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LGBTQ RIGHTS IN AN AGE OF DEMOCRATIC UNCERTAINTY: HOW TO COUNTER A POLITICS OF ERADICATION

NANCY J. KNAUER*

ABSTRACT

In this age of democratic uncertainty, the lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) community is facing its greatest challenge in decades—a Politics of Eradication premised on the conviction that LGBTQ people do not, or should not, exist. In 2021, the populist Make America Great Again (“MAGA”) movement began inundating state legislatures with bills designed to censor LGBTQ lives, remove LGBTQ people from public life, and, in the case of transgender people, literally define them out of existence. MAGA activists claimed these laws were necessary to protect women, children, and even national security. On January 20, 2025, this MAGA anti-LGBTQ agenda became the official policy of the United States.

There is nothing new about the Politics of Eradication. It is an old strategy long applied to unpopular groups that promises an appealing, and dangerous, finality. Today, a virulent anti-LGBTQ version of this strategy has galvanized the MAGA movement and motivated swing voters. It is both a symptom of democratic decline and a contributing factor. It represents an existential threat to LGBTQ people, but it also serves as a harbinger of what might lie ahead because the Politics of Eradication will not end with LGBTQ people.

This Article examines the Politics of Eradication as applied to LGBTQ people in the context of an authoritarian slide. The first section outlines the markers of democratic decline, including the rise of the MAGA movement and the consolidation of power at the executive level. The second section details the evolution of the MAGA movement’s anti-LGBTQ narrative and its embrace by the Trump administration. The final section provides a clear-eyed threat assessment and identifies the institutional levers and mechanisms of power that stand between LGBTQ people and certain erasure.

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INTRODUCTION

In this age of democratic uncertainty, the lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) community is facing its greatest challenge in decades—a Politics of Eradication premised on the conviction that LGBTQ

people do not, or should not, exist.¹ In 2021, the populist Make America Great Again (“MAGA”) movement began inundating state legislatures with bills designed to censor LGBTQ lives, remove LGBTQ people from public life, and, in the case of transgender people, literally define them out of existence.² MAGA activists claimed these laws were necessary to protect women, children, and even national security.³ On January 20, 2025, this MAGA anti-LGBTQ agenda became the official policy of the United States when President Trump issued executive orders rescinding nondiscrimination protections, cancelling all Diversity, Equity, and Inclusion (“DEI”) initiatives, and declaring “the immutable biological reality of sex.”⁴ The removal from government websites and databases of any mention of the ill-defined concepts of “gender ideology” or “DEI” swiftly followed these first-day executive orders, resulting in blanket deletions of LGBTQ people and references to any form of equity.⁵

During the first month of his second term, Trump issued executive orders banning transgender people from the military, sports teams, and bathrooms.⁶ He banned access to gender-affirming care for minors and pledged to stop the “indoctrination” of children in K-12 education.⁷ The federal government threatened school districts,⁸ states, municipalities, and hospitals with the loss of federal funding unless they abandoned their inclusive and welcoming

¹ Nancy J. Knauer, *The Politics of Eradication and the Future of LGBT Rights*, 21 GEO. J. GENDER & L. 615, 619 (2020).

² See *id.* See generally Kaleigh Rogers & Mary Radcliffe, *Over 100 Anti-LGBTQ+ Laws Passed in the Last Five Years — Half of Them This Year*, FIVE-THIRTY EIGHT (May 25, 2023, at 14:25 ET), <https://fivethirtyeight.com/features/anti-lgbtq-laws-red-states/> [<https://perma.cc/3UKE-87PE>] (“As waves of legislation have crested and receded, what’s left in their wake are red states with a new arsenal of restrictions on LGBTQ+ people.”).

³ See *infra* text accompanying notes 296–308 (detailing MAGA characterization of LGBTQ people as threat to children, women, and national security).

⁴ Exec. Order No. 14148, 90 Fed. Reg. 8237 (Jan. 20, 2025) (rescinding Biden-era protection); Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025) (defining “sex”); Exec. Order No. 14151, 90 Fed. Reg. 8339 (Jan. 20, 2025) (dismantling DEI initiatives).

⁵ Jeremy B. Merrill et al., *How Federal Agencies Have Already Changed Their Websites Under Trump*, WASH. POST (Jan. 31, 2025), <https://www.washingtonpost.com/politics/2025/01/31/federal-agencies-websites-trump/> [<https://perma.cc/4GKZ-VFBP>]; Jennifer Jacobs et al., *Agencies Asked to Scrub Federal Government Websites to Remove Diversity-Related Content*, CBS NEWS (Jan. 31, 2025, at 21:15 ET), <https://www.cbsnews.com/news/trump-officials-pausing-most-federal-government-websites-friday/> [<https://perma.cc/S4ZT-ZXYG>]; Ethan Singer, *Thousands of U.S. Government Web Pages Have Been Taken Down Since Friday*, N.Y. TIMES (Feb. 3, 2025), <https://www.nytimes.com/2025/02/02/upshot/trump-government-websites-missing-pages.html> [<https://perma.cc/9MVB-47LR>].

⁶ Exec. Order No. 14183, 90 Fed. Reg. 8757 (Jan. 27, 2025); Exec. Order No. 14201, 90 Fed. Reg. 9279 (Feb. 5, 2025); Exec. Order No. 14190, 90 Fed. Reg. 8771 (Jan. 29, 2025).

⁷ Exec. Order No. 14190, *supra* note 6; Exec. Order No. 14187, 90 Fed. Reg. 8771 (Jan. 28, 2025).

⁸ See, e.g., Zach Montague, *Education Dept. Gives Schools Two Weeks to Eliminate Race-Based Programs*, N.Y. TIMES (Feb. 17, 2025), <https://www.nytimes.com/2025/02/17/us/politics/education-dept-race-based-programs.html> [<https://perma.cc/7ACT-R253>].

LGBTQ policies, as well as other DEI practices.⁹ Many private sector companies opted to “obey in advance”¹⁰ and discontinued DEI programs that had become commonplace across corporate America after the 2020 protests for racial justice.¹¹ Throughout this period, Trump asserted a robust theory of executive power that claimed to transcend certain statutory and constitutional restraints, leading the United States ever closer to a full-blown constitutional crisis.¹²

To be clear, this current attack on LGBTQ people is not the predictable culture war backlash against LGBTQ rights that invariably counters for religious exemptions and argues against “special rights.”¹³ The Politics of

⁹ During the first month of his second term in office, President Trump issued a series of executive orders that prohibited the use of federal funds for DEI practices and “gender ideology.” *E.g.*, Exec. Order No. 14190, *supra* note 6 (directing federal agencies to prohibit the use of funds “to directly or indirectly support or subsidize the instruction, advancement, or promotion of gender ideology or discriminatory equity ideology” in K-12 education); see Troy Closson, *3 School Districts to Lose \$65 Million Over Gender and D.E.I. Policies*, N.Y. TIMES (Sep. 25, 2025), <https://www.nytimes.com/2025/09/25/nyregion/trump-dei-schools-federal-money.html> [https://perma.cc/N3K6-64FC]; Brooke Migdon, *Trump Threatens to Withhold Federal Funds from Maine Over Transgender Athletes*, THE HILL (Feb. 21, 2025, at 12:18 ET), <https://thehill.com/homenews/lgbtq/5157576-trump-federal-funds-maine-transgender-athletes/> [https://perma.cc/7HU8-EP2R]; Alex Zielinski, *Portland Mayor Orders Changes to City Equity Policies to Comply with Trump DEI Mandate*, OPB (July 31, 2025), <https://www.opb.org/article/2025/07/31/portland-oregon-politics-keith-wilson-diversity-equity-inclusion-donald-trump/> [https://perma.cc/946U-BCU2]; Caitlin Owens, *How Trump’s DEI Order Could Upend Hospitals’ Workforce Efforts*, AXIOS (Feb. 12, 2025), <https://www.axios.com/2025/02/12/trump-dei-executive-order-hospitals> [https://perma.cc/4X4D-57ZK].

¹⁰ TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 13, 17 (2017) (presenting “Do not obey in advance” as the first of “twenty lessons from the twentieth century” regarding how to respond to tyranny).

¹¹ See Wei Wei & Al Ghosh, Racial Diversity Discussions and DEI Commitments 6 (Nov. 25, 2024) (unpublished manuscript), <https://ssrn.com/abstract=5033569> [https://perma.cc/4V4N-6YYU]; Conor Murray & Molly Bohannon, *Citigroup Rolls Back Diversity Initiatives—Here Are All the Companies Cutting DEI Programs*, FORBES (Feb. 21, 2025, at 11:27 ET), <https://www.forbes.com/sites/conormurray/2025/02/21/pepsi-rolling-back-diversity-initiatives-here-are-all-the-companies-cutting-dei-programs/> [https://perma.cc/B6BR-MDRE].

¹² Adam Liptak, *Trump’s Actions Have Created a Constitutional Crisis, Scholars Say*, N.Y. TIMES (Feb. 12, 2025), <https://www.nytimes.com/2025/02/10/us/politics/trump-constitutional-crisis.html> [https://perma.cc/QXC5-4FAK]; see *infra* text accompanying notes 94–112 (explaining strong version of unitary executive theory advocated by Trump White House); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 65 (2018) (including rejection of “the Constitution or a willingness to violate it” as a “key indicator of authoritarian behavior”); see also Lisa Rein, *As Musk Reshapes the Government, Some Ask: Where Are the Guardrails?*, WASH. POST (Feb. 16, 2025), <https://www.washingtonpost.com/politics/2025/02/16/musk-doge-government-guardrails-safeguards/> [https://perma.cc/LBC4-MUYX]. See generally STEVEN G. CALABRESI ET AL., THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2009) (discussing evolution of the unitary executive theory).

¹³ Suzanne B. Goldberg, *Facing the Challenge: A Lawyer’s Response to Anti-Gay Initiatives*, 55 OHIO ST. L.J. 665, 670–72 (1994) (describing “civil rights/special rights equation”); Nancy J. Knauer, *Religious Exemptions, Marriage Equality, and the Establishment Clause*, 84 UMKC L. REV. 749, 749–50 (2016) (describing push for broad religious exemptions post-*Obergefell*).

Eradication is a much older strategy long applied to unpopular groups, which promises an appealing, and dangerous, finality.¹⁴ Its goal differs fundamentally from a campaign of subordination because it does not primarily seek to impose certain disabilities on, or otherwise denigrate, particular groups.¹⁵ It is not about state-imposed inferiority or presumed superiority.¹⁶ Rather, the goal of a Politics of Eradication is to erase or remove the target population and thereby make the problem go away.¹⁷ A virulent anti-LGBTQ version of this strategy has produced a dehumanizing narrative of LGBTQ people and their allies that has galvanized the MAGA base, motivated swing voters, and helped propel Trump to a second term in office.¹⁸

The populist embrace of an anti-LGBTQ Politics of Eradication in the United States is both a symptom of democratic decline and a contributing factor.¹⁹ It helps fuel a populist fury that demands conformity and a return to a golden age steeped in so-called traditional values.²⁰ The Politics of Eradication represents an existential threat to LGBTQ people, but it also serves as a harbinger of what might lie ahead because there is no reason to believe that the MAGA policy juggernaut will stop with LGBTQ people. Indeed, MAGA policy statements suggest otherwise.²¹ For example, the Politics of Eradication is already at work in the immigration context, where the call for mass deportations of undocumented immigrants in lieu of a proposal for amnesty or a pathway to citizenship evinces a clear intent to remove a population that has been subject to unrelenting demonization.²²

The implementation of a Politics of Eradication on the federal level has dealt the LGBTQ rights movement a devastating blow at a time when our democratic institutions and norms are fraying.²³ With signs of an authoritarian slide on the horizon, these are perilous times that require a clear-eyed threat assessment. It is imperative to untangle rhetoric from intention and determine

¹⁴ Knauer, *supra* note 1, at 619.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See, e.g., Editorial Board, Opinion, *Trump's Shameful Campaign Against Transgender Americans*, N.Y. TIMES (Feb. 9, 2025), <https://www.nytimes.com/2025/02/09/opinion/transgender-trump-orders.html> [<https://perma.cc/8XAS-YCRK>].

¹⁹ See *infra* text accompanying notes 35–61 (discussing markers of democratic decline).

²⁰ Robin S. Maril, *Power at the Fault Lines: A Queer and Transgender Model for Democratic Defense*, S. CAL. INTERDISC. L.J. (forthcoming 2025), <https://ssrn.com/abstract=4540725> [<https://perma.cc/6V6V-VMST>].

²¹ For example, the controversial policy blueprint *Project 2025* published by the Heritage Foundation takes direct aim at marriage equality and single-parent families. See *infra* text accompanying notes 251–60 (discussing *Project 2025*).

²² Hamed Aleaziz, *Trump Expands Quick Deportations Across the U.S.*, N.Y. TIMES (Jan. 25, 2025), <https://www.nytimes.com/2025/01/21/us/politics/trump-deportations-immigration.html> [<https://perma.cc/Z5HM-UMYW>].

²³ Editorial Board, Opinion, *Do We Still Have a Democracy?*, N.Y. TIMES (Oct. 31, 2025), <https://www.nytimes.com/interactive/2025/10/31/opinion/trump-autocracy-democracy-report.html> [<https://perma.cc/5NFS-BDJW>].

when to take the MAGA anti-LGBTQ narrative seriously, if not literally.²⁴ To the extent that the natural end goal of a platform of eradication is extermination, then how far will MAGA forces go to enforce their view of conformity and rid the United States of “gender ideology” and “DEI”? Will marriage equality and LGBTQ families be respected?²⁵ What penalties will they devise for so-called “groomers”?²⁶ Will they be satisfied with the civil death of transgender identities, or will they resort to criminal prohibitions like some states have already enacted for drag?²⁷ Will LGBTQ people be allowed to speak, publish, and read about their lives?²⁸

This Article examines the Politics of Eradication as applied to LGBTQ people in the context of an authoritarian slide. The first section outlines the markers of democratic decline, including the rise of the MAGA movement and the consolidation of power at the executive level. The second section details the evolution of the MAGA movement’s anti-LGBTQ narrative and its embrace by the Trump administration. The last section attempts to connect the dots and evaluate the extent of the threat posed by MAGA’s relentless demonization of LGBTQ people in terms of future policy initiatives. This section uses the lens of strategic institutional choice to assess which institutional mechanisms and levers of power could be used to stand between LGBTQ people and certain erasure.²⁹

²⁴ See, e.g., Eliot Wilson, Opinion, *Should We Take Trump 2.0 Literally, or Seriously?*, THE HILL (Jan. 21, 2025, at 15:00 ET), <https://thehill.com/opinion/white-house/5098051-after-the-inauguration-should-we-take-trump-2-0-literally-or-seriously/> [<https://perma.cc/NYW5-26VQ>].

²⁵ See *Obergefell v. Hodges*, 576 U.S. 644, 674–75 (2015) (explaining the denial of marriage to same-sex couples continues harm, disrespect, and works to subordinate them); Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

²⁶ Melissa Block, *Accusations of “Grooming” Are the Latest Political Attack — With Homophobic Origins*, NAT’L PUB. RADIO (May 11, 2025, at 05:27 ET), <https://www.npr.org/2022/05/11/1096623939/accusations-grooming-political-attack-homophobic-origins> [<https://perma.cc/Y8DE-S33C>].

²⁷ H.R. 359, 68th Leg., Reg. Sess. (Mont. 2023); Amy Beth Hanson, *Montana Judge Keeps in Place a Ban on Enforcement of Law Restricting Drag Shows, Drag Reading Events*, ASSOCIATED PRESS (Oct. 13, 2023, at 21:14 ET), <https://apnews.com/article/montana-drag-shows-ruling-ee8adb41c142718ec4b5047d0f3f36be> [<https://perma.cc/7SP9-YN8T>]; Adam Gabbatt, “Subtle and Sinister”: Republicans’ Anti-drag Crusade Seen as Assault on LGBTQ+ Rights, THE GUARDIAN (Sep. 19, 2023, at 06:00 ET), <https://www.theguardian.com/world/2023/sep/19/us-states-attack-drag-shows-lgbtq-rights> [<https://perma.cc/T2UK-QW3N>].

²⁸ See Catherine J. Ross, *Are “Book Bans” Unconstitutional? Reflections on Public School Libraries and the Limits of Law*, 76 STAN. L. REV. 1675, 1722 (2024).

²⁹ Nancy J. Knauer, *The Recognition of Same-Sex Relationships: Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice*, 28 U. HAW. L. REV. 23, 59–76 (2005) (describing strategic institutional choice as practiced by LGBTQ+ rights advocates).

I. DEMOCRATIC UNCERTAINTY

It should go without saying that democratic decline is especially dangerous for LGBTQ people and other marginalized groups who have benefited from the counter-majoritarian safeguards baked into liberal democracy. Despite the fact that our democratic system was built on inequality and was deeply flawed in many ways, its structure, institutions, and norms offered a path forward. Since the beginning of the twentieth century, various identity-based social movements have worked tirelessly within this system to secure formal equality and protections from discrimination.³⁰ Beginning in earnest in the 1970s, the LGBTQ rights movement built directly on the successes of both the civil rights movement and second wave feminism.³¹ It advanced a platform of legal reform on the state and federal levels that targeted not only the courts and legislatures, but also the executive branch.³² It closely monitored LGBTQ representation in the press and worked to make the private and nonprofit sectors inclusive and welcoming.³³ Thanks to these efforts, many LGBTQ people in the United States have had the opportunity to live authentic lives free from legal disabilities and largely protected from outright discrimination.

Our current democratic decline, however, has destabilized the democratic scaffolding that allowed and fostered this sort of forward momentum. It is no longer possible to rely on many of our democratic institutions or norms, including our system of checks and balances or even the rule of law. As a result, more than fifty years of advancements in LGBTQ rights are on the line, and there is the distinct possibility that LGBTQ people will be targeted for legal and other disabilities with little recourse. In order to assess the future of LGBTQ rights in the United States, it is imperative that we first understand the extent of the degradation of the system that in many ways has made it possible for LGBTQ people to live open and authentic lives. This section addresses the structural changes that lead to authoritarianism, the populist and nativist political philosophy that has fueled our slide towards authoritarianism, and the actions of the executive to consolidate power in a unitary presidency.³⁴

³⁰ See generally MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004) (exploring the civil rights movement).

³¹ See generally LILLIAN FADERMAN, *THE GAY REVOLUTION: THE STORY OF STRUGGLE* (2015) (describing the evolution of LGBTQ+ rights movement).

³² Nancy J. Knauer, *The LGBTQ Equality Gap and Federalism*, 70 AM. UNIV. L. REV. 1, 8 (2020).

³³ See FADERMAN, *supra* note 31, at 424 (noting that GLAAD was modeled on Jewish Anti-Defamation League).

³⁴ See Blake Emerson, *The Existential Challenge to the Administrative State*, 113 GEO. L.J. 1263, 1331–33 (2025) (proposing distributed rather than unitary approach to executive function).

A. *Markers of Democratic Decline*

The political scientists who study the rise of authoritarian regimes—“how democracies die”³⁵—tell us that there are certain bellwethers that can set the stage for would-be autocrats to consolidate power and neutralize their political opposition.³⁶ Doubts over election integrity, for example, can undermine the very foundation of a democracy—free and fair elections.³⁷ Increased partisan polarization is also a key factor in democratic decline, along with the erosion of democratic norms, such as seeing your opponents as legitimate and exercising forbearance in governance.³⁸ Since the 2016 presidential election, commentators have unnervingly applied these criteria to the United States and warned that we were poised for what is euphemistically referred to as a “democratic slide.”³⁹ Scholars have highlighted the need for vigilance because contemporary autocrats do not seize power in spectacular military *coups d’état*.⁴⁰ Instead, autocrats are democratically elected and then exploit their electoral mandate to systematically rewire the apparatus of the state.⁴¹ Contemporary examples of democratically elected autocrats include former President Hugo Chavez in Venezuela and former Prime Minister Viktor Orbán in Hungary, both of whom won popular elections only to demolish the very institutions that got them there in the first place.⁴²

In the United States, the checklist developed by the political scientists should be sobering, as we tick many, if not all, of the boxes. In terms of electoral integrity, we have long struggled with voter dilution through gerrymandering, as well as voter suppression.⁴³ Election denialism and the false claim that Donald Trump won the 2020 presidential election further denigrated our electoral system and inspired the January 6th insurrection

³⁵ LEVITSKY & ZIBLATT, *supra* note 12. See generally STEVEN LEVITSKY & DANIEL ZIBLATT, *TYRANNY OF THE MINORITY: WHY AMERICAN DEMOCRACY REACHED THE BREAKING POINT* 11 (2023) (“Why are threats to American democracy emerging now in the early twenty-first century?”).

³⁶ LEVITSKY & ZIBLATT, *supra* note 12, at 6–9.

³⁷ *Id.* at 23.

³⁸ *Id.* at 9.

