

NOT THE NEW NORM: EQUAL PROTECTION JURISPRUDENCE ON SEX AND TRANSGENDERISM

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We know the feeling of being confronted with the “why?” question and not knowing what to say after “because . . . ,” yet feeling we should be able to say something.¹

INTRODUCTION

As demand for medically induced gender transition therapy has increased,² at least nineteen states³ have sought to protect their minor citizen populations from the attendant harms of gender affirmation care.⁴ Several states have passed legislation prohibiting medical practitioners from administering cross-sex hormones and puberty suppressants to minor patients, with exceptions for physical illness or developmental disorders.⁵ In some states, transgender minors, their parents, and transgender advocates have filed suit to enjoin the enforcement of these proscriptive regulations.⁶ In

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1. Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 903 (2009).

2. See Jen Christensen, *Gender-affirming Surgeries in US Nearly Tripled from 2016 to 2019, Study Finds*, CNN (Aug. 23, 2023, 11:00 AM), <https://www.cnn.com/2023/08/23/health/gender-affirming-surgery-study/index.html>.

3. Hadley Arkes, *Is the Constitution “Neutral” on Nature?*, FIRST THINGS (Oct. 10, 2023), <https://www.firstthings.com/web-exclusives/2023/10/is-the-constitution-neutral-on-nature>.

4. E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT’L J. OF TRANSGENDER HEALTH S1, S5 (2022) (including in gender affirmation care “hormonal and surgical treatments, voice and communication therapy, primary care, hair removal, reproductive and sexual health, and mental health care”).

5. ARK. CODE ANN. § 20-9-1501 (2024); TENN. CODE ANN. § 68-33-103 (2023); 2023 Ind. Acts 10.

6. See generally *Dekker v. Weida*, 679 F. Supp. 3d 1271 (N.D. Fla. 2023); *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131 (N.D. Ala. 2022); *Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021); *Jane Doe 1, v. Thornbury*, No. 3:23-cv-230, 2023 WL 4230481 (W.D. Ky. 2023); *L.W. v. Skrmetti*, 679 F. Supp. 3d 668 (M.D. Tenn. 2023).

these injunctive suits, the challengers claim, among other things, that these laws violate the Equal Protection Clause of the Fourteenth Amendment.⁷

To frame the issue, the challengers claim that transgender status is a subcategory of sex.⁸ As a subcategory of sex, transgender status should merit the same protection granted to sex under the Equal Protection Clause.⁹ In particular, the challengers argue that the laws under review fail to survive intermediate judicial scrutiny, and thus violate the Fourteenth Amendment's Equal Protection Clause because these laws create an impermissible classification between transgender minors and non-transgender minors.¹⁰

The argument described above is premised on the 2020 decision, *Bostock v. Clayton County, Georgia*.¹¹ In *Bostock*, the Court held that the term "sex," within the meaning of the Title VII of the 1964 Civil Rights Act, includes gender identity and transgender status.¹² Writing in dissent, Justice Alito expressed concern that the inclusion of transgender status or gender identity in statutory classifications based on sex would have extensive implications for Equal Protection Jurisprudence.¹³ Recent developments in the lower courts show the prescience of Justice Alito's concern.

This Note comments on the merits (or rather demerits) of broadening sex-based classification to encompass gender identity and transgender status and articulates a few reasons why state laws do not violate the Equal Protection Clause when prohibiting medical practitioners from administering puberty suppressants and cross-sex hormones to minors to accomplish gender transition.

Part I of this Note will compare and contrast gender dysphoria and transgender identity with biological sex as sources of normative claims about sex. Part II will outline the analytical framework within which the Court evaluates sex-based equal protection claims and the normative principle that undergirds Equal Protection Jurisprudence. Part III will analyze the *Bostock* rationale in light of the framework and normative principle provided in Part

7. See generally *Dekker*, 679 F. Supp. 3d 1271; *Eknes-Tucker*, 603 F. Supp. 3d 1131; *Brandt*, 551 F. Supp. 3d 882; *Jane Doe 1*, 2023 WL 4230481; *L.W.*, 679 F. Supp. 3d 668.

8. See generally *Dekker*, 679 F. Supp. 3d 1271; *Eknes-Tucker*, 603 F. Supp. 3d 1131; *Brandt*, 551 F. Supp. 3d 882; *Jane Doe 1*, 2023 WL 4230481; *L.W.*, 679 F. Supp. 3d 668.

9. See generally *Dekker*, 679 F. Supp. 3d 1271; *Eknes-Tucker*, 603 F. Supp. 3d 1131; *Brandt*, 551 F. Supp. 3d 882; *Jane Doe 1*, 2023 WL 4230481; *L.W.*, 679 F. Supp. 3d 668.

10. *Dekker*, 679 F. Supp. 3d at 1289.

11. See *Bostock v. Clayton Cnty., Ga.* 590 U.S. 644, 659-61 (2020).

12. *Id.* at 650-52.

13. *Id.* at 733 (Alito, J., dissenting).

II. Finally, Part IV will offer a defense for the state's interest in regulating gender affirmation care.

I. GENDER DYSPHORIA, TRANSGENDER IDENTITY, AND BIOLOGICAL SEX

We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep the real and the true.¹⁴

To judge whether transgender-based discrimination should be treated the same as sex-based discrimination, one must first define the variety of terms gender theorists employ to describe transgender identity, and next evaluate the normative claims derived therefrom. It seems appropriate at the outset to define *sex* and *gender* because they are the two terms the Court uses when discussing sex-based classifications under the Equal Protection Clause.¹⁵ Additionally, these are the two key terms used to describe gender dysphoric and transgender individuals.¹⁶

Generally, sex is a narrowly defined facet of personal identity,¹⁷ whereas gender is considered a fairly broad spectrum of personal identity markers.¹⁸ Sex “refer[s] to the biological indicators of [being] male and female . . . such as . . . sex chromosomes, gonads, sex hormones.”¹⁹ The chromosomal development of a human person at the earliest stages of life defines the biological manifestations of sex in humans; “males have XY chromosomes and females have XX chromosomes; that is, males have a unique sex-

14. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899).

15. *United States v. Virginia*, 518 U.S. 515, 566 (1996) (Scalia, J., dissenting); *see also* *Craig v. Boren*, 429 U.S. 190 (1976).

16. AM. PSYCH. ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 511 (5th ed. 2022) [hereinafter DSM-5].

17. “A medical term designating a certain combination of gonads, chromosomes, external gender organs, secondary sex characteristics and hormonal balances. Common terms are ‘male,’ ‘female’ and ‘intersex.’ Informs the gender one gets assigned, therefore framing their later social interactions.” *Terms and Definition*, UC BERKELEY, <https://cejce.berkeley.edu/centers/gender-equity-resource-center/resources/educational-resources/terms-and-definitions> (last visited Oct. 18, 2024) [hereinafter *Terms and Definitions*].

