PennState Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 127 | Issue 3

Spring 2023

Freeing Females from Toplessness Bans: A Strict Scrutiny Analysis

Colleen Marron

Freeing Females from Toplessness Bans: A Strict Scrutiny Analysis

Colleen Marron*

ABSTRACT

Males may exhibit their bare chests on outdoor public property their entire lives. In many locations, this fundamental right to bodily autonomy afforded to men is denied to women. This Comment examines the Equal Protection Clause of the Fourteenth Amendment in conjunction with the fundamental right to bodily autonomy and focuses on the regulations forbidding female breast exposure. The assumption that female breasts require coverage due to their provocative nature normalizes and entrenches problematic issues, particularly the objectification of women, into law. The fundamental right to bodily autonomy requires protection over arbitrary and capricious social norms. This Comment stresses courts must establish the correct strict scrutiny standard of review to analyze female toplessness bans.

TABLE OF CONTENTS

* J.D. Candidate, Penn State Dickinson Law, 2023. Deepest admiration to Claudia Marron, whose freedom from the manacles of society transforms the status quo, and to Nicholas Myers for an incomparable friendship. Special thanks to Mary Wollstonecraft, Epicurus, and Ralph Waldo Emerson who led the liberation of my mind.

INTRODUCTION

Half of the population is partially denied the fundamental right to bodily autonomy.[1] The Equal Protection Clause of the Fourteenth Amendment [hereinafter EPC] guarantees the right to toplessness on public lands.[2] To fully establish the "equality, empowerment, and freedom"[3] of all people, a critical analysis of chest nudity laws must occur. The Declaration of Independence demands freedom through the essential ideals of "[l]ife, [l]iberty, and the pursuit of [h]appiness."[4] The U.S. Constitution insists upon securing the "[b]lessings of [l]iberty to ourselves and our [p]osterity."[5] Allowing women to show their breasts in public spaces may seem

1. *See* C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1154 (9th Cir. 2016) (citing Lawrence v. Texas, 539 U.S. 558, 564 (2003)) (explaining the U.S. Constitution "protects an individual's fundamental rights to liberty and bodily autonomy"); *see also* Meghan Boone, *Lactation Law*, 106 CALIF. L. REV. 1829, 1850–76 (2018) (discussing how women's rights to bodily autonomy receive drastically less protection than men's rights to bodily autonomy).

2. *See Lawrence*, 539 U.S. at 593 (2003) (citing Reno v. Flores, 507 U.S. 292, 303 (1993)) (reiterating only fundamental rights qualify for "heightened scrutiny"); *see also* State v. Lilley, 204 A.3d 198, 219 (N.H. 2019) (Bassett, J., dissenting) (quoting *In re* Sandra H., 846 A.2d 513, 517 (2004)) ("'Classifications based upon suspect classes or affecting a fundamental right are subject to the most exacting scrutiny.'"); U.S. CONST. amend. XIV, § 1; discussion *infra* Sections II.C.2–3 (describing how the EPC protects topless women); THOMAS LUNDMARK, POWER AND RIGHTS IN UNITED STATES CONSTITUTIONAL LAW 118 (2d ed. 2008).

3. Michaela Mullis & Jasmin McNealy, *"Free The Nipple" One Broadcast at a Time: FCC Indecency Regulations Of Nudity*, 35 WIS. J.L. GENDER & SOC'Y 43, 44 (2020) (citing *Free the Nipple: Inside the Controversy*, NEWIDEA (Nov. 10, 2015), https://bit.ly/3reAf3r [https://perma.cc/FB47-8SP7]) (discussing the "Free the Nipple" campaign which highlights the "constitutional rights to freely express [oneself]" and questions why rights are "applied more liberally to men's nudity than women's nudity")).

4. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

5. *See* U.S. CONST. pmbl.

radical; however, the U.S. Constitution guarantees the equal protection of laws.[6] To secure equal opportunity of life, liberty, and the pursuit of happiness, women must possess control over the display of their own breasts.[7]

This Comment begins with an exploration of the origins of female toplessness bans from the early 1900s to currently enforced statutes.[8] The analysis advocates for all courts to accept the physiological and sexual arousal similarities between breasts.[9] Supreme Court precedents establish the right to bodily autonomy is a fundamental right guaranteed by the U.S. Constitution.[10] Female toplessness prohibitions violate this fundamental right.[11] This Comment rejects governmental rationales for the bans based on "perceived moral sensibilities."[12] The protection of fundamental rights trumps the defense of social norms.[13] This Comment discards the currently applied intermediate scrutiny standard to female toplessness bans.[14] Instead, this Comment demands courts adopt the strict scrutiny

6. *See* U.S. CONST. amend. XIV, § 1; *see also* discussion *infra* Section II.B.2 (discussing how female toplessness bans violate a fundamental right protected by the EPC).

7. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776) (demanding the American ideals of "[l]ife, [l]iberty, and the pursuit of [h]appiness"); Nassim Alisobhani, *Female Toplessness: Gender Equality's Next Frontier*, 8 U.C. IRVINE L. REV. 299, 300 (2018) ("Female topless prohibitions are the embodiment of gender discrimination."). The prohibitions are some of the "remaining laws that blatantly treat men and women differently on the basis of how society views their bodies and the biological differences between the sexes." *Id.*

8. *See Ten Beach Censors Ban One-Piece Bathing Suits*, N.Y. TIMES (June 18, 1923), https://nyti.ms/3m2tcrj [https://perma.cc/4C4P-DNF7] [hereinafter *Ten Beach Censors*]; *see also* Elsa Devienne, *Invisible Lines in the Sand: Bather Arrests in Early 20th-Century Los Angeles*, METROPOLITICS (July 13, 2018), https://bit.ly/3vDHsdb [https://perma.cc/5YCA-J284]; statutes cited *infra* notes 34–35.

9. *See Overview of the Breast*, JOHNS HOPKINS MED. PATHOLOGY, https://bit.ly/3cGAhbu [https://perma.cc/WUY8-QCVR] (last visited Mar. 6, 2022); *see also* Maister, *infra* note 77, at 2923–31; *infra* notes 77–78 and accompanying text.

10. *See* discussion *infra* Section II.B.1 (discussing the cases which established the fundamental right to bodily autonomy).

11. *See* discussion *infra* Section II.B.2 (arguing how female toplessness bans violate the fundamental right to bodily autonomy, thus they violate the protections guaranteed by the U.S. Constitution).

12. *See* Eline v. Town of Ocean City, 7 F.4th 214, 222 (4th Cir. 2021), *cert. denied*, No. 21-8150, 2022 U.S. LEXIS 800 (Feb. 22, 2022) (affirming the constitutionality of the "perceived moral sensibilities" argument).

13. *See* U.S. CONST. art. VI, § 2 (establishing the federal constitution take precedence over state laws); *see also* discussion *infra* Section II.B.3 (determining fundamental right protections preempt morality arguments).

14. *See* discussion *infra* Section II.C.1 (discussing the standards of review under the EPC and the cases which established the intermediate scrutiny standard for gender discrimination); *see also* discussion *infra* Sections I.C.2 (asserting the intermediate scrutiny test is an inadequate standard).

standard, which will lead to the abolishment of female toplessness bans.[15]

I. BACKGROUND

A. The History of Female Toplessness Bans

1. Prior to the 21st Century

To recognize the need to reverse the bans, it is important to explain the origins of the bans. In the early 1900s, both women and men covered their chests at American beaches.[16] Slowly, a transition began. Now, men may appear topless, but women may not.[17] In the 1910s, police censors patrolled everyone's beach attire.[18] In 1920, the City Council of Atlantic City, New Jersey passed an ordinance.[19] It barred public display of women's nude legs above the knee.[20] The police even threw a woman in jail overnight due to her exposed knees.[21]

Laws required coverage of men's chests in public until "men fought for the right to go topless."[22] In 1935, amid a heat wave, 42 men protested a sanction on toplessness.[23] They all swam without

15. *See* Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion) (analyzing how gender discrimination laws require strict scrutiny analysis); *see also* C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1154 (9th Cir. 2016) (citing Lawrence v. Texas, 539 U.S. 558, 564 (2003)) (discussing how bodily autonomy is a fundamental right); Caruso v. Zenon, No. 95-MK-1578 BNB, 2005 U.S. Dist. LEXIS 45904, at *30 (D. Colo. July 25, 2005) (citing Miller v. Johnson, 515 U.S. 900, 922 (1995)) (clarifying the required elements to meet the strict scrutiny test); discussion *infra* Sections II.C.2–3 (asserting the intermediate scrutiny test is deficient, and strict scrutiny must be applied to female toplessness bans).

16. *See Ten Beach Censors*, *supra* note 8.

17. *See* statutes cited *infra* notes 34–35 (mandating women may be topless in public but not men); *see also* Petula Dvorak, *Men were Once Arrested for Baring Chests on the Beach*, WASH. POST (Jan. 5, 2019), https://wapo.st/3pphnxM [https://perma.cc/479G-AQHZ].

18. *See Ten Beach Censors*, *supra* note 8.