³⁹ See Thomas M. Keck, *Erosion, Backsliding, or Abuse: Three Metaphors for Democratic Decline*, 48 LAW & SOC. INQUIRY 314, 315–18 (2023).

⁴⁰ LEVITSKY & ZIBLATT, *supra* note 12, at 5.

⁴¹ Kim L. Scheppelle, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 545 (2018). Adolf Hitler became Chancellor of Germany within the existing constitutional framework of the Weimar Republic but then dismantled German democracy in 53 days. Timothy W. Ryback, *How Hitler Dismantled a Democracy in 53 Days*, THE ATLANTIC (Jan. 8, 2025), <https://www.theatlantic.com/ideas/archive/2025/01/hitler-germany-constitution-authoritarianism/681233/> [https://perma.cc/2PVS-XXHF].

⁴² Scheppelle, *supra* note 41, at 549–50, 554.

⁴³ Vanessa Williamson, Commentary, *Democratic Decline in the United States: Strategic Manipulation of Elections*, BROOKINGS INST. (Oct. 23, 2023), <https://www.brookings.edu/articles/democratic-decline-in-the-united-states-strategic-manipulation-of-elections/> [https://perma.cc/Q92D-KQ3R] (tracing democratic decline to 2010).

at the Capitol.⁴⁴ Partisan polarization in the United States is at an all-time high and is amplified by social media platforms with algorithms designed to maximize our outrage at one another.⁴⁵ Our democratic norms of civility and deliberation have given way to name calling and villainization, ushering in a new normal of alternative facts, conspiracy theories, and a pugilistic politics overshadowed by the increasing threat of political violence.⁴⁶

A number of independent indices that track the health of democracies across the globe confirm this conclusion.⁴⁷ For example, the Economist Intelligence Unit's Democracy Index is a well-respected gauge that classifies governments as full democracies, flawed democracies, hybrid regimes, or authoritarian regimes.⁴⁸ The Index is both quantitative and comparative and focuses primarily on rights and democratic institutions, with an emphasis on pluralism, civil liberties, and political culture.⁴⁹ The United States was first downgraded from a full democracy to a flawed democracy in 2016, and its score has only decreased since then.⁵⁰ A wide range of non-governmental organizations and think tanks have also raised red flags regarding the state

⁴⁴ See generally H.R. REP. NO. 117-663 (2022) (including Final Report of Select Committee to Investigate the January 6th Attack on the United States Capitol).

⁴⁵ Jordan Steven Sher, *After Sharing a Phony Rachel Maddow Video, I Reflected on How Algorithms Are Dividing Us*, S.F. CHRON. (Feb. 18, 2026), <https://www.sfchronicle.com/opinion/openforum/article/social-media-misinformation-partisan-algorithms-21320519.php> [<https://perma.cc/GQ68-Q7HX>]; see also R. George Wright, *A Free Speech-Based Response to Media Polarization*, 18 FIU L. REV. 193, 199 (2023) ("The hyperpolarization of social media itself thus impairs any collective attempt at communicative rationality in public discourse and decision making."); Emily Kubin & Christian von Sikorski, *The Role of (Social) Media in Political Polarization: A Systematic Review*, 45 ANNALS INT'L COMM. ASS'N 188, 199 (2021).

⁴⁶ See Lauren Irwin, *Republicans' and Democrats' Ideology Most Extreme in Decades: Gallup*, THE HILL (Jan. 16, 2025, at 10:11 ET), <https://thehill.com/homenews/campaign/5089106-republicans-democrats-ideology-extremes-gallup-survey/> [<https://perma.cc/7VGF-D6HM>]; James A. Piazza, *Political Polarization and Political Violence*, 32 SEC. STUD. 476, 476–79 (2023); Ned Parker & Peter Eisler, *New Cases of Political Violence Roil US Ahead of Contentious Election*, REUTERS (Oct. 21, 2024, at 18:22 ET), <https://www.reuters.com/world/us/new-cases-political-violence-roil-us-ahead-contentious-election-2024-10-21/> [<https://perma.cc/9V95-BVQA>].

⁴⁷ See Sujata Gupta, *Is U.S. Democracy in Decline? Here's What the Science Says*, SCI. NEWS (Oct. 18, 2024, at 11:00 ET), <https://www.sciencenews.org/article/united-states-democracy-decline-science> [<https://perma.cc/Q67Y-FRST>].

⁴⁸ ECONOMIST INTEL. UNIT, DEMOCRACY INDEX 2023: AGE OF CONFLICT 3 65–66 (2024), <https://www.eiu.com/n/campaigns/democracy-index-2023/> [<https://perma.cc/BT8Y-8Q3T>].

⁴⁹ *Id.* at 63–67.

⁵⁰ *Id.* at 3, 5. In the 2023 report by the Freedom in the World Index, the United States made the list of countries that had experienced the greatest decline in the past ten years. YANA GOROKHOVSKAIA, ADRIAN SHAHBAZ & AMY SLIPOWITZ, FREEDOM HOUSE, FREEDOM IN THE WORLD 2023 12 (2023), https://freedomhouse.org/sites/default/files/2023-03/FIW_World_2023_DigitalPDF.pdf [<https://perma.cc/QJM9-33FE>]. Freedom House was founded by Eleanor Roosevelt and Wendell Wilkie in 1941 as a think tank and advocacy organization to combat fascism and promote civil liberties. *Our History*, FREEDOM HOUSE, <https://freedomhouse.org/about-us/our-history> [<https://perma.cc/53L9-4LSZ>].

of democracy in the United States since the 2016 election.⁵¹ In 2023, the foundations supporting thirteen presidential libraries going back to Herbert Hoover signed an unprecedented joint letter that sent out “an urgent call to action for all Americans.”⁵² The letter read:

We, the undersigned, represent a wide range of views across a breadth of issues. We recognize that these views can exist peaceably side by side when rooted in the principles of democracy. Debate and disagreement are central features in a healthy democracy. Civility and respect in political discourse, whether in an election year or otherwise, are essential.⁵³

In the 2024 presidential election, eighty-one percent of likely voters reported that democracy was threatened, albeit for different reasons.⁵⁴ The Democratic party, with the support of notable Republicans such as former U.S. Representative Liz Cheney (R-WY), characterized a second Trump presidency as presenting a clear and present danger to our democratic system.⁵⁵ Former members of Trump’s first administration joined the chorus to denounce Trump and his candidacy.⁵⁶ During the election, Trump did little to counter these claims. Trump made headlines when he declared during a

⁵¹ See, e.g., LEVITSKY & ZIBLATT, *supra* note 35, at 6; Audie Cornish, Mano Sundaresan & Justine Kenin, *How the U.S. Became a ‘Backsliding Democracy’ According to a European Think Tank*, NAT’L PUB. RADIO (Feb. 25, 2021), <https://www.npr.org/2021/11/25/1059262066/how-the-u-s-became-a-backsliding-democracy-according-to-a-european-think-tank#:~:text=Press,How%20the%20U.S.%20became%20a%20%20backsliding%20democracy%2C%20according%20to,as%20a%20%22backsliding%20democracy.%22> [https://perma.cc/UWG4-XSSY].

⁵² David J. Kramer, *Presidential Centers Affirm That “Democracy Holds Us Together,”* GEORGE W. BUSH PRESIDENTIAL CTR. (Sep. 7, 2023), <https://www.bushcenter.org/publications/reaffirming-americans-commitment-to-a-more-perfect-union> [https://perma.cc/D84E-W595]; Gary Fields, *Presidential Centers from Hoover to Bush and Obama Unite to Warn of Fragile State of US Democracy*, ASSOCIATED PRESS (Sep. 7, 2023, at 18:30 ET), <https://apnews.com/article/united-states-democracy-presidents-threats-joint-statement-5530a89df2c41d58a22961f63fb0e6ff> [https://perma.cc/5HYE-J9SB].

⁵³ Kramer, *supra* note 52 (representing six libraries for Republican Presidents and seven libraries for Democratic Presidents).

⁵⁴ See *New Poll: 81% of Voters Believe Democracy Is Threatened*, GEO. INST. OF POL. & PUB. SERV. (Mar. 21, 2024), <https://politics.georgetown.edu/2024/03/21/new-poll-81-of-voters-believe-democracy-is-threatened> [https://perma.cc/TYM3-N9L9]; Nick Corasaniti, Ruth Igielnik & Camille Baker, *Voters Are Deeply Skeptical About the Health of American Democracy*, N.Y. TIMES (Oct. 27, 2024), <https://www.nytimes.com/2024/10/27/us/politics/american-democracy-poll.html> [https://perma.cc/NJ6B-4ZEB] (noting that Democrats cite Trump, whereas Republicans cite Kamala Harris, voting by mail, voting machines, and immigration).

⁵⁵ Once the third highest ranking Republican in the House, Liz Cheney became a fierce critic of President Trump and served as the Vice Chair of the United States House Select Committee on the January 6th Attack on the United States Capitol. Lisa Mascaro, *After Investigating Jan. 6, House GOP Sides with Trump and Goes After Liz Cheney*, ASSOCIATED PRESS (Dec. 17, 2024, at 21:55 ET), <https://apnews.com/article/trump-cheney-capitol-attack-prosecution-0aaba7a8d01115410c544374dd0d57f> [https://perma.cc/ED7S-7H6T].

⁵⁶ Zachary B. Wolf, *24 Former Trump Allies and Aides Who Turned Against Him*, CNN (Oct. 3, 2023, at 16:30 ET), <https://www.cnn.com/2023/10/03/politics/donald-trump-former-allies-what-matters/index.html> [https://perma.cc/JAY2-RRBG].

Fox News interview that he would only be a dictator on “day one”⁵⁷ and told a group of conservative Christians that if they voted for him in November, they would never have to vote again.⁵⁸ Clearly, these anti-democratic statements did not stop his reelection. To the contrary, polls reported substantial support for authoritarian leaders, particularly among Republicans.⁵⁹

Looking on the bright side, the political scientists are also quick to point out that there is nothing inevitable about an authoritarian slide, even when the conditions seem right. Strong democratic institutions and norms can serve as essential guardrails to constrain even the most charismatic would-be authoritarian.⁶⁰ In their 2023 book *Tyranny of the Minority*, Steven Levitsky and Daniel Ziblatt report that whether a democracy survives can depend on the willingness of politicians and officials to break with their party and stand strong for democracy in the face of an authoritarian power grab.⁶¹

B. Rise of the MAGA Movement

As the alarm bells began to go off about the future of American democracy, it was not simply Trump’s authoritarian leanings that concerned observers, but also the political philosophy of the emerging MAGA movement. During Trump’s presidential campaign in 2016, his policies and proposals ignited a populist base of supporters that, broadly speaking, embraced strong nativist views, anti-globalism, isolationism, and so-called traditional values.⁶² The

⁵⁷ Jill Colvin & Bill Barrow, *Trump’s Vow to Only Be a Dictator on “Day One” Follows Growing Worry Over His Authoritarian Rhetoric*, ASSOCIATED PRESS (Dec. 7, 2023, at 19:58 ET), <https://apnews.com/article/trump-hannity-dictator-authoritarian-presidential-election-f27e7e9d7c13fabbe3ae7dd7f1235c72> [<https://perma.cc/Q7Z4-4HX5>].

⁵⁸ Maggie Astor, *Trump Declines to Back Away from “You Don’t Have to Vote Again” Line*, N.Y. TIMES (July 30, 2024), <https://www.nytimes.com/2024/07/30/us/politics/trump-christians-vote-ingraham.html> [<https://perma.cc/59WD-EQDW>].

⁵⁹ *Survey: Four in Ten Americans Are Susceptible to Authoritarianism, but Most Still Reject Political Violence*, PUB. RELIGION RSCH. INST. (Sep. 7, 2024), <https://www.prii.org/press-release/survey-four-in-ten-americans-are-susceptible-to-authoritarianism-but-most-still-reject-political-violence/> [<https://perma.cc/R32J-Z3N6>]. The poll of 5,000 Americans found that “support for authoritarian views is strongest among Republicans (particularly those who hold favorable views of former President Donald Trump), supporters of Christian nationalism, white evangelical Protestants, and weekly churchgoers.” *Id.*

⁶⁰ LEVITSKY & ZIBLATT, *supra* note 12, at 7–10.

⁶¹ LEVITSKY & ZIBLATT, *supra* note 35, at 125 (“Breaking with antidemocratic behavior is the third principle of democratic behavior.”).

⁶² See Kurt Weyland & Raúl L. Madrid, *Introduction - Donald Trump’s Populism: What Are the Prospects for US Democracy?* in WHEN DEMOCRACY TRUMPS POPULISM 1, 1 (Kurt Weyland & Raúl L. Madrid, eds., 2019) (“Not since Andrew Jackson has the United States had a populist leader as chief executive.”); Darrell Bricker et al., *Immigration, Nativism, and Changing Politics: Special Issue Introduction*, 100 SOC. SCI. Q. 409, 409 (2019) (stating “during the 2016 U.S. presidential campaign that Donald Trump’s appeal resided largely in his anti-immigrant stances and nativist appeals”); Liam Stack, *Globalism: A Far-Right Conspiracy Theory Buoyed by Trump*, N.Y. TIMES (Nov. 14, 2016), <https://www.nytimes.com/2016/11/15/us/politics/globalism-right-trump.html> [<https://perma.cc/DAW4-FQKD>] (discussing Trump’s dislike of globalism); Charles Kupchan, *The Deep Roots of Trump’s Isolationism*, FOREIGN AFFS. (Sep. 9, 2024), <https://www.foreignaffairs.com/>

movement, also sometimes referred to as Trumpism, takes its name from Trump's campaign slogan: "Make America Great Again."⁶³ The slogan epitomizes a core belief of the MAGA Movement—the United States was once great, but it has floundered under the weight of immigration, multiculturalism, permissive liberalism, and the breakdown of traditional family and gender roles.⁶⁴ In September 2023, President Biden, who at that time was still running for re-election, specifically addressed the rising tide of extremism in the Republican party:

There's something dangerous happening in America now. There's an extremist movement that does not share the basic beliefs of our democracy: the MAGA movement. . . . [T]here's no question that today's Republican Party is driven and intimidated by MAGA Republican extremists. Their extreme agenda, if carried out, would fundamentally alter the institutions of American democracy as we know it.⁶⁵

Slightly over a year later, presidential candidate Vice President Kamala Harris openly referred to her Republican opponent as a fascist—a term that was long considered a third rail in American politics.⁶⁶ Indeed, by the end of the 2024 election cycle, a number of notable politicians and commentators were openly calling the Republican nominee for President of the United States, who is now our 47th President, a fascist.⁶⁷ For example, John Kelly, Trump's

united-states/deep-roots-trump-isolationism-america-first [https://perma.cc/23ZN-68W4] (describing Trump as a "neo-isolationist"); Flavio R. Hickel Jr. & Andrew R. Murphy, *Making America Exceptional Again: Donald Trump's Traditionalist Jeremiad, Civil Religion, and the Politics of Resentment*, 15 POL. & REL. 247, 248 (2022) ("Trump's rhetoric contextualized disparate sources of social resentment as emblematic of a broader story of American decline whose restoration required a recommitment to a pre-1960s vision of American greatness [that] reflects a romanticized Golden Age predating transformative social changes with respect to sexuality, gender roles, and civil rights.").

⁶³ Sam Dangremond, *Who Was the First Politician to Use "Make America Great Again" Anyway?*, TOWN & COUNTRY (Nov. 14, 2018, at 07:00 ET), <https://www.townand-countrymag.com/society/politics/a25053571/donald-trump-make-america-great-again-slogan-origin/> [https://perma.cc/436T-ZBZQ].

⁶⁴ Adam Volle, *MAGA Movement*, ENCYC. BRITANNICA (Mar. 26, 2026), <https://www.britannica.com/topic/MAGA-movement> [https://perma.cc/87ZH-KACE].

⁶⁵ Excerpts of Remarks as Prepared for Delivery by President Joe Biden on Democracy in Tempe, AZ, 2023 DAILY COMP. PRES. DOC. 849 (Sep. 28, 2023), <https://www.govinfo.gov/content/pkg/DCPD-202300849/pdf/DCPD-202300849.pdf> [https://perma.cc/A8AC-JVXX]; see also Peter Baker, *Biden Issues a Blistering Attack on Trump*, N.Y. TIMES (Sep. 29, 2023), <https://www.nytimes.com/2023/09/28/us/politics/biden-mccain-library.html> [https://perma.cc/BV6F-MEAG] (discussing President Biden's accusation that MAGA is a threat to democratic institutions and the nation).

⁶⁶ Jonathan Weisman, *Harris and Democrats Lose Their Reluctance to Call Trump a Fascist*, N.Y. TIMES (Oct. 17, 2024), <https://www.nytimes.com/2024/10/17/us/politics/harris-trump-fascism.html> [https://perma.cc/4YK7-DRQG].

⁶⁷ *Id.* Some commentators initially dismissed the MAGA movement as a cult of personality, with then-presidential candidate Hillary Clinton famously calling Trump's followers a "basket of deplorables" during the 2016 campaign. Roxanne Roberts, *Hillary Clinton's 'Deplorables' Speech Shocked Voters Five Years Ago — But Some*

former Chief of Staff, told *The New York Times* less than a month before the 2024 election that Trump “falls into the general definition of fascist.”⁶⁸ Within days, thirteen high-ranking former Trump administration officials signed a letter in support of Kelly’s remarks.⁶⁹ The letter read:

We applaud General Kelly for highlighting in stark details the danger of a second Trump term. Like General Kelly, we did not take the decision to come forward lightly . . . We are all lifelong Republicans who served our country. However, there are moments in history where it becomes necessary to put country over party. This is one of those moments.⁷⁰

Once the shock of using the term wears off, it is relatively easy to see how the MAGA movement satisfies many elements of the textbook definition of fascism. Fascism is a populist political philosophy that promotes militaristic nationalism and seeks to recapture the glory of a nation’s supposed golden age.⁷¹ It expresses contempt for elites, liberalism, and electoral democracy.⁷² Fascism is also associated with a strong leader, racism, xenophobia, and political violence.⁷³ It places a premium on conformity and traditional gender roles that help subordinate the interests of the individual for the good of the nation.⁷⁴

The MAGA movement’s extreme partisanship and affinity for conspiracy theories have contributed to and accelerated the erosion of our democratic institutions and norms, along with its attacks on immigrants and minority rights more generally.⁷⁵ Its efforts to undermine election integrity have destabilized the core prerequisite of any democratic system—the guarantee

Feel It Was Prescient, WASH. POST (Aug. 31, 2021), <https://www.washingtonpost.com/lifestyle/2021/08/31/deplorables-basket-hillary-clinton/> [https://perma.cc/LLF9-FY3D].

⁶⁸ Zoe Richards, *Former White House Chief of Staff John Kelly Says Trump Praised Hitler While in Office*, NBC NEWS (Oct. 23, 2024, at 09:22 ET), <https://www.nbcnews.com/politics/2024-election/john-kelly-says-donald-trump-meets-definition-fascist-rcna176706> [https://perma.cc/KG5E-KB48] (quoting recording of the interview); Michael S. Schmidt, *As Election Nears, Kelly Warns Trump Would Rule Like a Dictator*, N.Y. TIMES (Oct. 22, 2024), <https://www.nytimes.com/2024/10/22/us/politics/john-kelly-trump-fitness-character.html> [https://perma.cc/Z85R-AQPB].

⁶⁹ Megan Liebowitz, *13 Former Trump Administration Officials Sign Open Letter Backing Up John Kelly’s Criticism of Trump*, NBC NEWS (Oct. 25, 2024, at 06:53 ET), <https://www.nbcnews.com/politics/2024-election/13-former-trump-administration-officials-sign-open-letter-backing-john-rcna177227> [https://perma.cc/N25C-7TKU].

⁷⁰ *Id.*

⁷¹ JASON STANLEY, *HOW FASCISM WORKS* 4–23 (2018).

⁷² *Id.* at 37–55.

⁷³ Jonathan Rauch, *Yes, It’s Fascism*, THE ATLANTIC (Jan. 25, 2026), <https://www.theatlantic.com/ideas/2026/01/america-fascism-trump-maga-ice/685751/> [https://perma.cc/HB9N-2HBB]; KEVIN PASSMORE, *FASCISM: A VERY SHORT INTRODUCTION* 5 (2014).

⁷⁴ STANLEY, *supra* note 71, at 7–12.

