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The Constitution and Societal Norms: A Modern Case For Female Breast Equality

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THE CONSTITUTION AND SOCIETAL NORMS: A MODERN CASE FOR FEMALE BREAST EQUALITY

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Abstract

"The Constitution and Societal Norms: A Modern Case for Female Breast Equality" argues that laws prohibiting the public display of the female breast, but not the male breast, are unconstitutional under the Fourteenth Amendment's Equal Protection Clause. That these laws discriminate against women is obvious, yet courts have historically refused to recognize an Equal Protection Clause violation. However, the primary reasons courts rely upon are ripe for review. Most significantly, courts typically justify female breast censorship laws based on the government interest in protecting public sensibilities, without recognizing that public sensibilities change. Indeed, perceptions of the public female breast have changed. Taking these modern-day perceptions into account reveals that the protection of public sensibilities is, in fact, an inadequate governmental interest. Moreover, the Equal Protection Clause principles, as articulated in US v. Windsor and Obergefell v. Hodges, provide further support for finding female breast censorship laws unconstitutional. This Article also explains why female breast censorship laws are normatively harmful to both women and society. Ultimately, "The Constitution and Societal Norms: A Modern Case for Female Breast Equality" argues that laws prohibiting the public display of the female breast, but not the male breast, are harmful, outdated, and unconstitutional.

INTRODUCTION

Laws prohibiting public displays of the female breast, but not the male breast, should be deemed unconstitutional under the Fourteenth Amendment's Equal Protection Clause.[1] Several states and municipalities have laws prohibiting obscenity and public nudity. But many such laws, in addition to outlawing the public display of genitals, outlaw the public display of the female breast. Although the normativity of obscenity and public nudity laws are an issue in their own right, this Article focuses specifically on the censorship of female breasts.[2]

For example, Louisiana's obscenity statute carries a punishment of up to three years imprisonment or a $2,500 fine for a first time conviction.[3] Under this statute, obscenity is defined as the "[e]xposure of the genitals, pubic hair, anus, vulva, or *female* breast nipples in any public place . . . with the intent of arousing sexual desire or which appeals to prurient interest or is patently offensive."[4] In Delaware, "[a] male is guilty of indecent exposure in the second degree if he exposes his genitals or buttocks under circumstances in which he knows his conduct is likely to cause affront or alarm to another person."[5] A female is guilty of the same if "she exposes her genitals, *breast* or buttocks under circumstances in which she knows her conduct is likely to cause affront or alarm to another person."[6] In Chicago, one can be fined between $100

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[1] U.S. CONST. amend. XIV, §1 ("No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[2] In this Article, I use "censorship" as an umbrella term that encompasses the many ways the female breast is legally regulated separate and unique from the male breast. I use the word "female" to refer to people born biologically female, as that is how courts understand classifications based on sex. *See generally*, Luke Boso, *A (Trans)gender-Inclusive Equal Protection Analysis of Public Female Toplessness*, 18 LAW & SEXUALITY 143, 13–20 (2009) (arguing that courts' rigid understanding of sex undermines commonly-made arguments upholding female breast censorship laws). I use the word "women" to refer to individuals who identify as women.

[3] LA. REV. STAT. ANN. § 14:106 (G)(1)(2014).

[4] *Id*. § 14:106 (A)(1) (emphasis added). Were a constitutional challenge like the one discussed in Part III to fail, one could use the same evidence of society's current norms to defend against prosecutions under statutes like Louisiana's on the ground that the exposed female nipple on its own does not appeal to the prurient interest and is not patently offensive. Thus, unless the defendant intends to arouse sexual desire, the prosecution cannot prove the necessary elements of the statute.

[5] DEL. CODE ANN. TIT. 11, § 764(a) (1995).

[6] *Id.* § 764(b) (emphasis added).

and $500 for indecent exposure, which includes exposing to public view: "the genitals, vulva, pubis, pubic hair, buttocks, perineum, anus, anal region, or pubic hair region of any person, or any portion of the breast at or below the upper edge of the areola thereof *of any female person*."[7]

In the United States, female breast censorship is far-reaching. State laws and municipal ordinances that censor the female breast include "zoning ordinances, public exposure or lewdness ordinances and statutes, ordinances regulating sexually-oriented businesses, laws aimed at nude sunbathing, regulations of business and liquor licenses, and obscenity statutes."[8] Given the ad hoc tangle of laws and ordinances that censor, regulate, and criminalize the female breast, this Article focuses on the higher level constitutional issues bound up in any regulation of the female breast. The censorship of the public female breast, but not the public male breast, should be held to violate the Equal Protection Clause. Such censorship violates the Equal Protection Clause because one's breast is regulated under a different set of laws if one is female rather than male. Surprisingly, however, many courts that have confronted Equal Protection Clause arguments regarding this issue have upheld these facially discriminatory laws.[9] This Article offers a modern challenge.[10]

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[7] Chicago, Code of Ordinances § 8-8-080 (emphasis added).

[8] Virginia F. Milstead, *Forbidding Female Toplessness: Why "Real Difference" Jurisprudence Lacks "Support" and What Can Be Done About It*, 36 U. TOL. L. REV. 273, 276–77 (2005).

[9] *See infra* Part III.

[10] A significant scholarship exists which analyzes breast censorship laws under the Equal Protection Clause from a variety of angles. *See, e.g.*, Carmen M. Cusack, *Boob Laws: An Analysis of Social Deviance Within Gender, Families, or the Home (Etudes 2*), 33 WOMEN'S RTS. L. REP. 197, 197–98 (2012) (advancing "three different constitutional arguments to prove that municipalities that prohibit some females from exposing their nipples should be challenged on constitutional grounds."); *see also* Milstead, *supra* note 8, at 278–79 ("seek[ing] to dismantle the doctrine of real difference as the standard of review for Fourteenth Amendment gender cases . . . seek[ing] to reveal that these differences do not provide the best threshold determination for equal protection." (citations omitted)); *see also* Christina DeJong & Christopher E. Smith, *Equal Protection, Gender, and Justice at the Dawn of A New Century*, 14 WIS. WOMEN'S L.J. 123, 125 (1999) ("explor[ing] the applicability of equal protection principles to the field of criminal justice," including breast exposure laws); *see generally* Alyssa Silver, *Breasts on the Beach: Legal in New York?*, 9 J. SUFFOLK ACAD. L. 217 (1994) (focusing on New York's legal history and treatment of the public female breast). This Article adds to the argument by: presenting modern evidence of changing public norms to specifically challenge the oft-proffered "public sensibilities" governmental interest, *see e.g.*, People v. David, 152 Misc. 2d 66, 67 (Munroe Cnty. Ct. 1991), discussing new decisions at the intersection of First Amendment and

This Article proceeds in three parts. Part I surveys the history of female breast censorship, including highlighting the shifting societal opinion of the public female breast over time. This history lays the groundwork to show that the sexualization of the female breast has allowed for its continued censorship.

Part I also includes a primer of First Amendment doctrine as it relates to obscenity law and expressive speech. Although the First Amendment has a role to play in combating discriminatory obscenity laws, it is ancillary in this Article. This is because the First Amendment protects only *some* instances of the public female breast. The Equal Protection Clause goes much further.

Next, in order to frame the argument in Part III, Part I reviews the Equal Protection Clause doctrine as it relates to sex. The doctrine has produced the following intermediate scrutiny test for judging the constitutionality of laws that classify on the basis of sex: the sex-based classification must have an important—or exceedingly persuasive—governmental objective, and the means must be substantially related to that objective.[11]

Finally, Part I explores some of the few cases in which courts have struck down female breast censorship laws. The argument in Part III builds on, and augments, the reasoning in these decisions.

Part II makes three normative arguments as to why female breast censorship is harmful. First, such censorship perpetuates heterosexual male definitions of eroticism, contributing to the sexual and political subjugation of women. Second, female breast censorship laws enforce dangerous body image issues. Lastly, and most simply, these laws deprive women of the choice to be comfortable. Part II, then, elucidates the real-world implications of female breast

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Equal Protection Clause challenges, and suggesting that recent Supreme Court precedent further supports finding female breast censorship laws unconstitutional under the Equal Protection Clause.

[11] S*ee infra* Part I.D; *see also* United States v. Virginia, 518 U.S. 515, 524 (1996).

censorship in an effort to show that arguing for, or against, female breast equality is much more than a theoretical exercise.

Finally, using the two-pronged intermediate scrutiny test as an anchor, Part III demonstrates that female breast censorship laws violate the Equal Protection Clause. Courts that uphold female breast censorship laws commonly cite the protection of public sensibilities as the important governmental objective that satisfies the first prong. The changing understanding of the public female breast, however, severely undermines this justification. Indeed, public norms now include a growing acceptance of the public female breast. Moreover, recent Supreme Court dicta about Equal Protection Clause principles lend additional support to the conclusion that female breast censorship laws violate the Equal Protection Clause. Ultimately, this Article aims to persuade that laws prohibiting public displays of the female breast, but not the male breast, are outdated, harmful, and unconstitutional.

I. BREAST CENSORSHIP AND FRAMING THE LAW

A. History of Society's Perception of the Female Breast

The history of society's perception of the female breast sheds some light on why its legal censorship is a modern-day reality.[12] Important to keep in mind, however, is that "much of the documented epic of the [female] breast is a voyeuristic one, told from the perspective of those who lack the organs yet still claim ultimate authority on the subject."[13] That men have been the primary authors of history is not a radical notion; but, when analyzing how the female breast

[12] *See* Danielle Moriber, Note, *A Right to Bare All? Female Public Toplessness and Dealing with the Laws That Prohibit*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 453, 454 (2010) ("The wide variety of laws regulating women more stringently than men demonstrates a societal gender differentiation in conceptualizing chests." (citations omitted)).
[13] Natalie Angier, *Goddesses, Harlots and Other Male Fantasies*, http://www.nytimes.com/books/97/02/23/reviews/970223.23angiert.html (reviewing MARILYN YALOM, A HISTORY OF THE BREAST (1997)) ("Ms. Yalom . . . found very little in the record to indicate how women have felt about their breasts: whether they took pleasure in them, the extent to which they chose to display their breasts or if they had any say in the debate over wet-nursing.")

came to be censored and regulated in the United States, it is a notable factor. The historicizing of the female breast by men, after all, can be understood as a type of censorship itself.[14]

The following is an abbreviated, primarily Western, history of the female breast.[15] From the ancient civilizations to modern day United States, society's understanding of the female breast has fluctuated. Throughout history, however, two dominant understandings of the female breast emerge: its biological function and its erotic nature.[16] As will be seen, the eroticization of the female breast is what allows for its continued censorship.

In pre-Greek ancient civilizations, female breasts were emphasized and idolized, as evidenced by artwork and statues depicting gods with full, uncovered breasts.[17] Much of the idolizing revolved around women's lactation abilities.[18] However, the public veneration of the female breast faded with the rise of ancient Greece, during which time the breast was slowly "supplanted by . . . the 'reign of the phallus.'"[19]

Between 6th century BC and 1st century AD, the general time period of the events in the Hebrew Bible (Old Testament) and Christian New Testament, society's understanding of the female breast returned to a place of honor.[20] Society valued the breast for its capacity to feed infants, highlighting a cultural focus on women as mothers.[21]

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[14] *See* ADELINE MASQUELIER, DIRT, UNDRESS, AND DIFFERENCE: CRITICAL PERSPECTIVES ON THE BODY'S SURFACE 4 (2005) ("[W]omen's bodies have historically provided a fertile terrain for imagining, reasserting, or contesting the porous boundaries of moral worlds. The sexualization of power relations and the erotics of conquest—often represented as the male penetration of a veiled female interior—have proven remarkably resilient.").

[15] Much of this history is informed by scholar Marilyn Yalom's work: MARILYN YALOM, A HISTORY OF THE BREAST (1997).

[16] *See generally* MARILYN YALOM, A HISTORY OF THE BREAST (1997).

[17] *See id.* at 10–12.

[18] *See id.* at 9–10.

[19] *Id.* at 16 (quoting classics scholar, Eva Keuls).

[20] *Id.* at 5. ("[W]e find women validated primarily as mothers. . . [i]n both the Jewish and Christian traditions, breasts were honored as milk-producing vessels necessary for the survival of the Hebrew people and, later, the followers of Jesus.").

