GENDER-AFFIRMING HEALTHCARE BANS AS A HYBRID EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS PROBLEM

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I. INTRODUCTION

On June 24, 2024, the Supreme Court signaled an intent to weigh in on nationwide challenges to state laws banning the use of medication and procedures for gender affirmation pre-adulthood when it granted cert in *U.S. v. Skrmetti*.[1] Its decision may not only resolve a circuit split on the constitutionality of these bans[2] but may also affect constitutional challenges to other laws that impede the ability of transgender individuals to participate fully in society, including restrictions on bathroom access, athletic participation, and school curriculum.[3] If the Supreme Court rejects the equal protection arguments against the bans in *Skrmetti*, alternative avenues of challenge will be needed. So far, the main alternative has been a substantive due process argument based on parents' rights to direct the medical treatment of their children.[4] Concerned that this alternative may also be vulnerable, this article proposes an additional argument based on Justice Kennedy's opinions in *Lawrence v. Texas*[5] and *Obergefell v. Hodges*.[6]

Laws disadvantaging the lesbian, gay, bisexual, transgender, queer and plus ("LGBTQ+") community can fall through the cracks of equal protection

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1. 2024 WL 3089532 (granting cert to review the Sixth Circuit's decision reversing a preliminary injunction against such a ban in L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023)).

2. *Compare L.W.*, 83 F.4th 460, *and* Eknes-Tucker v. Governor of Ala., 80 F.4th 1205 (11th Cir. 2023), *with* Brandt v. Rutledge, 47 F.4th 661, 669 (8th Cir. 2022); *cf.* Kadel v. Folwell, 100 F.4th 122, 143 (4th Cir. 2024) (addressing denial of healthcare coverage for gender-affirming treatment).

3. *Tracking the Rise of Anti-Trans Bills in the U.S.*, TRANS LEGIS. TRACKER, https://translegislation.com/learn (last visited Aug 4, 2024).

4. *See infra* Part III.

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

6. Obergefell v. Hodges, 576 U.S. 644 (2015).

because of the reluctance of some courts to recognize a new category of suspect classifications[7] and the ability of creative legislators to avoid overt classifications in anti-LGBTQ+ policies.[8] And fundamental rights analysis under the Due Process Clause may fail to provide protection in light of the Court's increasing emphasis on whether an asserted right is deeply rooted in the history and tradition of the nation.[9] These problems have played out in the challenges to the healthcare bans and have led some courts to uphold the bans under a rational basis analysis under the Equal Protection Clause[10] and to conclude that gender-affirming treatment, a modern medical innovation, is not a historically protected right.[11]

The *Lawrence* and *Obergefell* opinions understood the gap in Fourteenth Amendment jurisprudence into which anti-LGBTQ+ policies fall and used a hybrid approach in which equality concerns and liberty interests inform one another.[12] They recognized that laws targeting an identity group for deprivation of important liberty interests are antithetical to democratic principles embodied in the Fourteenth Amendment.[13] This paper argues that even if the healthcare bans can survive separate equal protection and due process challenges, the hybrid approach adopted in the Justice Kennedy opinions definitively invalidates them. Like the anti-sodomy law at issue in *Lawrence* and the gay marriage ban at issue in *Obergefell*, the healthcare bans deprive transgender people of an aspect of their personal autonomy that is essential to their dignity and expose them to demeaning treatment and discrimination across many aspects of their public life. They do so not based on their purported safety concerns but on moral disapproval of or distaste for transgender identity–a government interest that the *Lawrence* and *Obergefell* decisions reject as sufficient under the hybrid approach.

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7. Tracy Turner, *Protecting the Anti-Oppression Legacy of* Obergefell *After* Dobbs, 98 ST. JOHN'S L. REV. 659, 670-73 (2025) (explaining the anomalies of the suspect classification doctrine).

8. For example, one argument to support the bans against equal protection challenges has been that they apply equally to men and women. See *infra* Part III, Section A, for a discussion of this argument. For a critique of equal protection disparate impact doctrine based on its failure to address seemingly neutral but in fact inequitable laws, see Turner, *supra* note 7, at 674-78.

9. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 231 (2022).

10. L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 488-89 (6th Cir. 2023); Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1230 (11th Cir. 2023); State v. Loe, 692 S.W.3d 215, 238 (Tex. 2024).

11. *L.W.*, 83 F.4th at 475-76; *Eknes-Tucker*, 80 F.4th at 1223; *Loe*, No. 23-0697, 2024 WL 3219030, at *7.

12. *See infra*, Part IV.

13. *Id.*

II. THE DESIGN & EFFECTS OF THE TRANSGENDER HEALTHCARE BANS

A. Gender-Affirming Care

Research by the Williams Institute reveals that approximately 300,000 transgender American youth ages 13-17[14] and over one million transgender adults live in the United States.[15] Surveys capture only those individuals willing to accept and declare their identity; in light of continuing social stigma that may interfere with self-identity, actual numbers may be higher.[16] Some transgender people experience gender dysphoria, a condition the American Psychiatric Association defines as "a marked difference between the individual's expressed/experienced gender and the gender others would assign [them]."[17] In her autobiography, Jennifer Finney Boylan describes a conversation with her mother at age three in which her mother remarks on how the toddler, biologically male but identifying as female, will grow up to wear shirts like her father, and the author's toddler self is immediately confused by the surprising expectation that she would be like her father rather than her mother.[18] A transgender identity is not perceived or desired; it just is.[19] At whatever age the discordance between the individual's understanding of self and others' perceptions occurs, it can cause extreme distress. The official diagnosis of gender dysphoria follows from "clinically significant distress or impairment in social, occupational, or other important areas of functioning."[20] Sufficiently confusing on its own, gender dysphoria is often

14. Elana Redfield et al., *The Impact of 2024 Anti-Transgender Legislation on Youth*, UCLA SCH. L., WILLIAMS INST. (Apr. 2024), https://williamsinstitute.law.ucla.edu/wp-content/uploads/2024-Anti-Trans-Legislation-Apr-2024.pdf.

15. Jody L. Herman et al., *How Many Adults and Youth Identify as Transgender in the United States?* UCLA SCH. L., WILLIAMS INST. (June 2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf.

16. *See* Daniel E. Shumer et al., *Advances in the Care of Transgender Children and Adolescents*, 63 ADVANCES IN PEDIATRICS 81 (June 3, 2016) (theorizing that rates of American transgender identity may be underreported due to social stigma).

17. *Gender Dysphoria*, AM. PSYCHIATRIC ASS'N (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf; *see also* The World Pro. Ass'n for Transgender Health (WPATH), *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, 7th Version 11 (2011), https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf (explaining that not all transgender people will experience gender dysphoria).

18. JENNIFER FINNEY BOYLAN, SHE'S NOT THERE: A LIFE IN TWO GENDERS 19-20 (2003).

19. Tia Powell et al., *Transgender Rights as Human Rights*, 18 AMA J. ETHICS 1126, 1128 (Nov. 2016) (explaining that while expression of gender identity involves choice that should be protected as a human right, the existence of gender identity is not a matter of personal choice); SUSAN STRYKER, TRANSGENDER HISTORY: THE ROOTS OF TODAY'S REVOLUTION 7 (rev. ed. 2017) ("Being trans is like being gay; some people are just 'that way.'").

20. *Gender Dysphoria*, *supra* note 17.

augmented by an unaccepting social environment.[21] Transgender people face higher rates of depression, substance abuse, and suicide.[22]

If we could imagine a society that did not attach social meaning to sex, gender dysphoria would literally not exist. Transgender identity is an aspect of human diversity that carries potential harm because of pressure to comply with social norms rather than being innately harmful.[23] Its stigma is external, not internal.[24] However, in today's society, the path to a full and happy life can depend upon passing (to others) as the gender the individual perceives themselves to be.[25]

To this end, the medical field has developed treatments to align the body with an individual's experienced gender.[26] For adults, this often means hormone therapy prescriptions and sometimes surgery. Hormone therapy, for example, can help transgender women develop breast tissue and decrease erections and body hair, and it can help transgender men decrease breast tissue, avoid menses, and achieve a deeper voice.[27] It can also adjust the body fat to muscle tissue ratio to feminize or masculinize appearance.[28] Surgical interventions may include breast surgery, genital surgery, voice surgery, and cosmetic surgery.[29] Surgery has been available in the United States since the 1960s, and hormone therapy since the 1980s.[30]

By the late 1990s, treatment options for children became available.[31] Standard of care, as developed by the World Professional Association for Transgender Health ("WPATH"), can include the use of puberty blockers for children who have reached Tanner Stage Two of puberty[32] and are at least twelve years old.[33] Puberty blockers suppress estrogen or testosterone production with the effect of delaying the onset of puberty.[34] This is a fully

21. WPATH, *supra* note 17, at 4.

22. Shumer, *supra* note 16, at 85.

23. WPATH, *supra* note 17, at 4.

24. *Id.*

25. *See* Shumer, *supra* note 16, at 87, 88 (identifying the ability to pass as the desired outcome from medical treatment).