19. *See* Margaret Elena DePond, *Beach Bodies: Gender and the Beach in American Culture, 1880-1940*, UNIV. N.M. DIGIT. REPOSITORY, Summer 2019, at 64–66. "Hired bathing suit censors" enforced the ordinance by "monitor[ing] what women wore and how women exposed their bodies." *Id.* The censors were required "to protect women from the seemingly dangerous male sexual gaze." *Id.* at 65.

20. *See id.*

21. *See Keeps Her Knees Bare in Atlantic City Jail: Authoress Holds Out for 'Constitutional Rights'–Policeman to Push Assault Charge*, N.Y. TIMES (Sept. 5, 1921), https://nyti.ms/3pzIrKP [https://perma.cc/4TVT-B76A] (reporting about a woman who refused a citation, so she was arrested and jailed overnight).

22. Dvorak, *supra* note 17 (arguing how men fought for their right to be topless, and now women are attempting to do the same).

23. *See id.*

the legally required swimwear.[24] The protest led to arrests and fines of two dollars per male.[25] The arrests did not deter men; they kept fighting. Then, in 1987, a male runner fought to overturn a Palm Beach, Florida ordinance.[26] It banned everyone from appearing in public without the upper portion of their bodies covered.[27] The plaintiff argued the ordinance infringed on his Fourteenth Amendment rights.[28] The Eleventh Circuit opined the ordinance constituted an "irrational and arbitrary"[29] restriction on dress.[30] Men succeeded in their fight.[31] Now, women pursue the fight to overturn enacted laws in their states and municipalities.[32]

2. Currently Enforced Prohibitions

In 2023, female toplessness prohibitions exist in numerous jurisdictions across America.[33] Criminal culpability occurs if a woman exposes her nipples or areolas on public land in Arizona, Delaware, Indiana, Louisiana, Michigan, or Utah.[34] The bans also persist in multiple municipalities and counties.[35] This analysis focuses on the

---

24. *See id.*

25. *See id.*; *see also CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://bit.ly/3zjsnAi [https://perma.cc/S5DT-NZLU] (last visited Mar. 31, 2023) (calculating two dollars in 1935 "has the same buying power as $44.24 in February 2023")*.*

26. *See* DeWeese v. Town of Palm Beach, 812 F.2d 1365, 1366 (11th Cir. 1987); PALM BEACH, FLA. ORDINANCE § 2-81 (1981) (repealed 1987).

27. *See* § 2-81.

28. *See DeWeese*, 812 F.2d at 1366.

29. *Id.* at 1369.

30. *See id.* at 1369–70 (declaring the ordinance was unconstitutional).

31. *Id.* at 1369*;* Dvorak, *supra* note 17 (arguing how men proudly fought for their right to be topless, and now women are now doing so, too).

32. *See* Eline v. Town of Ocean City, 7 F.4th 214, 222–24 (4th Cir. 2021), *cert. denied*, No. 21-850, 2022 U.S. LEXIS 800 (Feb. 22, 2022) (upholding a ban based on the government's argument of "perceived moral sensibilities"); *see also* Free the Nipple-Springfield Residents Promoting Equal. v. City of Springfield, 923 F.3d 508, 512 (8th Cir. 2019) (deciding the Springfield ordinance helps "protect morals"). *See, e.g.*, State v. Vogt, 775 A.2d 551, 557 (N.J. Super. Ct. App. Div. 2001) (determining female discrimination safeguards "the public's moral sensibilities").

33. *See* statutes cited *infra* notes 34–35; *see also* Kimberly J. Winbush, Annotation, *Regulation of exposure of female, but not male, breasts*, 67 A.L.R. 5th 431 § 1(a) (2023) (collecting and analyzing the "state and federal cases in which the courts have determined the validity of [toplessness] ordinances").

34. *See* ARIZ. REV. STAT. § 13-1402 (2022); DEL. CODE ANN. tit. 11, § 764 (2022); IND. CODE ANN. § 35-45-4-1.5 (LexisNexis 2023); LA. STAT. ANN. § 14:106 (2023); MICH. COMP. LAWS SERV. § 750.167 (LexisNexis 2023); UTAH CODE ANN. § 76-9-702(1)(b) (LexisNexis 2022); *see also Nudity and Public Decency Laws in America*, HG.ORG LEGAL RES., https://bit.ly/3DRs3cl [https://perma.cc/NB65-ZLZ7] (last visited Mar. 13, 2023) (providing an overview).

35. *See* OCEAN CITY, MD., CODE OF ORDINANCES §§ 58-192–58-193 (2022); SPRINGFIELD, MO., CODE OF ORDINANCES § 78-222 (2022); BREVLAND CNTY,

Ocean City, Maryland ordinances.[36] The Ocean City ordinances dictate people may not present themselves "in a state of nudity"[37] in public. The definition of nudity includes "the showing of the female breast with less than a fully opaque covering of any part of the nipple."[38] No similar restriction applies to male chests.[39] All the bans violate the equal protection of people.[40] They create arbitrary classifications of gender, which "perpetuate the legal, social, and economic inferiority of women."[41] Arbitrary classifications create unjust requirements in legal codes through false equivalences.[42]

B. False Equivalences

Female toplessness prohibitions create false equivalences.[43] A false equivalence arises from the "fetishization of a woman's body into law."[44] Some people presume topless women only desire to "attract attention" and create a show for the "public's enjoyment and sexual pleasure."[45] The legislative purposes of the bans reveal similar presumptions.[46] The creation of these false equivalences

---

FLA., CODE OF ORDINANCES § 74-28 to 29 (2021). *See, e.g.*, CITY OF LACONIA, N.H., ORDINANCE § 180-2 (1998).

36. *See* OCEAN CITY, MD., CODE OF ORDINANCES §§ 58-192–58-193 (2022).

37. *See* § 58-193.

38. *See* § 58-192.

39. *See id.*

40. *See* SPRINGFIELD, MO., CODE OF ORDINANCES § 78-222 (2022); *see also* discussion *infra* Section II.B.2 (explaining how female toplessness bans violate the fundamental right to bodily autonomy); discussion *infra* Sections II.B.3 (clarifying why fundamental rights are more protected than social norms); Alisobhani, *supra* note 7. *See, e.g.*, DEL. CODE ANN. tit. 11, § 764 (2022).

41. United States v. Virginia, 518 U.S. 515, 534 (1996). *See* Alisobhani, *supra* note 7 and accompanying text.

42. *See* Alisobhani, *supra* note 7, at 300; *see also infra* note 43 and accompanying text (describing the creation of false equivalences).

43. *See* Alisobhani, *supra* note 7, at 300 (explaining how the Newport Beach City female toplessness ban creates a false equivalence because it "codifies the fetishization of a woman's body into law"). The false equivalence leads to an absurd result that "any time a woman is topless in public she is doing it solely to attract attention and making her body a constant spectacle for the public's enjoyment and sexual pleasure." *Id.* Alisobhani concludes "this reasoning neglects the multitude of benign reasons why a woman would want to be topless in public, such as to cool off, to avoid tan lines, or to feel free from the encumbrances of straps and bands." *Id.*

44. *Id.*

45. *Id. See supra* note 43 and accompanying text.

46. The legislative findings conclude people "do[ ] not have [the] right to impose one's lifestyle on others." *See* OCEAN CITY, MD., CODE OF ORDINANCES §§ 58-191 (2022). The City of Laconia determined "the prohibited conduct . . . is deemed to have secondary effects . . . including crimes . . . and reduction of property values." CITY OF LACONIA, N.H., ORDINANCE § 180-1 (1998). *See* statutes cited *supra* notes 34–35.

perpetuates profound issues.[47] Young women commonly sexualize and objectify themselves based on societal norms.[48] The bans reinforce the expectation that women must hide their breasts because of the likelihood of objectification.[49]

Even though objectification persists, multiple federal and state courts uphold the constitutionality of the bans.[50] These courts observe the government maintains a responsibility to "protect morals."[51] However, the U.S. Constitution does not guarantee protection of moral norms.[52] Most people do not generally view breasts as unpalatable.[53] Dr. Herbenick's research concludes that the majority of the population approves of bare-breasted women at beaches.[54] The public's "acceptance of viewing female breasts" will likely continue to increase.[55] The false equivalences result in an imposition of the minority's morality onto everyone in a democratic society.[56]

---

47. *See* Alisobhani, *supra* note 7, at 300 (illustrating how the powerful statutes negatively affect the ways women value their bodies).

48. *See id.*

49. *See id.*

50. *See* Free the Nipple-Springfield Residents Promoting Equal. v. City of Springfield, 923 F.3d 508, 512 (8th Cir. 2019) (deciding the Springfield ordinance helps "protect morals"); *see also* United States v. Biocic, 928 F.2d 112, 115 (4th Cir. 1991) (stating part of society "does not want to be exposed willy-nilly to public displays"). *See, e.g.*, C.T. v. State, 939 N.E. 2d 626, 629 (Ind. Ct. App. 2010) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973)) (explaining the necessity of government "to protect the 'social interest in order and morality'").

51. *See* cases cited *supra* note 50 and accompanying text.

