


2023

License & (Gender) Registration, Please: A First Amendment Argument Against Compelled Driver's License Gender Markers

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Recommended Citation

Lexi Meyer, *License & (Gender) Registration, Please: A First Amendment Argument Against Compelled Driver's License Gender Markers*, 91 Fordham L. Rev. 1983 ().
Available at: <https://ir.lawnet.fordham.edu/flr/vol91/iss5/13>

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**LICENSE & (GENDER) REGISTRATION, PLEASE:
A FIRST AMENDMENT ARGUMENT
AGAINST COMPELLED DRIVER'S
LICENSE GENDER MARKERS**

*Lexi Meyer**

For as long as the United States has issued drivers' licenses, licenses have indicated the holder's gender in one form or another. Because drivers' licenses are issued at the state level, states retain the authority to regulate the procedures for amending them. In some states, regulations include requirements that a transgender person undergo gender confirmation surgery before they can amend the gender marker on their driver's license. Because many transgender people neither desire nor can afford gender confirmation surgery, these laws effectively preclude such people from obtaining gender-accurate identification. In doing so, these laws implicate multiple constitutional rights.

Lower courts evaluating surgical prerequisites to gender marker alteration have overturned such policies, holding that they violate the Fourteenth Amendment's Equal Protection or Due Process Clauses. This Note discusses the lower courts' approaches to analyzing gender-marker alteration surgical requirements, it demonstrates these frameworks' vulnerabilities for evaluating such policies and, moreover, it argues that they overlook these policies' speech implications. This Note then suggests that courts should evaluate gender marker alteration policies under First Amendment jurisprudence—specifically the compelled speech doctrine—and should apply strict scrutiny to determine their constitutionality. Ultimately, this Note concludes that surgical requirements for gender marker alteration and resultant inaccurate gender markers on drivers' licenses violate the right to be free of compelled speech and, therefore, are unconstitutional.

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INTRODUCTION.....	1985
I. GENDER, IDENTITY DOCUMENTS, AND THE FIRST AMENDMENT.....	1989
A. <i>The Terminology of Sex and Gender</i>	1989
1. Sex	1990
2. Gender & Gender Identity.....	1991
3. Gender Markers	1993
B. <i>Gender Markers & Identity Documents</i>	1994
1. Federal Trends in Gender Marker Alteration.....	1995
2. Current State Policies for Amending Drivers’ Licenses.....	1996
C. <i>The Application of First Amendment Doctrine to Gender Expression and Identity Documents</i>	1998
1. Symbolic Speech and Gender Expression	1999
2. Compelled Speech	2002
3. The Intersection of Government Speech, Compelled Speech, and Drivers’ Licenses.....	2005
II. GENDER MARKER ALTERATION AND THE FOURTEENTH AMENDMENT.....	2008
A. <i>Examining Surgical Requirements Under Equal Protection</i>	2009
B. <i>Examining Surgical Requirements Under Substantive Due Process</i>	2012
III. ADVANCING A FIRST AMENDMENT ARGUMENT AGAINST BURDENSOME GENDER MARKER ALTERATION POLICIES.....	2017
A. <i>The First Amendment Better Protects the Constitutional Rights at Stake in Gender Marker Alteration Policies</i>	2018
B. <i>Surgical Requirements for Gender Marker Alteration Unconstitutionally Compel Speech</i>	2019
1. Requiring Gender Confirmation Surgery Compels Expressive Conduct.....	2020
2. Requiring Gender Confirmation Surgery Compels Pure Speech.....	2022
C. <i>Surgical Requirements Do Not Withstand Strict Scrutiny</i>	2025
CONCLUSION.....	2027

INTRODUCTION

In August 2017, Darcy Corbitt went to the driver's license office in Lee County, Alabama, to obtain a replacement driver's license.¹ Having grown up in Alabama, Ms. Corbitt returned there from North Dakota, where she held a driver's license indicating her sex as "female."² Ms. Corbitt also held a passport and social security records indicating the same.³

Ms. Corbitt, who identifies as a woman and was assigned the biological sex "male" at birth, began the process of updating her government records while living in North Dakota.⁴ When the clerk in the Lee County, Alabama, office noted a discrepancy between her prior records and her updated documentation, however, it derailed Ms. Corbitt's efforts to obtain an accurate Alabama license.⁵ The clerk reacted with hostility and started referring to Ms. Corbitt as "he" and "it," asked about her anatomy and medical history, and discussed the situation in front of others in the office.⁶ Ultimately, the clerk refused to issue paperwork reflecting Ms. Corbitt's affirmed gender, insisting instead that Ms. Corbitt sign paperwork verifying her gender as "male."⁷ Ms. Corbitt left the Lee County driver's license office without signing the paperwork and thus without an Alabama license.⁸

Destiny Clark, similarly, is a transgender woman from St. Clair County, Alabama, who was assigned the biological sex "male" at birth.⁹ After legally changing her name, correcting her gender with the Social Security Administration, and sending requested medical documentation to the appropriate office of the Alabama Law Enforcement Agency (ALEA), Ms. Clark tried repeatedly to alter the gender marker on her driver's license.¹⁰ When Ms. Clark, who had undergone gender confirmation surgery, sent updated medical documentation from her surgeon to the clerk's office, a clerk again told her that the treatment was insufficient and that, as a matter of state policy, the clerk could not change Ms. Clark's documented gender.¹¹ A federal lawsuit ensued.¹²

In *Corbitt v. Taylor*,¹³ the plaintiffs argued that Alabama's surgical requirement violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, their right to informational privacy,

1. See First Amended Complaint for Declaratory and Injunctive Relief at 14, *Corbitt v. Taylor*, 513 F. Supp. 3d 1309 (M.D. Ala. 2021) (No. 18-CV-91), ECF No. 38.

2. See *id.* at 13.

3. See *id.*

4. See *id.* at 14.

5. See *id.*

6. See *id.*

7. See *id.*

8. See *id.*

9. See *id.* at 15.

10. See *id.* at 15–16.

11. See *id.* at 16.

12. See Complaint for Declaratory and Injunctive Relief, *Corbitt v. Taylor*, 513 F. Supp. 3d 1309 (M.D. Ala. 2021) (No. 18-CV-91), ECF No. 1.

13. 513 F. Supp. 3d 1309 (M.D. Ala. 2021), *appeal docketed*, No. 21-10486 (11th Cir. Feb. 12, 2021).

their right to refuse unwanted medical care, and their right to be free of compelled speech.¹⁴ The U.S. District Court for the Middle District of Alabama held the policy to be unconstitutional on equal protection grounds.¹⁵

Federal and state identity documents are used in daily life to establish identity for a broad range of purposes.¹⁶ Drivers' licenses are used to travel,¹⁷ enroll in schools,¹⁸ open bank accounts,¹⁹ vote,²⁰ and get new jobs,²¹ among other uses.²² Gender markers figure significantly into some of these uses, particularly when public benefits or resources are distributed along lines of sex or gender.²³ It is unclear, however, that sex or gender are

14. *See id.* at 1311–12.

15. *See id.* at 1312; *see infra* Part II.A.

16. *See* Megan Brodie Maier, *Altering Gender Markers on Government Identity Documents: Unpredictable, Burdensome, and Oppressive*, 23 U. PA. J.L. & SOC. CHANGE 203, 204 (2020) (discussing the many contexts in modern life in which proof of identity is required).

17. *See, e.g., Security Screening: Identification*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/travel/security-screening/identification> [<https://perma.cc/D4N9-4WDU>] (last visited Mar. 6, 2023).

18. *See, e.g., N.Y.S. DEP'T OF EDUC., A GUIDE TO UNDERSTANDING THE NEW RULES FOR SCHOOL REGISTRATION* (2015), https://www.p12.nysed.gov/sss/documents/EnrollmentBrochure_English.pdf [<https://perma.cc/5XZU-PHKN>]; *see also* N.Y.C. DEP'T OF EDUC., REGISTRATION CHECKLIST, <https://www.schools.nyc.gov/docs/default-source/default-document-library/registration-checklist> [<https://perma.cc/E9RE-UALC>].

19. *See Bank Accounts and Services: Can I Get a Checking Account Without a Driver's License?*, CFPB (Aug. 19, 2020), <https://www.consumerfinance.gov/ask-cfpb/can-i-get-a-checking-account-without-a-drivers-license-en-927/> [<https://perma.cc/Q8A2-RSGC>].

20. *See Voter ID Laws*, VOTE.ORG, <https://www.vote.org/voter-id-laws/> [<https://perma.cc/3GFN-CVAZ>] (last visited Mar. 6, 2023).

21. *See 12.0 Acceptable Documents for Verifying Employment Authorization and Identity*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/120-acceptable-documents-for-verifying-employment-authorization-and-identity> [<https://perma.cc/V46A-ZZZS>] (May 20, 2022).

22. Drivers' licenses are also used to purchase goods, the sale of which are restricted by age, such as alcohol or tobacco. *See, e.g., What You Need to Know If You're a Licensed Retailer: Preventing Sales to Minors*, N.Y.S. LIQUOR AUTH., <https://sla.ny.gov/what-you-need-know-if-youre-licensed-retailer> [<https://perma.cc/PVC7-B7MA>] (last visited Mar. 6, 2023) (listing a valid U.S. state or Canadian driver's license as the first acceptable form of identification for those looking to purchase alcohol).

23. *See Homeless Shelters*, N.Y.C. 311, <https://portal.311.nyc.gov/article/?kanumber=KA-02501> [<https://perma.cc/V53U-5Z45>] (last visited Mar. 6, 2023) (listing separate intake facilities at different locations based on gender for single adults). Relatedly, almost a quarter of respondents in the 2015 U.S. Transgender Survey reported housing instability because of anti-transgender bias. *See* SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, NAT'L CTR. FOR TRANSGENDER EQUAL., REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 176, 180 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/KB7R-UDQ8>]. Of survey respondents who had experienced homelessness in the past year because of their transgender status, 6 percent were denied access to a shelter, and 70 percent of those who stayed in a shelter experienced mistreatment based on their transgender status. *Id.*

necessary²⁴ or even useful data points for the general purposes of proving identity.²⁵

States vary considerably in the processes that they establish for altering gender markers on identity documents.²⁶ Before *Corbitt*, Alabama's gender marker alteration requirement was among the strictest in the country; however, it was not unique in the burden that it imposed on transgender license holders.²⁷ At least eight states and two territories require proof of surgery, a court order, or an amended birth certificate (or some combination thereof) before a person can alter their driver's license.²⁸ Although state and federal policies are trending toward expanded gender options, simplified amendment procedures, and reduced barriers to gender marker amendment,²⁹ a significant majority of transgender license holders is estimated to not have access to identity documents that accurately reflect their affirmed genders.³⁰ Transgender license holders in states with policies allowing self-determinative gender marker alterations, though, are significantly more likely to have gender-accurate identification.³¹

24. The Code of Alabama requires that drivers' licenses issued by the Alabama Department of Public Safety (now ALEA) contain a unique number assigned to the licensee, as well as "a color photograph of the licensee, the name, birthdate, address, and a description of the licensee." ALA. CODE § 32-6-6 (2022). The statute does not list either sex or gender as required data points for the description of the licensee. *Id.* This gender marker is required, rather, by ALEA policy. *See* Defendants' Brief in Support of Their Motion for Summary Judgment at 2, *Corbitt v. Taylor*, 513 F. Supp. 3d 1309 (M.D. Ala. 2021) (No. 18-CV-91), 2019 WL 690376.

25. *See, e.g.*, James McGrath, *Are You a Boy or a Girl?: Show Me Your REAL ID*, 9 NEV. L.J. 368, 370 (2009) ("The use of gender or sex on identification cards does little to positively identify individuals, and instead, creates problems for people who do not fall neatly into either of the two currently accepted categories of sex or gender.")

26. *Equality Maps: Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/identity_document_laws [<https://perma.cc/9GLZ-LKE6>] (last visited Mar. 6, 2023).

27. *See id.*

28. *See infra* note 105 and accompanying text. *See generally* ID DOCUMENTS CTR., NAT'L CTR. FOR TRANSGENDER EQUAL., HOW TRANS-FRIENDLY IS THE DRIVER'S LICENSE GENDER CHANGE POLICY IN YOUR STATE? (2019), https://transequality.org/sites/default/files/Drivers%20License%20Grades%20July%202021a_0.pdf [<https://perma.cc/RYX7-UFXF>]. The National Center for Transgender Equality grades policies on a scale from "A plus" through "F," the former applying to policies most favorable to transgender license holders. *See id.* Alabama's gender marker alteration policy is currently rated "D" because it is now unclear, which marks an improvement from its pre-*Corbitt* score, an "F." *Id.*

29. GENDER DESIGNATION WORKING GRP., AM. ASS'N OF MOTOR VEHICLE ADM'RS, RESOURCE GUIDE ON GENDER DESIGNATION ON DRIVER'S LICENSES AND IDENTIFICATION CARDS 3-4 (2016), <https://publicwebsitetest-kentico.aamva.org/getmedia/e0069691-e7cf-4a21-aac7-98a9118f63bd/Resource-Guide-on-Gender-Designation-on-Driver-s-Licenses.pdf> [<https://perma.cc/A77Q-VMWD>] (listing easy-to-understand amendment form, no surgical requirement, no court order requirement, a broad range of eligible providers for certification, and more among the key features of updated gender alteration procedures across jurisdictions).

30. Of respondents to the 2015 U.S. Transgender Survey, only 11 percent had their preferred name and gender on all IDs and records, while 68 percent reported not having a single ID with both their preferred name and gender. JAMES ET AL., *supra* note 23, at 82.

31. *See* JODY L. HERMAN & KATHRYN O'NEILL, WILLIAMS INST., GENDER MARKER CHANGES ON STATE ID DOCUMENTS: STATE-LEVEL POLICY IMPACTS 1 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gender-Markers-Jun-2021.pdf>

The procedures governing gender marker amendments to drivers' licenses have a direct and substantial impact on the ability of transgender people to fully participate in society free of harassment, violence, and oppression.³² Several lower courts have held requirements like proof of genital surgery to be unconstitutional, doing so on equal protection or substantive due process grounds.³³ The constitutional frameworks invoked to analyze burdensome policies, however, are vulnerable to evolving legal conceptions of sex, gender, and the relationship between them, the applicable degree of heightened scrutiny for classifications on these bases, and the scope of privacy rights under substantive due process jurisprudence.³⁴ More importantly, these frameworks overlook the burdens that such policies impose on speech.

