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Disestablishing Sex and Gender

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Disestablishing Sex and Gender

David B. Cruz

This Article argues that the Constitution might be understood to "disestablish" sex and gender. Religious and gender ideologies have acted and continue to act in similar harmful ways, legitimizing social dividing practices on the basis of the supposed extra-human authority of Nature or God, and thereby violating a congeries of constitutional principles. Under the disestablishment of sex and gender, proposed in this Article, government would be significantly constrained in its ability to rely upon or reinforce sex or gender beliefs or groups. Moving beyond current equal protection doctrine with its group-comparative focus on discrimination, this approach would focus analysis upon governmental support for and reinforcement of sex and gender beliefs and divisions, and it would impose greater constraints on government than courts and legislatures have commonly recognized. The Article examines how different conceptions of disestablishment would have different effects on such issues as governmental recognition of sex changes, sex-segregated education, and the mixed-sex requirement for civil marriage.

INTRODUCTION

Women have their world
And men, we have ours
We're into sports
And they're into flowers.

The women are talking
We do not understand
They speak in a language
We do not comprehend

—David Byrne[1]

For too long, the belief in fundamental differences between men and women—differences in their roles, their aptitudes, their very natures—has been an article of faith in both law and culture. It is time to disestablish sex and gender. While private individuals and groups should largely remain free to believe what they will about the sexual division of humankind,

1. DAVID BYRNE, *Women vs. Men*, *on* REI MOMO (Warner Bros. 1989).

under the Constitution, government must give up its roles in reinforcing gender ideologies and social divisions based on sex and gender.

The belief in deep and enduring sex differences is widely shared in the United States today. For many individuals and organizations, it is obvious that men and women are (and should be) different. For example, the Southern Baptists and other conservative religious groups have declared their normative view of the different positions of wedded men and women.[2] Authors Deborah Tannen (a sociolinguist) and John Gray (a psychologist) have found large, receptive, and remunerative audiences for their theories of the different linguistic styles[3] and "planetary origins"[4] of men and women. Sociobiologist Donald Symons has "even argue[d] that male and female sexuality are so different, so at odds, that it makes sense to think of the two sexes as separate species."[5]

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2. In 1998 the Southern Baptists amended their statement of faith, directing "[a] wife . . . to submit herself graciously to the servant leadership of her husband" and "serve as his helper." Yonat Shimron, *Baptists Say Wives Must Submit*, NEWS & OBSERVER (Raleigh, NC), June 10, 1998, at A1, *available at* 1998 WL 6142240 (quoting Amendment to the Baptist Faith and Message, internal quotation marks omitted). That amendment also "defines marriage strictly in heterosexual terms as a union of 'one man and one woman.'" *Id.*; *see also* John M. Swomley, *Storm Troopers in the Culture War*, HUMANIST, Sept.-Oct. 1997, at 8, *available at* 1997 WL 9007055 ("Tony Evans, one of [Promise Keepers'] most popular speakers, tells men to reclaim their role—without compromise—as head of the house and tells women they should submit for 'the survival of our culture.'").

3. Tannen has made a cottage industry of expounding the communicative differences of men and women. *See* DEBORAH TANNEN, TALKING FROM 9 TO 5: HOW WOMEN'S AND MEN'S CONVERSATIONAL STYLES AFFECT WHO GETS HEARD, WHO GETS CREDIT, AND WHAT GETS DONE AT WORK (1994) (re-titled TALKING FROM 9 TO 5: WOMEN AND MEN IN THE WORKPLACE: LANGUAGE, SEX, AND POWER for mass trade paperback release in 1995); DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION (1990); DEBORAH TANNEN, THAT'S NOT WHAT I MEANT : HOW CONVERSATIONAL STYLE MAKES OR BREAKS YOUR RELATIONS WITH OTHERS (1986) (re-titled THAT'S NOT WHAT I MEANT: HOW CONVERSATIONAL STYLE MAKES OR BREAKS RELATIONSHIPS for reprint ed. 1991). *See also* BONNIE TYLER, *If You Were a Woman (and I Was a Man)*, *on* SECRET DREAMS AND FORBIDDEN FIRE (Columbia 1986) ("If you were a woman and I was a man / Would it be so hard to understand").

4. Gray has likewise built a lucrative public career developing the theme that "men are from Mars, women are from Venus," with different communicative approaches and emotional needs. *See* JOHN GRAY, PRACTICAL MIRACLES FOR MARS AND VENUS: NINE PRINCIPLES FOR LASTING LOVE, INCREASING SUCCESS, AND VIBRANT HEALTH IN THE TWENTY-FIRST CENTURY (2000); JOHN GRAY, MARS AND VENUS STARTING OVER: A PRACTICAL GUIDE FOR FINDING LOVE AGAIN AFTER A PAINFUL BREAKUP, DIVORCE, OR THE LOSS OF A LOVED ONE (1998) (mass market paperback 1999); JOHN GRAY, MARS AND VENUS TOGETHER FOREVER: A PRACTICAL GUIDE TO CREATING LASTING INTIMACY (mass market paperback rev. ed. 1998); JOHN GRAY, MARS AND VENUS ON A DATE: A GUIDE FOR NAVIGATING THE 5 STAGES OF DATING TO CREATE A LOVING AND LASTING RELATIONSHIP (1997) (mass market reprint ed. 1998); JOHN GRAY, MARS AND VENUS IN LOVE: INSPIRING AND HEARTFELT STORIES OF RELATIONSHIPS THAT WORK (1996) (mass market paperback 1999); JOHN GRAY, MARS AND VENUS IN THE BEDROOM: A GUIDE TO LASTING ROMANCE AND PASSION (1995) (mass market paperback ed. 2001); JOHN GRAY, MEN ARE FROM MARS, WOMEN ARE FROM VENUS: A PRACTICAL GUIDE FOR IMPROVING COMMUNICATION AND GETTING WHAT YOU WANT IN YOUR RELATIONSHIPS (1992). *See generally* John Gray's Mars Venus LLC, *at* http://www.marsvenus.com (last visited Apr. 5, 2002).

5. ANNE FAUSTO-STERLING, MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN 4 (1985) (citing DONALD SYMONS, THE EVOLUTION OF HUMAN SEXUALITY (1979)). *But cf.*

This "gender fundamentalism" is not, however, confined to popular culture. Many laws and government practices in the United States also treat males and females as fundamentally different types of creatures. The categorical exclusion of women from certain military combat positions[6] and employment as guards at some correctional facilities,[7] the exemption of women from prosecution under some rape laws,[8] the requirement that one's sex be displayed on one's passport or driver's license,[9] the disadvantageous treatment accorded U.S. citizen mothers as opposed to fathers' ability to confer citizenship upon their children under certain naturalization statutes,[10] the disadvantages imposed upon fathers relative to mothers in other naturalization statutes,[11] and the ubiquity of "urinary segregation" of men and women[12] all testify to the cozy relationship between law and gender in the contemporary United States.

In possibly their most insidious form, gender ideologies point to "biology" as proof positive of enduring natural differences between men and women, which are then taken to justify sex-based legal impositions. For example, in 1981, in *Michael M. v. Superior Court of Sonoma County*,[13] the U.S. Supreme Court relied on "real" differences between men and women—the effect of pregnancy as a "natural deterrent" against women to engage in intercourse[14]— in rejecting an equal protection challenge to California's statutory rape law that applied only to males.[15] Concurring, Justice Stewart contended that "there are differences between males and females that the Constitution necessarily recognizes[,] the most basic of [which is that] females can become pregnant as the result of sexual intercourse; males cannot."[16]

Katrina C. Rose, *The Transsexual and the Damage Done: The Fourth Court of Appeals Opens Pandora's Box by Closing the Door on Transsexuals' Right to Marry*, 9 LAW & SEX. 1, 10 n.22 (1999-2000).

6. *See* Rostker v. Goldberg, 453 U.S. 57 (1981).

7. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977).

8. *See* Michael M. v. Super. Ct. of Sonoma County, 450 U.S. 464 (1981).

9. *See* LESLIE FEINBERG, TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO RUPAUL 61-62, 125 (1996).

10. *See* Breyer v. Meissner, 214 F.3d 416 (3d Cir. 2000).

11. *See* Nguyen v. INS, 533 U.S. 53 (2001).

12. MARJORIE GARBER, VESTED INTERESTS: CROSS-DRESSING AND CULTURAL ANXIETY 47-48 (1992) (quoting JACQUES LACAN, *The Agency of the Letter in the Unconscious*, *in* ECRITS: A SELECTION 151 (Alan Sheridan trans., W.W. Norton & Co. 1977) (1966)).

13. *Michael M.*, 450 U.S. at 466-67 (1981) (plurality opinion).

14. *Id.* at 473. Because pregnancy acts as a "natural . . . deterrent" to intercourse for females while the male, "by nature, suffers few of the consequences of his conduct," the plurality believed that the statute was permissible as a measure to "roughly 'equalize' the deterrents on the sexes." *Id.* Thus, in the plurality's view, "the statute . . . reasonably reflect[ed] the fact that the consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male." *Id.* at 476.

15. The California Supreme Court held that this sex-discriminatory law was "supported not by mere social convention but by the immutable physiological fact that it is the female exclusively who can become pregnant." Michael M. v. Super. Ct. of Sonoma County, 601 P.2d 572, 574 (Cal. 1979).

16. *Michael M.*, 450 U.S. at 478 (Stewart, J., concurring).

Feminist legal scholars writing in the 1970s and 1980s leveled searing criticisms at the Court's "real differences" Equal Protection Clause jurisprudence, charging the Justices with improperly taking cultural or legal effects for "real" sex differences.[17] The Court seemed to have been listening. For example, in 1991 it rejected efforts to exclude women from jobs potentially hazardous to reproduction in *U.A.W. v. Johnson Controls*,[18] and in 1996 in *United States v. Virginia*, it rejected claims about women's psychology of learning in striking down the exclusion of women from the Virginia Military Institute.[19]

This apparent progress was short-lived. In June of 2001, a five-member majority of the U.S. Supreme Court brought a "return of the 'real'" when it decided *Nguyen v. INS*.[20] In *Nguyen*, the Court rejected an equal protection challenge to a federal law making it more difficult for male than female U.S. citizens to confer citizenship on their offspring born abroad out of wedlock.[21] The all-male majority led by Justice Kennedy[22] relied upon natural "biology" justifications,[23] allowing the "proof of motherhood . . . inherent in birth itself" to excuse mothers from the statutory burdens placed on fathers.[24] The majority also observed that the statute's "use of gender specific terms takes into account a biological difference between the parents"[25]— without ever questioning the underlying propriety of such consideration. Hoisting dissenting Justice Ginsburg by her own petard, the majority quoted her declaration in *United States v. Virginia* that "[p]hysical differences between men and women are enduring"[26] in concluding that its invocations of real sex differences were

17. *See, e.g.*, Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 944-47 (1983).

18. 499 U.S. 187 (1991).

19. 518 U.S. 515 (1996).

20. 533 U.S. 53 (2001).

21. *See* Donald T. Kramer, *What Constitutes Reverse Sex or Gender Discrimination Against Males Violative of Federal Constitution or Statutes—Nonemployment Cases*, 166 A.L.R. FED. 1, §7(d) (2000).

22. Justice Ginsburg, along with Justices Souter and Breyer, joined Justice O'Connor's dissent.

23. The opinion uses the term "biological" 7 times; it invokes "blood link[s]" or "blood tie[s]" twice (something the statute requires citizen fathers but not citizen mothers to establish within a limited period). The majority simply asserted that government has an "important" interest in "assuring that a biological parent-child relationship exists," *Nguyen*, 533 U.S. at 62; the sex-discriminatory requirements were served because "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood," *id.* at 63; and the statutory hurdles for male parents supposedly "represent[ed] a reasonable conclusion by the legislature that the satisfaction of one of several alternatives will suffice to establish the blood link between father and child required as a predicate to the child's acquisition of citizenship," *id.* at 63.

24. *Id.* at 64. The majority believed that "the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth." *Id.* at 65. The Court fails to address the situation of women serving as gestational surrogates carrying to term a conceptus formed from another woman's egg and a man's sperm.

25. *Id.* at 64.

26. *Id.* at 68 (internal quotation marks and ellipsis omitted).

clearly unobjectionable.[27] For the *Nguyen* majority, it was because "[t]he difference between men and women in relation to the birth process"—one of "our most basic biological differences"—"is a real one"[28] that Congress could impose certain requirements upon men but not women without violating the guarantee of equal protection of the laws.

Certainly, there are physical differences between men and women. This, however, does not mean that such differences necessarily or even frequently justify differences in the law. Of course, as a social matter, gender exists, and men and women as groups exhibit statistical differences in a variety of areas, including life expectancies, earnings, chances of being raped, and likelihood of gender discrimination in employment. However, there is also tremendous intra-group variation. To note just a few examples, there are exceptionally physically strong women and physically weak men, sensitive men and tough-as-nails women, men and women who are superb chefs, and men and women who cannot manage to boil water.

In the face of such variation, the persistent acceptance by government of the unquestioned belief that men and women are or should be categorically different and treated as such, not only because God says so, but also because that is the treatment Nature dictates,[29] is troubling. The history of race, religion, and gender in the U.S. amply demonstrates that reliance on what God or Nature supposedly dictates has often led to unjust exclusions and limitations, and to the casual acceptance and reinforcement of social dividing practices[30] by government.

This article does not argue—yet again—for improved equal protection doctrines that might subject sex and sexual orientation discrimination to

27. *Id.* The majority believed that these enduring differences give rise to "an undeniable difference in the circumstance of the parents at the time a child is born." *Id.*

28. *Id.* at 73.

29. Given "the principle of inherent equality that underlies and infuses our Constitution," Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) (citing THE DECLARATION OF INDEPENDENCE (U.S. 1776)), it is not self-evident why it should be proper for government to distribute burdens in a sex-discriminatory fashion as a way of "acknowledg[ing] our most basic biological differences." *Nguyen*, 533 U.S. at 73.

30. I take the term "dividing practices" from Paul Rabinow, *see* Paul Rabinow, *Introduction*, *in* THE FOUCAULT READER 3, 7-11 (Paul Rabinow ed., 1984), via Bill Eskridge, *see* William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1503 n.284 (1993) (characterizing those pages of Rabinow's *Introduction* as "discussing Foucault's views that human society isolates certain subgroups as a means of dominating them"). *See also id.* at 1490, 1503 (discussing anti-lesbigay dividing practices); *id.* at 1505-10 (discussing racist and heterosexist dividing practices); William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007, 1095 (1997) (introducing constitutive dynamics of heterosexist dividing practices). In criticizing many such practices in this Article, I do not mean to deny either that dividing practices are "persistent features of social relations," Alan Hunt, *Law, Community, and Everyday Life: Yngvesson's Virtuous Citizens and Disruptive Subjects*, 21 LAW & SOC. INQUIRY 173, 183 (1996), or that "some such practices may be legitimate," William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 643 (1994).

strict scrutiny[31] and invalidate laws like those upheld in *Michael M.* and *Nguyen*. Even reconstructed equal protection doctrines might not be suited to addressing the range of problems posed when government reinforces sex and gender. For example, in order to achieve heightened scrutiny, a plaintiff must show that a law challenged as sex-discriminatory embodies a sex classification. Equal protection law, however, does not generally address the antecedent question of what is a sex classification or what definitions of male and female government may adopt.[32] Similarly, the question of whether governmental provision of single-sex schools is consistent with the Equal Protection Clause bogs down in endless empirical prognostication and debate about whether separate can really be equal in this context.[33]

This Article instead adopts a perspective different from the equal protection approach, focusing not so much on the supposedly similar or different groups at issue as on the ideological character of the sex/gender division that underwrites such government practices. In this respect, I aim to highlight similarities between gender and religion and the dividing practices they underwrite, arguing not simply for the equality of men and women before the law but for the deinstitutionalization of gender beliefs including correlations between bodily sex and gender stereotypes or expectations. The United States has to a large measure succeeded in disestablishing religion, so that government cannot use religious beliefs or identities to impose duties or make people's religion relevant to their civil standing. But it has not yet disestablished gender so that government cannot support or

31. Numerous scholarly articles and some judicial opinions have called upon the Supreme Court to interpret the Equal Protection Clause to require strict scrutiny of government action discriminating against women or lesbigay persons. *See, e.g.*, Watkins v. U.S. Army, 875 F.2d 699, 711-28 (9th Cir. 1989) (Norris, J., concurring in the judgment), *cert. denied*, 498 U.S. 957 (1990); Jantz v. Muci, 759 F. Supp. 1543 (D. Kan. 1991), *rev'd*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 508 U.S. 952 (1993); Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 14 WOMEN'S RTS. L. REP. 263 (1992); Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205 (1993); Fernando J. Gutierrez, *Gay and Lesbian: An Ethnic Identity Deserving Equal Protection*, 4 LAW & SEX. 195 (1994); E. Gary Spitko, *A Biologic Argument for Gay Essentialism-Determinism: Implidcations for Equal Protection and Substantive Due Process*, 18 U. HAW. L. REV. 571, 598-622 (1996); John Charles Hayes, Note, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny after* Bowers v. Hardwick, 31 B.C. L. REV. 375 (1990); Harris M. Miller, II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985).

32. *See infra* Part III.A. To the extent the Supreme Court has even attempted this question, asking whether pregnancy discrimination either constitutes, or is a proxy for, sex discrimination, its results have been overwhelmingly condemned by legal scholars. *See* Geduldig v. Aiello, 417 U.S. 484 (1974) (pregnancy discrimination in health coverage not unconstitutional sex discrimination); *see also* Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 (1984) (observing that "criticizing *Geduldig* has . . . become a cottage industry"). Even that issue, however, is different from the question of whether equal protection constrains the definitions of "male" and "female" that government may adopt.

33. *See infra* Part III.B.

reinforce gender beliefs or gender divisions. Rather, as *Michael M.* and *Nguyen* illustrate, governments in the United States persist in imposing duties on people on the basis of sex, acting as though a gesture toward some evidently "natural" difference by itself justifies different political treatment for the persons marked by that difference. While gender differs from religion, both can be especially pernicious when government joins forces with them. The problem is not simply avoiding immediate governmental complicity in religious or gender hierarchies; instead, the anterior problem is that religion and gender are dividing practices that use improper assumptions (the extra-human authority of God or Nature) for the allocation of rights and responsibilities in our constitutional order of one politically unitary People.

Part I of this Article describes how religion and gender might be seen as similar in their histories and operations. It suggests, in light of those similarities, that it would be profitable to explore what it might mean to treat sex/gender ideologies and divisions in a manner analogous to U.S. treatment of religious ideologies and divisions, thus constitutionally "disestablishing" gender.[34] Part II then uses the American experience with the disestablishment of religion and various conceptions thereof to explore theoretically what the disestablishment of gender might entail. Finally, Part III examines the practical impact of these theories on such issues as sex designation and the efficacy of sex-change efforts, sex-segregated education, and the mixed-sex requirement for civil marriage.

I

CONCEPTUALIZING GENDER ON THE MODEL OF RELIGION

Although it has not been a common comparison,[35] gender may effectively be conceptualized on the model of religion. Both religion and gender

34. Paisley Currah and I have been independently developing this notion. For a preliminary discussion by Professor Currah, see Symposium, *Queer Law 1999: Current Issues in Lesbian, Gay, Bisexual and Transgendered Law*, 27 FORDHAM URB. L.J. 279, 372 (1999) (remarks of Paisley Currah) (arguing that "the most fundamental goal of the transgender and of L/G/B/T politics needs to be the disestablishment of the current gender regime"); *id.* at 373 (envisioning "a gender pluralistic society, one that respects the official doctrine of separation of gender and state").

35. While law reviews contain little analysis expressly comparing gender to religion, there is a small but significant constitutional literature treating analogies between race and religion. *See, e.g.*, Thomas C. Berg, *Religion, Race, Segregation, and Districting: Comparing* Kiryas Joel *with* Shaw/Miller, 26 CUMB. L. REV. 365 (1995-1996); Jesse H. Choper, *Religion and Race under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491 (1994); Christopher L. Eisgruber, *Ethnic Segregation by Religion and Race: Reflections on* Kiryas Joel *and* Shaw v. Reno, 26 CUMB. L. REV. 515 (1995-1996); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 64-68 (1991); Sheri Lynn Johnson, *A Response to Professor Choper: Laying Down Another Ladder*, 79 CORNELL L. REV. 522 (1994); Gary J. Simson, *Laws Intentionally Favoring Mainstream Religions: An Unhelpful Comparison to Race*, 79 CORNELL L. REV. 514 (1994); Tsemin Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119 (1997). Articles comparing and contrasting race and gender are too legion to cite here.

involve ideology and social organization,[36] rely in their descriptions and prescriptions on extra-human authority, and implicate individual and group identity deeply, in ways making them simultaneously important as matters of conscience and potentially threatening as divisive forces tending toward installation or reinforcement of hierarchy. These commonalities between religion and gender, as well as their histories of underwriting social dividing practices, warrant treating gender as a subject of disestablishment under the egalitarian democratic regime established by the Constitution of the United States.

A. Gender as Ideology and Organization

Gender is an organizing principle. It is a way of seeing and making sense of both the "natural" world and the social world. Essentially, gender is a way of perceiving human beings. Human societies commonly classify higher animal populations, including human populations, into two kinds on the basis of sex: male and female.[37] At least insofar as human beings are concerned, gender comprises not only this binary division, but also attaches different characteristics, preferences, abilities, and roles in life, either descriptively or normatively, to these two categories.

What I am designating "gender" thus might also be termed "the sex/gender system,"[38] or a "gender scheme,"[39] or a "sex/gender ideology."[40] Isabel Marcus proposes a useful definition of the sex/gender system:

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36. *Cf.* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 997 (1990) (noting that religion may involve beliefs, status, and/or conduct).

37. *See, e.g.*, SYLVIANE AGACINSKI, PARITY OF THE SEXES xv (Lisa Walsh trans., 2001) (taking as incontrovertibly self-evident "the sexual condition of humanity, made up of males and females, like all higher animals").

38. Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, *in* TOWARD AN ANTHROPOLOGY OF WOMEN 157, 165 (Rayna R. Reiter ed., 1975) (defining "sex/gender system" as "a set of arrangements by which the biological raw material of human sex and procreation is shaped by human, social intervention and satisfied in a conventional manner), *quoted by* Wendy S. Strimling, *The Constitutionality of State Laws Providing Employment Leave for Pregnancy: Rethinking* Geduldig *After* Cal Fed, 77 CALIF. L. REV. 171, 208 (1989). Because I am not privileging "biological sex," my use of the phrase "sex/gender system" differs from that of Robert Nadeau, who has launched a jeremiad against what he defines as "the so-called sex/gender system in feminist theory," in which

> sex refers to physiological differences in the domain of the body, and gender to learned behavior in the domain of the mind. This two-domain distinction allowed sex-specific bodies to be viewed as separate and distinct from gender-neutral minds, and legitimated the idea that biological reality is wholly independent of gender identity.

ROBERT L. NADEAU, S/HE BRAIN: SCIENCE, SEXUAL POLITICS, AND THE MYTHS OF FEMINISM 3 (1996). Nadeau also seems to equate a woman's "womanhood" with "the connection between biological reality and gender identity." *See id.* at 6.

39. Arriola, *supra* note 31, at 22-23 (apparently describing "an all-encompassing framework of beliefs about sex and gender" as a "gender scheme").

40. I am thus using "ideology" somewhat loosely, only approximating some technical definitions of ideology, such as the characterization in the International Encyclopedia of the Social Sciences:

> [O]ne variant form of those comprehensive patterns of cognitive and moral beliefs about man, society, and the universe in relation to man and society, which flourish in human societies . . . As compared with other patterns of beliefs, ideologies are relatively highly

> The sex/gender system is that set of arrangements by which human, social intervention shapes the biological raw material of human sex and procreation. It involves the social creation of two genders from biological sex, a particular sexual division of labor, and the social regulation of sexuality. Sex and the gender constructed from it, as well as families and the sexual division of labor associated with them, are socially constructed or socially organized rather than immutable, despite the appearance of strong continuities across time and cultures.[41]

Of course, this description of the sex/gender system is an oversimplification. Throughout the world, in various times, gender has operated differently. At times people have used gender to sort human beings into more than two sex/gender categories.[42] Activities seen as proper behavior for men in one time and place may in another time and place be viewed as proper behavior for women.[43] Thus, it may be better to regard gender as a class of organizing principles, which we might call gender beliefs. The particular set of gender beliefs that hold sway in a specific population (an organization, a society) may be considered a gender ideology.[44]

In deeming such beliefs and propositions ideological, I do not dispute that there are average, group differences between men and women. Like Joan Williams, I do "not deny the existence of gender differences. Gender differences do exist: that is, men *as a group* differ from women *as a group* not only on the basis of biological 'sex' differences, but on the basis of social 'gender' differences."[45] However, as predicates for differential distribution of rights, privileges, or obligations, such sex or gender differences are indeed ideological. Where some trait or capacity occurs more often in women than men, or vice versa, but is present in at least one woman and one man, a decision to treat men and women differently on the basis of that

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systematized or integrated around one or a few pre-eminent values, such as salvation, equality, or ethnic purity.

The Concept and Function of Ideology, 7 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 66, 66 (1968), *quoted in* Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 281 (1989). For similar usage, see Arriola, *supra* note 31, at 17 (characterizing "a gender value system which equally supports sexism, homophobia and transphobia by enforcing the belief in sexual dimorphism or gender polarization" as a "sex/gender ideology").

41. Isabel Marcus, *Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York*, 42 U. MIAMI L. REV. 55, 58 (1987) (citing Jane Collier et al., *Is There a Family? New Anthropological Views*, *in* RETHINKING THE FAMILY 25 (Barrie Thorne & Marilyn Yalom eds., 1982); Rubin, *supra* note 38) (footnotes omitted).

42. *See generally* THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY (Gilbert Herdt ed., 1994).

43. *See, e.g.*, ANNE FAUSTO-STERLING, MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN (2d ed. 1992) (discussing different cultures' views about the proper gendering of hunting activity).

44. The sex/gender system then is something of a misnomer, as a sex/gender system might be regarded as just another term for a gender ideology.

45. Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 800 (1989).

trait or capacity converts an imperfect (albeit highly accurate) descriptive generalization into a binding normative command.

In such circumstances government, in restricting individual liberty, exhibits a preference to classify people as male or female rather than on the basis of the trait or capacity at issue. But even where what is at issue is some feature possessed only by members of one sex—a feature that thus might be thought to be a "fact" about men or women[46]—the choice to attribute binding legal significance to that feature still requires the exercise of human judgment and the exertion of human authority. Too often, however, the history of sex/gender classification in the United States has been marked by the displacement of human responsibility for normative judgments to "facts" of Nature.[47]

In this Article, I suggest analogizing such gender propositions or beliefs to religious ones. The Constitution commands governmental de-institutionalization of religion, precluding government from establishing belief in God. Government must neither declare nor deny that there is a God. Rather, government must maintain that the existence vel non of God and of divine laws, and their content, should generally be irrelevant to the content of civil laws.[48] Thus, de-institutionalization embodying respectful indifference[49] to the existence of God,[50] which some might term non-religion, is generally the proper governmental attitude toward religion.[51]

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46. *Cf.* United States v. Ballard, 322 U.S. 78, 94 (1944) (Jackson, J., dissenting) ("Belief in what one may demonstrate to the senses is not faith.").

47. *See infra* Part I.B.

48. The permissibility of some "accommodations" of religion might at first seem a counter-example to the irrelevancy claim in the main text. However, such exemptions of people of faith from secular legal obligations with which their faiths conflict ought not be understood as predicated upon governmental acceptance of belief in God or (for example) agreement with Sabbatarians that God in fact wishes them not to work upon the Sabbath. Rather, it is the fact that a citizen conscientiously holds such a belief, not the truth value of the belief, that (if anything does) justifies government in relieving the citizen from an otherwise applicable regulation.

