

COMMENTS

HOW A TOOL FOR EQUALITY FURTHERS OPPRESSION: THE PROBLEM WITH PUBLIC ACCOMMODATION ACTS AND A PROPOSED SOLUTION*

I. INTRODUCTION

Many public accommodation acts (PAAs) allow for the weaponization of civil rights law by socially and economically dominant groups.¹ For a manageable scope, this Comment focuses on the use of PAAs to hinder gender equity. PAAs fail to engage with the reality that women, trans, queer, and nonbinary persons are systemically disadvantaged by a cultural hierarchy that privileges cisgender males over those with other gender identities.² The PAAs perpetuate inequity by failing to distinguish between remedial actions and bigoted actions.³ By providing the most privileged with the same protections as the most vulnerable, PAAs preclude the creation of safe public spaces for vulnerable populations, under the guise of preventing “discrimination.”⁴ Yet safe public

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1. See, e.g., *Comm’n on Hum. Rts. & Opportunities v. Edge Fitness, LLC* (*Edge Fitness II*), 268 A.3d 630, 641 (Conn. 2022); *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 436–37 (6th Cir. 2004); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 727 (1982) (“The State’s primary justification for maintaining the single-sex admissions policy of MUW’s School of Nursing is that it compensates for discrimination against women and, therefore, constitutes educational affirmative action. As applied to the School of Nursing, we find the State’s argument unpersuasive.”); *Pietrangelo v. Refresh Club, Inc.*, No. 18-cv-1943, 2023 U.S. Dist. LEXIS 176296, at *25 (D.D.C. Sept. 29, 2023) (“The Wing held itself out as a social space for women and nonbinary individuals; it admitted no men; and when a man did apply, his application was denied through an extraordinary and atypical process. That is a paradigmatic case of discrimination.”).

2. See J.E. Sumerau & Eric Joy Denise, *Obscuring Oppression: Racism, Cissexism, and the Persistence of Social Inequality*, 4 SOCIO. RACE & ETHNICITY 322, 322–37 (2018) (“[E]xamining processes of obscuring oppression may provide insight into the persistence of inequality in society”). See generally Kim Parker & Cary Funk, *Gender Discrimination Comes in Many Forms for Today’s Working Women*, PEW RSCH. CTR. (Dec. 14, 2017), <https://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/> [<https://perma.cc/Q3WR-B5AS>]. While beyond the scope of this Comment, the PAAs similarly fail to account for other systems of oppression such as racism, homophobia, ableism, elitism, and others that could similarly be counteracted by the PAA Standing Test proposed. See *infra* Part III.C.

3. See, e.g., 43 PA. STAT. AND CONS. STAT. ANN. § 953 (West 2024); MO. ANN. STAT. § 213.065 (West 2024); MICH. COMP. LAWS ANN. § 37.2302 (West 2024); ME. REV. STAT. ANN. tit. 5, § 4592 (West 2024).

4. See, e.g., *Edge Fitness II*, 268 A.3d at 641; *Derungs*, 374 F.3d at 430; *Pietrangelo*, 2023 U.S. Dist. LEXIS 176296, at *25.

spaces are necessary for rectifying the effects of a long history of gendered oppression, underinclusiveness, and imbalanced public health.⁵ Systemically oppressed groups need to feel safe in public spaces to ensure that these individuals can fairly access public amenities and to improve gender equity in America.⁶

In lieu of sweeping legislative change, courts must find another way to ensure people are treated fairly under the PAAs.⁷ Courts must not subvert the progressive intention of the PAAs by allowing plaintiffs to use them to diminish the safety of vulnerable groups.⁸ To empower courts to prevent such misuse of the PAAs, this Comment suggests the adoption of a stricter view of standing in cases in which plaintiffs allege to be harmed by discriminatory actions that are remedial in nature.⁹

This Comment begins in Part II.A with an overview of state PAAs, and reveals that they do not improve the equitable use of public accommodations. Part II.B examines the current inequity among the sexes. Part II.C shows how that inequity is disguised by the legal illusion of the equality of the sexes. Part II.D analyzes *Commission on Human Rights & Opportunities v. Edge Fitness*, a case in which the plain language of Connecticut's PAA limited the court's ability to provide a just remedy to a reported violation that was remedial in purpose and effect.¹⁰ Part III.A unpacks what the *Edge Fitness* court got wrong, specifically how the focus on privacy is misplaced and how safety is the more pressing justification for PAA exceptions. Part III.B discusses the value of careful scrutiny for PAA violations. And Part III.C proposes a new judicial approach to PAA violation cases involving remedial actions: the PAA Standing Test.

The proposed PAA Standing Test is a three-part test which would have courts weigh the injury caused by the PAA violation against the injury prevented by the violative action, thus giving new weight to the previously overlooked harm being remedied: the harm of systemic inequity, be it sexism, transphobia, or some other systemic prejudice. For a plaintiff to be successful, he must plausibly allege that his harm outweighs the harm being remedied by the violative action.

5. Carrie Kerpen, *Do Women-Only Spaces Still Matter?*, FORBES (June 25, 2019), <https://www.forbes.com/sites/carriekerpen/2019/06/25/do-women-only-spaces-still-matter/?sh=65746e0f34e9> [https://perma.cc/NX3W-YMEP].

6. See, e.g., Christopher F. Karpowitz, Tali Mendelberg & Lee Shaker, *Gender Inequality in Deliberative Participation*, 106 AM. POL. SCI. REV. 553 (2012); Ruth Lewis, Elizabeth Sharpe, Jennifer Remnant & Rhiannon Redpath, 'Safe Spaces': Experiences of Feminist Women-Only Space, 20 SOCIO. RSCH. ONLINE 105 (2015); Jyoti Madhusoodanan, *Safe Space: Online Groups Lift Up Women in Tech*, NATURE (Nov. 21, 2022), <https://www.nature.com/articles/d41586-022-03798-y> [https://perma.cc/XS9E-QVE9].

7. For a thoughtful essay on how to approach legislative change, see Michael R. Evans, *The Case for All-Female Health Clubs: Creating a Compensatory Purpose Exception to State Public Accommodation Laws*, 11 YALE J.L. & FEMINISM 307, 309–11, 313–14 (1999).

8. See, e.g., *Edge Fitness II*, 268 A.3d at 641; *Derungs*, 374 F.3d at 430; *Pietrangelo*, 2023 U.S. Dist. LEXIS 176296, at *25.

9. Otherwise, the courts further inequities and prevent progress towards gender equity. See, e.g., *Edge Fitness II*, 268 A.3d at 633–34 (permitting men to bring suit under the PAA against gyms with women-only workout areas on the grounds that they faced slightly longer equipment wait times); *Derungs*, 374 F.3d at 430 (holding that the Ohio PAA does not prohibit bans on breastfeeding in places of public accommodation); *Pietrangelo*, 2023 U.S. Dist. LEXIS 176296, at *13 (granting cisgender male plaintiff summary judgment on his PAA violation claim where he alleged the defendant networking space designed for women and nonbinary people unlawfully discriminated against cisgender men).

10. *Edge Fitness II*, 268 A.3d at 641.

This Comment concludes that to ensure the advancement of gender equity, courts must adopt a different approach to PAA litigation. By using the proposed PAA Standing Test, courts could better balance the interests involved in PAA litigation to ensure that gender inequities, currently obscured by the concept of legal equality of the sexes, can be remedied. By implementing a more thoughtful standing analysis for PAA claims, the courts can improve gender equity (alongside other inequities) in America.

II. OVERVIEW

A. *Current PAAs Are Anti Gender Equity*

All sexes are equal under the law.¹¹ The United States Constitution's Fourteenth Amendment Equal Protection Clause purports to ensure the fair treatment of all citizens by prohibiting laws that would deny any person equal protection.¹² To pass constitutional muster, laws that discriminate based on sex or gender must show that they serve an important state interest and that they do so by means that are substantially related to serve that interest.¹³ This standard is known as *intermediate scrutiny*, and it is a lower standard than the one applied to racially discriminatory laws but is more demanding than the standard applied to discrimination based on age, disability, wealth, or felony status.¹⁴ Under the Fourteenth Amendment, states cannot enact laws that discriminate without justification, but the Amendment does not apply to private conduct.¹⁵ The federal government limits private discriminatory conduct via its Commerce Clause powers, with states providing additional statutory regulation.¹⁶

Drawing on its Article I Commerce Clause power, the federal government enacted its PAA, the Prohibition Against Discrimination or Segregation in Places of Public Accommodation Act, to limit the negative economic impact of commercial discrimination.¹⁷ This statute prohibits discrimination or segregation in places of public accommodation.¹⁸ It provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination on the ground of race, color, religion, or national origin."¹⁹ The statute does not address discrimination on the basis of sex, and courts have interpreted it as not prohibiting sex-based discrimination.²⁰

11. U.S. CONST. amends. XIV, XIX; *see also, e.g.*, *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990).

12. U.S. CONST. amend. XIV.

13. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (creating the intermediate scrutiny test).

14. *See Jennifer L. Greenblatt, Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers Are Created Equal*, 10 FLA. COASTAL L. REV. 421, 433–36 (2009).

15. U.S. CONST. amend. XIV.

16. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (holding that Congress possessed ample power under the Commerce Clause to enact provisions of the Civil Rights Act of 1964 precluding discrimination in public accommodations).

17. 42 U.S.C. § 2000a; *Heart of Atlanta Motel*, 379 U.S. at 258–62.

18. § 2000a.

19. *Id.* § 2000a(a).