First Amendment jurisprudence, meanwhile, offers underexplored frameworks through which to evaluate the constitutionality of restrictive gender marker policies.³⁵ Surgery requirements for gender marker alteration force both expressive conduct and direct speech by influencing individuals' choices to have gender confirmation surgery or, in the alternative, by forcing them to present a gender marker that is contrary to their gender identity.³⁶ The compelled speech doctrine, therefore, may offer an important alternative constitutional basis for ensuring that transgender people can legally identify themselves in accordance with their affirmed gender.³⁷

This Note addresses lower courts' approaches to evaluating the constitutionality of burdensome prerequisites for altering gender markers on drivers' licenses and state identification. Part I outlines the evolution of the U.S. Supreme Court's First Amendment jurisprudence and its application to gender expression and identity documents. Specifically, Part I explains First Amendment frameworks for analyzing symbolic speech, compelled speech, and government speech, as well as their application, if any, to gender identity, gender expression, and state identification. Part II discusses lower court decisions analyzing surgical requirements for gender marker alteration that have exclusively applied equal protection and substantive due process analyses in finding them unconstitutional. Part II also explains the vulnerabilities in these frameworks, given the courts' application of intermediate scrutiny under equal protection and the narrowing scope of the right to privacy under substantive due process. Part III argues that the First Amendment is the more appropriate lens through which to analyze gender marker alteration policies, as these policies implicate free speech and should

[<https://perma.cc/CM2J-RYRY>]. Based on a 2015 survey, "46.5% of those living full time in a gender different from their sex assigned at birth have corrected the gender markers on their driver's licenses in states with the least policy barriers, compared to 25.8% of those living in states with the most policy barriers." *Id.*

32. *See infra* note 76 and accompanying text. *See generally* HERMAN & O'NEILL, *supra* note 31.

33. *See infra* Part II.

34. *See infra* Part II.

35. *See infra* Part III.

36. *See infra* Part III.

37. *See infra* Part III.

be subjected to strict scrutiny. Part III then applies the Supreme Court's compelled speech framework to surgical gender marker alteration prerequisites, concluding that they violate the First Amendment protection against compelled speech and are thus unconstitutional.

I. GENDER, IDENTITY DOCUMENTS, AND THE FIRST AMENDMENT

The First Amendment is an important but underutilized avenue through which litigants can challenge laws that compel the expression of gender identity. To understand the relationship between the First Amendment and the individual interest in an accurate gender marker on identity documents, it is important to understand what “sex” and “gender” mean, current trends in gender marker alteration policies, and courts' applications of First Amendment doctrine to gender expression and state identification. Part I.A addresses the inapt legal and cultural conflation of “sex” and “gender.” It defines both terms and their usage in this Note, and it clarifies what information is sought and reflected by “gender markers” on identity documents. Part I.B discusses the history of identity documents and trends in gender marker alteration procedures at the federal and state levels. It describes three categories of current state gender marker alteration policies based on the attendant level of burden imposed on those looking to change their gender markers. Part I.C reviews Supreme Court jurisprudence on the right to symbolic speech, the right to be free of compelled speech, and the doctrine of government speech as they pertain to expressions of gender identity or identity documents.

A. *The Terminology of Sex and Gender*

Despite their differences, the terms “sex” and “gender” are often used interchangeably, both culturally and legally, to refer to biological sex or physiological characteristics.³⁸ Legislation generally uses the term “sex,” and judicial or administrative bodies frequently substitute “gender” for “sex”—or use the terms interchangeably—when interpreting such statutes.³⁹ This conflation of the terms both reinforces and is driven by definitional and rhetorical misunderstandings about the differences between the two.⁴⁰ It also frustrates efforts to address discrimination based either on sex or gender, and particularly based on discrimination that involves a divergence between the two.⁴¹ This section defines “sex,” “gender,” “gender identity,” and “transgender” to clarify their differences and their respective uses in this Note. It also defines “gender markers,” both by reference to its common

38. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 20 (1995).

39. Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 274 nn.39–43 (1999).

40. See Valdes, *supra* note 38, at 20 n.46, 21 n.50 (discussing lack of statutory definitions and how conflation of terms has been manipulated to interfere with antidiscrimination efforts).

41. See *id.* at 20 n.46 (explaining that using these terms interchangeably obscures the basis of discrimination against transgender and nonbinary people).

usage in the context of identity documents and by clarifying what information the data point aims to capture.

1. Sex

Sex is a biological designation that typically connotes a person's status as male or female.⁴² The medical field increasingly recognizes, however, that biological sex is not binary and, rather, includes a number of statuses described collectively as "intersex."⁴³ This is due, in part, to a lack of scientific certainty as to which aspects of human biology determines sex.⁴⁴ The medical community recognizes at least eight factors underlying biological sex, including but not limited to chromosomal combinations, external genitalia, secondary sex characteristics, and reproductive sex glands.⁴⁵ These factors align for most people, facilitating categorization within a binary framework.⁴⁶ For many others, however, one factor may be ambiguous, or the factors may be incongruent with one another.⁴⁷

Although biological determination of sex is multifactorial and nonbinary, designations are usually made at birth based on a single, observable criterion: external genitalia.⁴⁸ This indicator determines the sex recorded on a person's birth certificate, which, in turn, becomes the basis for that person's legal sex.⁴⁹ Determining *legal* sex, therefore, diverges significantly from determining *medical* sex, which accounts for a variety of biological factors and the possible incongruence among them.⁵⁰ This difference "render[s] law's construction of legal sex incorrect as a matter of fact and thus flawed

42. See generally *LGBTQ+ Definitions*, TRANS STUDENT EDUC. RES., <https://transstudent.org/about/definitions/> [<https://perma.cc/TFL5-3BVS>] (last visited Mar. 6, 2023) ("Sex Assigned at Birth: The assignment and classification of people as male, female, intersex, or another sex assigned at birth often based on physical anatomy at birth and/or karyotyping.").

43. See Vadim M. Shteyler, Jessica A. Clarke & Eli Y. Adashi, *Failed Assignments—Rethinking Sex Designations on Birth Certificates*, 383 NEW ENG. J. MED. 2399, 2399–400 (2020).

44. See Greenberg, *supra* note 39, at 278. The list of recognized sex criteria includes, among others: genetic or chromosomal sex (XY, XX, or other combination), gonadal sex (reproductive sex glands, including testes or ovaries), internal morphologic sex (seminal vesicles/prostate or vagina/uterus/fallopian tubes), external morphologic sex (genitalia, such as penis/scrotum or clitoris/labia), hormonal sex (androgens or estrogens), phenotypic sex (secondary sexual features, including facial or body hair, breasts, etc.), assigned sex and gender of rearing, and sexual identity. See *id.*

45. See *id.*

46. See *id.*

47. See *id.* at 278–79.

48. Kyle C. Velte, *Mitigating the "LGBT Disconnect": Title IX's Protection of Transgender Students, Birth Certificate Correction Statutes, and the Transformative Potential of Connecting the Two*, 27 AM. U.J. GENDER SOC. POL'Y & L. 193, 200 (2019). When external genitalia are unambiguous, a birth attendant will record a straightforward sex designation. See Greenberg, *supra* note 39, at 271–72. When genitalia are ambiguous, however, medical practitioners historically encouraged corrective surgery to conform with either male or female genitalia. See *id.*

49. See Greenberg, *supra* note 39, at 271.

50. See *id.*

as a matter of law and policy,”⁵¹ an error exacerbated by its failure to account for potential divergences between sex and gender identity.⁵²

This error appears in the issuance of drivers’ licenses and other forms of state identification because sex or gender markers are typically based on the sex indicated on a birth certificate.⁵³ When an individual’s biological sex is nonbinary or otherwise differs from what their birth certificate states, or when an individual’s gender identity does not correspond to their “legal” sex, the driver’s license designation will be incorrect.

2. Gender & Gender Identity

Gender, on the other hand, is a social construct that refers to the cultural characteristics and/or social roles associated with being either male or female.⁵⁴ Individuals with characteristics typically associated with the male sex have a masculine gender and are referred to as “men.”⁵⁵ Those with characteristics typically associated with the female sex have a feminine gender and are referred to as “women.”⁵⁶ Despite the frequent conflation of gender and sex in judicial opinions, the Supreme Court has acknowledged that the term “gender” refers to something distinct from—though related to—sex.⁵⁷

“Gender identity” refers to an individual’s internal sense of being a man, woman, both, or neither.⁵⁸ For most people, their self-perceived gender identity aligns with the sex assigned to them at birth.⁵⁹ “Cisgender” refers to a person whose gender identity *does* align with the sex they were assigned at

51. See Velte, *supra* note 48, at 200.

52. See *id.* See generally AM. MED. ASS’N, REPORT OF THE BOARD OF TRUSTEES 3 (2021), <https://www.ama-assn.org/system/files/2021-04/j21-bot15.pdf> [<https://perma.cc/W934-4XNP>] (“[A]bout 1 in 5,000 people have intersex variations; 6 in 1,000 people identify as transgender; and others are nonbinary . . . or gender nonconforming.”). When transgender, nonbinary, or intersex people have a gender identity that does not match the sex on their birth certificates, producing their birth certificate may lead to confusion, discrimination, harassment, and violence. See *id.*

53. See *infra* notes 71–72 and accompanying text. But see *infra* Part I.B.2 (discussing states with self-designated gender markers).

54. See generally Valdes, *supra* note 38. Several terms and theories surrounding gender identity were coined in 1955 by sexologist and professor John Money after noting the difference between gender and sex. *Id.*

55. See *id.* at 21 n.51. Traditionally, social norms dictate that men be strong, assertive, virile, macho, and rational. See *id.* The gender of persons with those traits is traditionally labeled masculine. See *id.* Women, on the other hand, are supposed to be weak, passive, quiescent, and emotional. See *id.* at 21–22 n.51. Individuals with those traits are traditionally considered feminine. See *id.*

56. See *id.*

57. See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting) (“The word ‘gender’ has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male.”).

58. See *LGBTQ+ Definitions*, *supra* note 42.

59. See Greenberg, *supra* note 39, at 274.

birth.⁶⁰ “Transgender” is an umbrella term for a person whose gender identity *does not* align with the sex they were assigned at birth.⁶¹

Transgender people may outwardly manifest their gender identities through clothing, cosmetics, and hairstyles, or by physiologically altering their voices or body shapes.⁶² This process of transitioning may or may not include gender confirmation surgery, which refers to the procedure(s) by which a transgender person medically alters their genitalia and secondary sex characteristics so that their physical appearance aligns with their gender identity.⁶³ Gender confirmation surgery involves a range of possible procedures, including genital reassignment, hysterectomy, facial surgeries, procedures to preserve fertility, and more.⁶⁴

Many transgender people choose not to or cannot afford to undergo genital reassignment⁶⁵ and may opt for less invasive surgeries or hormone therapy without altering their genitalia.⁶⁶ Others, meanwhile, may pursue nonsurgical gender affirmation through dermatological treatments or voice therapy.⁶⁷

Because gender is distinct from sex, and the two may not correspond to one another, the relationship between the two is governed by individual choices about gender expression and physiological transition.⁶⁸ To obtain drivers’ licenses and state IDs, the state may ask an individual to indicate their sex or gender while restricting the grounds for their answer.⁶⁹ This

60. See *LGBTQ+ Definitions*, *supra* note 42.

61. See *id.* (noting that transgender status is distinct from gender expression or presentation).

62. See *id.*

63. See LAMBDA LEGAL, *BENDING THE MOLD: AN ACTION KIT FOR TRANSGENDER STUDENTS* 24–25 (2008), https://www.lambdalegal.org/sites/default/files/publications/downloads/btm_bending-the-mold_0.pdf [<https://perma.cc/C65K-R634>].

64. See Fan Liang, *Gender Affirmation Surgeries*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/wellness-and-prevention/gender-affirmation-surgeries> [<https://perma.cc/HRP9-ABSK>] (last visited Mar. 6, 2023). Specifically, other procedures include phalloplasty, vaginoplasty, top surgery, facial gender surgery, scrotoectomy, and more. See *id.*

65. See Kelly Burden Lindstrom, *Document Correction and the Fight for Equality in the Transgender Community*, ABA, https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/sexual-orientation-gender-identity/document-correction-and-the-fight-for-equality-in-the-transgender-community/ [<https://perma.cc/P7D7-B5JE>] (last visited Mar. 6, 2023).

66. See Jill Filipovic, *From School to Society, the Intolerance Transgender People Face*, GUARDIAN (Mar. 20, 2013, 10:30 AM), <https://www.theguardian.com/commentisfree/2013/mar/20/school-society-intolerance-transgender> [<https://perma.cc/974U-SWY2>] (describing the nonsurgical means transgender people employ to align gender presentation with social, cultural, and physical markers of their gender identity).

67. See Fan Liang, *Gender Affirmation: Do I Need Surgery?*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/wellness-and-prevention/gender-affirmation-do-i-need-surgery> [<https://perma.cc/6Z2Z-FKUM>] (last visited Mar. 6, 2023).

68. See *id.* (explaining that some transgender people will choose not to have surgery because of the expense, because of a lack of family support, because not everyone views surgery as necessary to improve their quality of life, or because other options that can reduce gender dysmorphia are available to them).

69. See *infra* Part I.A.3.

raises questions about who properly defines those characteristics and the purposes that such information serves in the context of identity documents.

3. Gender Markers

Although gender identity is, by definition, self-determined, the state retains the authority to legally define gender through statutes and administrative policies governing identity documents.⁷⁰ Currently, all fifty states include a gender marker on drivers' licenses, a data point that states often assume is synonymous with sex.⁷¹ Beyond providing instructions to indicate one's "sex" as "male" or "female," states generally do not define what they mean by "gender marker." Rather, they explain the term by reference to a description of one's biological sex, creating another instance in which sex and gender are functionally conflated or, at a minimum, presumed to align with one another.⁷² However, the increasing use of self-determinative policies for altering gender markers on drivers' licenses,⁷³ as well as the way in which gender is publicly determined when comparing an individual to their driver's license, suggest that this data point purports to reflect gender identity and/or gender presentation.⁷⁴ Some states insist, however, that biological sex is the relevant data point for a narrow range of identity verification purposes.⁷⁵

Regardless of whether a state employs a sex marker or a gender marker on state identification, the implications of a marker that diverges from an

70. See *Issues: Identity Documents & Privacy*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues/identity-documents-privacy> [https://perma.cc/4EP9-PFJE] (last visited Mar. 6, 2023).

71. See, e.g., *Gender X*, N.Y.S. DEP'T OF MOTOR VEHICLES, <https://dmv.ny.gov/dmv-records/gender-x> [https://perma.cc/N67R-5XCN] (last visited Mar. 6, 2023) (explaining New York State's addition of a "Gender X" option for drivers' licenses while inviting applicants to update their "sex descriptor" online, referencing the new gender option).