49. While perhaps somewhat oxymoronic, "respectful indifference" seems no more so than "deliberate indifference," a governmental attitude well established (no pun intended) in constitutional doctrines. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 828 (1994) (holding, in case involving placement of transsexual woman in the general male prison population, that "[a] prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment") (citing Helling v. McKinney, 509 U.S. 25 (1993), Wilson v. Seiter, 501 U.S. 294 (1991), and Estelle v. Gamble, 429 U.S. 97 (1976)).

50. *But see* Michael W. McConnell, *What Would It Mean to Have a "First Amendment" for Sexual Orientation?*, *in* SEXUAL ORIENTATION AND HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE 234, 234 (Saul M. Olyan & Martha C. Nussbaum eds., 1998) ("Freedom of religion did not mean public agnosticism, but public abstinence from taking a position."). The intended distinction is not entirely clear.

51. This is true however much it may in some respects be difficult to distinguish respectful indifference or agnosticism from atheism.

For distinctions among religious, irreligious, and nonreligious ideologies, see Ingber, *supra* note 40, at 310-15. Ingber "proposes distinguishing between an irreligious ideology, which is opposed or hostile to religion (defined as a belief system based on the existence of the sacred or divine), and a nonreligious ideology, for which the existence or nonexistence of religion is irrelevant." *Id.* at 310.

This disestablishment of religion is, however, consistent in important ways with religious equality: government may act to promote freedom and equality of religion in the public realm, although it cannot take positions on the relative theological correctness or superiority of various religious sects.

By analogy, then, the de-institutionalization of sex and gender, and thus respectful indifference to sex difference, would be the constitutionally proper attitude for government to maintain. As with religious beliefs under the disestablishment of religion, under the disestablishment of sex and gender government would neither endorse nor disapprove gender beliefs. Treating gender beliefs as subjects of disestablishment in this fashion likely would have ramifications not only for conventional gender ideologies, such as the ideology of domesticity,[52] but also (although to a lesser extent) for some gender egalitarianism, possibly for example, the proposition that husbands and wives should both work outside the home. This proposition is true whether or not one defines a "gender belief" as a belief about *whether* men and women should be or are different, or as a belief *that* they are or should be different. On the first, more symmetric approach, the injunction to engage in market work specifies that men and women should not behave differently with respect to employment outside the home, and thus may constitute a gender belief which government must not endorse under a regime of gender disestablishment. But even on the second, asymmetric approach, government must neither endorse nor disapprove gender beliefs, and the exhortation to equality in market labor (as distinguished from mere enabling of equality there) might be thought improperly to repudiate the normative gender belief that it is the proper role of men and not of women to work in the business world.

Granted, even the de-institutionalization of gender may be inconsistent with some gender beliefs, such as ones holding that government should actually insist upon reinforcing "natural" differences between men and women. But as with religion, such an inconsistency does not make

52. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000); Joan Williams, *Do Wives Own Half? Winning for Wives After* Wendt, 32 CONN. L. REV. 249, 253 (1999) ("This essay shows how domesticity's peculiar organization of market work and family work first marginalizes mothers from market work, then limits their access to entitlements based on family work."); Joan Williams, *Market Work and Family Work in the 21st Century*, 44 VILL. L. REV. 305 (1999). Williams noted:

> Domesticity is a gender system comprised most centrally of the organization of market work and family work that arose around 1780, and the gender norms that justify, sustain, and reproduce that organization. . . . As a gender system it has two defining characteristics. The first is its organization of market work around the ideal of a worker who works full- time and overtime and takes little or no time off for childbearing or childrearing. . . . When work is structured in this way, caregivers often cannot perform as ideal workers. Their inability to do so gives rise to domesticity's second defining characteristic: its system of providing for caregiving by marginalizing the caregivers, thereby cutting them off from most of the social roles that offer responsibility and authority.

Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89, 89-90 (1998).

refusal to institutionalize gender itself a forbidden gender belief or anti-gender belief (analogous to an anti-religious or irreligious belief).[53] This gender de-institutionalization "neutrality" differs, albeit subtly, from sex-egalitarian ideologies. Unlike gender egalitarianist ideologies, de-institutionalization of gender or sex difference obtains only insofar as the public realm is concerned, and prescribes no sex-specific norms for men and women to follow. Rather, indifference to sex difference in the public realm only prescribes a measure of individual gender freedom, without specifying how men or women ought to use that freedom. The proper governmental attitude with respect to the citizenry is, as I suggest below,[54] one of unity and equal inclusion in the public realm without regard to an individual's sex or gender.

It is not clear that there is a precise gender analog to a religious group or institution or organization, which exists out of faith in a particular religion, whose members share adherence to a set of religious beliefs, and which at least some of the time engages in religious exercises. Yet we might identify "males" and "females" as gender groups. After all, membership in a religious organization involves identification and affiliation—religion encompasses not only beliefs, but identity and forms of social organization[55]—and belief is but an imperfect proxy for such identity and association. For example, large numbers of persons identify themselves as Catholic despite not adhering to various Church teachings, such as those banning artificial contraception or homosexual acts.[56]

In addition, gender beliefs often are rooted in religious belief systems.[57] For many people, biblical creation stories of Eve's origin as the helpmeet created for Adam by God ground their beliefs that God has

53. *Cf.* McGowan v. Maryland, 366 U.S. 420, 442 (1961) ("[T]he 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.").

54. *See infra* Part I.D.

55. *See, e.g.*, William P. Marshall, *Religion as Ideas: Religion as Identity*, 7 J. CONTEMP. LEGAL ISSUES 385 (1996).

56. I am not arguing here that gender beliefs are religious beliefs governed by the Free Exercise and Establishment Clauses of the Constitution. Rather, gender beliefs function like religious beliefs, raising many of the same concerns that render such ideological propositions an improper basis for government decisionmaking in the United States constitutional regime. *See* David B. Cruz, *"Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 1010-11 (2001) (discussing Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 140-42, 173 (1998)). Thus, even if one is not prepared to read the Constitution to require disestablishment of gender-as-religion, one might still embrace the broader gender "disestablishment" argument adduced in Part I.D of this Article.

57. *Cf.* Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 459 (1992) (arguing that "religion perpetuates and reinforces women's subordination").

distinct plans for men and for women.[58] Marriage conventionalists opposed to civil recognition of same-sex marriages frequently rely on religious bases for believing such arrangements contravene divinely ordained gender destinies.[59]

B. *The Extra-Human Authority of Religion and Gender*

Besides encompassing both ideology and social organization, both religion and gender have often recurred to extra-human sources of descriptive and normative authority. Nature frequently has been conflated with God's will, so that attempts to derive normative conclusions from naturalistic observations abound.[60] God and Nature have been taken to provide non-rational and non-falsifiable explanations for and justifications of a host of religious and gender beliefs.[61] This displacement of human responsibility for our dividing practices is a key and troubling point of commonality between religion and gender.

Religion, at least as practiced in the United States, depends upon belief in an authoritative extra-human God. Indeed, "[r]eligion acknowledges the existence of a sacred or transcendent reality from which basic human obligations emanate."[62] Similarly, "adherents of a religion usually believe its principles are authoritative and that the source of that authority transcends both individual conscience and the state."[63] But God has not been alone in providing some people with an authoritative vision of how things are and ought to be; Nature has played that role as well.[64] This is not too surprising, as God and Nature are often believed to go hand in hand as, respectively, transcendent Author and framework of human reality.

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58. *See, e.g., id.* at 459-69 (discussing "the ways in which religious practices and doctrine contribute to traditional attitudes towards women and their appropriate roles").

59. *See, e.g., infra* note 406 (quoting several marriage conventionalists).

60. This is a perilous effort, described by some as "the naturalistic fallacy." *See, e.g.*, EDWARD STEIN, THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION 300 (1999).

61. *Cf.* Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 462 (1996) ("In their rejection of Enlightenment epistemology, both radicals and religionists make the validity of their beliefs untestable by conventional means. The methods of science and rational argument are of no avail in evaluating religious beliefs . . . . Nor can faith be rationally *disproved* . . . .").

62. Ingber, *supra* note 40, at 332. (I believe Ingber overstates what is necessary to his theory when he further suggests that "[t]hese obligations are not matters of human debate, evaluation, or judgment." *Id.* at 332-33.) Following Durkheim, Ingber argues that "[i]t is the role played by the sacred or the divine that separates religions from other belief systems . . . for legal purposes. . . . [R]eligious duties must be based in the 'otherworldly' or the transcendent . . . ." *Id.* at 285-86 (footnotes omitted).

63. *Id.* at 282. "Religious morals, duties, and obligations generally are not seen as matters of individual choice and evaluation. They are, instead, understood to be externally imposed upon the faithful." *Id.* (footnote omitted).

64. *See, e.g.*, Freedman, *supra* note 17, at 915 ("The subordination of women has traditionally been justified by arguments drawn from biology or nature, in turn often equated with divine command.").

Sexual orientation is one area where the extra-human sources of authority of God and/or Nature are often taken to have spoken, authoritatively declaring heterosexuality normative and homosexuality deviant. "There is a rich abundance of reliable evidence supporting the traditional view that homosexuality is pathological, biologically abnormal, and mostly, if not entirely, a matter of experience, conditioning and choice," writes one "nature worshiper" in the North Carolina *News & Observer*.[65] Indeed, not only do some consider homosexuality "biologically abnormal," others believe that "[h]omoscxuality is anti-nature."[66] Many people today also dccry "sodomy," "homosexual conduct," and "homosexual behavior" as contrary to God and Nature.[67] What "homosexuals" do is "unnatural," people insist,[68] commonly fusing religion and nature in their condemnations: "Sodomy is unnatural, it's unhealthy, it's illegal, it's unholy, it's dangerous and it robs parents of grandchildren."[69]

Not only particular sex acts, but also entire relationships between same-sex couples are condemned as ungodly and unnatural. Indeed, some people view it as axiomatic: "[L]et's start with thc premise that a homosexual marriage is against God's intcnt, and therefore, is not a good idea."[70] As with condemnations of homosexuality, God and Nature are

65. Daniel Heimbach, *Public, But Not Mainstream*, NEWS & OBSERVER (N.C.), Oct. 8, 2000, at A29. According to Heimbach, "the homosexual agenda [is not] compatible with moral foundations that transcend human choice." *Id.*

66. Donald L. Yochum, *Homosexuality Is Against Nature*, FLA. TODAY, June 2, 1996, at 9A (letter following George Thompson, *Readers Divided on Gay Marriages Issue Hits Nerve in Brevard County*, FLA. TODAY, June 2, 1996, at 9A [hereinafter Thompson, *Readers Divided*]).

67. "God, our Creator . . . has declared homosexual behavior immoral for everyone without exception," declares one "nature worshiper." This immorality is true not just from a Christian point of view, he argues. "Homosexual behavior is considered immoral around the world by everyone who affirms an objective basis for moral judgment." Heimbach, *supra* note 65, at A29.

68. Jeana Lipscomb, Lctter to the Editor, *God Hates the Sin, Not Homosexual*, CHARLESTON GAZETTER, July 24, 2000, at P4A.

69. David T. Cannon, Letter to the Editor, *It's Gays' Actions, Not Who They Are*, FLA. TODAY, July 14, 2000, at 10. *See also* The Committee on Family and Social Health, *Why Heterosexuality Is Right and Homosexual Acts Wrong*, *at* http://www.geocities.com/cfsh1/3.html (last visited Dec. 4, 2001) [hereinafter CFSH, *Why Heterosexuality*] (contending that "[h]omosexual sex is obviously a physiologically uunatural deviation from the heterosexual norm"). The Committee on Family and Social Health purports to be "a group of Chicagoland-area conservative writers and intellectuals that was established to help inform and educate the public on issues connected to morality and mcntal health." The Committee on Family and Social Health, *Introduction to CFSH*, *at* http://www.geocities.com/cfsh1/6.html (last visited Dec. 4, 2001). I write "purports" because their claim to include intellectuals is questionable in light of their dazzling rhetoric, *e.g.*, CFSH, *Why Heterosexuality*, *supra* ("Homosexual activity is immoral and illegalizeable [sic] because it is a bad and absurd legal precedent."), and stunningly reasoned arguments:

> [L]et's consider their "consenting adults" argument; namely, that if two consenting adults agree to engage in homosexual sex, what's the problem? This argument is clearly flawed because just because [sic] two consenting adults agree to do something doesn't make the act right. Two consenting adults could agree to assault someone or rob a bank.

Id.

70. Rick Johnson, Letter, *Can't Declare Any Type of Behavior Moral*, FLA. TODAY, June 2, 1996, at 9A (lctter following Thompson, *Readers Divided*, *supra* note 66); *cf.* Paul Vallely, *Catholic Church*

frequently conjoined in nature worshipers' repudiation of same-sex marriage: "[W]e cannot, as a society, accept something . . . that is so contrary to nature and to the universal laws of God."[71] For some, it is clearly not primarily humans doing the categorizing here: "I understand that homosexuality is not normal behavior as defined by nature."[72] And for some, claims of "unnaturalness" are defended by recourse to the natural biological dictates of reproduction: "'I wouldn't support [providing civil marriage rights for same-sex couples],' [Massachusetts state Representative John J. Binienda Sr.] said. '. . . . The natural thing for a marriage is to produce a family; a same-sex marriage could not do that.'"[73]

Of course, the sophistication of these invocations of Nature is not uniformly high. They should not, however, be dismissed as the ranting of some marginal class of uneducated troglodytes, at least not while persons uttering them, including legislators, hold positions of authority in contemporary U.S. society.[74]

Alarmed that Priesthood Is Becoming a "Gay Profession," INDEP., May 1, 2001, at 3 ("'The natural consideration of marriage shows us that a couple unite themselves precisely because they are persons of different sexuality, with all the spiritual richness that this diversity has at a human level,' [said Pope John Paul II,] reaffirming the Church's opposition to homosexual marriages in February 2001.").

71. Matt C. Abbott, Letter, *Going Against Nature*, CHI. DAILY HERALD, Dec. 8, 1998, at 10; *see also* Richard Nicolaus, Letter to the Editor, *Gay Marriage: Bad News*, WASH. POST, Dec. 26, 1999, at B6 ("The ruling of the Vermont judges [requiring extension of the rights, privileges, and obligations of marriage to same-sex couples] sends the wrong message to families and children. Because of such rulings, gay marriages, like abortion, may someday become 'legal' in this country, but that would not make them natural nor moral."); Rev. Louis P. Sheldon, Editorial, *Gay Marriage "Unnatural"*, USA TODAY, Dec. 9, 1996, at 12A ("Calling a homosexual relationship a marriage won't make it so. There is no use of rhetoric that can sanitize it beyond what it is: unnatural and against our country's most basic standards.").

72. Chris Stern, Letter to the Editor, *Gay Marriage Argued*, THE COLUMBIAN, Feb. 28, 1997, *available at* 1997 WL 6516850. "I happen to object to gay marriages based on my belief that it [sic] is an unnatural union that mocks tradition and nature." *Id.*

73. Mary Anne Magiera, *Lawmakers Say Movement for Same-Gender Marriages Has Little Chance in State*, TELEGRAM & GAZETTE, Mar. 1, 1999, at A1. *See also* Dennis Bonnette, Letter to the Editor, *Marriage's Special Role Rules Out Homosexual Unions*, BUFF. NEWS, June 19, 1996, at B2 ("[F]or thousands of years society has placed a special value and protection upon the institution of marriage for the simple reason that it is the natural and unique means by which the human race is continued—both with respect to the procreation and the education of children.").

74. *See, e.g.*, Mike Kelly, *Wedding Bell Blues*, THE REC., June 23, 1996, at 1:

> [H]ere is the Belle of Bloomfield, Republican Assemblywoman Marion Crecco, declaring that she has been to Great Adventure and watched the animals. Her conclusion: Gay relationships are unnatural and she wants New Jersey to join 11 other states and ban gay marriages. . . .
>
> . . . .
>
> The animals on display in the wilds of Great Adventure, says Crecco, were quite heterosexual. And she asks that we humans take a cue from the lions and elephants before we start allowing gay people to tie the knot.
>
> . . . .
>
> She explains that she does not want children to be confused. Says Crecco: "You ought to be able to say to children, 'You're a boy and you're going to marry a girl.'"

Id. For a more scientifically informed look at "sexual orientation" in the animal kingdom, see BRUCE BAGEMIHL, BIOLOGICAL EXUBERANCE: ANIMAL HOMOSEXUALITY AND NATURAL DIVERSITY (1999).

God and Nature also provide the gender structure of family, in some people's view. "Beverly La Haye, founder of Concerned Women for America, said, 'The woman who is truly spirit-filled will want to be totally submissive to her husband. . . . Submission is God's design for women.'"[75] For many "nature worshipers," it is important that children be raised in "the closest facsimile [possible] to a natural family."[76] Since a "family" in this context is a social structure, what is a "natural family"? According to a significant number of people, it is a married, mixed-sex couple with its biological offspring: "The traditional institution of marriage is actually a product of nature itself—and not merely some human invention which can be redesigned and reinvented according to the latest fashionable whim."[77] For others, it is God himself who dictates family structure.[78]

The "natural" also justifies some people's view of women's destiny as mothers and the concomitant wrongness of abortion. "'[P]ro-life advertisements have been effective because motherhood is more of a natural choice for women,'" suggests Maryclaire Flynn, one of the directors of Massachusetts Citizens for Life.[79] Texas politician Beverly Clark has stated: "'[The GOP raises my spirits because it] openly embrace[s] the idea that abortion is wrong and same-sex marriages should not be tolerated. It's against what is natural in this country.'"[80]

Transsexual and intersexual people also fall afoul of the faith of "nature worshipers." Consider, for example, the views of the Campaign for California Families ("CCF"). When a bill was introduced to amend California law to allow transsexual persons born in the state to change the sex designation on their birth certificates,[81] CCF issued an "Assembly

75. Caryl Rivers, Editorial, *"Crazed" Foes of Women's Rights Are Advancing*, S.F. CHRON., Jan. 9, 1995, at A25.

76. *Interview with Pat Buchanan, Hannity & Colmes* (Fox News television broadcast, Dec. 21, 1999, *tr. available at* 1999 WL 18300908) (remarks of Sean Hannity).

77. Bonnette, *supra* note 73; *see also* Lawrence F. Burtoft, Editorial, *Bill Highlights Issue of Same-Sex Marriage*, OMAHA WORLD-HERALD, March 24, 1996, at A29 ("To sanction homosexual 'marriage' robs some children of this most natural nurturing environment [i.e., being 'raised by a mom and a dad'], and opens wide the door to gay and lesbian parenting."); *id.* ("The writer is a social research analyst for Focus on the Family, a nonprofit Christian ministry."). Indeed, for some, the very life of children requires that they be raised within this family structure: "[W]ithout [marriage] the newborn infant is unlikely to survive or, if he survives, to prosper." James Q. Wilson, *Against Homosexual Marriage*, COMMENT., March 1996, at 34, 36.

78. *See, e.g.*, Ed Trujillo, Letter, *God Didn't Create Adam and Steve*, FLA. TODAY, June 2, 1996, at 9A (letter following Thompson, *Readers Divided*, *supra* note 66) ("Why are you doing your best to destroy the traditional God-given family structure?").

79. Paisley Dodds, *Abortion Group Pilots New Ads*, AP ONLINE, Nov. 4, 1998, *available at* 1998 WL 21782953.

80. *Profile Q: A: Beverley Clark*, HEADWAY, 30 Nov. 1997, at 30, *available at* 1997 WL 12296279 (quoting Texas politician, a former Democrat turned Republican). This view is notable for its relativization of what is natural to the bounds of a political nation-state.

81. Governor Gray Davis vetoed the bill, A.B. 194, on August 6, 2001.

Floor Alert" opposing the bill and a publication entitled "The Anti-Nature Transsexual Agenda." According to CCF:

> AB 194 is an attack on nature. People are born with 46 chromosomes, XX for females and XY for males. You are born either male or female, and there are no in-betweens. This bill would promote an unnatural and radical sexual agenda that erodes nature and attacks the sensibilities of families. This bill would have the State supporting the gruesome procedure of men and women having their sex organs altered and removed.[82]

It may matter little to CCF that its claims about chromosome structure are scientifically invalid.[83] Many such gender ideologies, like many religious propositions, are in many ways a-rational or non-rational. One must take on faith that Jesus Christ is the risen son of God; this proposition is incapable of secular proof, even if history might provide important information about the life of the historical Jesus. Similarly, even those "new natural lawyers"[84] who purport to offer a secular morality that views men and women as fundamentally different—"complementary" in these scholars' terminology—concede that one either sees or does not see these fundamental differences.[85]

Now, granted, the same may be said of such laws as criminal prohibitions on murder—either one sees their morality, or one does not. Yet, notwithstanding the overwhelming consensus that laws against murder properly protect people's own interests, such laws are predicated upon equal respect for all persons, and they thereby view and treat such persons as fundamentally the same. Laws predicated on "gender complementarity," on the other hand, take a highly contestable and contested view of human nature as divided into different subclasses meriting differing treatment. Thus, the division inherent in the "new natural law" view of male and female makes its nonfalsifiability unacceptable in our constitutional order.[86] We should accordingly be uneasy about official pronouncements by organs of government that "[p]hysical differences between men and

82. Campaign for Family Values, *Assembly Floor Alert: Oppose AB 194 (Longville), The Anti-Nature Transsexual Agenda, at* http://www.savecalifornia.com/legislative/press_releases/ab194floor.pdf (last visited July 11, 2001). *But cf.* Ronald R. Garet, *Self-Transformability*, 65 S. CAL. L. REV. 121 (1991) ("There is a sense in which abandonments, and perhaps also transgressions, are unnatural acts. I suggest, roughly, that transsexuals are no more unnatural than, say, converts or immigrants, and that sex-reassignment surgery is no more unnatural than celibacy or the practice of ritual circumcision.").

83. *See generally* SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED (1998); Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999).

84. Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 264, 272 (1995).

85. *See, e.g.*, Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 301 (1995).

86. *See infra* Part I.D.

women . . . are enduring" and that "'[i]nherent differences' between men and women . . . remain cause for celebration."[87]

These foundational disputes about the "proper" roles of women and men are, like many nonfalsifiable religious positions, sharply contested.[88] These gender beliefs are, as religious beliefs have been in many times and places, highly divisive. The historical context of the adoption of the Constitution and the First Amendment reflects the religious disputes that drove many colonists to what became the United States. David Richards has examined the importance of abolitionist feminism to the disputes about how to reconstruct the Union following the Civil War.[89] Research has suggested that pro-life, stay-at-home married women often worry about their social role and station in a world where law significantly shields adult women's reproductive choices and where many other forces dispute the claim that a woman's place is in the home.[90]

As Part I.D below illustrates, political invocations of extra-human authority of the sort canvassed above are inconsistent with the United States's commitment to secular, representative and humanly accountable democracy. The history of race, religion, and gender in the United States amply demonstrates that reliance on what God or Nature has supposedly dictated has often led to unjust exclusions and limitations, and to the casual (even if contested) acceptance and reinforcement of government's social dividing practices in the name of the divine or the "natural."[91]

C. *Psychologies of Religion and Gender*

The psychological mechanisms of religion and sex/gender also indicate that they are similar dividing practices. Both religion and gender are personally important to many people's group or individual identities, yet these sources of strength and value paradoxically can lead to aggression. Accordingly, allowing government's coercive power to be deployed on the basis of religion or sex/gender is a risky practice that a well-designed constitution contemplating national unity should attempt to preclude.

Many people in the United States identify themselves as religious, and these identifications frequently stem from, and are inextricably intertwined

87. United States v. Virginia, 518 U.S. 515, 533 (1996).

88. Even Southern Baptists were internally divided over their 1998 affirmation that wives are to be subservient to husbands. *See supra* note 2 and accompanying text.

89. DAVID A.J. RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION: THE GROUNDS FOR FEMINISM AND GAY RIGHTS IN CULTURE AND LAW (1998).

90. KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984).

91. *See, e.g.*, DAVID A.J. RICHARDS, IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES 9 (1999) ("Biological reductionism rationalized the unjust cultural subjugation of African Americans and women as a separate species . . . ."); Sherry, *supra* note 61, at 483 ("Even today, the religious epistemologies that mandate discrimination against gays and lesbians are indistinguishable from those in the not too distant past that mandated discrimination against blacks.").

with, religious communities.[92] People are born and raised within faith communities, which impart to many a sense of belonging, and thus of group identity. While religious exit—conversion or abandonment of faith—is theoretically possible and occurs in practice,[93] it is not the norm. In addition, religious groups may deter exit by making it psychically painful.[94]

Such group identifications are entwined with individual identity.[95] As students of cultural groups such as religions have argued, "[c]ultural group membership ('Where do I belong?') . . . is a precondition to discovery and definition of one's self ('Who am I?')."[96] By identifying oneself as Catholic, for example, a person "make[s] a statement about membership in and belonging to that particular cultural group."[97] Similarly, membership in a religion "also provides a person with a system of values, customs, and ways of thinking that give one's life, activities, and choices meaning and significance."[98]

Some scholars suggest that religion is for them like a state of being. Thus, one "might emphasize the lack of volition and the sense of constraint that [some person] feels by virtue of being a Christian."[99] "Religious

92. *See, e.g.*, Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 29 (1983) Cover observed:

> There exists no Amish religion apart from the concept of the Amish community. A person cannot take up the Amish religion and practice it individually. The community subsists spiritually upon the bonds of a common, lived faith, sustained by "common traditions and ideals which have been revered by the whole community from generation to generation."

Id. (quoting Brief for Respondent at 21, Wisconsin v. Yoder, 406 U.S. 205 (1972) (No. 70-110), in turn quoting J. HOSTETLER, AMISH SOCIETY 131 (2d ed. 1968)).

93. *See, e.g.*, R. Stephen Warner, *Approaching Religious Diversity: Barriers, Byways, and Beginnings*, 59 SOCIOLOGY OF RELIGION 193 (Fall 1998), *available at* http://www.findarticles.com/cf_0/m0SOR/n3_v59/21206029/p1/article.jhtml (noting that "many Latinos convert to Protestantism").

94. *See, e.g.*, Justin K. Miller, Comment, *Damned if You Do, Damned If You Don't: Religious Shunning and the Free Exercise Clause*, 137 U. PA. L. REV. 271, 272-73 (1988) ("The shunned person can lose, among other things, her spouse, children, business, and standing in the community.") (footnotes omitted); *see also* Paul v. Watchtower Bible and Tract Soc'y of New York, Inc., 819 F.2d 875 (9th Cir. 1987) (holding Jehovah's Witnesses' practice of shunning constitutionally protected). *But see* Wollersheim v. Church of Scientology of Cal., 66 Cal. Rptr. 2d 1 (Ct. App. 1989) (Scientologists' program of retribution constitutionally unprotected), *review granted & op. superseded* by 832 P.2d 898 (Cal. 1992), *review dis'd, cause remanded* July 15, 1993.

95. *E.g.*, Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 307 (1986) ("The individual's identification with cultural groups—ethnic, racial, religious, or language groups—plays a major part in the process of self-definition. . . . Although the list of identifying labels is potentially long, every feature you choose to describe yourself also will embrace a group of people.").

96. Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 128 (1997).

97. *Id.* at 129.