52. *See* U.S. CONST. (including no explicit guarantee to the protection of social norms); *see also* Lawrence v. Texas, 539 U.S. 558, 559–79 (2003) (discussing instances adults may engage in traditionally immoral conduct because they are exercising their right to liberty granted by the Fourteenth Amendment); Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 24–25 (2005) (demonstrating why the American Constitution lacks social and economic rights).

53. *See* Exhibit 13 at 4, Eline v. Town of Ocean City, 7 F.4th 214 (4th Cir. 2021), *cert. denied*, 2022 U.S. LEXIS 800 (Feb. 22, 2022) (No. 21-850).

54. *See id.* at 4 (citing Deborah Herbenick et al., *Sexual Behavior in the United States: Results from a National Probability Sample of Males and Females Ages 14 to 94*, 7 J. SEXUAL MED., 255–65 (2010)) ("(51.9%) felt that women should be legally allowed to be 'topless.'").

55. *Id.* at 4–7 (citing Herbenick, *supra* note 54 at 255–65) ("Americans' public sensibilities have evolved to be accepting of female barechestedness in the same places where males may be barechested for purposes other than just breastfeeding.").

56. *See* Frontiero v. Richardson, 411 U.S. 677, 686–87 (1973) (plurality opinion) (explaining how women are subjected to an "inferior legal status without regard to the[ir] actual capabilities"); *see also* Exhibit 13 at 6, *Eline*, 7 F.4th 214 (citing Herbenick *supra* note 54, at 255–65) ("(51.9%) felt that women should be legally allowed to be 'topless.'"). The majority's opinion should be weighted heavier than the minority's opinion. *See id.*

The peer-reviewed scientific research finds the bans lead to more societal harm than good.[57] As a result, courts' "perceived moral sensibilities" justification for the bans accentuates the false equivalences.[58] The harm targeted at women consists of primarily misogynistic rationalizations masked by morality arguments.[59] One's own bodily display may materialize from ethical beliefs.[60] But courts should not utilize morality assertions to dictate women's dominion over the display of their own breasts.[61] Scientific research acknowledges the nearly indistinguishable attributes of all breasts.[62] The false equivalences become more problematic with the evaluation of the physiological similarities of breasts.[63]

II. ANALYSIS

A. The Comparisons Between Female and Male Breasts

1. Physiological Similarities

Courts should accept the similarities between the structures of breasts.[64] Some courts determine toplessness bans stand distinct from other gender discriminations.[65] They presume biological differences exist between female and male breasts.[66] However, the

57. *See* Exhibit 13 at 2, *Eline*, 7 F.4th 214 (describing the creation of "harmful secondary effects"). The societal effects lead to the discouragement of breastfeeding and the promotion of a culture that oversexualizes females. *See id.* at 6–7 (citing Dayna Fischtein et al., *Canadian Attitudes Toward Female Topless Behaviour*, 14 CAN. J. HUM. SEXUALITY, 63, 63–75 (2005)).

58. *Eline*, 7 F.4th at 222 (explaining the government's argument for enacting the ban). *See* Alisobhani, *supra* note 7, at 300 (demonstrating how female toplessness bans create false equivalences); *see also supra* note 43 and accompanying text.

59. *See* Alisobhani, *supra* note 7, at 314 (explaining how laws supported homophobia "masked as mortality" for a long time). This same reasoning applies to "sexist treatment of women's bodies" in the law. *Id.*

60. *See* Glazer, *infra* note 81, at 125–28 ("Nudity and morality are inextricably interwoven in the Judeo-Christian ethic.").

61. *See id.* ("The role of public sensibilities as a basis for discriminatory legislation and practices has been delegitimized in other contexts.").

62. *See Overview of the Breast*, *supra* note 9 (explaining the only difference in male breasts is the inability to produce milk).

63. *See* Alisobhani, *supra* note 7, at 300; *see also supra* note 43 and accompanying text (illustrating the false equivalences created by female toplessness bans); *Overview of the Breast*, *supra* note 9.

64. *See Overview of the Breast*, *supra* note 9; Virginia F. Milstead, *Forbidding Female Toplessness: Why "Real Difference" Jurisprudence Lacks "Support" and What Can be Done About it*, 36 U. TOL. L. REV. 273, 293–94 (2005) (discussing how governments do not extend full liberty to women's bodies).

65. *See Milstead*, *supra* note 64, at 293–94 (explaining "liberty and tolerance are valued over a perfect social environment" but the same liberties are not "extended to women's bodies").

66. *See, e.g.*, State v. Lilley, 204 A.3d 198, 208 (N.H. 2019) (concluding the female toplessness ordinance is not gender discrimination). The court reasoned

breasts consist of nearly identical structures.[67] Female and male breasts sit atop the pectoralis muscle, starting with the deep fascia layer followed by the breast tissue.[68] Next, the skin bears sweat glands and hair follicles.[69] Male breasts only lack the specialized lobules capable of milk production.[70] Consequently, a court should not allow discrimination in the law because of the almost identical biological structures.[71]

Alternatively, if a court refuses to accept the similarities, it should not rationalize a law based on "basic physiological" variances.[72] If permitted, then courts could justify gender discrimination into law, such as with holdings based on women's longer lifespans.[73] For example, a requirement that women must retire at 70 years old and men at 66 years old.[74] Or a requirement to reduce Social Security benefits if women claimed them at the same age as men.[75] All breasts deserve equal protection under the law even if a court deems "physiological differences" remain.[76] Another component courts fail to appreciate is the similarities in the sexual arousal levels between women and men.[77]

"men and women are not fungible with respect to the traditional understanding of what constitutes nudity." *Id.* (citing Eckl v. Davis, 51 Cal. App. 3d 831, 848 (Cal. 2d Dist. Ct. App. 1975)).

67. *See Overview of the Breast*, *supra* note 9.

68. *See id.*

69. *See id.*

70. *See id.*

71. *See Lilley*, 204 A.3d at 208 (citing *Eckl*, 51 Cal. App. 3d at 848) ("Men and women are not fungible with respect to the traditional understanding of what constitutes nudity."); *see also* Milstead, *supra* note 64; *supra* note 65 and accompanying text; *Overview of the Breast*, *supra* note 9.

72. *See Lilley*, 204 A.3d at 220 (Bassett, J. dissenting) (arguing the majority's reasoning is illogical because if a law is upheld based on biological differences, then absurd laws could be considered constitutional).

73. *See id.* ("Analyzing whether a law comports with equal protection does not require that the court be blind to basic physiological or anatomical differences."). Women on average live longer than men. *See id.*

74. *See id.*

75. *See id.*

76. *See id.* at 791–99 (stating the necessity of equal treatment for both genders should not depend on physiological or anatomical differences).

77. *See* Lara Maister et al., *The Erogenous Mirror: Intersubjective and Multisensory Maps of Sexual Arousal in Men and Women*, 49 ARCHIVES SEXUAL BEHAV. 2919, 2921–31 (2020) (finding men's and women's sexual arousal levels were identical when viewing nude chests). The peer-reviewed scientific study with over 600 participants established this conclusion. *See id.*

2. *Sexual Arousal Similarities*

A common presumption prevails in the media and throughout general society[78]: Sexual arousal to visual stimuli persists in men more prevalently than in women.[79] This leads to completely unfounded and sexist stigmas.[80] Scientific research confirms male breasts sexually stimulate women.[81] A separate study conducted by Bangor University examined over 600 people.[82] The study analyzed the sexual arousal levels for every body part.[83] When women viewed men's chests, tremendous excitement levels occurred.[84] The arousal levels in women persisted at the same level as their male counterparts.[85] Since both women and men eroticize their partners' chests, and men's breasts do not lactate, only men's breasts serve a purely erotic function.[86] Yet only men may universally display their naked chests in public.[87] Meanwhile, women's breasts serve more than an erotic function.[88] They may provide nourishment to sustain life.[89] Therefore, women must legally share the same chest freedom as men.[90]

---

78. *See id.*; *see also* Alisobhani, *supra* note 7, at 321–22 (explaining the presumption that women's bodies are more sexual than men's bodies is "entirely unfounded"). The stigma around breasts is a "uniquely female" experience. *Id.* at 321. Society reinforces the presumption that only women's breasts are sexual in nature. *See id.* at 322.

79. *See* Alisobhani, *supra* note 7, at 321–22 (explaining the common presumption). Even if the stereotypes explain how most people live, they are not indicative of all people. *See id.*; *see also supra* note 77 and accompanying text.

80. *See* Alisobhani, *supra* note 7, at 321–22; *see also supra* note 77 and accompanying text.

81. *See* Reena N. Glazer, *Women's Body Image and the Law*, 43 DUKE L.J. 113, 130 (1993) (citing Robert Wildman et al., *Males' and Females' Preferences for Opposite-Sex Body Parts, Bust Sizes, and Bust-Revealing Clothing*, 38 PSYCHOL. REP. 485, 485–86 (1976)) (concluding Dr. Jack Morin's study proved "men's and women's breasts have the same erotic potential" and "nipples in both sexes have erectile capacity").