72. Tennessee's driver's license gender amendment policy, for example, requires a physician's certification that the "necessary medical procedures to accomplish the change in gender are complete." See *ID Documents Center: Tennessee*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents/state/tennessee> [https://perma.cc/8GDY-Y67R] (Feb. 2023). Because sex, but not gender, can be changed through "medical procedures," the policy appears to use the term "gender" to refer to sex. See *id.*

73. See *infra* Parts I.B.1–2.

74. See HAYLEY GORENBERG, LAMBDA LEGAL, COMMENTS REGARDING OAR 735-062-0013, PROPOSED RULE ADDRESSING PHYSICAL DESCRIPTION, INCLUDING SEX, ON DRIVER LICENSE, DRIVER PERMIT OR IDENTIFICATION CARD 12–13 (2017), <https://www.courthousenews.com/wp-content/uploads/2017/06/lambda-legal.pdf> [https://perma.cc/3QLR-CFMG]. ("Bartenders do not examine customers' genitals before serving them alcoholic beverages, and police officers do not perform DNA testing before issuing tickets to speeding drivers."); see also Maier, *supra* note 16, at 230 ("In public, gender is determined primarily based on . . . gender presentation and the practical reality of how identity documents are used . . . [T]hat the gender designation . . . must correspond to the holder's anatomy . . . ignores how drastically [transgender] individuals . . . can change in their physical appearance.").

75. See *infra* Part II.A. This Note uses the term "gender marker" normatively to refer to the designation on a driver's license or state ID. When a state has explicitly conveyed its intent to employ a sex marker, rather than a gender marker, however, this Note uses "sex marker" accordingly.

individual's gender presentation are the same: transgender license holders with gender-inaccurate identification experience harassment, violence, denial of services, and discrimination as a result of identification that reveals their transgender status.⁷⁶

Because sex and gender provide different information in the context of identity verification, clarifying the differences between them and describing whether states require a sex or a gender marker on state identification aid in evaluating states' justifications for imposing surgical prerequisites to altering these designations.

B. Gender Markers & Identity Documents

While the issuance of contemporary identity cards began in earnest during World War II, the first drivers' licenses in the United States appeared in 1903.⁷⁷ By 1930, twenty-four states required a license to drive a car.⁷⁸ Ten years later, thirty-nine states were requiring drivers' licenses.⁷⁹ Though the international trend during and after World War II favored nationalized identification systems, the predominant practice in the United States was and remains centered around state-issued identification.⁸⁰ In practice, state-issued identification—usually in the form of a driver's license—functions as a national identity card.⁸¹ These cards are used for a broad range of daily activities, making it difficult to fully participate in society without one. Even in their earliest iterations, most state drivers' licenses included an explicit sex designation or indicated gender through a salutation.⁸² This section contextualizes gender markers on identity documents generally by describing recent trends in federal policies governing their alteration. It also lays out the current landscape of state law governing gender marker alteration by establishing and describing three categories of alteration policies.

76. See JAMES ET AL., *supra* note 23, at 82 (“[After] showing an ID with a name or gender that did not match their gender presentation, 25% of [respondents] were verbally harassed, 16% were denied services or benefits, 9% were asked to leave a location or establishment, and 2% were assaulted or attacked.”).

77. Elizabeth Nix, *When Was the First U.S. Driver's License Issued?*, HISTORY (Aug. 30, 2018), <https://www.history.com/news/when-was-the-first-u-s-drivers-license-issued> [<https://perma.cc/CB7E-69NC>]. The League of Nations promoted the concept of an international passport standard after World War I, but it was not until the late 1930s that countries started implementing national identity documents. Giulia Pines, *The Contentious History of the Passport*, NAT'L GEOGRAPHIC (May 16, 2017), <http://www.nationalgeographic.com/travel/features/a-history-of-the-passport/> [<https://perma.cc/G5TM-UJC6>]; Connor T. Jerzak, *A Brief History of National ID Cards*, FXB CTR. FOR HEALTH & HUM. RTS. HARV. UNIV. (Nov. 12, 2015), <https://fxb.harvard.edu/a-brief-history-of-national-id-cards/> [<https://perma.cc/TQV6-3VS2>].

78. See Nix, *supra* note 77.

79. See Maier, *supra* note 16, at 223.

80. See *id.* There is no national identity document in the United States other than the U.S. passport. See *id.*

81. See *id.*

82. See, e.g., Nick Corasaniti & Josh Williams, *Evolution of the New York Driver's License*, N.Y. TIMES (Mar. 16, 2013), <https://archive.nytimes.com/www.nytimes.com/interactive/2013/03/17/nyregion/17licenses-evolution.html> [<https://perma.cc/QWS4-KWFD>]; see also Maier, *supra* note 16, at 223.

1. Federal Trends in Gender Marker Alteration

Most U.S. jurisdictions have some judicial or administrative procedure through which a transgender person may alter their driver's license gender marker.⁸³ Increasingly, jurisdictions are modifying their statutes, regulations, or administrative policies to allow self-determined gender designations or changes based on a health-care professional's certification of gender status or appropriate treatment.⁸⁴ This policy shift came as a result of heightened awareness of surgical requirements—the burden imposed by them, their lack of medical necessity, and concerns about their constitutionality.⁸⁵ Relatedly, at least two federal courts have found that it is unconstitutional to entirely prohibit sex marker amendments on birth certificates,⁸⁶ fueling administrative efforts to implement new policies or to alter existing ones to avoid constitutional scrutiny.⁸⁷ More than two-thirds of U.S. jurisdictions allow for gender marker changes on drivers' licenses by self-designation or health-care provider certification, and nearly half recognize a nonbinary gender option.⁸⁸

On the federal level, every major form of government-issued identification reflects this modern process for gender marker amendment.⁸⁹ In 2010, for example, the U.S. Department of State abandoned its policy requiring proof of surgery for a transgender person seeking gender-amended passports and consular birth certificates.⁹⁰ After this change, it allowed such amendments based on a doctor's certification that the applicant had or was in the process of having “appropriate clinical treatment for transition to male or female.”⁹¹ The State Department further amended its policy to remove the medical

83. *See Equality Maps: Identity Document Laws and Policies*, *supra* note 26. Four states and two territories have unclear or unwritten procedures for altering gender on drivers' licenses, while the remaining states and territories have differentially burdensome procedures in place. *See id.*

84. 1 KAREN MOULDING, *SEXUAL ORIENTATION AND THE LAW* § 10:11 (2020).

85. *See id.*

86. The state interests advanced for imposing surgical requirements to alter gender markers may, but do not necessarily, apply to both birth certificates and drivers' licenses (or other forms of state ID). *See infra* Part II.A. Though courts' reasoning in evaluating such policies may be instructive, a discussion of the constitutionality of policies regulating birth certificates is beyond the scope of this Note.

87. *See F.V. v. Barron*, 286 F. Supp. 3d 1131, 1134 (D. Idaho 2018) (holding Idaho's policy barring transgender people from changing the gender marker on a birth certificate to be unconstitutional and ordering that Idaho begin granting applications to amend gender markers); *see also* *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333–34 (D.P.R. 2018) (holding Puerto Rico's policy prohibiting transgender people from changing gender markers on a birth certificate to be unconstitutional).

88. *See Equality Maps: Identity Document Laws and Policies*, *supra* note 26.

89. *See* Moulding, *supra* note 84.

90. *See Change of Sex Marker*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/passports/need-passport/change-of-sex-marker.html> [<https://perma.cc/N7S5-4753>] (last visited Feb. 8, 2020). The website, as recently as February 2020, described the medical certification requirement and the applicable period of passport validity based on whether the applicant had already transitioned to their updated gender or was in the process of doing so. *See id.*

91. *See id.*

certification requirement, now allowing gender amendments based on an applicant's self-designation.⁹²

Similarly, in 2013, the Social Security Administration adjusted its gender alteration policy to accept a passport, birth certificate, or court order recognizing a change of gender.⁹³ The U.S. Citizenship and Immigration Services also changed its policy to allow gender amendment on Permanent Resident Cards (green cards) based on a health-care provider's certification that the applicant had undergone appropriate treatment for gender transition.⁹⁴ Overall, the federal trend in the amendment of identity documents strongly favors self-designated gender markers.

2. Current State Policies for Amending Drivers' Licenses

Current state policies for amending gender markers on drivers' licenses can be grouped into three general categories based on the level of burden imposed, with each category containing its own set of prerequisites. This Note refers to these categories, by increasing level of burden, as self-determinative, moderate, and burdensome.⁹⁵

States with self-determinative policies, such as New York and Oregon, generally allow residents to mark "M," "F," or "X" on their drivers' licenses to indicate male, female, or other/nonbinary.⁹⁶ In the majority of these states, most importantly, the process does not require certification from a third party for approval.⁹⁷ Although some states require provider certification⁹⁸ or fail to offer a nonbinary option,⁹⁹ no state policy in this category features both of these characteristics. The National Center for Transgender Equality assigns an "A plus," "A," or "A minus" grade to states with self-determinative policies.¹⁰⁰

92. See *Selecting Your Gender Marker*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/passports/need-passport/selecting-your-gender-marker.html> [<https://perma.cc/T3XL-53S8>] (last visited Mar. 6, 2023). Notably, the State Department also now allows individuals to select "X" as a nonbinary gender option. See *id.*

93. See *Program Operations Manual System (POMS)*, SOC. SEC. ADMIN., <https://secure.ssa.gov/poms.nsf/lnx/0110212200> [<https://perma.cc/2MWH-KZME>] (Sept. 23, 2022).

94. See U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MEMORANDUM: ADJUDICATION OF IMMIGRATION BENEFITS FOR TRANSGENDER INDIVIDUALS (2012), https://www.uscis.gov/sites/default/files/document/memos/Transgender_FINAL.pdf [<https://perma.cc/34P6-7KL4>].

95. Policy resources and scholarship do not use these terms and generally group states more narrowly. This Note defines and uses these terms for ease of reference to both the types of policies at issue in this Note and those that are beyond the scope of this Note.

96. See *Equality Maps: Identity Document Laws and Policies*, *supra* note 26. Massachusetts, Minnesota, Nevada, Pennsylvania, and Vermont, for example, are among the twenty-two states (and Washington, D.C.) offering a self-determinative gender marker amendment procedure and nonbinary option. *Id.*

97. See ID DOCUMENTS CTR., *supra* note 28.

98. New Hampshire falls into this category. See *id.*

99. Michigan falls into this category. See *id.*

100. See *id.*

States with moderate policies for altering drivers' license gender markers require either an easy-to-understand amendment form¹⁰¹ or no form at all.¹⁰² Policies in this category generally require an attestation of gender identity from a third-party provider, varying in the range of professionals who may provide this attestation.¹⁰³

States with burdensome policies for altering gender markers on drivers' licenses require a court order, amended birth certificate,¹⁰⁴ or proof of genital surgery.¹⁰⁵ Although obtaining a court order appears to be a less onerous hurdle than surgery, many states with this prerequisite have not articulated the standard by which courts may or may not certify a gender change.¹⁰⁶ A lack of statutory provisions guiding the procedural requirements for a legal gender change gives broad leeway to state judges, who can exercise their discretion to approve or deny a court order even without a state-imposed surgical requirement.¹⁰⁷ States that do impose a surgical requirement usually articulate that a "complete," "successful," or "permanent" sex change is required to alter a gender marker, and they require additional medical attestations from the surgeon performing the operation.¹⁰⁸ These states do

101. See *Equality Maps: Identity Document Laws and Policies*, *supra* note 26. Thirteen states and one territory, including Alaska, Delaware, Missouri, and North Carolina, employ an easy-to-understand form. See *id.*

102. *Id.* Six states—Arizona, Florida, Idaho, Kansas, Utah, and Wisconsin—do not use any form. *Id.*

103. See ID DOCUMENTS CTR., *supra* note 28. Alaska, for example, accepts certification of a "sex" change from a medical or osteopathic doctor, social worker, psychologist, professional counselor, physician assistant, or nurse practitioner. See DIV. OF MOTOR VEHICLES, ALASKA DEP'T OF ADMIN., *Changing Identification Details: Sex*, <https://doa.alaska.gov/dmv/akol/namchg.htm> [<https://perma.cc/F6BD-4PSS>] (last visited Mar. 6, 2023).

104. In states requiring an amended birth certificate, the prerequisite is functionally the same as requiring a court order because the same court order certifying a gender change can be used for either a birth certificate or driver's license amendment. See, e.g., *How to Change Information on Your Driver License or ID Card*, TEX. DEP'T OF PUB. SAFETY, <https://www.dps.texas.gov/section/driver-license/how-change-information-your-driver-license-or-id-card> [<https://perma.cc/NBN6-C943>] (last visited Mar. 6, 2023).

105. See ID DOCUMENT CTR., *supra* note 28. Eight states and two territories fall into this category, including Georgia, Guam, Iowa, Kentucky, Louisiana, the Northern Mariana Islands, Oklahoma, South Carolina, Tennessee, and Texas. See *id.*

106. See *How to Change Information on Your Driver License or ID Card*, *supra* note 104. According to the National Center for Transgender Equality, "Texas does not have a specific gender change provision in statute, and therefore some counties and judges are averse to issuing the necessary court orders." *ID Documents Center: Texas*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents/state/texas> [<https://perma.cc/G9T7-3D4B>] (Feb. 2023).

107. See, e.g., TRAVIS CNTY. L. LIBR., *WHAT ARE THE STEPS TO CHANGE MY GENDER MARKER (TRAVIS COUNTY)* (2017), https://lawlibrary.traviscountytx.gov/docs/GenderMarker_Kit_March_2017.pdf [<https://perma.cc/ND4E-4M8L>].

108. See, e.g., *ID Documents Center: Oklahoma*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents/state/oklahoma> [<https://perma.cc/BYR4-VJQX>] (Feb. 2023) ("[T]he applicant must show . . . a notarized statement on letterhead from the physician who performed the sex change operation indicating the applicant or licensee has undergone a complete physical sex change. The letter shall state the sex change is 'irreversible and permanent.'").

not legally or medically define these standards,¹⁰⁹ however, thereby allowing courts or county clerk offices to use discretion in evaluating a medical attestation's legal sufficiency.¹¹⁰

Like with federal policies, the overwhelming policy trend at the state level is toward self-determinative gender marker alteration on drivers' licenses.¹¹¹ These distinctions and patterns inform the sufficiency of state interests advanced to justify surgical requirements for gender marker alteration.

C. The Application of First Amendment Doctrine to Gender Expression and Identity Documents

The First Amendment of the U.S. Constitution provides that the government "shall make no law . . . abridging the freedom of speech."¹¹² The Free Speech Clause restricts the government from prohibiting some written or spoken words,¹¹³ but it does not end there. Interpreting the First Amendment, the Supreme Court has recognized several forms of nonspeech conduct that are entitled to protection, describing them as expressive conduct or symbolic speech.¹¹⁴ Policies that have the effect of forcing individuals to convey gender expression or gender presentation inconsistent with their gender identity mandate expression that these individuals would not otherwise choose.¹¹⁵ Such policies, therefore, implicate First Amendment free speech protections.¹¹⁶

Though the Supreme Court has not explicitly addressed this issue, many scholars argue that gender expression is expressive conduct and thus protected by the First Amendment.¹¹⁷ When policies regulate gender expression by mandating conduct or direct speech in accordance with biological sex, the First Amendment provides an important pathway for litigants to challenge their constitutionality. This section provides an

109. *See id.*; *see also ID Documents Center: Louisiana*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents/state/louisiana> [<https://perma.cc/4X24-PH8D>] (Feb. 2023) (stating that an applicant must submit a physician's statement attesting to a "successful gender change/reassignment" without defining this standard or its scope).