98. *Id.*

99. David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1346 (1999) (analyzing "the words of one 'homosexual in a Christian church,' who offered encouragement to others in similar circumstances").

convictions frequently appear to their possessors as immutable: something they did not choose, but which chose them."[100]

Even though religious identity can be a source of succor to people buffeted by the perils and uncertainties of (post)modernity,[101] it can also pose serious harm. For some adherents, religion "becomes a system of holding mechanisms that keep the believer from facing the questions which must terrify humanity—What is God? What is meaning? What is life?"[102] Because this "insulat[ion] . . . from the existential fear that life is without meaning"[103] can be precarious,

> some believers develop a passionate adherence to their beliefs which leads to an us-versus-them mentality with respect to those who do not share their belief systems. Competing belief systems are then seen as threats to the individual's sense of self. For some, this means that the competing belief systems must therefore be attacked. . . . In this way, religious persecution and intolerance are created not by the ideas of religion, but by the psychology of adhesion to religious beliefs—a psychology which seeks not to understand or address religious issues but rather to avoid them, paradoxically, by passionate and unquestioned devotion to them.[104]

The prospect of such ideological conflicts can threaten bitter and potentially durable divisions between groups of adherents. Because government is supposed to control the legitimate use of force, the alignment of government with one or more religious sects can lead to persecution and oppression. These risks are exacerbated "without the skeptical cast of mind fostered by Enlightenment epistemology," for "antirational epistemologies—especially religion, with its extrahuman source of authority—are likely to be conducive to particularly deep conviction. Deep conviction, in turn, is a breeding ground for exactly the religious wars of previous centuries[.]"[105]

The psychology of sex/gender is similar to religion in important respects. Most people consider themselves members of a sex/gender group and thus as sharing commonalities with people of the same but not the other sex. In this way, sex/gender groups are affiliations of sorts. Granted, there is likely more physical proximity across the nation between people of

100. Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1, 62 (1992).

101. *See, e.g.*, David B. Salmons, *Toward a Fuller Understanding of Religious Exercise: Recognizing the Identity-Generative and Expressive Nature of Religious Devotion* 62 U. CHI. L. REV. 1243 (1995) ; Yang, *supra* note 96 (focusing on group identities).

102. William P. Marshall, *The Inequality of Anti-Establishment*, 1993 B.Y.U. L. REV. 63, 69.

103. Ingber, *supra* note 40, at 278.

104. Marshall, *supra* note 102, at 69. *See also* Marshall, *supra* note 55, at 390 (expanding upon religion as involving "the '"holding mode' of consciousness" and attendant perils).

105. Sherry, *supra* note 61, at 479.

different sexes than there is between people of different races.[106] Nonetheless, like religions, sex/gender groups can provide community, as in a women's consciousness-raising group or a male group of fishing buddies. And, like religious affiliations, people commonly enjoy these sex/gender affiliations by virtue of having been designated at or near birth as a member of a sex and thereafter being raised accordingly. While exit from one gender group to another is even more infrequent than exit with respect to religious groups, it still occurs.

Sex/gender group membership is also critical to many individuals' personal identity, because gender, like religion, connects group affiliation and personal identity.[107] For example, the role of gender in identity arises in popular culture. Thus, Peggy Lee or (with considerably more irony) Phranc sings, "I enjoy being a girl,"[108] and Aretha Franklin croons "you make me feel like a natural woman." The import of gender for identity is evident as well in the psy-professions.[109] Psy-professionals of various stripes examine what they consider to be "'male gender-identity,' that is . . . 'a man's awareness—both conscious and unconscious—that he is masculine or manly.'"[110]

Gender identity can also, like religion, lead to divisiveness rooted in an us-versus-them mentality. Thus, it has become commonplace to refer to a supposed "war between the sexes," or gender war.[111] Moreover, the relevance of sex/gender to reproductive processes connects it for many people to existential questions about life's meaning.[112] "[I]dentity, thus formed in intimate relations (as sexism clearly is[113]), has a personal intimacy that,

106. This is a function of heterosociality in general and in particular the mixed-sex composition of most families in the United States.

107. *See, e.g.*, Cruz, *supra* note 56, at 959 (discussing link between gender and personal identity).

108. PEGGY LEE, *I Enjoy Being a Girl, on* LATIN ALA LEE! (Capitol Records 1960); Phranc, *I Enjoy Being a Girl, on* I ENJOY BEING A GIRL (Island Records 1989). The ludic pre-woman of this song declares: "I'm strictly a female female/And my future, I hope, will be/In the home of a brave and free male/Who'll enjoy being a guy,/Having a girl like me!" *I Enjoy Being a Girl, in* RICHARD ROGERS & OSCAR HAMMERSTEIN II, FLOWER DRUM SONG (1950) (lyrics by Oscar Hammerstein II). For a glimpse of Phranc's butchness, which gives rise to the mentioned irony, see her website at http://www.phranc.net.

109. "By 'psy-professional' I will generally mean 'psychological, psychiatric, psychoanalytics, and/or, more generally, psychotherapeutic.'" Cruz, *supra* note 99, at 1300 n.13.

110. *Id.* at 1323 (quoting JOSEPH NICOLOSI, REPARATIVE THERAPY OF MALE HOMOSEXUALITY: A NEW CLINICAL APPROACH 94 (1991)).

111. *See, e.g.*, WILLIAMS, *supra* note 52, ch. 5 (discussing "gender wars").

112. *See, e.g.*, Hadley Arkes, *Questions of Principle, Not Predictions: A Reply to Macedo*, 84 GEO. L.J. 321, 322-23 (1995). Arkes noted:

> We are all men or women, and that inescapable division is rooted in the meaning of sexuality in the strictest sense. Not everyone is in the business of begetting, but begetting is the purpose that supplies the very reason for gender. . . . "Sexuality" refers to that part of our nature that has as its end the purpose of begetting.

Id.

113. And, I would add, sex/gender identity.

when under attack, construes the attack as a direct threat to self. . . ."[114] Also, like religion, gender's reliance on extra-human authority, whether God or Nature, can contribute to an unquestioning adherence to gender.[115] Gender dissidents, whose failure to conform to prevailing sex/gender ideologies calls into questions many people's (gendered) identities may be subject to gender policing, which can turn quite violent.[116]

Moreover, the force of fundamentalist beliefs, whether religious or gendered, is considerable (which may account for some of their divisive potential). The exquisite investment of many people in their sexed/gendered or religious identities may in turn be related to the history of use of religion and gender as bases for unjust exclusions from full participation in U.S. society. One reason that these exclusions are properly denominated "unjust" is the normative irrelevance of one's gender and one's religion to one's political status[117] and life chances.[118]

D. Neutrality, Equality, and Democratic Citizenship in the United States

Religion and gender have both been contested and divisive ideologies and forms of social organization in United States history. Like racial divisions, religious and gender divisions in society have frequently been justified by reference to extra-human authority (God or Nature), thus displacing human responsibility for our dividing practices. The Constitution has sought to tame these dividing practices and recognize people's full membership in society without regard to religion or gender, through, for example, the Religious Test Oath Clause,[119] the Religion Clause(s) (Free Exercise and Disestablishment),[120] the Equal Protection Clause,[121] the

114. RICHARDS, *supra* note 91, at 199.

115. *Cf.* Cruz, *supra* note 56, at 1015-17 (recounting, and criticizing, argument that the sexed/gendered structure of civil marriage should be kept "unquestioned").

116. *See, e.g.*, Cruz, *supra* note 99, at 1342-44 (discussing anti-lesbigay violence).

117. *See, e.g.*, J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 149-50 (1994) (O'Connor, J., concurring) (gender); Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) (religion).

118. *See* Mary Anne Case, *Unpacking Package Deals: Separate Spheres Are Not the Answer*, 75 DENV. U. L. REV. 1305 (1998).

119. U.S. CONST. art VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."). The Religious Test Oath Clause advances secular equality by constraining government's ability to make religious differences matter at law.

120. Indeed, the Religion Clause(s) might be seen originally as a proto-equal protection guarantee, which would be consistent with the modern trend in constitutional religion doctrine, with both free exercise, *see, e.g.*, Smith v. Employment Div., Dep't of Human Resources., 494 U.S. 872 (1990), and disestablishment, *see, e.g.*, Mitchell v. Helms, 530 U.S. 793 (2000) (overruling Meek v. Pittenger, 421 U.S. 349 (1975), and Wolman v. Walter, 433 U.S. 229 (1977)); Agostini v. Felton, 521 U.S. 203 (1997), moving toward equality-grounded views.

121. The analogies between equal protection and disestablishment are substantive and not merely formal; thus, these constitutional guarantees should be seen as having considerable overlap. This should not be confused with interpretively objectionable redundancy. The Equal Protection Clause came decades (and a war) after the Religion Clauses so one need not be taken aback if equal protection

Citizenship Clause, and the Nineteenth Amendment. While we have reasonably succeeded in disestablishing religion, there is much room for improvement with respect to gender divisions, both in practice and in theory.

Perhaps gender disestablishment will come in time. After all, religious disestablishment was first eroded in this country on a national level in 1789 when the Constitution barred the use of religious test oaths.[122] Further textual progress was made when the Bill of Rights, including the First Amendment's Establishment Clause, was adopted in 1791,[123] but it has taken a long time to reach a fairly advanced stage of religious disestablishment even with those explicit texts. There is no corresponding "Disestablishment of Gender Clause" in the text of the Constitution, so it is not surprising that sex and gender have not yet been disestablished.

But this could and should happen, even in the absence of a "Gender Disestablishment Clause." One reason that the lack of such a clause is not an insuperable embarrassment stems from another textual absence in the Constitution: there is no constitutional provision that disables states from establishing religion. Despite that absence, and despite the Supreme Court's insistence since at least its 1833 decision in *Barron v. Mayor & City Council of Baltimore*[124] that the Bill of Rights is a restraint only upon the federal government, much of the Supreme Court's disestablishment jurisprudence has been developed precisely in the form of restraints against state or local action, rather than the federal action inhibited by the First Amendment.

The application of constitutional principles of disestablishment of religion formally has been accomplished by incorporation of First Amendment rights, including incorporation of the disestablishment guarantee into the Fourteenth Amendment's Due Process Clause,[125] which prohibits states and localities from depriving any person of liberty without due process of law. While significant scholarly voices have argued for

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provides much that disestablishment does. *See generally* Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1 (1998).

122. *See supra* note 119. The Articles of Confederation did include a mutual defense provision that obliged the States even in the face of a religiously motivated attack upon one or more of them. *See* ARTICLES OF CONFEDERATION art. III (U.S. 1777). It stated:

> The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

Id.

123. *See* U.S. CONST. amends. I-X, especially amend. I ("Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof....").

124. 32 U.S. (7 Pet.) 243 (1833).

125. *See, e.g.*, David B. Cruz, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. REV. 1176, 1190 & nn.71-72 (1994).

grounding incorporation of the Bill of Rights in the Fourteenth Amendment's Privileges or Immunities Clause,[126] what is important for present purposes is the recognition that the Fourteenth Amendment requires the disestablishment of religion even though its text never explicitly mentions "religion."

For another reason, the Constitution should be understood to condemn governmental reinforcement of dividing practices, particularly where those practices have historically been justified by recourse to God or Nature. The Constitution creates and protects but one class of citizenship. All persons are fundamentally the same type, and all citizens are of the same class, rather than being members of essentially differing sex/gender subclasses. Citizenship is indivisible. It is in this, our radical political similarity, that the Constitution vigorously protects our individuality, protects us as individual persons and citizens. Our political choices must be justified as such, and not merely accepted as the product of pre-political differences created not by fellow persons but by Nature or God.

The text of the Constitution supports the premise that the citizenry ought presumptively to be regarded as comprising but one class of persons, rather than fundamentally differing sex/gender subclasses. The Equal Protection Clause guarantees that no state shall deprive "any person" within its jurisdiction of equal protection of the laws, not "any male or female person."[127] This provision has already been interpreted to restrict governmental discrimination on the basis of sex or gender. In particular, the Supreme Court has interpreted the gnarantee of equal protection to mean, in part, that government may not rely on stereotypes or "overbroad generalizations" about the proper roles of men or women when it allocates rights and responsibilities.[128]

This salutary trend should be coupled with recognition that the Fourteenth Amendment also contains the Citizenship Clause, which was added to overrule the Supreme Court's pernicious conclusion in *Scott v. Sandford*[129] that black Americans could not be citizens of the United States.[130] The Citizenship Clause establishes but one class of national citizenship and guarantees it to all persons born in the United States: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State

126. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 137-230 (1998).

127. Section 2 of the Fourteenth Amendment does specify a particular penalty for depriving adult males of the franchise. Whatever interpretive counterweight this provision might have been thought to earry should be overcome by the subsequent ratification of the Nineteenth Amendment, whieh prohibits denial of the franchise on the basis of sex.

128. *See, e.g.*, Schlesinger v. Ballard, 419 U.S. 498, 507 (1975).

129. 60 U.S. (19 How.) 393 (1856).

130. AMAR, *supra* note 126, at 768.

wherein they reside."[131] As Akhil Amar has succinctly put it, "[a]ll are declared citizens, and thus all are equal citizens."[132] Or, in the words of the first Justice Harlan, "[a]ll citizens are equal before the law."[133] And as Chris Eisgruber has noted, the Preamble to the Constitution writes in the name of "We the People of the United States"; "[t]he Constitution thereby assumes that such a thing as 'the People' exists."[134]

This unitary "People" further reinforces the conclusion that U.S. citizens should be regarded as constituting one indivisible class of persons. Dividing practices predicated on a contrary view that the citizenry is composed of fundamentally, naturally differing types of persons contravene that constitutional understanding. The problem with such governmental practices is not that they necessarily establish a hierarchy of citizens, with some persons relegated to second-class citizenship.[135] Rather, the anterior problem is that they are dividing practices that reflect an improper basis of extra-human authority for the allocation of rights and responsibilities in our constitutional order of one politically unitary People. Although government may sometimes have proper reason to treat groups of citizens differently, such reason cannot be simply that they are different "types" of people. Again, as Justice Harlan wrote (and as the Supreme Court reaffirmed a century later), the Constitution "neither knows nor tolerates classes among citizens."[136] The basic liberties and structures of our constitutional democracy therefore ought to be predicated, at least where divisions of "the People" are concerned, not upon a "prepolitical conception of the person" founded on views of the supposed "facts of human nature," but rather upon "a political conception of the person," specifically, "a conception of the person as free and equal citizen."[137]

This expressly constructive and political approach to conceptualizing the persons who constitute "the People of the United States" is designed to avoid some of the perils of a "natural(ized)" model of persons. As Jed Rubenfeld argues (following Michel Foucault), classifications of persons predicated upon a view that there are different "'type[s] of life, . . . life-form[s],' . . . work both conceptually and institutionally to exclude, disempower, and inferiorize in a variety of ways the individuals so

131. U.S. CONST., amend. XIV, § 1, cl. 1.

132. AMAR, *supra* note 126, at 768.

133. Gibson v. Mississippi, 162 U.S. 565, 591 (1896).

134. Eisgruber, *supra* note 35, at 516.

135. Jed Rubenfeld argues that "the moment of differentiation [and] the subsequent moment at which a hierarchy or an exclusion is established among differences . . . . are not really distinct. Or rather, if we call them distinct, the impulse toward hierarchy actually *precedes* and *produces* the differentiation in identities." Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 781 (1989).

136. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting); *see also* Romer v. Evans, 517 U.S. 620, 623 (1996) (quoting Harlan).

137. James E. Fleming, *The Parsimony of Liberalism*, 17 CONST. COMMENT. 171, 180-81 (2000).

identified."[138] This is not to say that interpretation of the Constitution should never be grounded in any manner upon a conception of human nature, or even a biological conception.[139] What I do mean is that constitutional interpretation should not be grounded in a notion that there are different types of human natures—that the persons who constitute the People come in differing varieties.

The premise that persons may be classified into different types according to their natures has a long and disgraceful history. Slavery and the ineligibility of black persons for citizenship were defended on the ground that black persons "had . . . been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit."[140] In turn, race segregation was predicated upon the proposition that black citizens were, as Justice Harlan diagnosed in *Plessy v. Ferguson*, persons "so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens."[141]

The exclusion of women from the legal profession was defended by Justice Bradley by rejecting both "the supposed right of every person, man or woman, to engage in any lawful employment for a livelihood"[142] and the indivisibility of the citizenry. Instead, Bradley recurred to the notion that the Fourteenth Amendment protects "privileges and immunities of women as citizens"[143] rather than, as the text of the Privileges or Immunities Clause provides, "the privileges and immunities of citizens of the United States," simpliciter.[144] Lawyering was improper for women by virtue of "nature herself, [which] has always recognized a wide difference in the respective spheres and destinies of man and woman."[145] It was "[t]he natural and proper timidity and delicacy which belongs to the female sex," "[t]he constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things," and "the law of the Creator" that in Bradley's view rendered women unfit for this public role.[146]

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138. Rubenfeld, *supra* note 135, at 777 (quoting 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 42-43 (1980)).

139. *See, e.g.*, Peter M. Cicchino, *Building on Foundational Myths: Feminism and the Recovery of "Human Nature": A Response to Martha Fineman*, 8 AM. U. J. GENDER SOC. POL'Y & L. 73, 74 (1999) (commending moral arguments grounded in "'human nature,'" that is, in "certain universal realities characteristic of the human condition across space and time").

140. Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856).

141. 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

142. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 140 (1873) (Bradley, J., concurring in the judgment).

143. *Id.*

144. U.S. CONST. amend. XIV, § 1, cl. 2.

145. *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring in the judgment).

146. *Id.*

The existence of some group differences between men and women should not be denied, but given the history of the use of "natural" differences to subordinate, invocations of nature should arouse suspicion. From this perspective, social differences, as in historical experiences of discrimination, ought to be less suspect when invoked to justify remedial measures to benefit the groups that have been on the losing ends of the "nature" invocations. This approach would be consistent, for example, with the views of those Justices who have thought that equal protection review of race-based affirmative action programs should be subject to a less demanding standard than review of "nonbenign" racial discrimination.[147] Likewise, majority-minority districts need not be viewed as necessarily dividing people by race but rather as uniting them and enhancing the historically depressed voting power of minorities.[148] Ideological gender beliefs, however, do just the opposite. They posit, especially as deployed in the notion of "complementarity," that there are two distinct and irreducibly different types of persons.

Instead, our constitutional order should be understood to be grounded upon a fundamentally indivisible citizenry. This view is consistent with prevailing notions of constitutional religious disestablishment. Adoption of the Fourteenth Amendment and incorporation of the First Amendment arguably changed the nature of the constitutional treatment of religion, shifting it from limited protection of rights of conscience against federal interference to a broad recognition of rights ("privileges or immunities") of citizens.[149] Thus, antidisestablishmentarianism[150] became insufficient. From that moment on, we have come to embrace Justice O'Connor's perhaps somewhat anachronistic but normatively attractive principle that one's religion should not be relevant to one's standing in the political

147. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 301-02 (1986) (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting) (state high school); Fullilove v. Klutznick, 448 U.S. 448, 518-19 (1980) (Marshall, J., joined by Brennan and Blackmun, JJ., concurring in the judgment) (federal government contracting); Univ. of Cal. v. Bakke, 438 U.S. 265, 358-59 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part) (state medical school); *cf.* Metro Broad., Inc. v. FCC, 497 U.S. 547, 564-65 (1990) (approving affirmative action going beyond redressing past discrimination in context of federal broadcast licensing).

148. *See, e.g.*, Eisgruber, *supra* note 35, at 515; Christopher L. Eisgruber, *The Constitutional Value of Assimilation*, 96 COLUM. L. REV. 87 (1996); Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297 (1994). I bracket here what I would characterize as the mis-use of majority-minority districts to dilute minority voting strength, as by "packing." *See, e.g.*, Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 249-50 (defining "cracking," "stacking," and "packing").

149. *See* AMAR, *supra* note 126, at 254-57; *cf.* Gary C. Leedes, *Rediscovering the Link Between the Establishment Clause and the Fourteenth Amendment: The Citizenship Declaration*, 26 IND. L. REV. 469, 480-81, 494-95, 508-18 (1993) (making similar argument about religious disestablishment).

150. *See generally* Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347 (1997).

community.[151] Moreover, the notion of political community should be conceived broadly, as should the relevant notions of citizenship. It is important to recognize social citizenship as a key site for the disestablishment of divisions, and social equality as a true aim of our political order under the Constitution.[152]

This approach has significant affinity with and is partly inspired by the feminist theory of Joan Williams. Professor Williams' theory is primarily focused on feminism as a program and scholarly genre, and is only secondarily concerned with constitutional doctrine. Nevertheless, her de-institutionalization prescriptions sketch a normatively attractive model for part of the constitutional law of sex and gender. Williams advocates

> a consistent refusal to institutionalize a correlation between gender roles and biological sex differences. [In her view,] institutionalizing a correlation between gender and sex necessarily reinforces gender stereotypes and the oppressive gender system as a whole. Moreover, [de-institutionalization] does not preclude helping women disadvantaged by their adherence to gender roles, since such women can be protected in a sex-neutral fashion by protecting all people (regardless of biology) who are victimized by gender.[153]

I would go further than Williams in insisting not only upon the de-institutionalization of gender in the sense of roles or traits that might be treated as correlated with sex, but also of sex itself, the ideological lynchpin of all systems of gender. My hope is not the naive yearning to make gender "go away" by refusing to contemplate it. The disestablishment of sex and gender need not mean simple gender-blindness, on the model of "color-blind" interpretations of equal protection or religion-blind interpretations of the First Amendment.[154] Blanket refusal to "see" sex would debilitate government's ability to "see" gender and, like refusal to "see" race or religion, would amount to willful ignorance directly at odds with the

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151. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 595, 626 (1989) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor., J., concurring)).

152. ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY (1996). The literature on notions of citizenship is too vast to do other than gesture toward in this footnote. Prominent among recent entries is ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997), which has prompted a number of reviews. *See, e.g.*, Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597 (1999) (book review). Other examples include numerous works cited in Kim Rubenstein, *Citizenship and the Centenary—Inclusion and Exclusion in 20th Century Australia*, 24 MELB. U. L. REV. 576, 576 n.1 (2000). *See also, e.g.*, T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002); LAUREN BERLANT, THE QUEEN OF AMERICA GOES TO WASHINGTON CITY: ESSAYS ON SEX AND CITIZENSHIP (Michele Aina Barale et al. eds., 1997); DAVID T. EVANS, SEXUAL CITIZENSHIP: THE MATERIAL CONSTRUCTION OF SEXUALITIES (1993).

153. Williams, *supra* note 45, at 802.

154. Most notably, see Philip J. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961).

aims of the Constitution to form a stronger union, to tame faction, and to limit the force of social divisions. Rather, government must remain empowered to work against social divisions while abstaining from reinforcement of the crucial predicate for gender divisions: the male/female dichotomy of "sex."[155]

II
DISESTABLISHING GENDER IN THEORY

This Part examines what the translation of religious disestablishment principles to the context of gender might look like. Because study of the constitutional law of religion in the United States is, to understate the case, not a jurisprudential field suffering from a surfeit of stifling unanimity,[156] there are numerous scholarly and judicial approaches to disestablishment, each with its proponents and detractors. I aim in this Part less to resolve those debates[157] and more to explore how various theoretical approaches would treat government reinforcement of gender.[158]

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155. For an early and perhaps under-appreciated legal critique of sex binarism, see Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L. REV. 1131 (1979).

156. *Cf.* Marci A. Hamilton, *A Reply*, 31 CONN. L. REV. 1001, 1010 (1999) ("A catalogue of doctrinal pigeonholes fails to take seriously the Court's own acknowledgment that there is no Grand Unified Theory, no single calipers, and no perfect multi-part formula that is up to the task of figuring out whether the Establishment Clause has been violated.").

157. While my aim is not to identify definitively the proper approach to disestablishing gender, I will express some opinions about the desirability vel non of some approaches with respect to some issues.

158. This Article concentrates upon broad theoretical approaches, rather than the particular doctrinal machinery that the Supreme Court may have adopted to govern various disestablishment disputes. This approach accounts for the lack of prominence herein of the in/famous *Lemon* test: the requirement that a law challenged as an establishment of religion must have a secular purpose, must not have the principal or primary effect of advancing or inhibiting religion, and must not foster an excessive entanglement of government and religion. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). This Article does not examine the *Lemon* test also because, as Justice Scalia noted, the Court does not always apply the *Lemon* test, *see* Lamb's Chapel v. Ctr. Moriches Union Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., joined by Thomas, J., concurring in the judgment). *See also* Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (cataloging instances of non-application). The Court has also softened its status, demoting it from a test to "no more than helpful signposts," Hunt v. McNair, 413 U.S. 734, 741 (1973), which "guide[] '[t]he general nature of [the Court's] inquiry in this area.'" Bowen v. Kendrick, 487 U.S. 589, 602 (1988) (quoting Mueller v. Allen, 463 U.S. 388, 394 (1983)). Moreover, in *Agostini v. Felton*, 521 U.S. 203 (1997), the Supreme Court modified the *Lemon* test for school-aid cases, demoting entanglement from an independent criterion necessary for constitutionality to merely one factor relevant to the primary effect inquiry. *See id.* at 234-35; Mitchell v. Helms, 530 U.S. 793, 807-08 (2000) (plurality opinion) (so characterizing *Agostini*); *id.* at 844-45 (O'Connor, J., joined by Breyer, J., concurring in the judgment) (same). In addition, the *Lemon* test in general and its entanglement prong in particular has been subject to extensive academic criticism. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1275-84 (2d ed. 1988); Jesse H. Choper, *A Century of Religious Freedom*, 88 CALIF. L. REV. 1709, 1720 (2000); Edward McGlynn Gaffney, Jr., *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS L.J. 205 (1980).

A. Free Exercise and Noncoercion

Part I of this Article explored analogies between religion and gender and offered reasons grounded in democratic constitutional theory for why the Constitution might be properly interpreted to disestablish gender. The analogy between disestablishment of religion and disestablishment of gender might be most apt if the Constitution were also understood to protect a right to the free exercise of gender. Such a right could be understood as an aspect of the constitutional protection of rights of conscience[159] and expression memorialized in the First Amendment (and, due to incorporation, protected by the Fourteenth Amendment); as part of the liberty substantively protected by the Fifth and Fourteenth Amendments; as a fundamental human right protected by the Fourteenth Amendment; or, perhaps most simply, as an aspect of the disestablishment of gender.

Whether understood as some form of liberty or autonomy right, or as an anti-discrimination guarantee, the right to the free exercise of gender analogous to the right to the free exercise of religion could be quite potent. The Supreme Court for decades has not upheld explicit discrimination by government on the basis of religion,[160] whereas its equal protection jurisprudence has sustained too many facially sex-discriminatory laws.[161]

1. Bases for a Right to the Free Exercise of Gender

One possible basis for a right to the free exercise of gender might be found in the First Amendment's guarantee of freedom of expression. While the text of the First Amendment specifies that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances,"[162] the Supreme Court has long and appropriately interpreted this language as protecting broader rights of expressive conduct and expressive association than these bare words might first suggest.

Thus, the Constitution has barred states from punishing the display of a red communist flag "as a sign, symbol, or emblem of opposition to

159. *See generally* DAVID A.J. RICHARDS, CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS (1993) (arguing for centrality to the Thirteenth, Fourteenth, and Fifteenth Amendments of abolitionist arguments based on right to conscience).

160. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559-60 (1993) (Souter, J., concurring) (invalidating animal-protective laws aimed at religious practices of Santéria).

161. *See, e.g.*, Nguyen v. INS, 533 U.S. 53 (2001) (upholding sex-discriminatory citizenship law); Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding sex-discriminatory draft registration); Michael M. v. Super. Ct. of Sonoma County, 450 U.S. 464 (1981) (upholding sex-discriminatory statutory rape law); Kahn v. Shevin, 416 U.S. 351 (1974) (upholding sex-discriminatory property tax exemption).