26. "Experienced gender" as used in this article refers to an individual's perception of their gender, which may be contrary to others' perceptions and to the individual's biological sex characteristics.

27. WPATH, *supra* note 17, at 36.

28. *Id.*

29. *Id.* at 57.

30. Shumer, *supra* note 16, at 83.

31. *Id.*

32. Tanner Stage Two is marked by the beginning of physical changes. *See Puberty*, CLEV. CLINIC (Dec. 5, 2021), https://my.clevelandclinic.org/health/articles/22192-puberty.

33. WPATH, *supra* note 17, at 18-19.

34. *Id.* at 18.

reversible treatment; puberty blockers can be stopped, and puberty will resume.[35] The medical community considers puberty blockers safe and has used them to treat other conditions like premature puberty for more than thirty years.[36]

The continuation of gender dysphoria past Tanner Stage Two into adolescence is a key diagnostic tool because gender identity becomes much less likely to change.[37] Accordingly, at this later stage, medical professionals may recommend hormone therapy.[38] Surgery is not the standard of care for children,[39] and therefore, challengers to the healthcare bans focus on invalidating the prohibition of puberty blockers and hormone therapy.[40]

The treatment options for children were developed because early intervention improves outcomes.[41] As explained by WPATH, denying treatment is not a neutral approach because it will prolong gender dysphoria and increase stigmatization and abuse by others at a vulnerable age.[42] Puberty blockers prevent the development of sex characteristics that are difficult or impossible to reverse.[43] They not only help the child pass as their perceived gender contemporaneously but also can avoid the need for invasive procedures that would otherwise be needed to match their gender identity with the perceptions of others later in life.[44] For example, early treatment can avoid the need for transgender men to undergo masculinizing chest surgery, electrolysis of facial and body hair, and feminizing facial surgeries, while it can help transgender women avoid voice surgery.[45]

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35. *Id.* at 18-19.

36. Shumer, *supra* note 16, at 90 (it was twenty-five years at the time of Shumer et al.'s 2016 article).

37. *Id*. at 90; *see also* Annelou L.C. de Vries et al., *Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment*, 134 PEDIATRICS 2 (Oct. 2014).

38. WPATH, *supra* note 17, at 20. One medical association recommends waiting until age sixteen, but because waiting can impede desired outcomes, some professionals may start treatment earlier depending on the maturity of the child and the stability of their gender identity. Shumer, *supra* note 16, at 92.

39. WPATH, *supra* note 17, at 21.

40. *See, e.g.*, Brief for the United States as Intervenor-Appellee, Eknes-Tucker v. Governor of Ala., 80 F.4th 1205 (11th Cir. 2023) (No. 22-11707), 2022 WL 3369276, at *3 (Eknes-Tucker U.S. Brief) (framing the issue as regarding the ban's limitation on puberty blockers and hormone therapy).

41. *See* Emily Newfield et al., *Female-to-Male Transgender Quality of Life*, 15 QUAL. OF LIFE RSCH. 1447-57 (2006) (finding an improvement in wellbeing with early gender-affirming treatment based on study of over 400 patients).

42. WPATH, *supra* note 17, at 21.

43. WPATH, *supra* note 17, at 19-20.

44. Shumer, *supra* note 16, at 89.

45. *Id*.

The gender affirming treatments described above are widely accepted by the medical field and supported by numerous studies.[46] A seminal study conducted in 2014 concluded that early treatment through puberty blockers (age twelve) and hormone therapy (age sixteen) followed by surgery in adulthood improves the lives of transgender people, enabling them to reach levels of well-being equivalent to their cisgender peers.[47] A larger study in 2006 centered on female-to-male transitions found that testosterone treatment alleviated distress from gender dysphoria.[48] A recent study of more than 3,500 patients found that hormone therapy in late adolescence similarly leads to improved emotional outcomes.[49]

Although no medications are ever without risks, the gradual transitioning process described above is recommended by an impressive list of the top, most relevant medical professional associations, including the American Medical Association and the American Academy of Pediatrics.[50]

B. The Healthcare Bans

After more than two decades of use, puberty blockers and hormone therapy have come under attack, beginning with the Arkansas legislature's passage of the first ban in 2021.[51] This corresponds in timing to an explosion of laws targeting transgender people throughout the country that regulate bathroom access, athletic participation, and school curriculum, among other aspects of transgender lives.[52]

These statutes typically bar prescriptions and procedures for the purpose of gender affirmation. As one typical example, Florida bars "sex reassignment prescriptions and procedures" to "affirm a person's perception of his or her sex if that perception is inconsistent with the person's sex," defined as "the organization of the human body of such person for a specific reproductive role, as indicated by the person's sex chromosomes, naturally occurring sex hormones, and internal and external genitalia present at birth."[53] The bans include puberty blockers, hormone therapy, breast

46. Anne Alstott et al., "*Demons and Imps": Misinformation and Religious Pseudoscience in State Anti-Transgender Laws*, 35 YALE J.L. & FEMINISM 223, 243, 284 (2024).

47. L.C. de Vries et al., *supra* note 37, at 6-7.

48. Newfield, *supra* note 41, at 1447-57 (2006) (study of 446 patients).

49. Sari L. Reisner et al., *Gender-Affirming Hormone Therapy and Depressive Symptoms Among Transgender Adults*, JAMA NETWORK OPEN (Mar. 17, 2025).

50. Alstott, *supra* note 46, at 243, 280 (Table 2).

51. Arkansas Save Adolescents from Experimentation (SAFE) Act, ARK. CODE § 20-9-1501 (2021).

52. *Tracking the Rise*, *supra* note 3.

53. FLA. STAT. §§ 456.001, 456.52 (2023); *see also* Alabama Vulnerable Child Compassion and Protection Act, ALA. CODE § 26-26-4 (2022); ARK. CODE ANN. § 20-9-1501(6) (2021); GA.

augmentation, breast removal, throat surgery, and genital alterations.[54] They expressly permit the same prescriptions for other purposes, including treatment of genetic abnormalities in sexual development.[55] The bans do not restrict treatment of early onset of puberty or ambiguity in sex characteristics, for example.[56] The bans typically cover up until adulthood at age eighteen.[57]

CODE ANN. §§ 31-7-3.5, 43-34-15(a) (2023); IDAHO CODE § 18-1506B (2) (2024); IND. CODE §§ 25-1-22-2, 25-2-22-13(b) (2023); IOWA CODE § 147.164(1)(d), (2)(a) (2023); KY. REV. STAT. ANN. § 311.372 (West 2023); Stop Harming Our Kids Act, LA. STAT. ANN. § 40:1098.2(A) (2024); Regulate Experimental Adolescent Procedures (REAP) Act, MISS. CODE ANN. § 41-141-3, 41-141-5 (2023); Missouri Save Adolescents from Experimentation (SAFE) Act, MO. REV. STAT. § 191.1720(1), (3), & (4) (2023); Youth Health Protection Act, MONT. CODE ANN. §50-4-1004 (2023); N.C. GEN. STAT. ANN. §§ 90-21.150 & 90-21.151 (2023); N.D. CENT. CODE ANN. § 12.1-36.1-02 (2023); Saving Ohio Adolescents from Experimentation (Safe) Act, OHIO REV. CODE §§ 3129.01 & 3129.02 (West 2024); OKLA. STAT. tit. 63, § 2607.1 (2023); S.C. CODE ANN. §§ 44-42-310 & 44-42-320 (2024); S.D. CODIFIED LAWS § 34-24-33 & 34-24-34 (2023); TENN. CODE ANN. § 68-33-103 (2023); TEX. HEALTH & SAFETY CODE § 161.702 (West 2023); UTAH CODE ANN. §§ 58-1-603 & 58-67-502 (West 2023); W. VA. CODE § 30-3-20 (2023); WYO. STAT. ANN. § 35-4-1001 (2024). For tracking of bills, see *Bans on Best Practices Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT, (last visited Apr. 20, 2025), https://www.lgbtmap.org/equality-maps/healthcare_youth_medical_care_bans.

54. ALA. CODE § 26-26-4 (2022); IND. CODE §§ 25-1-22-5 & 25-1-22-6 (2023); KY. REV. STAT. ANN. § 311.372 (West 2023); LA. STAT. ANN. § 40:1098.2(A) (2024); MISS. CODE ANN. §41-141-3 (2023); MO. REV. STAT. § 191.1720 (2023); MONT. CODE ANN. § 50-4-1004 (2023); N.C. GEN. STAT. ANN. § 90-21.150 (2023); N.D. CENT. CODE ANN. § 12.1-36.1–02 (2023); OHIO REV. CODE § 3129.01 (West 2024); OKLA. STAT. tit. 63, § 2607.1 (2023); S.C. CODE ANN. § 44-42-310 (2024); TEX. HEALTH & SAFETY CODE § 161.702 (West 2023); W. VA. CODE §30-3-20(a) (2023); WYO. STAT. ANN. § 35-4-1001(b) (2024).

