A NUDE AWAKENING: FEMALE-ONLY TOPLESSNESS BANS AS UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE

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TABLE OF CONTENTS

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I. INTRODUCTION

A. INTRODUCTION OF TOPIC

Americans have long challenged public nudity statutes in court, claiming that the gender-based double standards are unconstitutional.[1] With increasing national support for transgender rights and mothers who publicly breastfeed, the constitutionality of laws requiring women, but not men, to wear tops in public is unclear. The norms surrounding public nudity statutes are deeply ingrained in our society. In fact, simply determining whether a law involves physical differences or is the remains of societal gender stereotypes presents a daunting task. However, this often-blurred distinction is key to determining whether a statute violates the Fourteenth Amendment's Equal Protection Clause ("EPC").

As a Hackworth Fellow with the Santa Clara University Markkula Center for Applied Ethics, I spent a year in dialogue with students, professors, and women in leadership roles about the current reality of gender inequality. A common theme that came up again and again was the focus on equal treatment versus different treatment to get an equal outcome. Students and professionals alike grappled with the inclination against creating a new era of "separate, but equal" policies to recognize biological differences. This question transcends leadership ethics to the highest level of the American legal system, the Supreme Court of the United States.

This Note examines these challenges by exploring current judicial views on female-only toplessness bans set to be argued before the U.S. Supreme Court, as well as arguments on whether the inclusion of gender classifications in public nudity statutes violates the EPC.

B. OUTLINE OF NOTE

In 2019, both the New Hampshire Supreme Court and the U.S. Court of Appeals for the Tenth Circuit ruled on public nudity statutes that contained facial gender classifications with regard to toplessness. While both statutes included the same gender classification, the two courts split, with only the Tenth Circuit finding the prohibition unconstitutional under the EPC.

These two court opinions provide a foundation for this Note to first discuss the constitutionality of gender classifications in public nudity statutes. Next, this Note analyzes the EPC and its connection to gender

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[1] *See, e.g.*, Eckl v. Davis, 51 Cal. App. 3d 831, 843 (1975) (rejecting constitutional challenge to local ordinance criminally banning public nudity).

classifications and public nudity statutes. After discussing the implications of these legal findings, this Note considers the judiciary's role in determining the outcomes of public nudity statute cases, especially while the topic sits firmly in the public eye. Finally, this Note provides insights into how the U.S. Supreme Court would likely view this issue at present and how legislatures might evolve their perspectives on public nudity statutes.

In addition to concerns surrounding EPC violations, there are continual challenges to female toplessness bans as violations of the First Amendment right to free speech. While they may provide an avenue by which to challenge public nudity statutes, First Amendment challenges to public nudity statutes are not included in this Note's discussion.

II. NEW HAMPSHIRE SUPREME COURT: *STATE V. LILLEY*

A. BACKGROUND

Laconia City Ordinance Section 180–2 states "it shall be unlawful for any person to knowingly or intentionally, in a public place . . . [a]ppear in the state of nudity."[2] The ordinance defines nudity as the "showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple."[3]

On May 28, 2016, Ginger Pierro went to Endicott Park Beach in Laconia, New Hampshire to perform yoga.[4] She did not wear a shirt, despite the protestations of other beachgoers.[5] The police were called and informed Pierro that she was—by city ordinance—required to cover her breasts.[6] When she refused, police arrested her.[7] Three days later, Kia Sinclair and Heidi Lilley were arrested when they travelled to nearby Wiers Beach, also topless, to protest Pierro's arrest.[8] Pierro, Sinclair, and Lilley jointly moved to dismiss the charges. The trio argued that Laconia's public nudity ordinance violated the EPCs of both the New Hampshire State Constitution and the U.S. Constitution by facially differentiating between male and female nudity.[9]

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[2] State v. Lilley, 204 A.3d 198, 203 (N.H. 2019), *cert. denied*, 140 S. Ct. 858 (2020).
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] Lilley, 204 A.3d at 204.
[9] *Id.*

B. NEW HAMPSHIRE SUPREME COURT'S REASONING

The New Hampshire Supreme Court ruled that Laconia's public nudity ordinance does not classify on the basis of gender, and thus avoids triggering heightened scrutiny by the court.[10] The ordinance prohibits public nudity for both men and women.[11] The prohibition rests on the definition of nudity, which the court reasoned was based on anatomical differences between men and women.[12]

The dissent, however, found that a gender classification did exist on the face of the ordinance.[13] Judge Bassett explained, "if a woman and a man wear the exact same clothing on the beach, on Laconia's main street, or in a backyard 'visible to the public,' the woman is engaging in unlawful behavior—but the man is not."[14] The dissent further rejected the notion that the statute does not require heightened scrutiny simply because it mirrors the "'natural' differences between men and women. The dissent rightly points out that these "natural" distinctions between people—including differences in skin color, gender, and country of origin—have historically served as justifications for pervasive and perverse discrimination."[15] Accordingly, the dissent found that the government's purpose in establishing the ordinance was too insubstantial to survive intermediate scrutiny. Therefore, the dissent found the statute to be unconstitutional.[16]

The majority opinion in *State v. Lilley* mirrors decisions made by most courts in the United States when considering whether gender classifications in public nudity statutes violate the EPC.[17] On July 8, 2019, a petition for certiorari was filed with the Supreme Court but was subsequently denied on January 20, 2020.[18]

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[10] *Id*. at 208.

[11] *Id*.

[12] *Id*.

[13] Lilley, 204 A.3d at 217 (Bassett, J., dissenting).

[14] *Id*.

[15] *Id*. at 222.

[16] *Id*. at 223.

[17] *See, e.g.,* Free the Nipple–Springfield Residents Promoting Equal. v. Cty. of Springfield, 923 F.3d 508, 510 (8th Cir. 2019) (citing State v. Lilley and noting that "[t]he majority of courts considering equal protection challenges have upheld similar laws prohibiting women, but not men, from exposing their breasts.").

[18] Lilley v. New Hampshire, 140 S. Ct. 858 (2020) (denying petition for writ of certiorari).