82. *See* Maister, *supra* note 77, at 2920–24 (studying the levels of arousal when touching and seeing different portions of females' and males' bodies). Six hundred thirteen participants completed the study, and the scientists reported the "presence of a multimodal erogenous mirror between sexual partners." *Id.* at 2919.

83. *See* Maister, *supra* note 77, at 2920–24; *see also supra* note 81 and accompanying text.

84. *See* Maister, *supra* note 77, at 2924.

85. *See id.*

86. *See* Glazer, *supra* note 81; *see also* Maister, *supra* note 77; *supra* note 81 and accompanying text; *supra* note 77 and accompanying text.

87. *See* statutes cited *supra* notes 34–35; *see also* Exhibit 13 at 2, Eline v. Town of Ocean City, 7 F.4th 214 (4th Cir. 2021), *cert. denied*, No. 21-850, 2022 U.S. LEXIS 800 (Feb. 22, 2022).

88. *See* Exhibit 13 at 2, *Eline*, 7 F.4th 214.

89. *See id.*

90. *See id.* at 4–9.

B. Fundamental Right to Bodily Autonomy

Toplessness bans discriminate against females.[91] The bans also violate the fundamental right to bodily autonomy.[92] To comprehend how the bans violate the fundamental right, the right must first be explained.

1. Establishment of the Right

The right to bodily autonomy grants people the ability to exercise control over their bodies.[93] Throughout human history, women and men have been subjected to infringements of their right to bodily autonomy.[94] The U.S. Supreme Court initially recognized the right to bodily autonomy in 1891.[95] The Court held the most sacred right encompasses "every individual['s]" ability to possess and control her or his own body "free from all restraint."[96] Federal and state courts acknowledged and bolstered this right, eventually classifying it as a fundamental right.[97] The U.S. Constitution guarantees

---

91. *See* discussion *supra* Sections I.A.1–2 (emphasizing the history of toplessness bans from the early 1900s to 2023).

92. *See* discussion *infra* Section II.B.2 (elucidating how female toplessness bans violate the fundamental right to bodily autonomy). It is important to establish that the bans are gender discrimination plus fundamental right violations. *See* discussion *infra* Section II.B.2. This is necessary for all courts to apply the strict scrutiny standard. *See* discussion *infra* Sections II.C.2–3.

93. *See* Jonathan Herring, *The Nature and Significance of the Right to Bodily Integrity*, 76 CAMBRIDGE L.J. 566, 571 (2017) (comparing the differences between the right of bodily integrity and the right of bodily autonomy). The right to "bodily autonomy" relates to the capacity of a person to "make his or her own decisions in relation to his or her body." *Id.*

94. *See* Jonathan Todres, *Women's Rights and Children's Rights: A Partnership with Benefits for Both*, 10 CARDOZO WOMEN's L.J. 603, 603 (2004) (discussing the precarious "plight of women and children suffering human rights abuses around the globe").

95. *See* Union P. R. Co. v. Botsford, 141 U.S. 250, 251 (1891) (recognizing the importance of the right to control one's own person); *see also* Meghan Boone, *The Autonomy Hierarchy*, 22 TEX. J. ON CIV. LIBERTIES & CIV. RTS. 1, 17–18 (2016) (clarifying the extent of the roots of bodily autonomy in case precedents). Some current legal frameworks wrongfully undermine the right. *See id.*

96. *Botsford*, 141 U.S. at 251.

97. *See* Lawrence v. Texas, 539 U.S. 558, 564–65 (2003) (explaining how adults' conduct concerning their personal bodies is an exercise of their liberty and is protected by the U.S. Constitution); *see also* Cruzan v. Dir., M. Dep't of Health, 497 U.S. 261, 269 (1990) (citing Schloendorff v. Soc'y of New York Hosp., 211 N.Y. 125, 129–30 (N.Y. 1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body."); Lloyd v. Sch. Bd. of Palm Beach Cnty., 570 F. Supp. 3d 1165, 1180 (S.D. Fla. 2021) (citing Zinman v. Nova Se. Univ. 2021 U.S. Dist. LEXIS 1653411, at *17 (S.D. Fla. Sept. 15, 2021)) (finding a mask mandate does not "implicate the right to bodily autonomy under the Fourteenth Amendment"); Boone, *The Autonomy Hierarchy*, *supra* note 95, at

the protection of fundamental rights.[98] In *Lawrence v. Texas*,[99] the Court further recognized bodily autonomy is a constitutionally protected fundamental right.[100] Bodily autonomy expanded to include the "freedom of thought" and the "expression" of "intimate conduct."[101] The inability of women to act on their preferences in relation to toplessness violates their right to bodily autonomy.[102]

2. Female Toplessness Bans Violate the Fundamental Right

Female toplessness bans infringe on the fundamental right to bodily autonomy.[103] Women may not fully exercise authority over their breasts because the bans dictate the display of their bodies.[104] A female may desire to appear topless in public, not for attention

---

18–19 (discussing the boundaries of the right to bodily autonomy); *infra* note 101 and accompanying text.

98. *See* Pulliam v. Coastal Emergency Servs., 257 Va. 1, 20 (Va. 1999) (citing Etheridge v. Med. Ctr. Hosps., 237 Va. 87, 97 (Va. 1989)) (guaranteeing fundamental rights are protected either implicitly or explicitly by the U.S. Constitution). Some examples of fundamental rights include the "the right to free speech" and the "right to fairness in procedures concerning governmental deprivation of life, liberty or property." *See id.*

99. Lawrence v. Texas, 539 U.S. 558, 577 (2003).

100. *See Lawrence*, 539 U.S. at 564–65, 579 (2003) (stating "later generations can see that laws once thought necessary and proper in fact serve only to oppress . . . persons in every generation can invoke its principles in their own search for greater freedom"); *see also* Brown v. Greer, No. 20-82179-CIV-MARRA, 2020 U.S. Dist. LEXIS 251592, at *19 n. 2 (S.D. Fla. 2020), *aff'd*, Brown v. Greer, 2021 U.S. App. LEXIS 32582 (11th Cir. 2021); *supra* note 97 and accompanying text.

101. *See Lawrence*, 539 U.S. at 562 (explaining the spheres of our lives wherein the government should not dictate our choices). "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Id.* The case maintains a potentially unstable holding because of recent U.S. Supreme Court jurisprudence; however, the Court opined that *Lawrence v. Texas* is not threatened because no doubt is cast upon "precedents that do not concern abortion." *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277–78 (2022).

102. *See* Alisobhani, *supra* note 7, at 300 (demonstrating how some women desire the same chest nudity rights as men); *supra* note 43 and accompanying text.

103. *See* Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion) (discussing how America's "long and unfortunate history of sex discrimination" rationalized by "'romantic paternalism' . . . put women, not on a pedestal, but in a cage"); *see also* discussion *infra* Sections II.C.2–3 (asserting the intermediate scrutiny test is not high enough and strict scrutiny must be applied to female toplessness bans); Todres, *supra* note 94, at 604 (analyzing the precarious "plight of women and children suffering human rights abuses around the globe"); Herring, *supra* note 93 (explaining the right to "bodily autonomy" relates to the capacity of a person to "make his or her own decisions in relation to his or her body"); Boone, *The Autonomy Hierarchy*, *supra* note 95 (clarifying the extent of the roots of bodily autonomy in case precedents). Some current legal frameworks are wrongfully undermining the right. *See id.*

104. *See* Boone, *The Autonomy Hierarchy*, *supra* note 95; *see supra* note 103 and accompanying text.

purposes or shock value, but to regulate body temperature on a sweltering day.[105] She may long to proudly show comfort in her own skin or to feel free from societal restraints.[106] The bans impede females' personal decisions about the exhibition of their bodies which disturbs no one else's rights.[107] This deprivation of freedom violates a fundamental right.[108] If not classified as a fundamental right, the "statutory distinctions between the sexes" will "invidiously relegat[e] the entire class of females to inferior legal status."[109] The bans relegate females as inferior through the objectification of women's bodies into law.[110] Women's ability to appear topless requires recognition as a fundamental right.[111]

3. Fundamental Rights Transcend "Perceived Moral Sensibilities"

The fundamental right to bodily autonomy surpasses the protection of moral norms.[112] The Fourth Circuit upheld a toplessness ban by hinging it on the government's need to protect "perceived moral sensibilities."[113] Historically, courts utilized similar rationales

105. *See* Alisobhani, *supra* note 7, at 300; *see also supra* note 43 and accompanying text (rationalizing women's desire to go topless).

106. *See* Alisobhani, *supra* note 7; *see also supra* note 43 and accompanying text (rationalizing women's desire to be free from societal restraints).

107. *See* Herring, *supra* note 93, at 575 (respecting other people's right to bodily autonomy ensures no one else's rights are impeded upon); *supra* note 95 and accompanying text (stating the bans must be classified as a fundamental right violation).

108. *See Frontiero*, 411 U.S. at 686–87 (explaining women's rights are treated as inferior to men); *see also* Boone, *The Autonomy Hierarchy*, *supra* note 95, at 7 (stating the necessity of fundamental violation classifications); *supra* note 103 and accompanying text.

