Sex-Defining Laws and Equal Protection

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Many equal protection challenges to the recent onslaught of anti-transgender legislation ask courts to determine the constitutional limits of the state's ability to define sex. In these cases, transgender plaintiffs argue that the state violates constitutional guarantees of sex equality when its definition of sex coercively assigns them to a sex category against their will. The canon of constitutional sex discrimination, however, does not directly raise or answer definitional questions of sex. The canonical cases addressed the state's ability to treat men differently from women—not the state's ability to define "men" and "women." This difference between the canonical cases and what this Article calls "sex-defining" cases does not necessitate any monumental shifts in equal protection doctrine, but it does require courts to tweak their intermediate scrutiny analyses. The canonical cases tested the fit between the state's important interests and the law's differential treatment of men and women, but sex-defining cases require courts to test the fit between the state's important interests and the law's definition of sex. In most sex-defining cases, however, courts ignore this essential question. This failure has produced pro-trans decisions that are correct in their conclusions but flawed in their reasoning. As the likelihood of a grant of certiorari in one of these sex-defining cases rises, so do the stakes of these mistakes.

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This Article uses the pro-trans bathroom cases to illustrate what can go wrong when courts fail to examine the connection between the state's definition of sex and its proffered justifications for the law. These decisions deem trans-exclusionary bathroom rules unconstitutional for reasons that have little to do with the state's definition of sex, and instead, employ rationales that are fact-bound, narrow, and doctrinally questionable. Anti-trans courts, therefore, can and have upheld these laws with superficial and circular reasoning, without rebutting counter-analyses from pro-trans decisions. The second half of this Article is prescriptive and urges courts to adopt a contextual approach to sex when analyzing challenges to sex-defining laws. It makes clear how this approach flows directly from equal protection doctrine and how it lends itself to more doctrinally disciplined and normatively sound conclusions in sex-defining cases.

INTRODUCTION

During Justice Ketanji Brown Jackson's confirmation hearing, Senator Marsha Blackburn asked her to define the word "woman."[1] Justice Jackson declined, reminding the Senator that judges do not define words outside the context of a specific case or controversy. "What I do," Jackson explained, "is I address disputes. If there's a dispute about a definition, people make arguments, and I look at the law, and I decide."[2] Justice Jackson might have to do exactly that regarding the definition of sex in the near future. Constitutional challenges to laws that define sex have produced a large and conflicting body of case law, making a grant of certiorari in one of these cases both probable and imminent.[3]

1. *Transcript of Hearing on the Nomination of Ketanji Brown Jackson to be an Associate Justice of the Supreme Court of the United States before S. Comm. on the Judiciary*, 117th Cong. (2022).

2. *Id.*

3. *See infra* notes 32–33 and accompanying text discussing the circuit split between the Eleventh Circuit and two other circuits regarding the constitutionality of rules that define sex for bathrooms. However, the Supreme Court recently denied certiorari in a bathroom case. Metro. Sch. Dist. v. A. C., No. 23-392, 2024 WL 156480, at *1 (Jan. 16, 2024). Thus, the Court may not want to address the constitutionality of sex-defining laws right now or with a bathroom case; or maybe this case was not the best vehicle, in the Court's eyes. But the existing circuit split with bathrooms combined with the conflicting district court decisions regarding sports and identity documents make clear that the question is not whether the Court will hear one of these cases, but when. *See* A.C. v. Martinsville, 75 F.4th at 764 ("Litigation over transgender rights is occurring all over the country, and we assume that at some point the Supreme Court will step in with more guidance than it has furnished so far."); *see also id.* at 775 ("A conflict among the circuits will exist no matter what happens in the current suits. The Supreme Court or Congress could produce a nationally uniform approach; we cannot.") (Easterbrook, J., concurring).

The laws at the center of these challenges, what I call "sex-defining" laws,[4] are a product of state legislatures and school boards, among other legal actors, codifying what they understand to be the true meaning of sex. For the most part, these laws define sex based on some combination of sex assigned at birth (SAAB), genitalia, chromosomes, and reproductive anatomy. Under these laws, people assigned male at birth (AMAB), who have penises, testes, and XY chromosomes are male, while people assigned female at birth (AFAB), who have vaginas, ovaries, uteruses, and XX chromosomes are female. These definitions are deployed to determine if someone is male (M) or female (F)[5] for bathroom access, participation on single-sex sports teams, and eligibility for sex marker changes, among other things.[6] Since these laws do not include gender identity[7] in their definitions of sex, they often force transgender people into a sex category against their will and counter to their sense of self. For example, under a law that defines sex as SAAB for sex-segregated sports teams, a transgender man (someone whose gender identity does not align with the law's SAAB-based definition of sex)[8] would be categorized as F and banned from the men's sports team. Indeed, excluding transgender people from spaces that align with their

4. This Article focuses on laws that define sex to segregate people based on sex, including laws that define sex for bathrooms, sports, and sex markers on identity documents. To be sure, other laws define sex in related legal contexts. Bans on gender-affirming care, for example, also define sex and do so in trans-exclusionary ways. *See, e.g.*, S.B. 254 (Fla. 2023) (defining "sex" as "the classification of a person as either male or female based on the organization of the human body of such person for a specific reproductive role, as indicated by the person's sex chromosomes, naturally occurring sex hormones, and internal and external genitalia present at birth"). Because these bans determine access to a particular medical treatment, rather than separate people into male and female categories, they are not the type of sex-defining laws that this Article addresses. But many of the arguments in Parts I and III could be applicable to these laws. I hope to explore this topic in future work.

5. This Article uses the terms "M" and "F" to refer to the sex category into which sex-defining laws place people. A person who identifies as a man might be deemed M or F, depending on the person and the sex-defining law at issue.

6. *See, e.g.*, Hecox v. Little, 479 F. Supp. 3d 930, 948–49 (D. Idaho 2020) (challenging IDAHO CODE ANN. § 33-6203(3), which bars transgender women from participating in women's sports and defines sex as "student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels"); *see also infra* Part II.A (discussing the bathroom rules).

7. In this Article, "gender identity" refers to how someone self-identifies their sex. *See* Sexual Orientation and Gender Identity Definitions, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions [https://perma.cc/73VH-89KX] (defining gender identity as "[o]ne's innermost concept of self as male, female, a blend of both or neither — how individuals perceive themselves and what they call themselves"). As discussed *infra*, gender identity is one way to define sex. *See infra* notes 201–19 and accompanying text. This Article does not make a distinction between gender and sex, so gender identity and sex identity are synonymous. *See infra* note 210 (explaining why this Article does not distinguish between gender and sex).

8. "Transgender" refers to having a gender identity that does not align with birth-assigned sex. GLAAD, *Glossary of Terms: Transgender*, GLAAD MEDIA REFERENCE GUIDE (11th ed.), https://www.glaad.org/reference/trans-terms [https://perma.cc/Z5FA-B4XN].

gender identity is widely understood to be a primary motivation behind and function of these rules.[9]

Transgender plaintiffs have brought equal protection challenges to these sex-defining laws, arguing that they misclassify the plaintiffs' sex and, in turn, constitute sex discrimination. These cases ask judges to determine the constitutional limits of the state's ability to define sex. But the canon of constitutional sex discrimination does not explicitly tell them how to answer this question.[10] The canonical cases[11] (including, for example, *United States v. Virginia* (*VMI*),[12] *Mississippi University for Women v. Hogan*,[13] and *Craig v. Boren*[14]) addressed whether the state could treat men and women differently to achieve its goals. If the differential treatment was based on an insufficiently important state interest or did not advance the state's interest, the Court struck down the law.[15]

Equal protection challenges to sex-defining laws, on the other hand, are not about the state's ability to make distinctions between men and women; they are about the way the state has sorted people into M and F categories.[16] For instance, the plaintiffs in the bathroom cases are not challenging the state's ability to have sex-segregated bathrooms, i.e., its ability to require men to use the men's bathroom and women to use the women's bathrooms.[17] Instead, they are arguing that the bathroom rules' definitions of sex, as applied to them, miscategorize their sex and force them into a sex category that is both incorrect as a matter of fact and discriminatory as a matter of law.

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9. *See, e.g.*, Jessica A. Clarke, *Sex Assigned at Birth*, 122 COLUM. L. REV. 1821, 1825 (2022) ("[T]here has been an unprecedented onslaught of federal and state legislation aimed at curtailing transgender rights, almost all of it directly invoking the idea of 'biological sex.'").

10. This Article uses "canon" and "canonical case" to refer to the set of "authoritative texts that above all others shape the nature and development of constitutional law" for sex discrimination. *See* Richard Primus, *Canon, Anti-Canon and Judicial Dissent*, 48 DUKE L. J. 243, 243 (1998) (citing additional authorities).

11. The canonical cases include Supreme Court decisions that address how the Equal Protection Clause limits the state's ability to treat men and women differently. *See* Keith Cunningham-Parmeter, (*Un)Equal Protection*: *Why Gender Equality Depends on Discrimination*, 109 NW. U. L. REV. 1, 26–36 (2015) (discussing this line of cases beginning with *Reed v. Reed*, 404 U.S. 71, 76 (1971)).

12. 518 U.S. 515 (1996).

13. 458 U.S. 718 (1982).

14. 429 U.S. 190 (1976).

15. *See, e.g., VMI*, 518 U.S. at 519–20 (holding that a university's all-male admissions policy was unconstitutional because the policy was based on impermissible stereotypes about women, specifically that women were not qualified for VMI's unique "citizen-soldier" training, and because allowing women to attend VMI would not thwart the school's mission).

16. The sex-defining laws addressed in this Article do not have a third sexed category; they treat sex as binary and either M or F. This is not true of all sex-defining laws. *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 897 (2019) (discussing jurisdictions that have "adopted rules to allow 'non-binary' or 'X' designations on certain identification documents").

17. *See, e.g.,* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 618–19 n.17 (4th Cir. 2020) ("Grimm does not think that sex-separated restrooms are unconstitutional, and neither do we.").

The differences between the canonical cases and sex-defining cases do not require courts to depart from the fundamental principles of constitutional sex discrimination: both types of cases trigger intermediate scrutiny because they treat people differently based on sex.[18] But sex-defining cases do require courts to apply intermediate scrutiny differently. Under intermediate scrutiny, the state must show that (1) the law at issue is supported by important interests (the "important purpose" prong), and (2) the means employed substantially relate to those interests (the "ends-means" prong).[19] In the canonical cases, courts applied this test to determine whether treating men and women differently substantially related to an important governmental interest.[20] In sex-defining cases, however, the question is whether the *definition of sex* substantially relates to an important governmental interest.[21] In other words, the ends-means prong in the canonical cases examined the fit between the differential treatment of men and women[22] and the state's interests, whereas the ends-means prong in sex-defining cases tests the fit between the definition of sex and the state's interests.

A handful of courts have acknowledged this difference between the canonical and sex-defining cases,[23] and a subset of those courts have modified their ends-means analysis accordingly.[24] But many have not.[25] In turn, many cases have ultimately come to the right conclusion (that these laws violate equal protection) but have struggled to tackle head-on the crucial question of whether the state's definition of sex advances the state's proffered interests. Instead, these pro-trans decisions[26] have deemed these laws unconstitutional for reasons that have little to do with the state's definition of sex. Not only has avoiding this

18. There are many reasons why these laws trigger intermediate scrutiny. *See infra* Part I (discussing the common threads between the canonical and sex-defining cases and explaining why intermediate scrutiny applies to these laws).

19. *VMI*, 518 U.S. at 516.

20. *See infra* notes 53–57 and accompanying text (describing the intermediate scrutiny analysis in canonical cases).

21. For some anti-trans courts and litigants, there is no difference between a challenge to a M/F sex classification system and a challenge to a SAAB-based definition of sex. *See infra* notes 188–90 and accompanying text (explaining this position and why it is wrong).

22. Both types of challenges target a "sex classification," broadly defined as laws that make distinctions based on any "property that characterizes [a person] in terms of [their] sex." Jessica A. Clarke, *Sex Discrimination Formalism*, 109 VA. L. REV. 1699, 1721 (2023). The canonical cases challenge the different treatment of sexed classes, whereas the sex-defining cases challenge the process of classifying people as M or F.

23. *See infra* notes 240–47 and accompanying text (discussing the *Hecox* case); Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 844 n.10 (11th Cir. 2022) (Pryor, J., dissenting) (stating these cases bring "[us] in[to] new territory here, despite the majority opinion's refusal to explore it").

24. *See* Hecox v. Little, 79 F.4th 1009 (9th Cir. 2023); *see also infra* notes 240–47 and accompanying text discussing *Hecox*.

25. *See infra* Part II.A.

26. This Article uses "pro-trans" decisions and "anti-trans" decisions as shorthand to refer to the outcome of the case. Pro-trans decisions ruled in favor of the transgender litigants and anti-trans decisions did not. These labels do not refer to the political ideology of the judges who decided these cases.

central issue made parts of their reasoning narrow and doctrinally questionable, it has also left intact the state's faulty arguments and the flawed assumptions underlying those arguments.

This Article uses the pro-trans bathroom cases[27] to illustrate what can go wrong when courts' analyses ignore the fit between the state's chosen definition of sex and the state's proffered justifications for the law. These courts conclude that excluding the transgender boy plaintiffs from the boys' bathroom is unconstitutional, but they do not answer one of the most important questions: why the state's definition of sex for bathrooms (in these cases, SAAB/genitals), when applied to the plaintiffs,[28] fail to advance the state's purported privacy interests behind the bathroom rules. Instead, they rely on facts that are unrelated to the reason for the plaintiff's exclusion from the bathroom, like idiosyncratic aspects of the bathroom policies and case-specific facts about the plaintiffs' bathroom conduct. These facts, though not always irrelevant to an equal protection analysis, are not dispositive. Thus, these pro-trans decisions are easily distinguishable in future bathroom cases that have different facts but the exact same trans-exclusionary bathroom rule.

Not only are these decisions unhelpful in cases with slightly different facts, they also miss the opportunity to undermine the state's central argument. According to the state, "biological sex" (i.e., SAAB/genitals) is the only way to determine sex for bathrooms, if not for all purposes. Thus, under the state's theory, a transgender boy is F because he was AFAB or has a vagina. Therefore, the state argues, allowing him access to the boys' bathroom would mean it could no longer have sexed bathrooms. As Part III of this Article shows, the argument that a decision for the plaintiffs spells the end of sex-segregated bathrooms and the assumption upon which it is based (that SAAB/genitals always determine sex) are both flawed.[29] But the pro-trans bathroom cases failed to expose these flaws. And because they didn't, other courts have readily adopted these same assumptions, regurgitated the state's arguments, and transformed these arguments into law, without needing to contend with counter-analyses from the pro-trans decisions.

These holes in pro-trans decisions are becoming increasingly concerning for transgender litigants and the fight for LGBT equality in general. Initially, most of these courts ruled in favor of the transgender plaintiffs.[30] But more

27. This Article explains why it focuses on the bathroom cases, as opposed to other sex-defining cases, *see infra* notes 35–40 and accompanying text.

28. These are as-applied challenges, not facial ones. *See infra* notes 75–78 and accompanying text.

29. Put briefly, they are flawed because there is no legal authority supporting the conclusion that "sex" always means SAAB. *See infra* Part III.C.3 (hashing out this claim in more detail).

30. *See* Katie R. Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405, 1408 ("Across almost all contexts (student restroom and locker room access, medical services discrimination, identity documentation litigation, employment discrimination, etc.), in cases decided by judges

recently this winning streak has been slowing. For example, in its final act of 2022, the en banc Eleventh Circuit reversed its previous panel decision in *Adams v. School Board of St. Johns County* and held that a school board's rule requiring students to use the bathroom matching their "biological sex" passed constitutional muster.[31] This decision did not come as a surprise,[32] but it did create a circuit split.[33] With a showdown at the Supreme Court over these bathroom rules brewing and with anti-trans sex-defining laws continuing to proliferate, transgender plaintiffs need, but do not necessarily have, strong and well-reasoned precedent upon which to challenge these laws.

This Article takes existing principles of equal protection doctrine and explains how pro-trans advocates and courts can apply them in ways that produce more doctrinally sound decisions. Put simply, it argues that in challenges to sex-defining laws, the relevant means by which the state is achieving its goal is the definition of sex, not the differential treatment of men and women. Thus, to determine whether that definition substantially relates to the relevant state interest, courts need to (1) specify how the state is defining and deploying sex (i.e., identify the means), and (2) determine whether that definition of sex substantially relates to the state's important interest (i.e., conduct the ends-means analysis).

Courts can more easily answer these questions by incorporating what scholars have called a "context-informed" or "contextual" approach to sex in their equal protection analyses.[34] A contextual approach seeks to align the law's

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appointed by presidents of all parties, and across circuits and districts across the country, transgender litigants are achieving impressive merits victories on their [equal protection and due process] claims.").

31. Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 796 (11th Cir. 2022) (en banc). And in July 2023, the Sixth Circuit became the first federal court to allow a state's ban on gender affirming care to take effect. *See* L.W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408 (6th Cir. 2023) (holding that a state ban on gender affirming care did not violate the Equal Protection Clause and applying rational basis review). The Eleventh Circuit quickly followed suit in *Eknes-Tucker v. Marshall*, 80 F.4th 1205, 1230 (11th Cir. 2023). *See also* Katie Eyer, *Anti-Transgender Constitutional Law*, VANDERBILT L. REV. 1, 5 (forthcoming 2024) (discussing the recent increase in "the number of rulings in favor of anti-transgender constitutional principles—both in terms of the absolute number of rulings favorable to opponents of transgender equality, as well as in the proportion of cases resolved favorably to anti-transgender constitutional law litigants").

32. Both the recent influx of Trump-appointed judges on the Eleventh Circuit and the highly politicized nature of this case made this outcome fairly predictable. *See* Madison Alder, *Trump Posed to Flip 11th Cir., Election Law on Tap*, BLOOMBERG LAW (Nov. 20, 2019), https://news.bloomberglaw.com/us-law-week/trump-poised-to-flip-11th-circuit-election-law-disputes-on-tap [https://perma.cc/VF9J-M6JU].

33. The other two courts of appeals to address this question, the Fourth and Seventh Circuits, both held that nearly identical bathroom rules violated equal protection. *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020); Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017); *see also* A.C. by M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 775 (7th Cir. 2023) (applying *Whitaker* and treating it as controlling and outcome determinative).

34. *See* Clarke, *supra* note 16 (offering a contextual approach to integrating nonbinary identity and rights into the areas where law regulates sex and gender); Laura Lane-Steele, *Adjudicating Identity*, 9 TEX. A&M L. REV. 267, 320 (2022) (proposing "a context-informed approach" that "understands the

definition of sex with the goal or function of the particular law at issue. Whether a law can or should define sex based on gender identity, SAAB, genitals, chromosomes, or something else depends on why that particular law is using sex in the first place. In other words, a contextual approach should guide courts' end-means prong analyses in sex-defining cases.

This Article focuses on the cases involving sex-defining laws for bathroom access, as opposed to other sex-defining laws, for three reasons. First, there is a current circuit split on the constitutionality of these laws.[35] Second, sex-defining laws for bathrooms began proliferating many years ago[36] and have therefore produced more case law than other sex-defining laws.[37] Three federal courts of appeals have addressed equal protection challenges to bathroom rules: the Fourth Circuit,[38] the Eleventh Circuit,[39] and the Seventh Circuit.[40] Third, these opinions make similar doctrinal missteps, which means that these mistakes are not one-off errors and instead reflect a broader pattern of misunderstanding.

This Article makes several contributions to the literature. First, it tracks how equal protection challenges to sex-defining laws differ from the canon, causing many courts to confuse the constitutional analysis.[41] It also unearths the doctrinal and normative problems with the pro-trans bathroom cases and makes clear the stakes of these mistakes.[42]

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identity question to depend on why that particular law is asking the identity question in the first place"). Other scholars have argued for similar approaches to sex identity.

35. *See supra* notes 32–33 (discussing the circuit split). This is not to say that the bathroom cases are the *most* likely of all sex-defining cases to reach the Court first. Sports cases are also likely to reach the Court soon. Moreover, there is a petition for certiorari in a case involving bans on gender-affirming care. *See* Petition for Writ of Certiorari*,* L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023). As explained *supra* note 4, these cases are technically outside the scope of this Article.

36. North Carolina adopted such a law, HB2, in March of 2016. Hannah Schoenbaum & Gary D. Robertson, *North Carolina Laws Curtailing Transgender Rights Prompt Less Backlash Than 2016 'Bathroom Bill*,*'* AP (Aug. 18, 2023), https://apnews.com/article/transgender-health-north-carolina-new-laws-b28aed0d20d363c22b1107135125c2d6# [https://perma.cc/WF8S-Q43H] ("Seven years ago, North Carolina became ground zero in the nationwide fight over transgender rights with the passage of a 'bathroom bill' that galvanized culture warriors, canceled business projects and sporting events and influenced a gubernatorial race.").

37. As of this writing, only one circuit court has addressed sports on the merits. Hecox v. Little, 79 F.4th 1009, 1015 (9th Cir. 2023).

38. *Grimm*, 972 F.3d at 593.

39. Adams v. School Board of St. Johns County, 3 F.4th 1299, 1303 (11th Cir. 2021).

40. Whitaker *ex rel.* Whitaker v. Kenosha Unified School District, 858 F.3d 1034, 1039 (7th Cir. 2017); A.C. by M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 775 (7th Cir. 2023).

41. Scholars have argued that misclassification-type challenges from transgender plaintiffs don't map on to sex discrimination frames in other areas of law. *See, e.g.*, Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105 MINN. L. REV. 831, 857–58 (2020) (arguing that the gender nonconformity theory of sex discrimination, first articulated in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), is not a useful framework for vindicating the interests of transgender plaintiffs who "are not challenging sex classifications [but rather] are seeking access to them").

42. Other work has critiqued these bathroom cases on some of the same grounds. *See* Naomi Schoenbaum, *Equal Protection and The New Sex* (on file with author) at 18 (arguing that both pro- and anti-trans cases "are [improperly] built on a foundation of sex as biology as a matter of equal protection law"). Scholars have also praised certain aspects of the pro-trans bathroom cases' reasoning. *See, e.g.*,

Moreover, this Article contributes to the scholarship on contextual identity in law. Other projects offer contextual approaches to race,[43] sex,[44] age,[45] disability,[46] and sexual orientation[47] as remedies to existing problems in law, and others highlight how law has used context-dependent definitions of identity to maintain sexual[48] and racial[49] hierarchies. This Article builds on this work and applies a contextual understanding of sex to equal protection challenges to sex-defining laws. In doing so, it both exposes and helps remedy the current flaws in some pro-trans decisions. It also applies a contextual lens to the case law upon which anti-trans courts and litigants rely to reveal how these legal actors have mischaracterized these cases and to show why their legal arguments lack a doctrinal foundation. Finally, this Article develops the language to capture what

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Courtney Megan Cahill, *Sex Equality's Irreconcilable Differences*, 132 YALE L.J. 1065, 1118 (2023) (describing how the bathroom cases and other sex-defining cases have "rejected real-differences justifications as offensive to the anti-stereotyping principle's core features: its embrace of contemporary norms, its attention to on-the-ground facts, and its protection of individuality and exceptionality").

43. *See* Camille Gear Rich, Essay, *Affirmative Action in the Era of Elective Race: Racial Commodification and the Promise of the New Functionalism*, 102 GEO. L.J. 179 (2013) (arguing that employers should adopt a functionalist approach to racial identity, when determining eligibility for affirmative action programs, which focuses on how the employee has been racialized or how third parties understand the employee's race based on physical characteristics, documentary decisions about racial identity, and racial performance); Lauren Sudeall Lucas, Essay, *Identity As Proxy*, 115 COLUM. L. REV. 1605 (2015).