III. TENTH CIRCUIT: *FREE THE NIPPLE V. CITY OF FORT COLLINS*

Though the majority of courts have held that public nudity statutes do not violate the EPC, there is no clear consensus on this issue.[19]

In February 2019, however, the U.S. Court of Appeals for the Tenth Circuit found that a public nudity statute classification based primarily on gender violated the EPC and upheld a preliminary injunction against enforcement of the public nudity statute.[20] In 2015, the city council of Fort Collins, Colorado enacted an ordinance that permitted male toplessness but prohibited female toplessness.[21] In response, "Free the Nipple" sued Fort Collins for violating the EPC and requested a preliminary injunction to stop the ordinance's enforcement.[22] The district court granted the injunction and the decision was appealed to the Tenth Circuit Court of Appeals.[23]

To be granted a preliminary injunction, plaintiffs must "make a strong showing that their equal-protection claim is substantially likely to succeed on its merits."[24] In the case of *Free the Nipple–Fort Collins v. City of Fort Collins*, the Tenth Circuit determined that application of intermediate scrutiny was appropriate, and that the plaintiffs indeed had "made a strong showing of their likelihood of success on the merits."[25]

Using the framework established by *United States v. Virginia*, the *Free the Nipple–Fort Collins* court held that the statute simply did not recognize biological differences between men and women. Rather, the court found that the statute perpetuated gender stereotypes that have sexualized the female body throughout history.[26] The Court of Appeals quoted the district court in its decision:

> The ordinance discriminates against women based on the generalized notion that, regardless of a woman's intent, the exposure of her breasts in public . . . is necessarily a sexualized act. Thus, it perpetuates a stereotype engrained in our society that female breasts are primarily objects of sexual desire whereas male breasts are not.[27]

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[19] Free the Nipple–Springfield Residents Promoting Equal., 923 F.3d at 510.

[20] Free the Nipple–Fort Collins v. Cty. of Fort Collins, 916 F.3d 792, 798 (10th Cir. 2019).

[21] *Id*. at 795.

[22] *Id*. at 794–95.

[23] *Id*. at 795.

[24] *Id*. at 798.

[25] *Id*. at 805.

[26] Free the Nipple–Fort Collins, 916 F.3d at 800 (citing United States v. Virginia, 518 U.S. 515 (1996)).

[27] *Id*.

The majority found that (1) the government's justifications were not sufficiently compelling and (2) that the ordinance's means did not proportionately justify its ends to pass intermediate scrutiny.[28]

The dissent, however, disagreed with the majority's understanding of the physical differences doctrine explained in *United States v. Virginia* and insisted that the proper standard of review was one of only rational basis.[29] The dissent's application of rational basis review resulted in its finding that the statute's restriction of female, but not male, toplessness was constitutional.[30]

IV. FOURTEENTH AMENDMENT AND GENDER DISCRIMINATION

A. INCLUSION OF WOMEN IN THE FOURTEENTH AMENDMENT

When the Fourteenth Amendment was enacted, it was meant to partially remedy racial discrimination during the aftermath of the Civil War.[31] Preventing gender classifications was not its original intent.[32]

Heightened scrutiny under the EPC was first used for gender classifications in the U.S. Supreme Court case, *Frontiero v. Richardson*.[33] Subsequent cases have clarified that intermediate scrutiny should be used to determine the validity of laws employing gender classifications under the EPC.[34] Therefore, in order for a law that enables gender classification to be constitutional, it must "serve important governmental objectives and be substantially related to the achievement of those objectives."[35]

B. THE SUPREME COURT ON GENDER CLASSIFICATIONS AND PUBLIC NUDITY STATUTES

The U.S. Supreme Court has spoken previously about the constitutionality of public nudity statutes but has not yet considered the potential EPC ramifications. The Court has only decided cases involving

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[28] *Id*.

[29] Free the Nipple–Fort Collins, 916 F.3d at 808–09 (Hartz, J., dissenting).

[30] *Id*.

[31] Alexander Tsesis, *The Thirteenth Amendment: Meaning, Enforcement, and Contemporary Implications: Panel II: Reconstruction Revisited: Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641, 1670 (2012).

[32] *Id*.

[33] Frontiero v. Richardson, 411 U.S. 677, 688 (1973).

[34] Craig v. Boren, 429 U.S. 190, 197 (1976).

[35] *Id*..

nudity in public establishments (e.g., topless bars) as freedom of speech issues under the First Amendment.[36] The Court has not analyzed public nudity statutes that classify on the basis of gender as violations of the EPC.

V. EQUAL PROTECTION AND PUBLIC NUDITY STATUTES

A. REAL DIFFERENCES VS. SOCIETAL STEREOTYPES

In *United States v. Virginia*, the U.S. Supreme Court dealt with a statute that claimed to classify based on gender because of inherent differences between men and women.[37] Unlike with racial classifications, there are identifiable biological differences between men and women.[38] Thus, the Court had to determine whether the law was classifying based on these inherent differences, or whether citing to these differences merely provided a false justification to perpetuate stereotypes.[39] The opinion explains:

> 'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for the artificial constraints on an individual's opportunity. . . . But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.[40]

The Court's opinion in *Mississippi University for Women v. Hogan* holds that vigilance is required when looking at statutes that classify on gender:

> Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior,

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[36] *See generally* City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (considering First Amendment constitutional challenge to local ordinance banning public nudity and nude-dancing establishments); Barnes v. Glen Theatre, 501 U.S. 560 (1991) (holding that Indiana's public indecency statute was an infringement of First Amendment expressive activity); N.Y. State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981) (rejecting First Amendment challenge to ordinance prohibiting nude dancing in establishments licensed to sell liquor).

[37] United States v. Virginia, 518 U.S. 515, 520–21 (1996).

[38] *Id*. at 533.

[39] *Id*. at 533–34.

[40] *Id*.

the objective itself is illegitimate.[41]

1. History of Society Governing Female Modesty

Public nudity laws that require women to adhere to a modest dress code are not the original source of this societal pressure. Until fairly recently, the exposure of a woman's ankles was considered scandalous. And by even more modern standards, the thought of a woman wearing pants was outrageous.[42] However, the laws now in question are unique because they zero in on areas of the human body where women and men are anatomically different. This brings the issue of biology versus societal stereotypes to the forefront of the debate.

2. Nudity Classifications are Based on Real Differences

One's initial reaction to whether female toplessness statutes are based on real differences might understandably be an emphatic "yes." Looking at the male and female bodies, there are real physical differences between the chests of men and the chests of women. However, this idea is challenged by the prospect that the chests of men and women are not entirely different; rather, it is the societal sexualization of female bodies that prompts the classifications seen in public nudity laws.

Even when confronted with arguments about the unjust reality of gender classifications in public nudity statutes, pointing to the physical differences between male and female bodies seems like a surefire response. In the dissent of *Lilley*, Judge Bassett puts forward a commonly-used critique of gender classifications in public nudity statutes: "if a woman and man wear the exact same clothing [in public] . . . the woman is engaging in unlawful behavior—but the man is not."[43] However, even when men and women wear identical clothing, what they present to the public is not the same. The result of the same behavior (what is displayed to the public) is different, and this is based entirely on the real, physical difference between the chests of men and women.

Additionally, those who defend gender classification in public nudity statutes may claim that these laws do not deal with historical stereotypes as defined by equal protection. In order to make arguments based on historical stereotypes, a plaintiff must show that there is a long history of "overbroad

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[41] Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–25 (1982).

