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Protecting Transgender Youth After *Bostock*: Sex Classification, Sex Stereotypes, and the Future of Equal Protection

ABSTRACT. This Note argues that *Bostock v. Clayton County*'s holding under Title VII—that anti-LGBT discrimination is sex discrimination—applies as well under the Equal Protection Clause. Application of *Bostock*'s holding to the Equal Protection Clause would extend intermediate scrutiny to classifications on the basis of sexual orientation or gender identity, a significant constitutional development. Nonetheless, the Note explains how this development would shift rather than resolve constitutional conflict over LGBT and especially transgender equality, and it argues for the importance of sex-stereotyping arguments under intermediate scrutiny. The Note then locates the beginnings of these constitutional developments in litigation over laws and policies targeting transgender minors. Refuting defenses of these laws and policies sounding in biology, the Note argues that they rely on sex stereotyping—especially the stereotype that transgender minors are merely confused—in order to steer minors into particular sex roles. These laws and policies, which rely on sex-based stereotypes in order to compel conformity with the state's normative vision of sex roles, cannot withstand intermediate scrutiny.

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INTRODUCTION

In 2020, as the Supreme Court was preparing to hand down its momentous decision protecting LGBT[1] adults from employment discrimination in *Bostock v. Clayton County*,[2] fifteen state legislatures were debating bills whose purpose was to stop children from becoming like those adults. These were bans on gender-affirming healthcare for minors.[3] Less than one year after *Bostock*, Arkansas became the first state to pass such a law.[4] Such laws are the most extreme form of a new crop of state legislation targeting transgender minors,[5] which also includes laws prohibiting transgender student-athletes from participating in sports consistent with their gender identity.[6] These state laws are significant for the way they have shifted legal and political contestation over transgender rights to focus on transgender youth in particular, building on conflicts over transgender students' access to sex-specific spaces in school. They are also significant for generating some of the first legal disputes over transgender equality after *Bostock*. They thus furnish an opportunity to take stock of *Bostock* and to evaluate its impact on LGBT equality beyond Title VII — and in particular, under the Constitution.

This Note takes up those questions, arguing that the holding of *Bostock* — that discrimination against LGBT persons is necessarily sex discrimination — applies under the Equal Protection Clause of the Constitution.[7] Because Justice Gorsuch presented the majority opinion as nothing more than a routine application of textualism, those who seek to limit the impact of *Bostock* might suggest that the opinion only affects Title VII or statutes with similar language. I argue, however, that the opinion in fact relies on (1) a logical conclusion that LGBT

1. Because *Bostock* focuses on lesbians, gay men, bisexuals, and transgender individuals, I often use the term "LGBT" in this Note to describe the communities the Court explicitly considered. The developments I describe and advocate for, however, would generally have positive implications for other groups within the larger LGBTQ community. When speaking more broadly about that community outside the context of legal doctrine based on *Bostock*, I use broader terms such as queer and LGBTQ.

2. 140 S. Ct. 1731 (2020).

3. *See Past Legislation Affecting LGBT Rights Across the Country 2020*, ACLU (Mar. 20, 2020), https://www.aclu.org/past-legislation-affecting-lgbt-rights-across-country-2020 [https://perma.cc/B8PB-MF6J].

4. ARK. CODE ANN. § 20-9-1502 (West 2021).

5. For the purposes of this Note, I use the terms minors, youth, and children interchangeably.

6. *See LGBTQ Youth: Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT (Sept. 15, 2022), https://www.lgbtmap.org/img/maps/citations-sports-participation-bans.pdf [https://perma.cc/9LY2-X32R].

7. U.S. CONST. amend. XIV, § 1, cl. 4.

classifications are necessarily sex classifications, and (2) a purely anticlassificationist understanding of discrimination. Because equal-protection doctrine uses an anticlassification inquiry to determine whether to apply intermediate scrutiny, *Bostock*'s holding applies equally in that context. The formalistic reasoning approved by the U.S. Supreme Court in *Bostock* logically means that any state action distinguishing on the basis of sexual orientation or gender identity distinguishes on the basis of sex and thus requires intermediate scrutiny. This result would effectively make sexual orientation and gender identity protected characteristics under the Equal Protection Clause.

Recognizing anti-LGBT discrimination as a form of sex discrimination will shift rather than resolve constitutional conflict over LGBT—and especially transgender—equality. Once judges apply intermediate scrutiny to laws discriminating against LGBT people, *Bostock* will be of little help in evaluating those laws because of its thin understanding of discrimination. Applying intermediate scrutiny, courts will need to reason about the social meaning and context of LGBT classifications—exactly the kind of reasoning the majority opinion in *Bostock* studiously avoids. In other words, the potentially transformative holding of *Bostock* enables breakthrough constitutional progress for LGBT people, but fully realizing such progress will require going beyond that opinion's limited and limiting approach.

This Note locates the beginnings of post-*Bostock* constitutional developments in current litigation over school policies and state laws targeting transgender minors. In the wake of *Bostock*, a number of federal courts have invalidated or preliminarily enjoined school policies prohibiting transgender students from using the restrooms that align with their gender identity;[8] Idaho, Indiana, and West Virginia laws prohibiting transgender girls and young women from participating on female sports teams;[9] and Arkansas's and Alabama's bans on gender-affirming healthcare for minors.[10] So far, these courts have extended *Bostock* into the equal-protection realm tentatively, deciding on other grounds

8. *See* Adams *ex rel.* Kasper v. Sch. Bd. of St. John's Cnty., 968 F.3d 1286, 1295, 1310–11 (11th Cir. 2020), *vacated and superseded*, 3 F.4th 1299 (11th Cir. 2021), *reh'g granted*, 9 F.4th 1369 (11th Cir. 2021); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 618–20 (4th Cir. 2020).

9. *See* A.M. *ex. rel.* E.M. v. Indianapolis Pub. Sch., No. 22-cv-01075, 2022 WL 2951430, at *14 (S.D. Ind. July 26, 2022); Hecox v. Little, 479 F. Supp. 3d 930, 987 (D. Idaho 2020); B.P.J. v. W. Va. State Bd. of Educ., 550 F. Supp. 3d 347, 353–58 (S.D. W. Va. 2021). In addition, state courts in Utah and Montana have enjoined portions of similar laws under their state constitutions. *See* Roe v. Utah High Sch. Activities Ass'n, No. 220903262, 2022 WL 3907182, at *6–7, *14 (Utah Dist. Ct. Aug. 19, 2022); Barrett v. State, No. DV-21-581B, slip op. at 5–7, 10 (Mont. Dist. Ct. Sep. 14, 2022) (order on cross-motion for summary judgment).

10. *See* Brandt v. Rutledge, 551 F. Supp. 3d 882, 894 (E.D. Ark. 2021), *aff'd*, 47 F.4th 661 (8th Cir. 2022); Eknes-Tucker v. Marshall, No. 22-cv-184, 2022 WL 1521889, at *13 (M.D. Ala. May 13, 2022).

that intermediate scrutiny is needed and then adding that *Bostock* supports or confirms that decision. Still, their opinions have begun to build out *Bostock*'s constitutional impact. In applying intermediate scrutiny, these decisions gesture toward sex stereotyping to varying degrees without relying fully on such reasoning.[11]

After surveying these decisions, I contend that state laws and policies discriminating against transgender youth are based on and entrench a sex stereotype that no court has yet articulated: the stereotype of the "confused transgender child." This stereotype takes many forms. But at its core, the stereotype is built on the idea that transgender minors are confused or misled about their own identity, or merely going through a temporary phase, while cisgender minors are not. This stereotype subjects only transgender minors to skepticism, interrogation, and doubt concerning their identity, presuming that cisgender minors are correct about theirs. Building on earlier fears and stereotypes about queer people, it tends to treat cisgender identity as natural and transgender identity as the result of some malign influence. As I argue in this Note, recent state regulation targeting transgender minors unconstitutionally relies on this sex-based stereotype in order to steer minors into normatively defined sex roles.

This Note proceeds in three Parts. Part I examines the majority opinion in *Bostock*, showing that it rejected available sex-stereotyping arguments in favor of an anticlassification argument. The opinion relies on a logical conclusion that LGBT classifications are sex classifications, combined with an understanding of discrimination as mere classification. Building on this understanding of the opinion, Part II argues first that *Bostock*'s holding applies to equal-protection analysis. Section II.C then explains why, even if courts apply *Bostock* in equal-protection analysis, much discrimination would survive intermediate scrutiny if courts follow the *Bostock* majority in ignoring the relationship between anti-LGBT discrimination and sex stereotypes.

Finally, in Part III, I put this theory into practice. I start by analyzing how courts after *Bostock* have handled equal-protection challenges to laws and policies

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11. *See, e.g.*, *Grimm*, 972 F.3d at 615 (concluding that the school board's bathroom policy was "marked by misconception and prejudice," Tuan Ahn Nguyen v. INS, 533 U.S. 53, 73 (2001), and "reli[ed] on so-called 'biological gender'" to exclude the plaintiff, a transgender male student, from the boys' restroom); *id.* at 625-26 (Wynn, J., concurring) (explaining that the school board's bathroom policy "perpetuates a harmful and false stereotype about transgender individuals – namely the 'transgender predator' myth"); *Hecox*, 479 F. Supp. 3d at 982 (indicating that the Idaho legislature's justification for banning transgender women from participating in women's sports teams "appears . . . [to be] based on overbroad generalizations without factual justification"); *B.P.J.*, 550 F. Supp. 3d at 350 (suggesting that a West Virginia law prohibiting transgender girls from participating in girls' sports teams was founded on a "fear of the unknown and discomfort with the unfamiliar," as there was "scant evidence" that it "addresses any problem at all").

targeting transgender minors. Then I show how advocates can deploy *Bostock* and sex-stereotyping arguments—including the confused-transgender-child stereotype identified by this Note—to challenge laws and policies targeting transgender minors. With a particular focus on Arkansas's gender-affirming healthcare ban,[12] I argue that these laws and policies are built on sex stereotyping and are not adequately explained or justified by actual physical differences between the sexes. Therefore, they cannot withstand intermediate scrutiny. Finally, I contend that sex-stereotype reasoning has unique dialogic value in disputes over transgender minors: it speaks directly to states' inability to force minors into narrowly prescribed sex roles and allows courts and others to affirm transgender youth in ways the formalistic reasoning of *Bostock* cannot.

Protecting transgender youth under the Constitution will be most fully advanced by moving beyond *Bostock*, including by using the sex-stereotyping arguments *Bostock* ignored. While some have seen the opinion as offering a promising (if imperfectly realized) path to revitalizing antidiscrimination law,[13] I suggest in this Note that adopting *Bostock*'s approach more broadly—ignoring the history, context, and social meaning of discrimination—would impoverish antidiscrimination law. Still, it is *Bostock*'s formalistic reasoning that, by logically requiring intermediate scrutiny for LGBT classifications, can afford courts more opportunities to reason about the connections between anti-LGBT discrimination, sexism, and sex stereotypes. As I show in the context of disputes over transgender youth, advocates can utilize *Bostock* together with the arguments it ignored in order to build a robust foundation for LGBT equality under the Constitution.

I. UNDERSTANDING *BOSTOCK*

In this Part, I analyze the majority opinion in *Bostock v. Clayton County*, identifying its anticlassification approach in order to better understand the logic underpinning its holding and how that logic may apply under the Equal Protection Clause. *Bostock* consolidated two cases brought under Title VII. In one, Donald Zarda had been fired from his job because he was gay, and in the other, Aimee Stephens had been fired from her job because she was transgender.[14] Together,

12. ARK. CODE ANN. § 20-9-1502 (West 2021).

13. *See* Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1646-48 (2021); Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105 MINN. L. REV. 831, 837-38, 879-86, 900 (2020); Rachel Slepoi, Bostock*'s Inclusive Queer Frame*, 107 VA. L. REV. ONLINE 67, 82 (2021).

14. For the Court's summary of the basic facts of Zarda's and Stephens's cases, see *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737-38 (2020).

the two cases raised the question of whether Title VII's prohibition on sex discrimination in employment prohibits discrimination on the basis of sexual orientation and gender identity. By a six-three vote, the Court held that it does. Early reactions to Justice Gorsuch's majority opinion paid much attention to the form of textualism it employed, but somewhat less attention to the substantive understanding of antidiscrimination law it assumed.[15] Indeed, the emphasis on textualist method in the majority opinion and dissents obscures the normative and substantive judgment at the heart of the Court's decision. For whether it was through textualism, purposivism, or any other interpretive method, the Court in *Bostock* had to arrive at a substantive understanding of discrimination in order to adjudicate whether Donald Zarda's and Aimee Stephens's employers discriminated against them in violation of Title VII. As I will argue, despite Gorsuch's claims that textualism alone compelled the result in *Bostock*, the result in fact depended on the majority's anticlassification understanding of discrimination combined with the logical conclusion that LGBT classifications are sex classifications. Seeing the importance of this understanding of discrimination and this logical conclusion is key to understanding how *Bostock* applies in the equal-protection context.

I begin in Section I.A by outlining a form of argument with which the *Bostock* majority did not engage. The majority declined to rely on—but did not explicitly reject—a wealth of available arguments demonstrating how anti-LGBT discrimination is rooted in sex stereotypes.[16] By punishing deviation from sex stereotypes, as advocates explained to the Court, anti-LGBT discrimination enforces a sex-role system that has traditionally functioned to subordinate women. Revisiting these arguments helps to illuminate the approach that Justice Gorsuch did adopt in *Bostock* by showing how it ignores significant historical and social context. Additionally, as I will argue in Parts II and III, this doctrinal path not taken

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15. *See, e.g.*, Josh Blackman & Randy Barnett, *Justice Gorsuch's Halfway Textualism Surprises and Disappoints in the Title VII Cases*, NAT'L REV. (June 26, 2020, 6:30 AM), https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-half-way-textualism-surprises-disappoints [https://perma.cc/WW3D-ACYH]; Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 280-90 (2020); Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, 21 FED. SOC'Y REV. 158, 160-63 (2020); George F. Will, Opinion, *The Supreme Court's Decision on LGBTQ Protections Shows the Conflicting Ideas of Textualism*, WASH. POST, June 16, 2020, 4:48 PM EDT, https://www.washingtonpost.com/opinions/the-supreme-courts-decision-on-lgbtq-protections-shows-the-conflicting-ideas-of-textualism/2020/06/16/c6979b76-aff8-11ea-8758-bfd1d045525a_story.html [https://perma.cc/V995-QGC6]; Ezra Ishmael Young, Bostock *Is a Textualist Triumph*, JURIST (June 25, 2020, 3:53 PM), https://www.jurist.org/commentary/2020/06/ezra-young-bostock-textualist-triumph [https://perma.cc/NJ6W-ZM24].

16. *Cf.* Jeremiah A. Ho, *Queering* Bostock, 29 AM. U. J. GENDER SOC. POL'Y & L. 283, 349-55 (2021) (criticizing the Court for neglecting antistereotyping arguments in *Bostock*); Anthony Michael Kreis, *Unlawful Genders*, 85 LAW & CONTEMP. PROBS. 103, 104-08, 114 (2022) (same).

will be a valuable resource as *Bostock* influences LGBT equal-protection claims. In Section I.B, I then demonstrate that Gorsuch's opinion adopts a purely anticlassificationist approach to antidiscrimination law. I contend that "anticlassificationist" is a more instructive label for the opinion than "textualist" because its core reasoning rests not on statutory text or semantic meaning but on an underexplained normative judgment about discrimination and a logical conclusion about LGBT classifications.

A. The Path Not Taken

The Court in *Bostock* presented its holding as the clear answer supplied by the plain text of Title VII. Regardless of legislators' intentions or expectations, the majority reasoned, the statute prohibits discrimination because of sex, and that prohibition definitionally extends to discrimination because of LGBT identity.[17] Most reactions to the opinion have engaged with this reasoning on its own terms, either championing the opinion's brand of formalist textualism,[18] criticizing it as pseudotextualism,[19] or applauding the method while finding fault in its application.[20] This textual-logical argument, however, was only one of several rationales relied upon in lower courts and advanced before the Supreme Court.[21] In particular, as the Court decided *Bostock*, it had before it briefing and lower-court decisions that put forward a powerful argument based on sex stereotyping: anti-LGBT discrimination punishes individuals for not adhering to sex stereotypes and is therefore a form of sex discrimination.

The 1989 Supreme Court decision *Price Waterhouse v. Hopkins* is often understood as the fountainhead of this sex-stereotyping doctrine under Title VII, though its roots extend further back in state and federal antidiscrimination law.[22]

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17. *See Bostock*, 140 S. Ct. at 1737, 1741.

18. *See, e.g.*, Grove, *supra* note 15, at 267, 270-71; Young, *supra* note 15.

19. *See, e.g.*, *Bostock*, 140 S. Ct. at 1755-56 (Alito, J., dissenting) (describing the majority opinion as "like a pirate ship" that "sails under a textualist flag"); Blackman & Barnett, *supra* note 15 (characterizing the majority's method as "halfway textualism"); *see also* Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 72 (2021) (criticizing the majority's application of textualism, but concluding that the result was correct and arguing against textualism as a method).

20. *See, e.g.*, Lund, *supra* note 15, at 167.

21. *See, e.g.*, Zarda v. Altitude Express, Inc., 883 F.3d 100, 112-13 (2d Cir. 2018) (basing the decision that sexual-orientation discrimination violates Title VII on textual, sex-stereotype, and associational-discrimination analyses).

22. 490 U.S. 228 (1989); *see* Brief of Employment Discrimination Law Scholars as Amici Curiae in Support of the Employees at 7-15, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623 & 18-107);

In *Hopkins*, the Supreme Court recognized that discriminating against someone for failing to adhere to stereotypical notions of how men or women ought to act is a form of sex discrimination.[23] Following from *Hopkins*, the argument that anti-LGBT discrimination enforces sex stereotypes and so is also a form of sex discrimination can take various forms. Expressed simply, the argument is that anti-LGB discrimination punishes individuals for failing to conform to the stereotype of heterosexuality—that men are romantically and sexually attracted only to women, and women to men.[24] Likewise, antitransgender discrimination punishes individuals for failing to conform to the stereotype of cisgender identity—that individuals' gender identities always conform to the sex assigned to them at birth.[25] In lower-court decisions leading up to *Bostock*, both the Second and Seventh Circuits relied at least in part on this sex-stereotyping argument in the context of sexual-orientation discrimination.[26] In earlier cases involving

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Brief of the National Women's Law Center and Other Women's Rights Groups as Amici Curiae in Support of the Employees at 5-12, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623 & 18-107).

23. *See Hopkins*, 490 U.S. at 251.

24. *See, e.g.*, Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 346 (7th Cir. 2017) ("Hively represents the ultimate case of failure to conform to the female stereotype . . . : she is not heterosexual.").

25. In contrast, some have argued that transgender people actually conform to and reaffirm sex stereotypes by seeking to appear in traditionally masculine or feminine ways. *See* Brief for Women's Liberation Front as Amici Curiae Supporting Petitioners at 5, R.G. & G.R. Harris Funeral Homes v. EEOC, 139 S. Ct. 1599 (2019) (No. 18-107) ("Simply, Aimee Stephens is a man. He wanted to wear a skirt while at work, and his 'gender identity' argument is an ideology that dictates that people who wear skirts must be women, precisely the type of sex-stereotyping forbidden by *Price Waterhouse*."); *cf.* Katelyn Burns, *The Rise of Anti-Trans "Radical" Feminists, Explained*, VOX (Sept. 5, 2019, 11:57 AM EDT), https://www.vox.com/identities/2019/9/5/20840101/terfs-radical-feminists-gender-critical [https://perma.cc/MN76-7U3D] (critiquing this view); Charlie Kiss, *The Idea That Trans Men Are "Lesbians In Denial" Is Demeaning and Wrong*, ECONOMIST (July 3, 2018), https://www.economist.com/open-future/2018/07/03/the-idea-that-trans-men-are-lesbians-in-denial-is-demeaning-and-wrong [https://perma.cc/48N7-98SF] ("I was also a strong feminist and had swallowed the myth that trans people conformed to stereotypes and lived in strict gender roles."). These kinds of arguments ignore the diversity of transgender people and their gender expressions. Not all transgender women, for example, seek to dress or behave in traditionally feminine ways. *See* Kiss, *supra*. They also tend to ignore the agency of transgender people, who may seek to express their gender in whatever way feels best to them (just like cisgender people), not because they have internalized gender stereotypes or think that a particular gender "must" appear a certain way. In any case, in the context of employment discrimination, when an employer does not tolerate gendered behavior in a transgender employee that it would have accepted in someone assigned a different sex at birth, it is clear that the transgender employee has been discriminated against for deviating from a sex stereotype.

26. *See Hively*, 853 F.3d at 346; *Zarda*, 883 F.3d at 119-23; *see also* Kastl v. Maricopa Cnty. Cmty. Coll. Dist., 325 F. App'x 492, 493 (9th Cir. 2009) ("[I]t is unlawful to discriminate against a

transgender litigants, the Sixth and Eleventh Circuits had relied on sex-stereotype reasoning to hold that discrimination on the basis of gender nonconformity was a form of sex discrimination under the Equal Protection Clause.[27] And in *Bostock*, parties and amici made the same argument to the Court.