20. *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593, 595 (S.D.N.Y. 1970) ("We are in accord with Judge Tenney's conclusion that § 201(a) of the Civil Rights Act of 1964, guaranteeing to all persons

In order to fill the gaps left by the federal PAA, many state legislatures have passed their own PAAs prohibiting the unequal treatment of people on a variety of additional bases, including sex, in spaces where the public is served.²¹

These acts go beyond the minimum required by the Equal Protection Clause and the federal PAA to address a broader scope of identity-based discrimination.²² Such statutes are an essential tool for the ongoing battle against systemic discrimination. Take, for example, the relevant portion of Connecticut's PAA:

It shall be a discriminatory practice in violation of this section: (1) To deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation, resort or amusement because of *race, creed, color, national origin, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, intellectual disability, mental disability, physical disability*, . . . subject only to the conditions and limitations established by law and applicable alike to all persons . . .²³

With its PAA, Connecticut expanded the discrimination prohibition beyond race, color, religion, and national origin to prohibit discrimination based on creed, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, intellectual disability, mental disability, and physical disability.²⁴

Other state PAAs similarly prohibit a greater variety of discriminatory actions than the federal PAA.²⁵ Forty-five states have enacted some form of PAA to prohibit discrimination based on race, gender, ancestry, and religion.²⁶ Of those, twenty-five

the full and equal enjoyment of public accommodations without discrimination on account of race, color, religion or national origin, applies neither to discrimination on the basis of sex, nor to discrimination in a bar or tavern whose principal business is the sale of alcoholic beverages rather than food.” (citations omitted) (first citing 42 U.S.C. § 2000a(a); then citing *DeCrow v. Hotel Syracuse Corp.*, 288 F. Supp. 530, 532 (N.D.N.Y. 1968); and then citing *Cuevas v. Sdrales*, 344 F.2d 1019, 1020–23 (10th Cir. 1965)). However, the exclusion was found to be prohibited under the Fourteenth Amendment because New York engaged in “pervasive” and substantial regulation of liquor licenses, and so there was sufficient state action to invoke equal protection. *Id.* at 599.

21. See, e.g., CONN. GEN. STAT. ANN. § 46a-64 (West 2024); MINN. STAT. ANN. § 363A.11 (West 2024); OR. REV. STAT. ANN. § 659A.403 (West 2024).

22. For example, all state public accommodation statutes include prohibitions on sex-based discrimination. *State Public Accommodation Laws*, NAT'L CONF. OF ST. LEGIS., <https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx#:~:text=All%20states%20with%20a%20public,%2C%20gender%2C%20ancestry%20and%20religion> [https://perma.cc/TAU8-NGJZ] (last updated June 25, 2021); see also, e.g., ALASKA STAT. ANN. § 18.80.230(a)(1) (West 2024); KY. REV. STAT. ANN. § 344.145(1) (West 2024); VT. STAT. ANN. tit. 9, § 4502(a) (West 2024).

23. CONN. GEN. STAT. ANN. § 46a-64 (emphasis added).

24. *Id.*

25. Compare, e.g., N.J. STAT. ANN. § 10:5-12(f)(1) (West 2024) (prohibiting discrimination in public accommodations on account of “race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States or nationality”), with 42 U.S.C. § 2000a (prohibiting discrimination in public accommodations only on account of “race, color, religion, or national origin”).

26. E.g., MASS. GEN. LAWS ch. 272, § 98 (West 2024); KAN. STAT. ANN. § 44-1001 (West 2024). Alabama, Georgia, Mississippi, North Carolina, and Texas all lack a state PAA and so do not address sex discrimination in places of public accommodation. *State Public Accommodation Laws*, *supra* note 22.

jurisdictions prohibit discrimination based on sexual orientation²⁷ and twenty-four prohibit discrimination based on gender identity.²⁸

While the exact definition of a “public accommodation” varies by state, a wide variety of businesses are normally covered by these statutes, including restaurants, hotels, theaters, and retail stores.²⁹ Exceptions are frequently made for places that are distinctly private in nature, such as private clubs, religious organizations, restrooms, locker rooms, and other similar spaces.³⁰

Many such exceptions recognize a need for a degree of gender-based privacy.³¹ For example, Connecticut carves out an exception to its prohibition of sex-based discrimination for “the rental of sleeping accommodations provided by associations and organizations which rent all such sleeping accommodations . . . for the exclusive use of persons of the same sex or . . . separate bathrooms or locker rooms based on sex.”³² Minnesota makes an exception for “such facilities as restrooms, locker rooms, and other similar places.”³³ And Oregon defines “public accommodation” as a space that is *not* “[a]n institution, bona fide club or place of accommodation that is in its nature distinctly private.”³⁴

The focus of PAA exceptions tends to be the perceived gender-privacy needs of the binary sexes. The exceptions recognize equal privacy needs for men and women but ignore needs unique to certain identity groups such as women, trans, and nonbinary people.³⁵ By failing to provide an exception for some remedial measures to address concerns that may be unique to one sex, PAAs do not allow the advancement of equity

27. *State Public Accommodation Laws*, *supra* note 22; e.g., WIS. STAT. ANN. § 106.52(3) (West 2024).

28. *State Public Accommodation Laws*, *supra* note 22; e.g., CAL. CIV. CODE § 51(5) (West 2024). Note that the website incorrectly lists the California statute as “§ 512.” See *State Public Accommodation Laws*, *supra* note 22. Additionally, twenty prohibit discrimination based on age, eighteen prohibit discrimination based on marital status, e.g., DEL. CODE ANN. tit. 6, § 4504(a)(1) (West 2024), six prohibit discrimination based on military status, e.g., 775 ILL. COMP. STAT. ANN. 5/1-102(A) (West 2024), five prohibit discrimination based on pregnancy/childbirth status, e.g., N.J. STAT. ANN. § 10:5-12(f)(1) (West 2024), and three prohibit discrimination based on veteran status, e.g., WASH. REV. CODE ANN. § 49.60.215. See generally *State Public Accommodation Laws*, *supra* note 22.

29. NAT’L CTR. FOR LESBIAN RTS., STATE BY STATE GUIDE TO LAWS THAT PROHIBIT DISCRIMINATION AGAINST TRANSGENDER PEOPLE, (2010), <https://www.nclrights.org/wp-content/uploads/2013/07/StateLawsThatProhibitDiscriminationAgainstTransPeople.pdf> [<https://perma.cc/Y8UE-67VU>]; see also, e.g., COLO. REV. STAT. ANN. § 24-34-601(1) (West 2024) (listing several examples of public accommodations); IOWA CODE ANN. § 216.2(13) (West 2024) (same).

30. See, e.g., ALASKA STAT. ANN. § 18.80.230(b) (West 2024) (“[A] physical fitness facility may limit public accommodation to only males or only females to protect the privacy interests of its users.”); DEL. CODE ANN. tit. 6, § 4504(a)(2) (West 2024) (“A place of public accommodation may provide reasonable accommodations based on gender identity in areas of facilities where disrobing is likely, such as locker rooms or other changing facilities . . .”).

31. See, e.g., ALASKA STAT. ANN. § 18.80.230(b) (West 2024); DEL. CODE ANN. tit. 6, § 4504(a)(2) (West 2024).

32. CONN. GEN. STAT. ANN. § 46a-64(b)(1) (West 2024).

33. MINN. STAT. ANN. § 363A.24 subd. 1 (West 2024).

34. OR. REV. STAT. ANN. § 659A.400(2)(e) (West 2024).

35. See Evans, *supra* note 7, at 313–16.

among the sexes.³⁶ This is a critical issue that needs addressing, as, on more than one occasion, men have used PAAs to thwart attempts to address the long and continuing history of the oppression of women, nonbinary people, and trans people.³⁷

B. *There Is an Ongoing Need for Equity Among the Sexes*

The reality of sex-based oppression should guide lawmakers seeking to limit sex-based injustices.³⁸ Data reveals a pressing need for exceptions to PAAs for violative actions that serve remedial needs, such as those that further gender equity in the United States.³⁹ The current inequities among men, women, trans, and nonbinary people are stark.⁴⁰ Around 56.2% of women participate in the labor force compared to 67.7% of men.⁴¹ Working women earn only 83.1% of men's median weekly earnings.⁴² Financial inequity has compounding consequences, because income is inextricably linked to power and household authority; due to men's higher rates of pay and employment, power in the home and in public usually lies with men.⁴³

36. An approach that forces equal treatment under the law before equal treatment in society is achieved also disallows remedial action. *E.g.*, *Edge Fitness II*, 268 A.3d 630, 642 (Conn. 2022). For example, women's health is affected by cultural forces that correlate with them using gyms less frequently, yet gyms cannot treat men and women differently within their facilities even if it encourages more equitable use. *See* Jessica Salvatore & Jeanne Marecek, *Gender in the Gym: Evaluation Concerns as Barriers to Women's Weight Lifting*, 63 SEX ROLES 556, 557 (2010) ("Despite the benefits of weight lifting, everyday experience and observational studies in fitness centers and gyms suggest that women are usually underrepresented among users who lift free weights and engage in other types of weight-based strength training.").

37. *See, e.g.*, *Edge Fitness II*, 268 A.3d at 641; *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 430 (6th Cir. 2004); *Pietrangelo v. Refresh Club, Inc.*, No. 18-cv-1943, 2023 U.S. Dist. LEXIS 176296, at *25 (D.D.C. Sept. 29, 2023).

38. *See* Jessica Halperin, Note, *Ethical Mediation in an Unjust World: Claiming Bias and Negotiating Fairness*, 23 CUNY L. REV. 320, 320 (2020) ("In the context of multidimensional race- and sex-based inequalities in society, however, neutrality is an impossible ideal and notions of 'fairness' are complex. . . . Systemic oppression exists in many internalized, interpersonal, institutional, and cultural forms in the United States. . . ."); Lewis et al., *supra* note 6, at 106 ("[C]ontemporary discourses discourage women from acknowledging the consistently high rates of victimisation of women as a group, and encourage them instead to see victimisation as a failure of personal responsibility. Is the contemporary paradox the failure to see men's violence, abuse and harassment of women as routine and widespread, despite lived experiences of it as such?").

39. *Women in the Labor Force: A Databook*, U.S. BUREAU OF LAB. STAT. (Mar. 2022) [hereinafter *Women in the Labor Force*], <https://www.bls.gov/opub/reports/womens-databook/2021/home.htm> [<https://perma.cc/TF2L-JYMD>]; *Victims of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/victims-sexual-violence> [<https://perma.cc/8DG9-KD7B>] (last visited Apr. 16, 2024).