⁷⁵ Nancy J. Knauer, *Big Lies, Drag Shows, and Legal Fictions*, 36 L. & LITERATURE 653, 653 (2024); Tal Axelrod, *MAGA Lays Out Hardline Immigration Demands After National Guard Shooting*, AXIOS (Dec. 3, 2025), <https://www.axios.com/2025/12/03/trump-immigration-denaturalization-asylum-maga> [https://perma.cc/D8KP-PWYT]; Nikole Hannah-Jones, *How Trump Upended 60 Years of Civil Rights in Two Months*,

of free and fair elections—and increased our tolerance for political violence.⁷⁶ Trump first began expressing distrust in the U.S. electoral system during the 2016 presidential election, which he won.⁷⁷ His false assertions that he won the 2020 election led to widespread election denialism and inspired the January 6th, 2021 insurrection that threatened to disrupt the peaceful transfer of power.⁷⁸ Despite the fact that sixty court cases failed to reveal any fraud that would have changed the result of the 2020 election, Trump frequently repeats the “Big Lie”⁷⁹ that he won the election, and this Big Lie is now accepted as an article of faith by two-thirds of all Republicans.⁸⁰ In Trump’s second term, adherence to the belief that Trump did not lose the 2020 election has become a litmus test for members of his administration.⁸¹

Over 1,500 people were criminally charged in connection with the January 6th insurrection, including members of heavily armed right-wing militias and militant Christian nationalists.⁸² Trump faced a second impeachment for “inciting an insurrection” and was the subject of a damning

N.Y. TIMES (June 27, 2026), <https://www.nytimes.com/2025/06/27/magazine/trump-civil-rights-law-discrimination.html> [<https://perma.cc/AZ3H-9DLE>].

⁷⁶ In a 2023 poll, one-third of Republicans agreed with the statement that “American patriots may have to resort to political violence,” compared to only thirteen percent of Democrats—these figures are both up compared to a similar poll taken in 2021. PUB. RELIGION RSCH. INST., THREATS TO AMERICAN DEMOCRACY AHEAD OF AN UNPRECEDENTED PRESIDENTIAL ELECTION 6 (2023), <https://www.prri.org/research/threats-to-american-democracy-ahead-of-an-unprecedented-presidential-election/> [<https://perma.cc/UQ7M-ETWP>]; see also Garen J. Wintemute et al., *MAGA Republicans’ Views of American Democracy and Society and Support for Political Violence in the United States: Findings from a Nationwide Population-Representative Survey*, 19(1) PLOS ONE 1, 1, 2 (2024) (finding that MAGA Republicans were more likely than others to endorse political violence).

⁷⁷ JONATHAN LEMIRE, THE BIG LIE: ELECTION CHAOS, POLITICAL OPPORTUNISM, AND THE STATE OF AMERICAN POLITICS AFTER 2020 7 (2022).

⁷⁸ H.R. REP. NO. 117-663, *supra* note 44, at 110.

⁷⁹ Knauer, *supra* note 75, at 663 (stating that Trump loyalists do not use the term “Big Lie” to refer to the election denialism, but instead use the phrase “Stop the Steal”). For additional information on the origin of the term, see *id.* at 665.

⁸⁰ *After Three Years and Many Indictments, the “Big Lie” That Led to the January 6th Insurrection Is Still Believed by Most Republicans*, PUB. RELIGION RSCH. INST. (Jan. 5, 2024), <https://www.prri.org/spotlight/after-three-years-and-many-indictments-the-big-lie-that-led-to-the-january-6th-insurrection-is-still-believed-by-most-republicans/> [<https://perma.cc/F3NH-HPZS>]; Knauer, *supra* note 75, at 654 (describing how GOP-controlled states enacted new restrictive voting laws).

⁸¹ Patrick Marley & Colby Itkowitz, *Key Trump Cabinet Members Refuse to Acknowledge Trump Lost in 2020*, WASH. POST (Feb. 3, 2025), <https://www.washingtonpost.com/politics/2025/02/03/trump-cabinet-2020-election-deniers/> [<https://perma.cc/UKX8-TQ5C>].

⁸² Alexander Mallin, *Where the Jan. 6 Capitol Attack Investigation Stands, by the Numbers: DOJ*, ABC NEWS (Jan. 5, 2025), <https://abcnews.com/US/jan-6-capitol-attack-investigation-stands-numbers-doj/story?id=117353000> [<https://perma.cc/BQ52-NHHM>]; Alanna Durkin Richer & Michael Kunzelman, *A Look at Far-Right Extremists in Jan. 6 Riot*, ASSOCIATED PRESS (June 22, 2022, at 06:16 ET), <https://apnews.com/article/capitol-siege-proud-boys-donald-trump-congress-government-and-politics-a8baa24af07b20ab-792f4ef6f4481fac> [<https://perma.cc/5PAL-UHKW>]; Tom Gjeiten, *Militant Christian Nationalists Remain a Potent Force, Even After the Capitol Riot*, NAT’L PUB. RADIO (Jan. 19, 2021, at 09:59 ET), <https://www.npr.org/2021/01/19/958159202/militant-christian-nationalists-remain-a-potent-force> [<https://perma.cc/6F3H-5DTC>].

congressional report from the Select January 6th Committee, led by Representatives Bennie G. Thompson and Liz Cheney.⁸³ He was also indicted on federal and state charges of election interference, but the U.S. Department of Justice dismissed the federal charges against him in December 2024 after he won the election.⁸⁴ The Georgia election racketeering case remained open as of September 2025, pending a determination of whether state charges can be prosecuted against a sitting President.⁸⁵ On the first day of his second term in office, Trump pardoned all of the individuals who had been convicted in connection with the January 6th insurrection, even those who had been convicted of violent attacks against police officers, and ordered all pending cases related to the insurrection dismissed.⁸⁶ It remains unclear how close the United States came to a complete disruption in the peaceful transfer of power, especially now that the federal election interference charges have been dropped, but our democratic guardrails held. The attempt to overturn the results of the 2020 election failed because local election workers, career public servants, elected officials, and judges refused to accede to the pressure to ratify the Big Lie and made a choice to stand strong for democracy.⁸⁷

Much has changed since 2021. MAGA forces that were once a faction within the Republican party have now solidified control over the party of Lincoln. MAGA loyalists have been installed in positions of power at the Republican National Committee, and the 2024 GOP Platform was rebranded to include the catchphrase “Make America Great Again” in its title.⁸⁸ MAGA election deniers ran for state and local offices in great numbers and won, including ten governors, and eight state Attorneys General, all of whom could

⁸³ H.R. REP. NO. 117-663, *supra* note 44, at 566.

⁸⁴ Danny Hakim & Dan Simmons, *Prosecutors in Three States Press Ahead with Election Interference Cases*, N.Y. TIMES (Dec. 12, 2024), <https://www.nytimes.com/2024/12/12/us/trump-wisconsin-election-interference.html#:~:text=Other%20criminal%20cases%20involving%20Mr.,Trump's%20new%20term> [https://perma.cc/CYX7-J3FX].

⁸⁵ Richard Fausset & Danny Hakim, *Fani Willis Loses Bid to Continue Prosecuting Georgia Trump Case*, N.Y. TIMES (Sep. 16, 2025), <https://www.nytimes.com/2025/09/16/us/fani-willis-georgia-trump.html> [https://perma.cc/YK42-ZE6B] (“[T]he criminal case — once considered one of the most serious legal threats to Mr. Trump after he sought to overturn his 2020 election loss — will not move forward anytime soon, if ever.”).

⁸⁶ Granting Pardons and Commutation of Sentences for Certain Offenses Relating to the Events at or Near the United States Capitol on January 6, 2021, Proclamation No. 10887, 90 Fed. Reg. 8331 (Jan. 29, 2025), <https://www.govinfo.gov/content/pkg/FR-2025-01-29/pdf/2025-01950.pdf> [https://perma.cc/NT7V-W4Z4]; Ryan J. Reilly, *Meet Some of the Violent Jan. 6 Rioters Donald Trump Keeps Calling “Hostages,”* NBC NEWS (Apr. 4, 2024, at 11:54 ET), <https://www.nbcnews.com/politics/justice-department/trump-republicans-jan-6-hostages-violence-capitol-police-rcna143888> [https://perma.cc/AWV8-TYZC]. Before he left office, Biden pardoned Liz Cheney and all the other members of the House Select Committee on the January 6th Insurrection. Ivana Saric & Avery Lotz, *Biden Pardons Fauci, Cheney and Jan. 6 Panel Ahead of Trump Inauguration*, AXIOS (Jan. 20, 2025), <https://www.axios.com/2025/01/20/biden-pardon-fauci-cheney-jan-6-committee-trump> [https://perma.cc/9HTR-HYHP].

⁸⁷ Knauer, *supra* note 75, at 662.

⁸⁸ 2024 Republican Party Platform, AM. PRESIDENCY PROJECT (July 8, 2024), <https://www.presidency.ucsb.edu/documents/2024-republican-party-platform> [https://perma.cc/S9QS-KB2Z].

play a decisive role in future election controversies.⁸⁹ Trump often attacks some of his Republican critics as harshly as he goes after Democratic opponents, and he has denounced members of his former administration who have disagreed with him as “traitors.”⁹⁰

In his second term in office, Trump has pushed the boundaries of presidential power and launched new assaults on our democratic institutions, but Congressional Republicans, who control both houses, have remained silent in the face of the escalating threat to democracy.⁹¹ They have turned a blind eye to actions that arguably usurp their own constitutional authority, violate statutory law, and alienate our closest allies.⁹² They have blocked Democratic efforts to demand accountability as Elon Musk and his team of “special government employees” have dismantled the federal bureaucracy and gained access to classified government data systems.⁹³ Based on how things have been going in Congress, there is no indication that the MAGA Republicans are going to stand strong for democracy.

C. Unitary Executive Theory

From his first day in office as the 47th President of the United States, Donald Trump worked quickly to consolidate power and push out his MAGA political philosophy in a blizzard of executive orders, directives, and social media posts.⁹⁴ Many of his actions surpassed the traditionally recognized boundaries of presidential authority. Instead, they reflect a strong version of what is referred to as the unitary executive theory that was developed during the Reagan administration and later embraced by the George W. Bush administration in connection with the War on Terror.⁹⁵ According to this theory, the President’s control of the executive branch cannot be limited by Congress,

⁸⁹ *The Landscape of Election Denial in America*, REPLACING THE REFS, <https://election-deniers.org/#election-deniers-sitting-states> [<https://perma.cc/86K6-EQUP>].

⁹⁰ See, e.g., Chris Cameron, *Trump Amplifies Calls to Jail Top Elected Officials, Invokes Military Tribunals*, N.Y. TIMES (July 1, 2024), <https://www.nytimes.com/2024/07/01/us/politics/trump-liz-cheney-treason-jail.html> [<https://perma.cc/8MX6-2B8F>].

⁹¹ Carl Hulse, *As Shutdown Drags and Trump Flexes, Congress Cedes Its Relevance*, N.Y. TIMES (Oct. 22, 2025), <https://www.nytimes.com/2025/10/22/us/politics/trump-shutdown-congress-power.html> [<https://perma.cc/CG95-EFRB>].

⁹² Susan Davis, *So Far Congress Has Stayed Out of Trump’s Way, but Pressure Tests Lie Ahead*, NAT’L PUB. RADIO (Apr. 30, 2025, at 17:50 ET), <https://www.npr.org/2025/04/30/g-s1-63360/first-100-days-congress-acquiesces-to-trump-but-pressure-tests-ahead> [<https://perma.cc/3TP8-BVY8>].

⁹³ The Republican Accountability Project estimated in 2021 that six percent of national Republicans politicians consistently stood up for democracy, with many of those who did losing reelection or retiring. LEVITSKY & ZIBLATT, *supra* note 35, at 130–32.

⁹⁴ Zachary Basu, *Trump’s Mega-MAGA Month Transforms America*, AXIOS (Feb. 20, 2025), <https://www.axios.com/2025/02/20/trump-maga-month-transforms-america> [<https://perma.cc/D4KM-DX6Y>].

⁹⁵ Mark Tushnet, *Reflections on Calabresi and Yoo’s the Unitary Executive: A Political Perspective on the Theory of the Unitary Executive*, 12 U. PA. J. CONST. L. 313, 317, 324 (2010).

which therefore has no authority to establish independent agencies.⁹⁶ In its strongest form, the theory suggests that the President need not always follow the law.⁹⁷

Since Trump has taken office, he has embarked on a slash and burn campaign against the federal government. Many of the actions of his administration violate longstanding democratic norms and potentially violate constitutional or statutory law.⁹⁸ He has shut down agencies without Congressional approval and instituted mass firings of civil service protected federal workers, including career prosecutors who worked on his election interference cases.⁹⁹ Trump summarily fired over a dozen Inspectors General—some of whom were still serving from his first administration—and dismissed the heads of independent agencies.¹⁰⁰ He greenlighted a new entity called the Department of Government Efficiency (“DOGE”) to access untold amounts of federal data.¹⁰¹ In a move that does not test legal limits, but is definitely a norm breaker, Trump dismissed the chair of the Kennedy Center and appointed himself chair in her place.¹⁰²

Trump has also frozen funding that had already been appropriated by Congress and cancelled federal contracts and grants, including stopping nearly all foreign aid.¹⁰³ Such actions violate the Impoundment Control Act

⁹⁶ Maggie Haberman, Charlie Savage & Jonathan Swan, *Trump Suggests No Laws Are Broken If He’s “Saving His Country,”* N.Y. TIMES (Feb. 15, 2025), <https://www.nytimes.com/2025/02/15/us/politics/trump-saves-country-quote.html> [https://perma.cc/45PR-HAUJ]. Supporters of the unitary executive theory cite as authority for broad presidential powers the Vesting Clause of Article II in the U.S. Constitution. Jed H. Shugerman, *Vesting*, 74 STAN. L. REV. 1479, 1481 (2022).

⁹⁷ Haberman et al., *supra* note 96 (noting that in the first month of his second term Trump posted on both Truth Social and X a quote often attributed to Napoleon Bonaparte: “He who saves his Country does not violate any Law.”).

⁹⁸ Francesca Paris & Charlie Savage, *Is That Legal? A Guide to Trump’s Big Moves So Far*, N.Y. TIMES (Feb. 20, 2025), <https://www.nytimes.com/2025/02/20/upshot/trump-executive-orders-legality.html> [https://perma.cc/DY79-FEMC].

⁹⁹ *Id.*

¹⁰⁰ Zeke Miller, Erick Tucker & Will Weissert, *Trump Uses Mass Firing to Remove Independent Inspectors General at a Series of Agencies*, ASSOCIATED PRESS (Jan. 25, 2025, at 22:33 ET), <https://apnews.com/article/trump-inspectors-general-fired-congress-unlawful-4e8bc57e132c3f9a7f1c2a3754359993> [https://perma.cc/B5QB-YBJB].

¹⁰¹ The president’s special commission now has an unprecedented ability to view and manipulate information at many federal agencies. Charlie Warzel, Ian Bogost & Matteo Wong, *DOGE Has “God Mode” Access to Government Data*, THE ATLANTIC (Feb. 24, 2025), <https://www.theatlantic.com/technology/archive/2025/02/doge-god-mode-access/681719/> [https://perma.cc/3EQZ-WZGE].

¹⁰² Elisabeth Bumiller, *Trump’s Revenge Now Includes His Takeover of the Kennedy Center*, N.Y. TIMES (Feb. 18, 2025), <https://www.nytimes.com/2025/02/18/us/politics/kennedy-center-trump.html> [https://perma.cc/ZKB8-B4LC].

¹⁰³ Michael Casey, *Federal Judge Considering a Request to Further Block Trump Administration from Freezing Funds*, ASSOCIATED PRESS (Feb. 21, 2025, at 18:20 ET), <https://apnews.com/article/trump-spending-freeze-judge-federal-grants-loans-64d5ebcc46548fb3194bfd027cd56d59> [https://perma.cc/BN9K-CTKN]; Edward Wong & Apoorva Mandavilli, *U.S. Halt to Foreign Aid Cripples Programs Worldwide*, N.Y. TIMES (Jan. 28, 2025), <https://www.nytimes.com/2025/01/28/us/politics/trump-rubio-foreign-aid.html> [https://perma.cc/3P4U-AZYS].

of 1974 that was enacted post-Watergate, as well as Article I of the Constitution that grants Congress the “power of the purse.”¹⁰⁴ Russell Vought, Director of the Office of Management and Budget (OMB), takes the position that the President has the power of impoundment under the Constitution and that the Impoundment Control Act is necessarily unconstitutional.¹⁰⁵ Vought authored the section on the power of the executive in the controversial *Project 2025*,¹⁰⁶ a conservative blueprint for reshaping the federal government published by the Heritage Foundation, as explained in greater detail in Section III. Not surprisingly, it endorses a strong version of the unitary executive theory that includes the power of impoundment.¹⁰⁷ Despite Trump’s efforts on the campaign trail to distance himself from *Project 2025*, many of his executive actions track very closely to the conservative playbook, including his clearly unconstitutional attempt to rescind “birthright citizenship,” as guaranteed under the Fourteenth Amendment, by executive order.¹⁰⁸

Less than three weeks into Trump’s second term, there were over forty pending lawsuits challenging Trump’s executive actions as *ultra vires*.¹⁰⁹ It is not clear whether Trump’s strategy is to litigate these cases up to the U.S. Supreme Court in the hope of expanding his powers through favorable court rulings or to eventually disregard an unfavorable court order and thereby take us irrevocably down the road to a constitutional crisis. Whatever Trump does while in office enjoys expanded immunity thanks to the 2024 Supreme Court decision in *Trump v. United States*, the 2020 election interference case.¹¹⁰ Although the Supreme Court did not fully endorse Trump’s claim of “absolute immunity,” its 6-3 decision greatly expanded the scope of presidential immunity.¹¹¹ The Court held that the President has immunity from

¹⁰⁴ U.S. CONST. art. I; Impoundment Control Act of 1974, Pub. L. 93-344, Title X, §1001, 88 Stat. 332.

¹⁰⁵ Tony Romm, *Senate Confirms Russell Vought to Lead White House Budget Office*, WASH. POST (Feb. 6, 2025), <https://www.washingtonpost.com/business/2025/02/06/russell-vought-confirmed-omb-director/> [<https://perma.cc/74NG-XZ8R>].

¹⁰⁶ *Id.*

¹⁰⁷ Russell Vought, *The Executive Office of the President of the United States*, in MANDATE FOR LEADERSHIP 2025: THE CONSERVATIVE PROMISE 43, 43–45 (Paul Dans & Steven Groves eds., 2023) [hereinafter *Project 2025*]; Bobby Kogan, *How Trump and a Project 2025 Lead Author Are Trying to Undermine Checks and Balances Central to U.S. Governance*, CTR. FOR AM. PROGRESS (Sep. 9, 2024), <https://www.americanprogressaction.org/article/how-trump-and-a-project-2025-lead-author-are-trying-to-undermine-checks-and-balances-central-to-u-s-governance/> [<https://perma.cc/5XT4-7QBY>].

¹⁰⁸ U.S. CONST. amend. XIV; see *infra* text accompanying notes 250–59 (discussing *Project 2025*); Exec. Order No. 14160, 90 Fed. Reg. 8449 (Jan. 20, 2025) (Protecting the Meaning and Value of American Citizenship).

¹⁰⁹ Mattathias Schwartz, Opinion, *Why Federal Courts May Be the Last Bulwark Against Trump*, N.Y. TIMES (Feb. 9, 2025), <https://www.nytimes.com/2025/02/09/us/trump-federal-courts-lawsuits.html> [<https://perma.cc/FG7G-BBCM>].

¹¹⁰ *Trump v. United States*, 144 S. Ct. 2312 (2024).

¹¹¹ See *id.* at 2347.

criminal prosecution for acts conducted under his core constitutional authority and presumptive immunity for all official acts, but does not have immunity for any private acts.¹¹² The question of what constitutes “core” constitutional authority will depend on whether the Court adopts the strong version of the unitary executive theory asserted by the Trump administration.

II. THE POLITICS OF ERADICATION

The Politics of Eradication, as applied to LGBTQ people, is based on the conviction that LGBTQ people should not, or do not, really exist.¹¹³ It is not interested in a deliberation over how (or whether) to address existing disparities experienced by LGBTQ people or how (or whether) to protect LGBTQ people from discrimination. It opposes any government recognition of LGBTQ people or their families that might risk legitimizing and acknowledging the reality of LGBTQ lives and identities. To the contrary, its goal is to contain the perceived contagious nature of LGBTQ identities. The Politics of Eradication is certainly not unique to LGBTQ issues. It is an old strategy applied to unpopular groups that offers an appealing finality because it promises to just literally make the problem go away.

The MAGA movement has been very successful in reframing the understanding of sexual orientation and gender identity in a way that works to its political advantage. The movement’s anti-LGBTQ policy proposals take on an immediate sense of urgency because the movement claims that reforms are necessary to protect women, children, and the nation.¹¹⁴ After first capturing the red, or predominantly Republican-voting, states, the MAGA movement has now successfully enshrined this warped understanding of sexual orientation and gender identity in official U.S. policy. At the federal level, the definitions of “gender ideology” and “divisive ideology” are prime examples of gaslighting designed to make LGBTQ people question their own reality and invite others to deny it. Both definitions are based on Trump’s signature “commonsense” and reflect the growing influence of the global anti-gender movement in U.S. politics, which represents a shift from the Biblical justifications that had traditionally underpinned much of the anti-LGBTQ rhetoric on the far-right.¹¹⁵

¹¹² *Id.* at 2340–42. This ruling did not end the criminal prosecution pending against Trump at the time because the question remained as to whether Trump’s acts were official acts or private acts. Seth Barrett Tillman & Josh Blackman, *What We Did and Did Not Argue in Trump v. United States*, 25 HARV. J.L. & PUB. POL’Y PER CURIAM 1, 8 (2024).