44. *See* Clarke, *supra* note 16, at 902 (offering a contextual approach to integrating nonbinary identity and rights into the areas where law regulates sex and gender); Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 808 (2008) ("The question . . . is whether gender [is] an item of information that significantly forwards the goals of the given data collection process. Such an inquiry leads to varying answers depending on the purpose of data collection."); Nancy Leong, *Against Women's Sports*, 95 WASH. U. L. REV. 1251 (2018) (arguing that intermediate scrutiny should apply to sex classifications in sports (i.e., that the state must show that separating athletes by sex is substantially related to an important governmental interest)); *see generally* HEATH FOGG DAVIS, BEYOND TRANS: DOES GENDER MATTER? (2017) (arguing that legal sex classifications should bear a rational relationship to the legitimate goals of the rules that use these classifications).

45. *See* Alexander A. Boni-Saenz, *Legal Age*, 63 B.C. L. REV. 521, 522 (2022) (mapping three different definitions of legal age—chronological, biological, and subjective—and exploring various models of legal age based on these definitions).

46. *See* Katherine A. Macfarlane, *Disability Without Documentation*, 90 FORDHAM L. REV. 59 (2021).

47. *See* Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309 (2011) (arguing that the L.A. County Jail's reliance on verifying sexual orientation for eligibility in a special unit is not aligned with the unit's purpose of protecting vulnerable inmates and advocating that the jails stop using sexual orientation as a proxy for vulnerability and instead consider all vulnerable traits when determining eligibility, including disability, young age, and slightness, among others); *see also* Elizabeth F. Emens, *Inside Out*, 2 CALIF. L. REV. CIR. 95, 100 (2011) (asking whether a more comprehensive solution would seek to protect all inmates from sexual and physical violence rather than "limit[ing] the focus to a list of enumerated traits"); Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525 (2013).

48. *See generally*, PAISLEY CURRAH, SEX IS AS SEX DOES: GOVERNING TRANSGENDER IDENTITY (2022) (arguing that different iterations of the state construct "sex" differently depending on how sex is being used).

49. *See generally* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (2006); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998) (examining the racial determination cases in the nineteenth century).

some courts are already doing,[50] and provides a framework for courts to distinguish challenges to the state's ability to draw distinctions between men and women (cases like the canon) and cases that challenge the state's ability to define M and F.

Two points about this Article's scope. First, the plaintiffs in the bathroom cases brought claims under the Equal Protection Clause and Title IX, but this Article focuses only on equal protection claims. Title IX is limited to educational contexts, but the legal battles over transgender rights are far broader. Access to bathrooms, access to healthcare, eligibility for single-sex sports teams, and requirements for changing sex markers on identity documents, for example, do not always implicate Title IX but do tend to implicate the Equal Protection Clause.[51] Therefore, I limit my analysis to equal protection because of its broader applicability. Second, this Article does not directly challenge the constitutionality of sexed bathrooms.[52] This question is not presented in these cases,[53] and neither the plaintiffs nor the courts seem to think that sexed bathrooms raise constitutional problems.[54] Instead, this Article maps a path for courts to conclude that these bathroom rules' SAAB/genital-based definitions of sex do not survive intermediate scrutiny without directly undermining the constitutionality of sexed bathrooms.

This Article proceeds as follows. Part I maps the differences between the canonical cases and sex-defining cases. It shows how these differences require courts to tweak their intermediate scrutiny analyses but do not justify a departure

50. *See* Hecox v. Little, 79 F.4th 1009 (9th Cir. 2023) (finding that an Act barring transgender girls and women from participating in public school female sports teams likely violates the Equal Protection Clause because it is not substantially related to its purported goals); *see also infra* notes 240–47 and accompanying text discussing *Hecox*.

51. Even though the cases in this Article focus on schools and thus implicate Title IX, many sex-defining laws for bathrooms have been proposed (and passed) by state legislatures and apply beyond the schoolhouse doors. *See, e.g.*, HB 2, 2016 Leg., 2d Extra Sess. (N.C. 2016) (defining sex for bathrooms based on SAAB); HB 609, 65th Leg., Reg. Sess. (Mont. 2017) (same).

52. Many scholars have made such an argument. *See, e.g.*, Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 151–52 (2017) (arguing that "sex-segregated restrooms constitute an unconstitutional, sex-based harm that cannot be justified under contemporary constitutional, sex discrimination doctrine"); Laura Portuondo, *The Overdue Case against Sex-Segregated Bathrooms*, 29 YALE J. L. FEMINISM 465 (2018) (arguing that sexed bathrooms are normatively undesirable and unconstitutional); Mary Anne Case, *Why Not Abolish Laws of Urinary Segregation*?, *in* TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 211, 225 (Harvey Moltoch & Laura Norén eds., 2010); *c.f.* David B. Cruz, *Making Sex Matter: Common Restrooms as "Intimate" Spaces?*, 40 LAW & INEQ. 99 (2022) (arguing that the "intimacy" rationales for sexed bathrooms do not justify the exclusion of trans people). The challenges to sex-defining laws do not ask courts to rule on the constitutionality of sexed bathrooms, so this Article does not address that argument (though I do not disagree with it). Instead, they are arguing that the plaintiffs' exclusion from a particular bathroom violates equal protection. For these same reasons, I do not address constitutional questions regarding sex-neutral bathrooms, even though I agree with other scholars that replacing sexed bathrooms with sex-neutral ones is the best remedy to the bathroom issues. *See, e.g.*, Clarke, *supra* note 16, at 981–83.

53. See *infra* notes 62–63 and accompanying text explaining why this question is not presented.

54. *See infra* notes 121–22 and accompanying text.

from the core principles established in the canon. Part II discusses the bathroom cases. First, it provides a close reading of the pro-trans decisions and argues that their failure to address the critical question of fit between the state's definition of sex and the state's privacy goals weakens their precedential value and limits their applicability. It then turns to the en banc decision in *Adams* and argues that the gaps in the pro-trans decisions' reasoning allowed this anti-trans court to craft a deeply flawed opinion without needing to confront or rebut relevant counter-analyses. Part III provides a path forward. It explains the concept of contextual sex and how it both flows from and maps directly onto existing equal protection doctrine. Then, it spells out how this approach can remedy the flaws in the pro-trans bathroom cases discussed in Part II before applying a contextual approach to the bathroom cases. Part IV is a brief conclusion.

I.
THE CANON OF SEX DISCRIMINATION AND SEX-DEFINING CASES

This Part first traces how equal protection challenges to sex-defining laws differ from the types of constitutional sex discrimination challenges courts are used to and describes the framing and analytical shifts those differences require. Then, it explains why courts should not throw the baby out with the bath water—that is, even though sex-defining cases require analytical tweaks, they implicate the core principles of constitutional sex discrimination that were established in the canon.

A. The Differences Between the Canonical Cases and Sex-Defining Cases

Courts are familiar with equal protection challenges that track the canon of constitutional sex discrimination: cases like *United States v. Virginia*[55] and *Craig v. Boren.*[56] These canonical cases addressed laws that treated men and women differently, e.g., laws that denied women admission to a state university,[57] allowed women to drink alcohol at a younger age than men,[58] and gave preference to men over women as administrators of a decedent's estate.[59] The plaintiffs were asking the Court to require sex neutrality and to strike down the M/F sex classifications in the law.[60] In these cases, the laws at issue did not

55. United States v. Virginia (VMI), 518 U.S. 515 (1996).

56. Craig v. Boren, 429 U.S. 190 (1976).

57. *VMI*, 518 U.S. at 557–58; *see also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732–33 (1982) (striking down a law denying men admission to a particular public university).

58. *Craig*, 429 U.S. at 209–10.

59. Reed v. Reed, 404 U.S. 71, 76–77 (1971).

60. *See id.* at 74 (summarizing the plaintiff's argument).

explicitly define sex and the plaintiffs did not claim that the state had improperly classified them as M instead of F, or vice versa.[61]

Sex-defining cases, on the other hand, are not about the permissibility of M/F sex classifications.[62] In the bathroom cases discussed in Part II, for example, the plaintiffs repeatedly reminded the court that they were not arguing that sexed bathrooms writ large are unconstitutional. Indeed, these plaintiffs' claims were based on the existence of sexed bathrooms: they wanted to use a sexed bathroom, not a sex-neutral one.[63] Rather, these plaintiffs challenged the way the state was implementing the sex classification. They argued that the state's definition of sex, as applied to them, was unconstitutional sex discrimination because it misclassified their sex and forced them to use the wrong bathroom. The plaintiffs' harms, as they articulated them, did not flow from the state treating men and women differently; they were caused by the state improperly designating them as M or F.

Compare the goals of the plaintiffs in *United States v. Virginia* (*VMI*)[64] and *Grimm v. Gloucester County School Board*.[65] *VMI*, a core pillar of the canon, addressed the state's ability to exclude all women from Virginia Military Institute, a public military university.[66] There were no disputes as to how the university determined which applicants were women, and the parties were not

61. *See id.* at 72 n.2 (describing the Idaho state administration statute); *VMI* 518 U.S. at 521 (describing VMI's admissions policy and mission); *Craig*, 429 U.S. at 191 n.1 (describing the statute at issue).

62. *See* Eyer, *supra* note 30, at 1433 ("[I]t appears to be far more common for transgender litigants to challenge the assimilation of the transgender community into such systems on an as-applied basis than to challenge the underlying system itself."). LGBT rights groups have largely avoided challenging the constitutionality of sex segregation for strategic reasons. *Id.* at 1485; *see also* Marie-Amélie George, *Expanding LGBT*, 53 FLA L. REV. 243, 278-79 (2021); Clarke, *They Them Theirs*, *supra* note 16 (same).

63. Adams v. Sch. Bd. of St. Johns Cnty., Fla., 3 F.4th 1299, 1304 (11th Cir. 2021), *vacated*, 9 F.4th 1369 (11th Cir. 2021), *on reh'g en banc sub nom.* Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., No. 18-13592, 2022 WL 18003879 (11th Cir. 2022) (noting that the plaintiff found the school district's suggestion that he use only sex-neutral bathrooms "isolati[ng], depress[ing], humiliating, and burdensome" (internal quotation marks omitted)); Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1041 (7th Cir. 2017) ("Fearing that using the one gender-neutral restroom would single him out and subject him to scrutiny from his classmates . . . Ash continued to use the boys' restroom for the remainder of his junior year."); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 600 (4th Cir. 2020), *as amended* (Aug. 28, 2020) ("[T]he single-stall restrooms made Grimm feel 'stigmatized and isolated.' He never saw any other student use these restrooms."); *see also* Eyer, *supra* note 30, at 30 ("[T]he posture of these "as applied" cases has required the courts to grapple with a further important question: how to assess the government's interests in the context of a situation where the plaintiff is not challenging the underlying sex-based regulation—but rather only their treatment within it."). To be sure, there are many transgender and nonbinary people who would prefer an all-gender bathroom to a sexed bathroom, but these particular plaintiffs are binary and gender-conforming. *See* Marie-Amélie George, *Framing Trans Rights*, 114 N.W. U. L. REV. 555, 607–14 (2019).

64. *VMI*, 518 U.S. 515.

65. 972 F.3d 586, *as amended* (Aug. 28, 2020).

66. *VMI*, 518 U.S. at 557.

arguing over the "true" sex of a particular applicant.[67] Rather, the challengers claimed that denying all women admission to the university was unconstitutional sex discrimination.[68] *Grimm,* on the other hand, involved a challenge to a school's bathroom rule that assigned students to sexed bathrooms based on their SAAB/genitals. The plaintiff, a transgender boy, was not permitted to use the boys' bathroom based on his SAAB/genitals.[69] He argued that the rule was unconstitutional, as applied to him, because it defined his sex as F and forced him to use a bathroom that did not align with his male gender identity.[70] Unlike the challengers in *VMI*, Grimm did not want the court to end sexed bathrooms; he wanted to be properly classified as M.

Because sex-defining cases are challenging the definition of sex, not the M/F sex classification, the equal protection analysis in each type of case is slightly different. Both apply intermediate scrutiny's familiar two-step framework: (1) the important purpose prong—whether the law is supported by an important governmental interest; and (2) the ends-means prong—whether the means employed substantially relate to that interest.[71] Sex-defining cases and the canonical cases, however, differ slightly on the ends-means prong. In canonical cases like *VMI*, the means was the differential treatment of men and women, and courts determined whether this differential treatment was substantially related to an important governmental interest (the ends).[72] In sex-defining cases, however, the relevant means is different; the state is achieving its goal through its definition of sex.[73] Thus, sex-defining cases require courts to determine whether the *state's definition of sex* (not the differential treatment of men and women) substantially relates to an important governmental interest. To answer this question, then, courts need to (1) ascertain exactly how the state is defining sex and (2) examine whether that definition substantially relates to the state's goal. The canonical cases did not have to ask or answer these questions, and therefore courts cannot look to the canon for guidance on this part of the equal protection analysis.[74]

Another difference between the canon and challenges to sex-defining laws is that the former are mostly facial challenges whereas the latter are mostly as-

67. *See generally id.* at 523–30 (discussing the issues presented by the parties).

68. *Id.* at 530–33.

69. *Grimm*, 972 F.3d at 593. For an explanation of why this discussion conflates SAAB/genitals in this way, *see infra* notes 103–04 and accompanying text.

70. *Id.*

71. Most decisions, including most anti-trans decisions, apply intermediate scrutiny to these laws. *See infra* notes 120, 260–267 (discussing and defending the general consensus that intermediate scrutiny applies to challenges to bathroom cases). This is less true for challenges to bans on gender-affirming care, though. *See infra* note 82 (discussing cases that apply rational basis).

72. *See VMI*, 518 U.S. at 524 ("If single-gender education for males ranks as an important governmental objective, it becomes obvious . . . that the only means of achieving the objective is to exclude women from the all-male institution.") (internal quotations and citation omitted).

73. *See infra* Part II (discussing how the pro-trans bathroom decisions misidentified the means).

74. *See* Reed v. Reed, 404 U.S. 71, 74–77 (1971).

applied challenges.[75] In *VMI*, for example, the claim was that VMI's policy of excluding women was unconstitutional on its face, as applied to everyone, not that VMI's exclusion of particular women was unconstitutional (which would be an as-applied challenge).[76] Challenges to sex-defining laws, for the most part, are as-applied.[77] These plaintiffs are not arguing that the state's definition of sex is unconstitutional writ large, but rather that the definition is unconstitutional only when applied to the transgender plaintiffs themselves. In *Grimm*, for instance, the plaintiff did not challenge the bathroom rule's definition of sex when applied to cisgender students; his claim was limited to the bathroom rule's definition of sex when applied to him.[78]

Sex-defining cases, therefore, depart from the canon in two respects. First, the plaintiffs are challenging the definition of sex, not the M/F sex classification, and second, they are doing so on an as-applied basis rather than a facial one.[79] However, as discussed further in Part II, some courts have not sufficiently shifted their analyses to account for these differences. [80] Sometimes, these courts do not even acknowledge any differences between sex-defining cases and the canon. Instead, they treat these cases as if they were challenging the M/F sex classification rather than the definition of sex.[81]

B. The Overlap Between the Canonical Cases and Sex-Defining Cases

Thus far, this Part has emphasized the differences between the canonical cases and sex-defining cases, but these differences should not be overstated.[82]

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75. Facial challenges assert that the law is unconstitutional on its face, as applied to everyone in all circumstances; as-applied challenges contend that the law is unconstitutional only when applied to that particular plaintiff. *See* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).

76. *VMI*, 518 U.S. at 516.

77. Katie Eyer, *As-Applied Equal Protection*, 59 HARV. C.R. C.L. L. REV. 49, 50–51 (2024) (discussing the as-applied nature of the majority of transgender litigants' challenges to sex-defining laws).

78. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593 (4th Cir. 2020); *see also* En Banc Brief of Appellee Drew Adams at 21, Adams v. Sch. Bd. of St. Johns Cnty., Fla., 3 F.4th 1299 (11th Cir. 2021) (No. 18-13592) ("But the district court correctly understood that Andrew challenges Defendant's decision to treat him differently from other boys, not sex-separated restrooms themselves.").

79. *See supra* notes 55–78 and accompanying text.

80. *See supra* Part II and accompanying text; *see also* Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 844 (11th Cir. 2022) (en banc) (Pryor, J., dissenting) (stating these cases bring "[us] in[to] new territory here, despite the majority opinion's refusal to explore it").

81. *See infra*, Part II.A.1 (discussing the en banc *Adams* decision). Some judges do not think that as-applied equal protection challenges to laws that involve sex segregation exist in the first place. *See Adams*, 3 F.4th at 1327 (Pryor, J., dissenting) ("Moreover, the new majority opinion continues its earlier pretense of invalidating the policy it considers—then, the policy of separate bathrooms for the sexes; now, the schools' method of determining students' sex—only as it applies to Adams. Its earlier attempt at limiting itself to an as-applied challenge changed nothing."); *see also*, Eyer, *supra* note 77, at 3–4 (explaining why the courts that have adopted this view are wrong).

82. This point warrants emphasis because some recent decisions have applied rational basis review to laws that discriminate based on sex. *See, e.g*, L.W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 419 (6th Cir. 2023) (holding that a state ban on gender-affirming care did not violate the Equal Protection

Sex-defining laws and laws at issue in the canon implicate the same core equal protection principles and trigger intermediate scrutiny for the same essential reasons.[83] The canonical cases applied intermediate scrutiny to ensure that the state was not improperly restricting people's ability to live their lives based on their sex: a label imposed upon them at birth and based on the appearance of their genitals.[84] Regardless of whether someone accepts the label assigned at birth (like the women seeking admission to VMI) or not (like the transgender plaintiffs in the bathroom cases), the label itself is something they do not have control over and something that is rarely relevant to their ability to "contribute to society."[85] The immutable and (usually) irrelevant nature of assigned sex categories, in addition to the state's long history of using sex as a pretext for unlawful discrimination, are the reasons why courts closely interrogate laws that deny people opportunities or harm them in other ways because of their sex. Courts need to ensure that such sex-based harm is justified.[86]

These rationales apply to sex-defining cases in the same way they did in the canonical cases. In *VMI*, for example, VMI's exclusion of women triggered intermediate scrutiny because the state was limiting women's educational opportunities and restricting their ability to control their lives, and the only reason VMI was doing so was because of their sex.[87] Heightened scrutiny applies in sex-defining cases for the same reason. These laws harm people, deny them

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Clause and applying rational basis review)*;* Eknes-Tucker v. Marshall, 80 F.4th 1205, 1230 (11th Cir. 2023) (same). And arguments that sex-defining laws should receive rational basis review because they merely define sex are gaining traction. *See, e.g.*, Brief of the State Defendants-Appellants at 24, *Corbitt v. Taylor,* No. 21-10486 (11th Cir. May 26, 2021) (arguing that equal protection claims involving sex markers should not receive intermediate scrutiny because "heightened scrutiny applies when the State relies on suspect classifications to dole out discriminatory treatment, but that same scrutiny does not apply to the mere classification itself"). Explaining why these arguments are deeply flawed is beyond the scope of this Article, though I am exploring this question in future work.

83. Sex-defining laws, like the bathroom rules, receive heightened scrutiny for the same reasons the canon provides. There may be additional reasons to apply heightened scrutiny to these laws, and the canon-based justification provided does not preclude any additional justifications. *See infra* note 267 (discussing the trans-as-suspect-class theory of heightened scrutiny).

84. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 686 (1973) "[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility.").

85. *See id*. ("[W]hat differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.").

86. United States v. Virginia (VMI)*,* 518 U.S. 515, 531 (1996) ("Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, "our Nation has had a long and unfortunate history of sex discrimination.") (quoting *Frontiero,* 411 U. S. at 684).

87. *Id.* at 533 ("[T]he Court . . . has carefully inspected official action that closes a door or denies opportunity [based on sex]" and "the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature-equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.").

the ability to direct the course of their lives, and exclude them from spaces and opportunities to which they seek access because of something they cannot change: their SAAB.[88]

These throughlines in both types of cases become apparent if we reframe *VMI* as a sex-defining case.[89] Suppose VMI limited admission to people AMAB (as opposed to the undefined category of "men").[90] Then suppose someone AFAB challenged this rule under equal protection on an as-applied basis, just like the plaintiffs in sex-defining cases.[91] The plaintiff argued that because they thrived in the type of "adversative" educational environment VMI provides, admitting them would enhance, rather than detract from, the school's goal of producing "citizen-soldiers."[92] In this reformulated version of the case, the Court's justification for applying intermediate scrutiny remains the same: VMI denied the plaintiff a unique educational experience and it did so based exclusively on their SAAB.[93] The Court's intermediate scrutiny analysis does not change in any fundamental way either. VMI's justification for excluding the plaintiff would still be based on overbroad and impermissible assumptions about people AFAB: that they are not amenable to VMI's "adversative method of training" and admitting them to VMI "would downgrade VMI's stature, destroy the adversative system and, with it, even the school."[94]

The aspects of the Court's analysis that would change are those already discussed in this Part. First, the Court's ends-means analysis would examine the fit between VMI's SAAB-based admissions policy and the state's justifications for the policy. And second, the Court's inquiry would be limited to this one plaintiff, not everyone AFAB.

In sum, laws that treat men and women differently (*VMI*) and laws that define M and F (*Grimm*) both trigger heightened scrutiny because they treat people unequally based on sex: either because they are women (*VMI*) or because they are AFAB (*Grimm*).

II.
THE BATHROOM CASES

This Part discusses the implications of courts' failure to shift their equal protection analysis in sex-defining cases, using the bathroom cases as an example. First, it provides background on three cases addressing challenges to

88. *See, e.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 609 (4th Cir. 2020) (applying heightened scrutiny and relying on "central tenet[s] of equal protection [] sex discrimination cases").

89. I thank Jessica Clarke for this example.

90. *See VMI*, 518 U.S. at 521 (describing VMI's mission to "produce educated and honorable men" and providing no definition of the term "men").

91. *See* Eyer, *supra* note 77.

92. *See VMI*, 518 U.S. at 520.

93. *Id.* at 532–33.

94. *Id.* at 542; *see also* Frontiero v. Richardson, 411 U. S. 677, 686 (1973) (discussing VMI's justification for intermediate scrutiny).

sex-defining bathroom rules. Specifically, it discusses the facts, the details of the bathroom policies themselves, the plaintiffs' equal protection arguments, and the state's counter-arguments. Then it turns to the three decisions that ruled in favor of the plaintiffs. It argues that they provide unstable foundations for future sex-defining challenges because their reasoning does not address the core issues presented in these cases and, in turn, fails to rebut the heart of the state's arguments. Subsection B turns to the en banc *Adams* decision—the only court of appeals bathroom decision that ruled against the transgender plaintiff. It shows how the pro-trans decisions' failure to undermine the schools' flawed arguments made it easy for the en banc *Adams* court to adopt them and rule in favor of the schools without needing to contend with relevant counter-analyses from the pro-trans decisions.

A. The Pro-Trans Cases: The Panel Decisions in Adams*,* Grimm*, and* Whitaker

The three courts of appeals that have decided equal protection challenges to school bathroom rules are the Fourth Circuit (*Grimm v. Gloucester County School Board*),[95] the Eleventh Circuit (*Adams v. School Board of St. Johns County*),[96] and the Seventh Circuit (*Whitaker* ex rel. *Whitaker v. Kenosha Unified School District*).[97] All three cases share the same basic facts. The plaintiffs were all transgender boys[98] who began using the boys' bathroom at school.[99] Their respective school boards subsequently either passed a new rule or began enforcing a pre-existing, unwritten rule that prohibited these plaintiffs from using the boys' bathroom.[100] These bathroom rules assign students to the

95. 972 F.3d 586 (4th Cir. 2020).