40. *Women in the Labor Force*, *supra* note 39; *see also* Daniel Bergner, *The Struggles of Rejecting the Gender Binary*, N.Y. TIMES (June 4, 2019), <https://www.nytimes.com/2019/06/04/magazine/gender-nonbinary.html> [<https://perma.cc/QF46-82ZR>] (noting that statistics on nonbinary populations are lacking).

41. *Women in the Labor Force*, *supra* note 39.

42. *Median Earnings for Women in 2021 Were 83.1 Percent of the Median for Men*, U.S. BUREAU OF LAB. STAT. (Jan. 24, 2022), <https://www.bls.gov/opub/ted/2022/median-earnings-for-women-in-2021-were-83-1-percent-of-the-median-for-men.htm> [<https://perma.cc/Z6TS-VWMX>] ("In 2021, median weekly earnings for wage and salary workers who usually worked full time were \$998. Median earnings for women were \$912, or 83.1 percent of men's earnings. The women's-to-men's earnings ratio varied by race and Hispanic ethnicity. White women earned 82.2 percent as much as their male counterparts, compared with 94.1 percent for Black women, 78.5 percent for Asian women, and 87.6 percent for Hispanic women." (chart omitted)).

43. JOHN KENNETH GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE* 31–37 (1973) ("The common reality is that the modern household involves a simple but highly important division of labor. With the receipt

Statistics on employment inequity reflect a lack of respect for non-cisgender males in the workplace.⁴⁴ According to a 2018 Pew Research Center Study, women are nearly twice as likely as men to experience gender discrimination at work.⁴⁵ In addition to lower rates of pay, women hold less powerful positions and, as a result, confront greater obstacles when working to enact change.⁴⁶ For example, although they constitute 50.4% of the population,⁴⁷ women account for only about 28% of members of Congress, 33% of state legislature members, 30% of Fortune 500 company board members, and 11% of Fortune 500 company CEOs.⁴⁸

In addition to the financial imbalance and the related power imbalance, there is a shocking inequity in the experiences of personal safety and bodily autonomy among the sexes.⁴⁹ An astounding one in six women have experienced rape,⁵⁰ and these statistics suffer from chronic underreporting.⁵¹ Victims of rape are overwhelmingly female—women comprise 82% of juvenile victims and 90% of adult victims.⁵²

High rates of discrimination have also been documented among LGBTQ adults.⁵³ Over 57% report experiencing slurs, 51% report experiencing sexual harassment, and 51% report experiencing violence.⁵⁴ These statistics contribute to avoidance of public restrooms, healthcare facilities, and legal institutions.⁵⁵

of the income, in the usual case, goes the basic authority over its use. This usually lies with the male [A] natural authority resides with the person who earns the money. This entitles him to be called the head of the family.”). Traditional gender norms remain salient today and the normalcy of the male “breadwinner” persists. Alicia Eads, Laura Tach & Lauren Griffin, *Intra-Household Financial Inequality, Gender Equality, and Marital Dissolution*, 44 J. FAM. & ECON. ISSUES, 373, 376 (2023).

44. Emily A. Leskinen & Lilia M. Cortina, *Dimensions of Disrespect: Mapping and Measuring Gender Harassment in Organizations*, 38 PSYCH. WOMEN Q. 107, 114 (2013).

45. A.W. Geiger & Kim Parker, *For Women’s History Month, a Look at Gender Gains and Gaps in the U.S.*, PEW RSCH. CTR. (Mar. 15, 2018), <https://www.pewresearch.org/fact-tank/2018/03/15/for-womens-history-month-a-look-at-gender-gains-and-gaps-in-the-u-s/> [<https://perma.cc/Q3SB-GM6G>].

46. *Id.*

47. *U.S. Census Bureau Quickfacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/SEX255222> [<https://perma.cc/ZH6H-SZ55>] (last visited Apr. 16, 2024).

48. Geiger & Parker, *supra* note 45.

49. *Victims of Sexual Violence: Statistics*, *supra* note 39.

50. *Id.*

51. ALEXANDRA THOMPSON & SUSANNAH N. TAPP, U.S. DEP’T OF JUST., CRIMINAL VICTIMIZATION, 2022, at 5 (2023), <https://bjs.ojp.gov/document/cv22.pdf> [<https://perma.cc/2PCY-AZ4E>]; JACEY PASSMORE, BALLARD BRIEF, THE UNDERREPORTING AND DISMISSAL OF SEXUAL ASSAULT CASES AGAINST WOMEN IN THE UNITED STATES 5 (2023), <https://ballardbrief.byu.edu/issue-briefs/the-underreporting-and-dismissal-of-sexual-assault-cases-against-women-in-the-united-states> [<https://perma.cc/M5LS-C47C>] (“The [National Crime Victimization Survey] estimates that more than 2 out of every 3 rapes go unreported. Some scholars even estimate that the reporting rate is below 5%. Sexual assault (rape, in particular) is frequently labeled as the most underreported crime in the US.” (footnotes omitted)).

52. *Victims of Sexual Violence: Statistics*, *supra* note 39.

53. Logan S. Casey, Sari L. Reisner, Mary G. Findling, Robert J. Blendon, John M. Benson, Justin M. Sayde & Carolyn Miller, *Discrimination in the United States: Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Americans*, 54 HEALTH SERVS. RSCH. 1454 (2019).

54. *Id.* at 1457.

55. *Id.*

These statistics reflect America's long and well-documented history of discrimination against women, trans, and nonbinary people.⁵⁶ Until the latter decades of the nineteenth century, married women were denied legal, political, and economic rights on the sole basis of their sex, under the doctrine of coverture.⁵⁷ Under coverture, when a woman married, she "lost the ability to own or control property, enter into contracts, make a will, or bring or defend a lawsuit without her husband."⁵⁸ Legally speaking, a woman was her husband's property.⁵⁹ While coverture formally ended before the twentieth century, it has had a lasting effect.⁶⁰ For example, before the passage of Title VII of the Civil Rights Act of 1964, women could legally be, and frequently were, passed over for promotions in the workplace because of the belief that they were protected and supported by their husbands.⁶¹

Additionally, marital rape was not criminalized, due to the cultural belief that a wife always consented to her husband.⁶² It was not until the women's movement of the 1970s that marital rape was raised as a serious issue, and only recently, in 1993, did it become illegal in all fifty states.⁶³ Despite the legal shift, there are still exceptions or loopholes in at least twelve states that allow for some forms of legal marital rape.⁶⁴ And even in spite of its recent criminalization, marital rape remains a serious societal issue that affects 10%–14% of all married women, and 40%–50% of women who are physically abused.⁶⁵

While some aspects of women's societal role have changed for the better, we are a long way from achieving sex equity.⁶⁶ One example is coverture—though it had ended

56. See generally Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 L. LIBR. J. 459 (2002); Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154, 157 (2003); INTIMATE STATES: GENDER, SEXUALITY, AND GOVERNANCE IN MODERN US HISTORY (Margot Canaday, Nancy F. Cott, & Robert O. Self eds., 2021).

57. Zaher, *supra* note 56, at 460–62.

58. Tim Stretton & Krista J. Kesselring, *Introduction to MARRIED WOMEN AND THE LAW: COVERTURE IN ENGLAND AND THE COMMON LAW WORLD* 4, 7–8 (Tim Stretton & Krista J. Kesselring eds., 2013).

59. Zaher, *supra* note 56, at 460–61.

60. See Leskinen & Cortina, *supra* note 44, at 114.

61. Zaher, *supra* note 56, at 462; see also Leskinen & Cortina, *supra* note 44, at 114.

62. Zaher, *supra* note 56, at 462; Elaine K. Martin, Casey T. Taft & Patricia A. Resick, *A Review of Marital Rape*, 12 AGGRESSION & VIOLENT BEHAV. 329, 331 (2007) ("This precedent, known as the Hale doctrine, essentially declared that married women could not be raped and was officially accepted into the American legal system in 1857 under the *Commonwealth v. Fogarty* decision.").

63. Martin et al., *supra* note 62, at 331.

64. Mattie Quinn, *Marital Rape Isn't Necessarily a Crime in 12 States*, GOVERNING (Apr. 2, 2019), <https://www.governing.com/archive/gov-marital-rape-states-ohio-minnesota.html> [https://perma.cc/S92E-VWDE] ("Twelve states—Connecticut, Idaho, Iowa, Michigan, Minnesota, Mississippi, Nevada, Ohio, Oklahoma, Rhode Island, South Carolina and Virginia—have a loophole that legalizes marital rape."). E.g., S.C. CODE ANN. § 16-3-615 (requiring married victim to report the marital rape within thirty days and prove the use of "physical force or physical violence of a high and aggravated nature."); OKLA. STAT. tit. 21, § 1111 ("Rape is an act of sexual intercourse accomplished with a male or female who is the spouse of the perpetrator if force or violence is used or threatened, accompanied by apparent power of execution to the victim or to another person.").