109. *Frontiero*, 411 U.S. at 686–87 (explaining the distinctions relegate women to an inferior status without "regard to the actual capabilities of its individual members").

110. *See id.*; *see also* Boone, *The Autonomy Hierarchy*, *supra* note 95, at 40 ("The right to bodily autonomy becomes almost a prerequisite for all other human rights, and on that basis one could argue that bodily autonomy should be favored over other types."); *supra* note 103 and accompanying text.

111. *See* Nguyen v. INS, 533 U.S. 53, 74 (2001) (O'Connor, J., dissenting) (demonstrating how gender generalizations based on how people act ignores America's history of consistent female oppression); *see also Frontiero*, 411 U.S. at 686–87 (stating the statutory distinctions between genders should lead to a stricter standard of review).

112. *See* Lawrence v. Texas, 539 U.S. 558, 579 (2003) ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."); *see also* McFall v. Shimp, 10 Pa. D. & C.3d 90, 91 (Pa. Ct. Pl. 1978) ("Our society, contrary to many others, has as its first principle, the respect for the individual, and that society and government exist to protect the individual from being invaded and hurt by another.").

113. Eline v. Town of Ocean City, 7 F.4th 214, 222 (4th Cir. 2021), *cert. denied*, No. 21-850, 2022 U.S. LEXIS 800 (Feb. 22, 2022); *see also* Buck v. Bell, 274 U.S. 200, 207 (1927); Hardenbergh v. Hardenbergh, 10 N.J.L. 42, 44 (N.J. 1828).

to validate unjust laws.[114] The subsequent cases explain how courts incorrectly analyzed infringements on bodily autonomy and justified the infringements with morality arguments.[115]

The volatility of societal norms negates the rationalization of laws rooted in morality.[116] In *Hardenbergh v. Hardenbergh*,[117] the New Jersey Supreme Court opined that "the very being or legal existence of the woman is suspended during the marriage."[118] During the 1800s, women maintained inadequate autonomy over their own bodies or lives.[119] In *Buck v. Bell*,[120] the U.S. Supreme Court infamously affirmed the constitutionality of coercive sterilizations of women that were performed by the state.[121] The decision supported a perceived public good.[122] In *Goesaert v. Cleary*,[123] the Court determined a Michigan act was constitutional under the EPC.[124] The act forbade any female to work as a bartender unless she was the "wife or daughter of the male owner."[125] The act prevented presumed "moral and social problems."[126] Eventually, the majority of society accepted Justice Rutledge's dissent proclaiming no "conceivable justification [exists] for such discrimination against women."[127]

---

114. *See Buck*, 274 U.S. at 207 (deciding a woman may be sterilized by the state and "society will be promoted by her sterilization"); *see also Hardenbergh*, 10 N.J.L. at 44 (explaining how women become property of men when married). In 2023, these decisions are now considered violations of the fundamental right to bodily autonomy. *See contra id.*

115. *See Buck*, 274 U.S. at 205–07; *see also Hardenbergh*, 10 N.J.L. at 44; Goesaert v. Cleary, 335 U.S. 464, 466 (1948); Milstead, *supra* note 64, at 279 (arguing the test to distinguish between genders is not the "best threshold . . . for equal protection"); Alisobhani, *supra* note 7, at 300; *supra* note 43 and accompanying text (clarifying the false equivalences created by female toplessness bans).

116. *See Buck*, 274 U.S. at 205–07; *see also Hardenbergh*, 10 N.J.L. at 44; *see also Goesaert*, 335 U.S. at 466.

117. *Hardenbergh*, 10 N.J.L. at 44.

118. *Id.*

119. *See id.*

120. Buck v. Bell, 274 U.S. 200, 207 (1927).

121. *See id.* (proclaiming "[t]hree generations of imbeciles are enough").

122. *See id.*; *see also* Box v. Planned Parenthood Ind. & Ky., 139 S. Ct. 1780, 1786 (2019) (citing *Buck*, 274 U.S. at 200) (explaining how the U.S. Supreme Court rationalized the eugenics movement by upholding a "forced-sterilization law"). Clearly, the decision is a rationalization for blatant intrusions on females' right to bodily autonomy. *See contra id.*

123. Goesaert v. Cleary, 335 U.S. 464, 465 (1948).

124. *See id.*

125. *Id.*

126. *Id.* at 466.

127. *Id.* at 467–68 (Ruthledge, J., dissenting).

Beyond the volatility of moral norms, courts may not legally deploy morality arguments any longer.[128] In *Lawrence*, the Court observed that the government's interest in the protection of "moral sensibilities"[129] may not justify discriminatory classifications.[130] People's right to exercise bodily autonomy supersedes the defense of capricious social norms.[131] The Ninth Circuit reasoned morals adapt over time, so the protection of a fundamental right is more important.[132] The "perceived moral sensibilities" argument fails logically and legally.[133] Courts may not employ this deceptive consideration to violations of the right to bodily autonomy.[134]

4. Dress Codes

The rationales to overturn female toplessness bans do not conflict with the public policy considerations of dress codes.[135] In public schools, dress codes persist.[136] The U.S. Supreme Court

128. *See supra* notes 114–22 and accompanying text.

129. United States v. Biocic, 928 F.2d 112, 115 (4th Cir. 1991) (explaining the important governmental interest in protecting "moral sensibilities").

130. *See* Lawrence v. Texas, 539 U.S. 558, 577 (2003) (Stevens, J., dissenting) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986)) ("'[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.'").

131. *See id.*; *see also* Boone, *The Autonomy Hierarchy*, *supra* note 95, at 18–19 ("Courts have upheld the legality of individuals' rights to bodily autonomy, even when imposing on such a right may achieve the more morally defensible outcome.").

132. *See* C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1154 (9th Cir. 2016) (citing Lawrence v. Texas, 539 U.S. 558, 564 (2003)); *see also* Boone, *The Autonomy Hierarchy*, *supra* note 95, at 18–19; *supra* note 103 and accompanying text.

133. *See* Eline v. Town of Ocean City, 7 F.4th 214, 222 (4th Cir. 2021), *cert. denied*, No. 21-850, 2022 U.S. LEXIS 800 (Feb. 22, 2022) (asserting "perceived moral sensibilities" protects an important governmental interest); *C.R.*, 835 F.3d at 1154 (citing *Lawrence*, 539 U.S. at 564) (establishing the right to bodily autonomy is a fundamental right); *see also* Boone, *The Autonomy Hierarchy*, *supra* note 95; *supra* note 128 and accompanying text; Glazer, *supra* note 81; *supra* note 81 and accompanying text; Maister, *supra* note 77; *supra* note 77 and accompanying text.

134. *See* U.S. CONST. art. VI, § 2 (establishing the federal constitution take precedence over state laws); *see also* Milstead, *supra* note 64, at 279; Alisobhani, *supra* note 7, at 300 (explaining the false equivalences created by female toplessness bans); *supra* note 43 and accompanying text.

135. *See* Frontiero v. Richardson, 411 U.S. 677, 686–87 (1973) (plurality opinion) (clarifying the equal protection analysis); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513–14 (1969) (deciding dress codes are constitutional). *Tinker* does not implicate the rationales. *See id.*

136. *See Tinker*, 393 U.S. at 504 (enforcing dress codes are constitutional). Dress codes prevent "'materia[l] and substantia[l] interfere[nces] with the requirements of appropriate discipline in the operation of the school.'" *Id.* at 505 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). *See* Gfell v. Rickelman, 441 F.2d 444, 446 (6th Cir. 1971) (deciding dress codes may be necessary and enforceable).

reasoned dress codes are necessary to prevent "materia[l] and substantia[l] interfere[nce]" with "discipline in the operation of the school."[137] More formal expectations prevail in professional environments.[138] Schools require more formal attire to maintain proper conduct and decorum.[139] Similarly, court appearances require more formal attire than a grocery store run.[140] Schools and courtrooms may impose universally applicable dress codes because of the nature of indoor, professional environments.[141]

Courts reject dress codes that discriminate based on gender.[142] One school's dress code provided "girls are expected to wear dresses or skirts."[143] The Idaho Supreme Court declared females wearing pants does not disrupt school discipline or the educational system.[144] The court enforced the repeal of the dress code.[145] In 2019, three female students initiated action over a dress code requiring girls to wear skirts rather than pants or shorts.[146] The court

137. *Tinker*, 393 U.S. at 513 (citing *Burnside*, 363 F.2d at 749). Furthermore, dress codes are "reasonably related to the valid educational purposes" and discipline in schools. *See* Harper v. Edgewood Bd. of Educ., 655 F. Supp. 1353, 1355 (citing Davenport v. Randolph Cnty. Bd. of Educ., 730 F.2d 1395 (11th Cir. 1984)).

138. *See* Lynda K. Hopewell, *Appropriate Attire and Conduct for an Attorney in the Court Room*, 12 J. LEGAL PRO. 177, 177–78 (1986) (arguing for striking a balance between allowing a business to maintain its professional dignity and allowing an individual to express her own lifestyle); *see also* Wendy Mahling, *Secondhand Codes: An Analysis of the Constitutionality of Dress Codes in the Public Schools*, 80 MINN. L. REV. 715, 720 (1996) (explaining how "dress codes improve the educational environment of the classroom").

