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Emily Kaufman

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Liberty has been a bedrock principle of American democracy from the time of our nation's founding and is the norm that charters our nation's existence. Liberty was the motivation driving the colonists' rebellion against tyranny in order to establish a nation that would preserve liberty, at all costs. The preamble of the Constitution explicitly classifies every subsequent article's purpose, to secure the blessings of liberty.

This note will touch on the concepts of personal liberty in the context of abortion in the landmark case *Dobbs v. Jackson Women's Health Org*, and the implications of this case on the transgender community. Part A will discuss the impact of *Dobbs* on substantive due process within the meaning of the Fourteenth Amendment. Part B of this note will address the remaining avenue for advancing the rights of transgender individuals, under the Equal Protection Clause of the Fourteenth Amendment. Part C will examine the existing legal scholarship on how constitutional law intersects with the rights of transgender people. Finally, Part D will examine various state laws and executive orders targeting the trans community, and how they can be combatted under a due process or equal protection analysis.

Part A will be broken into three parts. Part I of this section will discuss substantive due process jurisprudence, *Roe* and *Casey*, the lead-up to *Dobbs,* and an examination of *Dobbs* itself. Part II will analyze what *Dobbs* means for the continued liberty of women in the modern world, while also incorporating the views of Blackstone and the philosopher John Stuart Mill. Part III will analyze the impact of the *Dobbs* decision as it relates to substantive due process and the transgender community, with a focus on the right to self-determination and bodily autonomy in the context of the need for hormones and other transition-related procedures necessary for trans Americans to secure the blessings of liberty.

Part B will include an initial discussion of the history and precedents of the Supreme Court that utilize equal protection analyses. Part I will discuss equal protection in the context of race. Part II will discuss recent

case law from the Supreme Court and other Federal Courts using the equal protection analysis including *Obergefell v. Hodges*. Part III will analyze the three Circuit Courts that have taken up the issue of hormone bans for transgender youth.

Part C will examine law review articles and other scholarship that examines where transgender rights stand under the Fourteenth amendment. This section will also discuss articles that analyze how *Dobbs* impacts constitutional law.

Part D will compare the substantive due process arguments with that of equal protection, with a focus on cases and issues yet to be decided. Seven types of anti-transgender legislation, bills, and executive orders will be examined through a substantive due process analysis compared with that of equal protection.

This is an exceedingly fast-moving area of law, with two new Circuit Court opinions regarding bans on gender-affirming care for transgender youth coming out in the months preceding the publication of this note. During the initial drafting of the note, only one Circuit had ruled on the issue of hormone bans for trans youth, and this ruling was for the transgender plaintiffs. In the months since initial drafting, two more Circuits, the Sixth and Eleventh, have ruled against transgender youth on both equal protection and due process grounds.

Research for this note was completed on September 7th, 2023 and any cases or articles published after that date were not taken into consideration.

A

Substantive due process emanating from the Fourteenth Amendment has a long history in American jurisprudence. One of the first cases to examine this concept was *Lochner v. New York*, from 1905.[1] In *Lochner*, the Court, in a majority opinion written by Justice Peckham, found that a New York statute setting maximum working hours for bakers violated the right to contract inherent in the Due Process Clause of the Fourteenth Amendment.[2] By limiting a jurisdiction's ability to regulate working conditions, *Lochner* severely limited the power of federal, state, and local governments to remedy the issues of the day.[3] The problems with this limitation on government power were laid bare during the Great Depression when a string of cases overturned legislation signed into law by President Franklin Roosevelt to combat the effects of the Depression on the American people.[4] The *Lochner* era continued from 1905 until 1937

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1 Lochner v. New York, 198 U.S. 45 (1905).

2 *Id.* at 64.

3 *See id.*

4 *See, e.g.*, United States v. Butler, 297 U.S. 1 (1936); Carter v. Carter Coal Co., 298 U.S. 238 (1936).

when the Court upheld a minimum wage statute in *West Coast Hotel v. Parrish*.[5] This decision overturned the unlimited "liberty to contract" established in *Lochner* as the *West Coast Hotel* Court found that a minimum wage was essential to people meeting the necessities of life in a time of economic turmoil.[6]

Twenty years after *Lochner* was handed down, the Court in *Pierce v. Society of Sisters* Court held that it was unconstitutional for the Oregon legislature to require all students aged eight to sixteen to attend public school.[7] In *Pierce*, the Court found that parents had a constitutional right to educate their children in the way that they saw fit.[8] Similar to the right to contract in *Lochner*, the right of parents to educate their children originated from the Due Process Clause of the Fourteenth Amendment.[9] While *Lochner* has been repudiated, Substantive Due Process has remained, but not without its critics.[10]

In *Washington v. Glucksburg*, the Court found that individuals do not have a right to die under the Due Process Clause of the Fourteenth Amendment.[11] Further, the Court stated that rights not enumerated within the text of the Constitution can be protected, but only if they are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[12] This originalist view on Substantive Due Process has severely limited the concept outside of those instances in which the right at issue is rooted in tradition.[13] Because *Dobbs v. Jackson Women's Health* has so eroded Substantive Due Process, it is highly unlikely that the present Supreme Court will expand the reach of Due Process protections outside of those previously enumerated in precedent.[14] This originalist position leaves the rights of transgender people in peril.[15]

I

The first landmark Supreme Court case concerning abortion was *Roe v. Wade* in which the Court in a 7-2 decision found that there is a constitutional right to abortion that springs from the penumbra of the Ninth

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5 W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 396 (1937).
6 *Id.* at 398-99.
7 Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).
8 *Id.*
9 *Id.*
10 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).
11 Washington v. Glucksberg, 521 U.S. 702, 728 (1997).
12 *Id.* at 720-21.
13 *See id.*
14 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).
15 *See, e.g.*, Dane Brody Chanove, Note, *A Tough Roe to Hoe: How the Reversal of Roe v. Wade Threatens to Destabilize the LGBTQ+ Legal Landscape Today*, 13 U.C. IRVINE L. REV. 1041, 1065 (2023).

and Fourteenth Amendments.[16] The *Roe* Court held that a woman's privacy interests and right to have an abortion are not unlimited and that her liberty interest must be weighed against the State's interest in "protecting potential life".[17] To balance these competing interests the Court held that the State would be unable to regulate abortion before viability.[18] With this analysis the Court created the trimester framework, in which the attending physician solely determined whether a woman could have an abortion during the first trimester[19], the State could regulate abortion to protect women's health during the second trimester, and a State could ban abortion during the third trimester, except to preserve the life and health of the mother.[20] The *Roe* Court believed that this right to privacy was rooted in the "concept of personal liberty" found in the Due Process Clause of the Fourteenth Amendment.[21]

This right to privacy flowing from the Due Process Clause found in *Roe* was previously emphasized in *Griswold v. Connecticut* in 1965, where the Court overturned a Connecticut statute preventing married couples from accessing contraception.[22] The right to contraception was extended to unmarried couples seven years later in *Eisenstadt v. Baird*.[23]

The *Roe* logic was revised by the Court in *Planned Parenthood v. Casey*.[24] The *Casey* Court held that women have a constitutional right to abortion, before fetal viability, stemming solely from the Fourteenth Amendment.[25] This right to an abortion under the Due Process Clause includes the right to privacy from "unwarranted government intrusion."[26] Going further, the *Casey* Court stated, "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."[27] Using *Loving v. Virginia*, a landmark case preventing states from banning interracial marriage as an example, the Court explained that at the time of the adoption of the

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16 Roe v. Wade, 410 U.S. 113, 153 (1973).
17 *Id.* at 154.
18 *Id.* at 163.
19 This effectively gave women control over the abortion decision during the first trimester as they could choose a doctor who would be willing to perform the procedure.
20 *Roe*, 410 U.S. at 164-65.
21 *Id.* at 153.
22 Griswold v. Connecticut, 381 U.S. 479, 485 (1965).
23 Eisenstadt v. Baird, 405 U.S. 438, 443 (1972).
24 *See* Planned Parenthood v. Casey, 505 U.S. 833, 846-47 (1992).
25 *Id*.
26 *Casey*, 505 U.S. at 896 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).
27 *Casey*, 505 U.S. at 848.

Fourteenth Amendment, many states outlawed interracial marriage, yet it was nevertheless found unconstitutional in *Loving*.[28]

The *Casey* court then used evocative prose stating that a woman's "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."[29] Finally, the *Casey* court determined that the State could "take measures to ensure that the woman's choice is informed" at any time during pregnancy, as long as the State measure does not create an "undue burden" on the woman.[30]

Lawrence v. Texas and *Obergefell v. Hodges* are two additional landmark Supreme Court cases concerning the LGBTQ community where the Court rooted its analysis in the Fourteenth Amendment.[31] *Lawrence* held that solely under the Due Process Clause, the Constitution protects individuals engaging in intimate, sexual activity in the privacy of their home from government interference.[32] *Obergefell* held that under both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, the State could not ban same-sex couples from marrying.[33]

In *Dobbs v. Jackson Women's Health Org.,* the Supreme Court overturned *Roe v. Wade* and *Planned Parenthood v. Casey*, holding that abortion is not protected by any provision in the United States Constitution.[34] The Court reasoned that there is no Constitutional right to abortion either from the penumbra of the Ninth and Fourteenth Amendments as advanced in *Roe*,[35] nor a right stemming from the Fourteenth Amendment's Due Process Clause alone, as advanced in *Casey.*[36] In support of their proposition, the Court, pointing to *Glucksburg*, stated that only rights "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty" shall be protected under the Due Process Clause.[37]

Looking at the history of abortion through a common law lens, and examining the works of common law titans such as Blackstone and Hale the Court determined that there is no deeply rooted abortion right and that

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28 *Casey*, 505 U.S. at 847-48 (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)).
29 *Id.* at 852.
30 *Id.* at 878.
31 Lawrence v. Texas, 539 U.S. 558, 578 (2003); Obergefell v. Hodges, 576 U.S. 644, 672 (2015).
32 *Lawrence*, 539 U.S. at 578.
33 *Obergefell*, 576 U.S. at 672.
34 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).
35 *Id.* at 2235.
36 *Id.* at 2271.
37 *Dobbs*, 142 S. Ct. at 2242 (quoting Washington v. Glucksberg, 521 U. S. 702, 721 (1997)).

in fact, abortion was considered a crime at common law.[38] Further, at the time of the adoption of the Fourteenth Amendment, the Court found that many states banned abortion and that doctors who performed abortion procedures were prosecuted.[39] All of this evidence woven together was dispositive to the Court that the Constitution does not protect a right to abortion.[40]

The *Dobbs* dissent uses forceful language when describing what the decision means for women's liberty.[41] Instead of balancing the State's interest in potential life with the rights of women, as had been done for the last fifty years, the new constitutional order "erases the woman's interest and recognizes only the State's."[42] By viewing our Nation's foundational Charters at the time of ratification, "it consigns women to second-class citizenship."[43] The Dissent continues, "the Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply."[44] Concluding, the Dissent mournfully states, "with sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent."[45]