65. Martin et al., *supra* note 62, at 345.

66. See, e.g., *Victims of Sexual Violence: Statistics*, *supra* note 39; Quinn, *supra* note 64; Geiger & Parker, *supra* note 45.

by the twentieth century, its social and legal consequences still echo in American culture.⁶⁷

C. The Illusion of Legal Gender Equality Prevents the Creation of Safe Public Spaces for Women, Trans People, and Nonbinary People Under the PAAs

In light of this troubling cultural context, courts should not deem spaces exclusionary to men unconstitutional without first analyzing their purpose and effect,⁶⁸ particularly in light of the fact that studies show that women-only spaces can serve state interests such as safety and civic engagement.⁶⁹ One study revealed that women speak significantly less when outnumbered by men in group discussions.⁷⁰ Another study examined the effects of safe spaces on women and found that “once women are safe *from* harassment, abuse, and misogyny, they feel safe *to* be cognitively, intellectually and emotionally expressive.”⁷¹ The researchers found that a sense of safety was important to women’s civic engagement, personhood, and freedom.⁷² The research shows that the need for some spaces free from men is not so much about gender privacy as it is about freedom and personal security for people who have been forced to navigate physical and financial oppression by men.⁷³

Despite the statistics on sexual violence, harassment, unequal representation, and wage and employment disparities, the American legal system perceives women to be on equal footing with men.⁷⁴ In the 1990 case of *Simeone v. Simeone*, the Supreme Court of Pennsylvania enforced a prenuptial agreement in which a woman bargained away her right to adequate alimony, despite being much younger than her husband and much more financially vulnerable.⁷⁵ In so doing, the court declared women’s oppression a thing of the past.⁷⁶ Justice Flaherty, writing for the majority, explained the court’s reasoning: “[T]he law has advanced to recognize the equal status of men and women in our society.

67. Zaher, *supra* note 56, at 463.

68. To improve the safety of vulnerable groups, courts should conduct more careful analyses before prohibiting safe spaces if their exclusion serves a legitimate purpose and is supported by data. See Lewis et al., *supra* note 6, at 2 (“Pain introduced the idea that space itself is gendered through the construction of fear in women’s lives and argued that ‘women’s perceptions of risk . . . the actual risks they are exposed to and . . . their behavioural responses have implications for their equal participation in society.’” (omissions in original) (quoting Rachel Pain, *Space, Sexual Violence and Social Control: Integrating Geographical and Feminist Analyses of Women’s Fear of Crime*, 15 PROGRESS HUM. GEOGRAPHY 415, 415 (1991))); see also Rosemary Clark-Parsons, *Building a Digital Girl Army: The Cultivation of Feminist Safe Spaces Online*, 20 NEW MEDIA & SOC’Y 2125, 2128 (2018) (“The cultivation of safe, communal spaces for free and open expression remains a key political priority among contemporary feminists . . .”).

69. See, e.g., Karpowitz et al., *supra* note 6, at 545; Lewis et al., *supra* note 6, at 1.

70. Karpowitz et al., *supra* note 6.

71. Lewis et al., *supra* note 6, at 1.

72. *Id.*

73. *Id.* See generally ANNE ENKE, FINDING THE MOVEMENT: SEXUALITY, CONTESTED SPACE, AND FEMINIST ACTIVISM (2007) (explaining how diverse women’s use of public spaces has been critical to the feminist movement).

74. *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990).

75. *Id.*

76. *Id.* (“Society has advanced . . . to the point where women are no longer regarded as the ‘weaker’ party in marriage, or in society generally.”).

Paternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities which they were perceived as having in earlier times have, appropriately, been discarded.”⁷⁷ *Simeone*’s declaration of the legal equality of men and women seemed to mean that courts would no longer mitigate the persistent inequities among the sexes. Gaining “equality” in the eyes of the court thus made women more vulnerable by negating the need for informal judicial protections, despite the persistent reality of women’s oppression.⁷⁸

The disjunction between the statistics on women’s oppression and this legal position on women’s equality creates a pressing need for a new legal approach to ensure the safety and security of women and all non-cis-male-identifying people—at least until the statistics reflect that something resembling equity has been achieved.⁷⁹ Activists and scholars have called attention to the absence of safety for women at home, at work, and in public spaces.⁸⁰ Observant businesspeople have responded by creating spaces that exclude men.⁸¹ But, as we will explore through the case *Commission on Human Rights & Opportunities v. Edge Fitness, LLC (Edge Fitness II)*, regardless of the circumstances, PAAs that address gender prohibit the exclusion of men from public accommodations, to the detriment of vulnerable groups like women.⁸²

D. Case Study: The (Mis-)Use of Connecticut’s PAA To Maintain Male Dominance in Gyms

In the 1990s, after being male-dominated for years, two Connecticut gyms, Club Fitness and Edge Fitness, aimed to serve a larger population by implementing women-only workout rooms within their coed gym facilities.⁸³

In response, the female customer base of these gyms rapidly expanded, confirming that there was a pressing desire for such space.⁸⁴ Many women who had not felt welcome in the male-dominated facilities now had a safe space to build strength at the gym.⁸⁵ Further, Jewish and Muslim women who cannot work out among men for religious reasons benefited from the facilities.”⁸⁶

77. *Id.* (citation omitted).

78. See Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1300 (1991) (“For claims based on sex, what the constitutional inequality net is made to catch has always been relatively rare and is now virtually extinct, while sex inequality, including through law, remains predatory and flourishing.”).

79. *Id.* at 1298.

80. See, e.g., Lewis et al., *supra* note 6, at 2.

81. See *Pietrangelo v. Refresh Club, Inc.*, No. 18-cv-1943, 2023 U.S. Dist. LEXIS 176296, at *11–12 (D.D.C. Sept. 29, 2023); *Edge Fitness II*, 268 A.3d 630, 633 (Conn. 2022).

82. *Edge Fitness II*, 268 A.3d at 642.

83. *Comm’n on Hum. Rts. & Opportunities v. Edge Fitness (Edge Fitness I)*, No. HHBCV196056021, 2020 Conn. Super. LEXIS 996, at *1–2 (Conn. Super. Ct. July 23, 2020), *rev’d*, 268 A.3d 630 (Conn. 2022).

84. *Id.* at *2.

85. See *id.* at *2–3.

86. See *id.* at *2 (noting that women of some religious backgrounds require single-sex exercise environments).

Alex Chaplin and Daniel Brelsford were male members at Club Fitness and Edge Fitness, respectively.⁸⁷ While the gendered spaces minimized women's routine experience of feeling objectified and/or body-shamed while working out and led to better public health,⁸⁸ Chaplin and Brelsford claimed to experience "slight delays in completing their workouts because they had to wait for other members to finish using . . . equipment."⁸⁹ Supposedly to combat these wait times, the men brought suit against the gyms, alleging a violation of the Connecticut PAA, which prohibits the denial of full and equal accommodations to any person in a place of public accommodation on the basis of sex, or discrimination or segregation on the basis of sex.⁹⁰

In response, the defendant-gyms argued that the women's spaces served an important purpose.⁹¹ An expert for the defense testified that (1) more than 60% of women customers would cancel their memberships if the women-only areas were removed, (2) women prefer separate areas for gender privacy and for safety reasons, (3) women-only spaces minimize the degrading feelings of objectification and body shame, and (4) abolishing the separate workout areas would be harmful to women's health.⁹² The gyms sought to improve the balance of their use among the sexes by addressing the reality that the gyms were male dominated prior to their adoption of safe spaces for women customers.⁹³ By providing women-only spaces, the gyms sought to become *more equitable* by better serving a more diverse clientele.⁹⁴

The Connecticut Supreme Court considered whether the PAA prohibited women-only workout facilities within coed gyms, or if it permitted them under an implied general gender privacy exception.⁹⁵ The defendant gyms urged that the explicit exceptions for bathrooms and locker rooms evidenced legislative intent to make exceptions for spaces that raised similar gender privacy concerns, such as their gyms.⁹⁶ Defendants asked the court to read Connecticut's PAA in relation to the General Statutes Section 46a-60(b)(1), which includes an open-ended exception to the ban on sex discrimination in employment when sex is a "bona fide occupational qualification" for a position.⁹⁷ Defendants urged that when the PAA was read together with this statute, there was legislative intent to create an implied gender privacy exception to the PAA.⁹⁸

Upon review, the Connecticut Supreme Court disagreed and found that because the legislature explicitly provided bathroom and locker room exceptions in the statute, there

87. *Id.* at *1–2.

88. *Id.* at *2–3.

89. *Edge Fitness II*, 268 A.3d 630, 633–34 (Conn. 2022).

90. *Id.*; CONN. GEN. STAT. ANN. § 46a-64(b)(1) (West 2024).

91. *See Edge Fitness I*, 2020 Conn. Super. LEXIS 996, at *2–3.

92. *Id.*

93. *See id.*

94. *See id.*

95. *Edge Fitness II*, 268 A.3d at 632–33.

96. *Id.* at 637.

97. *Id.*; *see also* CM-625 *Bona Fide Occupational Qualifications, Guidance*, EEOC (Jan. 2, 1982), <https://www.eeoc.gov/laws/guidance/cm-625-bona-fide-occupational-qualifications> [https://perma.cc/SS6Z-L4AL] ("An employer's exclusion of members of one sex from consideration for 'contact' positions is often based, in whole or in part, on the employer's perception of the privacy interests of its clients or customers.").

98. *Edge Fitness II*, 268 A.3d at 637.

was no ambiguity and no room to find an implied exception for spaces raising gender privacy concerns.⁹⁹ As a result, the court held, in a matter of first impression, that no implied gender privacy exception existed under the statute and that women-only workout areas in fitness centers were unlawfully discriminatory.¹⁰⁰ Under the Connecticut PAA, the convenience of Chaplin and Brelsford prevailed over the interests of the women using the facilities for their safety and health.¹⁰¹

III. DISCUSSION

A. *What the Edge Fitness II Court Got Wrong*

In *Edge Fitness II*, the defendant gyms demonstrated that the decision to provide a women-only space was not discriminatory in purpose.¹⁰² Its purpose was exactly the opposite: to improve gender equity in the facilities.¹⁰³ However, due to the unambiguous nature of the Connecticut PAA and the lack of creative thinking by the court, the remedial purpose and effect of the violative action was of no consequence.¹⁰⁴

The Connecticut Supreme Court did not consider that the separate workout area served an important state interest in addressing women's safety.¹⁰⁵ Instead of seeking an equitable conclusion, the court mechanically applied the statute.¹⁰⁶ In so doing, it allowed Chaplin and Brelsford to wield Connecticut's PAA as a weapon against women's equity and to preserve the gym as a male-dominated space.¹⁰⁷

The rule unambiguously provided by the Connecticut PAA ensures only formal, abstract equality—not fairness or equity.¹⁰⁸ Despite the reality that the women's workout

99. *Id.*

100. *Id.* at 633.