One objection to this argument is that the stereotypes of presumptive heterosexuality and presumptive cisgender identity are not, in fact, sex stereotypes. In *Hively v. Ivy Tech Community College*[28] — the Seventh Circuit decision holding that Title VII prohibited sexual-orientation discrimination — Judge Sykes raised just this argument in dissent. As she wrote (and as Justice Alito quoted approvingly in his *Bostock* dissent), "[H]eterosexuality is not a female stereotype; it is not a male stereotype; it is not a sex-specific stereotype at all."[29] But it is not clear that a sex-based stereotype must be sex-specific, as Sykes seemed to assume.[30] However, accepting Sykes's premise for the sake of argument, anti-LGBT discrimination actually *does* enforce sex-specific stereotypes: mandated heterosexuality or cisgender identity enforces a restrictive vision of masculinity on men and a restrictive vision of femininity on women. As a number of amici made clear to

transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women."); Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 525-27 (D. Conn. 2016) (holding that antitransgender discrimination is cognizable under Title VII in part on a sex-stereotyping rationale); Dawson v. H&H Elec., Inc., No. 14CV00583, 2015 WL 5437101, at *3 (E.D. Ark. Sept. 15, 2015) (discussing the plaintiff's claim that "she was terminated because of her gender transition and her failure to conform to gender stereotypes"); Schroer v. Billington, 577 F. Supp. 2d 293, 304 (D.D.C. 2008) (explaining that "[s]ex stereotyping based on a person's gender nonconforming behavior is impermissible discrimination" (quoting Smith v. Salem, 378 F.3d 566, 574-75 (6th Cir. 2004)). For reliance on similar sex-stereotype reasoning in the context of other antidiscrimination statutes, see *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 214 (1st Cir. 2000), which considers a sex-discrimination claim under the Equal Credit Opportunity Act; *Schwenk v. Hartford*, 204 F.3d 1187, 1192 (9th Cir. 2000), which considers a claim under the Gender Motivated Violence Act; and *M.A.B. v. Board of Education*, 286 F. Supp. 3d 704, 712-17 (D. Md. 2018), which considers a claim under Title IX.

27. *See* Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011); Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004). Naomi Schoenbaum has criticized this line of cases, which protect transgender plaintiffs on the basis of their gender nonconformity, for reifying the plaintiffs' sex assigned at birth. *See* Schoenbaum, *supra* note 13, at 836. While it is true that the opinion in *Smith* tends to treat the transgender woman in that case as an especially effeminate man, the gender-nonconformity approach does not necessarily do so — as an opinion like *Whitaker ex rel. Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034, 1047 (7th Cir. 2017), demonstrates. Schoenbaum distinguishes between the gender-nonconformity approach and a sex-stereotyping rationale, but I see no clean distinction between them: to defy sex stereotypes is to live in gender-nonconforming ways.

28. 853 F.3d at 351-52.

29. *Id.* at 370 (Sykes, J., dissenting) (emphasis omitted); *see* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1764 (2020) (Alito, J., dissenting).

30. *See* Brief for Petitioner at 28, *Bostock*, 140 S. Ct. 1731 (No. 17-1618).

the Court in *Bostock* by summarizing an abundance of work by legal scholars, historians, and sociologists, anti-LGBT discrimination subjects men and women to different, sex-specific stereotypes.

LGBT persons transgress sex-specific role expectations, undermining assumptions not just about each sex's complementary sexual roles but also about their roles in society.[31] Presumptive heterosexuality has traditionally undergirded complementary stereotypes that men would be dominant breadwinners and women submissive caretakers.[32] The mandate to be sexually and romantically attracted only to the opposite sex thus actually packages two very different, sex-specific mandates for how to behave as a woman or man. A man who defies the expectation of heterosexuality "does not conform to the stereotypical notion of a 'real' man. He fails to engage in behaviors that were traditionally deemed critical to the conception of men as the naturally dominant, strong, and assertive sex . . . ."[33] And a lesbian or bisexual woman, in turn, "subverts the notion that it is natural and inevitable for a woman to serve as the passive and subordinate partner to a man."[34] In a similar fashion, presumptive cisgender identity imposes two different sets of stereotypes on those assigned male or female sex at birth: it assumes "that those designated male at birth must behave, dress, and look a certain way, and those designated female must behave, dress, and look another way."[35] An employer who fires a transgender woman for being transgender, for

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31. *See* Brief of Anti-Discrimination Scholars as Amici Curiae in Support of the Employees at 3, 8-14, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623 & 18-107) [hereinafter Brief of Anti-Discrimination Scholars] (discussing this phenomenon and citing the work of numerous scholars); *see also* Amici Curiae Brief of Scholars Who Study the LGB Population in Support of the Employees at 12-13, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618 & 17-1623) [hereinafter Brief of Scholars Who Study the LGB Population] (explaining that LGB people face discrimination on the basis of their perceived deviation from the expectations of their gender).

32. *See* Brief of Anti-Discrimination Scholars, *supra* note 31, at 8-9 (citing Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 197-206).

33. *Id.* at 10 (citations omitted); *see also* Brief of Scholars Who Study the LGB Population, *supra* note 31, at 12 ("[G]ender norms for men dictate that they be sexually attracted only to women and engage in behaviors intended to compete with other men and impress women . . . .").

34. Brief of Anti-Discrimination Scholars, *supra* note 31, at 11; *see also* Brief of Scholars Who Study the LGB Population, *supra* note 31, at 12 ("[G]ender norms for women likewise dictate that they pursue and form romantic relationships only with men, and act and dress in a manner intended to be sexually attractive to men.").

35. Brief of Anti-Discrimination Scholars, *supra* note 31, at 14; *see id.* at 15 ("Discrimination against transgender individuals enforces sex stereotypes about the distinct identities, behaviors, appearances, and roles expected of individuals assigned as male or female at birth."); *cf.* Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.").

example, necessarily punishes her for failing to comply with the sex-specific role expectations for someone assigned male at birth.[36]

Discrimination against individuals for failing to conform to sex stereotypes is sufficient to violate Title VII, but the dissents in *Bostock* seem to require more. In stressing how unthinkable the result in *Bostock* would be to the Congress that passed the Civil Rights Act, both Justices Alito and Kavanaugh treated as relevant that anti-LGBT discrimination is supposedly unrelated to sexism and the unequal status of women—the concerns to which Title VII's prohibition on sex discrimination responded. Alito maintained that "discrimination because of sexual orientation is not historically tied to a project that aims to subjugate either men or women,"[37] while Kavanaugh simply quipped, "Seneca Falls was not Stonewall."[38]

In fact, sex-stereotyping arguments do posit such a relationship between anti-LGBT discrimination and sexism. First, although the enforcement of sex stereotypes limits the liberty and autonomy of all, it particularly and disproportionately disadvantages women. Because such stereotypes have traditionally defined women as "better suited to being mothers and caretakers, less able to act in ways thought necessary to succeed in the office, and less capable at jobs traditionally reserved for men," sex stereotyping reinforces a hierarchy that subordinates women, especially in the area of employment.[39] Anti-LGBT discrimination reinforces that hierarchy by enforcing a vision of biologically determined sex complementarity that positions men as breadwinners and women as caretakers. It also naturalizes complementary gendered behaviors—above all, male aggression and dominance in relation to female passivity and submissiveness—that tend to subordinate women to men.[40] The sex-specific stereotypes enforced by anti-LGBT discrimination thus reinforce a sex-role system that has historically

36. Brief of Anti-Discrimination Scholars, *supra* note 31, at 15; *see* Brief for Respondent Aimee Stephens at 31, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019) (No. 18-107) ("In short, Ms. Stephens was fired because she transgressed Mr. Rost's sex-based stereotypes about gender roles: she was both too masculine for his expectations of appropriate womanhood and too feminine for his notions of appropriate manhood.").

37. *Bostock*, 140 S. Ct. at 1765 (Alito, J., dissenting).

38. *Id.* at 1828 (Kavanaugh, J., dissenting).

39. Brief of Anti-Discrimination Scholars, *supra* note 31, at 19 (citing Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1824-39 (1990)); *see id.* at 20 ("A workplace in which such discrimination goes unchecked is thus a workplace in which employers retain a critical means of reaffirming hierarchical gender roles and, ultimately, of subordinating women.").

40. *See id.* at 20 ("Discrimination against LGBT individuals . . . reasserts the purported 'naturalness' of male dominance.").

subjugated women. And the sex stereotypes entrenched through anti-LGBT discrimination and harassment continue to limit the opportunities of women in the workplace today.[41] Recognizing anti-LGBT discrimination as a form of sex discrimination therefore furthers the purposes of Title VII even when the statute is understood narrowly as remedying the unequal status of women in the workplace.

The dissents in *Bostock* call these arguments "exotic"[42] and suggest that they are ahistorical.[43] In fact, though, the sex-stereotyping understanding of anti-LGBT discrimination is deeply rooted in history and reflects ordinary lived experience.[44] Homosexuality has long been understood as a form of gender inversion or gender transgression.[45] As a result, LGBT social movements in the twentieth century "saw the battle against sexism as the very heart of their struggle," and "[a]gain and again, in their articles, their manifestos, and their political fliers . . . returned to the same point: sexism."[46] As Cary Franklin has elaborated, many early LGBT activists understood that "[g]ay liberation is a struggle against

41. *See* Brief of Women CEOs and Other C-Suite Executives as Amicae Curiae in Support of Petitioner Bostock and Respondents Zarda, Moore and Stephens at 27-33, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623 & 18-107) (citing research showing how sex stereotypes continue to disadvantage women in professional settings); Brief of Service Employees International Union, International Brotherhood of Teamsters, and Jobs with Justice as Amici Curiae in Support of the Employees at 9-16, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623 & 18-107) (telling stories of individual female workers in traditionally male jobs who were targeted with antilesbian harassment for violating sex stereotypes).

42. *Bostock*, 140 S. Ct. at 1767 (Alito, J., dissenting).

43. *Id.* at 1828-29 (Kavanaugh, J., dissenting).

44. *Cf.* Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 186-89 (arguing that anti-LGBT discrimination as a form of sex discrimination is in fact common knowledge outside of the legal sphere).

45. For the "inversion theory" of homosexuality, see GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940, at 47-63 (1995). For more on how, in the early twentieth century, anxiety about gender roles underlay stereotype-based discrimination against both women and queer people in inseparable ways, see Kreis, *supra* note 16, at 108-14. *See also* Brief of Historians as Amici Curiae at 17, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623 & 18-107) ("[I]n the 1960s, gay and transgender people were often defined in the public imagination as much by their gender nonconforming demeanor and conduct as by their sexual practices."); *id.* at 18 (discussing a 1964 issue of *LIFE* magazine defining gay men as effeminates who wish to dress like women); *id.* at 19-20 (citing cases upholding enforcement against gay-bar patrons identified by gender nonconformity); ALLAN BÉRUBÉ, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO 20 (1990) (describing how the military enforced its ban on homosexuality by ferreting out effeminate male recruits).

46. John D'Emilio, *Foreword* to OUT OF THE CLOSETS: VOICES OF GAY LIBERATION, at xix-xxi (Karla Jay & Allan Young eds., 2d ed. 1992).

sexism"[47] and was "premised on the termination of the system of male supremacy."[48] Conversely, some conservative activists warned that the eradication of sex discrimination would necessarily entail the end of discrimination against gays and lesbians.[49] In the decades to follow, LGBT plaintiffs brought these arguments into courts.[50] Indeed, the earliest state supreme-court decision subjecting the prohibition of same-sex marriage to strict scrutiny was premised on a sex-discrimination rationale.[51]

Moreover, the link between sex stereotyping and anti-LGBT discrimination is apparent from ordinary lived experience.[52] As sociologists have documented, from a young age, many Americans understand "homosexuality as a form of sex-role transgression," and children employ anti-LGBT bullying and discrimination as a way of policing masculinity and femininity.[53] As one amicus brief in *Bostock*

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47. Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 115 (2010) (quoting Allen Young, *Out of the Closet: A Gay Manifesto* (abr.), RAMPARTS, Nov. 1971, *reprinted as Out of the Closets, Into the Streets*, *in* OUT OF THE CLOSETS: VOICES OF GAY LIBERATION 6, 7 (Karla Jay & Allen Young eds., 1972)).

48. *Id.* at 117 (quoting Allen Young, *Out of the Closet: A Gay Manifesto* (abr.), RAMPARTS, Nov. 1971, *reprinted as Out of the Closets, Into the Streets*, *in* OUT OF THE CLOSETS: VOICES OF GAY LIBERATION 6, 10 (Karla Jay & Allen Young eds., 1972)); *see also* Allen Young, *Out of the Closet: A Gay Manifesto* (abr.), RAMPARTS, Nov. 1971, *reprinted as Out of the Closets, Into the Streets*, *in* OUT OF THE CLOSETS: VOICES OF GAY LIBERATION 6, 10 (Karla Jay & Allen Young eds., 1972) ("The oppression of women and that of gay people are interdependent and spring from the same roots . . . ." (quoting Third World Gay Revolution & Gay Liberation Front, *Gay Revolution and Sex Roles*, CHI. GAY PRIDE (June 1971), *reprinted in* OUT OF THE CLOSETS: VOICES OF GAY LIBERATION, *supra*, at 254-55)).

49. *See id.* at 140.

50. *See* WILLIAM N. ESKRIDGE, JR. & CHRISTOPHER R. RIANO, MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS 14-15, 23-24, 182, 278-79, 425, 598-99 (2020).

51. *See* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993); *see also* Latta v. Otter, 771 F.3d 456, 479-96 (9th Cir. 2014) (Berzon, J., concurring) (adopting a sex-discrimination rationale for invalidating state laws refusing to recognize same-sex marriages).

52. *Cf.* Franklin, *supra* note 44, at 171 ("One need not read gender theory to know it."); Brief of Anti-Discrimination Scholars, *supra* note 31, at 11 ("These observations enjoy a wealth of scholarly support, but they do not require any elaborate sociology to prove.").

53. Franklin, *supra* note 44, at 186 (citing C.J. PASCOE, DUDE, YOU'RE A FAG: MASCULINITY AND SEXUALITY IN HIGH SCHOOL 53-54 (2d ed. 2011)); *see also* Cary L. Klemmer, Joshua Rusow, Jeremy Goldbach, Shanna K. Kattari & Eric Rice, *Socially Assigned Gender Nonconformity and School Violence Experience Among Transgender and Cisgender Adolescents*, 36 J. INTERPERSONAL VIOLENCE NP8567, NP8568 (2019) ("Socially assigned gender nonconforming adolescents . . . are at greater risk of missed school due to safety concerns, and bullying, as compared with those who conform to norms of gender expression."); S. Alexandra Marshall & M. Kathryn Allison, *Midwestern Misfits: Bullying Experienced by Perceived Sexual and Gender Minority Youth in the Midwestern United States*, 51 YOUTH & SOC'Y 318, 318 (2019) ("Thematic analysis revealed that gender nonconformity was a common factor in being bullied."); C.J.

put it, the connection between anti-LGBT discrimination and sex stereotyping is visible "in every social context—from the schoolyard to the water cooler."[54] Common slurs, for example, deride gay men as effeminate and lesbian women as masculine. To take one other prominent example, opponents of same-sex marriage still often explicitly ground their opposition in the importance of traditional sex roles.[55] The connections between sex stereotyping and anti-LGBT discrimination, then, are not only deeply rooted in history but also active in the present in a number of social and political contexts. Every time a lesbian couple is asked who the man in the relationship is, every time a gay or bisexual man is derided as effeminate, and every time a transgender person is harassed for not following their sex assigned at birth, a rigid sex hierarchy is reinforced and an individual is subordinated because of sex.

Parties and amici presented well-founded arguments to the Court in *Bostock* showing how anti-LGBT discrimination arises from and reinforces sex stereotypes, enforces sex-specific roles on men and women, and maintains a sex hierarchy that disadvantages women.[56] They supplied the Court with historical and legal analysis, as well as social science demonstrating the lived experience of LGBT individuals facing discrimination.[57] Justice Gorsuch's majority opinion, however, makes no mention of these arguments. They only surface in the dissents, where Justices Alito and Kavanaugh simply declare that homophobia,

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Pascoe, *Notes on a Sociology of Bullying: Young Men's Homophobia as Gender Socialization*, QED: A J. IN GLBTQ WORLDMAKING, Fall 2013, at 87, 88 ("[H]omophobia and homophobic language are central to shaping contemporary heterosexual masculine identities."); Elizabethe Payne & Melissa Smith, *LGBTQ Kids, School Safety, and Missing the Big Picture: How the Dominant Bullying Discourse Prevents School Professionals from Thinking About Systemic Marginalization or . . . Why We Need to Rethink LGBTQ Bullying*, QED: A J. IN GLBTQ WORLDMAKING, Fall 2013, at 1, 1 ("[W]e take the position that a majority of peer-to-peer aggression in U.S. public schools is some form of *gender policing* . . . .").

54. Brief of Anti-Discrimination Scholars, *supra* note 31, at 11; *see* Brief of the Trevor Project, PFLAG, and Family Equality as Amici Curiae at 9-15, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623 & 18-107) (describing the experiences of LGBTQ individuals facing discrimination and harassment in gendered forms); Brief for the Legal Aid Society as Amicus Curiae at 7-10, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623 & 18-107) (describing the experiences of LGBTQ clients facing discrimination and harassment because of sex stereotyping).

55. *See* Franklin, *supra* note 44, at 188; Kreis, *supra* note 16, at 118-20. For more on the role of sex stereotypes in same-sex marriage jurisprudence, see Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461 (2007).

56. *See supra* notes 31-36, 39-41, and accompanying text.

57. *See id.*

transphobia, and sexism are unrelated.[58] Revisiting these arguments casts the majority opinion in *Bostock* in a new light, rendering visible the substantive and methodological choices it made. In the next Section, I examine these choices, identifying the majority's anticlassification approach to Title VII as a crucial, substantive value choice obscured by the opinion's emphasis on interpretive method.

B. Bostock*'s Method and* Bostock*'s Holding*

Justice Gorsuch styled his opinion in *Bostock* as straightforwardly textualist—nothing more and nothing less than what the plain text of Title VII demands. As he summarized, "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."[59] "Textualist" may be an instructive label for comparing the opinion to examples of other interpretive methods, such as purposivism. But it is insufficient and unhelpful for understanding the opinion in the substantive context of antidiscrimination law. Understood within that doctrinal context, and in light of the opinion's choice not to engage with sex-stereotyping arguments, the opinion is better characterized as "anticlassificationist." It is this substantive approach to antidiscrimination law, more than any interpretive method, that compels the result in *Bostock*.[60]

To see why textualism offers an insufficient account of the majority opinion in *Bostock*, consider how Justice Gorsuch deals with the key word "discriminate" in Title VII. Gorsuch focuses his textualist inquiry on the phrase "because of sex" and the but-for causation standard he assumes that phrase implies. But such causation alone does not always create Title VII liability, as decisions upholding affirmative-action plans under Title VII show.[61] Applying Title VII requires a

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58. *See Bostock*, 140 S. Ct. at 1767 (Alito, J., dissenting) ("In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity."); *id.* at 1828-29 (Kavanaugh, J., dissenting) ("Seneca Falls was not Stonewall. The women's rights movement was not (and is not) the gay rights movement . . . . So to think that sexual orientation discrimination is just a form of sex discrimination is . . . also a mistake of history and sociology.").

59. *Bostock*, 140 S. Ct. at 1737.

60. *Cf.* Marc Spindelman, Bostock*'s Paradox: Textualism, Legal Justice, and the Constitution*, 69 BUFF. L. REV. 553, 554 (2021) (arguing that *Bostock*'s supposed textualism actually relies on normative principles from constitutional LGBT rights cases).

61. *See* Ricci v. DeStefano, 557 U.S. 557, 592-93 (2009); Johnson v. Transp. Agency, 480 U.S. 616, 640-42 (1987); United Steelworkers of Am. v. Weber, 443 U.S. 193, 200-08 (1979). Indeed, *Bostock* has been seen as a death knell for affirmative action. *See* Cass Sunstein, Opinion, *Gorsuch Paves Way for End of Affirmative Action*, BLOOMBERG L., June 17, 2020, 11:00 AM, https://

theory of discrimination—that is, a theory about when actions taken because of a protected characteristic are discriminatory. Indeed, Gorsuch assumes arguendo in *Bostock* that Title VII only prohibits adverse employment actions that are discriminatory.[62] He then selects one dictionary definition to assert that discriminate means simply "[t]o make a difference in treatment or favor (of one as compared with others),"[63] before paraphrasing this, slightly differently, as meaning to treat someone "worse than others who are similarly situated."[64]

The problem with this method is that discrimination is a normatively contested concept: whether and when classification treats someone worse than others is the subject of intense debate.[65] In particular, there have long been two competing and coexisting traditions within American antidiscrimination law: an antisubordination understanding whereby classifications are discriminatory only insofar as they perpetuate the subordination of marginalized groups, and an anticlassification understanding according to which classification alone is a harm.[66] The difference between these two understandings of discrimination is perhaps clearest in the context of affirmative action, a site of serious debate and contestation under Title VII.[67] On an anticlassification account, such remedies are discriminatory per se, because they classify based on prohibited characteristics. On the other hand, an antisubordination account distinguishes status-conscious remedies from discriminatory acts because the former do not perpetuate the subordination of oppressed groups. Far from it—they seek to remedy historical patterns of discrimination. Regardless of what one thinks about these differ-

news.bloomberglaw.com/us-law-week/opinion-gorsuch-paves-way-for-end-of-affirmative-action-cass-sunstein [https://perma.cc/MG7D-W5QU].