139. *See* Davis v. Firment, 269 F. Supp. 524, 528 (E.D. La. 1967); *see also* Mahling, *supra* note 138 (stating school dress codes encourage discipline and unity).

140. *See* Hopewell, *supra* note 138, at 177–79 (arguing for striking a balance between allowing a business to maintain its professional dignity and allowing an individual to express her own lifestyle).

141. *See* Hopewell, *supra* note 138, at 177–79; *see also supra* notes 138–40 and accompanying text.

142. *See, e.g.*, Johnson v. Joint Sch. Dist., 508 P.2d 547, 549 (Idaho 1973) (citing Murphy v. Pocatello Sch. Dist., 480 P.2d 878, 884 (Idaho 1971)) (deciding the "*Murphy*" standards mandated the court to reject the female-specific dress code).

143. *Johnson*, 508 P.2d at 547. Several female students initiated a lawsuit against the school to repeal the discriminatory dress code. *See id.*

144. *See id.* at 548.

145. *See id.* at 549 (affirming a prohibition on the dress code).

146. *See* Peltier v. Charter Day Sch., Inc., 384 F. Supp. 3d 579, 583–84 (E.D.N.C. 2019), *rev'd*, 8 F.4th 251 (4th Cir. 2021), *aff'd in part*, Peltier v. Charter Day Sch., Inc., 37 F.4th 104 (4th Cir. 2022) (arguing based on an EPC violation). On the initial appeal, the Fourth Circuit reversed the lower court's decision on procedural grounds. *See id.* However, the Fourth Circuit then granted a motion to rehear the case en banc and granted summary judgment to plaintiffs on the equal protection argument. *See* Peltier v. Charter Day Sch., Inc., 37 F.4th 104, 112 (4th Cir. 2022).

determined the dress code violated the EPC.[147] The dress code overly burdened females.[148] Dress codes survive constitutionality challenges if applicable to all students.[149] No substantive conflict occurs between dress codes and the right for people to make choices about their own bodies in public.[150] Everyone's fundamental right to bodily autonomy is guaranteed by the EPC.[151]

C. The Equal Protection Clause

The EPC declares "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."[152] To analyze the constitutionality of any statute under the EPC, courts must apply one of the following tests: strict scrutiny, intermediate scrutiny, or rational basis.[153] Strict scrutiny applies to a "statute that regulates a 'fundamental right' or a 'suspect class.'"[154] Intermediate scrutiny pertains to statutes that regulate a "'semi-suspect' class."[155] Rational basis scrutiny approves of any statute "rationally related to the achievement of a legitimate state interest."[156] Courts apply the strict scrutiny standard for violations of fundamental rights, so they should apply it to female toplessness bans.[157] Nevertheless,

147. *See Peltier*, 384 F. Supp. at 596–97 (explaining female students were "unable to play as freely during recess"). Furthermore, the dress code "requires [females] to sit in an uncomfortable manner in the classroom, causes them to be overly focused on how they are sitting, distracts them from learning, and subjects them to cold temperatures on their legs." *Id.* at 597.

148. *See id.* at 596–97; *see also supra* note 147 and accompanying text.

149. *See Peltier*, 384 F. Supp. 3d at 596–97; *see also Johnson*, 508 P.2d at 547; Hopewell, *supra* note 138, at 177–79 (arguing for striking a balance between allowing a business to maintain its professional dignity and allowing an individual to express her own lifestyle).

150. *See supra* notes 135–36 and accompanying text.

151. *See* U.S. CONST. amend. XIV, § 1; *see also* Lawrence v. Texas, 539 U.S. 558, 564–65 (2003); Pulliam v. Coastal Emergency Servs., 257 Va. 1, 20 (Va. 1999) (citing Etheridge v. Med. Ctr. Hosps., 237 Va. 87, 98 (Va. 1989)).

152. U.S. CONST. amend. XIV, § 1.

153. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (articulating the tests the U.S. Supreme Court utilizes under an EPC analysis).

154. Brown v. State, 811 A.2d 501, 506 (N.J. Super. Ct. App. Div. 2002) (citing Barone v. Dep't of Hum. Servs. 526 A.2d 1055, 1060 (N.J. 1987)).

155. *See id.* (citing *Barone*, 526 A.2d at 1060); *see also* Donna Matthews, *Avoiding Gender Equality*, 19 WOMEN'S RTS. L. REP. 127, 136 (1998) (explaining how Craig v. Boren, 429 U.S. 190 (1976) halted the march of gender discriminatory laws toward the higher classification).

156. *Brown*, 811 A.2d 501, 506 (citing *Barone*, 526 A.2d 1055).

157. *See id.* at 505. Female toplessness prohibitions violate the fundamental right to bodily autonomy. *See* discussion *supra* Section I.B.2. Thus, the bans violate the EPC under the strict scrutiny standard. *See* discussion *infra* Section II.C.3.

multiple courts apply the intermediate standard to the bans.[158] To prove courts employ the wrong standard, it is necessary to grasp the cases establishing the current standard.

1. Intermediate Scrutiny Standard

The next cases illustrate the evolution of the intermediate scrutiny standard of review.[159] In 1971, the U.S. Supreme Court reviewed Idaho statutes that granted mandatory preference to men over women in estate administration.[160] The Court opined states may treat people differently, but only if the classifications are "reasonable, not arbitrary . . . so that all persons similarly circumstanced shall be treated alike."[161] The Court struck down the Idaho statutes creating arbitrary distinctions founded solely on gender.[162]

In *Craig v. Boren*,[163] the Court established the intermediate scrutiny standard for gender discrimination laws.[164] The standard requires laws to "serve important governmental objectives."[165] The laws "must be substantially related to [the] achievement of those objectives."[166] In 1982, the Court struck down another discriminatory state statute benefitting women over men.[167] The Court added

158. *See* Matthews, *supra* note 155, at 129–30 (explaining gender discriminatory laws "can only be resolved by dismantling the existing gender equality jurisprudence").

159. *See* United States v. Virginia, 518 U.S. 515, 532–33 (1996) (regarding a male-only admissions policy); *see also* Clark v. Jeter, 486 U.S. 456, 461 (1988) (inquiring about a state statute requiring proof of paternity before seeking support from fathers); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 730–31 (1982) (permitting only women to enter nursing school at the University of Mississippi); Craig v. Boren, 429 U.S. 190, 197 (1976) (deciding whether it was acceptable that women could buy alcohol three years before males); Reed v. Reed, 404 U.S. 71, 75–77 (1971) (presuming males had the default administrating roles over estates for children who died intestate).

160. *See Reed*, 404 U.S. at 75–77 (explaining how the Idaho statutes §§ 15-312 and 15-314 are unconstitutional). The statutes created a presumption that fathers, as opposed to mothers, would serve as the default administrator of a child's estate simply because of their gender. *See id.*

161. *See id.* at 76 (citing Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

162. *See id.*

163. Craig v. Boren, 429 U.S. 190, 192 (1976).

164. *See id.* (opining that OKLA. STAT. tit. 37, §§ 241, 245, which "prohibit[ed] the sale of 'nonintoxicating' 3.2% beer to males under the age of 21 and to females under the age of 18" was unconstitutional). The court determined the statutes must be overturned because the discrimination against men was too great. *See id.*

165. *Id.* at 197.

166. *See id.* (determining that allowing women to purchase alcohol three years before males did not serve an important governmental objective, so it violated the EPC).

167. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 730–31 (1982) (stating the statute refused to allow male students to enroll in nursing school). This

the requirement of an "exceedingly persuasive justification."[168] This justification must be "'substantially related to the achievement of [governmental] objectives.'"[169] These cases established the "intermediate scrutiny"[170] standard.

The Court later applied the "intermediate scrutiny" standard in *United States v. Virginia*.[171] Virginia sponsored a male-only military college.[172] Justice Ginsburg observed that Virginia thwarted "substantial equality" for "educational opportunities."[173] The corresponding women's school offered no similar benefits.[174] Virginia failed to show an "'exceedingly persuasive justification' for excluding all women from the citizen-soldier training."[175] Ultimately, the Court found that the policy fell short of the intermediate scrutiny test.[176]

Courts apply the intermediate scrutiny test to uphold and overrule female toplessness bans.[177] Courts do not apply dependable principles to the standard[178]—the malleable intermediate scrutiny

---

decision further solidified the mandatory intermediate scrutiny test that courts must apply to discriminations based on gender. *See id.*

168. *See id.* at 731. The court added this requirement onto the requirement that the law must serve "important government objectives." *Craig*, 429 U.S. at 197.

169. *Hogan*, 458 U.S. at 724 (1982) (citing Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).

170. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (citing *Hogan*, 458 U.S. at 723–24) (clarifying the intermediate standard was established in previous cases). The petitioner filed the case to compel the respondent to pay child support of an illegitimate child. *See id.* The court explained which standard of review applied to each category of people. *See id.*

171. *See* State v. Lilley, 204 A.3d 198, 206 (N.H. 2019) (citing United States v. Virginia, 518 U.S. 515, 532–33 (1996)).