162. U.S. CONST. amend. I.

organized government."[163] Similarly, the First Amendment has protected a silent sit-in inside a public library.[164] The Supreme Court has also held that a parade constituted expression protected by the First Amendment.[165] Indeed, the Court has even held nude dancing to be "expressive conduct within the outer perimeters of the First Amendment."[166]

In addition, the Constitution protects both the affirmative freedom to express oneself and the negative freedom from compelled expression with which one ideologically disagrees. For this reason, the Court has held unconstitutional the state's attempt by statutes and regulations to compel objecting public school students to salute the American flag while reciting the pledge of allegiance.[167] As the Court explained in *Wooley v. Maynard*: "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[168] Thus, in *Wooley*, New Hampshire was held constitutionally barred from punishing George and Maxine Maynard for violating a law against covering up the state motto "Live Free or Die" on their automobile license plates, the ideology of which they objected to on moral, religious, and political grounds.[169]

Moreover, the Supreme Court has explained that the Constitution protects associational freedom, "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[170] Like freedom of speech, freedom of expressive association also embraces a concomitant right of freedom from compelled association that would interfere with one's expression.[171] Hence, for example, the Court has held it unconstitutional for a state to attempt via its law against

163. Stromberg v. California, 283 U.S. 359, 369 (1931) (internal quotation marks omitted). Although "[t]he Court did not hold that the flag displaying that took place in *Stromberg* constituted symbolic speech[,]" the Supreme Court has "sometimes cited [*Stromberg*] for this proposition." Joshua Waldman, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844, 1865 n.95 (1997) (citing Texas v. Johnson, 491 U.S. 397, 404-05 (1989), and West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943)).

164. Brown v. Louisiana, 383 U.S. 131, 136 (1966).

165. In this case, the parade was on and for St. Patrick's Day. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 568 (1995).

166. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991).

167. *Barnette*, 319 U.S. at 628-29, 642.

168. 430 U.S. 705, 714 (1977) (quoting *Barnette*, 319 U.S. at 637).

169. *See id.* at 707 & n.2 (1977).

170. Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

171. *See, e.g., id.* at 623 ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. . . . Freedom of association therefore plainly presupposes a freedom not to associate."). *But see id.* ("The right to associate for expressive purposes is not, however, absolute.").

sexual orientation discrimination in public accommodations to require the Boy Scouts of America to accept "an avowed homosexual and gay rights activist" as an assistant scoutmaster.[172]

The First Amendment has frequently been understood as protecting self-realization. For example, the Supreme Court in *Police Department of Chicago v. Mosley* stated that one reason for the First Amendment's protections was "to assure self-fulfillment for each individual."[173] In invalidating compulsory flag salutes by public schoolchildren, the Supreme Court viewed them as infringing "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[174]

Numerous First Amendment scholars have seen this portion of the Constitution as, in part, limiting government's power in ways that would interfere with independent personal self-development.[175] David Richards, for example, has argued repeatedly and eloquently that the First Amendment memorializes the Constitution's respect for "the inalienable right of conscience," which protects "the identifications central to one's self-respect as a person of conscience."[176] Freedom to shape one's identity and values free of governmental coercion is presupposed and necessary for the nation's commitment to a self-governing constitutional republic.[177]

The values of self-realization protected by the First Amendment ought to be understood as imminently applicable to sex and gender. A person's gender identity is dramatically salient, both psychologically and socially. Gender presentation and perception shape not only our sense of self, but

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172. Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).

173. 408 U.S. 92, 96 (1972). *Cf.* Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting) (viewing Supreme Court's abortion and contraception decisions as grounded in constitutional protection of individual "self-definition").

174. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

175. *But see* Jcd Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 794 (1989). Professor Rubenfeld suggested:

> We are all so powerfully influenced by the institutions within which we are raised that it is probably impossible, both psychologically and epistemologically, to speak of defining one's own identity. The point is not to save for the individual an abstract and chimerical right of defining himself; the point is to prevent the state from taking over, or taking undue advantage of, those processes by which individuals are defined in order to produce overly standardized, functional citizens.

Id.

176. David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 OHIO ST. L.J. 491, 508 (1994).

177. *Cf Barnette*, 319 U.S. at 641 ("We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent."). Rubenfeld also noted:

> The very possibility of accountability to a people presupposes that the bodies and minds of the citizenry are not to be too totally conditioned by the state that the citizenry is meant to be governing. If they were, self-government, although it might continue to exist in form, would in fact be wholly illusory.

Rubenfeld, *supra* note 175, at 805.

others' notions of who we are as well, and for most people this is to a significant degree intended (and thus truly communicative, and not merely evidentiary[178]). Indeed, in contemporary society we often regard it as indispensable to be able to assign a sex to individuals that we encounter.[179] One's sense of one's gender identity can profoundly affect the roles that one believes appropriate for oneself—in education, employment, family, and indeed, life in general.

That the First Amendment protects the values of self-realization from government interference should be reason enough to understand the Constitution to protect one's ability to shape one's own gender.[180] But since sex and gender are performative[181]—as one scholar puts it, "status as 'woman' or 'man' is achieved not by being born with a particular anatomy but by performing gendered behaviors successfully in accordance with prevailing social norms"[182]—their expressive nature provides further

178. *See generally* Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of "Speech"*, 1993 WIS. L. REV. 1525; *id.* at 1526-27 (suggesting that for "nonverbal conduct [to be able to] communicate, and thus potentially [to] come within the scope of the Free Speech Clause[,] action must have meaning, either by way of convention or in some other manner[, and] the actor must intend to communicate by means of the action"). Thus, for example, I have argued that civil marriage is an expressive resource protected under the First Amendment because marriage is in my view conventionally understood as and generally intended to be communicative. *See* Cruz, *supra* note 56, at 933-45. I doubt that there is "noncommunicative (civil) marriage." Hence, even those who may not intend to express anything might inadvertently (but knowingly, recklessly, or negligently) be taken by others to be expressing something. Given that many if not most of the meanings of civil marriages are matters of general knowledge, such unintending communicators should be regarded as having had full warning of the import of their civilly marrying, and a communicative intent imputed in law.

179. *See, e.g.*, KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US 3-4 (1995).

180. As constrained as that is, given the conventional basis of gender. *Cf.* Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 500 (1991) ("Manhood, of course, has no existence except as it is expressed and perceived.").

181. JUDITH P. BUTLER, BODIES THAT MATTER : ON THE DISCURSIVE LIMITS OF "SEX" x-xii, 1-4, 12-16 (1993) [hereinafter BUTLER, BODIES THAT MATTER]; JUDITH P. BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY ix, 7, 24-25 (1990). In arguing that sex and gender are performative, Professor Butler is not arguing that it is an object of radical volition, such that one could try out different genders each morning like dresses out of one's wardrobe. *See* BUTLER, BODIES THAT MATTER, *supra*. (For one misreading of Butler and similar theorists along those lines, motivated by both appropriate concern with the position(s) of women and to my mind unfortunate dedication to belief in "the reality of gender itself," see Kelly Kleiman, *Drag = Blackface*, 75 CHI.-KENT L. REV. 669, 675-76 (2000).) Thus,

> sexual identity—that is, what it means to be a woman and what it means to be a man—must be understood not in deterministic, biological terms, but according to a set of behavioral, performative norms that at once enable and constrain a degree of human agency and create the background conditions for a person to assert, *I am a woman.*

Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex and Gender*, 144 U. PA. L. REV. 1, 3-4 (1995).

182. Ellen Bayuk Rosenman, *"Just Man Enough to Play the Boy": Theatrical Cross-Dressing in Mid-Victorian England*, *in* GENDER BLENDING 303, 306 (Bonnie Bullough, Vern L. Bullough, & James Elias eds., 1997). This formulation is probably not as focused on the psyche as Butler's groundbreaking work on the performative nature of sex.

reason to interpret the First Amendment as guaranteeing one's right to free exercise of gender.

Alternatively, a free exercise of gender right might be seen as an aspect of the constitutional protection of persons against deprivations of liberty without due process of law,[183] much as the protection of the free exercise of religion against prohibition by state government is currently protected via the Fourteenth Amendment's Due Process Clause.[184] Admittedly, in the latter part of the twentieth century, the Supreme Court began taking a highly restrictive approach to the identification of fundamental rights protected by the due process guarantee.[185] Moreover, in 1976, in *Kelley v. Johnson*, the Court expressly upheld a regulation of male police officers' hair length.[186] *Kelley* did not, however, reject but instead assumed arguendo that "the citizenry at large has some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance."[187] Such a right might, as the *Kelley* dissenters insisted, be predicated upon constitutional "values of privacy, self-identity, autonomy, and personal integrity."[188] As the Court subsequently recognized, "the ability independently to define one's identity . . . is central to any concept of liberty."[189]

Those who are inclined to see autonomy in gender expression as a fundamental human right,[190] might find this another reason to conclude that the Constitution protects a right to the free exercise of gender. The precise doctrinal mechanism under this human rights approach could be the Privileges or Immunities Clause of the Fourteenth Amendment, which some scholars have argued was intended to constitutionally protect a broad range of human rights.[191]

First Amendment scholars who suggest that there is only one Religion Clause are not pressing a merely pedantic point of grammar or syntax.

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183. U.S. CONST. amend. XIV; *cf.* U.S. CONST. amend. V.

184. *See supra* note 125 & accompanying text.

185. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997); Bowers v. Hardwick, 478 U.S. 186 (1986).

186. 425 U.S. 238 (1976).

187. *Id.* at 244; *See also id.* at 249 (Powell, J., concurring) (finding "no negative implication in the opinion with respect to a liberty interest within the Fourteenth Amendment as to matters of personal appearance"); *id.* at 250 (Marshall, J., joined by Brennan, J., dissenting) ("I think it clear that the Fourteenth Amendment does indeed protect against comprehensive regulation of what citizens may or may not wear.").

188. *Id.* at 251 (Marshall, J., joined by Brennan, J., dissenting); *See also* Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2546 (1994) (characterizing "dress and appearance" as "matters affecting personal identity").

189. Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984).

190. *See* INTERNATIONAL CONFERENCE ON TRANSGENDER LAW & EMPLOYMENT POLICY, INC., INTERNATIONAL BILL OF GENDER RIGHTS, *reprinted in* FEINBERG, *supra* note 9, at 165-69.

191. *See generally, e.g.*, CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM (1997).

Rather, their aim is to emphasize that the Free Exercise Clause and the Establishment Clause actually work in tandem, not only textually but also as a matter of principle.[192] "Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof," the Constitution declares zeugmatically.[193] This textual linkage hints at the idea that both these limitations on government serve the common end of religious liberty.[194] The Establishment Clause precludes government from infringing religious liberty by compelling citizens to support a religion or religions to which they do not subscribe; the Free Exercise Clause precludes government from infringing religious liberty by forbidding citizens to engage in religious exercise or by singling out persons or activities for special disadvantage because of their religious identity, affiliation, or motivation.[195]

Efficacious disestablishment of religion requires protection of the free exercise of religion, at least as an anti-discrimination right. Otherwise, government could favor certain faiths by discriminatorily singling out the practitioners or practices of other faiths for special burdens or bans. Want to support religion without directly spending funds for that purpose? Tax

192. *See, e.g.*, Akhil Reed Amar, *The Supreme Court 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 119-20 (2000) ("On this view, there are not two separate Religion Clauses that coexist in tension—an Establishment Clause discriminating against religion and a Free Exercise Clause limiting the discrimination. Rather, there is one Religion Clause, proclaiming that the federal government should neither favor nor disfavor religion as such."); Cruz, *supra* note 125, at 1189 n.69 (discussing Richard J. Neuhaus, *Contending for the Future: Overcoming the Pfefferian Inversion*, 8 J.L. & RELIGION 115 (1990)).

193. U.S. CONST. amend. I.

194. *See, e.g.*, Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 556 (1991) ("According to the accommodationists, the religion clauses have the unitary focus of facilitating the people's religious liberty, and government promotion of such liberty is in the service of constitutional values."); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 690 (1992) ("Taken together, the Religion Clauses can be read most plausibly as warding off two equal and opposite threats to religious freedom—government action that promotes the majority's favored brand of religion and government action that impedes religious practices not favored by the majority."); Michael Stokes Paulsen, Lemon *Is Dead*, 43 CASE W. RES. L. REV. 795, 798 (1993) ("The two clauses protect a single central liberty—religious freedom—from two different angles."); John W. Whitehead, *The Conservative Supreme Court and the Demise of the Free Exercise of Religion*, 7 TEMP. POL. & CIV. RTS. L. REV. 1, 11 (1997) ("Justice Story perhaps differed from many modern justices in considering the promotion of religious freedom to be the common purpose behind both religion clauses.").

195. Or, in the words of Michael Paulsen, "[t]he Establishment Clause prohibits the use of the coercive power of the state to *prescribe* religious exercise; the Free Exercise Clause prohibits the use of government compulsion to *proscribe* religious exercise." Paulsen, *supra* note 194, at 798. This broader-sounding view is reconcilable with the formulation in the main text if one interprets "to proscribe religious exercise" (or "prohibiting the free exercise thereof") in intentional rather than extensional terms: to prohibit religious exercise then is to single out activities because of their religious character (intentional), rather than to prohibit activities that happen to include religious activities (extensional). The distinction between intentional and extensional definitions illuminates the textual plausibility of the rule of *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990), better than explained by the majority opinion in *Smith*.

atheists. Want to support Christianity? Tax non-Christians. One may have relatively effective protection for the free exercise of religion without disestablishment of religion—consider the state-supported Anglican church in Great Britain—but it is difficult to envision effective protections against disestablishment without protecting the free exercise of religion.

Hence, a right to the free exercise of gender, or perhaps "gender autonomy,"[196] might be understood most simply as an aspect of the constitutional disestablishment of gender, much as at least some aspects of the constitutional protection of free exercise of religion could be achieved under the rubric of disestablishing religion. The basic ideas, whose fuller development must be left to another occasion, would be that government improperly undermines the constitutional aspiration of a diverse but unified American people when it targets persons or groups for special advantage or disadvantage on the basis of sex or gender, and/or that government improperly relies on extra-human sources of authority (God or Nature) when it demands that people engage in gendered exercises.

As this disjunctive/conjunctive phrasing hints, there are different ways in which a constitutional right to the free exercise of gender might be conceived, just as there are different ways to regard the Constitution's prohibition on laws prohibiting the free exercise of religion. According to one approach, the right to free exercise of gender could be a substantive right, a right to engage in conduct that expresses one's gender, absent a compelling countervailing collective interest.[197] Of course, such a formulation raises significant slippery slope concerns, similar to those raised by the constitutional protection of expressive conduct.[198]

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196. Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 L. & SEXUALITY 123, 153 (2001); *see also, e.g.*, Bartlett, *supra* note 188, at 2546 ("As an autonomy issue, the problem [that feminists have with] dress and appearance norms [is that they] impede women from making their own choices and restrain them from expressing their true identity.").

Of course such autonomy can only be exercised within the social fields in which one necessarily lives in contemporary society. "What one might express through his or her dress and appearance decisions is always dependent on the cultural codes that give meaning to the range of possible expressions." *Id.* at 2549; *see, e.g.*, Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 367 (1999). Keller argued that

> the court's and Boeing's anxiety regarding [transitioning transsexual employee] Doe's clothing are as much concerned with the needs of others as with Doe's own identity. For the Boeing company, Doe's clothing is indeed expressive of identity—not of Doe's, but of the identity of other employees, an identity that implicates choice of bathrooms.

Id.; *cf.* Robert M. Cover, *Forward:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 10 (1983) ("The intelligibility of normative behavior inheres in the communal character of the narratives that provide the context of that behavior."). But the freedom to do what one can without governmental gender constraints is still valuable even if the abolition of such constraints would change the array of possible gender messages one might express through self-presentation.

197. This was the basic formal doctrinal understanding of the Constitution's ban on laws prohibiting the free exercise of religion from *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963), to *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 878-79 (1990).

198. *See, e.g.*, Cruz, *supra* note 56, at 975-76 & nn.269-70.

Just as in theory someone might engage in virtually any act in order to communicate a message, a person might engage in almost any conduct as an expression of the person's gender. For all but the most rampant of libertarians, the prospect that all such activities are constitutionally shielded from governmental regulation unless strict scrutiny is satisfied prompts a shudder at visions of anarchy.[199] The same reactions might result in response to a rule that privileges conduct engaged in for religious reasons, yet such an approach prevailed for three decades in the late twentieth century.

In the religion context, such anarchy concerns were in part assuaged by the sincerity requirement. While the truth or falsity of religious beliefs is deemed outside the province of government,[200] whether a person was sincerely motivated to engage in conduct for religious reasons is an allowable inquiry.[201] Likewise, one might recur to a sincerity limitation on conduct in which one wishes to engage to express one's gender: Government may not determine the truth or falsity of beliefs that men or women should act a certain way (or that each individual is either male or female), but it might question whether a person sincerely believed that, say, speeding while driving to school was an expression of her gender. Although the sincerity inquiry could have been an important restrictor on the flow of religious claims under the disestablishment of religion, in practice government seems to have proven hesitant to contest claims of religious sincerity.[202] This is perhaps due to the unseemliness of the necessary questioning, or perhaps due to the track record of claims for religious exemption.

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199. *See, e.g., Smith*, 494 U.S. at 888 ("Any society adopting such a system" of religious exemptions from all laws for sincerely religiously motivated conduct unless government narrowly tailors its law to a genuinely compelling interest "would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them."). *But see, e.g.*, CATHARINE COOKSON, REGULATING RELIGION: THE COURTS AND THE FREE EXERCISE CLAUSE (2001) (challenging this approach as founded upon a false dichotomy between order and anarchy).

200. *See, e.g.*, United States v. Ballard, 322 U.S. 78 (1944).

201. *See, e.g., id.*; Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 833 (1989). Justice Thomas claims that government is also barred from adjudicating the sincerity of religious claims. *See* Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion) (mistakenly or misleadingly invoking "our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity"); Columbia Union Coll. v Clark, 527 U.S. 1013, 1014 (1999) (Thomas, J., dissenting from denial of cert.) (same, verbatim). This position is not supported by the opinions he cites, none of which even mentions sincerity or any form of the word. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981). One is left to wonder what accounts for this blatant misrepresentation of current law.

202. At least when the claims are not seemingly outlandish, such as novel prisoner claims of religious motivation for requesting to be served Chateaubriand. *See* S. REP. No. 103-111, at 20-21 (1993), *reprinted in* 1993 U.S.C.C.A.N., 1908-09 (remarks of Senator Simpson) (recounting claims of inmates who "requested Chateaubriand and Harvey's Bristol Cream every other Friday as part of the practice of their religion").

This governmental self-restraint did not entail great self-sacrifice, for the government survived the compelling interest test applied to free exercise claims far more often than its regulations survived strict scrutiny in other contexts.[203] This led commentators, and eventually some Supreme Court Justices, to conclude that the Court's doctrine did not or should not demand that government justify its actions with a compelling interest whenever someone's exercise of religion was sincerely burdened. As of 1990, the Supreme Court has held the general rule[204] to be that neutral laws of general applicability do not offend the Free Exercise Clause,[205] which should instead be seen as essentially an anti-persecution[206] or anti-targeting[207] principle. Thus, free exercise was retooled from an independent substantive right to a comparative equality right. Government could not single out and place special burdens on religiously motivated activity or religious persons or groups.

The right to the free exercise of gender might be conceptualized in a similar fashion. It might be understood not to give anyone a substantive right to, say, wear a dress or smoke a cigar as an expression of gender. Instead, according to an anti-discrimination formulation, the right to free exercise of gender could bar government from treating gendered reasons for action worse than nongendered reasons. However, that formulation only captures half of the anti-discrimination rule. The other half could be that, much as government may not treat people differently on the basis of religion,[208] so too government may not treat people differently on the basis of sex or gender. Thus, at a minimum, government may not prescribe

203. *See generally* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407 (1992); *id.* at 1412 ("The . . . free exercise claimant, both in the Supreme Court and the courts of appeals, rarely succeeded under the compelling interest test, despite some powerful claims.").

204. I set to one side the possible exceptions to the *Smith* rule grounded in the opinion's various and varyingly persuasive distinctions. These are discussed in Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 41-54 (1991).

205. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 878-79 (1990); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

206. *Lukumi*, 508 U.S. at 523; Cruz, *supra* note 125.

207. *See, e.g.*, Mary Anne Case, *Lessons for the Future of Affirmative Action from the Past of the Religion Clauses?*, 2000 SUP. CT. REV. 325, 349 (2001) (noting that "*Church of the Lukumi* . . . prevents the legislature from singling out a religiously motivated activity for special disadvantage"); Leedes, *supra* note 149, at 517-18 ("[N]o religious person can be singled out and given privileges or disabilities because of his or her religious faith or loyalties. Indeed religious faith and loyalties are irrelevant to the rights and duties of citizens."). *But cf.* Marci A. Hamilton, *The First Amendment's Challenge Function and the Confusion in the Supreme Court's Contemporary Free Exercise Jurisprudence*, 29 GA. L. REV. 81, 129 (1994) (illustrating and criticizing how *Lukumi* contemplates upholding some actions explicitly targeted at religion, where a compelling interest is served and least restrictive means are employed).

208. *See, e.g.*, Hamilton, *supra* note 207 (arguing that intentional targeting of religion should be per se unconstitutional).

different rules of conduct for men and women on the basis of views of how men and women are or should be.

Such a right to free exercise of gender could have far-reaching implications, if courts and legislatures took it seriously. For example, it could result in invalidation of all governmentally imposed sex-specific dress codes and lingering restrictions on cross-dressing. It is hard to think of a truly compelling need for government to insist that men and women dress differently.[209] In addition, at least as a substantive right, the free exercise of gender would protect the ability of sincere transsexual persons[210] to adopt the gender identity of their choice free of governmental insistence that they will forever remain the gender designated at their birth.[211]

2. *Noncoercion*

One approach to operationalizing the disestablishment of religion in the U.S. constitutional order emphasizes the impermissibility of coercion. Like the closely related free-exercise notion, the noncoercion approach would be potentially powerful were it translated to the gender context, although it has distinct limits.

The noncoercion approach to religious disestablishment in the constitutional order treats coercion as a necessary element of an Establishment Clause violation.[212] On such "a non-coercion theory of the Establishment Clause, . . . government is free to rely on and endorse religious beliefs if it does not force anyone to confess or practice them."[213] As one scholar characterizes it, "[u]nder a coercion test, . . . [n]oncoercive injuries would

209. *Cf.* Bartlett, *supra* note 188, at 2570 ("[F]ew female-associated dress or appearance conventions exist that are not linked with stereotypes about women that emerged from or have become interwoven with their historically inferior status."). *But cf.* Goldman v. Weinberger, 475 U.S. 503 (1986) (rejecting, albeit with hearty helping of judicial deference, free exercise challenge to military uniform requirement on grounds of importance of uniformity of appearance).

210. By use of the phrase "sincere transsexual persons," I do not mean to insinuate that it's common for anyone to pretend to suffer from what clinicians may label "gender dysphoria." However, to the extent that free exercise of gender would be modeled upon the free exercise of religion, sincerity would be a prerequisite for any claimant, *see supra* notes 200-202 and accompanying text. Government often concedes this point in the religion context and might do so in the sex identity context.

211. *See, e.g.*, Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999) (holding that transsexual female was legally still male on the basis of presumed chromosomes and so lacked standing to bring claim as the male's surviving spouse under Texas wrongful death and survival statutes), *rev. denied* (Mar. 2, 2000), *cert. denied*, 531 U.S. 872 (2000).

212. *Cf.* Jesse H. Choper, *A Century of Religious Liberty*, 88 CALIF. L. REV. 1709, 1721-22 (2000) ("The Court should forbid government action only when its purpose is religious *and* it is likely to impair religious freedom by coercing, compromising, or influencing religious beliefs."). *But cf. Lee v. Weisman*, 505 U.S. 577, 604 (1992) (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring) ("Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.").

213. Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 730-31 (1997).

be irrelevant."[214] One of the most prominent judicial exemplars of this approach is Justice Kennedy's opinion for the Supreme Court in *Lee v. Weisman*, the 1992 decision holding unconstitutional a prayer delivered at a public high school's commencement ceremony.[215]

Even if coercion were not a necessary condition for a sex/gender establishment violation, a noncoercion approach would condemn some governmental actions with respect to sex or gender. The constitutional disestablishment of gender should preclude government from coercing citizens to participate in gendered exercises[216] or to behave in a gendered fashion; that is, it would generally bar the state from prescribing sex-specific rules of conduct.

Presumably, public schools would not be allowed to impose physical education requirements that can be satisfied only by participation in a single-sex activity. That would improperly require every student to identify as a member of a sex/gender group. While the majority of students might have no objection to such a requirement, any students who did not wish to identify according to the dominant majority's classifications, or who did not wish to engage in any sex/gender affiliation at all, would be coerced into violating their conscience. A noncoercion approach to the disestablishment of sex and gender would also forbid government to dictate or force a choice between only men's or women's locker rooms or bathrooms.[217] In sum, it would violate the disestablishment of sex and gender to

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214. Daniel O. Conkle, Lemon *Lives*, 43 CASE W. RES. L. REV. 865, 870 (1993).

215. 505 U.S. 577. Justice Kennedy does not, however, state that coercion is necessary for a free exercise violation but that it is sufficient. Writing for the Court, Kennedy observed: "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a state religion or religious faith, or tends to do so." *Id.* at 587 (internal quotations and brackets omitted). The Court considered the potential divisiveness of government's choosing a member of one faith to deliver the graduation prayer to be "of particular relevance here . . . because it centers around an overt religious exercise in a secondary school environment where . . . subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation." *Id.* at 588. "[P]rayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there." *Id.* at 592. Justice Kennedy noted:

> The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.

Id. at 593. "Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." *Id.* "To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means." *Id.* at 594. *See also* County of Allegheny v. ACLU, 492 U.S. 573, 659-63 (1989) (Kennedy, J., dissenting).

216. *Cf. Lee*, 505 U.S. at 594 ("The injury caused by the government's action . . . is that the State . . . in effect required participation in a religious exercise.").

217. *See, e.g.*, Terry S. Kogan, *Transsexuals and Critical Gender Theory: the Possibility of a Restroom Labeled "Other"*, 48 HASTINGS L.J. 1223 (1997).

force unwilling citizens first to declare a sex/gender identity (or, perhaps worse yet, to subject them to a sex/gender ascription on majority terms) and then to perform that identification.

A more difficult question is whether the mixed-sex requirement for civil marriage would violate the disestablishment of sex and gender on the ground that it coerces gender fealty on the part of lesbigay persons. As I have noted elsewhere, "[t]he conclusion that extending civil marriage only to mixed-sex couples unconstitutionally coerces lesbigay persons . . . requires a robust view of the interaction of legal, religious, and social norms and of the pressures that government 'bribes' might be thought to exert."[218] I do not explore these issues further here, in part because the question of the degree of coercion effectuated by the offer of mixed-sex civil marriage but not of same-sex marriage is exceedingly complex and perhaps not well suited to judicial resolution,[219] and in part because, as I discuss in succeeding Sections of this Article, there are clearer reasons for concluding that the mixed-sex requirement for civil marriage violates the disestablishment of sex and gender.

The anti-coercion principle does, however, have serious limits. Unless radically expanded to the indeterminate proposition that "aid to religion must not be structured to influence or distort religious choice"[220]—or in this context, aid to gender ideologies structured not to influence or distort gender choices—it is far too ineffective.[221] In particular, by itself the anti-coercion principle could allow government free rein to take non-coercive steps to support and foster gender fundamentalism or other gender beliefs and divisions.[222] The state could sponsor public awareness campaigns designed to encourage people to act in accordance with their sex. It could perhaps "teach" gender in public schools and universities, instructing people that they ought to behave as "proper" members of their sex. It might,

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218. David B. Cruz, *The New "Marital Property": Civil Marriage and the Right to Exclude?*, 30 CAP. U. L. REV. (forthcoming 2002).

219. The political process, on the other hand, has in my view poorly dealt with same-sex marriage issues.

220. Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 940 (1985-1986).

221. *Cf.* Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 501 (1994). Professor Gey remarked:

> In my view, Justice Kennedy cast his vote correctly in *Weisman*, but I do not believe that any defensible reading of the coercion standard can justify this result. The only way Justice Kennedy could reach the conclusion he reached in *Weisman* was to expand the coercion standard until it became virtually indistinguishable from the separationist views he rejected in *Allegheny*.

