One Hundred Years of Instability: Sex, Law, and Transgender Rights

Anne Caldwell, *University of Louisville*

Five years before the famous Seneca Falls Meeting in which a gathering of women demanded suffrage, Levi Suydam already had encountered the problem that sex posed for suffrage. Suydam, a 23-year-old man who supported the Whigs, petitioned to vote in 1843. The opposing party challenged his petition "on the grounds that 'he was more a female than a male, and that, in his physical organization, he partook of both sexes'" (Reis 2009, 34). Because the Whigs won by one vote, Suydam's status was central to the election outcome. After several medical exams in which different doctors reached different conclusions about Suydam's true sex, Suydam was determined to be "more female than male" (Reis 2009, 35). Suydam's case presents an important corollary to a more famous case of voting "fraud" after Susan B. Anthony voted in the 1872 presidential election. The 1873 trial and conviction of Anthony was straightforward: as a woman, she could not vote. Suydam posed a greater challenge to political order insofar as neither law nor medicine could pin down Suydam's sex within a framework of binary sex.

The Nineteenth Amendment, which prohibited the denial of the vote "on account of sex," might have rendered the uncertainty of sex politically and legally moot. It did not. As this article shows, judicial decisions on the status of trans persons reveal the enduring instability of sex as a legal category despite efforts to maintain an order of binary sexes. I explore this instability by examining the status of sex in the decades before the Nineteenth Amendment, political efforts during the Women's Movement of the 1970s to exclude trans women from the category of woman, and changing definitions of sex used in transgender jurisprudence. The inequalities produced by efforts to legally define sex support arguments for disestablishing sex from state regulation.

THE POLITICAL INSTABILITY OF "SEX"

The late-nineteenth and early-twentieth centuries were a period in which "sex"—a category that grouped together biology, social roles, desire, and identity—was changing. In the field of science, the new medicine of sex had identified the emergence of "inverts," a term that included those we today would identify as gays, lesbians, and trans persons. Urbanization increased the visibility of those who violated the behavior of men and women through their dress or sexual partners. The language of inversion and homosexuality became a way to express anxiety about political changes such as abolition, the suffrage movement, and progressivism. Because sex and social roles were seen as interwoven, suffragists and women seeking more independence risked becoming "unsexed," "unwomanly," "desexed" (Newman 1999, 36), or mannish (Heaney 2017, 7). Men interested in civic reform were attacked as unmanly, called out as a "mollycoddle" or "political hermaphrodite" (Murphy 2008).

As the second major women's movement formed in the 1960s, the instability of sex reappeared. Radical feminists challenged the classification of transgender women as "woman," insisting that transwomen remained defined by the status they were assigned at birth and therefore had no place in a women's political movement (Stryker 2017, 127–38). Conservative women who challenged the Equal Rights Amendment (ERA) in the 1970s invoked similar fears, suggesting that men would be able to enter women's restrooms. Opponents of the ERA also invoked concerns akin to opponents of women's suffrage, suggesting that the ERA would produce a unisex society, making women become men (Mathews and De Hart 1990, 152–53). Even today, the organization started by Phyllis Schlafly, the Eagle Forum, often files amicus briefs against transgender plaintiffs.

ANTI-TRANS JURISPRUDENCE

As much as "sex" has been an imprecise political category, so also has it been an imprecise legal category. Perhaps surprisingly, laws do not generally provide guidance on the criteria for defining sex (Greenberg 2006, 64). The lacuna in state law became apparent in the 1960s as courts considered the cases of transsexuals who sought to change their name or gender, to marry, or to divorce. In these cases, "[c]ourts had few precedents to follow…they had never before had reason to spell out a legal definition of sex. They had simply assumed that male and female were readily apparent and immutable" (Meyerowitz 2004, 241).