[42] Stuart P. Green, *To See and Be Seen: Reconstructing the Law of Voyeurism and Exhibitionism*, 55 AM. CRIM. L. REV. 203, 257 (2018).

[43] State v. Lilley, 204 A.3d 198, 217 (N.H. 2019), *cert. denied*, 140 S. Ct. 858 (2020).

generalizations about the different talents, capacities, or preferences of males and females."[44] The dissent in *Free the Nipple–Fort Collins* argues that public nudity statutes do no such thing, but instead focus on biological differences, which do not fall into the category of historical stereotypes.[45] The public nudity statutes in question do not facially relate in any way to the talents, capacities, or preferences of men and women. Instead, they focus only on the anatomical differences when making the distinction between which body parts must be covered with respect to each gender. Even if there were a societal stereotype that caused female breasts to be viewed as sexual objects, this stereotype is not the type of historical discrimination that the EPC is meant to alleviate.[46]

But accepting the argument that breasts are considered sexual and should be covered only because of societal stereotypes could lead down a slippery slope. For example, if a court found that breasts were only considered sexual due to stereotypes, women would then be allowed to appear topless in public. This decision might then lead society to question why other sexual images or body parts should not be displayed, or why modesty is necessary at all. There is concern that this line of reasoning could be used to find that everything is rooted in stereotype and, therefore, all laws based on moral values would be struck down. An illustration of this reasoning would be: first, breasts are determined to be sexual only because of gender stereotype. If true, are all sexual body parts considered bad or taboo only because of outdated societal assumptions or norms? And if so, are public nudity statutes permissible to begin with?

The problem with this argument is that the key challenge in these cases is not directed towards the requirement for a certain level of modesty, but towards the unequal level of modesty required of men and women. The idea of modesty, moreover, is not a societal stereotype of a certain group or class of people. Instead, modesty broaches questions about societal values—questions about which are meant for the legislature. While some in the United States may view modesty as a core American value (often related to religious beliefs), others point to the disparities in the burden that modesty as a value places on women and men as symptomatic of a historical patriarchy.[47]

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[44] Free the Nipple–Fort Collins v. Cty. of Fort Collins, 916 F.3d 792, 809 (10th Cir. 2019) (Hartz, J., dissenting).

[45] *Id*.

[46] *Id*.

[47] *See, e.g.*, *Modesty and Faith Connected in Many Religions*, NPR (May 10, 2010), https://www.npr.org/templates/story/story.php?storyId=126672354 [https://perma.cc/JA6F-YN3F].

3. Nudity Classifications are Based on Societal Stereotypes

It is undeniable that there are anatomical differences between the chests of men and women. However, as evidenced by the purported government interests of public nudity statutes, the key reason for preventing female toplessness has nothing to do with these differences, but instead concern over society's view of female breasts as sexual body parts in need of covering.[48]

Looking at the anatomies of women and men, the physical differences may not be as dramatic as they appear at first glance. One purported difference between male and female bodies is that female breasts are sexual, whereas the male chest is not. However, scientists have concluded that the male chest is part of his erogenous zone, similar to the female chest.[49] Additionally, research has shown that the male chest is the most sexually appealing part of the body to most women.[50] If the male chest, the most sexually appealing body part to women, is part of the erogenous zone like the female chest, then the male chest could be equated to the female chest in terms of its reproductive or sexual role. The idea, then, that only the female chest should be censored would coincide with the idea that predicating these laws on gender classification is based only on societal stereotypes of female modesty, rather than physical differences.[51]

Further,

> the only anatomical difference is that a woman's breast has 'lobes' which contain the mammary glands and ducts. Since men actually have the biological scaffold to breastfeed, and just have to be exposed to the right hormonal cocktail of progesterone, estrogen, oxytocin, and prolactin, this is not a true distinction.[52]

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[48] *See, e.g.,* Lilley, 204 A.3d at 204; Katelyn Beaty, *Toward a New Understanding of Modesty*, THE ATLANTIC, Aug 20, 2013, https://www.theatlantic.com/sexes/archive/2013/08/toward-a-new-understanding-of-modesty/278652 [https://perma.cc/77G8-ZWZ5]; Maureen Shaw, *America's Sexualization of Breasts is So Pervasive Even Other Women Think Public Breastfeeding is Gross*, QUARTZ (Aug 16, 2016), https://qz.com/756499/americas-sexualization-of-breasts-is-so-pervasive-even-other-women-think-public-breastfeeding-is-gross [https://perma.cc/Y8PT-2FWL].

[49] Nassim Alisobhani, *Female Toplessness: Gender Equality's Next Frontier,* 8 U.C. IRVINE L. REV. 299, 300 (2018).

[50] Virginia F. Milstead, *Forbidding Female Toplessness: Why "Real Difference" Jurisprudence Lacks "Support" and What Can Be Done About It*, 36 U. TOL. L. REV. 273, 283 (2005).

[51] *See* Free the Nipple–Fort Collins, 916 F.3d at 803 (discussing expert testimony on sexual stereotypes).

[52] Alisobhani, *supra* note 49, at 300.

It follows that a purely aesthetic difference points to societal stereotypes, not physical differences, as the reason behind public nudity laws that utilize gender classifications.

Additionally, there are societies throughout the world and throughout history in which women have commonly appeared topless in public.[53] In these societies, breasts are not seen as sexual, so they do not need to be covered.[54] It follows that there is nothing inherently "indecent" about the female breast itself; the stigma around the female breast arises entirely out of societal stereotypes and associations with the female body and female modesty.[55]

In *Free the Nipple–Fort Collins*, the district court heard and found credible testimony of a psychology professor, Dr. Roberts, who testified that "our society's sexualization of women's breasts—rather than any unique physical characteristic—has engrained in us the stereotype that the primary purpose of women's breast is sex, not feeding babies."[56] Dr. Roberts further concluded that this societal sexualization is the basis of a "sex-object stereotype" that "serves the function of keeping women in their place."[57]

4. Societal Stereotypes Grounded in Real Difference?

The reason why female toplessness bans are so problematic is that the key force driving the laws may not be the physical differences between the chests of men and women. A man could have a larger chest that visually looks similar to a female chest, but this would not cause concern under the statutes explored in this article. The gender of the person that the chest is on is at least part of the story.[58] Therefore, while there are physical differences between the chests of men and women, there is also at least some level of additional stereotypes or gender expectations that create a difference in the eyes of American society between men and women.

Ultimately, courts may find that female toplessness laws are driven by a combination of both real physical difference and the societal stereotypes that surround those physical differences. Heightened scrutiny would still apply here under the EPC since there is a classification drawn between men and women, but the grounding of the societal stereotypes within the

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[53] Milstead, supra note 50, at 284.

