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AFTER *R.M.A. V. BLUE SPRINGS*, CAN ALL TRANS BIRTH CERTIFICATE STATUTES FINALLY MEAN SOMETHING MORE?

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INTRODUCTION

The people of Missouri deserve a supreme court that will follow the law. Instead they are stuck with one seemingly determined to follow prevailing political whims.[1]

Early in 2019, the highest Court of Missouri's northern neighbor Iowa brought fairness to the operation of that state's Medicaid framework.[2] It did not do so by, as some are asserting, over-reaching its authority and creating new law where none existed.[3] Instead, it did so by acknowledging relevant existing law.[4] Unfortunately, the Republican-dominated Iowa Legislature disagreed and quickly ensured that *Good v. Iowa Dep't of Human Services* would have little chance to benefit anyone other than the prevailing litigant.[5] The road to the Iowa Court's decision should not be forgotten—be it in Iowa or Missouri or any state with relevant comparable law.

The Iowa Court ruled that the Department of Human Services is a public accommodation for purposes of civil rights law and, as a result, is constrained by the trans-inclusive language of the Iowa Civil Rights Act (ICRA).[6] In doing so, the court did not truly break new ground, but instead brought back to life land that had been poisoned by animosity toward trans existence. For even without explicit trans-inclusive statutory language, a federal court had long ago invalidated an informal state policy excluding transition-related healthcare.[7] That decision rested heavily on contemporary consensus of medical professionals regarding the efficacy of such procedures. After several years of anti-trans scholarship designed to create the appearance of a lack of consensus,[8] the Iowa agency promulgated a formal anti-trans

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[1] Carrie Severino, *Judicial Activism in Missouri*, NAT'L REV. (Mar. 1, 2019, 3:24 PM), https://www.nationalreview.com/bench-memos/judicial-activism-in-missouri/.

[2] Good v. Iowa Dep't of Hum. Servs., 924 N.W.2d 853 (Iowa 2019). The plaintiffs have been less successful in obtaining attorney's fees following the victory. Good v. Iowa Dep't of Hum. Servs., 2019 Iowa App. LEXIS 968 (Iowa Ct. App. Oct. 23, 2019).

[3] Todd Blodgett, *Taxpayer-Funded Transgender Services Jeopardize Medicaid*, DES MOINES REG. (Mar. 14, 2019, 8:58 AM), https://www.desmoinesregister.com/story/opinion/columnists/2019/03/14/costly-taxpayer-funded-transgender-services-undermine-medicaid/3155724002/.

[4] *Good*, 924 N.W.2d at 860–62 (citing Iowa Code §§ 216.7(1)(a) and 216.2(13)(b) (2019)).

[5] *See* 2019 Iowa Acts Ch. 85, §93, 2019 Iowa Acts 45 (codified as amended at IOWA CODE § 216.7 (1993)).

[6] *See* 2007 Iowa Acts Ch. 191, 2007 Iowa Acts 625.

[7] Pinneke v. Preisser, 623 F.3d 546 (8th Cir. 1980).

[8] *Compare* Jon K. Meyer & Donna J. Reter, *Sex Reassignment: Follow-Up*, 36 ARCHIVE GEN. PSYCH. 1010 (1980); *and* JANICE RAYMOND, THE TRANSSEXUAL EMPIRE: THE MAKING

policy,[9] which eventually did withstand a federal court challenge.[10] In 2007 came the addition of sexual orientation and gender identity to the ICRA, the latter of which the *Good* court relied upon.

Lost in the decades of commotion, however, was that Iowa's 2007 trans-inclusive civil rights protections were preceded by a different act of the Iowa Legislature which plainly and clearly placed the concept of change of sex within the auspices of positive Iowa law. That enactment was a transsexual birth certificate statute.[11] It preceded the ICRA expansion legislation by 31 years. Yet, nowhere in the published decision in 2019's *Good v. Iowa DHS*, the decision *Good* supplanted (*Smith v. Rasmussen*[12]) or the decision that *it* supplanted (*Pinneke v. Preisser*[13]) can any mention be found of the legislative imprimatur given to surgical (and even non-surgical[14]) transition by Iowa's 1975–76 Democratic legislative majority and by Republican Governor Robert Ray.[15]

The *Good* court did acknowledge and utilize one aspect of relevant law in coming to its conclusion. In doing so, it missed the opportunity to acknowledge the other piece of Iowa's trans-positive law. This article, however, is not about Iowa law.

My focus is on how, mere weeks before *Good*, the Missouri Supreme Court did not let such an opportunity slip by. In *R.M.A. v. Blue Springs R-IV Sch. Dist*. a young trans man had alleged that denial of access to the public accommodation of male-designated restrooms and locker room facilities was sex discrimination.[16] A five-judge majority found that, at the very least, his

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OF THE SHE-MALE 178 (1979) (all opposing the legitimacy of surgical sex reassignment); *with* Michael Fleming, Carol Steinman, and Gene Bocknek, *Methodological Problems in Assessing Sex-Reassignment Surgery: A Reply to Meyer and Reter*, 9 ARCHIVE SEXUAL BEHAV. 541 (1980); Carol Z. Steinman, *Study of Transsexuals Has Just Begun*, 19 TV/TS TAPESTRY, 4 (1980); *and*, *A Great Conspiracy?*, TRANSGENDER TAPESTRY, Winter 2002 at 31-32 (all calling into question the objectivity of anti-trans work that was being popularized in the early 1980s).

[9] *Good*, 2019 Iowa Supp. LEXIS 19 at *21.

[10] Smith v. Rasmussen, 249 F.3d 755 (8th Cir. 2001).

[11] 1976 Iowa Acts Ch. 1111.

[12] *See Smith*, 249 F.3d 755 (8th Cir. 2001), *reversing*, Smith v. Rasmussen, 57 F. Supp. 2d 736 (N.D. Iowa 1999).

[13] Pinneke v. Preisser, 623 F.2d (8th Cir. 1980).

[14] IOWA CODE §144.23(3) (2019) ("by reason of surgery or other treatment").

[15] Oddly enough, it *did* appear in the Iowa Supreme Court's 2009 marriage equality decision–despite no trans litigants being involved in that case. Varnum v. Brien, 763 N.W.2d 862, 893 (Iowa 2009).

[16] 568 S.W.3d 420 (Mo. 2019).

allegation fit within the sex discrimination expectations of the Missouri Human Rights Act (MHRA).[17] Chief Justice Fischer, in dissent, found R.M.A.'s legal sex to be irrelevant and that, by holding otherwise, the majority had "ignored the crux of the petition while discarding the substance of the MHRA."[18] Justice Wilson and the majority saw Fischer as essentially suggesting that "R.M.A.'s sex was determined by the genitalia he displayed at birth and can never be changed." Significantly, albeit tucked away in a footnote, Wilson noted that "no lesser authority than the General Assembly has acknowledged that one's sex may not remain throughout a person's life what it was identified to be when that person was born."[19]

This article does praise the Missouri court for acknowledging the clear, trans-positive aspects of the state's legal framework. However, the larger purpose of the article is to offer background that would have made the *R.M.A.* majority's footnote seven a bit more robust. It is background that the Missouri court should employ when it is next faced with questions of how trans people fit into the concept of discrimination based on "sex" as it exists in Missouri law. Additionally, it is historical context that courts in other states that do have a sex discrimination statute and a trans birth certificate statute but that lack an explicitly trans-inclusive civil rights statute should consider in similar cases.

The *R.M.A.* majority's pointing to the existence of Missouri's transsexual birth certificate statute was a good start—a *very* good start. It cannot cancel out a notorious pre-*Good* instance of the Iowa Supreme Court failing to acknowledge that state's trans birth certificate statute (or anything pointing to the legitimacy of trans existence), a failure which excluded trans people from the scope of Iowa's state sex anti-discrimination law.[20] But with

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[17] *Id.* at 427 n.7 (Wilson, J.).
[18] *Id.* at 433 (Fischer, C.J., dissenting).
[19] *Id.* at 427 n.7 (Wilson, J.) (citing MO. REV. STAT. 193.215.9 (2019)).
[20] Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470 (Iowa 1983). Audra Sommers brought suit on both sex and disability theories, losing on both. The Iowa Supreme Court seemingly was so eager to close the courthouse door to transsexuals that it used language on the disability prong so sweeping that the state, *even after it had prevailed against Audra Sommers*, begged the court for a revision so as not to disadvantage all future disability claimants. Appellee's Petition for Rehearing, Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470 (Iowa 1983) (No. 2-68164). Sommers' counsel shared that concern but, not surprisingly, also sought to revise the outcome to Sommers' benefit. Appellant's Petition for Rehearing, Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470 (Iowa 1983) (No. 2-68164). The court did constrict the scope of its ruling but still chose to leave trans people as

the very real possibility that the U.S. Supreme Court will knock down the *Price Waterhouse* of cards that is federal trans anti-discrimination law,[21] trans people, legal practitioners and otherwise, need to be ready, willing and able to use every element of trans-positive law that actually does exist—and to use them in every conceivable way.

The phrase *gender ideology*[22] has become a go-to conservative scaremongering cudgel, a 21st century replacement for now-obsolete calls to "protect the family" from marriage equality.[23] Part II of this Article is a reminder that the law Justice Wilson pointed to is not the product of anything from the 21st century. Instead, Missouri's General Assembly enacted it over a third of a century ago, with Republicans in both the White House and the Missouri governor's mansion. Part III is a lesson in temporal proximity. Not only does the vintage of the Missouri transsexual birth certificate statute stand in contrast to persistent assumptions about the newness of the "trans agenda"

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strangers to Iowa's civil rights laws, a status quo that would hold for almost a quarter-century.

[21] *See* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *cert. granted* 2019 U.S. LEXIS 2846 (U.S. April 22, 2019) (certiorari granted both on the question of the validity of trans claims based on Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), and its progeny, as well as whether trans people are *per se* covered under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1) (2019).

[22] Gillian Kane, *'Gender Ideology': Big, Bogus and Coming to a Fear Campaign Near You*, GUARDIAN (March 30, 2018), https://www.theguardian.com/global-development/2018/mar/30/gender-ideology-big-bogus-and-coming-to-a-fear-campaign-near-you. The phrase "gender ideology" appeared in some form in many of the anti-trans briefs submitted to the Court in Harris. *See* Brief Amici Curiae of U.S. Conference of Catholic Bishops, et. al. at ix, 23; Brief Amici Curiae of Billy Graham Evangelical Association, et. al. at iv., 12; Brief of Amicus Curiae Dr. Paul R. McHugh at iv, 31; and Brief of Scholars of Family and Sexuality as Amici Curiae in Support of Petitioner at 31 (all "gender ideology"); Brief of Scholars of Philosophy, Theology, Law, Politics, History, Literature, and the Sciences as Amici Curiae in Support of Petitioner at 17, 19, 28; and Brief of National Media and Policy Groups that Study Sex and Gender Identity as Amici Curiae in Support of Employers at 1, 29 (both "gender identity ideology" and "gender ideology"); Brief of Amicus Curiae Center for Arizona Policy in Support of Petitioner at 2, 20, 25, 29; and Brief of Amicus Curiae Foundation for Moral Law in Support of Petitioner at 3; Brief of Walt Heyer, et. al. in Support of Petitioner at 8 (all "transgender ideology"); Brief of Amicus Curiae Women's Liberation Front in Support of Petitioner at 5 ("'gender identity' argument is an ideology"); and Amicus Brief of Free Speech Advocates in Support of Petitioner at 1 ("totalitarian ideology of transgenderism").

[23] *See generally,* Roger Severino, *Pentagon's Radical New Transgender Policy Defies Common Sense*, CNS NEWS (June 1, 2016, 10:32 AM), https://www.cnsnews.com/commentary/roger-severino/pentagons-radical-new-transgender-policy-defies-common-sense.

(another neo-scaremongering gem),[24] it also places the law only a general assembly session away from the session that enacted the MHRA provision at issue in *R.M.A.* Part IV questions why it has taken this long for state-law combinations of sex discrimination and transsexual birth certificates to add up to at least some cracking open of courthouse doors for trans litigants.

One thing this article is not is an extensive examination of the entirety of either the *R.M.A.* litigation or of the larger issue of younger trans people's equal access to the educational system. In no way should this be read as a slight to them. They are, after all, the future. But they—as well as the rest of us—should be able to benefit from all of what has come before. The article's conclusion will address the extent to which all of that—not just the trans birth certificate statutes in and of themselves but how they logically should be interpreted as positively enhancing state sex discrimination law—should stand to benefit trans people even if the Supreme Court surprises everyone by accepting the most trans-positive interpretations of Title VII.

For trans kids will one day be trans adults. Some of them may at some point in their lives find themselves seeking work from businesses that regularly employ less than fifteen people. Even if a legitimate[25] incarnation of the federal Employment Non-Discrimination Act (ENDA)[26] or the Equality Act[27] becomes law, it seems likely that, as Title VII now does, it will only encompass those entities employing fifteen or more people. With the MHRA filling the gap between businesses employing fifteen or more people and those employing six or more, even the most trans-favorable *EEOC v. Harris Fun*eral *Homes* decision imaginable will not relegate the legal and historical analysis set out in this article to the dustbin of arcane academic discourse.

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[24] *See generally,* Stella Morabito, *How the Trans-Agenda Seeks to Redefine Everyone*, FEDERALIST (June 23, 2014), https://thefederalist.com/2014/06/23/how-the-trans-agenda-seeks-to-redefine-everyone/.

[25] Read: trans-inclusive.

[26] *See generally*, Employment Non-Discrimination Act of 2013, S. 815, 113th Cong., 1st Sess. (as passed by Senate, Nov. 7, 2013).

[27] *See generally*, Equality Act, H.R. 5, 116th Cong., 1st Sess., H.R. REP. NO. 116-56, at 1–2 (2019) (proposed amendment to the Civil Rights Act—with its fifteen-employee standard—to include anti-LGBT discrimination).

I. MISSOURI'S 1984 TRANSSEXUAL BIRTH CERTIFICATE STATUTE

In 1986, sex was objectively defined by human reproductive nature.[28]

The anti-LGBT Alliance Defending Freedom (ADF) spent three pages of its *R.M.A.* amicus brief to the Missouri Supreme Court attempting to support the above-quoted proposition.[29] It cited the DSM-V and several dictionaries.[30] It also pointed to Missouri precedent[31] approving the use of dictionaries to discern the "plain meaning"[32] of a term which lacks a legislatively-supplied one. The 1983 Missouri Supreme Court opinion in *Sermchief v. Gonzales* then served as the basis for the assertion: "The meaning is to be discerned as of the time the law was enacted."[33]

The ADF omitted much more regarding the *Sermchief* analysis of legislative intent than it included. "Fundamentally, we seek to ascertain the intent of the lawmakers and to give effect to that intent," Justice Warren Welliver wrote.[34] He pointed to the manners in which a court might accomplish that. One would be to attribute "to the words used in the statute their plain and ordinary meaning."[35] Another would be to look to "the general purposes of the legislative enactment."[36] Yet another would be to identify both the problems that the legislature sought to remedy as well as the circumstances and conditions existing at the time of enactment.[37] Perhaps

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[28] Brief of Alliance Defending Freedom as Amicus Curiae in Support of Respondents at 18–21, R.M.A. ex rel Appleberry v. Blue Springs R-IV Sch. Dist. (Mo. No. SC96683) (filed March 26, 2018).
[29] *Id.*
[30] Almost one-third of the space is devoted to a footnote asserting that trans people and their supporters are either confused or disingenuous about the appropriateness of introducing intersex matters into discussions of trans issues. "[S]uch conditions are rare, objectively diagnosable disorders of normal sexual development, and are quite unlike a theory of subjectively perceived continuum of genders suggested by gender identity theory advocates." *Id*. at 19-20 n.10.
[31] State v. Moore, 303 S.W.3d 515, 520 (Mo. 2010).
[32] Brief of Alliance Defending Freedom, *supra* note 28, at *18.
[33] *Id.* (citing Sermchief v. Gonzales, 660 S.W.2d 683, 688-89 (Mo. 1983)).
[34] *Sermchief*, 660 S.W.2d at 688.
[35] *Id.* at 688 (citing Bank of Crestwood v. Gravois Bank, 616 S.W.2d 505 (Mo. 1981); Kieffer v. Kieffer, 590 S.W.2d 915 (Mo. 1979); Beiser v. Parkway Sch. Dist., 589 S.W.2d 277 (Mo. 1979); State *ex rel*. Conservation Comm'n v. LePage, 566 S.W.2d 208 (Mo. 1978)).
[36] *Id.* (citing Eminence R-1 Sch. Dist. v. Hodge, 635 S.W.2d 10 (Mo. 1982); Bank of Crestwood, 616 S.W.2d at 510).
[37] *Id.* at 688–89 (citing *Kieffer*, 590 S.W.2d at 918; State *ex rel*. Zoological Park Subdist. of the City and County of St. Louis v. Jordan, 521 S.W.2d 369 (Mo. 1975); Mashak v. Poelker, 367 S.W.2d 625 (Mo. 1963)).

most notably, Welliver added that amended statutes, such as the nursing practice provisions at issue in *Sermchief*, "shall be construed on the theory that the legislature intended to accomplish a substantive change in the law."[38]

This portion of the article is not about any statutory changes that the Missouri General Assembly made in 1986; Part III will examine those changes. Instead, this portion is about one change that the Missouri General Assembly made in 1984. That change, even without a progressive call-out to textualism, undermines most, if not all, of the anti-trans arguments about the General Assembly's decision-making two years later. Sadly, as with similar statutory changes in so many other states, it went all but unnoticed.

The Missouri Supreme Court issued *Sermchief* on November 22, 1983.[39] Three weeks later S.B. 574[40] was pre-filed for the 1984 session of the General Assembly. Upon enactment in the spring, it became what Justice Wilson referred to in *R.M.A.* as the acknowledgement by the Missouri General Assembly that "one's sex may not remain throughout a person's life what it was identified to be when that person was born."[41]

With some modifications, this "Uniform Vital Statistics Law" was an adoption of the 1977 Model State Vital Statistics Act.[42] The language from the Model Act that has been of interest to trans people is:

> Upon receipt of a certified copy of an order of (a court of competent jurisdiction) indicating the sex of an individual born in this State has been changed by surgical procedure and that such individual's name has been changed, the certificate of birth of such individual shall be amended as prescribed in Regulation 10.8(e) to reflect such changes.[43]

The Missouri language read in 1984 (and still reads):

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[38] *Id.* at 689 (citing City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441 (Mo. 1980); Kilbane v. Director of the Dep't of Revenue, 544 S.W.2d 9 (Mo. 1976); and Gross v. Merchants-Produce Bank, 390 S.W.2d 591 (Mo. Ct. App. 1965)).