Opponents of transgender rights often use the language of "biological sex" to ground legislation and guide jurisprudence. Yet, no clear definition of biological sex exists. For example, doctors have used different methods to determine a person's "true" sex: genitalia and gonadal tissue in the nineteenth century; gonadal tissue, hormones, and eventually chromosomes in the twentieth century; and, in the second half of the twentieth century, psychological sex (Reis 2009, 85, 116, 117). Moreover, if jurisprudence has provided more precision than federal or state law in defining sex by invoking scientific knowledge, it is essential to recognize that "[c]hoosing which criteria to use in determining sex, and choosing to make the determination at all, are social decisions for which scientists can offer no absolute guidelines" (Fausto-Sterling 2000, 5).

doi:10.1017/S1049096520000335

Not surprisingly, transgender jurisprudence contains inconsistent definitions of sex and decisions about the status of trans persons. The first cases of transgender plaintiffs to come before the courts occurred mostly in the 1970s, when rights and privileges differed for men and women. For example, before the 1964 Civil Rights Act (Title VII), employers could legally discriminate against women. Until the 1972 Education Amendments (Title IX), schools and universities could discriminate against women. Women could be excluded from jury service until 1975. Only in the mid-1970s did the US Supreme Court find *some forms* of sex discrimination unconstitutional (*Frontiero* v. *Richardson* 1973 and *Craig* v. *Boren* 1976). In using a lower level of scrutiny than that used for racial classifications, the Court accepted that a certain amount of inequality among the sexes was appropriate.

The Nineteenth Amendment, which prohibited the denial of the vote "on account of sex," might have rendered the uncertainty of sex politically and legally moot. It did not.

As judges adjudicated early trans cases, they expressed concern about the impact of a ruling on a society organized around the unequal treatment of sex distinctions. In 1966, a state court ruled against permitting a change of sex markers on a birth certificate in *Anonymous* v. *Weiner.* As in the case of Suydam's ability to vote, in a society in which men and women have a different legal and political status, permitting a person to change their legal sex risks upending an unequal order. Transsexuals who "asked for a new definition of sex or a new legal gender status…threatened to overturn it all" (Meyerowitz 2004, 245). In this respect, the standing of women and trans persons before the courts has long been linked by the assumption that only two sexes exist and that there are fundamental differences between them.

The early employment discrimination cases of *Holloway* v. *Arthur Andersen & Co.* (1977) and *Ulane* v. *Eastern Airlines* (1984) revealed a legal commitment to this binary-sex system and a prohibition on any shifts within that binary. In *Holloway*, the Court found that the firing of a trans woman for the *act* of transitioning, rather than for having the *identity* of a transsexual, was permissible. The 7th Circuit went further in *Ulane*, placing transsexuals outside of the category of sex and the protection of the law. "It is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is a female, but because Ulane is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female" *(Ulane* v. *Eastern Airlines* 1984).

SHIFTS IN TRANSGENDER LAW

The turning point for transgender jurisprudence, as for feminist jurisprudence, was the 1989 case of *Price Waterhouse* v. *Hopkins.* It found that sex-based discrimination includes discriminating against someone because she does not fit stereotypes about how a woman should appear or behave. For example, as the US Supreme Court noted, the plaintiff was told she should "walk more femininely, talk more femininely, [and] dress more femininely." Discrimination based on sex stereotypes, therefore, is a form of sex discrimination. Since 1989, some courts have used this logic to argue that discrimination against trans persons is a form of sex stereotyping because it assumes that a person assigned female at birth should identify as a woman or that a person assigned male at birth should identify as a man (*Smith* v. *City of Salem* 2004).

