A FIRST AMENDMENT ANALYSIS OF TRANS-EXCLUSIVE SPORTS LAWS

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ABSTRACT

To date, 25 U.S. states have laws or regulations that limit the participation of transgender[1] *athletes to teams that correspond to their birth-assigned sex. Because transgender athletes do not identify with their birth-assigned sex, these laws are accurately characterized as* trans-exclusive sports laws*. They exclude transgender athletes from something that cisgender athletes take for granted—namely, the opportunity to participate in sports on the team that corresponds to one's gender identity. So far, legal challenges have focused on the harms to equality that flow from trans-exclusive sports laws. Important as these are, equality arguments overlook an important aspect of trans-exclusive sports laws: their burdens on freedom of expression. Equal protection arguments overlook the ways in which gender identity is expressive. At the same time, they open the door to the "real differences" doctrine, which limits equal protection liability for sex classifications deemed reflective of "real" differences between men and women.*

This Article develops a novel First Amendment analysis of trans-exclusive sports laws. Specifically, it identifies a conflict between trans-exclusive sports laws and the First Amendment guarantee against compelled speech. In a nutshell, by requiring trans athletes to either play their sport on a team that is publicly identified with their birth-assigned sex or give up their sport altogether, trans-exclusive sports laws compel trans athletes to send a message about their gender identity that these athletes sincerely disavow. By doing so, trans-exclusive sports laws violate the First Amendment guarantee against compelled speech.

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1. In this Article, "transgender" or "trans" is used in the sense identified by the Transgender Law Center: "The term 'transgender' is used to describe people whose gender identity does not correspond to their birth-assigned sex and/or the stereotypes associated with that sex." *10 Tips for Working with Transgender Patients*, TRANSGENDER L. CTR., https://transgenderlawcenter.org/resources/10tips/ [https://perma.cc/AJC5-E82E] (last visited Oct. 15, 2023); *see also* Grimm v. Gloucester County School Board, 972 F.3d 586, 596 (4th Cir. 2020) ("'Transgender' is . . . 'used as an umbrella term to describe groups of people who transcend conventional expectations of gender identity or expression.'" (quoting *LGBTQ+ Glossary*, PFLAG, http://pflag.org/glossary [https://perma.cc/CB2R-6LDB] (last visited Oct. 15, 2023))).

The argument for this conclusion proceeds as follows. Part I provides an overview of trans-exclusive sports laws (I.A). It then identifies principled, historical, and doctrinal reasons to analyze trans-exclusive sports laws from the perspective of the First Amendment (I.B). In Part II, the Article dives deeper into the First Amendment, distinguishing two strands of compelled speech doctrine: compelled association and compelled affirmation (II.A). It then extracts a unifying principle underlying both lines of doctrine: the Authenticity Principle, which bars the State from aiming to foster adherence to a particular ideological point of view by compelling someone to engage in an activity whose social meaning implies affirmation of an attitude or belief that they sincerely disavow (II.B). Finally, Part III demonstrates that trans-exclusive sports laws violate the Authenticity Principle. It demonstrates that trans-exclusive sports laws are indeed compulsory, notwithstanding the fact that transgender athletes have the nominal option of refraining from sports altogether (III.A). And it shows that trans-exclusive sports laws violate both elements of the Authenticity Principle (III.B). Indeed, compared to other exemplars, trans-exclusive sports laws arguably embody a compelled speech violation par excellence*. Hence, unless these laws are narrowly tailored to some compelling state interest, they are unconstitutional on First Amendment grounds alone.*

I.
THE HARMS OF TRANS-EXCLUSIVE SPORTS LAWS

A. Trans-Exclusive Sports Laws: An Overview

Imagine an athlete named Arya.[2] Arya was designated male at birth based on a doctor's examination of her body. Since a young age, Arya has gravitated towards objects and activities associated in our culture with girls. At school, Arya has preferred playing with girls; at home, Arya has preferred toys and games typically associated with girls. Arya has always felt more comfortable wearing clothing designated for girls, like dresses and skirts. When Arya turned five, she announced that she wanted to be treated as a girl. In particular, she wanted to be addressed using feminine pronouns. And when it came time to use school bathrooms and locker-rooms, and to pick a team in P.E. class, Arya unambivalently preferred joining the girls. Arya was able to find a community on the girls' soccer team at her school. Her therapist attests that this activity has made a significant difference to Arya's emotional and mental health. Now 12, Arya lives in a state

2. In opening the discussion with a fictional character, this Article follows the lead of Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. REV. L. & SOC. CHANGE 89 (2015). Like Weatherby's scenario, this scenario is based on first-person narratives of transgender persons and transgender athletes in particular, though it is not intended to model the experiences of any one author. Narrative sources consulted in writing this scenario include the following: JULIA SERANO, WHIPPING GIRL: A TRANSSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY (2007); MIA VIOLET, YES, YOU ARE TRANS ENOUGH: MY TRANSITION FROM SELF-LOATHING TO SELF-LOVE (2018); ANN TRAVERS, THE TRANS GENERATION: HOW TRANS KIDS (AND THEIR PARENTS) ARE CREATING A GENDER REVOLUTION (2018); Pat Griffin, *'Ain't I a Woman?': Transgender and Intersex Student Athletes in Women's Collegiate Sports*, *in* TRANSFEMINIST PERSPECTIVES IN AND BEYOND TRANSGENDER AND CRITICAL STUDIES 98–111 (Anne Enke ed., 2012); Tijen Butler, *10 Transgender Athletes Explain Why It's Fair to Compete*, PINK NEWS (Apr. 4, 2019), https://www.pinknews.co.uk/2019/04/04/transgender-athletes-why-fair-compete/ [https://perma.cc/F6LV-52WE].

that recently passed a law requiring all public school athletic activities, including the inter-scholastic girls' soccer team on which Arya excels, to admit athletes based solely on the sex that is listed on the athlete's birth certificate. Because Arya's birth certificate identifies Arya as male, Arya faces a choice: play on the boys' soccer team or give up soccer.[3]

This scenario is not uncommon. Twenty-five U.S. states now require transgender athletes to compete on the team that corresponds to their birth-assigned sex.[4] Because transgender athletes do not identify with their birth-assigned sex, these laws are accurately called *trans-exclusive sports laws*. They exclude transgender athletes from something that cisgender athletes take for granted: the opportunity to participate in sports on the team that corresponds to one's gender identity. At the federal level, former Representative Tulsi Gabbard introduced the Protect Women's Sports Act in 2020, which sought to amend Title IX to categorically ban transgender women and girls from competing on the sports team that corresponds to their gender identity.[5] More recently, the Department of Education issued a Notice of Proposed Rulemaking that would prohibit athletic associations from "categorically" barring athletes who are trans from participating on the team that corresponds to their gender identity.[6] However, the proposed Rule would empower universities and K-12 schools to selectively limit the participation of transgender athletes on the basis of, *inter alia*, considerations of competitive fairness.[7] Meanwhile, states with trans-inclusive sports policies—that is, policies that permit trans athletes like Arya to compete on the team that corresponds to their gender identity—have had to play defense. Specifically, some cisgender athletes have argued that Title IX prohibits the inclusion of transgender women and girls on women's teams, though they have not prevailed.[8]

Before the latest flurry of legislative activity targeting trans participation in sports, there was a similar campaign targeting access to bathrooms by trans

3. Evidently, this example involves an athlete who was designated male at birth. This reflects the fact that, as the following discussion makes clear, the lion's share of litigation and controversy around trans participation in sports has centered on the possibility of trans women and girls participating on female-designated teams. By contrast, the possibility of trans men and boys participating on male-designated teams has not generated nearly the same degree of controversy. Plausibly, this reflects a difference in what athletes are perceived as having an "unfair advantage." *See, e.g.*, Deirdre Cohen, *Diving Into the Debate Over Trans Athletes*, CBS NEWS (Mar. 27, 2022), https://www.cbsnews.com/news/diving-into-the-debate-over-trans-athletes/ [https://perma.cc/D6WY-EZBN].

4. *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT (Mar. 5, 2024), https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans [https://perma.cc/FHK7-BQR5].

5. Protect Women's Sports Act, H.R. 8932, 116th Cong. (2020).

6. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860 (proposed Apr. 13, 2023) (to be codified at 34 C.F.R. pt. 106).

7. *Id.*

8. Soule v. Conn. Ass'n of Schs., 57 F.4th 43 (2d Cir. 2022) (affirming district court's dismissal of plaintiffs' Title IX claims for injunctive relief for lack of standing).

people.[9] There, as here, anti-trans advocates framed their case in terms of protecting cisgender women from male predation. But there is no evidence that allowing trans women and girls to use female-designated bathrooms actually exposes cisgender women and girls to a higher risk of assault.[10] Simply put, that is a false transphobic trope. There is, however, evidence that trans-exclusive bathroom policies expose trans women and girls to a heightened risk of assault, hate crimes, and sexual abuse.[11] Needless to say, these so-called "bathroom bills" form part of a long history of the state using its coercive power to compel persons who are transgender or gender non-conforming to comply with the social norms applied to their birth-assigned sex. This long history includes gender-policing sumptuary

9. *See, e.g.*, Emily Bazelon, *Making Bathrooms More 'Accommodating'*, N.Y. TIMES MAG. (Nov. 17, 2015), https://www.nytimes.com/2015/11/22/magazine/making-bathrooms-more-accommodating.html [https://perma.cc/EG3L-NHF9]; Diana Tourjée, *New Transphobic 'Bathroom Bill' Targets Trans Women but Not Trans Men*, VICE (Dec. 20, 2016), https://www.vice.com/en/article/9k9wv3/new-transphobic-bathroom-bill-targets-trans-women-but-not-trans-men [https://perma.cc/D3YN-RCEP]; Colin Campbell, Jim Morrill & Steve Harrison, *Governor's Office: HB2 Repeal Possible if Charlotte Drops LGBT Ordinance First*, CHARLOTTE OBSERVER (Sept. 16, 2016), http://www.charlotteobserver.com/news/politics-government/article102255582.html [https://perma.cc/ESM2-E8WU]; David Badash, *NC Gov. Warns Charlotte Protecting LGBT People Will Bring 'Immediate' State Consequences*, NEW CIV. RTS. MOVEMENT (Feb. 22, 2016), https://www.thenewcivilrightsmovement.com/2016/02/nc_gov_warns_charlotte_protecting_lgbt_people_in_law_will_bring_immediate_state_consequences/ [https://perma.cc/H5WM-WBBL].

10. Julie Moreau, *No Link Between Trans-Inclusive Policies and Bathroom Safety, Study Finds*, NBC NEWS (Sept. 19, 2018), https://www.nbcnews.com/feature/nbc-out/no-link-between-trans-inclusive-policies-bathroom-safety-study-finds-n911106 [https://perma.cc/D2VJ-XTGT]; Stevie Borrello, *Sexual Assault and Domestic Violence Organizations Debunk 'Bathroom Predator Myth'*, ABC NEWS (Apr. 22, 2016), https://abcnews.go.com/US/sexual-assault-domestic-violence-organizations-debunk-bathroom-predator/story?id=38604019 [https://perma.cc/9YJV-54SY]; Carlos Maza & Luke Brinker, *15 Experts Debunk Right-Wing Transgender Bathroom Myth*, MEDIA MATTERS (Mar. 20, 2014), http://mediamatters.org/research/2014/03/20/15-experts-debunk-right-wing-transgender-bathro/198533 [https://perma.cc/DWV6-NCWL].