II

Already, *Dobbs v. Jackson Women's Health Org* is a watershed case.[46] Despite the majority's statements to the contrary, *Dobbs* implicates many rights within the sphere of personal liberty beyond abortion.[47] Emphatically, the majority states "nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."[48] However, as the dissent points out, this is hard to square with the majority's analysis of the Fourteenth Amendment as many rights beyond abortion are part of the same Constitutional fabric.[49]

The Court explains how abortion is different from other rights flowing from substantive due process such as the rights to contraception and same-sex marriage, due to the life of the fetus inherent in the abortion debate.[50] The abortion right, as stated in *Casey*, rests on the right to privacy which

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38 *Dobbs*, 142 S. Ct. at 2235-36.
39 *Id.* at 2285-97.
40 *Id.* at 2235.
41 *Id.* at 2350 (Breyer, Sotomayor, & Kagan, JJ., Dissenting).
42 *Id.* at 2323 (Breyer, Sotomayor, & Kagan, JJ., Dissenting).
43 *Id.* at 2325 (Breyer, Sotomayor, & Kagan, JJ., Dissenting).
44 *Id.* at 2326 (Breyer, Sotomayor, & Kagan, JJ., Dissenting).
45 *Id.* at 2350 (Breyer, Sotomayor, & Kagan, JJ., Dissenting).
46 *See, id.* at 2301 (Thomas, J. Concurring in Judgment).
47 *Id.*
48 *Id.* at 2239.
49 *Id.* at 2319.
50 *Id.* at 2243.

flows from the Due Process Clause.[51] At its core, the Dissenters in *Dobbs* fear that the reasoning from *Dobbs* will expand to other rights, because eliminating one ingredient from the analysis, the life of a child, would render the analysis employed by the *Dobbs* majority applicable to other rights grounded in the right to privacy such as the right to same gender sexual relations established in *Lawrence*.[52]

However, the legal analysis employed by the Court does not include a step to examine whether a right also has implications for the life of another individual.[53] Therefore, the legal test, while limited to the abortion context here, would be readily applicable to other rights if a new case came before the Court.[54] To illustrate this, the legal test the Court employs is excerpted below.

> First, we explain the standard that our cases have used in determining whether the Fourteenth Amendment's reference to "liberty" protects a particular right. Second, we examine whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as "ordered liberty." Finally, we consider whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents.[55]

The lynchpin of the Court's legal argument is whether a right is rooted in this Nation's history and traditions.[56] While Court precedent is also examined in the third prong of the legal test, the second prong carries the brunt of the Court's legal analysis.[57] Because the analysis employed by the Court would be readily applicable to any right stemming from the Due Process Clause of the Fourteenth Amendment, it most certainly will be applied to other rights.[58] While contraception and same-sex marriage have the added protection of precedent, mentioned in the third prong, rights concerning hormone access in the transgender community do not.[59]

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51 Planned Parenthood v. Casey, 505 U.S. 833, 896 (1992).

52 *See*, Dobbs v. Jackson Women's Health, 142 S. Ct. 2228, 2244 (2022); Lawrence v. Texas, 539 U.S. 558, 578 (2003).

53 *See Dobbs*, 142 S. Ct. at 2244.

54 *See id.*

55 *Id.*

56 *See id.*

57 *See id.*

58 *See id.*

59 *See Dobbs*, 142 S. Ct. 2228 *passim*.

As a result, this case has opened the floodgates on anti-trans bills in state legislatures across the country.[60] Without Supreme Court precedent to protect them, many of these bills, if and when they become law, would likely pass constitutional muster under the current Supreme Court's substantive due process analysis.[61]

The only way to ensure that these rights to hormones and bathroom use are protected under the Due Process Clause is if they are framed in a way that the current Supreme Court could reasonably understand these rights to be "implicit in the concept of ordered liberty," and stemming from the nation's "history and traditions."[62]

The majority reads the liberty written into the Fourteenth Amendment to solely include that which was understood as liberty in 1868,[63] fifty-two years before women had the right to vote.[64] The rights to engage in same-gender sexual activity (*Lawrence*) and for same-gender couples to marry (*Obergefell*) have been excluded from being considered deeply rooted in this nation's history or traditions, therefore not falling within the Court's interpretation of "the concept of ordered liberty."[65] Following this originalist line of reasoning from *Dobbs*, cases like *Lawrence* and *Obergefell* could find themselves in the ash heap of history along with *Roe* and *Casey*.[66]

The *Dobbs* majority believed it dispositive that at the time of the adoption of the Fourteenth Amendment, three-quarters of the States made abortion a crime at any stage of pregnancy.[67] However, it is self-evident that the liberty of women in America is not deeply rooted in this nation's history and traditions.[68] Women were not eligible to vote in all States until 1920[69] nor were they a separate legal entity from their husbands in this era, as stated in Justice Bradley's concurrence in *Bradwell v. State*.[70] To formulate a Constitutional analysis in the way in which rights were viewed

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60 *See, e.g.*, *Legislation Affecting LGBTQ Rights Across the Country*, ACLU (Dec. 22, 2022), https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country-2022?redirect=legislation-affecting-lgbtq-rights-across-country.

61 *See Dobbs*, 142 S. Ct. at 2242.

62 *Id.* at 2244.

63 *See id.* at 2252-53.

64 U.S. CONST. amend. XIX.

65 Dobbs v. Jackson Women's Health, 142 S. Ct. 2228, 2242 (2022) (quoting Washington v. Glucksberg, 521 U. S. 702, 721 (1997)).

66 *See id.* at 2301 (Thomas, J., concurring in Judgment).

67 *See id.* at 2235-36.

68 *See, e.g.*, Bradwell v. State, 83 U.S. 130, 141 (1873) (Bradley, J., concurring).

69 U.S. CONST. amend. XIX.

70 *Bradwell*, 83 U.S. at 141.

at a given point in history will not only stagnate Constitutional analysis but unnecessarily tether the present to bigoted views from the past.[71]

The Majority cites Sir William Blackstone, a common law scholar from eighteenth century England, in support of their assertion that abortions were a crime at common law.[72] The majority, however; does not read all of Blackstone.[73] In his seminal work, *Commentaries on the Laws of England*, Blackstone states, "the absolute rights of every Englishman . . . as they are founded on nature and reason, so they are coeval with our form of government; though *subject at times to fluctuate and change*," (emphasis added).[74] With this one line, Blackstone makes clear that he believed there to be natural rights of men, but that they were subject to fluctuation.[75] The majority twists Blackstone's words, by stating his position on a particular issue while ignoring Blackstone's ultimate belief in legal progress.[76] It may be a blind spot of Blackstone's that he believed his era had found the perfect balance between personal liberty and governmental constraint, but examining his pronouncements and lengthy discussion of the English gaining more liberties from each subsequent Monarch makes it evident that Blackstone observed legal progress and acknowledged its benefits.[77]

The namesake for this note is *On Liberty*, by the 19th-century philosopher John Stuart Mill.[78] Mill stated, "a person should be free to do as he likes in his own concerns; but he ought not to be free to do as he likes in acting for another, under the pretext that the affairs of the other are his own affairs."[79] While there can be debate about whether this principal of freedom would apply in the context of abortion, due to the "potential life" of the fetus, it would certainly apply in the context of hormone replacement therapy for transgender individuals.[80] Ultimately, Mill believed that people should be free from interference by the government when their actions solely concern themselves and that individuals should not use warped conceptions of their own liberty to oppress others.[81] Regarding women, Mill made a salient point for his time, "the almost despotic power of husbands over wives needs not be enlarged upon

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71 *See id*.
72 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).
73 *See id.* at 2249.
74 Sir William Blackstone, *Blackstone on the Absolute Rights of Individuals* 127 *(1753)*, https://oll.libertyfund.org/page/blackstone-on-the-absolute-rights-of-individuals-1753.
75 *Id*.
76 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2249 (2022).
77 *See* Blackstone, *Blackstone on the Absolute Rights of Individuals* 127 *(1753)*.
78 John Stuart Mill, *On Liberty* (1859).
79 *Id.* at 96.
80 *See id.*
81 *See* John Stuart Mill, *On Liberty*, 96 (1859).

here . . . wives should have the same rights, and should receive the protection of law in the same manner, as all other persons."[82] Women were not equal during Mill's time, but he recognized that liberty demands the equality of women, as the majority fails to see in *Dobbs*.[83]

The majority asserts that the Court does not have the authority to weigh in on moral arguments such as abortion and that the issue should be returned to the people and their elected representatives.[84] If the Court has no authority to weigh in on the issue, this means ipso facto that neither the woman nor her fetus has any constitutional rights concerning life or liberty.[85] Because of this, States could ban abortion outright and even potentially prevent women from obtaining life-saving C-Sections since *Dobbs* did not explicitly create an exception for the life of the mother.[86]

The *Dobbs* Court cites a quote by Abraham Lincoln to further their assertion that the concept of liberty is impossible to define, "We all declare for liberty; but in using the same word we do not all mean the same thing."[87] However, the majority again selectively chooses quotes to support their propositions.[88] Later in the speech, Lincoln made evident that the liberty he spoke of, was the same liberty that allowed former slaves to pass "from under the yoke of bondage," not the twisted liberty of the slaveowner to keep his slave in chains.[89] Lincoln was making a point, that true liberty, the liberty Lincoln himself ended up dying for, was for equality and freedom.[90]

The Court makes no mention of a woman's right to life under the Fourteenth Amendment, if her life is put in jeopardy during her pregnancy.[91] These issues and others will inevitably lead the subject of abortion to have another collision course with the Supreme Court in the coming years, as this opinion left far too many questions unanswered.[92]

III

Laws targeting the autonomy of women and their right to choose an abortion and laws targeting transgender people's access to gender

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82 *Id.*

83 *Id.*

84 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277 (2022).

85 *See id.*

86 *See id.*

87 *Id.* at 2247 (quoting President Abraham Lincoln, Address at Sanitary Fair at Baltimore: A Lecture on Liberty (Apr. 18, 1864)).

88 *See id.*

89 President Abraham Lincoln, Address at Sanitary Fair at Baltimore: A Lecture on Liberty (Apr. 18, 1864).

90 *Id.*

91 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) *passim*.

92 *See id.*

affirming care are tied together in a profound way.[93] Both types of legislation seek to control the bodily autonomy of an oppressed group. The legislative attacks on this bodily autonomy for women and trans people even have parallels.[94]

Trans activist and independent journalist Erin Reed stated in an interview that in Missouri "there was a bill that would ban you from leaving the state in order to have an abortion. Later that week Idaho Representatives released a similar bill that would ban you from leaving the state to get gender affirming care."[95] She went on to say that one representative pushing the Idaho bill saw hormone bans for trans youth as an extension of the pro-life argument, to preserve the potential for a child to later, create life.[96] The Missouri bill from 2022, would have allowed "private citizens to sue anyone who helps a Missouri resident have an abortion" even if the abortion takes place in another state.[97] The Idaho bill, also from 2022, would have criminalized cases of trans children traveling to other states for medical care.[98] Further, LGBTQ rights and abortion "challenge deeply held social norms about gender and sexuality" and the fight is seen by some as a fight over morality.[99] These similarities are undeniable and demonstrate how a woman's right to choose an abortion and a trans person's right to seek gender affirming care are two sides of the same coin.[100]

However, there are important differences between the abortion debate and LGBTQ legislation since the abortion debate encompasses the countervailing interest in the life of the fetus.[101] In the context of LGBTQ rights, there is not a viable countervailing interest beyond bare animus

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93 Chanove, *supra* note 15, at 1044-45.