62. *Bostock*, 140 S. Ct. at 1740.

63. *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 745 (2d ed. 1954)).

64. *Id.*

65. *Cf.* Franklin, *supra* note 44, at 159 ("[I]t is impossible to determine when employers are treating an individual of one sex 'worse' than an individual of another without considering the social context and making a normatively inflected judgment.").

66. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1472-73 (2004); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 9-11 (2003).

67. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 581-593 (2009); Johnson v. Transp. Agency, 480 U.S. 616, 640-42 (1987); United Steelworkers of Am. v. Weber, 443 U.S. 193, 208-09 (1979). Affirmative action is also a source of conflict in constitutional law, and the Supreme Court is currently deciding whether to overturn precedents allowing for affirmative action in the context of university admissions. *See* Students for Fair Admissions, Inc. v. Univ. of N.C., 142 S. Ct. 896 (2022) (granting certiorari and consolidating cases). Regardless of what the Supreme Court decides, my point here is simply that affirmative action shows the conflict between two different theories of discrimination: antisubordination and anticlassification.

ing theories of discrimination, the important point is that no amount of textualist inquiry can decide between the two. Dictionaries and linguistic corpora are of no use in resolving this fundamentally normative dispute.

Justice Gorsuch thus treats as self-evident what is actually a contested conception of discrimination.[68] In applying his interpretation of Title VII to the facts of the case, he asks only whether sex has played a role in an employment decision, never inquiring into the social meaning or context of sex-based distinctions.[69] Instead of analyzing the history of anti-LGBT discrimination or its social dynamics in the present, he constructs hypothetical scenarios designed to determine when an employer is or is not taking sex into account.[70] Textualism does not help explain why Gorsuch understands discrimination to consist of mere classification. To understand the opinion as driven by textualism is to accept its claim that the result in *Bostock* follows neutrally from the plain meaning of Title VII, rather than from any substantive value choices or normative commitments. But Gorsuch's anticlassification understanding of discrimination *is* a substantive value choice and a normative commitment, masked as the inevitable result of a purportedly neutral interpretive method.[71]

It is this commitment to an anticlassification account of discrimination that dictates the result in *Bostock*. The majority opinion relies on a logical conclusion: "[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[72] That

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68. Justice Gorsuch also entertains the idea that to discriminate means to disadvantage groups — which comes close to an antisubordinationist understanding — but he rejects this on the basis that Title VII protects individuals, not groups. *See Bostock*, 140 S. Ct. at 1740-41. But antisubordination is an understanding of discrimination whether against individuals or groups. Gorsuch never fully engages with this alternative understanding of what discrimination means.

69. *Cf.* Kreis, *supra* note 16, at 106 ("The formalistic focus on sex as a textual matter obscured the historical regulation of gender roles meant to oppress both women and sexual minorities . . . .").

70. *Bostock*, 140 S. Ct. at 1741, 1746.

71. *Cf.* Franklin, *supra* note 44, at 129-69 (arguing that textualism in *Bostock* does not eliminate normative value choices, but rather obscures them, making them into "shadow decision points").

72. *Bostock*, 140 S. Ct. at 1741; *see also id.* at 1737 ("Sex plays a necessary and undisguisable role in the decision . . . ."); *id.* at 1742 ("[A]n employer who discriminates [on the basis of homosexual or transgender identity] inescapably *intends* to rely on sex in its decisionmaking."); *id.* at 1744 ("When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex."); *id.* at 1747 ("[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex . . . ."); *cf.* Susannah Cohen, Note, *Redefining What It Means to Discriminate Because of Sex:* Bostock*'s Equal Protection Implications*, 122 COLUM. L. REV. 407, 431 (2022) ("The real crux of Justice Gorsuch's opinion is his assertion about the logical inseparability of sexual orientation and gender identity from sex . . . .").

is, distinguishing between homosexual and heterosexual individuals and between transgender and cisgender individuals necessitates consideration of those individuals' sex. However, this fact alone—without further inquiry into the context or social meaning of taking sex into account in particular situations—is sufficient to resolve the case only if one accepts a purely anticlassification understanding of discrimination.

The holding in *Bostock* thus relies on two foundations: first, a logical conclusion that because sexual orientation and transgender identity are both "function[s] of sex,"[73] distinctions based on either factor are necessarily distinctions on the basis of sex; and second, an understanding of discrimination such that any distinction or classification on the basis of a protected characteristic is discriminatory. Justice Gorsuch's commitment to textualism controls the way in which this logical conclusion and normative judgment are expressed, but it does not mandate them. The logical conclusion does not derive from any statutory text, and the understanding of discrimination is a substantive judgment about a contested normative concept.

As I make clear in Part II, seeing past *Bostock*'s invocation of textualism helps us to understand the potentially transformative reach of the decision beyond the text of Title VII. Additionally, seeing how the majority ignored sex-stereotyping arguments clarifies the limits of the opinion's impact and the resources available to build on *Bostock* in advancing LGBT equality under the Constitution.

II. *BOSTOCK* AND THE EQUAL PROTECTION CLAUSE

The Justices who dissented in *Bostock* already raised questions about the opinion's reach beyond Title VII. Justice Kavanaugh seemed to think that if anti-LGBT discrimination qualifies as sex discrimination under Title VII, it would under the Equal Protection Clause too: "All of the Court's cases from *Bowers* to *Romer* to *Lawrence* to *Windsor* to *Obergefell* would have been far easier to analyze and decide if sexual orientation discrimination were just a form of sex discrimination . . . ."[74] Justice Alito, meanwhile, worried that *Bostock* would "exert a gravitational pull in constitutional cases" and end up "equating discrimination because of sexual orientation or gender identity with discrimination because of sex" under the Constitution.[75] The stakes of *Bostock*'s extension into equal-protection doctrine are immense: at a time when the status of LGBT persons under the Equal Protection Clause is in flux, following *Bostock* in equal-protection doctrine

73. Zarda v. Altitude Express, Inc., 883 F.3d 100, 113 (2d Cir. 2018).

74. *Bostock*, 140 S. Ct. at 1833 (Kavanaugh, J., dissenting).

75. *Id.* at 1783 (Alito, J., dissenting).

would make sexual orientation and gender identity de facto suspect classifications. Importantly, any law singling out LGBT people would be subject to intermediate scrutiny. This would provide much stronger protections than antidiscrimination statutes provide alone. Although reaching only state actors, the Equal Protection Clause covers a wider range of domains than individual statutory provisions like Title VII (employment) or Title IX (education). And, unlike a private employer, a state cannot invoke its own religious tenets to justify its actions treating LGBT citizens differently.[76] Finally, extending intermediate scrutiny to anti-LGBT discrimination could help strengthen equal-protection arguments for *Lawrence* and *Obergefell*, due-process precedents on shakier ground after the overturning of *Roe v. Wade*.[77]

Justice Alito's concern is reminiscent of Justice Scalia's warning about same-sex marriage in his *Lawrence* dissent. There, Scalia famously foretold the Court's same-sex marriage decision in *Obergefell* with what, in retrospect, looks like inevitability.[78] But constitutional progress is never inevitable and, with regard to *Bostock*, equal-protection doctrine does not always mirror Title VII doctrine.[79] It is tempting simply to reiterate the key holding of *Bostock*—that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex"[80]—when analyzing anti-LGBT discrimination under the Equal Protection Clause. But since constitutional sex-discrimination law can function differently from Title VII, assessing how *Bostock* affects equal-protection claims requires dealing with constitutional doctrine and precedent in greater detail.

That is what this Part does. I argue that *Bostock*'s holding does indeed apply in the equal-protection context. The Supreme Court has consistently used an anticlassification trigger for intermediate scrutiny. And whether a distinction on the basis of LGBT identity is necessarily a distinction on the basis of sex is precisely the question that the Court asked—and answered—in *Bostock*. The reasoning of that opinion logically means that classifications on the basis of sexual orientation or gender identity merit intermediate scrutiny under the Equal

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76. *Cf. id.* at 1754 (majority opinion) (suggesting that employers might excuse anti-LGBT discrimination under Title VII because of their religious beliefs).

77. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301-02 (2022) (Thomas, J., concurring) (calling for the Court to reconsider these cases); *id.* at 2328-32 (Breyer, Sotomayor & Kagan, JJ., dissenting) (explaining why the majority's opinion imperils these and other precedents).

78. Lawrence v. Texas, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting).

79. *Compare, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (holding that disparate racial impact does not violate equal protection), *with* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that disparate racial impact can create Title VII liability).

80. *Bostock*, 140 S. Ct. at 1741.

Protection Clause. Holding otherwise would require reconsidering either *Bostock* or decades of constitutional sex-discrimination law.

A. Bostock*'s Straightforward Application to Equal-Protection Law*

Bostock has already begun to exert influence beyond Title VII, as courts (and the Department of Justice) have reasoned that it applies to Title IX because of its near-identical statutory language.[81] Since the Equal Protection Clause, of course, does not contain the same textual language as these statutes, the argument for applying *Bostock* under the Constitution might appear less straightforward. However, Title VII and equal-protection doctrine are closely related, and they tend to recursively influence each other.[82] In this context, *Bostock* logically applies under equal protection just as under Title VII because of the opinion's central conclusion that LGBT classifications are sex classifications.

A classification on the basis of sex is all that the Equal Protection Clause requires to trigger intermediate scrutiny. Although the Court has debated when sex distinctions represent invidious and unconstitutional discrimination, and although it has used antisubordination reasoning to guide that inquiry under intermediate scrutiny,[83] the Court has consistently held that simply classifying on the basis of sex merits such scrutiny in the first place.[84] And whether distinguishing between LGB people and heterosexual people or between transgender people and cisgender people is distinguishing on the basis of sex is precisely the

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81. *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020) ("Although *Bostock* interprets Title VII of the Civil Rights Act of 1964, it guides our evaluation of claims under Title IX." (citation omitted)); Memorandum from Pamela S. Karlan, Principal Deputy Assistant Att'y Gen., C.R. Div., U.S. Dep't of Just., to Fed. Agency C.R. Dirs. & Gen. Couns. (Mar. 26, 2021), https://www.justice.gov/crt/page/file/1383026/download [https://perma.cc/JH46-PE7G] ("[L]ike Title VII, Title IX applies to sex discrimination against individuals. The *Bostock* Court focused on this feature of Title VII in reaching its holding."); *see also* Adams *ex rel.* Kasper v. Sch. Bd. of St. John's Cnty., 968 F.3d 1286, 1305 (11th Cir. 2020) (applying *Bostock*'s reasoning in the context of sex discrimination under Title IX in original, superseded panel opinion). *But see* Tennessee v. U.S. Dep't of Educ., No. 21-cv-308, 2022 WL 2791450, at *2-3, 24 (E.D. Tenn. July 15, 2022) (issuing a preliminary injunction against similar guidance from the Department of Education and the EEOC). Notably, the court in *Tennessee v. U.S. Department of Education* concluded that the guidance was procedurally improper under the Administrative Procedure Act and did not contest the substance of the guidance nor make an argument for why *Bostock* would not apply to Title IX. *Id.* at *19-22.

82. *See* Cheryl I. Harris, *Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection*, 2014 U. CHI. LEGAL F. 95, 99, 124; Richard A. Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1354-1355 (2010).

83. *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 73 (2001); United States v. Virginia, 518 U.S. 515, 533-34 (1996).

84. *See, e.g.*, *Virginia*, 518 U.S. at 531-34 (summarizing this doctrine).

question the Court answered in *Bostock*. Although this is clearer if one sees past the *Bostock* majority's insistence that the plain text of Title VII resolved the case, one does not need to share any critique of *Bostock*'s textualism to see that the decision turned on its answer to this logical question. Applying *Bostock* under equal protection does not require any extension of the opinion's reasoning; it merely requires the Court to stand by the conclusion it already reached regarding LGBT classifications. That conclusion leads straightforwardly and necessarily to intermediate scrutiny for any state action that treats individuals differently for being lesbian, gay, bisexual, or transgender.[85]

It is true that equal protection and Title VII doctrine can differ—perhaps most significantly with respect to disparate-impact liability.[86] But generally these differences are because Congress and the Court approach issues differently. Consider the issue of pregnancy discrimination. After holding that a classification based on pregnancy was not a sex-based classification in *Geduldig v. Aiello*, the Court then understood that decision as essentially settling the same question under Title VII in *General Electric Co. v. Gilbert*, in which it reached the same conclusion.[87] The Court believed the question to be the same under both Title VII and the Equal Protection Clause: whether pregnancy classifications discriminate on the basis of sex.[88] Congress soon overrode *Gilbert*, passing the Pregnancy Discrimination Act.[89] Title VII and equal-protection doctrine differ, in

85. *Cf.* Cohen, *supra* note 72, at 442 ("With the same traits at play, logical consistency would require the Court to recognize discrimination on the basis of sexual orientation and gender identity as sex-based discrimination under the Equal Protection Clause as well."). *But see* Kreis, *supra* note 16, at 126 (claiming that *Bostock*'s "formalistic textualism will be insufficient to ensure LGBTQ discrimination claims are . . . analyzed with heightened scrutiny"). Here I speak specifically about LGBT individuals because of the language used by the majority opinion in *Bostock*, though the opinion may have significant implications for other LGBTQ communities more broadly.

86. Under the Constitution, disparate impact without discriminatory intent does not violate equal protection, but under Title VII, disparate impact alone can create liability. *Compare* Washington v. Davis, 426 U.S. 229, 245-46 (1976) (holding that disparate racial impact does not violate equal protection), *with* Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (holding that disparate racial impact can create Title VII liability).

87. *See* Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974); Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 136-40 (1976).

88. *See Gilbert*, 429 U.S. at 133-36; Harris, *supra* note 82, at 104-05.

89. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e). In the years since the Pregnancy Discrimination Act was passed, the Court has significantly cut back on *Geduldig*, recognizing pregnancy classifications as sex classifications in equal-protection cases. *See* Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L.J. 167, 202-11 (2020). This suggests that, as a matter of practice, these two bodies of law influence each other and tend to converge over time, even when initially differentiated

other words, because Congress and the Court answered the same question—whether pregnancy discrimination is a form of sex discrimination—differently. The Court came to one conclusion in *Geduldig* and *Gilbert*, and Congress came to another in the Pregnancy Discrimination Act. Today, with regard to anti-LGBT discrimination, it is the Court itself that has already spoken. There may be flexibility and normative judgment inherent in determining what constitutes a sex-based classification,[90] but the Court already made that judgment for LGBT classifications in *Bostock*.

B. Potential Counterarguments

There are several potential arguments for limiting *Bostock* to Title VII and similar statutory provisions, but none are persuasive. First, the textualist emphasis of *Bostock* might seem to provide a reason to limit the opinion to statutes with comparable language.[91] As the analysis in Part I made clear, however, the key holding of *Bostock* stems from a logical conclusion that taking sexual orientation or gender identity into account necessarily means taking sex into account. This is not a conclusion contingent on the particular text of Title VII. And it is not dicta either. It is reasoning necessary to the holding in the case—logically prior to and necessary for the Court's interpretation of Title VII. To be clear, one does not need to share any skepticism of the opinion's textualism to see that the key question in the case was whether LGBT distinctions are sex distinctions. And there is no principled basis for claiming that distinctions on the basis of LGBT identity are *inevitably* distinctions on the basis of sex in one context and not in another.

Related to this textualism argument, one might also suggest that the majority opinion in *Bostock* depended on Title VII's but-for causation standard.[92] Perhaps, then, one could argue that what defines a sex-based distinction in equal-

by a particular decision or amendment. However, the Court seems to have recently changed course and reaffirmed *Geduldig* in *Dobbs v. Jackson Women's Health Organization*. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245-46 (2022) (citing *Geduldig*).

90. *See* Cary Franklin, *Biological Warfare: Constitutional Conflict over "Inherent Differences" Between the Sexes*, 2017 SUP. CT. REV. 169, 182-83 ("[T]he Court exercises considerable judgment in determining what counts as a classification for purposes of equal protection law.").

91. *Cf.* Brandt *ex rel.* Brandt v. Rutledge, No. 21-2875, 2022 WL 16957734, at *1 n.1 (8th Cir. Nov. 16, 2022) (Stras, J., dissenting from denial of rehearing en banc) (expressing skepticism that *Bostock* applies to equal protection in part because the text of Title VII and the Equal Protection Clause "is not similar in any way"); Kreis, *supra* note 16, at 106 & n.13 (noting that *Bostock* is having a "ripple effect" with statutes where its textualist method can apply, but suggesting that "textualism cannot do the heavy lifting" under the Equal Protection Clause).

92. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739-40, 1742 (2020).

protection law differs from the but-for causation implied when statutes bar discrimination "because of sex." The problem here is that for decades the Supreme Court has described laws with sex distinctions in terms indistinguishable from language the Court has understood to embody a but-for causation standard. The Court has described state actions garnering intermediate scrutiny as "legislation that differentiates on the basis of gender,"[93] "gender-based distinction,"[94] "gender-based classifications,"[95] "gender-based differentiation,"[96] "gender-based government action,"[97] "discrimination on the basis of gender,"[98] "classification based on gender,"[99] "classifications based on sex,"[100] and "different treatment . . . on the basis of . . . sex."[101] It is hard to see how this language embodies a different causal standard than "because of sex." After all, all three opinions in *Bostock* used "on the basis of sex" interchangeably with "because of sex,"[102] and Justice Alito in dissent understood the issue of the case to be whether "[c]lassifying people by sexual orientation is different than classifying them by sex."[103]

In fact, there are signs that the Court understands a but-for causation question as a default feature of any antidiscrimination inquiry. The Court has consistently treated but-for causation as a default standard across statutory antidiscrimination law, even without "because of" language like in Title VII.[104] And importantly, in a recent antidiscrimination case involving 42 U.S.C. § 1981, the Court interpreted its own use of phrases including "on the basis of" and "because of" in prior opinions—the same language the Court has used in constitutional

93. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1690 (2017).

94. *Id.* at 1700; Califano v. Goldfarb, 430 U.S. 199, 202 (1977); Craig v. Boren, 429 U.S. 190, 200 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 (1975); *see also* Califano v. Westcott, 443 U.S. 76, 83 (1979) (using the term "gender distinction").

95. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 135 (1994); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 721 (1982); *Weinberger*, 420 U.S. at 653.

96. *Weinberger*, 420 U.S. at 645.

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

98. *J.E.B.*, 511 U.S. at 129; *see also Miss. Univ. for Women*, 458 U.S. at 723 (describing a policy that "discriminates . . . on the basis of gender"); *Califano*, 443 U.S. at 85 (holding that the law in question "discriminate[s] on the basis of gender").

99. *Virginia*, 518 U.S. at 532.

100. Schlesinger v. Ballard, 419 U.S. 498, 507 (1975); *see also Virginia*, 518 U.S. at 533 (describing "sex classifications").

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

102. *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1743, 1753 (2020); *id.* at 1757, 1759 (Alito, J., dissenting); *id.* at 1834 (Kavanaugh, J., dissenting).

103. *Id.* at 1833 (Alito, J., dissenting) (quoting Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 363 (7th Cir. 2017) (Sykes, J., dissenting)).

104. *See* Eyer, *supra* note 13, at 1643-45, 1651.

sex-discrimination cases—as assuming a but-for causation approach.[105] Moreover, in constitutional sex-discrimination cases, the Court has reasoned counterfactually in ways that appear undeniably to assume a but-for causation standard. So in *Weinberger v. Wiesenfeld*, a case concerning sex discrimination in social-security benefits, the Court reasoned, "If [Stephen Wiesenfeld] had been a woman, he would have received the same amount [of social-security benefits] as his son as long as he was not working";[106] in *Frontiero v. Richardson*, a case involving military benefits to dependent spouses, the Court emphasized that benefits "would automatically have been granted with respect to the wife of a male member of the uniformed services," but not to the husband of a female member;[107] and in *Orr v. Orr*, while invalidating a sex-based statutory scheme for alimony, the Court summarized: "Mr. Orr bears a burden he would not bear were he female."[108] The counterfactual reasoning in these constitutional precedents reflects the same but-for approach that the *Bostock* majority employed under Title VII.[109]

The majority opinion in *Bostock* also places great weight on the fact that Title VII protects individuals, not groups.[110] Some might argue that the Equal Protection Clause does not share the statute's focus on individuals. That doctrinal ship sailed long ago, however. The Equal Protection Clause has not been understood to be implicated only when an entire group or class is disadvantaged. Rather, it protects individuals against discrimination on the basis of their membership in a class or sharing of a group characteristic.[111] The Court has stated that equal protection is "guaranteed to the individual," and it is one of the "personal

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105. *See* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1016-17 (2020); *see also* Eyer, *supra* note 13, at 1651-52 (emphasizing this feature of *Comcast* and suggesting that *Comcast* supports applying a but-for inquiry under equal protection).