Id.

222. *Cf.* Berg, *supra* note 213, at 739 n.196 (considering the argument that "[i]f religious views are important, . . . the government should teach them and try to influence people even though it should not try to engage in (counterproductive) coercion"); Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 921-22 (1985-1986) (enumerating many un-"happy consequences" of a noncoercion-only rule).

for example, grant financial aid to female nursing majors and male business majors if differential funding were not understood as (impermissibly) coercive.[223] In short, anything not thought to infringe negative liberty might be permissible under this approach.

It is largely for this reason that, by itself, the noncoercion approach to disestablishment is anemic. As numerous scholars have observed, freedom from religious coercion is an archetypal free exercise concern, one that fails to capture many of the ways in which government might try unconstitutionally to establish religion.[224] Although free exercise is an important part of religious liberty and gender freedom, it is not the whole.

B. Neutrality, Nonpreferentialism, and Non-endorsement

Many approaches to disestablishment emphasize variations on a theme of "neutrality." Some religion scholars focus on concepts of neutrality per se, while others emphasize neutrality among religious denominations, and yet others emphasize the importance of state neutrality with regard to religions and religious beliefs. It is possible to translate each of these approaches to disestablishment of religion to the disestablishment of sex and gender, with varying results.

1. Neutrality

"Neutrality" is often described as the touchstone of the Religion Clause. Supreme Court decisions have insisted on "neutrality," and scholars have touted it as the proper attitude of government toward religion.[225] However, the Constitution is not and should not be completely neutral about religion. Our Constitution does express an opinion about religion by forbidding governmental establishments of religion. By doing so, it takes a stand on the position of religion in public life: religion may not capture government, nor are religious principles sufficient to justify laws restricting people's liberty. Thus, neutrality in its most common sense is an inappropriate conception of how government should treat religion.

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223. The Supreme Court's much criticized abortion funding decisions—*Maher v. Roe*, 432 U.S. 464 (1977) and *Harris v. McRae*, 448 U.S. 297 (1980)—adopted just such a view of state and federal decisions to fund childbirth but not most abortions, treating such distributional schemes not as coercing primary behavior (giving birth or aborting) but merely as expressing support for such behaviors.

224. *See, e.g.*, Ronald C. Kahn, *God Save Us from the Coercion Test: Constitutive Decisionmaking, Polity Principles, and Religious Freedom*, 43 CASE W. RES. L. REV. 983, 995 (1993) (contending, in discussing *Lee*, that "Dean Smith mistakenly argues that the Rehnquist Court is willing to focus on free exercise rights as at the core of Establishment Clause principles"); *id.* at 1015 (criticizing approaches "resting the Establishment Clause solely on a free exercise-based coercion test"); Laycock, *supra* note 222, at 922 ("Religious coercion by the government violates the free exercise clause. Coercion to observe someone else's religion is as much a free exercise violation as is coercion to abandon my own. If coercion is also an element of the establishment clause, establishment adds nothing to free exercise.").

225. *See* Laycock, *supra* note 36, at 993 & n.1 (citing cases and articles and "assum[ing] that neutrality is an important part of the meaning of the religion clauses").

This does not mean that the supposed "emptiness of neutrality as a guide to church-state relations" should be embraced.[226] As it has been noted, "[i]n a nation of immense religious diversity, it is of great symbolic value that government views all manner of religious belief neutrally."[227] The neutrality embodied in the Constitution, however, should be understood as a neutrality of inclusion, one in which people of faith are at liberty to play vital roles in a broadly conceived public realm. Within this neutrally inclusive public realm, we do not have any test oaths for public offices, and we have national laws prohibiting religious discrimination in a wide range of contexts, thus assuring inclusion of people of all religious faiths or of none in the public life of the nation. Accordingly, the Constitution deems religious beliefs and divisions out of place in matters of public governance, insisting that all people are equally welcome regardless of religion.

This is true not only in the governmental public sphere, but also in the broader public realm. Laws prohibiting private employers from discriminating on the basis of religion might have been seen as violating disestablishment principles, on the ground that such laws might affect people's religious choices and so be thought "to promote religion by eliminating one of the naturally [*sic*] occurring disincentives to religious practice (namely, the hostile reaction of private persons)."[228] Yet today, that is not the case:

> [A] different version of the public-private distinction [from the "classical liberal" version] is at work, resulting from the civil rights era and deeply embedded in modern legal and popular conceptions. Under this conception, some aspects of the market, though privately owned and controlled, are seen as "public" for certain purposes, including application of nondiscrimination norms. Thus, just as the government is seen as overstepping the proper bounds of its authority when it makes religious judgments, so is General Motors. . . . The modern view . . . is not based on who is ultimately right in their religious judgment, but on drawing the line between private and collective judgments. The difference is that the modern view conceptualizes at least some parts of the economic marketplace as a collective judgment, and treats "private" as meaning the individual . . . .[229]

In that public realm the constitutional norms of inclusion and equality and religious disestablishment are mutually consistent. Thus, those norms may be promoted for secular reasons irrespective of any religious reason some governmental or market actors might have to discriminate.

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226. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 268 (1987).

227. Laycock, *supra* note 36, at 998.

228. McConnell, *supra* note 50, at 252.

229. *Id.* at 253-54.

Under this conception of inclusive neutrality, then, a Constitution that disestablishes sex and gender should be understood to establish a public realm in which gender beliefs and divisions are not reinforced. Thus, laws prohibiting discrimination on the basis of gender in employment should be thought consistent with any neutrality command the Constitution might embody with respect to gender. Only in certain spheres—such as choice of life partner, roommate, maybe lodgers, maybe education, or maybe just religious education—would countervailing values shield private life from the gender-leveling forces of law.[230]

Under this form of neutrality, the Census generally should not be problematic from a standpoint of gender neutrality. It is not ipso facto improper for government to count men and women, although there could be problems if it did not accept self-identification, at least where sincerity is clear.[231] Sincerity might preclude acceptance of some assertions of gender identity if, for example, a gay man presented himself as a man in virtually every way but for some reason (such as civil marriage) claimed to be a woman.[232] Otherwise, neutrality and sincerity should allow almost any transperson, or intersexual person, to self-identify.

Neutrality alone might not achieve a full measure of gender freedom and justice. A gender analogue to the widely though not universally maligned *Smith* rule[233] might be that laws demanding everyone to be sensitive and wear make-up (or to be tough and eschew make-up) do not unconstitutionally privilege femininity (or masculinity) if they are facially neutral and generally applicable, even if men (or women) as a group might have more difficulty with or objections to compliance.[234]

In addition, there are different notions of neutrality. Professor Laycock identifies one possibility in "formal neutrality": "government

230. This is not necessarily to agree with Peter Bayer and the Canada Supreme Court that certain antidiscrimination laws are commanded by constitutional law/doctrine, *see* Peter Brandon Bayer, *Rationality—and the Irrational Underinclusiveness of the Civil Rights Laws*, 45 WASH. & LEE L. REV. 1 (1988); Vriend v. Alberta, 31 C.H.R.R. D/1 (S.C.C.) (1997), although the spirit of the Constitution certainly would push in that direction.

231. In the religious context, it is widely accepted in principle, if not always in practice, that while government may not attempt to adjudicate the truth or falsity of a religious belief, it is permissible for government to ensure that persons claiming a religious exemption from secular obligations are sincere in their assertion of conflicting religious beliefs. *See, e.g.*, United States v. Ballard, 322 U.S. 78, 88-92 (1944) (holding that jury in fraud case may not decide truth or falsity of religious representations but may consider sincerity).

232. The problem is not that sex change is impossible—that view reflects impermissible governmental gender fundamentalism: people come in two unchangeable types, male and female—but that a person is claiming to be more than one sex at a time (as opposed to intersexual or transitioning).

233. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 882 (1990) (holding that neutral laws of general applicability do not offend the free exercise clause, provided they have a rational basis).

234. A "women marines must wear lipstick" rule would be an unconstitutional gender enforcement, but query whether a "no make-up" rule would or should be understood as impermissible because it targets women (since the vast majority of make-up wearers are, I'd wager, women).

cannot utilize religion as a standard for action or inaction because [the religion] clauses . . . prohibit classification in terms of religion either to confer a benefit or to impose a burden."[235] Similarly, the disestablishment of sex and gender may preclude government from using sex or gender as a standard for action or inaction. Formal sex/gender neutrality would conclude that men and women may not be treated differently, and that government may not impose different obligations or confer different rights upon people on the basis of sex/gender. Such an approach should not be taken to the extreme, because it might dictate governmental indifference to exclusions of men or women from various sectors of the public realm thought to result from "private" sex or gender traits or divisions. For example, the Supreme Court's decision in *Geduldig v. Aiello*,[236] holding governmental discrimination against pregnancy in health insurance coverage not sex discrimination under the Equal Protection Clause, has been widely criticized as formalism run rampant.[237] Such exclusions would contradict the imperative norms of unity and inclusion that underwrite the Constitution generally, the Fourteenth Amendment more particularly, and, specifically, the Citizenship Clause. But it is one approach to gender disestablishment offered by analogies to religion.

Alternatively, Professor Laycock would interpret the Religion Clauses to embody what he terms "substantive neutrality": "the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."[238] An analogous substantive sex/gender neutrality would interpret the Constitution to require government to minimize the extent to which it either encourages or discourages sex/gender belief or disbelief, the practice or nonpractice of gender, and gender observance or nonobservance.

Substantive sex/gender neutrality might be an improper constitutional interpretation of the disestablishment of sex and gender, or at least of the free exercise of sex and gender. The extension of exceptional protection to religion[239] dictated by Laycock's vision of "substantive" religion neutrality

235. Laycock, *supra* note 36, at 1001 (quoting Philip B. Kurland, *supra* note 154).

236. 417 U.S. 484 (1974).

237. *See, e.g.*, Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 n.107 (1984) (lengthy citation of critical articles).

238. Laycock, *supra* note 36, at 1001. He rejects two other possible "neutral" approaches, what he terms "formal neutrality" (meaning "that government cannot utilize religion as a standard for action or inaction because [the religion] clauses . . . prohibit classification in terms of religion either to confer a benefit or to impose a burden"), *id.* (quoting Philip B. Kurland, *supra* note 154), and what he calls "disaggregated neutrality" (meaning an approach that "looks only at one side of the balance of advancing or inhibiting," or that "shift[s] back and forth among different versions of neutrality without explanation"), *id.* at 1007-08.

239. "Substantive neutrality" means that, under the Free Exercise Clause, government is less able to regulate problems caused by religion than problems caused by other "status[es,] belief[s,] speech, or . . . conduct." *Id.* at 997.

relieves people of the obligation to obey secular law because their reason for noncompliance is religious. Such an approach is rooted in an improper privileging of religion, a normatively and constitutionally unjustified vision of "unimpaired flourishing" of religion.[240] It is quite possible that exempting people from the scope of government prescriptions and prohibitions on the ground that such laws interfere with an individual's gender performance is likewise unwarranted.

2. *Nonpreferentialism*

One disestablishment approach often deemed a version of neutrality, albeit a weak one, is nonpreferentialism. According to this theory, disestablishment is not violated so long as government does not single out particular religions for special favor; government thus may constitutionally support all religions if it does so evenhandedly. Despite significant problems, this approach to the disestablishment of religion has been an important view of the First Amendment and continues to attract some support.[241] So it is worth a brief exploration.

In the religious context, nonpreferentialism holds that the Constitution "permits government aid to religion so long as that aid does not prefer one religion over others."[242] This position is most commonly staked out with respect to financial aid to religion, but is sometimes extended to other forms of aid as well. Under nonpreferentialism, government economic aid to religious schools is constitutionally permissible without regard to use, provided the aid is made equally available to schools run by any religion. Its adherents notwithstanding, this position has been forcefully criticized by First Amendment scholars[243] and repeatedly rejected by the Supreme Court.[244]

Translated to the gender context, nonpreferentialism would suggest that government might lend its support evenhandedly to all gender ideologies and beliefs, but may not single out particular gender ideologies or beliefs for special aid. If we take a gender ideology to be a belief system that

240. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1254 (1994). On the normative and constitutional indefensiveness of such privileging of religion, see *id.* at 1260-82.

241. *See, e.g.*, Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN'S L. REV. 245 (1991). The Supreme Court's establishment decisions have tended in the direction of neutrality in the school funding context, but only in situations where the aid is not just offered to all religions but actually to all schools or school users similarly situated other than with respect to religion. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793 (2000); Agostini v. Felton, 521 U.S. 203 (1997).

242. Laycock, *supra* note 222, at 875.

243. *See generally id.*

244. *See id.* at 876 & n.4 (citing Wallace v. Jaffree, 472 U.S. 38, 52-55 (1985); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 216-17 (1963); Ill. *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 211 (1948)).

men and women are different types of creatures descriptively, or that the roles, practices, and conduct normatively proper for women differ from those for men,[245] nonpreferentialism could do only slight good from a feminist point of view. If it so chose, government generally would be free to support views that there are different roles appropriate for men and for women, and that men and women are naturally, foundationally different. By itself that is not a good thing for feminism.

The only feminist good immediately noticeable from the nonpreferentialist approach is the slight potential for disrupting the coherence of gender: If various groups subscribe to different gender beliefs, so that, for example, one group holds that pink is a feminine color and blue a masculine color (as is common today), while another group believes the opposite (as was common a century ago), government could not aid one view without aiding the other. Evenhanded support for gender could then generate "noise" that may leave people less certain as to which color is proper for males and which is proper for females. In that case, they might conclude that sex does not correspond with proper colors, in which case gender to that extent would come to be both socially and governmentally disestablished.[246] However, such an effect would be contingent upon the actual distribution of gender beliefs, and, if there are many more groups who think pink is for girls, then the "noise" generated by the constitutionally mandated equal support for the small "pink is for boys" camp might not appreciably undermine the prevalent social gender norms.[247]

3. *Non-Endorsement*

Another approach to disestablishment that aims at a form of government neutrality emphasizes "non-endorsement." This approach to religious disestablishment, popularized, if not pioneered, by Justice O'Connor,[248] focuses on government symbolism and expression. The rule against endorsement generally holds that government should not appear to embrace religious beliefs or the proposition that a person's religion is relevant to his or her standing in the public realm.[249] Therefore, non-endorsement bars

245. *See supra* Part I.A.

246. *Cf.* Maxine Eichner, *On Postmodern Feminist Legal Theory*, 36 HARV. C.R.-C.L. L. REV. 1, 69 (2001) ("[T]he simple recognition that different groups approach gender roles in different ways may itself call into question the inevitability of the existing gender binary.").

247. I am thus not optimistic about this particular, limited means for law to "interrupt the cycle of the cultural practices that construct gender." *Id.* at 26.

248. *See* Eliott M. Berman, *Endorsing the Supreme Court's Decision to Endorse Endorsement*, 24 COLUM. J.L. & SOC. PROBS. 1, 6 (1990) ("Justice O'Connor first ennnciated the endorsement test in 1984 in her concurring opinion in *Lynch v. Donnelly*."); *id.* at 2 ("suggest[ing] that Justice O'Connor's endorsement analysis has actually been implicit in the Court's establishment clause jurisprudence for over forty years").

249. "Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to

government from communicating a message that nonadherents to a dominant religion are less favored or that citizens should have different public roles or life opportunities based upon their religion. This norm is a combination of equality, equal citizenship, and political unity principles, for it holds that "government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community."[250]

Translated to the gender context, non-endorsement would hold it to be an establishment violation for government to endorse gender beliefs, and hence unconstitutional to convey a message that members of one sex are superior to or favored over members of another, or that persons properly have different roles, life opportunities, or rights depending on their sex. While non-endorsement has been criticized as indeterminate and unjustified, and for its proponents' failures to assess adequately the messages government does convey, this approach has the virtue of capturing the intuition that to be treated as a complete equal means at least that you must not be told by government that you are not an accepted equal.

As a concomitant, government should not be perceived as embracing the proposition that its citizens should be foreclosed from any roles or opportunities in the public realm based upon their religion. Were the government allowed to affirm that religion should be a predominant consideration with respect to some public position, for example, it would then be "making adherence to a religion relevant" to people's standing in the political community. Community members of the approved religion would be overwhelmingly favored—because of their religion—in part of the public realm. This alignment of government with religion violates disestablishment norms. The Supreme Court has interpreted the Establishment Clause to mean that "government may not promote or affiliate itself with any

take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" County of Allegheny v. ACLU, 492 U.S. 573, 593-94 (1989) (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)). It may be that non-endorsement works best as a test for establishment violations involving the public display of religious symbols, rather than an all-purpose Establishment Clause principle, for the focus of the non-endorsement test is precisely on symbolism. *Cf. County of Allegheny*, 492 U.S. at 595 (avowing that Justice O'Connor's concurring opinion in *Lynch* "provides a sound analytical framework for evaluating governmental use of religious symbols"); Bd. of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("Cases involving government speech on religious topics . . . seem to me to fall into a different category [from cases involving government actions targeted at particular individuals or groups, imposing special duties or giving special benefits] and to require an analysis focusing on whether the speech endorses or disapproves of religion, rather than on whether the government action is neutral with regard to religion."). Indeed, the majority in *County of Allegheny* held that the relevant constitutional principle was that "the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs." 492 U.S. at 597.

250. *County of Allegheny*, 492 U.S. at 627.

religious doctrine or organization,"[251] and even if government were somehow able to set up a board with proportional representation for all of the nation's religions, the problem should not be considered cured.[252]

In the gender context, it would be an unconstitutional deviation from neutrality under a regime of disestablishment for government to take or appear to take a position on gender beliefs or thus to convey a message that persons properly have different opportunities or roles in the public realm depending on their sex.[253] Non-endorsement would be required because "government cannot endorse the [gender] practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community."[254] Under this non-endorsement view of the disestablishment of gender, government might be restricted from taking actions with the purpose or effect of endorsing gender beliefs.

This would have significant repercussions for current laws. For example, it would be extremely difficult under this principle for the United States military to justify the exclusion of women from combat positions. This rule, lacking any strong nongendered justification, clearly reinforces the traditional gender view of masculinity and femininity. Such a policy sustains the view that it is the role of men to defend women, whose role is to graciously accept being defended[255]—"one of the most potent remaining public expressions of 'ancient canards about the proper role of women.'"[256]

In addition, it seems non-endorsement might preclude government from insisting, for example, that chromosomes make someone a man or a woman. This is a gender belief that is deeply resisted (and often resented) by transgender persons who believe that they are a sex other than what their birth circumstances and presumed chromosomes might suggest. Some courts have invalidated marriages on the ground that a transgendered person is actually, that is, legally, of her birth sex and is thus a male ineligible to marry another male.[257] This clearly endorses a particular gender belief (indeed, not only ratifying someone else's belief but conclusively adopting

251. *Id.* at 590.

252. The implausibility of government succeeding at such a task (given the enormity of any body that would include representatives of the numerous faiths in the United States) co-exists with the certain divisiveness—a classic Establishment Clause concern—that would ensue over any effort to do so.

253. This non-endorsement of gender principle could be restricted to government speech or symbolism, or it might (like the "no endorsement of religion" rule) be applied more broadly.

254. *County of Allegheny*, 492 U.S. at 627 (O'Connor, J., concurring in part and concurring in the judgment) (I substituted the word "gender" for "religious").

255. *Cf.* Karst, *supra* note 180, at 536 (identifying "a special regard for women who must be protected as the symbolic vessel of femininity and motherhood" as underlying combat exclusion).

256. Rostker v. Goldberg, 453 U.S. 57, 86 (1981) (Marshall, J., joined by Brennan, J., dissenting) (quoting Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring).

257. *See, e.g.*, Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999), *cert. denied*, 531 U.S. 872 (2000).

it for the government's own), which is barred by the non-endorsement theory.

C. Separation and Privatization

Another cluster of approaches to the disestablishment of religion might be grouped under the rubrics of separation and privatization. Strict separationist approaches to the disestablishment of religion hold that the wall of separation between church and state should be high and impenetrable. Separationist approaches often are associated with the view that government cannot constitutionally support religious education, even where a religious school is also providing secular education that government could provide.[258] This doctrine was canonized in *Lemon v. Kurtzman*,[259] which held that for a law to withstand an establishment-of-religion challenge, it must have a secular purpose, must not have the primary effect of advancing religion, and must not excessively entangle government and religion.[260] The requirements might all be understood as ways of trying to separate government and religion or to "privatize" religion in the sense of restraining it as a potentially divisive force in some conception of a public sphere.[261]

The Supreme Court's 1944 decision in *United States v. Ballard*[262] might be thought of as based on separation or privatization. In *Ballard*, the Court held that the First Amendment precludes government from determining "the truth or verity of [a person's] religious doctrines or beliefs."[263] As the Court explained, "'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.'"[264] What, after all, could lead to more intermingling of government and religion than government allocating to itself the authority to determine what should be private questions of religious meaning and truth?

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258. For a historical account of separationism's emergence and decline in Establishment Clause adjudication, see Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 233-50 (1993).

259. 403 U.S. 602 (1971).

260. *See id.* at 612-13. I have omitted the official requirement that government action not have the primary effect of advancing *or "inhibiting"* religion, *see id.* at 612, because "[a]fter forty-plus years and many cases, no Supreme Court (and few, if any, lower court) decisions have rested on this 'no inhibition' prong," Gerard V. Bradley, *Church Autonomy in the Constitutional Order: The End of Church and State?*, 49 LA. L. REV. 1057, 1071 (1989). Indeed, "[t]he only instance in which the Supreme Court has invalidated an 'inhibition' of religion under the Establishment Clause was *Larson v Valente*, 456 U.S. 228 (1982), and the reasoning in that case was based [not on the primary inhibiting effect prong but] on denominational discrimination." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 119 n.9 (1992).

261. For an extended criticism of the privatization of religion, see STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993).

262. 322 U.S. 78 (1944).

263. *Id.* at 86.

264. *Id.* (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871)).

When government may not engage in religious activities, it cannot ally itself too closely with a religion[265] or take sides in religious disputes.[266] So too, would separationist approaches to gender disestablishment keep government from allying itself with gender groups ("boys," or "women," for example) or taking sides in gender disputes. However, even separationists permit government to "take sides" in religious disputes when it declares, for secular (i.e., nonreligious) reasons, that religion is an inappropriate basis for disabilities in the public sphere. Government likewise should then be allowed to side with anti-gender organizations insofar as it declares, for gender-secular (i.e., nongendered) reasons that sex/gender is an inappropriate basis for disabilities in the public sphere.[267]

A sex/gender analog to separationist approaches to religious disestablishment would thus require government to keep out of matters of gender, and so might demand that laws' predominant purposes and effects be nongendered. If one considers direct governmental aid to religious indoctrination or activities to violate separation of church and state, as current doctrine appears to,[268] then by analogy, direct governmental aid supporting gender beliefs or gendered activities would be impermissible. To the extent that aid distributed to religious groups is aid to religion and hence forbidden, aid to sex/gender groups would likewise be deemed impermissible. Or, to return to *Nguyen v. INS*,[269] it should be seen as a breach of separation of gender and state when an organ of government such as the Supreme Court relies on a gender belief in "our most basic biological differences"[270] to uphold sex discrimination in parents' ability to confer citizenship on their offspring, particularly where in so doing the Court reinforces a "stereotype of male irresponsibility" that had long plagued United States immigration and naturalization law.[271]

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265. *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982) (invalidating state law granting certain religious groups veto power over some liquor license applications).

266. *See, e.g.*, *supra* text accompanying note 264; Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 119 (1952) (invalidating state statute attempting to transfer control of Russian Orthodox churches in New York from one religious authority to another on grounds that it "intrude[d] for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom").

267. *See supra* note 228-30 and accompanying text.

268. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O'Connor, J., joined by Breyer, J., providing a majority concurring in the judgment) ("I also disagree with the plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause. . . . [A]ctual diversion [of secular government aid to religious indoctrination] is constitutionally impermissible."); *id.* at 868 (Souter, J., joined by Stevens and Ginsburg, JJ., dissenting) (affirming that disestablishment of religion "bars the use of public funds for religious aid").

269. 533 U.S. 53 (2001), discussed *supra* notes 20-28 and accompanying text.

270. *Id.* at 73.

271. *Id.* at 94 (O'Counor, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting); *see also id.* at 90-95.

In addition, questions of what is normatively proper gendered conduct for men as distinguished from women, how many sexes there are, or how to distinguish the sexes, would be beyond the authority of the state under a separationist approach, left instead to the diverse resolution by individuals and groups in the private realm. Hence it would likely be improper for government to defend a sex-discriminatory statutory rape law with the belief that minor women need special protection from pregnancy. Not all females under age 18 can get pregnant, and the risk of pregnancy is hardly the only governmental concern behind statutory rape laws. As a result, the Supreme Court's equation of femaleness with vulnerability would be improper and its much-criticized decision in *Michael M. v. Superior Court of Sonoma County*[272]—which relied on this view of males' and females' different "natural" susceptibility to pregnancy[273]—would likely be wrongly decided, under the disestablishment of sex and gender.[274]

D. Accommodation

The accommodation approach to disestablishment is usually coupled with other approaches (such as noncoercion, neutrality, or separationism), and distinguishes forbidden establishments from permissible accommodations. Accommodationist approaches posit that it is legitimate for government to facilitate people's independent, freely chosen religious activities. While such views have been most important in the context of governmental aid to schools, they could be extended to accommodating sex and gender. Even religious accommodation, however, has limits, and a gender analog is likely not to undo much of the work done by other approaches to disestablishing sex and gender.

1. Accommodation of Religion

Religion scholars and judges sometimes distinguish religious establishment, which is forbidden, from religious accommodation, which is permissible (or perhaps in some cases mandatory). Thus, it is permissible for government to accommodate religion where "[a]ccommodation refers to government laws or policies that have the purpose and effect of removing a burden on, or facilitating the exercise of, a person's or an institution's religion."[275] Under this view, for government "merely [to] remov[e] obstacles to the exercise of a religious conviction adopted for reasons independent of the government's action" is constitutionally

272. 450 U.S. 464 (1981).

273. *See supra* notes 13-16 and accompanying text.

274. This conclusion is strengthened by the fact that ratifying California's sex-discriminatory statutory rape law had the effect of reinforcing gender stereotypes. *See Michael M.*, 450 U.S. at 490-91 & n.4 (Brennan, J., joined by Marshall and White, JJ., dissenting).

275. McConnell, *supra* note 194, at 686.

legitimate.[276] However, if government "creates an incentive or inducement (in the strong form, a compulsion) to adopt that practice or conviction," it engages in unconstitutional establishment of religion.[277]

Practically, this approach to disestablishment appears primarily designed to save from constitutional condemnation both the exemption of believers from secular obligations that they have religious reasons to resist, and the extension of governmental support to activities such as the provision of education by religious institutions. From a principled perspective, the underlying notion is that it is proper for "government policies [to] take religion specifically into account not for the purpose of promoting the government's own favored form of religion, but of allowing individuals and groups to exercise their religion—whatever it may be—without hindrance."[278]

2. *Accommodation of Gender*

With respect to gender, an accommodationist approach would not condemn government action designed to facilitate private exercise of gender, whether government acts negatively (by exemption) or positively (by support). A gender translation of accommodation might give government appreciably more latitude to allow the flourishing of gender in the private sphere, provided the accommodations do not overstep any establishment limits on the accommodation principle.

Because of the accommodation approach's potential to undermine governmental efforts to eradicate sex discrimination in the public realm, it would then become particularly important to determine what accommodations are merely permissible—and thus need not be adopted by a jurisdiction committed to public sex equality—and which, if any, are actually mandatory—and thus constrain even a government fully committed to sex equality. In the religion setting, the doctrine of mandatory accommodation stemmed from the constitutional protection of the free exercise of religion, until *Employment Division v. Smith* largely abolished that doctrine.[279] Thus, there would need to be constitutional protection of gender expression or affiliation[280] for mandatory accommodation to arise.