18. DSM-5, *supra* note 16, at 511.

19. *Id.*

determining chromosome that they do not share with females.”²⁰ One’s natal sex, therefore, corresponds to the biological and anatomical composition of the human body, as expressed phenotypically in the individual’s “nonambiguous internal and external genitalia.”²¹ Conversely, gender is considered a “socially constructed system of classification that ascribes qualities of masculinity and femininity to people.”²² As with all social conventions, gender “characteristics can change over time and are different between cultures.”²³

Such definitions draw sharp distinctions between sex and gender identity. Accordingly, one may conclude, sex is a biological term describing a feature or set of features particular to the male or female human organism; whereas gender is a conventional term that refers to social stereotypes and expectations derived from one’s sex.²⁴ Moreover, gender identity becomes a distinct facet of one’s personal identity, as is sex, only when an individual assumes a non-conforming gender identity: an identity at variance with the social norms of the particular gender ascribed to an individual based on his or her natal sex.²⁵ Within the gender-diverse community, there is a further distinction between the gender dysphoric and the transgendered.²⁶

Gender dysphoria is a descriptive term that “focuses on dysphoria as [a] clinical problem, and not identity per se.”²⁷ Gender dysphoria is the “feeling of discomfort or distress that might occur in people whose gender identity differs from their sex assigned at birth or sex-related physical characteristics.”²⁸ To be classified as gender dysphoric, an individual’s distress at this incongruence must be “clinically significant,” or cause “impairment in . . . important areas of functioning.”²⁹ This dysphoria is accompanied by a strong desire to appear as a member of the opposite sex, and to be rid of one’s biologically defined secondary sex characteristics, such

20. Lawrence S. Mayer & Paul R. McHugh, *Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences*, 50 *THE NEW ATLANTIS* 4, 89 (2016).

21. DSM-5, *supra* note 16, at 511.

22. Terms and Definitions, *supra* note 17.

23. *Id.*

24. DSM-5, *supra* note 16, at 511.

25. Coleman et al., *supra* note 4, at S5-S6.

26. DSM-5, *supra* note 16, at 511.

27. *Id.* at 512.

28. *Gender Dysphoria: Overview*, MAYO CLINIC (Jan. 17, 2024), <https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/symptoms-causes/syc-20475255>.

29. DSM-5, *supra* note 16, at 513.

as genitalia or breasts.³⁰ In contrast to the clinical term gender dysphoria, transgender is applied as an umbrella term.³¹

Transgender describes individuals “whose gender identity is different from their assigned sex at birth. Transgender identity can be used as a broad term to encompass various transgender and non-binary gender identities.”³² Transgender identity differs from gender dysphoria in so far as it may be voluntarily assumed.³³ Yet, both the gender dysphoric and transgender identified who seek gender affirmation care share the desire to alter their anatomy, appearance, or dress to appear either masculine, feminine, or androgynous.³⁴ Moreover, gender identity is a “category of social identity and refers to an individual’s identification as male, female,” some classification between male and female, or some classification neither male nor female.³⁵

In an attempt to give some form to these amorphous terms, transgender is juxtaposed to the recently minted term cisgender. Cisgender refers to an individual whose gender identity aligns with his or her biological sex.³⁶ This is a bizarre use of the prefixes “trans” and “cis”, which when used in this fashion require a fixed point of reference (such as the Alps or the Atlantic).³⁷ Yet, in the arena of gender identity the appropriate reference point is less than clear and is certainly not *fixed*. Classifying individuals as either cisgendered or transgendered serves no purpose other than to characterize both as equally normative variants of gender identity, and thereby undermine the sex-gender norms of human biology.³⁸

30. *Id.*

31. Coleman et al., *supra* note 4.

32. *Id.*

33. *See id.* (defining transgender identity and gender nonconformity as a product of nature or by choice).

34. DSM-5, *supra* note 16, at 511, 514.

35. *Id.* at 511.

36. *Id.*

37. *Cis*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE ONLINE (5th ed. 2022), <https://www.ahdictionary.com/word/search.html?q=cis>; *Trans*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE ONLINE (5th ed. 2022), [HTTPS://www.ahdictionary.com/word/search.html?q=trans](https://www.ahdictionary.com/word/search.html?q=trans).

38. *See* AM. PSYCH. ASS’N, GUIDELINES FOR PSYCHOLOGICAL PRACTICE WITH TRANSGENDER AND GENDER NONCONFORMING PEOPLE 835 (2015); *see also* Jessica A. Clarke, *Sex Assigned at Birth*, 122 COLUM. L. REV., 1821, 1829; 1868 (Nov. 2022); *see also* Terms and Definitions, *supra* note 17 (preferring transgender to “gender variant” because it does not imply a “standard normativity.”).

Lest one oversimplify the sophistic complexity of gender identity theory, recently, “the concept of sex assigned at birth has been taken up by transgender rights advocates to replace the *troublesome* term ‘biological sex.’”³⁹ The phrase “sex assigned at birth” seems to distinguish biological sex from one’s legal sex in an attempt to undermine and replace the normative standard the former provides.⁴⁰ According to this delineation, *sex* is subdivided into two distinct categories: biological sex (something vaguely related to reproduction) and “sex assigned at birth” (one’s legal sex).⁴¹ Equivocating between the biological and the legal signification of the term *sex*, the phrase “sex assigned at birth” has the significant effect of turning *sex* itself (colloquially understood as a biological fact) into a legal convention.⁴² Such arguments attempt to divorce biological sex from legal sex, to subordinate biological sex to gender identity, and to elevate a subjective sense of gender identity above objective fact of human biology as a source of normative claims about the sexes in both the legal and social context.⁴³

The characterization of biological sex as a “troublesome” term does not accurately treat the matter. Biological sex in humans is not an ambiguous concept, as some gender theorists propose.⁴⁴ The male-female dichotomy defines male and female in relation to the role that each plays in reproduction.⁴⁵ The reproductive role provides “the fundamental and reliable basis for biologists to distinguish the sexes . . . not some other behavioral or biological trait.”⁴⁶ Defects in a given individual’s reproductive system do not except or undermine the validity and value of this dichotomy as a source of normative claims about the sexes.⁴⁷

Conversely, the purported multitude of gender identities which lie obscure under the shadow of transgender identity do not provide any clear standard to determine gender, sex, or identity because each gender identity

39. Clarke, *supra* note 38, at 1823 (emphasis added).

40. *Id.*; see also AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 38, at 834-35 (encouraging psychologists “to adapt or modify their understanding of gender, broadening the range of variation viewed as healthy and normative”).

41. Clarke, *supra* note 38, at 1846-47.

42. *Id.* at 1829-30.

43. See *id.* at 1830.

44. Mayer & McHugh, *supra* note 20, at 93.

45. *Id.* at 90.

46. *Id.*

47. *Id.* at 90-91.

variant is premised on nothing more than an individual's "deeply felt, inherent sense of being."⁴⁸ In keeping with gender identity theory, the World Professional Association for Transgender Health has stated that it is impossible to tell whether an individual is in fact transgender.⁴⁹ It is impossible to ascertain this fact because gender identity theory rejects any normative claims premised on the male-female dichotomy, while disregarding the fact that "the ability to recognize exceptions to sex-typical behavior," upon which much of the theory rests, "relies on an understanding of maleness and femaleness that is independent of . . . stereotypical sex-appropriate behavior."⁵⁰

Gender identity theory confuses biological nature with social convention and subjective impressions of the self. When "gender is entirely detached from the binary of biological sex, gender could come to refer to any distinctions in behavior, biological attributes, or psychological traits, and each person could have a gender defined by the unique combination of characteristics the person possesses."⁵¹ It provides no clues with which one may decipher any one of the legion of gender identities that may possess an individual at any given time.⁵² If gender identity is entirely unique to each individual, then people "lose any common set of criteria for defining what gender distinctions mean."⁵³ Without common definitions, discussions on the complex topics of sex and gender are only so much hot air and spilt ink, and there can be no objective criteria on which to premise sex-based normative claims and standards.