94 *See* Zoom Interview with Erin Reed, Independent Journalist and Activist, (Mar. 24, 2023); Will Fritz, *Independent journalist Erin Reed discusses Republicans' anti-LGBTQ proposals*, American Independent, Apr. 28, 2023, https://americanindependent.com/erin-reed-anti-lgbtq-proposals/.

95 Zoom Interview with Erin Reed, Independent Journalist and Activist, (Mar. 24, 2023).

96 *Id*.

97 Alice Miranda Ollstein & Megan Messerly, *Missouri wants to stop out-of-state abortions. Other states could follow.*, Politico, Mar. 19, 2022, https://www.politico.com/news/2022/03/19/travel-abortion-law-missouri-00018539

98 Tyler Kingkade, Idaho lawmakers seek to punish parents who take trans youth to other states for health care, NBC NEWS (Mar. 9, 2022), https://www.nbcnews.com/news/ us-news/idaho-trans-health-care-youth-bill-rcna19287.

99 Chanove, *supra* note 15, at 1044.

100 *See* Zoom Interview with Erin Reed, Independent Journalist and Activist, (Mar. 24, 2023).

101 Robin Maril, *Queer Rights After Dobbs v. Jackson Women's Health Organization*, 60 SAN DIEGO L. REV. 45, 77 (2023).

towards the community at large.[102] The animus against LGBTQ people will be explained more in depth in Section C.

Many states across the country have proposed or enacted anti-transgender laws. One of the most draconian types of laws restricting the rights of transgender people is found in the 'Alabama Vulnerable Child Compassion and Protection Act', which bans gender-affirming care for minors[103] The Act states in pertinent part;

> Section 4. (a) . . . [N]o person shall engage in or cause any of the following practices:
>
> > **(1)** Prescribing or administering puberty blocking medication to stop or delay normal puberty.
> >
> > **(2)** Prescribing or administering supraphysiologic doses of testosterone or other androgens to females.
> >
> > **(3)** Prescribing or administering supraphysiologic doses of estrogen to males.[104]

In the case concerning this act, *Eknes-Tucker v. Marshall*[105], the Middle District of Alabama held that parents have a fundamental right to direct the medical care of their children.[106] The *Eknes-Tucker* Court cites *Troxel v. Granville*, where the Supreme Court held that a parent's right to make decisions concerning the care of their children is one of "the oldest of the fundamental liberty interests."[107] The Court in *Eknes-Tucker* held that this fundamental liberty interest included a parent's "right to treat their children with transitioning medications subject to medically accepted standards."[108] In further support of its position, the District Court found that the Defendant's expert witness testified that no Country in the world categorically bans transitioning medications in the manner that Alabama did in their Act.[109] But the world is changing. Fifteen states filed as amici curiae in support of the constitutionality of Alabama's Act.[110] These states are Arkansas, Alaska, Arizona, Georgia, Indiana, Louisiana, Mississippi,

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102 *Id.*
103 S.B. 184, Ala. 2022 Reg. Sess. §§ 4-5 (Ala. 2022).
104 *Id*.
105 This case was decided one month before *Dobbs*, in May of 2022.
106 Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1146 (M.D. Ala. 2022).
107 *Id.* at 1144 (citing Troxel v. Granville, 530 U.S. 57, 65-66 (2000)).
108 *Id.* at 1144-45.
109 *Id.* at 1146.
110 *Id.* at 1141.

Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, and West Virginia.[111]

What these fifteen states have made clear is that transgender youth are not safe within their borders.[112] The Alabama District Court in *Eknes-Tucker* found for reason, for liberty, for justice, and for transgender youth.[113] Tomorrow's courts have not be so forgiving. With the current opinion in *Dobbs* eviscerating a woman's fundamental liberty interests in her body,[114] this line of argument has been used to deny transgender youth life-saving medical treatment.[115] If the Courts have no place wading into the depths of moral arguments such as those regarding abortion, as the Court repeatedly emphasized in *Dobbs*,[116] one could then easily argue that the Courts have no interest in wading into the political flashpoint that is transgender rights. This would allow states to pass draconian laws that seek to eliminate trans people from public life.

The Eleventh Circuit in a majority opinion written by Judge Barbara Lagoa, has overturned the District Court's opinion in *Eknes-Tucker* and vacated the Court's issuance of a preliminary injunction.[117] The Circuit Court found that the District Court had abused its discretion by granting the preliminary injunction in favor of the transgender plaintiffs.[118] Further, the court found that

> The plaintiffs have not presented any authority that supports the existence of a constitutional right to "treat [one's] children with transitioning medications subject to medically accepted standards." Nor have they shown that section 4(a)(1)-(3) classifies on the basis of sex or any other protected characteristic. Accordingly, section 4(a)(1)-(3) is subject only to rational basis review.[119]

One concerned parent stated during her testimony seeking injunctive relief, that she was worried her child may commit suicide if not given access to gender affirming care.[120] The United States, as an intervenor on behalf of the plaintiffs, proffered a medical expert, Dr. Armand H.

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111 *Id.*
112 *See id.*
113 *See id.*
114 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).
115 *See, e.g.*, Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1210-11 (11th Cir. 2023); L. W. v. Skrmetti, 73 F.4th 408, 412-13 (6th Cir. 2023).
116 *Dobbs*, 142 S. Ct. at 2277.
117 *Eknes-Tucker*, 80 F.4th 1205, at 1211.
118 *Id.*
119 *Id.* at 1210.
120 *Id.* at 1216.

Antommaria, who stated that in his expert opinion, "there are no equally effective alternative medical treatments for adolescents with gender dysphoria" and that hormone therapy and puberty blockers stand alone.[121] In contrast, one expert offered by the defendants, who gave his expert opinion on treatments for transgender youth, is not a medical doctor.[122] Another expert for the defense, Dr. Patrick Hunter, stated that "there is currently no established standard of care for transgender-identified youth."[123] This is patently false, as the World Professional Association for Transgender Health ("WPATH") has explicit standards of care for treating transgender youth, including a requirement of consistent and intense feelings of gender-nonconformity.[124]

With this evidence in mind, the Court of Appeals for the Eleventh Circuit found that, under the Due Process Clause of the Fourteenth Amendment, there is no fundamental right to "treat [one's] children with transitioning medications subject to medically accepted standards."[125] The Eleventh Circuit cited *Dobbs* extensively, stating "the Supreme Court has instructed courts addressing substantive due process claims to "engage[ ] in a careful analysis of the history of the right at issue" and be " 'reluctant' to recognize rights that are not mentioned in the Constitution."[126]

The Eleventh Circuit further found that cases like *Pierce v. Society of Sisters*, that outline a parent's fundamental rights concerning their children under the Fourteenth Amendment, do not extend so far as to grant a fundamental right to treat one's children with hormone therapy.[127] Because states have a fundamental interest in protecting children within their state, the court found that under the rational basis standard, Alabama's law survived review.[128]

The court reiterated what was stated in *Dobbs* — new rights under substantive due process ought to not be granted unless the right is "deeply rooted in [our] history and tradition," and "essential to our Nation's 'scheme of ordered liberty.'"[129] As is stated previously, *Dobbs* has so

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121 *Id.* at 1216.
122 *Id.* at 1217.
123 *Id.* at 1218.
124 *See, e.g.*, Nicole Scott, Note, *Trans Rights are Human Rights: Protecting Trans Minors' Right to Gender-Affirming* Care, 14 DREXEL L. REV. 685, 713 (2022); Jessica Matsuda, Note, *Leave Them Kids Alone: State Constitutional Protections for Gender-Affirming Healthcare*, 79 Wash & Lee L. Rev. 1597, 1607 (2022).
125 *Eknes-Tucker*, 80 F.4th, at 1210.
126 *Id.* at 1220 (citing Dobbs v. Jackson Women's Health Org., 142 S. Ct. 228, 2246-47 (2022)).
127 *Id.* at 1222.
128 *Id.* at 1234.
129 *Id.* at 1220 (citing Dobbs v. Jackson Women's Health Org., 142 S. Ct. 228, 2246 (2022)).

watered down substantive due process that courts are unwilling to expand it even when a related right is found in Supreme Court precedent.[130] While substantive due process may not be a winning argument, the Eleventh Circuit also found that the Alabama law at issue survived review under an equal protection analysis.[131] The court's analysis of the statute under the Equal Protection Clause will be discussed in Part B.

B

The Equal Protection Clause found in the Fourteenth Amendment has a longer and more straightforward history than the Due Process Clause.[132] The text of the Amendment states "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[133] An early case examining the Equal Protection Clause was *Strauder v. West Virginia*, where an African-American man was accused of murder and found guilty by an all-white jury, challenged a West Virginia statute prohibiting African-Americans from serving on a jury.[134] The Court found that the West Virginia statute violated the Equal Protection Clause, stating the following:

> the Fourteenth Amendment was framed and adopted . . . to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation.[135]

It is undeniable that the meaning of the Equal Protection Clause is to ensure equality between groups and the only debate concerns which groups and situations the Clause applies to.[136] This clarity in meaning can be juxtaposed with the Due Process Clause, which did not affirmatively encompass a substantive liberty right until *Lochner*, nearly half a century after the Fourteenth Amendment's initial passage.[137] The undeniability of

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130 Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1236 n.15 (11th Cir. 2023).
131 *Id.* at 1234.
132 *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1879).
133 U.S. CONST. amend. XIV.
134 *Strauder*, 100 U.S. at 303.
135 *Id.* at 306-07.
136 *See* U.S. CONST. amend. XIV.
137 *See* Lochner v. New York, 198 U.S. 45 (1905).

the Equal Protection Clause makes the Clause less prone to erosion from the Supreme Court.[138] This immovable strength may be utilized to ensure equality between transgender and cisgender people.[139]

I

Brown v. Board of Education is a seminal case that entered the American consciousness as the case that outlawed *de jure* segregation.[140] While the opinion only explicitly overturned segregation in education, *de jure* segregation in public accommodations would later be deemed unconstitutional in *Heart of Atlanta Motel v. United States*.[141] Chief Justice Warren explained how the Equal Protection Clause applied in the context of education in *Brown*;

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.[142]

The *Brown* Court discarded the willful misreading of the Equal Protection Clause found in *Plessy v. Ferguson* that had upheld *de jure* segregation for half a century under the premise of 'separate but equal'.[143] Following in the footsteps of *Brown*, the court in *Loving v. Virginia* held that bans on interracial marriage also violated the Equal Protection Clause of the Fourteenth Amendment.[144] The *Loving* majority states:

> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must

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138 *See* U.S. CONST. amend. XIV.
139 *See id.*
140 Brown v. Bd. of Educ., 347 U.S. 483 (1954).
141 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).
142 *Brown*, 347 U.S. at 495.
143 *See Brown*, 347 U.S. 483; Plessy v. Ferguson, 163 U.S. 537 (1896).
144 Loving v. Virginia, 388 U.S. 1, 12 (1967). (The Virginia anti-miscegenation statute in question was also found to violate the Due Process Clause).

> stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.[145]

The *Loving* Court makes clear that racial discrimination, with no legitimate legislative purpose, is unconstitutional under the Equal Protection Clause.[146] Regarding issues concerning the transgender community, a similar line of reasoning could be employed by advocates, as many of the anti-trans bills have no legitimate legislative purpose.[147]

When examining issues under an Equal Protection Clause analysis, the Supreme Court reviews statutes using three levels of scrutiny.[148] Strict scrutiny is the most heightened level of scrutiny that the Court applies.[149] This level is employed when a suspect class is at issue, historically this has been the case when there are laws regarding racial minorities.[150] To pass muster under strict scrutiny, there must be a compelling state interest in an objective that is narrowly tailored to achieve said objective.[151] Because the anti-miscegenation statute in *Loving* had no compelling state interest nor was it not narrowly tailored, it failed strict scrutiny review.[152]

Meanwhile, laws targeting women have received an intermediate level of scrutiny.[153] Women are considered a quasi-suspect class and to pass Constitutional muster, the legislation or regulation at issue must address an important state interest and be substantially related to achieving that interest.[154]

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145 *Id.* at 11-12.
146 *Id*. at 11.
147 *See id.*
148 *See, e.g.*, Beck Sigman, Comment, *Keeping Trans Kids Safe: The Constitutionality of Prohibiting Access to Puberty Blockers*, 71 Am. U. L. Rev. F.173, 181 (2022).
149 *Id.* at 182.
150 *See e.g.*, *Loving*, 388 U.S. at 11.
151 *See id.*
152 *Id.*
153 *See e.g.*, Craig v. Boren, 429 U.S. 190 (1976). (A case which held that sex discrimination in the purchase of alcohol in Oklahoma, violated the Equal Protection Clause).
154 *See, e.g.*, Sigman, *supra*, note 135 at 182-83.

Finally, the lowest tier of scrutiny is the rational basis standard.[155] Rational basis applies when the class at issue is not a suspect class.[156] To survive rational basis review, there must be a legitimate state interest that is rationally related to the action taken.[157]

II

In the case of *Frontiero v. Richardson*, the Supreme Court held that classifications based on sex are subject to heightened scrutiny.[158] The Court in *United States v. Virginia* clarified that the level of scrutiny that applied to women as a class is what is now considered intermediate scrutiny.[159] This requires the justification for government classification to be "exceedingly persuasive" and the classification at issue must serve "important governmental objectives" that are "substantially related" to achieving those objectives.[160]

Concerning LGBTQ people, the Court in *Romer v. Evans* struck down a Colorado amendment preventing localities from passing laws that protected the LGBTQ community.[161] In applying rational basis scrutiny, the *Romer* Court found that "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[162] Further, the Court cited *Department of Agriculture* v. *Moreno* for the proposition that "bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[163]

Later, in *United States v. Windsor*, the Court found that the Defense of Marriage Act ("DOMA") which excluded same-sex couples from the definition of "spouse" in federal statutes, violated the Fifth Amendment by singling out came-sex couples for unequal treatment in the recognition of their marriages.[164] This treatment was determined by the Court to violate the Equal Protection clause as applied to the Federal Government.[165]

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155 *See, e.g.*, Sigman, *supra*, note 135 at 181-82.

156 *See, e.g.*, U.S. v. Carolene Products Co., 304 U.S. 144, 153-54 (1938) (producer of an alternative type of milk), Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955) (opticians).

157 *Carolene Products Co.*, 304 U.S. at 153-54.

158 Frontiero v. Richardson, 411 U.S. 677, 686, 691 (1973).

159 United States v. Virginia, 518 U.S. 515, 533 (1996).

160 *Id.*

161 Romer v. Evans, 517 U.S. 620, 635 (1996).

162 *Id.* at 633.

163 *Id.* at 634-45 (citing Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)).

164 United States v. Windsor, 570 U.S. 744, 751, 775 (2013).

165 *Id.* at 770.

In determining the level of scrutiny to apply in a given case, there are multiple paths that may be taken. To determine whether there is a suspect class at issue, there is a four-factor test applied by the courts "(1) a history of discrimination, (2) whether the group shares an "immutable or distinguishing characteristic[]", (3) the political powerlessness of the class, and (4) a lack of relationship between the characteristic and the ability to contribute."[166]

First, it is undeniable that transgender people have a history of facing discrimination in housing, healthcare, and employment.[167] The court in a Fourth Circuit case called *Grimm v. Gloucester County School Board* cited "transgender people frequently experience harassment in places such as schools (78%), medical settings (28%), and retail stores (37%), and they also experience physical assault in places such as schools (35%) and places of public accommodation (8%).[168] Additionally, transgender people could be fired from their jobs simply for being transgender before the Supreme Court's landmark case in *Bostock v. Clayton County*, from 2020.[169]

Second, being transgender is an immutable characteristic and this identity is formulated at a young age.[170] The American Psychological Association explains that gender-non-confirming people have existed since antiquity and that while experts are not sure why certain people are transgender, it is likely due to a variety of factors including genetics, hormone levels, and life experiences.[171] This points to transgender status being an immutable characteristic.[172]

Third, transgender people are extremely underrepresented in all levels of government and a transgender person has never been elected to the US Congress.[173] Danica Roem was one of the first transgender elected officials in the country, winning her election to the Virginia House of Delegates in 2017.[174] While transgender people make up approximately

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166 Katie Eyer, *Transgender Constitutional Law*, 171 PENN. L. REV. (forthcoming) (manuscript at 24), https://ssrn.com/abstract=4173202.

167 Sigman, *supra* note 148, at 193-94.

168 *Grimm*, 972 F.3d at 612.

169 Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

170 *Grimm*, 972 F.3d at 612; Sigman, *supra* note 149, at 192.

171 *Understanding transgender people, gender identity and gender expression*, APA, (Sept. 14, 2023; 8:00pm), https://www.apa.org/topics/lgbtq/transgender-people-gender-identity-gender-expression.

172 *See id.*

173 Laura Gersony & Caroline Curran, *Sarah McBride could be 1st openly trans person in Congress, but her focus is on results for Delaware*, ABC, (Jun. 29, 2023), https://abcnews.go.com/Politics/sarah-mcbride-1st-openly-trans-person-congress-focus/story?id=100437396.

174 Antonio Olivo, *Danica Roem of Virginia to be first openly transgender person elected, seated in a U.S. statehouse*, Washington Post, Nov. 8, 2017, https://www.washingtonpost.com/local/virginia-politics/danica-roem-will-be-vas-first-

.6% of the US population, they only hold .007% of government positions.[175]

Fourth, transgender people can successfully contribute to society, and transgender status does not relate to an ability to contribute to society.[176] Further, seventeen "of our foremost medical, mental health, and public health organizations agree that being transgender "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities."'[177] Finally, transgender people contribute to legal scholarship, as the author of this note is herself transgender.

In their own right, transgender people can be viewed as a quasi-suspect class as the court found in *Grimm*.[178] All four factors required in determining whether a class requires heightened scrutiny are met for transgender people.[179]

Should a court determine that transgender people do not constitute a suspect class on their own, discrimination against transgender people still falls under intermediate scrutiny as discrimination against transgender people is sex-based discrimination.[180] The holding in *Bostock* that discrimination against LGBT people is sex discrimination under Title VII points towards the same logic applying under the Equal Protection Clause.[181] In fact, in his article on transgender youth in the aftermath of *Bostock*, Erik Fredericksen argues that "the holding of *Bostock* that discrimination against LGBT persons is necessarily sex discrimination applies under the Equal Protection Clause of the Constitution."[182] Because *Bostock* relies on a textualist analysis of Title VII, it is unlikely that the Supreme Court would find *Bostock* binding on an Equal Protection Analysis,[183] but *Bostock's* holding does strongly point to discrimination against LGBT people being impermissible sex discrimination.[184] The formalistic reasoning in *Bostock* points to the conclusion that "any state action distinguishing on the basis of sexual orientation or gender identity

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openly-transgender-elected-official-after-unseating-conservative-robert-g-marshall-in-house-race/2017/11/07/d534bdde-c0af-11e7-959c-fe2b598d8c00_story.html.

175 Sigman, *supra* note 148, at 194-95.

176 *Id.* at 195.

177 Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 612 (4th Cir. 2020).

178 *Grimm*, 972 F.3d at 613.

179 *Id*.

180 *See, e.g., id.*

181 Erik Fredericksen, Note, *Protecting Transgender Youth After Bostock: Sex Classification, Sex Stereotypes, and the Future of Equal Protection*, 132 Yale L.J. 1149, 1151-1152 (2023).

182 *Id.*

183 *See e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2220 (2023) (Gorsuch, J., concurring) (explaining the differences between Title VI and the Equal Protection Clause).

184 *See* Fredericksen, *supra* note 181, at 1149, 1151-52.

distinguishes on the basis of sex and thus requires intermediate scrutiny."[185] In *Bostock*, the majority states that "[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[186] Unless this logic is cabined exclusively in the context of Title VII, it would also apply in the equal protection context.[187]

Bostock relies on the assumption that distinctions based on sexual orientation or transgender status are both a function of sex and that distinctions on that basis alone are discriminatory.[188] Further, Title VII and equal protection are intertwined and influence each other as they both rest on the same premise; that people must be treated equally.[189]

If LGBTQ discrimination is based on sex-stereotyping, then it invariably is discrimination on the basis of sex and would be reviewed under intermediate scrutiny.[190] For example, "if Sarah, a transgender woman, is fired for showing up for work in a dress, we know that her employer would not have objected to her attire but-for her sex assigned at birth."[191] Alternatively, laws such as the school bathroom policy at issue in *Grimm*, where students could only use bathroom based on their biological gender, discriminates based on sex on its face.[192]

III

The first Circuit Court to take a case concerning a trans hormone ban, the Eighth Circuit, decided the case under an Equal Protection analysis in *Brandt v. Rutledge*.[193] In *Brandt*, the Eighth Circuit held that an Arkansas District Court's issuance of an injunction enjoining Ark. Code. Ann. §20-9-1502 ("Arkansas Youth Hormone Ban") was not an abuse of discretion.[194] The Arkansas Youth Hormone Ban prohibited any healthcare professional from "provid[ing] gender transition procedures to any individual under eighteen (18) years of age" or "refer[ring] any individual under eighteen (18) years of age to any healthcare professional for gender transition procedures."[195] The Eighth Circuit held that the