101. *Id.*

102. *Edge Fitness I*, No. HHBCV196056021, 2020 Conn. Super. LEXIS 996, *2–3 (Conn. Super. Ct. July 23, 2020), *rev'd*, 268 A.3d 630 (2022).

103. *See id.*

104. *See generally Edge Fitness II*, 268 A.3d at 637.

105. *See generally id.*

106. *See id.* at 641–42.

107. *See id.* at 633.

108. *Id.*; CONN. GEN. STAT. ANN. § 46a-64 (West 2024). By providing such a rigid rule, the Connecticut legislature has ignored that there is a need for remedial actions to achieve equity before the idea of equality can be useful. *See, e.g.,* Melina Constantine Bell, *Gender Essentialism and American Law: Why and How to Sever the Connection*, 23 DUKE J. GENDER L. & POL'Y 163, 170 (2016) ("Consider preferential treatment affirmative action in hiring or education as a rough comparison. Such affirmative action is a strategy for countering injustice, and is meant to be a temporary solution until social justice renders it unnecessary by extending equal opportunity to all."). Even affirmative action is being stripped away because it allows differential treatment of people based on protected classifications. *See generally* Students for Fair Admissions, Inc. (SFFA) v. President & Fellows of Harvard Coll., 143 S.Ct. 2141, 2175–76 (2023) (banning affirmative action in college admissions). This application of equality law perpetuates the injustice of inequity. Alphonso David, *Affirmative Action Combats Systemic Discrimination and Creates Equal Opportunity for People of Color*, U.S. NEWS (June 30, 2023), <https://www.usnews.com/opinion/articles/2023-06-30/affirmative-action-combats-systemic-discrimination-and-creates-equal-opportunity-for-people-of-color> [https://perma.cc/6H3Y-HMMS] ("The Roberts Court often uses post-racialism and colorblind policies to derail civil rights legislation, despite the reality that racial discrimination remains deeply ingrained in systems nationwide. . . . Affirmative action was one of the few existing policy efforts that effectively countered institutionalized racial inequity, and its end will only exacerbate

areas addressed women's documented health and safety interests caused by men's domination of fitness spaces,¹⁰⁹ the *Edge Fitness II* court ironically held that Connecticut's PAA prohibits such spaces in the name of equality.¹¹⁰

The limited and plain language of many PAAs, like Connecticut's, serves misplaced societal concerns by valuing privacy concerns and not safety interests.¹¹¹ Although the language of the statute left it little choice, the *Edge Fitness II* defense erroneously placed gender privacy at the center of its argument.¹¹² Safety, not privacy, is the pressing interest that demands an exception to the prohibition on exclusionary spaces.¹¹³ The three exceptions to the Connecticut statute (locker rooms, bathrooms, and same-sex sleeping accommodations) suggest that the legislature valued the cultural norm of gender privacy and intended to preserve it in certain spaces.¹¹⁴ Earlier drafts of the

disparities in representation and access to power and economic opportunity.”); see also Alphonso David, *The War on DEI is the Beginning of a Coordinated Attack on the Civil Rights Act of 1964*, FORTUNE (July 24, 2023), <https://fortune.com/2023/07/24/dei-coordinated-attack-civil-right-act-1964-supreme-court-politics-leadership-alphonso-david/> [https://perma.cc/Q9F7-ZTKM] (“The Republican attorneys general suggest that our current environment differs so substantially from where the country was in 1964 that our definition of what constitutes discrimination must change. They blithely and offensively suggest that America has solved racism It’s a laughable argument that is divorced from the practical realities we live in . . . a fact born out in the persistent racial disparities in wealth, wages, and promotions—in short, what defines American life.”). The *SFFA* decision illuminates the backward nature of the application of equality laws when considered next to other recent cases such as *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021). Philadelphia could not decline to contract with a foster care agency for refusing to certify same-sex couples as this impermissibly violated the agency’s free religious exercise where the language in the city ordinance forbidding discrimination was not “neutral and generally applicable.” *Id.* at 1876–77 (quoting *Emp. Div. v. Smith*, 494 U.S. 872, 878–82 (1990)). In reaching this holding, the Court found that the foster care was not a public accommodation even though the Philadelphia PAA defined a public accommodation broadly to include “all goods, services, facilities, privileges, advantages, or accommodations.” *Id.* at 1881 (quoting PHILA. CODE § 9-1102(1)(w) (2024)). The holding required the city to the contract with the religious foster care agency despite its continuing to discriminate against same-sex couples, so long as the city provided discrimination exemptions discretionarily. *Id.* at 1882.

109. Oliver W.A. Wilson, Crystal Colinear, David Guthrie & Melissa Bopp, *Gender Differences in College Student Physical Activity, and Campus Recreational Facility Use, and Comfort*, 70 J. AM. COLL. HEALTH 1315, 1315 (2022) (“Meaningful differences in physical activity behaviors, facility use, and comfort using facilities emerged. Administrators should consider changing environments and/or policies to provide equitable physical activity opportunities.”); see also Jon Lender, *State Human Rights Agency Seeks To Abolish Accommodation for Women’s Privacy at Fitness Clubs*, HARTFORD COURANT (Sept. 12, 2020), <https://www.courant.com/2020/09/12/jon-lender-state-human-rights-agency-seeks-to-abolish-accommodation-for-womens-privacy-at-fitness-clubs/> [https://perma.cc/Y6SW-YWDF] (“Women’s health and well being would be harmed, as many women would not exercise if forced into a co-ed environment and some would be forbidden to do so based on their religion.” (quoting *CHRO ex rel. Brelsford v. Edge Fitness*, No. 1720124, Final Agency Decision (C.H.R.O. Oct. 17, 2019))).

110. See *Edge Fitness II*, 268 A.3d 630, 642 (Conn. 2022).

111. See, e.g., ALASKA STAT. ANN. § 18.80.230(b) (West 2024) (“[A] physical fitness facility may limit public accommodation to only males or only females to protect the privacy interests of its users.”); DEL. CODE ANN. tit. 6, § 4504(a)(1) (West 2024) (“A place of public accommodation may provide reasonable accommodations based on gender identity in areas of facilities where disrobing is likely, such as locker rooms or other changing facilities”).

112. *Edge Fitness II*, 268 A.3d at 637.

113. See *Victims of Sexual Violence: Statistics*, *supra* note 39; THOMPSON & TAPP, *supra* note 51.

114. CONN. GEN. STAT. ANN. § 46a-64(b)(1) (West 2024).

Connecticut PAA expressly allowed an exception for “the provision of separate facilities for males and females where privacy concerns exist.”¹¹⁵ While this language is not in the final law, echoes of this intent are present in the statute.¹¹⁶

But recognizing gender privacy as its own exception, separate from issues of safety, threatens the goal of a more equitable society.¹¹⁷ Expanding the gender privacy exceptions to PAAs would permit a variety of discriminatory actions that do not serve a remedial purpose.¹¹⁸ Permitting segregation of the sexes when safety is not an issue would support existing systems of oppression and exclusion.¹¹⁹ However, permitting only those actions with a legitimate, remedial purpose and effect would limit permissible discriminatory actions to instances where courts can find a legitimate need for such action to undo an existing inequity.¹²⁰

The court wisely cautioned the defense against seeking to broaden the privacy exceptions, because it “could . . . negatively affect the rights of women in a different way.”¹²¹ It urged that “limiting the access of women and transgender people . . . to spaces on the basis of the privacy interests of men or the ‘moral comfort’ of customers [would] defeat[] the purpose of [Connecticut’s] antidiscrimination legislation.”¹²²

The majority recognized that using gender privacy as a baseline for determining when discrimination is permissible posed a threat to equality and equity.¹²³ In reaching its decision, the Connecticut Supreme Court considered an amicus curiae brief filed by the Gay, Lesbian, Bisexual, Transgender, and Queer Legal Advocates & Defenders (GLAD).¹²⁴ The GLAD brief illustrated how gender privacy can be used to widen the gap among the sexes:

Privacy has all too often been used as a guise to hide prejudice and discomfort with LGBTQ people. The invocation of “gender privacy[]” . . . has been relied upon for decades as an unfounded justification of those who objected to the presence of transgender people in gender-separated spaces. It has also been used as a reason to exclude openly gay and lesbian servicemembers from the military. The creation of a new “gender privacy” right could even encourage the reassertion of gender segregation in previously male-dominated spaces.¹²⁵

115. *Edge Fitness II*, 268 A.3d at 640.

116. *See generally* § 46a-64(b)(1).

117. Amicus Brief of GLBTQ Legal Advocates & Defenders et al., at 2, *Edge Fitness II*, 268 A.3d 630 (Conn. 2022) (No. SC 20538).

118. *See id.*

119. *See* *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982).

120. *See id.* (explaining that a state may only implement a policy of compensating for past discrimination against a gender group if compensated gender is still disadvantaged by the discrimination).

121. *Edge Fitness II*, 268 A.3d 630, 640 (Conn. 2022).

122. *Id.* at 641.

123. *Id.*

124. Amicus Brief of GLBTQ Legal Advocates & Defenders et al., *supra* note 117, at 1.

125. *Comm’n on Hum. Rts. & Opportunities v. Edge Fitness et al. Victory*, GLAD, <https://www.glad.org/cases/chro-v-edge-fitness/> [<https://perma.cc/69FJ-NVK4>] (last visited Apr. 16, 2024) (quoting and paraphrasing Amicus Brief of GLBTQ Legal Advocates & Defenders et al., *supra* note 117, at 4–5).