48. AM. PSYCH. ASS'N, *supra* note 38, at 862.

49. Coleman et al., *supra* note 4, at S45. ("[I]t is important to note it is not possible to distinguish between those for whom gender identity may seem fixed from birth and those for whom gender identity development appears to be a developmental process.").

50. Mayer & McHugh, *supra* note 20, at 89.

51. *Id.* at 88.

52. *See generally* Clarke, *supra* note 38.

53. Mayer & McHugh, *supra* note 20, at 88.

II. THE OPERATIVE NORMATIVE PRINCIPLE IN SEX-BASED CLASSIFICATIONS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. *History of Sex-Based Classification under the Equal Protection Clause*

Prior to 1971, the Court used the rational basis standard to adjudicate claims against the state for legislation that constituted sex-based discrimination brought under the Equal Protection Clause.⁵⁴ The rational basis standard is highly deferential to the state.⁵⁵ The early Court's view of the distinct natures of men and women may account for this relatively low standard of scrutiny.⁵⁶

In 1872,⁵⁷ a member of the Court wrote, "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman."⁵⁸ This view was shared by at least one state supreme court, which, in a case concerning sex-based discrimination, reasoned that the "law of nature destines and qualifies the female sex for the bearing and nurture of children,"⁵⁹ and found that women could be constitutionally barred from the legal profession because it was deemed "inconsistent with [those] radical and sacred duties," and "a departure[] from the order of nature; and when voluntary, treason against it."⁶⁰ Though neither of these cases dealt with an equal protection claim, the conclusions of both were drawn from the premise that there are stark natural differences between the sexes, such that the law can legitimately treat the sexes as if they are dissimilarly situated in a wide variety of circumstances.⁶¹ This principle was later adopted and applied to decide claims brought under the Equal Protection Clause.

In *Muller v. State of Oregon*, the Court held that a law restricting the number of hours that women could work in a laundry did not violate the

54. *United States v. Virginia*, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting).

55. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

56. See Mary Anne Case, "The Very Stereotype The Law Condemns": *Constitutional Sex Discrimination Law As A Quest For Perfect Proxies*, 85 CORNELL L. REV. 1447, 1451.

57. The Fourteenth Amendment was ratified July 9, 1868. U.S. CONST. amend. XIV.

58. *Bradwell v. State*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

59. *In re Goodell*, 39 Wis. 232, 244 (1875).

60. *Id.* at 245.

61. See *Bradwell*, 83 U.S. 130 (Bradley, J., concurring); *In re Goodell*, 39 Wis. 232.

Fourteenth Amendment's equal protection clause because it was rationally related to the state's interest in preserving the health of women.⁶² The Court opined that, "[e]ven though all restrictions on political, personal, and contractual rights were taken away, and [woman] stood, so far as statutes are concerned, upon an absolute equal footing with [man], it would still be true that she is so constituted that she will rest upon and look to him for protection."⁶³ Nearly twenty years later, the Court again applied the same rationale to uphold a law limiting the number of hours per week women could work in restaurants.⁶⁴ This line of cases represents a conflation of biological sex with conventional gender roles and illustrates the normative principle, however erroneous, at play in the Court's early equal protection jurisprudence.

While the Court's prior approach to sex-based discrimination persisted, the rational basis test remained the applicable standard. A change in the jurisprudence surrounding sex-based discrimination occurred in 1971 when the Court decided *Reed v. Reed*.⁶⁵ In *Reed*, a mother and father both applied to be the administrator of their deceased son's estate.⁶⁶ Under Idaho law at the time of this decision, if both a male and female applied to be the administrator of an estate, the male would be made administrator, as a matter of law.⁶⁷ The state argued that it had a legitimate interest in easing the administrative burden of the probate courts, that the sex-based classification accomplished this goal, and as such, the law was rationally related to the state's objective.⁶⁸ Notwithstanding the legitimacy of the state's interest, the Court held that this statutory classification violated the Equal Protection Clause.⁶⁹ The Court recognized that men and women are on equal footing in their ability to administer an estate.⁷⁰ Because Idaho's sex-based classification imposed a burden on all female applicants for estate administration and was not based on any innate difference between the sexes, the preferential treatment of male applicants was deemed wholly arbitrary.⁷¹

62. See *Muller v. Oregon*, 208 U.S. 412, 422-23 (1908).

63. *Id.* at 422.

64. *Radice v. New York*, 264 U.S. 292, 294 (1924).

65. *Reed v. Reed*, 404 U.S. 71 (1971).

66. *Id.* at 71-72.

67. *Id.* at 72.

68. *Id.* at 76.

69. *Id.*

70. *Id.*

71. *Id.*

Reed marks a notable break with the earlier Court's treatment of sex-based classifications. Though nominally applying the rational basis standard,⁷² the Court elevated the level of scrutiny applied to sex-based classifications to something more searching than the highly deferential rational basis standard.⁷³ Unlike the pre-*Reed* treatment of sex-based classifications, *Reed*'s progeny routinely held that disparate treatment of the sexes based solely on differences in conventional gender roles would no longer pass "constitutional muster."⁷⁴ Thus, the relevant precedent and application of the Equal Protection Clause to sex-based statutory classifications begins with *Reed* and develops to the present.⁷⁵

B. *Modern Analytical Framework*

The Fourteenth Amendment states: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁷⁶ The Court has repeatedly declared that the "purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the [s]tate's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."⁷⁷

Under the *Reed* standard, the Court applies a heightened standard of review to assess allegations of sex-based equal protection violations.⁷⁸ With some variance in application,⁷⁹ the heightened standard requires the government to show that a sex-based classification substantially furthers an important state interest.⁸⁰ The causal connection between the regulatory scheme and the state's objective requires "only a substantial relation between

72. *Id.*

73. *See id.* at 75-76.

74. *See id.* at 76-77; *see also* *Orr v. Orr*, 440 U.S. 268, 283 (1979); *Stanton v. Stanton*, 421 U.S. 7, 14-17 (1975).

75. *See Reed*, 404 U.S. 71; *Sessions v. Morales-Santana*, 582 U.S. 47, 58 (2017).

76. U.S. CONST. amend. XIV, § 1.

77. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923) (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918))).

78. *See Sessions*, 582 U.S. at 58.

79. *See United States v. Virginia*, 518 U.S. 515, 555-56 (1996).

80. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (stating "[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

end and means, not a perfect fit.”⁸¹ The issue that must be resolved in every sex-based equal protection claim is whether a state has engaged in “arbitrary discrimination,” meaning discrimination that cannot be adequately justified by a “fair and substantial relation to the object of the legislation.”⁸²

Notably, the “Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways;”⁸³ however, a “classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’”⁸⁴ Sex-based classifications implicate the Equal Protection Clause when a regulatory scheme “provides that a different treatment be accorded . . . on the basis of . . . sex[.]”⁸⁵ and the persons within the statutorily created classes are similarly situated in relation to the state’s purported objective.⁸⁶

C. *Similarly Situated in Relation to What?*

Whether a sex-based regulation substantially furthers an important state interest depends in large part on whether the classes that the regulation creates are similarly situated in relation to the state’s regulatory objective.⁸⁷ The Court’s recognition of an important state interest is outcome determinative because the recognized interest is the point of reference used to determine whether the classes are, or are not, similarly situated.⁸⁸ Identifying the state’s important interest is not always a simple task, as the

81. *Virginia*, 518 U.S. at 573 (Scalia, J., dissenting).