110. This Note is concerned with policies that impose genital surgery as a prerequisite to gender marker alteration. To the extent that burdensome policies have the effect of creating similarly insurmountable barriers to obtaining a gender-accurate driver's license, however, a constitutional analysis under the First and Fourteenth Amendments is proper. A discussion of self-determinative and moderate gender marker alteration policies are beyond the scope of this Note.

111. *See supra* note 96 and accompanying text.

112. U.S. CONST. amend. I.

113. The First Amendment straightforwardly protects verbal or written words, including publication or disclosure of information, as "speech." *Id.*; *see* *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (positing that "disclosure" and "publication" of information is the type of pure speech the First Amendment protects, distinguishing this from expressive conduct).

114. *See* *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

115. *See infra* Parts I.C.2, III.B.

116. *See infra* Parts I.C.2, III.B.

117. *See, e.g.,* Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. WOMEN & L. 187, 195, 204 (2013); Velte, *supra* note 48, at 234; *infra* note 160 and accompanying text.

overview of First Amendment jurisprudence for symbolic speech, compelled speech, and government speech, and it describes whether and how the Court has applied these concepts to gender expression or state identification.

1. Symbolic Speech and Gender Expression

The seminal case identifying symbolic expression as protected speech is *United States v. O'Brien*.¹¹⁸ There, the Supreme Court developed a framework for evaluating symbolic speech and the extent to which it may be regulated, one that was further developed in *Spence v. Washington*¹¹⁹ and *Texas v. Johnson*.¹²⁰

In *O'Brien*, an antiwar protestor was convicted under a federal statute criminalizing the destruction of draft cards.¹²¹ O'Brien burned his draft card to display his opposition to the Vietnam War and thus claimed that the statute violated his First Amendment right to free speech.¹²² The Court held that the statute was constitutional; it disaggregated the regulated conduct into expressive and nonexpressive features and determined that symbolic speech could be regulated based on the features targeted.¹²³ First, the regulation must be “unrelated to the suppression of free expression,” aiming instead to regulate the conduct’s nonexpressive elements.¹²⁴ Second, “the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of [an important governmental] interest.”¹²⁵ Because the government demonstrated an important interest—preserving draft cards—and the law prohibited the destruction of draft cards regardless of an actor’s expressive intent, the Court held that the statute did not aim to suppress speech and was essential to serving the stated interest.¹²⁶

In *Spence*, the Court faced a challenge to a Washington state law prohibiting the placement of words, designs, pictures, or other marks on an American or state flag.¹²⁷ Spence, who hung an altered flag to protest war-related activity, challenged his conviction on First Amendment grounds.¹²⁸ The Court found the statute to be unconstitutional as applied to Spence, holding that flag desecration as a form of protest is symbolic speech protected by the First Amendment.¹²⁹ In determining whether such conduct was symbolic speech, the Court articulated a two-part test: (1) the actor must

118. 391 U.S. 367 (1968).

119. 418 U.S. 405 (1974).

120. 491 U.S. 397 (1989).

121. *See O'Brien*, 391 U.S. at 370.

122. *Id.* at 369.

123. *See id.* at 377.

124. *Id.*

125. *Id.*

126. *Id.* at 378–80.

127. *See Spence v. Washington*, 418 U.S. 405, 405 (1974).

128. *Id.* at 406.

129. *See id.* at 410.

intend to convey a “particularized message,” and (2) it must be very likely that this message would be understood by those perceiving it.¹³⁰

In *Johnson*, the Court again upheld symbolic speech as protected speech under the First Amendment.¹³¹ There, Johnson burned a flag in political protest and was convicted under a Texas statute criminalizing the desecration of venerated objects.¹³² The Court applied the two-pronged *Spence* test and found that Johnson’s conduct was plainly expressive, as it was “sufficiently imbued with elements of communication.”¹³³ The Court, however, declined to apply *O’Brien*, finding that the statute targeted speech because it prohibited flag destruction intended to be insulting but not flag destruction under all circumstances.¹³⁴ Suppression of speech, therefore, was not incidental to the regulation, which the Court then subjected to “the most exacting scrutiny.”¹³⁵ The Court held the statute to be unconstitutional, finding that Texas’s interest in promoting national unity could not overcome the right to engage in Johnson’s conduct as a form of political protest.¹³⁶

In line with these precedents, a court evaluating a claimed symbolic speech violation will first apply the *Spence* test to determine whether the regulated act in question is expressive conduct.¹³⁷ If there is both an intent to convey a particularized message and a significant likelihood that those perceiving it would understand it as such, the court will determine whether it is constitutionally valid.¹³⁸ If the regulation targets the communicative content of the conduct, it is content based, and the court will apply strict scrutiny.¹³⁹ Under strict scrutiny, a law must be narrowly tailored to achieve a compelling governmental interest.¹⁴⁰ If the regulation restricts the communicative conduct without regard to the message conveyed, it is content neutral,¹⁴¹ and intermediate scrutiny applies.¹⁴² Under intermediate scrutiny, a law is

130. *Id.* at 410–11.

131. *See Texas v. Johnson*, 491 U.S. 397, 420 (1989).

132. *Id.* at 400.

133. *See id.* at 406 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)).

134. *See id.* at 411 (“If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law.”).

135. *See id.* at 412 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

136. *Id.* at 420.

137. *See Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

138. *See id.* at 410.

139. *See, e.g., Johnson*, 491 U.S. at 413–14 (finding that the state’s asserted interest in protecting flag’s symbolism was an impermissible viewpoint restriction).

140. *See id.*

141. Generally referred to as time, place, and manner restrictions, content-neutral regulations restrict communication without regard to the message conveyed. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189–201 (1983). Examples of such laws include bans on billboards in residential neighborhoods and bans on loud speeches near hospitals. *See id.* at 189–90.

142. *See United States v. O’Brien*, 391 U.S. 367, 376–77 (1968) (explaining that when the government regulates symbolic speech, a sufficiently important interest in regulating the nonspeech elements may justify limitations on First Amendment protection); *see also Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (“We have often noted that restrictions of . . . [expression] are valid provided they are justified without reference to the content of the regulated speech.”).

constitutionally valid only if it furthers an important governmental interest through means that are substantially related to that interest.¹⁴³

Litigants have used the theory of expressive conduct to challenge regulations that preclude transgender individuals from behaving in ways that correspond to their gender identity.¹⁴⁴ Successful challenges often involve restrictive institutional regulations—specifically those regarding school or workplace dress codes¹⁴⁵ and bathroom choice.¹⁴⁶

In *Doe v. Yunits*,¹⁴⁷ for example, the Massachusetts Superior Court considered whether a school could prevent a transgender student—a girl assigned the sex “male” at birth—from enrolling in school if she wore traditionally feminine clothing.¹⁴⁸ Applying *Spence*, the court found that the student could likely establish that her choice to wear traditionally female clothing expressed her identification with the female gender.¹⁴⁹ Further, the court added that this expression was “not merely a personal preference but a necessary symbol of her very identity.”¹⁵⁰

The U.S. Court of Appeals for the Second Circuit explicitly endorsed the Massachusetts Superior Court’s view in *Zalewska v. County of Sullivan*.¹⁵¹ In that case, the court found that a female employee’s decision to wear a skirt to express generalized cultural values was expressive conduct, but not sufficiently so to warrant First Amendment protection.¹⁵² The court distinguished the woman’s expression from the student’s in *Yunits*, however, noting that the student’s dress sent “a clear and particular message about [her] gender identity” that was readily understood in context.¹⁵³ It thus constituted protected symbolic speech.¹⁵⁴

143. See *Stone*, *supra* note 141, at 190.

144. See *infra* notes 145–57 and accompanying text.

145. See, e.g., *Zalewska v. County of Sullivan*, 316 F.3d 314, 320 (2d Cir. 2003) (acknowledging that a transgender “high school student’s decision to wear traditionally female clothes to school as an expression of female gender identity [is] protected speech”); see also *Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *3, *8 (Mass. Sup. Ct. Oct. 11, 2000) (granting preliminary injunction against a student’s school suspension for wearing clothing that did not conform with their assigned sex because the student was transgender and dressed according to their affirmed gender).

146. See, e.g., *Monegain v. Dep’t of Motor Vehicles*, 491 F. Supp. 3d 117 (E.D. Va. 2020).

147. No. 001060A, 2000 WL 33162199, at *1 (Mass. Super. Ct. Oct. 11, 2000).

148. See *id.* at *3.

149. See *id.* Though the student brought her claim based on her right to free expression under the Constitution of the Commonwealth of Massachusetts, the court applied the U.S. Supreme Court’s First Amendment jurisprudence to evaluate the claim. See *id.* Because the student sought a preliminary injunction restraining the defendant from preventing her enrollment, the court evaluated the likelihood of the student’s success on the merits. See *id.* Therefore, the court did not hold directly that the student’s clothing choices were expressive conduct, but rather that she had a strong likelihood of establishing as much at trial. See *id.*

150. See *id.* at *3.

151. 316 F.3d 314 (2d Cir. 2003).

152. See *id.*

153. *Id.* at 320.

154. *Id.*

Subsequently, in *Monegain v. Department of Motor Vehicles*,¹⁵⁵ the U.S. District Court for the Eastern District of Virginia evaluated a transgender government employee's claim that she had been fired for dressing in accordance with her affirmed gender, in violation of the First Amendment.¹⁵⁶ Citing *Johnson*, *Yunits*, and *Zalewska*, the court found that the employee's decision to dress in feminine attire was symbolic gender expression directed at the public and was, therefore, protected speech.¹⁵⁷

These decisions comport with scholarship on the intersection of symbolic speech and gender expression. As the *Zalewska* court acknowledged, scholars argue that gender expression communicates messages about a core aspect of a person's identity, messages rooted in First Amendment values of autonomy and self-realization.¹⁵⁸ Both a person's *desire* to behave, and the actual *act* of behaving, in ways that outwardly accord with their gender identity convey a specific message to others about that person's gender identity.¹⁵⁹ When such conduct is regulated because others are uncomfortable with or disagree with that person's conceptualization or presentation of gender identity, those regulations are unconstitutional unless they withstand strict scrutiny.¹⁶⁰

As these decisions show, the Supreme Court's line of precedents for evaluating symbolic speech supports recognizing outward gender expression as protected symbolic speech. When government policy forces such conduct, those policies implicate the compelled speech doctrine.¹⁶¹

2. Compelled Speech

Because gender expression is protectable speech, regulations that force an expression of gender identity implicate the First Amendment right to be free of compelled speech. This section provides an overview of the Court's jurisprudence on compelled speech, including its application to expressive conduct.

155. 491 F. Supp. 3d 117 (E.D. Va. 2020).

156. *See id.* at 135.

157. *See id.* at 134–35.

158. *See Velte*, *supra* note 48, at 234; *see also Kosbie*, *supra* note 117, at 195, 204 (“Gender nonconformity should be protected as speech because speakers and listeners understand the conduct as communicative.”).

159. *See Kosbie*, *supra* note 117, at 243 (“Restroom choice is deliberate and intended to communicate a central aspect of identity When a transgender man begins using the men's restroom, not only does his conduct communicate his gender, but he consciously chooses to do so in order to communicate his gender identity.”).

160. *See Danielle Weatherby*, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. REV. L. & SOC. CHANGE 89, 93 (2015) (“Because a transgender [person]'s outward expression of gender . . . conveys an important message . . . about [their] identity, [their] expressive conduct should be treated as speech that falls within the protective umbrella of the First Amendment.”). When expressive conduct is protected speech, school officials cannot restrict or silence the conduct simply because the message conveyed makes them uncomfortable. *See id.*

161. *See infra* Part III.

The Supreme Court has interpreted the First Amendment to protect both the right to speak and the right to refrain from speaking.¹⁶² The right to be free of compelled speech is rooted in the notion that liberty of belief is fundamental to the right of free expression.¹⁶³ Accordingly, “no official . . . 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.”¹⁶⁴ Because freedom of mind is at the core of the compelled speech doctrine, courts have interpreted it liberally¹⁶⁵ and have identified three general categories of compelled speech.¹⁶⁶ The first involves government action that forces a private speaker to disseminate a government message.¹⁶⁷ The second involves government action that forces a private speaker to endorse or accommodate another private speaker’s speech.¹⁶⁸ The third involves government action that forces an individual to subsidize an organization that engages in speech the individual opposes.¹⁶⁹

The Court first developed the compelled speech doctrine in *West Virginia State Board of Education v. Barnette*,¹⁷⁰ which concerned a state resolution requiring students to recite the pledge of allegiance and to salute the U.S. flag.¹⁷¹ The Court held that the resolution was unconstitutional, noting that both the recitation of the pledge *and* the physical salute constituted compelled speech.¹⁷² Describing the symbolic nature of the salute, Justice Robert H. Jackson explained that the resolution forced students to communicate, by both “word and sign,” their acceptance of the state’s political ideas.¹⁷³ In holding that the resolution violated the First Amendment, the Court affirmed the right to be free from both compelled direct speech and compelled expressive conduct.¹⁷⁴

162. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (reinforcing the notion that the First Amendment encompasses both the right to speak and the right to refrain from speaking); see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

163. See *Barnette*, 319 U.S. at 634 (explaining that a “Bill of Rights which guards the individual’s right to speak his own mind” cannot then allow “public authorities to compel him to utter that which is not in his mind”).

164. *Id.* at 642.

165. See Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 332 (2008).

166. See Kingsly Alec McConnell, Comment, *The Liberty Impact of Gender*, 95 WASH. L. REV. 459, 478 (2020) (describing three categories of unconstitutional compelled speech).

167. See, e.g., *Wooley*, 430 U.S. at 717.

168. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574–75 (1995) (finding that a public accommodations statute requiring parade organizers to include an LGBTQ-themed float interfered with their own message).

169. See, e.g., *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (“Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to . . . pay subsidies for speech to which they object.”). This Note deals only with the first category of compelled speech.

170. 319 U.S. 624 (1943).

171. See *id.* at 642.

172. See *id.* at 632 (“There is no doubt that, in connection with the pledges, the flag salute is a form of utterance.”).

173. *Id.* at 633.