One possible area where an accommodation of gender approach might make a difference is public restrooms. Currently, the vast majority of public restrooms are sex-segregated. This might be defended as a way for government to reduce a burden on those who have gendered modesty concerns.

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276. *Id.*

277. *Id.*

278. *Id.* at 688.

279. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990) (holding that as a general matter, religious exemptions are not required from neutral laws of general applicability).

280. *See supra* Part II.A.2 (discussing right to free exercise of gender and possible constitutional foundations).

Nonetheless, the existence of only male and female facilities will sometimes require people to make gendered identifications, which they might find objectionable and which can, for transgendered persons in particular, lead to unpleasant social consequences. Religious accommodations are not permissible if they impose substantial burdens (or at least religious burdens) on others; a purported "accommodation" of gender such as men's and women's restrooms should likewise be impermissible. Fortunately (given the reality of how strongly people cling to gender divisions), there is an alternative: provision of "men's," "women's," and "decline to state" or "nondiscriminating" restrooms.[281]

Rigidly sex-segregated athletics might also be justifiable only on an accommodation rationale, if at all. Given the overlapping bell curves of physical abilities of men and women, it seems difficult to justify separate men's and women's competitions on functional grounds such as "differing upper-body strength."[282] Fairness concerns may still arise, but if fairness is to be the standard, we would need a more sensitive measure of such physical traits than can be provided by a binary sex classification.

Nor is the mixed-sex requirement for civil marriage defensible on accommodation grounds. Certainly there are numerous religious denominations and persons who believe that it is not properly gendered behavior for two people of the same sex to seek to marry each other. Government might perhaps accommodate this by allowing clerics to perform the officiating function otherwise required of a public official, without becoming subject to a nondiscrimination requirement.[283] But accommodation alone cannot justify the exclusion of same-sex couples from the public institution of civil marriage.

3. *Limits of Accommodation*

The accommodation principle is not limitless; at some point attempted accommodations cross over the line to prohibited establishments. What these limits are is a matter of some controversy, with the Supreme Court rendering decisions that are in tension, if not outright contradiction, with each other.

Thus, in *Corporation of the Presiding Bishop v. Amos*,[284] the Court upheld the religious exemption to Title VII's prohibition against religious discrimination in employment as applied to secular nonprofit activities of

281. *See generally* Kogan, *supra* note 217. A similar analysis might apply to locker facilities at public institutions.

282. *But see* COLETTE DOWLING, THE FRAILTY MYTH: WOMEN APPROACHING PHYSICAL EQUALITY (2000).

283. *Cf. Repartee*, NAT'L CATH. REP., Apr. 3, 1998, at 28, *available at* 1998 WL 14872358 (observing that even if same-sex marriages were civilly recognized, "[n]o religion would be obligated to perform same-sex ceremonies") (letter of William C. Stosine, Iowa City, Iowa).

284. 483 U.S. 327 (1987).

religious organizations. Although the Court was unanimous as to the judgment, only a five-member majority embraced the Court's opinion, which sweepingly stated that "[a] law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose[; f]or a law to have forbidden 'effects' under *Lemon,* it must be fair to say that the government itself has advanced religion through its own activities and influence";[285] and that "[w]here, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities."[286]

On the other hand, the Supreme Court seems to have suggested various limits to permissible accommodations under the Establishment Clause. At least arguably, government may not use accommodation to justify imposing nontrivial costs of religious exercise directly on third parties.[287] It is also arguably unconstitutional to exempt religious activity, but not comparable secular activity, at least insofar as the exemption does not relieve religion of a significant deterrent.[288]

By analogy, accommodation of gender would be permissible where it relieves a burden that government has placed on the free exercise of gender, provided that government does not impose nontrivial costs of such accommodations directly on third parties and does not fail to exempt from regulation nongendered activities comparable to any accommodated exercises of gender. An accommodation approach thus might justify

285. *Id.* at 337.

286. *Id.* at 338. The majority also stated that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions," *id.* at 335, and that rational basis review applies to religious accommodations challenged under the Equal Protection Clause "where a statute is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion," provided the law satisfied the *Lemon* test, *id.* at 339.

287. *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985), where the Court invalidated a state law that prohibited employers from firing employees for refusal to work on their Sabbath, noting that this act, as construed by the Court, "imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates." *Id.* at 709. This was an establishment violation because it contravened the principle that "'[t]he First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities'" and thus had the unconstitutional primary effect of advancing a particular religious practice. *Id.* at 710 (quoting Otten v. Baltimore & O.R. Co., 205 F.2d 58, 61 (2d Cir. 1953)). Of course, since Thornton's estate was not claiming that the Free Exercise Clause guaranteed him the exemption Connecticut chose to provide by statute, the Supreme Court must have meant more broadly that the First Amendment not only gives no one such a right, but also forbids government to give persons such "an absolute and unqualified right." *Id.*

288. *See* Texas Monthly v. Bullock, 489 U.S. 1 (1989), where the Supreme Court held unconstitutional a sales tax exemption that Texas made available by statute only to "'[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith.'" *Id.* at 5 (plurality opinion by Brennan, J.) (quoting Tex. Tax Code Ann. § 151.312 (1982)).

government retaining "men's" and "women's" restrooms only as long as it also provides unisex or "decline to state" or "other" restrooms. Without an additional nongendered (or non–conventionally gendered) facility, the present system of urinary segregation would effectively continue. As mentioned in the earlier discussion regarding free exercise and coercion, this would come at the direct expense of gender dissenters. Hence, such an attempt to justify the sex/gender status quo on accommodation grounds would fail because it imposes the gender costs of accommodation on third parties.

III
DISESTABLISHING GENDER IN PRACTICE

The theoretical approaches to the disestablishment of sex and gender outlined in Part II enjoy varying degrees of plausibility. Appreciating their ramifications more fully requires examining them in practice, in the spaces of daily life where sex/gender ideologies operate frequently unmarked. In this Part, I consider three concrete sites for examining the disestablishment of sex and gender: governmental identification of persons' sex/gender, sex-segregated education, and the requirement that civil spouses be of different sexes.

A. What Makes a Man a Man? Sex/Gender Identification

Tell me if you can
What makes a man a man?
—Charles Aznavour & Bradford Craig[289]

Sometimes the clothes do not make the man.
—George Michael[290]

1. Definitional Problems

At the root of many of the questions of gender lie thorny definitional problems. What is it that makes a man a man, or a woman a woman? Perhaps it is God or Nature, as gender fundamentalists would have it, but perhaps something else. How would society know that a particular person has been made male or female—or has so become, if Simone de Beauvoir was correct that "one is not born, but becomes a woman"?[291] What are the criteria for sex determination? Or more to the point, since this Article examines

289. Charles Aznavour & Bradford Craig, *What Makes a Man a Man?*, *on* MARC ALMOND, TWELVE YEARS OF TEARS (Sire Records 1993).

290. GEORGE MICHAEL, *Freedom 90*, on LISTEN WITHOUT PREJUDICE (Sony/Columbia 1990).

291. SIMONE DE BEAUVOIR, THE SECOND SEX 267 (H.M. Parshley ed. & trans., Vintage Books 1989) (1952).

the disestablishment of sex and gender, what criteria—if any—ought or may government use to decide a person's sex?

Ideas abound as to what distinguishes females from males. Some judges have concluded that "it is the capacity to become pregnant which primarily differentiates the female from the male."[292] Others have implied that "full capacity to function sexually as male or female"[293] determines a person's sex/gender. Some insist that "biological factors such as chromosomes, gonads, and genitalia at birth"[294] define one's sex, apparently because "a person's gender [is] immutably fixed by our Creator at birth."[295] Olympics officials have used chromosome testing and genital morphology (as revealed by visual inspection of naked, or more recently, spandex-clad, athletes) to determine an athlete's gender.[296] One man who, before finally being told of his history and deciding to live as a male, was raised as a girl after the inadvertent surgical destruction of his penis, opined that "what makes you a man is: You treat your wife well, you put a roof over your family's head, you're a good father."[297] Thus, paternalistic heterosexuality or heterosociality, rather than, in his words, "just *bang-bang-bang*—sex,"[298] makes the man.

Part of the problem with all these approaches to sex/gender determination lies with the naturalization of the male/female dichotomy. The question of what makes someone a male or a female (or an "authentic" male or female) is reasonably contested. Socially, people treat persons as male or female based on presumptions about how male and female persons look and act, and often on the unverifiable belief that God or Nature created humans as two mutually exclusive, exhaustive types. Despite this dominant social view, people (and not just judges) have very different views on this matter. Almost any implementation of disestablishment of sex and gender would obviate many of the difficulties.

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292. General Elec. Co. v. Gilbert, 429 U.S. 125, 162 (1976) (Stevens, J., dissenting). *See also* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 330 (1993) (Stevens, J., joined by Blackmun, J., dissenting) ("[T]he capacity to become pregnant is the inherited and immutable characteristic that 'primarily differentiates the female from the male.'").

293. M.T. v. J.T., 355 A.2d 204, 210 211 (N.J. Super. Ct. 1976).

294. Littleton v. Prange, 9 S.W.3d 223, 232 (Ct. App. Tex. 1999) (Angelini, J., concurring).

295. *See id.* at 224 (majority opinion); *see also id.* at 231 ("Christie was created and born a male.... There are some things we cannot will into being. They just are.")

296. Phyllis Randolph Frye, *The International Bill of Gender Rights vs. The Cider House Rules: Transgenders Struggle with the Courts over What Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133, 170-72 (2000).

297. JOHN COLAPINTO, AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL 271 (2000) (internal quotation marks omitted) (quoting David Reimer), *quoted in* William O. Bockting, *Review*, 37 J. SEX RESEARCH 378 (2000), *available at* http://www.findarticles.com/cf_0/m2372/4_37/72272312/p1/article.html (last visited Apr. 9, 2002).

298. COLAPINTO, *supra* note 297, at 271.

2. Noncoercion Approach

A free exercise or coercion perspective on disestablishment would emphasize the impropriety of the state forcing someone to affirm gender beliefs or engage in gendered behavior. Hence, even if government believes, for example, that a transgender woman (say, Karen), who was a designated male at birth, is really still a man perhaps despite sex reassignment surgery, it ought not be able to make Karen affirm that she is male. Thus, the state should not be able to require that Karen identify herself as a male on her driver's license, nor should the federal government be able to require her to identify herself as a male on her passport. It is arguably permissible for the state to keep its own internal records (if it has some legitimate reason to do so)[299] based on its own view of Karen's sex/gender.[300] But it is inconsistent with disestablishment for the state to coerce Karen into carrying and displaying an identification with a personal sex/gender designation with which she disagrees.

Perhaps surprisingly, I draw further support for this conclusion more from the Supreme Court's First Amendment decision in *Wooley v. Maynard*,[301] an automobile license plate case, than from its Religion Clause decision in *Jensen v. Quaring*,[302] a driver's license case.

In *Wooley*, the Court held that the First Amendment precludes compelled speech and, thus, criminal punishment of George and Maxine Maynard for covering up the state motto, with which they ideologically disagreed.[303] Grounding its analysis in "the right of freedom of thought protected by the First Amendment"[304] or "'individual freedom of mind'"[305]—and thus a principle applicable to both the Free Speech and Religion Clauses—the Court averred that the Constitution protects the "right to decline to foster [religious, political, and ideological] concepts."[306] The

299. *Cf.* Bowen v. Roy, 476 U.S. 693 (1986) (holding Free Exercise Clause not violated by statutory requirement that a state agency use a social security number in administering subject programs notwithstanding plaintiffs' belief that use of the number would impair child's spirit); *id.* at 699 ("Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family.").

300. It is not clear, however, on what basis other than Karen's sincere self-identification the government could, consistent with the disestablishment of sex and gender, determine what Karen's sex "is." For example, consider whether the government could decide whether someone "is" a Catholic, even for government's own recordkeeping purposes. It is not clear to me that government could decide for itself whether someone who believes that it is not (always) a sin to use condoms for contraception "is" a Catholic.

301. 430 U.S. 705 (1977).

302. 472 U.S. 478 (1985).

303. *Wooley*, 430 U.S. at 713 (holding state cannot "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public").

304. *Id.* at 714.

305. *Id.* (quoting Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

306. *Id.*

Court declared that the Constitution precludes the state from using an individual as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable."[307]

Wooley supports the conclusion that it is impermissible for the government to coerce individuals to identify as male or female on their driver's licenses. In *Wooley*, the Court concluded that the state's purpose in requiring display of the state motto on license plates was to have individuals advertise its message, but suggested that the purpose of the state seal (accompanied by a slogan) on documents "is not to advertise the message it bears."[308] Moreover, the Court suggested that United States currency bearing the national motto was distinguishable from New Hampshire's license plates in part because currency "need not be displayed to the public" and its bearer "is thus not required to publicly advertise the national motto."[309]

One might thus think that *Wooley* only weakly supports the proposed claims on behalf of Karen, who after all is not being forced by the state to wear a scarlet "M" upon her chest. However, the sex identification on one's driver's license is not like an official government document with a state seal or a dollar bill with the national motto. The Court in *Wooley* suggested that an official seal was different because its purpose was "simply to authenticate the document by showing the authority of its origin."[310] While this might seem superficially similar to the driver's license sex designation—something to authenticate the document's bearer—the point of the sex designation is precisely to make a statement about the licensee or her identity, whereas the state seal is not intended to say anything about the bearer of the document. And while, like currency, a driver's license may "generally [be] carried in a purse or pocket" or wallet,[311] the Court in *Wooley* stated that the dollar "need not be displayed to the public,"[312] and is not "readily associated with" the one who spends it in the way that an automobile is "associated with" its operator.[313] Yet a driver's license is more readily associated with the licensee than currency is with its spender; a driver's license is taken as a truthful, authoritative statement regarding the identity of the licensee, and it is intended to be so taken. In addition to any governmental use of driver's licenses as identification, states commonly require vendors of alcohol and tobacco products and purveyors of a range of goods and services to rely on some document such as a driver's license to identify purchasers. Although the point of the latter practice generally is to establish a purchaser's age rather than sex, this simply suggests

307. *Id.* at 715.
308. *Id.* at 715 n.11.
309. *Id.* at 717 n.15.
310. *Id.* at 715 n.11.
311. *Id.* at 717 n.15.
312. *Id.*
313. *See id.*

that a photograph of a licensee as she or he customarily appears should be adequate for the state's legitimate identificatory purposes.

Quaring at first blush appears to be a stronger precedent for Karen.[314] After all, in *Quaring* the Court held that the state violated the Free Exercise Clause by coercing a woman whose religious views precluded her from having her photograph taken to submit to such procedure for her driver's license on pain of losing her driving privilege. Similarly, Karen objects to placement of state-required identification information on her driver's license.

The problem with *Quaring* is not simply that it was decided by a non-precedential split vote,[315] but that it was decided prior to *Employment Division, Department of Human Resources v. Smith*,[316] which held that exemptions from neutral, generally applicable laws were not generally compelled by the Free Exercise Clause.[317] Thus, today, assuming the photo requirement at issue in *Quaring* was deemed to be a neutral law of general applicability,[318] an exemption would likely not be forthcoming.[319]

Smith, however, does not pose the same problem for the hypothetical involving sex designation on a driver's license that it does for *Quaring*. In the sex designation hypothetical, the state is attempting to control a person's gender identification, at least on the driver's license, and thus directly implicates the disestablishment of sex and gender. In contrast, in *Quaring*, Nebraska did not implicate the Religion Clauses as directly, for it was attempting solely to require a visual identification of individuals on their driver's licenses. It was not attempting to require a religious identification by specifying that Quaring's license classify her as a Christian (as she self-identified), or as a member (or not) of any religion at all. Were a state to have some legitimate basis for requiring a religious identification on a driver's license,[320] it would not be free to reject an individual's

314. Let us set aside the fact that it was binding precedent only in the Eighth Circuit, since an equally divided Supreme Court affirmed the Court of Appeals decision. *See* Jensen v. Quaring, 472 U.S. 478 (1985).

315. *See* Jensen v. Quaring, 472 U.S. 478 (1985), *aff'g by an equally divided Court* Quaring v. Petersen, 728 F.2d 1121 (8th Cir. 1984).

316. 494 U.S. 872 (1990)

317. *Smith*, 494 U.S. at 881-82.

318. This is not a completely clear proposition, in light of "the fact that Nebraska exempts certain categories of permittees and temporary licensees from the photograph requirement," 728 F.2d at 1128 (Fagg, J., dissenting).

319. I set to one side the possibility that a court might hold that Frances Quaring presented a "hybrid" free exercise/free speech (compelled speech) claim and thus subject the photo requirement to strict scrutiny under the "hybrid rights" exception to the *Smith* rule. The basis for this exception for hybrid claims is intelleetually unclear, and some lower courts have accordingly refused to extend this exception beyond the factual circumstances of *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

320. I confess that I find this more difficult to imagine than such a requirement with respect to sex, perhaps because I have been raised in a society where sex/gender is taken as a fundamental and visible distinction between classes of persons.

self-identification of religion and instead insist upon the authority of its own preferred criteria for religious identification. Likewise, a state should not coerce people into making gender identifications with which they disagree.

This protection against coercion serves to shield the individual from the standardizing power of the state. It thus leaves individuals and private associations free to develop their own views of gender, potentially resulting in a plurality of approaches that might lead to enhanced liberty and, one should not overlook, happiness. People will be able to decide for themselves what it means to be male or female or something else, and to decide for themselves who they are.

3. Neutrality, Nonpreferentialism, and Non-Endorsement Approaches

The various neutrality approaches to disestablishment of sex/gender would also condemn the state's treatment of Karen. If the state must remain neutral on gender questions, then it cannot establish its own preferred criteria for deciding her sex irrespective of her beliefs and self-identification. If the state chose one fixed set of criteria (other than self-attribution) for sex designation, it would be improperly lending its force to one side in this contested matter. This is inconsistent with gender nonpreferentialism, which holds that governmental aid to gender must be extended neutrally to all gender systems. When government singles out one gender belief system for adoption as its own, it expresses a message of endorsement that likewise violates disestablishment.

4. Separation/Privatization Approach

A separation or privatization approach to implementing the disestablishment of sex and gender would likewise condemn the state's attempt to require Karen to make a gender identification according to government-chosen criteria. Such an approach would emphasize the jurisdictional notion that matters of sex and gender are not within the proper competence of the state, and that they must instead be left to individuals and their communities. Government definition of men and women is improper disestablishment of sex and gender, as government definition of Kosher is improper under the disestablishment of religion.[321]

5. Accommodation Approach

The best (although ultimately less than adequate) defense for the state's insistence on designating Karen as male may be that the sex identification should be upheld as an accommodation of gender. Many people

321. *See, e.g.*, Ran-Dav's County Kosher, Inc. v. State, 608 A.2d 1353 (N.J. 1992) (holding that regulations imposing substantive religious standards for Kosher foods enforceable civilly with clergy assistance violated religious disestablishment).

would not regard a transsexual woman—even a post-operative one such as Karen—as a "real" woman, the state might suggest.[322] Thus, for women or men who do not want their private spaces, such as locker rooms, invaded by people who are not "really" women or men, the state is merely providing a neutral, identificatory service.

This defense should fail. First, there is the potentially dispositive question whether the state's failure to provide this "identificatory service" could even be considered to impose a gender burden on anyone, and thus whether provision of the "service" might amount to an accommodation consistent with disestablishment of gender.[323] Second, disestablishment of gender ought not allow government to single out particular (even widely shared) private gender beliefs for governmental reinforcement. Consider a religious example: Governmental regulations that allow vendors to label their goods as "kosher" only if they comply with a specified sect's definition of kosher are unconstitutional despite their anti-fraud aims. As one court held, "[t]he regulations may have been designed to assure truth in marketing, but the truths being marketed are, in essence, religious truths."[324] A driver's license requirement that a person identify according to majoritarian sex/gender definitions similarly advances a gender truth, and thus crosses the line from permissible accommodation to impermissible establishment of gender.

It could be a different matter if government required people to disclose the basis for their religious or gender claims. It may well be constitutional for government to require purveyors of kosher food to disclose the definition of kosher under which they are operating, so that consumers are not duped.[325] "The enforceability of such regulations would inhere in the notion that they simply would 'compel [the merchant] to perform a secular obligation to which he contractually bound himself' by virtue of the fact that merchant represents food as being kosher."[326] If a similar gender

322. *Cf.* Campaign for California Families, *News Release: San Francisco's Attack on Nature*, May 2, 2001, *at* http://www.savecalifornia.com/press/newsreleases/release.cfm?nrid=PR010501A ("'Sex changes are Frankensteinian operations. . . . You are born either male or female, not 'in between.' San Francisco's policy [of covering sex reassignment surgery under insurance] is wrong. It's the latest attack against God and Nature.'").

323. *Cf. Ran-Dav's County Kosher*, 608 A.2d at 1365 (rejecting accommodation of religion characterization due to lack of "state-imposed burdens" in the absence of governmental kosher regulations).

324. *Id.* at 1366.

325. *Id.* In *Ran-Dav's County Kosher*, the New Jersey Supreme Court stated:

> The regulation could require those who advertise food products as "kosher" to disclose the basis on which the use of that characterization rests. Many kosher food purveyors would comply by imprinting the symbol of one of the recognized private agencies that supervise kosher compliance . . . . Other kosher establishments could comply with a disclosure requirement by indicating otber forms of rabbinical supervision. Such an approach would thus make use of the kosher foods industry's existing scheme of self-regulation.

Id.

326. *Id.* (quoting Avitzur v. Avitzur, 446 N.E.2d 136, 138 (N.Y. 1983)).

disclosure requirement were instituted as part of a general scheme of regulation of commercial fraud about one's self, it might be consistent with the disestablishment of gender[327]—although it would raise grave issues of privacy rights.[328] In other contexts, however, government might go too far if it required people to declare to the world their understanding of what makes a man a man or a woman a woman, rather than requiring only that a person not knowingly falsely purport to be a man or a woman.

Most simply, however, government could just cease to require sex identification on driver's licenses. This would do the most to minimize entanglement of the state and gender. The incremental loss of identifying information is well worth the substantial gain in gender autonomy.

B. *Boys Will Be Boys: Sex-Segregated Education*

Here's to the school girls lost in time
And the boys running wild to see what they can find
—Cheryl Wheeler[329]

In 1982, the Supreme Court, in *Mississippi University for Women v. Hogan*,[330] held it unconstitutional for the state to exclude men from enrolling for credit in its women's college's nursing program. Despite the majority's claim that it was not deciding the issue,[331] dissenting Justices predicted that the Court's opinion precluded public sex-segregated education.[332] In *United States v. Virginia*,[333] the Court held unconstitutional

327. If there were not general legal norms in place regarding honesty in merchants' contractual offerings or personal self-representation, the singling out of religious practices or gender identifications for a special legal honesty obligation might violate the disestablishment of religion or gender due to lack of the neutrality that disestablishment is widely taken to command.

328. *Cf.* Whalen v. Roe, 429 U.S. 589 (1977) (acknowledging constitutional right to informational privacy); Sterling v. Borough of Minersville, 232 F.3d 190 (3d Cir. 2000) (finding violation of constitutional right to informational privacy).

329. CHERYL WHEELER, *School Girls*, *on* MRS. PINOCI'S GUITAR (Rounder Records, Inc. 1995).

330. 458 U.S. 718 (1982).

331. *See id.* at 719 ("This case presents the narrow issue of whether a state statute that excludes males from enrolling in a state-supported professional nursing school violates the Equal Protection Clause of the Fourteenth Amendment."); *id.* at 723 n.7 ("[W]e decline to address the question of whether MUW's admissions policy, as applied to males seeking admission to schools other than the School of Nursing, violates the Fourteenth Amendment.").

332. *See id.* at 734 (Blackmun, J., dissenting). Justice Blackmun noted:

> [T]here is inevitable spillover from the Court's ruling today. That ruling, it seems to me, places in constitutional jeopardy any state-supported educational institution that confines its student body in any area to members of one sex, even though the State elsewhere provides an equivalent program to the complaining applicant.

Id.; *see also id.* at 735 (Powell, J., joined by Rehnquist, J., dissenting) ("The Court in effect holds today that no State now may provide even a single institution of higher learning open only to women students."); *id.* at 745 n.18 (Powell, J., joined by Rehnquist, J., dissenting). Justice Powell wrote:

> The question the Court does not answer is whether MUW may remain a women's university in every respect except its School of Nursing. . . . The logic of the Court's entire opinion, apart from [certain] statements mentioned above, appears to apply sweepingly to the entire

Virginia's provision of education only to men at the Virginia Military Institute (VMI) despite the state's having created a program at a private women's college in an effort to "save" VMI from the intrusion of women. Despite the majority's claim that it was not deciding the issue,[334] Justice Scalia in dissent predicted that the Court's opinion precluded public sex-segregated education,[335] and that "[t]he potential of today's decision for widespread disruption of existing institutions lies in its application to *private* single-sex education."[336] Both of these questions (may government provide single-sex education and may it financially support private single-sex education) are quite complicated under current equal protection and state action case law. From the perspective of the disestablishment of gender, however, the first fairly easily yields the answer "no" and the second more clearly yields the answer "yes" than when considered under the Equal Protection Clause.

1. Government Provision of Single-Sex Education

Save for those who take the Supreme Court to have spoken with sweeping breadth in *United States v. Virginia*, the arguments over whether government may provide single-sex education under the Equal Protection Clause and *Virginia* generally turn on details about the actual set of educational offerings provided to males and to females. If government were to offer an all-male school but no all-female school, then it would be discriminating unconstitutionally on the basis of sex in violation of the Equal Protection Clause.[337] Defenders of sex-segregated public education would

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> University. . . . I see no principled way—in light of the Court's rationale—to reach a different result with respect to other MUW schools and departments.

Id. Chief Justice Burger also dissented, but optimistically opined that, "[s]ince the Court's opinion relies heavily on its finding that women have traditionally dominated the nursing profession, it suggests that a State might well be justified in maintaining, for example, the option of an all-women's business school or liberal arts program." *Id.* at 733 (Burger, C.J., dissenting).

333. 518 U.S. 515 (1996).

334. *See id.* at 534 n.7. The Court noted:

> We do not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as "unique," an opportunity available only at Virginia's premier military institute, the Commonwealth's sole single-sex public university or college. Cf. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 720, n.1 (1982) ("Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males and females.").

Id. (parallel citations omitted).

335. *See id.* at 595 (Scalia, J., dissenting) ("Under the constitutional principles announced and applied today, single-sex public education is unconstitutional."); *id.* at 596 (predicting "that single-sex public education is functionally dead").

336. *Id.* at 598 (Scalia, J., dissenting); *see also id.* at 598-600 (suggesting that the Equal Protection Clause should, under principles of majority opinion, bar state support of single-sex private education).

337. *See, e.g.*, Garrett v. Bd. of Educ., 775 F. Supp. 1004 (E.D. Mich. 1991) (enjoining school board from creating three all-male academies with Afrocentric curricula). *But see, e.g.*, Kristin S. Caplice, *The Case for Public Single-Sex Education*, 18 HARV. J.L. & PUB. POL'Y 227 (1994) (arguing

likely ask whether one sex enjoyed an extant, uniquely prestigious institution[338] or instead whether *Virginia* could be distinguished because the schools or programs were "simultaneously opened."[339] In addition, partisans of sex-segregated education have noted that the Supreme Court did not read the record as establishing pedagogical value in the sex-segregated implementation of the so-called "adversative method" at VMI,[340] whereas sex-segregated education is said to provide "genuine educational benefit," at least for some females.[341]

Under most approaches to the disestablishment of gender, much of the foregoing analysis is beside the point. Under disestablishment approaches, equality becomes important, but is not the touchstone that it is under Equal Protection analysis. Rather, disestablishment of sex and gender concentrates upon identifying and prohibiting governmental support of, or involvement with, the sex/gender system.

a. Historical Practice Approach

As a preliminary consideration, it is noteworthy that an approach to constitutional interpretation that would limit the scope of constitutional principles by the actual historical practices of government might be thought to justify government aid to gendered education.[342] In the oft

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that provision of a sex-segregated school only for girls could be permissible if there were a strong remedial justification because the nursing school in *Hogan* and VWIL in *Virginia* were clearly not offered to overcome past discrimination against women).