82. *Craig*, 429 U.S. at 211 (Powell, J., concurring).

83. *Reed v. Reed*, 404 U.S. 71, 75 (1971).

84. *Id.* at 76 (citation omitted).

85. *Id.* at 75.

86. *Id.* at 75-76.

87. *Craig*, 429 U.S. at 197.

88. *Compare* *United States v. Virginia*, 518 U.S. 515, 520 (1996) (majority opinion) (reasoning that the Virginia Military Institute’s male only admissions policy violates the Equal Protection Clause, in part, because “[n]either the goal of producing citizen-soldiers nor VMI’s implementing methodology is inherently unsuitable to women.”), *with* *United States v. Virginia*, 518 U.S. at 576 (Scalia, J., dissenting) (“It is beyond question that Virginia has an important state interest in providing effective college education for its citizens. That single-sex instruction is an approach substantially related to that interest should be evident enough from the long and continuing history in this country of men’s and women’s colleges.”).

various opinions in *Michael M. v. Superior Court of Sonoma County* illustrate.

In *Michael M.*, the plurality held that California's statutory rape law did not violate the Equal Protection Clause,⁸⁹ recognizing that the state had an important interest in preventing teenage girls from being impregnated.⁹⁰ The statute created a sex-based classification between men and women because it only subjected males to criminal liability for engaging in sexual intercourse with a minor female, regardless of the age of the male.⁹¹ Nonetheless, the statute "pass[ed] constitutional muster"⁹² because men and women are not similarly situated in relation to pregnancy,⁹³ which was what the state was purportedly regulating.

The plurality reasoned that pregnancy itself is sufficient to discourage minor females from engaging in intercourse, such that the state need not heap a legal sanction on top of the sanction that nature provides.⁹⁴ The regulation discouraged males from having sexual intercourse with minor females, and thereby furthered the state's interest in preventing pregnancy in teenage girls.⁹⁵

The two concurring Justices agreed that California's interest in protecting teenage girls from pregnancy justified the sex-based classification. Following the plurality, Justice Stewart accepted the state's interest in protecting teenage girls from the risks of pregnancy.⁹⁶ He reasoned that the classification was justifiable because men and women are not similarly situated in relation to the attendant medical risks of intercourse: pregnancy and abortion.⁹⁷ Justice Blackmun, arguing along similar lines, found that the regulation was justified because the State has an important interest in protecting teenage women from unwanted pregnancy.⁹⁸

89. *Michael M. v. Sup. Ct. of Sonoma Cnty.*, 450 U.S. 464, 472-73 (1981).

90. *Id.* at 470.

91. *Id.* at 466.

92. *Id.* at 472-73.

93. *Id.* at 473 ("[V]irtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct.").

94. *Id.*

95. *Id.*

96. *Id.* at 479 (Stewart, J., concurring).

97. *Id.* at 479-80 ("[The female] alone endures the medical risks of pregnancy or abortion. She suffers disproportionately the social, educational, and emotional consequences of pregnancy. Recognizing this disproportion, California has attempted to protect teenage females[.]").

98. *Id.* at 482-83 (Blackmun, J., concurring).

Conversely, the dissenting Justices argued that the sexes were similarly situated in relation to California's interest in *detering* teenage pregnancy. Justice Brennan examined the legal effectiveness of a gender-neutral regulation.⁹⁹ He concluded that the sexes were similarly situated, in this case, because the regulation would be twice as effective if it punished both parties involved in the illicit entanglements.¹⁰⁰ Likewise, Justice Stevens opined that men and women are similarly situated in relation to venereal disease, which provides for both sexes a serious natural deterrent to sexual intercourse, just as pregnancy provides a natural deterrent for females.¹⁰¹ Though distinct in their rationales, both Justices believed that California's statute violated the Equal Protection Clause because men and women were on equal footing in relation to California's interest in deterring pregnancy.¹⁰²

The plurality in *Michael M.* emphasized the natural difference between the sexes in their ability to become pregnant, and, based on this natural difference, found that the sexes were dissimilarly situated in relation to the state's important interest in preventing teen pregnancy.¹⁰³ The dissenters emphasized that the sexes are on equal footing in relation to deterrence, in the form of criminal prosecution, which should justify the invalidation of the law.¹⁰⁴

As argued in this Note, the ultimate question that must be answered, when adjudicating claims of sex-based discrimination under the Equal Protection Clause, is whether the difference between the sexes is biological or conventional because this will determine if the sexes are on equal footing in relation to a state's important objective. Whether a statute violates the Equal Protection Clause is contingent upon the more fundamental determination: whether men and women are similarly situated under the statutory scheme?¹⁰⁵ This judgment requires a definite understanding of both the state's interest but also normative claims based biological data about the

99. *Id.* at 492 (Brennan, J., dissenting).

100. *Id.* at 493-94.

101. *Id.* at 498 (Stevens, J., dissenting).

102. *See id.* at 496 (Brennan, J., dissenting); *id.* at 502 (Stevens, J., dissenting).

103. *See id.* at 471-72 (plurality opinion).

104. *See id.* at 496 (Brennan, J., dissenting); *id.* at 502 (Stevens, J., dissenting).

105. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (maintaining the "Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.").

sexes. When biological sex is subordinated to gender identity, the biological facts, upon which valid sex-based classification rest, are obscured.¹⁰⁶

D. *Normative Method of Sex-Based Classification Jurisprudence*

Equal Protection Jurisprudence for sex-based classifications distinguishes between biological and conventional sex differences. In this Note, the analysis of the Equal Protection Clause is undertaken in light of Justice Brennan's remark in *Craig v. Boren*:

It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.¹⁰⁷

Current Equal Protection Jurisprudence necessarily entails a normative balancing exercise in order to ascertain the appropriate or tolerable standard for legislative behavior. The Court has assigned words like "legitimate," "important," or "compelling" to indicate the burden the government must shoulder to justify certain impositions on an individual's weightier liberty interests.¹⁰⁸ These categorizations denote the relative values of both the governmental interests in furthering particular policy goals and the liberty interests affected by discriminatory statutory schemes.¹⁰⁹ Accordingly, the state may impose a burden on certain individual liberties to secured goods of particular social value.¹¹⁰

The "Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in

106. See discussion *supra* Part I, concluding paragraph.

107. *Craig v. Boren*, 429 U.S. 190, 204 (1976).

108. *City of Cleburne*, 473 U.S. at 440-42.

109. *Id.* (comparing differing degrees of protection offered to age, sex, and race).