[21] *See id.*

This view faded with the Renaissance, during which the female breast took on a sexual connotation.[22] By the fifteenth century, art and literature began depicting women's breasts as erotic.[23] Paintings showed women holding out their breasts, "served up like a piece of fruit for the delectation of an observer," or a man's hand cupped around a woman's breast which "spoke for the sense of possession that men believed was their due."[24]

In the seventeenth century the pendulum began to swing back toward an understanding of the female breast as mainly biological—that is, existing to provide for children.[25] Around this time, mothers began to nurse their own infants, turning away from wet nurses.[26] Some artwork depicting women with exposed breasts, which represented democratic government, exemplified the public belief in mothers as contributing to the community through child-rearing.[27] Then again, other artwork seemed to continue the emphasis on the erotic breast.[28]

Eighteenth-century England marked a cultural high point for the obsession with women as mothers.[29] Motherhood was revered and becoming less associated with sexuality.[30]

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[22] *See generally*, YALOM, *supra* note 16, Chapter Two: *The Erotic Breast:* "Orbs of Heavenly Frame."
[23] YALOM, *supra* note 16, at 5.
[24] Angier, *supra* note 13 (quoting YALOM).
[25] YALOM, *supra* note 16, at 5 (this understanding was in the context of mothers being "seen as making a major contribution to the overall well-being of her household and community").
[26] *See id.*; *see also* Emily E. Stevens, et al., *A History of Infant Feeding*, 18(2) J PERINATAL EDUC. 32 (Spring 2009), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2684040/ (reviewing the "widespread disapproval of wet nursing" during the Renaissance, the changes in the profession of wet nursing, and the different practices among social classes).
[27] *See* YALOM, *supra* note 16, at 5–6; *see generally id.* Chapter 4: *The Political Breast: Bosoms for the Nation.*
[28] *See* Anne Hollander, *Fashion in Nudity*, 30 Ga. Rev. 642, 661 (1976) (discussing the eroticism of the bodice in fashion at the time, and noting "[t]he late seventeenth century abounds, for example, in paintings of ladies with very emphatic breasts escaping from their necklines- breasts which seem larger, rounder, and shinier than similarly unveiled ones in earlier centuries . . . Even the most consciously erotic mammary displays in the Renaissance were modest in size and sometimes vague in shape compared with those in certain Dutch or Italian versions painted after 1670.").
[29] *See generally* Ruth Perry, *Colonizing the Breast: Sexuality and Maternity in Eighteenth-Century England*, 2 JOURNAL OF THE HISTORY OF SEXUALITY, 204, 214 (1991).
[30] *See id.* at 215.

Unsurprisingly, along with this shift came a renewed cultural focus on the biological, rather than the sexual, purposes of women's breasts.[31]

The understanding of women as homemakers and mothers continued into the nineteenth-century Victorian Era.[32] During this time, women wore constricting clothing.[33] Restrictive garments, also popular in the United States, "called for almost complete covering of the upper body."[34] Thus, eighteenth- and nineteenth-century fashion can be viewed as a type of societal female breast censorship, which emphasized women's relegation to the domestic sphere.[35]

The nineteenth century also gave rise to the new fields of psychology and psychoanalysis, which merged the breast's biological purpose of feeding infants with a sexual significance.[36] The founder of psychoanalysis, Sigmund Freud, was attempting to prove that "sucking at the breast was not only the child's first activity, but also the starting point of one's entire sexual life."[37] The western history of the female breast is much a story about society's emphasis of the breast as primarily biological or primarily sexual. In both cases, historical indicators suggest that society played a significant role in how women should understand their own breasts.

B. The Modern Female Breast and Its Censorship

In the twentieth century, women in the United States began publically demanding a voice in how to define their breasts, although such definitions still revolved largely around sexuality

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[31] *See id.* at 215–16.
[32] *See* Moriber, *supra* note 12, at 456 (in the Victorian era, there were "no meaningful job opportunities available for women, and, because they were dependent on men, their role in society centered around entertaining and keeping house." (citation omitted)).
[33] *See id.* at 456 (e.g., girdles and petticoats).
[34] *Id.* (citation omitted).
[35] Jill Fields, *'Fighting the Corsetless Evil': Shaping Corsets and Culture, 1900-1930*, 33 J. SOC. HIST. 355, 355–56 (1999) (noting that "[s]cholarship on nineteenth-century women's history and dress explores the power of corsets to regulate women's behavior as well as to signify women's subordinate status," but acknowledging scholarly disagreement about the meaning of the corset).
[36] *See* YALOM, *supra* note 16, at 6.
[37] *Id.* In this same time period, with the rise of mass-production capabilities, the female breast also became ripe for commercialization and profit. Factory-made corsets, and eventually bras, worked their way into the national stream of commerce. *Id.*

and biology. These two understandings not only fit into a historical framework but also a scientific one.

People have long debated why female breasts evolutionarily exist. Some argue that female breasts are a naturally selected organ, existing for the purpose of feeding infants.[38] Others argue that female breasts are sexually selected organs, existing due to male sexual preference.[39] On one hand, female breasts help create and store fat that allows for easier lactation, which is used to feed infants.[40] On the other hand, "a woman's attractiveness to [men] seems to have been enhanced by breast development."[41] Although it is true that the size and shape of the female breast can play a role in sexual attractiveness,[42] there is no consensus as to whether males' sexual attraction to female breasts was secondary to breasts' biological function, or vice versa.[43]

In the 1960s and 70s, two breast-related social phenomena took hold: bra-burning and breast implants.[44] Some women refused to wear bras as a cultural statement of women's empowerment.[45] Other women sought to surgically enlarge their breast size to enhance their

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[38] *See* Tracy Clark-Flory, *On the rack: A cultural history of breasts*, SALON (May 9, 2012), http://www.salon.com/2012/05/10/on_the_rack_a_cultural_history_of_breasts/ (interviewing author Florence Williams).
[39] *See id.*
[40] *Id.*
[41] Peter Anderson, Rose E. Frisch, et al., *The Reproductive Role of the Human Breast [and Comments and Reply*], 24 CURRENT ANTHROPOLOGY, 25, 26 (1983).
[42] *Id.*
[43] *See* Clark-Flory, *supra* note 38.
[44] *See* YALOM, *supra* note 16, at 7; Clark-Flory, *supra* note 38 ("The first silicon breast implant was performed in 1962. . . It was particularly popular among women who made their living onstage . . . Eventually it leaked into the broader culture, and certainly by the '70s and '80s women were going for this. Then there was the implant scare of the '90s, in which a lot of women had problems with their implants, and the FDA actually banned them for 14 years. But now they're back . . . In fact, more women are getting implants now than ever before — over 300,000 a year.").
[45] *See* YALOM, *supra* note 16, at 7 ("By burning bras, more figuratively than literally, women undermined the basic idea of control coming from outside oneself. Henceforth women could question the authority of such previously sacrosanct agencies as medicine and fashion."); Alix Kates Shulman, Sex and Power: Sexual Bases of Radical Feminism, 5 Signs: Jour. of Women in Culture and Society, 590, 594–95 (recounting the early demonstration that led to the myth of literal bra-burning, in which sixty feminists picketed the Miss American Pageant, including by filling a trash can with "items of female 'torture' like curlers, bras, girdles, and high-heeled shoes.")

attractiveness.[46] Both actions revolved around a woman's choice of how her breasts would be displayed, which marked an important moment in the history of the female breast.[47]

At the same time, however, states began enacting public nudity and indecency laws[48] that explicitly prohibited public displays of the female breast, but not the male breast.[49] Municipalities also enacted such ordinances. In 1967, for example, New York revised its previously gender-neutral public anti-exposure statute to specifically restrict the female breast.[50] The very categories of these laws—obscenity, lewdness, public nudity—reveal that the sexualization of the female breast is what leads to its censorship.[51] Indeed, most states have

[46] See M. Grigg, et al. Information for Women About the Safety of Silicone Breast Implants (2000), available at http://www.ncbi.nlm.nih.gov/books/NBK44775/.
[47] See YALOM, supra note 16, at 7–8.
[48] The common law, too, imposed limits on public nudity. See Duvallon v. State, 404 So. 2d 196, 196 (Fla. Dist. Ct. App. 1981) ("At common law, indecent exposure was a public nuisance and punishable as a misdemeanor. It was viewed as an offense against religion and morality, involving 'open and grossly scandalous lewdness.' Rex v. Sedley, (1963) 1 Sid. 168, is often cited by commentators as support for this view. Today, the common law crime has been supplanted by statutory offenses in almost every jurisdiction in this country. These statutes vary somewhat as to wording, but a survey of the case law indicates that many of the same elements of the common law crime have been retained." (citations omitted)).
[49] See, e.g., Indiana's Indecent Exposure statute, effective in 1977, defines nudity as "the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state." IND. CODE ANN § 35-45-4-1 (West 2015). Delaware's indecent exposure statute, passed in 1982, finds a female guilty of second degree indecent exposure "if she exposes her genitals, breast or buttocks under circumstances in which she knows her conduct is likely to cause affront or alarm to another person." DEL. CODE ANN. tit. 11, § 764(b) (West)(2015). See also WYO. STAT. ANN. § 6-2-301 (West 2015) (defining "intimate parts" as "external genitalia, perineum, anus or pubes of any person or the breast of a female person."). Though not comprehensive, the sample of statutes at least hints at the possible correlation between women taking breast definition into their own hands with states specifically taking aim to limit the public female breast. Later, states and cities turned to zoning laws to regulate nudity and sex-based businesses, giving special attention to the female breast. *See, e.g.*, Buzzetti v. City of New York, 140 F.3d 134, 136 (2d Cir. 1998) (discussing 1995 New York City Council regulation restricting sexually-oriented businesses).
[50] New York's anti-exposure law, first adopted in 1881, was revised in 1935 to prohibit nudity and nudist colonies, was recodified in 1964 under "public lewdness," and was amended in 1967 "specifically to cover 'exposure of a female,'" which included not covering "her breast below the top of the aureola" [sic]. Reena N. Glazer, Women's Body Image and the Law, 43 DUKE L.J. 113, 119, n. 42 (1993) (citing 1967 N.Y. Laws 1074, amended by 1970 N.Y. Laws 100, repealed by 1983 N.Y. Laws 1574). The statute also included an exception for women "entertaining or performing in a play, exhibition, show or entertainment." Id. at 120.
[51] *See* Moriber, *supra* note 12 ("In the United States . . . women have traditionally been made to cover their breasts because of a socially ascribed sexual meaning."); and Glazer, *supra* note 50, at 135; and Clark-Flory, *supra* note 38 ("the sexualization of breasts is a reality and we're not going to change that any time soon").

passed laws to allow the public female breast during breastfeeding,[52] demonstrating that female breast censorship has little, if anything, to do with its biological function.

The modern legal censorship of the public female breast, however, is inconsistent with the growing societal acceptance of the public female breast—an acceptance accelerated by social media. For example, in 2014, Scout Willis, the daughter of actors Demi Moore and Bruce Willis, walked around New York City with her breasts exposed as a form of protest.[53] Willis was protesting Instagram, the social media picture-sharing website, because of its policy categorizing displays of the female areola as "instances of abuse."[54] Willis explained:

> Women are regularly kicked off Instagram for posting photos with any portion of the areola exposed, while photos sans nipple -- degrading as they might be -- remain unchallenged. So I walked around New York topless and documented it on Twitter, pointing out that what is legal by New York state law is not allowed on Instagram.[55]

Willis's action added fuel to Free the Nipple, a campaign for equal topless[56] rights for women, when she used the #FreetheNipple hashtag during her protest.[57] Lina Esco, creator of the campaign as well as a film of the same name, has argued, "[t]he boob or the nipple is the first

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[52] *See* National Conference of State Legislatures, *Breastfeeding State Laws*, September 2, 2015, *available at* http://www.ncsl.org/research/health/breastfeeding-state-laws.aspx (noting that "[f]orty-nine states**,** the District of Columbia and the Virgin Islands have laws that specifically allow women to breastfeed in any public or private location," and "[t]wenty-nine states, the District of Columbia and the Virgin Islands exempt breastfeeding from public indecency laws.").