[39] *See Sermchief*, 660 S.W.2d 683.

[40] 1984 MO. S.B. 574 (approved April 24, 1984). *See also* 1984 MO. L. R. 2180.

[41] R.M.A. *ex rel* Appleberry v. Blue Springs R-IV Sch. Dist., 568 S.W.3d 420, 427, n.7 (Mo. 2019) (Wilson, J).

[42] MODEL STATE VITAL STATISTICS ACT (U.S. DEPT. OF HEALTH, EDUC., & WELFARE 1977); *see also* Memo from Governor's Office re: SB 574 at 1, April 18, 1984, Office of the Governor, Kit Bond Legislative Files [hereinafter Bond Legislative Files], RG-003, Box 25, file SB 574, Missouri State Archives, Jefferson City, Missouri (the bill "is patterned after the Model Vital Statistics Act adopted by the Council of State Governments").

[43] MODEL STATE VITAL STATISTICS ACT, §21(e) (U.S. DEPT. OF HEALTH, EDUC., & WELFARE 1977).

> Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating the sex of an individual born in this state has been changed by surgical procedure and that such individual's name has been changed, the certificate of birth of such individual shall be amended.[44]

A product of its time, it clearly privileges transition that includes surgery—yet just as clearly it is a recognition by the State of Missouri that transition is real and that the law of the State of Missouri recognizes that reality.

As significant as the statute is both for Missouri-born trans people and for the general notion that transition is part of Missouri's legal tapestry, it is not clear if any trans people played any direct, overt role in spurring the General Assembly to enact it.[45] What is very clear, however, is that the funeral industry did play a role in leading the General Assembly to look favorably upon the Model Act:

> The bill was mainly supported by the Funeral Directors Association. Their interest was the elimination of the burial permit. A less cumbersome notification system has replaced the old system.[46]

Existing Missouri law required a funeral director to obtain a burial permit from a local registrar before a body could be disposed:

> This requires considerable time and expense of the funeral director, especially when the local registrar is located at a different town from the funeral director. Because of the burial permit requirement, local registrars must provide a 24-hour service for funeral directors which is also difficult.[47]

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[44] 1984 MO. S.B. 574 at §193.215.8 (April 24, 1984) (codified as amended at MO. REV. STAT. §193.215.9 (2019)).

[45] Even in states where there was some degree of open participation in the legislative process by trans people, often the stories behind such participation become obscured or lost. Katrina C. Rose, *Forgotten Paths: American Transgender Legal History*, 1955-2009 (Ph.D. diss. Univ. of Iowa 2018), 49-130 [hereinafter *Forgotten Paths*].

[46] Bond Legislative Files, *supra* note 42, at 3. For burial permits in Missouri before 1984, *see generally* 1947 MO. H.B. 65, §§ 28–30 (approved May 10, 1948) ("Uniform Vital Statistics Act"). For a broader look at the topic, *see* Ann M. Murphy, *Please Don't Bury Me Down in That Cold Cold Ground: The Need for Uniform Laws on the Disposition of Human Remains*, 15 ELDER L. J. 381 (2007).

[47] Bond Legislative Files, *supra* note 42, at 2. The burial permit issue was also of concern when Colorado considered (and approved) the Model Act that same year. *Hearing on S.B. 142, Feb. 9, 1984*, *Before the Senate Comm. on Heath Welfare & Institutions*, Colorado Legislature, Audio Source: Ampex 704 'Archives 84-8, 10:47 a.m., Feb. 7, thru, 8:02 a.m.,

A representative of the funeral lobby inquired about having the bill signed during a Funeral Directors Association meeting in early April. The timing apparently was not right. Nevertheless, the association was seen as being "most pleased" with the legislation.[48]

S.B. 574 also had support from the Missouri Hospital Association, Missouri Medical Association, and Missouri Association of Osteopathic Physicians and Surgeons because the bill would modernize the vital records system.[49] Garland Land, Vital Records State Registrar, pointed out two specific "deficiencies" in the then-existing statutory framework that S.B. 574 would address:

> 1. The present law requires us to use a procedure to amend birth records which Social Security and other adjudicating agencies find unacceptable. This causes great confusion among the elderly who are trying to get Social Security benefits. The bill provides an acceptable procedure for amending records.
>
> 2. Our present law has a loophole that allows people to create more than one birth certificate. This violates all recognized principles of vital records recording. It is of particular concern to us because birth records can be used for fraudulent purposes to assume new identities. The bill corrects this problem.[50]

Land also pointed out that: "the bill addresses areas on which our present law is silent. This will provide statutory authority for our present operating procedures."

He did not specifically mention changes of sex on birth certificates, but legislative materials underlying other states' adoption of the Model Act during the early 1980s *do*. For example, a memo accompanying the bill that

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Feb. 10,' Colorado State Archives, Denver, Colorado (testimony of Christen Paulson) (copy on file with author). A gap was seen between centralized death certificate issuance and local burial permit issuance that could omit information the deceased's physician(s) might know which could shed light on whether a seemingly uneventful death should be viewed with suspicion. *Id.* (testimony of Gabe Goldsmith).

[48] Handwritten note, dated Apr. 3, 1984, on Written Testimony of Garland Land on S.B. 574 Pertaining to Vital Records, n.d. The written testimony has no date, but Land testified before the House Governmental Review Committee on Feb. 14. Missouri Senate Weekly Bill Status Report, Mar. 16, 1984 at 116–17; Mark Doerner, Summary of Committee Action on S.B. 574, n.d.

[49] *Id.* at 1

[50] *Id*.

became New Mexico's law in 1981 noted generally that the change of sex provision came from the Model Act, but added:

> This addition provides formal recognition of certificate revisions occurring as a result of a surgically produced gender change. The department has provided for this by regulations, and currently revises six certificates per month. This addition will provide guidance to attorneys and others on how to proceed in amending the birth certificate.[51]

In Arkansas, which also put the Model Act into place in 1981, officials noted that the new law would "reflect some of the social customs and practices that are happening in Vital Records Registration," in particular "surgical sex changes."[52]

Sen. Henry A. Panethiere, an attorney who had successfully represented union officials before the U.S. Supreme Court two decades earlier, was lead author of the Missouri bill.[53] A Democrat from Kansas City and first elected in 1976, he served four terms before being successfully primaried in 1992.[54] His only connection to anything LGB or T appears to be the 1984 Vital Statistics bill via its transsexual provision.

Senate passage came on February 8 by a 33-0-1 margin.[55] The House passed it 137-0-25 on April 3.[56] No legislators of either party in either chamber voted against the bill, but nevertheless, two days after the House vote, the Senate had the opportunity to vote on the bill again, this time approving it 29-0-5.[57] The reason for the trip back to the Senate was that some in the House did have a problem with one particular element of the Model

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[51] Untitled memo on Vital Statistics Act bill dated Oct. 24, 1980 at 5, Governor Bruce King Papers, 2nd Term, Coll. 1982-023, Box 47, Folder 910, New Mexico State Archives, Santa Fe, New Mexico; *see also* Act of Apr. 9, 1981, ch. 309, 1981 N.M. Laws 1521 (1981).

[52] Henry C. Robinson, Jr. to Joyce Warren, Sept. 10, 1980, Morriss M. Henry Papers, Correspondence, Documents, and Papers, 1970-1985, Box 34, Folder 5 (Vital Statistics: Sept 10, 1980), University of Arkansas Special Collections, Fayetteville, Arkansas; *see also* Arkansas Vital Statistics Act of 1981, ch. 120, 1981 Ark. Acts 250 (1981).

[53] Vaca v. Sipes, 386 U.S. 171 (1967).

[54] Kate Beem, *Rep. DePasco Ousts Sen. Panethiere*, INDEP. EXAM'R, Aug. 5, 1992, at 1. (Panethiere died in 2005). *Alumni Memoriam*, U. OF MO. COLUM. SCH. OF L. TRANSCRIPT, Spring 2006, at 37.

[55] 1984 MO. SENATE J. 244-45.

[56] 1984 MO. HOUSE J. 1028-29.

[57] 1984 MO. SENATE J. 790–91.

Act's language.[58] So often, conventional gay rights wisdom has held that trans issues are just too much for legislators to address prior to addressing, or even just becoming educated on, non-trans LGB concerns. However, the sticking point for S.B. 574 was *not* its transsexual provision.

Instead, it was the rhetoric of government control over women's reproductive rights that led to the divide. Foreshadowing the terminologically-invasive politics of two generations later,[59] the House replaced the phrase "product of human conception" with "child" in the definition of "live birth" and with "fetus" in the definition of "fetal death."[60] The vote in favor of this revision was 121-19-22.[61]

Governor Kit Bond subsequently signed S.B. 574.[62] As was the case with other conservatives who approved of such transition-recognition legislation during the era,[63] when later serving in Congress, Bond voted for legislation which sought to restrict marriage recognition to those of heterosexual couples only. In 1996, he voted for the Defense of Marriage Act (DOMA), which became law.[64] A decade later, he supported the proposed Federal Marriage Amendment (FMA), which did not receive a sufficient number of votes to be sent to the states for ratification.[65]

Section 193.215 has rarely been cited by appellate courts—with most such references *not* being to the trans provision.[66] Apart from the *R.M.A.*

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[58] 1984 MO. House J. 1026–28 (121-19-22 vote to amend S.B. 574 by striking "product of human conception" and adding "child" and "fetus").

[59] *See* 2019 MO. H. B. 126 (approved May 24, 2019), *codified in relevant part at* MO. REV. STAT. §188.017.1 (2019) ("Right to Life of the Unborn *Child* Act") (emphasis added).

[60] *Compare* MODEL STATE VITAL STATISTICS ACT, §§1(f)–(g) (U.S. DEPT. OF HEALTH, EDUC., & WELFARE 1977) *and* 1984 MO. L. R. 2180 (proposed §§193.015(4) and (6)) *with* 1984 MO. S.B. 574 (enacted §§193.015(4) and (6)).

[61] 1984 MO. HOUSE J. 1027.

[62] *Governor Kit Bond News*, memo dated Apr. 24, 1984 at 3 (only noting the modernization aspect of the law); Bond Legislative Files, *supra* note 42.

[63] *See, e.g.*, 1984 COLO. ACTS. ch. 206. The underlying S.B. 142 was sponsored by then-State Sen. Wayne Allard, who later supported the federal DOMA in the House and the FMA in the Senate.

[64] 104 CONG. REC. S10129 (daily ed., Sept. 10, 1996) (rollcall vote).

[65] 109 CONG. REC. S5534 (daily ed., June 7, 2006).

[66] Adoption of N.L.B. v. Lentz, 212 S.W.3d 123, 124 (Mo. 2007); Bowers v. Bowers, 2017 Mo. App. LEXIS 670 (Mo. App. June 30, 2017); C. L. v. M. T. , 335 S.W.3d 19, 22 (Mo. App. 2011); Wilson v. Cramer, 317 S.W.3d 206 (Mo. App. 2010); M. T. v. C. L. , 274 S.W.3d 619 (Mo. App. 2009); Phillips v. Consol. Supply Co., 895 P.2d 574 (Idaho 1995) (non-trans Idaho resident sought an order from a court of that state directing Missouri to amend his Missouri birth certificate); *see also* Wolfe v. Missouri Dep't of Soc. Servs., 2006 U. S. Dist. LEXIS 30156 (W.D. Mo. May 17, 2006).

litigation, *that* has only been cited in trans cases from outside of Missouri—twice—each merely as part of a string cite of trans birth certificate statutes in general.[67] *J.L.S. v. D.K.S.* involved the dissolution of a marriage in which one spouse was trans, though the marriage was pre-transition.[68] Consequently, there was no issue of the marriage's validity based on the trans spouse's legal sex status at the time of the marriage.[69] The transition, however, clearly played a role in the breakdown of the relationship.[70]

The Missouri Court of Appeals made no reference to the General Assembly's implicit statement of transsexuality's legitimacy[71] when it reversed aspects of the Circuit Court's decree that treated the trans spouse equitably[72] and left intact a facially discriminatory visitation provision. "[D]uring those periods in which the minor children are in the temporary custody of Respondent, Respondent shall not cohabit with other transsexuals

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[67] *In re* Heilig, 816 A.2d 68, 83 n.8 (Md. 2003); *Ex parte* Delgado, 2005 TSPR 95 n.16 (P.R. June 30, 2005).

[68] State v. Palmer, 943 S.W.2d 766 (Mo. App. 1997).

[69] The documents in the case suggest that the trans spouse was not born in Missouri. This cis spouse, however, was born in Audrain County. Trial transcript at 12, *"J. L. S." v. "D. K. S."*, (No. CV193-3633DR) (Mo. Cir. Ct. St. Charles County). I am placing the initials in quotes here and in other citations thereto because, even though the Court of Appeals maintained their anonymity, the lower court documents do utilize the full names not only of the parties but their children and witnesses.

[70] And not merely between the spouses, though the cis spouse explicitly stated that it was the primary reason for the dissolution. Trial transcript, *supra* note 69, at 13. A deposition shows that the trans spouse's father was in no way approving of the transition. When asked if the use of the trans spouse's post-transition name offended him, he answered in the affirmative after asserting "I didn't name him that." Transcript at 12, telephone deposition of "K. S.", May 2, 1994, *"J. L. S." v. "D. K. S."*, No. CV193-3633DR (Mo. Cir. Ct. St. Charles County).

[71] The appellate court placed the term "sex-reassignment" in scare quotes, as if to place it outside the bounds of jurisprudence.

[72] These included specific findings by the Circuit Court (1) that the cis parent had interfered in the relationship between the children and the trans parent and (2) that "it would be in the best interest and welfare of the minor children, that they be reunited with" the trans parent. The Circuit Court also viewed the cis spouse to have been evasive when answering questions as to whether she would even comply with the court's order of visitation and temporary custody. *J. L. S.*, 943 S.W.2d at 771. It should be noted that the cis spouse's therapist was the "Ministries Director" of "Biblical Christian Counseling Ministries." Supplemental Legal File at 153-56, *"J. L. S." v. "D. K. S."*, No. CV193-3633DR (Mo. Cir. Ct. St. Charles County). More broadly, the Circuit Court called into question all of the cis spouse's experts for having no experience at all with transsexuality issues and specifically called out the "Ministries Director" for having "formed his opinions after one or two sessions with [cis spouse] without ever seeing the children." Amended Decree at 3-4, *"J. L. S." v. "D. K. S."*, (No. CV193-3633DR) (Mo. Cir. Ct. St. Charles County June 20, 1995).

or sleep with another female."[73] However, the circuit court placed no analogous restrictions on the cis spouse's cohabitation and sexual practices. Despite this imbalance, the court of appeals blithely dismissed the trans spouse's assertion of that aspect of the decree being unconstitutional, declaring "the court cannot ignore the effect which the conduct of a parent may have on a child's moral development."[74]

Possibly the first instance of a court recognizing that a transsexual birth certificate statute possesses meaning well beyond the realm of identity recordation occurred in one of Missouri's neighbors. The existence of a birth certificate statute in Illinois allowed the state's Supreme Court in 1978 to the invalidate Chicago's anti-crossdressing ordinance (at least as applied to transsexuals) due to state supremacy principles. In *City of Chicago v. Wilson*, Justice Thomas Moran reasoned that, via the legislature's 1955 enactment of a surgery-specific[75] trans birth certificate statute:

> [T]he legislature has implicitly recognized the necessity and validity of such surgery. It would be inconsistent to permit sex-reassignment surgery yet, at the same time, impede the necessary therapy in preparation for such surgery. Individuals contemplating such surgery should, in consultation with their doctors, be entitled to pursue the therapy necessary to insure the correctness of their decision.[76]

This did not wholly wipe out the Chicago ordinance. It still remained as a weapon for use against non-transsexuals.[77]

When Missouri's trans birth certificate statute became law, St. Louis still maintained an "indecent or lewd act" ordinance that contained explicit

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[73] Amended Decree at 5, *"J. L. S."*, (No. CV193-3633DR).
[74] *J. L. S.*, 943 S.W.2d at 771.
[75] 9 Ill. Rev. Stat. 1977, ch. 1111/2, par. 73-17(1)(d)). The law has since been revised to accommodate non-surgical transition. ILL. PUB. ACTS No. 100-360 (2017).
[76] City of Chicago v. Wilson, 389 N.E.2d 522, 525 (Ill. 1978).
[77] However, *Wilson* did inspire a federal court in Texas to render Houston's anti-crossdressing ordinance similarly inoperable against transsexuals – despite Texas not having a birth certificate statute. Doe v. McConn, 489 F. Supp. 76 (S. D. Tex. 1980). The current incarnation of the Chicago ordinance only deals with the amount of clothing worn, not the type. CHICAGO MUN. CODE § 8-8-080 (2018), http://library.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/title8offensesaffectingpublicpeacemorals/chapter8-8publicmorals?f=templates$fn=default.htm$3.0$vid=amlegal:chicago_il$anc=JD_8-8-080 (successor provision to CHICAGO MUN. CODE § 192-8).

anti-crossdressing language.[78] However, that St. Louis ordinance never had the opportunity to succumb to the *Wilson* legal theory.[79] It instead fell when challenged on broader constitutional grounds.[80]

That challenge resulted from a raid that occurred just as the General Assembly was beginning its consideration of S.B. 574.[81] Multiple elements of the ordinance were challenged, though the crossdressing language appears to have been easy for the federal district court to find unconstitutional in 1985.[82] The Eighth Circuit disposed of the remaining language the next year—in an opinion issued mere weeks after the MHRA legislation at issue in *R.M.A.* became law.[83]

II. THE 1986 MISSOURI HUMAN RIGHTS ACT: INHERENT EXPANSIVENESS AND LATTER-DAY CONSTRICTION

A relevant analysis of 1986 S.B. 513's path to becoming the Missouri Human Rights Act (MHRA)[84] is rather straightforward. Proposed by Sen. Wayne Goode, his chamber passed the bill on April 2 by a vote of 23-6, with four senators absent and one absent with leave.[85] Four weeks later, the House passed the bill 142-9, with eleven representatives absent and one vacant seat.[86] House amendments caused the bill to go back to the Senate that same day, which approved the bill 31-0, with three senators absent.[87]