55. ALA. CODE § 26-26-4 (2022); ARK. CODE ANN. § 20-9-1502 (c) (2021); FLA. STAT. §§ 456.001 (2023); GA. CODE ANN. § 43-24-15 (2023); IDAHO CODE § 18-1506B; IND. CODE §§ 25-2-22-13(c) (2024); IOWA CODE § 147.164 2(c) (2023); KY. REV. STAT. ANN. § 311.372(3) (West 2023); LA. STAT. ANN. § 40:1098.2(C) (2024); MISS. CODE ANN. § 41-141-3(f)(ii) (2023); MO. REV. STAT. § 191.1720(8) (2023); MONT. CODE ANN. § 50-4-1004(1)(c) (2023); N.C. GEN. STAT. ANN. § 90-21.152 (2023); N.D. CENT. CODE ANN. § 12.1-36.1–03 (2023); OHIO REV. CODE § 3129.04 (West 2024); OKLA. STAT. tit. 63, § 2607.1(A)(2)(b) (2023); S.C. CODE ANN. § 44-42-330 (2024); S.D. CODIFIED LAWS § 34-24(3) (2023); TENN. CODE ANN. § 68-33-103(b) (2023); TEX. HEALTH & SAFETY CODE § 161.703 (West 2023); UTAH CODE ANN. § 58-1-603 (1)(d)(3) (West 2023); W. VA. CODE § 30-3-20(c) (2023); WYO. STAT. ANN. § 35-4-1001(c) (2024).

56. ALA. CODE § 26-26-4 (2022); ARK. CODE ANN. § 20-9-1502 (c) (2021); FLA. STAT. §§ 456.001 (2023); GA. CODE ANN. § 43-24-15 (2023); IDAHO CODE § 18-1506B; IND. CODE §§ 25-2-22-13(c) (2024); IOWA CODE § 147.164 2(c) (2023); KY. REV. STAT. ANN. § 311.372(3) (West 2023); LA. STAT. ANN. § 40:1098.2 (2024); MISS. CODE ANN. § 41-141-3(f)(ii) (2023); MO. REV. STAT. § 191.1720(8) (2023); MONT. CODE ANN. § 50-4-1004(1)(c) (2023); N.C. GEN. STAT. ANN. § 90-21.152 (2023); N.D. CENT. CODE ANN. § 12.1-36.1–03 (2023); OHIO REV. CODE § 3129.04 (West 2024); OKLA. STAT. tit. 63, § 2607.1(A)(2)(b) (2023); S.C. CODE ANN. § 44-42-330 (2024); S.D. CODIFIED LAWS § 34-24(3) (2023); TENN. CODE ANN. § 68-33-103(b) (2023); TEX. HEALTH & SAFETY CODE § 161.703 (West 2023); UTAH CODE ANN. § 58-1-603 (West 2023); W. VA. CODE § 30-3-20(c) (2023); WYO. STAT. ANN. § 35-4-1001(c) (2024).

57. ALA. CODE § 26-26-3 (2022) (cross referencing § 43-8-1, which defines minor as under age nineteen); ARK. CODE ANN. § 20-9-1502 (2021); FLA. STAT. § 456.52 (2023); GA. CODE ANN. § 43-24-15 (2023); IDAHO CODE § 18-1506B (2024); IOWA CODE § 147.164 (2023); KY. REV.

III. THE LITIGANTS' ARGUMENTS IN THE TRANSGENDER HEALTHCARE BAN CASES

A. The Equal Protection Arguments

Under the Equal Protection Clause of the federal Constitution,[58] laws that draw distinctions based on a suspect or quasi-suspect classification are more closely scrutinized than those that draw benign distinctions.[59] Benign distinctions are subject only to rational basis review, which most laws pass.[60] Laws may fail rational basis review, however, if they are motivated by prejudice.[61]

Challengers to the healthcare bans have asserted three main equal protection[62] arguments: (1) the statutes discriminate based on gender identity, which should be recognized as a quasi-suspect classification;[63] (2) the statutes discriminate based on sex;[64] and (3) the statutes cannot even survive

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STAT. ANN. § 311.372 (West 2023); LA. STAT. ANN. § 40:1098.1 (2024); MISS. CODE ANN. § 41-141-5 (2023); MO. REV. STAT. § 191.1720 (2023); MONT. CODE ANN. § 50-4-1003 (2023); N.C. GEN. STAT. ANN. § 90-21.150 (2023); N.D. CENT. CODE ANN. § 12.1-36.1–01 (2023); OHIO REV. CODE § 3129.01 (West 2024); OKLA. STAT. tit. 63, § 2607.1 (2023); S.C. CODE ANN. § 44-42-320 (2024); S.D. CODIFIED LAWS § 34-24 (2023); TENN. CODE ANN. § 68-33-102 (2023); TEX. HEALTH & SAFETY CODE § 161.701 (West 2023); UTAH CODE ANN. § 58-1-603 (West 2023); W. VA. CODE § 30-3-20 (2023); WYO. STAT. ANN. § 35-4-1001 (2024).

58. U.S. CONST. amend. XIV.

59. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985).

60. *Id.* at 440.

61. *Id.* at 446-47, 450.

62. All but one of the cases this article will cover were in federal court invoking the federal Equal Protection Clause.

63. Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellees, Brandt v. Rutlege, 47 F.4th 661 (8th Cir. 2022) (No. 21-2875), 2022 WL 332470, at *15-17 [hereinafter Brandt U.S. Brief]; Plaintiffs' Motion for Preliminary Injunction and Incorporated Memorandum of Law at § III(A)(2)(a), Doe v. Ladapo, 676 F. Supp. 3d 1205 (N.D. Fla. 2023) (No. 4:23-cv-00114-RH-MAF), 2023 WL 8375488 (Doe v. Ladapo Plaintiff's Brief); Plaintiff's Suggestions in Support of Motion for Preliminary Injunction at 24, Noe v. Parson, No. 23AC-CC04530 (Mo. Cir. Ct. July 25, 2023) [hereinafter Noe Plaintiffs' Brief]; Brief of Plaintiffs-Appellees, L.W., 83 F.4th 460 (No. 23-5600), 2023 WL 5336554, at *30-32 [hereinafter L.W. Appellees' Brief]; Brief of Appellees, State v. Loe, 692 S.W.3d 215 (Tex. 2024) (No. 23-0697), 2023 WL 8527125, at *36-39 [hereinafter Tex. v. Loe Appellees' Brief].

64. Brandt U.S. Brief, *supra* note 63, at *10-14; Response Brief for Plaintiffs-Appellees, Eknes-Tucker, 80 F.4th 1205 (No. 22-11707), 2022 WL 3369279, at *51-54 [hereinafter Eknes-Tucker Appellees Brief]; Doe v. Ladapo Plaintiff's Brief, *supra* note 63, at § III(A)(2)(a); Noe Plaintiffs' Brief, *supra* note 63, at *24; L.W. Appellees' Brief, *supra* note 63, at *19-30; Tex. v. Loe Appellees' Brief, *supra* note 63, at *36-37; Brief of Appellees, K.C. et al. v. Individual Members of the Med. Licensing Bd. of Ind., 677 F. Supp. 3d 802 (S.D. Ind. 2023) (No. 23-2366), 2023 WL 6393468, at *23-33; *cf.* Plaintiffs-Appellees' Response Brief, Kadel v. Folwell, 100 F.4th 122 (4th Cir. 2024) (No. 22-1721), 2022 WL 6161304, at *19 [hereinafter Kadel Appellees' Brief]

rational basis review because they are based on prejudice.[65] Although authority for treating transgender identity as a quasi-suspect classification is growing[66] and was found by four courts to be a reason to invalidate the healthcare bans,[67] the most successful equal protection theory to challenge the bans has been that they discriminate based on sex.[68] Sex has already been recognized by the United States Supreme Court as a quasi-suspect classification, thus requiring heightened ("intermediate") scrutiny.[69]

The sex discrimination argument against the healthcare bans is based on the Court's holding in *Bostock v. Clayton County* that Title VII's prohibition of sex discrimination includes penalizing transgender people for failing to conform to society's expectations of them based on their biological sex characteristics.[70] Although *Bostock* interpreted Title VII rather than the Equal Protection Clause, ban challengers argue that sex discrimination must have the same meaning under the Constitution that it has under Title VII.[71] Assuming the reasoning in *Bostock* is applicable, the bans would be subject to intermediate scrutiny.[72] The bans prohibit treatment for the purpose of gender transitioning, which the statutes define as treatment intended to affirm a gender identity that is contrary to the individual's biological sex characteristics.[73] Thus, whether an individual is permitted to use a given puberty blocker or hormone-related medication depends on the individual's

(challenging denial of Medicaid coverage); Plaintiffs-Appellees' Response Brief, Kadel, 100 F.4th 122 (Fain v. Crouch, No. 22-1927), 2022 WL 17415738, at *27 [hereinafter Fain Appellees' Brief].