11. For example, a 2019 study found that trans and non-binary adolescents who attended schools that restricted their bathroom and locker room access were more likely to experience sexual assault than their trans and non-binary peers in schools without such restrictions. Edith Bracho-Sanchez, *Transgender Teens in Schools with Bathroom Restrictions Are at Higher Risk of Sexual Assault, Study Says*, CNN NEWS (May 6, 2019), https://www.cnn.com/2019/05/06/health/trans-teens-bathroom-policies-sexual-assault-study/index.html [https://perma.cc/JD2K-LXVY].

laws,[12] selectively applied "public indecency" statutes,[13] and affirmative "trans panic" defenses for hate crimes perpetrators[14]—to name a few.[15]

Proponents of trans-inclusive policies have not stayed on the sidelines. One case that is representative of both the trans-exclusive state laws that have been passed and the legal claims so far made against them is *Hecox v. Little*.[16] In 2020, Idaho passed a statewide ban on trans-inclusive sports participation. The Idaho ban required public colleges and universities to designate all of their intramural and interscholastic sports teams as for "males, men, or boys," "females, women, or girls" or "coed or mixed," specified that no person of the "male sex" may participate on any team designated for "females," and provided that if "dispute[d]," the sex of a prospective participant would be determined on the basis of a physical exam "relying only on one (1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels."[17] On behalf of two trans female athletes, the ACLU and Legal Voice brought suit.[18] They argued that the Idaho ban (1) impermissibly discriminates against trans female athletes and female athletes in general "on the basis of sex" in contravention of Title IX, (2) impermissibly discriminates against trans female athletes and women in general in contravention of the Fourteenth Amendment's Equal Protection Clause, and (3) impermissibly violates rights to privacy implicit in both the Fourteenth Amendment's Due Process Clause and the Fourth Amendment's guarantee against unreasonable searches and seizures.[19] They won the first round. Finding that the plaintiffs were likely to succeed on the merits of these claims, and that they would suffer irreparable harm if the law were not enjoined, the district court issued an injunction.[20]

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12. Sumptuary laws regulate civilian dress in public, and have frequently been used to criminalize gender nonconforming dress. *See generally* Int'l Comm'n of Jurists, *Gender Expression and Cross-Dressing*, *in* SEXUAL ORIENTATION AND GENDER IDENTITY CASEBOOK, https://www.icj.org/sogi-casebook-introduction/chapter-seven-gender-expression-and-cross-dressing [https://perma.cc/N3AY-UX7C] (last visited Nov. 17, 2023).

13. *See, e.g.*, JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 45-69 (2011) (discussing post-Stonewall use of, *inter alia*, public indecency statutes to regulate gender expression).

14. *See, e.g.*, Cynthia Lee, *The Trans Panic Defense Revisited*, 57 AM. CRIM. L. REV. 1411 (2020) (describing and normatively evaluating the "trans panic" defense).

15. *See generally* SUSAN STRYKER, TRANSGENDER HISTORY: THE ROOTS OF TODAY'S REVOLUTION (2017) (providing an overview of transgender history since World War II); MICHAEL BRONSKI, A QUEER HISTORY OF THE UNITED STATES (2011) (broader overview of LGBTQ+ history in the Americas since before 1492); C. RILEY SNORTON, BLACK ON BOTH SIDES: A RACIAL HISTORY OF TRANS IDENTITY (2017) (conceptual genealogy of the social categories of transness and blackness).

16. 479 F. Supp. 3d 930 (D. Idaho 2020).

17. IDAHO CODE § 33-6203.

18. Complaint, Hecox v. Little, 479 F. Supp. 3d 930 (D. Idaho 2020) (No. 1:20-cv-00184).

19. *Id.* at 50–52 (Title IX claim); *id.* at 43–46 (Equal Protection claim); *id.* at 46–49 (Due Process and Fourth Amendment claims).

20. Hecox v. Little, 479 F. Supp. 3d 930, 988 (D. Idaho 2020), *aff'd*, Hecox v. Little, 79 F.4th 1009 (9th Cir. 2023).

This mix of constitutional equality arguments, statutory equality arguments, and privacy arguments typifies the other challenges brought so far to bans on trans-inclusive sports policies.[21] By contrast, I am not aware of any First Amendment challenges that have been brought to trans-exclusive sports laws. This is not because the First Amendment has played no role in advancing transgender rights more broadly. To the contrary, there is a small but accumulating body of cases that have found First Amendment harms behind a range of trans-exclusive policies.[22] Trans-exclusive policies found to have First Amendment infirmities include a school's requirement that a transgender girl not wear conventionally feminine clothing and accessories,[23] an employer's requirement that a transgender woman use the men's room until she supplied something that would count as "proof" of transition,[24] and an employer's dismissal of a transgender woman subsequent to her transition.[25] With respect to compelled speech in particular, legal scholars have argued that prohibiting people who are transgender from using the bathroom corresponding to their gender identity violates the First Amendment guarantee against compelled speech.[26] However, there is no sustained defense in the scholarly literature or the case law of the specific claim that requiring trans athletes to

21. *See, e.g.*, Complaint, D.N. v. DeSantis, No. 0:21-cv-61344, 2023 WL 7323078 (S.D. Fla. Nov. 6, 2023), 2021 WL 2688957 (asserting Title IX and equal protection rights of trans girl not to be excluded from girls' volleyball and soccer teams); Complaint, Doe v. Horne, 2023 WL 4661831 (D. Ariz. July 20, 2023) (No. 4:23-cv-00185-JGZ) (asserting rights under Title IX, Equal Protection Clause, Americans with Disabilities Act, and Rehabilitation Act); Complaint, B.P.J. v. W. Va. State Bd. of Educ., 550 F. Supp. 3d 347 (S.D. W. Va. 2021) (No. 2:21-cv-00316) (asserting Title IX and equal protection rights in challenge to state law excluding trans girl from girls' cheerleading team). Notably, the Fourth Circuit enjoined the state law at issue in *B.P.J.*, pending review on the merits. B.P.J. v. W. Va. State Bd. of Educ., No. 23-1078, 2023 WL 2803113 (4th Cir. Feb. 22, 2023), *application to vacate injunction denied*, 143 S. Ct. 889 (2023) (mem.).

22. For scholarly overviews, see, for example, Kingsly Alec McConnell, *The Liberty Impact of Gender*, 95 WASH. L. REV. 459 (2020); Kara Ingelhart, Jamie Gliksberg & Lee Farnsworth, *LGBT Rights and the Free Speech Clause*, AM. BAR ASS'N (Apr. 14, 2020), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2020/march-april/lgbt-rights-free-speech-clause [https://perma.cc/83CW-T57E]; Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. WOMEN & L. 187 (2013); Sonia Katyal, *The 'Numerus Clausus' of Sex*, 84 U. CHI. L. REV. 389 (2017); Taylor Flynn, *Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms*, 118 TEMP. POL'Y & CIV. RTS. L. REV. 465 (2009).

23. Doe ex rel. Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *3 (Mass. Super. Ct. Oct. 11, 2000) (trans girl's "dressing in clothing and accessories associated with the female gender . . . express[es] her identification with that gender").

24. Kastl v. Maricopa Cnty. Cmty. Coll. Dist., No. Civ.02–1531PHX–SRB, 2004 WL 2008954, at *9, n.13 (D. Ariz. June 3, 2004) (trans woman's "attire may be understood as an expression of her change in gender identity, as it is clearly understood as such by her employer and the restroom patrons who complained of her use of the women's restroom").

25. Monegain v. Va. Dep't of Motor Vehicles, 491 F. Supp. 3d 117, 136 (E.D. Va. 2020) (trans woman's "expression of a female identity through feminine dress . . . was expressive of her gender to the 'public at large'" (quoting *Kastl*, 2004 WL 2008954, at *9)).

26. Weatherby, *supra* note 2 (arguing that bathroom choice is symbolic conduct communicating a particularized message about gender identity and that requiring trans students to use bathrooms corresponding to their birth-assigned sex violates their First Amendment right against compelled speech).

play on the team that corresponds to their birth-assigned sex but not to their gender identity constitutes compelled speech. That is the claim developed and defended in this Article.

B. The Case for a First Amendment Case

This Section identifies principled, historical, and pragmatic reasons for analyzing trans-exclusive sports laws from the perspective of the First Amendment. The first, principled reason for a First Amendment approach is that gender identity itself is, in certain important respects, expressive. There is a large body of scholarship making the case that a person's gender identity is both communicated and constituted by acts of gender expression.[27] Furthermore, playing on a sports team that is publicly identified with a particular sex is one of the most salient forms of gender expression in our culture.[28] Hence, any legal analysis of trans-exclusive sports laws that leaves out the First Amendment will fail to do justice to the underlying social phenomenon being analyzed. The second, historical reason is that an expressive analysis would *reclaim* the First Amendment for LGBTQ+ rights. In the current moment, it is predominantly opponents of LGBTQ+ inclusion who claim the authority of the First Amendment.[29] However, the LGBTQ+ civil rights movement successfully invoked the values of free speech and free association.[30] Accordingly, an expressive analysis would both revive that history and break the rhetorical monopoly on the First Amendment currently enjoyed by opponents of inclusion. Finally, the third, doctrinal reason is that violations of the First Amendment must satisfy a higher degree of scrutiny than sex-based denials of equal protection; at the same time, liability for First Amendment violations is not circumscribed by the "real differences" loophole.[31] After making these points, the Section concludes by addressing pragmatic concerns about the viability of a First Amendment case against trans-exclusive sports laws.

1. Principled Reasons for a First Amendment Analysis

We begin with first principles. What is gender? What does it mean to be a boy or a girl, a man or a woman? One view is *biological essentialism*. Biological essentialism can be understood as the conjunction of three main claims.[32] The first claim is that there are essential, biological differences between people assigned the male sex at birth and people assigned the female sex at birth in virtue of which some people belong to the *male sex* and some people belong to the *female sex.*

27. *See infra* notes 43–46 and accompanying text.
28. *See infra* notes 52–54 and accompanying text.
29. *See infra* notes 61–66 and accompanying text.
30. *See infra* notes 67–74 and accompanying text.
31. *Infra* notes 75–78 and accompanying text.
32. Mari Mikkola, *Gender Essentialism and Anti-Essentialism*, *in* THE ROUTLEDGE COMPANION TO FEMINIST PHILOSOPHY 168, 170 (Ann Garry, Serene Khader & Alison Stone, eds. 2017).

These differences are thought to be "essential" in the sense that all (and only) male persons have the relevant "male" traits, while all (and only) female persons have the relevant "female" traits. The putatively essential sex differences are variously defined in terms of chromosomes, hormone levels, external genitalia, or other attributes.[33] Another claim is that there are essential social and cultural differences between people assigned male at birth and people assigned female at birth in virtue of which some people have a *masculine gender identity*—they are men or boys—and some people have *a feminine gender identity*—they are women or girls. These differences are typically defined by reference to gender stereotypes: for example, men are competitive, ambitious, and oriented towards the public sphere, whereas women are cooperative, nurturing, and oriented towards the private sphere.[34] A third claim is that these essential socio-cultural differences in gender identity are *determined* by the essential, biological differences between the sexes. In other words, it is precisely *because* men and women are essentially different in the biological sense that they are essentially different in social and cultural senses.[35]

Although biological essentialism remains a common—even "common sense"—view of gender in many quarters,[36] it has been broadly rejected by both gender theorists[37] and many segments of the American public.[38] The claim that there are essential biological differences between people assigned male at birth and people assigned female at birth is undermined by the fact that some people are intersex: they have some of the physical traits associated with "maleness" and some of the physical traits associated with "femaleness."[39] The claim that biological differences *determine* social and cultural differences is undermined by the fact that males and females are socialized to behave in ways that confirm these social and cultural differences. This suggests that observed social and cultural differences between males and females are to a significant extent the "intended or unintended product[s] of a social practice."[40] Most importantly for our purposes, the claim that people assigned the male sex at birth are essentially different, socially and culturally, from people assigned the female sex at birth is irreconcilable with

33. *Id.* at 169–70.