¹¹³ Knauer, *supra* note 1, at 617.

¹¹⁴ See *infra* text accompanying notes 296–306 (detailing the MAGA characterization of LGBTQ people as a threat to children, women, and national security).

¹¹⁵ See Benjamin Wallace-Wells, *The Political Strategy of Ron DeSantis’s “Don’t Say Gay” Bill*, NEW YORKER (June 28, 2022), <https://www.newyorker.com/news/the-political-scene/the-political-strategy-of-ron-desantiss-dont-say-gay-bill> [<https://perma.cc/EHB5-4JXC>]. See generally JUDITH BUTLER, WHO’S AFRAID OF GENDER? (2024) (discussing the global anti-gender movement and its influence in political discourse).

This section charts how the MAGA movement came to embrace anti-LGBTQ initiatives during the first Trump administration, flooded state legislatures with anti-LGBTQ bills during the Biden administration, and then elevated an anti-LGBTQ Politics of Eradication into some of the central talking points of the 2024 presidential campaign and an effective strategy to reach swing voters. In the first months of his second term in office, Trump made good on his campaign promises and implemented many of these talking points through executive orders and other administrative actions.

A. *The First Trump Administration (2017–2021)*

In 2016, Trump had waged a campaign that was deceptively inclusive and friendly to LGBTQ people, as he repeatedly vowed to protect and value LGBTQ Americans. In his acceptance speech at the 2016 Republican Convention, Trump said: “As your President, I will do everything in my power to protect our LGBTQ citizens from the violence and oppression of a hateful foreign ideology.”¹¹⁶ He delivered a campaign speech in Colorado while holding and waving a LGBTQ pride flag that said “LGBTs for Trump” in black marker.¹¹⁷ He also famously said that transgender media personality and former Olympian, Caitlin Jenner, could use “any bathroom she chooses” at Trump Tower.¹¹⁸

Early in his first term, Trump returned to the theme of protecting LGBTQ people from the “hateful foreign ideology” that he first referenced at the 2016 Convention. His controversial travel ban for Muslim-majority countries, Executive Order 13769, lists protecting LGBTQ people from “acts of bigotry or hatred” as one of the justifications for the ban.¹¹⁹ It states:

In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the

¹¹⁶ Eugene Scott, *Trump’s Response to the Pulse Shooting in 2016 Gave False Hope About His LGBT Agenda*, WASH. POST (June 12, 2019), <https://www.washingtonpost.com/politics/2019/06/12/trumps-response-pulse-shooting-gave-false-hope-about-his-lgbt-agenda/> [<https://perma.cc/DH2X-GBCD>] (detailing Trump’s statement after reference to mass shooting at Pulse nightclub in Orlando, Florida).

¹¹⁷ Michael Lambert, *Donald Trump Waves LGBT Rainbow Flag at Colorado Rally*, ADVOCATE (Oct. 31, 2016), <https://www.advocate.com/2016/10/31/donald-trump-waves-lgbt-rainbow-flag-colorado-rally> [<https://perma.cc/TW8T-QQ7R>].

¹¹⁸ Helena Andrews-Dyer, *Donald Trump Says Caitlyn Jenner Can Use Whatever Bathroom She Wants at Trump Tower*, WASH. POST (Apr. 21, 2016), <https://www.washingtonpost.com/news/reliable-source/wp/2016/04/21/donald-trump-says-caitlyn-jenner-can-use-whatever-bathroom-she-wants-at-trump-tower/> [<https://perma.cc/6BQP-G8D6>].

¹¹⁹ Exec. Order No. 13769, 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017); see Earl M. Matlz, *The Constitution and the Travel Ban*, 22 LEWIS & CLARK L. REV. 391, 391–92 (2018) (discussing controversy and constitutional challenges to the travel ban).

United States should not admit those who engage in acts of bigotry or hatred (including “honor” killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, *or sexual orientation*.¹²⁰

When Trump became the first Republican president to recognize Pride Month in 2019,¹²¹ he again drew a comparison between the United States’ relative tolerance for LGBTQ people and other countries that continue to criminalize LGBTQ people, many of which are Muslim-majority countries.¹²² He tweeted:

As we celebrate LGBT Pride Month and recognize the outstanding contributions LGBT people have made to our great Nation, let us also stand in solidarity with the many LGBT people who live in dozens of countries worldwide that punish, imprison, or even execute individuals on the basis of their sexual orientation.¹²³

These episodic expressions of support, however, were overshadowed by Trump’s actions to reverse many of the Obama-era initiatives that recognized and protected LGBTQ identities, especially rights for transgender people. Under the Obama administration, there were tremendous policy gains within the executive branch to advance LGBTQ rights,¹²⁴ but it was relatively easy for the Trump administration to reverse many of these gains because they were not statutory or regulatory.¹²⁵ For example, in 2016, the Obama administration directed public schools to allow students to use bathrooms that align with their gender identity, even if that conflicted with the gender on their

¹²⁰ Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (emphasis added).

¹²¹ Tim Fitzsimmons, *Trump Recognizes LGBTQ Pride Month for First Time*, NBC NEWS (May 31, 2019, at 16:01 ET), <https://www.nbcnews.com/feature/nbc-out/trump-recognizes-lgbtq-pride-month-first-time-n1012611> [<https://perma.cc/P8SQ-2ZTL>].

¹²² All countries that impose capital punishment for homosexuality are Muslim-majority with the exception of Uganda. See *Legal Frameworks*, ILGA DATABASE WORLD, <https://database.ilga.org/criminalisation-consensual-same-sex-sexual-acts> [<https://perma.cc/2Z9Q-LYKU>] (Brunei, Iran, Mauritania, Nigeria, Saudi Arabia, Uganda, Yemen).

¹²³ Donald J. Trump (@realDonaldTrump), X (May 31, 2019, at 15:12 ET), <https://x.com/realDonaldTrump/status/1134538166919204865> [<https://perma.cc/B85T-JXMF>]; see Exec. Order No. 13769, 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017) (emphasis added).

¹²⁴ See generally Scott Horsley, *Not Always a “Thunderbolt”: The Evolution of LGBT Rights Under Obama*, NAT’L PUB. RADIO (June 9, 2016, at 05:02 ET), <https://www.npr.org/2016/06/09/481306454/not-always-a-thunderbolt-the-evolution-of-lgbt-rights-under-obama> [<https://perma.cc/7MPG-A3FM>] (“President Obama’s years in office have seen a flowering of gay and lesbian rights.”).

¹²⁵ See generally Emma Green, *How Trump Is Reversing Obama’s Nondiscrimination Legacy*, THE ATLANTIC (Aug. 14, 2019), <https://www.theatlantic.com/politics/archive/2019/08/trump-lgbtq-rules/596116/> [<https://perma.cc/W45J-WK8P>] (explaining the rationale for the administration’s “single-minded focus on administrative rulings and executive orders”).

birth certificates.¹²⁶ The Department of Education announced the policy in the form of a “Dear Colleague” letter, which is a common form of sub-regulatory guidance used by the Department of Education to explain how the Department interprets the relevant laws and regulations that apply to educational contexts.¹²⁷ At the time, the issue of access to bathrooms and locker rooms for transgender students was the subject of several ongoing and high-profile court cases, most notably the case brought by Gavin Grimm.¹²⁸ In February 2017, a little more than a month into the Trump administration, the Department of Education rescinded the bathroom guidance by issuing a new “Dear Colleague” letter, stating that the first one had been based on insufficient legal analysis.¹²⁹ Numerous other agencies also rescinded Obama-era protections for transgender people in a variety of spaces, including in prisons, homeless shelters, and schools.¹³⁰

One of the most significant gains that President Trump reversed was the Obama-era policy that allowed transgender people to serve openly in the military.¹³¹ Under the Trump policy, transgender individuals could continue to serve, but they had to do so in the gender they were assigned at birth.¹³² Moreover, they needed a doctor’s certificate stating that they have been stable in their sex assigned at birth for at least thirty-six months and have not transitioned.¹³³ In addition to reversing these Obama-era initiatives that recognized and protected LGBTQ identities,¹³⁴ the Trump administration

¹²⁶ U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUST., DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS 3 (2016), <https://www.justice.gov/opa/file/850986/dl> [<https://perma.cc/3AF7-28MK>] (extending protections under Title IX for transgender students).

¹²⁷ In this case, the interpretation announced in the letter was based on a determination that barring transgender students from public school bathrooms that matched their gender identities was a form of sex discrimination prohibited under Title IX. *Id.*

¹²⁸ See, e.g., Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 586 (4th Cir. 2020), *as amended* (Aug. 28, 2020); see also Grimm v. Gloucester School Board, Am. C.L. UNION (Oct. 6, 2021), <https://www.aclu.org/cases/grimm-v-gloucester-county-school-board?redirect=cases/gg-v-gloucester-county-school-board> [<https://perma.cc/H32A-H8JU>] (summarizing litigation).

¹²⁹ U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUST., *supra* note 126, at 1 (withdrawing policy guidance on transgender students).

¹³⁰ German Lopez, *The Trump Administration Just Rescinded Obama-Era Protections for Transgender Prisoners*, VOX (May 14, 2018), <https://www.vox.com/policy-and-politics/2018/5/14/17351636/trump-transgender-prison-lgbtq> [<https://perma.cc/QLD7-GW6Q>]; Chris Cameron, *Trump Presses Limits on Transgender Rights Over Supreme Court Ruling*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/24/us/politics/trump-transgender-rights-homeless.html> [<https://perma.cc/PL4T-X4GT>]. See generally ROBIN KNAUER MARIL, HUM. RTS. CAMPAIGN FOUND., TRUMP’S ADMINISTRATIVE ABUSE AND THE LGBTQ COMMUNITY (2017), <https://assets2.hrc.org/files/assets/resources/HRC-Trump-Administrative-Abuse-Sept2017.pdf> [<https://perma.cc/F9FY-RRS3>] (describing instances where first Trump administration rescinded Obama’s policies).

¹³¹ See Rebecca Kheel, *Pentagon Signs Directive to Implement Transgender Military Ban*, THE HILL (Mar. 12, 2019, at 20:22 ET), <https://thehill.com/policy/defense/433788-pentagon-signs-directive-to-implement-transgender-military-ban> [<https://perma.cc/A8MY-CBSB>]. Transgender servicemembers had been serving openly since 2016. *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ President Trump tweeted the policy change in 2017. *Id.*

tried to remove any acknowledgment of transgender people or identities from federal programs and civil rights protections.¹³⁵ Beginning in 2018, there was an interagency discussion about creating a federal definition of sex as a biological and immutable fact determined at birth for purposes of Title IX.¹³⁶ As explained below, Trump imposed just such a definition on transgender Americans on the first day of his second term in office—one that applies for all federal purposes, not just Title IX. He also renewed his ban on transgender service members several days later.¹³⁷

Shortly before Trump left office, he signed Executive Order 13950 that presaged his attack on DEI in his second term.¹³⁸ The order, titled *Combating Race and Sex Stereotyping*, prohibited the federal government, federal contractors, and federal grant recipients from providing employee training on “divisive concepts,”¹³⁹ which was understood at the time to be directed at “critical race theory,” an academic concept designed to study the systemic nature of racism twisted by the MAGA movement into an unrecognizable assault on white males.¹⁴⁰ As directed by the order, the U.S. Department of Labor set up a hotline for tips about noncompliance,¹⁴¹ and its now largely defunct Office of Federal Contract Compliance Programs announced that it would require federal contractors and subcontractors to submit for review the content of diversity and inclusion training programs, as well as their duration and expense.¹⁴² Three days prior to issuing Executive Order 13950, Trump had announced that he was going to create the “1776 Commission,” an advisory committee to promote “patriotic education.”¹⁴³ The 1776 Commission was designed to counter the influential 1619 Project undertaken by the *New York Times* commemorating the 400th anniversary of the beginning of American slavery.¹⁴⁴ Both the 1776 Commission and the ban on including “divisive concepts” in employee training appeared to be part of Trump’s response to the

¹³⁵ See Erica L. Green, Katie Benner & Robert Pear, “Transgender” Could Be Defined Out of Existence Under Trump Administration, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html> [<https://perma.cc/7C52-ZPZ9>].

¹³⁶ *Id.*

¹³⁷ Exec. Order No. 14183, *supra* note 6 (Prioritizing Military Excellence and Readiness).

¹³⁸ Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sep. 22, 2020).

¹³⁹ *Id.*

¹⁴⁰ See Caroline Mala Corbin, *A Critical Race Theory Analysis of Critical Race Theory Bans*, 14 U.C. IRVINE L. REV. 57, 59 (2024).

¹⁴¹ Exec. Order No. 13950, *supra* note 138; *U.S. Department of Labor Launches Hotline to Combat Race and Sex Stereotyping by Federal Contractors*, U.S. DEP’T OF LAB. (Sep. 28, 2020), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20200928-0> [<https://perma.cc/EQW4-VQ6P>].

¹⁴² Exec. Order No. 13950, *supra* note 138, at sec. 4.

¹⁴³ Donald J. Trump, U.S. President, Remarks at a White House Conference on American History 2 (Sep. 17, 2020), <https://www.govinfo.gov/content/pkg/DCPD-202000691/pdf/DCPD-202000691.pdf> [<https://perma.cc/7XCE-T3P7>].

¹⁴⁴ *Id.*; *The 1619 Project*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> [<https://perma.cc/XAM4-FTJY>].

racial justice protests following the murder of George Floyd.¹⁴⁵ In his speech announcing the creation of the 1776 Commission, Trump stated, “the left-wing rioting and mayhem are the direct result of decades of left-wing indoctrination in our schools.”¹⁴⁶ As explained below, Trump has revisited these issues in his second term with several executive orders dealing with “DEI” and “divisive ideology” that are much more expansive and cover “gender ideology,” directly implicating LGBTQ rights.

B. *The Interregnum (2021–2025)*

The period between Trump’s first and second terms was, in retrospect, a study in contrast and contradiction. The Biden administration and certain blue, or predominantly Democratic-voting, states continued to expand protections for LGBTQ people, offering unprecedented levels of protection and integration.¹⁴⁷ At the same time, however, the number of anti-LGBTQ bills proposed on the state level soared to staggering numbers, as explained below. Skirmishes on the local level disrupted school board meetings, threatened to close libraries, and saw armed militias disrupt drag story hours for children.¹⁴⁸

1. *The Biden Administration*

It was no surprise that President Biden used his term in office to advance LGBTQ rights given that it had been one of his gaffes as Vice President that eventually pushed the Obama administration to come out in favor of marriage equality.¹⁴⁹ Biden and his running mate Kamala Harris ran on a platform that expressed strong support for LGBTQ people, including a promise to pass the Equality Act, which would have amended the Civil Rights Act of 1964 to include sexual orientation and gender identity as protected classes.¹⁵⁰

¹⁴⁵ Michael Crowley & Jennifer Schuessler, *Trump’s 1776 Commission Critiques Liberalism in Report Derided by Historians*, N.Y. TIMES (Jan. 18, 2021), <https://www.nytimes.com/2021/01/18/us/politics/trump-1776-commission-report.html> [<https://perma.cc/HBL9-86G4>]; see Trump, *supra* note 143, at 1.

¹⁴⁶ Trump, *supra* note 143, at 1.

¹⁴⁷ See, e.g., Anne Branigan, *These LGBTQ Lawmakers Want to Make Their States a Refuge for Trans Kids*, WASH. POST (May 7, 2022), <https://www.washingtonpost.com/nation/2022/05/07/lgbtq-lawmakers-refuge-states-trans-kids/> [<https://perma.cc/JJF5-EKEH>].

¹⁴⁸ See, e.g., *Drag Story Time at Oregon Pub Draws Gun-Carrying Protesters*, NBC NEWS (Oct. 25, 2022, at 11:30 ET), <https://www.nbcnews.com/nbc-out/out-news/drag-story-time-oregon-pub-draws-gun-carrying-protesters-rcna53901> [<https://perma.cc/C83T-PYYK>].

¹⁴⁹ Steven Leviston, *Speaking from the Heart*, WASH. POST (Jan. 11, 2021), <https://www.washingtonpost.com/nation/2021/01/11/gay-marriage-joe-biden/> [<https://perma.cc/NP3D-2DF4>].

¹⁵⁰ Jeff Taylor, *Biden Talked a Big Game on LGBTQ Rights. Here’s What His Agenda May Look Like*, NBC NEWS (Nov. 11, 2020, at 15:29 ET), <https://www.nbcnews.com/feature/nbc-out/biden-talked-big-game-lgbtq-rights-here-s-what-his-n1247451> [<https://perma.cc/U9A8-CZRJ>]. The Equality Act would amend the Civil Rights Act of 1964

As President, Biden reversed Trump's anti-LGBTQ executive policies and expanded on the pro-LGBTQ protections that had been extended under the Obama administration.

On his first day in office, Biden issued Executive Order 13988, titled *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*.¹⁵¹ It prohibited discrimination in the federal government and by federal contractors on account of sexual orientation and gender identity, but it covered private employers as well.¹⁵² The expansion of protections to private employers was based on a 2020 U.S. Supreme Court case, *Bostock v. Clayton County*, that extended Title VII nondiscrimination protections in employment to include sexual orientation and gender identity.¹⁵³ Building off *Bostock*, the executive order also expanded nondiscrimination coverage to include protections for sexual orientation and gender identity in Title IX of the Education Amendments of 1972 and the Fair Housing Act of 1968 because those statutes were traditionally interpreted in concert with Title VII.¹⁵⁴

In another reversal of Trump policy, the Biden administration enthusiastically embraced DEI initiatives and programming across the federal government. On his first day in office, Biden issued Executive Order 13985, titled *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*.¹⁵⁵ It announced a "whole-of-government equity agenda" to "pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality."¹⁵⁶ LGBTQ people were included in the list of marginalized identities.¹⁵⁷ As this federal embrace of DEI was taking place, DEI was also being widely adopted in the private and non-profit sectors in response to the 2020 protests for racial justice.¹⁵⁸

(including Titles II, III, IV, VI, VII, and IX) to prohibit discrimination on the basis of sex, sexual orientation and gender identity in employment, housing, public accommodations, education, federally funded programs, credit, and jury service. The Equality Act, H.R.5, 117th Cong. (2021).

¹⁵¹ Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

¹⁵² *Id.*

¹⁵³ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

¹⁵⁴ Exec. Order No. 13988, *supra* note 151 ("Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love.").

¹⁵⁵ Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Which US Companies Are Pulling Back on Diversity Initiatives?*, ASSOCIATED PRESS (Feb. 5, 2025, at 19:59 ET), <https://apnews.com/article/dei-trump-race-gender-ethnicity-diversity-equity-inclusion-companies-policies-8b22129bab630e62be36aa447a2bd47b> [<https://perma.cc/EKC9-5UKK>] ("A number of prominent companies have scaled back or set aside the diversity, equity and inclusion initiatives that much of corporate America endorsed following the protests that accompanied the Minneapolis police killing of George Floyd, a Black man, in 2020.").

2. State Level Anti-LGBTQ Bills

Beginning in 2021, there was a precipitous uptick in anti-LGBTQ bills introduced in state legislatures just as the country was shaking off its COVID-19 pandemic lockdown.¹⁵⁹ The proposed bills touched on many aspects of LGBTQ lives. The vast majority of the bills were directed at transgender people, especially transgender children.¹⁶⁰ The bills sought to establish a binary and immutable definition of sex, censor classroom discussion, ban books, prohibit access to gender-affirming medical care, prohibit transgender students from participating in sports, require transgender people to use the bathroom of the sex they were assigned at birth, and establish expansive religious exemptions to allow open discrimination against LGBTQ people.¹⁶¹

Given the partisan polarization over LGBTQ rights, these bills were most successful in red states, with Florida being a notable first-mover in the new anti-woke war on LGBTQ people.¹⁶² Florida's Governor, Ron DeSantis, declared in his second inaugural speech, "We will never surrender to the woke mob. Florida is where woke goes to die."¹⁶³ DeSantis grabbed national headlines in 2022 with Florida's "Don't Say Gay" law and later with his efforts to revamp public higher education in the state.¹⁶⁴ However, what was going on in Florida was just the tip of the iceberg.