Price Waterhouse has proven useful to transgender plaintiffs; it has not been decisive. Two factors in particular affect whether courts are likely to decide for or against transgender plaintiffs: the definition of sex that a court uses and the court's attitude toward congressional law. Cases in which courts use what one scholar called "reform" jurisprudence—recognizing biological sex as composed of multiple elements including anatomy, physiology, and secondary sex characteristics as well as an individual's own self-identification—tend to rule in favor of transgender plaintiffs (Sharpe 2002, 80–86). Courts that focus on only anatomy or reproductive capacity tend to rule against transgender plaintiffs (Sharpe 2002, 80–86). The other significant factor is a court's approach to congressional intent. Both Title VII and Title IX refer simply to sex, leaving courts to determine whether "sex" covers gender identity. Some courts defer to what they assume to be Congress's focus on the "traditional" meaning of sex, as well as the repeated failure of Congress to pass the Employment Non-Discrimination Act, the non-discrimination bill that would cover LGBT persons. Those courts generally find against transgender plaintiffs. More trans-supportive rulings pay less deference to congressional intent. In doing so, they reference Justice Scalia's famous judgment that "[m]ale-on-male sexual harassment in the workplace was assuredly not the principle evil Congress was concerned with when it enacted Title VII. But the statutory prohibitions often go beyond the principle evil to cover reasonably comparable evils, and it is ultimately the provision of our laws rather than the principle concerns of our legislators by which we are governed" (*Oncale* v. *Sundower* 1998). The Equal Employment Opportunity Commission also has held that transgender discrimination as such is sex discrimination, without any necessary reference to sex stereotyping (*Macy* v. *Holder* 2012). Courts thus have various rationales available to support or oppose transgender rights.

Additionally, cispersons and trans persons still face disparate treatment before the courts. In some cases, that disparity is explicit. In *Broadus* v. *State Farm Insurance Co.* (2000), the US Supreme Court found the 1977 precedent of *Holloway* more

https://doi.org/10.1017/S1049096520000335 Published online by Cambridge University Press

relevant than *Price Waterhouse*'s prohibition on sex stereotyping (Bender-Baird 2011, 25). The *Broadus* decision focused on the fact that "Ann Hopkins was not a transsexual and that the current plaintiff was" (cited in Bender-Baird 2011, 25). *Broadus* reveals the problem most transgender plaintiffs face. Courts remain profoundly cis-centric, imposing demands on transgender plaintiffs that cisgender plaintiffs do not encounter.

Courts remain profoundly cis-centric, imposing demands on transgender plaintiffs that cisgender plaintiffs do not encounter.

In *Broadus*, the Court interpreted the law differently because of the plaintiff's gender. Even when courts rule in favor of transgender persons, they do so from a cis-normative position that differentially burdens transgender plaintiffs.

Such is the very definition of *cisgenderism*: "Cisgenderism refers to the cultural and systemic ideology that denies, denigrates, or pathologizes self-identified gender identities that do not align with assigned gender at birth as well as resulting behavior, expression, and community" (Lennon and Mistler 2014). Those assumptions are both demeaning and dangerous because they lead to a perception of trans persons as not only abnormal but also deceptive. Cispersons often expect trans persons to "verify" their gender—to the satisfaction of the interrogating cisperson (Bettcher 2013). When that verification is not satisfactory, cispersons may engage in a range of violent behaviors from harassment to assault to murder. That hierarchy is reinforced whenever cisgender experience is taken as the only normal and default experience of gender.

A comparison between *Price Waterhouse* and recent cases involving transgender plaintiffs makes the cis-normativity of the law clear. Ann Hopkins's claim of discrimination required that she show that her behavior was stereotyped because she was a woman. She did not need to show that she was a woman. Transgender plaintiffs, in contrast, must generally first prove that they are a trans man or woman to become a recognizable subject before the law. This demand is bound up with the medicalization of trans persons (Spade 2003, 16–18). Recent cases involving Title IX claims by trans students, such as *G.G.* v. *Gloucester County School Board* (2016) and suits by transgender service members against the Trump administration, evince this dynamic as the plaintiffs describe themselves to the Court according to the criteria set out by the Diagnostic and Statistical Manual of the American Psychiatric Association for gender dysphoria. In this sense, courts demand that transgender plaintiffs verify their identities in a way not expected of cisgender persons, who are not required "to provide an affidavit from a medical expert confirming their gender identity" (Currah 2006, 12).