172. *See Virginia*, 518 U.S. at 519. The United States filed suit against Virginia for violating the EPC by refusing admission to women. *See id.*

173. *See id.* at 554 (citing Sweatt v. Painter, 339 U.S. 629, 633 (1950)).

174. *See id.* at 553 (citing United States v. Virginia, 44 F.3d 1229, 1250 (4th Cir. 1995) (Phillips, J., dissenting)) ("[T]he Commonwealth has created a VWIL program fairly appraised as a 'pale shadow' of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence.").

175. *Id.* at 534 (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). A law is "unconstitutional under the Fourteenth Amendment if the intent of the passage is to 'create or perpetuate the legal, social, [or] economic inferiority of women.'" Free the Nipple-Fort Collins v. City of Fort Collins, 216 F. Supp. 3d 1258, 1265, *aff'd*, 916 F.3d 792 (10th Cir. 2019) (citing *Virginia*, 518 U.S. at 533–34).

176. *See Virginia*, 518 U.S. at 558.

177. *See* Eline v. Town of Ocean City, 7 F.4th 214, 224 (4th Cir. 2021), *cert. denied*, No. 21-850, 2022 U.S. LEXIS 800 (Feb. 22, 2022) (deciding the ban does not violate the EPC by applying the intermediate scrutiny standard of review); Free the Nipple-Fort Collins v. Fort Collins, 916 F.3d 792, 802 (10th Cir. 2019) (deciding the ban does violate the intermediate scrutiny test under the EPC). *See, e.g.*, C.T. v. State, 939 N.E.2d 626, 629 (Ind. Ct. App. 2010) (deciding the ban does not violate the EPC when utilizing the intermediate scrutiny test).

178. *See Virginia*, 518 U.S. at 568 (Scalia, J., dissenting).

test adapts over time.[179] The Court employs the standard inconsistently and on a whim.[180] Many U.S. district and circuit courts examine female toplessness bans through intermediate scrutiny.[181] The standard leads courts to hold opposite outcomes for nearly identical statutes.[182] Courts justify governmental enactment of the bans in the Fourth, Seventh, and Eighth Circuits.[183] Meanwhile, the Tenth Circuit determined a Fort Collins, Colorado ordinance required repeal.[184] A circuit split invites a potential certiorari review by the U.S. Supreme Court.[185] The Court may clarify or alter the analyses of lower courts.[186] In *Eline v. Town of Ocean City*,[187] the Fourth Circuit validated a toplessness ban.[188] The plaintiffs appealed.[189] In 2022, the U.S. Supreme Court denied the petition for a writ of certiorari.[190] Yet it may resolve the current circuit split with a different challenger in the future.[191]

---

179. *See id.* (proclaiming the intermediate scrutiny standard needs more consistent evaluations).

180. *See id.* (explaining the inconsistent application of the intermediate scrutiny).

181. *See Eline*, 7 F.4th at 224 (deciding the ban does not violate the EPC using the intermediate scrutiny standard of review); *Free the Nipple-Fort Collins*, 916 F.3d at 802 (deciding the ban does violate the EPC when applying the intermediate scrutiny). *See, e.g.*, *C.T.*, 939 N.E.2d at 629 (deciding the ban does not violate the EPC using the intermediate scrutiny test).

182. *See* cases cited *supra* note 177 (showing discrepancies in the analyses of the bans); statutes cited *supra* notes 34–35 (listing similarly worded statutes).

183. *See Eline*, 7 F.4th at 224 (finding a ban is constitutional after an intermediate scrutiny analysis); *see also* Tagami v. City of Chi., 875 F.3d 375, 380 (7th Cir. 2019) (deciding the Chicago ordinance withstands the intermediate scrutiny test); Free the Nipple-Springfield Residents Promoting Equal. v. City of Springfield, 923 F.3d 508, 512 (8th Cir. 2019) (reasoning a ban is constitutional through intermediate scrutiny).

184. *See Free the Nipple-Fort Collins*, 916 F.3d at 799 (opining the ban does violate the EPC using intermediate scrutiny).

185. *See* SUP. CT. R. 10 (discussing the Supreme Court's considerations for granting a "writ of certiorari").

186. *See id.*

187. Eline v. Town of Ocean City, 7 F.4th 214, 224 (4th Cir. 2021), *cert. denied*, 2022 U.S. LEXIS 800 (Feb. 22, 2022)

188. *See id.* (deciding the ban does not violate the EPC using the intermediate scrutiny standard of review).

189. *See id.*

190. *See* Eline v. Town of Ocean City, No. 21-850, 2022 U.S. LEXIS 800 at *1 (Feb. 22, 2022) (determining the "[p]etition for writ of certiorari" is denied).

191. *See* SUP. CT. R. 10; *see supra* note 185 and accompanying text.

2. Strict Scrutiny Standard

The U.S. Supreme Court has never reviewed female toplessness bans.[192] In *Frontiero v. Richardson*,[193] the Court declared "classifications based upon sex . . . are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[194] The plurality opinion allows every court in America to justify the application of the strict scrutiny test to female toplessness bans.[195]

Courts should apply the strict scrutiny standard to all female toplessness prohibitions.[196] Undoubtedly, disparate treatment between genders occurs in relation to the bans.[197] Interpretation of the bans as simply sex-based statutes—even if they correctly indicate the ways most people act—still "den[ies] individuals opportunity."[198] The bans also violate the fundamental right to bodily autonomy.[199] All courts must apply the strict scrutiny standard for violations of fundamental rights.[200] Thus, they must apply strict scrutiny for female toplessness bans.[201] If courts apply strict scrutiny, then the repeal of all prohibitions must transpire.[202]

---

192. *See Eline*, 2022 U.S. LEXIS at *1. *See, e.g.*, State v. Lilley, 204 A.3d 198 (N.H. 2019), *cert. denied*, 140 S. Ct. 858 (2020).

193. Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion).

194. *Id.* Justice Powell's concurring opinion stated gender discrimination laws mandated "close judicial scrutiny." *See id.* at 691 (Powell, J., concurring). Therefore, the absolute universal application of strict scrutiny to all gender discrimination laws fell short, but just barely. *See id.*

195. *See id.* at 682–91.

196. *See generally id.*

197. *See* discussion *supra* Sections I.A.1–2 (emphasizing the origins of the toplessness bans from the early 1900s to 2023).

198. Nguyen v. INS, 533 U.S. 53, 74 (2001) (O'Connor, J., dissenting).

199. *See* discussion *supra* Section II.B.2 (elucidating how female toplessness bans violate the fundamental right to bodily autonomy).

200. *See* discussion *supra* Section II.B.2 (establishing the bans are gender discrimination plus fundamental right violations).

201. *See* discussion *supra* Section II.C (describing the levels of review under the EPC that courts apply to challenged statutes to test the validity of the plaintiffs' claims). Female toplessness prohibitions violate the fundamental right to bodily autonomy. *See* discussion *supra* Section I.B.2. Thus, the bans violate the EPC when the strict scrutiny standard is applied. *See* discussion *infra* Section II.C.3.

202. *See* Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (plurality opinion) (quoting Reed v. Reed 404 U.S. 71, 76–77 (1971)) ("[A]ny statutory scheme which draws a sharp line between the sexes . . . involves the 'very kind of arbitrary legislation choice forbidden by the [Constitution].'"); *see also* discussion *infra* Section II.C.3 (applying strict scrutiny to the Ocean City ordinances).

3. Strict Scrutiny Applied to the Ocean City Ordinances

For any statute to survive the strict scrutiny test, it must satisfy two elements.[203] First, the defendant must prove the "necessary" statute "promote[s] a compelling state interest."[204] The U.S. Supreme Court demands the defendant "must show strong evidence of a harm it seeks to remedy."[205] Second, the "narrowly tailored"[206] interest must employ "the least restrictive means"[207] to meet the "compelling state interest."[208] Courts acknowledge "governments can rarely come up with a governmental interest that is so compelling that it can justify legislation subject to the strict scrutiny test."[209]

To apply the strict scrutiny test to a law, a review of the statutory language occurs first.[210] Section 53-193 of the Ocean City, Maryland Code of Ordinances states: "[I]t shall be unlawful for any person to be on the beach, boardwalk, public parks . . . or any other public place . . . in a state of nudity."[211] Section 58-192 defines "state of nudity" as "the showing of the female breast with less than a fully opaque covering of any part of the nipple."[212] The definitional ordinance does not mention male breasts.[213]

The "state of nudity" ordinance fails to pass the first element of strict scrutiny.[214] In *Eline*, five plaintiffs filed suit asserting the

---

203. *See* Eu v. San Francisco Cnty. Dem. Central Comm., 489 U.S. 214, 222–29 (1989) (explaining for a law to survive a Fourteenth Amendment challenge, the law must "serv[e] a compelling governmental interest" and be "narrowly tailored to serve that interest"); State v. Lilley, 204 A.3d 198, 205 (N.H. 2019) (clarifying how the state court applies the federal strict scrutiny test to challenged statutes).

204. Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (quoting Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969)).

205. Caruso v. Zenon, No. 95-MK-1578 BNB, 2005 U.S. Dist. LEXIS 45904, at *10 (D. Colo. 2005) (citing Miller v. Johnson, 515 U.S. 900, 922 (1995)).

206. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (clarifying a law must be narrowly tailored to satisfy the EPC); *see also Lilley*, 204 A.3d at 205 (laying out the strict scrutiny test).

207. *Dunn*, 405 U.S. at 353 (deciding the state statute did not meet the strict scrutiny test because the government did not use the "least restrictive means" possible).

208. *Id.* at 337 (quoting *Kramer*, 395 U.S. at 627).

209. DANIEL R. MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 13 (9th ed. 2021) (describing how strict scrutiny is strict in theory but usually fatal in fact).

210. *See* OCEAN CITY, MD., CODE OF ORDINANCES §§ 58-192–58-193 (2022).

211. OCEAN CITY, MD., CODE OF ORDINANCES § 58-193.

212. *Id.* § 58-192.

213. *See id.*

214. *Id. See supra* notes 203–09 and accompanying text (laying out the elements of the strict scrutiny standard).

ordinances violated their rights under the EPC.[215] The town justified the law based on the residents' "perceived moral sensibilities."[216] But the "perceived moral sensibilities"[217] argument does not establish a "necessary" purpose "to promote a compelling state interest."[218] The sight of topless women in public does not infringe on anyone's fundamental rights.[219] No person involved in the case even alleged the visibility of topless females caused harm.[220] The legislature admitted females' bare breasts do not offend everyone.[221] And the Tenth Circuit found topless women in public do not endanger children or create traffic problems.[222] Nor do they contribute to public disorder or generate irreparable harm.[223] No justifiable harm arose, only personal disfavor by the minority of residents.[224] Since the government did not seek to rectify any harm, the ban does not support a necessary purpose to "compel[ ] state interest."[225] The ordinances fall short of the first element.[226]

For the second element, the "narrowly tailored"[227] governmental purpose of "perceived moral sensibilities"[228] fails to meet the minimum threshold. The ban is not the "least restrictive means" to

---

215. *See* Eline v. Town of Ocean City, 7 F.4th 214, 216 (4th Cir. 2021), *cert. denied*, No. 21-850, 2022 U.S. LEXIS 800 (Feb. 22, 2022).

216. *Id.* at 222.

217. *Eline,* 7 F.4th at 222.

218. *See* Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (quoting Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627 (1969)).

219. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 437 (1985) (asserting fundamental rights must be violated for the strict scrutiny test to be triggered); *see also* Free the Nipple-Fort Collins v. Fort Collins, 916 F.3d 792, 802–08 (10th Cir. 2019) (deciding there is no harm imposed on others by topless women in public).

220. *See Eline*, 7 F.4th at 219. The court relied on the government's "public sensibilities" argument. *See id.* at 224. The defense argued the City Council members were elected officials, so they could speak on behalf of the town. *See id.*

221. *See id.* at 217 (stating the Ocean City Council found the prohibition is not offensive to everyone).

222. *See Free the Nipple-Fort Collins*, 916 F.3d at 802–08 (refuting the government's rationale for the enactment of the ban).

223. *See id.*

224. *See Eline*, 7 F.4th at 217. "Only one member in the audience—a 70-year-old Ocean City resident—spoke" in favor of the nudity ordinance. *Id.* at 217. Yet, the court still relied on the government's interest in "public sensibilities." *See id.* at 224.

225. Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (quoting Kramer v. Union Free Sch. Dist. 395 U.S. 621, 627 (1969)). *See* OCEAN CITY, MD., CODE OF ORDINANCES §§ 58-192–58-193 (2022); *Eline*, 7 F.4th at 214; *see also supra* notes 203–09 and accompanying text (explaining the elements of the strict scrutiny standard).

226. *See* OCEAN CITY, MD., CODE OF ORDINANCES §§ 58-192–58-193 (2022).

227. State v. Lilley, 204 A.3d 198, 205 (N.H. 2019).

228. *See Eline*, 7 F.4th at 222.

protect morals.[229] A lesser restrictive means could require the allocation of small, designated areas as chest-covered public spaces.[230] The ordinances fall flat under the second element.[231] The ordinances fail to satisfy either element of the strict scrutiny test.[232] No court could uphold any comparable female toplessness ban under the strict scrutiny standard.[233] All bans must be abolished.[234]

CONCLUSION

Women's bodies belong to them alone.[235] The exposure of breasts should not invite objectification.[236] Legislatures and courts must eliminate promulgations of bodily objectification.[237] They should accept the physiological and sexual arousal similarities of

229. *See Dunn*, 405 U.S. at 353 (deciding the state statute did not meet the strict scrutiny test because the government did not use the "least restrictive means" possible).

230. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (Brennan, J., dissenting) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16–17 (1973)) (explaining the violation of fundamental rights may only be justified under a strict scrutiny test "if it furthers a compelling government purpose, and even then, if only no less restrictive alternative is available"); *see also Dunn*, 405 U.S. at 353.

231. *See* OCEAN CITY, MD., CODE OF ORDINANCES §§ 58-192–58-193 (2022).

232. *See id.*; Brown v. State, 811 A.2d 501, 505 (N.J. Super. Ct. App. Div. 2002) (clarifying if a fundamental right is violated, the law does not pass the strict scrutiny test, so the statute is not constitutional); *see also* Pulliam v. Coastal Emergency Servs., 257 Va. 1, 20–21 (Va. 1999) (requiring fundamental rights to be protected); *see* discussion *supra* notes 192–202 and accompanying text. If a law violates a constitutional right, then it must be overturned. *See generally* LUNDMARK, *supra* note 2.

233. *See* MANDELKER, *supra* note 209 (describing how strict scrutiny is strict in theory but usually fatal in fact); *see* discussion *supra* Section II.B.2 (asserting female toplessness bans are a fundamental right protected by the EPC).

234. *See* discussion *supra* Section II.B.2 (asserting female toplessness bans are a fundamental right protected by the EPC); *see also* discussion *supra* Sections II.C.1–2 (arguing why female toplessness bans violate strict scrutiny).

235. *See* Alisobhani, *supra* note 7, at 300 (explaining how women own their bodies); *see also supra* note 43 and accompanying text (clarifying the false equivalences created by female toplessness bans).

236. *See* Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion) (citing M. GRUBERG, WOMEN IN AMERICAN POLITICS 4 (1968)) (discussing how America's "long and unfortunate history of sex discrimination" rationalized by "'romantic paternalism' . . . put women, not on a pedestal, but in a cage"); *see also* Alisobhani, *supra* note 7, at 300 (declaring the right to chest nudity is a right for females to finally feel comfortable in their own skin); *supra* note 43 and accompanying text (clarifying the false equivalences created by female toplessness bans).

237. *See supra* note 233 and accompanying text. Objectification will persist if adult entertainment establishments remain the only public places to view live breasts. *See* Alisobhani *supra* note 7, at 311.

both genders' breasts.[238] The right to bodily autonomy permits people to appear topless on public land.[239] Fundamental right protections transcend capricious and "perceived moral sensibilities."[240] Encroachments on the right to bodily autonomy infringe on a fundamental right.[241] Consequently, intermediate scrutiny provides an inadequate standard of review.[242] Instead, courts must adopt the strict scrutiny standard under the EPC.[243] Courts must overturn all female toplessness prohibitions.[244]

238. *See* discussion *supra* Sections II.A.1–2 (arguing if courts accepted the scientifically proven similarities of the breasts, then the governments' rationales for toplessness bans would falter).

239. *See* C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1154 (9th Cir. 2016) (citing Lawrence v. Texas, 539 U.S. 558, 564 (2003)) (explaining how bodily autonomy is a fundamental right); *see also* discussion *supra* Section II.B.2 (analyzing female toplessness bans are a fundamental right protected by the EPC).

240. Eline v. Town of Ocean City, 7 F.4th 214, 222 (4th Cir. 2021), *cert. denied*, No. 21-850, 2022 U.S. LEXIS 800 (Feb. 22, 2022) (affirming the constitutionality of the "perceived moral sensibilities" argument). *See* discussion *supra* Section II.B.3 (arguing how fundamental protection trumps the justification of moral sensibilities).

241. *See* discussion *supra* Section II.B.1 (explaining how the right to bodily autonomy is a fundamental right).

242. *See* discussion *supra* Section II.C (describing the standards of review under the EPC: strict scrutiny, intermediate scrutiny, and rational basis). Female toplessness prohibitions violate the fundamental right to bodily autonomy. *See* discussion *supra* Section I.B.2. Thus, the bans violate the EPC when the strict scrutiny standard is applied. *See* discussion *supra* Section II.C.3.

243. *See* discussion *supra* Section II.C.2 (clarifying why strict scrutiny is the precise standard to analyze female toplessness bans).

244. *See* discussion *supra* Section II.C.3 (applying the strict scrutiny standard to the Ocean City ordinances). The analysis proves the necessity to repeal all female toplessness bans. *See* discussion *supra* Section II.C.3.

***