110. Compare *Reed v. Reed*, 404 U.S. 71, 73 (1971) (holding that administrative convenience does not justify burdening the rights of a woman to be the executrix of her son's estate), with *Michael M. v. Sup. Ct. of Sonoma Cnty.*, 450 U.S. 464, 472-73 (1981) (holding that the need to mitigate teen pregnancy and teens seeking abortions justifies prosecuting males of any age who engage in sexual intercourse with a minor female).

different ways.”¹¹¹ The Court applies the same principle of equal protection under both the V and XIV Amendments. Thus, in *Rostker v. Goldberg*, the Court held that excluding women from selective service registration did not conflict with Equal Protection Jurisprudence.¹¹² The Court found that men and women were not similarly situated in relation to fitness for military combat.¹¹³ Congress’s decision to exclude women from selective service was justified because the military’s need to have an adequate number of combat troops outweighed “gestures of superficial equality.”¹¹⁴

Conversely, in *United States v. Virginia*, the Court held that the Virginia Military Institute (VMI) policy that limited admittance to male applicants violated the Equal Protection Clause.¹¹⁵ The Court reasoned that neither Virginia’s interest in the benefits provided to young men in a single-sex educational environment¹¹⁶ nor the imposition of substantial modification to the particular educational model the VMI employed¹¹⁷ justified the exclusion of women from the benefits afforded the students and graduates of the VMI.¹¹⁸ The Court rested its holding on the premise that neither VMI’s aim nor pedagogical method “is inherently unsuitable for women.”¹¹⁹ Therefore, to exclude women because of their sex did not substantially further either the VMI’s stated objectives or the Commonwealth’s “nondiscrimination commitment.”¹²⁰

Leaving aside Justice Scalia’s contention that the treatment of the VMI is an example of the Court “load[ing] the dice”¹²¹ against the state, his dissent illustrates the difficulty of drawing sharp distinctions between biological and conventional sex differences. In part, Justice Scalia rests his argument on the evidentiary finding that men and women actually have different

111. *Reed*, 404 U.S. at 75.

112. Though the Court gives great deference to Congress in military affairs, this deference does not immunize Congress from ordinary strictures which Equal Protection Jurisprudence imposes. *Compare* *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981), *with* *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (finding even in military context equal protection prohibits “any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience”).

113. *Rostker*, 453 U.S. at 78-79.

114. *Id.* at 79.

115. *United States v. Virginia*, 518 U.S. 515, 519 (1996).

116. *Id.* at 535.

117. *Id.*

118. *See id.* at 534.

119. *Id.* at 520.

120. *Id.* at 525.

121. *Id.* at 568 (Scalia, J., dissenting).

developmental and educational needs.¹²² He reasoned it was this *real* difference between the sexes that should have guided the Court's resolution of the *actual* issue: whether the VMI's admissions policy substantially furthers the important state interest in providing "effective college education for its citizens?"¹²³

The principle underlying both the VMI decision and Scalia's dissent is that differential treatment of the sexes premised on conventionally held beliefs about ability or inability is constitutionally impermissible.¹²⁴ Whether the majority or Scalia has the better argument, reasonable minds may disagree. What may be inferred from this case, and judicial reviews of other sex-based statutory schemes,¹²⁵ is that for a governmental interest to be sufficiently "important" to justify differential treatment based on sex, the law must rest on some real biological difference between the sexes.¹²⁶

III. *BOSTOCK*, SEX, AND GENDER IDENTITY

The *Bostock* decision is important for understanding the equal protection claim at issue in this Note because transgender advocates have explicitly and implicitly borrowed the *Bostock* rationale to argue against the prohibition of medically induced gender transition therapy.¹²⁷ An evaluation of the Court's reasoning is pertinent to understand the incompatibility of the normative claims of gender identity theory with the Equal Protection Clause's operative normative principle.

A. *Bostock v. Clayton County, Georgia*

The question presented in *Bostock* was whether the term "sex," within the meaning of Title VII of the Civil Rights Act of 1964, includes

122. *Id.* at 576.

123. *Id.*

124. *See id.* at 520.

125. *See Michael M. v. Sup. Ct. of Sonoma Cnty.*, 450 U.S. 464 (1981); *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981).

126. *Compare Virginia*, 518 U.S. at 520 (placing special significance on the biological equality of the sexes in as it relates to their ability to complete the VMI curriculum), *with Virginia*, 518 U.S. at 576 (Scalia, J., dissenting) (placing significance on the VMI educational model uniquely tailored to males).

127. *See generally Dekker v. Weida*, 679 F. Supp. 3d 1271 (N.D. Fla. 2023); *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131 (N.D. Ala. 2022); *Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021); *Jane Doe 1 et al. v. Thornbury*, No. 3:23-cv-230, 2023 WL 4230481 (W.D. Ky. 2023); *L.W. v. Skrmetti*, 679 F. Supp. 3d 668 (M.D. Tenn. 2023).

transgender identity.¹²⁸ The Court held the Title VII protections afforded to sex-based discrimination extends to transgender identity.¹²⁹ The Court's rationale was simple: if one of the causes of differential treatment is sex, then sex-based discrimination has occurred.¹³⁰ The Court reasoned that one must first identify the sex of a person before one can know whether that person is transgender.¹³¹ Therefore any discrimination against a person for his transgender identity is discrimination based on sex because "transgender status [is] inextricably bound up with sex."¹³²

The Court asserted that transgender identities "are inextricably bound up with sex. Not . . . in some vague sense . . . but because to discriminate on these grounds" is to treat an individual differently on account of his sex.¹³³ To illustrate its reasoning, the Court posed the following hypothetical: if A (a man) identifies as a woman, and B (a woman) identifies as a woman, then if A is fired for his transgender identity then sex must have been a substantial factor in the decision to terminate because A was fired not because of his feminine gender identity, but because he is biological male with a feminine gender identity.¹³⁴

The *Bostock* Majority's treatment of sex and transgenderism effectually collapses the distinction between biological and conventional claims about sex and gender identity. The Majority's equivocation on the point of transgender identity is patent.¹³⁵ First, the Court notes that transgender identity and sex are "distinct concepts"¹³⁶ and are yet "inextricably bound up" with each other without explaining how sex and transgender identity can be both distinct and bound up.¹³⁷ Second, the illustrative hypothetical does not accurately illustrate the relationship between sex and gender identity and treats the issue as if sex and gender identity are really the same thing.

Suppose an employer hired A (a man) and B (a woman) who both identify as women. A is fired and B is retained. According to the Court's

128. *Bostock v. Clayton Cnty.*, Ga. 590 U.S. 644, 650-52 (2020).

129. *Id.*

130. *Id.* at 659.

131. *Id.*

132. *Id.* at 660.

133. *Id.* at 660-61

134. *Id.* at 659.

135. Paul R. McHugh & Gerard V. Bradley, *Therapeutic Jurisprudence*, FIRST THINGS (Dec. 2020), <https://www.firstthings.com/article/2020/12/therapeutic-jurisprudence> [https://perma.cc/G4HL-V486].

136. *Bostock*, 590 U.S. at 667-68.

137. McHugh & Bradley, *supra* note 135.

reasoning, A was fired in substantial part because of his sex.¹³⁸ This argument in isolation is not obviously unreasonable. Nonetheless, suppose either A or B, or both A and B, identify as a nonconforming gender variant, such as agender.¹³⁹ The employer need not consider the biological sex of either A or B, but only the apparent manifestation of their subjective sense of self. After all, agender identity, like all nonconforming gender identities, does not have as the fixed reference point the normative male-female dichotomy used in the Court's hypothetical.¹⁴⁰ May the employer fire either A or B on account of their nonconforming gender identity because their expressed gender identity is intentionally neuter? The Court's reasoning and illustrative hypothetical do not provide an answer to this question.¹⁴¹

Unsurprisingly, the *Bostock* decision did not receive universal acclaim. Professor Robert George of Princeton University wrote, the *Bostock* rationale "is sophisticated and the position [it] endorse[s] is untenable."¹⁴² In a similar vein, Professor of Law at Notre Dame, Gerard Bradley, called the reasoning used in *Bostock* a piece of "stunning sophistry."¹⁴³ The Court appears to have forgotten or ignored that transgender identity is a fluid concept, defined not by sex characteristics but the subjective self-perception the individual.¹⁴⁴ As such, the Court's assertion that transgender identity and sex are distinct yet "inextricably bound up" seems another "flaw in [the] reasoning" which contributes to *Bostock* being "mistaken at its heart."¹⁴⁵

Justice Alito accused the *Bostock* Majority of a failure to pause and reflect upon the import of its decision.¹⁴⁶ He predicted that the Majority's expansive definition of sex would be employed in sex-based classifications claims under the Fourteenth Amendment's equal protection clause.¹⁴⁷ He

138. *Bostock*, 590 U.S. at 667-68.