The GLAD brief explains why making exceptions for gender privacy is not the path to equity.¹²⁶ Allowing discrimination on moral grounds would make anti-discrimination laws ineffective.¹²⁷

B. A Scrutiny Test Would Better Allow for Societal Progress Towards Equity

The limited and plain language of the PAAs make it difficult for the judiciary to permit “discriminatory” actions which attempt to remedy issues of inequity.¹²⁸ The approach to fairness in the law underpins the seemingly incurable gender equity gap in America.¹²⁹ Absent a creative solution, the courts have little option but to apply the stiffly designed PAAs, even when the result is unjust. While privacy concerns alone should not be enough to justify an exception to the PAAs,¹³⁰ public health and valid safety concerns should.¹³¹

Edge Fitness II illustrates the limited functionality of Connecticut’s PAA.¹³² The court’s conclusion revealed the Act’s dangerous potential as a tool for maintaining the status quo of male dominance by demanding equality without context.¹³³ In privileging men’s immediate access to weight machines over women’s safety, the case revealed the failure of Connecticut’s PAA to address larger societal biases and legitimate safety concerns.¹³⁴ Due to the similarity of other states’ accommodation acts, *Edge Fitness II* reveals the need for a different interpretive approach to the acts when plaintiffs challenge discriminatory actions that are designed to serve a remedial purpose.

It is possible that the conduct at issue in *Edge Fitness II* would pass intermediate scrutiny if government action were involved. Women’s desire for privacy at the gym stems from the legitimate concern that they may fear for their safety in a male-dominated space.¹³⁵ Safety is commonly used as a justification for

126. Amicus Brief of GLBTQ Legal Advocates & Defenders, *supra* note 117, at 4–5.

127. *See id.*

128. *See, e.g., Edge Fitness II*, 268 A.3d at 633.

129. The goal of treating men and women the same under the law, despite the objective inequity among the sexes, ignores the need for remedial actions to put them on equal footing so that equal treatment will maintain fairness, instead of maintaining the same level of inequity. *See MacKinnon, supra* note 78, at 1286 (“The first step in these legal attempts to advance women was to demand women’s inclusion on the same terms as men. Laws that had provided ‘special protections’ for women were to be avoided. The point was to apply existing law to women as if women were citizens—as if the doctrine was not gendered to women’s disadvantage, as if the legal system had no sex, as if women were gender-neutral persons temporarily trapped by law in female bodies.” (footnote omitted)).

130. Amicus Brief of GLBTQ Legal Advocates & Defenders et al., *supra* note 117, at 1.

131. *See, e.g., Johnson v. California*, 543 U.S. 499, 514 (2005) (“Strict scrutiny does not preclude the ability of prison officials to address the compelling interest in prison safety.”); *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (“[Judicial precedent] recognize[s] the legitimacy of the government’s interests in ensuring public safety” (internal quotation mark omitted) (quoting *Schenck v. Pro-Choice Network*, 519 U.S. 357, 376 (1997))).

132. *See Edge Fitness II*, 268 A.3d 630, 642 (Conn. 2022).

133. *See id.* (“We therefore conclude that the defendants’ gyms are places of public accommodation that have denied the complainants full and equal accommodations on the basis of their [male] sex.”).

134. *See id.* at 641.

135. *See Victims of Sexual Violence: Statistics, supra* note 39.

government restriction on the rights of its citizens.¹³⁶ Under the intermediate scrutiny test, women-only spaces could be allowed if data supported finding women's health and safety an important state interest and supported a conclusion that creating women-only space is substantially related to serving that interest.¹³⁷

The fears expressed in the GLAD brief could be quelled.¹³⁸ As society moves toward equity, such spaces would become unnecessary and thus unlawful.¹³⁹ Additionally, no one could co-opt the statute to discriminate unless they could point to an important (or compelling) state interest, supported by data, that is served by their substantially related (or narrowly tailored) exclusionary action.¹⁴⁰ Because men do not face the same threats to their physical safety,¹⁴¹ and because they use gym facilities at disproportionately higher rates than women,¹⁴² men would not qualify for a men-only gym space where women and/or nonbinary people likely would. In lieu of legislative changes to the acts, a scrutiny-based approach could avoid abuses of PAAs by dominant groups and allow marginalized groups to create safe spaces in a variety of settings.¹⁴³ However, scrutiny is not an appropriate approach for a nongovernmental action.¹⁴⁴

136. See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 596 (2006) (“[A] mere ‘reasonable suspicion’ that knocking and announcing ‘under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime,’ will cause the [‘knock and announce’] requirement to yield.” (quoting *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997))). Safety is a state interest that can enable discriminatory laws to survive various levels of scrutiny. See, e.g., *United States v. Carolene Prods.*, 304 U.S. 144, 154 (1938) (holding that the Filled Milk Act was rationally related to the public’s health and safety interests and so allowed a limitation on *Carolene Products’* right to contract); *Johnson v. California*, 543 U.S. 499, 514 (2005) (“Strict scrutiny does not preclude the ability of prison officials to address the compelling interest in prison safety.”).

137. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) (“[W]e consistently have emphasized that ‘the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.’” (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975))).

138. Amicus Brief of GLBTQ Legal Advocates & Defenders et al., *supra* note 117, at 2.

139. See, e.g., *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013) (holding a remedial action based on outdated data did not pass scrutiny).

140. See, e.g., *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (holding that the government interests of “maximizing the number of foster families, protecting itself from liability, and ensuring equal treatment of prospective foster parents and foster children did not justify the city’s failure to grant [a foster care] agency an exemption from the requirement to certify same-sex couples” under the First Amendment); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) (holding that the assumption men would be unduly sympathetic to other men in paternity actions was not an “exceedingly persuasive justification” for “discrimination on the basis of gender in jury selection” (quoting *Pers. Adm’r v. Feeney*, 442 U.S. 256, 273 (1979))).

141. *Victims of Sexual Violence: Statistics*, *supra* note 39.

142. *Wilson et al.*, *supra* note 109, at 1315–20.

143. Exceptions for remedial actions would allow public accommodations to prevent bigotry while allowing progress towards equity. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 529 (1989) (Marshall, J., dissenting) (“The majority’s unnecessary pronouncements [prohibiting Richmond’s remedial action] will inevitably discourage or prevent governmental entities, particularly States and localities, from acting to rectify the scourge of past discrimination.”).

144. *Albright v. S. Trace Country Club of Shreveport, Inc.*, 03-3413 (La. 07/06/04), 879 So. 2d 121, 141 (Knoll, J., concurring) (“This intermediate level of scrutiny should only be applicable in cases involving state

Traditionally, scrutiny is used to analyze the constitutionality of government actions that have a discriminatory purpose or effect.¹⁴⁵ It is the role of the judicial branch to apply scrutiny to ensure state action does not violate the Constitution of the United States.¹⁴⁶ Currently, legislation that has a discriminatory impact is subject to various levels of scrutiny to determine its constitutionality.¹⁴⁷ Facially discriminatory laws can still be constitutional if they are narrowly tailored to serve a compelling government interest.¹⁴⁸ Facially neutral laws that do not have a discriminatory impact on protected groups are subject only to a rational basis test.¹⁴⁹ If discriminatory impact is shown and the law involves a suspect class, facially neutral laws are subject to either intermediate or strict scrutiny, depending on which protected groups are affected.¹⁵⁰

However, intermediate scrutiny is only applied when a *government* actor discriminates against *certain* protected classes, such as laws that discriminate based on gender.¹⁵¹ To pass intermediate scrutiny, the law must advance an important government interest by means substantially related to that interest.¹⁵² Scrutiny is not applied to analyze private conduct such as the conduct regulated by the PAAs.¹⁵³ Nonetheless, the constitutional scrutiny analysis is a useful framework for analyzing the type of harm caused by a PAA violation and assessing whether that harm qualifies a plaintiff for standing in a statutory violation claim.

Any scrutiny test would be viewed as judicial overstep;¹⁵⁴ a court cannot warrant a violation on the grounds that it passes scrutiny without overstepping into the realm of the legislative branch. By issuing such a ruling, a court would essentially be adding its own exception to the statute.¹⁵⁵ The court's role in *Edge Fitness II* was to determine if the Connecticut statute contained an implied gender privacy exception, not to conduct an intermediate scrutiny analysis of the statute or

action and should not apply to private entities who do not possess the police power necessary to further an appropriate governmental objective").

145. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967); *Craig v. Boren*, 429 U.S. 190 (1976).

146. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

147. For a discussion of the levels of scrutiny and how they are applied, see Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984).

148. See, e.g., *Kadel v. Folwell*, 620 F. Supp. 3d 339 (M.D.N.C. 2022); *SFFA v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2175–76 (2023).

149. See, e.g., *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938); *Pers. Adm'r v. Feeney*, 442 U.S. 256, 271–73 (1979).

150. See, e.g., *Johnson v. California*, 543 U.S. 499, 512–13 (2005); *Craig v. Boren*, 429 U.S. 190, 197 (1976); see also Richard E. Levy, *Political Process and Individual Fairness Rationales in the U.S. Supreme Court's Suspect Classification Jurisprudence*, 50 WASHBURN L.J. 33, 35 (2010).

151. Levy, *supra* note 150, at 34 (noting that scrutiny applies only to state action).

152. *Craig*, 429 U.S. at 197–98 (creating the intermediate scrutiny test).

153. See Levy, *supra* note 150, at 35.

154. *Edge Fitness II*, 268 A.3d 630, 641 (Conn. 2022) (“[T]he sensitivity of the determination of where to limit antidiscrimination protections, along with evolving contemporary understandings of the terms ‘gender’ and ‘sex’ renders this issue uniquely well suited for consideration in the first instance by the legislature” (citation omitted)).

155. See *supra* note 7.

to propose better guidelines.¹⁵⁶ The court correctly clarified that the ability to fix any issues with the PAA lies with the legislative branch.¹⁵⁷

While the *Edge Fitness II* court reached an adequate legal conclusion, it did not provide anyone with justice. The outcome left a lingering question: Was there another way the court could have allowed for the creation of such a necessary safe space? As discussed, legislation with discriminatory intent or impact on protected groups must pass varying levels of scrutiny to determine if they are constitutionally permitted.¹⁵⁸ But what about judicial decisions that have a discriminatory impact? Can a court decide a case in a way that reenforces systemic oppression? Currently, as the *Edge Fitness II* decision shows, the answer is “yes.”