106. 420 U.S. 636, 640-41 (1975).

107. 411 U.S. 677, 680 (1973).

108. 440 U.S. 268, 273 (1979); *see also* Eyer, *supra* note 13, at 1651-53 (arguing that the same but-for causation standard should govern constitutional and statutory antidiscrimination law, and finding support for this in *Comcast*).

109. *Cf. Comcast*, 140 S. Ct. at 1015 ("This focus [on counterfactual reasoning] fits naturally with the ordinary rule that a plaintiff must prove but-for causation.").

110. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1740-41 (2020).

111. Almost fifty years ago, Owen M. Fiss identified (and argued against) an individualistic antidiscrimination principle as the controlling interpretation of the Equal Protection Clause. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107 (1976). As Fiss noted, class-based considerations play a role in this dominant approach, but the doctrinal focus is on how individuals have been treated. *See id.* at 123, 127; *see also* Siegel, *supra* note 66, at 1473 (identifying a "commitment to protect individuals rather than groups" in "our equal protection tradition").

rights" protected by the Fourteenth Amendment.[112] To be sure, antisubordination and group-based reasoning do come into play when evaluating policies under heightened scrutiny.[113] But for determining when a classification has been made, all that equal-protection doctrine requires is that an individual be treated differently because of a protected characteristic. That is why the counterfactual reasoning quoted above from *Weinberger*, *Frontiero*, and *Orr* shows a concern with whether an individual has faced a burden because of sex. Constitutional sex-discrimination cases ask whether an individual has been treated differently because of sex—just what the Court asked in *Bostock*.

Finally, courts could note that they do not parse opinions like statutes, and they could abandon the literal language of earlier sex-discrimination opinions in favor of a more limited understanding of their holdings. All the laws and policies in the canonical sex-discrimination cases under the Equal Protection Clause, one might argue, dealt with laws and policies that facially treated men differently from women, and that is what the Court always meant in describing classification on the basis of sex. At first glance, there is some language to support this contention in prior opinions.[114] Ultimately, though, this argument merely repackages old errors. First, *Bostock* made clear that LGBT classifications *do* treat men and women differently: that is what it means when someone is treated differently because of his or her sex. The objection, then, seems to be that LGBT classifications do not treat all women or all men differently. However, many sex-based classifications do not draw a line between all men and all women. They may distinguish, for example, between widows and widowers,[115] or between mothers and fathers.[116] Additionally, facial classification does not require explicit reference to men or women. A law that favors those who adhere to traditional gender roles would classify on the basis of sex, as would a hypothetical child-custody law designed to keep children and parents of the same sex together after

112. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*."); J.E.B. v. Alabama, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) (explaining that the Fourteenth Amendment is concerned with "rights of individuals, not groups"); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978) (opinion of Powell, J.) (similar).

113. For example, in the sex-discrimination context, see *United States v. Virginia*, 518 U.S. 515, 533-34 (1996).

114. *See id.* at 532 (subjecting to intermediate scrutiny "official action that closes a door or denies opportunity to women (or to men)"); Craig v. Boren, 429 U.S. 190, 197 (1976) (describing the level of scrutiny for "statutory classifications that distinguish between males and females").

115. *See* Califano v. Westcott, 443 U.S. 76, 84 (1979); Weinberger v. Wiesenfeld, 420 U.S. 636, 637-39 (1975).

116. *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017).

a divorce. In short, there are no persuasive grounds for keeping *Bostock* from applying under the Equal Protection Clause. Restricting it in that way would be inconsistent with the Court's constitutional sex-discrimination jurisprudence.

C. *The Difference* Bostock *Would Make*

Applying *Bostock* under equal protection would essentially make sexual orientation and gender identity suspect classifications, and it is worth emphasizing the magnitude of this constitutional development. Not all circuits have extended heightened scrutiny to LGBT classifications. And among other things, such heightened scrutiny would help protect *Lawrence* and *Obergefell* now that the Supreme Court has called into question the due-process reasoning in those precedents with its decision in *Dobbs v. Jackson Women's Health Organization*. This development alone, however, will not resolve constitutional conflict over many LGBT-equality claims.

As seen earlier, Justice Kavanaugh has suggested that the Court's LGB-rights cases would have been much easier to decide if anti-LGBT discrimination had been understood as a form of sex discrimination.[117] But triggering intermediate scrutiny does not necessarily resolve constitutional disputes. While discrimination on the basis of a protected characteristic is generally enough to establish liability under Title VII, equal-protection doctrine allows state actors to justify disparate treatment.[118] Intermediate scrutiny may often be sufficient to invalidate laws, but especially on normatively contested issues of gender, it leaves some room for state actors to justify sex-based distinctions. For example, although state actors cannot justify sex classifications on the basis of sex stereotypes, they can *sometimes* justify them on the basis of actual differences between the sexes.[119] Intermediate scrutiny thus often requires engaging with the social meaning and context of sex classifications—territory avoided by *Bostock*. *Bostock*'s anticlassification approach helps pull the intermediate-scrutiny trigger, but it cannot answer the questions generated by applying such scrutiny.

This is where the sex-stereotyping arguments *Bostock* left untouched can be a valuable resource, complementing that decision's anticlassification approach

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117. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1833 (2020) (Kavanaugh, J., dissenting).

118. Title VII permits employers to justify apparently discriminatory action within a narrow range of *bona fide* occupational qualifications. *See* 42 U.S.C. § 2000e-2(e) (2018).

119. *See Virginia*, 518 U.S. at 533-34.

with antisubordination reasoning.[120] If courts accept the *Bostock* dissenters' unsupported assertions that anti-LGBT discrimination has nothing to do with sex stereotypes or sexism, they will have much greater latitude to uphold anti-LGBT laws under intermediate scrutiny. This would allow courts to affirm *Bostock*'s relevance under the Equal Protection Clause while seriously curtailing its impact. By contrast, pre-*Bostock* arguments that do link anti-LGBT discrimination to sex stereotypes and the subordination of women would help invalidate many laws that classify on the basis of sexual orientation or gender identity. Indeed, if one accepts that anti-LGBT discrimination is, at base, a form of sex stereotyping, then anti-LGBT state action will generally be rooted in such stereotypes. The combination of using *Bostock* in order to demonstrate sex-classification and sex-stereotype reasoning to invalidate actions under the resulting intermediate scrutiny is a potentially powerful form of constitutional argument, and it is one that would represent a significant development for LGBT equality under the Constitution.

However, this will require courts to see past invocations of biological difference and to recognize stereotypes. In the next Part, I trace these constitutional developments in more detail by examining litigation over recent laws and policies targeting transgender youth — some of the first disputes to test the reach and impact of *Bostock*. These examples show more concretely how *Bostock* might apply under the Equal Protection Clause and demonstrate the utility and limits of *Bostock*, as well as the continuing value of sex-stereotype arguments amid claims based on physical differences and "biological" sex.

III. PROTECTING TRANSGENDER YOUTH AFTER *BOSTOCK*

Transgender youth have become one of the main focal points of disputes over LGBTQ rights. In addition to the continuing conflict over school policies regarding sex-specific spaces, a large number of states in recent years have considered and passed bills that target transgender minors in various ways.[121] In this Part, I

120. Sex-stereotype reasoning is not necessarily antisubordination reasoning, and it does not sort neatly onto either side of the distinction between antisubordination and anticlassification theories of discrimination. For example, one could reason about sex stereotyping in order to determine whether a distinction classifies on the basis of sex, without regard to whether that classification subordinates a group or individual. However, sex-stereotype analysis can often lead to consideration of individual and group-based harms resulting from enforced stereotypes. *See, e.g.*, *supra* Section I.A; *infra* Section III.B. For this reason, combining sex-stereotype reasoning with *Bostock* would add at least some antisubordination reasoning to that decision's approach.

121. *See, e.g.*, Priya Krishnakumar, *This Record-Breaking Year for Anti-Transgender Legislation Would Affect Minors the Most*, CNN (Apr. 15, 2021, 9:46 AM ET), https://www.cnn.com/2021/04/15

examine litigation challenging antitransgender policies and laws as examples of how *Bostock* is already affecting equal-protection claims, and I explore how the sex-stereotyping arguments that *Bostock* ignored figure into this litigation. I then develop a fuller account of how these laws and policies rely on and entrench sex stereotyping. Finally, I refute defenses of these laws based in biology.

My analysis is, to some extent, particular to the specific cases discussed here, but it also offers broader lessons for transgender equal-protection claims on the horizon. As I show in Section III.A, federal district and circuit courts are tentatively beginning to use *Bostock* to subject antitransgender discrimination to heightened scrutiny. The courts are not fully relying on *Bostock*'s rationale, however, but including it among various alternative grounds for heightened scrutiny. Although this might suggest that *Bostock* is not needed or that its constitutional impact is insignificant, I argue that the reasoning of *Bostock*—distinctions based on sexual orientation or gender identity are definitionally based on sex—is especially important for courts to develop. In a fast-evolving area of the law concerning normatively contested issues, it is the one rationale that the Supreme Court has endorsed. It offers a way of advancing transgender-equality claims in all federal courts.

As Section III.B demonstrates, once courts reason that intermediate scrutiny is warranted, it proves to be a powerful tool even absent sex-stereotyping arguments. Courts have been able to invalidate antitransgender policies and laws for not being substantially related to advancing the purposes they avow without having to hold that the policies are based in stereotypes. Still, some courts have recognized and alluded to sex stereotyping in these cases, beginning to engage in a form of reasoning that I argue has unique value. Sex-stereotype reasoning can enable courts to register and respond to the underlying reasons why state laws are targeting transgender minors, and it offers a way of countering the harmful expressive effects of these laws. Even if not persuasive to all judges, this reasoning is important to advance and develop in and out of courts—regardless of whether courts arrive at intermediate scrutiny through *Bostock*.[122]

/politics/anti-transgender-legislation-2021/index.html [https://perma.cc/KD8J-SST3]; Dan Avery, *State Anti-Transgender Bills Represent Coordinated Attack, Advocates Say*, NBC NEWS (Feb. 17, 2021, 1:32 PM EST), https://www.nbcnews.com/feature/nbc-out/state-anti-transgender-bills-represent-coordinated-attack-advocates-say-n1258124 [https://perma.cc/X73V-UJ5D]. For a discussion on the increase in policies targeting transgender minors as part of a broader focus among opponents of LGBTQ rights on LGBTQ youth, see Michael J. Higdon, *LGBTQ Youth and the Promise of the Kennedy Quartet*, 43 CARDOZO L. REV. 2385, 2393-2403 (2022).

122. They can also potentially be useful to support arguments for animus under rational-basis review. *See* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 908-10 (2012) (discussing animus as stereotype-based fear).

In Section III.C, however, I suggest that courts have not yet articulated a fundamental stereotype at the heart of recent state action targeting transgender minors: that of the confused transgender child. With particular focus on Arkansas's law banning gender-affirming healthcare for minors, I then show in Sections III.D and III.E that these laws and policies rest on the stereotype that transgender minors are confused or merely going through a temporary phase while their cisgender peers are not. Based on this stereotype, the laws and policies selectively doubt only the gender identity of transgender youths and decisions to affirm and realize only that identity. As I explain, these forms of state action attempt to compel conformity with normatively prescribed sex roles.

The response to constitutional arguments in many of these cases has been an appeal to biology and allegedly inherent physical differences between the sexes, replicating a familiar dynamic.[123] Thus, after elaborating the sex-stereotyping arguments against these laws, I briefly refute defenses of them sounding in biology in Section III.F. Advocates pressing these justifications for antitransgender policies have misconceived sex-discrimination law. The phrases "biological sex" and "inherent differences between the sexes" are not constitutional shibboleths whose mere utterance immunizes sex discrimination from scrutiny. And, as I show, biology and inherent sexual differences do not actually explain these laws and policies. By contrast, sex-based stereotypes do.

A. Bostock *and the Attack on Transgender Youth*

As queer and transgender young people have started coming out earlier in life and have gained growing visibility,[124] they have increasingly become the target of state legislation. In the last several years, state legislatures have attempted to regulate the gender identity of minors in novel ways, both at school and beyond.[125] In addition to ongoing disputes over sex-segregated school spaces, two forms of legislation have proven especially popular among numerous states: laws

123. *See* Franklin, *supra* note 90, at 169-70. For the prevalence of arguments from biology deployed against transgender inclusion, especially in the context of restroom access, see Shannon Price Minter, *"Déjà Vu All Over Again": The Recourse to Biology by Opponents of Transgender Equality*, 95 N.C. L. Rev. 1161, 1186-1203 (2017).

124. *See* Ilan H. Meyer, *Coming out Milestones*, Williams Inst. 1 (Oct. 11, 2018), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Coming-Out-Milestones-Oct-2018.pdf [https://perma.cc/EQR5-GN65].

125. *See, e.g.*, Meredith Deliso, *'Catastrophic' Number of State Bills Target Transgender Youth, Advocates Say*, ABC News (Mar. 7, 2021, 9:09 AM), https://abcnews.go.com/US/story?id=76138305 [https://perma.cc/K3BV-94VA]; Li Cohen, *A Surge in Legislation Targeting Trans Youth "Could Come at the Literal Cost of Lives," Advocates Warn*, CBS News (Apr. 10, 2021, 7:11 AM), https://www.cbsnews.com/news/transgender-rights-legislation-surge-youth-mental-health [https://perma.cc/LF45-T5LJ].

restricting transgender minors' participation on sports teams that align with their gender identity, and laws prohibiting transgender minors from accessing gender-affirming medical care. The bans seek to codify highly restrictive definitions of "biological" sex that are designed precisely so that transgender minors cannot be recognized under the law as anything but their sex assigned at birth.[126] This Section analyzes the (as-of-yet) successful legal challenges to these laws and policies, focusing on how courts have utilized *Bostock* so far, and what kinds of reasoning they have used in invalidating them under intermediate scrutiny.[127]

Although they have appeared in a variety of states, these bills are the result of a coordinated effort.[128] In 2020, eighteen states considered bills that would ban transgender student-athletes from participating on sports teams that aligned with their gender identity. Only one passed—in Idaho—and it was

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126. *See* ARK. CODE ANN. § 20-9-1501(1) (West 2021) (defining sex by reference to "naturally occurring" hormones and characteristics at birth); IDAHO CODE § 33-6203(3) (2022) (determining sex by "reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels"); W. VA. CODE § 18-2-25d(b) (West 2021) (defining "biological sex" by reference to characteristics at birth). On "biological sex" as a reactionary term without scientific support, see Jessica A. Clarke, *Sex Assigned at Birth*, 122 COLUM. L. REV. 1821, 1851-59 (2022). On the problems with definitions of biological sex in specific transgender sports bills, see Shayna Medley, *[Mis]interpreting Title IX: How Opponents of Transgender Equality Are Twisting the Meaning of Sex Discrimination in School Sports*, 45 N.Y.U. REV. L. & SOC. CHANGE 673, 685-87 (2022).

127. In two of these cases, courts recently published decisions too late to be incorporated into this Note prior to publication. The Eleventh Circuit, sitting en banc, reversed the panel decision in *Adams ex rel. Kasper v. School Board of St. John's County*. *See* Adams *ex rel.* Kasper v. Sch. Bd. of St. John's Cnty., No. 18-13592, 2022 WL 18003879, at *1, *3, *19 (11th Cir. Dec. 30, 2022) (en banc). And the district court that preliminarily enjoined West Virginia's transgender sports ban subsequently dissolved the injunction and granted summary judgment to the defendants. *See* B.P.J. v. W. Va. State Bd. of Educ., No. 21-cv-00316, 2023 WL 111875, at *10 (S.D. W. Va. Jan. 5, 2023). Neither of these decisions seriously calls into question the application of *Bostock* to equal-protection law. Both decisions, however, accept biological justifications for antitransgender policies, *see Adams*, 2022 WL 18003879, at *12; *B.P.J.*, 2023 WL 111875, at *7-8, and they demonstrate the continuing conflict between sex-stereotyping arguments and claims on biology as antitransgender policies are increasingly subjected to intermediate scrutiny.

128. *See* Sarah Posner, *The Christian Nationalist Boot Camp Pushing Anti-Trans Laws Across America*, INSIDER (Sept. 21, 2022, 9:13 AM), https://www.insider.com/christian-nationalist-trans-statesmen-academy-alabama-ohio-missouri-laws-2022-8 [https://perma.cc/83P8-EPRK]; Alexa Sussmane, *The Far-Right Push to Outlaw Gender-Affirming Treatment for Minors*, 30 TUL. J.L. & SEXUALITY 91, 107-10 (2021); Sam Levin, *How Trans Children Became 'A Political Football' for the Republican Party*, GUARDIAN (Mar. 23, 2021, 6:00 AM EDT), https://www.theguardian.com/us-news/2021/mar/23/anti-trans-bills-us-transgender-youth-sports [https://perma.cc/Q2GN-AZUC].

promptly met with a preliminary injunction.[129] Idaho's law also contains a sex-verification procedure, whereby any girl whose femininity is challenged must submit to an invasive examination to verify her sex.[130] In 2021, more states considered similar bills, and eight passed them into law.[131] Less than two months into 2022, South Dakota became the first state to enact such a law that year, followed by eight other states.[132] Some of these laws only ban female transgender athletes from female teams,[133] while others ban all transgender athletes from their gender's teams.[134] Still others are less clear on this point.[135] So far, legal challenges have resulted in two more preliminary injunctions in federal courts in West Virginia and Indiana.[136]

Meanwhile, in 2020, fifteen states considered bills that would ban gender-affirming healthcare for minors.[137] None passed. In 2021, however, twenty-one

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129. The preliminary injunction was then appealed to the Ninth Circuit, which has remanded the case in light of potential mootness. *See* Hecox v. Little, 479 F. Supp. 3d 930, 989 (D. Idaho 2020) (issuing injunction); Hecox v. Little, Nos. 20-35813 & 20-35815, 2021 U.S. App. LEXIS 18903, at *6 (9th Cir. June 24, 2021) (remanding the case to the district court).

130. *See* IDAHO CODE § 33-6203(3) (2022). On the racist history (and present) of sex testing and gender policing in women's athletics, see Medley, *supra* note 126, at 682-85.

131. *See LGBTQ Youth: Bans on Transgender Youth Participation in Sports*, *supra* note 6, at 7.

132. *See* Jo Yurcaba, *South Dakota Governor Signs 2022's First Trans Athlete Ban into Law*, NBC NEWS (Feb. 3, 2022, 7:07 PM EST), https://www.nbcnews.com/nbc-out/out-politics-and-policy/south-dakota-governor-signs-2022s-first-trans-athlete-ban-law-rcna14725 [https://perma.cc/KTZ6-7X63]; *LGBTQ Youth: Bans on Transgender Youth Participation in Sports*, *supra* note 6, at 7.

133. *See* KY. REV. STAT. ANN. § 164.2813 (West 2022); S.B. 44, 2022 Leg., Reg. Sess. (La. 2022).

134. *See* ALA. CODE § 16-1-52 (2021); S.C. CODE ANN. § 59-1-500 (2022); TENN. CODE ANN. § 49-6-310 (2022); TEX. EDUC. CODE ANN. § 33.0834 (West 2022).

135. *See* S.B. 1165, 55th Leg., 2d Reg. Sess. (Ariz. 2022); ARK. CODE ANN. § 16-130-104 (2021); FLA. STAT. § 1006.205 (2021); IDAHO CODE § 33-6203 (2020); IND. CODE § 20-33-13-4 (2022); IOWA CODE § 261I.2 (2022); MISS. CODE ANN. § 37-97-1 (2021); MONT. CODE ANN. § 20-7-1306 (2021); OKLA. STAT. tit. 70, § 27-106 (2022); S.D. CODIFIED LAWS § 13-67-1 (2022); UTAH CODE ANN. §§ 53G-6-901 to -902 (West 2022); W. VA. CODE § 18-2-25d (West 2021). These laws only explicitly bar transgender female athletes from female teams, but they also require that sports be categorized as male, female, or coed, and define male teams by reference to sex at birth.

136. *See* A.M. by E.M. v. Indianapolis Pub. Schs., No. 22-cv-01075, 2022 WL 2951430 (S.D. Ind. July 26, 2022); B.P.J. v. W. Va. State Bd. of Educ., 550 F. Supp. 3d 347 (S.D. W. Va. 2021). In addition, two state courts have enjoined similar laws on state constitutional grounds. *See* Roe v. Utah High Sch. Activities Ass'n, No. 220903262, 2022 WL 3907182 at *6-7 (Utah Dist. Ct. Aug. 19, 2022) (order granting preliminary injunction); Barrett v. State, No. DV-21-581B, slip op. at 10 (Mont. Dist. Ct. Sept. 14, 2022) (order on cross-motions for summary judgment).