139. Agender refers to individuals who are "internally ungendered," have no "felt sense of gender identity," or identify "as neither man nor woman." Terms and Definitions, *supra* note 17.

140. *See Bostock*, 590 U.S. at 667-68.

141. *See id.*

142. Robert George, *The Bostock Case and the Rule of Law*, MIRROR OF JUSTICE (June 15, 2020), <https://mirrorofjustice.blogs.com/mirrorofjustice/2020/06/the-bostock-case-and-the-rule-of-law.html>.

143. McHugh & Bradley, *supra* note 135.

144. Shelby Hanssen, Note, *Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law*, 96 OR. L. REV. 283, 285 (2017) ("[G]ender is not fixed; instead, it is fluid, constantly subject to evolving notions of gender, societal expectations, and one's own subjective identity.").

145. McHugh & Bradley, *supra* note 135.

146. *Bostock*, 590 U.S. at 732 (Alito, J., dissenting).

147. *Id.*

opined that “equating discrimination because of . . . gender identity with discrimination because of sex, the Court’s decision will be cited as a ground for subjecting [both] forms of discrimination to the same exacting standard of review.”¹⁴⁸ The result of this will “mire[]” the “entire Federal Judiciary” for years with claims testing the reach of the Majority’s reasoning.¹⁴⁹ The recent slew of injunctive suits¹⁵⁰ and current circuit split on this exact issue have proven Alito’s intuition true.

B. *State Laws and the Circuit Split*

In 2021, the State of Arkansas passed legislation prohibiting, among other things, the administration of puberty suppressants and cross-sex hormones to individuals under the age of eighteen.¹⁵¹ Shortly after this legislation was operative, challengers sought to have it enjoined, claiming that the prohibition violated the Equal Protection Clause.¹⁵² The district court held for the challengers and enjoined the enforcement of the prohibition.¹⁵³ On appeal, the Eighth Circuit Court of Appeals upheld the lower court’s ruling¹⁵⁴ because it determined that the regulation discriminated based on sex, not age.¹⁵⁵ Despite Arkansas’s interest “in protecting children from experimental medical treatment,”¹⁵⁶ the appellate court held the Arkansas law prohibiting minors from receiving cross-sex hormones and puberty suppressants discriminated on the basis of sex because “the minor’s sex at birth determines whether or not the minor can receive certain types of medical care under the law, [the Arkansas Act].”¹⁵⁷

148. *Id.*

149. *Id.*

150. *See* Dekker v. Weida, 679 F. Supp. 3d 1271 (N.D. Fla. 2023); Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131 (N.D. Ala. 2022); Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021); Jane Doe 1 et al, v. Thornbury, No. 3:23-cv-230, 2023 WL 4230481 (W.D. Ky. 2023); L.W. v. Skrmetti, 679 F. Supp. 3d 668 (M.D. Tenn. 2023).

151. ARK. CODE ANN. § 20-9-1501 (2024); ARK. CODE ANN. § 20-9-1502 (2024).

152. *See* Brandt, 551 F. Supp. 3d 882 (E.D. Ark. 2021).

153. *Id.* at 894.

154. Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661, 672 (8th Cir. 2022).

155. *Id.* at 669.

156. *Id.* at 670.

157. *Id.* at 669.

The appellate court's reasoning implicitly endorsed the *Bostock* rationale,¹⁵⁸ insofar as both conflate sex with gender identity.¹⁵⁹ The Court in *Bostock* used an inaccurately narrow hypothetical¹⁶⁰ to illustrate that discrimination based on transgender identity “necessarily entails discrimination based on sex.”¹⁶¹ Just so, the Eighth Circuit reasoned that the Arkansas statute created an unconstitutional sex-based classification because “a minor born as a male may be prescribed testosterone or have breast tissue removed . . . but a minor born female is not permitted to seek the same medical treatment.”¹⁶²

The Eighth Circuit's example suffers from a similar logical defect as did the *Bostock* hypothetical because the Arkansas ban does not deny medical hormone treatment or surgery to one sex while it is allowed to the other.¹⁶³ The treatment ban covers only “gender transition procedures,”¹⁶⁴ and specifically allows for hormone treatment and surgery, regardless of sex, provided that the patient has a physical ailment resulting from a “medically verifiable disorder of sex development” that would require such treatment.¹⁶⁵ The law prohibits a particular treatment end—medically induced gender transition therapy—for a particular age group.¹⁶⁶

The Eleventh and Sixth Circuit appellate courts took a contrary position to the Eighth Circuit on medical gender transition therapy bans similar to the Arkansas Act. Both the Eleventh and Sixth Circuits explicitly rejected the *Bostock* rationale, as applied to the Alabama¹⁶⁷ and Tennessee¹⁶⁸ bans on the

158. The lower court relied in part on *Bostock*'s rationale to determine the equal protection claim. *Brandt*, 551 F. Supp. 3d at 889.

159. See *Bostock*, 590 U.S. at 660-61; *Brandt*, 47 F.4th at 669-70.

160. See *Bostock*, 590 U.S. at 659; see also McHugh & Bradley, *supra* note 135.

161. *Bostock*, 590 U.S. at 669.

162. *Brandt*, 47 F.4th at 669.

163. See ARK. CODE ANN. § 20-9-1502 (2024).

164. § 20-9-1502(a).

165. § 20-9-1502(c)(1).

166. § 20-9-1502(a).

167. ALA. CODE § 26-26-4(a) (2022) (proscribing the prescription or administration of cross-sex hormones and puberty suppressants to minors “for the purpose of attempting to alter the appearance of or affirm the minor’s perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor’s sex”).

168. TENN. CODE ANN. § 68-33-103(a)(1)(A) (2023) (prohibiting healthcare providers from administering medical procedure to minors for the purpose of “[e]nabling a minor to identify with, or live as, a purported identity inconsistent with the minor’s sex”).

administrations of cross-sex hormones and puberty suppressants.¹⁶⁹ Each found that the statutes under their respective considerations created an age-based classification and did not constitute sex-based discrimination.¹⁷⁰ The different method of treatment does not indicate unequal treatment of the sexes, but “simply reflects real, biological differences between males and females and equally restricts the use of puberty blockers and cross-sex hormone treatment for minors of both sexes.”¹⁷¹ In concluding, both appellate courts recognized “[g]ender identity and gender dysphoria pose vexing line-drawing dilemmas”¹⁷² and constitute the “types of issues quintessentially . . . reserve[d] to the legislative, not judicial, action.”¹⁷³

The *Bostock* opinion’s influence over lower courts has introduced confusion into the realm of sex-based Equal Protection Jurisprudence because the normative standard it underwrites is at odds with the standard the Court ordinarily uses to determine the validity of a sex-based regulation under the Equal Protection Clause.¹⁷⁴

IV. JUSTIFYING THE REGULATION: IMPORTANT GOVERNMENT INTEREST

Two questions remain: (A) Do states have an important interest in preserving the health and safety of children from the adverse effects of cross-sex hormone and puberty suppressants, and (B) Do states have an important interest in maintaining the dignity of the human person?