65. Eknes-Tucker Appellees Brief, *supra* note 63, at *59-60; Noe Plaintiffs' Brief, *supra* note 63, at *39-41; L.W. Appellees' Brief, *supra* note 63, at *49; Tex. v. Loe Appellees' Brief, *supra* note 63, at *45-51. *Cf.* Fain Appellees' Brief, *supra* note 63, at *34.

66. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 610-11 (4th Cir. 2020) (holding that transgender identity is a suspect classification and citing several federal district court decisions in accordance); *accord* Karnoski v. Trump, 926 F.3d 1180, 1200 (9th Cir. 2019); *see also* Katie Eyer, *Transgender Constitutional Law*, 171 U. PENN. L. REV. 1405, 1424 (2023) (finding a trend in courts recognizing transgender identity as a quasi-suspect classification).

67. Doe v. Ladapo, 676 F. Supp. 3d 1205, 1218 (N.D. Fla. 2023); Brandt v. Rutledge, 551 F.Supp.3d 882, 889 (E.D. Ark. 2021), *aff'd on other grounds*, 47 F.4th 661, 669 (6th Cir. 2022); Poe *ex rel.* Poe v. Labrador, 709 F. Supp. 3d 1169, 1193 (D. Idaho 2023). *Cf.* Kadel, 100 F.4th at 143 (addressing denial of healthcare coverage).

68. Brandt, 47 F.4th at 669; Doe v. Ladapo, 676 F. Supp. at 1218; Koe v. Noggle, 688 F. Supp. 3d 1321, 1346 (N.D. Ga. 2023); Poe,709 F. Supp. at 1197; K.C., 677 F. Supp. 3d at 813-15, order stayed at 2024 WL 811523; Eknes-Tucker v. Marshall, 603 F. Supp.3d 1131, 1147 (M.D. Ala. 2022), *rev'd*, Eknes-Tucker, 80 F.4th 1205.

69. United States v. Virginia, 518 U.S. 515, 531 (1996).

70. Brandt U.S. Brief, *supra* note 63, at *11 (citing Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020)).

71. *See, e.g.*, Eknes-Tucker Appellees' Brief, *supra* note 63, at *54.

72. Doe v. Ladapo, 676 F. Supp. 3d at 1217.

73. SAFE Act, *supra* note 51.

biological sex characteristics, i.e., the differentiation between lawful and unlawful use is based on sex.[74]

Even if a court is willing to treat discrimination against transgender identity as quasi-suspect either as its own wrongful classification or as a form of sex discrimination, ban challengers have significant additional hurdles to overcome. One hurdle is to prove that the statutes are discriminatory. Proponents of the statutes argue, and some courts have agreed, that the bans discriminate based on factors other than gender identity and sex, namely age and medical procedure.[75] They argue that the statutes are not discriminatory based on sex because the statutes ban gender-transitioning healthcare (a set of specific medical treatments) for all minors, not just males or females.[76] With respect to transgender discrimination, they argue that the regulation of a condition that affects only members of a suspect classification is not discriminatory for that reason.[77] Both arguments can point to the Supreme Court's dismissal of equal protection arguments in *Dobbs v. Jackson Women's Health Organization* on the ground that regulation of abortion does not constitute sex discrimination, even though only females need the procedure.[78]

One response to these arguments has been that the connection between the healthcare bans and transgender identity is different than the connection between pregnancy and sex. As the Fourth Circuit has explained, gender dysphoria is inseparable from transgender identity as it is merely a medical term for the distress that can result from the lived experience of transgender people.[79] While only females can get pregnant, and many will, gender dysphoria is *defined* based on transgender identity. Arguing that the bans are nondiscriminatory because they technically apply to all minors even though they are clearly directed at transgenderism is, as the Fourth Circuit expressed, as tautological as arguing that the bans apply to all to whom they apply.[80]

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74. *See, e.g.*, Brandt, 47 F.4th 661, 669 (8th Cir. 2022). *Cf.* Kadel, 100 F.4th at 146-47 (making a similar point regarding the bans' relationship to transgender status).

75. Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1227 (2023); L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 483 (2023); State v. Loe, 692 S.W.3d 215, 226 (Tex. 2024).

76. *Eknes-Tucker*, 80 F.4th at 1229; *L.W.*, 83 F.4th at 480; *Loe*, 692 S.W.3d at 226.

77. *Eknes-Tucker*, 80 F.4th at 1229-30; *L.W.*, 83 F.4th at 481.

78. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 236 (2022); *see also L.W.*, 83 F.4th at 481 (citing this aspect of *Dobbs*); *Loe*, 692 S.W.3d at 226 (relying on a prior Texas Supreme Court holding similar to *Dobbs*).

79. Kadel v. Folwell, 100 F.4th 122, 146 (4th Cir. 2024).

80. *Kadel*, 100 F.4th at 147, 150 (finding that using a purportedly neutral classification as a proxy for a suspect one triggers heightened scrutiny); *see also* Poe v. Labrador, 709 F. Supp. 3d 1169, 1180 (Fed. Cl. 2023) (concluding that banning transitioning therapy for all minors is no less discriminatory against transgender youth than banning yarmulkes would be discriminatory against Jewish men).

In addition, an argument that has worked with all courts that have decided in favor of the ban challengers is that the bans are discriminatory because they permit the same treatments to be used in other contexts, like to stall premature puberty and alter intersex traits, while only prohibiting the treatments for the purpose of transgender affirmation.[81] Therefore, the bans are not based only on the medical procedure and age; the distinction they draw based on the purpose of the treatment for transgender affirmation should trigger heightened scrutiny.[82] In response, ban proponents have argued that prohibiting treatments for one purpose but not another is not an unusual form of medication regulation.[83] Regulation can involve a weighing of risks and benefits that may come out differently when non-treatment carries greater risk compared to treatment.[84] Significantly, however, the statutes do not appear to weigh risks and benefits in a manner that considers the cost of non-treatment of gender dysphoria.[85] Instead, they seem to be based on disapproval of transgender affirmation as an important or even desirable outcome.[86] The judgment that gender conformity is a desirable outcome warranting use of the medications, while transgender affirmation to address gender dysphoria is not, would be a classification based on sex and transgender status and would thus not avoid intermediate scrutiny.

A third response is that even if the challenges to the bans are viewed as disparate impact claims rather than direct discrimination, animus can be proven.[87] A disparate impact claim is one in which the challenged law does not make an overt classification but disproportionately affects a suspect

81. *Kadel*, 100 F.4th at 147; *Brandt*, 47 F.4th at 669; Doe v. Ladapo, 676 F. Supp. 3d 1205, 1218 (N.D. Fla. 2023); K.C. v. Individual Members of the Med. Licensing Bd. of Ind., 677 F. Supp. 3d 802, 814 (S.D. Ind. 2023); *Poe*, 709 F. Supp. 3d at 1180; *Koe*, 688 F. Supp. 3d at 1346.

82. *K.C.*, 677 F. Supp. 3d at 814-15; *Poe*, 709 F. Supp. 3d at 1180.

83. *L.W.*, 83 F.4th at 480; *see also* Eknes-Tucker v. Governor of Alabama, Case No. 2:22-cv-184-LCB, Opening Brief of State Defendants, 2022 WL 2399551, at *52 (June 27, 2022) [hereinafter Eknes-Tucker Defendants' Brief].

84. Eknes-Tucker Defendants' Brief, *supra* note 83, at *52.

85. *Poe*, 709 F. Supp. 3d at 1181.

86. *Id.* This is particularly clear from the Defendant's Brief in *Eknes-Tucker*, when it attempts to justify the ban's differential treatment of transgender affirmation compared to gender conforming treatment by urging the right of the legislature to weigh costs and benefits differently for different uses of a treatment. Implicit in that argument is an assumption that gender conforming is more important than transgender affirmation. Eknes-Tucker Defendants' Brief, *supra* note 83, at *52; *see also* State v. Loe, 692 S.W.3d 215, 225 (Tex. 2024) (accepting the legislature's implied determination that the benefits of gender-affirming treatment are insufficient to outweigh any risks of treatment as a sufficient rational basis for the ban).

87. *Poe*, 709 F. Supp. 3d at 1180 (concluding that despite theoretically applying to all minors, there was "every evidence" that the healthcare ban intended to single out transgender individuals and thus triggered heightened scrutiny).

classification.[88] Such claims trigger heightened scrutiny upon proof that the challenged policy was motivated by invidious discrimination.[89] Animus can also invalidate laws under a rational basis analysis, triggering what some have referred to as rational basis "plus" or rational basis "with bite."[90] So far, courts rejecting heightened scrutiny have not invalidated the bans under an animus analysis.[91] However, one court did invoke the concept of animus to conclude that the bans lack a substantial relationship to an important government interest under intermediate scrutiny.[92] To support a finding of animus, litigants and scholars have pointed to the coordinated timing of the healthcare bans along with other statutes that similarly seek to control and even silence transgender identity.[93] In addition, bill sponsors and supporters of the bans have sometimes made overtly discriminatory statements.[94] On the other hand, the states could argue that they are not attempting to interfere with adult transitioning, a fact that arguably belies animus because if they were motivated by anti-trans sentiment, we might expect them to also ban adult transitioning.