96. 3 F.4th 1299 (11th Cir. 2021). The Eleventh Circuit issued a previous decision in this case that ruled in favor of the plaintiff but on broader grounds. Adams v. Sch. Bd, of St. John Cnty., 968 F.3d 1286 (11th Cir. 2020). The court vacated that decision and issued a revised opinion, narrowing its holding and reasoning. This Article focuses on the revised panel opinion.

97. 858 F.3d 1034 (7th Cir. 2017). The Seventh Circuit recently decided another bathroom case, *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023). The facts of this case are almost identical to those in *Whitaker*, and the court held that its reasoning in *Whitaker* both applied and determined the outcome. *Id.* at 775 ("[This] appeal[] [is] almost, indistinguishable from *Whitaker*. Because our reasoning in *Whitaker* controls, we [rule in favor of the transgender plaintiff]."). Because *Whitaker* develops the reasoning that *Martinsville* merely applies, this Article focuses on the *Whitaker* decision.

98. That all three plaintiffs in these cases were transgender boys, and not transgender girls, may not have been a mere coincidence. Transgender boys in the boys' bathroom do not prompt the same "predator in the girls' bathroom" discourse that has plagued transgender rights advocacy for decades. *See* Marie-Amélie George, *Framing Trans Rights,* 114 NW. U. L. REV. 555, 556–57 (2019) ("LGBT rights opponents across the country successfully led campaigns to repeal antidiscrimination protections for gays and lesbians by convincing voters that gender identity would grant sexual predators access to women's restrooms."). Thus, LGBT rights groups may have intentionally selected cases involving transgender boys as a strategic matter. *See id.*, at 591 (discussing the strategical reasons pro-LGBT "campaigns have featured binary transgender individuals, who reinforce gender norms").

99. *Grimm*, 972 F.3d at 598; *Adams*, 3 F.4th at 1306; *Whitaker*, 858 F.3d at 1041.

100. *Grimm*, 972 F.3d at 600; *Adams*, 3 F.4th at 1306; *Whitaker*, 858 F.3d at 1041.

bathroom that corresponds with their "biological sex."[101] The policies do not define "biological sex," and, during the litigation, the schools' attorneys resisted defining the terms with precision.[102] But a close examination of the schools' briefs and oral arguments reveals that "biological sex" refers to SAAB or genitals.[103] In other words, the policies bar these plaintiffs from the boys' bathroom because they were AFAB or have vaginas.[104] To determine students' "biological sex," the policies look to the sex marker on the students' identity documents at the time they enrolled.[105]

The plaintiffs challenged the bathroom rules under equal protection and argued that the bathroom policies were unconstitutional because they misclassified the plaintiffs' sex as F and forced them to use a bathroom inconsistent with their true sex, M.[106] They did not argue that the SAAB/genital definition of sex was unconstitutional on its face. Nor did they object to the schools' definition of sex when applied to cisgender students,[107] only when applied to transgender students.[108] In other words, how the schools assign cisgender students to bathrooms was irrelevant in these cases.

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101. The *Grimm* policy assigns students to bathrooms based on their "biological gender." *Grimm*, 972 F.3d at 593. Similarly, the *Adams* and *Whitaker* policies define sex as "biological sex." Initial Brief of the Appellant at 5, *Adams*, 3 F.4th 1299 (11th Cir. 2021) (No. 18-13592-EE); Petition for a Writ of Certiorari at iii, Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker *ex rel.* Whitaker, 138 S. Ct. 1260 (2018) (No. 17-301).

102. *See, e.g.*, Oral Argument at 1:40–4:50, *Adams*, 57 F.4th 791, https://www.ca11.uscourts.gov/oral-argument-recordings [https://perma.cc/4GXA-3B25] (the school's attorney resisted defining sex in response to persistent questioning by the judge).

103. The schools' attorneys sometimes admitted that "biological sex" refers to SAAB either in their briefs (*see* Supplemental Brief of Appellant at 4, *Grimm*, 972 F.3d 586 (No. 19-1952)) or when pressed by judges during oral arguments. *See* Oral Argument at 7:50-8:50, *Adams*, 57 F.4th 791 (the judge repeatedly asked what "biological sex" meant throughout oral argument and eventually asked whether it means birth-assigned sex, to which the school board's attorney responded affirmatively).

104. To be sure, there is a difference between a SAAB-based and a genital-based definition of sex, but this distinction is not meaningful in these particular cases. Under most state laws, individuals under eighteen cannot have genital surgery; therefore, all of these plaintiffs' genitals aligned with their SAAB at the time of the litigation. Moreover, the schools themselves don't make a meaningful distinction between the two. For example, during the en banc oral argument in Adams, the school's attorney was asked how the bathroom policy would apply if Adams had undergone anatomical changes, and the attorney said that he did not know. Oral Argument at 13:00–13:50, *Adams*, 57 F.4th 791, https://www.ca11.uscourts.gov/oral-argument-recordings [https://perma.cc/4GXA-3B25].

105. *See, e.g.*, *Grimm,* 972 F.3d at 608 ("[T]he Board . . . has defended its policy by taking the position that it will rely on the sex marker on the student's birth certificate.").

106. *See Grimm*, 972 F.3d at 593; *Adams*, 3 F.4th at 1307; *Whitaker*, 858 F.3d at 1051.

107. *See* En Banc Brief of Appellee Drew Adams at 30, *Adams*, 57 F.4th 791 (No. 18-13592) (arguing school district's bathroom "policy [] does not affect transgender and cisgender students in the same way" and asserting that "[b]anning transgender boys from the boys' restroom has no effect on non-transgender girls, just as a tax on yarmulkes has no effect on people who are not Jewish" (quotations omitted)); Norsworthy v. Beard, 87 F. Supp. 3d 1164 (N.D. Cal. 2015), *appeal dismissed and remanded*, 802 F.3d 1090 (9th Cir. 2015) (making similar argument against prison name-change policies discriminating against transgender inmates).

108. But not all transgender students. The plaintiffs defined "transgender" in a way that excludes most, if not all, non-binary and gender-fluid students. *See, e.g.*, En Banc Brief of Appellee Drew Adams at 19, *Adams*, 57 F.4th 791 (No. 18-13592) ("[M]edical experts define transgender patients as being

The schools, for their part, put forth two related, but slightly distinct, justifications behind their policies and argued that both were sufficiently important to survive intermediate scrutiny: (1) protecting their students' interests in bodily privacy from the "opposite sex"[109] in the bathroom[110] and (2) ensuring their students had privacy in using the bathroom away from the "opposite sex."[111]

The schools did not expound on the first interest ("bodily privacy from the opposite sex") with great specificity, but they seemed to be referring to privacy interests implicated by the actual or potential exposure to the "nude or partially nude body, genitalia, and other private parts . . . of the opposite biological sex" in the bathroom.[112] According to the schools, allowing these plaintiffs to use the boys' bathroom undercut this interest because they are not "biological boy[s]" (based on their SAAB/genitals) and allowing "biological girls" to use the boys' bathroom put cisgender boys at risk of exposing their bodies to the opposite sex.[113] Under this logic, excluding the plaintiffs from the boys' bathroom is not only substantially related to this interest, but is its mirror image since avoiding

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'insistent, persistent, and consistent over time in their cross-gender identification,' a definition apparent throughout the model policies that the task force examined. . . . In short, '[t]ransgender individuals are not gender fluid and their sense of who they are is settled.'"); Laura Lane-Steele, *The Non-Binary Bogeyman*, 73 FLA. L. REV. F. 31, 35 (2024). Moreover, the plaintiffs' as-applied framing begs the question: Which students are transgender and should be allowed to use the bathroom associated with their gender identity and which students are cisgender and can be assigned to bathrooms based on SAAB/genitals? This question is not raised or discussed by the parties or the courts in these cases, so this Article does not address it.

109. When this Article describes the schools' interests behind the bathroom rule it uses the term "opposite sex" to reflect the schools' articulation of their own interests. However, the term "opposite sex" reflects and reinforces the notion that there are two, binary, mutually exclusive, and opposing sexed categories. As discussed further in Part III, this Article rejects such essentialized notions of legal sex. Thus, this Article's use of "opposite sex" is not an endorsement of the term, but rather a description of the schools' stated interests, in the schools' terms. It uses the terms "different sex" or "another sex" when employing this concept in other contexts.

110. *See* Initial Brief of Appellant at 22, *Adams*, Fla., 3 F.4th 1299 (No. 18-13592) ("There is no question the protection of bodily privacy is an important government interest and that the government may promote this interest by excluding members of the opposite sex from places where individuals are likely to engage in intimate bodily functions."); *see also* Brief in Support of Gloucester Cnty., Grimm v. Gloucester Cnty. Sch. Bd., 400 F. Supp. 3d 444 (E.D. Va. 2019) (No. 15-00054).

111. *See* En Banc Brief of Appellant the School Board of St. Johns County at 14, *Adams*, 57 F.4th 791 (No. 18-13592) (arguing that "separating bathrooms based on sex has been commonplace across societies and throughout history" and "dates back as far as written history will take us"); *see also* Brief in Support of Defendants' Motion to Dismiss the Amendment Complaint at 8, Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017) (No. 16-3522) ("Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex.") (internal quotations omitted).

112. Brief in Support of Defendants' Motion to Dismiss the Amended Complaint at 8, Whitaker v. Kenosha Unified Sch. Dist., No. 16-CV-943-PP, 2016 WL 5239829 (E.D. Wis. Sept. 22, 2016) (No. 2:16-cv-00943) (quoting G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 734–35 (4th Cir. 2016), *vacated and remanded*, 580 U.S. 1168 (2017)).

113. Initial Brief of Appellant at 31, *Adams*, 3 F.4th 1299 (No. 18-13592); *id.* at 27 ("For example, when Adams enters a boys' bathroom and there is a biological boy using the urinal, that biological boy's privacy rights have been violated.").

any risk of opposite sex bodily exposure requires banning "biological girls" from the boys' bathroom.[114]

The schools' other justification for the bathroom rule—students' privacy interest in using the bathroom away from the opposite sex—is essentially a justification for maintaining sexed bathrooms writ large. That's because the schools think these challenges threaten their ability to maintain sex-segregated bathrooms; that is, they understand these cases to be about the schools' ability to segregate bathrooms by "biological sex."[115] Under the schools' theory, allowing these transgender plaintiffs to use the boys' bathroom would spell the end of sexed bathrooms because it would allow a "biological girl" to use the boys' bathroom.[116] If a "girl" can use the boys' bathroom, under the schools' logic, there would no longer be a basis upon which to separate bathrooms based on sex.

The fundamental disagreement between the schools and the plaintiffs, therefore, revolved around how the schools defined the plaintiffs' sex for bathrooms. For the schools, the plaintiffs are "girls" because their sex is dictated by their SAAB/genitals, and SAAB/genitals are the only way to determine someone's sex, not only for the purposes of bathrooms but seemingly for all purposes.[117] The plaintiffs' gender identity, appearance, and secondary sex characteristics are irrelevant to their sex, according to the schools.[118] For the plaintiffs, SAAB/genitals are not the only way to define sex, and, for transgender students like them, they are also the wrong way to define sex. The plaintiffs marshaled expert testimony and detailed narratives of their medical and social transitions to prove that their gender identity, and therefore their true sex, is M.[119]

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114. Initial Brief of Appellant at 31, *Adams*, 3 F.4th 1299 (No. 18-13592)*; see also Adams*, 3 F.4th at 1329 (11th Cir. 2021) (Pryor, J., dissenting) ("Indeed, the policy is a mirror image of its objective—it protects students from using the bathroom with the opposite sex by separating bathrooms on the basis of sex.").

115. Initial Brief of Appellant at 31, *Adams*, 3 F.4th 1299 (No. 18-13592); *see also* Reply Brief of Appellant at 18, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020) (No. 19-1952) (framing the issue as whether "separating boys and girls into different restrooms based on their physiology is [] sex-based discrimination that is prohibited by the Equal Protection Clause").

116. Initial Brief of Appellant at 31, *Adams*, 3 F.4th 1299 (No. 18-13592); *see also* Reply Brief of Appellant at 18, *Grimm*, 972 F.3d 586 (No. 19-1952).

117. *See* Reply Brief of Appellant at 18, *Grimm*, 972 F.3d 586 (No. 19-1952) ("The equal protection question surrounds Grimm's sex at birth . . . . The evidence in this case establishes that Grimm's birth sex is female. Grimm's choice of gender identity did not cause chromosomal or biological changes in his body.").

118. *See id.*, *see also* Initial Brief of Appellant at 53, *Grimm*, 972 F.3d 586 (No. 19-1952) ("Grimm's gender identification as a male does not alter the anatomical and physiological differences between Grimm and other male students, nor does it erase the anatomical and physiological differences between a male student who identifies as a female and other female students.").

119. *See, e.g.*, En Banc Brief of Appellee at 7–9, Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791 (11th Cir. 2022) (No. 18-13592) (describing the plaintiff's identity and his transition including details like: "Andrew's medical transition included carefully-monitored hormone therapy, and eventually a mastectomy in 2017 to create a typically masculine chest"). Adams's brief also includes numerous references to the expert witness testimony during the district court stage. *E.g.*, *id*. at 15 ("The experts testified that failing to recognize a transgender student's gender sends a message—both to the transgender student and others—that the transgender student is different from their peers and needs to

All three pro-trans decisions applied intermediate scrutiny to the plaintiffs' equal protection claims and held that the bathroom rules, as applied to the plaintiffs, were unconstitutional.[120] They also all agreed with the plaintiffs that these cases were not about the constitutionality of sexed bathroom writ large and instead were about the schools' ability to exclude the plaintiffs from the boys' bathroom.[121] In this sense, they understood that these cases were different from canonical cases.[122] However, they did not set up or analyze these claims in ways that cut to the heart of these cases.

As explained in Part I, the questions presented in sex-defining cases, such as these bathroom cases, differ from the questions in canonical cases.[123] In sex-defining cases, the relevant means by which the state is achieving its goal is the state's precise definition of sex.[124] Therefore, in the bathroom cases, the questions presented under intermediate scrutiny are (1) whether the schools' interests behind the bathroom rule (students' privacy interests in both shielding their bodies from the opposite sex in the bathroom and in using the bathroom away from the opposite sex) are sufficiently important and (2) whether the schools' definition of sex, as applied to the plaintiffs, substantially relates to those interests. But none of these decisions asked or answered these precise questions.[125] Instead, they relied on rationales that were based on idiosyncratic and easily fixable aspects of the bathroom policies or case-specific facts about

be isolated from them in restrooms, causing the transgender student to experience shame, and other harms as well.").

120. They all held that intermediate scrutiny applied to the plaintiffs' equal protection claims because the policies rest on a sex-based distinction. *See, e.g.*, *Grimm*, 972 F.3d at 608 ("We agree with the Seventh and now Eleventh Circuits that when a School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate, the policy necessarily rests on a sex classification.") (quoting *Whitaker* and citing the *Adams* district court opinion). Some courts justified intermediate scrutiny on additional grounds. *See, e.g.*, *id.* at 607 ("For the reasons that follow, we conclude that heightened scrutiny applies to Grimm's claim because the bathroom policy rests on sex-based classifications and because transgender people constitute at least a quasi-suspect class.").

121. *See Grimm*, 972 F.3d at 593 ("At the heart of this appeal is whether equal protection and Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender."); Adams v. Sch. Bd. of St. Johns Cnty., Fla., 3 F.4th 1299, 1304 (11th Cir. 2021) ("We conclude the School District's policy barring Mr. Adams from the boys' restroom violates the Constitution's guarantee of equal protection, because the School District assigns students to sex specific bathrooms in an arbitrary manner."); *Whitaker*, 858 F.3d at 1038–39 (framing Whitaker's argument as a "simple request [] to use the boys' restroom while at school").

122. These opinions explicitly state that their decisions have no bearing on the school's ability to classify students based on sex for bathrooms. *See e.g.*, *Adams*, 3 F.4th at 1308 ("To be clear, Mr. Adams does not challenge the existence of sex-segregated bathrooms and does not question the ubiquitous societal practice of separate bathrooms for men and women. Thus, this opinion needs not and does not address the larger concept of sex-segregated bathrooms."); *Whitaker,* 858 F.3d at 1055 ("Although the School District argues that implementing an inclusive policy will result in the demise of gender-segregated facilities in schools, the *amici* note that this has not been the case.").

123. *See supra* Part I.

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

125. *See generally Grimm,* 972 F.3d 586; *Adams,* 3 F.4th 1299; *Whitaker*, 858 F.3d 1034 (holding that the bathroom rule violated the plaintiffs' constitutional rights but for reasons unrelated to their SAAB/genitals).

the plaintiffs' bathroom conduct that might not be present in other cases. While each court framed its analysis slightly differently, there are two flawed lines of reasoning that run through the three decisions: (1) the schools' interests in bodily privacy were not advanced by excluding the plaintiffs from the boys' bathroom because the plaintiffs (or any other transgender student) did not violate anyone's bodily privacy in the bathroom; and (2) using the sex marker at the time of enrollment to determine bathroom access was arbitrary because it made transgender students' access to the bathroom contingent on whether they changed their sex marker pre- or post-enrollment. The following discussion addresses these two rationales in turn and explains their doctrinal and normative flaws.

1. Courts' Rationale 1: Improper Reliance on the Lack of Bodily Privacy Infringements

All three decisions shot down the schools' privacy justifications for their bathroom policies with the same basic rationale. The factual records in all three cases were devoid of evidence that the plaintiffs violated other students' bodily privacy in the bathroom.[126] Based on this lack of evidence, these courts reasoned that the bathroom policies' privacy justifications were either (1) merely conjectural and failed the important purpose prong of intermediate scrutiny, or (2) not advanced by excluding the plaintiffs from the boys' bathroom and failed the ends-means prong.[127] In other words, because these transgender students were not violating cisgender boys' bodily privacy by "sneaking a peek" at cisgender boys' genitals or exposed bodies while using the bathroom, the schools' privacy concerns were not sufficiently important to survive scrutiny and excluding these plaintiffs from the boys' bathroom did not affect student privacy. Sometimes, these courts bolstered this argument by noting the lack of evidence that *any* transgender student violated other students' privacy in the bathroom. For instance, the *Grimm* majority employed this reasoning in its ends-means analysis, writing:

> The Board does not present any evidence that a transgender student, let alone Grimm, is likely to be a peeping tom, rather than minding their own business like any other student. Put another way, the record demonstrates that the bodily privacy of cisgender boys using the boy's restrooms did not increase when Grimm was banned from those restrooms. Therefore, the Board's policy was not substantially related

126. *See Whitaker*, 858 F.3d at 1054 ("The School District has not produced any evidence that any students have ever complained about Ash's presence in the boys' restroom. Nor have they demonstrated that Ash's presence has actually caused an invasion of any other student's privacy."); *Grimm*, 972 F.3d at 603 (reciting the district court's finding that the Board's privacy argument was "based upon sheer conjecture and abstraction"); *Adams*, 3 F.4th at 1306 ("The School District also confirmed it was unaware of a single negative incident involving a transgender student using a restroom.").

127. *See Whitaker*, 858 F.3d at 1054; *Grimm*, 972 F.3d at 603; *Adams*, 3 F.4th at 1306.

to its purported goal.[128]

And the *Adams* panel opinion—albeit in dicta, responding to the dissent—invoked this same logic, stating that "the School District has never shown how its policy furthers [a privacy interest], as this record nowhere indicates that there has ever been any kind of 'exposure' . . . [And] nothing in the record suggests Mr. Adams or any *other transgender* student ever threatened another student's privacy."[129] The *Whitaker* decision also relied on the absence of complaints about the plaintiff using the boys' bathroom, highlighting "the practical reality of how [the plaintiff], as a transgender boy, uses the bathroom: by entering a stall and closing the door."[130] Therefore, because the plaintiff did not do anything in the bathroom that might put other boys' privacy at risk, the school had no privacy-related reason to exclude him.

The following discussion argues that this line of reasoning is problematic for at least three reasons: (1) it is unresponsive to the schools' privacy-based justifications for their bathroom rule and therefore leaves those justifications fully intact for future anti-trans courts and litigants to deploy; (2) it misidentifies the proper ends and means and creates a doctrinal flaw in these decisions; and (3) it leaves several important questions unanswered, leaving room for anti-trans courts to answer them in troubling ways.

a. This Rationale is Unresponsive to the Schools' Justifications

This "no evidence of bodily privacy violations" rationale is not entirely responsive to the schools' justifications behind their bathroom rules: it does not address the "privacy in using the bathroom away from the opposite sex" justification at all and it is only partially responsive to the "bodily privacy from the opposite sex" justification.

i. Schools' First Justification: Privacy in Using the Bathroom Away from the Opposite Sex

The schools' "privacy in using the bathroom away from the opposite sex" justification is unrelated to actual or potential bodily exposure. The schools

128. *Grimm*, 972 F.3d at 614.

129. *Adams*, 3 F.4th at 1313; Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791 (11th Cir. 2022) (en banc). The district court in *Adams* also used this to support its holding. As to the School Board's concern that a transgender boy could peek at other boys while using the urinals, the district court found that "this is not a real concern for several reasons." Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., Fla., 318 F. Supp. 3d 1293, 1314 (M.D. Fla. 2018). First, "Adams cannot use a urinal and always uses a stall." *Id.* Second, "there is no evidence that a transgender boy is more likely to be curious about another student's anatomy than any other boy" or that "transgender students might expose themselves to other students in the restroom." *Id.*

130. *Whitaker*, 858 F.3d at 1052. Relying on *Whitaker*, the decision in *A.C. v. Martinsville* invoked the same rationale. A.C. by M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 773 (7th Cir. 2023) (reasoning that allowing a transgender boy plaintiff to access the boy's facilities "does not implicate the interest in preventing bodily exposure, because there is no such exposure . . . There is no evidence that any students will be exposed to A.C. or vice versa.").

argued that this interest was implicated when the plaintiffs merely entered the bathroom because they are girls.[131] Under the schools' logic, therefore, the lack of bodily privacy violations is irrelevant: the plaintiffs invade other boys' privacy by their mere presence in the boys' bathroom.

The non-responsiveness of this "no evidence of bodily privacy violations" line of reasoning would not be a problem if these decisions explained why this privacy interest was either not sufficiently important or why excluding the plaintiffs from the boys' bathroom failed to advance this interest. But they did not.[132] Indeed, these courts agreed (or did not contest) that the schools have an important state interest in promoting student privacy interests through sex-segregated bathrooms.[133] This isn't surprising: the plaintiffs agreed with this claim too.[134] The point of disagreement between the schools and the plaintiffs was whether excluding the plaintiffs from the boys' bathroom based on their SAAB/genitals advances this interest. By ruling in favor of the plaintiffs, these courts implicitly sided with the plaintiffs on this question.[135] However, they provided only conclusory rationales rather than explaining why excluding the plaintiffs from the boys' bathroom did not advance the schools' opposite-sex privacy interest. The closest the courts came to providing a substantive answer on this point was merely stating that the plaintiffs are boys. Because the plaintiffs are boys, these courts reasoned, they are the same sex as cisgender boys, not a different sex.

For instance, the *Adams* court explained that its decision "'will not integrate the restrooms between the sexes,' because there is 'no evidence to suggest [Adams's] identity as a boy is any less consistent, persistent and insistent than any other boy.'"[136] But the court did not explain why gender identity (as opposed to SAAB/genitals) was dispositive to Adams's sex for bathroom purposes.[137] Instead, the court relied on the fact that a state agency allowed him to change the sex marker on his birth certificate to M, explaining "we cannot simply ignore the legal definition of sex the state has already provided us, as reflected in the official documentation of Mr. Adams's sex as male on his driver's license and birth certificate."[138] The *Grimm* court did the same thing. It rebutted the school's claim that Grimm's "biological sex" made him a girl for bathroom purposes by

131. *See, e.g.*, Brief of Appellant at 5, *Adams*, Fla., 3 F.4th 1299 (No. 18-13592) ("This practice contemplates that an expectation of privacy begins at the bathroom door and guarantees for students and parents that persons of different biological sexes will not share the bathroom.").