The enacted statute defined "discrimination" as "any unfair treatment based on race, color, religion, national origin, ancestry, *sex*, age as it relates

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[78] ST. LOUIS CODE ORD. § 15.30.010 (1984) (prohibiting "appear[ing] in any public place in a state of nudity or in a dress not belonging to his or her sex or in an indecent or lewd dress").
[79] It appears as though a larger group of plaintiffs, including a transitioning trans woman, were at one point preparing to challenge the ordinance. *Masquerade is Up for St. Louis Law*, GAY NEWS-TELEGRAPH, June 1984 at 1. This could have led to a *Wilson*-style challenge. However, the ultimate focus of *D. C. v. City of St. Louis* was drag performers arrested in the raid on a club known as Uncle Marvin's.
[80] D. C. v. City of St. Louis, No. 84-1152C(3) (E.D. Mo. order dated May 13, 1985) ("[O]nly that portion of § 15.30.010 which makes it unlawful to appear 'in a dress not belonging to his or her sex' is stricken, and the remainder of the ordinance is operative.").
[81] *See* Jim Thomas, *St. Louis Bar Raided*, GAY NEWS-TELEGRAPH, Feb. 1984 at 1; Jim Thomas, *Another St. Louis Bar is Raided*, GAY NEWS-TELEGRAPH, March 1984 at 1.
[82] D. C. v. City of St. Louis, No. 84-1152C(3) (E.D. Mo. order dated May 13, 1985).
[83] *Compare* D. C. v. City of St. Louis, 795 F.2d 652, 653–55 (8th Cir. 1986); *with* S.B. 513, 83rd Gen. Assemb., 2nd Reg. Sess. (Mo. 1986).
[84] S.B. 513, 83rd Gen. Assemb., 2nd Reg. Sess. (Mo. 1986).
[85] 1986 MO. SENATE J. 759–60.
[86] 1986 MO. HOUSE J. 2026–27.
[87] 1986 MO. SENATE J. 1751–53.

to employment or handicap."[88] It spoke to discrimination in access to public accommodations:

> All persons within the jurisdiction of the state of Missouri are free and equal and shall be entitled to the full and equal use and enjoyment within this state of any place of public accommodation, as hereinafter defined, without discrimination or segregation on the grounds of race, color, religion, national origin, *sex*, ancestry, or handicap.[89]

The 1986 MHRA included a lengthy, example-laden definition of "places of public accommodation." Of particular relevance, the definition encompassed:

> Any public facility owned, operated, or managed by or on behalf of this state or any agency or subdivision thereof, or any public corporation; and any such facility supported in whole or in part by public funds[.][90]

That definition remained for the *R.M.A.* court to quote. There was no explicit definition of "sex" for the court to quote—just as there had not been one in 1986.

That means that the General Assembly that year had not, as the Alliance Defending Freedom claimed, "objectively defined" the word "sex" by linking it to "human reproductive nature."[91] Yet, by addressing "sex" even without providing an explicit definition, did the General Assembly not provide the contours of a definition for the term that would more than justify Justice Wilson's *R.M.A.* footnote seven? The mere co-existence of a trans birth certificate statute and a sex discrimination statute in the same

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[88] S.B. 513, 83rd Gen. Assemb., 2nd Reg. Sess. (Mo. 1986) (codified at MO. REV. STAT. 213.010.2 (1986)) (emphasis added).

[89] S.B. 513, 83rd Gen. Assemb., 2nd Reg. Sess. (Mo. 1986) (codified at MO. REV. STAT. 213.065.1 (1986)) (emphasis added).

[90] S.B. 513, 83rd Gen. Assemb., 2nd Reg. Sess. (Mo. 1986) (codified at MO. REV. STAT. 213.010.11(e) (1986)).

[91] Brief of Alliance Defending Freedom, *supra* note 28, at 18-21. Additionally, even though S.B. 98, 99th Gen. Assemb., Reg. Sess., (Mo. 2017), S.B. 745, 99th Gen. Assemb., Reg. Sess., (Mo. 2017), and S.B. 720, 98th Gen. Assemb., Reg. Sess., (Mo. 2016) did not specifically target the MHRA, Chief Justice Fischer's neglecting to mention the failure of the General Assembly to pass either of those bills–which would have mandated a chromosome-based "biological sex" standard for usage of public school restrooms, locker rooms and shower facilities – makes his reliance upon similar legislative inaction toward a decade's worth of Missouri Non-Discrimination Act (MONA) bills appear to be somewhat less than intellectually honest. R.M.A. *ex rel* Appleberry v. Blue Springs R-IV Sch. Dist., 568 S.W.3d 420, 432 n.4 (Mo. 2019).

jurisdiction's body of law conclusively negates any argument for the interpretive definition of "sex" sought by ADF and those of like antipathy for trans people.[92] That argument may be too broad for some. But even those with such breadth should be willing to concede that when one state's legislative body positively addresses "change of sex" and "sex discrimination" in close proximity to one another, the only legitimate interpretation of "sex" in that state's law is one that includes trans people and the changes that occur during the course of their lives.

Even so, proximity may not be the end of the story—or, at the very least, it may not enhance the story a great deal. Iowa's legislature gave its approval to transsexuality six years after it enacted a sex discrimination statute. However, that six-year gap saw a significant turnover in legislative membership. Barely a third of the legislators who approved of adding "sex" to the Iowa Civil Rights Act in 1970 were there to offer any opinion on the birth certificate bill that emerged from the 1975-76 session. Nevertheless, of the 41 legislators who had the opportunity to vote on both, 27 of the legislators voted in favor of both. Only two voted yes on sex discrimination and no on the trans birth certificate statute; one split his votes in the opposite direction. The remaining eleven were absent for either one or both votes.[93] So while there is nothing in Iowa's collective legislative history of the first half of the 1970s to suggest opposition to reading the birth certificate statute and the sex discrimination statute together, the actions of the legislators who considered both bills are not conclusive positive proof either.

Missouri is a different matter. There, the trans birth certificate statute and the MHRA bill were considered only two years apart—with only one

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[92] As I noted in 2004, the argument would be most forceful where trans-positive law (typically, a birth certificate statute) precedes the "sex"-based civil rights legislation. Katrina C. Rose, *The Proof is in the History: The Louisiana Constitution Recognises Transsexual Marriages and Louisiana Sex Discrimination Law Covers Transsexuals – So Why Isn't Everybody Celebrating?*, 9 DEAKIN L. REV. 399, 444-46 (2004). At the time, I was unaware of Missouri having established its MHRA after it had enacted a trans birth certificate statute; instead, the employment focus of that article was Louisiana's replacement of its women's protection statutes with something that resembled a modern anti-discrimination regime – an action that took place over a decade after it had enacted a birth certificate statute. Of equal concern was ensuring that those who might be tempted to presume that anti-same-sex-marriage statutes and constitutional amendments intended to wipe out recognition of transition understood that not only were transsexuals not the targets of such laws but that many in the anti-same-sex-marriage camp had cast clear pro-transsexual votes in their pasts.

[93] For a comparative breakdown of Iowa votes by legislator, *see infra* Appendix A.

election cycle intervening.[94] One hundred and sixty-one out of a possible 197 Missouri legislators (81.7% of seats) had the opportunity to vote in 1984 on whether Missouri public policy positively acknowledges the reality of transsexuality and then to vote in 1986 on whether the MHRA bill containing the category of "sex" should become part of Missouri law. One hundred and twenty-five of those 161 voted yes on both bills—meaning that over three-quarters of those who did serve in both sessions voted yes on both and just under two-thirds of the total number of legislators who could serve at any one time voted yes on both.[95]

This does not prove that all 125 of the double-yes legislators consciously intended to explicitly include "change of sex" within the MHRA's concept of "sex."[96] However, it should remove from the scope of ethical argument any contentions such as that put forth by the ADF in its brief as well as that put forth by Justice Fischer in the *R.M.A.* dissent. Tennessee infamously inverted the intent of the Model Act in 1977 to produce a hardwired statutory ban on allowing trans people's birth certificates to reflect the reality of transition. It should be beyond doubt that—had Missouri done similarly in 1984—Fischer, the ADF and all who oppose the *R.M.A.* majority's holding would view the combination of the 1986 MHRA and a 1984 *anti*-transsexual birth certificate statute as conclusive proof that trans people are beyond Missouri law's boundaries of "sex."

The Supreme Court's "role is to declare the meaning of the language used in the MHRA consistent with legislative intent."[97] The General Assembly said yes in 1984 to the notion that Missouri law should accept and acknowledge that "the sex of an individual [can be] changed by surgical procedure."[98] Therefore, no argument regarding the use and interpretation of the word "sex" as used in Missouri law should rely at all upon ordinary

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[94] In addition to the 1984 general election, there were also four resignations (Alex Fazzino, Bob Fowler, David Scott and Robert Jackson) and two deaths (Roy Humphreys and D. R. "Ozzie" Osbourn) in 1985. *See* 1986 MO. HOUSE J. 7.

[95] For a comparative breakdown of Missouri votes by legislator, *see infra* Appendix B.

[96] It is worth noting that, during his final term in the Senate, 1986 MHRA bill sponsor (and yes vote on the 1984 trans birth certificate bill) Wayne Goode was a co-sponsor of one of the earliest Missouri trans-inclusive civil rights bills. *See* S.B. 452, 91st Gen. Assemb., Reg. Sess. (Mo. 2001).

[97] R.M.A. *ex rel* Appleberry v. Blue Springs R-IV Sch. Dist., 568 S.W.3d 420, 433 (Mo. 2019) (Fischer, J., dissenting).

[98] 1984 MO. S.B. 574, *currently codified in relevant part at* MO. REV. STAT. § 193.215.9 (2019).

dictionary definitions of the word; and no such argument can ethically rely on any dictionary definition of "sex" that does not take into account "change of sex." The importance of the breadth of "sex," however, goes beyond 1984, beyond 1986, beyond *R.M.A.*, and even beyond the boundaries of Missouri and its laws.

The 1986 MHRA incorporated much of the pre-existing Discriminatory Practices Act.[99] That 1965 Act did include "sex" among its protective classifications. But it did stand apart from federal law. For example, unlike Title VII it explicitly included "ancestry."[100] Yet not every difference translated to enlargement of the courthouse doorway. The mere existence of the MHRA has been deployed to prevent the usage of a public policy exception to at-will employment termination.[101] Critically though, the 1986 Act was regarded as a replacement of the 1965 Act despite existing Missouri law and federal Title VII continuing to serve as some guidance,[102] albeit not exclusively.[103]

Slightly over a decade ago, the Missouri Supreme Court firmly detached the MHRA from federal law on a causational level. After *Daugherty v. City of Maryland Heights*,[104] plaintiffs would need to show only that the complained-of adverse action targeting a protected characteristic was a *contributing* factor in the entirety of the discriminatory activity being challenged—not a motivating factor.[105] Clearly, this was a development that would benefit plaintiffs—at least in the abstract.

But then, in 2017, a very business-friendly General Assembly struck back. Introduced by Sen. Gary Romine, S.B. 43 began with language that

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[99] William C. Martucci, et. al., *Recent Developments in Missouri: Labor and Employment Law*, 55 UMKC L. REV. 539, 545 (1987),

[100] S.B. 235, 73rd Gen. Assemb., Reg. Sess. (Mo. 1965). Both continued into the MHRA. *See generally,* Emily Crane, *Employees Beware: How S. B. 43 Takes Missouri Anti-Discrimination Law Too Far*, 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 178, 182–83 (2018).

[101] Joseph H. Knittig, *Everything You Wanted to Know About Missouri's Public Policy Exception But Didn't Know You Should Ask*, 61 MO. L. REV. 949, 966 (1996) (citing *Kramer v. St. Louis Regional Health Care Corp*., 758 F. Supp. 1317 (E. D. Mo. 1991); and *Wyrick v. TWA Credit Union*, 804 F. Supp. 1176 (W.D. Mo. 1992)).

[102] Martucci, et. al., *supra* note 99, at 546–47.

[103] There are instances of straining to find parallel intent despite the lack of identical language. *See* Letter from Chris Koster, Att'y Gen., Mo., to Lawrence G. Rebman, Dir., Mo. Dep't of Labor and Indus. Rel. (Apr. 22, 2010) (on file with author).

[104] 231 S.W.3d 814 (Mo. 2007).

[105] Crane, *supra* note 100, at 188–80; *see also* State *ex. rel.* Diehl v. O'Malley, 95 S.W.3d 82 (Mo. 2003) (finding a right to a jury trial in MHRA cases).

would have realigned the MHRA with federal law as to causation.[106] In committee, language crept in that would have not merely re-established an equilibrium but instead would have hardwired a "but for" causation standard into the MHRA. That precise language later disappeared, but an analogous intent found its way in.

The end result of S.B. 43 was the term "because of" becoming defined as "as it relates to the adverse decision or action, the protected criterion was the motivating factor"[107] and "motivating factor" meaning that "the employee's protected classification *actually* played a role in the adverse action or decision and had a determinative influence on the adverse decision or action."[108] As Emily Crane observed, "The codification of a but-for causation standard suggests that the intent of Missouri lawmakers was not to bring the state's standard in line with analogous federal law, but instead to heavily restrict plaintiffs' ability to bring successful employment discrimination claims."[109] Two years have passed, but the monumental task that the wrongly-convicted face when forced to prove *actual* innocence[110] should give all pause when pondering just how heavy that restrictiveness may ultimately be.

Crane is not alone in noting how plaintiff-averse and defendant-friendly S.B. 43 is generally.[111] The NAACP even issued a travel advisory for Missouri when S.B. 43 was signed into law.[112] Others—including many who opposed the bill before it became law—pointed out that it seemed to be

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[106] 2017 MO. S. B. 43 (as introduced).
[107] MO. REV. STAT. § 213.010(2) (2019).
[108] MO. REV. STAT. § 213.010(19) (2019) (emphasis added).
[109] Crane, *supra* note 100, at 191.
[110] *See generally,* McQuiggin v. Perkins, 569 U. S. 383, 386 (2013) ("tenable actual-innocence gateway pleas are rare") (Ginsburg, J.); House v. Bell, 547 U. S. 518, 538 (2006) ("absolute certainty" not required, yet the relevant standard of proof is so demanding that it rarely is met, citing *Schlup v. Delo*, 513 U. S. 298 (1995)) (Kennedy, J.).
[111] *See generally*, Brian Stachowski, *Senate Bill 43: Raising the Bar on Discrimination*, ST. LOUIS U. L. J. ONLINE (Sept. 25, 2017), https://www.slu.edu/law/law-journal/online/2017-18/raising-the-bar-on-discrimination.php; Megan Crowe, *Changes to the MHRA Raise Burden of Proof and Limit Damages for Plaintiffs*, SAINT LOUIS U. L. J. ONLINE (Oct. 30, 2017), https://www.slu.edu/law/law-journal/online/2017-18/changes-to-mhra-raise-burden-of-proof.php.
[112] *Travel Advisory for the State of Missouri*, NAACP (Aug. 2, 2017), https://tinyurl.com/yxt7ygqa.

very friendly to one specific employer: the bill's sponsor, Sen. Gary Romine, owner of Show-Me Rent-to-Own in Sikeston.[113]

During 2017, that business was the subject of a racial discrimination suit. A former employee had alleged that his supervisor regularly used racial slurs—including telling the employee to "quit acting like a n*gger." That allegation was denied.[114] However, lawyers did concede an accompanying allegation: that there was a map on a store wall containing a circle around a predominantly African-American neighborhood along with the words: "Do not rent."[115]

The personal interest that Romine had in the potential impact of S.B. 43 came to light rather early in the 2017 session—and "self-dealing" is one of the kinder descriptions of the situation that one can find.[116] Jay Benson, president of the Missouri Association
of Trial Attorneys, viewed S.B. 43 and the many similar bills as together comprising "an epidemic" in light of the manner in which "the civil justice system is designed to hold people accountable when they do bad things."[117] University of Missouri-St. Louis political
scientist Dave Robertson said, "This kind of legislation just adds to the perception that legislators are benefiting themselves and using government to do it."[118]

Not surprisingly, most Democrats opposed the bill, yet many refused to vote on it at all, believing that even casting votes in opposition would make them complicit in Romine's conflict of interest.[119] With Republican majorities in the General Assembly, S.B. 43 nevertheless passed easily—

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[113] Sarah Fenske, *Sued for Discrimination, Missouri Senator Pushes Law Limiting Discrimination Suits*, RIVERFRONT TIMES (Apr. 12, 2017), https://www.riverfronttimes.com/newsblog/2017/04/12/sued-for-discrimination-missouri-senator-pushes-law-limiting-discrimination-suits.

[114] *Id.*

[115] *Id.*

[116] *Id*.

[117] Kevin McDermott, *Missouri Republicans' Push to Limit Lawsuits Could Have Unexpected Beneficiaries: Themselves*, ST. LOUIS POST-DISPATCH (Feb. 13, 2017), https://www.stltoday.com/%20news/local/govt-and-politics/missouri-republicans-push-to-limit-lawsuits-could-have-unexpected-beneficiaries/article_74be21d5-7860-5223-8431-3fb6e10a6602.html.

[118] *Id*.

[119] Jason Hancock, *Missouri Bill Making it Harder for Workers to Win Discrimination Cases Goes to Greitens*, KANSAS CITY STAR (May 8, 2017), https://www.kansascity.com/news/politics-government/article149421579.html.

though not before an attempt to make lemonade out of the lemon. Farmington Republican Rep. Kevin Engler proposed an amendment which would have added sexual orientation and gender identity to the MHRA,[120] essentially tracking the intended effect of the long-languishing Missouri Non-Discrimination Act (MONA) proposal.[121] He asserted that he was "disgusted" that Missouri law allowed employers to fire someone "if you find out they're gay."[122] Ironically demonstrating the desirability of allowing LGBT people clear access to MHRA remedies, Harrisonville Republican Rick Brattin openly questioned whether gays are even human.[123] Gay Kansas City Democrat Greg Razer favored the amendment but, after Engler withdrew it, another Kansas City Democrat, Brandon Ellington, criticized the entire sequence of events as a "stunt."[124]

Perhaps it was a stunt; perhaps it was not. The end result, however, was clear. S.B. 43 became law without the language of MONA.
Engler's attempt to attach pro-civil rights language to an anti-civil rights proposal was, by no means, the first such stunt.