338. *See, e.g.*, Jane Maslow Cohen, *Equality for Girls and Other Women: The Built Architecture of the Purposive Life*, 9 J. CONTEMP. LEGAL ISSUES 103, 140 (1998) ("application to a prestigious, state-wide post-secondary icon of sex-segregated education").

339. Jonathan N. Reiter, *California Single-Gender Academies Pilot Program: Separate But Really Equal*, 72 S. CAL. L. REV. 1401, 1425 (1999) (quoting United States v. Virginia, 44 F.3d 1229, 1250 (4th Cir. 1995) (Phillips, J., dissenting)).

340. *See, e.g.*, Cohen, *supra* note 338, at 117 (noting failure of this argument with its "unproven empirics"); *id.* at 129 (distinguishing *Virginia* and arguing for remedial value of boy-free schooling for "some girls").

341. *Id.* at 130; *see also* Caplice, *supra* note 337, at 241 (arguing that "a number of sociological studies . . . conclude that single-sex schools are superior to coeducational institutions in academic results, faculty-student interaction, intellectual self-esteem, and in all aspects of a student's experience, except for social life"); Reiter, *supra* note 339, at 1455 (claiming, not uncontroversially, that "empirical evidence demonstrates [that] many of California's public school students will receive a more effective education in a single-gender environment than a coeducational setting").

342. I have not included tradition as an independent interpretation of religious disestablishment due to its very limited precedential support and its normative unattractiveness, as explicated by numerous scholars critical of *Marsh v. Chambers*, 463 U.S. 783 (1983), of ceremonial deism, *see, e.g.*, Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2174 (1996) ("If, however, the Court means what it says when it espouses the principle that government may not, consistent with the Establishment Clause, endorse religion and send messages to citizens that cause them to feel like outsiders in the political community, the Court should have the intellectual honesty and fortitude to recognize that ceremonial deism violates a core purpose of the Establishment Clause."), and/or of Justice Scalia's jurisprudence, *see, e.g.*, J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1623 (1990).

criticized decision *Marsh v. Chambers*,[343] for example, a majority of the Supreme Court relied on a history of opening prayers at legislative sessions to reject an Establishment Clause challenge to Nebraska's practice of employing a chaplain to give daily opening prayers.[344]

In a similar move under the Equal Protection Clause, Justice Powell's dissent in *Hogan* repeatedly characterized single-sex schools as "a traditionally popular and respected choice of educational environment,"[345] opined that "[c]oeducation, historically, is a novel educational theory[,]"[346] and invoked "America's tradition,"[347] to argue that equal protection should be interpreted to allow a state to offer sex-segregated schooling. Likewise, Justice Scalia's dissent in *Virginia* objected to the Court's discounting "the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government[,]"[348] and insisted that "'when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.'"[349]

If adopted, this interpretive approach might well sustain government provision of single-sex education, as Justice Scalia argued. The Supreme Court, however, has not consistently adhered to such an approach for religion under the Establishment Clause,[350] and it likewise should not be embraced under the disestablishment of gender. This "historical citation"[351] approach would suffer from similar problems with respect to the

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343. 463 U.S. 783 (1983).

344. *Id.* at 786. The Court observed:

> The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.

Id. See also id. at 790 ("In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress . . . ."); *id.* ("No more is Nebraska's practice of over a century, consistent with two centuries of national practice, to be cast aside.").

345. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 735 (1982) (Powell, J., dissenting).

346. *Id.* at 736.

347. *Id.* at 745.

348. United States v. Virginia, 518 U.S. 515, 566 (1996) (Scalia, J., dissenting).

349. *Id.* at at 568 (quoting Rutan v. Republican Party of Ill., 497 U.S. 62, 95 (1990) (Scalia, J., dissenting)).

350. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 662-63 (1989) (Kennedy, J., joined by Rehnquist, C.J., and White and Scalia, JJ., concurring in the judgment in part and dissenting from the invalidation of the display of a creche on the Grand Staircase of the County courthouse) ("Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage.").

351. Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 IOWA L. REV. 35, 47 (1993).

disestablishment of sex and gender as it does in the religion context, where it "is the triumph of history over principle."[352] It also would serve dramatically to legitimize government participation in the maintenance of the hegemony of gender, throwing the weight of the state behind those who would continue to insist that men and women are naturally different and, as such, properly treated differently. Therefore, other approaches to disestablishing sex and gender ought to be considered.

b. Noncoercion Approach

A noncoercion approach to disestablishment might condemn only government actions that reinforce gender by coercive means.[353] Accordingly, a free exercise or noncoercion approach to the disestablishment of gender could allow government to provide single-sex education as long as it does so in a way that does not coerce anyone into selecting a single-sex option. For example, assume that a state offers its citizens education at a men-only college (as Virginia had done with VMI) and, as would be likely, at several coeducational institutes. So long as the schools are not structured to pressure men into rejecting mixed-sex education,[354] and so long as women are not pressured into some gendered affiliation or exercise, there would be no disestablishment violation on such an approach. Men and women alike would be free to go to college, to attend private colleges, or to attend sex-integrated public colleges. In addition, men would be free to attend a single-sex public college. Although women would not be able to do the same, this would not coerce them into performing or abstaining from any gendered exercise. The same would be true mutatis mutandis for a state that provided both a women's college and mixed-sex colleges.

Coercion is appropriate as a sufficient condition for unconstitutionality. As I have discussed, however, only an impoverished view of disestablishment would make coercion necessary for unconstitutionality. Utah, for example, would clearly violate the disestablishment of religion were it to provide a public college solely for members of the Church of Jesus Christ of Latter-Day Saints. So too should a state that provides an educational opportunity only to one sex be understood to violate the disestablishment of gender.

But consider Justice Scalia's argument, promulgated in *Virginia*, that the state's operation of VMI as a men-only institution should be viewed in the context of the other educational opportunities open to college students in Virginia—which included four private women's colleges but only one

352. *Id.*

353. *See supra* Part II.A.

354. For example, the men's college might be funded distinctly better than equally available integrated colleges, or offer degrees in subjects not available in a public mixed-sex college.

private men's college.[355] Does this approach supply a persuasive reason to reject constitutional challenges to a state's operation of a sex-segregated school for men or women, as the case may be?

Under disestablishment, even more so than under Equal Protection, the perspective that the schools run by the state should be assessed simply as part of one unified educational system comprising both public and private schools is flawed. Justice Scalia's notion might be defensible as a proposed Equal Protection Doctrine. One might think that Equal Protection permits the government to adopt a "localized" or "topical" approach in order to compensate through law for social disadvantages that identifiable groups of people suffer.[356] Therefore, government might conclude that the outnumbering of private men's colleges by private women's colleges amounts to a disadvantage suffered by men, and that the state's provision of a men-only college thereby serves constitutionally to ameliorate that disadvantage.

However, this analysis is improper under a disestablishment approach. Consider, for example, what it would sanction. Should the "system" argument be enough were, for example, a public school district to decide to open a Jewish day school for only Jewish high school students because there were already enough private Christian schools in the district, so they were merely correcting for the market's failure to provide an otherwise viable Jewish school? No. Granted, there is nothing wrong with that argument from the point of view of noncoercion. However, noncoercion ought to be a necessary but not sufficient condition for constitutionality under the disestablishment of gender.

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355. According to Justice Scalia, the state's determination to offer men a single-sex education at VMI but not to offer women a single-sex education at any public university is constitutionally permissible because the relevant baseline for equal protection analysis is the entire network of both public and private higher education:

> Substantial evidence in the District Court demonstrated that the Commonwealth has long proceeded on the principle that "'[h]igher education resources should be viewed as a whole—public and private'"—because such an approach enhances diversity and because "'it is academic and economic waste to permit unwarranted duplication.'" It is thus significant that, whereas there are "four all-female private [colleges] in Virginia," there is only "one private all-male college," which "indicates that the private sector is providing for th[e] [former] form of education to a much greater extent that it provides for all-male education." In these circumstances, Virginia's election to fund one public all-male institution and one on the adversative model—and to concentrate its resources in a single entity that serves both these interests in diversity—is substantially related to the Commonwealth's important educational interests.

United States v. Virginia, 518 U.S. 515, 578-79 (1996) (Scalia, J., dissenting).

356. In the Religion Clause context, such an approach might be condemned by Professor Laycock as a "disaggregated" view that failed to include relevant advantages into the same reckoning as the disadvantages. *Cf.* Laycock, *supra* note 36, at 1007-11 (critically discussing "disaggregated neutrality" approaches to the Religion Clauses).

c. Nonpreferentialism Approach

The form of Scalia's "system" argument is not objectionable from the point of view of nonpreferentialism, although one would have to modify the relevant injunction from "support all religions equally" to "support all religions equally where the relevant comparison point is the total of private and public support for religion," possibly also including "relative to their total proportions of adherents." But once one stops measuring equal support solely by reference to what government itself offers, one opens the door even wider to contentious disputes about just how many adherents different denominations should be counted as having, how to identify the relevant religious groupings, just how much support each religion is already receiving in total in private, and so on. Here, the devil is in the details, which might suggest that nonpreferentialism should not be subject to the kind of extension necessary to save Justice Scalia's "system" argument.

Of course, things might be simpler in the gender disestablishment context, where the gender groups that are socially recognized are not as numerous. Commonly, people recognize two gender types of persons, male and female,[357] with perhaps a sense that there are some persons who are difficult to classify. But if such anomalous persons[358] are relatively few, deciding that men and women are the relevant sexes and that a certain part of the population counts as female and the complement as male might seem more manageable than the analogous inquiries in the religion context. Thus, nonpreferential support might appear able to underwrite the public-plus-private systemic approach to government-provided single-sex education.

However, there are at least three possible objections to this line of argument. First, religions are defined not only by groups of people with common identities/affiliations, but also by religious belief systems. If one focuses upon ideology analogs rather than identity analogs, complexity in determining which gender groups count comes back into the equation. This might, however, not be an insuperable difficulty where government is doling out aid on the basis of identity/affiliation (i.e., male and female).

Second, and more damning, the gender nonpreferentialist defense of the system argument requires government to take sides in disputes about just how many sexes human beings come in. Not everyone agrees that there are precisely two sexes. Some scientists suggest, based upon the existence of intersexual persons of varying anatomies, that there are at least

357. *See, e.g.*, BORNSTEIN, *supra* note 179, at 24 ("In this culture, the only two sanctioned gender clubs are 'men' and 'women.' If you don't belong to one or the other, your're told in no uncertain terms to sign up fast.").

358. *Cf.* Diane P. Wood, *Sex Discrimination in Life and Law*, 1999 U. CHI. LEGAL F. 1, 8 ("'Sex' might refer only to the observable physical characteristics that divide up the world into two genders, biological anomalies such as hermaphroditism to one side.").

five sexes.[359] In adopting certain contested beliefs about human sexes the government arguably violates the very neutrality that nonpreferentialism looks to for justification, even if nonpreferentialism is consistent with government support of gender generally.

Third, and perhaps most challenging to the system argument, what is at stake in cases like *Virginia* is not support of gendered educational opportunities but actual provision thereof. Arguably, government cannot itself provide gendered education even under non-preferentialist approaches to disestablishment, for even nonpreferentialism has its limits. Prime among them ought to be a restraint on government "aiding" religion or gender by segregating people (even in limited contexts, such as college education).[360] When government tries to segregate in this fashion, it goes beyond "benevolent neutrality" to "sponsorship."[361] As Christopher Eisgruber has argued, our "constitutional commitment to democracy . . . entails"[362] that "the Constitution includes a broad anti-segregation principle."[363] Government contravenes this principle when it creates jurisdictions or institutions segregated by force of law, even if many people might welcome the segregation. Admittedly, the widespread popularity of heterosexual dating, sex, and living arrangements does more to ensure some kinds of identification between men and women[364] than is assured between persons of different religions or races (who may live in separate communities, go to different churches, etc.). Nonetheless, segregating people by sex in institutions of higher education perpetuates the view that male and female citizens are different types of persons, who may learn better when separated. This proposition is fundamentally at odds with the unity of the citizenry

359. *See, e.g.*, Ann Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, THE SCIENCES, Mar.-Apr. 1993, at 20; *see also* David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1325 n.154 (1999) ("Contrary to popular belief, human bodies are not born in just one of exactly two genital/chromosomal/gonadal configurations.") (citing Alexander Morgan Capron & Richard D'Avino, *Legal Implications of Intersexuality*, *in* THE INTERSEX CHILD 218 (Nathalie Josso ed., 1981); Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999)); Ruth Hubbard, *Gender and Genitals: Constructs of Sex and Gender*, 14 SOC. TEXT 157 (1996).

360. *Cf.* Bd. of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring in the judgment) (arguing that "goverument may not segregate people . . . on the basis of religion" in part due to "[t]he danger of stigma and stirred animosities").

361. *See, e.g.*, *id.* at 705 (drawing distinction between quoted terms) (internal quotation marks omitted).

362. Christopher L. Eisgruber, *Ethnic Segregation by Religion and Race: Reflections on* Kiryas Joel *and* Shaw v. Reno, 26 CUMB. L. REV. 515, 517 (1995-1996).

363. *Id.* at 515.

364. *Cf.* Lillian Bevier, *Thoughts from a "Real" Woman*, 18 HARV. J.L. & PUB. POL'Y 457, 457-63 (1995) (taking a class-based approach to equal protection out of odds with current doctrine's classification focus, although apparently concluding from heterosexual structures of reproduction and childrearing that there is no particular need for more than minimal judicial scrutiny of sex classifications).

presupposed by the United States' constitutional commitment to democracy under disestablishment.[365]

d. Neutrality and Separation/Privatization Approaches

Beyond the practical problems involved in determining what would count as equal or evenhanded support in the context of government provision of religious schools, both neutrality and separation or privatization approaches to disestablishment strongly counsel against the propriety of the system argument. Under neutrality approaches, government may neither favor nor act hostilely toward religion in general or particular creeds.[366] Of course, this requires identifying a baseline from which to judge departures as non-neutral. While as a general matter the status quo may be suspect as a normative baseline,[367] it seems tremendously difficult to avoid in the context of disestablishment. Even such an advocate of unimpaired religious flourishing as Professor Laycock recognizes that religions must also be free to wither without government stepping in to bolster them. Thus, his "substantive neutrality" approach aims at keeping government from influencing religion for the better or the worse.[368] This requires acceptance of some public/private distinction, where government action is public and religious action is private.

Hence, at least in broad conceptual outline, neutrality as conceived by Layock is closely related to separation or privatization approaches to disestablishment. Religion is thus a matter for private, not governmental, purveyance, and it would be improper for government to intervene in the private market for religious education by running a Jewish school. This is not to say that if a state's mostly Christian legislators offer a Jewish school their intent must be to advance or establish Judaism as a state religion,[369] but only that they have taken on matters properly left outside the sphere of

365. *Cf.* Eisgruber, *supra* note 362, at 517 ("[S]egregating people tends to disrupt the process of identification. Segregation causes us to think of one another as members of different communities rather than members of a shared community . . . .").

366. *See supra* Part II.B.

367. *See, e.g.*, Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 873-75, 902-11 (1987); *cf.* Eisgruber & Sager, *supra* note 240, at 1258 (noting recourse to baseline of existing distribution of wealth as limit to religious privileging).

368. The second prong of the *Lemon* test does this as well, at least nominally. *See supra* notes 158, 260 & accompanying text.

369. *Cf.* Bd. of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 732 (1994) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) ("The Court today finds that the Powers That Be, up in Albany, have conspired to effect an establishment of the Satmar Hasidim. I do not know who would be more surprised at this discovery: the Founders of our Nation or Grand Rebbe Joel Teitelbaum, founder of the Satmar. The Grand Rebbe would be astounded to learn that after escaping brutal persecution and coming to America with the modest hope of religious toleration for their ascetic form of Judaism, the Satmar had become so powerful, so closely allied with Mammon, as to have become an 'establishment' of the Empire State.").

government, and thereby at least behaved in a way that endorses one particular religion to a significant degree.

e. Accommodation Approach

Can an accommodation approach to disestablishment of sex and gender justify government provision of sex-segregated education? Dissenting in *Hogan*, Justice Powell defended the women-only registration policy of the nursing program at the Mississippi University for Women expressly in terms of accommodation. In his view, the issue was "whether a State transgresses the Constitution when—within the context of a public system that offers a diverse range of campuses, curricula, and educational alternatives—it seeks to accommodate the legitimate personal preferences of those desiring the advantages of an all-women's college."[370] Invoking free choice, Powell concluded that "Mississippi's accommodation of such student choices is legitimate because it is completely consensual and is important because it permits students to decide for themselves the type of college education they think will benefit them most."[371]

Although Powell's langnage resonates with disestablishment concepts (such as noncoercion and accommodation), his reliance on the notion of accommodating people's gendered educational preferences in the Equal Protection context differs significantly from the disestablishment notion of accommodation. The idea behind accommodation in the religion or gender context is to constitutionally ratify government efforts to lift government-imposed burdens on the free exercise of religion or gender. Such a purpose is widely regarded as legitimate, and actions in the service of accommodation are thus permissible despite the disestablishment of religion or gender, provided government stays within constitutional limits.[372]

In the context of college education, however, government does not generally appear to have imposed a constitutionally cognizable burden[373] on the free exercise of gender.[374] Unlike race, which is an unlawful basis

370. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 739-40 (Powell, J., joined by Rehnquist, J., dissenting). Note that Powell's argument for a systemic analysis of the state's educational offerings would include only public institutions, not private ones as Justice Scalia's dissent in *United States v. Virginia* later advocated.

371. *Id.* at 744.

372. *See supra* Part II.D.

373. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 935 (1989) (discussing "the significance and difficulty of defining a constitutionally cognizable burden upon free exercise").

374. One might argue that taxing people to support public education reduces the amount of money they have with which they might purchase sex-segregated private education, and so either the governmental expenditure of tax revenues on public mixed-sex education or the taxation in support thereof, or both, is a "burden" on the free exercise of gender. This chain of reasoning, however, has not been accepted in legal definitions of burden on religion, perhaps because it would entail that any taxation amounts to a "burden" on someone who wishes to spend money for some religious activity or

for refusing a person admission to private schools,[375] gender is not an unlawful ground for limiting admission to schools. Indeed, in many cases a private school may limit its students to one sex even if the school receives federal funding.[376] In the absence of a governmentally imposed burden, then, state actions in support of gender are not constitutionally permissible accommodations, but unconstitutional gender favoritism or reinforcement of gender ideologies.

2. *Government Funding of Private Single-Sex Education*

Assume that government provision of sex-segregated education is unconstitutional; what then of government funding of private single-sex education?[377] Justice Scalia's view in *United States v. Virginia* was that "[t]he only hope for state-assisted single-sex private schools [under the Equal Protection Clause] is that the Court will not apply in the future the principles of law it has applied today."[378] In his view, the majority's logic should imply that "the government *itself* would be violating the Constitution by providing state support to single-sex colleges."[379] The basis for this conclusion was the Supreme Court's 1973 decision in *Norwood v. Harrison*,[380] where, in Justice Scalia's view, the Court "saw no room to distinguish between state operation of racially segregated schools and state support [through textbook loans] of privately run segregated schools."[381] In *Norwood*, the Court reiterated that "a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."[382]

The persuasiveness of Justice Scalia's argument depends largely on the weight of *Norwood v. Harrison* and the force of the race-gender analogy in this context. In its brief in *United States v. Virginia*, the United

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reason (or at the least that any taxation does so where government expends money on some activity somehow in competition with the religious activity).

375. *See* 42 U.S.C. § 1981 (1994). This is the case regardless of whether a private school receives federal funds. *See* Runyon v. McCrary, 427 U.S. 160 (1976).

376. *See* 20 U.S.C. § 1681(a) (1999) (prohibiting single-sex admission policies by federal grantee schools); 20 U.S.C. § 1681(a)(1) (1999) (applying that policy only to private "institutions of vocational education, professional education, and graduate higher education," thereby allowing single-sex admission policies for all other federal grantee schools).

377. If public single-sex schools are constitutional, there is little difficulty in funding private ones.

378. United States v. Virginia, 518 U.S. 515, 600 (1996) (Scalia, J., dissenting).

379. *Id.* at 599.

380. 413 U.S. 455 (1973) (holding unconstitutional Mississippi program lending textbooks to private schools as applied to white academies).

381. *Virginia*, 518 U.S. at 599 (Scalia, J., dissenting).

382. *Norwood*, 413 U.S. at 465 (internal quotation marks omitted) (quoting Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 475-76 (M.D. Ala. 1967)). In *Virginia*, 518 U.S. at 599, Justice Scalia also quoted *Cooper v. Aaron*, 358 U.S. 1, 19 (1958) ("State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws.") (alteration in *Virginia*) (Scalia, J., dissenting).

States implied that *Norwood* was decided against the governmental support program because Mississippi "was under a federal desegregation order, and . . . therefore had an affirmative constitutional duty to dismantle its segregated system of education, [and thus] could not provide aid to all-white private schools founded in order to avoid public school desegregation."[383] Citing as authority the Supreme Court's much criticized decision in *Moose Lodge No. 107 v. Irvis*,[384] the federal government's brief cautiously shifted to a descriptive voice: "Providing public assistance to private institutions that admit only members of certain groups has not been held to violate equal protection when that aid is part of a non-discriminatory government program serving legitimate governmental objectives."[385]

But perhaps the constitutional treatment of gender is better analogized to religion than to race. The Supreme Court has not been able or willing to see much value in race or race-consciousness, dreaming instead of a color-blind country. But it has not waxed rhapsodic about any vision of sex- or gender-blindness, instead preferring to "celebrate" what it conceives of as "'[i]nherent differences' between men and women."[386] Maybe our doctrine treats drawing or acting upon racial distinctions a cause for constitutional regret,[387] but it does not always regard sex discrimination in the same manner. This might be seen in the use of a formally lower level of equal protection scrutiny for gender classifications than for race classifications, and it may stem from biologistic and heterosexist adulation of sexual difference. If the Court is not mistaken in construing the Constitution in this fashion, perhaps then the Constitution fiat-out repudiates racism but has a more complicated relationship to sexism—one of disestablishment. That is, perhaps the Constitution is committed to the disestablishment of gender, and consequently to the disestablishment, but not wholesale repudiation, of sexist gender ideologies. If that is so, analogizing to the disestablishment of religion may be more helpful than racial analogies in examining federally funded sex-segregated private schools.

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383. Brief for the Cross-Respondent at 37, United States v. Virginia, 518 U.S. 515 (1996) (No. 94-2100) [hereinafter VMI Cross-Respondent Brief].

384. 407 U.S. 163, 176 (1972) (holding that state's grant of valuable liquor license to private club does not render State liable for club's policy of racial exclusion). This parenthetical description is taken verbatim from the government's brief. VMI Cross-Respondent Brief, *supra* note 383, at 37.

385. VMI Cross-Respondent Brief, *supra* note 383, at 37.

386. United States v. Virginia, 518 U.S. 515, 533 (1996).

387. *Cf.* Eisgruber & Sager, *supra* note 240, at 1254. Professors Eisgruber and Sager explained:

> The underlying logic of the privilcging view of religious exemptions is this: It is a matter of constitutional regret whenever government prevents or discourages persons from honoring their religious commitments; accordingly, government should act so as to avoid placing religious believers at a substantial disadvantage by virtue of their efforts to conform their conduct to their beliefs.

Id.

In contrast to the application of Equal Protection doctrine to intentionally racially segregated schools, under the disestablishment of gender, most (although not all) disestablishment approaches would likely entail the constitutionality of at least certain forms of government "support" of private single-sex education.

a. Noncoercion Approach

So long as it does not abandon its commitment to free public education, government would likely be able to offer financial support to private single-sex education without running afoul of gender disestablishment under a coercion or free exercise approach. If government is not channeling appreciably greater funds to private sex-segregated institutions than it is investing in public, mixed-sex schools and colleges, it would be difficult to conclude that government is coercing anyone to attend a sex-segregated institution solely by virtue of its educational funding decisions. Indeed, even with government support, the direct cost to students of attending private schools of any type generally exceeds that of attending public schools, so any vector of coercion would likely run the other direction—away from disestablishment trouble.

However, a practice should not be deemed consistent with disestablishment simply because it does not coerce people. Accordingly, we should consider whether other approaches to disestablishment of gender would forbid government to financially support private single-sex schools.

b. Neutrality Approach

The neutrality required under disestablishment of gender is related to, although somewhat different from, the neutrality commanded by equal protection, and this results in slightly different emphases under disestablishment analysis. The Equal Protection Clause is animated in part by a form of the neutrality norm: the idea that the sovereign must govern impartially.[388] Although this means that the state must not play favorites,[389] it also means that the state may not single out people for undeservedly less favorable treatment. Rather, government must treat persons with equal concern and respect[390] or equal regard.[391] Officially imposed or sponsored stigma,

388. *See, e.g.*, Michael M. v. Super. Ct. of Sonoma County, 450 U.S. 464, 502 (1981) (Stevens, J., dissenting).

389. *See, e.g.*, HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 8-15 (1993) Gillman argues that "the Lochner era represented a serious, principled effort to maintain one of the central distinctions in nineteenth-century constitutional law—the distinction between valid economic regulation, on the one hand, and invalid 'class' legislation, on the other." *Id.* at 10.

390. *See, e.g.*, Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should Be Overruled*, 59 U. CHI. L. REV. 381, 382 (1992) (explicating the Bill of Rights).

391. Eisgruber & Sager, *supra* note 240, at 1282-83, 1297-1301 (interpreting constitutional treatment of religion and comparing it to equal protection).

then, becomes for some analysts the touchstone of an equal protection violation.[392]

Whether or not such notions of stigma or inferiority exhaust the content of equal protection, neutrality under disestablishment should be understood as a more demanding concept. Government acts non-neutrally when it is hostile toward religion, gender, particular religious or gender beliefs, or affiliations/identifications; when it advances religion, gender, particular religious or gender beliefs, or particular religious or gender groups; or, as I have argued, when it treats religion or gender as first-order relevant in the public realm.[393]

This does not mean that neutrality under disestablishment compels the government to ignore adverse treatment of religious or gender groups in public by private parties. But just because some school students may be hostile toward Satmar Hasidim, for example, does not mean that government may resort to voluntary religious segregation to solve the problem.[394] Similarly, government need not itself resort to running separate schools—with voluntary admission—for males and females in order to address genuine problems of domination of classrooms and schoolyards by boys or men. Voluntary choice should not be thought to provide an armor of neutrality when government is an engine of religious or gendered segregation. Rather, we should commit to a constitutional understanding that would hold government to a higher standard, requiring it to attempt to pursue less gendered avenues of ensuring that everyone in its jurisdiction obtains a high quality public education.[395]

When, however, government does not directly create segregated institutions but instead funds private schools generally, including those that segregate on religious or gender bases, the question of neutrality is more difficult. When the government itself provides non-segregated education, refusal to fund private segregated education ought be seen as non-neutral,

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392. I am not using "stigma" here as a narrow synonym for "psychological injury." *Cf.* Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 14 (2000) (treating the two interchangeably). Rather, I mean it to also include "governmental action [that] denigrate[s] any person or group," *id.*, so that determining whether equal protection is violated by asking whether a law's social or expressive meaning "conflicts with the proposition that we must matter equally to our government," *id.* at 68, does rely on stigma—the imputation of inferiority of a person or group. *Cf.* Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 65 (1977). Professor Karst explained:

> It is true enough that the existence of a loss of dignity or self-respect by a particular stigmatized individual is a subjective matter; some slaves surely maintained their self-respect throughout their enslavement. But the stigma itself is an objective social fact; some inequalities have much more potential for producing the stigma of caste than do others.