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185 *Id.*
186 *Id.* at 1168. (citing Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020)).
187 *See* Fredericksen, *supra* note 181 at 1167.
188 *Id.* at 1167.
189 *Id.* at 1169.
190 *See* Fredericksen, *supra* note 181, at 1176; Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 608 (4th Cir. 2020).
191 Katie Eyer, *Transgender Constitutional Law*, 171 PENN. L. REV. (forthcoming) (manuscript at 36), https://ssrn.com/abstract=4173202.
192 *Grimm*, 972 F.3d at 608.
193 Brandt v. Rutledge, 47 F.4th 661, 672 (8th Cir. 2022).
194 *Id.*
195 *Id.* at 668 (citing Ark. Code Ann. § 20-9-1502(a), (b)).

plaintiffs would likely succeed on the merits and issued an injunction.[196] This is because the Arkansas law, as written, would allow children of one sex to have a procedure that would be illegal for a child of another sex.[197] The Eighth Circuit stated,

> A minor born as a male may be prescribed testosterone or have breast tissue surgically removed, for example, but a minor born as a female is not permitted to seek the same medical treatment. Because the minor's sex at birth determines whether or not the minor can receive certain types of medical care under the law, Act 626 discriminates on the basis of sex.[198]

The courts' finding that the Arkansas statute was discrimination on the basis of sex meant the proper standard of review was intermediate scrutiny.[199] Further, the court found that the District Court below relied on ample evidence to support the conclusion that the Arkansas statute should be enjoined and that it violated the Equal Protection Clause.[200]

As the first Federal Circuit Court to weigh in on access to hormones for transgender youth, it is a persuasive authority.[201] Due to the avalanche of anti-trans bills that have been introduced, and bills that have passed to become law, more Circuits have weighed in on the issue.[202]

In July of 2023, the Sixth Circuit found that a Tennessee law banning gender-affirming care for transgender minors did not violate either the Equal Protection Clause nor the Due Process Clause.[203] The Tennessee district court found that the statute at issue improperly discriminated on the basis of sex and that transgender people constituted a quasi-suspect class when analyzed under the Equal Protection Clause.[204] The Sixth Circuit disagreed, finding that the Act does not discriminate on the basis of sex because "[t]he Act bans gender-affirming care for minors of both sexes. The ban thus applies to all minors, regardless of their biological

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196 *Id*. at 671.
197 *Id*.
198 Brandt v. Rutledge, 47 F.4th 661, 669 (8th Cir. 2022).
199 *Id.* at 670.
200 *Id.* at 671.
201 *See id.* at 669.
202 *See e.g*, Maggie Astor, *G.O.P. State Lawmakers Push a Growing Wave of Anti-Transgender Bills*, N.Y. Times, Jan. 30, 2023, https://www.nytimes.com/2023/01/25/us/politics/transgender-laws-republicans.html, L.W. v. Skrmetti, 73 F.4th 408 (6th Cir. 2023), Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022).
203 L.W. v. Skrmetti, 73 F.4th 408, 412-413 (6th Cir. 2023).
204 *Id.* at 414.

birth with male or female sex organs."[205] The court explained that the Act containing the word "sex" was not dispositive saying,

> The Act mentions the word "sex," true. But how could it not? That is the point of the existing hormone treatments—to help a minor transition from one gender to another. That also explains why it bans procedures that administer cross-sex hormones but not those that administer naturally occurring hormones. Tenn. Code Ann. § 68-33-103(b)(1)(A).[206]

The Tennessee Act specifically prohibits children assigned male at birth from taking puberty blockers to stop male puberty because they identify as female, but explicitly allows children assigned male at birth to take puberty blockers if their male puberty starts too early.[207] However, the Sixth Circuit found that this did not amount to sex-based discrimination.[208] The Sixth Circuit reasoned that the act was not mere pretext for invidious discrimination, without examining how transgender people are treated in society today nor, examining the Tennessee legislative record.[209] Finally, the Sixth Circuit stated,

> If a law restricting a medical procedure that applies only to women does not trigger heightened scrutiny, as in *Dobbs*, a law equally applicable to all minors, no matter their sex at birth, does not require such scrutiny either.[210]

However, the law at issue would not apply equally to all minors. If a seven-year-old child assigned male at birth started male puberty, the child would be allowed to receive puberty blockers. Were the child to say that they wanted to take puberty blockers because they identified as a girl, under the statute's text, would this be impermissible transitioning medication or be included in the early-onset puberty carve-out and therefore permissible?[211] This distinction in rationale as a basis for denying medical care fails even a rational basis review.[212]

The Sixth Circuit also declined to apply intermediate scrutiny in cases concerning transgender people because the Supreme Court has yet to

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205 *Id.* at 419.
206 *Id.*
207 *Id.* at 413.
208 L.W. v. Skrmetti, 73 F.4th 408, 419 (6th Cir. 2023).
209 *Id.*
210 *Skrmetti*, 73 F.4th at 419.
211 L.W. v. Skrmetti, 73 F.4th 408, 419 (6th Cir. 2023).
212 *See id.*

consider transgender people a quasi-suspect class requiring heightened scrutiny.[213] Further, the Sixth Circuit declined to apply the rationale from *Bostock* as *Bostock* concerned Title VII, while the case before the Sixth Circuit concerned the Equal Protection Clause.[214]

One month after the Sixth Circuit's decision, in *Eknes-Tucker v. Governor of Alabama*, the Eleventh Circuit overturned a district court's grant of a preliminary injunction, finding it likely that the state of Alabama would succeed on the merits.[215] The Eleventh Circuit found that the plaintiffs in *Eknes-Tucker* failed to demonstrate that the Alabama law at issue classified individuals on the basis of sex.[216] The Alabama legislature found, as paraphrased by the Eleventh Circuit, "This use of puberty blockers for gender nonconforming children is experimental and not FDA-approved [. . .] This unproven, poorly studied series of interventions results in numerous harmful effects for minors, as well as risks of effects simply unknown due to the new and experimental nature of these interventions."[217] The Eleventh Circuit accepted these findings by the Alabama legislature without independent analysis, beyond restating statements by certain witnesses for the plaintiffs from a preliminary injunction hearing.[218]

In deciding that the Alabama statute at issue did not violate the Equal Protection Clause, the court stated,

> As mentioned, one of the Minor Plaintiffs' arguments is that section 4(a)(1)-(3) directly classifies on the basis of sex because it "uses explicitly sex-based terms to criminalize certain treatments based on a minor's 'sex.'" Of course, section 4(a)(1)-(3) discusses sex insofar as it generally addresses treatment for discordance between biological sex and gender identity, and insofar as it identifies the applicable cross-sex hormone(s) for each sex—estrogen for males and testosterone and other androgens for females.[219]

However, this analysis does not consider that the Act would allow puberty blockers for a cisgender girl whose puberty starts early but would deny the same puberty blockers to a transgender girl who does not wish to

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213 *Id.* at 419.
214 *Id.* at 420.
215 Eknes-Tucker v. Gov. of Alabama, 80 F.4th 1205, 1210–11 (11th Cir. 2023).
216 *Id.*
217 *Id.* at 1211-12.
218 *See id.* at 1211-12, 1219.
219 Eknes-Tucker v. Gov. of Alabama, 80 F.4th 1205, 1227 (11th Cir. 2023).

go through male puberty.[220] The court emphasizes that the Alabama statute applies to all minors when there are specific carveouts for early-onset puberty, male circumcision, and intersex conditions.[221] These carveouts in the Alabama statute show its true purpose: invidious discrimination.[222] A statute of 'general applicability' with numerous carveouts is not applied equally to all groups.[223]

Next, the Eleventh Circuit failed to distinguish the instant case from the factual scenario in *Glenn v. Brumby*, where the Eleventh Circuit found that "discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause."[224] The Eleventh Circuit in *Brumby* stated, "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."[225]

The court in *Eknes-Tucker v. Governor of Alabama* may disagree with the holding in *Brumby*, but it does not matter as *Brumby* is the controlling law.[226] The Eleventh Circuit erred in *Eknes-Tucker* by not applying its own circuit's precedent, which it established in *Brumby*: discrimination against transgender people is sex discrimination, and this discrimination warrants heightened scrutiny.[227]

C

Much of the literature on the constitutionality of attacks on the transgender community focuses on two things: bigotry and disinformation.[228] In a previous segment on Fox News, Tucker Carlson called the concept of transgender children 'grotesque.'[229] In December 2022, Carlson interviewed Chaya Raichik, the founder of Libs of TikTok, a right-wing Twitter account.[230] Raichick stated during the interview, "The LGTBQ community has become this cult, and it's so captivating, and it

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220 *See id.* at 1228.
221 *Eknes-Tucker*, 80 F.4th at 1213.
222 *Id.*
223 *See id.*
224 Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011).
225 *Id.* at 1317.
226 Eknes-Tucker v. Gov. of Alabama, 80 F.4th 1205, 1234 (11th Cir. 2023).
227 *Id.*; *Brumby*, 663 F.3d at 1319.
228 *See e.g.*, Zeeshan Aleem, *Tucker Carlson just supercharged the Libs of TikTok anti-LGBTQ bigotry*, *Opinion*, MSNBC (Dec. 27, 2022), https://www.msnbc.com/opinion/msnbc-opinion/tucker-carlson-libs-tik-tok-rcna63369.
229 Chanove, *supra* note 15, at 1046.
230 *See e.g.*, Zeeshan Aleem, *Tucker Carlson just supercharged the Libs of TikTok anti-LGBTQ bigotry*, *Opinion*, MSNBC (Dec. 27, 2022), https://www.msnbc.com/opinion/msnbc-opinion/tucker-carlson-libs-tik-tok-rcna63369.

pulls people in so strongly, unlike anything we've ever seen," she went on to say that, "They brainwash people to join, and they convince them of all these things, and it's really, really hard to get out of it . . . it's extremely poisonous," which is unequivocal animus towards the LGBTQ community.[231]

One speaker at the Conservative Political Action Conference ("CPAC"), Michael Knowles of *The Daily Wire*, stated, "transgenderism must be eradicated from public life entirely."[232] This is an attack on the transgender community, hinting at violence, that lays bare the hatred that some people have towards transgender people.[233] The Merriam-Webster dictionary defines *eradication* as "to do away with as completely as if by pulling up by the roots."[234] Some listeners may interpret Knowles' statement as a call to action to eradicate transgender people through violence.[235] Neither the court in *Eknes-Tucker* nor in *Skrmetti* grappled with the anti-trans rhetoric present in the country, seriously questioning the legal reasoning behind their decisions.[236]

When examining any law targeting the transgender community or the LGBTQ community at large, it is crucial to understand this contempt as a frame of reference and to have a critical eye when examining legislation targeting the LGBTQ community explicitly.[237]

This critical eye must extend to information included in amicus briefs and other scientific evidence relied on by the parties.[238] Amicus briefs introduce "uninterrogated factual claims into appellate litigation" without the crucible of cross-examination or pre-trial motions.[239] Courts must be wary of citing amicus briefs that lack tested scientific theory or use

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231 *Id.*

232 Peter Wade & Patrick Reis, *CPAC Speaker Calls for Eradication of 'Transgenderism' — and Somehow Claims He's Not Calling for Elimination of Transgender People*, ROLLING STONE (Mar. 6, 2023), https://www.rollingstone.com/politics/politics-news/cpac-speaker-transgender-people-eradicated-1234690924/.