C. *The PAA Standing Test: Getting Around Statutes To Provide Equity by Using a Heightened Standing Requirement for Remedial Actions*

This Part outlines the proposed PAA standing test, drawn from various Supreme Court precedents,¹⁵⁹ that could be applied at common law to ensure that judicial decisions regarding PAAs do not have a discriminatory impact. The test would require plaintiffs suing under a PAA to show a heightened injury in fact in order to have standing. This would apply if the violation stemmed from an action with clear remedial intent. Conducting a scrutiny-like analysis to determine if a plaintiff has standing would permit courts to consider whether a remedial statutory violation amounts to a legally cognizable harm without overstepping into legislative territory.

The proposed test asks the courts to interpret the Fourteenth Amendment’s Equal Protection Clause and its cascade of related statutes, specifically PAAs, to provide anti-subordination assurances.¹⁶⁰ Reading anti-subordination, instead of anti-classification, into the Equal Protection Clause and related statutes, such as PAAs, would prevent the courts from blindly banning all actions using prohibited classifications.¹⁶¹

156. *Edge Fitness II*, 268 A.3d at 632–33.

157. *Id.* at 641.

158. See *supra* notes 145–154 and accompanying text; *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”); see also *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.”), *overruled by Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

159. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 557 (1992) (establishing the requirements for standing including injury in fact); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 330 (2016) (denying standing for mere statutory violations and requiring a showing of a “concrete” and “particularized” injury); *Carolene Prods. Co.*, 304 U.S. at 152 n.4 (explaining the need for higher levels of scrutiny for actions that affect “discrete and insular” minorities); *Craig v. Boren*, 429 U.S. 190, 197–98 (1976).

160. U.S. CONST. amend. XIV, § 1; Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986) (“Under the anti-subordination perspective, it is inappropriate for certain groups . . . to have subordinated status because of their lack of power in society as a whole.”).

161. This is sorely needed as courts have frequently failed to address real inequities in the name of formal equality. See, e.g., *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that mere disproportionate impact on a particular racial group, without evidence of a discriminatory purpose, was not enough to trigger strict

First, if a plaintiff alleges a violation of a PAA, the court should determine if there was an actual and legally cognizable injury.¹⁶² Second, the courts should resolve whether the violative action serves an important state interest and if the action is narrowly tailored to address the identified state interest. Lastly, the courts should conduct a balancing test to determine if the violative action's legitimate purpose is outweighed by the harm suffered.

The proposed test provides a way around narrow PAAs to enable the courts to provide justice where a PAA may seem to require the prohibition of an effective remedial action. It suggests that courts implement a three-prong inquiry to determine if a plaintiff alleging a violation of a PAA has standing to sue. Implementing the test would ensure that the statutes cannot be used to destroy remedial measures that improve gender equity, so long as they are not causing concrete and particularized harm beyond the statutory violation itself.¹⁶³ It would ensure that members of the dominant group could not use PAAs to attack equitable solutions without making it more difficult for those harmed by nonremedial actions to bring suit.¹⁶⁴ The proposed test would require plaintiffs to plead an injury in fact that amounts to something more than mere gym wait times.¹⁶⁵

1. Injury in Fact

The first prong would make certain the plaintiff has adequately demonstrated an injury in fact. To satisfy the injury in fact standing requirement, federal courts frequently require additional evidence that the plaintiff suffered concrete and particularized harm from the alleged violation and did not merely encounter a statutory violation.¹⁶⁶

Article III of the Constitution requires a plaintiff to prove three elements before they have standing to access the federal court system.¹⁶⁷ First, they must prove an injury in fact which can be defined as “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.”¹⁶⁸ Second, they must prove that there is “a causal connection between the injury and the conduct complained of.”¹⁶⁹ Third, they must show that the injury can likely be “redressed by a favorable decision.”¹⁷⁰ Finally, to have standing to litigate a statutory

scrutiny because the law was facially neutral and did not invoke issues of classification, although it clearly invoked issues of subordination).

162. *Lujan*, 504 U.S. at 560–61 (outlining the requirements for standing, including injury in fact).

163. *See id.*

164. *See supra* note 1 and accompanying text.

165. *See Edge Fitness II*, 268 A.3d 630, 633–34 (Conn. 2022).

166. Mark E. Rooney, *Courts Are Increasingly Dismissing No-Harm FDCPA Claims*, ACA INT'L (Apr. 6, 2021, 11:00 AM), <https://www.acainternational.org/news/courts-fdcpa-claims-spokeo-robins-supreme-court-standing-fcra-debt-collection-litigation/> [https://perma.cc/T45M-67K6].

167. U.S. CONST. art. III, § 2, cl. 1; *Lujan*, 504 U.S. at 557; *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) (“[A] court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties.” (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986))).

168. *Lujan*, 504 U.S. at 560 (citations omitted) (internal quotation marks omitted) (first citing *Allen v. Wright*, 468 U.S. 737, 756 (1984); then citing *Warth v. Seldin*, 422 U.S. 490, 508 (1975); then citing *Sierra Club v. Morton*, 405 U.S. 727, 740–41 (1972); and then quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

169. *Id.*

170. *Id.* at 561 (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38 (1983)).

violation, a plaintiff must show “that the allegedly harmed interest is within the ‘zone of interests’ protected by the statute providing the cause of action.”¹⁷¹

Several recent decisions evidence a shift toward more rigorous enforcement of the injury in fact bar to standing.¹⁷² In 2016, *Spokeo, Inc. v. Robins* clarified that mere statutory violations were insufficient if unaccompanied by a showing that the violation caused concrete and particularized harm.¹⁷³ In 2021, *TransUnion LLC v. Ramirez* similarly upheld this requirement for standing.¹⁷⁴

In *Spokeo*, the Supreme Court discussed whether a statutory violation may constitute a concrete injury in fact, and concluded that the mere violation of a statutory right does not confer Article III standing to those impacted unless plaintiffs could additionally show that they suffered concrete and particularized harm as a result.¹⁷⁵ The Court explained that a plaintiff cannot allege “a bare procedural violation, divorced from any concrete harm, and satisfy the injury in fact requirement of Article III.”¹⁷⁶ *Spokeo* dealt with a suit brought under the Fair Credit Reporting Act of 1970.¹⁷⁷ The plaintiff alleged that Spokeo, a “people search engine,” which provides personal information such as age, city, marital status, and other details, provided inaccurate information.¹⁷⁸ The lower court failed to analyze whether the plaintiff’s injury, caused by the posting of inaccurate information about him, was sufficiently concrete.¹⁷⁹ As a result, the Supreme Court remanded the case for further analysis.¹⁸⁰ The Court appeared to raise the bar to standing by requiring the plaintiff to show his injury was both “concrete *and* particularized.”¹⁸¹ *Spokeo* suggests that statutory-based causes of action have become more difficult to advance.¹⁸²

TransUnion confirmed the Supreme Court’s stance on the requirements for satisfying injury in fact.¹⁸³ It held that, to join a class action involving a violation of the Fair Credit Reporting Act, plaintiffs had to show a “concrete” harm.¹⁸⁴ Those that could not make such a showing lacked standing to sue.¹⁸⁵ It explained that “[c]entral to assessing concreteness is whether the asserted harm has a ‘close relationship’ to a harm

171. Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE AGRIC. & NAT. RES. L. 349, 350 (2015) (citing *Lujan*, 504 U.S. at 561); *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151 (1970).

172. See, e.g., *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2197 (2021); *Tarr v. Burger King Corp.*, No. 17-23776-CIV, 2018 U.S. Dist. LEXIS 2176 (S.D. Fla. Jan. 5, 2018).

173. 578 U.S. 330, 334 (2016) (citing *Friends of the Earth, Inc. v. Laidlaw Env’t Servs., Inc.*, 528 U.S. 167, 180–81 (2000)).

174. 141 S. Ct. at 2198 (citing *Spokeo, Inc.*, 578 U.S. at 341).

175. *Spokeo, Inc.*, 578 U.S. at 341 (“Article III standing requires a concrete injury even in the context of a statutory violation.”).

176. *Id.*

177. 15 U.S.C. § 1681; *Spokeo, Inc.*, 578 U.S. at 333.

178. *Spokeo, Inc.*, 578 U.S. at 333.

179. *Id.* at 333–34.

180. *Id.* at 334.

181. *Id.*

182. Rooney, *supra* note 166.

183. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204–05 (2021).

184. *Id.* at 2200.

185. *Id.*

traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including . . . reputational harm.”¹⁸⁶ The Court explained:

Courts must afford due respect to Congress’s decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant’s violation of that statutory prohibition or obligation. In that way, Congress may “elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.” But even though “Congress may ‘elevate’ harms that ‘exist’ in the real world before Congress recognized them to actionable legal status, *it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.*”¹⁸⁷

In short, if a defendant’s violation of a statute caused no concrete and particularized harm to the plaintiff, courts may not grant the plaintiff a remedy.¹⁸⁸

While the Supreme Court has made its position on standing in statutory violation cases clear, state courts are not directly governed by Article III standing.¹⁸⁹ While most states apply constitutional standing, only a minority use the controlling federal test developed in *Lujan v. Defenders of Wildlife*.¹⁹⁰ Typically, this means there is a lower bar to standing in state courts.¹⁹¹ However, standing is an important requirement in all courts to ensure that defendants are not punished arbitrarily for actions that do not result in cognizable harm.¹⁹² The simple common law test proposed here could aid state courts in streamlining their decisions, to ensure that standing is met in cases involving PAA violations.¹⁹³

The proposed PAA standing test would provide a way to resolve issues of standing in PAA statutory violation claims, particularly those brought in state courts. While standing should always be required by the courts, the proposed test for PAA violations would require the courts to *twice* consider the alleged injury: having plaintiffs both identify the injury *and* consider it in conversation with the purpose of the violative action. To satisfy the first prong, the plaintiff must show a “concrete *and* particularized” injury that bears a close relationship to a harm that commonly provides a basis for a lawsuit.¹⁹⁴

186. *Id.* (quoting *Spokeo, Inc. v. Robins*, 578 U.S. at 340–41).