174. See *id.*

The Supreme Court further developed the compelled speech doctrine in *Wooley v. Maynard*,¹⁷⁵ which involved a challenge to a New Hampshire statute requiring drivers to display the state motto on their license plates.¹⁷⁶ There, the Court made clear that requiring people to disseminate the state's ideological message on their property is unconstitutionally compelled speech.¹⁷⁷ Considering the state's assertion that the motto facilitated identification of passenger vehicles, the Court further noted that individuals could not be forced to display the state's message "for the express purpose that it be observed and read by the public."¹⁷⁸

In *Wooley*, the Court's analysis included four steps to establishing compelled speech: (1) speech¹⁷⁹ (2) to which a plaintiff objects¹⁸⁰ that (3) is compelled by the state¹⁸¹ and (4) is readily associated with its bearer.¹⁸² Though the Court did not articulate this test explicitly, subsequent cases evaluate these factors, and some lower courts have enumerated them in part.¹⁸³

The Supreme Court developed the contours of the compelled speech doctrine in several later cases. In *Riley v. National Federation of the Blind of North Carolina, Inc.*,¹⁸⁴ for example, the Court determined that protection from compelled speech applies equally to forced statements of fact as it does to forced statements of opinion.¹⁸⁵ In *United States v. United Foods, Inc.*,¹⁸⁶ the Court established that a speaker's objection to the compelled speech at issue need not reflect a point of major disagreement to constitute a sufficient objection.¹⁸⁷

Like with the analysis for symbolic speech, once a court determines that a law implicates the First Amendment by compelling speech, it will apply

175. 430 U.S. 705 (1977).

176. *See id.* at 707.

177. *See id.* at 717.

178. *Id.* at 713.

179. *See id.* (validating the challenger's view that he was forced to bear the state's ideological message through the New Hampshire state slogan).

180. *See id.* (emphasizing the challengers' objection to the slogan and their grounds for doing so).

181. *See id.* at 715 ("[The] statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty . . .").

182. *See id.* at 717 n.15 (distinguishing the national motto on coins from the state slogan on license plates because coins are associated only with the government, whereas license plates are associated with the individual on whose car they appear).

183. *See, e.g.,* *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) (articulating the compelled speech test as (1) speech (2) to which a plaintiff objects that (3) is compelled by governmental action); *see also* Brief of Law Professors as *Amici Curiae* in Support of Plaintiffs-Appellees at 6, *Corbitt v. Taylor*, No. 21-10486 (11th Cir. Aug. 2, 2021), 2021 WL 3421575 (merging the three-part *Cressman* test with the fourth factor discussed in *Wooley*).

184. 487 U.S. 781 (1988).

185. *See id.* at 797-98.

186. 533 U.S. 405 (2001).

187. *See id.* at 411 ("[T]here is no apparent principle which distinguishes out of hand minor debates . . ."). Other developments in the compelled speech doctrine are inapplicable and beyond the scope of this Note.

heightened scrutiny.¹⁸⁸ Strict scrutiny applies to regulations that compel speech because, by compelling someone to speak a message they would not otherwise express, such regulations necessarily alter the content of that person’s speech.¹⁸⁹ Therefore, these laws are presumptively content based, rather than content neutral, and courts will subject them to strict scrutiny¹⁹⁰ unless a recognized exception applies.¹⁹¹

The compelled speech doctrine is an important tool for protecting private citizens’ rights to refrain from expressing objectionable speech, such as unwanted expressions of gender identity. It is not always clear, however, if a compelled speech claim involves a private citizen conveying a government message or the government conveying its own speech.¹⁹² In such cases, including in the context of gender markers on state IDs, constitutional analysis under the compelled speech doctrine intersects with the government speech doctrine.

3. The Intersection of Government Speech, Compelled Speech, and Drivers’ Licenses

The First Amendment’s Free Speech Clause protects private speech from undue government regulation, but it does not similarly regulate government speech.¹⁹³ Pursuant to the government speech doctrine, the government is entitled to “say what it wishes” . . . and to select the views it wants to express¹⁹⁴ as well as to “promote a program, espouse a policy, or take a position.”¹⁹⁵ In some cases, therefore, First Amendment analysis requires a court to determine whether contested speech is private speech unduly regulated by the government or is the government’s own speech.¹⁹⁶

The two main cases establishing the government speech framework are *Pleasant Grove City v. Summum*¹⁹⁷ and *Walker v. Texas Division, Sons of Confederate Veterans*.¹⁹⁸ In *Summum*, the Court held that allowing certain

188. See *supra* Part I.C.1.

189. See *Nat’l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2368 (2018).

190. See *id.*

191. See Abigail Tubin, Note, *Mandatory Narrated Ultrasounds: A First Amendment Perspective on Abortion Regulations*, 90 FORDHAM L. REV. 1853, 1868 (2022). A court may apply intermediate scrutiny or rational basis review if the law falls into a recognized exception. See *id.* In *Zauderer v. Office of Disciplinary Counsel for the Supreme Court of Ohio*, for example, the Court recognized an exception to strict scrutiny review of content-based laws for required factual disclosures in the context of commercial speech. 471 U.S. 676 (1985). This exception and others, however, are inapplicable and beyond the scope of this Note.

192. See *infra* Part I.C.3.

193. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (“[G]overnment speech is not restricted by the Free Speech Clause.”).

194. *Id.* at 467–68 (quoting *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

195. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015).

196. Christine Bacon, Annotation, *Application of First Amendment Speech Protection to Governmental Entities: Government Speech Doctrine*, 67 A.L.R. Fed. 3d Art. 4 (2021).

197. 555 U.S. 460 (2009).

198. 135 S. Ct. 2239 (2015).

privately donated monuments to be placed in public parks constituted expressive government conduct.¹⁹⁹ Accordingly, it rejected the argument that disallowing other proposed monuments infringed on private parties' freedom of speech.²⁰⁰ Because the government (1) exercised final approval authority over their selection, (2) took ownership of most of the monuments in the park, and (3) expressly set forth the criteria used to select monuments, the monuments' placement reflected government speech and was not subject to a valid First Amendment challenge under the Free Speech Clause.²⁰¹

In *Walker*, the Court held that specialty license plates conveyed government speech, and not private speech protected by the First Amendment.²⁰² In so holding, the Court noted the state's long history of using license plates to display state messages, the relationship in the public mind between license plates and the state, and the state's authority to control the criteria and approval of license plates in vehicle registration and identification.²⁰³ Accordingly, the state's choice to *not* approve certain specialty license plate designs did not violate the Free Speech Clause with respect to the party that proposed the design.²⁰⁴

Based on these precedents, courts have derived a three-part test to distinguish government speech from protected private speech: (1) whether the medium has historically been used for government speech, (2) whether the public reasonably interprets the speech as being conveyed by the government, and (3) whether the government maintains editorial control over the speech.²⁰⁵ Courts have applied this test to identify government speech in various contexts;²⁰⁶ these determinations, however, are generally fact intensive, and the speech conveyed by a given medium may or may not be government speech depending on the circumstances. Thus, these decisions turn not only on the medium, but also on the nature of the speech involved.²⁰⁷

199. *See Sumnum*, 555 U.S. at 481.

200. *See id.*

201. *See id.* at 472–73.

202. *See Walker*, 135 S. Ct. at 2246.

203. *See id.* at 2247–2250.

204. *See id.* at 2246–47. This is distinguishable from *Wooley*, which involved a state forcing a driver to affirmatively display a government message on a license plate. *Wooley v. Maynard*, 430 U.S. 705, 706–07 (1977). The challenger in *Walker*, however, argued that the state violated his free exercise rights by refusing to express the challenger's message in the government's own speech. *Walker*, 135 S. Ct. at 2245.

205. *See, e.g., Pulphus v. Ayers*, 249 F. Supp. 3d 238, 247 (D.D.C. 2017).

206. *See Delano Farms Co. v. Cal. Table Grape Comm'n*, 586 F.3d 1219, 1226 (9th Cir. 2009) (finding that certain advertising activities were rendered government speech given the state's control over the activities); *see also Dean v. Warren*, 12 F.4th 1248, 1264 (11th Cir. 2021) (“[The appellant] engaged in government speech when she cheered in a team uniform at a football game on behalf of her public university.”); *Martinez v. Draper City*, No. 17-CV-00772, 2017 WL 3128806, at *3 (D. Utah July 21, 2017) (finding that a parade was government speech because it was funded, organized, and carried out by the city).

207. *Compare Comm'r of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1204 (Ind. 2015) (holding a state's license plate requirements to be government speech because the state allowed personalized license plates displaying alphanumeric combinations approved by the motor vehicle bureau), *with Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 823 (W.D. Mich.

Moreover, attributing speech to the government does not protect it from compelled speech analysis if it is sufficiently associated with a private person, rather than with the state.²⁰⁸ In other words, government speech may implicate the compelled speech doctrine when a private entity is forced to convey it.

Several cases involving identity documents reflect the intersection of the compelled speech and government speech doctrines. In *Doe v. Kerry*,²⁰⁹ for example, the U.S. District Court for the Northern District of California found that a mandatory, unique identifier on the passports of registered sex offenders was government speech that did not implicate the passport holders' free speech rights.²¹⁰ There, the court rejected a compelled speech challenge by distinguishing the factual legal classification from compelled speech cases involving ideological messages.²¹¹

In *Doe v. Marshall*,²¹² however, the Middle District of Alabama upheld a compelled speech challenge to similar identifiers on state identity cards issued to sex offenders even though the identifiers constituted government speech.²¹³ There, the court relied on *Riley* and determined that the compelled speech doctrine applied to the forced factual disclosure of one's sex offender status on an ID.²¹⁴ Applying the fourth factor addressed in *Wooley*—how closely the speech was associated with its bearer—the court reasoned that the sex offender identifier, like other personally identifying information on the ID card, was readily associated with the ID holder, not with the state.²¹⁵ Because the identifier compelled speech and was not the least restrictive means of achieving the state's interest in law enforcement's ability to easily identify sex offenders, the requirement did not pass strict scrutiny, and the court held it to be unconstitutional.²¹⁶

The *Marshall* court pointed to additional factors that distinguished the government speech involved in issuing and presenting state IDs from permissible government speech in other contexts.²¹⁷ Although no one is

2014) (differentiating personalized license plates from specialty plates and holding that personalized plates were not government speech because only one of each could be issued).

208. See *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (“We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of [the state’s] ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.”).

209. No. 16-CV-0654, 2016 WL 5339804, at *1 (N.D. Cal. Sept. 23, 2016).

210. See *id.* at *18.

211. See *id.*

212. 367 F. Supp. 3d 1310 (M.D. Ala. 2019).

213. See *id.* at 1325 (“The message here is indeed government speech. After all, the State issues the ID cards and controls what is printed on them.”).

214. See *id.* at 1324.

215. See *id.* at 1326 (“The ID cards are chock-full of . . . personal information: their full name, photograph, date of birth, home address, sex, height, weight, hair color, eye color When people see the brand on Plaintiffs’ IDs, they associate it with Plaintiffs.”). Further, the court noted, “the dirty looks that Plaintiffs get are not directed at the State.” *Id.*

216. *Id.* at 1326–27.

217. See *id.* at 1325–26.

legally compelled to present state-issued ID and, thereby, convey the government's speech, having state-issued identification is a "virtual necessity" in daily life.²¹⁸ It is required for job applications, to cash checks, to enter certain business, and more.²¹⁹ Therefore, this functional requirement is, in effect, conditioned on displaying the government's message.²²⁰ Alternatives like federally issued passports, the court determined, do not alleviate this burden because they are more cumbersome for daily use and more expensive to acquire.²²¹ Ultimately, the availability of alternatives to state-issued identification does not preclude finding that the government compels ID holders to convey its speech through certain information contained therein.²²²

Additionally, the fact that identification is personalized and *displayed* informs the relationship between government speech and compelled speech.²²³ The *Marshall* court distinguished identification documents from U.S. currency, which is engraved with the national motto, "In God We Trust."²²⁴ Currency, unlike an identity document, is not personalized, and the speech it contains does not convey anything substantive about its holder.²²⁵ More importantly, currency is not presented for the purpose of displaying its speech, but rather to be exchanged without regard to the speech.²²⁶ The court explained that the motto on currency is plainly attributed only to the government, while the individualized contents of ID cards are more likely to be attributed to the ID holder.²²⁷

The symbolic speech, compelled speech, and government speech doctrines intersect in the context of gender marker alteration policies for drivers' licenses.²²⁸ Although both plaintiffs and scholars have challenged surgical requirements for gender marker alteration as violations of both the right to expressive conduct and the right against compelled speech, lower courts have only decided such challenges under Fourteenth Amendment jurisprudence.²²⁹

II. GENDER MARKER ALTERATION AND THE FOURTEENTH AMENDMENT

The Supreme Court has not addressed the constitutionality of surgical prerequisites to gender marker alteration on state identification. Scholars argue that these requirements violate the Equal Protection Clause by

218. *Id.* at 1325 (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

219. *See id.*

220. *See id.*

221. *See id.* at 1325–26 (“[T]he State cannot force someone to choose between carrying a government message and paying extra money.”).

222. *See id.*

223. *See id.* at 1326.

224. *See id.* (differentiating the contents of identification cards from the speech on currency in light of their relative functions).

225. *See id.*

226. *See id.*

227. *See id.*

228. *See infra* Part III.

229. *See infra* Part II.

imposing a sex-based classification that is not substantially related to an important state interest, and that they also violate the right to informational privacy under a substantive due process analysis.²³⁰ Accordingly, challenges to surgical gender marker alteration requirements for drivers' licenses have been decided for plaintiffs on either equal protection²³¹ or substantive due process grounds.²³² No court has based its holding in such a case on alternative constitutional grounds. This part discusses two lower courts' approaches to evaluating surgical requirements for altering gender markers on state identification. Part II.A discusses a lower court decision applying equal protection jurisprudence to such a policy and the vulnerability that results from applying intermediate scrutiny. Part II.B discusses a lower court decision applying substantive due process jurisprudence and the vulnerability of the right to privacy as grounds for their decision.

A. Examining Surgical Requirements Under Equal Protection

In the 2020 case *Corbitt v. Taylor*, the Middle District of Alabama took up constitutional challenges by transgender license holders to Alabama Policy Order 63.²³³ Policy Order 63 required that applicants submit proof of genital surgery to ALEA before they could amend their driver's license gender marker.²³⁴ ALEA interpreted the policy to mean that the applicant must have "complete" surgery, which meant at least genital surgery but might also include top surgery.²³⁵ Neither the policy nor a statute further defined the "complete" surgery standard,²³⁶ leaving state employees with considerable discretion in evaluating applicants' documentation.²³⁷ The court noted that the effect of the policy was to make surgical genital modification the only pathway to obtaining an amended gender marker.²³⁸

The court analyzed the policy under the Equal Protection Clause.²³⁹ Discussing the applicable standard of review, the court reasoned that intermediate scrutiny applied because the state classified people by giving

230. See, e.g., Velte, *supra* note 48, at 239–41; see also Maier, *supra* note 16, at 233–38.

231. See, e.g., *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1311–12 (M.D. Ala. 2021), *appeal docketed*, No. 21-10486 (11th Cir. Feb. 12, 2021).

232. See, e.g., *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015).

233. See 513 F. Supp. 3d 1309.

234. See *id.* at 1312.

235. See *id.*

236. Section 22-9A-19 of the Code of Alabama, which governs the amendment of vital documents, indicates that sex on a birth certificate may be amended based on a certified court order indicating a sex change by "surgical procedure," but it does not specify which surgical procedures suffice. ALA. CODE § 22-9A-19d (2022). Policy Order 63, which is based on section 22-9A-19d, requires proof that sexual reassignment surgery has been completed but, similarly, does not specify which procedures constitute sexual reassignment surgery. See Defendants' Brief in Support of Their Motion for Summary Judgment, *supra* note 24.