233 *See* S.B. 0003, 2023 Leg., 113th Sess. (Tn. 2023).

234 *Eradication*, MERRIAM-WEBSTER DICTIONARY (Sep. 8, 2023, 5:51pm), https://www.merriam-webster.com/dictionary/eradicate.

235 Peter Wade & Patrick Reis, *CPAC Speaker Calls for Eradication of 'Transgenderism' — and Somehow Claims He's Not Calling for Elimination of Transgender People*, Rolling Stone, (Mar. 6, 2023), https://www.rollingstone.com/politics/politics-news/cpac-speaker-transgender-people-eradicated-1234690924/.

236 *See* L.W. v. Skrmetti, 73 F.4th 408, 416 (6th Cir. 2023); Eknes-Tucker v. Gov. of Alabama, 80 F.4th 1205, 1235 (11th Cir. 2023).

237 *See e.g.*, Zeeshan Aleem, *Tucker Carlson just supercharged the Libs of TikTok anti-LGBTQ bigotry*, *Opinion*, MSNBC (Dec. 27, 2022), https://www.msnbc.com/opinion/msnbc-opinion/tucker-carlson-libs-tik-tok-rcna63369.

238 Ari Ezra Waldman, *Manufacturing Uncertainty in Constitutional Law*, 91 FORDHAM L. REV. 2249, 2256 (2023).

239 *Id.*

questionable research methods.[240] Legislatures may also accept misinformation or "alternative" facts to explain legislative action that may appear on its face to be based on animus.[241] For example, some legislatures claim that transgender people may not use bathrooms matching their identity because cisgender men would use laws allowing transgender people to use their bathrooms of choice to enter women's restrooms to prey on women and young girls.[242] Not only is this predatory behavior not a common occurrence, but pro-trans laws would not immunize predators from liability whether they are transgender or not.[243] This predator line of reasoning is illogical and uses fear that non-trans people will abuse a law to prevent trans people from comfortably existing in society.[244]

This misinformation has also manifested into debates about the standards of care for transgender youth who receive hormone replacement therapy or puberty blockers.[245] However, the World Professional Organization for Transgender Health ("WPATH") has delineated standards for treating transgender youth that are followed across the country.[246] The WPATH only recommends puberty-blocking treatments for minors when the minor exhibits "a long-lasting and intense pattern of gender nonconformity."[247] This is far from the wild west of medical care that some states claim transgender minors encounter.[248] Gender-affirming care for transgender youth is safe and necessary in ensuring their life, liberty, and pursuit of happiness.[249]

The Eleventh Circuit fell victim to misinformation in the case of *Otto v. Boca Raton* where the court "enjoined Boca Raton's conversion therapy ban as an unconstitutional content-based restriction on speech despite medical evidence attesting to the practice's harms."[250] The Eleventh Circuit criticized the report from the American Psychological Association for lack of research on the harms of conversion therapy.[251] This position "manufactured scientific disagreement when none existed", as medical researchers do not conduct studies on conversion therapy presently due to

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240 *See id.*
241 *Id.* at 2256, 2258.
242 *Id.* at 2256.
243 *See id.*
244 *See id.*
245 *Id.* at 2293.
246 Jessica Matsuda, Note, *Leave Them Kids Alone: State Constitutional Protections for Gender-Affirming Healthcare*, 79 WASH. & LEE L. REV. 1597, 1607 (2022).
247 Nicole Scott, Note, *Trans Rights are Human Rights: Protecting Trans Minors' Right to Gender-Affirming Care*, 14 DREXEL L. REV. 685, 713 (2022).
248 *See id.;* Waldman, *supra* note 239, at 2293.
249 Waldman, *supra* note 239, at 2306.
250 *Id.* at 2273.
251 *Id.* at 2275.

ethical standards preventing the harm of minors.[252] Misinformation must be avoided at all costs, otherwise it will become entrenched into case law, casting doubt not only individual cases but on the judiciary at large. Courts must above all strive to discover truth and use all tools at their disposal to uncover it.

The Eleventh Circuit, as well as the Sixth Circuit, fell victim to this misinformation in *Eknes-Tucker v. Governor, of the State of Alabama* and *L.W. v. Skrmetti*.[253] The court in *Skrmetti* states that the "arena of public debate and legislative action" is the proper forum for novel discussions on gender-affirming care to occur.[254] This does not take into account the cascade of discrimination faced by transgender people.[255] Likewise, the court in *Eknes-Tucker* found that:

> This case revolves around an issue that is surely of the utmost importance to all of the parties involved: the safety and wellbeing of the children of Alabama. But it is complicated by the fact that there is a strong disagreement between the parties over what is best for those children. Absent a constitutional mandate to the contrary, these types of issues are quintessentially the sort that our system of government reserves to legislative, not judicial, action.[256]

This reasoning obscures that there really is no debate about whether gender-affirming care for transgender youth is appropriate; the only debate is *when* puberty-blockers or hormones should be administered.[257] There is no evidence that the majority of adolescents and adults regretted receiving gender-affirming care.[258]

Both the Eleventh Circuit and Sixth Circuit have manufactured debate where there is none and have fallen prey to "what Professors Bobby Chesney and Danielle Citron called the 'liar's dividend': when everything

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252 *Id.*

253 L.W. v. Skrmetti, 73 F.4th 408, 421 (6th Cir. 2023); Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1210-11 (11th Cir. 2023).

254 *Skrmetti*, 73 F.4th at 420.

255 *See id.*; *Understanding the Transgender Community*, HRC, (Sept. 15, 2023, 7:27 p.m.) https://www.hrc.org/resources/understanding-the-transgender-community.

256 Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1231 (11th Cir. 2023).

257 Matthew A. Holman, *Physicians, Parents, and the Transgender Child: Does the State Have A Legitimate Interest in Prohibiting Gender-Affirming Treatment in Minors?*, 56 Fam. L. Q. 95, 109 (2023); Waldman, *supra* note 244, at 2251.

258 Matthew A. Holman, *Physicians, Parents, and the Transgender Child: Does the State Have A Legitimate Interest in Prohibiting Gender-Affirming Treatment in Minors?*, 56 Fam. L.Q. 95, 109 (2023).

is uncertain, anything could be false."[259] When "legislatures rationalize discrimination with 'alternative' facts to enforce values that are inconsistent with scientific knowledge, deference to these legislature's determinations is not proper."[260] In particular, it is dangerous for courts to defer to legislatures on the basis of mere "rational speculation" as occurred in *Eknes-Tucker* and *Skrmetti*.[261]

D

There are far too many different flavors of anti-LGBTQ bills that have been introduced during the 2023 legislative session across the country to be able to discuss all of them in a single note. This Note will analyze the seven most dangerous effects resulting from bills and executive orders, emphasizing their impacts on the transgender community.

Dobbs will have profound effects on the use of substantive due process as a legal argument in the coming years. Equal protection can apply to situations that do not involve a protected class, or a particularly deeply rooted liberty interest.[262] For substantive due process to be invoked, there must be a substantial liberty interest at stake.[263] Given the recent evisceration of the more fluid right to privacy, unless a right has already been enumerated under due process and can be readily applied to issues concerning the transgender community, substantive due process will likely not be a winning argument at the Supreme Court.

There are seven issues found in anti-transgender laws that will be discussed in this Note: youth hormone bans; adult hormone bans; liability for doctors who prescribe gender affirming care; taking children away from parents due to transgender status; banning trans people from public life; and criminal bathroom bills. Of these seven issues, only two bring forth strong substantive due process claims: youth hormone bans and removing children from their parents. This is due to precedent reaching back almost one hundred years, including *Pierce*, which grants parents the ability to control the lives of their children, free from state interference.[264] Given the current state of substantive due process jurisprudence, there is simply not a strong argument under the theory for the other five issues found in the anti-transgender bills.

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259 Waldman, *supra* note 244, at 2253.
260 *See id*. at *2255.*
261 *See id.* at 2268.
262 *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 153-54 (1938).
263 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003).
264 *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).

1. Youth Hormone Bans

As of the writing of this Note in September of 2023, twenty-two states have banned gender affirming care for minors.[265] These states include Arizona, Utah, South Dakota, Arkansas, Tennessee, Mississippi, Alabama, and Florida.[266] The Arkansas[267] law and Alabama[268] law have both been halted by preliminary injunctions. Laws that target transgender children are likely the most dangerous type of anti-transgender law, as transgender children have a lessened ability to move to a different state as compared to adults and face irreversible effects if forced to go through the wrong puberty. With trans youth currently at the center of the anti-LGBTQ Right Wing culture war, the stakes couldn't be higher.

Thankfully for transgender youth, both *Eknes-Tucker* and *Brandt* offer a reprieve, however, with *Eknes-Tucker's* reversal by the Eleventh Circuit Court of Appeals, the state of trans healthcare remains in flux.[269] The District Court opinion in *Eknes-Tucker* focuses on the violation of Due Process in the Alabama law, as the law denies parents the ability to adequately control and influence the lives of their children.[270] In the wake of *Dobbs*, substantive due process has been severely weakened, but the precedent from *Pierce* offers light at the end of the tunnel.[271] A substantive due process argument concerning children's inherent liberty would likely fail, as children have a limited form of liberty and have not had their rights enumerated in substantive due process precedent pre-*Dobbs*.[272] However, the fundamental rights of parents are enumerated in *Pierce* and even a conservative Supreme Court would likely rule that an all-out ban would violate the fundamental liberty interest that parents have in the lives of their children.[273] If parents can send their children to private schools, as explained in *Pierce*, it would be illogical that they would not have the right to control the medical care of their children.[274] While it is likely that a law

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265 *Map: Attacks on Gender Affirming Care by State*, HRC, (Sept. 15, 2023; 7:38PM), https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map.

266 Kiara Alfonseca, *Map: Where gender-affirming care is being targeted in the US*, ABC, (Sept. 15, 2023; 7:41PM), https://abcnews.go.com/amp/US/map-gender-affirming-care-targeted-us/story?id=97443087.

267 Brandt v. Rutledge, 47 F.4th 661, 672 (8th Cir. 2022).

268 Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1138 (M.D. Ala. 2022)

269 *See* Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1210-11 (11th Cir. Aug. 21, 2023) (overruling *Eknes-Tucker*, 603 F. Supp. 3d at 1138.); Brandt, 47 F.4th at 672.

270 *Eknes-Tucker*, 603 F. Supp at 1144.

271 *See* Dobbs v. Jackson Women's Health, 142 S. Ct. 2228 (2022); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).

272 *See e.g.*, Laurence D. Houlgate, *Three Concepts of Children's Constitutional Rights: Reflections on the Enjoyment Theory*, 2 U. PA. J. CONST. 77, 78 (Dec. 1999).

273 *See Pierce*, 268 U.S. at 534.

274 *See id.*

creating more restrictions for transgender youth to be prescribed hormones would likely pass due process muster, a total ban on hormone therapy for youth likely would not.