Despite not arriving until almost two decades after the first state trans birth certificate statute—indeed not arriving until after four of them—the first federal gay rights bill included no language designed to encompass anti-trans discrimination.[125] Such was the status quo for two decades—until the first generation of failed "Equality Act" bills yielded to the employment-specific

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[120] S.B. 43, 99th Gen. Assemb., Reg. Sess. (Mo. 2017)., House Am. No. 1, *proposed at* 2017 MO. H.J. 2215 (May 8, 2017).
[121] *See generally,* Alex Edelman, *Show-Me No Discrimination: The Missouri Non-Discrimination Act and Expanding Civil Rights Protections to Sexual Orientation or Gender Identity*, 79 UMKC L. REV. 741 (2011).
[122] Hancock, *supra* note 119.
[123] *Id.* ("there is a distinction between homosexuality and just a human being").
[124] *Id*. By no means was it Engler's first "stunt." While in the Senate he floated a proposal to make littering a capital offense. Paula Barr, *Senator Engler Gets Attention He Wanted*, DAILY JOURNAL (Feb. 12th, 2009), https://dailyjournalonline.com/news/local/senator-engler-gets-attention-he-wanted/article_3f5729cb-c45b-5001-b68b-f468a7340265.html.
[125] Equality Act of 1974, H. R. 14752, 93rd Cong., 2nd Sess. Interestingly, this first federal gay rights bill covered all areas of discrimination *except* in employment. *See* Bruce Voeller, *NGTF on Capitol Hill: An Historical Overview of the Program for Federal Gay Rights Legislation*, IT'S TIME, Special Bonus Issue (1976) at 1, 2. By 1974, Illinois, Arizona, Louisiana and Hawaii had already enacted trans birth certificate statutes. 1955 ILL. LAWS. p. 1026; 1967 ARIZ. LAWS Ch. 77; 1968 LA. ACTS Ch. 611; 1973 HAW. ACTS Ch. 39.

Employment Non-Discrimination Act (ENDA) generation of failed bills. One constant, however, was the exclusion of trans protections.[126]

The then-Human Rights Campaign Fund (HRCF—now known as HRC) and Chai Feldblum, who played a significant role in drafting the language of what came to be ENDA (and later served as an EEOC commissioner), viewed what they were working with in the early 1990s as reality.[127] Trans people, however, dealt with a competing reality—one in which far too many of their number were dying violently as the end result of unemployment-based homelessness. "HRCF is intentionally allowing transgendered people to die by pretending they don't know it is happening," Cei Bell screamed in the *Philadelphia Gay News*.[128] There was no willingness to trust crumbs of theory while LGBs would, if a gay-only ENDA became law, feast on clear, unequivocal statutory protections. For the remainder of the Clinton Administration and on into the 21st century, trans people dug in for a war on two fronts: against HRCF and against Congress, where there had been little desire for any positive movement on civil rights under Democratic control and where there was even less under the Republican leadership produced by the disastrous 1994 mid-term elections.[129]

Truces can occur during wartime. Some between trans activists and HRC(F) have materialized occasionally. In the run-up to a 1995 lobbying event, activists and HRCF (just weeks away from dropping its "F") issued a joint statement indicating that the latter had "made a commitment to work with representatives of a spectrum of the transgendered community with a specific focus on hate crimes."[130] The statement went on to offer the hope of

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[126] *See e.g.* 97 CONG. REC. S1708 (daily ed., Sept. 9, 1981) ("'[S]exual orientation' means male or female homosexuality, heterosexuality, and bisexuality by orientation or practice."); and Civil Rights Amendments Act of 1991. H.R. 1430, 102d Cong. (1991) ("'Affectional or sexual orientation' means male or female homosexuality, heterosexuality, and bisexuality by orientation or practice, by and between consenting adults.")

[127] Chari R. Feldblum, *Gay People, Trans People, Women: Is It All About Gender?*, 17 N.Y. L. SCH. J. HUM. RTS. 623–702 (2000).

[128] Cei Bell, *Transgendered Persons Deserve Inclusion and Respect*, PHILADELPHIA GAY NEWS, July 21, 1995, at 11.

[129] *See generally*, National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103–160, § 571 (Nov. 30, 1993) (Don't Ask, Don't Tell); Employment Non-Discrimination Act of 1994, S. 2238, 103rd Cong., 2d Sess. (introduced June 23, 1994) (first ENDA bill); Adam Clymer, *G. O. P. Celebrates its Sweep; Clinton Vows to Find Common Ground*, New York Times, Nov. 10, 1994 at A1.

[130] Kristina Campbell, *Transgender Lobbyists Meet with Hill Staffers*, WASH. BLADE, Oct. 6, 1995.

"good faith" in a future of dialogue-engagement and coalition-building "in the context of ending violence and discrimination against [the trans] community."[131] Any focus on hate crimes would certainly address the former. The absence of any serious work on ENDA was a sore poised to do nothing but fester. Even so, following the meeting, Texas trans activist and attorney (and later judge) Phyllis Frye publicly declared, "There's a very good chance the war with HRCF may be coming to a close."[132]

The politics of 1996 delayed the inevitable of Frye and her followers learning how far off the mark her prediction was.[133] President Bill Clinton was running for re-election, and the Republican congressional leadership saw Hawaii's same-sex marriage litigation[134] as a wedge issue that could damage his chances. Republicans reflexively proposed legislation that purported to insulate the federal government and dissenting states from having to recognize same-sex marriages, should any state begin allowing them.[135] This was, of course, the Defense of Marriage Act (DOMA) and it passed with ample Democratic support in addition to the votes of the Republican majorities. Clinton signed the bill to prevent a veto from being used against him in the election.[136]

DOMA proved to be about more than just marriage. As Feldblum describes it, the Republican leadership wanted to bring the bill up for a vote as an embarrassment to all Democrats. However, they wanted no amendments that might spread the embarrassment around, such as gun control or health care. Sen. Ted Kennedy brokered a deal to stop all

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[131] *Id.*

[132] David Olson, *Transgendered Activists Meet with Local, National Gay Groups*, WINDY CITY TIMES, Sept. 28, 1995 at 10 (sec. 1).

[133] *See generally,* Katrina C. Rose, *Has the Future Already Been Forgotten? A Post-2007 Transgender Legal History Told Through the Eyes of the Late, (Rarely) Great Employment Non-Discrimination Act*, 23 WILLIAM & MARY J. WOMEN & L. 527– 637 (2017) [hereinafter *Future Already Been Forgotten?*].

[134] Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), *resolved as moot sub. nom*., Baehr v. Miike, 994 P.2d 566 (Haw. 1999).

[135] Defense of Marriage Act, P. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996).

[136] This aspect of DOMA's history re-emerged in presidential politics two decades later. Michelle Ye Hee Lee, *Hillary Clinton's Claim that DOMA Had to be Enacted to Stop an Anti-Gay Marriage Amendment to the U. S. Constitution*, WASH. POST (Oct. 28, 2015), http://tinyurl.com/oc2235p; Amanda Renteria, e-mail dated Oct. 25, 2015, *quoted in e-mail chain posted at* WIKILEAKS, https://wikileaks.org/podesta-emails/emailid/4957 (last visited Apr. 30, 2020); Chris Johnson, *He Said, She Said*, WASH. BLADE, Oct. 30, 2015 at 1.

amendments except one: ENDA.[137] The resulting votes showed the gulf between employment and marriage. DOMA passed 85-14 while ENDA failed 50-49, meaning over thirty senators voted *for* both.[138]

The deal proved to have long-lasting ramifications not only for marriage equality and ENDA but also for the relationship between trans people and HRC. The organization came to lean upon the razor-thin failure margin of the 1996 ENDA vote as a justification for not altering the LGB-only ENDA paradigm.[139] Many trans activists countered that it had not even been a 'true vote' but instead merely political theater to create the appearance of progress—both for senators who wanted to have it both ways with respect to their gay rights record and for HRC itself in the face of a pre-determined reality of ENDA not having any chance of being considered by the Newt Gingrich-led House.[140]

Over a decade passed before ENDA proposals became trans-inclusive—but the 2007 bill proved to be no more of a "true" inclusive bill than what occurred in the Senate in 1996 had been a "true" vote. The bait-and-switch of 2007 was the last serious consideration of civilian LGBT anti-discrimination legislation at the federal level.[141] A trans-inclusive ENDA did pass the Senate in 2013—while Republicans were in firm control of the House.[142] Similarly, a trans-inclusive, second-generation Equality Act bill passed the House in 2019—with Republican control ensuring that the Senate is a graveyard for civil rights proposals.[143]

The result? When the Missouri Supreme Court issued its *R.M.A.* decision in 2019, federal statutory law was still as free of explicit employment anti-discrimination protections for LGBT people as it was when Bella Abzug's first "Equality Act" bill died 45 years earlier.

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[137] Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, *in* JOHN D'EMILIO, WILLIAM B. TURNER AND URVASHI VAID, EDS., CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS (2000), pp. 149, 84-85. The House never took up ENDA for consideration in 1996.

[138] 104 CONG. REC. S10129 (Sept. 10, 1996) (rollcall vote no. 279 Leg.).

[139] Tracy Baim, *HRC: Birch on Trans Issues*, OUTLINES, Sept. 1, 1999 at 14.

[140] Vanessa Edwards Foster, *More HRC and Trans Issues*, OUTLINES, Sept. 22, 1999 at 6.

[141] *Future Already Been Forgotten?, supra* note 133, at 576–94.

[142] Employment Non-Discrimination Act of 2013, S. 815, 113th Cong., 1st Sess.

[143] *See generally*, EQUALITY ACT, H.R. 5, 116th Cong., 1st Sess. (Rpt. 116–56) (proposed amendment to the Civil Rights Act with its 15-employee standard—to include anti-LGBT discrimination).

In 1993, sexual orientation, defined trans-inclusively, became part of the MHRA.[144] The bad news for Missouri is that the addition was to Minnesota's MHRA.[145] Good news did follow, but not until 1999. A slightly modified version of Minnesota's trans-inclusive definition of sexual orientation was added to Missouri's law governing hate crimes.[146] It was at this time that efforts began to seek to add a similarly trans-inclusive category of sexual orientation to Missouri's MHRA.[147] Here, one must return to bad news: no such bill has ever become law. Even worse, the hate crime statute has a track record of proving to be impotent in preventing violence against trans people.[148]

While in law school, future *R.M.A.* counsel Alex Edelman authored a note on MONA, which even by 2011 had suffered through more than a decade of legislative indifference. Advocating for that indifference to transmute to positive action, Edelman implored, "As long as the existing human rights laws fail to protect against discrimination on the basis of sexual orientation or gender identity, some citizens will continue to live in fear of discrimination."[149]

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[144] 1993 MINN. LAWS Ch. 22. § 2.

[145] 1993 MINN. LAWS Ch. 22.

[146] 1999 MO. S. B. 328, *relevant definition codified at* MO. REV. STAT. 556.061(46) (2019). The Missouri trans clause differs from Minnesota's in that it uses "not traditionally associated with one's gender" rather than "not traditionally associated with one's biological maleness or females." MINN. STAT. §363A. 03, subd. 44 (2019). Notably, the Missouri Hate Crime bill, as introduced, did use Minnesota's phraseology. 1999 MO. S. B. 328 (as introduced).

[147] *See generally*, 2000 MO. S. B. 622 ("biological maleness or femaleness"). A decade would pass before such proposals would have distinct "sexual orientation" and "gender identity" categories. *See* 2012 MO. S. B. 798; 2012 MO. H. B. 1500.

[148] The murder of trans teen Ally Steinfeld has resulted in two guilty pleas, with a third person charged with first degree murder and set to stand trial in 2020—three years after the killing. Jackie Rehwald, *Ally Steinfeld Case: Third Suspect Pleads Guilty in Texas County Transgender Teen Murder Case*, SPRINGFIELD NEWS-LEADER (May 9, 2019), https://www.news-leader.com/story/news/crime/2019/05/09/trans-teen-ally-steinfeld-murder-case-girlfriend-briana-calderas/1151486001/. However, the hate crime provision is not even available for Missouri prosecutors who might actually want to use it in conjunction with a murder charge—something the Steinfeld prosecutor seemed disinclined to even consider in the abstract. Max Londberg, *Missouri Law Doesn't Allow Hate Crime Charges in Transgender Teen's Brutal Slaying*, KANSAS CITY STAR (Oct. 4, 2017, 9:40 AM), https://www.kansascity.com/news/local/crime/article176919421.html. Adding insult to the dead, the other charges in the killing—armed criminal action, abandonment of a corpse and tampering with physical evidence—also fell outside of the purview of hate crime enhancement. Rehwald, *supra*.

[149] *Edelman*, *supra* note 121, at 741.

Edelman offered a primer on the mechanics of bringing a complaint before the Missouri Commission on Human Rights.[150] He also laid out the specifics of what the long-languishing MONA[151] would add to the MHRA, including language addressing perception of a victim's relevant traits.[152] His article went on to highlight developments in federal law—from *Price Waterhouse* through *Schroer v. Billington*.[153] "While this is promising," Edelman wrote, "it is not nearly enough,"[154] going on to describe as "Kafkaesque" the interplay between potentially viable sex discrimination claims and animus toward the uncovered specific characteristics of sexual orientation and gender identity that a discriminator could actually use to get away with discriminatory activity.[155]

Edelman valiantly argued that enactment of MONA would give LGBT Missourians clear recourse against discrimination. "By punishing discrimination," he reasoned, "the government indicates its disapproval of that type of discrimination."[156] The converse should be true as well: a statement of positivity by the government should connote approval.

Throughout all of his arguments about why "MONA is right for Missouri,"[157] including an extensive plea to not view MONA as being incompatible with religious rights, nowhere will one find the first plank of (LGB)T rights in Missouri: the state's recognition of transition. "Missouri may not seem a likely place to expand the rights of LGBT Americans."[158] It might appear a bit more likely—even to the state's legislators—if the relevant audience is presented with the fact that, at least for trans Missourians, the process began during Ronald Reagan's first term as president.

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[150] *Id.* at 742.
[151] Alex Edelman specifically referenced the 2010 Senate bill. 2010 MO. S. B. 626.
[152] *Edelman*, *supra* note 121, at 744–46.
[153] *Id.* at 746–47 (citing Price Waterhouse v. Hopkins, 490 U. S. 228 (1989); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001); Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008)).
[154] *Edelman*, *supra* note 121, at 747.
[155] *Id.* at 748.
[156] *Id.* at 749.
[157] *Id.* at 750–54.
[158] *Id.* at 756.

III. FROM DICTA TO SUBSTANCE

It seems obvious to the court that if a state permits such a change of sex on the birth certificate of a postoperative transsexual, either by statute or administrative ruling, then a marriage license, if requested, must issue to such a person provided all other statutory requirements are fulfilled.[159]

Ohio has never enacted a trans birth certificate statute. However, in 1987, Stark County Probate Court Judge Denny Clunk offered his thoughts, quoted above, on how courts in states that have done so should rule in cases involving opposite-sex trans marriages. Opponents of trans rights eagerly cite the ultimate negative decision in the case.[160] To them, the decision is proof that transition recognition is all but alien to American jurisprudence.[161] It is not alien, but it has been ignored.

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[159] *In re* Ladrach, 513 N.E.2d 828, 831 (Ohio Probate Ct. Stark Co. 1987).

[160] For court opinions favorably citing *Ladrach* without noting the pro-trans dicta, *see* Littleton v. Prange, 9 S.W.3d 223, 228-29 (Tex.App.-San Antonio 1999, pet. denied), *cert. denied*, 531 U. S. 872 (2000); *In re* Gardiner, 42 P.3d 120, 130 (Kan. 2002); *In re* Nash and Barr, Nos. 2002-T-0149 and 2002-T-0179, 2003 Ohio App. LEXIS 6513 (Ohio Ct. App. Dec. 31, 2003); Kantaras v. Kantaras, 884 So.2d 155 (Fla. Ct. App. 2004), *rev. denied*, 898 So.2d 80 (2005); Gajovski v. Gajovski, 610 N.E.2d 431, 433 (Ohio Ct. App. 1991) (non-trans case but nevertheless uncritically accepting the ultimate outcome of *Ladrach*). For similar citations in scholarly and advocacy settings, *see generally* Mathew D. Staver, *Transsexuality and the Binary Divide: Determining Sex Using Objective Criteria*, 2 LIB. U. L. REV. 459, 464 n.17, 466, 478–79 (2008); Marika E. Kitamura, *Once a Woman, Always a Man? What Happens to the Children of Transsexual Marriages and Divorces?: The Effects of a Transsexual Marriage on Child Custody and Support Proceedings*, 5 WHITTIER J. CHILD & FAM. ADV. 227, 231 (2005); Teresa A. Zakaria, *By Any Other Name: Defining Male and Female in Marriage Statutes*, 3 AVE MARIA L. REV. 349, 351 (2005). The *Ladrach* decision was also cited against marital equality in litigation not involving trans people. *See generally* Answer Brief of Campaign for California Families on the Merits at 52-52 n.39, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S147999).

[161] It is worth noting that Staver has, on multiple occasions inaccurately cited *pro-transition* case law for the proposition that transition recognition is a notion alien to the law. Staver, *supra* note 160, at 464 n.17; Answer Brief, *supra* note 160, at 52 n.39 (each identically asserting that *M. T. v. J. T.*, 355 A. 2d 204 (N.J. Super. App. Div. 1976) stands for the proposition that "male <sic> transsexual who underwent sex-reassignment surgery may not be considered female for marital purposes" when in fact the decision validated a marriage between a cis male and a trans woman). I cannot determine whether the inaccurate citing was intentional, but a decade later Staver and his Liberty Counsel organization were called out by the U. S. Supreme Court Clerk's Office for misgendering case party Gavin Grimm. *Compare* Scott S. Harris (by Denise McNerney) to Mat Staver, letter dated Feb. 24, 2017; *with* Brief of Amici Curiae Dr. Judith Reisman and the Child Protection Institute in Favor of Petitioner, Gloucester County Sch. Bd. v. G. G., 137 S. Ct. 1239 (2017) (No. 16-273).