Whether under intermediate scrutiny or rational basis review, a significant hurdle for ban challengers to overcome is the states' purported interest in protecting the well-being of children. Such an interest is, of course, universally accepted as important.[95] Challenges to the bans are

88. Washington v. Davis, 426 U.S. 229, 239-42 (1976).

89. *Id.*

90. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446-47, 450; Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring); *see generally* Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?,* 90 N.Y.U. L. REV. 2070 (2015); Thomas B. Nachbar, *Rational Basis "Plus"*, 32 CONST. COMMENT. 449 (2017).

91. Eknes-Tucker v. Governor of Alabama, 80 F. 4th 1205, 1230 (2023); L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 489 (2023); State v. Loe, 692 S.W.3d 215, 225 (Tex. 2024).

92. Doe v. Ladapo, 676 F. Supp. 3d 1205, 1220 (N.D. Fla. 2023).

93. Noe Plaintiffs' Brief, *supra* note 63, at *33-34; Loe v. Texas, No. D-1-GN-23-003616, Plaintiffs' Verified Original Petition for Declaratory Judgment and Application for Temporary and Permanent Injunctive Relief, 2023 WL 5016644, ¶ 66-70 (July 12, 2023) [hereinafter Texas v. Loe Plaintiffs' Petition]; Austin Hoenig, *Anti-Transgender Legislation in Arizona, Alabama, and Arkansas: Arbitrary Moral Discrimination Masquerading as Child Protection*, 101 DENV. L. REV. 185, 189-90 (2023); Scott Skinner-Thompson, *Trans Animus*, 65 B.C. L. REV. 965, 983-84 (2024).

94. *Ladapo*, 676 F. Supp. 3d at 1223; Brandt U.S. Brief, *supra* note 63, at *26-28; Brief for the United States as Intervenor-Appellee, Eknes-Tucker, 80 F.4th 1205, 2022 WL 3369276, at *48-49; L.W. Appellees' Brief, *supra* note 63, at *30; Noe Plaintiffs' Brief, *supra* note 63, at *32-33; Texas v. Loe Plaintiffs' Petition, *supra* note 93, at ¶ 56; Hoenig, *supra* note 93, at 205; *Chapter One: Outlawing Trans Youth: State Legislatures and the Battle Over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2182-83 (2021); Skinner-Thompson, *supra* note 93, at 1007-17.

95. *See, e.g.*, K.C. v. Individual Members of the Med. Licensing Bd. of Ind., 677 F. Supp. 3d 802, 815-16 (S.D. Ind. 2023) (acknowledging the state's interest in regulating healthcare but finding an issue regarding overbreadth).

particularly vulnerable at this stage of the analysis because it is easy for ban supporters to find experts to poke holes in the status of research on gender affirming treatment.[96] For some courts, evidence of the risks of gender dysphoria and the benefits of early intervention, along with the significant consensus in the medical field that early intervention is standard of care, are sufficient to invalidate the bans as at least overbroad.[97] But for other courts, the murkiness of the question is a sufficient reason to leave the issue to the state legislatures to decide.[98]

In sum, while the equal protection arguments have been, to date, more successful than not, they face significant hurdles at every stage. Given the vulnerability of the equal protection challenges, a substantive due process argument might improve the chances of a successful challenge by introducing a higher level of scrutiny. A finding that a law interferes with a fundamental right under the Due Process Clause triggers strict scrutiny, a much tougher bar for the states to pass than the rational basis and intermediate scrutiny standards invoked under the Equal Protection Clause.[99]

B. The Substantive Due Process Arguments

The main substantive due process challenge to the bans has been based on a parent's right to make medical decisions on behalf of a child.[100] A line of Supreme Court cases supports the protection of parenting from government interference in some contexts, such as educational choices[101] and extended family relationships.[102] However, courts are reluctant to recognize

96. *See generally* Alstott, et al., *supra* note 46.

97. Brandt v. Rutledge, 47 F.4th 661, 670-71 (8th Cir. 2022); Kadel v. Folwell, 100 F.4th 122, 156-57 (4th Cir. 2024); *K.C.*, 677 F. Supp. 3d at 817; *Ladapo*, 676 F. Supp. 3d at 1221-25; Koe v. Noggle, 688 F. Supp. 3d 1321, 1349-56 (N.D. Ga. 2023); State v. Loe, 692 S.W.3d 215, 226 (Tex. 2024).

98. L.W. *ex rel*. Williams v. Skrmetti, 83 F.4th 460, 488-89 (6th Cir. 2023); *Eknes-Tucker*, 80 F.4th at 1230; *see also Kadel*, 100 F.4th at 195-96 (Wilkinson, C.J., dissenting).

99. *See* Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997).

100. *Ladapo*, 676 F. Supp. 3d at 1220; *Poe*, 709 F. Supp. 3d at 1179; Brandt v. Rutledge, 551 F. Supp. 3d 882, 892 (E.D. Ark. 2021), *aff'd on other grounds*, 47 F.4th 661 (8th Cir. 2022); Eknes-Tucker Appellees' Brief, *supra* note 63, at *27-28; Noe Plaintiffs' Brief, *supra* note 62 at *41, *43; L.W. Appellees' Brief, *supra* note 63, at *49-50; Tex. v. Loe Appellees' Brief, *supra* note 63, at *23-26; Brief of Appellees, K.C. v. Individual Members of the Med. Licensing Bd. of Ind., 677 F. Supp. 3d 802 (S.D. Ind. 2023) (No. 23-2366), 2023 WL 6393468, at *41-42; *see also* Muth v. Voe, 691 S.W.3d 93, 109 (Tex. App. 2024) (addressing due process challenge to policy declaring a parent's decision to permit medical treatment for gender dysphoria to be child abuse).

101. Meyer v. Nebraska, 262 U.S. 390, 400-01 (1923) (father had right to let son learn German language).

102. Troxel v. Granville, 530 U.S. 57, 66-68 (2000) (mother had a due process right to refuse visitation by grandparents).

a right to treatment of one's choice as opposed to a right to refuse medical treatment; only the latter has been recognized.[103] Some have concluded that recognizing a fundamental right to free choice in medical care would jeopardize and contradict the long history of regulation of the medical field and pharmaceutical industry in America.[104] And if there is no general right to access treatment, then there can be no derivative parental right either. The due process challenges have been less successful than the equal protection challenges.[105]

An alternative, not yet raised in the cases, would be to recognize a fundamental right to live in accordance with one's experienced gender.[106] The due process problem with the healthcare bans is not that they ban certain medical treatments for minors. We expect the government to remove or limit dangerous medications and to require proof of their safety and efficacy. Instead, the problem is that they are specifically designed to delay transgender affirmation.[107] The healthcare bans do not distinguish between

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103. *Compare* Cruzan *ex rel*. Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261, 279 (1990) (supporting a liberty interest in refusing medication), *with Glucksberg*, 521 U.S. at 725-26 (distinguishing the right to refuse life-sustaining treatment suggested in *Cruzan* with the purported right to obtain medicine to hasten death); *see also Skrmetti*, 83 F.4th at 476 (distinguishing between compelling and restricting medical treatment).

104. *See Skrmetti*, 83 F.4th at 475-76 (finding that a right to certain medical care would be contrary to the tradition of regulation); Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1223 (11th Cir. 2023) (rejecting an asserted right of parents to direct a particular medical treatment that is not permitted under state law); State v. Loe, 692 S.W.3d 215, 229 (Tex. 2024) (emphasizing state's traditional role in regulating health and welfare).

105. Most court decisions permitting challenges to the bans to proceed have been based on equal protection, not due process. Brandt *ex rel*. Brandt v. Rutledge, 47 F.4th 661, 669, 671 (8th Cir. 2022); K.C. v. Individual Members of the Med. Licensing Bd. of Ind., 677 F. Supp. 3d 802, 818 (S.D. Ind. 2023); *Poe*, 709 F. Supp. 3d at 1189; Koe v. Noggle, 688 F. Supp. 3d 1321, 1346 (N.D. Ga. 2023). For court opinions accepting both theories, *see Ladapo*, 676 F. Supp. 3d at 1220; Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1144 (N.D. Ala. 2022), 46, *rev'd* 80 F.4th 1205. For a compelling argument in favor of recognizing the parental right in this context, see Hila Keren, *Due Care in a Conservative Court*, 2025 WIS. L. REV. 1, 1-2 (2025).

106. *See* Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 L. & SEXUALITY 123, 131 (2001) (proposing that gender identity be recognized as a fundamental right). In a later article, Weiss shifts from this proposal to urging litigants to focus on applying rational basis review. Jillian T. Weiss, *Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for* Lawrence v. Texas, 5 J. RACE, GENDER, AND ETHNICITY 2, 2 (Feb. 2010). She argues that the lack of a consistent history of viewing transgenderism as immoral supports an argument that laws interfering with expression of transgenderism lack a rational basis. *Id.* at 37-38. She finds support for this in the Court's discussion in *Lawrence* of the lack of a consistent history of prosecuting same-sex intimacy in its invalidation of anti-sodomy laws. *Id.* While this author does not disagree that *Lawrence* might support such an argument, this article will explore a different aspect of *Lawrence*.