Brandt is currently the seminal case for ruling in favor of transgender youth under an Equal Protection analysis.[275] The Supreme Court would likely find that a total hormone ban for trans youth violates equal protection when similarly situated cisgender youth would be allowed access to gender-affirming care.[276]

Ultimately, the Equal Protection analysis grants transgender youth liberty in their own right and would likely strike down watered-down hormone bills.[277] In comparison, the due process analysis only grants liberty to the parents of trans youth, and would not be applicable in cases where a trans child wants to transition, but their parent or guardian forbids it.[278] Trans youth deserve liberty envisioned by the framers, and the Equal Protection Clause grants them that.[279]

2. Adult Hormone Bans

No bills have yet passed that would ban transgender adults from accessing gender-affirming healthcare, but several states have introduced bills that would ban this care.[280] An Oklahoma bill, HB 2177, would prohibit public funds from being used for gender-affirming care.[281] While it appears the main purpose of the bill is to ban any gender-affirming care for trans youth, one section states that gender-affirming care for adults will be curtailed.[282]

> E. It shall be prohibited for any public funds in this state to be directly or indirectly used, granted, paid, or distributed to any entity, organization, or individual for the provision of the services described in subsection B of this section to any minor or adult. No facility that receives public funds shall allow its staff or facilities to be used to perform the services described in subsection B of this section on any minor or adult. Any violation of this section shall result in the loss of public funding to the

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275 *See* Brandt v. Rutledge, 47 F.4th 661, 672 (8th Cir. 2022).
276 *See, e.g.*, *Lawrence*, 539 U.S. at 578.
277 *See Brandt*, 47 F.4th at 672.
278 *See* Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1146 (M.D. Ala. 2022).
279 *See* U.S. CONST. amend. XIV.
280 *See, e.g.*, Brooke Migdon, *Florida bill targets gender-affirming health care for trans youth, adults*, THE HILL, Mar. 03, 2023, https://thehill.com/homenews/3883279-florida-bill-targets-gender-affirming-health-care-for-trans-youth-adults/.
281 H.B. 2177, 2023 Leg., (Ok. 2023).
282 *Id*.

> entity, organization, or individual for a minimum of one (1) year and shall not be reinstated until full compliance with this act.[283]

Section B, which section E refers back to, solely concerns transgender minors.[284] Constitutional violations aside, section E as it concerns transgender adults, would likely not stand for being impermissibly vague.[285] Statutes must be clear for purposes of judicial interpretation; changing one section of a statute that alters the scope of the legislation to conflict with another section cannot survive judicial review.[286]

A similar bill, Texas's SB 1029, would likewise ban public funds from being used for any gender-affirming care.[287] Because the vast majority of health and hospital spending is funded by state and local governments, almost all trans Texans would be negatively impacted and could see a loss of transition-related medical care.[288]

Principles of liberty and bodily autonomy under substantive due process ought to provide recourse for transgender adults.[289] However, given *Dobbs* and its curtailment of the substantive due process analysis, bodily autonomy does not easily fit in a category already created by the Court, and the Court is unlikely to create a new category of substantive due process rooted in bodily autonomy.[290]

Counterintuitively, *Skinner v. Oklahoma* could be used as precedent under an Equal Protection analysis despite the case being a prohibition on forced sterilization (a common concern for anti-trans advocates).[291] This is because *Skinner*, under an Equal Protection analysis, found that an Oklahoma law that forced only certain criminals to be sterilized, but not white collar criminals, violated Equal Protection.[292] While this is somewhat of an odd argument, it would be readily applicable here. If cisgender people are allowed to access hormone replacement therapy, including women going through menopause and men with low testosterone, but similarly situated transgender adults would not be

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283 *Id*. at § E.
284 *Id*.
285 *See id.*
286 *See, e.g.*, Skilling v. United States, 561 U.S. 358, 405 (2010).
287 S.B. 1029, 2023 Leg., 88th Sess. (Tx. 2023).
288 *See* Urban Institute, *State and Local Backgrounders: Health and Hospital Expenditures*, https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/health-and-hospital-expenditures#Question1Health.
289 *See* U.S. CONST. amend. XIV.
290 *See* Dobbs v. Jackson Women's Health, 142 S. Ct. 2228 (2022) *passim*.
291 Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
292 *Id*.

allowed to access these hormones, it would violate equal protection, including under *Skinner*.[293]

Texas SB 1029 even includes a section stating that the provisions of the statute would not apply to those who are genetically intersex.[294] This distinction would likely fail intermediate scrutiny as there is no important state interest substantially related to having a distinction between those who are allowed access to hormone replacement therapy and those who are not.[295] The only logical explanation is that trans youth are being explicitly discriminated against, and not able to receive hormones/puberty blockers solely on the basis of their sex assigned at birth.[296]

3. Fining Doctors who Provide Gender Affirming Care

Another tactic that has been used to limit access to gender affirming care for both youth and adults is to fine or criminally punish doctors who provide this type of care.[297] Two states that have introduced bills that would punish doctors for treating transgender people are Florida and Oklahoma.[298] Due to the constraints on substantive due process from the majority in *Dobbs*, and because there is no precedent concerning doctors and substantive due process, Equal Protection is the only avenue that would likely be successful.[299]

Florida's HB 1421 would create a 30-year statute of limitations for those who receive gender-affirming care and claim negligence against their prescribing physician.[300] This can be compared to the standard statute of limitations for medical malpractice in Florida which is generally 2 years, with a maximum of 8 years in cases where a newborn is harmed.[301] Increasing the statute of limitations fifteen-fold simply because the care being offered is for transgender people would likely not raise a strong due process argument as having a short statute of limitation is not a "deeply rooted" right. It would, however, raise an extremely powerful equal protection argument.[302] Having this type of disparity in the statute of

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293 *See id.*

294 S.B. 1029, 2023 Leg., 88th Sess. (Tx. 2023).

295 *See id.*

296 *See id.*

297 *See, e.g.*, Jim Saunders, *Legislation would make it illegal for doctors to provide gender-affirming care to minors*, WUSF PUBLIC MEDIA, (Mar. 3, 2023), https://health.wusf.usf.edu/health-news-florida/2023-03-06/legislation-would-make-it-illegal-for-doctors-to-provide-gender-affirming-care-to-minors.

298 H.B. 1421, 2023 Leg., (Fl. 2023); HB 2177, 2023 Leg., (Ok. 2023).

299 *See* Dobbs v. Jackson Women's Health, 142 S. Ct. 2228 (2022).

300 H.B. 1421, 2023 Leg., (Fl. 2023).

301 *See* H.B. 1421, 2023 Leg., (Fl. 2023); Fla. Stat, § 95.11 (2023).

302 *See* H.B. 1421, 2023 Leg., (Fl. 2023); Fla. Stat, § 95.11 (2023).

limitations, without an important state interest, would not survive intermediate scrutiny nor rational basis review.[303]

4. Health Insurance Bans for Gender Affirming Care

Much like the bills targeting doctors who provide gender affirming care, health insurance bans will likely not raise winning substantive due process at the Supreme Court. However, arguments under equal protection would likely be successful. Oklahoma HB 2177 states in relevant part,

> G. Insurance coverage for the services described in subsections B and C of this section performed within this state on any minor or adult shall be prohibited.
>
> 1. A health benefit plan under an insurance policy or other plan providing health care coverage in this state shall not include reimbursement for the services described in subsections B and C of this section whether performed on a minor or adult.
>
> 2. A health benefit plan under an insurance policy or other plan providing health care coverage in this state is not required to provide coverage for the services described in subsection B of this section whether performed on a minor or adult.[304]

Denying insurance coverage for hormone replacement therapy ("HRT") or other transition related healthcare for transgender people, but not denying HRT to similarly situated cisgender individuals would likely fail an equal protection analysis.[305] *Moreno* held that the aspect of a federal law barring unrelated individuals in the same household from being eligible for the food stamps program did not rationally relate to the legitimate state interest of fighting hunger.[306] Given that *Moreno* is still good law, a state would need a compelling reason for violating the Equal Protection Clause, especially when there is likely a quasi-suspect class at issue in transgender people.[307]

Because cisgender and biologically intersex people would likely be able to access hormones and other care generally sought by transgender people, unless the state of Oklahoma could come up with a believable

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303 *See* H.B. 1421, 2023 Leg., (Fl. 2023); Fla. Stat, § 95.11 (2023).
304 HB 2177, 2023 Leg., (Ok. 2023).
305 *See, e.g.*, United States Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973).
306 *Id.*
307 *See id.*

reason for this distinction, beyond simple animus towards the transgender community, the blanket insurance ban will likely fail judicial scrutiny.[308]

5. Taking Children Away from their Parents due to Transgender Status

On February 18, 2022, the Texas Attorney General ("AG") issued an opinion wherein he determined that "sex change procedures and treatments . . . when performed on a child, can legally constitute child abuse."[309] In response, Texas Governor Greg Abbott sent a letter to the Commissioner for the Department of Family and Protective Services ("DFPS") expressing his view that the procedures mentioned in the Attorney General's opinion constituted child abuse and that DFPS must follow the law as stated in the AG's February 18 opinion.[310] A lawsuit was filed against Abbott and the DFPS Commissioner, and in response, a Texas District Court granted a temporary injunction preventing the enforcement of the new State policy against Plaintiffs and any other similarly situated individuals.[311] The State of Texas then took an interlocutory appeal which reinstated the District Court's temporary injunction.[312] The Texas Supreme Court held, (1) that the Texas Court of Appeals injunction protects only Plaintiffs against DFPS (as a Statewide injunction is beyond their authority), (2) that the Attorney General's Opinion was non-binding on DFPS, and (3) the Governor's statement to DFPS was non-binding.[313] The Texas Supreme Court further held that DFPS would be allowed to investigate other parents of transgender youth who are non-parties, but that DFPS would need a Court order to take any action against the parents of any transgender children.[314] While DFPS would not be able to take action alone, all that would be needed is court approval, and teary-eyed children could soon be ripped from their parent's arms.[315]

These actions by Governor Greg Abbott are a brazen attempt to subvert the Texas Constitution by controlling the actions of agencies that the Texas Constitution declares are independent.[316] In response to this policy, transgender families are beginning to leave Texas in search of states that will protect their trans children from the oppressive yoke of

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308 *See id.*; HB 2177, 2023 Leg., (Ok. 2023).
309 In re Abbott, 645 S.W.3d 276, 279 (Tex. 2022).
310 *Id.*
311 *Id.*
312 *Id.*
313 *Id.* at 284.
314 *Id.* at 281-82.
315 *See id.*
316 *See id.* at 280.

State-sanctioned tyranny.[317] Kimberly Shappley, the mother of Kai Shappley, a transgender youth activist from Texas, feels that her daughter is no longer safe in the state and has started a go-fund-me fundraising campaign to help her and her family move out of Texas.[318] This is what our nation has come to, where Parents leave their home States like refugees from a war, a war on transgender people. There is, however; a way forward by utilizing the Equal Protection Clause of the Fourteenth Amendment. Given that cisgender youth are not being snatched from their parents due to healthcare decisions made by their parents, this policy would likely violate equal protection.[319]

Although the Texas policy towards the transgender community actively harms trans youth, Florida's SB 254 takes draconian legislation to its logical conclusion, to take children away from their parents.[320] The bill would allow a court in Florida to take emergency "jurisdiction" over a child who either is transgender, has a transgender sibling, or transgender parent.[321] The bill would effectively steal all transgender children from their parents and forcibly de-transition them while also stealing cisgender children from any parent who happens to be trans.[322] A watered down version of this bill, passed both chambers of the Florida Legislature.[323] This insidiousness is reminiscent of what the Chinese government has done to the Uyghur people due to their identity as Muslims, being a religious minority in China.[324] This is a truly horrifying prospect that must be said out loud before it becomes a reality.