In 1995 Maryland enacted legislation which was not a wholesale adoption of the Model Act but was an effort to update its vital statistics framework.[162] It was an update that included portions of the Model Act, among them the transition-recognition subsection.[163] Pennsylvania-born Janet Heilig Wright attempted to make use of the statute while living in Maryland.[164] Lower courts said she could not utilize the law but Maryland's highest court, construing the case as presenting primarily a jurisdictional question, ruled in her favor. In 2003, Judge Alan Wilner noted both the paucity of legislative history for his state's law as well as an almost non-existent amount of available history for the language within the Model Act itself.[165] Almost going—but now not merely in dicta—where Denny Clunk had gone in *Ladrach* a quarter century earlier, Wilner viewed the General Assembly's usage of the transition language as speaking for itself:

> [It] is clear that, in enacting § 4-214(b)(5), the Legislature necessarily recognized the jurisdiction of the Circuit Courts to consider and grant petitions to declare a change in gender; indeed, *that section could have no other rational meaning*.[166]

The public policy underlying the 1995 law may have given Maryland courts the authority to grant gender change judgments for any Maryland resident who so petitions, but the court would not "opine on what the collateral effect of any judgment attesting to a change in gender might be."[167] Consequently,

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[162] 1995 MD. LAWS Ch. 97.

[163] MODEL STATE VITAL STATISTICS ACT, §21(d) (U.S. DEPT. OF HEALTH, EDUC., & WELFARE 1992). The language was evident in the bill despite the bill title not directly calling attention to it. The committees that heard the bill, however, were made aware of it. Maryland General Assembly, House Environmental Matters Comm. Doc. on 1995 H. B. 1068 at 3–4. On March 21, the bill passed the House 136-0 (with three delegates not voting and two absent). House vote tally, 1995 H. B. 1068 (legislative date March 19, 1995). The Environmental Matters Committee vote had been 20-0. Voting Record, H. B. 1068, March 16, 1995. On April 4 the Senate approved the bill 46-0 with one senator not voting. Senate vote tally, 1995 H. B. 1068 (legislative date April 2, 1995). The Economic and Environmental Affairs Committee vote had been 11-0. Voting Record, H. B. 1068, March 30, 1995. Gov. Parris Glendenning signed the bill into law.

Bills in 1996 and 1997 to add birth certificate privacy safeguards to the gender transition process – as well as to address more specific complaints that certificates amended pursuant to the 1995 guidelines looked fake – did not meet with similar success, each dying quickly in committee. 1996 MD. H. B. 323; 1997 MD. H. B. 323.

[164] In re Heilig, 816 A. 2d 68, 69 (Md. 2003).

[165] *Id.* at 82.

[166] *Id.* at 84 (emphasis added).

[167] *Id.* at 85. A lengthy footnote noting the differing views in common law-based jurisdictions—recognition vs. anti-recognition—ended with the reiteration that, in light of

Wilner and his unanimous court still stopped short of fully adopting Clunk's dicta as Maryland law.[168]

"When I argued the *Heilig* case, the Court inquired about the issue of surgery," attorney Alyson Meiselman recalled. "My reply was the trial court never allowed the case to get that far, as to presenting evidence. However, I did argue that the change had to have a level of permanency."[169] Opinions vary among trans people on that matter, as well as on what constitutes sufficient permanence for transition. Thomas Beatie's pregnancies—after having conformed his Hawaii birth certificate to reflect a male identity—angered and frightened many, but not all, trans people.[170] Dean Spade declared that Beatie's legal sex status could not be questioned.[171] Yet it was, albeit ultimately unsuccessfully.

When Beatie and his wife sought a divorce in Arizona, a trial court judge had trouble fitting a marriage between "a female [Nancy] and a person capable of giving birth, who later did so [Thomas]" into Arizona's definition of marriage.[172] He impugned the affidavit Thomas had relied upon to secure his male Hawaii birth certificate, pointing out not only that it merely indicated he had undergone unspecified "surgical procedures." He also pointed to Thomas's non-disclosure of the retention of his ability to become pregnant.[173]

The court of appeals took a different view and managed to do so without questioning Arizona's constitutional ban on same-sex marriage.[174]

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the case brought by Wright being only a petition for gender change and not a request for a marriage license, marriage "is an issue that is not before us in this case and upon which we express no opinion. " *Id*. at 85–86 n.9.

Maryland never fell victim to an anti-same-sex marriage constitutional amendment, but it had enacted one of the earliest state DOMA laws. 1973 MD. LAWS Ch. 213. Consequently, in 1995—as well as at the time of *Heilig*—sex status for purposes of marriage validity was a live issue in the state. And four years after *Heilig*, Wilner was part of the Court of Appeals majority which kept Maryland from joining the list of states that judicially opened marriage to same-sex couples. Conaway v. Deane, 932 A. 2d 571 (Md. 2007).

[168] In re Heilig, 816 A. 2d 68, 85 (Md. 2003).

[169] Alyson Meiselman, *comment in* TransMaryland Facebook group, Sept. 20, 2014 (accessed Sept. 21, 2014 (on file with author)).

[170] THOMAS BEATIE, LABOR OF LOVE: THE STORY OF ONE MAN'S EXTRAORDINARY PREGNANCY (2008), 254; Leigh Smith, *Transfags and Bigotry*, ENOUGH NON-SENSE (Nov. 17, 2008, 7:40 PM), https://web.archive.org/web/20090310113658/http://tgnonsense.wordpress.com/2008/11/17/transfags-and-bigotry/.

[171] Jen Christensen, *Trans Positions*, ADVOCATE (May 3, 2008, 12:00 AM), https://www.advocate.com/news/analysis/2008/05/03/trans-positions.

[172] Beatie v. Beatie, 333 P.3d 754, 756 (Ariz. Ct. App. 2014).

[173] *Id.* at 757.

[174] *Id.*

Judge Kenton Jones examined two of the four oldest transsexual birth certificate statutes. Arizona's own was relevant given the location of the divorce action, but Hawaii's governed Thomas's identification documentation and the validity of the marriage when and where it was performed. Both, at relevant times, specified "sex change operation." Jones, however, observed that the Hawaii statute required:

> [O]nly that an examining physician provide an affidavit, and that the affidavit indicate "the birth registrant has had a sex change operation and the sex designation on the birth registrant's birth certificate is no longer correct." In accordance with [the statute], Thomas provided the State of Hawaii with an affidavit from Dr. Brownstein verifying he had undergone a sex change operation, as well as extensive hormonal and psychological treatment, and that the specific procedures and treatment qualified Thomas to be "legally considered male." Therefore, Thomas complied with the statute.[175]

Jones then compared Hawaii's legal framework to Arizona's. Surprisingly, he concluded Arizona's was even more liberal than Hawaii's. This was based primarily on evidentiary niceties; Hawaii required an affidavit, but Arizona only required a written statement:

> Arizona's statute does not require specific surgical procedures be undertaken or obligate the applicant to forego procreation. As such, the sworn affidavit Thomas presented to the Director of the Hawaii Department of Health toward obtaining an amended birth certificate also met the requisites of Arizona's own statutory provision.[176]

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[175] *Id.* at 758.

[176] *Id.* at 759–60. Oddly enough, the two statutes Jones analyzed no longer consisted of their original wording. A 2004 rewrite of Arizona's 1967 statute saw the substitution of "sex change operation" for the original "surgical operation." 2004 ARIZ. LAWS Ch. 117, § 8. Hawaii's statute had undergone a similar revision a quarter century earlier, with "sex change" being added to modify "operation." 1979 HAW. ACTS No. 130. Five years later, the section was reorganized, but with the "sex change operation" provision remaining substantively unchanged. 1984 HAW. ACTS No. 167. Arguably then, neither change was truly a liberalization but instead more of a specification. The initial version of the Hawaii statute, from 1973, included separate provisions for where "the sex item on the person's birth certificate was entered incorrectly" and for where "by reason of [an] operation the sex designation on such person's birth record should be changed." The House Health Committee

Consequently, not only was Thomas's status as a male—and in turn the Hawaii marriage—recognized as real but the Arizona divorce action was allowed to proceed, demonstrating that even where a trans birth certificate specifies surgery, there is more than a little room for disagreement as to what qualifies. The Arizona Court of Appeals was clear that, for a trans man, the ability to give birth did not legally negate any procedures that may have taken place.

Notably, Jones made an effort to ensure that a then-recent observation by the Chief Judge Michael J. Davis of the District of Minnesota would not be as easily ignored and forgotten as Denny Clunk's *Ladrach* dicta has been. "The only logical reason to allow the sex identified on a person's original birth certificate to be amended," Davis wrote in 2012 and which Jones quoted alongside Clunk, "is to permit that person to actually use the amended certificate to establish his or her legal sex for other purposes, such as obtaining a driver's license, passport, or marriage license."[177]

The only logical interpretation of a state statutorily allowing the sex identified on a person's original birth certificate to be amended is that the sex has changed, not just from male to female (or vice versa) for individual trans people but for the laws of the states whose legislatures have approved. It is all change, and it is all "sex." But it should not all be constrained within birth certificates. And none of it should ever have been constrained by selectively conservative use of dictionaries. But so often it was.

An important element of the history of the nation's first trans-inclusive state civil rights law is an all-but-forgotten vignette of how the nation's first trans-inclusive civil rights *city ordinance*[178] almost was stripped of its trans-inclusivity. The scant reporting on the series of events in 1980

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report, however, only refers to "corrections," implying the sort of distinction between trans-specific statutes and those of the variety that so many courts have refused to interpret in transsexuals' favor. Nevertheless, that could have been only for brevity as the committee also seems to have been aware of the sort of concern transsexuals have regarding identification documents: "As certified photostatic copies are preferred directly from the corrected records, they remain potential sources of embarrassment – particularly in the case of changed father's name, previously incorrectly designated sex, etc." 1973 HAW. S. C. REP. 432 *on* H. B. 154, *reprinted at* 1973 HAW. HOUSE J. 939.

[177] Beatie v. Beatie, 333 P.3d 754, 760 (Ariz. Ct. App. 2014) (quoting Radtke v. Miscellaneous Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund, 867 F. Supp. 2d 1023, 1034 (D. Minn. 2012)).

[178] MINNEAPOLIS ORD. of Dec. 30, 1975, pp. 1216-37, *amending* MINNEAPOLIS ORD. of March 29, 1974.

which almost led to revising the 1975 ordinance in a manner that would have left its key suspect class category definition without its trans clause[179] offered much evidence of finger-pointing regarding who was or was not to blame for a draft re-write that did not contain trans-inclusive language. That reporting, however, serves up no conclusive answer, either as to who or as to *why*. It may have been an intentional attempt to erase the trans stain from one of the nation's earliest gay rights laws while no one was paying close attention. Or it may have been merely a benign, albeit misguided, attempt to make the wording of the ordinance better. It may even have been mere laziness or sloppiness on the part of whoever provided copies of the ordinance[180] to those intending to draft new language.[181] Ultimately, the 1975 incarnation of the Minneapolis Civil Rights Ordinance survived intact and served as a trans-inclusive model when Minnesota enacted a statewide measure in 1993. No erasure occurred, but the eraser was there for the using.

Judicial reliance upon dictionaries to maintain trans people's position as strangers to remedial law could merely be evidence of laziness. Reliance on dictionaries to prop up the constrictive imaginary of a past that likely never existed is at best symptomatic of a cowardice that fails not merely trans people but society as a whole. At worst, it evidences blatant bigotry. The real history of the trans law that already exists, though not erased in the strictest sense, is obscured from the view of those who have a right to know about it by those who have an obligation to, at the very least, acknowledge its existence. The real lives of real people become lost in a never-ending debate. Do dictionaries define the world in which people exist? Or do people and their lives define what is real, with dictionaries merely being lexicological scriveners of that reality? And if not people and *their lives*, what about their pets?

Not until March 2019 did the Oxford English Dictionary (OED) deem the modern incarnation of the word "puggle"—describing a breed of dog that

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[179] Wording that, a generation later, found its way into Missouri's hate crime law.

[180] Bear in mind that this was long before the everyday lives of legal professionals included Westlaw, LEXIS or what we know today as the internet. One professed excuse for the wrong language coming into play was the City of Minneapolis providing an out-of-date hardcopy of the ordinance language to someone involved with the revision effort.

[181] Katrina C. Rose, *Reflections at the Silver Anniversary of the First Trans-Inclusive Gay Rights Statute: Ruminations on the Law and its History—and Why Both Should be Defended in an Era of Anti-Trans 'Bathroom Bills,'* 14 U. MASS. L. REV. 70, 99-101 (2019) [hereinafter *Reflections*].

is a cross between a pug and a beagle—to be sufficiently legitimate for inclusion. The announcement of this addition (among many others) to the OED included an acknowledgement of at least some familiarity with that incarnation of "puggle" from as early as 2002.[182] But given that the OED's 2002 reference source is a *Wisconsin State Journal* classified ad for puggle pups,[183] one should be willing to presume that, well before 2002, plenty of encounters between pugs and beagles resulted in puppies. Did humans have a dictionary-mandated responsibility to wrongly tell those resultant puggles that they did not actually exist?[184]

The gap between that 2002 *Wisconsin State Journal* classified ad and the addition of "puggle" to the OED was 17 years. Over the course of travelling 17 times 'round the seasons[185] I was born, and I completed elementary, junior high, and all but my final semester of high school. At the beginning of that journey, Lyndon Johnson was president; at the end, Ronald Reagan. In between, I came to terms with who I am; through mainstream news sources I learned I was not alone—even in Houston, Texas.[186]

During the 17 years preceding the Iowa Supreme Court's declaration in *Sommers* that "by proscribing discrimination on account of sex the legislature did not intend that the term would include transsexuals,"[187] Sixteen American state-level jurisdictions enacted legislation recognizing change of sex.[188] Iowa was one of those. But its own high court affirmed a

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[182] Johnathan Dent, *New Words in the OED: March 2019*, OXFORD ENGLISH DICTIONARY (BLOG), March 18, 2019, https://public.oed.com/blog/new-words-in-the-oed-march-2019/.
[183] *Puggle,* n.2, OXFORD ENGLISH DICTIONARY, https://www.oed. com/view/Entry/ 78414912.
[184] Full disclosure: I have never owned a puggle. However, during a portion of my doctoral studies, some research from which I have utilized in this Article, two pugs were part of my family. Rose, *Forgotten Paths, supra* note 45, at vii.
[185] Apologies to Joni Mitchell, *The Circle Game,* on LADIES OF THE CANYON (Reprise 1970).
[186] Long before I became aware of how close she came to being the first trans litigant to have a case heard by the U. S. Supreme Court, *Mayes v. Texas*, 416 U.S. 909 (1974) (denial of certiorari, Douglas, J., dissenting from the denial), I was aware of Ann Mayes via frequent mainstream news coverage. *See generally,* Phil Hevenee, *Whatever Happened to Toni Mayes After He <sic> Became Ann Mayes?,* HOUSTON POST, April 1, 1978. This is in addition to my becoming aware of an athlete via her attaining cultural ubiquity in 1976—not Caitlyn Jenner, but Renee Richards. *See generally* Ray Kennedy, *She'd Rather Switch—And Fight*, SPORTS ILLUSTRATED, Sept. 6, 1976 at 17–19.
[187] Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 474 (Iowa 1983) (No. 2-68164).
[188] Arizona (1967), Louisiana (1968), Hawaii (1973), Utah and North Carolina (both 1975), Iowa (1976), California (1977), Michigan (1978), Virginia (1979), Guam (1980), Arkansas, D. C. , Massachusetts, New Mexico and Oregon (all 1981) and Georgia (1982). These 16 are

trial court decision that rested entirely on a dictionary definition of "sex,"[189] falling back upon the already-lengthy string of anti-trans Title VII decisions[190] even while crowing about Iowa civil rights law not being bound by federal limitations.[191] When the trial court concluded that "the word or term 'sex' must be construed according to its *accepted* usage,"[192] the 1976 Iowa statute memorializing the Iowa Legislature's *acceptance* of the reality of change of sex should have been front-and-center. However, it was nowhere to be found. Not only was the question of whether that acceptance by the Iowa Legislature had an effect on state sex discrimination law left unanswered by Sommers; it was never even asked.[193]

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in addition to the 1955 Illinois statute. For an examination of the extent to which this body of pro-transsexual law went unnoticed in the late 1970s and early 1980s even in pro-civil rights circles, *see Reflections, supra* note 181, at 130 n.328 (2019). For one of the only other analyses of how the body of trans-positive birth certificate statutes came to be, *see* Jami K. Taylor, Barry L. Tadlock, and Sarah Poggione, *State LGBT Rights Politics Outliers: Transsexual Birth Certificate Laws*, 34 AM. REV. OF POLITICS 245 (2013) (attempting to provide a cohesive political science explanation for why certain states enacted such statutes).

[189] The trial court judge, Dick Strickler, did not provide a citation to the specific dictionary from which he quoted. Sommers v. Iowa Civil Rights Comm'n, No. CL-38-21968 at 1 (Iowa Dist. Ct. Polk Cty. Jan. 14, 1982) ("Either of two divisions or organisms distinguished respectfully as male or female; the sum of the structural, functional and behavioral peculiarities of living beings that subserve reproduction by two inneracting <sic> parents and distinguish male from female. ").

[190] Though noting the early favorable result in Karen Ulane's suit E. Airlines, Inc., 81 C 4411, 1982 WL 31020 (N.D. Ill. Apr. 21, 1982), the Iowa Supreme Court uncritically relied upon Sommers v. Budget Marketing, Inc., 667 F.2d 748 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977); Powell v. Read's, Inc., 436 F. Supp. 369 (D. Md. 1977); and Voyles v. Ralph K. Davies Medical Center, 403 F. Supp. 456 (N.D. Ca1. 1975), *aff'd. without op.*, 570 F.2d 354 (9th Cir. 1978). *Sommers*, 337 N.W.2d at 474.

[191] *Id.* (citing Franklin Mfg. Co. v. Iowa Civil Rights Comm'n, 270 N.W.2d 829 (Iowa 1978)).

[192] Sommers, No. CL-38-21968 at 1 (emphasis added).