34. *Id.*

35. *Id.*

36. *See, e.g.*, Solangel C. Troncoso, Zach C. Schudson & Susan A. Gelman, *Women Versus Females: Gender Essentialism in Everyday Language*, 52 J. PSYCHOLINGUISTIC RSCH. 975 (2023) (examining gender essentialism as manifested in use of gender/sex terms).

37. Mikkola, *supra* note 32, at 170.

38. Molly Fischer, *Think Gender is a Performance? You Have Judith Butler to Thank for That*, CUT (June 3, 2016), https://www.thecut.com/2016/06/judith-butler-c-v-r.html [https://perma.cc/99T2-KK7A] (discussing popular uptake of anti-essentialist views of gender to the extent that "it's Judith Butler's world" now).

39. *See Intersex*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/articles/16324-intersex [https://perma.cc/6YD3-RULZ] (last visited Oct. 15, 2023) ("People who are intersex have genitals, chromosomes, or reproductive organs that don't fit into a male/female sex binary.").

40. Sally Haslanger, *Ontology and Social Construction*, PHIL. TOPICS, Fall 1995, at 95, 97 (1995) (suggesting a non-biological explanation for social and cultural differences between males and females).

the existence and the lived experiences of persons who are trans. As summarized by the Transgender Law Center, "a transgender woman is a woman who was assigned male at birth and has a female gender identity."[41] By contrast, "a transgender man is a man who was assigned female at birth and has a male gender identity."[42] Because a person's gender identity can diverge from their birth-assigned sex, so that some people assigned the male sex have and express a feminine gender identity while some people assigned the female sex have and express a masculine gender identity, the basic premise of biological essentialism—that gender identity ineluctably follows biology—is false.

Once we take seriously the thought that biology itself does not determine a person's gender identity, the connection between gender identity and gender expression becomes apparent. For it is in and through acts of *gender expression* that a person's gender identity becomes intelligible to others. In particular, a person's gender identity becomes intelligible to others in the manifold ways that a person self-identifies, dresses, and comports themselves in the world. Under one conception of gender identity, what this Article will call the *internal conception*, acts of gender expression make a person intelligible to others as having a particular gender identity by *communicating* that person's gender identity. The internal conception pinpoints a person's gender identity in an "internal understanding of [one's] own gender,"[43] understood as the "deeply felt, inherent sense of being a girl, woman, or female; a boy, a man, or male; a blend of male or female; or an alternative gender"[44] or as the "innermost concept of self as male, female, a blend of both or neither."[45] On this view, if a trans person wears clothing that is culturally associated with members of the opposite birth-assigned sex, that behavior can be seen as communicating the inner psychological fact that they identify with members of the opposite birth-assigned sex. By contrast, under another conception of gender—the *performative conception*—acts of gender expression make a person intelligible as having a particular gender identity by *constituting* that very identity.[46] On this view, gendered forms of self-presentation do not simply communicate the pre-existing psychological fact that a person has a particular gender identity. More fundamentally, the "stylized repetition" of gendered behavior is *what*

41. TRANSGENDER L. CTR., *supra* note 1.

42. *Id.*

43. *Id.*

44. Am. Psych. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCH. 832, 834 (2015).

45. *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions [https://perma.cc/C9E3-3BSQ] (last visited Oct. 15, 2023).

46. *See, e.g.*, JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990) [hereinafter BUTLER, GENDER TROUBLE]; JUDITH BUTLER, UNDOING GENDER 40–56, 75–101 (2004) [hereinafter BUTLER, UNDOING GENDER]; LAURA KRAMER, THE SOCIOLOGY OF GENDER: A BRIEF INTRODUCTION 55–57, 77 (3d ed. 2011) (overview of performative theories of gender). *See generally* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 39–41 (2006) (connecting LGBTQ+ rights with a general ideal of authentic self-expression).

makes it the case that a person has a particular gender identity in the first place.[47] In other words, "[t]here is no gender identity behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its results."[48] Needless to say, it is a difficult question whether the internal conception or the performative conception is a more plausible account of gender identity, or even whether they are ultimately in conflict.

For our purposes, the key point is that both the internal conception of gender identity and the performative conception of gender identity open up space for a novel First Amendment intervention in the context of trans athletes. First, both conceptions illuminate the fact that LGBTQ+ identities "merge not only status and conduct, but also viewpoint, into one whole."[49] The internal conception draws our attention to the connection between *viewpoint* and *conduct*. Understanding oneself as having a particular gender identity involves adopting a certain viewpoint on oneself and the social world in general. To that degree, gender expression communicates a particular viewpoint. Accordingly, state action that regulates gender expression *as such* should presumptively be suspect as viewpoint-based discrimination.[50] By contrast, the performative conception draws our attention to the connection between *status* and *conduct*. Insofar as gender expression constitutes a person as having a particular gender identity, state action that regulates gender expression on that basis seeks to dictate what gender identity a person has. As we will explore momentarily, this implicates general First Amendment principles protecting freedom of conscience and freedom from compelled affirmation.[51] Second, and more specifically, athletic activity is a particularly clear-cut instance of gender expression. As a wealth of social scientific evidence attests, gender socialization paradigmatically occurs in the context of team sports. In particular, children are often drawn towards team sports in part because of a desire to affirm and express their nascent gender identities.[52] This reflects the insights of the internal conception of gender. At the same time, children are often directed towards team sports in part because of an impulse on the part of others to shape their gender identities in particular ways.[53] From the performative perspective, children become constituted *as* gendered subjects—boys and girls—in significant part through the "stylized repetition" of playing day-in, day-out on a sex-identified

47. BUTLER, GENDER TROUBLE, *supra* note 46, at 140.

48. *Id.* at 25.

49. Nan Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1701 (1993).

50. For an overview of viewpoint discrimination as distinct from content-based discrimination, see Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99 (1996).

51. *See infra* Part II.

52. *See, e.g.*, MICHAEL KIMMEL, GUYLAND: THE PERILOUS WORLD WHERE BOYS BECOME MEN 24–43 (2008) (examining how American males between the ages of 16 and 26 learn how to be men, particularly in the context of team sports); Shaun R. Harper, *The Measure of a Man: Conceptualizations of Masculinity Among High-Achieving African American Male College Students*, 48 BERKELEY J. SOCIO. 89, 97–98 (2004) (providing an intersectional analysis of gender and racial identity construction in the context of collegiate athletics).

53. *See, e.g.*, KIMMEL, *supra* note 52, at 130.

team.[54] Given sports' gendered significance, it is hardly surprising that debates about who can play which sports have long been a proxy for broader societal disagreements about what it means to be a man or a woman.[55]

In sum, there are strong principled reasons to analyze trans rights in general and the rights of trans athletes in particular through the lens of the First Amendment. Whether we understand gender expression as communicating or constituting a person's gender identity, gender identity is suffused with expressive significance—and so its regulation by the state raises First Amendment concerns. Moreover, athletic activity in particular functions as a site of gender communication and gender constitution in a context of social constraint. Together, these facts establish a *prima facie* case for analyzing trans-exclusive sports laws from the perspective of the First Amendment. But the reasons for a First Amendment case are not only principled or conceptual. They are also historical and doctrinal.

2. Historical Reasons for a First Amendment Analysis

In the current climate, the First Amendment can seem like an odd choice for the defender of LGBTQ+ rights. After all, none of the marquee LGBTQ+ rights cases decided by the U.S. Supreme Court in the last 30 years—starting with *Romer v. Evans*,[56] going through *Lawrence v. Texas*,[57] *United States v. Windsor*,[58] and *Obergefell v. Hodges*,[59] and culminating most recently in *Bostock v. Clayton County*[60]—have relied on the First Amendment as a doctrinal basis. To the contrary, insofar as the First Amendment has figured in LGBTQ+ rights litigation since the 1990s, it has generally been on the side of those who oppose expanding

54. *See, e.g.*, Kristi Tredway, *Judith Butler, Feminism, and the Sociology of Sport*, *in* THE PALGRAVE HANDBOOK OF FEMINISM AND SPORT, LEISURE AND PHYSICAL EDUCATION 409 (Louise Mansfield, Jayne Caudwell, Belinda Wheaton & Beccy Watson eds., 2018) (summarizing extant research on sports as gender performance); Debra Shogan & Judy Davidson, *Parody of the Gay Games: Gender Performativity in Sport*, 1 TORQUERE: J. CANADIAN GAY & LESBIAN STUD. ASS'N 87 (1999) (analyzing the parodic possibilities of gender performance in the context of "gay games"); Iris M. Young, *Throwing Like a Girl: A Phenomenology of Feminine Body Comportment, Motility and Spatiality*, 3 HUMAN STUD. 137 (1980) (discussing what it's like to comport one's body in a "feminine" way, primarily but not exclusively in the context of sports).

55. SUSAN CAHN, COMING ON STRONG: GENDER AND SEXUALITY IN WOMEN'S SPORT 3 (2d ed. 2015) (making the general case that increased participation in sports by girls and women over the course of the 20th century has unsettled gendered assumptions about strength, competitiveness, and leadership skill).

56. 517 U.S. 620 (1996) (invalidating on equal protection grounds a state constitutional amendment prohibiting LGBT-inclusive anti-discrimination protections).

57. 539 U.S. 558, 578 (2003) (invalidating on substantive due process grounds a state law criminalizing same-sex sodomy).

58. 570 U.S. 744, 744 (2013) (invalidating on substantive due process and equal protection grounds a federal law limiting federal recognition of marriages to opposite-sex unions).

59. 576 U.S. 644, 675 (2015) (invalidating on substantive due process and equal protection grounds state prohibitions on same-sex marriage).

60. 590 U.S. 644, 652 (2020) (holding that the prohibition on sex discrimination contained in Title VII of the Civil Rights of Act of 1964 entails a prohibition on sexual orientation and gender identity discrimination).

protections for persons who are LGBTQ+. In particular, opponents of LGBTQ+ rights have asserted that complying with LGBTQ+-inclusive anti-discrimination protections would impermissibly burden both First Amendment free exercise[61] and free speech[62] rights under the broader rhetorical umbrella of "freedom of conscience."[63] Although the Court initially declined to issue a broad ruling on the substantive merits of these claims,[64] it delivered a First Amendment win to opponents of inclusion in *303 Creative LLC v. Elenis*, which found that Colorado's sexual orientation-inclusive public accommodations law would impermissibly violate the First Amendment guarantee against compelled speech if applied to a website designer who refused to make wedding websites for same-sex couples.[65] *303 Creative* comes on the heels of a Sixth Circuit decision that found a valid First Amendment compelled speech objection to policies requiring the use of a transgender person's pronouns.[66]

However, it was not always thus. To the contrary, as Carlos Ball details in his fascinating book *The First Amendment and LGBT Equality*, it was freedom of expression and association—not equal protection or substantive due process—that secured crucial early victories for sexual and gender minorities in the 1960s and 1970s.[67] Among the examples he discusses are decisions invalidating restrictions

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61. *E.g.*, Petition for Writ of Certiorari at 11–23, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018) (No. 16-11); Petition for Writ of Certiorari at 23–37, 303 Creative v. Elenis, 600 U.S. 570 (2022) (No. 21-476).

62. Petition for Writ of Certiorari, *Masterpiece Cakeshop, Ltd.*, 584 U.S. 617 (No. 16-111); Petition for Writ of Certiorari, *303 Creative*, 600 U.S. 570 (No. 21-476).

63. For a critical overview of the "freedom of conscience" frame*,* see Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015).

64. In *Masterpiece Cakeshop, Ltd.*, 584 U.S. 617, the Court validated a free exercise objection to the application of an LGBT-inclusive public accommodations law, but limited the grounds of its holding to a fact-specific determination that specific statements and conduct by the relevant administrative body evinced religious animus. *Id.* at 625 ("Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality."). Likewise, in *Fulton v. City of Philadelphia*, 593 U.S. 522, 532 (2021), the Court validated a free exercise objection to the application of LGBT-inclusive anti-discrimination provisions in a city contract. But the Court declined to find a general First Amendment exemption from neutral and generally applicable anti-discrimination laws, reasoning that the challenged provisions were not neutral and generally applicable in the first place because of the exemption-granting discretion they accorded Philadelphia city officials. *Id.* at 533 ("CSS urges us to overrule *Smith*, and the concurrences in the judgment are in favor of doing so. But we need not revisit that decision here." (citations omitted)).