237. See Defendants' Brief in Support of Their Motion for Summary Judgment, *supra* note 24 (naming two ALEA medical unit employees as the people responsible for evaluating whether a doctor's documentation of appropriate gender confirming treatment satisfied the surgical requirement).

238. See *Corbitt*, 513 F. Supp. 3d at 1313.

239. See *id.* at 1313–15.

them different sex designations on their licenses.²⁴⁰ The court explained that, through Policy Order 63, the state determined the criteria by which it made “sex classifications” and, through its requirements, denied plaintiffs the ability to decide their “sex” for themselves.²⁴¹ Therefore, the policy imposed a straightforward sex classification and triggered intermediate scrutiny.²⁴²

In *Corbitt*, the state advanced two interests to justify its policy: (1) to ensure consistency with the state’s existing requirements for amending birth certificates and (2) to provide an accurate description of a license holder for law enforcement to verify identity during post-arrest search and placement procedures.²⁴³ Considering the first justification, the court questioned the state’s premise that uniformity between documents mattered, pointing out that Alabama did not require applicants looking to amend one document to also amend the other.²⁴⁴ Even if the policy achieved such uniformity, the court explained that administrative efficiency was not a sufficiently important interest to justify the classification.²⁴⁵

Enumerating the reasons for which states record sex on birth certificates, however, the court intimated that its analysis may be different if the state had considered or presented evidence supporting the need to similarly indicate sex on a driver’s license.²⁴⁶ The court suggested, for example, that the government has serious interests in collecting sex-based population data through birth certificates, and that such interests may apply to drivers’ licenses.²⁴⁷ The court also clarified that the inclusion of a sex designation on a driver’s license was based solely on ALEA practice, rather than on a textual requirement, either from an Alabama statute or regulation.²⁴⁸ Thus, the court suggested that the state may have good reasons for insisting on criteria for indicating sex on a driver’s license akin to those supporting the criteria for birth certificates or in compliance with statutory requirements.²⁴⁹ Problematically for the state, however, its criteria were not statutorily mandated, and the state neither argued nor relied on those reasons in developing Policy Order 63.²⁵⁰

Suggesting that the state may, in such a case, have a sufficiently important interest in uniformity between birth certificates and drivers’ licenses, the court went on to evaluate whether the surgical requirement was substantially related to that interest.²⁵¹ Finding that it was not, the court pointed specifically to the policy’s lack of specificity about the required surgical procedures and to the state’s inconsistent application of the “complete”

240. *See id.* at 1314.

241. *See id.* at 1315.

242. *See id.*

243. *See id.* at 1316.

244. *See id.* at 1317.

245. *See id.* (citing *Craig v. Boren*, 429 U.S. 190, 198 (1976)).

246. *See id.* at 1318.

247. *See id.*

248. *See id.*

249. *See id.*

250. *See id.*

251. *See id.* at 1319.

surgery requirement.²⁵² Because neither the policy governing birth certificate sex amendment nor Policy Order 63 indicated the particular surgeries that sufficed, the state could not establish that the latter's requirement achieved uniformity with the former's.²⁵³ Moreover, because ALEA approval for gender marker alteration appeared to turn on a doctor's particular phrasing or on ALEA staff's "impression[]" of the documentation's adequacy, the state failed to establish procedural consistency, even under Policy Order 63 alone.²⁵⁴

Turning to the second interest, the court accepted that biological sex markers on drivers' licenses were a key piece of information for law enforcement booking processes.²⁵⁵ Acknowledging that such data informs law enforcement officers' choice of whether a male or female officer should conduct a body search, as well as administrative choices about housing, supervision, and medical care, the court found that facilitating law enforcement booking procedures was an important state interest.²⁵⁶ The court declined to address whether the surgical amendment requirement was substantially related to this interest, however, because the interest was offered post hoc, in that that ALEA did not actually consider it at the time they developed Policy Order 63.²⁵⁷

Beyond the context of gender marker alteration policies, there are many instances in which courts have upheld sex-based classifications, finding that the state interests advanced passed intermediate scrutiny.²⁵⁸ Similarly, despite the *Corbitt* court's holding about Policy Order 63, its analysis reflects several ways for surgical requirements for sex marker alteration on drivers' licenses to withstand intermediate scrutiny. Because, under equal protection jurisprudence, courts are likely to apply intermediate scrutiny to laws that classify people based on transgender status—as a classification that necessarily distinguishes between people on the basis of sex²⁵⁹—equal protection analysis leaves room for courts to uphold surgical requirements for sex marker alteration policies.

252. *See id.*

253. *See id.*

254. *See id.*

255. *See id.* at 1321. "Booking" refers to the procedures that follow an individual's arrest, including a physical search, entering the individual's personal details and information about the crime into the police station's system, and determining an appropriate placement in a holding cell or jail. *See id.* at 1316.

256. *See id.* at 1321.

257. *See id.* at 1321–22.

258. *See, e.g., Roster v. Goldberg*, 453 U.S. 57 (1981) (applying intermediate scrutiny and upholding sex-based classification in statute requiring men but not women to register for the draft in light of the close relationship between excluding women and creating a reliable pool from which to draw combat troops); *see also Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464 (1981) (applying intermediate scrutiny and upholding a statute punishing males but not females for having sexual intercourse with minors given the state's interest in preventing teenage pregnancies and its close relationship to the imposition of a criminal penalty as a deterrent for potential impregnators).

259. *See generally Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (holding that discrimination based on transgender status necessarily discriminates based on sex).

Corbitt demonstrated that states may have several important interests supporting a sex marker alteration policy.²⁶⁰ A state's reliance on sex markers on drivers' licenses for law enforcement custodial procedures is one such interest.²⁶¹ Moreover, the *Corbitt* court hypothesized that the state may have important interests in recording sex on drivers' licenses similar to its interests in recording sex on birth certificates, such as in tracking certain sex-based demographic data.²⁶² In other words, the problem was not that important state interests did not justify the policy, but that the interests were not actually considered in developing the policy. As to whether the policy substantially furthered such interests, the court posited that the state could have specified the required surgical procedures to reduce inconsistent or excessively discretionary application across applicants.²⁶³ Tailoring the policy by enumerating the required procedures would substantially further the state's interest in ensuring that drivers' licenses conveyed a sex in line with state birth certificates and in aid of law enforcement custodial purposes.²⁶⁴

Thus, a state could conceivably develop a policy with such interests in mind and require specific, enumerated surgical procedure(s) to substantially further those interests to pass constitutional muster under an equal protection analysis.²⁶⁵

B. Examining Surgical Requirements Under Substantive Due Process

In the 2015 case *Love v. Johnson*,²⁶⁶ the U.S. District Court for the Eastern District of Michigan considered constitutional challenges to Michigan's policy for altering gender designations on state identification cards.²⁶⁷ The policy required that applicants provide a certified birth certificate showing the applicant's sex.²⁶⁸ An applicant could not use any other document or form of identification, such as a U.S. passport, to establish their sex or a change thereof.²⁶⁹ Thus, transgender applicants looking to change their driver's license gender marker first needed to obtain an amended birth certificate.²⁷⁰ The effect of the policy was to create a significant barrier or a complete bar to gender marker alteration depending on an applicant's birth state.²⁷¹ Michigan-born applicants, for example, would have to undergo genital surgery in accordance with Michigan's requirements for amending

260. *See Corbitt*, 513 F. Supp. 3d at 1321.

261. *See id.*

262. *See id.* at 1318.

263. *See id.* at 1319.

264. *See id.*

265. *See id.* at 1318–21.

266. 146 F. Supp. 3d 848 (E.D. Mich. 2015).

267. *See id.* at 851.

268. *See id.*

269. *See id.*

270. *See id.*

271. *See id.*

sex on a birth certificate.²⁷² Some other applicants, however, would be unable to amend their driver's license under any circumstances if their home state did not allow birth certificate sex amendments.²⁷³

The policy's challengers alleged that it indirectly forced them to disclose their transgender status whenever they presented their identification because of the incongruence between their gender presentations and gender markers.²⁷⁴ They argued that this violated their rights to free speech, equal protection under the law, and substantive due process.²⁷⁵ Under substantive due process, the challengers argued that the policy impermissibly infringed on their right to privacy, right to travel, and right to autonomy in medical decision-making.²⁷⁶

The court applied a substantive due process analysis, first determining whether the policy violated a constitutionally protected right.²⁷⁷ Considering the plaintiffs' assertion that their transgender status was highly personal and intimate information, disclosure of which was embarrassing and placed them at risk of bodily harm, the court analyzed whether the policy violated the constitutional right to privacy.²⁷⁸ It began its analysis by explaining the right to privacy as an unenumerated, fundamental right "implicit in the concept of ordered liberty."²⁷⁹ Rooted in the Supreme Court's substantive due process jurisprudence, the court explained, the right to privacy protects both decisional and informational privacy.²⁸⁰ After finding that the allegations related to the right to informational privacy, the court next explained that the disclosure at issue must implicate a "fundamental liberty interest" to constitute a violation of that right.²⁸¹

Based on the U.S. Court of Appeals for the Sixth Circuit's precedent, the court enumerated two instances in which constitutionally protected informational privacy interests were implicated: (1) when the release of

272. See MICH. COMP. LAWS ANN. § 333.2831 (West 2023) ("A request that a new certificate be established to show a sex designation other than that designated at birth . . . shall be accompanied by an affidavit of a physician certifying that sex-reassignment surgery has been performed.").

273. See *Love*, 146 F. Supp. 3d at 851. One plaintiff in *Love*, a Michigan resident born in Ohio, sought to amend her birth certificate in order to obtain a gender-accurate Michigan driver's license. See Complaint for Declaratory and Injunctive Relief, *Love v. Johnson*, No. 15-CV-11834 (E.D. Mich. filed May 21, 2015), ECF No. 1. An Ohio court refused to amend the sex on her birth certificate pursuant to Ohio law, effectively precluding her from amending her driver's license. See *id.*

274. See *Love*, 146 F. Supp. 3d at 852.

275. See *id.*

276. See *id.*

277. See *id.* at 853.

278. See *id.* at 853–56.

279. See *id.* at 853 (quoting *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1060 (6th Cir. 1998)).

280. See *id.* at 853. Decisional privacy refers to the interest in "independence in making certain kinds of important decisions," whereas informational privacy involves the "interest in avoiding disclosure of personal matters." *Id.* (quoting *Lambert v. Hartman*, 517 F.3d 433, 440 (6th Cir. 2008)).

281. See *id.* (quoting *Lambert v. Hartman*, 517 F.3d 433, 440 (6th Cir. 2008)).

personal information could lead to bodily harm²⁸² and (2) when the information released was of a sexual, personal, and humiliating nature.²⁸³ Considering statistical evidence of the rate of hate crimes against transgender individuals, and the plaintiffs' firsthand experiences of harassment based on their transgender status, the court found that the policy implicated both of the constitutionally protected liberty interests under the right to privacy.²⁸⁴ Because the policy infringed on a fundamental right, the court would uphold the policy only if it withstood strict scrutiny.²⁸⁵

In *Carcaño v. McRory*,²⁸⁶ however, the U.S. District Court for the Middle District of North Carolina explicitly challenged the *Love* court's finding that disclosure of an individual's transgender status implicated a fundamental right.²⁸⁷ There, the court considered a school's use of birth certificates to determine a student's sex to regulate bathroom use, and it evaluated whether the divergence between a student's sex on their birth certificate and bathroom choice unconstitutionally disclosed their transgender status.²⁸⁸ The court, however, found that individuals have no constitutionally protected privacy interests in information that is freely available in public records—because the sex on a birth certificate is a matter of public record, using or revealing this information did not violate a fundamental liberty interest under the right to privacy.²⁸⁹ Accordingly, the court applied rational basis review rather than strict scrutiny.²⁹⁰

The state in *Love* advanced two interests to justify its policy: (1) “maintaining accurate state identification documents” to “promote effective law enforcement” and (2) ensuring “that the information on the license is consistent with other state records describing the individual.”²⁹¹ Apparently accepting that these were, in fact, compelling state interests, the court focused instead on whether the policy actually furthered them.²⁹²

Looking at the first interest, the court pointed out that the policy actually undermined law enforcement efforts by creating a discrepancy between the sex marker on the birth certificate and the ID holder's appearance or name.²⁹³ A third party using the ID to verify its holder's identity would thus be likely

282. *See id.* (quoting *Lambert v. Hartman*, 517 F.3d 433, 440 (6th Cir. 2008)).

283. *See id.* (quoting *Lambert v. Hartman*, 517 F.3d 433, 440 (6th Cir. 2008)).

284. *See id.* at 856.

285. *See id.* (“Where, as here, state action infringes upon a fundamental right, ‘such action will be upheld under the substantive due process component of the Fourteenth Amendment only where the governmental action furthers a compelling state interest, and is narrowly drawn to further that state interest.’” (quoting *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064 (6th Cir. 1998))).

286. 203 F. Supp. 3d 615 (M.D.N.C. 2016).

287. *See id.* at 647.

288. *See id.*

289. *See id.*

290. *See id.*

291. *Love v. Johnson*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015).

292. *See id.*

293. *See id.*

to conclude that the holder was not the person reflected on the ID.²⁹⁴ Therefore, the policy was more likely to impede law enforcement efforts than to aid them.²⁹⁵

Turning to the second interest, the court pointed out that the amendment policy applied only to existing license holders.²⁹⁶ New applicants, meanwhile, could use a U.S. passport to apply for a driver's license and indicate a sex that corresponded to the one on their passport,²⁹⁷ which could be altered based merely on certification of appropriate clinical treatment.²⁹⁸ The court found that the state failed to establish how this two-tiered system regulating amendment of sex designations on identification served its interest in maintaining consistency among state records.²⁹⁹

Finally, the court evaluated whether the policy was sufficiently tailored to further the state's interests based on whether it was the least restrictive means of achieving them.³⁰⁰ Highlighting two facts, the court first noted that at least twenty-five states and the District of Columbia did not impose a surgical requirement to alter gender markers on drivers' licenses or state IDs, though they likely had as strong an interest in ensuring accurate state records or aiding law enforcement efforts.³⁰¹ Second, it added that at least thirteen other states and the U.S. Department of State had implemented policies requiring only a medical provider's certification of gender status, which need not include evidence of surgery.³⁰² Therefore, the court summarily decided that Michigan's policy was not the least restrictive means of achieving its purported interests and, consequently, failed strict scrutiny.³⁰³

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*³⁰⁴ in 2022, however, altered the Court's substantive due process jurisprudence by overturning the constitutional right to abortion that *Roe v. Wade*³⁰⁵ established. The Court grounded its analysis by explaining that, when identifying unenumerated rights under substantive due process, the Court must not confuse what Americans feel the Fourteenth Amendment *should* protect with what it actually does.³⁰⁶ The risk, the Court explained, is that forays into new, unenumerated rights will cross the line into judicial policymaking, a usurpation of legislative authority.³⁰⁷ Explaining that the right to abortion was not deeply rooted in U.S. history—the modern standard

294. *See id.* (citing *K.L. v. Alaska*, No. 3AN-11-05431, 2012 WL 2685183, at *1, *7 (Alaska Super. Ct. Mar. 12, 2012)).