6. Eliminating Trans People and Drag Queens from Public Life

Eerily reminiscent of the segregation of African-Americans during the Civil Rights era, states such as Tennessee have passed legislation attempting to ban transgender people from public life.[325] Tennessee SB 0003, which was signed into law by the Governor, bans an adult cabaret

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317 *See* TRANS KID'S FAMILY SEARCHING FOR SANCTUARY, https://www.gofundme.com/f/trans-kids-family-searching-forsanctuary?member=20440171&sharetype=teams&utm_campaign=p_na+share-sheet&utm_medium=copy_link&utm_source=customer.

318 *Id.*

319 *See id*.

320 S.B. 254, 2023 Leg., (Fl. 2023).

321 *Id*.

322 *See id*.

323 Aryn Fields, *Statement on Denial of Preliminary Injunction for Florida SB 254's Restrictions on Healthcare for Transgender Adults*, HUM. RTS. CAMPAIGN, (Sept. 12, 2023), https://www.hrc.org/press-releases/statement-on-denial-of-preliminary-injunction-for-florida-sb-254s-restrictions-on-healthcare-for-transgender-adults.

324 Lindsay Maizland, *China's Repression of Uyghurs in Xinjiang*, Council on Foreign Relations, (Sept. 22, 2022), https://www.cfr.org/backgrounder/china-xinjiang-uyghurs-muslims-repression-genocide-human-rights.

325 *See*, S.B. 0003, 2023 Leg., 113th Sess. (Tn. 2023).

performance on public property, including in the definition of cabaret performance "male or female impersonators who provide entertainment that appeals to a prurient interest".[326] Violation of the statute would be a misdemeanor, while subsequent offenses would be considered a felony.[327] Under this law, transgender people could be considered male or female impersonators.[328] The operative language in the statute is male or female impersonators for "prurient interest".[329]

As many anti-transgender activists consider transgender people innately sexual and predatory,[330] it is entirely possible that any performances by transgender people, whether or not they are in drag, would be prohibited.[331] For example, a trans actress performing in a children's show, could potentially under the statute, be considered a female impersonator and face a misdemeanor charge.[332] It is yet to be seen how the statute would be enforced, but given the blanket ban on all adult performances in public, the only saving grace for transgender entertainers in other industries is that their performances are not sexually explicit.[333]

Due process has no foundational cases that would be of use, and even equal protection would be difficult to apply as all 'prurient' performances would be banned in public, a prima facie equal application of the laws.[334]

7. Banning Trans People from Bathrooms

Arkansas is bringing back the transgender bathroom ban, prominently seen in North Carolina back in 2016, only this time, the bill would make it a felony for trans people to use the bathroom of their gender identity.[335] Arkansas SB 270 states,

> Arkansas Code § 5-14-110(a), concerning the conduct that constitutes the offense of sexual indecency with a child, is amended to add an additional subdivision to read as follows:

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326 *Id.*
327 *Id.*
328 *See id.*
329 *Id.*
330 *See, e.g.*, Katy Steinmetz, *Why LGBT Advocates Say Bathroom 'Predators' Argument Is a Red Herring*, Time Magazine, May 02, 2016, https://time.com/4314896/transgender-bathroom-bill-male-predators-argument/.
331 *See* S.B. 0003, 2023 Leg., 113th Sess. (Tn. 2023).
332 *See id.*
333 *See id.*
334 *See* S.B. 0003, 2023 Leg., 113th Sess. (Tn. 2023).
335 Tal Kopan & Eugene Scott, *North Carolina governor signs controversial transgender bill*, CNN, Mar. 26, 2016, https://www.cnn.com/2016/03/23/politics/north-carolina-gender-bathrooms-bill/index.html; S.B. 270, 2023 Leg., 94th Sess. (Ar. 2023).

> (6)(A) Being eighteen (18) years of age or older, the person knowingly enters into and remains in a public changing facility that is assigned to persons of the opposite sex while knowing a minor of the opposite sex is present in the public changing facility.[336]

This bill would criminalize any transgender person who used a bathroom or changing room regardless of their conduct in the bathroom, if a child is present.[337] In the bill, Arkansas defines sex as "a person's immutable biological sex as objectively determined by anatomy and genetics existing at the time of birth."[338] Therefore, all transgender people would be guilty of sexual indecency with a child for simply using the bathroom.[339]

The bill likely violates due process in the procedural sense (something the Court rarely infringes upon) because it creates a criminal penalty for existence alone, without an individualized finding as to whether a transgender person is in the correct bathroom.[340] Because many transgender people have been on hormones and received gender affirming surgeries, and the bill would apply to them, it is likely invalid under due process.[341] Forcing a transgender man into a woman's bathroom who has a full beard and *is* a man, does not fulfill any reasonable governmental objective.[342]

Clear issues with the bill such as it applying to trans people who are recognized by a state as the gender they identify as would also likely cause the bill to fail judicial review.[343] Because traditional procedural guarantees are absent from this bill, and it would lead to criminal sanctions, an analysis under equal protection or *substantive* due process is likely not warranted.[344]

CONCLUSION

There may be a situation where the Equal Protection Clause cannot do the heavy lifting for the transgender community. If, for example, a state passed a law banning any surgeries such as top surgery for minors, including for cisgender youth, the Equal Protection Clause would be of little use. Should a law like this pass, substantive due process would be the

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336 S.B. 270, 2023 Leg., 94th Sess. (Ar. 2023).
337 *Id*.
338 *Id*.
339 *See id.*
340 *See id.*
341 *See id.*
342 *See id.*
343 *See id.*
344 *See id.*

only constitutional argument that could prevail, however; as previously mentioned, the implications of *Dobbs* combined with *Dobbs* elevation of *Glucksburg*, creates serious obstacles.[345] In the view of the *Dobbs* majority, allowing transgender youth to have access to transition-related surgeries is not deeply rooted in this nation's "history and traditions", nor "implicit in the concept of ordered liberty"[346]. These transgender children would likely have to hope that puberty blockers are enough or move to another state where it would be legal to perform necessary transgender related surgeries.

While outside the scope of a note concerning arguments about the Fourteenth Amendment, it is important to examine why these anti-transgender bills are being introduced and passed into law. Transgender people are the convenient scapegoat of a changing world, where conceptions of gender and identity are shifting. This sea-change in society is leading to fear, and hatred of the unknown, as transgender adults make up less than one percent of the population.[347] The years ahead for the transgender community appear bleak, but the Fourteenth Amendment will always be a potential shield against hatred and fear codified into law.[348]

Substantive due process is limited from expansion due to the *Dobbs* Court's interpretation of the *Glucksburg* principal that laws must be "deeply rooted in the nation's history and traditions" to be protected.[349] There is a way that this line of reasoning can be cabined to the abortion context. *Lawrence* does not mention *Glucksburg* nor limit the concepts of liberty to those that are rooted in tradition. Liberty is expansive, and America has changed since the founding. While abortion may not have be a right that is deeply rooted in history or tradition bodily autonomy is. Freedom from persecution by an oppressive government certainly is deeply rooted in the history and fabric of America. There is hope in the language and guidance from *Pierce*, if only the Supreme Court determines to use it.

Bills that ban trans individuals from receiving gender-affirming care but allow their cisgender counterparts to receive similar care, fail the rational basis test under the Equal Protection Clause. While the shield of Substantive due process may not be utilized by the Supreme Court, equal protection is always applicable because even if transgender people are not

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345 Dobbs v. Jackson Women's Health, 142 S. Ct. 2228, 2242 (2022) (quoting Washington v. Glucksberg, 521 U. S. 702, 721 (1997)).

346 *Id*.

347 Jody L. Herman, Andrew R. Flores, & Kathryn K. O'Neill, *How Many Adults and Youth Identify as Transgender in the United States?*, UCLA SCH. OF L. WILLIAMS INST., Jun., 2022, https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/.

348 *See* U.S. CONST. amend. XIV.

349 *Dobbs*, 142 S. Ct. at 2242.

a protected class, rational basis would apply. This may be the legal argument that saves the transgender community from persecution by the State, as has become rampant of late.

It is important to note that no one is arguing that hormone treatment for transgender youth should not be regulated. There are certainly risks when trans youth take puberty blockers and hormones. It is therefore reasonable for there to be debates about best practices, like when and in what circumstances trans youth should have access to hormones. As it stands, all youth must consult with a mental health professional to determine that they are indeed suffering from gender dysphoria before there may be physical interventions such as puberty blockers or hormones.[350] In the last few years, there have been discoveries about negative impacts on the bone health of trans youth who take hormones.[351] But none of the laws mentioned in this Note are about regulation, every single one of the bills and laws at issue are about outright bans on gender-affirming care.

The state inevitably has a right to regulate medical care, we do not want unlicensed practitioners providing gender-affirming care to transgender youth after all. But the Sixth and Eleventh Circuits have masked this truth under the guise of democratic principles and reasoned debate, but fail, either deliberately or otherwise, to recognize that reasoned debate would allow gender-affirming care, with more stringent requirements. That type of debate is a compromise. Outright bans on gender affirming care are not the result of reasoned debate. The reasoning by the Sixth and Eleventh Circuit Courts of Appeal is reminiscent of the majority in *Plessy v. Ferguson*. Both turn a blind eye to blatant violations of constitutional principles of equality. While it is true that substantive due process, under current Supreme Court precedent is weakened, for both the Eleventh and Sixth Circuits to blatantly ignore the obvious, that a statute about preventing people from accessing care to change their sex is not related to sex, is clear error.

While it is true that both trans boys and trans girls experience the same harm from the laws, that is not the proper comparator. The proper comparator is cisgender youth who have precocious, or early-onset, puberty. To allow those cisgender youth gender-affirming care, but not

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350 *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, World Pro. Ass'n for Transgender Health, at 18, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf.

351 Giulia Giacomelli & Maria C. Meriggiola, *Bone Health in transgender people, a narrative review*, National Library of Medicine, 13 J. Therapeutic Advances in Endocrinology and Metabolism 1, 3-4 (2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9150228/.

similarly situated transgender youth access to similar care violates the Equal Protection Clause. And could not all transgender people be intersex? This would certainly explain why we experience gender dysphoria.

Many States hope to legislate transgender people out of society or at least back into the shadows from whence we came. More laws are being introduced and passed that chip away at the rights of all transgender people. As rights are eradicated, one law at a time, one case at a time, what will be left? Not a liberty that holds true to our founding principles of life, liberty, and the pursuit of happiness. Patrick Henry famously said, "give me liberty, or give me death." If these laws are not halted, many transgender youth, staring at oblivion, will choose death.