¹⁵⁹ Wyatt Ronan, *2021 Officially Becomes Worst Year in Recent History for LGBTQ State Legislative Attacks as Unprecedented Number of States Enact Record-Shattering Number of Anti-LGBTQ Measures into Law*, HUM. RTS. CAMPAIGN (May 7, 2021), <https://www.hrc.org/press-releases/2021-officially-becomes-worst-year-in-recent-history-for-lgbtq-state-legislative-attacks-as-unprecedented-number-of-states-enact-record-shattering-number-of-anti-lgbtq-measures-into-law> [<https://perma.cc/U3A5-EQNN>]; Cullen Peele, *Roundup of Anti-LGBTQ+ Legislation Advancing in States Across the Country*, HUM. RTS. CAMPAIGN (May 23, 2023), <https://www.hrc.org/press-releases/roundup-of-anti-lgbtq-legislation-advancing-in-states-across-the-country> [<https://perma.cc/GB8G-HGQY>].

¹⁶⁰ Ronan, *supra* note 159.

¹⁶¹ *Id.*

¹⁶² Jeff Weiner & Kathryn Varn, Opinion, *Why Florida Is America's Least Gay-Friendly State*, AXIOS (June 1, 2024), <https://www.axios.com/2024/06/01/florida-pride-month-desantis-anti-lgbtq-restrictions> [<https://perma.cc/K94N-FT6X>].

¹⁶³ Matt Dixon & Gary Fineout, "Where Woke Goes to Die": DeSantis, *With Eye Toward 2024, Launches Second Term*, POLITICO (Jan. 3, 2023, at 14:24 ET), <https://www.politico.com/news/2023/01/03/desantis-2024-second-term-00076160> [<https://perma.cc/3S8F-HR3X>]. The term "woke" means different things to different people from awareness of social injustice to more pejorative and dismissive connotations toward progressive values and priorities. Kiara Alfonseca, *What Does "Woke" Mean and Why Are Some Conservatives Using It?*, CBS NEWS (Mar. 4, 2025, at 22:42 ET), <https://abcnews.go.com/Politics/woke-conservatives/story?id=93051138> [<https://perma.cc/85JE-9CGG>].

¹⁶⁴ Clifford Rosky, *Don't Say Gay: The Government's Silence and the Equal Protection Clause*, 2022 U. ILL. L. REV. 1845, 1852 (2022); Patricia Mazzei, *Legal Settlement Clarifies Reach of Florida's "Don't Say Gay" Law*, N.Y. TIMES (Mar. 11, 2024), <https://www.nytimes.com/2024/03/11/us/florida-dont-say-gay-law-settlement.html> [<https://perma.cc/R5L4-NHEU>]; Rebecca Carballo, Andrew Atterbury & Bianca Quilantan, *Trump Is Betting on DeSantis' College Oversight Revamp. It's Shaping Up to Be a Red-state Revolution*, POLITICO (Feb. 21, 2026), <https://www.politico.com/news/2026/02/21/trump-fuels-desantis-college-oversight-shakeup-00788295> [<https://perma.cc/F2SQ-DM7T>].

In state legislatures across the country, there was an all-out assault on the rights of LGBTQ people and their ability to move freely through their daily lives. Broadly speaking, the proposed legislation was focused on four different goals:

- Censor and silence LGBTQ identities, such as Florida’s “Don’t Say Gay” bill, parental approval curricular bills, book bans, and criminal prohibitions against drag;¹⁶⁵
- Exclude LGBTQ people from public life, such as bathroom bans and sports bans;¹⁶⁶
- Erase LGBTQ identities, such as binary sex definitions, bills prohibiting access to gender-affirming care, and parental rights bills authorizing conversion therapy;¹⁶⁷ and
- Provide expansive religious and moral exemptions, such as in the context of adoption and foster care.¹⁶⁸

From 2021 to 2024, the number of anti-LGBTQ bills introduced in state legislatures increased over three-fold.¹⁶⁹ During that period, the nature of the bills evolved, often borrowing from concepts that were being introduced in the abortion context, such as third-party reporting.¹⁷⁰ In 2021 and 2022, the number of anti-LGBTQ bills introduced at the state level were 164 and 278, respectively, with twenty enacted each year.¹⁷¹ The volume of anti-LGBTQ legislation increased dramatically in 2023 when 510 bills were introduced

¹⁶⁵ See, e.g., *LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/curricular_laws [<http://perma.cc/B39P-JM6H>] (listing nineteen states that have at least one school censorship law).

¹⁶⁶ See, e.g., *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans [<https://perma.cc/D8DB-VCZB>] (listing twenty-seven states prohibiting transgender students from participating in sports consistent with their gender identity).

¹⁶⁷ See, e.g., *Regulating Gender to Allow Discrimination*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/nondiscrimination/defining_sex [<https://perma.cc/6NTT-5B6P>] (listing sixteen states with restrictive definitions of “sex”).

¹⁶⁸ See, e.g., *Religious Exemptions*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/religious_exemptions/medical [<https://perma.cc/77KV-E7N2>] (listing ten states with religious exemptions that allow medical professionals to refuse to serve LGBTQ patients).

¹⁶⁹ See *infra* note 171 (reporting 164 anti-LGBTQ laws introduced in 2021); *infra* note 174 (reporting 533 anti-LGBTQ laws introduced in 2024).

¹⁷⁰ Sarah Prager, *More Bounty Laws Offering Cash for Reporting Trans People, Abortions, and Librarians Expected in 2025*, PRISM (Jan. 8, 2025), <https://prismreports.org/2025/01/08/bounty-laws-texas-trans-rights-abortion/> [<https://perma.cc/45H6-2SER>].

¹⁷¹ See *Legislation Affecting LGBT Rights Across the Country 2021*, AM. C.L. UNION (Dec. 17, 2021), <https://www.aclu.org/documents/legislation-affecting-lgbtq-rights-across-country-2021> [<https://perma.cc/3EXT-5S5Z>]; *Past Legislation Affecting LGBT Rights Across the Country 2022*, AM. C.L. UNION (Dec. 2, 2022), <https://www.aclu.org/documents/legislation-affecting-lgbtq-rights-across-country-2022> [<https://perma.cc/TW6T-CDHN>].

and eighty-eight of them were signed into law.¹⁷² A new development that year concerned restrictions on speech and expression relating to drag shows.¹⁷³ The number of anti-LGBTQ bills continued to increase in 2024 when there were 533 anti-LGBTQ bills introduced, forty-seven of which were signed into law.¹⁷⁴ One notable change in the bills introduced in 2024 is that bills seeking to restrict curricular offerings started to use the term “DEI.”¹⁷⁵ By this time, a number of red states had enacted multiple anti-LGBTQ laws.¹⁷⁶ Tennessee, for example, had enacted a total of twenty-one anti-LGBTQ laws by mid-2024.¹⁷⁷ As of September 2025, the American Civil Liberties Union reported that it was tracking 616 anti-LGBTQ bills as they make their way through state legislatures.¹⁷⁸ Many of these bills have been introduced in states that already have multiple anti-LGBTQ laws on the books.¹⁷⁹ For example, Texas has a full slate of anti-LGBTQ laws, but thirty-two specifically anti-transgender (“anti-trans”) bills were introduced on the first day of the pre-filing period ahead of the 2025 legislative session.¹⁸⁰

This frenzied legislative activity greatly exacerbated the LGBTQ equality gap in the United States, creating stark disparities in rights and protections from one state to another.¹⁸¹ A similar type of equality gap can be found with respect to abortion rights, which now vary widely from state to state.¹⁸² As in the case of abortion rights, the differing levels of state protection have led to inter-state disputes that raise important questions regarding the extent to which sister states must accede to out-of-state judgments in the context of state

¹⁷² See *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2023*, AM. C.L. UNION (Dec. 21, 2023), <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2023> [https://perma.cc/2UZW-H5TR].

¹⁷³ Adam Gabbatt, “Subtle and Sinister”: Republicans’ Anti-Drag Crusade Seen as Assault on LGBTQ+ Rights, THE GUARDIAN (Sep. 19, 2023, at 06:00 ET), <https://www.theguardian.com/world/2023/sep/19/us-states-attack-drag-shows-lgbtq-rights> [https://perma.cc/PZ5L-RY26].

¹⁷⁴ See *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2024*, AM. C.L. UNION (Dec. 6, 2024), <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2024> [https://perma.cc/DG4X-F3LK].

¹⁷⁵ Mary Ellen Flannery, *Anti-DEI Laws Take Aim at Students of Color and LGBTQ+ Students*, NEA TODAY (Feb. 14, 2024), <https://www.nea.org/nea-today/all-news-articles/anti-dei-laws-take-aim-students-color-and-lgbtq-students> [https://perma.cc/529F-PLV4].

¹⁷⁶ Rogers & Radcliffe, *supra* note 2.

¹⁷⁷ Kimberly Kindy, *Tennessee Leads Charge in Passing Laws Targeting LGBTQ Rights*, WASH. POST (Apr. 7, 2023), <https://www.washingtonpost.com/politics/2023/04/07/tennessee-republicans-lgbtq-laws-legislature/> [https://perma.cc/Z3HE-2WRQ].

¹⁷⁸ *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2025*, AM. C.L. UNION (Dec. 29, 2025), <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2025> [https://perma.cc/6QFQ-NHFG].

¹⁷⁹ See *id.*

¹⁸⁰ Erin Reed, *Republicans File 32 Anti-Trans Bills on First Day in Texas*, ERIN IN THE MORNING (Nov. 18, 2024), <https://www.erininthemorning.com/p/republicans-file-32-anti-trans-bills> [https://perma.cc/SZ4L-X2V8].

¹⁸¹ Knauer, *supra* note 32, at 3–5.

¹⁸² Allison McCann & Amy Schoenfeld Walker, *Tracking Abortion Laws Across the Country*, N.Y. TIMES (Mar. 9, 2026, at 19:20 ET), <https://www.nytimes.com/interactive/2024/us/abortion-laws-roe-v-wade.html> [https://perma.cc/4NSU-A5C9].

long-arm statutes.¹⁸³ Texas, for example, has aggressively enforced its prohibition on gender-affirming care for minors, suing out-of-state hospitals for medical records.¹⁸⁴ Texas has also targeted the parents of transgender children.¹⁸⁵ The Texas Attorney General takes the position that gender-affirming care for a minor constitutes child abuse and that anyone who has “reasonable cause” to believe that such “abuse” is occurring must report the “abuse” to the authorities or face potential criminal charges.¹⁸⁶ The opinion has triggered social service investigations into families, causing some families with transgender children to move out of state rather than risk having their children placed in foster care.¹⁸⁷ However, it is unclear whether these parents could still face prosecution.

As red states ramp up their enforcement of anti-LGBTQ laws, many blue states have enacted increased protections for LGBTQ people. Twenty blue states have pledged to work together to create a “rainbow wall” to protect transgender children, their families, and doctors who provide gender-affirming care from out-of-state judgements.¹⁸⁸ But it remains to be seen whether these laws can blunt the impact of state long-arm statutes. At the same time, the disparity among the states has set in motion a much larger clash over foundational principles of federalism. As discussed in Section III, Trump’s aggressive enforcement of his anti-LGBTQ agenda has placed blue states with LGBTQ-protective legislation in a tenuous position because many of their state laws are at odds with federal policy. For example, seven

¹⁸³ See generally Joseph William Singer, *Conflict of Abortion Laws*, 16 NE. U. L. REV. 313, 325 (2024) (discussing “complex conflict of laws issues” raised in the wake of *Dobbs v. Jackson Women’s Health Organization*); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (overturning the landmark decision *Roe v. Wade*, 410 U.S. 113 (1973), and ruling that the authority to regulate access to abortion rests with the states).

¹⁸⁴ Marin Wolf, *Paxton Drops Inquiries into Seattle Children’s over Gender-Affirming Care in New Agreement*, DALL. NEWS (Apr. 22, 2024, at 18:04 CT), <https://www.dallas-news.com/news/public-health/2024/04/22/seattle-childrens-hospital-to-leave-texas-over-gender-affirming-care-inquiries/> [https://perma.cc/HHF3-4G67]; María Luisa Paúl, *Judge Blocks Texas AG’s Probe for Youth Transgender Records After Lawsuit*, WASH. POST (Mar. 1, 2024), <https://www.washingtonpost.com/nation/2024/02/29/pflag-transgender-texas-lawsuit-ken-paxton/> [https://perma.cc/6DL4-8XMD].

¹⁸⁵ See Press Release, Ken Paxton, AG Paxton Declares So-Called Sex-Change Procedures on Children and Prescription of Puberty Blockers to be “Child Abuse” Under Texas Law (Feb. 21, 2022), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-declares-so-called-sex-change-procedures-children-and-prescription-puberty-blockers-be> [https://perma.cc/EXH2-D3AF].

¹⁸⁶ Amir Vera & Ashley Killough, *Texas AG Declares Pediatric Gender-Affirming Procedures To Be Child Abuse, Legal Opinion Says*, CNN (Feb. 23, 2022, at 23:26 ET), <https://www.cnn.com/2022/02/23/us/texas-attorney-general-gender-affirmation-child-abuse/index.html> [https://perma.cc/Y7G4-AHLX].

¹⁸⁷ See Emma Tucker, *Anguish Lingers as Transgender Kids’ Families Seek Medical Care Outside Texas — And Fight a State Ban*, CNN (Jan. 27, 2024, at 11:35 ET), <https://www.cnn.com/2024/01/27/us/texas-families-transgender-youth-gender-affirming-care-ban/index.html> [https://perma.cc/5RBH-QKLL].

¹⁸⁸ Branigan, *supra* note 147.

states affirmatively mandate an inclusive LGBTQ curriculum,¹⁸⁹ and fourteen states protect a minor's right to access gender-affirming care.¹⁹⁰ In these states, schools and hospitals must now follow federal guidelines or face a complete loss of federal funding, but if they choose to follow the federal guidelines, they will break state law.¹⁹¹ For example, the Attorney General of New York has warned hospitals that discontinuing access to gender-affirming care in accordance with federal guidance may violate state law.¹⁹²

3. *Local Skirmishes*

The MAGA movement has been very invested in local politics since the COVID-19 pandemic-related disputes regarding school shutdowns, mask requirements, and vaccine mandates.¹⁹³ Beyond those concerns, conservative organizations poured unprecedented amounts of money into local school board races, often seeking to recall elected members and replace them with far-right ideologues who would object to the teaching of "critical race theory" in K-12 education and any expressions of LGBTQ inclusivity.¹⁹⁴ For example, Moms for Liberty ("M4L") was formed in 2021 and quickly gained prominence within the MAGA movement.¹⁹⁵ M4L describes itself as a parents' rights organization, but the Southern Poverty Law Center classifies the organization as an anti-government "extremist group."¹⁹⁶ The activities of M4L and other conservative parents' rights groups were confrontational and could easily

¹⁸⁹ Matt Laviates, *Amid Book Bans, DEI Cuts and "Don't Say Gay" Laws, 7 States Will Mandate LGBTQ-Inclusive Curricula*, NBC NEWS (Mar. 25, 2024, at 17:41 ET), <https://www.nbcnews.com/nbc-out/out-news/washington-lgbtq-history-schools-governor-law-rcna144991> [<https://perma.cc/NUA7-VGXP>].

¹⁹⁰ *Bans on Best Practice Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT (Mar. 3, 2026), https://www.lgbtmap.org/equality-maps/healthcare_youth_medical_care_bans [<https://perma.cc/6VMP-VH87>].

¹⁹¹ See, e.g., Joseph Goldstein, *N.Y. Attorney General Warns Hospitals Against Canceling Transgender Care*, N.Y. TIMES (Feb. 3, 2025), <https://www.nytimes.com/2025/02/03/nyregion/ny-attorney-general-transgender-care.html> [<https://perma.cc/K7Y8-FT7C>].

¹⁹² *Id.*

¹⁹³ Amelia Nierenberg, *The Conservative School Board Strategy*, N.Y. TIMES (Oct. 27, 2021), <https://www.nytimes.com/2021/10/27/us/the-conservative-school-board-strategy.html> [<https://perma.cc/WFP2-3E2U>].

¹⁹⁴ Andrew Atterbury, *National Conservative Groups Pour Money into Local School Board Races*, POLITICO (Sep. 19, 2022), <https://www.politico.com/news/2022/09/19/conservative-school-board-fundraising-florida-00057325> [<https://perma.cc/W2C7-5NL6>]; Elizabeth Miller, *Candidates, Statewide Organizations Focus on Inclusive Policies in Oregon School Board Races*, OPB (May 13, 2023), <https://www.opb.org/article/2023/05/13/oregon-school-board-races-inclusive-policies/> [<https://perma.cc/294X-BUY8>].

¹⁹⁵ See Jonathan Weisman, *Moms for Liberty's School Board Antagonism Draws G.O.P. Heavyweights*, N.Y. TIMES (June 29, 2023), <https://www.nytimes.com/2023/06/29/us/politics/moms-for-liberty-republicans.html> [<https://perma.cc/GW5M-Y5Z2>].

¹⁹⁶ *Id.*; *Moms for Liberty*, S. POVERTY L. CTR., <https://www.splcenter.org/resources/extremist-files/moms-liberty/> [<https://perma.cc/85LE-RKUP>].

throw school board meetings into chaos, as school boards across the country became embroiled in curricular disputes over pride flags and bathrooms.¹⁹⁷

In addition to its focus on schools, the MAGA movement targeted public libraries and there was a sharp increase in attempts to ban books, with the American Library Association reporting a sixty-five percent jump in the number of unique titles that were challenged in 2023.¹⁹⁸ According to PEN America, the majority of the titles challenged involved issues related to race and/or LGBTQ identities.¹⁹⁹ The number one banned book in 2023 was *Gender Queer* by Maia Kobabe, a graphic memoir that follows Kobabe's journey exploring their own gender and queer identity.²⁰⁰ Some municipalities even considered defunding and closing their libraries entirely, which was reminiscent of the days when municipalities would choose to close their community pool rather than comply with a desegregation order.²⁰¹ Although book bans played out mostly at the local level, some states also enacted blanket laws designed to protect minors.²⁰² In 2024, four states enacted new laws or regulations designed to protect minors from what they deem to be inappropriate material.²⁰³ The law enacted by Utah uniquely recognizes the importance of local school districts.²⁰⁴ It provides that if a book is removed by a certain number of districts, then the State Board of Education will order the book removed statewide.²⁰⁵

¹⁹⁷ Weisman, *supra* note 195; see, e.g., Emily Rizzo, *This School Board Made News for Banning Books. Voters Flipped It to Majority Democrat*, NAT'L PUB. RADIO (Nov. 11, 2023, at 14:00 ET), <https://www.npr.org/2023/11/11/1212185489/election-pennsylvania-school-board> [<https://perma.cc/SH4Z-8FLN>] (reporting longstanding school board dispute).

¹⁹⁸ *American Library Association Reports Record Number of Unique Book Titles Challenged in 2023*, AM. LIBR. ASS'N (Mar. 14, 2024), <https://www.ala.org/news/2024/03/american-library-association-reports-record-number-unique-book-titles> [<https://perma.cc/GPK8-ABJC>].

¹⁹⁹ Jo Yurcaba, *More Than Half of Books Banned Last Year Featured LGBTQ Characters or People of Color, Report Finds*, NBC NEWS (Feb. 27, 2025, at 08:30 ET), <https://www.nbcnews.com/news/nbcblk/banned-books-lgbtq-transgender-black-people-of-color-pen-america-rcna193879> [<https://perma.cc/W7RX-N7QG>].

²⁰⁰ Alexander Alter, *How a Debut Graphic Memoir Became the Most Banned Book in the Country*, N.Y. TIMES (June 22, 2023), <https://www.nytimes.com/2022/05/01/books/maia-kobabe-gender-queer-book-ban.html> [<https://perma.cc/2N5H-PZM8>]; *Maia Kobabe's 'Gender Queer' Tops List of Most Criticized Library Books for Third Straight Year*, ASSOCIATED PRESS (Apr. 8, 2024, at 06:00 ET), <https://apnews.com/article/maia-kabobe-gender-queer-challenged-library-book-d3e4de3fc0243e42f6ca7bc7fac65979> [<https://perma.cc/S4B6-SKYY>].

²⁰¹ Librarians have also assumed a central role in many of these debates, facing vitriol and personal harassment when they stand for free speech. Emily Williamson, *Cast as Criminals, America's Librarians Rally to Their Own Defense*, N.Y. TIMES (Feb. 6, 2024), <https://www.nytimes.com/2024/02/03/us/book-bans-librarians.html> [<https://perma.cc/G8FZ-NNZL>].

²⁰² Elizabeth A. Harris, *More States Are Passing Book Banning Rules. Here's What They Say*, N.Y. TIMES (Aug. 7, 2024), <https://www.nytimes.com/2024/07/29/books/book-banning-south-carolina-tennesse-idaho-utah.html> [<https://perma.cc/8FD6-P2E3>].