[54] *Id*.

[55] Free the Nipple–Fort Collins, 916 F.3d at 803.

[56] *Id*.

[57] *Id*.

[58] *See, e.g*. *Modesty and Faith Connected in Many Religions*, *supra* note 47.

physical differences of male and female bodies may help the court progress through the forthcoming analysis on the validity of such a statute's governmental purpose.

5. Equal Application vs. Classifications

One also could make the argument that public nudity statutes do not make any gender classification as defined under the EPC.[59] Instead, one would argue that the rules may look different in the sense that what constitutes nudity differs based on the anatomies of men and women, but the statute is applied equally to male and female nudity.[60] Therefore, under this line of reasoning, the public nudity statutes are not unconstitutional. However, the U.S. Supreme Court in *Loving v. Virginia* specifically addressed this question, stating that the equal application of a statute containing a racial classification does not absolve it from violating the EPC.[61] This implies that the equal application of a classification does not have any legal merit.

On the other hand, *Loving v. Virginia* was a case involving a racial classification, not a gender classification, so the court applied strict scrutiny rather than intermediate scrutiny.[62] Because intermediate scrutiny is the legal standard used to analyze gender classifications, *Loving* may be inapposite.[63] However, it is doubtful that this line of argument would even survive an intermediate level of scrutiny.

B. INTERMEDIATE SCRUTINY APPLICATION

1. Serve Important Government Objectives

In the numerous public nudity statute challenges to appear in U.S. courts, there have been many different justifications used to defend the constitutionality of this government action. To pass intermediate scrutiny, statutory gender classifications must serve not only a legitimate, but an important government purpose.[64] The important purpose must be the

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[59] *See, e.g.* State v. Lilley, 204 A.3d 198, 206 (N.H. 2019), *cert. denied*, 140 S. Ct. 858 (2020) (" . . . a proscription that imposes requirements on both men and women, but applies to women somewhat differently.")

[60] *Id.*

[61] Loving v. Virginia, 388 U.S. 1, 8–9 (1967).

[62] *See* United States v. Virginia, 518 U.S. 515, 533 (1996) (discussing *Loving*'s impact on gender classification equal protection analysis).

[63] *See id.*

[64] Craig v. Boren, 429 U.S. 190, 197–198 (1976).

government's actual purpose in establishing the challenged statute, not simply a potential purpose.[65]

Additionally, the statutory gender classification must be substantially related to the achievement of that purpose.[66] While there is no clear standard for what constitutes a close enough fit between the classification and the achievement of an important governmental purpose, courts have emphasized that if a statute's impact is too overinclusive or underinclusive in addressing the problem to be cured, the statute will not pass intermediate scrutiny.[67]

a. Preserving Community Morals and Well-Being

Courts have disagreed about whether protecting morality and the well-being of the community is an important government interest.[68] Many courts agree that the interest itself is important, though this does sometimes lead courts to attack the tightness of fit between the statutes in question and the interest to be achieved.[69] Other courts have rejected the notion that protection of morality is the actual purpose the government is attempting to achieve, and instead argue that it is simply a means to perpetuate gender stereotypes under the guise of protecting community morals.[70]

The concurrence in *Lawrence v. Texas* found that moral disapproval cannot be used as a legitimate government interest to justify government action.[71] Here, lawmakers use the idea of modesty or public morality to voice moral disapproval of women dressing "scandalously" or not wearing enough clothing to cover their breasts. Through the lens of the *Lawrence v. Texas* concurrence, this moral disapproval is not a government interest that could uphold the law under the EPC.

Citing *People v. Santorelli*, the dissent in *Lilley* explains, "one of the most important purposes to be served by the Equal Protection Clause is to ensure that 'public sensibilities' grounded in prejudice and unexamined

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[65] United States v. Virginia, 518 U.S. at 535–36.

[66] Craig, 429 U.S. at 197. The relationship between a challenged statute's classification and how that achieves the statute's asserted important government objective is often referred to as how the "means" of such a statute "fits" its ends. *See, e.g.*, Nirej S. Sekhon, *Equality and Identity Hierarchy*, 3 NYU J.L. & LIBERTY 349, 388 n.196 (2008). In this "means-ends testing," the more substantially related the two are, the "tighter" the fit, militating in favor of constitutionality under the EPC. *See id.*

[67] Orr v. Orr, 440 U.S. 268, 272 (1979).

[68] *See, e.g.*, Ways v. Cty. of Lincoln, 331 F.3d 596, 600 (8th Cir. 2003).

[69] *Id.*

[70] State v. Lilley, 203 A3d. 198, 206 (N.H. 2019), *cert. denied*, 140 S. Ct. 858 (2020).

[71] Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring).

stereotypes do not become enshrined as part of the official policy of government."[72] Despite this, the majority of the New Hampshire Supreme Court in *Lilley* accepted that Laconia's public nudity ordinance was grounded in the purpose of supporting "public health, safety, morals, and public order."[73]

The idea of modesty on its own appears to be a weaker justification for gender classifications in public nudity statutes. Using modesty as a justification opens the door for arguments concerning biological differences versus historical stereotypes about women's bodies and demeanor. Further, if it is determined that female breasts are so sexual that they need to be covered, it could also be found that women find male toplessness equally sexualized, so equal covering would need to exist for modesty to be fairly achieved.

b. Traffic Safety

The city of Fort Collins listed the promotion of traffic safety as one of the city's primary justifications for a gender classification within its public nudity statute, which was challenged in *Free the Nipple–Fort Colins*.[74] Fort Collins explained that if female toplessness were allowed, women would walk around without shirts, and this would distract drivers, resulting in an increase in traffic accidents.[75] The U.S. Supreme Court, however, already decided in another gender classification case, *Craig v. Boren*, that while traffic safety may be an important government purpose, the means-end fit must be very tight in order for a law to surpass intermediate scrutiny.[76] In *Craig*, a law that created different drinking ages for young men and women in order to prevent traffic accidents was unconstitutional because it was both underinclusive and overinclusive.[77] Female toplessness bans seem to suffer from the same deficiency as the alcohol statute in *Craig*. It is possible that a gender-based classification in the form of a female toplessness ban could promote traffic safety. However, there are many other ways to promote traffic safety that would be more closely related to and effective in targeting the issue.[78]

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[72] Lilley, 204 A.3d at 224 (Bassett, J., dissenting).

[73] Lilley, 204 A.3d at 214 (majority opinion).

[74] Free the Nipple–Fort Collins v. Cty. of Fort Collins, 916 F.3d 792, 804 (10th Cir. 2019).

[75] *Id*.

[76] Craig v. Boren, 429 U.S. 190, 199 (1976).

[77] *Id*.

[78] Free the Nipple–Fort Collins, 916 F.3d at 805.