137. *See Past Legislation Affecting LGBT Rights Across the Country 2020*, *supra* note 3.

states considered such bills, and one became law in Arkansas.[138] Arkansas's law is called the Save Adolescents From Experimentation (SAFE) Act. The bill contained numerous legislative findings about the potential harms of gender-affirming healthcare (while omitting mention of the medical consensus approving them), and the statute prohibits doctors from providing these treatments for the purpose of transition.[139] The Act allows the very same treatments, however, to be administered to those it calls "persons born with a medically verifiable disorder of sex development," within which category the Act means to include intersex individuals.[140] A slightly narrower ban also passed in Tennessee, in 2021.[141] And early in 2022, Texas Governor Greg Abbott bypassed legislation by instructing state agencies to treat gender-affirming care as child abuse under existing state law.[142] This triggered reporting requirements backed by criminal penalties for teachers, nurses, and doctors. It also threatened parents with investigation by Texas' Department of Family and Protective Services. Alabama and Arizona then followed, passing their own gender-affirming healthcare bans in 2022.[143] Like the Arkansas law, the laws in Alabama, Arizona, and Tennessee prohibit treatments only when used in gender-affirming care, allowing them for other purposes.[144] The Arkansas and Alabama laws have both been met with preliminary

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138. *See* Kerith J. Conron, Kathryn O'Neill & Luis A. Vasquez, *Prohibiting Gender-Affirming Medical Care for Youth*, WILLIAMS INST. 1 (Apr. 2021), https://escholarship.org/content/qt040032xd/qt040032xd.pdf [https://perma.cc/2WBF-PSK6]; ARK. CODE ANN. § 20-9-1501 to -1504 (West 2021).

139. ARK. CODE ANN. § 20-9-1502(a) (West 2021); *see* H.B. 1570, 93d Gen. Assemb., Reg. Sess. § 2 (Ark. 2021). For an overview of gender-affirming medical treatments and their importance to many transgender minors, see Note, *Outlawing Trans Youth: State Legislatures and the Battle over Gender Affirmative Healthcare for Minors*, 134 HARV. L. REV. 2163, 2165-72 (2021).

140. *See* ARK. CODE ANN. § 20-9-1501(6)(B)(i) (West 2021); Note, *supra* note 139, at 2173-74. For similar provisions, see S.B. 184, 2022 Leg., Reg. Sess. § 4(b) (Ala. 2022); and S.B. 1138, 55th Leg., 2d Reg. Sess. § B (Ariz. 2022).

141. TENN. CODE ANN. § 63-1-169 (West 2021).

142. *See* Julian Mark, *Texas Governor Directs State Agencies to Investigate Gender-Affirming Care for Trans Youths as 'Child Abuse*,' WASH. POST (Feb. 23, 2022), https://www.washingtonpost.com/nation/2022/02/23/greg-abbott-gender-affirming-care-child-abuse-directive [https://perma.cc/5W2J-JYRV].

143. *See Healthcare Laws and Policies: Bans on Best Practice Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT (Apr. 9, 2022), https://www.lgbtmap.org/img/maps/citations-youth-medical-care-bans.pdf [https://perma.cc/UBS8-BQMJ]. On the number of youths potentially affected by these laws, see Kerith J. Conron, Kathryn K. O'Neill, Luis A. Vasquez & Christy Mallory, *Prohibiting Gender-Affirming Medical Care for Youth*, WILLIAMS INST. 1 (Mar. 2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Mar-2022.pdf [https://perma.cc/ND6A-RKV6].

144. *See* S.B. 184, 2022 Leg., Reg. Sess. § 4(b) (Ala. 2022); S.B. 1138, 55th Leg., 2d Reg. Sess. § B (Ariz. 2022); TENN. CODE ANN. § 63-1-169(c) (West 2021).

injunctions.[145] An Eighth Circuit panel recently affirmed the injunction against Arkansas's SAFE Act (a decision the entire Circuit then declined to rehear en banc),[146] while Alabama is currently appealing the injunction against that state's law. Notably, the fervor behind this legislative attack has also spilled over into extralegal action, including harassment and threats of violence against doctors and hospitals offering gender-affirming care.[147]

In addition to this flurry of state legislation, litigation over school policies regarding transgender students' access to sex-specific spaces has continued after *Bostock*. Two cases concerning school restrooms in the Fourth and Eleventh Circuits—*Grimm v. Gloucester County School Board* and *Adams v. School Board of St. John's County*—began before *Bostock* was decided but resulted in decisions after *Bostock*. In both cases, transgender male students successfully challenged their schools' refusal to let them use male restrooms. In *Grimm*, a Fourth Circuit panel held that a school's restroom policy prohibiting transgender students from using the restroom that aligned with their gender identity violated equal protection and Title IX.[148] In *Adams*, an Eleventh Circuit panel initially issued an opinion affirming an injunction against a similar school-bathroom policy on Title IX and equal-protection grounds, but the court then issued a subsequent opinion vacating and superseding the initial one. The superseding opinion reached the same ruling but only on the basis of equal protection.[149] The Eleventh Circuit has decided to review that subsequent decision en banc.[150]

This overview gives some sense of the surge in litigation over transgender minors in the two years after *Bostock*. Courts in these cases are citing *Bostock*, but

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145. Brandt v. Rutledge, 551 F. Supp. 3d 882, 894 (E.D. Ark. 2021); Eknes-Tucker v. Marshall, No. 22-CV-184, 2022 WL 1521889, at *13 (M.D. Ala. May 13, 2022).

146. Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661, 672 (8th Cir. 2022), *reh'g en banc denied*, No. 21-2875, 2022 WL 16957734 (8th Cir. Nov. 16, 2022).

147. *See* Brandy Zadrozny & Ben Collins, *Doctors Providing Trans Care Are Under Increasing Threat from Far-Right Harassment Campaigns*, NBC NEWS (Oct. 7, 2022, 9:02 AM EDT), https://www.nbcnews.com/tech/internet/far-right-influencers-are-targeting-individual-doctors-rcna49701 [https://perma.cc/UD7F-SQJK]; Melissa Gira Grant, *Doxxed Doctors, Library Bomb Threats, and Attacks on Pride Centers: A Week in Escalating Anti-LGBTQ Violence*, NEW REPUBLIC (Sept. 28, 2022), https://newrepublic.com/article/167882/rising-right-wing-lgbtq-threats-violence-tiktok-tucker-carlson [https://perma.cc/6PM5-ACQY]; Brandy Zadrozny, Ben Collins & Tom Winter, *FBI Charges Massachusetts Woman with Boston Children's Hospital Bomb Threat*, NBC NEWS (Sept. 15, 2022, 10:23 PM EDT), https://www.nbcnews.com/tech/internet/fbi-charges-massachusetts-woman-boston-childrens-hospital-bomb-threat-rcna47973 [https://perma.cc/B7E6-58ZD].

148. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 620 (4th Cir. 2020), *reh'g denied*, 976 F.3d 399 (4th Cir. 2020) (mem.), *cert. denied*, 141 S. Ct. 2878 (2021) (mem.).

149. *See* Adams *ex rel.* Kasper v. Sch. Bd. of St. John's Cnty., 968 F.3d 1286, 1295, 1311 (11th Cir. 2020), *vacated and superseded*, 3 F.4th 1299, 1320 (11th Cir. 2021).

150. Adams v. Sch. Bd. of St. Johns Cnty., 9 F.4th 1369 (11th Cir. 2021) (mem.).

they are relying on it in the equal-protection context only tentatively. In *Grimm*, the Fourth Circuit relied on *Bostock* to hold that the school's policy violated Title IX,[151] but the court did not cite the case for the court's holding that intermediate scrutiny was required for its equal-protection analysis. Instead, the panel's constitutional analysis relied on the fact that the challenged policy classified based on the sex listed on a student's birth certificate;[152] on the rationale of *Glenn v. Brumby*, an earlier Eleventh Circuit case holding that discrimination on the basis of gender nonconformity is sex discrimination;[153] and on its holding that transgender people constitute a quasi-protected class.[154] In *Adams*, the Eleventh Circuit panel published an initial opinion that similarly used *Bostock* in its Title IX analysis while relying on *Glenn v. Brumby* (governing precedent in that circuit) for its Equal Protection Clause analysis.[155] Still, the court understood *Bostock* as "confirming" the equal-protection analysis.[156] By contrast, in a subsequent, superseding opinion, the panel rested its decision only on equal protection and did not cite *Bostock*.[157] In neither of these bathroom cases, then, have the courts used *Bostock* robustly in equal-protection analysis, though the *Adams* panel initially suggested the precedent's constitutional relevance.

Decisions invalidating transgender sports bans have relied only tentatively on *Bostock* under equal protection. In *Hecox v. Little*, the federal district court that enjoined Idaho's law banning transgender women and girls from female sports teams used *Bostock* in a manner similar to that used by the Eleventh Circuit in the initial *Adams* opinion.[158] Judge Nye, who authored the opinion, decided in his equal-protection analysis that heightened scrutiny was warranted based on Ninth Circuit precedent treating transgender people as a quasi-protected class, but he bolstered this conclusion with a reference to *Bostock*.[159] He cited the Ninth Circuit's precedents, and then he noted that *Bostock* also counsels that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex."[160] The court thus acknowledged that *Bostock* was a decision interpreting Title VII, but nonetheless it used

151. *See Grimm*, 972 F.3d at 616-17.

152. *See id.* at 608.

153. *See id.* (citing Glenn v. Brumby, 663 F.3d 1312, 1319 (11th Cir. 2011)).

154. *See id.* at 610-13.

155. *See Adams*, 968 F.3d at 1302, 1305 (citing *Glenn*, 663 F.3d at 1320 & n.9).

156. *Id.* at 1296.

157. *See* Adams *ex rel.* Kasper v. Sch. Bd. of St. John's Cnty., 3 F.4th 1299, 1307-11 (11th Cir. 2021).

158. For the Idaho law, see IDAHO CODE ANN. §§ 33-6201 to -6206 (West 2021).

159. *See* Hecox v. Little, 479 F. Supp. 3d 930, 973-75 (D. Idaho 2020).

160. *Hecox*, 479 F. Supp. 3d at 974 (quoting Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020)).

Bostock's reasoning to support heightened scrutiny under the Equal Protection Clause.[161]

In *B.P.J. v. West Virginia State Board of Education*, a federal district court in West Virginia preliminarily enjoined a law in that state very similar to the one in Idaho.[162] Bound by the Fourth Circuit precedent of *Grimm*, the court held that the law merited intermediate scrutiny because its targeting of transgender girls classified on the basis of sex and because transgender people constitute a quasi-suspect class.[163] As in *Hecox*, though, the court added that this was in accordance with the Supreme Court's holding in *Bostock*.[164] The federal district court in Indiana that issued a preliminary injunction against that state's transgender sports law did not reach any constitutional claims, but it did rely on *Bostock* in its Title IX analysis.[165] Also of note, though not under the Federal Constitution, is a Utah state court decision that relied on *Bostock* in order to understand antitransgender discrimination as sex discrimination under the state constitution. The court partially enjoined Utah's similar transgender sports law.[166]

Opinions invalidating gender-affirming healthcare bans have also cited *Bostock* in their constitutional analysis. Equal-protection arguments are especially important in these cases because the healthcare bans, unlike the policies and laws considered earlier, do not implicate Title IX. Courts have enjoined both Arkansas's and Alabama's healthcare bans. In *Brandt v. Rutledge*, a federal district court held that Arkansas's SAFE Act likely violated equal protection, the due-process rights of transgender minors' parents, and the First Amendment rights of doctors to recommend gender-affirming treatment.[167] In the district court's equal-protection analysis, the court followed as persuasive the Fourth Circuit's reasoning in *Grimm*: it understood the law's transgender-based classification as a sex classification without having to rely on *Bostock*, and it also treated transgender people as a quasi-suspect class.[168] The court then noted that this result was in

161. *See id.* When the court concludes that heightened scrutiny should apply, it does not cite *Bostock* but somewhat ambiguously cites Ninth Circuit precedents treating transgender people as a quasi-protected class, along with *Craig v. Boren*, 429 U.S. 190 (1976). *See id.* at 975.

162. 550 F. Supp. 3d 347, 358 (S.D. W. Va. 2021). *Compare* IDAHO CODE ANN. §§ 33-6201 to -6206 (West 2021), *with* W. VA. CODE ANN. § 18-2-25d (West 2021).

163. *B.P.J.*, 550 F. Supp 3d at 354.

164. *Id.* at 356.

165. A.M. *ex rel.* E.M. v. Indianapolis Pub. Schs., No. 22-cv-01075, 2022 WL 2951430, at *9-11 (S.D. Ind. July 26, 2022).

166. Roe v. Utah High Sch. Activities Ass'n, No. 220903262, 2022 WL 3907182, at *5, *6-7 (Utah Dist. Ct. Aug. 19, 2022).

167. *See* Brandt v. Rutledge, 551 F. Supp. 3d 882, 889-94 (E.D. Ark. 2021).

168. *Id.* at 889.

accord with the holding of *Bostock*.[169] The Eighth Circuit upheld this decision in a brief opinion, understanding the SAFE Act as classifying by sex without mentioning transgender identity.[170] The circuit court also deferentially upheld the district court's factual findings about gender-affirming care, which make clear that the SAFE Act is not substantially related to the purpose of protecting children.[171] The full Eighth Circuit then declined to rehear this case en banc.[172]

Finally, out of all of these cases, the district court that enjoined Alabama's gender-affirming healthcare ban has provided perhaps the strongest assertion of *Bostock*'s constitutional relevance.[173] In *Eknes-Tucker v. Marshall*, the court issued a preliminary injunction against Alabama's law based on parental due-process rights and on equal protection.[174] It began its tiered scrutiny analysis under equal protection by quoting *Bostock* for the proposition that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[175] It understood this conclusion as consistent with the circuit precedent of *Glenn v. Brumby*, which held that discrimination on the basis of gender nonconformity is a form of sex discrimination.[176] Even though the court could have simply relied on the equal-protection circuit precedent of *Glenn v. Brumby*, it actually started its constitutional analysis with *Bostock*. As the court implicitly recognized, Justice Gorsuch's logical conclusion that LGBT classifications are sex classifications is as true under equal protection as it is under Title VII.

In all of these cases, *Bostock* has not been strictly necessary to the result, and most courts have at most gestured toward relying on it under the Equal Protection Clause. Nevertheless, their citations to *Bostock* can be seen as the first steps toward building out the decision's constitutional reach. These district- and circuit-court opinions have tended to rest on multiple grounds, and they have given several reasons for why recent antitransgender policies and laws require intermediate scrutiny. But among these alternative grounds, *Bostock* is unique. Not

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169. *Id*.

170. *See* Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661, 669 (8th Cir. 2022) ("Because the minor's sex at birth determines whether or not the minor can receive certain types of medical care under the law, Act 626 discriminates on the basis of sex.").

171. *Id.* at 670-71.

172. Brandt *ex rel.* Brandt v. Rutledge, No. 21-2875, 2022 WL 16957734, at *1 (8th Cir. Nov. 16, 2022).

173. Eknes-Tucker v. Marshall, No. 22-CV-184, 2022 WL 1521889, at *13 (M.D. Ala. May 13, 2022).

174. *Id.* at *7-10.

175. *Id.* at *9 (quoting Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020)).

176. *Id.* (citing Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011)).

every circuit has held that intermediate scrutiny extends to antitransgender discrimination or has understood antitransgender discrimination as sex discrimination. *Bostock* offers a rationale for extending intermediate scrutiny to transgender equal-protection claims in every circuit—a rationale that was accepted just recently by six members of the Supreme Court, including four current members of the Court. As this area of the law rapidly develops in different ways across the country, *Bostock* provides a way to standardize transgender protection under the Constitution nationwide. It also offers a bulwark against retrenchment in the event that the Supreme Court rejects some circuits' alternative arguments for transgender people as a (quasi-)protected class.

B. Sex-Stereotype Reasoning in Cases Involving Transgender Youth

Once intermediate scrutiny is triggered—whether on the basis of *Bostock* or otherwise—these cases show how powerful it can be, even without invoking sex-stereotyping arguments. Courts have been able to point out logical inconsistencies in the relationship between the challenged laws or policies and their purposes and justifications, without having to question those justifications themselves.[177] In this Section, I examine courts' rationales once they apply intermediate scrutiny, showing the general absence of sex-stereotype reasoning. Nonetheless, I emphasize where some courts do engage in—or at least allude to—stereotype analysis.

In all of these cases, courts have pointed out the ill fit between the challenged laws and policies and their avowed purposes. In *Grimm*, applying intermediate scrutiny to the school board's policy of excluding transgender students from their gender's bathroom, the Fourth Circuit credited the school board's interest in protecting student privacy but held that keeping Grimm from using male restrooms was not substantially related to that interest. The board "ignore[d] the reality of how a transgender child uses the bathroom."[178] In the superseding opinion in *Adams*, the court similarly held that the school's policy of determining bathroom access based on documentation from when a child first enrolls in school was not substantially related to its purported interest in protecting students' privacy, characterizing the policy as arbitrary.[179]

Courts enjoining transgender sports laws have taken a similar tack under intermediate scrutiny. The Idaho district court in *Hecox* held that Idaho's blanket ban on female transgender student-athletes was not substantially related to the

177. *Cf.* Clarke, *supra* note 126, at 1887-91 (describing how courts in these cases have relied on pragmatic points to rebut supposed problems attending transgender inclusion).

178. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 613 (4th Cir. 2020).

179. Adams *ex rel.* Kasper v. Sch. Bd. of St. John's Cnty., 3 F.4th 1299, 1309-10 (11th Cir. 2021).

state's interests in promoting sex equality and providing opportunities for female athletes.[180] The court that enjoined West Virginia's transgender student-athlete ban likewise accepted, for the sake of argument, the state's interests in providing equal athletic opportunity for female athletes and protecting them while they participate in sports. It held, however, that the law did not advance those interests as applied to the plaintiff in that case.[181]

In evaluating Arkansas's gender-affirming healthcare ban, the district court in *Brandt* also accepted the state's interest in protecting children but pointed out that the law's understanding of gender-affirming healthcare as harmful was contrary to medical consensus.[182] Moreover, the law permitted the same medical procedures if undertaken for other purposes, so the law was not substantially related to protecting children from those procedures.[183] The Eighth Circuit approved of this reasoning, agreeing that the SAFE Act was not substantially related to its professed purposes.[184] Similarly, the district court in *Eknes-Tucker* rejected Alabama's argument that gender-affirming treatments were dangerously experimental, finding that justification for the law to be "hypothesized, [and] not exceedingly persuasive."[185]

Sex-stereotype reasoning has not been integral to courts' decisions in these cases. Nonetheless, such reasoning is present in them to varying degrees. The initial opinion in *Adams* stands out in this respect. It is the only decision so far to invalidate a law or policy targeting transgender minors explicitly because it relies on and enforces a sex stereotype—though it was superseded by an opinion that does not rely on such reasoning.[186] The original decision held not just that the record did not support the school board's purported justifications for its policy, but also that its policy impermissibly served to enforce gender stereotypes and so could not withstand intermediate scrutiny.[187] As the court reasoned, Adams "defies the stereotype that one's gender identity and expression should align with one's birth sex,"[188] and the challenged policy singled him out for precisely

180. *See* Hecox v. Little, 479 F. Supp. 3d 930, 978-85 (D. Idaho 2020).

181. *See* B.P.J. v. W. Va. State Bd. of Educ., 550 F. Supp. 3d 347, 355-56 (S.D. W. Va. 2021).

182. *See* Brandt v. Rutledge, 551 F. Supp. 3d 882, 889-91 (E.D. Ark. 2021).

183. *See id.*

184. Brandt v. Rutledge, 47 F.4th 661, 670-71 (8th Cir. 2022).

185. Eknes-Tucker v. Marshall, No. 22-CV-184, 2022 WL 1521889, at *10 (M.D. Ala. May 13, 2022).

186. *See* Adams *ex rel.* Kasper v. Sch. Bd. of St. John's Cnty., 3 F.4th 1299, 1308-11 (11th Cir. 2021), *vacated and superseded*, 3 F.4th 1299, 1320 (11th Cir. 2021).

187. *See id.* at 1301-03.