107. *See Attacks on Gender-Affirming and Transgender Health Care*, AM. COLL. PHYSICIANS (Aug. 6, 2024), https://www.acponline.org/advocacy/state-health-policy/attacks-on-gender-affirming-and-transgender-health-care; *see also* Stacy Weiner, *States Are Banning Gender-*

allowable and prohibited use based on the levels or modes of treatment.[108] Were that the nature of the states' regulations, it would be easier to conclude that the states are exercising their authority to ensure medications are used safely. Higher levels of exposure to a medication, if proven to worsen the risk of side effects, could warrant regulation of permissible prescription levels, for example.

Instead, the bans are based on the outcomes for which the medications are prescribed. They differentiate between allowable use for gender conformity and prohibited use for transgender affirmation.[109] Since the risks of a medication do not change based on the purpose of their use, the states are necessarily making a judgment that conformity is a desired outcome warranting treatment while transgender affirmation, at least for youth, is not. In addition to the equal protection problem posed by this judgment, as discussed in the prior section, it also interferes with gender identity expression. *Eisenstadt v. Baird* is illustrative.[110] In that decision, the Court invalidated a law that permitted contraceptives for married women but not for unmarried women.[111] For the class of unmarried women, the policy at issue permitted all use of contraceptives for the purpose of preventing disease but not for the purpose of preventing pregnancy.[112] The Court analyzed the case under equal protection doctrine, seeking a rational basis for the different treatment of unmarried and married women.[113] It concluded that moral disapproval of extramarital sex was not a valid government interest because punishing a woman by forcing an unwanted pregnancy would be unreasonable.[114] It also concluded that safety was not at issue, since the FDA already regulated the safety of medications and medical devices.[115] All that remained was a judgment by the state that contraceptives were immoral.[116] The Court then reasoned that if, under *Griswold v. Connecticut*, a state could not interfere with married women's access to contraceptives under the Due

Affirming Care for Minors. What Does that Mean for Patients and Providers?, ASS'N AM. MED. COLL. (Feb. 20, 2024), https://www.aamc.org/news/states-are-banning-gender-affirming-care-minors-what-does-mean-patients-and-providers.

108. *Supra* note 55.

109. *See* UTAH CODE ch. 1 § 58-1-603 (2023), https://le.utah.gov/xcode/Title58/Chapter1/58-1-S603.html; *see also Eknes-Tucker*, 80 F.4th at 1210.

110. 405 U.S. 438 (1972).

111. *Id.* at 442-43.

112. *Id.* at 442.

113. *Id.* at 447.

114. *Id.* at 448.

115. *Id.* at 452.

116. *Id.*

Process Clause,[117] then it could not do so for unmarried women.[118] And if, on the other hand, a state could prohibit contraceptives, then the Equal Protection Clause would not permit it to do so for unmarried women only.[119] Such a differentiation lacked a rational basis because "the evil, as perceived by the State, would be identical, and the underinclusiveness would be invidious."[120]

Although the *Eisenstadt* analysis was under the Equal Protection Clause, the same conclusion is relevant to due process analysis. The states' purported interest in safety is questionable in light of FDA controls that already reduce risk.[121] However, even if safety concerns were supportable, the concern should be the same regardless of whether identical treatments are being used for gender conformity or transgender affirmation. The states' decision to only ban the treatments when used for transgender affirmation necessarily carries a moral judgment that transgender affirmation for minors is an undesirable result. If that judgment is not invidious under the Equal Protection Clause, then it should be interrogated under the Due Process Clause. Here, it is important to separate two steps of analysis: the first would be whether transgender affirmation is an aspect of personal autonomy protected under the Due Process Clause, and the second would be whether there is a compelling government interest in barring minors from exercising it.[122] Whether the government has a heightened interest in protecting minors should not be relevant to whether the interference with the right triggers strict scrutiny but rather should be considered at the strict scrutiny stage.[123]

Even on the first step, ban challengers will run into a significant hurdle: the Court's current focus on finding that any asserted right is deeply rooted in the history and tradition of the nation.[124] In *Dobbs v. Jackson Women's Health Organization*, women challenged a restrictive abortion law that clearly violated prior Supreme Court precedent developed since *Roe v. Wade*.[125] When it decided to revisit *Roe*'s determination that women have a

117. 381 U.S. 479, 485-86 (1965).

118. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

119. *Id.* at 454.

120. *Id.*

121. *Development & Approval Process*, FOOD AND DRUG ADMIN. (FDA), https://www.fda.gov/drugs/development-approval-process-drugs (last visited Jan. 18, 2025).

122. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (recognizing that a fundamental right triggers heightened scrutiny).

123. *See Glucksberg*, 521 U.S. at 728 (completing its review of whether the asserted right was fundamental before applying the proper level of judicial scrutiny); State v. Loe, 692 S.W.3d 215, 269 (Tex. 2024) (Lehrmann, J., dissenting) ("That the right is not absolute in no way logically limits the breadth of that right . . . .").

124. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 239 (2022).

125. *Id.* at 230.

fundamental right under the Due Process Clause to terminate their pregnancy, the Court latched on to an approach to substantive due process articulated in *Washington v. Glucksberg*.[126] Under the *Glucksberg* approach, the Court engages in a historical analysis of the right and narrows the inquiry to the exact conduct the government is seeking to regulate.[127] In *Dobbs*, the Court focused on a historical exploration of abortion laws going back to the Middle Ages.[128] It spent the most space on the law at the time of the original Constitution and passage of the Fourteenth Amendment.[129] Of course, as the dissent pointed out, women were subordinated and disenfranchised during this period.[130] Women had few rights at all.[131] Oblivious to this problem, the historical analysis led the Court to conclude that women had no "deeply rooted" right to access abortion care.[132] The Court declined to analyze abortion in the context of a broader right to bodily autonomy,[133] a right that affected men as well as women and thus could have found support even in male-dominated history.[134]

Like women, LGBTQ+ people have faced a history of discrimination in this country.[135] Accordingly, their rights do not fare well under the history and tradition test used in *Dobbs*. In *Bowers v. Hardwick*, the Court upheld a law that criminalized sodomy.[136] Like the *Dobbs* opinion, the *Bowers* opinion insisted on historical support for the exact conduct at issue, sodomy, rather than considering support for a broader right to sexual privacy or personal autonomy.[137] Citing prohibitions of sodomy dating back to the 1800s, it denied a fundamental right and concluded that moral disapproval of same-sex relationships was a sufficient rational basis to support the provision in the absence of a need for strict scrutiny.[138] As will be explained in the next section, *Bowers* was later reversed in *Lawrence v. Texas*, but the Court in

126. *Id.* at 239 (citing *Glucksberg*, 521 U.S. at 720-21).

127. *Glucksberg*, 521 U.S. at 722-23.

128. *Dobbs*, 597 U.S. at 241-50.

129. *Id.* at 245-49.

130. *Id.* at 372 (Breyer, Sotomayor & Kagan, JJ., dissenting).

131. *See id.* at 373.

132. *Id.* at 250.

133. *Id.* at 218.

134. *See* Cruzan *ex rel*. Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261, 278 (reviewing Supreme Court decisions supporting a right to refuse medical treatment).

135. *See* Lawrence v. Texas, 539 U.S. 558, 570-71 (2003); *see generally*, WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861-2003 6 to 7 (2008).

136. Bowers v. Hardwick, 478 U.S. 186, 187-88 (1986).

137. *Id.* at 190.

138. *Id.* at 192-94, 196.

Lawrence needed to find a way to avoid the history and tradition test to justify the reversal.[139]

Given the historical silencing of transgender people,[140] application of the history and tradition test to transgender affirming care is likely to weigh against its recognition as a fundamental right. In *Eknes-Tucker*, the Eleventh Circuit applied the *Dobbs* analysis to a due process challenge to a gender affirming healthcare ban.[141] Its historical analysis focused as narrowly as possible, that is, on whether history supported the right of parents to treat their children with transgender affirming medication.[142] Since the availability of relevant medications did not emerge until well into the Twentieth Century, the court found that no fundamental right existed to trigger strict scrutiny.[143]

To have a viable due process argument, ban challengers have to escape the Court's recent focus on finding support for the exact conduct at issue in early American history. The solution lies in Justice Kennedy's jurisprudence, through which the Court repudiated *Bowers*[144] and eventually protected same-sex marriage.[145] Connecting equal protection and due process, he understood and articulated that the government cannot use its authority to demean and marginalize an identity group by targeting essential aspects of their existence for erasure.

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139. *Infra* Part IV, Section A.