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

The issue of book banning was elevated to the federal level under the Biden administration. When Biden announced his later-discarded plan to run for re-election in 2024, he specifically mentioned the surge in attempts to ban books and said that books were part of our “bedrock freedoms” that were under threat from “MAGA extremists.”²⁰⁶ Biden had earlier directed the U.S. Department of Education’s Office of Civil Rights (“OCR”) to investigate cases of book banning as potential civil rights violations and created the position of the Book Ban Coordinator within the OCR.²⁰⁷ On January 24, 2025, just two weeks into Trump’s second term, the U.S. Department of Education issued a press release titled: *U.S. Department of Education Ends Biden’s Book Ban Hoax*.²⁰⁸ The Press Release explained that upon investigation:

Books are not being “banned,” but that school districts, in consultation with parents and community stakeholders, have established commonsense processes by which to evaluate and remove age-inappropriate materials. Because this is a question of parental and community judgment, not civil rights, OCR has no role in these matters.²⁰⁹

As M4L targeted school boards and libraries, armed militias attempted to disrupt or intimidate LGBTQ inclusive programming.²¹⁰ The scene of heavily armed protestors wearing militia-type clothing first surfaced during the COVID-19 pandemic.²¹¹ In states with open carry laws, such as Michigan, armed protestors railing against COVID-19 pandemic lockdown rules were frequent sights outside state capitols.²¹² In the LGBTQ context, the armed protestors specifically targeted events called Drag Story Hours, run by a nonprofit organization created in 2015 to promote storytelling and

²⁰⁶ Manuela López Restrepo, *Book Bans Are Getting Everyone’s Attention — Including Biden’s. Here’s Why*, NAT’L PUB. RADIO (Apr. 25, 2023, at 17:32 ET), <https://www.npr.org/2023/04/25/1172024559/book-bans-spike-biden-culture-wars-lgbtq-gender-queer-libraries> [<https://perma.cc/8XFY-MT6X>].

²⁰⁷ Zach Montague, *Education Dept. Ends Book Ban Investigations*, N.Y. TIMES (Jan. 24, 2025), <https://www.nytimes.com/2025/01/24/us/politics/education-dept-ends-book-ban-investigations.html> [<https://perma.cc/HJZ7-2ST4>].

²⁰⁸ Press Release, U.S. Dep’t of Educ., Department of Education Ends Biden’s Book Ban Hoax (Jan. 24, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-ends-bidens-book-ban-hoax> [<https://perma.cc/PZH4-2RJP>].

²⁰⁹ *Id.*

²¹⁰ See *Drag Story Time at Oregon Pub*, *supra* note 148 (discussing armed militias).

²¹¹ See, e.g., Manny Fernandez & David Montgomery, *Businesses Chafing Under Covid-19 Lockdowns Turn to Armed Defiance*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2020/05/13/us/coronavirus-businesses-lockdown-guns.html> [<https://perma.cc/WP8X-FFU4>].

²¹² Abigail Censky, *Heavily Armed Protesters Gather Again at Michigan Capitol To Decry Stay-At-Home Order*, NAT’L PUB. RADIO (May 14, 2020, at 10:01 ET), <https://www.npr.org/2020/05/14/855918852/heavily-armed-protesters-gather-again-at-michigans-capitol-denouncing-home-order> [<https://perma.cc/34MF-GXA7>].

diversity.²¹³ The events are geared toward “kids and teens of all ages.”²¹⁴ A character dressed in drag reads a story to the children and engages in other learning activities.²¹⁵ Opponents of Drag Story Hours argue that the events are inappropriate for children and constitute “grooming” and the sexualization of children.²¹⁶ They claim that they are protecting the children by trying to shut down the events.²¹⁷ Members of the Proud Boys, a far-right hate group, have participated in many of the protests.²¹⁸

As mentioned earlier, one of Trump’s first actions during his second term was to appoint himself chair of the Kennedy Center after dismissing the chair and eighteen board members.²¹⁹ One of the rationales that he gave for the unusual move was that the Kennedy Center had hosted a drag event for LGBTQ youth under 18 called Dragtastic Dressup.²²⁰ The now-deleted description on the Kennedy Center website described the event as “LGBTQ+ youth under 18 and their parents/caregivers are invited to come learn the history of drag and watch these incredible performers strut their stuff.”²²¹ When Trump announced his plan to “Make the Kennedy Center Great Again” on his social media platform, Truth Social, he posted: “Just last year, the Kennedy Center featured Drag Shows specifically targeting our youth—THIS WILL STOP.”²²²

²¹³ *About*, DRAG STORY HOUR, <https://www.dragstoryhour.org/about> [<https://perma.cc/F434-8GJ3>].

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Jeff McMillian, *Analysis: Political Rhetoric, False Claims Obscure the History of Drag Performance*, PBS NEWS (Oct. 30, 2022, at 09:30 ET), <https://www.pbs.org/newshour/politics/political-rhetoric-false-claims-obscure-the-history-of-drag-performance> [<https://perma.cc/6XVE-AUW3>]; Kiara Alfonseca, *Drag Story Hours Continue To Be Targets Amid Conservative Backlash*, ABC NEWS (Mar. 25, 2024, at 17:06 ET), <https://abcnews.go.com/US/drag-story-hours-continue-targets-amid-conservative-backlash/story?id=108471808> [<https://perma.cc/4AZP-UB67>].

²¹⁷ Alfonseca, *supra* note 216.

²¹⁸ See *Drag Story Time at Oregon Pub*, *supra* note 148 (discussing armed militias); *UPDATED Report: Drag Events Faced More Than 160 Protests and Significant Threats Since Early 2022*, GLAAD (Apr. 25, 2023), <https://glaad.org/anti-drag-report/> [<https://perma.cc/5JCB-96KX>].

²¹⁹ Javier C. Hernández, Robin Pogrebin & Shawn McCreesh, *Trump Names Loyalist Interim Leader of Kennedy Center as He Strengthens His Grip*, N.Y. TIMES (Feb. 10, 2025), <https://www.nytimes.com/2025/02/10/arts/music/trump-kennedy-center-board-removed.html> [<https://perma.cc/XR53-3HLX>]; Shawn McCreesh, Maggie Haberman & Javier C. Hernández, *Trump Says He Will Dismiss Kennedy Center Board Members and Install Himself as Chair*, N.Y. TIMES (Feb. 9, 2025), <https://www.nytimes.com/2025/02/07/us/politics/trump-kennedy-center.html> [<https://perma.cc/H4LJ-2TWA>].

²²⁰ *Dragtastic Dress-up*, PRINCE GEORGE’S SUITE MAG. & MEDIA, <https://pgsuite.com/calendar/rnha29rabay2y8g-tgw2e-5bfzw-thaye-b48lj-wmsaj-9apcl> [<https://perma.cc/UQJ4-PW58>].

²²¹ *Id.*

²²² Bob Mondello, *Trump Plans to Become Chair of the Kennedy Center: Here Are 3 Things to Know*, NAT’L PUB. RADIO (Feb. 8, 2025, at 18:06 ET), <https://www.npr.org/2025/02/08/nx-s1-5290955/three-takeaways-from-president-trumps-kennedy-center-takeover> [<https://perma.cc/Z7HZ-26SY>].

C. *The 2024 Campaign*

By 2024, it was clear to Republicans that anti-LGBTQ initiatives, particularly anti-trans initiatives, could be a winning strategy, and what would have once been far-right fringe sentiments were now legitimate GOP talking points. The Trump campaign went all-in and placed anti-trans policies at the forefront of Trump's domestic policy proposals, along with his proposals for the mass deportation of immigrants and anti-DEI measures.²²³ Trump even remarked that he was surprised by the broad appeal anti-trans rhetoric had for his MAGA supporters, saying that they would rather hear about transgender "insanity" than cutting taxes.²²⁴ The MAGA commitment to enacting anti-LGBTQ policies, and particularly anti-trans policies, was spelled out in two important documents: the 2024 GOP Platform and *Project 2025*, the controversial report published by the Heritage Foundation, as discussed below.

1. *Trump Rallies and Campaign Advertising*

Trump's 2024 campaign wholeheartedly embraced the virulent anti-LGBTQ rhetoric and policies that had been percolating through the states during the Biden administration. Trump started talking about transgender issues straight out of the gate.²²⁵ In his announcement that he was running for President, Trump promised that schools teaching "radical civics and gender insanity" would lose federal funding.²²⁶ He continued, "We will not let men, as an example, participate in women's sports. No men! My people tell me 'Sir, that's politically incorrect to say.' I say, 'that's okay, I'll say it anyway.'"²²⁷ Asserting his executive authority, Trump added, "As commander-in-chief, I will get Biden's radical left ideology out of our military."²²⁸ Trump's defiant anti-trans narrative was echoed by many speakers at the 2024 Republican Convention²²⁹ and was, as explained below, stated plainly in the official GOP party platform.

²²³ Bill Barrow, *What Trump Has Promised for His 2nd Administration*, PBS NEWS (Jan. 19, 2025, at 13:23 ET), <https://www.pbs.org/newshour/politics/what-trump-has-promised-for-his-2nd-administration> [<https://perma.cc/DJ8R-XWNM>].

²²⁴ Ewan Palmer, *Trump Says Supporters More Concerned About Transgender Issues Than Taxes*, NEWSWEEK (June 11, 2023, at 07:04 ET), <https://www.newsweek.com/trump-transgender-supporters-north-carolina-1805783> [<https://perma.cc/LS76-JLCG>] (reporting Trump said, "I talk about transgender, everyone goes crazy. Who would have thought? Five years ago, you didn't know what the hell it was.").

²²⁵ Christopher Kane, *Trump Reiterates Anti-LGBTQ Themes in Presidential Campaign Announcement*, WASH. BLADE (Nov. 15, 2022), <https://www.washingtonblade.com/2022/11/15/trump-reiterates-anti-lgbtq-themes-in-presidential-campaign-announcement> [<https://perma.cc/9DAN-8MXF>].

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Matt Laviertes, *RNC Speakers Lean into Homophobic and Transphobic Rhetoric*, NBC NEWS (July 18, 2024, at 22:06 ET), <https://www.nbcnews.com/>

Trump consistently highlighted the issue of transgender rights at his campaign rallies, perhaps only overshadowed by his promise of mass deportations.²³⁰ For example, he often aired a degrading and mean-spirited video about transgender service members that interspersed profanity-laced clips from Stanley Kubrick's classic 1987 Vietnam movie about an abusive drill sergeant, *Full Metal Jacket*, with clips of drag performers and others expressing support for LGBTQ rights.²³¹ At a rally in North Carolina, Trump said: "If you want to have a sex change or a social justice seminar, then you can do it somewhere else, but you're not going to do it in the Army, Navy, Coast Guard, Air Force, Space Force, or the United States Marines."²³² Trump, as President-elect, later aired the video at his pre-inauguration rally.²³³

The Trump campaign also used anti-trans messaging to reach voters beyond those who reliably turned out for his rallies. It launched an anti-trans advertising blitz that rivaled the infamous, and much reviled, Willie Horton advertisement from 1988, which was widely criticized for exploiting racial stereotypes and stoking irrational fears.²³⁴ Republicans spent an estimated \$215 million on anti-trans attack advertisements in the 2024 election cycle.²³⁵ The Trump campaign commissioned several variations of an advertisement featuring clips of Kamala Harris' 2019 interview by the transgender rights advocate Mara Keisling where Harris discusses her support for the legal requirement to provide gender-affirming care for incarcerated people.²³⁶ The advertisements

nbc-out/out-politics-and-policy/rnc-speakers-lean-homophobic-transphobic-rhetoric-rcna162505 [https://perma.cc/993M-8RXH].

²³⁰ Bill Barrow, *Trump and Vance Make Anti-Transgender Attacks Central to Their Campaign's Closing Argument*, ASSOCIATED PRESS (Nov. 1, 2024, at 13:56 ET), https://apnews.com/article/trump-harris-transgender-politics-61cff97a64fac581ffc5f762be4c57d3 [https://perma.cc/M57J-2UCA].

²³¹ Donald Trump Uses "Full Metal Jacket" Clips to Portray His Ideal Military, ASSOCIATED PRESS (Oct. 14, 2024, at 16:19 ET), https://apnews.com/article/donald-trump-full-metal-jacket-kubrick-3910423bc7d5fbc6269f07462f45409c [https://perma.cc/RP98-P99Y].

²³² Michelle L. Price & Jill Colvin, *Trump Speaks from Behind Bulletproof Glass at First Outdoor Rally Since His Attempted Assassination*, ASSOCIATED PRESS (Aug. 21, 2024, at 22:25 ET), https://apnews.com/article/trump-vance-north-carolina-60de08931c1a964e8e1fb21d3778d35e [https://perma.cc/2LC2-B5XX].

²³³ Isaac Arnsdorf et al., *Trump Promises Pardons, Blasts Enemies at Rally Before Inauguration*, WASH. POST (Jan. 19, 2025), https://www.washingtonpost.com/politics/2025/01/19/blocks-capitol-attack-trump-rally-will-symbolize-his-reinvention/ [https://perma.cc/YPF7-34MK].

²³⁴ Noah Bierman, *In Campaign's Final Weeks, Trump Airs Anti-Transgender Ads During Football Games*, L.A. TIMES (Oct. 13, 2024, at 03:00 PT), https://www.latimes.com/politics/story/2024-10-13/2024-election-trump-anti-transgender-ad [https://perma.cc/VVG5-VD8F]; see also Steve Harrison, *On Football Saturdays and Sundays, It's Anti-Trans Ads All the Time*, WFAE (Oct. 14, 2024, at 09:13 ET), https://www.wfae.org/politics/2024-10-14/on-football-saturdays-and-sundays-its-anti-trans-ads-all-the-time [https://perma.cc/WEG8-4JZZ] (comparing anti-trans ads to the 1988 Willie Horton ad).

²³⁵ Maham Javadi & Casey Parks, *LGBTQ+ Americans Stockpile Meds and Make Plans to Move After Trump's Win*, WASH. POST (Dec. 9, 2024), https://www.washingtonpost.com/nation/2024/12/09/lgbtq-trump-reactions-preparations/ [https://perma.cc/96FG-HB2H].

²³⁶ Christopher Wiggins, *Donald Trump Punches Down on Transgender People in Hypocritical New Kamala Harris Attack Ad*, THE ADVOCATE (Oct. 22, 2024), https://

end with an ominous and divisive takeaway: “Kamala is for they/them, President Trump is for you.”²³⁷ Beginning in October 2024, the advertisements were aired more than 30,000 times, including in key swing states.²³⁸ The Trump campaign put the advertisements into heavy rotation during sporting events, including NFL and college football games.²³⁹ According to an analysis by Super PAC Future Forward, “Kamala is for they/them” was one of Trump’s most effective thirty-second attack advertisements, shifting the race 2.7 percentage points in favor of Trump after viewers watched it.²⁴⁰ The Democrats did not respond directly to the advertisements, and some Democrats have questioned the extent to which the party’s seemingly unconditional embrace of transgender rights cost Harris the election.²⁴¹

2. *The 2024 GOP Platform*

Once Trump and his MAGA followers had secured control of the Republican party, it was a foregone conclusion that the 2024 GOP Platform would reflect MAGA priorities. The result, however, was striking. Whereas past GOP Platforms were long, policy-heavy documents, the 2024 GOP Platform was a brief sixteen-page endorsement of MAGA philosophy with eccentric capitalization that mimicked the style of Trump’s social media posts.²⁴² Some LGBTQ advocates were relieved to see that the 2024 Platform dropped the GOP’s longstanding explicit objection to marriage equality in favor of affirming what it refers to as the “Sanctity of Marriage.”²⁴³ In a

www.advocate.com/election/trump-transgender-kamala-harris-attack [<https://perma.cc/H68A-7X6G>].

²³⁷ Susan Davis, *GOP Ads on Transgender Rights Are Dominating Airwaves in the Election’s Closing Days*, NAT’L PUB. RADIO (Oct. 19, 2024, at 05:00 ET), <https://www.npr.org/2024/10/19/g-s1-28932/donald-trump-transgender-ads-kamala-harris> [<https://perma.cc/86QY-7KKT>].

²³⁸ *Id.*

²³⁹ Shane Goldmacher, *Trump and Republicans Bet Big on Anti-Trans Ads Across the Country*, N.Y. TIMES (Oct. 8, 2024), <https://www.nytimes.com/2024/10/08/us/politics/trump-republican-transgender-ads.html> [<https://perma.cc/SH7M-G4BE>].

²⁴⁰ Shane Goldmacher, Maggie Haberman & Jonathan Swan, Opinion, *How Trump Won, and How Harris Lost*, N.Y. TIMES (Nov. 16, 2024), <https://www.nytimes.com/2024/11/07/us/politics/trump-win-election-harris.html> [<https://perma.cc/D6A9-G73Y>].

²⁴¹ Matt Laviates, *Some Democrats Blame Party’s Position on Transgender Rights in Part for Harris’ Loss*, NBC NEWS (Nov. 8, 2024, at 18:16 ET), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/democrats-blame-partys-position-transgender-rights-part-harris-loss-rcna179370> [<https://perma.cc/QD83-2UMY>].

²⁴² Republican Party, *2024 GOP Platform Make America Great Again!*, AM. PRESIDENCY PROJECT (July 8, 2024), <https://www.presidency.ucsb.edu/documents/2024-republican-party-platform> [<https://perma.cc/PCH6-8GPM>] [hereinafter *GOP Platform*]; see also Megan Pratz, *With Just One Mention of Abortion, Republican Party Lays Out Its 2024 Policy Platform*, NAT’L PUB. RADIO (July 8, 2024, at 14:21 ET), <https://www.npr.org/2024/07/08/nx-s1-5033015/rnc-republican-party-platform-2024> [<https://perma.cc/3TEB-EKRU>] (explaining GOP policy positions).

²⁴³ Jo Yurcaba, *GOP’s 2024 Platform: A Shift on Same-Sex Marriage or the Same Old Stance?*, NBC NEWS (Aug. 2, 2024, at 12:25 ET), <https://www.nbcnews.com/nbc-out/>

section titled “Empower American Families,” the Platform promised that “Republicans will promote a Culture that values the Sanctity of Marriage, the blessings of childhood, the foundational role of families, and supports working parents. We will end policies that punish families.”²⁴⁴ Although this language could be read as a concession in favor of marriage equality, “Sanctity of Marriage” is a conservative term of art.²⁴⁵ It is used throughout right-wing religious and political circles to express an exclusionary view of marriage as a unique institution that can only be between one man and one woman.²⁴⁶ In this way, the Platform signaled a clear disapproval to right-wing voters familiar with the term.

The GOP 2024 Platform did not mince words regarding its views on transgender Americans. The Platform began by outlining “twenty promises that we will accomplish very quickly when we win the White House and Republican Majorities in the House and Senate.”²⁴⁷ Two of these “promises” involved restricting the rights of transgender people: keeping “men out of women’s sports” and stopping federal funds for schools “pushing . . . gender ideology . . . on our children.”²⁴⁸ The Platform also advocated for eliminating Title IX protections and defunding school districts that maintain LGBTQ-inclusive policies, but it stopped short of calling for the binary and immutable definition of sex that Trump imposed on January 20, 2025—his first day in office.²⁴⁹

3. *Project 2025*

As mentioned earlier, Trump tried to distance himself throughout his campaign from *Project 2025*, the conservative blueprint for reshaping the United States government published by the Heritage Foundation that is based on far-right principles of governance and economic and social policies.²⁵⁰ The different sections of the 900-page report are organized by government

out-politics-and-policy/gop-2024-platform-shift-same-sex-marriage-rcna164517 [https://perma.cc/G8W7-Z56N].

²⁴⁴ GOP Platform, *supra* note 242.

²⁴⁵ Yurcaba, *supra* note 243.

²⁴⁶ *Id.*

²⁴⁷ GOP Platform, *supra* note 242.

²⁴⁸ *Id.*

²⁴⁹ In a section titled “Republicans Will End Left-wing Gender Insanity,” the GOP Platform says Republicans will continue to support efforts to ban transgender girls and women in women’s sports, ban taxpayer funding for gender-affirming surgeries, “stop Taxpayer-funded Schools from promoting gender transition, reverse Biden’s radical rewrite of Title IX Education Regulations, and restore protections for women and girls.” *Id.* A section of the updated platform titled “Knowledge and Skills, Not CRT and Gender Indoctrination” says Republicans will “defund schools that engage in inappropriate political indoctrination of our children using Federal Taxpayer Dollars,” alluding to the conservative effort in recent years to restrict LGBTQ-inclusive curricula. *Id.*

²⁵⁰ Neil Vigdor & Simon J. Levien, *What Is Project 2025, and Why Did Trump Distance Himself from It During the Campaign?*, N.Y. TIMES (Nov. 23, 2024), <https://www.nytimes.com/2024/11/06/us/politics/trump-project-2025.html> [https://perma.cc/LVB8-ZPEK].

function or Cabinet department, and many of them are written by former officials from the first Trump White House.²⁵¹ Despite Trump's protestations on the campaign trail, many of his early executive actions seem to follow the *Project 2025* playbook.²⁵² He has also appointed a number of the authors of *Project 2025* to important roles within his administration, suggesting that *Project 2025* may provide important clues regarding the administration's next steps, as well as provide additional background for policies that Trump has already implemented.²⁵³

Trump's early anti-trans initiatives closely track *Project 2025*'s recommendations. For example, *Project 2025* proposes erasing federal workplace and other protections despite *Bostock*, creating a biological binary definition of sex, imposing a transgender ban in the military, and ending federal funding for both gender-affirming care and DEI programs.²⁵⁴ Trump implemented each of these proposals within his first week in office.²⁵⁵ However, he has not yet implemented the proposals *Project 2025* makes with respect to marriage equality and LGBTQ families, as detailed below.