132. *See generally infra* Part II.A.1.

133. *See, e.g.*, Adams *ex rel*. Kasper v. Sch. Bd, of St. John Cnty., 968 F.3d 1286, 1297 (11th Cir. 2020) ("[W]e assume the government may promote its interest in protecting privacy by maintaining separate bathrooms for boys and girls or men and women. Mr. Adams, for his part, does not question the ubiquitous societal practice of separate bathrooms for men and women.").

134. *See id.*; *see also*, Eyer, *supra* note 77 at 50–51.

135. *See supra* note 120 and accompanying text.

136. Adams v. Sch. Bd. of St. Johns Cnty., Fla., 3 F.4th 1299, 1312 (11th Cir. 2021).

137. *See id.*

138. *Id*. at 1312–13.

pointing to all the ways in which Grimm was just like cisgender boys: his gender identity is "consistently, persistently, and insistently"[139] male, he "wear[s] boys' clothing;"[140] and holds himself out to his school community as a boy.[141]

By declaring that the plaintiffs' gender identity or their identity documents dictated their sex for bathroom purposes, without explaining why these indicators were relevant to the schools' privacy interests, the courts engaged in the same problematic reasoning as the schools.[142] Both offered different definitions of sex and concluded that their definition should dictate the plaintiffs' sex for bathroom purposes. But they did not explain why their definition substantially related to the schools' interests. The schools and the courts were talking past each other, both claiming that particular traits were the relevant traits to determine sex for bathrooms, but without explaining why.

Thus, neither this explanation ("the plaintiffs are boys") nor the "no evidence of bodily privacy violations" rationale responded to, or undercut, the schools' claim that excluding transgender boys from the boys' bathroom was necessary to achieve privacy from the opposite sex. Nor did these courts provide a substantive challenge to the schools' assumption that the plaintiffs are girls based on their SAAB/genitals. Therefore, even though the schools ultimately lost these cases, their argument and its underlying assumption went unrebutted.

ii. Schools' First Justification: Privacy in Using the Bathroom Away from the Opposite Sex

These decisions' "lack of bodily privacy violations" rationale is only slightly more responsive to the schools' other purported interest behind the bathroom rule: bodily privacy from the opposite sex. These courts are right that the absence of bodily privacy violations indicates that the schools' concerns about bodily privacy are conjectural.[143] But ensuring bodily privacy in the bathroom overall is *not* a complete or proper articulation of the schools' stated interest. Indeed, it would have been difficult for the schools to argue that they were concerned with bodily privacy in the bathroom. The schools facilitate, or at least do nothing to prevent, same-sex bodily exposure. Cisgender students are exposed to each other's bodies when they "change in the bathrooms" and "use undivided urinals," but the schools expressed no concern about this type of

139. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 596 (4th Cir. 2020) (internal quotations omitted).

140. *Id.* at 598.

141. *Id.* at 610.

142. By using the plaintiffs' appearance or related characteristics to determine their sex, but without explaining why those traits are relevant to bathrooms, pro-trans decisions can also reinforce problematic sex stereotypes. *See* Schoenbaum, *supra* note 41, at 23 (providing additional examples of pro-trans judges invoking similar rationales and critiquing them for reinforcing "the very same stereotypes of masculinity and femininity that the doctrine is supposed to eradicate").

143. *See supra* note 126 (quoting the courts' discussion of the conjectural nature of the schools' concerns).

bodily exposure. [144] Cisgender students' bodily exposure was not just something the schools conceded was happening under their watch; they used the fact of same-sex cisgender bodily exposure as a reason why transgender students should not be able to use the bathroom.[145]

The schools' interest is bodily privacy from *the opposite sex* in the bathroom, not bodily privacy in the bathrooms.[146] According to the schools, the plaintiffs are girls because they were AFAB and have vaginas; therefore, their mere presence in the boys' bathroom creates a risk of opposite-sex bodily exposure.[147] Even if the plaintiffs behave perfectly in the bathroom, eventually they may inadvertently expose their bodies or view a cisgender boy's exposed body. For the schools, it is only a matter of time before their concerns are actualized.[148] Thus, these courts' reliance on the plaintiffs' good bathroom behavior does not fully address the schools' "bodily privacy from the opposite-sex" justification. Not dismantling this argument leaves it mostly intact for anti-trans courts and litigants to invoke in future cases.

b. This Rationale Confuses the Ends-Means Analysis

In addition to being unresponsive to the schools' arguments, this line of reasoning is also doctrinally flawed because it confuses the ends-means analysis of intermediate scrutiny. It treats the schools' end as bodily privacy in the bathroom and the means as banning the plaintiffs from the boys' bathroom. That is, because banning the plaintiffs did not affect bodily privacy, the means did not substantially relate to the ends.[149] But these are not the relevant ends or the means: the schools' end is preventing opposite sex bodily exposure, not

144. *See* Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 806 (11th Cir. 2022) (en banc).

145. *See, e.g*, *id*. (explaining that students are able to see each other's unclothed bodies in the bathroom and stating that "students' use of the sex-separated bathroom is not confined to individual stalls, e.g., students change in the bathrooms and, in the male bathrooms, use undivided urinals").

146. The en banc *Adams* court recognized as much, describing the privacy interests in the case as "using the bathroom away from the opposite sex and shielding one's body from the opposite sex, *not using the bathroom in privacy*." *Id.* (emphasis added).

147. Petition for a Writ of Certiorari at 25, Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ. v. Whitaker *ex rel.* Whitaker, 138 S. Ct. 1260 (2018) (No. 17-301) ("Allowing a transgender student to use the bathroom that does not correspond with the sex on that student's birth certificate threatens the privacy interests of other students."); *see* Reply Brief of Appellant the School Board of St. Johns County at 10–12, Adams v. Sch. Bd. of St. Johns Cnty., 3 F.4th 1299 (11th Cir. 2021) (No. 18-13592); Reply Brief of Appellant at 19, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020) (No. 19-1952). Moreover, the schools claim that installing privacy barriers between the urinals would not alleviate their bodily privacy concerns but could not articulate what exactly their remaining concerns were. *See Grimm*, 972 F.3d at 603 (explaining that the school board's witness could not explain why "expanded stalls and urinal dividers could not fully address [the school's privacy concerns]").

148. *See, e.g.*, Brief of Appellant at 19, *Grimm*, 972 F.3d 586 (No. 19-1952) ("[T]he School Board does not have to wait for another student's constitutional privacy rights to be actually violated before it takes those privacy rights into consideration in enacting a policy to protect all students' privacy rights.").

149. *See generally Grimm,* 972 F.3d 586; *Adams,* 3 F.4th 1299; *Whitaker*, 858 F.3d 1034 (discussing the "peeping tom" issue as applied to plaintiff Grimm).

preventing bodily exposure in general. And the means is keeping a "biological girl" out of the boys' bathroom.[150] In other words, these decisions analyzed the fit between excluding the plaintiffs from the boys' bathroom and bodily privacy instead of the fit between excluding the plaintiffs from the boy's bathroom and bodily privacy *from the opposite sex* in the bathroom.

Anti-trans courts have already used this doctrinal flaw to discount these courts' ultimately correct conclusions. For instance, dissenting in the panel decision in *Adams*, Judge Pryor wrote: "[E]vidence that Adams or other transgender students 'harass[ed] or peeped at' other students in the bathroom . . . would not justify a sex-based classification. If voyeurism is equally problematic whether it occurs between children of the same or different sexes, then separating bathrooms by sex would not advance any interest in combatting voyeurism."[151] Judge Pryor's dissent has many problems of its own, but this part of his argument is correct. Voyeurism has nothing to do with sex.[152]

c. This Rationale Leaves Critical Questions Unanswered

A third problem with this rationale is what it leaves unsaid. When these courts dismissed the schools' interest in bodily privacy from the opposite sex by asserting that there are no bodily privacy violations, they left unanswered several important questions, which allows future courts to provide dangerous answers. First, these decisions are silent about the durability of their reasoning in cases that *do* have allegations of bodily privacy violations involving transgender plaintiffs.[153] Concluding that the plaintiffs' good bathroom behavior was part of the reason the school could not ban them from the boys' bathroom suggests that a school may be able to exclude a badly behaved transgender plaintiff to protect bodily privacy.[154] The constitutionality of the bathroom policy should not depend on a plaintiff's good or bad bathroom behavior, but these decisions did not preclude this possibility. And their reliance on the good behavior of other transgender students, not just the plaintiffs, amplifies this risk.[155] If a single transgender student violates someone's bodily privacy, does this mean that all transgender students' rights are at risk? In light of this uncertainty, transgender students may need to behave better than their cisgender peers in the bathroom to ensure that their rights are secure. They may need to be more polite, shield their

150. *See* Initial Brief of Appellant at 22, *Adams*, 3 F.4th 1299 (No. 18-13592) (discussing the school's claim that plaintiff Adams would violate the privacy of "biological boys").

151. *Adams*, 3 F.4th at 1334.

152. Jessica Clarke makes a related point. *See* Clarke, *supra* note 22, at 1737 ("Empirical arguments of this sort are not persuasive to jurists who take it as normatively unproblematic, if not mandated by long-accepted social practice, for a school to regard transgender boys as girls when it comes to restrooms.").

153. *See supra* note 126 and accompanying text.

154. *See id.*

155. The courts repeatedly noted that there had been no instances of privacy violations in general, not just from the plaintiffs. *See id.*

bodies from exposure, and ensure their gaze never wanders onto the body of another student to secure their place in the bathroom. Cisgender students are exempt from such careful self-policing.

Moreover, if a transgender plaintiff did violate a cisgender student's bodily privacy, these courts' objection to the conjectural nature of the schools' privacy interest would disappear. The schools' concerns about bodily privacy would no longer be hypothetical. But would their concerns about bodily privacy from the *opposite sex* also no longer be hypothetical? If not, cisgender boys are sharing the bathroom with the opposite sex when transgender boys like the plaintiffs use the boys' bathroom. What follows, then, is that transgender boys like the plaintiffs are not the same sex as cisgender boys and the state can assign them to the bathroom based on their SAAB/genitals. This hole in these courts' reasoning, combined with their failure to rebut the schools' claim that the plaintiffs are girls based on their SAAB/genitals, leaves a clear path for anti-trans courts and litigants to continue invoking their flawed arguments without needing to distinguish these cases. And as Part II.B shows, the *Adams* en banc court did exactly that.[156]

Another question this line of reasoning raises but does not answer is whether the plaintiffs' good bathroom behavior was related to their sex. By relying on the absence of privacy violations committed by the plaintiffs, these courts suggested (or at least did not rebut) some association between good behavior in the bathroom and transgender identity. Of course, these transgender students' good behavior in the bathroom had nothing to do with their "sex" and therefore could not have been the basis for their ability to use the boys' bathroom.[157] But failing to make this point explicit runs the risk of implicitly tying bathroom conduct to "sex." It is also the mirror image of a common anti-trans argument that transgender people will behave like predators in the bathroom because of their sex or transgender status.[158] When these courts linked good bathroom behavior to transgender identity, they might have legitimized the foundations of this anti-trans argument. Assuming that someone's behavior in the bathroom is related to their sex, generally, or their transgender identity, specifically, is an impermissible sex stereotype.[159]

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156. *See infra* notes 192–98 and accompanying text.

157. Some courts do make this difference clear. *See*, *e.g.*, Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ., 858 F.3d 1034, 1052 (7th Cir. 2017) ("Transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions. Or for that matter, any other student who uses the bathroom at the same time.").

158. *See* George, *supra* note 98 at 556–57.

159. *See* Glenn v. Brumby, 663 F.3d 1312, 1318 (11th Cir. 2011) ("All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype."); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982) (holding that a gender-based classification reflecting "archaic and stereotypic notions . . . is illegitimate"); Frontiero v. Richardson, 411 U.S. 677, 684–85 (1973).

2. Courts' Rationale 2: Overreliance on the Policy's Use of Sex Markers

A second common rationale these decisions employed relates to how the bathroom rules determine "biological sex." These rules assign students to bathrooms based on their "biological sex." "Biological sex" is determined by the sex marker on students' birth certificates at the time they enrolled in the school.[160] Students' sex markers at the time of their enrollment are not always perfect proxies for "biological sex" (SAAB/genitals), particularly when it comes to transgender students. That's because in many states, people under eighteen can change the sex markers on their birth certificates and other identity documents without modifying their "biological sex."[161] Therefore, if a transgender boy student changed the sex marker on his birth certificate from F to M before enrolling in the school, his "biological sex" at the time of enrollment would be M and he could use the boys' bathroom. But if he changed his sex marker to M after enrolling, his "biological sex" would remain F and he could not use the boys' bathroom. [162] Thus, these policies are not 100 percent effective in keeping people AFAB or with vaginas out of the boys' bathroom because transgender boys who changed their sex marker prior to enrolling can use the boys' bathroom.

All three decisions took issue with this aspect of the bathroom policies. They reasoned that because transgender boys' ability to use the boys' bathroom is based on whether they changed their sex marker pre- or post-enrollment, the policies were either arbitrary or failed to advance the schools' goal of keeping "biological girls" out of the boys' bathroom. Of the three panel opinions, *Adams* relied most heavily on this line of reasoning.[163] The plaintiff, Andrew Adams,

160. *See, e.g.*, Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 797 (11th Cir. 2022) (en banc) ("For purposes of this policy, the School Board distinguishes between boys and girls on the basis of biological sex—which the School Board determines by reference to various documents, including birth certificates, that students submit when they first enroll in the School District. The School Board does not accept updates to students' enrollment documents to conform with their gender identities."); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 608 (4th Cir. 2020) ("And, although the Board did not define 'biological gender,' it has defended its policy by taking the position that it will rely on the sex marker on the student's birth certificate.").

161. Some states do require bottom surgery for sex marker changes. *See, e.g.*, ALA. CODE § 22-9A-19 (West 2024) (requiring complete sex reassignment surgery to change the sex marker on a birth certificate).

162. These policies do not allow students to change their sex after enrollment for bathroom purposes, even when students have their sex markers changed to reflect their gender identity. *See, e.g.*, *Grimm*, 972 F.3d at 601 ("Grimm and his mother . . . asked that his school records be updated to reflect his gender as male . . . . In January 2017, through legal counsel, the Board informed Grimm in a letter that it declined to update his records.").

163. Indeed, the *Adams* court framed the entire equal protection question around the policy's use of sex markers on enrollment documents, stating, "[t]he issue before us is whether the challenged policy passes intermediate scrutiny in assigning students to bathrooms based solely on the documents the School District receives at the time of enrollment." Adams v. Sch. Bd. of St. Johns Cnty., Fla., 3 F.4th 1299, 1308 (11th Cir. 2021). To be sure, they may have framed the issue this narrowly in an attempt to avoid en banc review, considering their original decision was much broader in its framing and reasoning.

enrolled before changing his sex marker to M, but if he had enrolled after changing his sex marker to M, he would not have been barred from the boys' bathroom.[164] The court held that this differential treatment based on the time of enrollment made the rule unconstitutionally arbitrary because it "target[ed] some transgender students for bathroom restrictions but not others."[165] According to the court, the policy was both arbitrary and failed to successfully exclude all "biological girls" from the boys' bathroom because students who were AFAB or had a vagina could use the boys' bathroom if they enrolled after a sex-marker change.[166] Like the *Adams* court, *Grimm*[167] and *Whitaker*[168] also deemed the policies ineffective or arbitrary based on the policies' differential treatment of transgender students.

While these decisions are right that sex markers are not perfect proxies for "biological sex," this rationale is (1) doctrinally flawed, and (2) suggests that fixing this proxy would render the bathroom rule constitutional. First, the relevant question of fit is not between the sex markers on students' identity documents and the students' "biological sex." The relevant fit is between the goals of the bathroom rules and the means the rules employ to achieve those goals. The goals of these bathroom rules relate to privacy away from another sex in the bathroom—not accurately determining "biological sex." And the means the rules use to achieve those ends is defining sex based on SAAB/genitals—not using sex markers on documents. Thus, the fit courts should have examined was

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Compare Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1296–1304 (11th Cir. 2020), *with Adams*, 3 F.4th at 1308.

164. *Adams*, 3 F.4th at 1306.

165. *Id.* at 1309.

166. *Id.* at 1316 ("[T]he School District repeatedly conceded that its policy would allow a transgender male student to use the boys' bathroom as long as he provided documents at the time of enrollment that reflected his sex as male.").

167. *Grimm*, 972 F.3d at 615 (reasoning that the policy singled out Grimm for discrimination because it applied to Grimm but not to "other students, such as students who had fully transitioned but had not yet changed their sex on their birth certificate" or "students who, for whatever reason, do not have genitalia that match the binary sex listed on their birth certificate"). The concurrence in *Grimm* also reasoned that the policy was both inconsistent and arbitrary for this same reason. *Id.* at 622 (Wynn, J., concurring) ("[B]y focusing on an individual's birth certificate, the Board ensures the policy lacks a basic consistency: it fails to treat *even transgender* students alike. Specifically, the policy targets transgender students whose birth certificates do not match their outward physical characteristics while ignoring those transgender students whose birth certificates are consistent with their outward physiology.") (emphasis added); *id.* ("If, unlike Grimm, this hypothetical student had obtained a birth certificate identifying him as male prior to enrolling at Gloucester High, then that student would have been able to use the boys' restrooms under the Board's current interpretation of its own policy. It is arbitrary that this hypothetical transgender student would not be subject to the policy, whereas Grimm would.").

168. Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1054 (7th Cir. 2017) (calling the policy "arbitrary" because it treated transgender students differently based on whether they enrolled before or after changing their sex markers). Like in *Grimm* and *Adams*, the *Whitaker* court reasoned that because a student AFAB could use the boys' bathroom if they amended their birth certificate or passport before enrolling, sex markers on these documents were not a perfect proxy for what the school board referred to as "biological sex." *Id.*

the one between the schools' interest in privacy away from the opposite sex and the plaintiff's SAAB/genitals.[169]

This doctrinal misstep on the ends-means analysis opens these pro-trans courts to doctrinal critiques from anti-trans courts who have used this flaw to their advantage. The anti-trans *Adams* en banc court cited this aspect of the *Adams* panel's decision as one reason to reverse. Specifically, it stated that the panel improperly framed Adams's claim "as a challenge to School Board's enrollment documents policy—i.e., the means by which the School Board determines biological sex upon a student's entrance into the School District," rather than addressing Adams's "challenge to the School Board's bathroom policy—the policy separating the male and female bathrooms by biological sex."[170]

Beyond the doctrinal problem, another flaw with these courts' objection to the imperfect proxy between "biological sex" and sex markers is that the schools can easily fix this problem by using students' original birth certificates to determine SAAB/genitals instead of amended birth certificates. While not necessarily perfect indicators of "biological sex," original birth certificates are better proxies for SAAB/genitals than amended birth certificates.[171] Using original birth certificates would solve one of these opinions' main objections to the policies: that they are arbitrary because they treat transgender students differently depending on whether they enrolled before or after changing their sex marker.[172] Transgender plaintiffs would still be barred from the boys' bathroom under such a bathroom policy, but would such a policy be constitutional? These decisions are silent on this point. All of sudden, with a slight change in the policy, a major piece of these opinions' equal protection holding falls away.[173] But nothing changes for the plaintiffs and the other transgender students governed by these policies—they still can't use the boys' bathroom. These opinions, or at least this aspect of these pro-trans opinions, will be of little value to future plaintiffs challenging similar rules that use original birth certificates instead of amended ones. Rather, the state will be able to use this reasoning to its advantage

169. *See generally* United States v. Virginia (VMI), 518 U.S. 515 (1996) (holding that the relevant proxy is between the ends and the means).

170. Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 799 n.2 (11th Cir. 2022). Pryor's dissent in the panel decision also makes this argument: "Only by framing the *means* of ascertaining students' sex [SAAB] as being the *goal* of the schools' separation of bathrooms does the majority turn the schools' reliance on enrollment papers into a sex-based classification to which intermediate scrutiny could apply." *Adams*, 3 F.4th at 1325 (Pryor, J., dissenting).

171. This is because they would reflect the sex the doctor assigned a baby at birth, before the person had an opportunity to change their sex marker.

172. *See supra* notes 169–71 and accompanying text.

173. Indeed, drafters of trans-exclusionary sex-defining laws are already using original birth certificates to determine "sex." *See, e.g.*, IND. CODE ANN. § 20-33-13-4 (defining sex "based on a student's biological sex *at birth*) (emphasis added); KY. REV. STAT. ANN. § 164.2813(2) (West 2023) (defining sex-based "on the student's original, unedited birth certificate"); *see also* Clarke, *supra* note 9, at 1848 (providing several examples that use original birth certificates).

by arguing that this constitutionally problematic aspect of the policy has been remedied and therefore the policy is constitutional.

3. Possible Explanations for These Rationales

These pro-trans decisions are ultimately correct, but they are of limited use in future sex-defining equal protection cases. They did not explain why excluding the plaintiffs from the boys' bathroom *based on their SAAB/genitals* failed to advance the schools' two privacy-related justifications for their policies. Nor did they confront or rebut the foundational assumption underlying the schools' arguments: that SAAB/genitals dictate the plaintiff's sex for bathroom purposes. Moreover, their reasoning does not apply to cases with allegations that a transgender plaintiff violated someone's bodily privacy in the bathroom or to cases where "biological sex" is determined using an original birth certificate rather than an amended one. Knowing with absolute certainty why these courts are making these mistakes is impossible, but I offer some explanations below.

a. The Ends-Means Analysis Differs from the Canon

Both the "no evidence of privacy infringement" rationale and the "inconsistent sex marker rationale" can be understood as ends-means errors. The "no evidence of privacy infringement" rationale treats bodily privacy as the schools' end and excluding students who violate their peers' bodily privacy as the means. But the schools' end is bodily privacy from the *opposite sex*, not overall bodily privacy.[174] And the "inconsistent sex marker" rationale misunderstands the schools' ends as determining "biological sex" and the means as sex markers.

One possible explanation for the courts' mistakes stems from the fact that the sex-defining cases require a different ends-means analysis than the canon.[175] The means in sex-defining cases is the definition of sex, not the differential treatment of men and women (like in the canon).[176] So, in sex-defining cases, identifying exactly how the state is defining sex and determining whether the definition advances the state's interests are crucial. These are new tasks for courts, and the canon does not provide courts with explicit instructions on how to answer these questions, which might have contributed to the pro-trans courts' errors.[177]

174. *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 614 (4th Cir. 2020), *as amended* (Aug. 28, 2020) (discussing the school's opposite sex bodily privacy rationale in *Adams*). These schools are not achieving their privacy goals by excluding students from the bathroom for improper conduct; they are achieving their privacy goals by defining sex as SAAB/genitals. The schools banned the plaintiffs from the boys' bathroom because they are "girls" under the bathroom policy, not because they are being "peeping toms."

175. *See supra* notes 71–74 and accompanying text.