65. 600 U.S. 570, 602–03 (2023) ("In this case, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance. . . . The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands. Because Colorado seeks to deny that promise, the judgment is *Reversed*.").

66. Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021) (reversing district court's grant of a motion to dismiss suit by professor challenging on First Amendment compelled speech grounds a public university's requirement that professor use transgender student's preferred pronouns).

67. CARLOS BALL, THE FIRST AMENDMENT AND LGBT EQUALITY (2017).

on bringing same-sex partners to school dances,[68] rejecting the argument that the presence of LGBTQ+ persons could support liquor license revocations,[69] and overturning obscenity convictions of publishers or distributors of gay magazines.[70] The general pattern in this era was a gradual expansion of the spaces and contexts in which LGBTQ+ people could enjoy meaningful freedom of expression and association. First, courts recognized the right to publish visual and literary media about minority sexual identities;[71] then, courts recognized a limited right of public employees to communicate their LGBTQ+ identities without being subject to adverse employment action;[72] finally, courts recognized the more formal associational rights of LGBTQ+ student and political organizations.[73] Viewed from this vantage point, the premise that First Amendment freedoms must be *sacrificed* in order to protect LGBTQ+ persons is profoundly myopic. On the contrary, enlisting the First Amendment in defense of LGBTQ+ Americans would be a return to form—indeed, a reclamation of "the first queer right."[74]

3. Doctrinal Reasons for a First Amendment Analysis

The historical rationale for reviving a First Amendment defense of LGBTQ+ rights gains doctrinal support from the fact that First Amendment arguments establish a higher burden of justification for state action than Equal Protection Clause arguments as applied to sex classifications. First, as a general matter, state action that burdens First Amendment freedoms on the basis of the content expressed by the burdened speech must satisfy strict scrutiny in order to pass constitutional muster,[75] while sex classifications that implicate equal protection need only satisfy intermediate scrutiny.[76] Second, and most importantly, there is no First Amendment safe harbor that protects otherwise unconstitutional state action on the grounds that it reflects "real differences" between males and females. This stands in contrast to equal protection's "real differences" doctrine,[77] under which sex classifications are deemed to satisfy intermediate scrutiny as long as they are

68. *Id.* at 119–22 (citing Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980)).

69. *E.g.*, *id.* at 62–67 (citing Stoumen v. Reilly, 37 Cal. 2d 713 (1951) and One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control, 50 N.J. 329 (1967)).

70. *E.g.*, *id.* at 37–39 (citing One, Inc. v. Olesen, 355 U.S. 371 (1958) and Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962)).

71. *See* Hunter, *supra* note 49, at 1701.

72. *Id.*

73. *Id.* at 1702.

74. Scott Skinner-Thompson, *The First Queer Right*, 116 MICH. L. REV. 881 (2018).

75. Sable Commc'ns of Cal. v. FCC, 492 U.S. 115 (1989).

76. Craig v. Boren, 492 U.S. 190 (1976).

77. *See, e.g.*, Ann Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983) (articulating and critiquing the idea of a "real differences" escape valve for intermediate scrutiny liability).

predicated on "real differences" between males and females.[78] Unsurprisingly, the "real differences" doctrine has also figured in debates about athletic participation. In particular, the Ninth Circuit has applied the "real differences" doctrine to justify excluding cisgender male volleyball players from a girls' volleyball team, reasoning that "average real differences" justify that conclusion despite the fact that boys did not have an opportunity to play interscholastic volleyball.[79] Although that decision is now more than four decades old and involved only cisgender individuals, it exemplifies the potential for the "real differences" doctrine to function as an escape valve for equal protection liability in the sex discrimination context. To be sure, the assumption that birth-assigned sex reliably correlates with athletic ability has been empirically disputed.[80] And even insofar as there is a correlation between birth-assigned sex and "average real differences" in athletic ability, we do not in general exclude people from athletic participation on the grounds that they belong to a group whose members display "above average" athletic abilities. More to the point, any trans-exclusive sports policy justified on these grounds would face difficulties satisfying the substantial relation prong of intermediate scrutiny,[81] insofar as athletic associations are free to classify athletes directly on the basis of physical strength and ability without relying on birth-assigned sex as an imperfect proxy for these traits.[82] However, even if these counterarguments prove availing in certain contexts, they distract us from a more fundamental constitutional injury for which "real differences" are irrelevant.

In short, there are principled, historical, and doctrinal considerations for developing a First Amendment case against trans-exclusive sports laws. Nevertheless, a set of tactical concerns must be addressed before going further. Can we

78. *E.g.*, Michael M. v. Superior Ct., 450 U.S. 464, 465, 470 (1981) (upholding different ages of consent for males and females in the context of a state criminal prohibition on statutory rape because, in virtue of not being able to get pregnant, a young male "by nature, suffers few of the consequences of his conduct"); Nguyen v. INS, 553 U.S. 53 (2001) (upholding differential naturalization standards for citizenship applications depending on whether the male or female parent is a citizen).

79. Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982).

80. *E.g.*, Tinbete Ermyas & Kira Wakeam, *Wave of Bills to Block Trans Athletes Has No Basis in Science, Researcher Says*, NPR (Mar. 18, 2021) (providing an overview of extant research on the connection between athletic ability and sex-linked physiological differences), https://www.npr.org/2021/03/18/978716732/wave-of-new-bills-say-trans-athletes-have-an-unfair-edge-what-does-the-science-s [https://perma.cc/EN9K-8R2H]; *see also* Chase Strangio & Gabriel Arkles, *Four Myths About Trans Athletes, Debunked*, ACLU (Apr. 30, 2020), https://www.aclu.org/news/lgbtq-rights/four-myths-about-trans-athletes-debunked [https://perma.cc/Q6VD-3Y4J].

81. Intermediate scrutiny invalidates sex-based classifications which are not substantially related to an important governmental interest. In particular, "statutes employing gender as an inaccurate proxy for other, more germane bases of classification" are rightly "invalidated" under intermediate scrutiny. Craig v. Boren, 492 U.S. 190, 198 (1976).

82. *See, e.g.*, Erin Buzuvis, *Transgender Student-Athletes and Sex Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 36–38, 47–48 (2011) (proposing a number of non-discriminatory measures to address the concern about sex-related differences in athletic potential, including direct sorting based on demonstrated individual ability).

reasonably expect the federal courts, as presently constituted, to take seriously a First Amendment argument on behalf of trans athletes? And if that's not a realistic expectation, isn't the Article's entire argument an "intellectual exercise" in the pejorative sense?

Fully acknowledging the weight of these concerns, this Article maintains that a First Amendment case for trans-inclusive sports laws is nevertheless worth taking seriously for at least three reasons. First, it is possible that pessimism will not prevail. LGBTQ+ rights occupy a curious position in the constellation of civil rights. Although the Christian right has largely succeeded in capturing the federal courts—primarily, but not exclusively, via President Trump's three Supreme Court appointments[83]—it is also true that popular support for LGBTQ+ rights continues to improve.[84] Moreover, although it is difficult to infer any causal connection between popular opinion and judicial behavior, the fact that six justices endorsed a trans-inclusive interpretation of the Civil Rights Act's prohibition on discrimination "because of sex"[85] suggests that the Justices may not be oblivious to this cultural sea-change.[86] In short, it may be premature to assume that the Supreme Court would dismiss outright a First Amendment case for trans-inclusive sports policies—let alone the federal circuits more broadly. Second, the American judiciary includes more than the courts of the federal government. There are 50 other "imperfect solutions" to the question of how to live together under a just constitutional order, each containing its own fundamental rights guarantees.[87] In particular, state constitutional rights to freedom of expression have often advanced before, or beyond, federal recognition of First Amendment freedoms.[88] And some of these solutions have proven less imperfect than others. When it comes to

83. Katherine Stewart, *How the Christian Right Took Over the Judiciary and Changed America*, GUARDIAN (June 25, 2022, 3:00 PM), https://www.theguardian.com/world/2022/jun/25/roe-v-wade-abortion-christian-right-america [https://perma.cc/VTC2-2C2H].

84. *See, e.g.*, Henry Berg-Brousseau, *ICYMI: New Data Shows Support for LGBTQ+ Rights Continues to Tick Upward, in Contrast to Onslaught of Anti-LGBTQ+ Legislation in States Across Country*, HUM. RTS. CAMPAIGN (Mar. 18, 2022), https://www.hrc.org/press-releases/icymi-new-data-shows-support-for-lgbtq-rights-continues-to-tick-upward-in-contrast-to-onslaught-of-anti-lgbtq-legislation-in-states-across-country [https://perma.cc/H56C-BKMD].

85. Bostock v. Clayton County, 590 U.S. 644, 652 (2020) (holding that the prohibition on sex discrimination contained in Title VII of the Civil Rights of Act of 1964 entails a prohibition on sexual orientation and gender identity discrimination).

86. James F. Smith, *U.S. Supreme Court v. American Public Opinion: The Verdict Is In*, HARV. KENNEDY SCH. (July 13, 2020), https://www.hks.harvard.edu/faculty-research/policy-topics/democracy-governance/us-supreme-court-v-american-public-opinion [https://perma.cc/76YW-RD8L] (noting that 83% of Americans surveyed reported that firing people for LGBT status should be illegal and suggesting this as a possible partial explanation of the conservative majority's holding in *Bostock*).

87. JEFFREY SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2008) (describing how state supreme courts, in their interpretation of the fundamental rights embodied in their respective state charters, have often anticipated or accelerated fundamental rights advances at the federal level).

88. *Id.* at 151–72 (describing how state constitutionalism anticipated the U.S. Supreme Court's holding in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), a case discussed below in Section II.A).

LGBTQ+ rights, it was a state high court—namely, the Massachusetts Supreme Judicial Court—that first endorsed a constitutional rationale for marriage equality.[89] Hence, even if the doors of the federal courts *are* effectively closed to a First Amendment defense of trans athletes, it by no means follows that so too are the doors of every state court. Third, and finally, the American constitutional conversation includes more than the federal *or* state judiciaries. To the contrary, popular understandings of what it means to enjoy freedom of expression, the right to due process, and other fundamental rights are partly constitutive of the meaning of these guarantees.[90] Plausibly, these social meanings, in turn, can influence judicial interpretations of constitutional rights—both "upstream" (constraining how courts interpret the relevant rights) and "downstream" (shaping the implementation of institutional interpretations and the legitimacy accorded thereto). For all three reasons, a First Amendment case against trans-exclusive sports laws should not be dismissed on purely tactical grounds. To the contrary, it is worth putting that case in its best light.

The next Section will begin to lay out that case. However, several important qualifications are in order. First, this Article takes no position on the moral or legal justifiability of having sex-segregated sports teams in the first place.[91] Taking as given that sex-segregated sports are here to stay for the foreseeable future, this Article asks whether athletes who are trans have any First Amendment claim against being placed on a team that is publicly associated with a gender identity they sincerely disavow. Second, this Article focuses on athletes who both are trans and have a binary gender; it does not stake out a position on the equally important question of whether non-binary athletes have First Amendment rights in this domain.[92] Finally, although trans athletes have a First Amendment right against being placed on teams that correspond to a sincerely disavowed gender identity, it does not follow that they are under any obligation to exercise that right. In other words, nothing in this Article should be construed as implying that trans athletes who choose to play on the team that corresponds to their birth-assigned sex should

89. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

90. For theoretical examinations of the connection between popular understandings and social meanings, see, for example, William Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2005); Keith Werhan, *Popular Constitutionalism, Ancient and Modern*, 46 U.C. DAVIS L. REV. 65 (2012).