[193] And, by this, I mean the birth certificate statute was nowhere to be found in the litigation. During the course of my doctoral studies I reviewed the documents on file at the Polk County Courthouse and at the State Historical Society of Iowa, both in Des Moines. This is inclusive of copies of Audra Sommers' complaints to the Iowa Civil Rights Commission in 1980 up through the decision by the Iowa Supreme Court in 1983 (with the high court's original opinion, *see supra* note 20, seeming to be the only missing document). None of the documents indicate that anyone on either side – plaintiff, defense *or the judiciary* – even knew of the existence of the 1976 birth certificate statute. Katrina C. Rose, *Where the Rubber Left the Road: The Use and Misuse of History in the Quest for the Federal Employment Non-Discrimination Act*, 18 TEMP. POL. & CIV. RTS. L. REV. 397, 450 (2009) [hereinafter *Left the Road*]. Though I do have trouble believing that no one actually was aware of it; the absence should be viewed as stronger evidence that no one viewed it as relevant to the operation of the word "sex" in Iowa law. That, in turn, should *not* be viewed as evidence that it indeed

In 2009, as a preface to its pro-marriage equality *Varnum v. Brien* decision, the Iowa high court proudly and validly recounted the state's record of civil rights advances that can be found in its history of decision-making, dating back as far as the first opinion ever issued by the court,[194] a runaway slave case with a positive outcome for that runaway slave.[195] *Sommers* was not among the civil rights triumphs cited in *Varnum*. Nor was it the case cited in the court's *mea culpa* footnote acknowledging that it has not always "been at the forefront in recognizing civil rights in all areas and at all times."[196] In 2019, had the Iowa Legislature completely dispensed with gender identity protections in the Iowa Civil Rights Act instead of merely preventing future cases such as *Good*, then the 1983 *Sommers* decision would have reasserted itself as governing civil rights precedent under Iowa law.

If by 1983, instead of recognizing transition, Iowa and 16 other state-level jurisdictions had opted explicitly to ban reflecting transition on birth certificates and only one (for hypothetical purposes, let us say Tennessee) had chosen the recognition route,[197] it seems highly likely that the Iowa Supreme Court would have made *some* reference to what would have been a clear negative legislative statement by the state against the underlying concept of transsexuality to rationalize its decision to shut Audra Sommers (and all transsexuals) out of Iowa sex discrimination protections.

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has no such relevance but, instead, that everyone involved failed not just Audra Sommers but all trans people.

[194] Varnum v. Brien, 763 N.W.2d 862, 877 (Iowa 2009) (citing *In re Ralph*, 1 Morris 1 (Iowa 1839); Clark v. Board of Dirs., 24 Iowa 266 (1868); Coger v. North West. Union Packet Co., 37 Iowa 145 (1873)).

[195] As if to anticipatorily contradict Dred Scott v. Sandford, 60 U. S. 393 (1857), the Iowa court surmised, "Property, in the slave, cannot exist without the existence of slavery; the prohibition of the latter annihilates the former, and, this being destroyed, he becomes free." *Ralph*, 1 Morris at 13. For more on the case, *see* John C. Parish, *An Early Fugitive Slave Case West of the Mississippi River*, 6 IOWA J. HIST. L. & POL. 94 (1908).

[196] *Varnum*, 763 N.W.2d at 877 n.4 (citing *In re* Carragher, 128 N.W. 352, 354 (1910) (upholding certain sex-based occupational distinctions)). Oddly enough, despite no trans litigants being involved in Varnum, the court did mention the trans birth certificate statute—but only as part of its discussion of the immutability of sexual orientation. *Id.* at 893.

[197] This is, of course, the converse of the 1983 status quo. Tennessee was, and still is, the only state to legislatively travel the explicit anti-recognition path. 1977 TENN. ACTS Ch. 128. *See also* 2014 TENN. A.G. OP. No. 14-70 (surmising that the existence of the state's anti-trans birth certificate statute would operate to preclude conforming a person's sex designation to post-transition reality on existing police booking sheets, warrants, and court records in Tennessee).

Equally likely, the following year, Seventh Circuit Court of Appeals would have acted similarly. Judge Harlington Wood would not have blithely dismissed what would have been Karen Ulane's *in*ability to obtain a conformed Illinois birth certificate. In the *Ulane v. Eastern Airlines* opinion he actually authored, he refused to ascribe any significance to the conformed birth certificate itself[198] or to even overtly acknowledge that the state in which his court sits then recognized transition (much less that it was the first state to enact a statute that would do so.[199]) Of course, state law would not trump federal law, but it can certainly play an evidentiary role in determining what Congress could have intended.[200] Moreover, acknowledgment of it might have yielded an opinion which, as an element of live litigation, would have been no more favorable to plaintiff Karen Ulane than the *Ulane v. Eastern Airlines* opinion we all know, but as a judicial and historical artifact three-and-a-half decades on would not provoke readers otherwise not prone to hyperbole to place it in the same league of dishonor as *Bowers v. Hardwick*,[201] *Plessy v. Ferguson*[202] and *Dred Scott v. Sandford*.[203]

Prof. William Eskridge has made the case for dictionaries serving the expansive cause as to the question of the meaning of "sex" as utilized by Congress in 1964 for Title VII. There was no unanimity among contemporary mainstream dictionaries, and certainly not unanimity in favor of anti-transgender (and anti-LGB) interpretations of "sex." Some did indeed go well

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[198] *Ulane*, 742 F.2d at 1083.

[199] *See* Katie D. Fletcher, In re Simmons: *A Case for Transsexual Marriage Recognition*, 37 LOY. U. CHI. L. J. 533, 554–55 (2006).

[200] Or *not* intended. The Supreme Court never had the opportunity to rule on the question, but there was administrative precedent holding that Congress's complete failure to discuss how the federal Defense of Marriage Act would operate with respect to heterosexual marriages involving trans people should not inherently operate to the disadvantage of trans people.

> [I]t is notable that Congress did not mention the case of *M. T. v. J. T.*, which recognized a transsexual marriage. Nor did it mention the various State statutes that at the time of consideration of the DOMA provided for the legal recognition of a change of sex designation by postoperative transsexuals. Rather, Congress's focus, as indicated by its consistent reference to homosexuals in the floor discussions and in the House Report, was fixed on, and limited to, the issue of homosexual marriage.

In re Lovo-Lara, 23 I&N Dec. 746, 749–50 (BIA 2005) (omitting citation and footnote).

[201] 478 U.S. 186 (1986).

[202] 163 U.S. 537 (1896).

[203] 60 U.S. 393 (1857).

beyond the biological binary.[204] Yet, well after *Ulane*, dictionaries were used as weapons against transsexuals in areas of the law far beyond Title VII.[205]

In the 2019 Supreme Court Title VII cases, there will be two primary brands of weaponry: an arsenal of dictionaries and the legislative history of Title VII. History in a broader sense stands poised to be either victor or victim, and locked arm-in-arm with whichever position prevails will be trans people.[206] Professor Christopher Leslie has highlighted the degree to which history was victimized even while those seeking marriage equality prevailed in *Obergefell v. Hodges*. "Collectively," Leslie wrote, "the *Obergefell* dissenters have valiantly tried to rewrite America's legal, constitutional, and social history, all in an attempt to justify denying civil rights to same-sex couples."[207] He branded the dissents as "false narratives"[208] Are trans people mere months away from being on the short end of the next batch of false narratives? If so, will they be majorities rather than dissents?

Though the situation is improving, so much of the scholarship on trans law is riddled with omissions and inaccuracies.[209] However, it is disturbing

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[204] William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections,* 127 YALE L.J. 322, 338–39 (2017) (pointing to the dictionaries as part of a discussion of *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (en banc)); s*ee also* Brief of William N. Eskridge, Jr. and Andrew M. Koppelman as Amici Curiae in Support of Employers, *Bostick v. Clayton County, Ga*. at 20–21 (U.S. filed July 3, 2019) (Nos. 17-1618, 17-1623 and 18-107).

[205] *See In re* Gardiner, 42 P.3d 120, 135 (Kan. 2002); *In re* Nash and Barr, Nos. 2002-T-0149 and 2002-T-0179, 2003 Ohio App. LEXIS 6513 (Ohio Ct. App. Dec. 31, 2003).

[206] This should not be read as dismissive the potential impact on cis LGBs from *Bostock v. Clayton County* and *Altitude Express, Inc. v. Zarda* should they result in negative decisions from Supreme Court. However, in light of (1) the degree to which the very existence in the law of trans people could be impacted negatively by Harris and (2) the long history of certain corners of LGB rights advocacy demanding that trans people rely solely expansive readings of Title VII to the exclusion of being included in federal civil rights bills, it is fair to assert that trans people have much more skin in this particular game.

[207] Christopher R. Leslie, *Dissenting from History: The False Narratives of the Obergefell Dissenters*, 92 IND. L.J. 1007 (2017).

[208] *Id*.

[209] Published work in other fields can be even worse. For example, an extensive three-volume set marketed as satisfying the requirements and goals of California's *Fair, Accurate, Inclusive, and Respectful (FAIR) Education Act*, 2011 CAL. LAWS ch. 81, is, in its state-by-state analysis, severely deficient as to transgender history and law. Its chapter on Colorado wholly omits that state's laws related to transition recognition. Mary Jo Wiatrak-Uhlenkott, *Colorado*, in CHUCK STEWART, ED., PROUD HERITAGE: PEOPLE, ISSUES, AND DOCUMENTS OF THE LGBT EXPERIENCE (2014), 855, 899 ("Colorado does not currently have laws expressly related to gender change on state ID"). Missouri's does mention that state's birth certificate statute but offers no insight as to its vintage. Though it does mention *J. L. S. v. D. K. S.*, it omits the St. Louis anti-crossdressing ordinance and inaccurately asserts that the

that in 2015 a law review article could be published asserting that Virginia was *in 2002* the first state to allow trans birth certificate amendments without a surgery requirement.[210] This erased not only the fact that Iowa[211] (and possibly Utah[212]) had done so a quarter-century earlier but that Virginia's statute, surgery-specific though it may be, was enacted during the same era,[213] an era when the only detectable success of the increasingly professionalized gay rights movement was the construction of the myth, still believed in some circles,[214] that trans people are legally and politically untouchable.

Amid the emerging transgender scholarship, a simple question arose regarding the trans community's ability to secure surprising "political and policy victories against the odds." That question is, "[h]ow are they doing

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trans-inclusive hate crime statute was initially gay-only and at thereafter became trans-inclusive. Vanessa Campagna, *Missouri*, in STEWART, ED., PROUD HERITAGE, *supra* at 1039–47. The single paragraph on identification law in Iowa's chapter essentially restates the wording of the birth certificate statute, but with no indication that it came into being before the state repealed its sodomy statute. The chapter does chide the state's hate crime statute for not being trans-inclusive, but again, without any indication of its vintage. Adam Foley, *Iowa*, in STEWART, ED., PROUD HERITAGE, *supra* at 964–71. Similarly, the author of the chapter on Michigan quotes directly from that state's birth certificate statute but says nothing about it having been enacted in 1978. Karyl E. Ketchum, *Michigan*, in STEWART, ED., PROUD HERITAGE, *supra* at 1013, 1018. It is also worth noting that the chapter on Nebraska, though it does mention the state's birth certificate statute, contains no mention of the murder of Brandon Teena in its section on the state's LGBT history. Pat Tetrault, *Nebraska*, in STEWART, ED., PROUD HERITAGE, *supra* at 1055–68. For the marketing of the book, *see Proud Heritage: People, Issues, and Documents of the LGBT Experience,* ABC-CLIO (Dec. 2014), https://www.abc-clio.com/ABC-CLIOCorporate/product.aspx?pc=A4094C.

[210] Nancie Palmer, et. al., *Identity: Societal and Legal Ramifications With Special Focus on Transsexuals*, 39 NOVA L. REV. 117, 147 (2015) ("Virginia was the first state that allowed birth certificate amendments to a trans person's proper gender without requiring sex-reassignment surgery").

[211] 1976 IOWA ACTS ch. 1111, § 1 (denoting "surgery or other treatment").

[212] 1975 UTAH LAWS ch. 64, § 1 (utilizing the term "sex change" but not spelling out what degree of medical involvement would suffice).

[213] 1979 VA. ACTS ch. 711.

[214] The belief carried powerful weight a decade ago during the last serious attempt to enact federal LGB(T) rights legislation. *See generally Left the Road, supra* note 193; ISAAC WEST, TRANSFORMING CITIZENSHIPS: TRANSGENDER ARTICULATIONS OF THE LAW 129–62 (2014). Some feel that, despite rhetoric of inclusion, the belief has not gone away and will again play a destructive role should the shifting winds of D.C. politics makes LGB(T) rights legislation viable again. Matthew S. Bajko, *With Time, Ire Over Pelosi's ENDA Stance Fades*, BAY AREA REP., June 27, 2019 at 26 (quoting trans activist Gwen Smith contrasting House Speaker Nancy Pelosi's opposition to trans-inclusion in the 2007 ENDA bill with her acceptance of it in the Equality Act bill in 2019 by asserting that the latter was "easy, because she knows it is going nowhere in the Senate. I think we'd see her true colors if something was actually on the line").

that?"[215] The sad truth is that it is not always clear. Part II of this article certainly would have benefited from evidence of the same level of active engagement by trans Missourians with their state's legislative process in 1984 as exists regarding New Jersey's original trans birth certificate statute,[216] enacted later that same year.[217] It may have occurred, but at present it has eluded the historical recovery process.

What sadly is clear is that one of the "odds" that trans people have had to overcome in achieving progress *now* is a lack of willingness to acknowledge progress *of the past*.[218] Sometimes this acknowledgement, when it does occur, is quite perverse. No one can credibly argue that, if North Carolina had not, in 2016, already had a transsexual birth certificate, it would have even considered enacting one in the first instance. But the then-41-year-old provision was a part of North Carolina's legal fabric. The wave of anti-trans animosity in 2016 did lead the state's General Assembly to not only nullify a Charlotte civil rights ordinance[219] but also to more broadly gut civil rights laws.[220] But the infamous H.B.2 did not contain an exclamation point

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[215] JAMI K. TAYLOR, DANIEL C. LEWIS, AND DONALD P. HAIDER-MARKEL, THE REMARKABLE RISE OF TRANSGENDER RIGHTS 295 (2018).

[216] 1984 N.J. Pub. L. ch. 191. This surgery-privileging statute was recently superseded by a more modern, non-surgery-specific one. *Babs Siperstein Law*, 2018 N.J. Pub. L. ch. 58.

[217] Records indicate that the bill was sponsored at the urging of a New Jersey-born trans woman then living in D. C. She played a major role in arranging for letters of support for the bill from professionals in the trans community and allies. W. Cary Edwards, et. al., to Gov. Thomas H. Kean, Executive Office Inter-Communication dated Nov. 5, 1984, Gov. Thomas H. Kean, Counsel's Office: Bill Files for the 1984–1985 Legislative Session, S54CO002, Box 31, File S. 1386, New Jersey State Archives, Trenton, New Jersey.

[218] *See generally, Reflections*, *supra* note 181, at 124–38. An example from within the world of activism can be found in how the Human Rights Campaign (HRC), during a time of major tension between establishment-centric gay organizations (such as HRC) and the trans community over the viability of inclusion in federal civil rights legislation, misrepresented the 1979 Los Angeles Civil Rights Ordinance as being non-inclusive even in 2002 when in fact it had been trans-inclusive from day one. Human Rights Campaign, *Los Angeles, City of, CA*, HRC WORKNET, http://www.hrc.org/worknet/asp_search/results.asp?skey=sDetail &id=302 (printout dated Nov. 13, 2002, in possession of author) (URL no longer active); HUMAN RIGHTS CAMPAIGN, *Jurisdictions that Prohibit Employment Discrimination Based on Gender Identity, Characteristics or Expression*, HRC WORKNET, http://www.hrc.org/worknet/asp_search/results_covered.asp?W=2 (printout dated Nov. 13, 2001, in possession of author) (URL no longer active).

[219] CITY OF CHARLOTTE ORD. 7056 (enacted Feb. 22, 2016).

[220] 2016 N.C. LAWS ch. 3 (2nd Ex. Sess.), *since partially revised*, 2017 N.C. LAWS ch. 4. *See also* Dominic Holden, *North Carolina Enacts Law to Allow LGBT Discrimination*, BUZZFEED (last updated Mar. 24, 2016, 12:20 AM), https://www.buzzfeednews.com/article/dominicholden/north-carolina-lgbt-discrimintion.

converting North Carolina's 1975 pro-transsexual birth certificate statute to a Tennessee-style anti-transsexual birth certificate statute. The 1975 pro-trans law was even relied upon by 21st century opponents of trans rights during the state's nearly-instantaneous proposal and passage of H.B. 2 as a means to paint that bill as reasonable.[221] The same Republican super-majority and the same Republican governor who quickly made H.B. 2 part of the law of North Carolina could have wiped out the state's recognition of transition. But they did not.

Professor Eskridge and Professor John Ferejohn identify a "super-statute" as:

> [A] law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does "stick" in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law-including an effect beyond the four corners of the statute.[222]

One could argue that the events of 2016 are evidence that the 1975 transsexual birth certificate statute, at least to some degree, established a new normative framework for state policy (in that it recognized surgical transition). In addition, it had become firmly rooted in the public culture in that even anti-LGBT politicians impliedly professed approval of it, albeit disingenuously for the purpose of enacting anti-civil rights legislation. Yet it would be hyperbolic—in fact, bordering on silly—to argue that transsexual birth certificate statutes are the caliber of "super-statute" of which Eskridge and Ferejohn wrote.[223]

They are, however, neither "legislative compromises that are short-term fixes to bigger problems and cannot easily be defended as the best policy result that can be achieved" nor even, despite seemingly dealing with but a single word, statutes that "cover narrow subject areas."[224] For trans people, if they are not super-statutes *per se*, then they are specialized super-statutes.

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[221] *See generally,* House Floor Debate on H.B. 2, N.C. General Assembly, March 23, 2016, *audio available at* https://www.ncleg.gov/DocumentSites/HouseDocuments/2015-2016%20Session/Audio%20Archives/2016/03-23-2016.mp3 (last visited Aug. 6, 2019).
[222] William N. Eskridge, Jr., & John Ferejohn, *Super-Statutes,* 50 DUKE L.J. 1215 (2001).
[223] The Civil Rights Act of 1964 is but one of their examples of "super-statutes." *Id.* at 1237.
[224] *Id.* at 1215 (offering the *Alcohol and Drug Abuse Amendments*, Pub. L. No. 98-24, 97 Stat. 175 (1983); Hawaii Reciprocal Beneficiaries Act, 1997 HAW ACTS Ch. 383 as statutes that are *not* super).