The court in *Free the Nipple–Fort Collins* also expressed disbelief at the genuineness of Fort Collins's claim that traffic safety was the city's primary objective in creating the female toplessness law.[79] The court pointed to the requirement laid out in *United States v. Virginia* that a gender-based classification must be "genuine" and not rely on "overbroad generalizations."[80] A ban on female toplessness seemed, to the court, to fall into the category of a sweeping generalization and was not a legitimate justification for the statute.[81]

c. Protecting Children

The city of Fort Collins also listed the protection of children as one of their justifications for a female toplessness ban.[82] Fort Collins expressed fear that if female-toplessness were legal, women would walk around topless regularly, and this would scandalize the children living in the community.[83] The Tenth Circuit Court of Appeals, however, pointed out that some large neighboring cities had not banned female toplessness, and there had been "no evidence of any harmful fallout."[84]

The opinion further explained that Fort Collins's fears are not based on actual biological differences between female and male nipples, but on the stereotypes that exclusively accompany female breasts.[85] Fort Collins had an exception to the female toplessness law for breastfeeding, which is the main biological difference between male and female breasts.[86] Therefore, the biological difference between female and male breasts cannot be used to justify the gender classification in this case. The issue, therefore, must be the societal sexualization of female breasts and the negative stereotype that follows.[87]

Moreover, children are exposed to oversexualized images of women every day in advertising and entertainment.[88] A woman going topless at the beach, for example, would be much less "damaging" than the images in the

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[79] *Id*. at 804.
[80] *Id*.
[81] *Id*.
[82] *Id*. at 804.
[83] *Id*. at 803.
[84] Free the Nipple–Fort Collins, 916 F.3d at 802.
[85] *Id*. at 803.
[86] *Id*.
[87] *Id*.
[88] Luke Boso, *A (Trans)Gender-Inclusive Equal Protection Analysis of Public Female Toplessness*, 18 LAW & SEX. 143, 148 (2009).

media that children consume, which already present sexualized images of women's bodies.

On the other hand, a woman going topless in a public area is different than a sexualized female image in the media. Parents often can control what media their children consume and may deem which images are appropriate for their children to see. Additionally, if the sexualized images are promoted by a company, parents may choose not to shop at that store and create pressure to tone down the sexuality portrayed in the images to something more kid friendly.

A parent has much less ability to control who a child will see or interact with when going to a public space in the community (e.g., to the local pool). Additionally, the only parental recourse would be to boycott those public spaces, which could become difficult if more women make the decision to go topless. Unlike media, which parents can curate for their children's viewing experience, parents are powerless over who is present in public spaces around their children.

However, this returns to the issue of moral disapproval. The government cannot forbid a certain race of people from going to a public pool because the majority finds that exposing their children to the other race is against their moral views. The key question is whether intermediate scrutiny affords gender classifications a level of protection similar to that given by strict scrutiny regarding racial classifications.

d. Protecting Women from Sexual Assault

The government also has argued that it implements female toplessness bans for the purpose of protecting women from physical or sexual assault.[89] Whether or not the sexualization of women's breasts is based on biological differences or historical stereotypes, the government claims that society does view women's breasts as sexual objects. Therefore, if the government allowed women to go topless, women would be at higher risk of being sexually assaulted, and the government has a legitimate interest in protecting women from these types of attacks.

However, this argument is based on historical gender stereotypes that view women as in need of third-party protection. Nassim Alisobhani explains that the "[p]aternalistic notions that a woman needs the law to protect her from a man's gaze and his uncontrollable desire to touch her if he sees her bare chest undermine the struggle for gender equality."[90] Instead of focusing on the act of physical or sexual assault, the government's

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[89] *Id*.

[90] Alisobhani, *supra* note 49, at 300.

justification focuses on the victim and attempts to regulate victim behavior instead of focusing on physical assault by men.

If a court were to accept this as a legitimate government interest, the difficulty then would lie in showing that it is substantially related to that achievement. Furthermore, as Alisobhani points out, both men and women do things every day that in one way or another increase the risk of physical or sexual assault.[91] Why should female toplessness, in particular, be forbidden?

Overall, protecting women is most likely the weakest governmental interest to be put forward. The argument for a paternalistic legislature ironically highlights the gender stereotypes that are being considered and perpetuated when the government seeks to create and uphold gender classifications in nudity laws.

2. Substantially Related to Achievement

In order for a law to pass an intermediate scrutiny analysis, there must be both an important government objective and a substantial relation to the achievement of that objective.[92] Unlike a rational basis review, which tolerates laws that are underinclusive or overinclusive,[93] intermediate scrutiny requires a much tighter fit.[94]

a. It is Substantially Related

Whether or not its beliefs are based in stereotype, society may oppose public female toplessness.[95] If the judiciary accepts the protection of morals and public well-being as an important government purpose, this seems to be a close fit between the law and the purpose to be achieved. Additionally, it would be difficult to create a more tailored law to achieve the same purpose if the female nipple is really the core of the problem being addressed.

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[91] *Id*.

[92] United States v. Virginia, 518 U.S. 515, 524 (2016).

[93] *See* Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 109–111 (1949) (concluding that a state law, which was substantially underinclusive, was not necessarily impermissible under rational basis review).

[94] *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny under the EPC to require gender-based classifications be substantially related to the achievement of an important government purpose).

b. It is NOT Substantially Related

Depending on which purpose is accepted by the court, however, gender classifications may not be found to be substantially related to their respective statute's purpose. As discussed earlier, for example, there is a major fit issue with regard to the purpose of traffic safety. This would present both an underinclusive and an overinclusive problem. Female toplessness laws would be underinclusive in promoting traffic safety because many traffic accidents and unsafe driving practices have nothing to do with seeing topless women. The laws are overinclusive because not all people who see topless women would resultingly become unsafe drivers or cause an accident.

This fit issue is exacerbated even further with regard to the goal of maintaining public order. The majority in *Free the Nipple–Fort Collins* illustrated this fit issue:

> A female-only toplessness ban strikes us as an unnecessary and overbroad means to maintain public order and promote traffic safety 'when more accurate and impartial lines can be drawn.' . . . For instance, the City could abate sidewalk confrontations by increasing the penalties for engaging in offensive conduct . . . . But the City can't impede women's (and not men's) ability to go topless unless it establishes the tight means-ends fit that intermediate scrutiny demands.[96]

Additionally, there is a fit issue with the achievement of protecting women from sexual assault. There is an obvious alternative set of laws that are a much tighter fit for achieving these goals: laws that target the perpetrators, rather than victims, of sexual assault.

Finally, a gender-neutral public nudity statute would equally be able to preserve the modesty and wholesome values of the community. A law that requires both genders to cover their nipples in public would achieve the same purpose without the gender classification.