91. For popular discussions of this issue, see, for example, Maggie Mertens, *Separating Sports by Sex Doesn't Make Sense*, ATLANTIC (Sept. 17, 2022), https://www.theatlantic.com/culture/archive/2022/09/sports-gender-sex-segregation-coed/671460/ [https://perma.cc/A9XJ-PZWR]; Steve Magness, *There's Good Reason for Sports To Be Separated by Sex*, ATLANTIC (Sept. 29, 2022), https://www.theatlantic.com/culture/archive/2022/09/why-elite-sports-should-remain-separated-by-sex/671594/ [https://perma.cc/7TW5-XWHY].

92. For a popular discussion of this issue, see Frankie de la Cretaz, *Living Nonbinary in a Binary Sports World*, SPORTS ILLUSTRATED (Apr. 16, 2021), https://www.si.com/wnba/2021/04/16/nonbinary-athletes-transgender-layshia-clarendon-quinn-rach-mcbride-daily-cover [https://perma.cc/J8RJ-WDWV].

be discouraged or prevented from doing so. The point is that it should, indeed, be a choice.

II.
COMPELLED SPEECH AND THE AUTHENTICITY PRINCIPLE

A. Compelled Speech Doctrine: An Overview

This Section (II.A) provides an overview of the U.S. Supreme Court's compelled speech cases. It zeroes in on two strands of doctrine that are especially relevant to sports, namely cases governing compelled affirmation and cases governing compelled association. The next Section (II.B) extracts a common denominator that unifies both strands of doctrine: what this Article calls the Authenticity Principle. In a nutshell, the Authenticity Principle bars the State from compelling someone to engage in a type of behavior that would lead a reasonable observer, who did not know the behavior was compelled, to attribute to the compelled party an attitude or belief that that person sincerely disavows. If the State has done so, and it has done so with the aim of fostering adherence to a particular ideological point of view, then it has violated the First Amendment guarantee against compelled speech.

Several strands of case law fall under the heading "compelled speech." Unsurprisingly, law professors have proposed competing taxonomies.[93] To place the Article's intervention in context, it is useful to distinguish between five strands of compelled speech doctrine.[94] The first strand involves *compelled affirmation*. These are cases where the State compels people to affirm messages or viewpoints with which they sincerely disagree.[95] The second strand involves *compelled association*. These are cases where the State compels an expressive association to admit or associate with people whose admission or co-association interferes with the

93. *E.g.*, Eugene Volokh, *The Law of Compelled Speech,* 97 TEX. L. REV. 355 (2018) (distinguishing two main strands with multiple sub-strands); Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147 (2006) (distinguishing a different set of four strands).

94. To the author's knowledge, this particular five-part taxonomy is original. However, it pulls together strands discussed in Volokh and Alexander, *supra* note 93. This taxonomy provides more detail than Volokh's two-part taxonomy, and also separates compelled revelation cases, unlike Alexander's.

95. *E.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (requiring public school students to recite the Pledge of Allegiance violates the First Amendment guarantee against compelled speech); Wooley v. Maynard, 430 U.S. 705 (1977) (requiring drivers to display state license plates with the motto "Live Free or Die" violates the First Amendment guarantee against compelled speech).

group's message.[96] The third strand involves *compelled support*. These are cases where the State compels someone to subsidize speech on the part of others with which they disagree.[97] The fourth strand involves *compelled hosting*. These are cases where the State compels someone to host or disseminate speech on the part of others with which they disagree.[98] Finally, the fifth strand involves *compelled revelation*. These are cases where the State compels someone to divulge personal information in a context where that revelation exposes them to a meaningful risk of harassment or retaliation.[99]

This Article focuses on the first two strands: compelled affirmation and compelled association.[100] Playing on a sports team that is publicly identified with a particular sex is an action that carries expressive significance in our culture. To that degree, requiring someone to engage in that activity, or compelling someone to choose between engaging in that activity or incurring unacceptably high costs, implicates concerns about compelled affirmation. At the same time, playing on a team is an essentially associative activity: it's something you do *with others*. To

96. *E.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995) (requiring a St. Patrick's Day parade organization opposed to gay rights to include an openly gay, lesbian, and bisexual contingent would impermissibly violate the organization's First Amendment right against compelled expressive association); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (mandatory inclusion of openly gay scoutmaster would violate Scouts' First Amendment right against compelled expressive association); Rumsfeld v. Forum for Acad. & Institutional Rts., Inc., 547 U.S. 47 (2006) (no First Amendment violation when law schools are compelled to host military recruiters at on-campus job fairs, notwithstanding schools' avowed opposition to the military's "Don't Ask, Don't Tell" policy).

97. *E.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (no First Amendment violation when public employees who refuse to join a labor union are required to pay dues, provided dues not used for ideological or political purposes), *overruled by* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878 (2018) (public-sector employees may not be compelled to pay union dues if they have refused to join); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997) (no First Amendment violation when tree fruit producers are required to contribute to the cost of generic advertising for fruits); Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205 (2013) (conditioning NGOs' receipt of federal funds on implementing a policy explicitly opposing prostitution violates First Amendment).

98. *E.g.*, Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) ("right to reply" statute granting political candidates criticized by newspapers a right to have the responses to those criticisms published violates the First Amendment compelled speech guarantee); Pac. Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1 (1986) (public utility has a First Amendment compelled speech right not to be required to carry a message supplied by a public interest group in rebuttal to messages which the utility had supplied in its newsletter).

99. *E.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (connecting freedom of expressive association with the Fourteenth Amendment due process guarantee and finding that civil rights organizations have a substantive due process right against mandatory divulgence of membership lists); Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988) (requiring charitable fundraisers to disclose to potential donors the percentage of monies that went directly to charities violates the First Amendment compelled speech guarantee); Ams. for Prosperity v. Bonta, 141 S. Ct. 2373, 2382 (2021) (citing *Patterson*, 357 U.S. at 462) (requiring charities to disclose names and addresses of major donors violates First Amendment association rights).

100. However, there may be significant concerns about compelled revelation, as well—particularly when a person's avowed sex or avowed gender identity is challenged by others.

that degree, requiring someone to play on a particular team also implicates concerns about compelled association. Let us take each strand in turn.

The first in the line of compelled affirmation cases is *West Virginia State Board of Education v. Barnette*.[101] This case involved a First Amendment challenge to a West Virginia Board of Education policy requiring all students to salute the American flag while reciting the Pledge of Allegiance, on pain of being sent home for non-compliance. Overruling its prior decision in *Minersville School District v. Gobitis*,[102] the Court held explicitly that the First Amendment entails a prohibition against compelled speech. First, it observed that "[s]ymbolism is a primitive but effective way of communicating ideas," as "a short cut from mind to mind."[103] Second, it noted that the compulsory flag salute and pledge compel "affirmation of a belief and attitude of mind."[104] Third, it observed that this "involuntary affirmation" is not remotely justifiable on the grounds that it is necessary to avert a clear and present danger.[105] From these premises the Court concluded, "[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."[106]

The second major Supreme Court compelled affirmation case is *Wooley v. Maynard*.[107] That case involved a First Amendment challenge to a New Hampshire state law requiring all noncommercial vehicles to bear license plates displaying the state motto "Live Free or Die." The Court acknowledged a difference "of degree" between requiring the affirmative act of saluting a flag and requiring only the passive act of displaying a state motto.[108] However, it held that in both cases, "we are faced with a state measure which forces an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."[109] In particular, it characterized New Hampshire's law as compelling "use [of one's] private property as a 'mobile billboard' for the State's ideological message."[110] Deeming this violative of the First Amendment guarantee against compelled affirmation, the Court invalidated New Hampshire's law.[111]

A twofold theme recurs in both opinions. The first theme is that *freedom of mind* is the ultimate grounds or justification for the prohibition on compelled affirmation. The second theme is that an element of compelled affirmation is a

101. 319 U.S. 624 (1943).
102. 310 U.S. 586 (1940).
103. *Barnette*, 319 U.S. at 632.
104. *Id.* at 633.
105. *Id.* at 633–64
106. *Id.* at 634.
107. 430 U.S. 705 (1977).
108. *Id.* at 715.
109. *Id.*
110. *Id.*
111. *Id.* at 717.

certain kind of *state purpose*, namely that of fostering adherence to a particular ideological point of view. Indeed, the *Barnette* Court was especially disturbed by the fact that West Virginia's policy "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[112] Echoing that view, the *Wooley* Court explicitly characterized "[t]he right to speak and the right to refrain from speaking" as "complementary components of the broader concept of 'individual freedom of mind.'"[113] Given the premise that freedom of thought grounds the right against compelled affirmation, it is unsurprising that the Court should find an impermissible aim of thought control behind violations of that right. The *Barnette* Court summarized its holding by stating, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[114]

By contrast, the Court's *compelled association* cases concern the right of associations to control their membership. These cases are not explicitly grounded in an appeal to freedom of thought. Instead, they focus on a particular kind of harmful effect—namely, misleading the public about the association's authentic commitments—that may result from forced inclusion of an unwanted member.

The first case in this triptych is *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.[115] The question in that case was whether requiring an Irish veterans' council to include an openly gay, lesbian, and bisexual marching contingent in its St. Patrick's Day Parade pursuant to a Massachusetts anti-discrimination law constituted a violation of the council's First Amendment rights. The Court found that it did. The Court stated the general principle that "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."[116] This evokes the idea that it is intrinsically disrespectful to require "dissemination" of views contrary to one's own. As the opinion progresses, the Court emphasizes concerns about inauthenticity and misidentification. Indeed, the next sentence turns to *Turner Broadcasting System, Inc. v. FCC*, emphasizing that central to the Court's finding no compelled speech violation was its assumption that "there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."[117] The Court similarly distinguishes *PruneYard Shopping Center v. Robins*, where there was little worry of deception or misidentification because the owner of a shopping mall compelled to permit

112. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
113. *Wooley*, 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637).
114. *Barnette*, 319 U.S. at 642.
115. 515 U.S. 557 (1995).
116. *Id.* at 576.
117. *Id.* (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 655 (1994)).

speakers onto the premises "could 'expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand.'"[118] In *Hurley*, by contrast, the likelihood of misidentification of the true speaker was more significant, given the nature of the parade and its relation to the contingents that constitute it. In particular:

> Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole.[119]

To compel inclusion of an openly LGB contingent, therefore, would impermissibly modify the message the council intended its parade to convey. At least, so the Court held.

The idea that "misattribution" is a core harm in the compelled association context recurs in the Court's two other marquee compelled association cases. First, in *Boy Scouts of America v. Dale*,[120] the Court considered the question of whether requiring the Boy Scouts of America (BSA) to include an openly gay assistant scoutmaster pursuant to a New Jersey anti-discrimination law constituted compelled association in violation of BSA's First Amendment rights. The Court found that it did.[121] It emphasized the ways in which BSA is an expressive association: in particular, BSA's general commitment to instilling various civic virtues and its specific position that being gay is incompatible with being "clean" and "morally straight" as those terms are used in the "Scout Oath and Law."[122] The Court then considered whether including Dale, an openly gay scoutmaster active in LGBT rights organizations, would interfere with the Scouts' message. It concluded that it would.[123] The main reason the Court gave was that the presence of an openly gay scoutmaster would expose BSA to the risk of misattribution. As the Court put it, "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[124] Because that message was decidedly not the official position of the BSA, Dale's inclusion would impermissibly modify the message the Scouts sought to express.[125] Second, in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*,[126] the Court

118. *Id.* at 579–80 (quoting *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980)).
119. *Hurley*, 515 U.S. at 577.
120. 530 U.S. 640 (2000).
121. *Id.* at 661.
122. *Id.* at 649–50.
123. *Id.* at 655–56.
124. *Id.* at 653.
125. *Id.* at 654–56.
126. 547 U.S. 47 (2006).

considered whether an Act of Congress requiring law schools to provide equal access to military recruiters notwithstanding the schools' avowed opposition to the military's "Don't Ask, Don't Tell" policy of excluding openly LGB servicemembers constituted a violation of the compelled speech guarantee. The Court found that it did *not*.[127] The linchpin of its holding was that compelled inclusion of military recruiters did not "sufficiently interfere with any message of the school."[128] In particular, the Court contrasted the case at hand with *Miami Herald Publishing Co. v. Tornillo*, where the Court found a compelled speech violation principally because the right-of-reply statute at issue required newspapers to substitute one message for another.[129]

In short, compelled speech doctrine embodies a varied set of fact patterns, a diverse set of holdings, and a range of "first principles" under which these holdings are plausibly justified. Accordingly, the next Section asks: is there a common denominator to these cases?