188. *Id.* at 1302.

that reason — "because he is transgender and did not act or present as female, the sex he was assigned at birth."[189]

The other clearest invocation of impermissible stereotyping in these cases is in Judge Wynn's concurrence in *Grimm*. Wynn makes explicit the stereotype of transgender people as predators that lurks behind the exclusion of transgender students from restrooms. He also relates this to earlier stereotyped fears about disfavored communities:

> The "transgender predator" myth echoes similar arguments used to justify segregation along racial lines. In the 1950s, segregationists spread false rumors that Black women would spread venereal diseases to toilet seats, and that Black men would sexually prey upon white women if public swimming pools were integrated. . . . Even more recently, privacy concerns similar to those championed by the Board were invoked by opponents of gay and lesbian equality. These opponents argued that such individuals, especially gay men, must not be allowed to come into contact with young children or adolescents. They justified such claims by pointing either to a supposed uncontrollable, predatory sexual attraction among gay men toward children, or to an insidious desire to convert young people to an immoral (which is to say, non-heterosexual) lifestyle.[190]

The majority only alludes to this form of stereotyping behind the school board's invocation of privacy as a reason to exclude Grimm from the bathrooms his other male peers used. In skeptically evaluating the school board's privacy rationale, the Fourth Circuit briefly notes that the school board's decision was motivated by stereotyping and animus, but the court does not base its analysis on this.[191]

Like the majority opinion in *Grimm*, the opinion in *Hecox* comes close to sex-stereotype reasoning without fully relying on it, concluding that the Idaho law's reliance on a supposed "'absolute advantage' between transgender and cisgender women athletes is based on overbroad generalizations without factual justification."[192] Finally, the decisions in *Brandt*, *Eknes-Tucker*, and *B.P.J.* do not engage in any sex-stereotype analysis, though the court in *B.P.J.* begins by briefly noting

189. *Id.*

190. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 626 (4th Cir. 2020) (Wynn, J., concurring).

191. *See id.* at 615 (majority opinion).

192. Hecox v. Little, 479 F. Supp. 3d 930, 982 (D. Idaho 2020).

that "[a] fear of the unknown and discomfort with the unfamiliar have motivated many" discriminatory actions in our history.[193]

The fact that sex-stereotype reasoning has not been at the core of the decisions protecting transgender youth from recent discriminatory laws and policies might suggest that advocates do not need sex-stereotype reasoning to succeed in this context. But such reasoning, including drawing on pre-*Bostock* arguments connecting anti-LGBT discrimination to sex stereotypes, may be especially valuable to develop for future cases with laws that more plausibly advance state interests. In addition, stereotype-based arguments have significant value beyond their doctrinal impact in courts. They are important for calling out and rebutting claims and preconceptions (sometimes stated, sometimes unstated) about transgender identity that underly antitransgender policies.

Recognizing and describing the dynamics of stereotype-based discrimination has a particular benefit in the context of transgender youth because there are distinct harms from stereotype-entrenching state action directed at minors. Indeed, antidiscrimination law has long shown a special concern for the harms that stereotype-entrenching state action inflicts on children.[194] Such action seeks to intervene in a time of identity formation and in sites of social reproduction, and for that reason it is especially pernicious. It targets young citizens still realizing and expressing their identities and still forming conceptions of proper sex roles. Legislation like transgender student-athlete bans or gender-affirming healthcare bans do not simply punish minors for being transgender but rather attempt to steer minors away from identifying as transgender in the first place. More broadly, at a class level, these laws aim to homogenize gender diversity and reproduce a system of traditional gender roles in the next generation. They are a clear message that these states doubt, disbelieve, and devalue transgender identity. The laws effect serious harm in their enforcement, but they also send seriously harmful messages simply by being passed into law.

One of the advantages of stereotype-based reasoning is that it can recognize and make visible these specific harms. There is value in calling out stereotypes

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193. B.P.J. v. W. Va. State Bd. of Educ., 550 F. Supp. 3d 347, 350 (S.D. W. Va. 2021). In *Eknes-Tucker*, the court did understand Alabama's healthcare ban as discriminating on the basis of gender nonconformity, and the concept of nonconformity is certainly related to an idea of rejecting stereotypes. However, the court reasoned in this way in order to decide that the law classified on the basis of sex, not in order to decide whether that classification could be justified. *See* Eknes-Tucker v. Marshall, No. 22-CV-184, 2022 WL 1521889, at *9 (M.D. Ala. May 13, 2022) (citing Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011)).

194. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954); United States v. Windsor, 570 U.S. 744, 772 (2013); Obergefell v. Hodges, 576 U.S. 644, 668 (2015).

and rendering them visible — as, for example, Judge Wynn did in his *Grimm* concurrence.[195] Sex-stereotype reasoning offers a way for courts to do this. It enables them to speak directly to the state's inability to coerce young and developing citizens into narrowly prescribed sex roles and to selectively second guess the identities only of transgender youth. Given the historical erasure of queer and transgender minors, and the struggles they often still face in finding acceptance and affirmation of their identity, courts' capacity to amplify the idea that the state cannot coerce minors into cisgender sex roles is especially valuable. And beyond courts, recognizing and rejecting state enforcement of sex stereotypes in a variety of democratic fora can help advance the same aims.

There are good reasons, then, to incorporate sex-stereotyping arguments into transgender litigants' challenges to the recent tide of antitransgender policy. And while some courts have at least alluded to the operation of sex stereotypes in this context, no court has yet addressed or articulated a specific form of sex stereotyping that underlies many of these policies and laws. In the next Section, I identify this stereotype and its history.

C. The Confused Transgender Child: A New Sex-Stereotyping Argument

Sex stereotyping takes many forms, targeting different groups with different specific stereotypes and affecting differently situated individuals in intersectional ways.[196] Recent policies discriminating against transgender minors are built on and enforce a sex-based stereotype specific to queer and transgender people — and to queer and transgender youth in particular. At the heart of policies that require transgender boys to use girls' restrooms, or require all transgender girls to play sports alongside boys, or require transgender children to undergo the puberty and maturation of their sex assigned at birth, is a doubting of transgender minors' identity. These policies treat transgender minors as their sex assigned at birth, assuming that the state knows a child's sexual identity better than the child. Importantly, this doubt is entirely selective — that is, the state singles out for skepticism only transgender youth. This is based on a longstanding stereotype: queer or transgender identity is for minors a confused and temporary phase, while cisgender and heterosexual identity is not; and queer or

195. *Grimm*, 972 F.3d at 626 (Wynn, J., concurring).

196. By invoking the concept of intersectionality, I mean that sex stereotyping operates in tandem with other forms of discrimination, such as racism, in ways that are not captured by merely analyzing sex stereotyping as the combination of two separate forms of discrimination. *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 ("[T]he intersectional experience is greater than the sum of racism and sexism.").

transgender youth are too young to know their identity, while cisgender and heterosexual youth are not. In short, this is the stereotype of the confused transgender child. One transgender minor affected by Alabama's healthcare ban recently noted that this is the message the law sends: "Syrus Hall, a 17-year-old from Mobile, Ala., has heard it all before: 'You'll grow out of it.' 'It's a phase.' 'You're just confused.' 'It makes me mad,' he says."[197]

This insistence that minors who claim to be transgender are not, or are merely going through a temporary phase, might sound familiar to anyone who has grown up queer or transgender. Indeed, the recent spate of policies and laws targeting transgender minors is the latest iteration of longstanding calls to protect children from the influence of homosexuality and gender variance. As Clifford J. Rosky has demonstrated, the "fear of the queer child" can be traced back to the idea, prevalent in the early to mid-twentieth century, that adult homosexuals (often understood as gender deviants) would seduce young children.[198] Fear about sexual perverts seducing and enticing others—especially young people—to follow in their footsteps motivated a nationwide "campaign to purge homosexuals from civil service and public schools."[199]

During the 1970s, opponents of gay rights then "introduced more palatable claims of indoctrination, role modeling, and public approval."[200] These narratives suggested new ways in which queer adults—and the public's growing acceptance of them—could mislead unwitting children into a queer life. With, for example, the antigay activist Anita Bryant and her Save Our Children campaign directed against antidiscrimination ordinances, and the Briggs Initiative (a California ballot initiative that sought to ban gays and lesbians from working in public schools), opposition to the growing movements for queer rights raised alarms about homosexual "recruitment" and indoctrination.[201] This backlash stoked fears about exposing children to queerness and took advantage of a gen-

197. Melissa Block, *'It's Hurtful': Trans Youth Speaks out as Alabama Debates Banning Medical Treatment*, NPR (Mar. 28, 2021, 7:00 AM ET), https://www.npr.org/2021/03/28/981225604/its-hurtful-trans-youth-speaks-out-as-alabama-debates-banning-medical-treatment [https://perma.cc/L3KC-WXLZ].

198. Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 629-32 (2013).

199. *Id.* at 631-32.

200. *Id.* at 609.

201. *See* Craig Konnoth, *The Protection of LGBT Youth*, 81 U. PITT. L. REV. 263, 266-67 (2019); Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793, 831-38 (2017); Marie-Amélie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 YALE L. & POL'Y REV. 83, 133-39 (2017); Clifford J. Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1477-85 (2017); Melissa Murray, *Marriage Rights and Parental Rights: Marriage, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 358-85 (2009).

eral fear of the possibility of queer children. Together with antigay school-curriculum laws, these social and political developments contributed to a general erasure of queer youth. As Teemu Ruskola noted and critiqued in 1996, the law also tended to erase the existence of queer youth, constructing gay and lesbian children as "confused, presumptively heterosexual future adults."[202]

More recently, even as the legal and cultural "fantasy that gay and lesbian youth do not exist"[203] has lessened in power, Rosky has written of the persistence of anxieties about queer children, including "the fears that exposing children to homosexuality and gender variance will make them more likely to develop homosexual desires, engage in homosexual acts, form homosexual relationships, deviate from traditional gender norms, or identify as lesbian, gay, bisexual, or transgender."[204] In fact, these widespread stereotypes made it to the Supreme Court in 2003, surfacing at the oral argument in *Lawrence v. Texas*. After Chief Justice Rehnquist asked whether invalidating sodomy laws "would also mean that a State could not prefer heterosexuals to homosexuals to teach kindergarten," Justice Scalia followed up by suggesting that such a preference might be justified by a fear that "the children might . . . be induced to . . . follow the path of homosexuality."[205]

Today, these narratives are still motivating forms of anti-LGBTQ backlash, and they are related to the idea that the very existence of LGBTQ people and relationships are adult topics inappropriate for children to encounter. This is visible in the panic over books with LGBTQ subject matter in school libraries, in legislation banning the discussion of nonnormative gender and sexuality from schools, and in the maligning of LGBTQ adults as "groomers" of children.[206] All

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202. Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy that Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 274 (1996).

203. *Id.* at 270; *cf.* Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay*, 29 SOC. TEXT 18, 25 (1991) (arguing that anxieties over gay children reflect "the overarching, hygienic Western fantasy of a world without any more homosexuals in it").

204. Rosky, *supra* note 198, at 608.

205. Transcript of Oral Argument at 20-21, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

206. For book bans, see, for example, Deepa Shivaram, *More Republican Leaders Try to Ban Books on Race, LGBTQ Issues*, NPR (Nov. 13, 2021, 1:40 PM ET), https://www.npr.org/2021/11/13/1055524205/more-republican-leaders-try-to-ban-books-on-race-lgbtq-issues [https://perma.cc/X3ZF-KXQG]; and Gwen Aviles, *Eight of 10 Most-Banned Books Challenged for LGBTQ Content*, NBC NEWS (Apr. 20, 2020, 4:35 PM EDT), https://www.nbcnews.com/feature/nbc-out/eight-10-most-banned-books-challenged-lgbtq-content-n1188041 [https://perma.cc/M47C-AMEZ]. For legislation, see, for example, S.B. 1834, 2022 Leg., Reg. Sess. § 1001.42(8)(c)(3) (Fla. 2022), which states, "A school district may not encourage classroom discussion about sexual orientation or gender identity in primary grade levels or in a manner that is not age-appropriate or developmentally appropriate for students." And for the

of these efforts promulgate the idea that LGBTQ identity among youth is inherently suspect and the product of sinister influence rather than normal development. The recent legislative attack on transgender youth is an offshoot of this tradition, relying on the idea that transgender youth are not, and cannot really be, who they say they are. And the attack is developing in the context of a political and cultural discourse replete with references to transgender youth as confused or merely going through a phase.[207]

To recognize this as a harmful stereotype is not to say that identity does not change over time, nor does recognition of the stereotype suggest that minors are never confused or never change in how they understand their identity. After all,

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"groomer" accusation, see, for example, Frank Bruni, Opinion, *Republicans' Fresh Fixation on Vintage Homophobia*, N.Y. TIMES, Apr. 7, 2022, https://www.nytimes.com/2022/04/07/opinion/republican-homophobia-grooming-gay.html [https://perma.cc/2FGS-65RN]; and Melissa Block, *Accusations of 'Grooming' Are the Latest Political Attack—With Homophobic Origins*, NPR (May 11, 2022, 5:27 AM ET), https://www.npr.org/2022/05/11/1096623939/accusations-grooming-political-attack-homophobic-origins [https://perma.cc/ED2S-BHZZ].

207. *See, e.g.*, 167 CONG. REC. H571 (daily ed. Feb. 23, 2021) (statement of Rep. Lauren Boebert) (referring to a hypothetical transgender girl as a "confused man"); Press Release, Marco Rubio, U.S. Sen. for Florida, Rubio, Cotton, Colleagues Introduce Legislation to Protect Minors from "Gender Reassignment" Surgery (June 23, 2022), https://www.rubio.senate.gov/public/index.cfm/2022/6/rubio-cotton-colleagues-introduce-legislation-to-protect-minors-from-gender-reassignment-surgery [https://perma.cc/48AT-2CEG] (quoting the House sponsor of a federal bill restricting gender-affirming healthcare as calling transgender children "gender-confused children"); Madeleine Kearns, *The Brazen Transgender Policy Agenda*, NAT'L REV. (July 18, 2022, 4:51 PM), https://www.nationalreview.com/corner/the-brazen-transgender-policy-agenda [https://perma.cc/4HFE-9SJ6] (referring to transgender children as "gender-confused children"); Kyle Smith, *Bill Maher: Trans Kids Are 'Cannon Fodder' in the Culture Wars*, NAT'L REV. (May 23, 2022, 7:25 AM), https://www.nationalreview.com/corner/bill-maher-trans-kids-are-cannon-fodder-in-the-culture-wars [https://perma.cc/9532-K4CV] (describing approvingly Bill Maher's comments about transgender identity among children as a phase akin to "[t]he dinosaur phase, the Hello Kitty phase"); Associated Press, *Arizona Governor Won't Say Transgender People Exist*, NBC NEWS (Apr. 1, 2022, 12:20 PM EDT), https://www.nbcnews.com/nbc-out/out-politics-and-policy/arizona-governor-wont-say-transgender-people-exist-rcna22561 [https://perma.cc/MY87-Y39T] (reporting that Arizona Governor Doug Ducey declined to say whether transgender people exist one day after signing antitransgender legislation and quoting Center for Arizona Policy President Cathi Herrod as referring to transgender children as "vulnerable children struggling with gender confusion"); Katelyn Burns, *The Massive Republican Push to Ban Trans Athletes, Explained*, VOX (Mar. 26, 2021, 12:51 EDT), https://www.vox.com/identities/22334014/trans-athletes-bills-explained [https://perma.cc/U5RF-NJ5T] (quoting the sponsor of Minnesota's transgender sports ban as saying that "[t]he last several years have been witness to a rise in the number of confused boys and men mistakenly believing themselves to be girls and women"); Emilie Kao, *Woke Gender*, HERITAGE FOUND. (July 7, 2021), https://www.heritage.org/gender/commentary/woke-gender [https://perma.cc/5DMW-2QZV] ("By vanquishing the threats of legal punishment and 'cancel culture,' parents can stop schools and hospitals from luring more confused children into the horrors of the gender industry.").

many young people come to realize that they were mistaken about their presumed heterosexuality or cisgender identity. But the problem with the stereotype of the confused transgender child is that it assumes transgender identity among minors is necessarily, definitionally, or presumptively the result of confusion or delusion. To argue against this stereotype is to assert not that minors are locked into an identity whenever they claim it, but rather that the state cannot assume that sexual identities are illegitimate simply because they deviate from a traditional vision of sex roles. Nor does this argument assert that no one ever detransitions—though it does question the disproportionate emphasis on this phenomenon in conversations regarding transgender people.[208] Studies suggest that a very small proportion of those who transition may later regret it for complex reasons (including dealing with harassment and discrimination), but that does not justify treating as confused or misled all who seek gender-affirming treatment or those who seek to live out their transgender identity.[209] That is a wildly overbroad generalization: a stereotype.

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208. Julia Serrano has written a highly helpful introduction to debates over detransitioning and critique of how narratives of detransitioning are often deployed. *See* Julia Serrano, *Detransition, Desistance, and Disinformation: A Guide for Understanding Transgender Children Debates*, MEDIUM (Aug. 2, 2016), https://medium.com/@juliaserano/detransition-desistance-and-disinformation-a-guide-for-understanding-transgender-children-993b7342946e [https://perma.cc/2PJN-ZQNC]; *see also* Liam Knox, *Media's 'Detransition' Narrative Is Fueling Misconceptions, Trans Advocates Say*, NBC NEWS (Dec. 19, 2019, 8:23 AM EST), https://www.nbcnews.com/feature/nbc-out/media-s-detransition-narrative-fueling-misconceptions-trans-advocates-say-n1102686 [https://perma.cc/Y83C-AQUH] (describing the media's role in portraying detransitioning as more common than it is, thereby "fueling misconceptions about the gender transition process"). For high-profile coverage of detransitioners, see Jesse Singal, *When Children Say They're Trans*, ATLANTIC (July-Aug. 2018), https://www.theatlantic.com/magazine/archive/2018/07/when-a-child-says-shes-trans/561749 [https://perma.cc/RW5D-6BWM]; and Andrew Sullivan, *The Hard Questions About Young People and Gender Transitions*, N.Y. MAG. (Nov. 1, 2019), https://nymag.com/intelligencer/2019/11/andrew-sullivan-hard-questions-gender-transitions-for-young.html [https://perma.cc/BDK7-NAMG]. For criticisms and responses, see, for example, Robyn Kanner, *I Detransitioned. But Not Because I Wasn't Trans*, ATLANTIC (June 22, 2018), https://www.theatlantic.com/family/archive/2018/06/i-detransitioned-but-not-because-i-wasnt-trans/563396 [https://perma.cc/RX8V-FX88]; Tey Meadow, *The Loaded Language Shaping the Trans Conversation*, ATLANTIC (July 10, 2018), https://www.theatlantic.com/family/archive/2018/07/desistance/564560 [https://perma.cc/7ZAR-3GCL]; and Alex Barasch, *Sacred Bodies*, SLATE (June 20, 2018, 5:48 PM), https://slate.com/human-interest/2018/06/desistance-and-detransitioning-stories-value-cis-anxiety-over-trans-lives.html [https://perma.cc/EPA8-H6EW].

209. One major meta-analysis of twenty-seven studies found that only 1% of those undergoing gender-affirming surgery later have regrets about the procedure. *See* Valeria P. Bustos, Samyd S. Bustos, Andres Mascaro, Gabriel Del Corral, Antonio J. Forte, Pedro Ciudad, Esther A. Kim, Howard N. Langstein & Oscar J. Manrique, *Regret After Gender-Affirmation Surgery: A Systematic Review and Meta-Analysis of Prevalence*, 9 PLASTIC & RECONSTRUCTIVE SURGERY art.

The stereotype of transgender identity as mistake, as confusion, or as temporary phase is a sex stereotype based on overbroad generalizations about how men and women mature, behave, and look. When laws regulate on the basis of this stereotype, they enforce a narrow vision of acceptable sex roles defined by how the state thinks a man or woman ought to be. For example, by forcing transgender children to undergo puberty as their sex assigned at birth, Arkansas's SAFE Act mandates that those assigned a particular sex at birth will mature only in particular ways the state deems appropriate for that sex. Moreover, the law explicitly defines these acceptable sex roles in reproductive terms. It defines its core concept of "biological sex" as "the biological indication of male and female *in the context of reproductive potential or capacity*."[210] The law is built on the idea that girls grow up into women who become pregnant, and boys grow up into men who impregnate.

Laws discriminating against transgender minors do not merely punish deviation from sex-role stereotypes. At an individual level, such laws aim to deter young people away from their identity and actually steer them into stereotyped sex roles. This is why antitransgender laws deliberately target young people at an age of identity formation and exploration and why the laws focus on contexts of gendered socialization such as school sports teams and restrooms. This is classic sex stereotyping, relying on overbroad sex-based generalizations in order to enforce particular sex roles. And longstanding constitutional law makes clear

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no. e3477, at 1 (2021). A recent study of 317 youths found that five years after *socially* transitioning, only 2.5% ended up identifying as cisgender, none of whom had proceeded to gender-affirming hormone therapy. *See* Kristina R. Olson, Lily Durwood, Rachel Horton, Natalie M. Gallagher & Aaron Devor, *Gender Identity 5 Years After Social Transition*, 150 PEDIATRICS art. no. e2021056082, at 3 (2022). Another recent study from the Netherlands found that 98% of the 720 youths studied who began puberty suppression and hormone treatment in adolescence continued gender-affirming treatment into adulthood. *See* Maria Anna Theodora Catharina van der Loos, Sabine Elisabeth Hannema, Daniel Tatting Klink, Martin den Heijer & Chantal Maria Wiepjes, *Continuation of Gender-Affirming Hormones in Transgender People Starting Puberty Suppression in Adolescence: A Cohort Study in the Netherlands*, 6 LANCET: CHILD & ADOLESCENT HEALTH 869, 870 (2022). *See also* Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'Ayan Anafi, *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. 108 (Dec. 2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/439P-9SVL] ("Respondents who de-transitioned cited a number of reasons for doing so, including facing too much harassment or discrimination after they began transitioning (31%), having trouble getting a job (29%), or pressure from a parent (36%), spouse (18%), or other family members (26%)."); *id.* at 111 ("Respondents who had de-transitioned cited a range of reasons, though only 5% of those who had de-transitioned reported that they had done so because they realized that gender transition was not for them, representing 0.4% of the overall sample.").