[53] *See* Stephanie Marcus, *Scout Willis Posts Topless Photos On Twitter To Protest Instagram's Anti-Nudity Policy*, HUFFINGTONPOST.COM (May 28, 2014, 4:16pm), http://www.huffingtonpost.com/2014/05/28/scout-willis-topless_n_5405769.html/.

[54] Scout Willis, *Scout Willis Topless Instagram Protest*, XOJANE.COM, (June 2, 2014), http://www.xojane.com/issues/scout-willis-topless-instagram-protest.

[55] *Id.*

[56] Sometimes referred to as "topfree." *See, e.g.*, Topfree Equal Rights Association (TERA), http://www.tera.ca/ (last visited Nov. 15, 2015).

[57] *See #FreeTheNipple: Topless Protest Against Internet Censorship Follows Scout Willis Instagram Challenge*, HUFFINGTONPOST.CO.UK (Apr. 6, 2014, 12:37BST), http://www.huffingtonpost.co.uk/2014/06/04/freethenipple-topless-protest-internet-censorship-scout-willis-instagram-challenge-pictures_n_5443907.html; *see also What is Free the Nipple*, FREE THE NIPPLE (2014), http://www.freethenipple.com/.

thing you see when you're born, it's the thing you depend on, it's the first thing that nourishes us, at what point did it become an obscene thing?"[58]

The Topfree Rights Association (TERA) is another example of the modern movement for female breast equality.[59] This organization was formed in Canada in 1997,[60] and provides legal aid for female topless issues, mostly in Canada and the United States. TERA's statement of purpose describes being motivated by simple equality, individual choice, and female comfort.[61]

GoTopless, yet another example of the modern era of female breast definition and equality, focuses on a growing willingness of women to bare their nude breasts in public. GoTopless was founded in 2007, and promotes Go Topless Day, in which women are encouraged to bare their breasts, and males are encouraged to wear bikinis or bras.[62]

Willis's demonstration, Free the Nipple, TERA, and GoTopless might be characterized as political protests, and, therefore, fairly questioned in terms of how representative they are of societal norms of the female breast. After all, political protests typically emerge to change societal norms. Still, that these protests have cropped up in the last twenty years, and three in the last eight years, is evidence that substantial segments of society find female breast censorship laws repugnant enough to take action against them.

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[58] *#FreeTheNipple: Topless Protest Against Internet Censorship Follows Scout Willis Instagram Challenge*, HUFFINGTONPOST.CO.UK (Apr. 6, 2014, 12:37BST), http://www.huffingtonpost.co.uk/2014/06/04/freethenipple-topless-protest-internet-censorship-scout-willis-instagram-challenge-pictures_n_5443907.html

[59] *See Statement of Purpose and Principles*, TOPFREE EQUAL RIGHTS ASSOCIATION, http://www.tera.ca/index.html#Purpose (last visited Nov. 22, 2015).

[60] *News Releases*, TOPFREE EQUAL RIGHTS ASSOCIATION (Jun. 14, 1997), http://www.tera.ca/news.html#97-06-14.

[61] *Id.* at http://www.tera.ca/index.html#Purpose.

[62] GOTOPLESS.ORG, http://gotopless.org/index.php (last visited Nov. 15, 2015). Although GoTopless claims to be motivated by notions of liberal equality—even invoking the Constitution on the front page of its website—at least one journalist has pointed out that the founder of GoTopless is also the spiritual leader of the Raelian Movement, which has been accused of cult-like activities. *See* Katy Kelleher, *Go Topless Equality Movement Founded By Sketchy Cult Leader*, JEZEBEL.COM (August 23, 2010), http://jezebel.com/5619500/go-topless-equality-movement-founded-by-sketchy-cult-leader.

The Outdoor Co-Ed Topless Pulp Fiction Appreciation Society, on the other hand, is not overtly political. Instead, members of the group are simply trying to take advantage of New York's topless equality.[63] The organization is made up of mostly women, who read in public places around New York City while wearing no tops.[64] By taking advantage of the law in a public way—they often document their meet-ups on a blog—they demonstrate that female breast equality is about more than theoretical debate; it implicates actual behavior.

The fashion industry, too, has signaled a shift toward public female breast acceptance. For example, at the 2014 London Fashion Week, several designers showcased female garments that revealed the nipple.[65] Sheer garments were the "leftfield trend," with several collections "suggest[ing] that day-to-day nipple freedom might just be a hair's breadth away."[66]

Protest actions, social organizations and even fashion trends are all indicators of shifts in society's understanding of the public female breast.[67] The recent wave of actions challenging female breast censorship suggests that public norms are expanding to make room for the public female breast. The ubiquity of public and workplace breastfeeding,[68] too, supports this

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[63] *See infra* Part I.E.1; I.E.3.

[64] *The Outdoor Co-ed Topless Pulp Fiction Appreciation Society*, http://coedtoplesspulpfiction.wordpress.com/about/ (last visited Nov. 15, 2015).

[65] *See* Nathalie Olah, *Why nipples were much more than just a trend at London Fashion Week*, THEGUARDIAN.COM (Sept. 19, 2014), http://www.theguardian.com/fashion/2014/sep/19/why-nipples-were-much-more-than-just-a-trend-at-london-fashion-week.

[66] *Id.* Indeed, scholars pointed to fashion trends and advertising norms in 1999 that depicted the nude or nearly nude female breast. *See* DeJong & Smith, *supra* note 10, at 142 ("women often wear tops of thin or tight-fitting materials that reveal their nipples, albeit thinly covered by fabric, to the eyes of the public . . . [F]emale breasts that are uncovered or nearly uncovered are pervasive in advertising and entertainment media."). *See also 108 Ridiculously Naked Fall/Winter Outfits*, COSMOPOLITAN.COM, http://www.cosmopolitan.com/style-beauty/fashion/news/g4620/nakedest-runway-looks-nyfw-fall-2015/? (last visited Nov. 23, 2015) ("The biggest runway trend of fall 2015 is definitely nipples.").

[67] Even some municipalities seem to be accepting the public female breast. In 2012, San Francisco passed a public nudity ordinance, which only prohibited exposure of a person's "genitals, perineum, or anal region," but not breasts. S.F., CAL., POLICE CODE ORDINANCE § 154(b) (2012), *available at* http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances12/o0234-12.pdf.

[68] *See supra* note 52, and accompanying text; *see generally* Alexis Grant, *What Women Should Know about Breastfeeding at Work*, USNEWS.COM (Feb. 15, 2011), http://money.usnews.com/money/careers/articles/2011/02/15/what-women-should-know-about-breastfeeding-at-work.

understanding. These evolving societal standards play a central role in the constitutionality of female breast censorship, ultimately strengthening the argument to find such censorship laws unconstitutional.

C. First Amendment Issues

The First Amendment[69] protects some instances of the public female breast, but is an insufficient shield for total female breast equality. It is therefore important to understand the First Amendment's role in female breast censorship cases to understand its limits.

Governmental laws regulating the content of any speech—which includes actions that contain communicative messages[70]—are habitually challenged for infringing on the First Amendment. For example, in *United States v. O'Brien*, a defendant argued that burning a draft card was "symbolic speech" protected by the First Amendment.[71] As another example, defendants who have been charged with an obscenity violation may base their defense on a constitutional argument alleging that the law in question violates the First Amendment.[72] Additionally, owners of sex-related businesses, like strip clubs and adult-themed stores, often use the First Amendment to challenge zoning laws that restrict their businesses to undesirable locations.[73] Protesting a female breast censorship law by demonstrating topless in public is arguably speech and invokes the First Amendment. In such instances, two First Amendment doctrines come into play: (1) the regulation of obscene speech, and (2) the regulation of expressive conduct.

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[69] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.").
[70] *See* Brown v. State, 383 U.S. 131, 141–42 (1966); *see also* Hightower v. City of San Francisco, 77 F. Supp. 3d 867, 875 (N.D. Cal. 2014) ("The First Amendment protects not only the expression of ideas through printed or spoken words, but also symbolic speech—nonverbal activity ... sufficiently imbued with elements of communication." (citations and quotation marks omitted)).
[71] *See* United States v. O'Brien, 391 U.S. 367, 376 (1968).
[72] *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 559 (1969).
[73] *See, e.g.*, Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976).

"[A]s a general matter, ... government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[74] But there are limited exceptions, including obscenity.[75] Obscene speech is a category of *unprotected* speech that can be prevented and regulated.[76] The modern test for whether material is obscene comes from *Miller v. California*.[77] Generally, if the speech meets the three prongs of the *Miller* test, it is obscene and may be freely regulated.[78] The test is:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[79]

Because of the last element, obscene speech with political value escapes the obscenity label.[80] Not only that, but political speech occupies a special status in First Amendment jurisprudence, and is strongly protected against governmental regulation.[81] Therefore, if public nudity is speech, it can likely avoid being categorized as obscene so long as it has political value.

But is public nudity speech? The Supreme Court has noted, "Being 'in a state of nudity' is not an inherently expressive condition."[82] Lower courts have agreed.[83] Accordingly, "[i]n

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[74] Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729, 2733 (2011) (quoting Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (internal quotation marks omitted)).
[75] *Id.* (citing Roth v. United States, 354 U.S. 476, 483 (1957)).
[76] *See id.* at 2733–34; Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1380 (2008) ("If expression or conduct qualifies as obscenity, it is excluded from the First Amendment's protective reach." (citations omitted)).
[77] *See* Miller v. California, 413 U.S. 15 (1973).
[78] *See id.* at 23–25.
[79] *Id.* at 24 (internal citations omitted). Ordinances or statutes concerning zoning of obscene material are also governed by *Renton v. Playtime Theatres, Inc*., 475 U.S. 41 (1986).
[80] *See, e.g.*, United States v. Various Articles of Merch., 230 F.3d 649, 658 (3d Cir. 2000), *as amended* (Dec. 15, 2000) (finding nudist lifestyle "magazines qualify for First Amendment protection because of their political value.").
[81] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position.").
[82] City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion).
[83] *See e.g.*, Hightower v. City & Cnty. of San Francisco, No. C-12-5841 EMC, 2013 WL 361115, at *7 (N.D. Cal. Jan. 29, 2013) (citing South Fla. Free Beaches, Inc. v. Miami, 734 F.2d 608, 610 (11th Cir.1984) ("nudity is protected as speech only when combined with some mode of expression which itself is entitled to first amendment

deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, [the Court has] asked whether [a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."[84]

Ongoing litigation in San Francisco is illustrative. In *Hightower v. City & Cnty. of San Francisco*, two plaintiffs filed a class action lawsuit "alleging that the enforcement of a San Francisco ordinance that bars nudity on, *e.g.,* public streets and sidewalks violates their First Amendment rights."[85] The plaintiffs had protested the ordinance by appearing nude in public.[86] At least twice, they were issued citations and taken into custody.[87]

The first question the court addressed was whether the plaintiffs' nudity was speech such that it received First Amendment protection. The court identified the two-part test (intent to convey a message, and likelihood it would be understood), and applied it to multiple instances of the plaintiffs protesting in the nude.[88] In a fact-intensive decision, the court found that in some instances, the nudity constituted expressive speech, and in others it did not.[89] If nudity is expressive speech, it is more difficult for the government to regulate.[90]

As can be seen, the First Amendment is not a complete shield against all female breast censorship laws. For instance, topless sunbathing would be unlikely to receive First Amendment protection, either due to such conduct being labeled obscene, or due to a finding that it is not expressive conduct. Protesting a public nudity law by exposing one's breasts, however, is

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protection.")); *see also* State v. Turner, 382 N.W.2d 252, 253 (Minn. Ct. App. 1986) ("The Minnesota Supreme Court has held that 'nudity is not protected expression, but conduct, which the city has a substantial interest in regulating via its police power.'" (citation omitted)).

[84] Texas v. Johnson, 491 U.S. 397, 404 (1989) (quotation omitted).

[85] Hightower v. City & Cnty. of San Francisco, 77 F. Supp. 3d 867, 872 (N.D. Cal. 2014).

[86] *See id.* at 873.

[87] *See id.*

[88] *See id.* at 876.

[89] *See generally id.* at 877–87.