B. The Common Denominator: The Authenticity Principle

Three questions immediately present themselves when we set the two strands of doctrine, compelled affirmation and compelled association, side-by-side. First, is there a unifying principle at work? In particular, the compelled association cases appear to place great weight on the contingent consideration that third parties might be *misled* about the relevant association's authentic commitments by forced inclusion of an unwanted member. Whether or not that's a plausible harm to posit in the compelled association context, it's not very plausible in the context of the compelled affirmation cases. As Professor Larry Alexander observes, it is doubtful that very many observers would have concluded that Barnette or Wooley *actually* endorsed the messages they were compelled to convey, precisely because the context of compulsion was presumably common knowledge.[130] This leads to the second question, a conceptual puzzle about the meaning of compelled speech itself. In a situation where everyone knows that the relevant conduct is compelled by law, so that deception is not at issue, what exactly is the harm of compelled speech? Finally, the third question concerns the relationship between the Court's compelled speech jurisprudence and LGBTQ+ rights. Strikingly, every one of the major compelled speech cases just discussed that implicated LGBTQ+ rights and

127. *Id.* at 68–70.

128. *Id.* at 64.

129. "The compelled-speech violations in *Tornillo* and *Pacific Gas* also resulted from interference with a speaker's desired message. In *Tornillo*, we recognized that 'the compelled printing of a reply . . . tak[es] up space that could be devoted to other material the newspaper may have preferred to print,' and therefore concluded that this right-of-reply statute infringed the newspaper editors' freedom of speech by altering the message the paper wished to express." *Id.* (alterations in original) (citation omitted) (quoting Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256, 258 (1974)).

130. Alexander, *supra* note 93, at 152–53.

interests found against the party advocating LGBTQ+ rights and interests.[131] Is it realistic to expect those same cases to deliver a win for LGBTQ+ rights in the context of trans athletes?

Let us begin with the first question. It is true that these five compelled association and compelled affirmation cases are all over the map in terms of how likely it is that third parties might be misled about the compelled actor's authentic commitments. Nevertheless, in the four cases where the Court found a compelled speech violation—all but *Rumsfeld*, that is—the compelled actor was forced to engage in a *type of behavior* whose *social meaning* suggests the affirmation of certain beliefs or attitudes. Here, it is useful to distinguish a type of behavior from a particular token of behavior. It is also useful to distinguish the social meaning of an action from the individual's intended meaning. Specifically, a type of behavior is a general category of behavior which is instantiated in a variety of individual tokens.[132] For example, if the students in *Barnette* had complied with West Virginia's mandate and pledged allegiance to the flag, they would have embodied a certain type of behavior (pledging allegiance to the flag) *in* a particular token (these students, pledging allegiance to this particular flag, in this particular time and place). As a sociological generalization, pledging allegiance to the flag, as a type of behavior, embodies patriotism. However, someone familiar with the coercive context in which the students (counterfactually) pledged allegiance to the flag would presumably not interpret that particular token as actually embodying patriotism. Likewise, the social meaning of an action is the public meaning of that action, in light of norms of interpretation that define what a certain action does and does not express in a particular cultural context. By contrast, the speaker's intended meaning is what the individual author of that action intended with their conduct—which may or may not align with the social meaning of their action.[133] For example, when we say that pledging allegiance to the flag "embodies patriotism," this is naturally understood as a claim about the social meaning of that action-type. Whether a given token of allegiance-pledging is intended by a specific speaker to convey patriotism, or even whether a majority of instances of allegiance-pledging carry that motivation, is a different question. The preceding cases suggest that compelled speech occurs when an actor is compelled to engage in a

131. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 581 (1995) (finding against LGBT party seeking inclusion in St. Patrick's Day Parade); Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000) (finding against gay prospective scoutmaster seeking inclusion in Boys Scouts); *Rumsfeld*, 547 U.S. at 70 (finding against law schools seeking to exclude recruiters on the basis of their exclusive policies towards LGB people).

132. For an overview of the type-token distinction's metaphysics, see Linda Wetzel, *Types and Tokens*, STAN. ENCYCLOPEDIA OF PHIL. (Apr. 28, 2006), https://plato.stanford.edu/entries/types-tokens/ [https://perma.cc/7JMA-SKML].

133. In a canonical essay on expressivist theories of law, Elizabeth Anderson and Richard Pildes make this point in reference to "expressive" meanings: "The expressive meaning of a particular act or practice, then, need not be in the agent's head, the recipient's head, or even in the heads of the general public. Expressive meanings are socially constructed." Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1525 (2000).

type of behavior whose social meaning is at odds with their authentic commitments as a speaker. Whenever this occurs, the State coerces someone to behave in such a way that they become an "instrument"[134] of or "billboard"[135] for a message they sincerely disavow. This injury persists even when other parties' background knowledge of the particular context in which the behavior-token occurs would not lead them to infer that the actor endorses the message they are compelled to enact.

More precisely, there is a question to which the answer is arguably "yes" in all four of the above cases finding a compelled speech violation. *Absent background knowledge of compulsion*, would a *reasonable observer* who observes someone engaging in the *type of activity* compelled by the challenged law *attribute* to the actor a particular *attitude or belief* that the actor *sincerely disavows*? Absent knowledge of compulsion, a reasonable observer would generally infer that someone affirms a particular attitude, namely patriotic allegiance to a particular country, if they are observed reciting that country's pledge and saluting that country's flag. This is a consequence of the fact that allegiance-pledging *qua* action-type carries the social meaning of patriotism. Absent knowledge of compulsion, a reasonable observer would generally infer that someone affirms a particular attitude, namely endorsement of a particular motto or statement, if they are observed displaying that motto or statement on their vehicle. This is a consequence of the fact that motto-displaying on one's vehicle *qua* action-type carries the social meaning of endorsement vis-à-vis the contents of the displayed motto. Similarly, absent knowledge of compulsion, a reasonable observer would plausibly infer that a parade organizer who includes an openly LGB contingent affirms "that people of [minority] sexual orientations have as much claim to unqualified social acceptance as heterosexuals,"[136] just as they would plausibly infer that an association that admits an openly gay person "accepts homosexual conduct as a legitimate form of behavior."[137] This too reflects the social meaning of the relevant types of actions. By contrast, even absent knowledge of compulsion, it would *not* be reasonable to infer that a law school that hosts a large number of employers representing a diverse set of commitments necessarily endorses any one of those commitments.[138] Indeed, insofar as some employers' commitments are plausibly *incompatible* with each other—such as an abolitionist public defender's office and a "tough on crime" district attorney's office—it would be *unintelligible* to infer that the hosting institution endorses all the commitments espoused by the employers it hosts.

134. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

135. *Id.*

136. *Hurley*, 515 U.S. at 574.

137. *Boy Scouts of Am.*, 530 U.S. at 653.

138. It could be argued that hosting an employer expresses a minimal form of endorsement, namely of the employer as offering a legitimate form of employment to the school's students. Hence, if any of the law schools had taken the position that the U.S. Army is not a legitimate source of employment for its students, the Authenticity Principle would suggest that they might have a cognizable claim. But that was not, of course, the claim at issue in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006).

This demonstrates that the relevant type of behavior—a professional school's hosting a job fair—does not carry the social meaning of endorsement vis-à-vis the hosted employers' particular political commitments. By contrast, the social meaning of the other compelled behaviors does support an inference of endorsement. Therein lies a crucial difference.

As we saw, the compelled affirmation cases articulate a strong commitment against (1) a particular kind of state *purpose*: namely, that of "fostering public adherence to an ideological point of view."[139] When set alongside the compelled association cases, they also articulate a strong commitment against (2) a certain *means* used to advance that purpose: namely, compelling someone to engage in a type of behavior whose *social meaning* implies an attitude that the compelled actor sincerely disavows. Together, the constraint on state purposes and the constraint on state means define a unifying compelled speech principle that bars the State from pursuing that purpose using those means. Call this constraint the *Authenticity Principle*.

The Authenticity Principle explains why compelled speech violations are objectionable, answering the second question about harms. A plausible basis for compelled speech doctrine would identify some injuries that are *intrinsic* to compelled speech itself. For example, *Wooley*'s references to "instrumental[ization]" and making a person into a "mobile billboard"[140] strongly suggest that compelled speech is objectionable in and of itself, and not merely because of its contingent results. *Hurley* strikes a similar note, observing that compelled speech compromises the speaker's "right to autonomy over the message."[141] The Authenticity Principle isolates an intrinsically objectionable feature of compelled speech. For whenever the State violates the Authenticity Principle, it acts on a purpose that expresses disrespect for the speaker's autonomy. Rather than seeing citizens as free thinkers and agents who are capable of independent thought and action, the State seeks to implant or "foster" adherence to a particular "ideological" point of view.[142] At the same time, whenever the State violates the Authenticity Principle, the *means* it employs are also disrespectful, because it treats people *as mere means*: it "instrument[alizes]" them by commandeering their expressive capacities for the sake of ends that they sincerely reject.[143] In both respects, violations of the Authenticity Principle are intrinsically disrespectful. The First Amendment bars these forms of disrespect.[144]

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139. *Wooley*, 430 U.S. at 715.

140. *Id.*

141. *Hurley*, 515 U.S. at 576.

142. *Wooley*, 430 U.S. at 715.

143. *See id.*

144. For a general exploration of the idea that respect for autonomy is an integral part of the First Amendment free speech guarantee, see, for example, C. Edwin Baker, *Autonomy and Free Speech*, 27 CONSTITUTIONAL COMMENTARY 251 (2011); Susan Brison, *The Autonomy Defense of Free Speech,* 108 ETHICS 312 (1998); Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517 (1997).

But does the First Amendment, for that reason, bar trans-exclusive sports laws? This brings us to the third question, about the implications of applying a substantively anti-LGBTQ+ compelled speech jurisprudence to trans-exclusive sports policies. As we shall see, the same principle that unifies the *Hurley-Rumsfeld* line of cases also vindicates the right of trans athletes to play as who they are.[145]

III.
TRANS-EXCLUSIVE SPORTS LAWS VIOLATE THE AUTHENTICITY PRINCIPLE

A. Trans-Exclusive Sports Laws Constitute Compulsion

This first Section (III.A) will demonstrate that trans-exclusive sports laws are compulsory. In particular, the mere fact that trans athletes have the option of quitting sports altogether does not mean that trans-exclusive sports laws are not genuinely compulsory. As the case law makes clear, when the alternative to unwanted expression carries unacceptably high costs, it is not a genuine alternative.[146] The next Section (III.B) will demonstrate that trans-exclusive sports laws violate the Authenticity Principle. Specifically, they are motivated at least in part by the aim of fostering adherence to a particular ideological point of view, namely biological essentialism about gender.[147] And they seek to fulfill that aim by compelling athletes who are trans to engage in a type of activity, namely participation on a sports team that is publicly associated with their birth-assigned sex, which would justify a reasonable observer in attributing to trans athletes a gender identity that they sincerely disavow. Finally, the third Section (III.C) will conclude the Article and recenter the experiences of trans athletes.