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[96] Free the Nipple–Fort Collins v. Cty. of Fort Collins, 916 F.3d 792, 804 (10th Cir. 2019).

VI. IMPLICATIONS AND CONSEQUENCES OF PUBLIC NUDITY LAWS AS CONSTITUTIONAL OR UNCONSTITUTIONAL

A. TRANSGENDER INDIVIDUALS

Legal gender classifications are not as simple as they were once understood. There are additional implications to having gender classifications that are based on anatomical sex, because there are people who do not identify with the sex that they were born as.[97] Thus, it must be clearly established whether a woman's birth sex or gender identity determines who is regulated by the law.

Many courts have determined that "the common meaning of male and female, as those terms are used statutorily. . . refer to immutable traits determined at birth."[98] This raises the question: what happens when someone who is born as anatomically male transitions to female? If the law classifies this person as male, then is this person legally allowed to show their breasts in public under the current public nudity statutes? This could potentially raise fit issues under the intermediate scrutiny analysis. A law prohibiting female toplessness then would not have the effect of shielding society from the female breast.[99]

Further, how would courts handle the opposite scenario: what happens when someone anatomically female at birth transitions to male and goes in public topless? Would it matter if the transgender man had received top surgery? Would local governments begin to legislate what determines that a person is "transgender enough" to be included or excluded from the toplessness bans?

One possible solution is to enact legislation that forbids female breasts from being uncovered, as opposed to forbidding people who were born as women or identify as women from exposing their breasts. However, while this might legally solve some issues, it still ignores the wider implications of gendered nudity statutes. If, at a local public pool, a transgender man decides to go swimming without a shirt, how can our law balance respect for each individual's identity and personal freedom while also preserving the important purposes laid out by the government? There is also much more awareness and openness about gender fluidity outside of the transgender community that further complicates any potential solution that

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[97] *See, e.g.* Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, WILLIAMS INST. (June 2016), https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states [https://perma.cc/B2GV-EYEV].

[98] Bosso, *supra* note 88, at 146.

[99] *Id.*

legislators may be considering.[100] Society's view of sexuality and gender is changing,[101] and legislators need to be aware of these changes to ensure that all people are protected and that all voices are being heard—not just those who fit into the historical status quo.

B. BREASTFEEDING

For the most part, public nudity statutes contain exceptions for breastfeeding in public—almost all states have written the right to publicly breastfeed into state law.[102] Additionally, while there is no federal law creating a right to breastfeed in public, there is an exception written into law that allows women to breastfeed on federal property.[103]

However, some of these laws have additional requirements for mothers that require them to breastfeed in a way that "adhere[s] to societal expectations for women's supposed natural tendency for modesty."[104] Some states require women to breastfeed "with discretion" in order to receive protection against public indecency laws, and many laws include language on the importance of modesty while breastfeeding a child.[105]

While it is important to recognize that these states have taken steps to protect breastfeeding mothers, the additional modesty requirements perpetuate a stigma around female breasts, which at their biological core are meant to feed infants. The breastfeeding laws with modesty requirements "reinforce a narrow conception of appropriate womanhood and motherhood."[106] This focus on modesty in the context of breastfeeding in public suggests that the concern regarding female toplessness is rooted in stereotypes about breasts being sexual, as opposed to their sexuality being inherent in the breasts themselves. If the concern were not sexual, then using breasts for their primary function of feeding an infant in public would not merit additional modesty requirements.

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[100] Katy Steinmetz, *Beyond 'He' or 'She': The Changing Meaning of Gender and Sexuality*, TIME, Mar. 16, 2017, https://time.com/magazine/us/4703292/march-27th-2017-vol-189-no-11-u-s [https://perma.cc/S5E3-495F].

[101] *Id*.

[102] Meghan Bone, *Lactation Law*, 106 CALIF. L. REV. 1829, 1842 (2018).

[103] *Id*. at 1843.

[104] *Id*. at 1862–63.

[105] *Id*.

[106] *Id*. at 1867.

C. WOMEN'S RIGHTS AND EMPOWERMENT

Many of the lawsuits which challenge public nudity statutes as violations of the EPC are brought by people who are fighting for the freedom of women to go topless in the name of female empowerment.[107] This discourse is based around the argument that the sexualization of breasts hampers one's ability to hold a place in society equal to that of cisgender men.[108] However, there are some arguments that suggest invalidating nudity statutes with gender classifications could hurt women empowerment movements.[109]

The dissent in *Free the Nipple–Fort Collins* argues that allowing female toplessness could result in increased harassment and objectification of women.[110] Even if a woman does not consider her own toplessness sexual, objectification is determined not by intent, but by the perception of bystanders.[111] Since society considers female toplessness sexual in nature, according to the dissent, public nudity laws that prevent female toplessness also limit harassment of women in public.[112] However, as previously discussed, focusing on harassment to construe such statutes as protecting women ignores the fact that the root of the problem is *members of the public* objectifying women.[113] Instead of trying to prevent harassment by regulating women's clothing, it would be far more effective to create regulations that target the problematic behavior in this situation: sexual harassment and assault.

The dissent in *Free the Nipple–Fort Collins* also argues that sexualization of female breasts is not a negative stereotype, because women want their husbands to find them sexy.[114] The dissenting judge explained, "there is nothing inherently invidious to an adult of either gender in

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[107] *See* Free the Nipple–Fort Collins v. Cty. of Fort Collins, 916 F.3d 792, 811 (10th Cir. 2019).

[108] *See, e.g.,* Jaimee Swift & Hannah Gould, *Not an Object: On Sexualization and Exploitation of Women and Girls*, UNICEF USA (Jan. 15, 2020), https://www.unicefusa.org/stories/not-object-sexualization-and-exploitation-women-and-girls/30366 [https://perma.cc/X8EG-VAAS].

[109] Free the Nipple–Fort Collins, 916 F.3d at 811 (Hartz, J., dissenting).

[110] *Id*.

[111] *Id*. at 805.

[112] *Id*. at 809.

[113] *Cf*. Transcript of Oral Argument at 20, Frontiero v. Richardson, 411 U.S. 677 (1973) (No. 71-1694) (argument by Ruth Bader Ginsburg) ("I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks.") (quoting Sarah Gintey); Frontiero, 411 U.S. at 686 (". . . . the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .") (internal quotation marks and citation omitted).

[114] Free the Nipple–Fort Collins, 916 F.3d at 809 (Hartz, J., dissenting).

declaring that an inherent biological, morphological feature of his or her body is erotic. That view would be inconsistent with the fundamental role of sexual attraction in our most revered social institution—marriage; to believe that a spouse is sexually attractive is not to demean the spouse."[115] However, the issue here is not whether individuals find a body part sexually attractive. The issue is the regulation of a class of person's behavior based on what society finds sexually attractive, and purported values of modesty. It would not be inherently depraved for women to decide that men's ears are sexy, but it would not be appropriate for them to say that all men therefore must cover their ears.