295. *See id.*

296. *See id.*

297. *See id.* at 857.

298. *See id.*; *see supra* notes 90–91 and accompanying text.

299. *See Love*, 146 F. Supp. 3d at 857.

300. *See id.*

301. *See id.*

302. *See id.*

303. *See id.*

304. 142 S. Ct. 2228 (2022).

305. 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

306. *See Dobbs*, 142 S. Ct. at 2247.

307. *See id.* at 2247–48 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

for identifying unenumerated rights that substantive due process safeguards³⁰⁸—the Court determined that the right to abortion was not a protected unenumerated right.³⁰⁹

The Court proceeded to invalidate the notion that the right to abortion is integral to the broader, entrenched right to privacy.³¹⁰ Noting that the right to privacy is not absolute, the Court reasoned that “ordered liberty” mediates the boundaries of the competing interests at stake in recognizing a given right, but that states may choose to balance those interests differently.³¹¹ According to the Court, the country’s historical understanding of “ordered liberty,” including any recognition of the right to privacy, does not prevent the states from regulating abortion legislatively to reflect their respective balance of interests.³¹² The Court distinguished its treatment of abortion from its treatment of other rights entrenched in the right to privacy because abortion implicates potential life, stating that its decision should not be understood to undermine other established privacy rights.³¹³ Justice Thomas’s concurrence, however, signaled his interest in reviewing the Court’s substantive due process jurisprudence more broadly.³¹⁴

Justice Thomas agreed with the majority that there is no constitutional right to abortion because it is not a form of liberty that the Fourteenth Amendment’s Due Process Clause protects, but he went further adding that the Due Process Clause *only* protects procedural rights.³¹⁵ Referring to substantive due process as an “oxymoron” lacking any constitutional basis, he asserted that the Fourteenth Amendment’s Due Process Clause does not protect *any* substantive rights.³¹⁶ Though he agreed that the *Dobbs* decision alone would not affect privacy rights or other substantive due process precedents, he advocated that the Court reconsider *all* of its substantive due process decisions moving forward.³¹⁷ Stating that “any substantive due process decision is demonstrably erroneous,” while specifically naming three cases based on the right to privacy, Justice Thomas asserted that it was the Court’s duty to correct those errors.³¹⁸ Under such circumstances, the Court would need to determine whether other constitutional provisions protected rights that were previously recognized under substantive due process.³¹⁹ Such protections, however, would depend on whether a given provision protects unenumerated rights at all.³²⁰ Thus, under Justice Thomas’s view,

308. See *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

309. See *Dobbs*, 142 S. Ct. at 2243, 2254.

310. See *id.* at 2257–58.

311. *Id.* at 2257.

312. *Id.*

313. See *id.* at 2258.

314. See generally *id.* (Thomas, J., concurring).

315. See *id.* at 2300–01.

316. See *id.* at 2301.

317. See *id.*

318. See *id.*

319. See *id.* at 2301–02.

320. See *id.* at 2302.

the entire body of substantive due process jurisprudence—and the unenumerated rights protected therein—is vulnerable to overruling.³²¹

Because the *Dobbs* decision narrowed the scope of the right to privacy by overturning the constitutional right to abortion, the right to privacy may not be secure as grounds for evaluating the constitutionality of gender marker alteration policies for drivers' licenses.³²² Justice Thomas's concurrence, signaling the possibility that the Court might reevaluate substantive due process decisions, adds to this insecurity.³²³ Further, considering the room that intermediate scrutiny affords states to craft constitutionally valid but burdensome gender marker alteration policies under an equal protection analysis, the constitutionality of surgical requirements under the Fourteenth Amendment remains uncertain.

III. ADVANCING A FIRST AMENDMENT ARGUMENT AGAINST BURDENSOME GENDER MARKER ALTERATION POLICIES

Several U.S. states and territories impose surgical requirements for altering gender markers that purport to advance various state interests.³²⁴ Lower courts have held such policies to be unconstitutional under the Fourteenth Amendment, exercising judicial restraint by declining to reach the other constitutional arguments advanced in each case.³²⁵ These frameworks, however, generate uncertainty about the policies' constitutionality under the Fourteenth Amendment.³²⁶ Moreover, they overlook the ways in which surgical requirements for gender marker alteration and the gender marker itself compel speech and implicate the First Amendment.³²⁷ The compelled speech doctrine under the First Amendment provides an important alternative basis through which to evaluate the constitutionality of these policy requirements.

This part argues that courts should evaluate surgical prerequisites to gender marker alteration on drivers' licenses under the First Amendment. Part III.A contends that the compelled speech doctrine better safeguards the constitutional rights at stake in those policies by applying strict scrutiny in the context of an enumerated constitutional right. Part III.B argues that surgical requirements constitute compelled speech because they generate government-mandated speech, to which driver's license holders object, that is closely associated with the license holder. Part III.C maintains that these requirements are unlikely to withstand strict scrutiny because surgery requirements are an overly restrictive means of achieving even compelling state interests or do not actually serve those interests.

321. *See id.*

322. *See infra* Part III.A.

323. *See infra* Part III.A.

324. *See supra* Part I.B.2 (describing states with burdensome gender marker alteration policies).

325. *See supra* Parts II.A–B.

326. *See supra* Parts II.A–B.

327. *See infra* Parts III.B.1–2.

A. *The First Amendment Better Protects the Constitutional Rights at Stake in Gender Marker Alteration Policies*

Under an Equal Protection Clause analysis, the likelihood that courts will apply intermediate scrutiny to gender marker alteration policies leaves room for states to craft burdensome gender marker alteration policies that pass constitutional muster.³²⁸ Intermediate scrutiny requires only that a sex-based classification further important governmental interests through means that are substantially related to those interests, whereas strict scrutiny requires that a law be the least restrictive means of achieving a compelling state interest.³²⁹ The Middle District of Alabama's analysis in *Corbitt* identifies important state interests and suggests ways in which legislatures might tailor policies to ensure that they are substantially related to achieving those interests.³³⁰

Because such policies implicate First Amendment speech protections, however, intermediate scrutiny does not adequately protect the constitutional rights at stake.³³¹ Courts review laws that compel speech under strict scrutiny because they are presumptively content-based regulations.³³² Surgical gender marker alteration policies compel speech in at least two ways and, thus, should be evaluated under strict scrutiny.³³³ The Eastern District of Michigan's analysis in *Love* demonstrates that surgical gender marker alteration policies, as well as other burdensome policies that effectively force license holders to bear an inaccurate gender marker, will not pass strict scrutiny.³³⁴ Because equal protection analysis applies intermediate scrutiny—and, thus, may validate some carefully crafted policies³³⁵ that would not pass strict scrutiny³³⁶—the equal protection framework may allow First Amendment violations to stand.

Although, under substantive due process, courts will apply strict scrutiny to laws that burden fundamental rights,³³⁷ the *Dobbs* decision raises questions about the evolving scope of the right to privacy.³³⁸ In *Dobbs*, the Court distinguished abortion from other rights integral to the right to privacy, yet it made clear that an unenumerated right must be deeply rooted in the

328. See *supra* Part II.A (discussing conceivably important state interests and how a state might craft a policy that is substantially related to achieving them).

329. See *supra* Part I.C.1 (explaining the standard for intermediate and strict scrutiny).

330. See *supra* Part II.A.

331. See *infra* Parts III.B.1–2 (explaining how surgical gender marker alteration requirements compel expressive conduct and pure speech); see also *supra* Part I.C.1 (explaining that courts apply strict scrutiny to laws that compel speech unless an exception applies).

332. See *supra* notes 187–90 and accompanying text.

333. See *infra* Parts III.B.1–2.

334. 146 F. Supp. 3d 848, 857 (E.D. Mich. 2015).

335. See *supra* Part II.A.

336. See *Love*, 146 F. Supp. 3d at 857.

337. See Part II.B (examining a court decision that applied strict scrutiny to a policy infringing on the right to privacy).

338. See *supra* Part II.B.

nation's history to fall within the doctrine's protections.³³⁹ In *Love*, the court framed the liberty interest at stake in terms of the bodily harm that may result from the disclosure of private information.³⁴⁰ In *Carcaño*, however, the Middle District of North Carolina framed the liberty interest solely in terms of the right not to disclose one's transgender status,³⁴¹ rather than the right to be free of the harm that may result. Thus, whether a right is deeply rooted in the nation's history may turn on how the court frames and interprets the scope of that right. When, as in *Carcaño* and *Dobbs*, a court finds that a law does not infringe on a fundamental right, it will not apply strict scrutiny.³⁴²

Additionally, Justice Thomas's *Dobbs* concurrence makes clear that substantive due process decisions may be vulnerable to being overruled.³⁴³ Although the Court clarified that the *Dobbs* decision should not be interpreted to undermine other substantive due process precedents,³⁴⁴ Justice Thomas's signaling about future opportunities to do so warrants exploration of alternative avenues for evaluating the constitutionality of gender marker alteration policies. Yet, unlike the right to privacy—or other unenumerated rights under substantive due process—the right to free speech is enumerated in the First Amendment.³⁴⁵ The compelled speech doctrine under the First Amendment thus offers a viable and more reliable pathway for challenging burdensome gender marker alteration policies.

B. Surgical Requirements for Gender Marker Alteration Unconstitutionally Compel Speech

The government may express its own views, but the First Amendment does not allow it to compel others to voice them.³⁴⁶ Requirements that have the effect of forcing an individual to present the state's contrary view of that person's gender thus implicate the First Amendment and may impermissibly infringe on a person's right to be free from compelled speech. To establish that speech is being compelled, a plaintiff must demonstrate "(1) speech; (2) to which they object; (3) that is compelled by governmental action; and (4) with which they are readily associated."³⁴⁷ This section argues that surgical prerequisites to gender marker alteration compel speech in at least two ways: (1) by compelling expressive conduct through compliance with the surgery requirement itself, or (2) in the alternative, compelling pure speech through an inaccurate gender marker.

339. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242, 2258 (2022).

340. See *Love*, 146 F. Supp. 3d at 856.

341. 203 F. Supp. 3d 615 (M.D.N.C. 2016).

342. See *supra* notes 289–90 (discussing application of rational basis review to laws that do not burden a fundamental right).

343. See *supra* notes 314–21 and accompanying text.

344. See *Dobbs*, 142 S. Ct. at 2258.

345. See U.S. CONST. amend. I; see also *supra* Part I.C (discussing the Free Speech Clause).

346. See *supra* Part I.C.3 (explaining that government speech is not immune to compelled speech analysis).

347. See Brief of Law Professors as *Amici Curiae* in Support of Plaintiffs-Appellees, *supra* note 183, at 6; see also *supra* Part I.C.2.

1. Requiring Gender Confirmation Surgery Compels Expressive Conduct

Requiring gender confirmation surgery to alter the gender marker on a driver's license compels expressive conduct by conditioning the issuance of a gender-accurate license on unwanted gender expression. The choice to undergo or to forgo gender confirmation surgery, like other outward expressions of gender identity, is expressive conduct that the First Amendment's Free Speech Clause protects.³⁴⁸

Applying *Spence* to such conduct, a court must ask whether the conduct intends to communicate a particular message and, if so, whether those perceiving the conduct understand it as such.³⁴⁹ One's expression of their gender identity, whether through clothes, hairstyles, or various forms of bodily alteration, communicates a message about a core element of their identity.³⁵⁰ Whereas some transgender people communicate their gender through the choice to have genital surgery, others may feel that their gender identity does not depend on genital reassignment.³⁵¹ Alternatively, they may choose surgeries that alter secondary sex characteristics, or no surgery at all, to express their gender identity.³⁵² Having or not having gender confirmation surgery is, therefore, conduct that communicates a message not only about one's gender identity, but also about how and by whom one's gender identity is defined.³⁵³

Transgender people's outward gender presentation, including the choice to alter their body, conveys a message about their gender identity.³⁵⁴ Just as people understand that choice of dress, accessories, or hairstyles communicate their bearer's gender identity, people understand that bodily alteration to change one's sex similarly communicates gender identity.³⁵⁵ The conduct of not having surgery, therefore, has expressive qualities that are infringed on by surgical requirements for gender marker alteration. A surgical requirement compels symbolic speech when it influences one's choice to undergo surgery contrary to one's own conception of their gender identity.

Gender confirmation surgery may be objectionable to many transgender individuals for several reasons. As the Supreme Court explained in *United Foods*, the compelled speech doctrine applies even to minor points of disagreement.³⁵⁶ The decision to have unwanted elective surgery in order to

348. See Velte, *supra* note 48, at 234–36; see also *supra* Part I.C.1.

349. See *supra* Part I.C.1 (discussing how courts apply the test to identify expressive conduct and/or symbolic speech).

350. See *supra* Part I.C.1 (discussing modes of gender expression as protected symbolic speech); Weatherby, *supra* note 160, at 120.

351. See *supra* Part I.A.2 (discussing the reasons a transgender person may not pursue gender confirmation surgery at all).

352. See *supra* notes 64–67 and accompanying text (discussing the range of nongenital surgical options).

353. See Velte, *supra* note 48, at 235–36.

354. See Weatherby, *supra* note 160, at 121.

355. See Velte, *supra* note 48, at 236.

356. 533 U.S. 405, 411 (2001).

avail oneself of the benefit of having an accurate driver's license plainly exceeds that bar. The surgery itself may be objectionable because it is invasive, costly, painful, and medically unnecessary.³⁵⁷ Moreover, the notion that anatomy determines gender identity is far from uncontroversial.³⁵⁸ Even if a state successfully argues that a license designation is a sex marker that only identifies biological sex rather than gender, a challenger may object to basing their biological sex solely on external genitalia at birth.³⁵⁹ Therefore, a challenger has several grounds on which to object to gender confirmation surgery as a prerequisite to gender marker amendment.

Additionally, the surgical requirement is plainly compelled by the state. The Supreme Court explained in *Wooley* that a license plate bearing the state motto compelled speech even though the state did not force the challenger to drive.³⁶⁰ The Court described driving as a “virtual necessity” that the state impermissibly conditioned on displaying an objectionable message on a license plate.³⁶¹ Similarly, though policies for gender marker alteration do not impose a general requirement that transgender people undergo gender confirmation surgery, certain states make these procedures a precondition to obtaining gender-accurate drivers' licenses or state identification.³⁶² Driving remains a “virtual necessity,” but this precondition extends beyond the ability to drive. Presenting a state-issued ID is also a necessity for a broad range of daily activities.³⁶³ Therefore, suggesting that the surgery is not compelled because a person could choose to not use or obtain a state ID presents a false choice.