Clearly, one threshold question is whether trans-exclusive sports laws entail *compulsion*. As we've seen, trans-exclusive sports laws like Idaho's are broadly worded: they categorically bar trans female athletes from athletic participation on the team that corresponds to their gender identity.[148] Moreover, they do so with respect to both intramural and interscholastic sports activities.[149] In general, the regular physical education curriculum often includes some form of intramural

145. Of course, whether the Court would be willing to recognize this implication is a further question. Even if the most coherent interpretation of the Court's compelled speech jurisprudence yields a principle which counts against trans-exclusive sports policies, it is still an open question whether or not a majority of the Court would prefer to have a less coherent First Amendment jurisprudence which excludes trans athletes than a more coherent First Amendment jurisprudence which includes trans athletes. But if so, that does not vitiate the importance of pointing out the implications of the Court's own reasoning. To the contrary, doing so is part and parcel of evaluating the Court's integrity.

146. *See infra* note 151 and accompanying text.

147. *See infra* notes 161–163 and accompanying text.

148. IDAHO CODE § 33-6203(2) (2020) ("Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex.").

149. *Id.* § 33-6203(3).

athletic activity.[150] Hence, we can distinguish two scenarios. In one scenario, athletic activities that are part of the mandatory physical education curriculum are sex-segregated, in which case a requirement that trans athletes participate on the team that corresponds to their biological sex is *directly* compulsory. It is directly compulsory in the sense that participation in that activity is a condition of meeting the requirements of the physical education curriculum. It is not difficult to see how this scenario embodies compulsion. A transgender athlete's refusal to play on the team that corresponds to their biological sex would entail refusal to comply with the school's curricular requirements. In that respect, it would be no different from the refusal of Jehovah's Witnesses to salute the Pledge.[151] The second, more common scenario involves interscholastic sports leagues. As the story about Arya made clear, trans-exclusive sports laws are not directly compulsory in this context, because there is no requirement to participate in *any* interscholastic sports league. Instead, what these laws do is force a choice: play on the team that doesn't correspond to your gender identity, or play on no (recognized interscholastic) team at all. The question is whether forcing that choice constitutes compulsion.

Given the Court's holding in *Wooley*, the answer is "yes." The challenged law in *Wooley* did not directly compel display of the state motto. Like trans-exclusive sports laws as applied to interscholastic sports leagues, the law compelled a choice: display the state motto, or don't drive a car. However, this fact did not prevent the Court from finding compulsion. Indeed, the majority opinion did not even *countenance* the argument that New Hampshire's law isn't compulsory because people can simply avoid its requirements by not driving a car. The Court's only allusion to that rejoinder was its observation that "driving an automobile [is] a virtual necessity for most Americans."[152] Implicit in this observation is the judgment that compulsion exists even in the absence of formal legal coercion when the *costs* of noncompliance are prohibitively high.[153] Hence, we must examine the benefits of athletic participation for trans athletes—and the corresponding costs of exclusion.

There is an abundance of evidence that athletic participation provides not only obvious physical health benefits but also significant social, psychological, and

150. *See, e.g.*, *School and Youth Programs*, CDC, https://www.cdc.gov/physicalactivity/community-strategies/school-and-youth-programs.html [https://perma.cc/8VKL-XNK5] (last visited Feb. 10, 2024).

151. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1993).

152. Wooley v. Maynard, 430 U.S. 705, 715 (1977).

153. For a general philosophical discussion of the connection between coercion and raising the costs of noncompliance, see Scott Anderson, *Coercion*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 23, 2023), https://plato.stanford.edu/entries/coercion/ [https://perma.cc/FG44-CFG9].

emotional benefits.[154] Trans-exclusive sports laws thus compel trans athletes to choose between playing on a team that doesn't reflect who they are and foregoing those significant benefits. For many, this may be as good as no choice at all. Andraya, one of the trans athletes whose inclusion on a girls' sports team was challenged as contravening Title IX, says "I have known two things for most of my life: I am a girl and I love to run."[155] Transgender triathlete Chris Mosier observes, "[b]arring trans people from participation hurts everyone. Young people start to think that there is no place for them in athletics and they drop out, even when it is the one place where they may find belonging and hope."[156] As Mosier's reference to "belonging and hope" suggests, serious mental health challenges may accompany exclusion from sports. In particular, the amicus brief filed by the Women's Sports Foundation and other groups in *Hecox* points out that "participation in sport has also been reported to protect against feelings of hopelessness and suicidality."[157] The brief's observation is vindicated by empirical social psychology.[158] Evidently, mitigating suicidality is a potentially life-saving benefit for anyone. But it is all the more so for trans youth, who suffer from extraordinarily high rates of suicidal ideation and attempt.[159] Given these facts—the robust connection between athletic participation and mental health, and the disproportionate mental health burdens experienced by trans youth in particular—it is not an exaggeration to say that banning trans athletes from participating on the team that corresponds to their gender identity may, in some cases, kill. For that reason, "just don't play sports" is an even less persuasive constitutional rejoinder to a compelled speech claim in this context than "just don't drive a car" would have been in *Wooley*. The costs—and the stakes—are simply too high.

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154. *See, e.g.*, Leanne C. Findlay & Robert J. Coplan, *Come Out and Play: Shyness in Childhood and the Benefits of Organized Sports Participation*, 40 CANADIAN J. BEHAV. SCI. 153 (2008); David M. Hansen, Reed W. Larson & Jodi B. Dworkin, *What Adolescents Learn in Organized Youth Activities: A Survey of Self-Reported Developmental Experiences*, 13 J. RSCH. ON ADOLESCENCE 25, 47 (2003); Sarah J. Donaldson & Kevin R. Ronan, *The Effects of Sports Participation on Young Adolescents' Emotional Well-Being*, 41 ADOLESCENCE 369, 369–89 (2006).

155. *ACLU Responds to Lawsuit Attacking Transgender Student Athletes*, ACLU (Feb. 12, 2020), https://www.aclu.org/press-releases/aclu-responds-lawsuit-attacking-transgender-student-athletes [https://perma.cc/BPW7-DBCS].

156. Butler, *supra* note 2.

157. Brief of Amici Curiae 176 Athletes in Women's Sports, the Women's Sports Foundation, & Athlete Ally in Support of Plaintiffs-Appellees & Affirmance at 23, Hecox v. Little, 79 F.4th 1009 (9th Cir. 2023) (No. 20-35813, No. 20-35815), ECF No. 72.

158. *See, e.g.*, Lindsay A. Taliaferro, Barbara A. Rienzo, M. David Miller, R. Morgan Pigg, Jr. & Virginia J. Dodd, *High School Youth and Suicide Risk: Exploring Protection Afforded Through Physical Activity and Sport Participation*, 78 J. SCH. HEALTH 545 (2008); Buzuvis, *supra* note 82, at 48.

159. In particular, the 2020 National Survey on LGBTQ Mental Health found that "more than half of transgender and nonbinary youth [have] seriously considered suicide"—while over 20% of transgender and nonbinary youth had attempted suicide in the last year. TREVOR PROJECT, NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 2020, at 1, 3 (2020), https://www.thetrevorproject.org/wp-content/uploads/2020/07/The-Trevor-Project-National-Survey-Results-2020.pdf [https://perma.cc/TEH7-V3C7].

B. Trans-Exclusive Sports Laws Constitute Compelled Speech

Given the existence of compulsion, the critical question is whether there's compelled *speech*. As we've seen, this in turn depends on (1) whether the relevant law or policy is motivated by the purpose of fostering adherence to a particular ideological point of view that is unacceptable to the compelled actor, and (2) whether the relevant law or policy attempts to achieve that end by compelling someone to engage in a type of activity whose social meaning entails affirmation of a sincerely disavowed attitude.[160]

Trans-exclusive policies are motivated, at least in significant part, by the aim deemed impermissible in *Wooley*: namely, that of "fostering public adherence to an ideological point of view" which is "unacceptable" to the compelled party.[161] Let us take each of these elements in turn. First, trans-exclusive sports bans are motivated at least in part by a particular *point of view* about the relationship between biological sex and gender identity. The point of view in question is biological essentialism, according to which "biological sex" necessarily determines what gender identity a person should be recognized as having.[162] Second, it is clear that biological essentialism is properly deemed *ideological*. The Supreme Court has recognized that, in general, "sexual orientation and gender identity" are "controversial subjects."[163] Moreover, courts have explicitly recognized what any casual observer of debates over gender and sexuality already knows to be true: what determines who ought to "count" socially as a man or a woman is a controversial normative question about our social practices, not a value-neutral question of scientific fact.[164] Third, this ideological view is clearly *unacceptable* to trans athletes. Trans athletes petition to be recognized as belonging to the gender they identify with, which in their case diverges from the sex they were assigned at birth.

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160. *Supra* notes 132–139 and accompanying text.

161. Wooley v. Maynard, 430 U.S. 705, 715 (1976).

162. For example, Representative John W. Rose (R-Tennessee) articulates the essentialist inference from biological sex to gender identity when he says that it is "common sense" that "[b]iological males ought to compete against biological males, and biological females ought to compete against biological females." Annie Karni, *House Passes Bill to Bar Transgender Athletes from Female Sports Teams*, N.Y. TIMES (Apr. 20, 2023), https://www.nytimes.com/2023/04/20/us/politics/transgender-athlete-ban-bill.html [https://perma.cc/L33M-7KS2].

163. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 913–14 (2018) ("Unions can also speak out in collective bargaining on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions. These are sensitive political topics, and they are undoubtedly matters of profound 'value and concern to the public.' We have often recognized that such speech 'occupies the highest rung of the hierarchy of First Amendment values' and merits 'special protection.'" (footnotes and citations omitted) (quoting Snyder v. Phelps, 562 U.S. 443, 452–53 (2011)).

164. *See* Bongo Prods., LLC v. Lawrence, 548 F. Supp. 3d 666, 681–85 (M.D. Tenn. 2021) (granting, on First Amendment compelled speech grounds, a motion for preliminary injunction against a Tennessee state law requiring businesses which permit patrons to use the bathroom corresponding to their gender identity to prominently display a sign attesting to this fact, partly on the grounds that the ideas expressed by those signs are not "merely value-neutral, helpful statements of fact").

Clearly, that petition presupposes the falsity of biological essentialism. Fourth, and finally, trans-exclusive sports laws aim at least in part to *foster* public adherence to biological essentialism. As ACLU Deputy Director Chase Strangio points out, the recent spate of anti-trans legislative activity is supposedly a response to "a crisis that is manufactured by groups that have long been working to solidify particular norms of gender and sexuality," which include the norm of biological essentialism.[165] For these reasons, trans-exclusive sports laws violate the constraint on state purposes implied by the Authenticity Principle.

Furthermore, trans-exclusive sports laws also violate the Authenticity Principle's constraint on permissible state means.[166] They attempt to achieve ideological adherence *precisely* by compelling trans athletes to engage in a form of behavior whose social meaning entails a sincerely disavowed gender identity. First, consider the perspective of a spectator observing a middle-school game of boys' soccer. One of the players on this team—Arya—was assigned the male sex at birth and has consistently identified as a girl since a young age. In this context, what attitudes or beliefs would a reasonable observer infer that Arya affirms? Absent knowledge of compulsion, observing only the generic type of behavior exhibited (participating on the team marked "boys"), a reasonable observer would infer that Arya identifies as a boy. That is, they would infer that Arya affirms the attitude "I am a boy." Just as the activity of playing on the boys' soccer team *of School X* warrants the reasonable inference that the player is identified *with School X*, so too does the activity of playing *on the boys'* soccer team of School X warrant the reasonable inference that the player identifies *with boys*. Moreover, given the powerfully gendered social meaning attached to sports in our culture,[167] it would also be reasonable for an observer who did not know that Arya was compelled to play on the boys' team to infer that part of what motivated Arya's choice to play on the boys' soccer team was the intent or desire of conveying the very message "I am a boy," "I identify as a boy," or "I am one of the boys." Either way, a reasonable observer unfamiliar with the context of compulsion would attribute an identity to Arya that she sincerely disavows.