A. *The Important State Interests*

A “[s]tate plainly has authority, in truth a responsibility, to look after the health and safety of its children.”¹⁷⁵ It has become common for children as young as eight years old to receive puberty suppressants with cross-sex

169. *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1228-29 (11th Cir. 2023); *L.W. ex rel Williams v. Skrmetti*, 73 F.4th 408, 419 (6th Cir. 2023).

170. *Eknes-Tucker*, 80 F.4th at 1229-30; *Skrmetti*, 73 F.4th at 419.

171. *Eknes-Tucker*, 80 F.4th at 1231; *see also Skrmetti*, 73 F.4th at 419.

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

173. *Eknes-Tucker*, 80 F.4th at 1231.

174. *McHugh & Bradley*, *supra* note 135 (guiding lower courts to make “strange turns to arrive at ‘pro-trans’ results”); *see also* Parts I and II.C.

175. *Skrmetti*, 73 F.4th at 419.

hormones introduced as early as age twelve.¹⁷⁶ The World Professional Association for Transgender Health continues to advocate for the availability of gender affirmation care in the form of sex hormone therapy.¹⁷⁷ Hormone therapy is a method of gender affirmation care used to alter one's physical appearance that it may better reflect one's gender identity.¹⁷⁸ This type of medically induced gender transition therapy refers to the administration of puberty suppressants and cross-sex hormones.¹⁷⁹

Puberty suppressants, sometimes called puberty blockers,¹⁸⁰ are administered once puberty has begun, in an attempt to "pause" the development of the body so that pubescent youths can better explore their "gender needs."¹⁸¹ In some cases, the World Professional Association for Transgender Health deems puberty suppressants "medical[ly] necessary" to mitigate the distress puberty may cause to transgender youths.¹⁸² Moreover, the administration of puberty suppressants is part of a two-phase medical transitioning plan.¹⁸³ The first phase stunts the normal development of the individual's body during the period of puberty.¹⁸⁴ In the second phase, cross-sex hormones are administrated.¹⁸⁵

Cross-sex hormone therapy involves giving estrogens to males to "feminize their body" and testosterone to females to "masculinize their body."¹⁸⁶ For a male seeking to feminize his body, the health risks include infertility, heart problems, stroke, and blood clots.¹⁸⁷ Additionally, recipients of such treatment may develop breast cancer.¹⁸⁸ Within six months of beginning estrogen treatment, the male child will lose muscle mass, gain fat, and suffer testicular atrophy.¹⁸⁹ The female patient fares no better, risking

176. Megan Twohey & Christina Jewett, *They Paused Puberty, but Is There a Cost?*, N.Y. TIMES (Nov. 14, 2022), <https://www.nytimes.com/2022/11/14/health/puberty-blockers-transgender.html>.

177. Coleman et al., *supra* note 4.

178. *See id.* at S110.

179. *See id.*

180. Twohey & Jewett, *supra* note 176.

181. Coleman et al., *supra* note 4, at S50.

182. *Id.* at S67-S68.

183. *Id.* at S112.

184. *Id.*

185. *Id.*

186. DSM-5, *supra* note 16, at 862.

187. *Feminizing Hormone Therapy*, MAYO CLINIC (Dec. 2, 2023), <https://www.mayoclinic.org/tests-procedures/feminizing-hormone-therapy/about/pac-20385096>.

188. *Id.*

189. *Id.*

infertility, blood clots, and vaginal atrophy.¹⁹⁰ Notwithstanding the attendant physical health risks, the World Professional Association for Transgender Health advised that cross-sex hormones be administered shortly after the commencement of puberty suppression for its purported mental health benefits.¹⁹¹

Alternatively, some psychiatrists have recognized that transgenderism is a “psychological rather than a biological matter.”¹⁹² Accordingly, it should be treated with psychotherapeutic methods, not hormone therapy.¹⁹³ Gender transition hormonal therapy as a medical intervention may have far-reaching consequences and “cause long-term harm to children and adolescents.”¹⁹⁴ Both puberty suppressants and cross-sex hormones threaten infertility and significantly diminished bone health.¹⁹⁵ There is no significant evidence to show that either puberty suppressants or cross-sex hormone therapy reduces the clinical needs of “transgender-identifying people.”¹⁹⁶ Additionally, studies on the long-term effects of gender transition therapy, such as the 2011 Dhejne study done in Sweden, have indicated an increased mortality and suicide rate among recipients of gender affirmation care.¹⁹⁷

As Dr. Paul McHugh¹⁹⁸ has intimated, the inability to give informed consent to blocking puberty poses a major problem for the pretended ethicality of medically induced gender transition therapy.¹⁹⁹ Dr. McHugh noted, “puberty is one of the great transforming neuro-endocrine events in anybody’s life.”²⁰⁰ This transformation is one which the medical community

190. *Masculinizing Hormone Therapy*, MAYO CLINIC (Dec. 2, 2023), <https://www.mayoclinic.org/tests-procedures/masculinizing-hormone-therapy/about/pac-20385099>.

191. Coleman et al., *supra* note 4, at S113.

192. Paul McHugh, *Transgenderism: A Pathogenic Meme*, PUB. DISCOURSE (June 10, 2015), <https://www.thepublicdiscourse.com/2015/06/15145/>.

193. *Id.*

194. Andre Van Mol et al., *Correction: Transgender Surgery Provides No Mental Health Benefit*, PUB. DISCOURSE (Sept. 13, 2020), <https://www.thepublicdiscourse.com/2020/09/71296/>.

195. MAYO CLINIC, *supra* note 187; *Puberty Blockers for Transgender and Gender-Diverse Youth*, MAYO CLINIC (June 14, 2023), <https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/in-depth/pubertal-blockers/art-20459075>; *see also* Twohey & Jewett, *supra* note 176.

196. Van Mol et al., *supra* note 194.

197. *Id.*

198. Dr. McHugh is a renown psychiatrist and professor at Johns Hopkins University School of Medicine where he has service with distinction since 1975. Matthew J. Franck & Paul McHugh, *A Rosy-Cheeked Irish Boy Who Has Come Very Far: An Interview with Dr. Paul McHugh*, PUB. DISCOURSE (May 20, 2021), <https://www.thepublicdiscourse.com/2021/05/75886/>.