Id.

393. *See supra* Part II.B.

394. *See* Bd. of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687 (1994).

395. *Cf. id.* at 714 (O'Connor, J., concurring in part and concurring in the judgment) (noting "an important aspect of accommodation under the First Amendment: Religious needs can be accommodated through laws that are neutral with regard to religion").

in that it favors schools that do not engage in segregation. So, if neutrality were the sole and ultimate test of constitutionality with respect to either the disestablishment of religion or sex and gender disestablishment, even-handed funding might pass muster. Therefore, the debate about government funding of religious education is thus best understood as one over whether neutrality is the sole component to disestablishment in this context, or whether stronger norms of nonreinforcement such as separationism ought to govern.

c. Nonpreferentialism Approach

The weaker notion of neutrality embodied in nonpreferentialism would allow government to support gender if it evenhandedly advances all gender ideologies and gender groups. Thus, government support of all accredited private schools would be consistent with disestablishment of gender on this narrower view, provided government does not restrict its aid to a preferred subset of institutions on a gendered basis. Current federal law that makes it unlawful for private "institutions of vocational education, professional education, and graduate higher education" that receive federal financial assistance to maintain a single-sex admission policy[396] would deny aid to sex segregationist schools while extending it to sex integrationist schools. This would be akin to denying aid to Christian schools that limit enrollment to Christians while providing aid to Catholic schools that employ no religious criteria for enrollment. Whether such a scheme of financial assistance is consistent with nonpreferentialism depends on whether its mandate of evenhandedness is understood intensionally, focusing on the rule used, or extensionally, focusing on the actual beneficiaries. If the government's basis for denying aid to the hypothetical Christian school is simply that the school is discriminating on the basis of religion, without reference to whether the school's reason for discriminating is religious, then government might be understood as extending aid to all schools that meet secular eligibility criteria, provided those criteria are applied to all schools and not simply all religious schools.[397] In intensional terms,

396. *See* 20 U.S.C. § 1681(a) (1999) & 1681(a)(1) (1999).

397. Were the secular eligibility criteria applied only to religious schools, it might then be possible that the aid statute would be viewed as embodying an explicit denominational preference, as the majority treated the Minnesota statute invalidated in *Larson v. Valente*, 456 U.S. 228 (1982). There, the statute "provided that only those religious organizations that received more than half of their total contributions from members or affiliated organizations would remain exempt from the registration and reporting requirements of the [state's charitable solicitations] Act," *id.* at 231-32, and thus "focuse[d] precisely and solely upon religious organizations," *id.* at 246 n.23. Such a conclusion seems possible, rather than certain, because the statute invalidated in *Valente* arguably was intended to favor "well-established churches" over "churches which are new." *See id.* (internal quotation marks omitted); *see also id.* at 259 (White, J., joined by Rehnquist, C.J., dissenting) (noting that Court of Appeals concluded that fifty percent rule "'appear[ed] to be designed to shield favored sects, while continuing to burden other sects'").

then, the assistance program would not embody a denominational preference. If effect were the touchstone, however, the assistance program might be seen as "effectively distinguish[ing] between"[398] religions that believe in religious discrimination and those that do not, which in extensional terms would be a denominational preference. The former characterization is more consonant with case law regarding the establishment of religion.[399] Therefore, this view would allow funding of sex-segregated schools in the narrow manner described above. Nonetheless, that does not settle the issue, as nonpreferentialism is a relatively weak form of disestablishment and not one that is clearly normatively warranted.

d. Non-Endorsement Approach

From the perspective of non-endorsement, equal government aid to all private schools regardless of any gendered enrollment policies would not seem to be objectionable. If government is ignoring the gender basis of the admissions policies of sex-segregated schools and of those of sex-integrated schools, it is difficult to see how government could convey a message to sex-integrationists that they are disfavored outsiders of less than full citizenship stature. This might change if the educational landscape was dramatically different than it is, and a large majority of the institutions eligible for aid were sex-segregated. But that is not the contemporary United States, so on the non-endorsement view of the disestablishment of gender, truly even-handed schemes of general government aid for education should be constitutional.

e. Separation/Privatization Approach

Non-endorsement is not, however, generally taken to be the sole goal of disestablishment.[400] It may be a better theoretical model for addressing governmental embrace of religious or gender symbols than for government funding disputes. The latter are thought, at least in the religion area, to raise serious questions sounding in separation or privatization. Due in significant part to historical reasons, the Supreme Court has understood the "core"[401] of the Establishment Clause to contain a "prohibition on direct state funding of religious activities."[402] Thus, keeping government out of the

398. *Id.* at 246 n.23.

399. *See generally id.*

400. *Cf., e.g.*, Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 695-96 (1997) (noting O'Connor's announced shift from using non-endorsement as the sole inquiry in Establishment Clause cases to treating non-endorsement as a subdomain-specific test).

401. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 880 (1995) (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting).

402. *Id.* at 847 (O'Connor, J., concurring); *see also id.* at 868 (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting) ("Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause . . . .").

business of advancing religion takes center stage under separation or privatization. The dispute in the religious school aid cases has been how to reconcile this principle with those of religious neutrality or nondiscrimination.[403] This is complicated because religious schools provide educational instruction of secular value and much secular content, as do sex-segregated schools. Just how much aid government may, or must, constitutionally provide to such schools without violating the obligation not to advance religion, or gender, is tricky.

The resolution might, however, be simpler under the disestablishment of gender than religion. Suppose a private women's college were to offer exactly the same curriculum as a private college that was not sex-segregated. The only distinction between the two schools would be their admissions policies: single-sex or co-educational. Funding the sex-segregated school in that situation would not be underwriting the direct teaching of gendered beliefs any more than would be funding the sex-integrated school. This is different from the situation of a private religious school and a private secular school, where the curriculum of the religious school presumably includes religious beliefs, so that funding the former would underwrite the direct teaching of religious beliefs in a way that funding the latter would not. In this respect, funding single-sex colleges would seem less problematic from the perspective of the disestablishment of gender beliefs than funding religious schools appears under the disestablishment of religion. Therefore, under a separationist approach, such funding may not be problematic, at least if the focus is on ideology or beliefs more than organization or groups.

f. Accommodation Approach

As for accommodation of gender, under the earlier analysis of this issue,[404] government should generally not be thought to have cognizably burdened the free exercise of gender. To claim otherwise would mean, peculiarly, that government's failure to financially assist sex-segregated schools would by itself provide a justification to aid such schools. Therefore, an accommodation approach to the disestablishment of gender would not justify government aid to sex-segregated schools. Of course, this does not necessarily justify denying aid to such schools, but nonetheless assumes that providing such aid requires affirmative justification.

403. *See, e.g., id.* at 846-47 (O'Connor, J., concurring).

404. *See supra* notes 372-76 and accompanying text.

C. *Man and Wife: Civil Marriage and the Mixed-Sex Requirement*

"I now pronounce you man and wife"
Are magic words like "Open Sesame"
—Lorenz Hart[405]

Civil marriage is one of the last great bastions of resistance to the disestablishment of religion in the United States. A great deal of the near-hysteria that has ensued in the wake of the 1993 Hawaii Supreme Court decision that made lawful same-sex marriages look like a distinct possibility in the United States is grounded in people's religious beliefs that marriage means, simply must be, and was instituted by God as, a union of one man with one woman.[406]

1. *Problematic Rationales for the Mixed-Sex Requirement*

Under the disestablishment of religion, however, religious beliefs are supposed to be an inadequate predicate for denying people their rights. Perhaps recognizing that fact, many marriage exclusionists—those people who would continue to exclude same-sex couples—have attempted to articulate secular reasons to retain the legal limitation of civil marriage to couples of different sexes (the "mixed-sex requirement"). Many of these explanations might reflect partial historical explanations for how or why marriage became enshrined as a legal status regulated by the state, but they so poorly fit the actual contours of marriage laws in the United States today that they cannot be regarded as justifying the mixed-sex requirement.[407]

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405. LORENZ HART, *He and She*, *in* THE BOYS FROM SYRACUSE (1938).

406. To list only a few illustrations of the religious nature of the refusal to allow same-sex couples to marry civilly: A Salt Lake City resident objected to the notion of civil marriages for same-sex couples because "marriage is sacred," Jon R. Perry, *Public Forum Letter*, SALT LAKE TRIBUNE, Oct. 22, 1999, at A14; one reader's letter to a Colorado newspaper argued that civil nonrecognition of same-sex marriages was proper because "the majority of moral people believe that marriage consists of the union of a man and a woman, and to the people who respect it, it is indeed a sacred institution[,]" J.R.C. Scott, *It's Not Biased to Believe in Sanctity of Marriage*, DENVER ROCKY MOUNTAIN NEWS, Mar. 7, 2000, at 35A; and Representative Funderburk of North Carolina supported Congress's combatively named Defense of Marriage Act with the argument that otherwise, same-sex couples might be able to marry civilly, which would enable them "to pretend that their unions are marriages" in violation of his constituents' "God-given beliefs" about the nature of marriage, 142 CONG. REC. H7480, H7487 (July 12, 1996).

407. To be adjudged constitutional, the mixed-sex requirement would need to survive not merely rational basis review, but instead would need to be narrowly tailored to a compelling governmental interest because it significantly burdens many people's fundamental right to marry, classifies on the basis of sex and sexual orientation in presumptive violation of the Equal Protection Clause, and deprives many lesbigay people of a unique expressive resource on a basis that is neither content- nor viewpoint-neutral. *See, e.g.*, David B. Cruz, *Same-sex Marriage I*, *in* 5 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2307 (Leonard W. Levy et al. eds., 2d ed. 2000); David B. Cruz, *"Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925 (2001).

Another rationale for the mixed-sex requirement that has been recently advanced purports to be both secular and a very close fit for the mixed-sex requirement: "gender complementarity." In this vein, David Coolidge of Catholic University's "Marriage Project" argues that marriage should be understood as "a unique community defined by sexual complementarity—the reality that men and women are 'different from, yet designed for' one another."[408] Similarly, according to Professor Lynn Wardle, "[b]y requiring one person of each sex, heterosexual marriage statutes convey a critical message about the equal contribution of both sexes to an important social institution."[409] Rather than resisting gender hierarchy, same-sex marriage would, in Wardle's view, entrench it: "Legalizing same-sex marriage, on the other hand, would send a message that a woman is not absolutely necessary and equally indispensable to the socially valued institution of marriage, weakening rather than strengthening equality for the vast majority of women."[410]

This complementarity argument is unembarrassed by the poor fit that dogs the claim that marriage is for procreation—no one in the United States is required to procreate, or even to be capable of procreation, to marry. As natural law scholars Gerard Bradley and Robert George see the matter, echoing overtly religious ethicists who also rely on "real" sex differences,[411]

> [m]arriage, considered not as a mere legal convention, but, rather, as a two-in-one-flesh communion of persons that is consummated and actualized by sexual acts of the reproductive type, is an intrinsic (or, in our parlance, "basic") human good; as such, marriage provides a noninstrumental reason for spouses, whether or not they are capable of conceiving children in their acts of genital union, to perform such acts.[412]

To the extent that conventionalists seek to preserve marriage as "a relationship between a man and a woman" in order to signify the supposed value of gender complementarity, this would indicate that a married woman is needed or valued by law or society in a civil marriage relationship *as a woman*. Marriage exclusionists such as Wardle who assert that

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408. David Orgon Coolidge, *Same-Sex Marriage?* Baehr v. Miike *and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 29 (1997).

409. Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-sex Marriage*, 1996 B.Y.U. L. REV. 1, 87.

410. *Id.*

411. For example, some religious ethicists rely on a "two-in-one flesh unity" theory:

> The unity ritualized and enacted in sexual behavior is a two-in-one flesh unity, a unity that has its created basis in the physical and biological complementarity of male and female. There are various ways human beings can imitate, or play at imaging this unity, but apart from the actual basis in reality of male and female sexual union, these ways are only pretense or imaginative simulations of the real thing.

JAMES P. HANIGAN, HOMOSEXUALITY: THE TEST CASE FOR CHRISTIAN SEXUAL ETHICS 102 (1988).

412. George & Bradley, *supra* note 85, at 301-02 (footnote omitted).

changing civil marriage to allow same-sex couples to marry will signify that a woman is not necessary to a marriage are correct.[413] But they are at best obtuse if they maintain that this provides a persuasive reason not to recognize same-sex marriages.[414] What they fail to remark upon is that, without the mixed-sex requirement, civil marriage would also connote that a man is not necessary to a marriage.[415] Given the extent of norms of male superiority even in contemporary United States society, the dispensability of men would seem a newer, more striking proposition than female dispensability and would at least have the potential to outweigh it in the gender-equity-symbolism scale.

Relatedly, marriage conventionalists' conclusion that signifying the dispensability of men and women to marriage is a reason to exclude same-sex couples improperly lends governmental imprimatur to the belief in naturalness of gender norms, thereby violating the disestablishment of gender on a non-endorsement view. If civil marriage were appropriately neutral concerning gender in the fashion that the disestablishment of gender would require under most approaches, it would convey the message that a person is worthy precisely as a person, without regard to his or her sex/gender.[416] That, unlike the gender complementarity position, is a proper proposition for civil marriage to endorse.

Under the disestablishment of sex and gender, government must not elevate sex/gender over all other aspects of a person's identity, declaring it legally salient, for this would greatly reinforce and institutionalize gender.

> The system of gender—the practice of instituting social roles assigned to a person in virtue of his or her biological sex—serves the function of tying the property of biological sex to a host of other properties to which sex has no necessary or natural connection. The institution of gender creates regularities that would otherwise not exist.[417]

Where, as in modern American society, gender acts as a social system to constrain the ways in which individuals may live their lives, the disestablishment of gender should be understood to constitutionally oblige government to refrain from lending support to such regulative gender. This

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413. *See supra* text accompanying note 410.

414. *See also* Samuel A. Marcosson, *The Lesson of the Same-Sex Marriage Trial: The Importance of Pushing Opponents of Lesbian and Gay Rights to their "Second Line of Defense,"* 35 U. LOUISVILLE J. FAM. L. 721, 750 (1996) (although "not wish[ing] to be unduly harsh," concluding that this argument "is ridiculous on its face, both in the substance and implications").

415. Thus Wardle is mistaken insofar as he has claimed that "[l]egalizing same-sex marriage . . . would send a message that a woman is not . . . *equally* indispensable to . . . marriage." Wardle, *supra* note 409, at 87 (emphasis added).

416. *Cf.* Louise M. Antony, *Back to Androgeny: What Bathrooms Can Teach Us About Equality*, 9 J. CONTEMP. LEGAL ISSUES 1, 11-12 (1998) ("[W]hat makes a being worthy of moral concern, and capable of moral agency is just that set of properties that human men and women share.").

417. *Id.* at 6.

position leaves individuals and groups free to try to preserve gender, which may be important to many people's happiness and their desires for their posterity, but at the same time removes a potent if limited tool of coercive gender-norming—governmental power.

2. *Noncoercion Approach*

As was suggested earlier,[418] the question whether the requirement that parties to a civil marriage be of different sexes should be understood as unconstitutionally pressuring people into gendered behavior is exceedingly complex. In answering that question, the mixed-sex requirement should be viewed in its proper context—as part of the fabric of social practices that Adrienne Rich incisively labeled "compulsory heterosexuality,"[419] practices that include both the infliction of often gruesome violence upon people identified as lesbigay or trans,[420] and widespread religious condemnation of the intimate sharing of lives by two people of the same sex. While there may well be a disestablishment violation on this coercion theory, the complexity and contestedness of the necessary judgments makes it an unlikely avenue for persuading legislatures or courts to abolish the mixed-sex requirement.

3. *Neutrality, Nonpreferentialism, and Non-Endorsement Approaches*

Neutrality, nonpreferentialism, and non-endorsement approaches to the disestablishment of sex and gender more readily yield the conclusion that the mixed-sex requirement for civil marriage is unconstitutional. Although the normative baselines for assessments of whether government has departed from neutrality are not always self-evident, it seems plain that with the mixed-sex requirement, government is taking sides in the debate about the necessity of certain gendered aspects of human relationships for personal happiness and social stability. This lends state authority to gender conventionalists at the expense of those who would expand civil marriage to embrace same-sex couples. This governmental "handicapping" is profoundly non-neutral: "The statutory codification of heterosexuality represented by the mixed-sex requirement . . . discriminates [with respect to the expressive resource of civil marriage] in favor of positive expressions about the subject of heterosexual intimacy and against lesbigay-positive expression."[421] By restricting civil marriage to mixed-sex couples, government is not extending aid evenhandedly to adherents of all

418. *See supra* Part II.A.

419. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980).

420. *See, e.g.*, David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1342-44 (1999); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1461-69 (1992).

421. Cruz, *supra* note 56, at 989.

gender ideologies, but instead is materially and discursively privileging[422] a particular "proper" set of gender ideologies—those maintaining that women should marry men and vice versa, but that men should not marry men nor women marry women.

In so doing, government violates the injunction against conveying a message of favor or preference for particular gender beliefs. The mixed-sex requirement for civil marriage marks lesbigay persons as less than full members of the political community. This is why so many critics of current marriage laws have objected that the mixed-sex requirement relegates lesbigay persons to an inferior class of citizenship.[423] Relatedly, we should not think that the inclusive move of abolishing the mixed-sex requirement would count as disapproval of the gender views of marriage conventionalists. In a situation such as this, government either employs a sex-based classification to exclude people from an important public institution in conflict with their beliefs about gender propriety, or admits people to the institution without regard to sex, in confiict with others' gender beliefs. The former course is prima facie justified by its inclusiveness without referring to contested gender ideologies (whether heterosexist or sex-egalitarianist) and should be followed as the neutral course.[424]

422. *See generally id.* (arguing that marriage is an expressive resource and not simply an economically privileged relationship).

423. *See, e.g.*, Berta Esperanza Hernandez-Truyol & Shelbi D. Day, *Afterword—Straightness as Property: Back to the Future—Law and Status in the 21st Century*, 12 U. FLA. J.L. & PUB. POL'Y 71, 87 (2000) ("By refusing to recognize 'marriage' beyond the legal union between a man and a woman, and defining 'spouse' as a person of the opposite sex, . . . Congress [in the 'Defense of Marriage Act'] forces gays/lesbians into a second-class citizenship role . . . ."); Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149, 156 (2000) ("[By] denying committed same-sex couples the right to marry, while at the same time giving them the same bundle of legal rights associated with marriage, ... [Vermont's civil union law] sends to same-sex couples the same message of second-class matrimonial citizenship that the separate but equal doctrine sent to racial minorities in the six decades before *Brown v. Board of Education*."); Remarks of Hannah Garber-Paul, *Session One: Social, Cultural, and Philosophical Issues, Symposium: Should the Government Recognize Same-sex Marriages?*, 7 U. CHI. L. SCH. ROUNDTABLE 1, 5 (2000) ("[I]n our refusal to permit gay people equality within this institution, we are in fact saying that we believe that they are second-class citizens.").

424. Operating under the rubric of the disestablishment of sexual orientation, Michael McConnell suggests that the neutral course, if any, is for government to cease licensing marriage. McConnell, *supra* note 50. While this would leave the meaning of marriage up to social institutions outside government, abolishing marriage would still be a governmental course of action defended by its inclusiveness (everyone is now eligible for inclusion in the government's preferred relationship status, for there is none once marriage is abolished) and its failure to employ a sex-based classification. It is consequently unclear to me why disestablishment of gender (or sexual orientation, for that matter) would constitutionally compel government to choose abolition of marriage over abolition of the mixed-sex requirement for marriage. Such a preference would require an even more demanding neutrality than sex, gender, or sexual orientation disestablishment insists upon. *See* Cruz, *supra* note 56, at 1024-25 (discussing abolition of civil marriage as entailment of neutrality as to the good life).

4. Separation/Privatization Approach

Separation or privatization approaches to gender disestablishment do no better at supporting the mixed-sex requirement. If sex and gender are matters for private resolution, apart from the power and authority of government, then it is improper for the state to decide for all couples whether they are the right combination of sexes for marriage. If government were to restrict marriage to couples who parent children or who commence doing so within some reasonably short period of time, that would constitute a functional public justification for privileging certain adult relationships as civil marriage not based upon sex/gender. Yet it would not justify the mixed-sex requirement, for same-sex couples and mixed-sex couples can both be quite good at parenting,[425] and existing marriage laws do not require civil spouses ever to raise children.[426] Regardless of whether disestablishment of gender should allow government to employ narrowly tailored gender-based classifications for compelling, public nongendered reasons, thus far no such reasons adequate to justify the mixed-sex requirement have been advanced.[427]

5. Accommodation Approach

The mixed-sex requirement for civil marriage does not appear defensible on accommodation grounds. Despite the belief of many that it is not properly gendered behavior for two people of the same sex to (seek to) marry each other, government could perhaps accommodate this by allowing clerics or others with such sex/gender beliefs to restrict their performance of the officiating function otherwise required of a public official to mixed-sex couples. Accommodation cannot, however, justify the mixed-sex requirement's complete exclusion of same-sex couples from the public institution of civil marriage.

Nor does an accommodation approach to gender justify the mixed-sex requirement. Government cannot be seen as burdening anyone's exercise of gender when it refuses to limit people's rights on the basis of gender, so the predicate for regarding the mixed-sex requirement as an accommodation of gender is entirely lacking. It is true that gender is not only an individual matter.[428] Without other like-minded people, various features of persons (of our bodies, sartorial preferences, speech patterns, relationship

425. *See, e.g.*, Judith Stacey & Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 65 AMER. SOCIOLOGICAL REV. 159, 177 (2001) (concluding, from extensive literature review, that most differences between same-sex and mixed-sex parenting "cannot be considered deficits from any legitimate public policy perspective").

426. *See* Cruz, *supra* note 56, at 1006-07 (elaborating upon this point).

427. *See, e.g., id.* at 1004-13 (reviewing purported public welfare and morality justifications for mixed-sex requirement).

428. Were it so, then it would have been unable to underwrite the great many social dividing practices that it has to date.

partners) would not be (re)cognized as group traits, and thus could not be sexed/gendered.[429] For an individual who holds fixed gender beliefs and would resist giving them up because they are important to her or his very sense of self, others must hold or act upon similar beliefs in order for gender as she or he understands it to be a meaningful category. But the same is true of other individuals who may have conflicting gender beliefs or anti-gender beliefs. Thus, there would be no truly neutral way of determining whose rights should be curtailed on the basis of gender in order for government to avoid burdening others' rights; hence, the conclusion of no burden.

Nonetheless, a government that abolished the mixed-sex requirement might well be justified on accommodation grounds in allowing private persons[430] to refrain from solemnizing same-sex marriages if they disagreed with the practice.[431] Similarly, those who conscientiously object to mixed-sex marriage on the ground that it has been a patriarchal relationship that has contributed to the subordination of women might be shielded from any obligation to marry mixed-sex couples. No clerics, for example, would be required to officiate over marriages whose gender conflguration conflicted with their gender beliefs. But, as I argued earlier, it would not be a proper accommodation of such gender beliefs for government to retain the mixed-sex requirement, for that would impose the burden of "accommodating" majoritarian gender beliefs squarely upon gender minorities, in gross violation of the disestablishment of sex and gender.

CONCLUSION

Like most or all societies throughout history, the United States is in the grip of gender. Yet this need not continue to be the case, at least with respect to government. The concerted and sometimes confiicting efforts of feminists, transsexual persons, intersexual and transgender activists, lesbian, gay, and bisexual individuals and organizations—indeed, gender dissidents of all persuasions—have put increasing pressure on the conceptual and coercive apparati of gender in the new millennium. Undoubtedly, gender naturalism (the belief that the sex/gender system as one understands it

429. *Cf.* JOSEPH RAZ, THE MORALITY OF FREEDOM 162 (1986) ("[M]onogamy, assuming that it is the only valuable form of marriage, cannot be practised by an individual. It requires a culture which recognizes it, and which supports it through the public's attitude and through its formal institutions.").

430. Perhaps government employees with gender objections to performing certain types of marriages might be exempted as well. This might be justifiable on accommodation grounds provided other parties do not bear the costs of such exemption; at a minimum, those whose marriages a government employee refuses to officiate must be able to receive prompt service by other employees, who in turn must not be significantly burdened on the job by having to "cover for" the objecting employee. *Cf.* Estate of Thornton v. Caldor, 472 U.S. 703, 710 (1985).

431. This is similar to what has happened in Vermont with respect to civil unions; some town clerks have expressed their unwillingness to record these same-sex unions because of their religious beliefs.

is ordained by God or Nature) and gender fatalism (the belief that it is futile, if not counterproductive, to attempt to resist the importunings and coercions of prevailing gender ideologies[432]) pose formidable obstacles to a practical program for the reduction in power of sex and gender. But belief in the naturalness and the inevitability of human aggression have not extinguished the hope for and efforts toward achieving a world without war or violent crime, and gender naturalism and gender fatalism need not smother aspirations for a world free of the constraints of gender. Not everyone would wish to see such a world; for many, sex and gender are in their contemporary configurations a source of meaning and value.[433] Accordingly, disestablishment of sex and gender, rather than outright abolition, might be an appropriate policy for government to adopt.

Feminist scholarship has begun to develop ways to conceptualize the dis-institutionalization of gender that would be required under a program of disestablishment. In this Article, I have ventured a theoretical basis for understanding that fundamental charter of restrictions on the exercise of power by government in the United States, the Constitution, to disestablish sex and gender. I have also offered a set of explorations of what disestablishing sex and gender might mean in theoretical terms as well as how it would operate in practice with respect to some concrete legal issues. If the Court were to move in this direction and ask whether government is supporting or reinforcing sex/gender ideologies and divisions, it might well avoid such mistakes as *Michael M. v. Superior Court*[434] and *Nguyen v. INS*.[435]

I have not aimed to resolve definitively the permissibility of any particular governmental involvement with gender, the superiority of any one theoretical or doctrinal approach to disestablishing sex and gender, or even the desirability or propriety of interpreting the Constitution to require such disestablishment.[436] I do, however, insist with my analyses that many "mainstream" legal scholars, particularly constitutional scholars, are overdue in interrogating the complacency and complicity of government with the naturalization and reinforcement of both sex and gender. It is imperative that the legal academy join in contributing to the efforts of critical

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432. *See, e.g.*, Freedman, *supra* note 17, at 915 ("Such arguments [justifying women's subordination on the basis of biology or nature] deny both the desirability and possibility of change.").

433. *See, e.g.*, Kogan, *supra* note 217, at 1249 ("Many transsexuals have no desire to blur the categories of male and female. After undergoing sex reassignment surgery, many MTF transsexuals consider themselves (and desire others to consider them) as both a gendered female and a biologically-sexed female.").

434. 450 U.S. 464 (1981); *see supra* text accompanying notes 13-16, 272-274.

435. 533 U.S. 53 (2001). *See supra* text accompanying notes 20-28, 269-271.

436. Disestablishing sex and gender would likely not produce a set of constraints on government as satisfactory to many feminists as would a constitutional approach grounded in the eradication of sexism in all spheres of life.

gender theorists[437] to think about the dividing practices of sex and gender—and about the Constitution—in new, more critical ways.[438] When government acts, it speaks for the gender-pluralistic population that constitutes the People of the United States, and our law must make more room for dissident sex/gender ideologies and identities.

437. *See, e.g.*, Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Franke, *supra* note 181; Francisco Valdés, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1 (1995).

438. *Cf.* Marci A. Hamilton, *A Reply*, 31 CONN. L. REV. 1001, 1010 (1999) ("[T]here are many contributions legal scholars can make beyond spinning out doctrinal platforms. Good judgment rests on awareness of how laws affect humans and institutions and on knowledge about history, human character, and culture.").