[90] *See id.* at 880–81 (discussing and applying the *O'Brien* test for government regulation of expressive conduct).

conceivably protected, because the conduct—nudity—conveys a political message.[91] This likely protection provides support for the argument that breast censorship laws fail the intermediate scrutiny test, as will be further described in Part III.

D. Equal Protection Clause Doctrine for Classifications Based on Sex

Section 1 of the Fourteenth Amendment states that, "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[92] The Equal Protection Clause has been interpreted to require that laws that classify on the basis of sex satisfy intermediate scrutiny. For the law to be deemed valid under this standard, the classification must serve an "important governmental objective[] and . . . the discriminatory means employed [must be] substantially related to the achievement of [that] objective[]."[93]

The Court's jurisprudence on the Equal Protection Clause as it relates to sex has evolved greatly, albeit clumsily, since its origins in *Reed v. Reed*.[94] In *Reed*, the mother and father of a decedent both sought to control administration of his estate.[95] The father was chosen based on an Idaho statute that required the male to be chosen over the female if both parents were equally qualified.[96] Upon appeal to the Supreme Court, Chief Justice Burger, writing for a unanimous Court, declared the statute's preference for males to be "arbitrary" and one that could not "stand

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[91] *See* Tagami v. City of Chicago, No. 14 CV 9074, 2015 WL 4187209, at *2–3 (N.D. Ill. July 10, 2015) (holding that the plaintiff sufficiently alleged a First Amendment claim against an indecency ordinance "when she appeared in public wearing opaque body paint covering her otherwise bare chest during a GoTopless Day [female topless protest] event."); *see also* Moriber, *supra* note 12, at 455 ("If a woman is engaged in unassociated nudity, or nudity that is not intertwined with 'speech' or a 'message' separate from the nudity, the nudity is mere conduct and is not entitled to First Amendment Protection. If, however, the nudity is not 'nudity for nudity's sake' and is associated with speech as part of a specific message, it will likely fall under the protections of the First Amendment . . . Ironically, because protesting is highly valued and generally protected as political speech, when women are protesting topless bans, their specific expression will likely be permissible.").

[92] U.S. CONST. amend. XIV, §1. The Equal Protection Clause has also been reverse incorporated into the Fifth Amendment's Due Process Clause, so as to apply to federal government action in addition to state government action. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

[93] United States v. Virginia, 518 U.S. 515, 533 (1996) (internal quotations and citation omitted).

[94] Reed v. Reed, 404 U.S. 71 (1971).

[95] *See id.* at 71–72.

[96] *See id.* at 71–73.

in the face of the Fourteenth Amendment's command that no State deny the equal protection of the laws to any person within its jurisdiction."[97] The Court thus struck down a sex-based distinction under a standard that resembled rational basis review.

Two years later, in *Frontiero v. Richardson*, the Court went much further and declared that classifications on the basis of sex were "inherently suspect" and subject to strict scrutiny judicial review.[98] In *Frontiero*, a female Air Force member challenged a federal law that required her to prove her husband was in fact dependent on her in order to receive certain benefits, although a man could claim his wife as a dependent without any such proof.[99] The Court held that a law that accorded "differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience . . . violate[d] the Due Process Clause of the Fifth Amendment."[100] Importantly, the Court recognized the nation's "long and unfortunate history of sex discrimination," based on ideas of romantic paternalism, that "in practical effect, put women, not on a pedestal, but in a cage."[101]

Yet, strict scrutiny review for sex-based classifications did not last. In *Craig v. Boren*, the Court held that laws with classifications based on sex would be subject to "elevated or 'intermediate' level scrutiny."[102] In *Boren*, an Oklahoma statute prohibited a certain type of beer to be sold to males under the age of 21, but to females only under the age of 18.[103] Despite an argument that the law was tailored to address traffic safety issues, the Court held that it

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[97] *Id.* at 74.
[98] Frontiero v. Richardson, 411 U.S. 677, 688 (1973) ("With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid.").
[99] *See id.* at 678.
[100] *Id.* at 690–91.
[101] *Id.* at 684.
[102] Craig v. Boren, 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting).
[103] *See id.* at 191–92 (majority opinion).

"invidiously discriminate[d] against males 18-20 years of age."[104] Thus, in the same case that the Court introduced the intermediate scrutiny test, it used it to strike down a law.

In later cases, like *Mississippi Univ. for Women v. Hogan*,[105] and *United States v. Virginia*,[106] the Court clarified its intermediate scrutiny standard. Now, "[t]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification."[107] That is, the sex-based classification must have an important—or exceedingly persuasive—governmental objective, and the means must be substantially related to that objective.[108]

E. Cases in which Breast Censorship Laws Held to Violate the Equal Protection Clause

The intermediate scrutiny standard has since been applied to both uphold and strike down female breast censorship laws. The following cases are some of the few in which judges struck down such laws after analyzing them under some version of the two-pronged intermediate scrutiny test. These cases illustrate the types of analyses with which courts engage when resolving breast censorship challenges. Ultimately, Part III builds on and augments the reasoning in the following cases in establishing that female breast censorship laws violate the Equal Protection Clause.

1. People v. David

In 1989, Mary Lou Schloss and Romona Santorelli had a topless picnic at a public beach in Rochester, New York.[109] Along with twenty to thirty other women, Schloss and Santorelli

[104] *Id.* at 204.
[105] Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).
[106] *Virginia*, 518 U.S. at 515.
[107] *Miss. Univ. for Women*, 458 U.S. at 724; *see also Virginia*, 518 U.S. at 531.
[108] *See* Virginia, 518 U.S. at 524.
[109] *See* Glazer, *supra* note 50, at 124.

"removed their shirts and swam, sunbathed, and played volleyball."[110] They were arrested for violating New York Penal Law section 245.01, [111] which read:

> A person is guilty of exposure if he appears in a public place in such a manner that the private or intimate parts of his body are unclothed or exposed. For purposes of this section, the private or intimate parts of a female person shall include that portion of the breast which is below the top of the areola. This section shall not apply to the breastfeeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment.[112]

The women were first convicted by a judge who upheld the constitutionality of the law, in part by relying on the biblical book of Genesis.[113] The state appellate court, however, found the "statute's gender classification violates the Equal Protection Clauses of the [United States] and [New York State] Constitutions."[114]

The court based its holding on a straightforward application of a version of the current intermediate scrutiny test. First, instead of asking whether the classification had an important governmental objective, the court asked whether "the statute protect[ed] a legitimate government interest."[115] The court's entire analysis of this prong consisted of one sentence. Relying on another New York state case, the court found that "protecting the public's sensibilities is a legitimate government interest."[116]

Next, instead of asking whether the means of sex-based classification were substantially related to that government objective—the "tailoring" prong of the analysis—the court asked whether "the gender-based classification [was] a reasonable means of achieving substantial

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[110] *Id*.
[111] *Id.*
[112] People v. David, 152 Misc. 2d 66, 67 (Munroe Cnty. Ct. 1991) (quoting Penal Law § 245.01).
[113] See Glazer, supra note 50, at 124–25.
[114] David, 152 Misc. 2d at 68. The court noted, however, that the statute could be "construed to be gender neutral and implicitly include in its prohibitions the exposure of a male's breast as violative of the statute where it is satisfactorily demonstrated that it constitutes 'private or intimate parts' of a person. Though an equal protection violation has been determined, the law does not require reversal of the conviction on that ground." Id.
[115] *Id*. at 67.
[116] *Id*.

government ends and not merely the arbitrary classifying of people by sexual sterotypes [sic]."[117] This analysis is more deferential to the state than the current constitutional standard. This is because the New York court required only a reasonable relationship, rather than a substantial relationship, between the classification and the government purpose. Moreover, the New York appellate court in this case interpreted reasonableness to mean "not merely. . . arbitrary,"[118] which lowers the threshold even further. If, then, a law is still struck down as violating the Equal Protection Clause under this interpretation of the constitutional standard, it certainly would not have withstood scrutiny under the standard as it is known and applied today.

In its tailoring analysis, the New York appellate court identified the government purpose as protecting public sensibilities. It therefore focused on whether there was something particular about the female breast that threatened public sensibilities. The court's primary analysis relied heavily on expert witnesses opining that "[m]ale and female breasts are physiologically similar except for lactation capability."[119] Given the similarities, the court concluded that the "gender based classification does not serve the legitimate governmental interest better than would a gender neutral law."[120]

Interestingly, the court went on to note that the experts also concluded that community standards had evolved to the point where female breasts were no longer considered a private or intimate body part.[121] Although in the context of the remedy, this conclusion could be understood as another reason for finding that censoring the public female breast was not a reasonable way to protect public sensibilities. First, public sensibilities do not need protection from a body part whose only sex-based distinction is lactation abilities. Second, even if community norms are

[117] *Id.*
[118] *See id.*
[119] *Id.* at 68.
[120] *Id.*
[121] *See* David, 152 Misc. 2d at 68.

used, experts testified that the female breast is no longer understood as an intimate body part that needs to be shielded to protect the public. The court could have also intended these two reasons as support for the same point: because the only physical difference between a female breast and a male breast is lactation ability, it is not an intimate body part, and its regulation is not reasonably related to protecting public sensibilities. In any event, the New York appellate court in *People v. David* found that in 1991, public sensibilities did not require the censorship of female breasts. The gender classification was struck down.[122]

2. Williams v. City of Fort Worth

In *Williams v. City of Fort Worth*,[123] a nightclub owner alleged that a Fort Worth zoning ordinance was unconstitutional for a variety of reasons. One of those reasons was that the ordinance was an equal protection violation as it "only regulates exposure of female breasts but not male breasts and, therefore, unconstitutionally discriminates against female topless dancers and proprietors of clubs featuring female topless dancers."[124] The ordinance defined nudity as: "less than completely and opaquely covered: a) Human genitals, pubic region or pubic hair, b) Human buttock, c) *Female* breast or breasts below a point immediately above the top of the areola."[125]

After a lengthy analysis, the court held that the nudity portion of the ordinance violated the equal protection rights of female topless dancers.[126] Importantly, the Texas appeals court in this case was not analyzing the ordinance under the United States Equal Protection Clause but

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[122] *Id.* at 68 ("The statute can therefore be construed to be gender neutral and implicitly include in its prohibitions the exposure of a male's breast as violative of the statute where it is satisfactorily demonstrated that it constitutes "private or intimate parts" of a person.").
[123] Williams v. City of Fort Worth, 782 S.W.2d 290 (Tex. App. 1989), *writ denied and writ withdrawn* (Oct. 10, 1990), *disapproved of by* Schleuter v. City of Fort Worth, 947 S.W.2d 920, 925 (Tex. App. 1997) (noting disapproval "to the extent [Williams] hold[s] that the Texas Equal Rights Amendment was intended to apply to an ordinance prohibiting female topless dancing in residential neighborhoods.").
[124] *Id.* at 295.
[125] *Id.* at 292 (emphasis added).
[126] *See id.* at 298.

the Texas Equal Rights Amendment. If a law is found to discriminate on the basis of sex in Texas, it "survive[s] strict judicial scrutiny 'only if the proponent can prove that there is no other manner to protect the state's compelling interests.'"[127] Unlike in *People v. Davis*, this is a higher standard of review than the Supreme Court's Equal Protection Clause doctrine demands. Nevertheless, under the court's reasoning, the law could not survive the less strict intermediate scrutiny standard.

In considering whether the law discriminated on the basis of sex, the court rejected two arguments commonly made by defenders of female breast censorship laws: real physical difference between male and female breasts and the eroticization of the female breast. The City argued that the ordinance does not treat women differently *because they are women*, but only because their breasts are physically different from men's breasts.[128] The court, however, rejected the physical difference argument because the City failed to show why physical difference required different treatment under the statute.[129] Next, amici curiae for the City argued that the ordinance merely regulates erogenous zones, which include the female breast, but not the male breast.[130] The court first called into question the flimsy support the amici had cited, and then highlighted the inherently discriminatory perspective such justification would require the court to adopt:

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[127] *Id.* at 296 (citation omitted).
[128] *See id.*
[129] *See id.* Although many courts rely on the physical difference between male and female breasts, the *Williams* court pointed out that real difference alone should not uphold a discriminatory law. Scholar Hirczy de Mino maintains that the *Williams* decision "demonstrates a keener appreciation for the ease with which physical differences between men and women can serve to deny equal rights, and the need to look not only at whether a unique characteristic is present, but whether it is relevant to the discrimination." Wolfgang P. Hirczy de Mino, *Does an Equal Rights Amendment Make A Difference?*, 60 ALB. L. REV. 1581, 1603 (1997). *See also Virginia,* 518 U.S. at 533–34 ("Sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,' to 'promot[e] equal employment opportunity,' to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women." (internal citations omitted)).
[130] *See* Williams, 782 S.W.2d at 297.