Relatedly, alternatives to the compelled symbolic speech do not alleviate the problem. Because passports are generally more expensive to obtain than state IDs are, and people do not routinely carry or use passports as they do state IDs, the option of getting a passport instead of a state ID does not preclude finding that the surgery requirements compel speech.³⁶⁴ Similarly, avoiding compelled expressive conduct by not having surgery and using a gender-inaccurate ID compels direct speech through the inaccurate gender marker,³⁶⁵ creating reinforcing conditions that both compel speech. When a person chooses to undergo gender confirmation surgery to avoid the negative consequences of foregoing identification or of presenting an inaccurate ID—

357. *See supra* notes 65–68 and accompanying text.

358. *See supra* Parts I.A.1–2 (discussing the differences between sex and gender and explaining not only that these are distinct concepts, but also that sex and gender do not necessarily align for all people).

359. *See supra* note 44 and accompanying text.

360. 430 U.S. 705, 715 (1977).

361. *See id.*

362. *See supra* Part I.B.2 (explaining that burdensome gender marker alteration policies effectively preclude many transgender people from amending their gender markers).

363. *See Doe v. Marshall*, 367 F. Supp. 3d 1310, 1325 (M.D. Ala. 2019).

364. *See id.* at 1325–26.

365. *See infra* Part III.B.2 (arguing that inaccurate gender markers constitute compelled speech).

consequences flowing directly from government policy—that act of gender expression is compelled by the state.

Finally, the decision to undergo gender confirmation surgery is closely associated with the person having surgery. A person perceiving someone's decision to undergo surgical body alteration would generally not understand that choice as expression on behalf of the government or a third party. As with other conduct related to gender expression, those acts are interpreted as conveying messages about the person engaging in them.³⁶⁶ Therefore, when surgical requirements to gender marker alteration motivate the decision to undergo otherwise unwanted gender confirmation surgery, they compel expressive conduct that is readily associated with that individual, not with the government or a third party.

Even if such policies do not actually influence any transgender person to seek unwanted gender confirmation surgery, surgical requirements for gender marker alteration still compel speech for any person who does not undergo surgery.³⁶⁷ For those who will not or cannot undergo surgery, the surgical requirement compels speech through the inaccurate gender marker itself.

2. Requiring Gender Confirmation Surgery Compels Pure Speech

Requiring gender confirmation surgery to alter the gender marker on a driver's license compels pure speech by forcing transgender people who do not want to or cannot undergo surgery to bear an inaccurate gender marker on their license or state ID. The driver's license gender marker is speech because disclosure or publication of information is, straightforwardly, speech.³⁶⁸ Driver's license gender markers are published words or characters purporting to denote a person's gender.³⁶⁹ Any time a person is asked to present identification, whether for government or private purposes, they are presenting that published text. Both the fact of that text's publication and the repeated presentation of that published information constitute protected speech.

As with unwanted gender confirmation surgery, transgender people may strongly object to presenting inaccurate gender markers on their drivers' licenses or other state identification. A conflict between the government's view of an individual's gender and that person's self-perceived gender identity is a substantial disagreement. The disagreement is not only about a given person's gender designation, but also about the appropriate basis for

366. See Kosbie, *supra* note 117, at 195, 204.

367. See *infra* Part III.B.2 (arguing that inaccurate gender markers constitute compelled speech).

368. See *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001); *supra* Part I.C (discussing First Amendment speech protections).

369. See *supra* Part I.A.3 (explaining states' use of gender markers on drivers' licenses and other forms of state identification).

that designation.³⁷⁰ Gender identity is not a matter of mere preference but is at the core of individual identity.³⁷¹ To present a gender marker that conflicts with one's own self-perception and/or gender presentation is unacceptable for many.

Moreover, there are many practical reasons for which transgender license holders object to having and actually avoid using gender-inaccurate identification. Drivers' license holders with inaccurate gender markers report harassment, violence, discrimination, and denial of services when they furnish identification that contrasts from their appearance.³⁷² Litigants challenging burdensome alteration policies have reported the extensive lengths to which they go to avoid having to present inaccurate identification.³⁷³

Though having drivers' licenses and state IDs is not legally compulsory, the gender markers on them represent compelled government action. As previously discussed, driving—and thus having a driver's license—and presenting state identification are virtual necessities.³⁷⁴ Carrying and furnishing a driver's license as identification are thus analogous to displaying the license plate in *Wooley*.³⁷⁵ When the state's policy conditions the acquisition or use of this necessity on an inaccurate gender marker—unless, as previously discussed, an individual undergoes genital surgery to avoid the inaccurate marker—the state compels speech. Thus, such policies effectively require transgender individuals who do not want, cannot afford, or are otherwise unable to undergo gender confirmation surgery to choose between two forms of compelled speech.

Finally, drivers' license gender markers are readily associated with their bearers. Drivers' licenses are a means of identifying people through the information they contain. Although they are issued by the government, no one associates the government with the personally identifying information contained on such documents.³⁷⁶ Rather, viewers understand licenses to be associated directly with the individuals who bear and furnish them.³⁷⁷ Indeed, the information an ID contains serves the express purpose of being read or observed by others who will rely on it to affirmatively identify the holder. The *function* of a license and the speech it displays, then, are also analogous to those of the license plate at issue in *Wooley*.³⁷⁸ In the case of drivers' licenses, however, the information directly describes the ID holder, rendering its connection to its bearer even closer than that of a license plate.

370. See *supra* Part I.A.2 (explaining that gender identity is one's self-perception as being male, female, both, or neither, and that one's gender identity is distinct from and may not correspond with one's biological sex or sex assigned at birth).

371. See *supra* Part I.C.1.

372. See *supra* notes 23, 76 and accompanying text.

373. See Brief of Law Professors as *Amici Curiae* in Support of Plaintiffs-Appellees, *supra* note 183, at 7.

374. See *supra* Part III.B.1.

375. See *supra* Part III.B.1; *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

376. See *Doe v. Marshall*, 367 F. Supp. 3d 1310, 1325–26 (M.D. Ala. 2019).

377. See *id.*

378. See *id.*; see also *Wooley*, 430 U.S. at 715.

The close association between a gender marker on state identification and its bearer renders the government speech doctrine nondispositive in this context, even if the text published on state identification is, in fact, government speech. Whether the government is speaking depends on (1) whether the medium has historically been used for government speech, (2) whether the public reasonably interprets the speech as being conveyed by the government, and (3) whether the government maintains editorial control over the speech.³⁷⁹ The first factor is easily satisfied because drivers' licenses are issued by the government and convey data points required by the issuing state.³⁸⁰ In states where gender markers are not self-determined, the third factor is satisfied because the issuing state determines the criteria by which gender is designated.³⁸¹ The second factor, however, is not as straightforward.

While the public may reasonably interpret some speech on licenses as being conveyed by the government, this is not necessarily the case for gender markers or other personal or physical descriptors. The government, for example, may reasonably be viewed as the speaker in conveying a type of identification, the class of a driver's license, information about the issuing state, or other purely governmental classifications. As the court in *Marshall* determined, however, individualized data on the license, like gender and other personal descriptors, are likely to be attributed solely to the license holder.³⁸²

Regardless, finding that the gender marker is government speech does not insulate it from compelled speech analysis. The government may express its own views, but the First Amendment prohibits it from forcing private citizens to convey those views.³⁸³ In other words, although the government speech doctrine allows the government to hold a contrary view of an individual's sex or gender—or of how to define those characteristics—the compelled speech doctrine precludes it from forcing that individual to endorse the government's contrary view.³⁸⁴ By functionally requiring transgender individuals to present drivers' licenses or other state identification indicating a sex or gender that is contrary to their own gender identity, the surgical alteration requirements force them to do exactly that and endorse the government's view. Therefore, inaccurate gender markers resulting from surgical alteration requirements compel private speech, the government speech doctrine notwithstanding.

379. See *supra* Part I.C.3 (explaining the Supreme Court's government speech jurisprudence).

380. See *supra* Parts I.A.3, I.B.2.

381. See *supra* Parts I.A.3, I.B.2.

382. See *Marshall*, 367 F. Supp. 3d at 1326.

383. See *supra* Part I.C.3 (discussing the intersection of the government speech and compelled speech doctrines).

384. See *Wooley v. Maynard*, 430 U.S. 705, 713 (1977); *Marshall*, 367 F. Supp. 3d at 1326.

C. Surgical Requirements Do Not Withstand Strict Scrutiny

As previously discussed, surgical prerequisites to altering gender markers compel speech by requiring transgender people to choose between gender confirmation surgery, which compels expressive conduct, or bearing an inaccurate gender marker, which compels pure speech.³⁸⁵ Therefore, such policies implicate the First Amendment's free speech protections, and courts should evaluate their constitutionality under strict scrutiny.³⁸⁶ This section argues that surgical requirements for altering sex or gender markers fail strict scrutiny because, even if they serve compelling state interests, they are not the least restrictive means of achieving those interests.

The interests that a state advances to justify policies imposing surgical requirements will likely differ based on whether the state claims to employ a sex marker or a gender marker, assuming that the state acknowledges the difference between the two. Alabama justified its sex marker alteration policy, for example, with the state's interest in procedural consistency with birth certificate *sex* amendment and appropriate classification and treatment in a custodial context based on *genital sex*.³⁸⁷ Such interests would not justify a surgical requirement for altering a *gender* marker, however, which conveys data that is distinct from genital sex.³⁸⁸ Michigan similarly justified its sex marker alteration policy with the state's interest in accurate state identification to promote law enforcement efforts and maintain consistent descriptions of individuals across state records.³⁸⁹

Using Michigan's and Alabama's justifications as a starting point, courts may find that facilitating law enforcement efforts when identity verification or custodial management is based on genital sex is a compelling state interest.³⁹⁰ Courts may also find that states have a compelling interest in tracking demographic data based on sex through driver's license or state ID records.³⁹¹ Because the Supreme Court recognizes, however, that gender is distinct from biological sex,³⁹² and because gender need not correspond with genital sex,³⁹³ there is no compelling state interest justifying a genital surgical requirement in order to amend a conceded *gender* marker on state identification. Even when a state could establish a compelling state interest, surgical requirements for amending either a sex or gender marker will not

385. See *supra* Parts III.B.1–2.

386. See *supra* Part I.C.1. (explaining that, once a court determines that a law implicates free speech protections under the First Amendment, it will apply strict scrutiny); see also *supra* Part I.C.2 (discussing strict scrutiny's presumptive application to laws that compel speech, unless an exception applies, because they are necessarily content-based regulations).

387. See *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1311–12 (M.D. Ala. 2021), *appeal docketed*, No. 21-10486 (11th Cir. Feb. 12, 2021).

388. See *supra* Parts I.A.1–3 (explaining the difference between sex and gender, as well as sex and gender markers).

389. See *Love v. Johnson*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015).

390. See *supra* Parts II.A–B.

391. See *Love*, 146 F. Supp. 3d at 856.

392. See *supra* note 57 and accompanying text.

393. See *supra* Parts I.A.1–2 (explaining that sex and gender are distinct and, for transgender individuals, do not align with one another).

withstand strict scrutiny because they are highly unlikely to be the least restrictive means of achieving those interests.

Twenty-two states and the District of Columbia offer self-determinative gender marker alteration on drivers' licenses and provide a nonbinary gender option.³⁹⁴ As the court suggested in *Love*, these states presumably have no less of an interest in facilitating law enforcement efforts, appropriately managing individuals in custody, or recording certain demographic data based on sex.³⁹⁵ The dearth of reported challenges in achieving these ends suggests that these states' policies do not truly depend on genital surgical alteration as a prerequisite to sex or gender marker alteration. The federal government's policies with respect to passports and consular birth certificates,³⁹⁶ meanwhile, similarly suggest that the state can achieve these ends without relying on overly restrictive prerequisites to altering sex and gender markers.

When law enforcement relies on genital sex to determine appropriate placement, searches, or care in a custodial context, genital sex designations on state identification are overly restrictive for at least two reasons. First, driver's licenses and state IDs are used to prove identity broadly in daily life and in contexts outside of law enforcement custody.³⁹⁷ Moreover, law enforcement officers can merely ask a person in custody to self-identify their genital status, to express a preference for the sex or gender of the person who searches them, or to indicate a placement preference for sex-segregated penal facilities. Even when a state will not recognize individual preference and will rely only on genital sex for such placement, a physical search—which would occur prior to placement in a penal facility, regardless³⁹⁸—can establish genital sex instead of an ID.

Finally, surgical requirements impede, rather than facilitate, general law enforcement identity verification purposes. When surgical prerequisites result in a sex or gender marker that does not correspond with an individual's gender presentation, an officer viewing the ID is likely to conclude that its bearer is not the person reflected on the ID.³⁹⁹ This is true regardless of whether the marker indicates genital sex or gender, since identity verification in most contexts does not rely on genital verification.⁴⁰⁰ Accordingly, a sex marker that does not match gender identity *or* a gender marker based on genital sex will likely not align with an individual's outward gender presentation. Consequently, surgical requirements for altering sex or gender markers so that state identification conveys one's genital sex either do not

394. *See supra* note 96 and accompanying text.

395. *See Love*, 146 F. Supp. 3d at 857.

396. *See supra* Part I.B.1.

397. *See* Brief of Law Professors as *Amici Curiae* in Support of Plaintiffs-Appellees, *supra* note 183, at 11.

398. *See supra* note 255 and accompanying text (explaining a physical search as part of police departments' booking procedures).

399. *See supra* Part II.B (explaining how sex or gender markers that do not align with an individual's outward gender expression impede law enforcement goals).

400. *See supra* note 74 and accompanying text.

serve or are not the least restrictive means of achieving conceivably compelling state interests. They are, therefore, unlikely to withstand strict scrutiny and are thus unconstitutional under the First Amendment.⁴⁰¹

CONCLUSION

In an era of evolving notions of sex and gender, as well as who may properly assign these to individuals, the First Amendment is an important tool for challenging laws that compel gender expression, including forced, inaccurate gender markers on drivers' licenses. Lower courts, however, have overlooked the First Amendment implications of driver's license gender markers by deciding constitutional challenges to surgical alteration requirements under the Fourteenth Amendment.

The likelihood that intermediate scrutiny will apply to equal protection challenges to transgender classifications highlights the inadequacy of this framework when those classifications also implicate free speech. Even though strict scrutiny applies when a fundamental right is burdened under substantive due process, the Supreme Court's narrowing of the scope of the right to privacy—as well as the potential vulnerability of substantive due process precedent more broadly—makes substantive due process an unreliable framework through which to decide the constitutionality of gender marker alteration policies. By applying the compelled speech doctrine to gender marker alteration requirements, lower courts can ensure that they review these laws with the appropriate degree of judicial scrutiny—strict scrutiny—and invalidate policies that unconstitutionally compel speech. States may continue to require that drivers' licenses reflect certain identifying information, but they cannot do so through policies that impermissibly compel protected gender expression.

401. *See supra* Parts I.C.3, II.A–B (applying strict scrutiny analysis to policies that compelled speech and invalidating them based on insufficient tailoring).