The section of *Project 2025* on the U.S. Department of Health and Human Services (HHS) devotes the most attention to LGBTQ issues. The section was written by Roger Severino, who served as Director of the HHS Office of Civil Rights during the first Trump administration and spearheaded the 2018 effort to promulgate an administrative definition of sex.²⁵⁶ Severino is a staunch opponent of LGBTQ rights and an early adopter of the term "gender ideology."²⁵⁷ He begins his chapter by listing five overreaching goals for HHS. The first goal is titled "Protecting Life, Conscience, and Bodily Integrity."²⁵⁸ Not surprisingly, this goal includes the need to "uphold bodily integrity rooted

²⁵¹ *Project 2025*, *supra* note 107, at xv–xxii (listing biographical material for the authors).

²⁵² Alison Durkee, *Here's How Trump's Executive Orders Align with Project 2025*, FORBES (Mar. 17, 2025, at 14:29 ET), <https://www.forbes.com/sites/alisondurkee/2025/02/06/heres-how-trumps-executive-orders-align-with-project-2025-as-co-author-nears-senate-confirmation/> [<https://perma.cc/FBS7-834A>].

²⁵³ Bill Barrow, *After Trump's Project 2025 Denials, He Is Tapping Its Authors and Influencers for Key Roles*, ASSOCIATED PRESS (Nov. 23, 2024, at 17:22 ET), <https://www.yahoo.com/news/trumps-project-2025-denials-tapping-222200810.html> [<https://perma.cc/Z5TY-D5GQ>].

²⁵⁴ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020); *Project 2025*, *supra* note 107, at 103, 450, 582–85.

²⁵⁵ Durkee, *supra* note 252.

²⁵⁶ Green et al., *supra* note 135; *Project 2025*, *supra* note 107, at 449.

²⁵⁷ Mary Anne Case, *Trans Formations in the Vatican's War on "Gender Ideology,"* 44 SIGNS 639, 639 (2019).

²⁵⁸ The first goal articulated by Roger Severino warns that: Radical actors inside and outside government are promoting harmful identity politics that replaces biological sex with subjective notions of "gender identity" and bases a person's worth on his or her race, sex, or other identities. This destructive dogma, under the guise of "equity," threatens American's fundamental liberties as well as the health and well-being of children and adults alike. The next Secretary must ensure that HHS programs protect children's minds and bodies and that HHS programs respect parents' basic right to direct the upbringing, education, and care of their children. *Project 2025*, *supra* note 107, at 450.

in biological realities, not ideology” and to “protect children’s minds and bodies” from what Severino describes as “harmful identity politics that replace biological sex with subjective notions of ‘gender identity.’”²⁵⁹ Throughout the chapter, Severino disparages transgender people and gender-affirming care, referring to the “radical redefinition of sex”²⁶⁰ and linking “gender identity” to the “ideologically motivated sexualization of [] children.”²⁶¹

Unlike the 2024 GOP Platform, *Project 2025* does not try to hide its disdain for same-sex marriage. Goal #3 is titled “Promoting Stable and Flourishing Married Families.”²⁶² It bears quoting at length:

Families comprised of a married mother, father, and their children are the foundation of a well-ordered nation and healthy society. Unfortunately, family policies and programs under President Biden’s HHS are fraught with agenda items focusing on “LGBTQ+ equity[.]” . . . These policies should be repealed and replaced by policies that support the formation of stable, married, nuclear families.

Working fathers are essential to the well-being and development of their children, but the United States is experiencing a crisis of fatherlessness that is ruining our children’s futures. In the overwhelming number of cases, fathers insulate children from physical and sexual abuse, financial difficulty or poverty, incarceration, teen pregnancy, poor educational outcomes, high school failure, and a host of behavioral and psychological problems. . . .

In the context of current and emerging reproductive technologies, HHS policies should never place the desires of adults over the right of children to be raised by the biological fathers and mothers who conceive them.²⁶³

Severino later doubles down on the primacy of the nuclear family, composed of a father and a mother, when talking about the need for broad religious exemptions for grant recipients that “maintain a biblically based, social science–reinforced definition of marriage and family.”²⁶⁴ Severino asserts inaccurately that:

Social science reports that assess the objective outcomes for children raised in homes aside from a heterosexual, intact marriage are clear: All other family forms involve higher levels of instability (the average length of same-sex marriages is half that

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 475.

²⁶¹ *Id.*

²⁶² *Id.* at 451.

²⁶³ *Id.*

²⁶⁴ *Id.* at 481.

of heterosexual marriages); financial stress or poverty; or poorer behavioral, psychological, or educational outcomes.

For the sake of child well-being, programs should affirm that children require and deserve both the love and nurturing of a mother and the play and protection of a father.²⁶⁵

He also expresses his contempt for the Respect for Marriage Act that attempts to codify the holding in *Obergefell v. Hodges*.²⁶⁶ He argues that HHS program grants should be available to “recipients who affirm that marriage is between not just any two adults, but one man and one unrelated woman.”²⁶⁷

Toward the end of his chapter, Severino sums up what he sees as “The Family Agenda” for HHS:

The Secretary’s antidiscrimination policy statements should never conflate sex with gender identity or sexual orientation. Rather, the Secretary should proudly state that men and women are biological realities that are crucial to the advancement of life sciences and medical care and that married men and women are the ideal, natural family structure because all children have a right to be raised by the men and women who conceived them.²⁶⁸

The direction not to “conflate sex with gender identity or sexual orientation” stands in direct contravention to the holding in *Bostock*.²⁶⁹ As explained below, Trump has issued executive orders that adopt this position.

D. Trump’s Second Term (2025–?)

Trump’s victory in 2024 established that villainizing transgender people could also be a winning political strategy on the national stage. His victory emboldened the MAGA movement to double down on its anti-trans agenda and left the Democrats questioning their strong support for transgender rights as they second-guessed the campaign.²⁷⁰ For many LGBTQ people, the

²⁶⁵ *Id. Contra* Charlotte J. Patterson, Rachel H. Farr & Abbie E. Goldberg, *LGBTQ+ Parents and Their Children*, NAT. COUNCIL ON FAM. RELS. (Oct. 2021), <https://www.ncfr.org/system/files/2021-10/Policy%20Brief%20Oct%202021.pdf> [<https://perma.cc/9AC8-HEJT>] (concluding that “both parents and children are generally well adjusted and that they do not differ in well-being or in multiple developmental outcomes from parents and children in the general population”); *NCFR Board of Directors Statement on Project 2025*, NAT. COUNCIL ON FAM. RELS. (Oct. 1, 2024), <https://www.ncfr.org/news/ncfr-board-directors-statement-project-2025> [<https://perma.cc/7KE2-62RG>] (“If Project 2025 reaches full implementation, it will do real and lasting harm to families as they exist in our pluralistic, diverse, and democratic society.”).

²⁶⁶ See *Project 2025*, *supra* note 107, at 481. See generally *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) for its holding.

²⁶⁷ *Project 2025*, *supra* note 107, at 481.

²⁶⁸ *Id.* at 489.

²⁶⁹ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

²⁷⁰ Lavietes, *supra* note 241.

election of Trump to a second term inspired dread and the finger pointing by the Democrats seemed like scapegoating.²⁷¹ Two weeks after the election, Rep. Nancy Mace (R-SC) introduced an amendment to the U.S. House of Representatives rules to restrict access to single-sex facilities at the U.S. Capitol, meaning bathroom and locker room, to “biological sex.”²⁷² The proposed rules change was directed at Sarah McBride (D-DE), who had just been elected the first openly transgender member of Congress.²⁷³ No Republican member of Congress came out against the proposed rules change, which took effect at the beginning of the 119th Congress.²⁷⁴

Although it was clear from the campaign that LGBTQ Americans were going to be in for a bumpy ride, it remained an open question whether Trump’s anti-trans narrative on the campaign trail was merely performative or whether he would follow through on his promises. Trump clarified any doubts in his inaugural speech. After declaring that “the Golden Age of America begins now,” Trump announced that “it will henceforth be the official policy of the United States government that there are only two genders: male and female.”²⁷⁵ Later that day, Trump signed his first batch of executive orders that were directed at not only transgender Americans, but also LGBTQ people more generally. He imposed a federal definition of sex as immutable and binary, rescinded Biden-era protections for LGBTQ people, and took aim at DEI practices.²⁷⁶ In a remarkable about-face, the private sector had already begun to reverse its support for DEI initiatives in advance of the inauguration.²⁷⁷ There was no discernible Republican pushback to any of these efforts.

²⁷¹ Casey Parks, “*People Are Afraid*”: Trump’s Actions Targeting Trans Rights Lead to Confusion, Fear, WASH. POST (Jan. 29, 2025), <https://www.washingtonpost.com/nation/2025/01/29/trump-trans-executive-orders-fear-confusion/> [https://perma.cc/7HM8-GYGR]; Christopher Wiggins, “*Morning Joe*’ Continues Fixation on Trans Issues in Post-Election Blame Game Without Talking to Trans People, THE ADVOCATE (Nov. 13, 2024), <https://www.advocate.com/election/morning-joe-transgender-election-fixation> [https://perma.cc/VD9Z-4LCE].

²⁷² H.R. 1579, 118th Cong. (2025); Syedah Asghar & Rebecca Shabad, *Rep. Nancy Mace Says Her Anti-Trans Bathroom Bill ‘Absolutely’ Targets Rep.-Elect Sarah McBride*, NBC NEWS (Nov. 19, 2024, at 11:50 ET), <https://www.nbcnews.com/politics/congress/nancy-mace-defends-anti-trans-bathroom-bill-says-absolutely-targets-sa-rcna180805> [https://perma.cc/4F83-6Q3Q].

²⁷³ *Id.*

²⁷⁴ Jo Yurcaba, *Speaker Mike Johnson Maintains House Transgender Bathroom Ban*, NBC NEWS (Jan. 7, 2025), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/speaker-mike-johnson-maintains-house-transgender-bathroom-ban-rcna186669> [https://perma.cc/2AKG-WLUE].

²⁷⁵ Donald J. Trump, U.S. President, The Inaugural Address 1, 4 (Jan. 20, 2025), <https://www.govinfo.gov/content/pkg/DCPD-202500103/pdf/DCPD-202500103.pdf> [https://perma.cc/V4NF-PHDV].

²⁷⁶ Exec. Order No. 14148, *supra* note 4 (rescinding Biden-era protections); Exec. Order No. 14168, *supra* note 4 (defining “sex”); Exec. Order No. 14151, *supra* note 4 (dismantling DEI initiatives).

²⁷⁷ Katie Paul & Juby Babu, *Meta, Amazon Scale Back Diversity Programs Ahead of Trump Inauguration*, REUTERS (Jan. 10, 2025, at 17:38 ET), <https://www.reuters.com/sustainability/society-equity/meta-end-diversity-programs-ahead-trump-inauguration-2025-01-10/> [https://perma.cc/96V3-DW3M].

1. *Gender Ideology*

In his initial hours as the 47th President of the United States, Trump signed an unprecedented number of first-day executive orders.²⁷⁸ The second executive order Trump signed was titled *Initial Rescissions of Harmful Executive Orders and Actions*.²⁷⁹ It rescinded seventy-eight of Biden's executive orders, including Executive Order 13988 and Executive Order 14004.²⁸⁰ Executive Order 13988 had extended broad nondiscrimination protections based on sexual orientation and gender identity consistent with *Bostock v. Clayton County*.²⁸¹ Executive Order 14004 had reversed the prior ban on transgender service members that Trump had imposed during his first term.²⁸²

Beyond these expected reversals of Biden-era policies, Trump issued a number of executive orders directed specifically at transgender Americans. The orders, *inter alia*, establish a federal binary and immutable definition of sex,²⁸³ prohibit transgender athletes from serving on teams that correspond with their gender identity,²⁸⁴ ban access to gender-affirming care for minors,²⁸⁵ impose penalties on schools and teachers who practice inclusive policies,²⁸⁶ and prohibit transgender troops from serving in the military.²⁸⁷ The anti-trans orders are notable because they do not use the term transgender, but instead refer to the ill-defined concept of "gender ideology."²⁸⁸ The orders also disparage the prevailing medical consensus regarding gender identity and suggest that transgender people are somehow being dishonest and untruthful.²⁸⁹ Following

²⁷⁸ Megan Forrester & Bill Hutchinson, *Trump's Record-Breaking Day 1 Executive Actions Prompt Legal Challenges*, ABC NEWS (Jan. 22, 2025, at 12:27 ET), <https://abcnews.go.com/Politics/trumps-record-breaking-day-1-executive-actions-prompt/story?id=117933368> [<https://perma.cc/ZR8K-RGJJ>].

²⁷⁹ Exec. Order No. 14148, *supra* note 4 (Initial Rescissions of Harmful Executive Orders and Actions).

²⁸⁰ *Id.*; Exec. Order 14004, 86 Fed. Reg. 7471 (Jan. 25, 2021); Exec. Order No. 13988, *supra* note 151.

²⁸¹ Exec. Order No. 13988, *supra* note 151; *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

²⁸² Exec. Order No. 14004, *supra* note 280 (Enabling All Qualified Americans to Serve Their Country in Uniform).

²⁸³ Exec. Order No. 14168, *supra* note 4 (Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government).

²⁸⁴ Exec. Order No. 14201, *supra* note 6 (Keeping Men Out of Women's Sports).

²⁸⁵ Exec. Order No. 14187, *supra* note 7 (Protecting Children from Chemical and Surgical Mutilation).

²⁸⁶ Exec. Order No. 14190, *supra* note 6 (Ending Radical Indoctrination in K-12 Schooling).

²⁸⁷ Exec. Order No. 14183, *supra* note 6 (Prioritizing Military Excellence and Readiness).

²⁸⁸ *See, e.g.*, Exec. Order No. 14168, *supra* note 4 (Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government).

²⁸⁹ Exec. Order No. 14183, *supra* note 6 (Prioritizing Military Excellence and Readiness).

the MAGA anti-trans strategy, the orders claim to be necessary in order to protect children, women, and national security.²⁹⁰

The first anti-trans executive order that Trump signed, for example, frames anti-trans policy as a civil rights measure necessary to protect women and restore faith in government.²⁹¹ It has wide-reaching ramifications, ranging from disallowing gender markers on official documents to reflect an individual's gender identity to requiring the Federal Bureau of Prisons to force the estimated 1,500 transgender women in custody to be housed with men.²⁹² The Executive Order established a definition for "gender ideology" that is maddeningly vague. It provides that:

"Gender ideology" replaces the biological category of sex with an ever-shifting concept of self-assessed gender identity, permitting the false claim that males can identify as and thus become women and vice versa, and requiring all institutions of society to regard this false claim as true. Gender ideology includes the idea that there is a vast spectrum of genders that are disconnected from one's sex. Gender ideology is internally inconsistent, in that it diminishes sex as an identifiable or useful category but nevertheless maintains that it is possible for a person to be born in the wrong sexed body.²⁹³

All other executive orders that target "gender ideology" refer back to this definition.²⁹⁴

The executive orders evince a clear disregard for mainstream medical opinions that is consistent with the vein of scientific denialism and conspiratorial thinking that runs through the MAGA movement and that was on full display during the COVID-19 pandemic.²⁹⁵ For example, Executive Order 14187, titled *Protecting Children from Chemical and Surgical Mutilation*, which provides that the United States will not fund or otherwise support gender-affirming care for minors, claims to protect children from "junk science."²⁹⁶ Perhaps even more troubling is the picture of transgender people that

²⁹⁰ *Id.*; Exec. Order No. 14168, *supra* note 4 (Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government); Exec. Order No. 14187, *supra* note 7 (Protecting Children from Chemical and Surgical Mutilation).

²⁹¹ Exec. Order No. 14168, *supra* note 4.

²⁹² *Id.*; Shaila Dewan & Amy Harmon, *Trump Bars Transgender Women from U.S. Prisons for Female Inmates*, N.Y. TIMES (Jan. 23, 2025), <https://www.nytimes.com/2025/01/23/us/trump-transgender-inmates-prison.html> [<https://perma.cc/S9BH-CT54>].

²⁹³ *Id.*

²⁹⁴ *See, e.g.*, Exec. Order No. 14190, *supra* note 6 (Ending Radical Indoctrination in K-12 Schooling).

²⁹⁵ Thomas B. Edsall, Opinion, *MAGA vs. Science Is No Contest*, N.Y. TIMES (Sep. 11, 2024), <https://www.nytimes.com/2024/09/11/opinion/republicans-science-denial.html> [<https://perma.cc/4469-5872>].

²⁹⁶ Exec. Order No. 14187, *supra* note 7 (Protecting Children from Chemical and Surgical Mutilation).

emerges from these executive pronouncements. Executive Order 14183, titled *Prioritizing Military Excellence and Readiness*, bans transgender troops from serving in the military, but not before disparaging their character.²⁹⁷ By way of background, the United States military is the largest employer of transgender people, with an estimated 15,000 to 25,000 transgender service members.²⁹⁸ The Executive Order asserts that these transgender service members are *per se* not “honorable.” It provides:

adoption of a gender identity inconsistent with an individual’s sex conflicts with a soldier’s commitment to an honorable, truthful, and disciplined lifestyle, even in one’s personal life. A man’s assertion that he is a woman, and his requirement that others honor this falsehood, is not consistent with the humility and selflessness required of a service member.²⁹⁹

It also contends that using pronouns that align with one’s gender identity is not compatible with military readiness and, by extension, threatens national security:³⁰⁰

It is the policy of the United States Government to establish high standards for troop readiness, lethality, cohesion, honesty, humility, uniformity, and integrity. This policy is inconsistent with the medical, surgical, and mental health constraints on individuals with gender dysphoria. This policy is also inconsistent with shifting pronoun usage or use of pronouns that inaccurately reflect an individual’s sex.³⁰¹

Finally, the Executive Order asserts that transgender troops suffer from disqualifying mental illness. It states:

Longstanding Department of Defense (DoD) policy (DoD Instruction (DoDI) 6130.03) provides that it is the policy of the DoD to ensure that service members are “[f]ree of medical conditions or physical defects that may reasonably be expected to require excessive time lost from duty for necessary treatment or hospitalization.” As a result, many mental and physical health conditions are incompatible with active duty, from conditions that require substantial medication or medical treatment to bipolar and

²⁹⁷ See Exec. Order No. 14183, *supra* note 6 (Prioritizing Military Excellence and Readiness).

²⁹⁸ The Editorial Board, Opinion, *Trump’s Shameful Campaign Against Transgender Americans*, N.Y. TIMES (Feb. 9, 2025), <https://www.nytimes.com/2025/02/09/opinion/transgender-trump-orders.html> [<https://perma.cc/F3LD-YDYU>].

²⁹⁹ *Id.*

³⁰⁰ Exec. Order No. 14183, *supra* note 6 (Prioritizing Military Excellence and Readiness).

³⁰¹ *Id.*

related disorders, eating disorders, suicidality, and prior psychiatric hospitalization.³⁰²

This characterization of transgender service members who have signed up to put their lives on the line for our country provides a telling preview of how the MAGA movement plans to paint transgender people going forward: deceitful, mentally ill, and a risk to national security.

With respect to protecting children from “indoctrination,” Executive Order 14190 titled *Ending Radical Indoctrination in K-12 Schooling* focuses on gender ideology and also “discriminatory equity ideology.”³⁰³ It ends federal funding for schools with inclusive policies and threatens administrators, teachers, and staff with potential criminal penalties for respecting a student’s gender identity.³⁰⁴ The U.S. Department of Education wasted no time getting to work. In a letter dated January 28, 2025, it notified the Denver Public School District that it was under investigation for violating the civil rights of its female students by installing an “all-gender” bathroom.³⁰⁵ Similar investigations are underway in five northern Virginia school districts.³⁰⁶

2. Diversity, Equity, and Inclusion

On Trump’s first day in office, he also took aim at what the MAGA movement currently refers to as DEI.³⁰⁷ These actions build on the measures Trump put in place toward the end of his first term after the 2020 racial justice protests, but they have a much greater reach.³⁰⁸ Although DEI is often paired with its evil twin of “gender ideology,” a number of Trump’s executive orders focused solely on DEI, framing it as a form of reverse discrimination that is

³⁰² *Id.*

³⁰³ The Executive Order defines “discriminatory equity ideology” as “an ideology that treats individuals as members of preferred or disfavored groups, rather than as individuals, and minimizes agency, merit, and capability in favor of immoral generalizations.” Exec. Order No. 14190, *supra* note 6 (*Ending Radical Indoctrination in K-12 Schooling*).