> Our court is not authorized . . . to take judicial notice of the concept that the breasts of female topless dancers, unlike their male counterparts, are commonly associated with sexual arousal. Such a viewpoint might be subject to reasonable dispute, depending on the sex and sexual orientation of the viewer.[131]

After holding that the ordinance discriminated against women as women, the court found that the ordinance was not the only way to protect the City's compelling interest of preventing secondary neighborhood effects, as the record contained no proof of a connection whatsoever.[132] As a result, the court struck down the nudity definition in the ordinance.[133]

3. People v. Santorelli

People v. Santorelli, a case decided by New York's highest state court, is a frequently cited case on the topic of female breast censorship.[134] The facts underlying this case are similar to *People v. David* because the case involved the same defendants. In June of 1986, Romona Santorelli and eight other women removed their tops in an expression of public disagreement with a New York law that criminalized the public exposure of the female, but not male, breast.[135] Seven women were arrested.[136]

Despite the majority holding that the convictions for topless sunbathing were rightly dismissed in a court below,[137] the concurring opinion is more often discussed. This is because

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[131] *Id*.
[132] See *id.*
[133] See *id*. at 298. Still, after rejecting using community standards in the case at hand, the court took care to note, "we are not discussing community standards for appropriate attire in public places where unwitting observers may be subject to offense, such as are governed by public lewdness statutes." *Id.* Thus, the court set up a distinction between public female toplessness and private female toplessness based on the willingness of third parties to seeing female breasts. *See id.*
[134] See generally People v. Santorelli, 80 N.Y.2d 875 (N.Y. 1992).
[135] See Glazer, supra note 50, at 113.
[136] *Id*.
[137] See Santorelli, 80 N.Y.2d at 877.

only the concurrence, not the five-paragraph majority opinion, engaged in Equal Protection Clause analysis.[138]

The concurrence analyzed the case under the two-pronged intermediate scrutiny test associated with sex-based Equal Protection Clause challenges.[139] Like in *People v. David*, the concurrence first identified the government interest as protection of public sensibilities.[140] Unlike in *People v. David*, however, the concurrence found this interest to be the source of the constitutional problem.

> [T]he concept of "public sensibility" itself, when used in these contexts, may be nothing more than a reflection of commonly held preconceptions and biases. One of the most important purposes to be served by the Equal Protection Clause is to ensure that "public sensibilities" grounded in prejudice and unexamined stereotypes do not become enshrined as part of the official policy of government.[141]

The concurrence then described the danger that "public sensibilities" in this context are likely just a proxy for stereotypes. First, "the female breast is no more or less a sexual organ than is the male equivalent."[142] Moreover, even though some may find the female breast arouses the prurient interests, such a perspective is itself "a suspect cultural artifact rooted in centuries of prejudice and bias toward women."[143] Without even addressing the tailoring aspect of the intermediate scrutiny inquiry, the concurrence concluded that the criminal statute violated the Equal Protection Clause based on the absence of an important governmental interest.[144]

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[138] See Santorelli, 80 N.Y.2d at 877 (Titone, J., concurring) ("Citing the maxim that wherever possible statutes should be construed so as to sustain their constitutionality, the [majority] bypass[ed] appellants' equal protection argument by holding that Penal Law § 245.01 simply does not apply 'in these circumstances.'").
[139] *See id.* at 880 ("When a statute explicitly establishes a classification based on gender, as Penal Law § 245.01 unquestionably does, the State has the burden of showing that the classification is substantially related to the achievement of an important governmental objective.").
[140] *See id.* at 880–81.
[141] *Id.* at 881.
[142] *Santorelli*, 80 N.Y.2d at 881 (Titone, J., concurring)
[143] *Id.* at 882.
[144] *See id.* at 883.

II. THE COSTS OF CENSORSHIP

Female breast censorship is normatively harmful. First, it perpetuates heterosexual male definitions of eroticism, contributing to the sexual and political subjugation of women. Second, it enforces dangerous body image issues. Lastly, it deprives women of the choice to be comfortable. This Part aims to show that there are normative grounds for objecting to female breast censorship laws.[145]

A. Eroticism and the Subjugation of Women

The eroticization of the female breast has perpetuated the subjugation of women. Yet, the eroticism of female breasts is not a universally held belief. In other cultures around the world, the female breast does not have an erotic meaning.[146] This does not mean, however, that other body parts are not similarly sexualized. Scholar Marilyn Yalom writes:

> Non-Western cultures have their own fetishes—small feet in China, the nape of the neck in Japan, the buttocks in Africa and the Caribbean. In each instance, the sexually charged body part—what the French poet Mallarme refers to as 'the veiled erotic'—owes much of its fascination to full or partial concealment.[147]

One might thus conclude: the more public the body part, the less sexual the body part. Female breast censorship ensures concealment, which makes it more difficult for female breasts to shed their sexual character.

Eroticized body parts are not necessarily harmful. However, when eroticized body parts develop into the eroticization of a class of people, there is a danger that the class's sexuality overshadows other aspects of the class. In the case of female breasts, the eroticization comes

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[145] Additionally, the harms expounded upon in this Section refute the occasionally-made argument that the Equal Protection Clause is not implicated by female breast censorship in the first place, because the laws do not perpetuate women's inferiority. *See infra* notes 209–212, and accompanying text.

[146] *See* Milstead, *supra* note 8, at 284 (specifically noting cultures in Africa and the South Pacific). *But see* Boso, *supra* note 2, at 152–53 (citing a Canadian case, R. v. Jacob, [1996] 112 C.C.C. (3d) 1, 15 (Can.), in which the judge convicted a woman for toplessness, citing that the female breast is "sexually stimulating to men.").

[147] YALOM, *supra* note 16, at 3.

primarily from the heterosexual male point of view.[148] As legal scholar Luke Boso points out, "[s]ociety . . . has carved out an exception to the general nonacceptance of female breast exposure: exposure to entertain or sexually arouse males."[149] This is evidenced in that "[w]omen are often free to expose their breasts at times and in places in which men desire it: at topless bars and clubs, in pornography, and in the bedroom."[150] Heterosexual male eroticization of the female breast, sanctioned by government laws that require its censorship when not in certain circumstances, threatens to—or perhaps continues to—subjugate women as a class, by objectifying women and dictating how, where, and why they may present their bodies.[151]

The sexualization of the female breast emanating mainly from the heterosexual male viewpoint is important because, as Virginia Milstead has remarked, it "overlooks the perspective of women on the issue, and what women find erotic. It in fact overlooks the perspective of anyone who is not a heterosexual male."[152] In fact, some research has demonstrated that women find the male chest the most sexually stimulating body part.[153] Moreover, male and female breasts are both capable of sexual arousal.[154]

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[148] *See* Milstead, *supra* note 8, at 282. ("In any case, the greater difficulty with the courts' conclusion that women's breasts are erogenous while men's are not is two-fold: first, the conclusion is based only on the perspective of heterosexual men; second, it assumes an inherent difference where one does not exist."). Of course, people who are not heterosexual and male may find female breasts erotic, too, yet the historical eroticization of the female breast that helps explain female breast censorship laws came primarily from heterosexual males. See *supra* Parts I.A, B.
[149] Boso, *supra* note 2, at 147.
[150] *Id.*
[151] *See* Jessica Blankenship*, The Social and Legal Arguments for Allowing Women to Go Topless in Public*, THE ATLANTIC (Sep 18, 2013, 8:34 AM), http://www.theatlantic.com/national/archive/2013/09/the-social-and-legal-arguments-for-allowing-women-to-go-topless-in-public/279755/2/ ("Proponents of topless equality assert that laws that single out women are effectively perpetuating a degrading cultural norm towards sexualizing women's bodies without their consent. The concern is that the laws incidentally support a larger mentality of objectifying women.").
[152] Milstead, *supra* note 8, at 283 (citation omitted).
[153] *See* Milstead, *supra* note 8, at 282.
[154] *See id.* at 282–83; *see generally* Roy Levin & Cindy Meston, *Nipple/Breast Stimulation and Sexual Arousal in Young Men and Women* 3 JOURNAL OF SEXUAL MEDICINE, 450 (2006), *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1743-6109.2006.00230.x/abstract (explaining conclusion of questionnaire-based study in article's abstract, that "[m]anipulation of the nipples/breasts causes or enhances sexual arousal in approximately 82% of young women and 52% of young men with only 7–8% reporting that it decreased their arousal.")

The heterosexual male eroticization of the female breast has led to, or at least allowed for, the continued public censorship of the female breast. Because female breasts are sexual to heterosexual males, they must be covered to avoid arousing men.[155] This is problematic for two reasons: first, it requires women instead of men to be responsible for heterosexual men's urges;[156] and second, it restricts women based on other's perception of them.[157] Both of these problems enforce women's subjugation, as the law requires women to cover up for men, and disregards women's choices free from the male perspective.[158]

B. Enforcement of Dangerous Body Image Issues

Female breast censorship reinforces female breast eroticization.[159] Female breast eroticization contributes to the general sexual objectification of women in relation to men.[160] Such objectification produces dangerous body image issues for women.[161]

Society plays an important role in how individuals view themselves and their bodies.[162] One important societal factor that impacts body image is the way one imagines other people

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[155] *See* Glazer, *supra* note 50, at 116 ("[T]he (heterosexual) male myth of a woman's breast has been codified into law. Because women are the sexual objects and property of men, it follows that what might arouse men can only be displayed when men want to be aroused.").
[156] *See id*. at 135 ("This framework of protecting women from men shifts the burden of responsibility from men to women; because women provoke uncontrollable urges in males, society excuses male behavior and blames the victim for whatever happens . . . In many ways, the excitement for men in viewing women bare-breasted is rooted in the prohibition against public exposure."); *see also* Boso, *supra* note, 2 at 149 ("[T]o the extent that society is concerned about heterosexual males' harmful response to female toplessness, shifting the burden to women to prevent male behavior is a biased and inequitable solution.").
[157] *See* Glazer, *supra* note 50, at 116–117; *see also* Libby S. Adler, *A Short Essay on the Baring of Breasts*, 23 HARV. WOMEN'S L.J. 219 (2000) (explaining that censoring the female breast in turn censors female expressions of victory, protest and aggression); *see also* Moriber, *supra* note 12, at 459 (to some women, "a prohibition on making the individual choice to go top-free symbolizes an inability to shed the remnants of subordination and be liberated, as men are.").
[158] *See* Milstead, *supra* note 8, at 283 ("Aside from this view being distinctly androcentric, and accordingly a view that contributes to women's political and social marginalization, it is bad law. It is bad law to claim that a proposition is "indisputable" when it has only considered the perspectives of less than half the population." (citations omitted)); *see also* Glazer, *supra* note 50, at 114–116.
[159] *See supra* Part II.A.
[160] *See* Martin S. Weinberg & Colin J. Williams, *Bare Bodies: Nudity, Gender, and the Looking Glass Body*, 25 SOCIOLOGICAL FORUM 47, 48 (March 2010) ("Sexual objectification occurs when a woman's sexual parts or functions are separated out from her person, reduced to the status of mere instruments, or else regarded as if they were capable of representing her." (quoting Bartky)).
[161] *See id.*

perceive their body.[163] The law helps mold such perceptions.[164] For example, if concealment of a body part contributes to the body part's sexuality, a law mandating concealment perpetuates the body part's sexuality.[165] This is the case with female breasts and female breast censorship laws. As discussed, these laws can lead to eroticization and objectification of women.[166] Unsurprisingly, feelings of objectification can lead to body shame and anxiety.[167]

Women are already more likely than men to have body image issues.[168] Body image issues can lead to a variety of serious physical and mental impairments, like eating disorders, depression, anxiety, and suicidality, among others.[169] Feelings of objectification have been specifically linked to higher rates of depression and eating disorders.[170]

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[162] *See* NATIONAL EATING DISORDERS ASSOCIATION, *Media, Body Image, and Eating Disorders*, https://www.nationaleatingdisorders.org/media-body-image-and-eating-disorders (discussing the significant influence that media has on body image); *see also* Kate Fox, *Mirror, mirror, A summary of research findings on body image*, SOCIAL ISSUES RESEARCH CENTRE (1997), http://www.sirc.org/publik/mirror.html (noting effects of media depictions of beauty ideals). Studies have also found that the media has a profound effect on women's acceptance of their own bodies and what the ideal female body looks like. *See generally* Martin Eisend & Jana Möller, *The Influence of TV Viewing on Consumers' Body Images and Related Consumption Behavior*, 18 MARKETING LETTERS, 101, 101 (2006).