That is how they are used in everyday life by everyday trans people. Improper conservative judicial reliance on dictionaries and even a bit of laziness within the trans community and among its legal allies in not thinking beyond the "four corners" of birth certificate statutory language has been a roadblock to them becoming far more in far more jurisdictions than the few that, thus far, have opened their eyes to what a state's transition recognition really means.

CONCLUSION

During the heat of the 2012 presidential campaign, the *Washington Blade* ran an opinion piece about the then-current state of trans rights. "Trans Americans enjoy robust bias protections," perennial Maryland legislative candidate[225] Dana Beyer declared.[226] Far from being just an overly optimistic analysis of law by a non-attorney, it was a dangerous fit of ill-reasoned castigation of a majority of the trans community that was, and still is, unwilling to accept smoke and mirrors in place of statutory bedrock. "ENDA," she asserted, was "not a legal necessity today to protect transgender Americans" but, instead, merely a "political necessity."[227]

Criticism of her analysis is not incompatible with advocacy for expansive use of trans birth certificate statutes. Yes, there was much to be happy about on the *Price Waterhouse v. Hopkins* front in 2012. The nightmarish *Holloway-Sommers-Ulane* triumvirate had been joined on the trans legal landscape by decisions such as *Schwenk v. Hartford*,[228] *Rosa v.*

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[225] Michael K. Lavers, *Jealous Wins Md. Gubernatorial Primary*, WASH. BLADE, June 29, 2018 at 4, 8; Michael K. Lavers, *Mizeur Falls Short in Maryland*, WASH. BLADE, June 27, 2014 at 1, 4; Lou Chibbaro, Jr., *Dana Beyer to Launch Maryland Delegate Bid*, WASH. BLADE (June 24, 2010, 2:16 PM), https://www.washingtonblade.com/2010/06/24/dana-beyer-to-launch-maryland-delegate-bid/.; Will O'Bryan, *Political Transition: Democrat Dana Beyer Fights to be Maryland's First Transgender Delegate*, METRO WEEKLY (Aug. 9, 2006), https://www.metroweekly.com/2006/08/political-transition/.

[226] I do understand that authors rarely have full control over the titles of their work once they are accepted for print. I've had a few columns printed in the *Washington Blade*; none ran with the exact title I'd submitted. Had Beyer not used the key word "robust," for which I have long criticized her column, it would be unfair to attribute that phraseology to her. However, that language does appear in the body of the column – arguably with even more of a Pollyanna view of the law than the title suggests: "[L]et's acknowledge and use our robust protections, and let's not promote ignorance because we're unable to adapt to circumstances that have radically changed for the better." Dana Beyer, *Trans Americans Enjoy Robust Bias Protections*, WASH. BLADE, June 29, 2012 at 21.

[227] *Id.*

[228] 204 F.3d 1187 (9th Cir. 2000).

Park West Bank,[229] *Smith v. City of Salem*,[230] *Barnes v. City of Cincinnati*[231] and *Glenn v. Brumby*.[232] Joining them that year was *Macy v. Holder*, the EEOC decision formally disavowing the anti-trans view of Title VII and specifically conceding "that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on…sex,' and such discrimination violates Title VII."[233]

Schwenk, Rosa, Smith, Barnes, Glenn, and *Macy* all *joined* the old triumvirate; nothing truly *replaced* it, even in circuits that adopted *Price Waterhouse*-centric reasoning. With top LGB powerbrokers having long before decided that marriage equality was *the* agenda item, any chance whatsoever of ENDA becoming law had died during the first biennium of the Obama Administration.[234] While it lay dead in Congress, Title VII still only said "race, color, religion, sex, or national origin."[235]

There was no "sexual orientation." And there was no "gender identity or expression." And then came the Trump Administration.

LGBT America spent much of the summer and early fall of 2018 concerned about the nomination of Brett Kavanaugh to the U.S. Supreme Court, both because of his past[236] and because of what a future with him on the high court might bring.[237] Well before Kavanaugh was nominated, the high court had dodged Gavin Grimm's case.[238] But with Kavanaugh on the Court as the replacement for Anthony Kennedy, on April 22, 2019, the Court granted certiorari in *Harris Funeral Homes v. EEOC* on the specific questions of whether Title VII covers trans people *per se* and whether it covers trans people via the *Price Waterhouse* sex stereotyping theory.[239]

The case originated in Michigan.[240] Much like Missouri of today and Iowa of 1983, Michigan is a state that has a sex discrimination statute *and* a

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[229] 214 F.3d 213 (1st Cir. 2000).
[230] 378 F.3d 566 (6th Cir. 2004).
[231] 401 F.3d 729 (6th Cir. 2005).
[232] 663 F.3d 1312 (11th Cir. 2011).
[233] App. No. 0120120821, Agency No. ATF-2011-00751 at *14 (EEOC Apr. 20, 2012).
[234] *Future Already Been Forgotten?*, *supra* note 133, at 576–94.
[235] Civil Rights Act of 1964, 42 U.S.C.S §2000e.
[236] Peter Rosenstein, *Will the Senate Confirm a Lying Sleazebag?*, WASH. BLADE, Oct. 5, 2018 at 19.
[237] Kathi Wolfe, *Be Afraid, Be Very Afraid, of Brett Kavanaugh*, WASH. BLADE, July 13, 2018 at 18.
[238] Gloucester Cty. Sch. Bd. v. G. G., 137 S. Ct. 1239 (2017).
[239] 139 S. Ct. 1599 (2019).
[240] EEOC v. R. G. & G. R. Harris Funeral Homes, Inc., 884 F. 3d 560 (6th Cir. 2018).

transsexual birth certificate statute. However, it does not have a specifically-enumerated statutory avenue for trans people to seek redress for bigotry that impedes their ability to find and maintain employment and housing as well as to access public accommodations on the same terms as all others. A Kavanaugh-infused Supreme Court could rule against the tapestry of trans-inclusive interpretations of federal law that trans people have, largely on an *ad hoc* basis, used in recent years. Despite that tapestry being anything but "robust," in many instances, trans people have been told by cis gay power brokers to rely on it to the exclusive consideration of adding trans protections to LGB-only bills,[241] notably the pre-2007 ENDA proposals.[242] If that tapestry disintegrates from merely not robust to wholly non-existent,[243] trans people will need to know as much as we can about what we have to fall back on. Those who might be handling such cases need to know as well.

And so do those who will be deciding the cases. But the outlook for accurate decision-making is grim in a world where a federal appellate court can, in 2019, issue an opinion that can cause an observer to sincerely question whether it knows the difference between sexual orientation and gender identity or the history of the terms being defined to mutually exclude one another.[244] No precedent that rests on the demonstrably inaccurate

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[241] *See* Cathy Brennan, *Grave Disservice*, WASH. BLADE, Jan. 5, 2001 at 27; Cathy Brennan, *Banning Discrimination Based on Sexual Orientation: A Primer on Maryland's New Civil Rights Law*, MD. BAR J., May–June 2002, at 50, 53–54 (touting the state's 2001 gay-only rights law and leaving *Price Waterhouse* for trans people as an "emerging legal theor[y]," taking up where the 2001 *Washington Blade* item, from prior to the bill's passage, left off).

[242] This is in addition to the overly optimistic assessments of Beyer and those of like mind. Katrina C. Rose, *Three Names in Ohio:* In re Bicknell, In re Maloney *and Hope for Recognition that the Gay-Transgender Twain Has Met*, 25 T. JEFFERSON L. REV. 89, 99 n.46 (2002) (citing a representative of HRC for a 1999 assertion that the combination of (1) whatever may sprout from *Price Waterhouse v. Hopkins* and (2) the non-inclusive version of ENDA that HRC insisted upon up through the ENDA Crisis of 2007 as combining to leave no possibility that any trans person would not be covered by federal law).

[243] Arianne Cohen, *The Trump Administration is Canceling LGBTQ People on Government Websites*, Fast Company (Nov. 21, 2019), https://www.fastcompany.com/90434456/the-trump-administration-is-canceling-lgbtq-people-on-government-websites (noting that the Centers for Disease Control and Prevention replaced "LGBTQ" with "LGB" on pages about queer youth, while also deleting certain transgender statistics).

[244] In *Wittmer v. Phillips 66 Co.*, 304 F. Supp. 3d 627, 634 (S. D. Tex. 2018), the district court stated that the Fifth Circuit had not yet addressed the question of whether Title VII encompassed transgender discrimination. However, Judge Ho of the Fifth Circuit countered that "we have addressed the issue. In *Blum v. Gulf Oil Corp*., 597 F.2d 936 (5th Cir. 1979), we expressly held that Title VII does not prohibit discrimination on the basis of *sexual orientation*."

presumption that enactment of a gay-only rights bill would have had any positive impact on trans people as trans people should have any force today. Yet it does.

Even in a trans-friendly *Harris* ruling, it seems unlikely that the high court or even those arguing the case will delve into the still-largely-untapped wealth of state trans law. A trans-averse ruling will leave all trans people in Michigan in the position of needing an alternative to Title VII, an alternative that seems unlikely to emerge at the federal level any time soon, even if a Democrat enters the White House in 2021. They will need to make arguments based on their own state's law. Michigan's legal framework contains the Elliott-Larsen Civil Rights Act (ELCRA)[245] *and* a trans birth certificate statute, enacted two years apart.[246]

The concept of interpreting the "sex" ELCRA provision to include trans people is not unheard of. When Michigan's civil rights agency decided to do so (along with interpreting it to include sexual orientation),[247] the decision was not without pushback. Republican Attorney General Bill Schuette quickly issued an opinion as dictionary reliant as the *R.M.A.* dissent. Absent, though, was any mention of the Michigan Legislature having altered the legal paradigm of "sex" in a trans-positive manner two years after it passed the ELCRA.[248] Schuette's Democratic successor, Dana Nessel, adopted the trans-positive view espoused by the civil rights commission,[249] but that is not an ultimate solution. It is merely a pause until the inevitable resolution by Michigan's appellate courts, which have demonstrated a willingness to go out of their way to allow a cause of action by cis plaintiffs *against* trans equality.[250]

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[245] 1976 MICH. ACTS ch. 453, *currently codified in relevant part at* MICH. STAT. §37.2202(1)(a) (2019).
[246] 1978 MICH. ACTS. ch. 368, *currently codified in relevant part at* MICH. STAT. §333.2831(c) (2019).
[247] Kristen Jordan Shamus, *Equal at Last? Michigan Civil Rights Commission Bans LGBTQ Discrimination*, DETROIT FREE PRESS (last updated May 22, 2018, 9:48 AM), https://www.freep.com/story/news/local/michigan/2018/05/21/michigan-civil-rights-commission-elliott-larsen-act-lgbtq-discrimination/630552002/.
[248] 2018 MICH. A.G. OP. No. 7305 (July 20, 2018).
[249] Kristen Jordan Shamus, *AG Dana Nessel to Reconsider LGBTQ Rights Protections*, DETROIT FREE PRESS (last updated Feb. 2, 2019, 10:13 AM), https://www.freep.com/story/news/local/michigan/2019/02/01/lgbtq-michigan-civil-rights-law/2743034002/.
[250] Cormier v. PF Fitness-Midland, LLC, 909 N.W.2d 266 (Mich. 2018), *rev'd in part*, 2017 Mich. App. LEXIS 893 (Mich. Ct. App. June 1, 2017).

And, riding the pendulum back to the possibility of a positive *Harris* ruling from the Supreme Court, *some* trans people in Michigan will *still* need to be aware of, and be able to make, an argument for the ELCRA and the trans birth certificate statute working in concert to the benefit of trans civil rights. For that positive *Harris* ruling will do nothing for those caught in the Michigan analogue of the gap presented in this Article's introduction. The Missouri Human Rights Act applies to employers of at least six people.[251] The ELCRA, however, encompasses employers of at least *one* person.[252]

The theory that the Missouri Supreme Court breathed life into via *R.M.A.*'s footnote seven will not be an academic one irrespective of how the U.S. Supreme Court rules in *Harris*. However, a negative outcome will make its vitality an imperative not merely for trans people in Missouri and Michigan but also for those in Arizona,[253] Kentucky,[254] Louisiana,[255] Nebraska,[256] North Carolina,[257] Wisconsin,[258] and Virginia.[259] The statutory framework in each of these states contains a trans birth certificate provision as well as one or more provisions prohibiting discrimination based on sex.[260] But each lacks an explicit statutory prohibition against discrimination against trans people. Even Wisconsin, almost four decades after it became the first to prohibit discrimination based on sexual orientation—defined, of course, to

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[251] MO. REV. STAT. § 213.010(8) (2019).
[252] MICH. STAT. § 333.2831(c) (2019).
[253] ARIZ. STAT. § 36-337(A)(3) (2019); ARIZ. STAT. § 41-1463(B) (2019).
[254] KY. REV. STAT. § 213.121(5) (2019); KY. REV. STAT. § 344.040(1) (2019).
[255] LA. REV. STAT. § 40:62 (2019); LA. REV. STAT. § 23:332 (2019).
[256] NEB. REV. STAT. § 48-1104 (2019); NEB. REV. STAT. § 71-604.01 (2019).
[257] N.C. GEN. STAT. § 143-422.2 (2019); N.C. GEN. STAT. § 130A-118(b)(4) (2019). North Carolina's sex discrimination law postdates the state's transsexual birth certificate statute. *Compare* Equal Employment Practices Act, 1977 N.C. LAWS ch. 726; *with* An Act to Amend G. S. 130-60 to Authorize Issuance of a New Birth Certificate After Sex Reassignment Surgery, 1975 N.C. LAWS ch. 556.
[258] WIS. STAT. § 111.321 (2019); WIS. STAT. § 69.15(4)(b) (2019).
[259] VA. CODE §2.2-3900, et. seq. (2019); VA. CODE § 32.1-269(E) (2019). It should be noted that with the Democratic sweep in its 2019 elections, Virginia may become the next state to enact explicit LGBTQ rights legislation. Alex Bollinger, *Danica Roem Just Became the First Trans Person Reelected to a State Legislature*, LGBTQ NATION (Nov. 6, 2019), https://www.lgbtqnation.com/2019/11/danica-roem-just-became-first-trans-person-reelected-state-legislature/; s*ee also* 2020 VA. S.B. 868.
[260] The list would also include Alabama and Georgia, each of which has a trans birth certificate statute. CODE OF ALA. § 22-9A-19(d) (2019); CODE OF GA. § 31-10-23(e) (2019). However, both not only lack sexual orientation and gender identity protections but also lack sex discrimination protections.

exclude trans people[261]—leaves those who can use its (or another state's) trans birth certificate statute with no avenue of redress against discrimination.

This Article has taken a somewhat convoluted route. But it is one necessitated by the degree to which the rationale of footnote seven has been ignored prior to *R.M.A.*. Beginning in Iowa, this Article did spend most of its time in Missouri, only to conclude in Michigan, all in service of a legal theory that should have been self-evident decades ago but which disturbing percentages of multiple communities, legal professionals, historians and LGB people, still refuse to recognize as even a possibility, much less a reality. This Article also undergirds a historico-legal reality that goes much deeper than footnote seven: that long before any legislatures seriously considered LGB anti-discrimination measures, several not only considered but approved of conferring positive legal status upon change of sex.[262] *That* is robust.

Those acts of conferring—when and where they happened—did more than merely give individual trans people the ability to live life without identification documents that would out them at every turn. Contrary to what the calcified, minimalistic definitions in the mainstream dictionaries selectively relied upon by certain judges say, those legislatures changed "sex,"[263] even if the dictionaries did not acknowledge it. The birth certificate statutes may not rise to the level of "super statutes" as Eskridge and Ferejohn envision the term,[264] but the thousands upon thousands of trans people who have used them might argue differently. For it is impossible to use such a statute by only staying within its four corners.[265] Anyone who makes such four-corner use thereafter goes out into the world. Seeking or attempting to maintain employment. Seeking or attempting to maintain housing. Making use of any number of public accommodations.

With the help of amended/new birth certificates (as well as drivers licenses, passports, etc.), it is all done as who they really are while interacting

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[261] WIS. STAT. § 111.32(13m) (2019) ("[H]aving a preference for heterosexuality, homosexuality or bisexuality, having a history of such a preference or being identified with such a preference.").

[262] *See generally*, *Reflections, supra* note 181, at 126–31.

[263] This is not necessarily a theory put forth by Joanne Meyerowitz in her important work on the history of transsexuality, but it would be improper not to pay homage to her research. JOANNE MEYEROWITZ, HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES (2002).

[264] Eskridge & Ferejohn, *supra* note 222, at 1215.

[265] *Id*. at 1216 ("[T]he super-statute and its institutional or normative principles have a broad effect on the law-including an effect beyond the four comers of the statute.").

with at least some individuals who, if given absolute power over transition, would "mandate it out of existence."[266]

The first trans person to use the first trans birth certificate statute, whoever she or he may have been, took that statute beyond its textual four corners the instant that that person left the courthouse with a government-sanctioned change of sex. As the Illinois Supreme Court held in *City of Chicago v. Wilson*, that first statute had legal impact well beyond its four corners even for those who had yet to use it.[267] There has never been a legitimate reason to view the statutory changes that recognize such a core aspect of life as transition as not having effect throughout the entirety of the body of law of those states which have enacted them. Yet that has rarely stopped such erasure from taking place. What stopped the Iowa Supreme Court in 1983 from recognizing the effect in *Sommers*, at least beyond conservative inertia, is unclear, though it is clear that no one on either side made the argument for it. What is also clear is that, at present, decisions such as *Wilson* and *R.M.A.* —generations removed from one another—are exceptions. Irrespective of how the U.S. Supreme Court rules in *Harris*, these decisions should become the rule. Nevertheless, this Article should not be read as offering a prediction as to whether they will.

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[266] RAYMOND, TRANSSEXUAL EMPIRE, *supra* note 8, at 178. Raymond is a largely discredited, transphobic second-wave feminist. However, trans-erasive thought has begun to creep into the judiciary. *See* United States v. Varner, 2020 U.S. App. LEXIS 1346 at *9–*10 (5th Cir. Jan. 15, 2020) (Duncan, J.) (suggesting strongly that any acknowledgement whatsoever of trans litigants' identities should be considered judicial impartiality that prejudices opposing parties).