DISESTABLISHING SEX

This disparity provides one more rationale for following the long-term goals suggested by key figures in trans legal scholarship. These scholars argue that incorporating trans persons within sex discrimination jurisprudence is inadequate. Instead, sex should be entirely disestablished from state regulation in the same manner as religion. Currah (2006, 24) argued that this goal would end "the state's authority to police the relation between one's legal sex assigned at birth, one's gender identity, and one's gender expression." Fogg (2014, 46) concluded that most sex-classification policies "fail even the lowest level of judicial scrutiny because they are not rationally related to legitimate policy goals." Moreover, government sex classifications cause discrimination because they allow administrative agents "the power to use their normative ideas about gender to deprive people of their civil right to use the public accommodations under their watch" (Fogg 2014, 48). Ending government sex regulation would give people the autonomy to determine their own gender (Currah 2006; Fogg 2014; Spade 2003).

Whereas courts have focused largely on how to define sex in transgender law, current developments suggest that scholars' and activists' interest in disestablishment may be having an impact on the courts. The District Court decision, *Schroer* v. *Billington* (2008), compared protection for people to change their religion to people's right to change their sex without discrimination (Bender-Baird 2011). *Macy* v. *Holder* (2012) also referenced religious identification in addressing protection for transgender persons.

If we want to understand how the disestablishment of sex might look, a concrete example exists in the 2015 *Obergefell* v. *Hodges* decision on marriage equality. Its effect has been to largely render irrelevant sex status with respect to marriage. As long as same-sex marriages were prohibited, a primary concern of courts in determining the sex of transgender plaintiffs was to ensure that the presence of a trans spouse did not inadvertently create a same-sex marriage (Sharpe 2002). *Obergefell* thus removed a primary concern of courts in adjudicating the sex of trans persons.

In this respect, the Obergefell *decision affirms what has haunted parts of American politics since the suffrage movement emerged in the nineteenth century: a legal decision that no necessary connection exists between sex and law or politics.*

In this respect, the *Obergefell* decision affirms what has haunted parts of American politics since the suffrage

https://doi.org/10.1017/S1049096520000335 Published online by Cambridge University Press

movement emerged in the nineteenth century: a legal decision that no necessary connection exists between sex and law or politics. Part of conservatives' hostility toward the women's liberation movement, the gay rights movement, and the transgender movement is that they undermine traditional gender roles (O'Leary and Sprigg 2015). *Obergefell* deeply threatens social conservatives not simply because it validates homosexuality but also because it decreases the legal basis for differential treatment of the sexes. This places it in line with the Nineteenth Amendment and jurisprudence that have sought to reduce the extent to which the government can endorse legal and political differences on the basis of sex. ■

REFERENCES

Bender-Baird, Kyla. 2011. *Transgender Employment Experiences: Gendered Perceptions and the Law*. New York: State University of New York Press.

Bettcher, Talia Mae. 2013. "Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion." *Transgender Studies Reader 2*, ed. Susan Stryker and Aren Aizura, 278–90. New York: Routledge.

Currah, Paisley. 2006. "Gender Pluralisms under the Transgender Umbrella." In *Transgender Rights*, ed. Paisley Currah, Richard M. Juang, and Shannon Price Minter, 3–31. Minneapolis: University of Minnesota Press.

Fausto-Sterling, Anne. 2000. *Sexing the Body: Gender Politics and the Construction of Sexuality*. New York: Basic Books.

Fogg, Heath Davis. 2014. "Sex-Classification Policies as Transgender Discrimination: An Intersectional Critique." *Perspectives on Politics* 12 (1): 45–60.

Greenberg, Julie. A. 2006. "The Roads Less Traveled: The Problem with Binary Sex Categories." In *Transgender Rights*, ed. Paisley Currah, Richard M. Juang, and Shannon Price Minter, 51–73. Minneapolis: University of Minnesota Press.

Heaney, Emma. 2017. *The New Woman: Literary Modernism, Queer Theory, and the Trans Feminine Allegory*. Evanston, IL: Northwestern University Press.