210. ARK. CODE ANN. § 20-9-1501(1) (West 2021) (emphasis added).

that compelling conformity with the state's desired vision of how to be a man or woman is not a valid state interest.[211]

D. The Transgender-Confusion Stereotype in Gender-Affirming Healthcare Bans

Gender-affirming healthcare bans are the clearest example of the stereotype of the confused transgender child in action. In this Section, I specifically focus on Arkansas's SAFE Act to show how this stereotype undergirds such legislation. Before analyzing the law, though, it is helpful to summarize what gender-affirming care actually entails. Such treatment is approved and recommended by every major American medical association, including the American Psychiatry Association, the American Psychological Association, the American Academy of Child and Adolescent Psychiatry, the American Academy of Pediatrics, the Endocrine Society, and the World Professional Association for Transgender Health.[212] In addition, the American Medical Association supports insurance coverage for

211. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533-34 (1996); Weinberger v. Wiesenfeld, 420 U.S. 636, 642-45 (1975); *see also infra* Section III.F (describing *Virginia* and its logic).

212. *See* Jack Drescher, Ellen Haller & Eric Yarbrough, *Position Statement on Access to Care for Transgender and Gender Diverse Individuals*, AM. PSYCHIATRIC ASS'N (2018), https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2018-Access-to-Care-for-Transgender-and-Gender-Diverse-Individuals.pdf [https://perma.cc/ZBT8-CHQV]; Am. Psych. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCH. 832, 846-47 (2015); *AACAP Statement Responding to Efforts to Ban Evidence-Based Care for Transgender and Gender-Diverse Youth*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (Nov. 8, 2019), https://www.aacap.org/AACAP/Latest_News/AACAP_Statement_Responding_to_Efforts-to_ban_Evidence-Based_Care_for_Transgender_and_Gender_Diverse.aspx [https://perma.cc/SS87-P9FL]; Jason Rafferty et al., *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 PEDIATRICS art. no. e20182162, at 4 (2018); Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869, 3870-73 (2017); Eli Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, WORLD PRO. ASS'N FOR TRANSGENDER HEALTH 9 (2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English2012.pdf [https://perma.cc/TX3C-9YU6]; *see also* Note, *supra* note 139, at 2165-66 (describing the current standard of care).

gender-affirming care.[213] The benefits of gender-affirming healthcare can be immense for transgender youths' mental health and general wellbeing.[214]

A healthcare professional following the gender-affirming approach does not begin with any physical interventions. Rather, the first steps involve counseling and, potentially, social transitioning, which might include the child wearing clothing or using pronouns consistent with their gender identity.[215] The World Professional Association for Transgender Health's (WPATH) standards of care leave decisions regarding social transitioning in early childhood to parents, with advice from medical professionals.[216] And WPATH cautions, "Before any physical interventions are considered for adolescents, extensive exploration of psychological, family, and social issues should be undertaken . . . ."[217]

If a doctor agrees that physical intervention is appropriate, this process occurs in three steps.[218] First, a child can receive medications that suppress puberty at its onset.[219] WPATH guidelines explicitly require parental consent for such medications.[220] Delaying puberty allows the child to further consider their gender identity, and it also prevents the development of secondary sex characteristics that can worsen gender dysphoria and make later transition more difficult.[221] Puberty-suppressing therapy begins at the onset of puberty and is entirely re-

213. *Issue Brief: Health Insurance for Gender-Affirming Care of Transgender Patients*, AM. MED. ASS'N 1 (2019), https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf [https://perma.cc/R6FS-B5AE].

214. *See* Conron et al., *supra* note 138, at 2; Note, *supra* note 139, at 2167-72; Maureen D. Connolly, Marcus J. Zervos, Charles J. Barone II, Christine C. Johnson & Christine L.M. Joseph, *The Mental Health of Transgender Youth: Advances in Understanding*, 59 J. ADOLESCENT HEALTH 489, 494 (2016).

215. *See* Coleman et al., *supra* note 212, at 16.

216. *See id.* at 17.

217. *Id.* at 18.

218. *Id.*

219. *Id.*

220. *Id.* at 19.

221. *Id.*

versible: if a child wishes, the child may stop the therapy and undergo puberty.[222] For this reason, puberty blockers are often colloquially referred to as a "pause button."[223]

Adolescents who wish to continue physically transitioning after pubertal suppression may then undergo masculinizing or feminizing hormone therapy—typically around the age of sixteen, though sometimes earlier.[224] This intervention leads to some developments that are not reversible, such as a lower voice caused by testosterone.[225] WPATH guidelines recommend parental consent for this step.[226]

Finally, a transgender person may seek surgical procedures, which are irreversible. Both WPATH and the Endocrine Society recommend waiting for genital surgery until the age of majority.[227] Both organizations' guidelines also state that any surgery should not occur until a minor has had significant experience living in congruence with their gender identity.[228] The American Academy of

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222. *Id.* at 18-19. This is sometimes obscured by concerns about potential irreversible consequences from puberty blockers followed by hormone therapy. *See, e.g.*, *Opinion on the Use of Puberty Blockers in America Is Turning*, ECONOMIST (Oct. 16, 2021), https://www.economist.com/united-states/2021/10/16/opinion-on-the-use-of-puberty-blockers-in-america-is-turning [https://perma.cc/P4BJ-2D45] ("Though blockers are often described as operating like a pause button, most children prescribed them go on to cross-sex hormones. *This combination* can have irreversible consequences, including sterility and the inability to orgasm." (emphasis added)).

223. *E.g.*, Katelyn Burns, *Bills Targeting Trans Kids Are Getting Defeated in State Legislatures*, VOX (Feb. 11, 2020, 3:50 PM EST), https://www.vox.com/2020/2/11/21133117/south-dakota-bill-trans-kids-defeated [https://perma.cc/SYN8-CBDB] ("Puberty blockers for transgender adolescents are often described as a 'pause button[] . . . .'"); *see also* Maura Priest, *Transgender Children and the Right to Transition: Medical Ethics When Parents Mean Well but Cause Harm*, 19 AM. J. BIOETHICS 45, 48 (2019) (describing puberty-blocking therapy as "freez[ing] the child in time physiologically").

224. *See* Coleman et al., *supra* note 212, at 19-20.

225. *Id.* at 18.

226. *Id.* at 20. The WPATH guidelines cover treatment in various countries, in some of which sixteen is the age of medical consent. The guidelines accordingly do not require parental consent for hormone therapy. *See id.*

227. *Id.* at 21; Hembree et al., *supra* note 212, at 3872.

228. Coleman et al., *supra* note 212, at 21 ("Genital surgery should not be carried out until . . . patients have lived continuously for at least 12 months in the gender role that is congruent with their gender identity."); *id.* (recommending that chest surgery happen "after ample time of living in the desired gender role and after one year of testosterone treatment"); Hembree et al., *supra* note 212, at 3872 ("We advise that clinicians approve genital gender-affirming surgery only after completion of at least 1 year of consistent and compliant hormone treatment, unless hormone therapy is not desired or medically contraindicated.").

Pediatrics similarly states that current protocols in gender-affirming care "typically reserve surgical interventions for adults," though some forms of surgery "are occasionally pursued during adolescence on a case-by-case basis."[229]

Of course, not all transgender youth wish to pursue all or any of these steps, but these are the possible stages of medical intervention, all of which occur with individualized assessment and consultation. It is a gradual and gradated process based on informed consent, allowing for continued exploration and consideration before progressing to increasingly irreversible medical interventions.[230]

The current approach, then, builds considerable caution into gender-affirming treatment, making sure that children have the opportunity to live out their gender identity and see how it feels, to make informed decisions knowing all risks, and to take gradual steps with medical and parental guidance. Importantly, the medical community does not assume that transgender children are, by default, confused about their gender. On the contrary, it recognizes and recommends specific standards of care to help transgender minors realize their identity. The consensus approach of the medical community is responsive to the possibility of an individual child's identity changing or being uncertain, but it does not harmfully presume that all transgender children are mistaken about their identity.

Proponents of gender-affirming healthcare bans have claimed that the laws are needed because children should not be able to make such monumental decisions at an early age. One Arkansas state legislator, for example, commented that he wants minors "to let their minds develop and mature a little bit before they make what could be a very permanent and life-changing decision."[231] A proponent of the SAFE Act argued that the law "protects minors from being preyed upon and pressured into making adult decisions before they are ready."[232] Such

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229. Rafferty et al., *supra* note 212, at 7.

230. The complaint in a legal challenge to Alabama's gender-affirming healthcare ban helpfully walks through these stages, emphasizing all the diagnostic criteria that must be met and the informed consent required at each stage. *See* Complaint for Declaratory & Injunctive Relief at 10-16, Walker v. Marshall, No. 22-cv-00480 (N.D. Ala. Apr. 11, 2022).

231. Rachel Herzog & Michael R. Wickline, *Transgender-Bill Veto Overridden; State 1st to Ban Kids' Gender-Affirming Care*, ARK. DEMOCRAT GAZETTE (Apr. 7, 2021, 7:26 AM), https://www.arkansasonline.com/news/2021/apr/07/transgender-bill-veto-overridden [https://perma.cc/KCZ7-F58Y] (quoting Arkansas State Senate Republican leader Scott Flippo).

232. Max Bryan, *Legislature Overrides Hutchinson's Veto of Bill Targeting Gender Reassignment*, USA TODAY (Apr. 6, 2021, 4:40 PM ET), https://www.usatoday.com/story/news/politics/2021/04/06/arkansas-legislature-overrides-hutchinsons-veto-transgender-bill/7111073002 [https://perma.cc/NH3D-KYFH] (quoting State Representative Robin Lundstrum); *see also* Devan Cole, *Arkansas Becomes First State to Outlaw Gender-Affirming Treatment for Trans Youth*, CNN (Apr. 6, 2021, 6:56 PM EDT), https://www.cnn.com/2021/04/06/politics/arkansas-

reasoning ignores the facts that puberty blockers are entirely reversible, that minors access gender-affirming healthcare with parental consent and medical guidance, and that current standards of care entail a gradual, informed, and cautious approach.

Even if one credits legislatures' concerns about minors' ability to appreciate and understand serious medical decisions, gender-affirming healthcare bans show a highly partial concern. The laws doubt, question, and police only one kind of medical decision made by minors: the decision to seek gender-affirming treatment. By contrast, they do not voice any doubts about the decisions of presumed cisgender minors to choose medical interventions into their sexual development that align with their sex assigned at birth. When cisgender minors experience delayed puberty, for example, the SAFE Act does not prohibit the use of hormone therapy to induce puberty consistent with one's sex assigned at birth—a double standard that is sharpened by the fact that the decision to undergo puberty is far less reversible than the decision to delay puberty through puberty-blocking treatment.[233] Nor does the SAFE Act prohibit the use of puberty blockers to delay precocious puberty. The law allows the use of puberty blockers for any medical purpose other than transitioning.[234]

The motivation behind this double standard is clearly to protect and enforce some particular, normative conception of sex. What is that normative understanding of sex? Is it a "biological" understanding, or perhaps an understanding of sex as immutable from birth? The law's exceptions suggest otherwise. The law, after all, allows for surgery to align an intersex child with one particular sex. And the law further permits medical intervention in the sexual development of minors by allowing for treatment to delay early-onset puberty. It is only when medical interventions contravene the assignment of male or female sex at birth that the law ties the hands of minors and their parents. The law thus punishes not those who deviate from biology or nature but those who deviate from the state's own normative judgment as to how a child should mature sexually. And this normative judgment about sex roles is based on the stereotype about transgender youth discussed above: that transgender minors are generally confused or misled about their own identity.

transgender-health-care-veto-override/index.html [https://perma.cc/JV9V-LW23] (quoting State Representative Lundstrum as saying, "But when they're under 18, they need to grow up first. That's a big decision, there's no going back").

233. For criticism of a similar double standard in the way the medical field deals with these situations, see B.R. George & Danielle M. Wenner, *Puberty-Blocking Treatment and the Rights of Bad Candidates*, 19 AM. J. BIOETHICS 80, 80 (2019).

234. *See* Brandt v. Rutledge, 551 F. Supp. 3d 882, 891 (E.D. Ark. 2021).

The SAFE Act generally understands transgender minors as in fact cisgender minors who are simply confused. Its legislative findings begin by emphasizing that transgender people are a small portion of the population and then assert:

> For the small percentage of children who are gender nonconforming or experience distress at identifying with their biological sex, studies consistently demonstrate that the majority come to identify with their biological sex in adolescence or adulthood, thereby rendering most physiological interventions unnecessary . . . .[235]

The Act does not cite any particular authority here, and it may be conflating children who behave in gender-nonconforming ways with children who experience gender dysphoria and do not identify with their sex assigned at birth—two very different situations.[236] In any case, this finding makes it clear that the state's rationale is dependent on the idea that transgender minors generally do not exist and that minors who claim to be transgender are merely going through a confused phase. That is the message the law sends to transgender minors, and that message causes harm.[237]

Legislative history confirms the stereotype at the root of Arkansas's law. Legislators' statements on the floor showed a selective concern for medical intervention that alters rather than affirms one's sex assigned at birth, a belief that children cannot know they are transgender, and an assumption that transgender children will generally grow out of this identity. While debating the bill, the SAFE Act's lead sponsor argued that transgender minors should wait "until they're eighteen before they make a life-long decision."[238] She stated that her support for the bill was based on her "fear that these kids are gonna make choices, long-term choices, when they're children."[239] Of course, for a transgender girl, the decision to undergo male puberty is no less significant or

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235. H.B. 1570, 93d Gen. Assemb., Reg. Sess. (Ark. 2021).

236. For instance, a cisgender man might behave in certain ways traditionally understood as feminine while still feeling completely at home in his male identity. For the difference between the outward manifestations of gender ("gender expression") and one's internal sense of one's own gender ("gender identity"), see, for example, *Glossary of Terms: Transgender*, GLAAD, GLAAD Media Reference Guide, https://www.glaad.org/reference/trans-terms [https://perma.cc/ZV78-TYHR].

237. *Cf.* Block, *supra* note 197 (quoting a transgender minor's reaction to a gender-affirming healthcare ban and describing how "the notion that he's a 'gender-confused child' who's just 'going through a phase' causes real pain").

238. Recording: 93d General Assembly, Regular Session, Arkansas House of Representatives, at 2:10:41 (Mar. 10, 2021) (statement of Rep. Robin Lundstrum), https://sg001-harmony.sliq.net/00284/Harmony/en/PowerBrowser/PowerBrowserV2/20210310/-1/21305?viewMode=1#info_ [https://perma.cc/KZE9-9DJM].

239. *Id.* at 2:37:20 (statement of Rep. Robin Lundstrum).

"long-term" than the decision not to undergo it. In fact, the decision simply to *delay* male puberty, through puberty-blocking treatment prohibited by Arkansas's law, is much less "long-term" than the sexual development the state would force upon her. The same cosponsor informed her fellow legislators that some transgender minors "may choose to be transgender when they're older," and "that's okay," but that the SAFE Act is needed because "when they're under eighteen, they need to grow up first."[240] These statements lay bare the logic of Arkansas's law: decisions taken to affirm transgender identity are cause for special concern, while decisions taken to affirm cisgender identity are unquestioned. Living as transgender is an adult decision that minors are incapable of making, but minors are perfectly able to realize their sexual identity if it comports with the state's preferred sex roles.

Other cosponsors of the bill stated more explicitly that the SAFE Act was important to pass because transgender children are wrong about their own identity. After comparing being transgender to wanting to be a cow, one legislator claimed that God made children cisgender, and therefore the state should not "encourage" children to transition.[241] Another cosponsor echoed the sentiment, claiming that "85% of [transgender minors] will have their confusion resolved to how they were created."[242] This legislative history certainly contains transphobia, but it is particularly interesting that some of the legislators who offered these comments contemplate the existence of transgender adults. In fact, one speaker claimed to have no problem with the existence of transgender adults. There is a more specific anxiety operating in tandem with general transphobia in this legislation: a fear of transgender *children* and a concurrent assumption that such children are confused or have been led astray.

I have focused on Arkansas's law to demonstrate how gender-affirming healthcare bans are based in the stereotype of transgender identity as a confused phase, but other states' bans illustrate this as well. Alabama's law, for example, contains a legislative finding claiming that transgender identity is something most children "will outgrow."[243] A doctor testifying in the Alabama House Health Committee Hearing on the bill echoed this sentiment, calling

240. *Id.* at 2:36:55 (statement of Rep. Robin Lundstrum). The same representative echoed this sentiment while testifying in Missouri's state legislature in favor of a similar law there, claiming "[m]aybe [transgender] kids just need time to grow up." Posner, *supra* note 128.

241. *Recording: 93d General Assembly, Regular Session, Arkansas House of Representatives*, *supra* note 238, at 2:24:59-2:26:13 (statement of Rep. Jim Wooten).

242. *Id.* at 2:21:41 (statement of Rep. Mary Bentley).

243. S.B. 184, 2022 Leg. Reg. Sess. § 2(4) (Ala. 2022).

transgender minors "gender confused youth."[244] And in signing the bill into law, Alabama Governor Kay Ivey stated, "I believe very strongly that if the Good Lord made you a boy, you are a boy, and if he made you a girl, you are a girl. . . . [L]et us all focus on helping them to properly develop into the adults God intended them to be."[245]

These laws are founded on the stereotype that transgender minors are merely confused and unable to understand their own identity. They use that stereotype to entrench and compel narrow sex roles: minors can access puberty blockers, hormone therapy, and even surgery to conform with the state's conception of what a boy or a girl ought to be, but they may not access puberty blockers in order to deviate from that narrow, normative conception of sex roles.[246] Under these laws, the state presumes that it knows best what sex every child is and ought to be. And it uses the coercive power of the law to enforce that judgment, thereby withholding medically appropriate care that would dramatically benefit transgender children.[247]

Recognizing the operation of the confused-transgender-child stereotype in this context does not necessarily mean embracing the most permissive approach to gender-affirming treatment possible. It means recognizing that laws like Arkansas's SAFE Act assume that transgender minors are presumptively confused, and so *none* should be allowed access to gender-affirming care, no matter what. There is ongoing debate about how cautious to be with gender-affirming care for minors,[248] and there surely ought to be room for a nuanced conversation

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244. Mike Cason, *Bill to Ban Transgender Treatments for Alabama Minors Heard in Committee Today*, AL.COM (Mar. 11, 2021, 8:24 AM), https://www.al.com/news/2021/03/bill-to-ban-transgender-treatments-for-alabama-minors-could-advance-today.html [https://perma.cc/2NQH-EFVV].

245. Steve Almasy & Amanda Musa, *Alabama Governor Signs into Law Two Bills Limiting Transgender Youth Protections*, CNN (Apr. 8, 2022, 4:50 PM EDT), https://www.cnn.com/2022/04/08/us/alabama-transgender-bills/index.html [https://perma.cc/7MDQ-7EJR].

246. It should be noted that genital surgery—a rhetorical scarecrow in many gender-affirming healthcare bans—is generally *not* a form of treatment available to transgender minors under eighteen. *See* Note, *supra* note 139, at 2167.

247. On the benefits of gender-affirming care for minors, see *supra* note 214 and accompanying text.

248. *See, e.g.*, Emily Bazelon, *The Battle over Gender Therapy*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/15/magazine/gender-therapy.html [https://perma.cc/F4N6-F8MQ]; Ross Douthat, Opinion, *How to Make Sense of the New L.G.B.T.Q. Culture War*, N.Y. TIMES, Apr. 13, 2022, https://www.nytimes.com/2022/04/13/opinion/transgender-culture-war.html [https://perma.cc/4CQR-4DVV]; Jenny Jarvie, *A Transgender Psychologist Has Helped Hundreds of Teens Transition. But Rising Numbers Have Her Concerned*, L.A. TIMES (Apr. 12, 2022, 3:00 AM PT), https://www.latimes.com/world-nation/story/2022-04-12/a-transgender-psychologist-reckons-with-how-to-support-a-new-generation-of-trans-teens [https://perma.cc/WC79-567H].

about the particularities of such treatments—one that is grounded in fact and that centers the voices of those who actually require gender-affirming care.[249] But this, in fact, is all the more reason to oppose the wholesale banning of these treatments for all children—regardless of parental consent or medical approval—by legislatures operating on the basis of sex stereotyping.