[267] With state-city pre-emption being the basis for the partial invalidation of Chicago's anti-crossdressing ordinance due to the state birth certificate statute, the ordinance should, therefore, have been equally invalid, as against a pre-surgical transsexual person, the moment that the law took effect in 1955 as it was held to be regarding the Feb. 1974 arrest that set the litigation in motion. City of Chicago v. Wilson, 389 N.E.2d 522 (Ill. 1978).

APPENDIX A: RELEVANT VOTING RECORDS OF THOSE WHO SERVED IN BOTH THE 1969-1970 AND THE 1975-1976 SESSIONS OF THE IOWA LEGISLATURE

Legislator	VOTE ON ADDITION OF "SEX" TO IOWA CIVIL RIGHTS ACT: 1969 H.F. 251 House floor vote: Feb. 16, 1970 Senate floor vote: March 25, 1970				VOTE ON TRANSSEXUAL BIRTH CERTIFICATE BILL: 1975 H.F. 798 House floor vote: April 28, 1975 Senate floor vote: Jan. 30, 1976			
	Chamber	Yes	No	A/NV	Chamber	Yes	No	A/NV
Leonard C. Andersen	House	•			Senate	•		
Irvin L. Bergman	House	•			Senate	•		
Glen E. Bortell	Senate			•	House		•	
James E. Briles	Senate	•			Senate	•		
James T. Caffrey	House	•			House	•		
Dale M. Cochran	House	•			House	•		
C. Joseph Coleman	Senate	•			Senate			•
Frank Crabb	Senate	•			Senate		•	
Lucas J. DeKoster	Senate	•			Senate	•		
Elmer H. Den Herder	House			•	House	•		
Minnette Doderer	Senate	•			Senate	•		
Donald V. Doyle	House	•			House	•		
Richard F. Drake	House	•			House			•
Keith H. Dunton	House	•			House	•		
Gene W. Glenn	Senate	•			Senate	•		
James W. Griffin, Sr.	Senate	•			Senate			•
Willard R. Hansen	House	•			Senate	•		
Eugene M. Hill	Senate	•			Senate			•
Norman G. Jesse	House	•			House	•		
Robert M. Kreamer	House	•			House		•	
Clifton C. Lamborn	Senate	•			Senate	•		
James I. Middleswart	House	•			House	•		
Floyd H. Millen	House	•			House	•		
Charles P. Miller	House	•			Senate			•
Elizabeth R. Miller	House	•			Senate			•
Fred W. Nolting	House	•			Senate			•
Joan Orr	Senate	•			House	•		
William D. Palmer	Senate	•			Senate	•		
Charles N. Poncy	House	•			House	•		
Berl E. Priebe	House	•			Senate	•		
W.R. Rabedeaux	Senate	•			Senate	•		
Norman G. Rodgers	Senate	•			Senate	•		
Roger J. Shaff	Senate	•			Senate	•		
Elizabeth Shaw	Senate	•			Senate	•		
Delwyn Stromer	House			•	House	•		
Dale L. Tieden	Senate	•			Senate	•		
Bass Van Gilst	Senate	•			Senate	•		
Andrew Varley	House	•			House	•		
Richard W. Welden	House			•	House			•
James D. Wells	House	•			House	•		
William P. Winkelman	House		•		Senate	•		
TOTALS		**36**	**1**	**4**		**30**	**3**	**8**

APPENDIX B: RELEVANT VOTING RECORDS OF THOSE WHO SERVED IN BOTH THE 1983-1984 AND THE 1985-1986 SESSIONS OF THE MISSOURI GENERAL ASSEMBLY

Legislator	VOTE(S) ON TRANSSEXUAL BIRTH CERTIFICATE BILL: 1984 S.B. 574 1st Senate floor vote: Feb. 8th House floor vote: April 3rd 2nd Senate floor vote: April 5th				VOTE ON MISSOURI HUMAN RIGHTS ACT BILL: 1986 S.B. 513 1st Senate floor vote: April 2nd House floor vote: April 30th 2nd Senate floor vote: April 30th			
	Chamber	Yes	No	A/NV	Chamber	Yes	No	A/NV
Mark C. Abel					House	•		
G.M. Allen	House			•	House	•		
Ron Auer	House	•			House	•		
Gracia Yancey Backer	House	•			House	•		
J.B. (Jet) Banks	Senate	•			Senate			• •
Stephen (Steve) Banton	House	•			House	•		
Todd Barklage	House	•						
Francis (Bud) Barnes	House	•			House	•		
Jim Barnes	House	•			House	•		
Robert (Bob) Barney	House	•			House	•		
Philip M. Barry	House	•			House	•		
John F. Bass	Senate	• •			Senate	• •		
Richard P. Beard	House	•						
Charles Becker	House	•			House	•		
Karen McCarthy Benson	House	•						
Frank Bild	Senate	•		•	Senate	• •		
Glenn H. Binger	House	•			House	•		
John A. Birch	House	•			House	•		
Mary Groves Bland	House	•			House	•		
Leroy Blunt	House	•			House	•		
Douglas Boschert					House		•	
Francis (Fran) R. Brady	House	•			House	•		
Larry Braungardt	House			•				
Russell G. Brockfield	House	•			House	•		
Everett W. Brown	House	•			House	•		
Galen Browning	House	•			House		•	
Fred B. Brummel	House	•			House	•		
Jerry W. Burch	House			•	House	•		
Flavel J. Butts	House	•			House	•		
Roy Cagle	House	•			House	•		
Marion G. Cairns	House	•			House	•		
E.J. Cantrell	House			•	House	•		
Steven R. Carroll					House	•		
Mervin R. Case					House	•		
Harold L. Caskey	Senate	• •			Senate	• •		
Gail L. Chatfield					House	•		
Doyle Childers	House	•			House	•		
William (Bill) Clay, Jr.	House			•	House	•		
Donna Ann Coleman	House	•						
Bonnie Sue Cooper	House	•			House	•		
Fred E. (Gene) Copeland	House	•			House	•		
Gerald (Jerry) Cox	House	•						
Norwood Creason	House	•			House			•

Legislator	VOTE(S) ON TRANSSEXUAL BIRTH CERTIFICATE BILL: 1984 S.B. 574 1st Senate floor vote: Feb. 8th House floor vote: April 3rd 2nd Senate floor vote: April 5th				VOTE ON MISSOURI HUMAN RIGHTS ACT BILL: 1986 S.B. 513 1st Senate floor vote: April 2nd House floor vote: April 30th 2nd Senate floor vote: April 30th			
	Chamber	Yes	No	A/NV	Chamber	Yes	No	A/NV
Dewey G. Crump	House	•			House	•		
Wayne Crump	House	•			House			•
Phil B. Curls	Senate	• •			Senate	• •		
George P. Dames	House	•			House	•		
Fletcher Daniels					House	•		
Mrs. Pat Danner	Senate	• •			Senate		• •	
Steve Danner	House	•			House	•		
Michael P. David	House	•			House	•		
W.T. (Bill) Dawson	House			•	House			•
John Dennis	Senate	•		•	Senate	• •		
Ronnie DePasco	House	•			House	•		
Edwin L. Dirck	Senate	• •			Senate	• •		
David Doctorian	Senate	• •			Senate	• •		
Lorita (Laurie) B. Donovan	House	•			House	•		
Patrick Dougherty	House	•			House	•		
Sam Doutt	House	•			House	•		
Vic Downing	House			•	House	•		
Joseph L. (Joe) Driskill	House	•			House	•		
Robert L. Dunning, Sr.	House	•			House	•		
Fred Dyer	Senate	• •			Senate	• •		
Charlie Eberspacher					House	•		
Russ Egan	House	•			House	•		
Frank C. Ellis	House	•			House	•		
Harold J. Esser	House			•				
Herb C. Fallert	House	•			House	•		
Alex J. Fazzino	House	•						
Bob Feigenbaum	House	•			House	•		
Ken F. Fiebelman					House	•		
F.A. Findley	House	•			House	•		
Francis E. Flotron, Jr.	House	•			House	•		
Louis H. Ford	House			•	House	•		
Bob Fowler	House	•						
John J. Fowler	House	•			House	•		
Estil V. Fretwell	House	•			House	•		
Donald L. Gann	House	•			House	•		
Clifford W. (Jack) Gannon	Senate	• •			Senate	• •		
Howard M. Garrett	House	•						
Jack Goldman	House	•			House	•		
Wayne Goode	House	•			Senate	• •		
Russell Goward	House	•			House	•		
Christopher Graham	House	•			House	•		
Bob F. Griffin (Speaker)	House	•			House	•		
R.B. Grisham	House	•			House	•		
Ray Hamlett	House	•			House	•		
Doug Harpool	House	•			House	•		
Betty Cooper Hearnes	House	•			House	•		
Ralph Hedrick	House	•			House	•		
Patrick J. Hickey	House	•			House	•		
Harry Hill	House	•			House	•		

Legislator	VOTE(S) ON TRANSSEXUAL BIRTH CERTIFICATE BILL: 1984 S.B. 574 1st Senate floor vote: Feb. 8th House floor vote: April 3rd 2nd Senate floor vote: April 5th				VOTE ON MISSOURI HUMAN RIGHTS ACT BILL: 1986 S.B. 513 1st Senate floor vote: April 2nd House floor vote: April 30th 2nd Senate floor vote: April 30th			
	Chamber	Yes	No	A/NV	Chamber	Yes	No	A/NV
George K. Hoblitzelle	House	•			House	•		
Bob Holden	House	•			House	•		
Derek Holland	House	•			House	•		
W.O. (Bob) Howard					House	•		
Mildred Humphreys					House	•		
Roy Humphreys, Jr.	House	•						
Robert (Bob) Jackson	House	•						
Ken Jacob	House	•			House	•		
Martha Jarman	House	•			House	•		
Robert Thane (Bob) Johnson	Senate	•	•		Senate	•	•	
A. Clifford Jones	Senate	•	•		Senate		•	•
Orchid (Mrs. Leon) Jordan	House	•			House	•		
Mary C. Kasten	House	•			House	•		
Timothy M. (Tim) Kelley	House	•			House		•	
Chris Kelly	House	•			House	•		
Garnett A. Kelly	House			•				
Don Koller					House	•		
Gene Lang	House			•	House	•		
Ken Legan	House	•			House		•	
William E. (Bud) Lewis	House	•			House	•		
Sheila Lumpe	House	•			House	•		
Mike Lybyer	Senate	•	•		Senate	•	•	
Fred Lynn	House	•			House	•		
L.W. (Lew) Maddox	House	•			House	•		
W.A. (Bill) Markland	House	•			House	•		
Gladys Marriott	House	•			House			•
T.W. (Tom) Marshall					House	•		
Jan Martinette					House	•		
Jean H. Mathews	House	•			House	•		
James L. (Jim) Mathewson	Senate	•	•		Senate	•	•	
Jerry E. McBride	House	•			House	•		
Karen McCarthy					House	•		
Thomas W. McCarthy	Senate		•	•	Senate		•	•
Claire McCaskill	House	•			House	•		
Joe McCracken	House	•			House	•		
William (Bill) McKenna	House	•			House	•		
Nolan G. McNeill	House	•						
Donald R. McQuitty					House	•		
Emory Melton	Senate	•	•		Senate		•	•
Norman Merrell	Senate	•		•	Senate	•		•
Wesley A. Miller	House	•			House		•	
Jim Mitchell	House	•			House	•		
Neil Molloy					House	•		
Marjorie (Jean) Montgomery					House	•		
Annette N. Morgan	House	•			House	•		
Travis Morrison	House	•			House	•		

Legislator	VOTE(S) ON TRANSSEXUAL BIRTH CERTIFICATE BILL: 1984 S.B. 574 1st Senate floor vote: Feb. 8th House floor vote: April 3rd 2nd Senate floor vote: April 5th				VOTE ON MISSOURI HUMAN RIGHTS ACT BILL: 1986 S.B. 513 1st Senate floor vote: April 2nd House floor vote: April 30th 2nd Senate floor vote: April 30th			
	Chamber	Yes	No	A/NV	Chamber	Yes	No	A/NV
Walt Mueller	House	•			House			•
James W. (Jim) Murphy	Senate	• •						
Jim Murphy	House			•	House	•		
Al Nilges	House	•			House	•		
W. Eugene Oakley	House	•						
Judith O'Connor	House			•	House			•
Matt O'Neill					House	•		
Joseph R. Ortwerth	House	•			House	•		
D.R. (Ozzie) Osbourn	House	•						
Lois Osbourn					House	•		
William R. O'Toole	House	•						
Edward E. Ottinger	House	•			House		•	
Paul (Pete) Page	House	•			House	•		
Henry A. Panethiere	Senate	• •			Senate	• •		
Carole Roper Park	House	•			House	•		
Lester R. Patterson	House			•	House	•		
Jim Pauley	House	•			House	•		
Walter R. Peterson, Jr.	House	•			House	•		
Jack E. Pohrer	House	•						
Marvin E. Proffer	House	•			House			•
Edward E. Quick					Senate	• •		
William (Bill) Raisch	House			•	House	•		
Don Randall	House	•						
David L. Rauch	House			•	House			•
Sandra Lee Reeves	House			•	House	•		
Tony Ribaudo	House			•	House	•		
James N. Riley	House	•			House	•		
Henry C. Rizzo					House	•		
Randy Robb	House	•						
Richard (Dick) Roehl	House	•						
Larry Rohrbach	House	•			House		•	
James (Jay) Russell	House			•	House			•
John T. Russell	Senate	• •			Senate	• •		
Jeff W. Schaeperkoetter	House	•			House	•		
Edward H. Schellhorn					House	•		
Earl L. Schlef	House			•	House	•		
John D. Schneider	Senate	• •			Senate	•		•
Ed Schwaneke	House	•			House	•		
David E. Scott	House	•						
Delbert Scott					House	•		
John E. Scott	Senate	• •			Senate	• •		
Vernon E. Scoville	House	•			House	•		
Robert (Bob) Sego	House	•			House	•		
Stephen R. Sharp					Senate			• •
Gary D. Sharpe	House	•						
S. Sue Shear	House	•			House	•		
O.L. Shelton	House	•			House	•		
Bill Skaggs	House	•			House	•		
Dennis Smith	Senate	• •			Senate	•	•	
James (Jim) Smith	House	•						

Legislator	VOTE(S) ON TRANSSEXUAL BIRTH CERTIFICATE BILL: 1984 S.B. 574 1st Senate floor vote: Feb. 8th House floor vote: April 3rd 2nd Senate floor vote: April 5th						VOTE ON MISSOURI HUMAN RIGHTS ACT BILL: 1986 S.B. 513 1st Senate floor vote: April 2nd House floor vote: April 30th 2nd Senate floor vote: April 30th					
	Chamber	Yes		No		A/NV	Chamber	Yes		No		A/NV
Melvin Smith	House	•					House			•		
Todd P. Smith							House	•				
Phil Snowden	Senate	•	•									
Danny Staples	Senate	•	•				Senate		•			•	
Earle F. Staponski	House	•					House	•				
David L. Steelman	House	•										
Kaye H. Steinmetz	House	•					House	•				
Ron Stivison							House	•				
James R. (Jim) Strong	Senate	•	•				Senate		•			•	
Chuck Surface							House	•				
James Talent							House	•				
Lynn Thomas							House	•				
Nelson B. Tinnin	Senate	•	•									
Joan T. Tobin							House	•				
Merrill M. Townley	House	•					House			•		
Joseph L. Treadway	House	•					House	•				
Irene Treppler	House					•	Senate	•	•				
Charles Quincy Troupe	House	•					House	•				
Ralph Uthault, Jr.	Senate	•	•				Senate	•	•				
Thomas Albert Villa	House	•										
Nathan B. Walker	House	•										
Elbert A. Walton, Jr.	House					•	House	•				
Bob Ward	House	•					House	•				
Winnie P. Weber	House					•	House	•				
Richard M. Webster	Senate	•	•				Senate		•	•			
William L. Webster	House											
William E. Whitehall	House	•					House	•				
Harry Wiggins	Senate	•	•				Senate	•	•				
Curtis R. Wilkerson	House	•					House	•				
Eddie Williams 131							House	•				
Fred Williams 56	House	•					House					•
Roger B. Wilson (Boone)	Senate	•	•				Senate	•	•				
Truman E. Wilson (Buchanan	Senate	•				•	Senate	•	•				
Clarence J. Wohlwend							House	•				
J. Dan Woodall	House	•					House	•				
Harriett Woods	Senate	•	•									
Rex R. Wyrick	House	•					House	•				
Robert Ellis Young	House	•					House					•
Mark A. Youngdahl	House	•					House	•				
Dennis Ziegenhorn	House					•	House	•				

BREAKDOWN OF VOTES		
LEGISLATORS WHO SERVED IN THE **HOUSE** DURING BOTH THE 1984 AND 1986 SESSIONS	131 OUT OF A POSSIBLE 163	**Yes on both bills: 97** No on both bills: 0 Absent on both bills: 3 Yes on BC bill / No on MHRA bill: 8 Yes on BC bill / Absent on MHRA bill: 7 No on BC bill / Yes on MHRA bill: 0 Absent on BC bill / Yes on MHRA bill: 16 Absent on BC bill / No on MHRA bill: 0
LEGISLATORS WHO SERVED IN THE **SENATE** DURING BOTH THE 1984 AND 1986 SESSIONS	30 OUT OF A POSSIBLE 34	**Yes on both bills: 27** No on both bills: 0 Absent on both bills: 0 Yes on BC bill / No on MHRA bill: 2 Yes on BC bill / Absent on MHRA bill: 1 No on BC bill / Yes on MHRA bill: 0 Absent on BC bill / Yes on MHRA bill: 0 Absent on BC bill / No on MHRA bill: 0
LEGISLATORS WHO SERVED IN THE HOUSE IN 1984 **AND** IN THE SENATE IN 1986	2	**Yes on both bills: 1** Absent on BC bill / Yes on MHRA bill: 1
TOTALS	Total number of seats in the Missouri General Assembly: **197** Total number of legislators with chances to vote on both bills: **161 (81.7%)** Total number who voted yes on both bills: **125 (63.4% of total seats)** **(77.6% OF POSSIBLE VOTES)**	