D. BREASTS AS SEXUAL IN OTHER CONTEXTS

If gender classifications within public nudity statutes are found to be unconstitutional, the implications could ripple across the legal community. In order to find public nudity statutes with gender classifications unconstitutional, a court would almost certainly have to determine that the sexualization of female breasts is based solely on harmful, societal stereotypes. This could lead to questions surrounding laws and policies involving women's bodies in other areas of the law, such as employment or criminal law.[116]

Society, generally, views a stranger patting a man's chest as a slightly uncomfortable, if not harmless, act. However, a stranger approaching a woman and touching her breasts would hardly be seen as harmless, but instead encroach upon sexual assault. So, can breasts be sexual in some situations and not others? If society is to accept that breasts are only sexualized due to societal stereotypes, the answer would be no. If female breasts are then as non-sexual as male breasts, this opens up new questions regarding definitions of groping or workplace harassment, among other concepts.

One possible solution could be to continue to label behavior that sexualizes breasts as inappropriate, even if a court decides that breasts are only sexual because of societal stereotypes. However, this reasoning could spiral quickly. Could walking around without a shirt be seen as behavior that sexualizes breasts? Would gender classifications once again be acceptable in public nudity statutes? If courts were to invalidate gender classifications in public nudity statutes, then judges would need to be clear about why and how this change impacts wider legal jurisprudence.

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[115] *Id*.

[116] Swift & Gould, *supra* note 108.

VII. ROLE OF JUDICIARY IN DETERMINING "CORRECT" OUTCOME

A. ORIGINALISM AND GENDER EXCLUDED FROM EQUAL PROTECTIONS ANALYSIS

The originalist approach to constitutional interpretation bases its reasoning on the meaning of the constitutional provision at the time of ratification, and applies this interpretation to determine present-day application when considering laws in relation to the Constitution.[117] With regard to the EPC, the original purpose of the Fourteenth Amendment was to remedy racial discrimination during the aftermath of the Civil War.[118] It was not originally enacted with the intent to also apply to classifications based on gender.[119] Under an originalist lens, gender is not included under the Equal Protection analysis. Therefore, public nudity statutes with gender classifications would be constitutional under the Fourteenth Amendment.

Additionally, one of the primary purposes of originalism is to prevent moral backsliding.[120] The famous image often utilized by originalists is Ulysses asking to be tied to the mast of his ship to prevent him from potentially giving in to the song of the siren.[121] Originalists believe that morals will degrade over time, so the role of the Constitution is partially to keep morals at the level prescribed at the founding of the country.[122]

Under this lens, public nudity could be seen as a primary example of why the Constitution is in place. Originalists would view a world where the Constitution allowed for public female toplessness as antithetical to the values the Framers were trying to protect. A constitutional argument for female toplessness would likely seem absurd to an originalist thinker, and if put in front of originalist judges, public nudity laws that classify based on gender would almost certainly be found constitutional.

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[117] *See* Michael C. Dorf, *The Living Constitution and Future Generations: The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631, 1661 (2009).

[118] *Id*.

[119] Tsesis, *supra* note 31, at 1670.

[120] Dorf, *supra* note 117, at 1661–63.

[121] *Id*.

[122] *Id*.

B. LIVING CONSTITUTION AND ROLE OF SOCIAL MOVEMENTS IN SHAPING THE CONSTITUTION

The view that the Constitution is a "living document" prescribes the judiciary a role in shaping an evolutionary interpretation of the Constitution.[123] David Strauss suggests that "constitutional change is not the product of shifts in political will, but instead occurs as judges enforce constitutional commitments in changing historical circumstances."[124] Strauss identifies social movement activity as a factor that judges must take into account when interpreting the constitution's meaning.[125]

"Free the Nipple" movements have popped up across the country, as citizens fight to destigmatize female breasts.[126] However, Reva Siegel points out that not all social movements can successfully sway the judiciary's interpretation of the Constitution.[127] A key requirement is that social movements must meet the "public value condition," meaning movements can only successfully influence constitutional interpretation to the extent that "it is persuasive in presenting it as the *nation's*: as required by the principles and as resonant with the memories that comprise the nation's constitutional tradition."[128]

Feminism and the movement towards gender equality are powerful forces in the United States and continue to be staples in political and societal discourse. The "public value condition" is met with the women's rights movement and becomes influential in shaping the public understanding of how the Constitution and government should operate. However, this issue becomes more complicated when discussing female toplessness within the larger movement for gender equality. While there is widespread support for the idea of gender equality, support for female toplessness is not as pervasive.

The symbol of the "bra burning feminist" is still widely acknowledged as emblematic of a radical form of gender equality that resonates with a much narrower audience than the overall gender equality movement.[129]

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[123] Reva Siegel, *The Jurisgenerative Role of Social Movements in U.S. Constitutional Law*, SEMINARIO EN LATINOAMÉRICA DE TEORÍA CONSTITUCIONAL Y POLÍTICA PAPERS 7 (2004).

[124] *Id*.

[125] *Id*. at 8.

[126] *See, e.g*., Free the Nipple–Fort Collins v. Cty. of Fort Collins, 916 F.3d 792, 796 (10th Cir. 2019).

[127] Siegel, *supra* note 123, at 9.

[128] *Id*. at 11–12 (emphasis in original).

[129] Jennifer Lee, *Feminism Has a Bra-Burning Myth Problem,* TIME, June 12, 2014, https://time.com/2853184/feminism-has-a-bra-burning-myth-problem [https://perma.cc/5G3F-TAZB].

Furthermore, if burning a bra is seen as radical, throwing the bra and shirt away completely would likely not capture this "public value condition." The majority of the country might not be ready for a judicial decision that finds female toplessness bans unconstitutional.

C. JUDICIAL RESTRAINT

A competing view of the role of the judiciary would adamantly oppose the use of the U.S. Supreme Court to usher in progressive social change.[130] The idea of judicial or constitutional restraint posits that justices should defer to the other branches of government and only void laws that clearly violate the Constitution.[131]

James Bradley Thayer infamously took the position that the Court should only invalidate statutes when the unconstitutionality is "so clear that it is not open to rational question."[132] This form of judicial review gave overwhelming deference to the legislature in creating laws, as the governmental body was both better suited and structurally entitled to make public policy decisions.[133] A Thayerian view of public nudity statutes would vehemently reject the idea of judicial activism and the judiciary as a means for social movements to produce change.