199. *Id.*

200. *Id.*

does not fully comprehend.²⁰¹ The various unknowns surrounding the cause and progression of puberty in humans make the claim that it can be “paused” without long-term harm dubious at best.²⁰² The complexity of gender identity and the pitfalls of the gender affirmation care urge those who would consider hormonal transition therapy to proceed with caution.²⁰³ Finally, “[s]cience has shown that gender identity issues in children usually do not persist into adolescence or adulthood, and there is little scientific evidence for the therapeutic value of puberty-delaying treatments.”²⁰⁴

The psychiatrist’s aim is to help patients, which entails a normative value judgment about what is truly good for a given individual.²⁰⁵ The treating professional must first gain an understanding of the patient’s “subjective inward experience”²⁰⁶ to assist the patient in correcting the false, detrimental assumptions that perpetuate psychological distress.²⁰⁷ The psychiatrist motivated by “political activism”²⁰⁸ does not help children when he “affirms” their self-perceived transgender identity at the cost of “long-term harm.”²⁰⁹ A psychiatrist ought to treat the source of the patient’s distress and felt incongruity.²¹⁰ Such treatment requires normative claims about the human person, which are substantially lacking in gender theory because it is “[f]ad medicine . . . and gender-anxious people deserve better.”²¹¹

B. *Gender Affirmation Care and Human Dignity*

As with all normative value judgments, “[h]uman dignity is a foundational assumption.”²¹² State regulations that ban cross-sex hormone and puberty suppressants not only protect children from the long-term consequence of medically induced gender transition therapy but also work to

201. *Id.*

202. *See id.*

203. Mayer & McHugh, *supra* note 20, at 106.

204. *Id.* at 86.

205. McHugh & Bradley, *supra* note 135.

206. *Id.*

207. McHugh, *supra* note 192.

208. Van Mol et al., *supra* note 194; *see* Coleman et al., *supra* note 4.

209. *See* McHugh & Bradley, *supra* note 135.

210. *Id.*

211. Van Mol et al., *supra* note 194.

212. Singer, *supra* note 1, at 963.

preserve the dignity of the human person through the promotion of health and respect for the human body.

It is keeping with human dignity that individuals refrain from needlessly mutilating their bodies.²¹³ Respect for human “dignity entails the demand that [individuals] should treat with respect [their] own bod[ies], but also the body of every other person, especially the suffering.”²¹⁴ It is true that gender dysphoric children are afflicted with mental anguish,²¹⁵ however, “[t]herapeutic interventions for children must take into account the probability that the children may outgrow cross-gender identification.”²¹⁶ The vast majority of gender dysphoric children, if permitted to develop normally, will grow out of their dysphoria.²¹⁷

States may regulate the health care field for the well-being of its citizens, and when doing so they “[are] entitled to a ‘strong presumption of validity.’”²¹⁸ Health is recognized as a basic human good.²¹⁹ The “state exists to protect and promote all . . . basic goods.”²²⁰ It is only when the state regulates health care as to deprive a particular class of people from all reasonable avenues by which its members may seek needed care that the state violates the dignity of the human person.²²¹

The medically induced gender transition therapy bans considered in this Note do not deprive children of health care on the basis of their gender identity, nor do they deprive them of other therapeutic methods of treating their gender dysphoria.²²² On the contrary, they are tailored to allow children with physical disorders and diseases to be treated with due care and respect while preventing other children from the irreversible harm that may result from medically induced gender transition therapy.²²³

213. CATECHISM OF THE CATHOLIC CHURCH ¶ 2297 (2d ed. 1997).

214. *Id.* ¶ 1004.

215. DSM-5, *supra* note 16, at 513-15.

216. Mayer & McHugh, *supra* note 20, at 106.

217. Franck & McHugh, *supra* note 198.

218. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 300 (2022).

219. Ryan T. Anderson & Sherif Girgis, *Against the New Puritanism: Empowering All, Encumbering None*, in *DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION* 108, 125 (2017).

220. *Id.* at 134.

221. *See id.* at 135.

222. *See* ALA. CODE § 26-26-4 (1975); ARK. CODE ANN. § 20-9-1502 (2024); TENN. CODE ANN. § 68-33-103 (2023).

223. *See* § 26-26-4; ARK. CODE ANN. § 20-9-1502 (2024); TENN. CODE ANN. § 68-33-103 (2023); *see also* discussion *supra* Part IV. A.

The World Professional Association for Transgender Health claims that “[h]ealth is promoted through public policies and legal reforms that advance tolerance and equity for gender diversity and that eliminate prejudice, discrimination, and stigma.”²²⁴ Antidiscrimination advocacy such as this is meant to preserve minority groups from the dignitary harm incident to their status as human persons who are not “acknowledged or respected” by society.²²⁵ This presumably well intentioned sentiment does not adequately justify turning a blind eye to the great “uncertainty surrounding the diagnosis of and prognosis for gender dysphoria in children,”²²⁶ and the “particularly complex and difficult” methods of treatment.²²⁷ Nor does zealous advocacy restore to mutilated children their lost appendages, fertility, and the normal development of their pubescent bodies.

Regulations that prohibit minors from accessing medical gender transition therapy show due respect for the innate human dignity of all persons. “Human institutions . . . must labor to minister to the dignity and purpose of man.”²²⁸ Due respect for human dignity demands that individuals not “undervalue” their bodies.²²⁹ People are “not allowed to despise [their] bodily [lives]; rather [they are] obligated to regard [their bodies] as good.”²³⁰

Men and women are created in the image of God.²³¹ The image of God is the basis for human dignity.²³² The complementarity of the sexes is ordered for the social well-being and flourishing of the human person.²³³ In light of this understanding of human nature, when due respect for the body is “wanting, man’s dignity is most grievously lacerated.”²³⁴ And “every man remains to himself an unsolved puzzle.”²³⁵

224. Coleman et al., *supra* note 4.

225. See John Corvino, *Religious Liberty, Not Religious Privilege*, in *DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION* 20, 73-75 (2017).

226. Mayer & McHugh, *supra* note 21, at 106.

227. *Id.*

228. *Gaudium et Spes* [Pastoral Constitution of the Church in the Modern World] ¶ 29 (1965).

229. *Id.* ¶ 41.

230. *Id.* ¶ 14.

231. *Id.* ¶ 12.

232. *Id.* ¶ 21.

233. See *id.* ¶ 12.

234. *Id.* ¶ 21.

235. *Id.*

CONCLUSION

For a statutory scheme that creates a sex-based classification to survive intermediate scrutiny, the state must show that the regulation substantially furthers an important government interest.²³⁶ State laws barring medically induced gender transition therapy reflect legitimate and serious reservations about whether this method of gender affirmation care is truly therapeutic.²³⁷ A state's important interest in the health and safety of children²³⁸ is directly and substantially furthered by limiting minors' access to puberty suppressants and cross-sex hormones.

"The normative philosophy that underlies the Equal Protection Clause"²³⁹ for sex-based claims rests on norms derived from the male-female dichotomy of the sexes. The male-female norm provides a solid footing for the Court to determine whether the justification for a regulatory scheme that creates a sex-based classification rests on real biological differences or stereotypical gender roles, and whether such classes are similarly situated in relation to a state's important interest.

Gender identity theory proposes gender and sex norms which collapse the distinction between the natural and conventional qualities of sex differences. To include the protean concept of gender identity within the meaning of sex for purposes of equal protection analysis would abandon the standard that the Court has applied to sex-based discrimination cases, and undermine the normative principles, which have animated the Court's rationale.

The Court has maintained that there are some enduring differences between men and women. To find otherwise and to adopt the normative claims advocated by gender theorists, in cases where state law prohibits the administration of puberty suppressants and cross-sex hormones to minors, would be to imply that state legislators, and the people they represent, cannot make meaningful distinctions between a child and an adult, health and sickness, science and ideology.

236. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

237. *See L.W. ex rel Williams v. Skrmetti*, 73 F.4th 408, 419-20 (6th Cir. 2023).

238. *See generally Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1236 (11th Cir. 2023) (Brasher, J., concurring).

239. *Craig*, 429 U.S. at 204.