187. *Id.* at 2204–05 (emphasis added) (citations omitted) (first quoting *Spokeo, Inc.*, 578 U.S. at 341; and then quoting *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018)).

188. *See id.* at 2203 (“[U]nder Article III, a federal court may resolve only ‘a real controversy with real impact on real persons.’” (quoting *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019) (Gorsuch, J., concurring in the judgment))).

189. *Sassman*, *supra* note 171, at 349.

190. *Id.*

191. *See id.* at 353 (“An overwhelming majority of states provide some exception to their constitutional standing requirements, meaning that the requirements are not ‘irreducible’ as in *Lujan*.”).

192. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (recognizing that the Due Process Clause of the Fourteenth Amendment prohibits imposition of arbitrary punishments (citing *Cooper Indus. v. Leatherman Tool Grp.*, 532 U.S. 424, 433 (2001))).

193. *See Sassman*, *supra* note 171, at 349 (“I recommend further study assessing the diversity of state rationales for constitutional standing and generating an alternative theory of constitutional standing distinguishable from Article III doctrine and better suited to the states’ flexible approaches.”).

194. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

For example, under this test for standing, the courts would likely not provide a judicial remedy for wait times at the gym, particularly if the cause of the wait time was found to be substantially related to public health and safety.

2. Analyzing the Purpose of the Violation To Allow More Leeway for Remedial Actions

The second prong of the proposed test directs courts to analyze the purpose of the defendant's action to assess the harm suffered. If the violative act is not remedial, a "mere" violation may cause enough harm to demand a judicial remedy. But if the violative act is in service of remedying an inequity, a slight injury, such as a longer wait time for gym equipment,¹⁹⁵ may not rise to the level of injury in fact required by the courts to issue a remedy.

Showing some deference to remedial actions would serve an important public policy goal—more efficiently achieving racial, gender, economic, and other forms of equity.¹⁹⁶ Ensuring the action is tailored to the larger interest of improving gender equity would ensure citizens are not disadvantaged harmfully or unnecessarily.¹⁹⁷ By incorporating this analysis into a standing determination, the court applying the test would stay within the judicial realm without overstepping into the legislative arena.¹⁹⁸ The proposed analysis would not be a determination of whether the action is a permissible statutory violation, but rather a determination of whether the harm suffered satisfies the injury in fact requirement.

Under the current approach to equal rights law, remedial actions have not been given the deference they deserve.¹⁹⁹ This is, in part, due to the disagreement surrounding the Fourteenth Amendment's purpose as prohibiting classifications or prohibiting subordination.²⁰⁰ Unlike an anti-classification approach, an anti-subordination approach would permit greater remedial measures, because it would seek to undo existing harms, whereas an anti-classification approach would prohibit acknowledging and addressing systemic oppression that affects certain classifications differently than others.²⁰¹

In *Richmond v. J.A. Croson Co.*, the Supreme Court held that because Richmond failed to adequately identify the need for remedial action in the awarding of its public

195. See *Edge Fitness II*, 268 A.3d 630, 633 (Conn. 2022) ("While using equipment in the main workout areas, the complainants experienced slight delays in completing their workouts because they had to wait for other members to finish using that equipment.").

196. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 529 (1989) (Marshall, J., dissenting).

197. If men dominate a public space, carving out space for women to progress towards parity of use should not be deemed a harm by the courts. See *Edge Fitness I*, No. HHBCV196056021, 2020 Conn. Super. LEXIS 996, *2 (Conn. Super. Ct. July 23, 2020) ("Although the fitness industry was male dominated until relatively recently, in the 1990s each fitness facility began offering a women-only work-out area in response to a perceived need. Business with women increased after the women-only workout areas began to be offered. A large portion of the business each facility does with women will be lost if the facilities discontinue women-only work-out areas."), *rev'd*, 268 A.3d 630 (2022).

198. See Sassman, *supra* note 171, at 353 ("[A] majority of states apply constitutional standing . . .").

199. See *J.A. Croson Co.*, 488 U.S. at 490–91.

200. John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 *FORDHAM L. REV.* 423, 430–31 (2002).

201. MacKinnon, *supra* note 78, at 1290 ("[D]ifferences, including products of social inequality, make unequal treatment not unequal at all.").

construction contracts, its treatment of its citizens on a racial basis violated the Equal Protection Clause.²⁰² In reaching its decision, the Court viewed classification as the enemy, instead of subordination.²⁰³ In his dissent, Justice Marshall opined:

In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brutal and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice.²⁰⁴

Justice Marshall recognized the need for remedial actions to create an equitable society.²⁰⁵ Viewing remedial actions as equally suspect to actions based on prejudice prevents progress towards equity.²⁰⁶

To ensure justice, the courts should analyze the purpose of an action challenged under a PAA. As the *TransUnion* Court noted, “[E]ven though Congress may elevate harms that exist in the real world . . . to actionable legal status, it may not simply enact an injury into existence”²⁰⁷ The remedial nature of an action should be relevant to a determination of whether the harm is judicially cognizable, and so it is an appropriate analysis for the courts.²⁰⁸ It helps determine whether the harm is real, or if it is merely created by the statute.²⁰⁹ If the violative action serves an important interest, and is substantially related to that interest, the court should then analyze whether the injury caused by the violation is worthy of a judicial remedy.

3. Weighing Injury Against Function

The final step in the three-prong analysis is weighing the injury against the purpose and practical function of the violative action. This requires the courts to recognize that hate-based actions are more harmful than remedial actions.²¹⁰ Actions taken to remedy an injustice that results in differential treatment based on protected characteristics such as gender are, by their nature, less harmful than those intended to subordinate a class for

202. 488 U.S. at 498–99; *see also id.* at 552 (Marshall, J., dissenting).

203. *See id.* at 499 (majority opinion); *see also id.* at 551 (Marshall, J., dissenting) (“[T]he majority has gone beyond the facts of this case to announce a set of principles which unnecessarily restricts the power of governmental entities to take race-conscious measures to redress the effects of prior discrimination.”).

204. *Id.*

205. *Id.*

206. *See MacKinnon, supra* note 78, at 1292–94 (“The operative view has been that if classifications that distinguish by sex were eliminated from law, sex equality would be achieved. . . . [A]bolishing sex as a legal category . . . is not even a watered-down approximation of what [women] need. What they need is change: for men to stop hurting them and using them because they are women, and for everyone to stop letting them do it because they are men.”).

207. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) (internal quotation marks omitted) (quoting *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018)).

208. *See J.A. Croson Co.*, 488 U.S. at 552–53 (Marshall, J., dissenting) (explaining how applying the same scrutiny standard to remedial actions works against achieving equity).

209. *See TransUnion*, 141 S. Ct. at 2197 (explaining that harms that do not resemble a traditionally cognizable injury require a showing of more than merely the underlying violation to be remedied).

210. *See Michael T. Schmitt & Nyla R. Branscombe, The Meaning and Consequences of Perceived Discrimination in Disadvantaged and Privileged Social Groups*, 12 EUR. REV. SOC. PSYCH. 167, 167, 184–85 (2002) (“[A]ttributions to prejudice are considerably more harmful for the psychological well-being of members of disadvantaged groups than they are for members of privileged groups.”).

reasons of prejudice.²¹¹ For example, while gym wait times are technically a harm, they bear little resemblance to any other legally recognized harm.²¹² If implemented purely to discriminate due to personal prejudice, the harm suffered is not only the wait time, but also the sting of unfounded bias and hate. If, though, a gym wait time is implemented as the result of an interest in creating a more accessible and gender-balanced gym environment, then the harm may be found to be insufficient, as it is only a gym wait time and such an injury does not typically create a judicially cognizable harm.²¹³

IV. CONCLUSION

As they are currently written, the various states' PAAs can serve as tools for maintaining the status quo of male dominance in public spaces. PAAs have hindered progress towards equity by failing to provide exceptions for remedial actions, even actions that serve compelling state interests such as safety. Courts have asserted that it is not within their power to do anything besides mechanically apply the statutes.²¹⁴ While legislative change would provide a straightforward solution, it is not the only way to resolve the situation. Courts can utilize judicial tools to ensure just decisions are being reached. Harms must be legally cognizable to receive a remedy at law, so courts are not bound to recognize standing in every case brought under PAAs. By using the proposed PAA standing test, courts could better balance the interests at stake in PAA cases, to ensure that the legal illusion of sex and gender equality is not concealing real inequities that the violative action seeks to address. By using a more rigorous standing analysis, courts can help the nation progress towards equity under the existing PAAs.

211. *See id.* at 169.

212. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) ("Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation."); *Edge Fitness II*, 268 A.3d 630, 633 (Conn. 2022) (noting that plaintiffs' alleged injury was a "slight delay" in equipment availability).

213. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019) ("To support standing, an injury must be 'legally and judicially cognizable.'" (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997))); *Laufer v. Arpan LLC*, 29 F.4th 1268, 1274 n.4 (11th Cir. 2022) ("We don't read *Heckler* and *Allen* to hold that illegal discrimination always and necessarily results in concrete injury—only that 'discrimination itself . . . can cause' concrete injury . . ." (first omission in original) (emphasis omitted) (first quoting *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984); and then citing *Allen v. Wright*, 468 U.S. 737, 757 n.22 (1984))), *vacated as moot*, 77 F.4th 1366 (11th Cir. 2023).

214. *Edge Fitness II*, 268 A.3d 630, 641 (Conn. 2022) (applying the plain and unambiguous language of the statute and explaining that "the sensitivity of the determination of where to limit antidiscrimination protections, along with evolving contemporary understandings of the terms 'gender' and 'sex' renders this issue uniquely well suited for consideration in the first instance by the legislature" (citation omitted)).