140. Jaime M. Grant et al., *Injustice at Every Turn: A Report on the National Transgender Discrimination Survey*, NAT'L CTR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE (2011), https://transequality.org/sites/default/files/docs/resources/NTDS_Exec_Summary.pdf (executive summary of survey of over 6,000 transgender and genderqueer individuals revealing pervasive discrimination across categories including employment, education, and housing). For court decisions finding that transgender individuals face a history of discrimination sufficient to treat transgender identity as a quasi-suspect classification, see Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 607 (4th Cir. 2020); Karnoski v. Trump, 926 F.3d 1180, 1201 (9th Cir. 2019); Doe v. Ladapo, 676 F. Supp. 3d 1205, 1218-19 (N.D. Fla. 2023).

141. Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1220 (11th Cir. 2023).

142. *Id.*

143. *Id.* at 1221.

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

145. Obergefell v. Hodges, 576 U.S. 644, 644 (2015).

IV. A NEW ARGUMENT BASED ON THE HYBRID APPROACH IN LAWRENCE AND OBERGEFELL

A. The Lawrence and Obergefell Decisions

The statutes at issue in *Lawrence*[146] and *Obergefell*[147] regulated the most intimate aspects of the lives of gay and lesbian people: love, intimacy, and marriage. Yet, the specific conduct they targeted–sodomy[148] and same-sex marriage[149]–failed the history and tradition test for due process protection. *Bowers* held as much with respect to sodomy,[150] and same-sex marriage would have met the same fate.[151] However, in light of the cruelty of history to gay and lesbian people,[152] Justice Kennedy concluded in *Lawrence* that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[153] He reasoned that "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[154] Instead of undertaking the doomed task of finding historical support for the rights of gay and lesbian people, Justice Kennedy's majority opinions in *Lawrence* and *Obergefell* refocused on the oppressive effect of the challenged laws, an approach that allowed anti-discrimination concerns that were previously confined to equal protection analysis to inform substantive due process analysis.[155]

At the surface level, the opinions declare a seemingly broad scope for due process protection. *Obergefell* described a broad right to "certain personal choices central to individual dignity and autonomy."[156] *Lawrence* protected individuals' "dignity as free persons" to enter into important "personal bond[s]."[157] The broadness of the language led the dissenting justices to argue that the majority's reasoning would extend to protect all

146. 539 U.S. at 563.
147. Obergefell v. Hodges, 576 U.S. 644 (2015).
148. *Lawrence*, 539 U.S. at 563.
149. *Obergefell*, 576 U.S. at 653-54.
150. Bowers v. Hardwick, 478 U.S. 186, 190 (1986).
151. *Obergefell*, 576 U.S. at 688-90 (Roberts, Scalia, Thomas, JJ., dissenting).
152. *Id.* at 660-61.
153. Lawrence v. Texas, 539 U.S. 558, 572 (2003).
154. *Id.* at 671. For a detailed analysis of this flaw inherent in the history and tradition test, see Turner, *supra* note 7, at 664-69.
155. For an extensive analysis and defense of this point, see generally Turner, *supra* note 7.
156. *Obergefell*, 576 U.S. at 663.
157. *Lawrence*, 539 U.S. at 567.

personal decisions, including polygamy, incest, and bestiality.[158] However, the dissent's interpretation overlooks the role that equal protection considerations played in the majority's holding. Central to both decisions was the understanding that the laws at issue not only interfered with important aspects of personal autonomy but did so in a manner that stigmatized gay and lesbian people, making it difficult for them to live full lives.[159] Sodomy and same-sex marriage did not have a history of protection that would solidify them as fundamental rights under the history and tradition analysis, and the Court did not take the opportunity to declare a new suspect classification for sexual orientation.[160] Instead, the Court found that the inequity inherent in crippling the ability of individuals to form loving relationships, as did the laws at issue, sat at an intersection of the two clauses of the Fourteenth Amendment.[161] The rights at issue had to be recognized because they were essential to the well-being of gay and lesbian people, and failing to protect them would continue to force them to live a life in the shadows.[162] The Court concluded that the Fourteenth Amendment represents an ideal of equal dignity that stands against the use of government control to treat a segment of society as social outcasts.[163]

Another way to understand these decisions is that rather than narrowing its inquiry, in the *Glucksberg* style, to interests that only affected gay and lesbian people–sodomy and same-sex marriage–the Court analyzed the broader freedoms they manifested–intimacy and marriage. Justice Kennedy writes, "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty."[164] The Court concluded that "against a long history

158. *Obergefell*, 576 U.S. at 704 (Roberts, Scalia, Thomas, JJ., dissenting); *Lawrence*, 539 U.S. at 599 (Scalia, Roberts, Thomas, JJ., dissenting).

159. *Obergefell*, 576 U.S. at 675; *Lawrence*, 539 U.S. at 575.

160. *Obergefell,* 576 U.S. at 666.

161. *See Obergefell*, 576 U.S. at 672 ("Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other."); *Lawrence*, 539 U.S. at 575 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects.").

162. *See Obergefell*, 576 U.S. at 658 ("Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment."), and 671 ("[L]aws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter."); *Lawrence*, 539 U.S. at 575 (finding that the anti-sodomy laws demean and subject gay men to discrimination in society).

163. *Obergefell*, 576 U.S. at 681.

164. *Id.* at 675.

of disapproval of their relationships, th[e] denial to same-sex couples of the right to marry works a grave and continuing harm . . . [and] serves to disrespect and subordinate them."[165] This conclusion was central to the Court's holding.[166] Similarly, the *Lawrence* opinion starts by recognizing a liberty interest in an individual's ability to form a deep personal relationship with someone else through intimacy and then concludes that anti-sodomy laws violate the Constitution by removing that freedom for gay men.[167] Thus, when the *Glucksberg* approach of narrowing the rights inquiry to the precise conduct at issue would perpetuate discrimination, due process requires a broader inquiry.

Importantly, both decisions dismissed moral judgment as a sufficient reason to uphold laws that have these damaging effects. With respect to sodomy, the *Lawrence* decision stated, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[168] Similarly, the *Obergefell* opinion rejected the government's argument that same-sex marriage devalued the institution of marriage, an assertion that clearly communicated a moral judgment regarding same-sex relationships.[169] The moral judgment that same-sex love is deviant, which underlay the statutes in both cases, is indistinguishable from prejudice against those for whom it is the only option.

B. Application to the Healthcare Bans

The conditions for the application of the *Lawrence*/*Obergefell* hybrid approach apply to the review of the healthcare bans. The *Glucksberg* approach would narrowly focus the due process inquiry on whether gender affirming healthcare has deep roots in the history and tradition of the nation. This, however, would permit the perpetuation of the discrimination and social stigma that transgender people have historically faced. In Justice Kennedy's words, it would permit rights to be "defined by who exercised them in the past"[170] and would enable discrimination to continue simply because discrimination existed in the past.[171] Although transgender people

165. *Id*.

166. *Id.*

167. *Lawrence*, 539 U.S. at 567.

168. *Id.* at 577 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

169. *Obergefell*, 576 U.S. at 658, 679.

170. *Id.* at 671.

171. For this critique of the history and tradition test, see Turner, *supra* note 7, at 664-69.

have lived in America since the beginning,[172] they have had a long path toward equal citizenship, one that is still a work in progress. From restrictive laws in the 1850s[173] to government crackdowns and violence in the 1960s[174] to lack of access to healthcare during the AIDS epidemic,[175] the path to the eventual de-pathologization of trans identity in 2013[176] was long and tragic. The government's role in silencing the trans community has created a deeply rooted history of discrimination rather than protection.

The bans connect to historical discrimination against transgender people in the same way that the anti-sodomy and same-sex marriage laws connected to discrimination against gay and lesbian people. As analyzed above, the healthcare bans draw a distinction between the same treatments based on whether they are used to conform to gender norms or for transgender affirmation and thus carry a moral judgment that transgender affirmation is a lesser, if not altogether improper, goal.[177] This reflects a broader judgment that transgender people are deviant since it assumes that transgenderism is a dangerous risk to avoid by delaying treatment. In light of the role of prejudice in the denial of autonomy the bans target, they should trigger the hybrid equal protection and due process analysis from the *Lawrence* and *Obergefell* opinions, and courts should replace the narrow *Glucksberg* inquiry with a broader consideration of the importance of gender affirming healthcare to the dignity and personhood of transgender people. Courts should analyze whether living true to one's gender identity is as intimate and personal as the ability to engage in intimate relationships and marry.

Such an analysis would support a due process claim. The transgender healthcare bans would deny an identity group an essential aspect of their personhood. Until society stops attaching social expectations to sex characteristics, transgender people have only three choices–live a lie, endure extreme societal discrimination,[178] or undergo gender affirming treatment. The first two options carry high risk of depression, substance abuse, and suicide.[179] The third has the potential to enable a happy life[180] but is greatly

172. STRYKER, *supra* note 19, at 45-47.

173. *Id.* at 46-48.

174. *Id.* at 67-76, 84-85.

175. *Id.* at 140.