176. *See id.*

177. As discussed in Part III, an additional barrier might relate to courts' essentialist understandings of sex—that "sex" has one consistent definition that exists *a priori* and does not change

b. Schools Obfuscating Their Definition of "Sex"

The canon's lack of direct guidance on the ends-means prong might not be the only reason these opinions' ends-means analyses are flawed. Because the relevant means in sex-defining cases is the definition of sex, identifying the exact definition of sex is crucial to determining the constitutionality of the rules. But the schools' attorneys made this difficult for these courts by repeatedly obscuring their rules' exact definition of sex.[178] The schools used terms like "biological sex" or "biological gender" to define "sex," but did not provide additional specificity.[179] Even when pressed by courts, the schools' attorneys resisted requests to clarify their definition of "biological sex." In lieu of precision, they sometimes said that "biological sex" meant the sex markers on the students' identity documents. But, as explained, sex markers are not the school's definition of "biological sex": sex markers are a proxy for whatever "biological sex" means. Without a specific definition of sex, the courts could not determine whether that definition of sex substantially relates to the schools' privacy goals.

c. As-Applied Nature of the Bathroom Cases

The as-applied nature of these bathroom cases may also have something to do with these decisions' weaknesses. Courts do not have much practice with as-applied equal protection challenges. The canonical cases were facial challenges,[180] as are most other equal protection cases.[181] Thus, the pro-trans bathroom courts might have misunderstood how the as-applied versus facial distinction affected the equal protection analysis due to their lack of familiarity with as-applied challenges in sex discrimination cases. With as-applied challenges, courts focus on the facts of the specific case and ask whether the state violated the rights of the specific plaintiffs under specific factual circumstances: for example, whether a law survives constitutional muster when applied to a particular religious group.[182] But the underlying legal test or issues presented do not change.[183] What changes are the scope of the inquiry and the remedy. The facial version of the plaintiffs' claim in the bathroom cases would be whether assigning *all students* to bathrooms based on their SAAB/genitals substantially

based on legal context. Conscious or unconscious commitments to sex essentialism prevent courts from determining whether a certain definition of sex relates to a law's goals.

178. *See Grimm*, 972 F.3d at 593 (referencing the attorneys' hesitancy to define sex during the *Adams* oral argument); *see also supra* notes 101–03 and accompanying text.

179. *See infra* Part III.A for a discussion of the need for specificity.

180. See *supra* Part I (discussing the canonical cases).

181. *See, e.g.*, David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1381–82 (2005) (explaining that there is "facial review in almost all equal protection challenges").

182. As-applied challenges are most often brought in the religion context. *See, e.g.*, Fulton v. City of Philadelphia, 593 U.S. 522, 542 (2021) (holding that a city burdened a foster care agency's religious exercise by compelling it to certify same-sex couples as foster parents).

183. *See* Bucklew v. Precythe, 139 S. Ct. 1112, 1127 (2019) ("[C]lassifying a lawsuit as facial or as-applied . . . does not speak at all to the substantive rule of law necessary to establish a constitutional violation.").

relates to the schools' privacy interests. The as-applied version asks whether excluding *the plaintiffs* based on their SAAB/genitals substantially relates to the schools' privacy interests.

These pro-trans decisions might have thought that the as-applied nature of these challenges justified their reliance on specific factual circumstances—namely, the plaintiffs' good bathroom behavior and the bathroom rules' use of sex markers.[184] However, the as-applied nature of these cases did not give these courts a green light to rely on any of the specific facts in the record. The specific facts upon which courts rely in as-applied challenges still must relate to the central legal question presented in these cases. But the facts upon which the pro-trans decisions relied (no bad behavior and the fact that sex markers are an imperfect proxy for SAAB/genitals) were not why the plaintiffs were excluded from the boys' bathroom. They were excluded because they were AFAB or had vaginas.

d. Preserving a Justification for Sexed Bathrooms

Anti-trans courts and litigants equate these courts' rulings in favor of the plaintiffs with the elimination of sexed bathrooms altogether, painting these decisions as radical departures from deeply entrenched social norms.[185] Perhaps these courts invoked these two fact-specific, tangential rationales instead of addressing the core issues in these cases because they did not know how to do so without adding fuel to these anti-trans accusations. In other words, these courts may have been unsure how to conclude that the school could not exclude these plaintiffs from the boys' bathroom based on their SAAB/genitals in a way that preserved the school's ability to exclude cisgender boys from the girls' bathroom (or vice versa). If the school could not exclude transgender boys from the boys' bathroom because they have vaginas or because they were AFAB, then why can the school exclude cisgender girls, who also were AFAB and have vaginas? Maybe these courts thought that answering the core question in these cases (whether excluding the plaintiffs based on the SAAB/genitals advances privacy) required them to answer a question they did not know how to answer (why the school could, nevertheless, continue to exclude cisgender girls from the boys' bathroom).

If these courts were under this impression, their avoidance of the core issues in these cases makes perfect sense. But this impression is false for two reasons. First, it fails to fully appreciate how the as-applied nature of these challenges

184. *See supra* Part II.A.

185. For example, Judge Pryor, dissenting in the *Adams* panel decision, accused the majority's reasoning of "failing to acknowledge any sex-specific privacy interest" and requiring an impossible "justification for sex-separated bathrooms that does not involve sex." Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1334 (11th Cir. 2020) (Pryor, J., dissenting); Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 817 (11th Cir. 2022) (en banc) (asserting that a ruling in favor of the Plaintiff would "provide[] ample support for subsequent litigants to transform schools' living facilities, locker rooms, showers, and sports teams into sex-neutral areas and activities").

limits the questions these courts must answer. These challenges have nothing to do with how the schools assign *cisgender* students to bathrooms. These plaintiffs have no objection to the schools' definition of sex when applied to cisgender students, only when applied to transgender students.[186] Courts can conclude that the school cannot ban transgender boys from the boys' bathroom without saying anything about cisgender students. Second, a decision that the school cannot define sex based on SAAB/genitals, as applied to transgender students or all students, does not mean that the school cannot have sexed bathrooms. SAAB/genitals are not the only way to determine sex for bathrooms. Part III explains how courts can do this, but for now, the point is that pro-trans courts' errors might stem from wanting to avoid accusations that their decisions ban sex-segregated bathrooms writ large.[187]

B. The En Banc Decision in Adams

Regardless of why these courts did not directly answer the questions at the heart of these cases, their failure to do so made it easy for the *Adams* en banc court to reverse the panel's decision and rule in favor of the school.[188] Neither the *Adams* panel nor the other two cases directly undermined the assumptions at the core of the schools' argument: (1) that SAAB/genitals determine sex, (2) that the plaintiffs are therefore "girls," and (3) that letting the plaintiffs use boys' bathroom means that cisgender boys would be forced to share the bathroom with "girls."[189] The *Adams* en banc court readily adopted these same assumptions, regurgitated the schools' arguments, and transformed these arguments into law, without needing to contend with counter-analyses from the pro-trans decisions.

First, the *Adams* en banc court, like the schools, treated Adams' equal protection challenge as one to the constitutionality of separating bathrooms based on "biological sex."[190] The court found no meaningful difference between an as-applied challenge to the bathroom rule's definition of sex and a challenge to the existence of sexed bathrooms.[191] These two claims are conceptually distinct. The court was only able to equate them because it made the same assumptions about the meaning of sex that the schools did: that sex means SAAB in all legal contexts and as applied to every person.[192] For the court and the

186. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593 (4th Cir. 2020); *Adams*, 3 F.4th at 1307; Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017); *see also supra* note 108 (discussing how this argument begs the question of how to distinguish between cisgender and transgender students).

187. *See supra* note 188 and accompanying text.

188. *Adams*, 57 F.4th at 808.

189. *See supra* Part II.A.

190. *Adams*, 57 F.4th at 808 ("Simply put, and contrary to the dissent's claims, this is a case about the constitutionality and legality of separating bathrooms by biological sex because it involves an individual of one sex seeking access to the bathrooms reserved for those of the opposite sex.").

191. *Id.* at 800 n.3.

192. *Id.* at 814 (asserting that sex means biological sex for both transgender and cisgender students).

schools, a decision in favor of Adams is the same as a decision ending sexed bathrooms because "sex" *is* SAAB. Rather than explaining why SAAB, and specifically, Adams' SAAB, should determine sex for bathroom purposes, the court dismissed any possibility that Adams' SAAB might not be dispositive of his sex and summarily concluded that his gender identity, or any other aspect of his sex, was irrelevant.[193] Thus, not only did the court's misconstrual of the plaintiff's claim improperly turn this case into one that fits neatly within the canon, but it also answered the critical question in this case—whether SAAB should determine Adams' sex for bathroom purposes—without any explanation or support.[194]

Reframing Adams's claim as one that challenges sexed bathrooms, as opposed to the definition of sex, helped the court obscure the flaws in its analysis. By contorting the canonical cases to appear as if they directly applied to Adams's claims, the court could characterize its conclusion as "obvious": that the school's justifications for the bathroom rule were important and that excluding "biological girls" from the boys' bathroom was "clearly" related to those justifications.[195] This outcome is neither obvious nor correct, for the reasons explained in Part III.C. But in reaching this conclusion, the *Adams* court did not have to work very hard to brush aside the three conflicting court of appeals decisions.[196] Future anti-trans courts and litigants, now armed with a favorable en banc decision, will continue to make the same flawed arguments. And until a pro-trans decision confronts and rebuts these arguments, they will continue to characterize their conclusions as "obvious" applications of the canon.

III.
CONTEXTUAL SEX AND SEX-DEFINING LAWS

This Part explains how a contextual approach to sex can help produce doctrinally and normatively sound decisions in sex-defining cases. Part III.A introduces and explains the idea of contextual sex and then discusses how a contextual approach flows directly from existing equal protection doctrine. Part III.B explains how such an approach provides an antidote to the flaws in the pro-trans decisions discussed in Part II. Part III.C applies a contextual approach to a bathroom case like *Grimm*, *Adams*, or *Whitaker*: an as-applied challenge to a bathroom rule that defines sex based on SAAB/genitals.

193. *Id.* ("Adams's gender identity is thus not dispositive for our adjudication of Adams's equal protection claim.").

194. *See id.* at 812–14.

195. *Id*. at 804–05 (noting that "using the bathroom away from the opposite sex . . . is *obviously* an important governmental objective" and that the bathroom rule "is *clearly* related to—indeed, is almost a mirror of—its objective") (emphasis added).

196. The en banc majority did not even cite the *Grimm* or *Whitaker* majority opinions in its equal protection analysis. *See id*. at 800–11 (equal protection analysis).

A. Contextual Sex

1. Contextual Sex in General

A contextual approach to identity means that legal identity determinations are, or should be, driven by the goals or functions of the relevant law. Scholars have used the concept of contextual identity to both describe how some areas of law already treat identity[197] and how law should treat identity.[198] The literature on contextual sex has become significantly more robust over the last decade (although these scholars do not always use the language of "contextual sex").[199] Professor Jessica Clarke, a leading voice in the area, describes a contextual approach to sex as one that resists universal definitions of sex and gender and instead defines them "with attention to each legal context."[200] In other words, a contextual approach to sex identity aligns the law's definition or deployment of "sex" with the purpose of the law at issue. Under this approach, sex has no pre-legal meaning that can be directly imported into all legal contexts.[201] Rather, the meaning of sex depends on why the law is using sex in the first place. Whether a law should define sex by gender identity, SAAB, hormone levels, genitals, something else, or nothing at all depends on the purpose of the law.[202] This approach, therefore, understands sex as capable of being disaggregated into what this Article calls "models."[203] Four popular models of sex are shown below.

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197. As many scholars have noted, contextual approaches to identity have long been used in law, though not always explicitly and not always to advance desirable goals. HANEY LÓPEZ, *supra* note 49, at 7, 78 (describing how legal determinations of race shifted to uphold white supremacy); *see also* Gross, *supra* note 49, at 120–23 (examining the racial determination cases in the nineteenth century); Sonia K. Katyal & Jessica Y. Jung, *The Gender Panopticon: AI, Gender, and Design Justice*, 68 UCLA L. REV. 692, 707 (2021) (documenting how legal and non-legal actors employ AI technologies to determine sex identity); CURRAH, *supra* note 48, at 15 (describing how definitions of sex change based on the state's goals, which are not always explicit or normatively desirable).

198. Macfarlane, *supra* note 46, at 59 (arguing that disability determinations should be driven by the purpose of the Americans with Disabilities Act); *c.f.* Sudeall, *supra* note 43, at 1609–11 (arguing that equal protection doctrine should abandon identity as determinative of the level of scrutiny courts apply in favor of an approach that better serves the purposes and values of equal protection law).

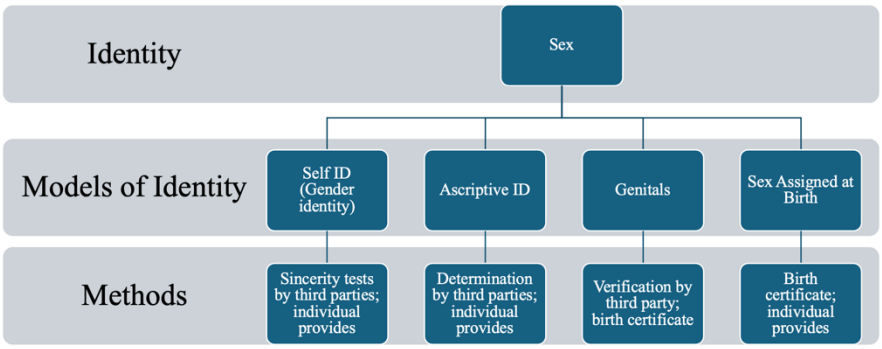
199. Professor Clarke has advocated for a "contextual approach to debates over sex and gender regulation" as applied to non-binary gender identity. Clarke, *supra* note 16, at 933; *see also* Davis, *supra* note 44, at 17 (arguing that whether institutions should employ sex classifications depends on whether the sex classification bears a rational relationship to a legitimate policy goal). For a contextual approach to sex in biomedical research, *see* Sarah S. Richardson, *Sex Contextualism*, 14 PHILOSOPHY, THEORY, AND PRACTICE IN BIOLOGY 1 (2022).

200. Clarke, *supra* note 16, at 933.

201. *See id*. at 934.

202. *Id.* at 936 ("Whether sex or gender should be defined based on genetics, hormones, morphology, physiology, psychology, elective choice, documentary evidence such as birth certificates, public perceptions, something else, or not at all . . . may [depend on whether] the law's purpose is to forbid discrimination, express respect for a person's identity, ensure accurate medical records, create fair divisions in sporting events, provide affirmative action for people disadvantaged by male dominance, or some mix of these goals.").

203. This Article is not the first to disaggregate sex in this way. *See, e.g.*, Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 747, 756 (2015) (disaggregating multiple identity categories, including sex, into three different models: ascriptive, elective, and formal); CURRAH, *supra* note 48, at



Sex can be understood as someone's gender identity, i.e., their self-identification. Ascribed sex is the sex others assign to someone based on what the observer knows, or thinks they know, about that person's sex.[204] A genital-based model of sex determines sex based on the person's genitals. [205] Sex assigned at birth (SAAB) is the sex medical professionals assign to babies when they are born, typically based on what the baby's genitals look like.[206]

These models of sex identity are illustrative, not exhaustive; other common models of sex include hormones,[207] internal reproductive organs, and chromosomes. Moreover, different models of sex can overlap and can be co-constitutive. For instance, a person may identify as a woman publicly (self-identification) which, in turn, affects how third parties perceive their sex (ascriptive identity).

Different models of sex may or may not align within a particular individual. Transgender identity is often conceptualized as a misalignment of SAAB and

38–39 (delineating different conceptions of "sex" held by different ideological positions (SAAB, gender identity, genitals, etc.)).

204. Other scholars have discussed ascribed sex at length, though not always using this terminology. *See, e.g.*, SUZANNE J. KESSLER & WENDY MCKENNA, GENDER: AN ETHNOMETHODOLOGICAL APPROACH 153 (Univ. of Chi. Press ed., 1978) (describing the concept of "cultural genitals" as the genitals ascribed to someone based on appearance and other gendered cues). Ascribed identity has been examined by other scholars as well. *See* Clarke, *supra* note 207, at 897; Lane-Steele, *supra* note 34, at 276. Disaggregating anatomical aspects of sex from gender identity is not a new idea. *See, e.g*, Robert Stoller, *A Contribution to the Study of Gender Identity*, 45 INT'L J. PSYCHOANALYSIS 220, 220 (1964) (describing gender identity as a separate concept from anatomical sex but hypothesizing that the latter influenced the former).

205. This account of contextual sex does not make distinctions between "sex" and "gender." Gender, which is typically understood as referring to roles, behaviors, appearances, and expressions, is encompassed in other models of sex (ascriptive, self-identification etc.). *See* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 1–34 (1990) (challenging predominant discourses that treat sex and gender as having coherent distinctions).

206. *See* Clarke, *supra* note 9, at 1832–50 (providing a robust account of the history behind, and its relationship to, "biological sex").

207. A testosterone-based model of sex is particularly salient in the context of sex-defining laws for sex segregated sports. *See infra* notes 241–47 and accompanying text (discussing the *Hecox* case).

gender identity,[208] but for many transgender people, other models of sex (like ascriptive sex and gender identity) do align. And although cisgender individuals' SAAB typically aligns with their gender identity, other models of their sex may not.[209] For example, some cisgender women do not have XX chromosomes[210] and others are not always perceived as women,[211] while some cisgender men have similar testosterone levels as cisgender women[212] and others might have secondary sex characteristics that are commonly associated with women.[213] Thus, a central aspect of a contextual understanding of sex identity is its rejection of any assumptions that any two models of sex align, either in general or within one specific individual.

Because this approach does not presuppose alignment of any two models of sex, it does not consider "biological sex" to be a legitimate model of sex. "Biological sex" could refer to chromosomal sex, SAAB, genital-based sex, hormones, or something else. But many laws that use this term do not typically define it with either specificity or consistency.[214] Instead they often use it to obscure their precise definition of sex, operating under an unspoken assumption that all of these "biological" models of sex always align.[215] A contextual

208. *See, e.g.*, *Sexual Orientation and Gender Identity Definitions*, HUMAN RIGHTS WATCH, https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions [https://perma.cc/73VH-89KX] (defining transgender as "[a]n umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth").

209. This presumes that "transgender" means SAAB not aligning with gender identity. But we could define "transgender" to include anyone who has a model of sex that does not align with the others (i.e., a person who identifies as a man, has a penis, and was AFAB could be "transgender" if he has a low level of testosterone or has XXY chromosomes).

210. *Swyer Syndrome*, MEDLINE PLUS, https://medlineplus.gov/genetics/condition/swyer-syndrome/ [https://perma.cc/XB99-D64Y] (describing a condition in which people AFAB have XY chromosomes).

211. *See, e.g.*, Edith Honan, *Woman Mistaken for a Man Settles NY Lawsuit*, REUTERS (May 13, 2008), https://www.reuters.com/article/us-lawsuit-gender/woman-mistaken-for-a-man-settles-ny-lawsuit-idUSN1341998020080513 [https://perma.cc/NZ2H-BUUT] (discussing lawsuit brought by a cisgender woman who was mistaken for a man in the women's restroom).

212. *Low Testosterone: Male Hypogonadism*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/diseases/15603-low-testosterone-male-hypogonadism [https://perma.cc/84Y3-F8FJ]

213. *Gynecomastia*, JOHNS HOPKINS MEDICINE, https://www.hopkinsmedicine.org/health/conditions-and-diseases/gynecomastia#:~:text=Gynecomastia%20is%20an%20overdevelopment%20or,the%20male%20hormone%20(testosterone) [https://perma.cc/6JJ7-TND6] (describing condition causing significant breast tissue growth in cisgender men).

214. Some laws do not define biological sex. *See, e.g.*, ALA. CODE § 16-1-52 (2023) (distinguishing between "biological males" and "biological females" without defining "biological"). There is no consistent meaning of "biological sex" when the term is defined. *Compare* IDAHO CODE ANN. § 33-6203 (West 2023) (basing "biological sex" on "the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels"), *with* S.C. CODE ANN. § 59-1-500 (West 2023) (defining "biological sex" as SAAB); *see also* Clarke, *supra* note 9, at 1847 (compiling laws).

215. *See id.*; *see also* Adams *ex rel* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 796 (11th Cir. 2022) (en banc).

approach requires the state to define "biological sex" with precision and to specify the model or models of sex to which "biological sex" refers.

2. Contextual Sex and Equal Protection

A contextual approach to sex in sex-defining cases directly maps onto and flows from existing equal protection doctrine. The second prong of an intermediate scrutiny analysis tests the fit between the state's end and the means employed to achieve that end, and as explained in Part I, the means in sex-defining cases is the state's definition of sex.[216] A contextual approach is performing the same inquiry as the ends-means prong: determining whether the state's definition of sex (i.e., the model of sex) aligns with the purpose of the law.[217] The intermediate scrutiny test modifies a contextual approach only in dictating how closely aligned the definition of sex and the state's objective need to be. Here, the definition must "substantially relate" to the state's goal.[218] Put simply, a contextual approach to sex *is* the ends-means analysis for sex-defining laws under intermediate scrutiny.[219]

Because the question of fit on the ends-means prong is between the model of sex and the law's purpose, it is worth highlighting the distinction between *models* of sex identity and *methods* to determine sex identity under a particular model. There are many possible methods for determining sex under each model. For example, suppose a law uses self-identification (gender identity) to determine sex. There are several methods state actors could employ to determine how someone identifies their sex. They could simply ask the person how they identify ("What is your sex?"). They could examine how the individual has previously identified their sex (like looking to the person's sex selection on the prior Census). Or they could have third parties determine if their self-identification is sincere—like having the person take a lie detector test. A sampling of methods that can be used to determine sex under four different models is shown below.

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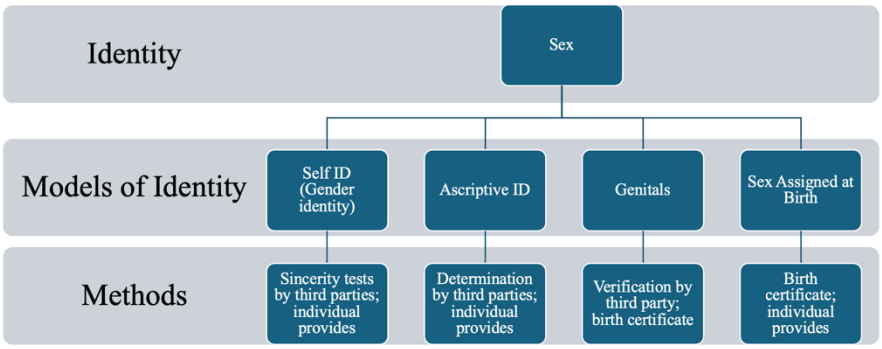
216. *See supra* Part I (discussing intermediate scrutiny and the proper ends and means in sex defining cases).

217. *Id.*

218. Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

219. A contextual approach to equal protection questions can be applied regardless of the level of scrutiny because it tracks equal protection's two-step analysis.



Each method has its own set of tradeoffs. Some methods may predict the particular model of sex more accurately or be easier and less expensive to administer, while others are more respectful of bodily autonomy, privacy, and dignity. For example, consider different methods for determining gender identity. Asking people to identify their sex is minimally intrusive but somewhat costly to administer. Looking to individuals' sex selection on the previous Census is less burdensome to administer but may not be as accurate, since some people may have changed how they identify since the last Census. Subjecting individuals to sincerity tests is costly to administer and extremely intrusive on individuals' privacy, though, in theory, may increase accuracy.[220] This Article does not fully evaluate which methods are best for each model.[221] Nor does it suggest that methods of determining a model of sex are irrelevant to analyzing a law's constitutionality. Rather, this Article highlights the conceptual distinction between methods and models in order to clarify the ends-means inquiry: specifically, to make clear that the relevant means in the end-means analysis are the models of sex, not the methods, and the primary question of fit is between the model and the law's goal.[222]

Taking these previous points together, a contextual approach to sex applied to an equal protection challenge to a sex-defining law would proceed as follows.

220. *C.f.* Lane-Steele, *supra* note 34, at 329 (arguing that determining identity often risks harming privacy and dignitary interests); Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1505 (2014) (discussing how dignity, privacy, and autonomy interests are implicated when legal actors make determinations about identity).