[163] *See* Weinberg & Williams, *supra* note 160, at 48.

[164] *See* Glazer, *supra* note 50, at 115 (arguing that "the law has contributed to the creation of an environment in which women are conditioned to hate their bodies and strive for an unrealistic and unattainable ideal form.").

[165] *See supra* note 147 and accompanying text. *But see* Peter Anderson, Rose E. Frisch, et al., *The Reproductive Role of the Human Breast [and Comments and Reply]*, 24 CURRENT ANTHROPOLOGY, 25, 26 (1983) ("There appears to be no relationship between whether the breasts are normally bared or concealed by clothing and their erotic significance, although in societies that prefer women to keep their breasts covered this is usually restricted to the period between puberty and the birth of the first child.").

[166] *See supra* Part II.A.

[167] *See* Weinberg & Williams, *supra* note 160, at 48.

[168] *See generally,* Glazer, *supra* note 50, at 114–15; Alan Feingold & Ronald Mazzella, *Gender Differences in Body Image Are Increasing*, 9 PSYCHOLOGICAL SCIENCE 190, 190–93 (May 1998) (meta-analysis from second half of twentieth century noting women's body dissatisfaction over time, and that "males are more satisfied with their bodies than females."); *see also* Fox, *supra* note 162 ("All research to date on body image shows that women are much more critical of their appearance than men."); NATIONAL EATING DISORDERS ASSOCIATION, *Research on Males and Eating Disorders*, https://www.nationaleatingdisorders.org/statistics-males-and-eating-disorders (citing a 2011 study that found "female-to-male ratio [of positive screens for eating disorders] was 3-to-1."). *But see* Denis Campbell, *Body image concerns more men than women, research finds*, THE GUARDIAN (Jan. 5, 2012, 7:05 PM), http://www.theguardian.com/lifeandstyle/2012/jan/06/body-image-concerns-men-more-than-women (describing a British study that showed males have significant anxiety about body image).

[169] *See Negative Body Image Related To Depression, Anxiety And Suicidality*, SCIENCEDAILY (June 6, 2006), www.sciencedaily.com/releases/2006/06/060606224541.htm ("Adolescents with negative body image concerns are more likely to be depressed, anxious, and suicidal than those without intense

The law should be careful not to perpetuate dangerous body image issues, given the seriousness of its effects, especially on women. But female breast censorship laws do just that. They reinforce female breast eroticization, which can lead to objectification, which in turn produces body image issues.

C. Deprivation of Comfort

Finally, the right for women to bare their breasts publically allows women the choice to be comfortable. Female breast censorship deprives women of that choice. Naturally, being topless in public may not be desirable in all places, at all times, for all people. Men tend to enjoy this option of undress during warm weather, in places like beaches, parks, and festivals. Social stigma and restrictive laws aside, some women would also likely enjoy being able to go without tops in such situations.[171] Currently, however, for women to do so, they not only face the fear of law, but also harassment.

That women are harassed when they breast-feed in public is indicative of the problem.[172] Even women who are using their breasts to fulfill a biological purpose are subjected to unwanted

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dissatisfaction over their appearance."); *See also Body Image and Health - 2002. Revised 2009*, AUSTRALIAN MEDICAL ASSOCIATION (Apr. 26, 2009), https://ama.com.au/position-statement/body-image-and-health-2002-revised-2009.

[170] Weinberg & Williams, *supra* note 160, at 50.

[171] *See* CAROLYN LATTEIER, BREASTS: THE WOMEN'S PERSPECTIVE ON AN AMERICAN OBSESSION, 161 (1998) (recounting an incident with Kayla Sosnow, arrested for being topless in 1996 in the Osceola National Forest, who was topless because the temperature was ninety degrees and it felt more natural and comfortable); Morwenna Ferrier, *The real reason French women have stopped sunbathing topless*, THE GUARDIAN (Jul. 28, 2014, 1:45 PM), http://www.theguardian.com/fashion/fashion-blog/2014/jul/28/real-reason-french-women-have-stopped-sunbathing-topless (reporting on France's history of topless sunbathing, including French women's comfort with it, but discussing other factors that have led to its decline, like health concerns, the "Americanisation" of women as sexual beings, and nude breasts being used for protest).

[172] *See, e.g.*, Liz Lohuis, *Breastfeeding mom says she was harassed, store apologizes*, WYFF4.COM (Jul. 8, 2014, 6:46 AM), http://www.wyff4.com/news/breastfeeding-mom-says-she-was-harassed-store-apologizes/26835128 (woman breastfeeding in North Carolina store harassed); *see also* Katy George, *Busting Out: The Right to Bare It All*, ETHOS MAGAZINE (Sept. 26, 2010), http://ethosmagonline.com/busting-out-the-right-to-bear-all/ ("American attitudes toward naked breasts play a large role in persuading women to make the switch to formula, as discrimination against and harassment of nursing women are all too common despite numerous state laws allowing public breastfeeding.")

attention. Indeed, several states have carved out breast-feeding exceptions for laws that otherwise censor the female breast.[173] Ultimately, eliminating female breast censorship laws altogether would better protect breast-feeding women.[174]

This understanding depends on a certain logical chain. Breast censorship laws encourage society's understanding of the female breast as sexual; because the female breast is sexualized, the public female breast is seen as inappropriate and can result in harassment. Accordingly, abolishing breast censorship laws will reduce the sexualization of the female breast, allowing women to bare their breasts without fear of harassment. Of course, abolition of breast censorship laws alone is insufficient. Women must also be willing to take advantage of the legal choice to be topless. Groups like the Outdoor Co-Ed Topless Pulp Fiction Appreciation Society in New York, where female toplessness is legal, demonstrate that some women are so willing.

Only when women begin to bare their breasts publically in the same manner as men—which would result more quickly without censorship laws—will public female breasts become a "non-event."[175] At that point, harassment will no longer be a barrier to a woman's choice to be comfortable.

III. FEMALE BREAST CENSORSHIP VIOLATES THE EQUAL PROTECTION CLAUSE

The censorship of the public female breast, but not the public male breast, violates the Equal Protection Clause of the Fourteenth Amendment. A law that regulates the female breast

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[173] *See supra* note 52.

[174] *See* George, *supra* note 172 ("Topfree advocates say the hyper-sexualization of women's chests has only harmed society. By hiding breasts, American culture has made them an enticing taboo and encouraged both males and females to consider them nothing more than aesthetic ornaments, ignoring their true function as sources of food for infants.").

[175] *See Sunday's 'GoTopless Pride Parade' to end at Brooklyn's new boob-themed bar*, PR NEWSWIRE (Aug. 23, 2014), http://www.prnewswire.com/news-releases/sundays-gotopless-pride-parade-to-end-at-brooklyns-new-boob-themed-bar-272425541.html ("'We hope that by participating in annual topless festivities, New York City women and women around the world will feel increasingly comfortable to go topless in public,' [Rachel] Jessee [GoTopless Spokesperson] said. 'When a woman's uncovered chest in public becomes the simple non-event it already is for a man, we will have accomplished our mission.'")

applies only to members of one sex, patently denying "the equal protection of the laws" between the two sexes.

This Part responds to commonly-cited reasons that courts use to deny Equal Protection Clause challenges by analyzing female breast censorship laws under the two-pronged intermediate scrutiny standard required by the Supreme Court. First, this Part argues that based on current societal norms, there is no important governmental interest to justify female breast censorship. Second, even if an important governmental interest exists, the sex-based classification is not substantially related to that interest. A proper means analysis results in substantial overinclusivness and underinclusivness. Finally, this Part turns to the recent Supreme Court cases *United States v. Windsor* and *Obergefell v. Hodges*, which contain additional support for Equal Protection Clause challenges to female breast censorship.

Although a handful of courts have already found Equal Protection Clause violations, most courts have upheld these facially discriminatory laws by relying on improper Equal Protection Clause analyses and outdated societal norms. Importantly, if a court faces such a challenge today, it is insufficient to simply rely on one line of cases or the other. Instead, the court must properly account for evidence of modern public norms—at least when the government advances the interest of protecting public sensibilities.

A. No Important Governmental Objective

Analyzing female breast censorship laws under an intermediate scrutiny standard, as doctrine demands, demonstrates that such laws do not pass constitutional muster. First, the sex-based classification must have an important governmental objective. Indeed, the classification must have an "exceedingly persuasive justification."[176]

[176] *Miss Univ. for Women*, 458 U.S. at 724 (citation omitted); *see also* Virginia, 518 U.S. at 531.

Proponents of female breast censorship laws have offered a variety of supposed important governmental objectives for upholding such censorship, including preventing riots,[177] shielding children, and protecting women from assault.[178] More commonly, courts cite protecting public sensibilities as the important governmental objective that satisfies this prong of the analysis.[179] The changing understanding of the public female breast, however, undermines this justification. The protection of public sensibilities is far from "exceedingly persuasive."

"Public sensibilities" is an amorphous and subjective concept. As a result, courts that invoke it generally attempt to make it more concrete by relying on two lines of support: community standards and the doctrine of real difference.[180] Given shifting societal norms, both justifications fall short.

1. Modern Community Standards Do Not Require Breast Censorship

In *People v. Craft*, the court explained that the governmental objective was "to protect the general public from being accosted by offensive conduct in public places," which included women baring their breasts.[181] The court attempted to justify this "public sensibilities" argument by stating that New York's police power includes the ability to prohibit public nudity.[182] But this statement merely kicked the question down the road—why are only bare female breasts

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[177] *See* DeJong & Smith, *supra* note 10, at 143–45 (discussing convictions invoking this rationale and disputing its veracity).
[178] *See* Boso, *supra* note 2, at 148 (arguing such claims are disingenuous); DeJong & Smith, *supra* note 10, at 145–46.
[179] *See, e.g.*, United States v. Biocic, 928 F.2d 112, 115–16 (4th Cir. 1991) (important government interest is "protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones."); State v. Vogt, 775 A.2d 551, 557 (N.J. Super. Ct. App. Div. 2001).
[180] Real difference and community norms are not always mutually exclusive lines of reasoning. *See* Milstead, *supra* note 8, at 277 ("While claiming that the laws are based on physical differences, the courts nevertheless reveal that their main concern is how the public perceives female breasts.").
[181] People v. Craft, 134 Misc. 2d 121, 124, (NY City Ct. 1986) *rev'd,* 149 Misc. 2d 223 (NY Co. Ct. 1991) *rev'd sub nom.* People v. Santorelli, 80 N.Y.2d 875 (1992). Even though this case was ultimately reversed, the court's reasoning provides relevant insight into how courts justify facially discriminatory breast censorship laws in the face of Equal Protection Clause challenges.
[182] *Craft*, 134 Misc. 2d at 124.

subject to nudity regulation, although bare male breasts are not? The court ultimately answered that, "community standards, as perceived by the Legislature, regard the female breast as an intimate part of the human body."[183]

The court's justification is exceedingly *un*persuasive for two reasons. First, community standards no longer understand the female breast as an intimate body part that requires covering.[184] But, even if a legislature regarded the female breast as intimate, the legislature's finding is not the unreviewable final word on what constitutes an intimate part of the human body, such that it can freely regulate that body part even if regulations differ between the sexes. At that point, the Equal Protection Clause comes into play and courts have a role in determining the law's constitutionality.