176. *Id.* at 170 (recounting the DSM-V's deletion of trans identity as a pathology as a turning point in trans rights).

177. *See supra* section D.

178. *See supra* notes 2, 21, 22, 175.

179. Shumer, *supra* note 16, at 84.

180. *See* Alstott, *supra* note 46; *see also* de Vries, *supra* note 47.

inhibited by the healthcare bans due to the delay in care they require.[181] It was the cruelty of excluding gay and lesbian people from the joy of intimate relationships and marriage that led the Court to invalidate anti-sodomy[182] and same-sex marriage[183] laws. Because delay of gender affirming care makes a full transition more difficult and, in some cases, impossible,[184] the healthcare bans have a similarly devastating effect on the happiness of transgender people.[185] Without the ability to pass as their experienced gender, transgender people face social ostracization that impedes friendships, intimate relationships, employment, and even basic safety.[186] Like the rights at issue in *Lawrence* and *Obergefell*, the ability to access gender affirming care at a time in life when it can be the most effective is vital to the wellbeing of transgender people, allowing them to escape from the shadows and live their lives as their true selves.

In light of the devastating effects of denying early treatment, states should have a compelling or at least substantial interest at stake. And the decisions in *Lawrence* and *Obergefell* held that this interest should be something other than moral disapproval.[187] The healthcare bans cannot pass this test because they are based on moral disapproval. They ban treatment for transgender affirmation but not for other conditions.[188] They do so

181. On the importance of early intervention, see *supra* notes 40-44; *see also* Kimberly Jade Norwood & Jaimie Hilemana, *The Tragic Costs of "Protecting" Trans Youth*, 73 WASH. U. J.L. & POL'Y 203, 226 (2024) (citing Grace Panetta*, Lawmakers in Blue States Are Linking Protections for Abortion and Gender-Affirming Care*, 19TH, (June 9, 2023), https://19thnews.org/2023/06/abortion-trans-health-care-shield-laws/).

182. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

183. Obergefell v. Hodges, 576 U.S. 644, 658 (2015).

184. Eliza Chung, *Trans Adults Deserve a Right to Sue for Gender-Affirming Care Denied at Youth*, 24 CUNY L. REV. 145, 156-59 (2021).

185. Kareen M. Matouk & Melina Wald, *Gender-affirming Care Saves Lives*, COLUM. DEP'T PSYCH. (Mar. 30, 2022) https://www.columbiapsychiatry.org/news/gender-affirming-care-saves-lives.

186. *Supra* notes 21, 22, and 24. Failing to pass as one's experienced gender makes transgender identity visible and subject to discrimination and violence. *See* Andrew R. Flores et al., *Gender Identity Disparities in Criminal Victimization: National Crime Victimization Survey, 2017–2018*, 111(4) AM. J. PUB. HEALTH 726, 727 (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7958056/pdf/AJPH.2020.306099.pdf (summarizing results of study showing disproportionate violence against transgender individuals); Jaime M. Grant et al., *Injustice at Every Turn: A Report on the National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY & NAT'L GAY & LESBIAN TASK FORCE (Sept. 11, 2012), https://transequality.org/sites/default/files/docs/resources/NTDS_Exec_Summary.pdf (executive summary of survey of over 6,000 transgender and genderqueer individuals revealing pervasive discrimination across categories including employment, education, and housing).

187. The opinions are vague about what sort of interest, if any, could have sustained the statutes at issue but they both firmly conclude that moral disapproval of same-sex love was insufficient. *Lawrence*, 539 U.S. at 577; *Obergefell*, 576 U.S. at 658, 679.

188. *Supra* note 55.

without establishing that the particular regimens for transgender affirmation are more harmful than the regimens for treatment of other conditions. The main harm that ban proponents point to is the concern that children will regret transitioning later in life.[189] Even if we put aside the evidence that puberty blockers are reversible[190] and that regret is uncommon at the stage of hormone therapy,[191] the legislature's consideration of transition regret without consideration of non-transition consequences undeniably perpetuates a moral judgment that cisgender people are more worthy of protection than transgender people or, at least, that cisgender is normal while transgender is abnormal. In truth, while cisgender may be more common, diversity in gender identity[192] defies any ability to characterize what is "normal." Differences in identity are real, not imagined or deranged.[193]

The moral judgment inherent in the bans becomes clearer if we try to imagine what a regulation would look like if it equally valued cisgender and transgender identities. Instead of differentiating between permissible use and impermissible use based on whether the treatments were for the purpose of transgender affirmation, they would set allowable levels of puberty blockers and hormone-controlling medications (and they would have based such regulation on evidence that higher levels pose higher risks). Instead of banning treatment completely, they would permit some consideration of the level and duration of distress experienced by the child seeking transitioning treatment. To address the as-yet-unproven risk of regret, we might imagine required waiting periods, maturity assessments, social transitioning prerequisites, and monitoring. We would expect to see more than just a handful of anecdotes to establish that regret is a real risk, and we would

189. Noa Ben-Asher & Margot J. Pollans, *Gender Regrets: Banning Abortion and Gender-Affirming Care*, 2024 UTAH L. REV. 763, 769-73 (2024).

190. WPATH Standards of Care, *supra* note 17, at 18-19.

191. *Supra* note 37; *see also* Ben-Asher & Pollans, *supra* note 189, at 770 (citing court opinions that have remarked on the lack of evidence to support regret as a real risk); Alstott et al., *supra* note 46, at 256 (revealing the use of anecdotal evidence as the sole support for the assertion that transitioning care is sometimes regretted).

192. American Psychological Association, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70(9) AM. PSYCH. 832, 835 (2015).

193. One of the decisions granting a preliminary injunction against a ban faced this question directly. Doe v. Ladapo, 676 F. Supp. 3d at 1210-11. The judge saw in the evidence that bias was "just below the surface" in the proceedings leading up to enactment of the statutes in the form of a belief that transgender identity is "not real, that it is made up." *Id.* Bill proponents used words like "evil," "false," "delusion," "lie," "charade," and "woke idea" to describe what scientific experts had established was not a matter of personal choice. *Id.* The denial of the reality of transgender identity as an inherent human trait that underlies the statutes would support a finding that the statutes fail a rational basis test. Piper Hinson, *Biting Back Against Animus: Gender-Affirming Care Bans Enacted with Animus are Unconstitutional Under the Rational Basis with Bite Standard*, 54 SW. L. R. 436 (2025); they certainly fail any version of heightened scrutiny.

expect that the legislature balanced that risk against the currently established high risk from nontreatment.

Instead, the picture is quite different. We see complete bans on transgender affirming care without any consideration of the costs to transgender youth. We see these bans being passed along with other legislation aimed at controlling transgender identity through school curriculum, bathroom access, and athletics. We see no exceptions, even for children in extreme distress. Like the anti-sodomy laws and same-sex marriage laws, the healthcare bans perpetuate the marginalization of and discrimination against transgender people by marking them as deviant. If equal protection and due process doctrine cannot address this inequity in their separate spheres, we should use the precedent set by *Lawrence* and *Obergefell* to consider their intersection. The principles of democracy expressed in the Fourteenth Amendment cannot permit the use of government power to subordinate a segment of society based on prejudicial attitudes regarding their basic humanity. The healthcare bans, in their current state, do exactly this and should be invalidated using the hybrid approach in *Lawrence* and *Obergefell*.

V. CONCLUSION

Litigants challenging gender affirming healthcare have had some success using the Equal Protection Clause and the Due Process Clause as tools to invalidate statutory prohibitions of gender-affirming care for minors. These statutes purport to be concerned about youth, but a look behind their veneer reveals they are really part of a culture war against transgender identity.[194] They do not protect all youth but rather protect only cisgender children, ignoring the devastating effect of delaying care for transgender youth. Litigants have successfully argued that they are invalid under the Equal Protection Clause because they are based on animus. They are also arguably invalid under the Due Process Clause because they interfere with an individual's ability to express their gender identity. Yet, challenges have not been universally successful due to wrinkles created in legal doctrine. These wrinkles include the continuing reluctance to afford the LGBTQ+ community the full protection of the Fourteenth Amendment by either recognizing the suspect classification (whether sex or transgender identity) or by understanding that the history and tradition test for due process rights is a flawed analysis when it would perpetuate past societal discrimination.

194. *See* Ben-Asher & Pollans, *supra* note 189, at 789-92 (tying the family values movement and religious ideology to the healthcare bans); Alstott et al., *supra* note 46, at 258 (on the role of religious organizations in the movement against gender-affirming care).

The hybrid approach used by the *Lawrence* and *Obergefell* opinions has played a key role in correcting these shortcomings in the law. For the same reason that the government could not be allowed to criminalize gay love and exclude same-sex couples from the social acceptance conveyed through legal marriage, it should not be allowed to criminalize healthcare upon which some transgender youth rely to escape the emotional hardships that societal discrimination subjects them to and ultimately to live a full life as their true selves. So far, these two essential Court opinions have been overlooked by litigants and courts, but they could play a valuable role as an additional avenue for protection.