221. The choice between methods is certainly important, but beyond the scope of the Article.

222. Courts need not completely ignore the proxy between methods and models of sex in their constitutional analysis. A terrible fit between methods and models could be relevant. For example, if a sex-defining law used chromosomal sex as the method for determining a gender identity-based model of sex, courts should be suspicious of the law. There are numerous other methods for determining gender identity that are both less intrusive and burdensome as well as more accurate. Using chromosomal sex in light of these other options could signal that the state's interest in gender identity is pretextual and that it is actually using chromosomal sex as its preferred model. Methods could also be relevant to a court's analysis if they implicate constitutional (or non-constitutional) concerns. For instance, suppose a school examined students' genitals to determine SAAB. The proxy between SAAB and the method for determining SAAB would not be the problem. The problem would be that the method likely violates students' rights to privacy.

First, a court would identify the precise model of sex the state is using. Sometimes, this model can be easily gleaned from the law itself: for example, a law may explicitly define sex as SAAB. Other times, like in the bathroom cases, the state is less transparent about the model it is using and instead deploys imprecise or vague definitions of sex like "biological sex."[223] In these circumstances, a court would need to determine the specific model or models of sex to which "biological sex" refers.[224]

Once the court has identified how exactly the state is defining sex, it can then square up the question presented, using the state's exact definition of sex as the relevant means. For example, suppose an all-women's public university defined "woman" for the purposes of admission as someone who has XX chromosomes. If a transgender woman (with XY chromosomes) was denied admission and brought an equal protection challenge to this policy, the question presented would be whether the state's chromosome-based model of sex is substantially related to an important governmental interest.

If the law's definition of sex does not substantially relate to the state's interests, the law fails the ends-means prong of intermediate scrutiny and is unconstitutional.[225] The ends-means prong is satisfied if the model of sex does substantially relate to the state's goal. But a court's analysis would not stop there: satisfying the ends-means prong does not mean that the law survives intermediate scrutiny. Even if the model of sex perfectly aligns with the law's purpose, that purpose still must be sufficiently important. [226] Laws with blatantly unconstitutional purposes can employ a model of sex that aligns with those purposes. For instance, imagine that a state passed a law defining marriage as between one "man" and one "woman." The law defined "woman" as someone who had a vagina and "man" as someone who had a penis. The state's interest behind the law was to ensure that married couples could have penetrative, penis-vagina sexual intercourse.[227] This law satisfies the ends-means test because the model of sex aligns with the law's goal: defining sex based on genitals is the best way to advance the goal of promoting this particular type of sexual intercourse

223. *See supra* notes 101–03 and accompanying text.

224. This might not be as easy as it sounds. The state's attorneys may resist courts' attempts to define "biological sex" with sufficient precision like we saw with the bathroom cases. *See id*.

225. For an example, *see infra* notes 240–47 and accompanying text (discussing the *Hecox* case).

226. *See supra* note 201 (describing how the state has used contextual identity to advance white supremacy).

227. This example is not entirely hypothetical. In a 1976 case, *J.T. v. M.T.*, the court was asked to determine whether a marriage between a post-operative transgender woman and a cisgender man was valid. 355 A.2d 204 (N.J. 1976). The court deemed the marriage valid because the wife had a vagina and could have penis-vagina sexual intercourse. *Id.* ("[I]f . . . the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person's identification at least for the purposes of marriage to the sex finally indicated.").

within a heterosexual marriage.[228] But the tight fit between the law's goal and a genital-based model of sex does not mean the law is constitutional. The state's goal of promoting penis-vagina intercourse in heterosexual marriage is not a permissible goal for several reasons, at least under existing law.[229]

Moreover, a severe misalignment between the model of sex and the purpose of the law might indicate that the law's stated purpose is pretextual and obscuring the law's actual purpose. Under intermediate scrutiny, courts need not accept that the stated purpose of a law is the actual purpose behind the law and can dig deeper.[230] Courts go about determining the actual purpose behind a law in a variety of ways.[231] Most relevant here is a gross lack of fit between the means and ends: when a law's means are so vastly unrelated to the stated governmental interests, this can indicate that the government's stated interests may be masking its more nefarious actual purpose.[232] So, a law that employs a definition of sex that does nothing to advance its stated purpose or actively undermines its purpose suggests that the state has alternative, unarticulated motives behind the law. Examining which interests such a definition of sex actually advances, rather than the stated interests, can reveal the actual purpose of a law.[233]

For instance, suppose a law determines sex for women's sports using internal reproductive organs: anyone who does not have a uterus and ovaries is not eligible to participate in an all-women's sports team or league. The state claims this law is substantially related to the important governmental interest in

228. Other models of sex might also advance this goal, but only to the extent those models align with someone's genitals. For example, a SAAB model of sex would produce the same result as a genital-based model only if someone's SAAB matched their genitals. But if someone had genitals that did not match their SAAB, a SAAB-based model would not advance the law's goals. A contextual approach, therefore, favors a genital-based definition of sex over a SAAB-based definition.

229. State objectives that promote heterosexual marriage over same-sex marriage are no longer permissible. *See* Obergefell v. Hodges, 576 U.S. 644, 681 (2015). Neither are state laws that treat penis-vagina sex more favorability than other types of sex. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

230. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975) ("[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."); United States v. Virginia (VMI), 518 U.S. 515, 535 (1996) ("[O]ur precedent instructs that 'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically."); *see also* Whitney Kelly, *United States v. Virginia: The United States Supreme Court Rules That the Virginia Military Institute's Male-Only Admissions Policy Violates the Equal Protection Clause of the Constitution*, 71 TUL. L. REV. 1375, 1386 (1997) (arguing that an inquiry into actual purposes is required, not just permitted, under these precedents).

231. *See* Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 22 (1992).

232. *See id* at 7–8.

233. Courts do this frequently in cases involving equal protection challenges. *See, e.g.*, Perry v. Brown, 671 F.3d 1052, 1063 (9th Cir. 2012) (holding that denying same-sex couples the right to marry had nothing to do with the state's alleged goal of "responsible procreation" because the state wasn't doing anything to regulate the marriages of different-sex couples who could not procreate or did not want to procreate; based on this lack of fit, the court held that the actual purpose of the law was rooted in animus against same-sex couples); *Romer v. Evans*, 517 U.S. 620 (1996) (holding that Colorado's law banning anti-discrimination laws that covered sexual orientation was unconstitutional based on "a radical lack of fit" between the law's means and ends).

sex equality. According to the state, because "biological men" (people without these internal organs) have distinct and significant physical advantages over "biological women" (people with these organs), excluding the former from women's sports ensures competitive fairness. An internal reproductive organ-based model of sex, however, is not rationally related to the state's sex equality goal. These organs are not what dictate strength, speed, or other traits related to athleticism. Due to this gross lack of fit between the law's stated goal and the model of sex used to achieve this goal, a court could find that the purported purpose of the law is not its actual purpose and that the outcome the law produces—excluding transgender women and girls from women's sports—is the actual goal of the law.[234]

Courts are certainly not required to infer anti-trans purposes behind sex-defining laws when the model of sex does not advance the law's stated purpose. Courts' analyses can end after concluding that the law fails the ends-means prong of intermediate scrutiny. Nor are courts required to figure out which model of sex (if any) substantially relates to the law's goals. That's the state's job.[235] Courts that want to reach a broader conclusion, however, could certainly employ a contextual approach and determine which model of sex the state could permissibly use to advance their goals. Such an analysis might reveal that no model of sex substantially relates to the law's actual purpose. If no definition advances an important governmental interest, the state should not define sex in that legal context.

Some courts have already employed certain aspects of a contextual approach in equal protection challenges to sex-defining laws, further indicating that equal protection doctrine supports and aligns with a contextual approach to sex. *Hecox v. Little*, a recent Ninth Circuit opinion addressing the constitutionality of a sex-defining law for sports, is a notable example.[236] The law at issue in *Hecox* barred transgender girls and women from women's sports to further Idaho's purported interests in promoting fairness and equality in women's sports.[237] The law defined "female" for women's sports based on reproductive anatomy, chromosomes, and naturally produced testosterone levels. The state argued that limiting participation in women's sports to "females"

234. This is essentially what the *Hecox* court held, discussed *infra* notes 240–47 and accompanying text. Hecox v. Little*,* 79 F.4th 1009 (9th Cir. 2023) (holding that the state's chosen model of sex "illustrates the Legislature appeared less concerned with ensuring equality in athletics than it was with ensuring the exclusion of transgender women athletes").

235. The burden is on the state to show that they have defined sex in a way that passes constitutional muster. *See* United States v. Virginia (VMI), 518 U.S. 515, 533 (1996) ("The burden of justification is demanding, and it rests entirely on the State.").

236. *Hecox,* 79 F.4th at 1009.

237. IDAHO CODE ANN. § 33-6202(12) (West 2023) (the purpose of the law is "promoting sex equality, providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities, and by providing female athletes with opportunities to obtain college scholarship and other accolades").

advanced its interests in fairness and equality for women in sports.[238] The court essentially adopted a contextual approach in its intermediate scrutiny analysis. It treated the state's definition of "females" as the relevant means by which the state was achieving its goals.[239] The court then analyzed whether any of those models of sex (though it does not use the term models) were substantially related to the state's interests.[240] It concluded that none of the models helped promote fairness and safety in women's sports. These models, the court reasoned, do not affect athletic performance and therefore do nothing to ensure a level playing field in women's sports.[241] Because the law failed the ends-means prong,[242] the court affirmed the district court's decision that the law was probably unconstitutional.[243] Thus, as *Hecox* shows, a contextual approach to sex-defining laws flows from and is supported by existing equal protection doctrine. Relatedly, it does not create a brand-new frame for analyzing these laws. Rather, it names something that courts are already doing.

This discussion does not purport to address or resolve all the nuances of contextual sex and equal protection. For example, it does not address if or when the state should use a model of sex in place of the sexed category. [244] Suppose testosterone is the model of sex that best aligns with a law's goals. Whether the state should use testosterone instead of sex to make distinctions between groups (i.e., "high testosterone" and "low testosterone" categories rather than M and F categories)[245] is beyond the scope of this Article. It also does not address all the

238. IDAHO CODE ANN. § 33-6203(3)).

239. *Hecox,* 79 F.4th at 1028.

240. *Id.* at 1022–24.

241. *Id*. at 1023 (explaining why the law's definition of sex was unrelated to its goal and noting that the law omitted the "one [sex-related] factor that a consensus of the medical community appears to agree" affects athletic performance: circulating testosterone).

242. The court held that the law was unconstitutional for other reasons as well. *See, e.g*., *id*. at 1033 ("[T]he sex verification provision likely fail[s] heightened scrutiny because Idaho failed to demonstrate an "exceedingly persuasive justification," for subjecting only young women and girls to the humiliating and intrusive burden of the sex verification process."). Moreover, some of the court's reasoning suffers from the same problems as the pro-trans bathroom cases. Namely, *Hecox* relied on the small number of transgender girls playing on girls' sports teams to conclude that the state's concerns were unsubstantiated. *Id*. at 1032. This rationale is contingent on the number of trans people in sports remaining low, which raises the same concerns as the pro-trans bathroom courts' reliance on the plaintiffs' good bathroom behavior.

243. *Id*. at 1033 ("Thus, we need not and do not decide what policy would justify the exclusion of transgender women and girls from Idaho athletics under the Equal Protection Clause, because the total lack of means-end fit here demonstrates that the Act likely does not survive heightened scrutiny.").

244. Naomi Schoenbaum provides some guidance on this question of when to substitute a sexed trait for the sexed category. *See* Schoenbaum, *supra* note 42, at 57 (on file with author) (analyzing which functions of sex are permissible under an anti-stereotyping approach to sex equality and determining, for example, "a sex classification allocating benefits to women due to the physical condition of pregnancy" should use pregnancy rather than sex to make this distinction).

245. Others have addressed this idea in the context of sports. *See* Joanna Harper, *Athletic Gender*, 80 L. & CONTEMP. PROBS., 139, 152 (2017) (discussing the concept of "athletic gender" and how it could be used to categorize in sports).

grounds upon which sex-defining laws could violate equal protection,[246] other parts of the Constitution,[247] or other laws; nor does it necessarily preclude any of these other arguments.

This subpart has shown how a contextual approach aligns with and flows from existing doctrine. The ends-means prong of intermediate scrutiny in sex-defining cases is essentially a contextual sex analysis: it examines the fit between the means the state is using to achieving its goals (which is its definition of sex in sex-defining cases) and the state's goals.

B. The Contextual Approach as a Remedy

Part III.B explains how a contextual approach can provide a remedy to the flaws in the pro-trans bathroom decisions discussed in Part II. These decisions' failure to set up and answer the core questions presented stemmed, at least in part, from their confusion over the relevant ends and means: they struggled to locate the precise means the bathroom rules used to advance the schools' privacy goals.[248] A contextual approach can prevent such confusion. Here's why.

First, this approach makes clear that the state's definition of sex (i.e., the model of sex) is the means by which the state is trying to achieve its interests and that the model of sex is what must substantially relate to those interests.[249] This approach, therefore, could have prevented these courts from improperly focusing on the fit between (1) bodily privacy and removing transgender plaintiffs from the bathroom and (2) sex markers on identity documents at the time of enrollment and SAAB/genitals. Relatedly, the distinction this approach draws between models and methods can prevent courts from confusing the two. When the pro-trans decisions treated sex markers on birth certificates as the means, rather than the model of sex (SAAB/genitals), they were improperly

246. For example, suppose a school defined "sex" for sexed locker rooms based on an ascriptive model of sex. School administrators assigned students an M or F label depending on how the administrators perceived the student's sex. An ascriptive model of sex might substantially relate to the school's goals behind the locker room rule, but it might violate equal protection for a different reason. A school administrator determining someone's sex based on how well the student passed as a girl or a boy might violate anti-stereotyping principles; the model of sex and the method for determining the model, in this example, both arguably rely on overly broad generalizations about how men and women should act, appear, and behave.

247. For instance, if a law defined sex based on chromosomes and determined the makeup of someone's chromosomes by forcing them to undergo expensive or invasive genetic testing, the law might fail a substantive due process challenge. Indeed, substantive due process is another common ground upon which these laws are challenged. *See* Eyer, supra note 30, at 1445-51 (discussing cases alleging substantive due process violations). It is not difficult to imagine why; sex-defining laws often raise serious autonomy, dignity and privacy concerns. *See, e.g.*, Clay Wirestone, *Kansas Anti-Trans Sports Law Opens Door for Genital Inspections of Kids*, KAN. REFLECTOR (Apr. 9, 2023), https://kansasreflector.com/2023/04/09/kansas-anti-trans-sports-law-opens-door-for-genital-inspections-of-kids-I-the-simple-truth/ [https://perma.cc/5BGP-B976] (describing how a sex-defining regulating women's sports could lead to genital inspections of children).

248. *See supra* notes 152–55, 172 and accompanying text.

249. *See supra* Part III.A (discussing the question of fit between the model of sex and the law's purpose).

using the *method*, not the *model*, in their ends-means analyses.[250] A contextual frame shows that sex markers on identity documents are methods of determining a SAAB/genital model of sex, not models in and of themselves. This distinction, in turn, makes clear to courts that "biological sex" (SAAB/genitals), not sex markers, is the proper means in the ends-means analysis.

Additionally, prompting courts to demand specificity when it comes to the relevant model of sex can help stave off the state's attempts to keep its definition of sex vague and indeterminate, which ensures courts locate the precise means for the ends-means inquiry. Recall that in the bathroom cases, the schools made repeated attempts to evade precision when it came to their definitions of "biological sex."[251] Even when courts pressed for additional specificity, the state's attorneys were loath to provide any.[252] With a contextual approach, the schools could no longer get away with vague and misleading definitions of sex. They could no longer invoke terms like "biological sex" without specifying the exact models of sex to which it refers.

Moreover, this approach concretizes the distinction between sex-defining cases and cases that challenge M/F sex classification systems, like sexed bathrooms: if the plaintiff is challenging sexed bathrooms, the court analyzes the fit between the M/F sex classification and the important state interests, but if the plaintiff is challenging the definition of sex, the court analyzes the fit between the definition of sex and the important state interests. Having these two different frames gives legal actors the language to explain why bathroom cases like *Grimm*, *Whitaker*, and *Adams* are not about sexed bathrooms writ large. Drawing out this distinction also makes it more difficult for anti-trans courts to do what the *Adams* en banc court did and treat sex-defining challenges as if they were challenges to sexed bathrooms.[253] Anti-trans litigants and courts may still assert that a challenge to the definition of sex is equivalent to a challenge to the ability to draw distinctions between M and F. But they would at least have to defend their position and explain why they are conflating the two (because they assume SAAB always determines sex). A contextual approach will not force anti-trans courts and litigants to change their ideological commitments to the meaning of sex (that it is defined by SAAB because sex is fixed at birth and cannot change), but it might help expose those commitments. Once out in the open, they would need to justify their position that SAAB equals legal sex.

Relatedly, highlighting the ways in which sex-defining cases are conceptually and analytically distinct from M/F sex-classification cases can help

250. *See supra* Part II.A.2.

251. *See supra* notes 101–03 and accompanying text.

252. *See, e.g.*, Oral Argument at 1:18–22:08, Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., No. 18-13592, 2022 WL 18003879 (11th Cir. 2022), [https://perma.cc/4GXA-3B25] (search "18-13592" in "Case Number" search field; then select mp3 under "Argument Date" "2022-02-22") (school board attorney repeatedly evades requests from the judge about the school's definition of "biological sex").

253. *See supra* notes 193–200 and accompanying text.

pro-trans courts fend off critics who claim that their decisions will lead to the end of sex-segregated bathrooms. As discussed more extensively in the next subsection, courts can address the core questions presented in these cases and rule for the plaintiffs in a way that preserves the school's ability to exclude cisgender boys from the girls' bathroom.[254] So, to the extent that the pro-trans bathroom cases' flaws stemmed from this uncertainty, this approach shows why the constitutionality of a sex-defining law does not hinge on the constitutionality of the sex classification.

C. Applying the Contextual Approach to a Bathroom Case

This subpart applies the principles of contextual approach to a bathroom case like *Grimm*, *Adams*, or *Whitaker*: an as-applied equal protection challenge to a rule that defines sex for bathroom purposes as SAAB/genitals, where the plaintiffs are not challenging the schools' ability to assign students to sexed bathrooms writ large and instead are challenging the criteria the schools use to determine their bathroom assignments.[255] First, this Section applies the contextual approach to frame the questions presented. Then, it addresses each of the schools' two privacy-related justifications for the bathroom rule, in turn, and argues that the bathroom rules fail intermediate scrutiny under both justifications—either the justification is not sufficiently important, the means do not substantially relate to the justification, or both.

These bathroom rules treat people differently based on sex, and therefore, the following analysis applies intermediate scrutiny. Before jumping into the analysis, I briefly explain why. First, as explained in Part I, the bathroom cases trigger intermediate scrutiny for the reasons provided in the canonical cases.[256] These bathroom rules harm the plaintiffs and restrict their ability to live their lives because of an immutable sexed characteristic—their SAAB.[257] Second, both the pro-[258] and anti-trans[259] bathroom cases applied intermediate scrutiny to these laws. To be sure, they did not always rely on the same rationales, but they all invoked a sex-based justification for applying heightened scrutiny. For example, some pointed to the fact that the bathroom rules segregate by sex[260] and

254. *See infra* Part III.C.

255. *See supra* note 107.

256. *See supra* Part I.

257. *See id.*

258. *See supra* note 120; *see also*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 618 (4th Cir. 2020).

259. *See, e.g.*, Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 801–03 (11th Cir. 2022) (en banc). Anti-trans decisions in other contexts, beyond bathrooms, have also applied intermediate scrutiny. *See, e.g.*, *B. P. J. v. W. Virginia State Bd. of Educ.,* No. 2:21-CV-00316, 2023 WL 111875, at *6 (S.D.W. Va. Jan. 5, 2023) (ruling against the transgender plaintiff but stating that "[t]here is no debate that intermediate scrutiny applies to the law at issue here—[a sex-defining law for sports] plainly separates student athletes based on sex").

260. *See, e.g.*, *Adams*, 57 F.4th at 801–03 ("The School Board's bathroom policy requires 'biological boys' and 'biological girls'—in reference to their sex determined at birth—to use either

some said that the but-for reason the plaintiffs were excluded from the boys' bathroom was their "sex," i.e., their SAAB.[261] But sex-based rationales are the common thread in all cases that apply intermediate scrutiny.[262] Moreover, a contextual approach reinforces courts' existing understanding that bathroom rules treat people differently based on sex. The reason the plaintiffs in these cases could not use the boys' bathroom was their SAAB/genitals:[263] i.e., model(s) of their sex. Thus, intermediate scrutiny applies because sex is the basis upon which the rules make distinctions and the but-for cause of the plaintiffs' harm.

1. Framing the Questions

The crucial first step is properly framing the questions these cases present. So far, this Article has shown that those questions are (1) whether the schools' justifications for the rules are important (bodily privacy away from the opposite

bathrooms that correspond to their biological sex or sex-neutral bathrooms. This is a sex-based classification.").

261. *See, e.g.*, *Grimm*, 972 F.3d at 616 ("[Grimm's]sex remains a but-for cause for the Board's actions."). This rationale follows from the *Bostock* decision. *See* Bostock v. Clayton Cnty., 590 U.S. 644, 661 (holding that discrimination is based on "sex" if the but-for cause of the discrimination is SAAB); *see also* Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017) ("Here, the School District's policy cannot be stated without referencing sex.").

262. In the context of gender affirming care bans, anti-trans courts have recently rejected these rationales for heightened scrutiny and have subjected these laws to rational basis review. *See, e.g.*, L.W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 412–13 (6th Cir. 2023) (rejecting the plaintiff's argument that intermediate scrutiny applied to a ban on gender-affirming care because the availability of a certain medication or procedure turned on the SAAB of the person seeking care). *Skrmetti*'s reasoning is not in line with *Bostock* or the canon, as scholars have already noted and for the reasons provided in Part I. *See id.*; *see also supra* Part I; Marc Spindelman, *Trans Sex Equality Rights After Dobbs*, 171 U. PA. L. REV. 1, 11 (2023) (critiquing *Skrmetti* and arguing that "bans on gender-affirming medical care for trans youth implicate—and likely or actually run afoul of—established constitutional sex equality guarantees"); Mary Ziegler, *Opinion: The Surprising Second Life of the Supreme Court's Abortion Decision*, CNN (July 12, 2023), https://www.cnn.com/2023/07/12/opinions/tennessee-trans-law-sixth-circuit-abortion-ziegler/index.html [https://perma.cc/2FKY-5HKK].

263. These rules also treat two groups differently: students whose gender identity aligns with the school's definition of sex and students whose gender identity does not align with the school's definition of sex. These groups are defined by the alignment or misalignment of different models of sex. For this reason, some pro-trans courts and scholars have characterized these laws as classifying based on transgender status; because transgender status is a quasi-suspect class, they argue, this is an additional reason why these laws receive intermediate scrutiny. *See, e.g.*, *Grimm*, 972 F.3d at 610–13 (concluding that transgender status is a quasi-suspect class and discrimination against them is sex discrimination); Eyer, *supra* note 30, at 1424–26 (discussing other cases that have held that "transgender individuals should be considered a suspect or quasi-suspect class (and thus discrimination against them should be subject to heightened scrutiny)"); Kevin Barry, Brian Farrell, Jennifer Levi & Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 550–67 (2016) (explaining why transgender people meet the four criteria for a quasi-suspect class). For reasons that are beyond the scope of this Article, I think a sex-based justification for heightened scrutiny has both practical and normative advantages over a trans-as-suspect-class justification for equal protection challenges to sex-defining laws like these bathroom laws. But putting those aside, this Article's analysis adopts a sex-based justification for intermediate scrutiny because it is the one with the broader consensus among both pro- and anti-trans courts and because it flows from, and is reinforced by, a contextual approach.

sex in the bathroom and using the bathroom away from the opposite sex), and (2) whether their chosen model of sex substantially relates to those justifications.[264]

A contextual approach can help frame these questions with even more specificity. In the bathroom cases, the schools are employing their definition of sex as part of their ends *and* their means. That is, their definition of sex is relevant in both prongs of the intermediate scrutiny analysis. A contextual approach replaces sex with the precise model of sex to which the schools are referring (SAAB/genitals). Therefore, the questions presented are first, whether (a) bodily privacy away from the opposite sex, i.e., students who were assigned a different sex at birth or have different genitals, or (b) privacy in using the bathroom away from the opposite sex, i.e., students who were assigned a different sex at birth or have different genitals are sufficiently important state interests; and second, whether excluding the plaintiffs based on their SAAB/genitals advances either of those interests.

