates should argue that The Supreme Court already decided this issue, and this discrimination is unconstitutional. In the end, advocates need to argue that the government cannot exclude based on people’s intrinsic identities, based on a social construct. This country cannot let these gender purity laws continue to spread, because it will only lead to more discrimination and hate.

VI. One Final Thought

So, what is a woman? We could leave the defining up to each individual person. Each person can define for themselves if they are a woman. Alternatively, a working definition could be the following, “A woman is one of the multitude of genders on a spectrum within the social construct of gender which people can identify with; identifying with this gender leads to social expectations, norms, and repression over one’s body, autonomy, and opportunity.”

¹³⁰ *Plyler v. Doe*, 547 U.S. 202 (1982).