While Thayer's emphasis on deference has been muted in the past forty years, the preference for a deferential court over an "activist" court remains.[134] Many still believe that the legislature should remain the primary policymaking branch, while courts should only step in when statutes clearly cross the constitutional line.[135] In fact, Alexander Bickel characterized judicial review as "the power to apply and construe the Constitution, in matters of the greatest moment, against the wishes of a legislative majority, which is, in turn, powerless to affect the judicial decision."[136]

Female toplessness may be an issue better solved by the legislature than the courts. Public nudity in many ways presents a subjective moral issue, both in regards to the importance placed on modesty and what it means to be modest. Community views of modesty may vary in different areas, and local governments may be better able to balance the interests in

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[130] Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint,* 100 CALIF. L. REV. 519, 521 (2012).
[131] *Id*.
[132] *Id*. at 522.
[133] *Id*. at 523.
[134] *Id*. at 537.
[135] *Id*.
[136] Alexander Bickel, THE LEAST DANGEROUS BRANCH 20 (1962).

question than the courts. Additionally, because society's understanding of gender and sexuality is constantly evolving, legislatures with an "ear to the ground" might be the most responsive system that is able to address the needs and protections of the local community.

On the other hand, if arguments that female toplessness bans perpetuate harmful stereotypes against women are persuasive, it may be unjust for courts to leave the issue to the legislature. The Court's opinion in *Palmore v. Sidoti* states that while the Constitution and the power of the judiciary to enforce it cannot on their own control bias and prejudice in our society, the judiciary cannot at the same time stand back and allow bias to continue unchallenged.[137] There is little doubt that the female breast is generally considered sexual in the United States. However, there is a real question of whether this view is grounded in negative, historical stereotypes of women's modesty, which could run afoul of the EPC. Can courts ethically stand by and allow legislatures to make decisions that, while embraced by many viewpoints, tolerate and perpetuate harmful stereotypes about women?

VIII. HOW THE SUPREME COURT WOULD AND SHOULD RULE

There is a strong argument for the notion that gender classifications in public nudity statutes have no important government purpose and are based on outdated, historical stereotypes about female bodies and female modesty.[138] However, the thought of outlawing all local ordinances that forbid public female toplessness seems radical and foolhardy. The norm and importance of covering female breasts is incredibly pervasive in U.S. society, to the point that even liberal cities or states may consider legalizing public female toplessness radical.[139] That being said, it must be noted that invalidating gender classifications in public nudity laws is not a guarantee that women have a constitutional right to be topless. On the contrary, the invalidation of the gender classifications would only make public nudity laws gender neutral. A city or state could still decide that, as a matter of public policy, modesty in public needs to be preserved. In doing so, however, governments would need to create gender-neutral statutes. For example, a law stating that both genders' nipples must be covered in public would be constitutional even if the U.S. Supreme Court found gender classifications in nudity statutes unconstitutional.

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[137] Palmore v. Sidoti, 464 U.S. 429, 433 (1984).
[138] *See, e.g.*, Free the Nipple–Fort Collins v. Cty. of Fort Collins, 916 F.3d 792, 803–04 (10th Cir. 2019).
[139] Beaty, *supra* note 48; Shaw, *supra* note 48.

Overall, however, public nudity laws that contain gender classifications are likely constitutional. Maintaining public well-being likely is an important government purpose, and it is certainly an overarching function of a local government.[140] Additionally, while there are almost certainly generalized stereotypes that help explain why there is a societal expectation for women to cover their breasts,[141] there are also real anatomical differences that align with this stereotype.[142] Especially considering the makeup of the current U.S. Supreme Court, if the Court granted the petition for writ of certiorari to *Lilley*, there is a high likelihood that these laws would be found constitutional.

Furthermore, on January 20, 2020, the U.S. Supreme Court denied the petition of certiorari to hear *Lilley* on appeal.[143] Despite there being a split between two high courts regarding the constitutionality of female toplessness bans, the Court denied the opportunity to resolve the debate. This is likely because the issue has not reached a level of ripeness to the point the Court feels any urgency on the issue, particularly since a holding of unconstitutionality would be a radical change, even among more liberal regions. For now, it remains up to lower federal and state courts to determine the constitutionality of these laws with facial gender classifications.

IX. HOW LEGISLATURES SHOULD VIEW PUBLIC NUDITY STATUTES MOVING FORWARD

If the U.S. Supreme Court finds gender classifications in public nudity statutes constitutional, it does not necessarily mean that the statutes are effective or appropriate for many constituencies within the United States. Legislators need to be responsive to the wishes of their constituents, including any minority of constituents whose views are evolving alongside their understanding of society. Transgender individuals and breastfeeding mothers are both statistical minorities,[144] and while women make up at least

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[140] *See, e.g.*, State v. Lilley, 204 A.3d 198, 208 (N.H. 2019), *cert. denied*, 140 S. Ct. 858 (2020) (finding the governmental purposes of "public health, public safety, morals and public order" to be legitimate and noting that "[f]ederal courts have found these to be important or substantial interests under intermediate scrutiny.").

[141] *See, e.g.*, Free the Nipple–Fort Collins, 916 F.3d at 803–04 (holding that female-only public toplessness bans perpetuates the "sex-object stereotype").

[142] *See, e.g.*, Lilley, 204 A.3d at 208 (". . . . men and women are not fungible with respect to the traditional understanding of what constitutes nudity.").

[143] Lilley v. New Hampshire, 140 S. Ct. 858 (2020).

[144] Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, WILLIAMS INST. (June 2016), https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states [https://perma.cc/PSG6-Z2J9]; *Breastfeeding: Data & Statistics,* CTRS. FOR

half of the population,[145] they are still underrepresented in the political process.[146] Therefore, legislators need to think through public nudity statutes carefully and fully consider the implications of the laws, rather than signing off on behalf of antiquated principle beliefs.

X. CONCLUSION

Public nudity statutes are just a piece of the ongoing debate about gender equality and ensuring that women and men are truly equal under the law. Public nudity statutes that contain gender classifications may not be necessary or beneficial moving forward in a society with evolving views about gender, sexuality, and equality. However, it is likely that despite these views, and despite the stereotypes that still surround female toplessness and modesty, public nudity statutes with gender classifications are constitutional under the EPC.

DISEASE CONTROL & PREVENTION, https://www.cdc.gov/breastfeeding/data/facts.html [https://perma.cc/H3QJ-5S69].

[145] *QuickFacts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045 [https://perma.cc/BE6S-PZVS].

[146] Anna Brown, *Despite Gains, Women Remain Underrepresented among U.S. Political and Business Leaders*, PEW RSCH. (Mar. 20, 2017), https://www.pewresearch.org/fact-tank/2017/03/20/despite-gains-women-remain-underrepresented-among-u-s-political-and-business-leaders [https://perma.cc/VJ7W-P93X].