Hence, trans-exclusive sports laws violate both elements of the Authenticity Principle. Therefore, they constitute compelled speech. This conclusion gains strength when we compare these laws to the laws at issue in *Barnette* and *Wooley*.[168] In a paper arguing that the military's "Don't Ask, Don't Tell" policy compelled gay and lesbian service members to tacitly affirm a heterosexual identity, Tobias Wolff infers two axes of compelled affirmation from *Barnette* and

165. Sway, *Inside the Republican Anti-Transgender Machine*, N.Y. TIMES (May 13, 2021), https://www.nytimes.com/2021/05/13/opinion/sway-kara-swisher-chase-strangio.html [https://perma.cc/8RDY-E6AB].

166. *See supra* note 139 and accompanying text.

167. *See supra* notes 52–55 and accompanying text.

168. *See supra* notes 101–111 and accompanying text.

Wooley.[169] The first is the *intimacy axis*. This refers to "how personally or intimately the speaker is implicated by a compelled affirmation."[170] The second is the *dissension axis*. This refers to the "measure of the opportunity that the involuntary speaker retains to make known her disagreement with the message."[171] As Wolff points out, *Barnette* and *Wooley* are arguably mirror-images in respect of these two axes.[172] The Jehovah's Witnesses compelled to recite the Pledge and salute the flag were intimately implicated in the disavowed message.[173] The challenged law essentially mandated a fine-grained performance of patriotism, down to the words and the physical actions of the compelled speaker. By contrast, the Jehovah's Witnesses in question had ample opportunities to make clear their disagreement with the compelled message; mandatory Pledge recitations were a brief part of the school day, after which students could disavow what they'd just said.[174] Conversely, the Maynards were far less intimately implicated with the message they were compelled to convey.[175] The passive "act" of displaying a license plate is far less personal than the active performance of Pledge-recitation and flag-saluting. However, the Maynards enjoyed far fewer opportunities for dissension; as Wolff points out, they could have put some sort of bumper sticker on their car asserting their rejection of "Live Free or Die," but "common sense suggests that such an item would be neither very practical nor very effective and would make for a somewhat ridiculous spectacle in any event."[176]

By contrast, trans-exclusive sports laws impose significant burdens on both axes. Take *dissension* first. Perhaps Arya could prominently display a sticker on her uniform that says "I am a girl." However, the social meaning of her gender performance as a whole would then be muddled. On the one hand, she would be engaging in a type of activity whose social meaning strongly supports the inference that she identifies as a boy. On the other hand, she would be engaging in behavior that suggests that she explicitly disavows this inference. Given this ambiguity, it is unclear what conclusion about public meaning would be drawn by an observer of Arya's behavior.[177] At the very least, dissension would not be straightforward. Furthermore, trans-exclusive sports laws entail a particularly *intimate* form of compelled affirmation. First, the compelled activity itself—physically and spiritually demanding, pregnant with social meaning, and performed before a large audience—is significantly more intimate than reciting the Pledge or displaying a license plate. Hence, commandeering that activity to send an ideological message

169. Tobias Wolff, *Compelled Affirmations, Free Speech, and the Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141, 1200 (1997).

170. *Id.*

171. *Id.*

172. *See id.*

173. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

174. Wolff, *supra* note 169, at 1200–01.

175. *See* Wooley v. Maynard, 430 U.S. 705 (1976).

176. Wolff, *supra* note 169, at 1201–02.

177. *See supra* notes 132–135 and accompanying text.

is a particularly disrespectful form of instrumentalization. Second, the message itself is profoundly intimate. Many cisgender people would acknowledge that their gender identity is an integral part of who they are.[178] Moreover, the extraordinary lengths to which many transgender persons go simply to be recognized as who they are attest to the intimacy of gender identity.[179] Third, and most importantly, athletic participation involves elements of identity *construction* that are absent from Pledge-reciting or motto-displaying. As discussed, gender identity is not only expressive in the evidentiary sense that gendered behavior is taken to *communicate* the presence of a particular inner identity. The performative theory of gender highlights the fact that gender identity is also expressive in the *constitutive* sense that gendered behavior fulfills its own prophecy.[180] From that perspective, when Arya is compelled to play on the boys' soccer team, there is a sociologically important sense in which she is literally *being made* into a boy—play by play, game by game, week by week. By contrast, there is arguably no comparably significant social identity that the Maynards and the students in *Barnette* were forcibly constituted as having.[181]

To appreciate the significance of this third point, consider two analogies to Arya's compulsory identity-construction. The first analogy stems from freedom of religion.[182] In *Lee v. Weisman*, the Supreme Court considered whether inviting a clergyman to deliver a brief prayer at a high school graduation ceremony violated the Establishment Clause of the First Amendment.[183] The Court found that it did. After dismissing the argument that atheistic or agnostic students could simply abstain from the graduation exercise, the Court held that "[w]hat matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it. Finding no violation under these circumstances would place objectors in the

178. *See supra* notes 44–45.

179. Memoirs by persons who are transgender attest to these extraordinary lengths better than could a scholarly monograph. *See, e.g.*, JOY LADIN, THROUGH THE DOOR OF LIFE: A JEWISH JOURNEY BETWEEN GENDERS (2012) (recounting a trans woman's experience of transitioning as a professor at an Orthodox Jewish university); TREVOR MACDONALD, WHERE'S THE MOTHER? STORIES FROM A TRANSGENDER DAD (2016) (discussing the challenges of parenting as a transgender father); MARY COLLINS & DONALD COLLINS, AT THE BROKEN PLACES: A MOTHER AND TRANS SON PICK UP THE PIECES (2017) (narrating how mother and child navigated teen son's gender reassignment surgery); CN LESTER, TRANS LIKE ME: CONVERSATIONS FOR ALL OF US (2017) (exploring how essentialist views of gender limit everyone's ability to live freely and authentically); ANNE L. KOCH, IT NEVER GOES AWAY: GENDER TRANSITION AT A MATURE AGE (2019) (discussing the challenges and joys of undergoing gender reassignment as a senior).

180. BUTLER, GENDER TROUBLE, *supra* note 46 (developing the theory of gender as a repeated performance).

181. Perhaps the Maynards were forcibly constituted as having a libertarian "New Hampshire" identity, while the students in *Barnette* were forcibly constituted as having a "patriotic children" identity. It is unclear that these identities are comparable in significance to gender identity.

182. For a sustained exploration of the parallels between gender expression and religious exercise, see David Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997 (2002).

183. 505 U.S. 577 (1992).

dilemma of participating, *with all that implies*, or protesting."[184] Implicit in the Court's statement is the recognition that participating in a religious exercise is not just communicative; it is also constitutive. Whether someone socially counts as being Muslim or Jewish or Christian depends in significant part on whether they successfully "perform" that religion through rituals of various kinds.[185] Performing a particular religion means engaging in activities, such as prayer exercises, whose social meaning implies membership in that religion. To that extent, compelling an atheist or agnostic to engage in a religious exercise does not only subject that person to the risk of misunderstanding; on a deeper level, it subjects that person to compulsory identity-construction.[186] Hence, to state the analogy crudely: prayers are to religion what sports are to gender. From that perspective, the same fundamental normative principle that justifies disallowing group prayer in *Lee*—namely, that otherwise some self-identified atheists would be forcibly constituted as believers—also justifies invalidating trans-exclusive sports laws on the grounds that, otherwise, some self-identified girls would be forcibly constituted as boys (or vice versa).[187]

The second analogy that underscores the intimacy of compulsory identity-construction in the context of trans athletes stems from the domain of privacy. Jed Rubenfeld famously grounds the right to privacy in "not what is being *prohibited*, but what is being *produced*."[188] As he explains, violating someone's right to privacy does not only prevent that person from actualizing their identity in various ways. It also forces someone *into* an identity that they may find deeply inauthentic or repugnant. Sodomy laws do not only prevent gays and lesbians from exercising sexual autonomy; they also "channel" gays and lesbians into "a network of social institutions and relations" defined by the overarching imperative of heteronormativity.[189] Anti-choice laws do not only prevent women from exercising

184. *Id.* at 593 (emphasis added).

185. For work on the performative theory of religion, see, for example, ROY RAPPAPORT, RITUAL AND RELIGION IN THE MAKING OF HUMANITY (1999); JILL STEVENSON, SENSATIONAL DEVOTION: EVANGELICAL PERFORMANCE IN TWENTY-FIRST CENTURY AMERICA (2013); STANLEY JEYARAJA TAMBIAH, A PERFORMATIVE APPROACH TO RITUAL: RADCLIFFE-BROWN LECTURE, 1979 (Oxford Univ. Press 1981).

186. *See Lee*, 505 U.S. at 593 ("There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.").

187. Private prayer by individuals does not raise the same Establishment Clause concerns as public group prayer, since by hypothesis the only people praying do so of their own volition. At the same time, where to draw the line between public group prayer and private individual prayer—and when one individual's act of prayer might reasonably be attributed to other, nearby individuals—is hardly straightforward. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022) (holding that Free Exercise and Free Speech Clauses protected a coach who prayed on a football field following football games).

188. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 783 (1989).

189. *Id.* at 799–800.

reproductive autonomy; they also channel women into the social identity of *being a mother*—"with all the pervasive, far-reaching, lifelong consequences that childbearing ordinarily entails."[190] To be sure, trans-exclusive sports laws employ different methods from sodomy laws and anti-choice laws. In their public aspect, they are closer to compulsory religious exercises than to invasions of privacy. But the identity-constitutive harms are comparable. Both the qualitative evidence of memoirs by persons who are trans[191] and the quantitative evidence of mental health disparities between the transgender population and the cisgender population[192] point towards the enormous costs of compulsory gender identity construction. Indeed, "[l]aws that force such undertakings on individuals may properly be called 'totalitarian.'"[193]

CONCLUSION

This Article analyzes trans-exclusive sports laws from the perspective of the First Amendment. Specifically, this Article develops an answer to the question: what First Amendment interests, if any, do trans athletes have in not being compelled to either give up sports or participate on a team that corresponds to a gender identity which those athletes sincerely disavow? The answer lies in compelled speech doctrine. Specifically, trans-exclusive sports laws aim to foster adherence to a particular ideological point of view, namely gender essentialism. And they do so by compelling athletes who are trans to engage in an activity whose social meaning both communicates and constitutes a gender identity that those athletes sincerely disavow. In virtue of having these characteristics, trans-exclusive sports laws fall squarely within the domain of state action prohibited by the Supreme Court's compelled speech jurisprudence. Hence, unless trans-exclusive sports laws are narrowly tailored to some compelling state interest,[194] it follows that they are unconstitutional on First Amendment grounds alone. Of course, it does not follow that trans-exclusive sports laws are constitutionally objectionable *only* in virtue of violating the First Amendment. On the contrary, there are powerful arguments against trans-exclusive sports laws sounding in equality and privacy, as well. But no legal analysis of trans-exclusive sports laws is complete if it leaves out the First Amendment. Indeed, if we take seriously both the law of the First Amendment and the lived experiences of athletes who are trans, it is not hyperbolic to say that for millions of children like Arya, trans-exclusive sports laws

190. *Id.* at 739–40.

191. *See supra* note 179.

192. TREVOR PROJECT, *supra* note 159.

193. Rubenfeld, *supra* note 188, at 802.

194. Which is, of course, a difficult bar to clear. Even if it may be an overstatement to say that strict scrutiny is always "fatal in fact," empirical evidence confirms the doctrinal intuition that a high majority of state actions subject to strict scrutiny are indeed deemed unconstitutional. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795–96 (2006).

"invad[e] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[195]

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