Initially, that female breasts were an intimate body part by societal standards in 1986, the year *People v. Craft* was decided, can be disputed.[185] But even if they were, the 1986 community standard is not the yardstick by which to measure community standards today.[186] Community standards have evolved greatly in the past twenty-nine years.[187] The existence of organizations like the Outdoor Co-Ed Topless Pulp Fiction Appreciation Society, Free the Nipple, and GoTopless, among others discussed in Part I, demonstrates that the community

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[183] *Id.* at 125.

[184] Helen Pundurs, Comment, *Public Exposure of the Female Breast: Obscene and Immoral or Free and Equal?*, 14 IN PUB. INT. 1, 32 (1995) ("[C]ommunity standards are not an immutable entity, especially regarding moral values and acceptable behavior."). It should also be noted that some courts refuse to even engage in the analysis of whether societal norms are changing, and if so, whether those changes affect the justification of protecting public sensibilities. *See* Milstead, *supra* note 8, at 288–89 (citing cases in which courts considered changing social norms arguments to be irrelevant, noting "[m]any courts do not independently review the question of whether a difference in standards exists; they merely rely on the courts that came before them," and arguing why such judicial abdication is harmful).

[185] Indeed, in *Craft* the defendants argued that "the government interest [of protecting public sensibilities] is illegitimate because it is based on stereotyped and archaic notions of the female breasts as objects for sexual pleasure." *Craft*, 134 Misc. 2d at 125.

[186] *See* Milstead, *supra* note 8, at 291–92 (discussing how an intermediate scrutiny analysis should be conducted, and noting that one court "acknowledged that 'nudity is a social concept, a changing social perception.'" (citation omitted)); *cf. id.* at 289 ("[T]he law supposes that standards of decency vary from community to community." (citation omitted)).

[187] *See supra* Part I.B.

standard has begun to embrace the public female breast as being no different than the public male breast. Despite female breast censorship laws, and despite some members of society still clinging to the view that the female breast is uniquely erotic, women are demanding to go topless.[188]

One could argue that these acts of resistance are coming from a minority of citizens, and thus do not represent modern norms. But this argument assumes that the majority of citizens who have not engaged with these issues are *actively for* female breast censorship. The assumption is erroneous. At best, the majority of citizens appears neutral on the issue. If not, one would expect to find incidents of groups protesting to enforce female breast censorship laws, or counter-protesting female topless demonstrations, for example.[189] Even aside from groups devoted to equal topless rights for women, current fashion trends are evidence of a community standard that has begun to accept the public female breast.[190] Moreover, at least one recent nudity statute in a large municipality allows the display of male and female breasts alike.[191] Female breast censorship only makes sense from a historically-entrenched heterosexual male point of view, which understands the female breast as primarily erotic.[192]

Second, if protecting public sensibilities, as defined by community standards, can be deemed an important governmental interest in the Equal Protection Clause analysis, then those

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[188] *See supra* notes 53–64, and accompanying text; *see also* Moriber, *supra* note 12, at 478 ("In the summer of 2008, when the group GoTopless conducted a topless demonstration on Lincoln Road, a commercial and social center in Miami Beach, there were no arrests. Instead, the group only drew a modest crowd of onlookers." (citations omitted)).

[189] This author is aware of no publicity surrounding topless demonstrations that has reported on such incidents.

[190] *See supra* notes 65–66, and accompanying text.

[191] *See supra* note 67.

[192] *See* People v. Santorelli, 80 N.Y.2d 875, 881–82 (1992) (Titone, J., concurring) ("They further contend that to the extent that many in our society may regard the uncovered female breast with a prurient interest that is not similarly aroused by the male equivalent, that perception cannot serve as a justification for differential treatment because it is itself a suspect cultural artifact rooted in centuries of prejudice and bias toward women. Indeed, there are many societies in other parts of the world—and even many locales within the United States—where the exposure of female breasts on beaches and in other recreational area is commonplace and is generally regarded as unremarkable." (internal citations omitted)); *see also, supra* Part II.A.

standards should not be defined by the legislature alone. If permissible, then laws that classify on the basis of sex can *always* overcome the first prong of judicial review as long as the legislature declares the classification to be based on community standards. Unless courts wish to relinquish their power of judicial review—at least in regards to the first prong of the intermediate scrutiny inquiry—they must measure community standards by more than a law's passage in the legislature.

Furthermore, recall that a woman who exposes her breasts to communicate political disagreement with breast censorship laws is probably protected under the First Amendment.[193] The likely legality of this conduct illustrates that protecting public sensibilities is actually an impermissible pretense for perpetuating a stereotype that harms women. In the context of protest, the public female breast is acceptable; but in the context of sunbathing, the public female breast is not. Thus, the *purpose* for which a woman reveals her breasts could be determinative of the legality of her action. That is, she might be allowed to bare her breasts in protest protected by the First Amendment, but not allowed to bare her breasts for comfort protected by the Equal Protection Clause. If this is the case, then either protecting public sensitivities is a sham governmental interest (as evidenced by it only mattering in certain contexts), or, the individual right to political expression outweighs the interest in public sensitivities. In both cases, the inconsistent application of the law reveals the deep flaw in the justification of protecting public sensibilities.

2. Real Difference Justification as Stereotypes in Disguise

Courts also try to bolster the public sensibilities justification by claiming that female breasts and male breasts are physically different, and it is the difference of the female breast that would offend the public, which allows for its censorship. In *Craft v. Hodel*, plaintiffs challenged

[193] *See supra* note 91, and accompanying text.

a National Park Service regulation that barred public nudity, defined as: "a person's intentional failure to cover with a fully opaque covering that person's own genitals, pubic areas, rectal area, or female breast below a point immediately above the top of the areola when in a public place."[194]

The district court upheld the statute in the face of an Equal Protection Clause challenge, based on the important governmental interest of protecting public sensibilities as they relate to the real difference between male and female breasts.[195] Quoting from *People v. Craft*, the court found that the important governmental interest "is to protect the public from invasions of its sensibilities, and merely reflects current community standards as to what constitutes nudity."[196] But the *Hodel* court went one step further in trying to reify "community standards." The nudity regulation was not about stereotypes, the court insisted, but was based on recognition of "a physical difference between the sexes which has implications for the moral and aesthetic sensitivities of a substantial majority of the country."[197] Similarly, a New Jersey appellate court agreed that, "[p]rotecting the public sensibilities is an important governmental interest based on an indisputable difference between the sexes."[198]

There are two doctrinal difficulties with a court's injection of "physical difference" into breast censorship Equal Protection Clause analysis. First, an announcement of "real difference" is often impermissibly used as an excuse to bypass the first prong of the two-step intermediate scrutiny inquiry. Second, the existence of real difference adds nothing to the argument that the protection of public sensibilities is an important government interest.

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[194] Craft v. Hodel, 683 F. Supp. 289, 290 n. 1 (D. Mass. 1988) (citation omitted).
[195] *See id.* at 299–301.
[196] *Id.* at 299.
[197] *Id.* at 300.
[198] State v. Vogt, 775 A.2d 551, 557 (N.J. Super. Ct. App. Div. 2001).

Courts sometimes begin their analysis of breast censorship cases by invoking the real difference between male and female breasts. These courts claim that, "the difference is biological."[199] Initially, these courts are correct: female breasts are biologically different from male breasts in their lactation abilities. The problem is that too often courts stop at this point, and declare the real difference between female and male breasts as justifying the regulation of the female breast.

J & B Social Club No. 1, Inc. v. City of Mobile is instructive.[200] In *J & B Social Club*, the Mobile, Alabama City Council enacted an ordinance that banned females, but not males, from dancing topless in bars.[201] Despite the ordinance classifying on the basis of sex, which is a suspect class that triggers intermediate scrutiny review, the court refused to apply an Equal Protection Clause analysis. "It is apparent to the naked eye, and this court takes judicial notice, that female breasts are quite often different from male ones," the court asserted.[202] "In this regard, men and women are not 'similarly situated,' and the ordinance therefore raises no impermissible gender classification."[203] Such an approach impermissibly bypasses the entire intermediate scrutiny analysis based on the court's judicial notice that there is a difference between male and female breasts. Upon finding this real physical difference, the rest of the court's Equal Protection Clause analysis includes the following: "Assuming, however, that such a distinction is 'gender-based' for equal protection purposes, the court finds that the distinction is substantially related to an important governmental interest."[204]

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[199] Milstead, *supra* note 8, at 279.
[200] *See generally J & B Social Club No. 1, Inc. v. City of Mobile*, 966 F.Supp. 1131 (S.D. Ala. 1996).
[201] *See id.* at 1133–34.
[202] *Id.* at 1139.
[203] *Id.*
[204] J & B Soc. Club No. 1, 966 F.Supp. at 1139. It then cited three cases with no further analysis. *Id.*

Like in *J & B Social Club*, sometimes courts frame the analysis in terms of men and women being "similarly situated" or not. But, as legal scholar Giovanna Shay argues:

> properly understood, 'similarly situated' is not a threshold hurdle to equal protection analysis on the merits in cases involving facial classifications . . . . In cases regarding express categories, no matter the level of equal protection scrutiny applied, the focus of the "similarly situated" analysis is substantially the same as the key inquiry of equal protection review: Does the legislative classification bear a close enough relationship to the purpose of the statute?[205]

In *City of Albuquerque v. Sachs*, a New Mexico appellate court was tasked with analyzing whether an Albuquerque ordinance barring public nudity violated the New Mexico Equal Rights Amendment for prohibiting the public display of female breasts "without a fully opaque covering of [the] entire nipple," but not male breasts.[206] Yet, the court improperly bypassed a substantive analysis upon finding a physical difference between male and female breasts.[207] As Judge Linda M. Vanzi explained, the court "used a biological difference to justify a social stereotype. Notwithstanding documentary evidence that there is no inherent, significant difference between men's and women's breasts, it appears that the court was primarily concerned not with whether there is a difference but rather with societal norms."[208]

In yet another example of improperly bypassing the intermediate scrutiny analysis, the court in *Tagami v. City of Chicago* found that the plaintiff, who was challenging a Chicago indecent exposure ordinance, failed to state an Equal Protection Clause claim.[209] The court found, "while the Ordinance permits men but not women to appear bare-chested in public, *Tagami* fails to allege how this distinction places 'artificial constraints' on a woman's opportunity, or how the [Ordinance] is used to 'create or perpetuate the legal, social, and

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[205] Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 588 (2011).
[206] City of Albuquerque v. Sachs, 92 P.3d 24, 25 (N.M. Ct. App. 2004).
[207] *See id.* at 27 (rejecting Defendants' call for strict scrutiny review, "agree[ing] with the district court's approach and hold[ing] that the classification in the City Ordinance is properly based on a unique characteristic.").
[208] Linda M. Vanzi, *Freedom at Home Revisited: The New Mexico Equal Rights Amendment After New Mexico Right to Choose/naral v. Johnson*, 40 N.M. L. REV. 215, 222 (2010).
[209] *See* Tagami v. City of Chicago, No. 14 CV 9074, 2015 WL 4187209, at *3 (N.D. Ill. July 10, 2015).

economic inferiority of women.'"[210] Not only is such a showing not required,[211] but in fact the sex-discriminatory ordinance *does* perpetuate the social inferiority of women.[212]

Courts commonly invoke real difference in an attempt to bolster the public sensitivities argument, even though the real differences between male and female breasts do not make female breasts more in need of shielding. The biological difference, after all, is lactation ability, and most states have exceptions to public nudity and obscenity laws for breast-feeding mothers.[213] If the real difference is the justification for protecting sensibilities, then why is a demonstration of that real difference—breastfeeding—specifically allowed in full display of the public?[214] In actuality, a court's determination of real difference between male and female breasts is used to impermissibly justify discriminatory stereotypes.[215]

In analyzing a law under the Equal Protection Clause, courts must ensure the important governmental interest is not actually enforcing a stereotype. The need to root out laws that classify based on gender stereotypes is one reason women were deemed a suspect class in the first place.[216] In *Mississippi University for Women v. Hogan*, the Court instructed:

> [T]he test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. [217]

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[210] *Id.* (citations omitted).
[211] *See* Shay, *supra* note 205, and accompanying text.
[212] *See supra* Part II.A.
[213] *See supra* note 52.
[214] *See* Moriber, *supra* note 12, at 461 ("By enacting these statutes, state legislatures are implicitly recognizing that the female breast is functionally different, but that its exposure in a nonsexual manner is not offensive or indecent.").
[215] *See* Milstead, *supra* note 8, at 279 (arguing "that courts view the breast from a distinctly heterosexual male perspective, and from this perspective they conclude there is a real difference between men and women.")
[216] *See, e.g.*, Frontiero, 411 U.S. at 685 ("[O]ur statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.").
[217] *Miss. Univ. for Women*, 458 U.S. at 724–25.