Replacing "sex" with SAAB/genitals in both prongs reveals the complete circularity of this inquiry. The schools think that this circularity means that they win; they claimed that their bathroom policies are "of course" substantially related to their important goals because keeping "biological girls" out of boys' bathrooms is the "only way" to achieve their sex-based privacy goals.[265] But this argument just gerrymanders the schools' ends to align with the means. Aligning ends and means in this way is not enough, on its own, to survive intermediate scrutiny.[266] Indeed, the Supreme Court rejected a similar argument in *VMI*: namely, that having an all-male school was an important governmental purpose, and the means employed to achieve that purpose, i.e., only admitting men, substantially furthered that purpose.[267] Technically, the means employed (only admitting men) did substantially advance the state's goal (all-male school). But the Court made clear that merging the ends and means in this way was insufficient to withstand heightened scrutiny, characterizing the argument as "circular" in a way that "bent and bowed" the intermediate scrutiny test.[268] This is precisely what the schools are doing when they claim that the perfect fit between the ends and means makes their policies constitutional.

The circularity of the schools' position, on its own, does not mean that their bathroom policies fail intermediate scrutiny. But it does mean that the schools

264. *See supra* Part III.A.2.

265. *See, e.g.*, En Banc Brief of Appellant the School Board of St. Johns County at 8, Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791 (11th Cir. 2022) (No. 18-13592) ("[T]he policy is of course substantially related to the important governmental interest of protecting student privacy in bathrooms. Excluding members of one biological sex from a bathroom designated for the other biological sex is perhaps the only way to afford such privacy."); see also *supra* notes 194–98 (discussing the *Adams* en banc decision).

266. United States v. Virginia (VMI), 518 U.S. 515, 529 (1996).

267. *See id.*

268. *Id.* at 545.

carry the burden to defend their policies beyond this argument. They need to prove that bodily privacy from people with different SAAB/genitals and using the bathroom away from people with different SAAB/genitals are important state interests and that excluding these plaintiffs from the boys' bathroom based on their SAAB/genitals advances them. As argued below, the schools have not carried their burden.

The following discussion provides two reasons why the bathroom rules are unconstitutional. First, neither of the schools' arguments about sex-based privacy, which the *Adams* en banc court regurgitates, find support in equal protection jurisprudence. At most, the schools may have shown that equal protection allows them to maintain sex-segregated bathrooms to advance a general sex-based privacy interest. But they have not shown that the plaintiffs' SAAB/genitals are relevant to the schools' sex-based privacy interests; nor have they shown that excluding these plaintiffs advances those interests.

A second reason why the polices fail constitutional muster is that they are premised on an unproven assumption that the schools' student bodies agree that SAAB/genitals always determine sex and that therefore the plaintiffs are "girls" in the boys' bathroom. If their cisgender students—the people whose privacy interests they claim are at the heart of their bathroom policies—do not think the plaintiffs are "girls," the bathroom policies do not advance the schools' purported "privacy from the opposite sex" goals. The schools' failure to support this assumption is fatal to the constitutionality of their bathroom rules.

2. Sex-Specific Privacy Interests Are Not Driven By SAAB/Genitals

The core of the schools' argument is that the plaintiffs' SAAB/genitals threaten their students' sex-based privacy interests. But the doctrine does not support this position.

As an initial matter, many of the cases the schools rely on fail to address sex-specific privacy interests at all and therefore do not apply to either of the schools' sex-based privacy rationales for the bathroom policies. The cases that do articulate a sex-specific privacy interest do not support the schools' position that excluding the plaintiffs based on their *SAAB/genitals* is related to a sex-based privacy interest.[269] That is, the schools presume, but do not show, that SAAB/genitals are the driving forces behind these cases' sex-based privacy rationales. The following discussion addresses the schools' two privacy-based arguments in turn and explains why the schools' arguments are not supported by the very cases they cite.

269. *See, e.g.*, Byrd v. Maricopa County Sheriff's Dept., 629 F.3d 1135 (9th Cir. 2011); United States v. Virginia (VMI), 518 U.S. 515 (1996).

a. Interest 1: Bodily Privacy from the Opposite Sex

Neither the *Adams* court nor the schools can support their argument that ensuring students' bodily privacy away from the opposite sex, i.e., people with different SAAB/genitals in the bathroom, is an important state interest that is advanced by excluding the plaintiffs from the boys' bathroom.[270]

To be sure, courts acknowledge that sex can matter to bodily privacy, and sometimes, sex is highly relevant to courts' bodily privacy holdings. But this body of law does not help the schools' position, and reading these cases through a contextual lens help reveal why. *Byrd v. Maricopa County Sheriff's Department* is a Ninth Circuit case commonly cited to support the schools' argument.[271] In *Byrd*, the court held that a strip search of a male inmate performed by a female officer violated the inmate's Fourth Amendment right to be free from unreasonable searches.[272] The sex of the female officer was a "critical factor" for the court; if a male officer had conducted the same search under the same circumstances, the search may have been permissible.[273]

Even though *Byrd* and similar cases articulate a sex-specific privacy interest, they do not support the schools' specific argument. As an initial matter, *Byrd*-like cases, that is cases where sex is relevant to the court's bodily privacy holding, involve drastically different facts and legal principles than the bathroom cases, and the plaintiffs and the pro-trans cases routinely distinguish the case law the schools rely upon on these grounds.[274] The *Byrd*-like cases almost always involve non-consensual bodily exposure that is coerced by a state actor and the

270. *See Adams ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 805 (11th Cir. 2022); En Banc Brief of Appellant the School Board of St. Johns County at 8, *Adams*, 57 F.4th 791 (No. 18-13592); Brief in Support of Defendants' Motion to Dismiss the Amendment Complaint at 8, Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017) (No. 16-3522); Brief in Support of Defendants' Motion to Dismiss the Amended Complaint at 8, Whitaker v. Kenosha Unified Sch. Dist., No. 16-CV-943-PP, 2016 WL 5239829 (E.D. Wis. 2016) (No. 2:16-cv-00943) (quoting Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 734 (4th Cir. 2020)).

271. *See, e.g.*, *Adams*, 57 F.4th at 805 (citing *Byrd*, among other cases, to support the proposition that "courts have long found a privacy interest in shielding one's body from the opposite sex in a variety of legal contexts"); Adams v. Sch. Bd. of St. Johns Cnty., 9 F.4th 1369 (11th Cir. 2021) (Pryor, J., dissenting) (citing *Byrd*, among other cases, to support the proposition that "[t]he school policy also substantially advances its objective to protect children from exposing their unclothed bodies to the opposite sex. Courts have long understood that the 'special sense of privacy' that individuals hold in avoiding bodily exposure is heightened 'in the presence of people of the other sex.'").

272. 629 F.3d at 1147.

273. *Id.* at 1146 ("[C]ross-gender strip searches in the absence of an emergency violate an inmate's right under the Fourth Amendment to be free from unreasonable searches. Because the cross-gender nature of the search is a critical factor in the strip searches discussed in these cases, we cannot agree with our dissenting colleagues that the gender of the officer conducting the search is irrelevant.").

274. *See, e.g.*, Initial Brief of Appellee at 44, *Adams*, 3 F.4th 1299 (11th Cir. 2021) (No. 18-13592-EE) ("Defendant also cites a series of cases involving involuntary exposure of one's genitals, including for example, searches of various kinds . . . or hidden filming. . . .Those cases simply do not apply here, in the enclosed setting of a restroom, where any student may seek the privacy of a stall, as Drew always does.")

plaintiffs' privacy arguments are often rooted in the Fourth Amendment, which is not at issue in the bathroom cases. [275]

But even putting these important distinctions aside,[276] these cases still do not support the schools' position, and reading these cases through a contextual lens helps reveal why. A contextual lens seeks to uncover which model or models of sex were driving a court's reasoning about sex-specific bodily privacy. In *Byrd*, for example, the key inquiry is what exactly made the prison guard and the inmate different sexes. Unsurprisingly, the answer is not clear from the face of the opinion—whether the prison guard was a woman was not at issue, so the court had no reason to discuss what made her a woman for the purpose of the inmate's privacy claim.[277]

What is clear, though, is that the prison guard's SAAB/genitals were not the models of sex driving the court's analysis. That the female officer in *Byrd* had a vagina or was AFAB could not have been what made her and the inmate different sexes and caused the sex-specific privacy violation.[278] Indeed, the female officer might not have had a vagina and might not have been AFAB. The court does not say, and why would it?[279] These aspects of her sex were irrelevant. Instead, the sex-specific privacy harm most likely stemmed from the inmate's perception of the officer's sex, i.e., her ascriptive sex.[280] The privacy harm was sex-based because the inmate *thought* he was getting searched by a woman, not because the officer had a vagina or was AFAB.[281] And there is no indication that

275. *See, e.g.*, Harris v. Miller, 818 F.3d 49, 59 (2d Cir. 2016) (addressing whether a female inmate's right to privacy was violated when a male guard conducted a forced inspection of her naked body); Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981) (determining whether forceful removal of a female inmate's underclothes by male guards and performance of a vaginal search by a female nurse while the male guards were present were unwarranted invasions of her right to privacy); Canedy v. Boardman, 16 F.3d 183, 185 (7th Cir. 1994) (regarding whether a male inmate's Fourth Amendment right to privacy was violated when female prison guards conducted a strip search).

276. If anyone is causing coerced or nonconsensual bodily exposure in the bathroom, it is the schools, not the plaintiffs. The schools complain that transgender boys might see a cisgender boy's penis while using the urinals, but it is the schools that have designed the urinals in such a way that makes it difficult or impossible for boys to hide their bodies. However, whether cisgender boys' bodily exposure is coerced or consensual is not dispositive to this analysis for the same essential reason that the plaintiffs' good bathroom behavior was not: namely, that transgender boys' right to use the boys' bathroom turns on the fit between their SAAB/genitals and privacy, not on the design of the bathroom or the coerciveness nature of bodily exposure. *See supra* Part II.A.1. The relevant question here is whether transgender boys and cisgender boys are the same sex for privacy purposes.

277. *See generally* Byrd v. Maricopa Cnty. Sheriff's Dep't, 629 F.3d 1135 (9th Cir. 2011).

278. *See id.* at 1143.

279. *See id.* at 1147 (describing the officer simply as "an unnamed female cadet").

280. *See supra* Part III.A (discussion of different models of sex, including ascriptive sex).

281. In related legal contexts, both courts and scholars have acknowledged that perceived identity is most relevant to the law at issue. For instance, Title VII and related state statutes have been interpreted to cover circumstances in which the discriminator misperceived someone's race, sex, national origin, or sexual orientation and discriminated against them based on a misperceived identity. *See, e.g.*, EEOC v. MVM, Inc., No. TDC-17-2864, 2018 WL 2197727, at *10 (D. Md. May 14, 2018) ("Discrimination where the employer is mistaken in his belief that an employee is of a particular national origin is just as insidious as discrimination where the employer is correct."). For scholarship on this issue, *see* Wendy

the inmate perceived her to be a woman because he saw her genitals or asked her about her SAAB.[282]

The same holds true for the other cases like *Byrd* that the *Adams* en banc court and the schools cite about sex-specific bodily exposure: the SAAB/genitals of the person who allegedly infringed on the plaintiff's privacy were not the aspects of sex relevant to the sex-specific privacy harm.[283] By analogy then, the SAAB/genitals of the students who threaten the schools' sex-based bodily privacy interest (i.e., the transgender plaintiffs) are not the relevant aspects of the plaintiffs' sex for that interest.[284]

Thus, this line of cases might support an argument that sex-specific bodily privacy is an important government interest. But these cases do not support the schools' position: that the state has an important interest in ensuring that students can shield their exposed bodies from someone with different SAAB/genitals but not from someone with the same SAAB/genitals.

The other line of privacy-related cases the schools use to support their argument is even more irrelevant than the *Byrd*-like cases. First, the rich case law about a non-sex-specific constitutional right to bodily privacy is inapposite because non-sexed bodily privacy was not at issue in the bathroom cases. For instance, *Fortner v. Thomas* is invoked frequently to support the schools' sex-specific privacy interest.[285] *Fortner*, which involved a strip search of an inmate by a prison guard, held that prisoners retain a constitutional right to bodily

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Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 90–91 (2013); Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469, 475–76 (2010); Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 104, 132–41 (2017); Leora F. Eisenstadt, *Fluid Identity Discrimination*, 52 AM. BUS. L.J. 789, 806-09 (2015); Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 716–17 (2014); Lane-Steele, *supra* note 34, at 271–72, 322–31.

282. *See Byrd*, 629 F.3d at 1136–37 (describing the encounter between Byrd and the officer).

283. *See, e.g.*, Canedy v. Boardman, 16 F.3d 183, 185 (7th Cir. 1994) (noting that the SAAB/genitals of the prison guard were not relevant to the sex-specific nature of the privacy violation); Kent v. Johnson, 821 F.2d 1220, 1226–27 (6th Cir. 1987) (same); Cookish v. Powell, 945 F.2d 441, 446–47 (1st Cir. 1991) (same); Lee v. Downs, 641 F.2d 1117, 1119–20 (4th Cir. 1981) (same); Harris v. Miller, 818 F.3d 49, 59, 62–63 (2d Cir. 2016) (same).

284. To be sure, in the *Byrd*-like cases, the SAAB/genitals of the plaintiffs—the people whose privacy was being infringed—were often relevant to the sexed nature of these privacy infringements. These plaintiffs' claims were often based on the nonconsensual viewing of their genitals. *See, e.g.*, *Byrd*, 629 F.3d at 1136–37. Said differently, the genitals of the victims may have been relevant to these courts' sex-specific privacy analysis, but the perpetrators' genitals were not. For this reason, these cases do not indicate that transgender plaintiffs' SAAB/genitals are relevant to a sex-specific privacy analysis in the bathroom cases. In the bathroom cases, the schools were concerned about cisgender boys' privacy; they were the victims of the privacy violation. The schools did not care about transgender students' privacy, bodily or otherwise. For the schools, the transgender students are like the prison guards: they are the ones posing a threat to cisgender boys' bodily privacy.

285. *See, e.g.*, Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 805 (11th Cir. 2022) (citing Fortner v. Thomas, 983 F.2d 1024, 1026–27 (11th Cir. 1993), for the assertion that "courts have long found a privacy interest in shielding one's body from the opposite sex in a variety of legal contexts").

privacy even when they are incarcerated.[286] But the court gave no indication that the sex of the prison guards affected this bodily privacy right. It did not say that only male prison guards could violate female inmates' bodily privacy, or vice versa.[287] Therefore, *Fortner* could only support the argument that the schools have an important state interest in protecting students' bodily privacy in general. Whether students have an interest in bodily privacy is irrelevant in the bathroom cases; everyone agrees that they do.[288]

What's more, bodily privacy is not even the schools' justification for the bathroom rule. As the en banc *Adams* court itself recognized, the relevant state interests are "using the bathroom away from the opposite sex and shielding one's body from the opposite sex, *not using the bathroom in privacy*."[289] Thus, *Fortner* and other cases about a general interest in bodily privacy do not support the constitutionality of a bathroom policy that excludes a transgender boy from the boys' bathroom to advance the schools' goal of bodily privacy from the opposite sex.

Fortner and similar cases do suggest that while all bodily privacy infringements are harmful in their own right, they become increasingly harmful when the person doing the infringing is someone of a different sex.[290] But this cannot be the argument the schools are making either. The schools do not treat all bodily exposure as harmful in its own right. Indeed, they openly admit that students of the same sex see each other's exposed bodies all the time and express nothing but apathy about this type of bodily exposure.[291] The schools' bodily privacy concerns are not implicated when a cisgender boy sees another cisgender boy's exposed body or penis in the bathroom. However, these concerns supposedly go from zero to sufficiently important to survive intermediate scrutiny if there is a chance that someone AFAB or with a vagina sees a cisgender boy's exposed body or penis.[292] The doctrine does not support the position that

286. *Fortner*, 983 F.2d at 1026 ("As a matter of first impression in this circuit, we hold that a prisoner retains a constitutional right to bodily privacy."). *Brannum v. Overton Cnty. Sch. Bd.*, another case the schools often rely on, also discusses a general bodily privacy interest, but with respect to students, not inmates. 516 F.3d 489, 494–95 (6th Cir. 2008) (finding that defendant's videotaping of students in the locker room without consent violated the students' Fourth Amendment rights).

287. *Fortner*, 983 F.2d at 1028–30.

288. *See, e.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 613 (4th Cir. 2020) ("No one questions that students have a privacy interest in their body when they go to the bathroom.").

289. *Adams*, 57 F.4th at 806 (emphasis added).

290. *See, e.g.*, *Fortner*, 983 F.2d at 1030 ("[M]ost people . . . have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.") (quoting Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981)); Harris v. Miller, 818 F.3d 49, 63 (2d Cir. 2016) ("We further note that cross-gender strip searches of inmates conducted in the absence of an emergency or other exigent circumstances are generally frowned upon.").

291. *See, e.g.*, Initial Brief of Appellant at 8, Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 3 F.4th 1299 (11th Cir. 2021) (No. 18-13592-EE) ("The boys' bathrooms at Nease have urinals and stalls with doors, but there are no partitions between the urinals.").

292. *See supra* notes 110–18 and accompanying text (discussing the schools' bodily privacy argument).

same-sex bodily exposure is completely benign while opposite-sex bodily exposure is an interest sufficiently important to survive intermediate scrutiny.

In sum, existing doctrine supports arguments that are *related* to the schools' arguments: (1) that bodily privacy is important, and (2) that bodily privacy infringements are more serious when the victim and the perpetrator are different sexes. But the doctrine does not support the schools' position that transgender boys' SAAB/genitals pose a threat to their interest in ensuring their students have bodily privacy from the opposite sex in the bathroom.

b. Interest 2: Privacy in Using the Bathroom Away from the Opposite Sex

The schools' other purported justification for the bathroom policy, ensuring students have privacy in using the bathroom away from people with different SAAB/genitals, fares no better under current law. The schools and the *Adams* court claimed that ensuring boys have privacy from the opposite sex in the bathroom requires excluding the plaintiffs from the boys' bathroom.[293] This argument assumes that the plaintiffs are the opposite sex for bathroom purposes, but the doctrine does not support the assumption that the plaintiffs' SAAB/genitals make them the opposite sex for bathrooms. If anything, the case law supports the opposite conclusion: forcing (or even allowing) the plaintiffs to use the girls' bathroom directly undermines this interest. There are two related lines of cases the schools claim support their argument: (1) cases endorsing the view that sex-segregated bathrooms promote privacy, and (2) cases permitting the state to treat boys and girls (or men and women) differently when the two groups are not similarly situated.[294] The following discussion addresses each line of cases in turn and explains why neither saves the bathroom rules.

The first set of cases acknowledges that sex-segregated bathrooms can promote a privacy interest in using the bathroom away from people of another sex. [295] But this is not at issue in the bathroom cases; the plaintiffs do not contest this point.[296] The contested issue is whether the plaintiffs are girls or boys for bathroom purposes. Not only do these cases fail to support the schools' claim that the plaintiffs are girls, they do not even discuss definitional questions of sex.

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293. *See supra* notes 115–18 and accompanying text.

294. These could be considered the same line of cases. I separate them here for organizational and clarity purposes.

295. *See supra* Part I (discussing this line of cases); *see also* United States v. Virginia (VMI), 518 U.S. 515, 550 n.19 (1996) ("Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements."); Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 913 (7th Cir. 2010) ("[T]he law tolerates same-sex restrooms or same-sex dressing rooms, but not white-only rooms to accommodate privacy needs."); Faulkner v. Jones, 10 F.3d 226, 232 (4th Cir. 1993) ("[S]ociety [has given its undisputed approval] of separate public rest rooms [*sic*] for men and women based on privacy concerns. The need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different.").

296. *See supra* note 78.

And, as explained in Part I, they had no reason to. Neither the meaning of sex nor the sex of the parties in these cases was disputed.[297]

The schools' arguments relied on these cases' statements about "physical differences" between men and women as being relevant to the privacy afforded by sex-segregated spaces to justify their bathroom rules.[298] Specifically, they argued that these cases authorized excluding transgender boys from the boys' bathroom because the basis for their exclusion was a physical difference, i.e., their genitals or SAAB. But reading these cases with a contextual lens helps reveal why the schools are wrong. These cases do not specify which aspects of sex or which physical differences are relevant to a sex-specific privacy interest. For example, *Adams* and the schools cited a footnote in *VMI* about how admitting women to VMI "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements."[299] But *VMI* said nothing about which aspects or models of sex made such alterations necessary. The Court did not say whether SAAB, genitals, secondary sex characteristics, or other differences were driving the privacy interests that sex-segregated spaces serve.[300] Would the alterations be necessary if the only person AFAB admitted to VMI had a penis and was perceived as a man? What if this student had a vagina but no one knew? The Court does not tell us whether the university's interest in protecting its students' "privacy from the other sex in living arrangements" would be best served by placing such a student in the male or female living unit.[301] And this case certainly does not tell us what the schools claim flows from the opinion: that SAAB/genitals and only SAAB/genitals were the models of sex driving the necessary changes in living arrangements a co-ed VMI would require.[302]

VMI's discussion of the connection between physical differences and sex-based privacy might even cut against the schools' claim. The plaintiffs in the bathroom cases share many physical characteristics with cisgender boys,

297. *See id.*; *see also supra* Part I.

298. *See* Initial Brief of Appellant at 29–30, Adams v. School Board of St. Johns Cnty., 3 F.4th 1299 (11th Cir. 2021) (No. 18-13592) ("In [*VMI*], the Supreme Court recognized that '[p]hysical differences between men and women . . . are enduring' and that 'the two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'") (quoting *VMI*, 518 U.S. at 533).

299. *See Adams ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 805 (11th Cir. 2022); En Banc Brief of Appellant the School Board of St. Johns County at 11, *Adams ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791 (11th Cir. 2022) (No. 18-13592); *see also VMI*, 518 U.S. at 550 n.19; Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 913 (7th Cir. 2010) (stating, in the context of a race discrimination claim, that "the law tolerates same-sex restrooms or same-sex dressing rooms . . . to accommodate privacy needs" while providing no additional explanation regarding the connection between sex and privacy).

300. *VMI*, 518 U.S. at 550, n.19 (discussing VMI's privacy concerns regarding the admission of women without mentioning any specific differences between men and women).

301. *Id.*

302. *See id.* at 548.

including short hair, a flat chest, and facial hair.[303] *VMI* and other cases discussing physical differences do not tell courts whether a transgender boy who has short hair, a flat chest, facial hair, and a vagina should be classified as M or F in order to advance sex-specific privacy interests.[304] In fact, they could support the conclusion that the plaintiffs cannot use the *girls'* bathroom because of real physical differences between the plaintiffs and cisgender girls.