Lennon, Erica, and Brian J. Mistler. 2014. "Cisgenderism." *TSQ: Transgender Studies Quarterly* (1) 1–2: 63–64.

Mathews, Donald G., and Jane Sherron De Hart. 1990. *Sex, Gender, and the Politics of the ERA*. New York: Oxford University Press.

Meyerowitz, Joanne. 2004. *How Sex Changed: A History of Transsexuality in the United States*. Cambridge, MA: Harvard University Press.

Murphy, Kevin P. 2008. *Political Manhood: Red Bloods, Mollycoddles, & the Politics of Progressive Era Reform*. New York: Columbia University Press.

Newman, Louise Michele. 1999. *White Women's Rights: The Racial Origins of Feminism in the United States*. New York: Oxford University Press.

O'Leary, Dale, and Peter Sprigg. 2015. "*Understanding and Responding to the Transgender Movement*." Washington, DC: Family Research Council.

Reis, Elizabeth. 2009. *Bodies in Doubt: An American History of Intersex*. Baltimore, MD: Johns Hopkins University Press.

Sharpe, Andrew N. 2002. *Transgender Jurisprudence: Dysphoric Bodies of Law*. London: Cavendish Publishing Limited.

Spade, Dean. 2003. "Resisting Medicine, Re/Modeling Gender." *Berkeley Women's Law Journal* 18 (15): 15–37.

Stryker, Susan. 2017. *Transgender History: The Roots of Today's Revolution*. New York: Seal Press.

https://doi.org/10.1017/S1049096520000335 Published online by Cambridge University Press

Achieving Diversity and Inclusion in Political Science

Diversity and Inclusion Programs

The American Political Science Association has several major programs aimed at enhancing diversity within the discipline and identifying and aiding students and faculty from under-represented backgrounds in the political science field. These programs include:

Ralph Bunche Summer Institute (RBSI) (Undergraduate Juniors)
The RBSI Program is an annual five-week program designed to introduce to the world of doctoral study in political science to those undergraduate students from under-represented racial/ethnic groups or those interested in broadening participation in political science and pursuing scholarship on issues affecting underrepresented groups or issues of tribal sovereignty and governance. Application deadline: January of each year. For more information, visit www.apsanet.org/rbsi.

APSA Minority Fellows Program (MFP) (Undergraduate Seniors or MA and PhD students)
(Fall Cycle for seniors and MA Students, Spring Cycle for PhD students) MFP is a fellowship competition for those applying to graduate school, designed to increase the number of individuals from under-represented backgrounds with PhD's in political science. Application deadline: October and March of each year. For more information, visit www.apsanet.org/mfp.

Minority Student Recruitment Program (MSRP) (Undergraduates and Departmental members)
The MSRP was created to identify undergraduate students from under-represented backgrounds who are interested in, or show potential for, graduate study and, ultimately, to help further diversify the political science profession. For more information, visit www.apsanet.org/msrp.

APSA Mentoring Program
The Mentoring Program connects undergraduate, graduate students, and junior faculty to experienced and senior members of the profession for professional development mentoring. APSA membership is required for mentors. To request a mentor or be a mentor, visit www.apsanet.org/mentor.

APSA Status Committees
APSA Status Committees develop and promote agendas and activities concerning the professional development and current status of under-represented communities within the political science discipline. For a listing of all APSA status committees, visit www.apsanet.org/status-committees.

For more information on all Diversity and Inclusion Programs, visit us online at www.apsanet.org/diversityprograms. Please contact Kimberly Mealy, PhD, Senior Director of Diversity and Inclusion Programs with any questions: kmealy@apsanet.org.

To contribute to an APSA Fund, such as the Ralph Bunche Endowment Fund or the Hanes Walton Jr. Fund, visit us at www.apsanet.org/donate.

https://doi.org/10.1017/S1049096520000335 Published online by Cambridge University Press