Courts that invoke real difference as further justification for protecting public sensibilities defy this command.[218] This is because such invocations are revealed to be no more than social constructions based on stereotypes. The Fourth Circuit in *United States v. Biocic* essentially admits this to be true. It identified the important governmental interest as "protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous," which include the female breast.[219]

Yet, research and physiological realities challenge the veracity of the claim that female breasts are erogenous, while male breasts are not.[220] This real difference, then, is no more than a stereotype in disguise. As previously explained, the claim that female breasts must be censored to protect the public is a primarily heterosexual male viewpoint, based on the sexualization of female breasts. From this understanding, the objective of protecting the public mores reflects an impermissible "archaic and stereotypic notion[]."[221]

B. Means Not Substantially Related

Even if the protection of public sensibilities was deemed an important governmental interest, female breast censorship laws are not substantially related to that objective. Society's understanding of the breast has evolved to the point that the public female breast would not lead to an erosion of public sensibilities. Moreover, female breast censorship laws are both underinclusive and overinclusive to the governmental goal, which signals that the laws should fail the second prong of the intermediate scrutiny analysis.

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[218] *See* People v. Santorelli, 80 N.Y.2d 875, 881 (1992) (Titone, J., concurring) (protecting public sensibilities "is a tenuous basis for justifying a legislative classification that is based on gender, race or any other grouping that is associated with a history of social prejudice . . . Indeed, the concept of 'public sensibility' itself, when used in these contexts, may be nothing more than a reflection of commonly held preconceptions and biases." (citations omitted)).
[219] *Biocic*, 928 F.2d at 115–16.
[220] *See* Milstead, *supra* note 8, at 282 (citation omitted); *see also* Cusack, *supra* note 10, at 201–03.
[221] *Miss. Univ. for Women*, 458 U.S. at 725.

Almost a quarter of a century has passed since a New York appellate court found that public sensibilities did not require the censorship of female breasts.[222] Given the majority of cases that hold otherwise, however, one may fairly argue that the court's conclusion in *People v. David* was an anomaly. Even if that is the case, new evidence shows that society's understanding of the public female breast has evolved to the point that its public display is closer to a "non-event"[223] than a universally offensive action.

Several organizations have formed within the last twenty years to protest female breast censorship laws and provide legal aid to women facing issues related to female breast censorship.[224] In New York, where it is legal for women to be topless, women are forming groups to take advantage of that right.[225] Furthermore, the fashion industry has embraced the female breast, with 2014 designs from multiple designers featuring sheer and see-through tops for women.[226] In 2015, there were 66 planned Go Topless Day actions, with over 30 planned in the United States, in which women protested female breast censorship by baring their breasts.[227] Celebrities are also voicing their support for female breast equality.[228] Even though some may be surprised to see the female breast in public, surprise is not a reaction that requires protecting public sensibilities. In light of how the modern public understands the female breast, one would

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[222] *See* People v. David, 152 Misc. 2d 66 (Munroe Cnty. Ct. 1991).
[223] *See supra* note 175 and accompanying text.
[224] *See supra* Part I.B.
[225] *See supra* notes 63–64, and accompanying text.
[226] *See* Nika Mavrody, *Free the Fashion Nipple: A Brief History of Runway Boobs*, THE FASHION SPOT (June 25, 2014), http://www.thefashionspot.com/runway-news/420487-free-the-fashion-nipple-a-brief-history-of-runway-boobs/#/slide/1 (discussing "nipple trend" of Spring 2014 fashion shows); *see also* notes 65, 65 and accompanying text.
[227] GOTOPLESS DAY – AUG 23, 2015, GOTOPLESS.ORG, http://gotopless.org/gotopless-day (last visited Nov. 28, 2015).
[228] *See* Sean O'Connell, *How Miley Cyrus Is Supporting The Topless-Rights Movie Free The Nipple*, CINEMABLEND, http://www.cinemablend.com/new/How-Miley-Cyrus-Supporting-Topless-Rights-Movie-Free-Nipple-68340.html (noting that in addition to Miley Cyrus, "Lena Dunham, Liv Tyler, Rihanna and Keira Knightley have all voiced support for the topless movement").

be hard pressed to argue that female breast censorship is substantially related to protecting the modern public's sensibilities.

Furthermore, female breast censorship laws are both over- and underinclusive to the goal of protecting public sensibilities. They are overinclusive because a growing segment of the public is simply not offended by the public female breast. They are underinclusive because public sensibilities might need protection from similarly offensive breasts that are currently legally allowed to be on display. For example, some may take offense to seeing large male breasts or male breasts that look like female breasts. Some may need protecting from the erotic male chest in general.[229] More broadly, there are a plethora of human activities that people may find unwelcome, unattractive, or offensive in public, yet most such activities are not illegal.[230]

Evidence of society's understanding of the public female breast, as well as the overinclusive and underinclusive nature of female breast censorship laws, reveals that such laws are not substantially related to protecting public sensibilities. They therefore cannot overcome the second prong of the intermediate scrutiny test.

C. Violation of Equal Protection Clause Principles

Finally, recent Supreme Court precedent contains supplementary support for Equal Protection Clause challenges to female breast censorship. *United States v. Windsor*[231] and *Obergefell v. Hodges*[232] suggest that Equal Protection Clause principles are violated by laws that impose a stigma and disapproval on a class of people, like breast censorship laws do to women.

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[229] *See supra* notes 153–54, and accompanying text.
[230] *See* Milstead, *supra* note 8, at 293 ("If the goal is to preserve public decency, one wonders why more human practices are not the subject of criminalization. People are forced to witness 'unusual hairstyles, unattractive dress, or politically offensive speech.' . . . The reason none of these offensive practices is the subject of a law is that people understand that they come along with living in a populous society." (citations omitted)).
[231] *See generally* United States v. Windsor, 133 S. Ct. 2675 (2013).
[232] *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

In *U.S. v. Windsor*, the Court struck down the Defense of Marriage Act (DOMA), a federal law that defined marriage as between one man and one woman.[233] In striking down DOMA, the Court partially relied on the law's violation of Equal Protection Clause principles.[234] Two years later in *Obergefell v. Hodges*, the Supreme Court held that same-sex couples have a fundamental right to marry.[235] It anchored its decision in the Due Process Clause,[236] but also analyzed how the Equal Protection Clause informed its holding.[237] Female breast censorship laws do not fit squarely into the framework of these cases.[238] Yet, the Supreme Court's discussions about Equal Protection Clause principles buttress the argument that female breast censorship laws violate the Equal Protection Clause.

In *Windsor*, the Court explained Equal Protection Clause principles by describing laws that *violate* these principles. For example, quoting from *Dept. of Agriculture v. Moreno*,[239] Justice Kennedy in *Windsor* stated: "The Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify

[233] *Windsor*, 133 S. Ct. at 2682; *see also* Obergefell, 135 S. Ct. at 2597.
[234] *See* Windsor, 133 S. Ct. at 2693.
[235] *Obergefell*, 135 S. Ct. at 2607–08 (holding that "same-sex couples may exercise the fundamental right to marry in all States . . . and . . . that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character").
[236] *See id.* at 2597–98 (discussing the fundamental liberties in the Due Process Clause). The Court found "that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples." *Id.* at 2599.
[237] *See id.* at 2602–03 (for example, the Court noted that "[t]he right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. . . Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other.").
[238] Among other differences, marriage has a uniquely long and deep social history, *see id.* at 2593–94, is a fundamental right, *Obergefell*, 135 S. Ct. at 2598, and a substantial body of Supreme Court doctrine exists on the topics of homosexuality and marriage, *see* Windsor, 133 S. Ct. at 2596–97. Moreover, it is important to note the role that federalism played in the *Windsor* decision. Specifically, that several states had passed laws legalizing same-sex marriage played a part in the Court finding DOMA unconstitutional. *See* Windsor, 133 S. Ct at 2689, 2695. In the case of female breast censorship, there is no single federal law at issue, which states have bucked. Instead, female breast censorship laws exist throughout the country in various cities and states, in various forms.
[239] Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973).

disparate treatment of that group."[240] More relevant to the female breast censorship context, the Court went on to suggest that laws motivated by, and having the effect of, disapproving of a class violate Equal Protection Clause principles.[241]

The *Windsor* Court clarified why DOMA had the purpose and effect of disapproving of gay couples, which sheds some light on what constitutes sufficient disapproval to violate Equal Protection Clause principles. The Court found, "[t]he avowed purpose and practical effect of [DOMA is] to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[242] Thus, whether a law imposes a disadvantage on a class, a separate status on a class, and a stigma on a class, are important inquiries.

Female breast censorship laws do all three to women, demonstrating the "purpose and effect of disapproval of [a] class."[243] First, female breast censorship laws disadvantage women by making them more vulnerable to body image issues, and by eliminating the choice to be comfortable without a top in public.[244] Women are therefore unable to live as freely and fully as men. Second, such laws impose a separate status on women's breasts, as not only different than men's breasts, but as body parts that must be hidden away from public sight.[245] Finally, the law brands women's breasts with a stigma. The inability to reveal one's breasts in public further

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[240] *Windsor*, 133 S. Ct at 2693.
[241] *See id.* ("DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government . . . In determining whether a law is motived by an improper animus or purpose, '[d]iscriminations of an unusual character' especially require careful consideration. DOMA cannot survive under these principles . . . DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class." (internal citations and quotation omitted)).
[242] *Id*; *see also* Obergefell, 135 S. Ct. at 2604 (discussing inequality between same-sex and opposite-sex couples from exercising a fundamental right, and noting "[e]specially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.").
[243] *Windsor*, 133 S. Ct at 2693.
[244] *See supra* Part II.B and C.
[245] *See* Glazer, *supra* note 50, at 114–16.

stigmatizes female breasts as erotic body parts that require covering.[246] The stigmatization of female breasts creates a danger of stigmatizing the women to whom they are attached.

The *Obergefell* Court recognized that "in interpreting the Equal Protection Clause . . . new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[247] Modern science, protest movements, social organizations, and fashion trends provide such insights and societal understandings, which reveal unjustified inequality in the public display of breasts between the sexes. *Windsor* and *Obergefell*'s discussions of Equal Protection Clause principles strengthen the conclusion that female breast censorship laws violate the Equal Protection Clause.

CONCLUSION

Aside from a handful of cases, courts have consistently upheld facially discriminatory laws that censor the female breast. Initially, then, it might appear difficult for a court faced with an Equal Protection Clause challenge today to overturn a breast censorship law without flying in the face of that precedent.[248]

Yet, a proper intermediate scrutiny analysis requires courts to consider *modern* community norms, at least when the government advances a public sensibilities argument. Modern community norms about the public female breast have changed. As evidenced by social organizations, fashion trends, and protest movements, modern society is increasingly accepting of the public female breast. When courts take into account this modern understanding of society's perception of the public female breast, it is clear that female breast censorship laws cannot withstand constitutional muster. Moreover, the Equal Protection Clause principles as

[246] *See supra* Part II.A.
[247] *Obergefell*, 135 S. Ct. at 2603.
[248] *See* Hodel, 683 F. Supp. at 300, (stating, "[e]very court that has considered an equal protection challenge to nude bathing and swimming restrictions has firmly rejected it. I will not part company from them").

recently articulated by the Supreme Court further support the finding that female breast censorship laws are unconstitutional.

Laws prohibiting public displays of the female breast, but not the male breast, are outdated and harmful. More significantly, they are unconstitutional under the Fourteenth Amendment's Equal Protection Clause.