The second line of cases the schools' claim support their arguments permits the state to treat men and women differently without running afoul of equal protection if men and women are not similarly situated due to biological differences. In *Nguyen v. I.N.S.*, one of the leading cases in this line, the Supreme Court upheld a law that provided different citizenship rules for children born abroad and out of wedlock depending on the sex of the citizen-parent. The law made it easier for children whose mother was a U.S. citizen to attain U.S. citizenship than for children whose father was a U.S. citizen.[305] The law's purposes were to ensure that the child was both biologically related to and had a meaningful relationship with the U.S. citizen parent.[306] Treating mothers and fathers differently, according to the Court, was substantially related to those purposes because of a real biological difference between the birth processes of mothers and fathers—namely, that mothers were always present for the child's birth but fathers did not have to be.[307] Therefore, this real difference meant that mothers were more likely than fathers to be biologically related to and emotionally connected with their children.[308] Under the Court's reasoning, treating mothers and fathers differently based on the mother's (assumed) necessary presence at birth was not an impermissible stereotype about the roles of men and women, but rather a real physical difference that substantially related to the goals of the law.[309]

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303. *See, e.g.*, *Adams ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., Fla., 318 F. Supp. 3d 1293, 1312 (M.D. Fla. 2018) ("Adams has undergone social, medical, and legal transitions to present himself as a boy. Adams wears his hair short; he dresses like a boy; his voice is deeper than a girl's; his family, peers, classmates and teachers use male pronouns to refer to him; he takes hormones which suppress menstruation and make his body more masculine, including the development of facial hair and typical male muscle development; he has had a double mastectomy so his body looks more like a boy.").

304. Adams's attorneys also explained why these precedents don't apply. *See* Plaintiff's Brief at 37, *Adams ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791 (11th Cir. 2022) (No. 18-13592) (distinguishing *Nguyen* and *Michael M*). Pro-trans courts have too. *See Adams*, 318 F. Supp. 3d at 1312.

305. Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 59–60 (2001).

306. *Id.* at 62, 64–65.

307. *Id.* at 64.

308. *Id.* at 64–65.

309. *Nguyen* has been undermined by *Sessions v. Morales-Santana*, 582 U.S. 47 (2017), and extensively critiqued by numerous scholars. *See, e.g.*, David S. Cohen, *Justice Kennedy's Gendered World*, 59 S.C. L. REV. 673, 691 (2008) (arguing that the *Nguyen* opinion "rel[ied] on gender stereotypes of women and men and their relationship to their children"); Doug NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2282–84 (2017) (arguing that *Nguyen* is based on impermissible assumptions about non-marital fathers and mothers); Courtney Cahill, *The New Maternity*, 133 HARV. L. REV. 2221, 2229 (2020) (disrupting the Court's assumption that birth is inherently tied to legal maternity and arguing that "advances in family law surrounding the new maternity . . . destabilize constitutional maternity's factual

The *Adams* en banc court and the schools claim *Nguyen* and related cases[310] support the schools' ability to bar the plaintiffs from the boys' bathroom because the reason for the plaintiffs' exclusion, their SAAB/genitals, are "biological differences."[311] But sex-based biological differences do not give the state carte blanche to discriminate.[312] The state cannot merely point to any biological difference and automatically survive intermediate scrutiny.[313] Rather, the *Nguyen* line of cases requires that the biological differences be substantially related to the purpose of the law.

The absurdity of the schools' position that the mere existence of biological differences is a sufficient justification for sex discrimination becomes apparent when applied in other contexts. If this position were correct, the state could pass a law allowing women, but not men, to purchase marijuana because men and women have different chromosomes (a biological difference); or allowing only women to obtain a pilot's license because women have lower testosterone levels than men, on average (a biological difference); or allowing men but not women to donate blood because men have penises and women do not (a biological difference). These laws would not be constitutional under *Nguyen* or any other Court case because the permissibility of these sex-based distinctions is not solely determined by whether that distinction is based on biological differences.[314] Rather, the state must explain why the biological differences are relevant to the law at issue. This is equal protection doctrine 101.[315] Why do chromosomes have anything to do with the ability to purchase marijuana? Why does someone's testosterone level affect their ability to fly a plane? Why do penises have anything to do with blood donation?

Sex-defining laws are not exempt from this doctrinal requirement. Suppose an all-women's state university defines "women" for admissions purposes as "people with uteruses and two functioning ovaries" and denies admission to anyone without a uterus or two functioning ovaries. The companion all-men's university defines men as "people who can successfully impregnate another person" and excludes anyone who is infertile. These rules' constitutionality

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assumptions and regressive tendencies"). I agree with these critiques, but even putting its flaws aside, *Nguyen* does not support the schools' position.

310. *See* Michael M. v. Superior Court of Sonoma Cty., 450 U.S. 464 (1981) (holding that a statutory rape law that applied only to men did not violate equal protection because women and men were not similarly situated with regard to pregnancy); United States v. Virginia (VMI), 518 U.S. 515, 533 (1996) ("Physical differences between men and women, however, are enduring.").

311. *See, e.g.*, Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 809 (11th Cir. 2022) (claiming that the Court has "ground[ed] its sex discrimination jurisprudence" in "biological differences between the sexes") (citing *Nguyen*, 533 U.S. at 73); En Banc Brief of Appellant the School Board of St. Johns County at 7, *Adams*, 57 F.4th 791 (No. 18-13592) (citing Nguyen, 533 U.S. at 73).

312. Adams's attorneys also make this point. *See* En Banc Brief of Appellee Drew Adams at 22–26, Adams v. Sch. Bd. of St. Johns Cnty., Fla., 3 F.4th 1299 (11th Cir. 2021) (No. 18-13592).

313. *See Nguyen*, 553 U.S. at 73.

314. For an account explaining why biological sex differences do not drive sex equality jurisprudence, *see* Schoenbaum, *supra* note 42, at 14–18.

315. *See supra* Part I (discussing the intermediate scrutiny framework).

depends on whether these biological differences advance the purpose of the schools' admissions rules. The women's school would need to explain why having a student body exclusively made up of people with a uterus and two functioning ovaries serves an important state interest. Why, for example, would admitting a woman AFAB who had her ovaries and uterus removed after ovarian cancer undermine those goals? The constitutionality of the men's university's policy would depend on whether the state could show how fertility relates to the state's goal, and why admitting a sterile cisgender man, for example, impedes those purposes.

Rather than providing a substantive reason for why the plaintiffs' SAAB/genitals are related to the schools' privacy interests, the schools and the *Adams* en banc court make conclusory assertions that the plaintiffs' SAAB/genitals—what they call "biological sex"—are relevant to the privacy afforded by sexed bathrooms. For instance, the *Adams* court declared that "[w]hen it comes to the bathroom policy, biological sex is the 'relevant respect' with respect to which persons must be 'similarly situated,'" and suggested that Adams is similarly situated to cisgender girls.[316] But the court failed to make any explicit connection between "biological sex" and the schools' privacy goals. It merely provides a circular and conclusory reason: "because biological sex is the sole characteristic on which the bathroom policy and the privacy interests guiding the bathroom policy are based."[317]

In sum, biological differences cannot, on their own, justify sex discrimination. Biological differences must advance the underlying purpose of the law. The *Adams* en banc court and the schools missed the crucial step of explaining why the biological differences the bathroom rules employ (SAAB/genitals) have anything to do with the state's privacy goals.[318] They treated the connection as obvious, but that's not enough under heightened scrutiny. Therefore, the schools have not shown that excluding the plaintiffs from the bathroom based on their SAAB/genitals substantially relates to their interest in protecting their students' privacy from the opposite sex.

3. No Showing that Students Understand the Plaintiffs to be "Girls"

Both of the schools' privacy rationales for the bathroom rule rest on an unproven assumption that their student body has the same understanding of sex that they do. Excluding the transgender boy plaintiffs from the boys' bathroom only ensures that cisgender boys do not share bathroom with girls or risk different-sex bodily exposure in the bathroom if cisgender boys understand the plaintiffs to be the girls. If the students do not think that the plaintiffs are girls, then excluding the plaintiffs from the boys' bathroom fails to advance the

316. *Adams*, 57 F.4th at 803 n.6.
317. *Id.*
318. *See, e.g.*, *id.* at 809 (citing *Nguyen*, 553 U.S. at 60).

schools' opposite-sex-based privacy interests. But the schools neither acknowledge nor defend this assumption that their students understand sex in general, and the plaintiffs' sex specifically, in the same way they do.[319] Because they do not defend it, the bathroom policy falls apart on the ends-means prong. The following discussion expands on this point, exposing this undefended assumption and showing why it's fatal to the schools' position.

The schools' argument about excluding the plaintiffs from the boys' bathroom to protect students from the opposite sex in the bathroom presupposes (1) that their students are aware of the plaintiffs' SAAB/genitals, and (2) that their students treat SAAB/genitals as dispositive of the plaintiff's sex. A hypothetical will clarify these points. Suppose Gavin Grimm, one of the transgender plaintiffs, enrolled in his school after he transitioned: that is, after he changed his name, started identifying as a boy, and conformed his appearance to that of most other boys.[320] The cisgender boys who shared the bathroom with Grimm may have no idea that they are sharing a bathroom with someone with a vagina and AFAB. In this scenario, the cisgender boys are likely determining Grimm's sex in the same way the inmate in *Byrd* determined the female prison guard's sex: by Grimm's appearance.[321] Just like the prison guard's SAAB/genitals were not causing the sex-specific privacy violation in *Byrd,* Grimm's hidden genitals or his SAAB are not causing any privacy violation in this example—there is no straight-line or automatic connection between Grimm's hidden SAAB/genitals and cisgender boys' privacy interests in shielding their exposed bodies from a different sex. Grimm's SAAB/genitals are not relevant; what's relevant is what the cisgender boy thinks or knows about Grimm's sex.[322]

The same holds true even if a cisgender boy did know that Grimm was AFAB or had a vagina or even saw his vagina. The risk of different-sex bodily exposure in this case would depend on whether this boy thought Grimm's SAAB/genitals made him a girl. How this boy adjudicates Grimm's sex turns on whether this boy shares the schools' view that SAAB/genitals are constitutive of sex in general or of Grimm's sex specifically. If this boy understands Grimm's sex to be based on his appearance and self-identification, he would consider Grimm to be a boy and would not understand himself to be at risk of exposing his body to a girl.

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319. *See generally* Brief of Appellant, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020) (No. 19-1952); Brief of Appellant, Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017) (No. 16-3522); Brief of Appellant, Adams v. School Board of St. Johns Cnty., 3 F.4th 1299 (11th Cir. 2021) (No. 18-13592).

320. Gavin Grimm transitioned between his freshman and sophomore year. *Grimm*, 972 F.3d at 593 ("Gavin entered his sophomore year living fully as a boy.").

321. *See* Byrd v. Maricopa Cnty. Sheriff's Dep't, 629 F.3d 1135 (9th Cir. 2011).

322. *See* Kessler & McKenna, Clarke, Lane-Steele, Stoller, *supra* note 208 (discussing ascribed sex).

Because these plaintiffs identified as boys and, in many ways, were indistinguishable from cisgender boys, most of their peers probably understood them to be boys, not girls.[323] Indeed, many of the plaintiffs' fellow students knew the plaintiffs were transgender (and therefore were likely aware of plaintiffs' SAAB and genitals) and still considered them to be boys.[324] Teachers and parents, not students, were the primary objectors to the plaintiffs' using the boys' bathroom.[325] In this context, the plaintiffs' ascriptive sex, not their SAAB/genitals, is most relevant to protecting against any different-sex privacy interest in the bathroom. Thus, assigning these plaintiffs to the bathroom based on SAAB/genitals does not just fail to advance this privacy interest. It undermines this privacy interest because it allows (or sometimes forces) transgender boys, who many perceive to be boys, to use the girls' bathroom.[326] Although not in these exact terms, some pro-trans judges and advocates have made similar insights. For example, the concurrence in *Grimm* concluded that allowing Grimm to use the girls' bathroom "harm[ed] student privacy interests more than it helped them"[327] because Grimm looks like a boy. Judge Wynn continued:

> Unlike his clothed genitals, Grimm's male characteristics—no breasts, masculine features and voice timbre, facial hair, and a male haircut—would have been readily apparent to any person using the girls' restroom. Put simply, Grimm's entire outward physical appearance was male. As such, there can be no dispute that had he used the girls' restroom, female students would have suffered a similar, if not greater, intrusion on bodily privacy than that the Board ascribes to its male students.[328]

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323. *See, e.g.*, *infra* notes 333–38 (discussing the plaintiffs' appearances).

324. *See* Complaint at ¶ 26, Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., No. 16-CV-943-PP, 2016 WL 5239829 (E.D. Wis. Sept. 22, 2016) ("Since [Ash's] transition at school, he has been widely known and accepted as a boy by the school community."); Oral Argument at 30:30, Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1053 (7th Cir. 2017), [https://perma.cc/D773-GNFZ] ("While [Whitaker] certainly is known to be transgender to many of his classmates, that's not across the board in a school of 1,700 students. Most kids know him to be a boy.").

325. *See Grimm*, Brief in Support of Summary Judgment at 3, Grimm v. Gloucester Cnty. Sch. Bd., 400 F. Supp. 3d 444 (E.D. Va. 2019) (No. 15-00054) (stating that the complaints the School Board received about Grimm were "mostly from parents of students").

326. LGBT rights groups have been highlighting how prohibiting gender-conforming transgender people from using the bathroom that aligns with their gender identity will result in undesirable outcomes, as legal historian Marie-Amélie George has documented. *See* George, *supra* note 98, at 597–98 (2019) (providing an example of how LGBT rights groups and litigators have invoked the argument that "the plaintiffs' gender normativity undermined the law"). For this same reason, the bathroom rules undermine their other justification: bodily privacy from the opposite sex. Cisgender girls might perceive the plaintiffs to be boys, which would risk bodily exposure to students of another sex.

327. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 623 (4th Cir. 2020), *as amended* (Aug. 28, 2020) (Wynn, J., concurring).

328. *Id.*

Similarly, during the *Whitaker* oral argument, one judge hypothesized that students would be more uncomfortable if the plaintiff used the girls' bathroom, not the boys' bathroom, because the plaintiff is "a male by all external indicia."[329] This theme surfaced again later in the argument. Another judge described a fact pattern involving a transgender girl who has "breasts," "has had estrogen therapy," and is an "externally female looking girl until you get down below the waist."[330] The judge then said that forcing this transgender girl to use the boys' bathroom is "the real risk" of the policy.[331] If ascriptive sex is the model of sex driving sexed privacy interests in the bathroom, then these courts are right that the bathroom policy does not substantially relate to its purpose of sex-specific privacy in bathrooms. Rather, as applied to these plaintiffs, the policy does the exact opposite because it forces a student who appears to be a boy to use the girls' restroom.

To be clear, this Article is not endorsing a bathroom rule based on perceived or ascribed sex nor is it suggesting that such a rule would pass constitutional muster. An ascriptive sex-based rule has many problems of its own: it could reinforce essentialist and problematic sex stereotypes and might violate other equal protection principles.[332] The point here is not to provide schools with a model of sex (or a method for implementing the model) that advances their purported interests and is otherwise legally permissible. That's the schools' job—not the court's.[333] The only question a court has to reach is whether determining the plaintiffs' sex based on their SAAB/genitals substantially relates to the schools' purported privacy interests. Because they do not advance the schools' privacy interests, the bathroom rule fails prong two of intermediate scrutiny.

Perhaps this careful dissection of the case law and the schools' arguments gives the schools more credit than they deserve. Many of their privacy arguments are absurd on their face. First, the schools define sex based on genitals, and yet, according to the very cases the schools cite, the makeup of a student's genitals (either presently or when they were born) is *private*.[334] Determining sex based

329. Oral Argument at 6:25, Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1053 (7th Cir. 2017), https://media.ca7.uscourts.gov/sound/2017/nr.16-3522.16-3522_03_29_2017.mp3 [https://perma.cc/6MQH-DFR6].

330. *Id.*

331. *Id.* at 16:00.

332. For instance, making bathroom access contingent on how well students "pass" as either M or F likely constitutes unconstitutional sex stereotyping. Whether someone can access a particular bathroom cannot be based on how well they conform to stereotypical notions about how M or F should look. *See generally*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (in the context of Title VII).

333. *See* United States v. Virginia (VMI), 518 U.S. 515, 533 (1996) ("The burden of justification is demanding [under intermediates scrutiny] and it rests entirely on the State.").

334. *See* Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1989) ("Most people, however, have a special sense of privacy in their genitals"); *see also* Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 805 (11th Cir. 2022) (citing Fortner v. Thomas, 983 F.2d 1024, 1030 (11th Cir. 1993)) (recognizing people have "a special sense of privacy in their genitals").

on genitals to advance an interest in bodily privacy that is particularly concerned with keeping genitals private defies basic logic. Second, their bodily privacy argument is based on the existence of bodily exposure that they facilitate. If the schools created boys' bathrooms in a way that made it hard for students to see each other's exposed body parts, there would be no risk of bodily exposure period—different sex or not. Instead, they have created bathroom environments that promote, or at least do not prevent, bodily exposure.[335] Instead of fixing the bodily privacy problem they have created, the schools decided to solve this "problem" by kicking transgender boys out of the boys' bathroom.

I take these arguments seriously not because they are strong arguments, but because of their continued traction. The core assumption behind the schools' argument—that cisgender boys' interests in bodily privacy are not violated if they urinate near other people AMAB or with penises—but are severely violated if they urinate near someone AFAB or with a vagina—is absurd to some, myself included. But many judges likely disagree. Therefore, calling the schools' position absurd is not enough to win without first explaining why the case law fails to support their arguments.

This discussion has revealed that excluding the plaintiffs from the boys' bathroom based on their SAAB/genitals is not substantially related to either privacy-related justification. Therefore, the bathroom rules are unconstitutional, as applied to these plaintiffs.

D. Reflections and Limits

This Article has provided courts one analytical path that leads to the conclusion that a SAAB/genital-based definition of sex for bathroom access, as applied to a plaintiff like Adams, Grimm, or Whitaker, violates equal protection. This is by no means the only path to such a conclusion.[336] There are bathroom-specific arguments for why these policies are unconstitutional that this Article does not mean to preclude. But this Article has used bathroom rules as an

335. *See* Byrd v. Maricopa Cnty. Sheriff's Dept., 629 F.3d 1135 (9th Cir. 2011).

336. For other arguments as to why sexed bathrooms in general are unconstitutional, or why these bathroom rules are unconstitutional, *see, e.g.*, Cruz, *supra* note 52, at 111 (arguing that privacy is not the primary driver behind these bathrooms rules but rather that these rules can be understood as a response to "the boundaries of gender being contested, and continued efforts to instill gendered intimacy within sex-based classes—to make sex matter in a time when sex's social or public significance may seem greatly diminished compared to the past"); *see also*, Brief for Professors Samuel Bagenstos, et. al as Amici Curiae in Support of Respondent at 2–5, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020) (No. 16-237) (arguing that bathroom rule in *Grimm* unlawfully "subjects transgender students to "discrimination" because it is not necessary to require those students to comply with such sex-based segregation in order to advance any important institutional objective"); Susan Hazeldean, *Privacy as Pretext*, 104 CORNELL L. REV. 1719 (2019) (arguing that privacy arguments invoked against trans rights are pretextual); Portuondo, *supra* note 52 (arguing that sexed bathrooms are normatively undesirable and unconstitutional); Colker *supra* note 52 (arguing that "sex-segregated restrooms constitute an unconstitutional, sex-based harm that cannot be justified under contemporary constitutional, sex discrimination doctrine").

example of how a contextual approach can strengthen equal protection challenges to all laws that define sex to classify people as M or F.

Though a contextual approach can build a more robust foundation upon which to challenge sex-defining laws, it is not a silver bullet. It has limits, many of which are part and parcel of a contextual approach and were addressed in Part III.A's discussion of contextual sex.[337] This discussion expands on the limitations that are particularly salient to the preceding analysis.

First, a contextual approach provides little in the way of normativity. While it can help reveal the state's actual purpose behind sex-defining laws, it does not, on its own, provide a theory for why these purposes are improper. It relies on other theories and doctrines to do that work. If courts deem a state's commitment to upholding binary, stable, M/F, sex categories or to eradicating the existence of transgender people as important state projects, there is nothing the contextual approach can do to help.

The second limitation of this approach stems from its primary normative commitment: namely, its rejection of naturalized and pre-legal definitions of sex and its mandate that the legal meaning of sex change depending on the context. Because of this undeniable ideological prerequisite, some conservative judges will not adopt it. Judges who believe that the meaning of sex exists *a priori*, outside of law, and therefore carries the same meaning regardless of legal context, will not adopt this approach because it directly clashes with these beliefs. This approach requires judges to reject the notion that SAAB, genitals, or any model of sex for that matter are essential components of the legal meaning of sex that must be included in any sex-defining law. A contextual sex analysis is off the table for those committed to certain pre-existing and inflexible views about sex and who cannot suspend their gender ideologies when doing their jobs. Indeed, most, if not all pro-trans arguments are probably off the table for these judges.

However, a judge does not need to be a staunch progressive to be amenable to this approach. Sex-defining cases draw judges into the intense, heated, and partisan debates about the meaning of sex, but this approach can give these judges an "out" if they want one. That's because this approach allows judges to make legal determinations about the meaning of sex without making broader pronouncements about what sex does or should mean outside the bounds of the particular law at issue. A contextual approach to sex, by its very nature, cabins any legal definition of sex to the specific context in which it is being used.[338] Legal actors need only recognize that legal context affects the meaning of a particular word—something they routinely recognize in other contexts.

Further, judges do not necessarily need to abandon their cultural or religious beliefs about sex to adopt this approach. A judge can still believe, as a

337. *See supra* Part III.A.

338. *See supra* notes 202–21 and accompanying text.

political or religious matter, that sex is defined by A, B, and C traits. This approach does not ask judges to abandon this view, but it does ask them to acknowledge that the legal context affects which traits are relevant to the legal question at hand—that sometimes trait A is the only thing that matters and traits B-C do not need to be addressed at all. For instance, a judge could still believe that a woman is someone who has XX chromosomes (trait A), has certain genitals (trait B), and sincerely believes that they are a woman (trait C). If they understand that not all of these traits matter in all legal contexts, they can apply a contextual approach (at least sometimes).

Simply put, a contextual approach is what equal protection doctrine already supports and what judges are supposed to be doing. Like Justice Jackson said at her confirmation hearing, a judge's task is not to determine the "true" essence of sex or to make broad pronouncements about the definition of man or woman.[339] Their job is to apply the law to a discrete set of facts. A contextual approach does exactly that—uses the law to determine the meaning of sex.

CONCLUSION

This Article is for the present. It is deeply practical, charting an analytical path that lawyers and judges can use today. Its primary goal is to build a more robust foundation for transgender litigants to fight laws that purport to define sex but are usually thinly veiled attempts to reassert the state's ideological position about sex and punish people who defy that ideology. This path avoids directly challenging the constitutionality of sexed bathrooms writ large: not only is this question not squarely presented in these cases, but it is also a question that many transgender and gender equality advocates suspect is political kryptonite for progressives.[340] Maybe it is, at least in this current political landscape.[341]

Although this Article does not address the legality or normative value of sexed bathrooms or sex segregation in general, it is careful to not reify their legitimacy either. This Article leaves room for future challenges to systems of compulsory binary sex and ongoing projects that destabilize the "natural attitude" about sex: that M and F are separate non-overlapping categories, are easily distinguished from each other, and have a stable and true essence.[342]

339. *See supra* note 1 and accompanying text.

340. *See* George, *supra* note 98, at 613 (explaining how transgender rights advocacy groups have avoided directly challenging sex segregation).

341. However, Eyer, *supra* note 30 at 65, 73, 81–84, suggests that given the extraordinarily high success rates of current movement litigation, there may be more room for "risky" arguments, including challenges to sex-based classifications.

342. *See* Harold Garfinkel, *Passing and the Managed Achievement of Sex Status in an "Intersexed" Person*, *in* THE TRANSGENDER STUDIES READER 58, 62 (Susan Stryker & Stephen Whittle eds., 2006) (describing the natural attitude of sex as the idea that "members of the normal population . . . are essentially, originally, in the first place, always have been, and always will be, once and for all, in the final analysis, either 'male' or 'female'").