E. The Transgender-Confusion Stereotype in Other Antitransgender Policies

Gender-affirming healthcare bans are the clearest example of the stereotype of the confused transgender child in action. But other recent policies and laws targeting transgender minors show the influence of the same overbroad assumptions. Of course, every law and policy must be analyzed on its own, taking into account its particular text and context. The stereotype of the confused transgender child may not fully explain every instance of policy targeting transgender youth, and its operation may be clearer in gender-affirming healthcare bans than in, for example, some transgender sports bans. But all of these policies and laws should be understood together as part of the same panic about transgender minors, inseparable from a larger political context in which transgender identity is continually doubted and disbelieved. In general, any regulation of transgender minors that refuses to treat them as anything other than their sex assigned at birth and that meets transgender identity among minors with inherent skepticism likely has at least some roots in the stereotype of the confused transgender child.[250]

For example, laws restricting transgender athletes' participation on sports teams and policies keeping transgender students from using the bathroom that accords with their gender are both attempts to prevent transgender minors from forms of gendered socialization. They target sex-specific, homosocial spaces and activities through which children internalize who is male or female and what social arrangements follow from this. Forcing a transgender boy to use the girls' bathroom sends the message that he is "really" a girl and simply incorrect about

249. *See* Sahar Sadjadi, *The Vulnerable Child Protection Act and Transgender Children's Health*, 7 TRANSGENDER STUD. Q. 508, 513 (2020) ("In the strange political times in which we find ourselves, we need to preserve the space necessary for research, analysis, and debate over these issues, while adamantly holding open spaces in which young trans and gender-variant life is valued and can unfold along multiple pathways.").

250. My aim in this Section is to show how the confused-transgender-child stereotype also plays a role in the context of these laws and policies—not to offer a comprehensive analysis of the purposes and rationales behind them. For my argument that biology and inherent differences between the sexes do not adequately justify these laws and policies, see *infra* Section III.F.

his identity. The school district in *Adams*, for example, based its policy on students' sex listed in their original enrollment documents.[251] Even though Adams was able to alter his birth certificate to reflect his male identity, in the school's eyes he was still a girl.[252] The school's judgment about what bathroom he ought to use was, at root, a judgment about what his identity really was.

In a similar fashion, transgender sports bans prohibit transgender minors from participating in socially significant sex-specific activities that do not conform to the government's judgment about their sex roles. These laws keep transgender minors from gaining social recognition for their identity—perhaps because the state fundamentally does not believe that these children accurately know who they are. That would explain why Mississippi's governor, while signing that state's ban on transgender student-athletes, described it as a response to what he called President Biden's "encourag[ing]" of "transgenderism amongst our young people."[253] Similarly, the sponsor of Texas's comparable bill understood transgender minors as "individuals who are quote confused,"[254] while in the state's House floor debate over the bill another representative emphasized his skepticism of transgender identity per se, urging, "God has a design—for the family, for us as individuals. He says clearly in his word, the Creator of the universe created us male and female."[255] More generally, such laws and their proponents tend to describe transgender girls as boys or men, revealing that they understand transgender minors as fundamentally incorrect about their own identity.[256]

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251. *See* Adams *ex rel.* Kasper v. Sch. Bd. of St. John's Cnty., 3 F.4th 1299, 1308-09 (11th Cir. 2021).

252. *Id.* at 1305.

253. *See* Emily Wagster Pettus, *Mississippi Gov Signs Bill Limiting Transgender Athletes*, ASSOCIATED PRESS (Mar. 11, 2021), https://apnews.com/article/joe-biden-mississippi-discrimination-gender-identity-tate-reeves-9dfa2829f12e5f7efbb1653aaf468941 [https://perma.cc/5RFH-VBQU]; *see also* Burns, *supra* note 207 (quoting Representative Eric Lucero, the sponsor of Minnesota's transgender sports ban, as saying, "The last several years have been witness to a rise in the number of confused boys and men mistakenly believing themselves to be girls and women . . . .").

254. *See* Kate McGee & Aliyya Swaby, *Texas Republicans Want to Keep Transgender Women Out of Women's School Sports Teams*, SALON (Feb. 7, 2021, 12:30 PM EST), https://www.salon.com/2021/02/07/texas-republicans-want-to-keep-transgender-women-out-of-womens-school-sports-teams_partner [https://perma.cc/GY7E-HKPX] (quoting this remark).

255. Recording: 87th Legislative Session, Third Called Session, Part 2, Texas House of Representatives (Oct. 14, 2021), at 2:42:49-2:44:36 (statement of Rep. Matthew R. Schaefer), https://tlchouse.granicus.com/MediaPlayer.php?view_id=47&clip_id=22669 [https://perma.cc/M663-94K2].

256. *See, e.g.*, S.B. 228, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021) (referring to "allowing boys to compete in girls' athletic competitions"); *On the First Day of Pride Month, Florida Signed a Transgender Athlete Bill into Law*, NPR (June 2, 2021, 7:54 ET), https://www.npr.org/2021/06

The stereotype of the confused transgender child is present to some degree in any law that generally presumes transgender minors are not who they claim to be, often in tandem with other forms of stereotyping and overbroad generalization about gender. For some laws and legislative records, the doctrinal argument that the law is based in this stereotype will be more difficult to make in court. Nonetheless, it is important to recognize and explicitly identify the stereotype of the confused transgender child not just for challenging particular laws in court but also for more generally and holistically understanding the current wave of antitransgender policy targeting children.

F. Responses to Sex-Stereotyping Arguments

Under intermediate scrutiny, laws relying on and seeking to entrench sex stereotypes are unconstitutional. Proponents and defenders of recent antitransgender policies, however, have claimed that biology and physical differences between the sexes, rather than sex stereotyping, somehow explain the choices that school boards and state legislatures have made. In any challenge to such policies based on sex-stereotyping arguments, refuting these claims based in biology will be crucial. As I show in this Section, such defenses misconceive how recent antitransgender policies operate, and they misconceive the relationship between sex stereotyping and biological or physical differences in sex-discrimination law. Appeals to biology cannot justify these policies and laws.

Defenses of laws and policies targeting transgender youth tend to draw on a key passage from *United States v. Virginia*: Justice Ginsburg's summation of the sex-discrimination doctrine she played such a crucial role in establishing. Some judges and legislators have seen this precedent as permitting antitransgender policies that are based on one's sex assigned at birth, merely because the passage acknowledges inherent differences between the sexes:

> "Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the

/02/1002405412/on-the-first-day-of-pride-month-florida-signed-a-transgender-athlete-bill-into-l [https://perma.cc/S3YP-ZQXW] ("'In Florida, girls are going to play girls sports and boys are going to play boys sports,' Gov. Ron DeSantis said as he signed the bill into law at a private Christian academy in Jacksonville that would not be subject to the law."). Even putting the misgendering in examples like these aside, this practice overlooks the biological and physical differences between transgender girls who have undertaken gender-affirming treatment and cisgender boys. These policies refuse to countenance any transgender children as anything other than their sex assigned at birth, presuming that the state knows their true sex better than they do.

> members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promot[e] equal employment opportunity," to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.[257]

In his dissent in *Adams*, for example, Chief Judge Pryor cites this passage to support his claim that the Supreme Court "has long grounded its sex-discrimination jurisprudence in reproductive biology."[258] The challenged bathroom policy in that case, whereby a transgender boy like Adams cannot use male restrooms, is explained and justified, Pryor suggests, by the physiological differences between men and women.[259] Similarly, in dissenting from the Fourth Circuit's denial of en banc review of an earlier decision in *Grimm*, Judge Niemeyer wrote that the challenged restroom policy was consistent with the Supreme Court's observation "that '[p]hysical differences between men and women' are 'enduring' and render 'the two sexes . . . not fungible.'"[260] The Arizona, Arkansas, Idaho, Louisiana, and West Virginia laws regarding transgender athletes similarly invoke *Virginia*, citing this passage to support their restrictive definitions of "biological" sex.[261] Citing *Virginia*, West Virginia's law states that "[t]here are inherent differences between biological males and biological females" before defining biological sex as "an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics *at birth*."[262] Idaho's law cites the same language from *Virginia* before defining sex by reference to criteria that exclude consideration of circulating hormone levels (which can be managed through hormone therapy).[263]

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257. United States v. Virginia, 518 U.S. 515, 533-34 (1996) (first quoting Califano v. Webster, 430 U.S. 313, 320 (1977) (per curiam); and then quoting Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987)) (footnote omitted) (internal citations omitted).

258. Adams *ex rel.* Kasper v. Sch. Bd. of St. John's Cnty., 3 F.4th 1299, 1334 (11th Cir. 2021) (Pryor, C.J., dissenting).

259. *Id.* at 1333-35.

260. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 600 (4th Cir. 2020) (Niemeyer, J., dissenting) (quoting *Virginia*, 518 U.S. at 533, 550 n.19).

261. *See* S.B. 1165, 55th Leg., 2d Reg. Sess. § 2(5) (Ariz. 2022); ARK. CODE ANN. § 16-130-102(6) to (7) (West 2021); IDAHO CODE ANN. § 33-6202(1) (West 2021); S.B. 44, 2022 Leg., Reg. Sess. § 1 (La. 2022); W. VA. CODE ANN. § 18-2-25d(a)(1) (West 2021).

262. W. VA. CODE ANN. § 18-2-25d(a)(1), (b)(1) (West 2021) (emphasis added).

263. IDAHO CODE ANN. § 33-6203(3) (West 2021).

Taken together, these citations of *Virginia* show an attempt to refashion the meaning of this canonical opinion into a trans-exclusionary precedent. All this reliance on *Virginia*, however, is misplaced. For one thing, *Virginia* did not offer any definition of sex, let alone one that forecloses the possibility of transitioning. With some sleight of hand, these citations attempt to transform Justice Ginsburg's references to inherent physical differences between the sexes into *immutable* physical differences. But nowhere in *Virginia* is there any indication that transitioning cannot be recognized or respected in the law. Even more fundamentally, *Virginia* did not suggest that sex-discrimination or sex-stereotyping analysis simply stops when it encounters claims based in physiology and biology. The key passage quoted above is not an exception to state-actors' burden of showing an "exceedingly persuasive justification" for distinguishing on the basis of sex but an elaboration of that test.[264] When state actors rely on physical differences, sex classifications still cannot serve as "artificial constraints on an individual's opportunity" or as barriers that "create or perpetuate the legal, social, and economic inferiority of women."[265] As Reva B. Siegel has explained, *Virginia* establishes a highly contextual, historically informed antisubordination inquiry for when state actors reason from the body to justify sex distinctions.[266]

Virginia does not suggest that the invocation of physical differences between the sexes can immunize state action from judicial scrutiny. It says precisely the opposite: state reliance on physical differences calls for careful examination to ensure that claims on the body neither artificially constrain individual opportunity nor give cover to social, role-based judgments about how men and women ought to be.[267] And when the antitransgender laws and policies considered here are examined, it is clear that their reliance on biology does both of these things.

These laws and policies *artificially* constrain individual liberty and opportunity because physical differences do not actually explain the way they distinguish on the basis of sex. Chief Judge Pryor, for example, never elaborates on what exactly reproductive biology or physiology have to do with who is allowed to enter and use a private, individual bathroom stall.[268] Nor does biology explain

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264. *Virginia*, 518 U.S. at 531.

265. *Id.* at 533, 534.

266. Siegel, *supra* note 89, at 205-06.

267. *Cf.* Franklin, *supra* note 90, at 170 (noting that basing sex distinctions on physical differences "does not mean the state has carte blanche to discriminate on the basis of sex"); Siegel, *supra* note 89, at 204 (explaining that *Virginia* "recognized physical differences between the sexes and extended scrutiny to regulation implicating differences, rather than suggest that real differences might stand outside equality's reach").

268. On the weakness of biological arguments for restricting transgender people's access to restrooms, see Minter, *supra* note 123, at 1196-99.

blanket bans on all transgender student-athletes, which apply equally to prepubertal kindergartners and to high-school students.[269] Some states' laws are more limited in applying to students beginning in middle or high school, but these laws still fail to take into account whether an individual athlete has ever in fact undergone male puberty or has suppressed testosterone.[270] Indeed, the fact that these laws tie athletic eligibility to sex assigned at birth means that they are guaranteed *not* to track biological reality for many transgender minors. The laws will not be responsive at all to the biological consequences of puberty blockers, testosterone suppression, or hormone therapy.

Some of the legislative history behind Florida's law restricting transgender children's athletic participation illustrates how flimsy the biological justification for these laws is.

When asked why the bill did not accommodate those transgender children who do not actually possess any physical advantage over their cisgender peers (whether because they happen to be smaller or slower, for example, or because they have undergone hormone therapy), the bill's sponsor replied, "We could not settle on the science so we went to what was the most simplistic way, which is to say that if you're a male at birth you may not play in women's sports."[271] She then clarified: "We couldn't settle on how exactly to do that, so we've gone to what is the most simple, when you're talking about sports—is that men are generally stronger than women."[272] She later characterized the approach of the bill as follows: "Men are generally stronger than women and that's the premise of this bill and that's why we're doing it."[273] In other words, instead of an attempt to actually track physical or biological differences regarding transgender athletes, and their relevance to athletic performance, the legislature opted to use minors' sex assigned at birth as an imperfect, overbroad proxy for the relevant criteria.

This is an example of transgender-specific sex stereotyping (that transgender girls are effectively boys) combined with overbroad generalizations

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269. *See* ALA. CODE § 16-1-52 (2021); S.B. 1165, 55th Leg., 2d Reg. Sess. § 2(5) (Ariz. 2022); ARK. CODE ANN. § 16-130-102(6) to (7) (West 2021); IDAHO CODE ANN. §§ 33-6202 to -6203 (West 2021); IND. CODE § 20-33-13-4 (2022); IOWA CODE ANN. § 261I.2 (West 2022); S.B. 44, 2022 Leg., Reg. Sess. § 1 (La. 2022); MISS. CODE ANN. § 37-97-1 (West 2021); MONT. CODE ANN. § 20-7-1306 (West 2021); OKLA. STAT. tit. 70, § 27-106 (2022); S.C. CODE ANN. § 59-1-500 (2022); S.D. CODIFIED LAWS § 13-67-1 (2022); TEX. EDUC. CODE ANN. § 33.0834 (West 2022); UTAH CODE ANN. §§ 53G-6-901 to -902 (West 2022).

270. *See* FLA. STAT. § 1006.205 (2021); KY. REV. STAT. ANN. § 164.2813 (West 2022); TENN. CODE ANN. § 49-6-310 (2022); W. VA. CODE ANN. § 18-2-25d (West 2021).

271. Recording: 2021 Legislature, Regular Session, Florida Senate, at 1:56:58-1:57:06 (Apr. 28, 2021) (statement of Sen. Kelli Stargel), https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=7284 [https://perma.cc/Q8WR-997Q].

272. *Id.* at 1:57:45-1:57:53 (statement of Sen. Kelli Stargel).

273. *Id.* at 2:11:52-2:11:56 (statement of Sen. Kelli Stargel).

about men as necessarily stronger than women. Not every transgender woman is bigger or stronger than her cisgender peers, even absent medical transitioning. A particular child assigned male at birth might in fact be shorter, slower, and less strong than most of their cisgender female peers, but Florida's law would still treat that child as possessing an unfair athletic advantage. Laws like Florida's apply without exception to all transgender athletes—and to all sports, as though the same physical characteristics were advantageous in every context, from basketball to bowling to gymnastics. This overbreadth suggests that these blanket bans are less concerned with the complexities of biological reality and more concerned with entirely excluding a community on the basis of sex. The laws may note biological differences, but the distinctions they make turn on overbroad generalizations. Inherent physical differences between the sexes do not adequately explain all of this targeted regulation of transgender children in contexts of gendered socialization. Sex stereotyping does.

Finally, we have already seen why biology does not explain or justify the policy choices of laws banning gender-affirming healthcare. As explained above, these laws in fact do allow medical interventions that alter one's sexual development from birth—for precocious puberty or for intersex children, for example. It is only when a minor seeks the same forms of medical care for the purpose of deviating from the sex role the state has selected for them that the laws prohibit that choice.

The presence of biology and inherent sexual differences in these laws, then, is doing exactly what the Supreme Court warned it cannot do in *Virginia*. It is serving as an artificial constraint on individual liberty and as a pretext for overbroad sex-based generalizations. When constitutional sex-discrimination law is properly understood, and when invocations of biology are actually scrutinized, it is clear that these policies are based on sex stereotyping and seek to perpetuate normatively defined sex roles. For that reason, they cannot survive heightened scrutiny.

CONCLUSION

Bostock is a transformative decision couched in a restrictive framework. Its textualism obscures an underexplained choice to understand discrimination as mere classification. It also ignores the connections between anti-LGBT discrimination and the enforcement of sex stereotypes, leaving unanswered the claims by dissenting Justices that such discrimination has little to do with sexism or the subordination of women. That being said, *Bostock*'s holding—properly understood—does meaningfully shift equal-protection doctrine. Its conclusion that distinctions on the basis of LGBT identity are sex-based distinctions means that, under the Equal Protection Clause, LGBT classifications warrant intermediate

scrutiny. The majority in *Bostock* may focus on the particular text of Title VII, but the decision rests on a logical conclusion about LGBT classifications. As this Note has argued, there are no persuasive grounds for limiting *Bostock* to Title VII and similar statutes. If courts hold as much, the consequences would be immense. Lesbian, gay, bisexual, and transgender people would be clearly protected under the Equal Protection Clause nationwide.

This significant development, however, will often not be enough to render anti-LGBT laws and policies unconstitutional. When such discrimination triggers intermediate scrutiny, courts that—like the Supreme Court in *Bostock*—ignore the connections between anti-LGBT discrimination, sex stereotypes, and sexism may uphold much discriminatory state action. *Bostock* alone will not be enough to protect LGBT equality under the Constitution. Combining the rationale of *Bostock* with sex-stereotyping arguments, though, can provide a more powerful form of constitutional argument to vindicate the promise of equal protection for all sexual minorities.

So far, courts adjudicating recent disputes over laws targeting transgender youth have mostly gestured toward *Bostock*'s relevance under the Equal Protection Clause only tentatively, including it among other, more fully elaborated rationales for intermediate scrutiny. But as this area of the law develops in different circuits in the absence of Supreme Court guidance, the *Bostock* rationale is uniquely valuable for having earned the Court's approval. Few circuits have yet extended intermediate scrutiny to antitransgender discrimination, and *Bostock* provides an argument for why all of them must. Properly applied in the equal-protection context, *Bostock* means that all of the recent laws and policies singling out transgender youth must pass intermediate scrutiny.

Applying intermediate scrutiny to such laws, courts have drawn on sex-stereotype reasoning to varying degrees, but they have not yet articulated a key sex stereotype on which such regulation is often founded: that transgender minors cannot know they are transgender and are merely confused or going through a temporary phase. Laws and policies that single out transgender minors for skepticism and doubt concerning their identity and then regulate on this basis to enforce narrowly prescribed sex roles cannot survive intermediate scrutiny. Nor can shallow references to physical differences between the sexes justify such state action under *Virginia*. In none of these contexts do such differences actually explain the discriminatory policy choices made by school boards, school districts, or state legislatures. Rather, these choices are dictated by an effort to control and restrict the ways in which young people live out their sexual identity and gain recognition of it from their communities.

Although transgender youth have had success so far in the recent litigation canvassed in this Note, they may soon face courts less amenable to their claims.

Assumptions about sex and gender are deeply entrenched and normatively contested, and it can be easy to simply point to a concept like "biology" without actually analyzing what it means or how it applies in a particular dispute.[274] However, even if courts fail to recognize the sex stereotyping that underlies antitransgender bathroom policies, sports bills, and healthcare bans, there is significant value in advancing such arguments both in and out of courts. Sex-stereotype reasoning allows courts to affirm transgender youth, speaking directly to states' inabilities to doubt, denigrate, and punish young people who do not conform to a government's preferred sex roles. This is just one example of the dialogic benefits of having courts recognize and speak to histories of marginalization, stereotype-based subordination, and the relationship between anti-LGBT discrimination and sex discrimination.

Courts, after all, do not merely rule in particular disputes but function as dialogic partners with other players in our democracy. As transgender rights are demanded and contested through our democratic system, courts play a powerful role not only in resolving specific disputes but also in shaping and disciplining discourse. How courts understand and tell stories of discrimination influences how our broader society conceptualizes what discrimination is.[275] That is, courts do not simply identify something in the world called "sex discrimination"; they participate in fashioning the concept itself.

Adopting *Bostock*'s approach to antidiscrimination law more broadly within courts and in other democratic fora would hamper the ability to articulate, make visible, and remedy inequality in our democracy. That decision's formalistic, anticlassificationist approach is incapable of identifying and responding to the harms of recent laws and policies targeting transgender youth, which go beyond simply taking sex into account. Understood properly, *Bostock* does have the potential to protect transgender youth and significantly advance LGBT equality under the Constitution—but it will do so most effectively if its limited and limiting approach is not allowed to stand in the way.

274. *See, e.g.*, Adams *ex rel.* Kasper v. Sch. Bd. of St. John's Cnty., 3 F.4th 1299, 1322 (11th Cir. 2021) (Pryor, C.J., dissenting).

275. *See* Brian Soucek, *Queering Sexual Harassment Law*, 128 YALE L.J.F. 67, 67-69 (2018).