³⁰⁴ *Id.*

³⁰⁵ *U.S. Department of Education Launches Investigation into Denver Public Schools for Converting Girl’s Restroom to All-Gender Facility*, U.S. DEP’T OF EDUC. (Jan. 28, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-launches-investigation-denver-public-schools-converting-girls-restroom-all-gender-facility> [<https://perma.cc/Y76V-HHL7>].

³⁰⁶ Brooke Migdon, *Education Department Investigating Northern Virginia School Districts for Transgender Support Policies*, THE HILL (Feb. 17, 2025, at 14:50 ET), <https://thehill.com/homenews/lgbtq/5149578-education-department-northern-virginia-schools-transgender-students-trump-executive-order/> [<https://perma.cc/XN7H-NCHC>].

³⁰⁷ Exec. Order No. 14151, *supra* note 4 (requiring end of all DEI “mandates, policies, programs, preferences, and activities” across the federal government, including all equity-related grants and contracts); Exec. Order No. 14170, 90 Fed. Reg. 8621 (Jan. 30, 2025) (targeting hiring practices of the federal government).

³⁰⁸ The use of the acronym DEI represents an evolution of MAGA thinking and messaging from Trump’s first term when these sorts of objections were couched in terms of “critical race theory” or “diversity.” See *supra* text accompanying notes 138–46.

undermining our meritocracy and, ultimately, our democracy.³⁰⁹ Given that the Biden administration had included sexual orientation and gender identity in all DEI efforts, along with other groups that have historically experienced barriers in employment and education, all of Trump's anti-DEI measures directly impact LGBTQ people.³¹⁰ That said, DEI is also a powerful "dog whistle" that conjures images of racial preferences in the right-wing brain.³¹¹

Trump's anti-DEI executive orders initially focused on the activities of the federal government by discontinuing DEI programs and hiring practices.³¹² Federal government workers involved in DEI initiatives were among the first to be placed on administrative leave amidst the ongoing race to decrease the size of the federal workforce.³¹³ As with the anti-trans executive orders, the anti-DEI executive orders are framed not only in terms of civil rights, but also in terms of national security. For example, Executive Order 14170, titled *Reforming the Federal Hiring Process and Restoring Merit to Government Service*, prohibits taking diversity into account in any government hiring because such hiring is said to "put[] critical government functions at risk" and be contrary to our democratic system.³¹⁴ Immediately after the tragic mid-air collision between a commercial jet and a military Black Hawk helicopter in Washington, DC on January 30, 2025, Trump cast the blame for the collision that claimed sixty-seven lives on "DEI hiring," without any evidence.³¹⁵ MAGA Republicans had also blamed the 2024 collapse of the Francis Scott Key Bridge in Baltimore on DEI, pointing to the race and sex of one of the Commissioners overseeing the Port of Baltimore. Representative Phil Lyman (R-UT) posted on social media "DEI=DIE."³¹⁶

³⁰⁹ See, e.g., Exec. Order No. 14170, *supra* note 307 (Reforming the Federal Hiring Process and Restoring Merit to Government Service).

³¹⁰ See, e.g., Exec. Order No. 13985, *supra* note 155 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government).

³¹¹ Andrew Lawrence, *Racist Dog Whistle: The Right Wing Has Weaponized "DEI,"* THE GUARDIAN (Apr. 21, 2024, at 10:00 ET), <https://www.theguardian.com/culture/2024/apr/21/dei-language-conservatives-baltimore> [<https://perma.cc/4V9G-USSS>].

³¹² Exec. Order No. 14151, *supra* note 4 (Ending Radical and Wasteful Government DEI Programs and Preferencing); Exec. Order No. 14170, *supra* note 307 (Reforming the Federal Hiring Process and Restoring Merit to Government Service).

³¹³ Alexandra Olson & Zeke Miller, *Trump Administration Moves to Begin Cutting All Federal DEI Staff*, PBS (Jan. 22, 2025, at 09:59 ET), <https://www.pbs.org/newshour/politics/trump-administration-moves-to-begin-cutting-all-federal-dei-staff> [<https://perma.cc/LX2Z-HSV6>].

³¹⁴ Exec. Order No. 14170, *supra* note 307 (Reforming the Federal Hiring Process and Restoring Merit to Government Service).

³¹⁵ David E. Sanger, *Trump Blames D.E.I. and Biden for Crash Under His Watch*, N.Y. TIMES (Jan. 30, 2025), <https://www.nytimes.com/2025/01/30/us/politics/trump-plane-crash-dei-faa-diversity.html> [<https://perma.cc/3D4N-X4DX>].

³¹⁶ Curtis Bunn, *Utah Lawmaker Blames "Diversity" for Baltimore Bridge Collapse*, NBC NEWS (Mar. 27, 2024, at 16:27 ET), <https://www.nbcnews.com/news/nbcblk/utah-lawmaker-blames-diversity-baltimore-bridge-collapse-rcna145261> [<https://perma.cc/M5VE-RAB3>].

The anti-DEI orders were extended to apply to government contractors and federal grantees.³¹⁷ Generally, they prohibit any DEI programs or initiatives, calling them “dangerous, demeaning, and immoral race- and sex-based preferences.”³¹⁸ Trump also rescinded a longstanding Johnson-era executive order that had extended nondiscrimination protection to the employees of federal contractors and required certain data reporting to the Department of Labor.³¹⁹ The same anti-DEI executive order requires agencies to recommend private and nonprofit sector entities to audit for potential noncompliance with the DEI prohibitions.³²⁰

The anti-DEI executive orders set off a mad dash across agencies and government websites to identify and delete anything remotely related to DEI.³²¹ Federal workers were placed on leave and offices and programs were shuttered.³²² The lack of a meaningful definition of what constitutes DEI may have led to some overkill, or perhaps the intention was to keep the definition vague and cast a very broad net. Federal grants were paused, purportedly to allow time to determine whether the grants were consistent with “Presidential priorities,” including his anti-DEI orders.³²³ Federal websites were purged of any reference of LGBTQ people, sexual orientation, or gender identity, but other concepts such as gender equity in health outcomes also disappeared

³¹⁷ Naftali Bendavid & Cleve R. Wootson Jr., *Trump’s Fierce Attacks on DEI Reflect a Longtime GOP Focus*, WASH. POST (Feb. 1, 2025), <https://www.washingtonpost.com/politics/2025/02/01/dei-trump-republicans-diversity/> [<https://perma.cc/GQ7F-NJVJ>].

³¹⁸ Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 31, 2025) (Ending Illegal Discrimination and Restoring Merit-Based Opportunity).

³¹⁹ *Id.*; Exec. Order No. 11245, 3 C.F.R. 336 (1964–1965). The Office of Federal Contract Compliance Programs in the Department of Labor collected demographic information from federal contractors in order to monitor compliance with the affirmative action requirements of Executive Order 11245. See LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 116.04 (2d ed. 2024) (describing the reporting requirement and public disclosure under the rescinded Executive Order). See generally Heather Timmons, *Why LBJ Signed Executive Order 11246 that Trump Rescinded*, REUTERS (Jan. 23, 2025, at 09:25 ET), <https://www.reuters.com/world/us/why-president-johnson-signed-executive-order-1965-that-trump-rescinded-2025-01-23/> [<https://perma.cc/J4X7-27VS>] (describing rescinded Executive Order).

³²⁰ Exec. Order No. 14173, *supra* note 318 (Ending Illegal Discrimination and Restoring Merit-Based Opportunity).

³²¹ Singer, *supra* note 5.

³²² Donald Judd & Katelyn Polantz, *White House Orders Government DEI Employees To Be Placed on Leave*, CNN (Jan. 22, 2025, at 18:08 ET), <https://www.cnn.com/2025/01/21/politics/white-house-government-dei-employees-on-leave> [<https://perma.cc/Q4AT-QG48>].

³²³ OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-25-13, MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (2025); Jonathan Swan & Zolan Kanno-Youngs, *Inside the Chaotic Rollout of Trump’s Federal Funding*, N.Y. TIMES (Jan. 29, 2025), <https://www.nytimes.com/2025/01/29/us/politics/trump-funding-freeze-rollout.html> [<https://perma.cc/W4KA-BCJU>].

from the CDC and NIH websites.³²⁴ The FBI training center in Quantico, Virginia painted over its “core values” mural in its lobby, which had included the words “diversity,” “fairness,” “compassion” and “integrity.”³²⁵

In addition, all affinity groups, organizations meant to foster a sense of belonging for workers who share a common identity or interest, across the federal government were suspended.³²⁶ At West Point, twelve affinity groups were discontinued, including the National Society of Black Engineers Club and Society of Women Engineers.³²⁷ At the U.S. Department of Defense, also known as the Department of War, Secretary of Defense Pete Hegseth has long been a vocal critic of DEI. In a memo to employees, Hegseth wrote that DEI efforts “are incompatible with the values of DoD.”³²⁸ The memo continued that DoD would no longer celebrate Black History Month, Asian American Pacific Islander Heritage Month, National American Indian Heritage Month, LGBTQ Pride Month, Women’s History Month, Juneteenth, Martin Luther King Jr. Day or Holocaust Remembrance Day.³²⁹

³²⁴ Lena H. Sun, Dan Keating & Fenit Nirappil, *CDC Removes Gender, Equity References in Public Health Material*, WASH. POST (Feb. 1, 2025), <https://www.washingtonpost.com/health/2025/01/31/cdc-website-gender-lgbtq-data/> [https://perma.cc/W3LB-XJ7N]; Carter Sherman & Jessica Glenza, *CDC Webpages Go Dark as Trump Targets Public Health Information*, THE GUARDIAN (Feb. 4, 2025, at 08:32 ET), <https://www.theguardian.com/us-news/2025/feb/04/cdc-pages-trump-public-health> [https://perma.cc/V256-TRFC]; Julie Steenhuysen & Ted Hesson, *US Health Agencies Scrubbing Websites to Remove “Gender Ideology”*, REUTERS (Jan. 31, 2025, at 15:13 ET), <https://www.reuters.com/world/us/us-health-agencies-scrubbing-websites-remove-gender-ideology-2025-01-31/> [https://perma.cc/CLD6-7F4Q].

³²⁵ Bendavid & Wootson, *supra* note 317, at 4; Perry Stein & Jeremy Roebuck, *Several Senior FBI Leaders Told to Leave Agency or Be Fired, People Familiar with Matter Say*, WASH. POST (Jan. 30, 2025), <https://www.washingtonpost.com/national-security/2025/01/30/fbi-leadership-removed-kash-patel-trump/> [https://perma.cc/AL48-2BVL].

³²⁶ Kimmy Yam, *Trump’s Anti-DEI Executive Orders Target Employee Resource Groups, Federal Workers Say*, NBC NEWS (Jan. 27, 2025, at 18:43 ET), <https://www.nbcnews.com/news/asian-america/trump-anti-dei-orders-target-federal-employee-groups-rcna189212> [https://perma.cc/3Z2X-E3NS].

³²⁷ Anemona Hartocollis & Eve Sampson, *The Military Led Diversity Efforts. West Point’s Club Ban Is a Shift*, N.Y. TIMES (Feb. 7, 2025), <https://www.nytimes.com/2025/02/07/us/west-point-clubs-minorities-women-trump.html> [https://perma.cc/78V5-Y6UE].

³²⁸ Memorandum from Pete Hegseth, U.S. Sec’y of Def., to Senior Pentagon Leadership Commanders of the Combatant Commands Defense Agency and DoD Field Activity Directors, *Restoring America’s Fighting Force* (Jan. 29, 2025), <https://media.defense.gov/2025/Jan/29/2003634987/-1/-1/1/RESTORING-AMERICAS-FIGHTING-FORCE.PDF> [https://perma.cc/GV74-8X35]; Will Steakin & Matt Seyler, *Pentagon Intelligence Agency Pauses Events, Activities Related to MLK Day, Black History Month*, ABC NEWS (Jan. 29, 2025, at 19:13 ET), <https://abcnews.go.com/Politics/pentagon-intelligence-agency-pauses-events-activities-related-mlk/story?id=118244237> [https://perma.cc/2MYD-H7JF]. President Trump signed an Executive Order in September 2025 that authorized the use of the secondary title of the Department of War, but only Congress can officially change the name of the department. Exec. Order No. 14347, 90 Fed. Reg. 43893 (Sep. 5, 2025) (Restoring the United States Department of War).

³²⁹ *Id.*

3. *Obedying in Advance*³³⁰

In the private and non-profit sectors, many entities have rushed to comply with the anti-DEI orders in the hope of avoiding federal scrutiny.³³¹ But change was in the air even before Trump's inauguration. The corporate enthusiasm for DEI policies that increased dramatically after the murder of George Floyd had started to wane in the summer of 2024 when several high-profile corporations discontinued their diversity programs.³³² In the days preceding Trump's second inauguration, tech giants that had been part of the Trump resistance in 2020 began to join the Trump bandwagon. Meta, Amazon, and Target all announced in January 2025 that they were discontinuing their DEI programs and many Fortune 500 companies stopped participating in external surveys to gauge LGBTQ inclusivity, such as the HRC workplace equity index.³³³ Major universities also began unceremoniously dismantling their DEI offices and programs lest they risk alienating the already shrinking pool of federal grants and research funds.³³⁴

Trump's executive actions take the position that any sort of engagement with DEI violates civil rights laws in our newly color-blind society. His actions indicate that the federal government will use whatever tools it has at its disposal, including stopping funding and canceling government contracts, to root out DEI practices. This drastic about-face in policy has left many entities scrambling, wondering what could be next.

III. WHAT'S NEXT?

The speed with which Trump set about erasing transgender people from public life and dismantling DEI has taken some commentators by surprise.³³⁵

³³⁰ SNYDER, *supra* note 10, at 17 (including "[Lesson No.] 1: Do not obey in advance").

³³¹ See, e.g., Susan Snyder, *Penn Scrubs Diversity Initiatives from Its Website to Comply with Trump's Order*, PHILA. INQUIRER (Feb. 15, 2025, at 05:00 ET), <https://www.inquirer.com/education/university-pennsylvania-dei-donald-trump-order-20250215.html> [<https://perma.cc/E3WU-EL5F>].

³³² See, e.g., Kate Gibson, *John Deere & Co. Backs Off Diversity Policies, Following Tractor Supply*, CBS NEWS (July 18, 2024, at 13:37 ET), <https://www.cbsnews.com/news/john-deere-dei-policies-tractor-supply-robbey-starbucks/> [<https://perma.cc/NU89-QYMG>].

³³³ Paul & Babu, *supra* note 277; Anne D'Innocenzio, *Target Says It Is Ending Its DEI Goals and Programs, Citing an 'Evolving External Landscape'*, PBS NEWS (Jan. 24, 2025, at 16:40 ET), <https://www.pbs.org/newshour/politics/target-says-it-is-ending-its-dei-goals-and-programs-citing-an-evolving-external-landscape> [<https://perma.cc/9S42-HT8H>]; Laya Neelakandan, *Corporate DEI Index Sees 65% Drop in Participation from Fortune 500 Companies*, CNBC (Feb. 4, 2026, at 15:43 ET), <https://www.cnbc.com/2026/02/04/corporate-dei-index-hrc.html> [<https://perma.cc/4PWQ-2G5D>].

³³⁴ Snyder, *supra* note 331.

³³⁵ Patrick Healy & M. Gessen, Opinion, *There's a Reason Even "Smart" People Surrender to Trump*, N.Y. TIMES (Feb 13, 2025), <https://www.nytimes.com/2025/02/13/opinion/trump-authoritarianism-surrender.html> [<https://perma.cc/TJ54-JU5W>].

Some groups that supported Trump have recoiled from his actions in office.³³⁶ The disconnect reflects the enduring question about Trump: When should we take his statements literally and when are they just belligerent showmanship? In the case of LGBTQ rights (as well as immigration, tariffs, and the federal bureaucracy) Trump's words on the campaign trail were clear and supported by both the 2024 GOP Platform and *Project 2025*. His early days in office have left little daylight between official U.S. policy and Trump's MAGA rallies.³³⁷ Not only have his policies tested the contours of the separation of powers, but they promise to reach deep into state and local concerns and strain the limits of federalism. Far from stemming the tide of anti-trans legislation on the state level, Trump's victory and the stunning change in U.S. policy seem to have accelerated these efforts.³³⁸ At this juncture, it is crucial to consider what lies ahead for LGBTQ people in this new MAGA-dominated world and ask what we can do about it.

It is unrealistic to assume that Trump and the MAGA movement will stand down and be satisfied with the current slate of legal disabilities that they have imposed on LGBTQ people, particularly transgender people. The topic of LGBTQ rights has motivated voters, especially suburban educated white women whose support for Trump had been elusive.³³⁹ The topic has also proven to be red meat for the nativist and populist forces that make up important portions of the MAGA movement. It would be magical thinking to expect that Trump would turn his back on something that delivers on election day and so energizes his base. As with all scapegoating, continuing to point the finger at transgender people provides a convenient distraction from the price of eggs and further solidifies the "them versus us" mentality that fuels populist hatred.³⁴⁰ There is also no reason to assume that the Trump administration will limit its attacks to transgender people, but rather that targeted attacks on LGB

³³⁶ Filip Timotija, *Pro-Trump Arab American Group Changing Name After Gaza Remarks*, THE HILL (Feb. 5, 2025, at 16:42 ET), <https://thehill.com/homenews/campaign/5128941-trump-arab-american-group-name-change/> [https://perma.cc/2MPZ-2SB6].

³³⁷ Stephen Collingson, *Trump Is Imposing MAGA Rule on the Government Hour-by-Hour*, CNN (Jan. 23, 2025, at 07:45 ET), <https://www.cnn.com/2025/01/23/politics/maga-rule-government-trump-analysis/> [https://perma.cc/9WYR-6ST2].

³³⁸ Dave Lawler & Erica Pandey, *Trump Win Emboldens GOP's Anti-Trans Blitz*, AXIOS (Nov. 21, 2024), <https://www.axios.com/2024/11/21/trump-anti-trans-bathroom-laws-gop/> [https://perma.cc/3H57-JYUR].

³³⁹ See Hugh Tomlinson, *The Two Sentences That Doomed Kamala Harris's Campaign*, THE TIMES (Nov. 15, 2025, at 20:00 GMT), <https://www.thetimes.com/world/us-world/article/kamala-harris-trans-gender-democrat-election-campaign-kvzqz9d6c> [https://perma.cc/H7AW-YJMK].

³⁴⁰ Odette Yousef, *Trump's Anti-Trans Effort Is an Agenda Cornerstone with Echoes in History*, NAT'L PUB. RADIO (Feb. 6, 2025, at 10:27 ET), <https://www.npr.org/2025/02/06/nx-s1-5288145/trump-anti-trans-executive-order> [https://perma.cc/3GGD-YGJX].

people and their families will follow. The issues are twined, not only in the umbrella acronym that defines the LGBTQ community, but also in the minds of those who mean the community harm.

Signs of what may be on the horizon are all around us: the increasingly punitive nature of state anti-trans legislation, the characterization of transgender people emerging from the executive orders, the administration's expansive yet vague definition of "gender ideology" and "DEI," the rejection of scientific and medical expertise, the language of the 2024 GOP Platform and *Project 2025*, the voices of the rabidly anti-LGBTQ segments of the MAGA movement, the resounding silence of the Republican party, and the disarray of the Democratic Party. Trump's turn toward Russia and away from our European allies underscores the uncomfortable fact that we should also take note of what has happened in other countries that have experienced an authoritarian slide.³⁴¹ LGBTQ people under Russian President Vladimir Putin, for example, have suffered severe repression.³⁴² Viktor Orbán in Hungary proudly touts his country's anti-LGBTQ stance as providing a positive example for American conservatives.³⁴³

This section discusses what might be coming down the pike next in terms of anti-LGBTQ initiatives. This section also uses the lens of strategic institutional choice to identify the democratic institutions that could potentially help LGBTQ people counter future attempts to contain supposedly contagious ideologies and eradicate LGBTQ people from public life. With Republicans in control of both houses of Congress and the presidency, the courts and the states stand as the most obvious bulwarks against further attacks. But in this period of democratic decline, both judicial independence and federalism may be uncertain allies.

A. Good Policy Requires Good Data, Not Alternative Facts

As they say, "good policy requires good data." In order to establish the MAGA theory of "gender ideology" and "indoctrination," it is necessary to disregard accepted scientific and medical consensus regarding LGBTQ

³⁴¹ See Robert Jimison, *As Trump Turns Toward Russia and Against Ukraine, Republicans Are Mum*, N.Y. TIMES (Feb. 19, 2025), <https://www.nytimes.com/2025/02/19/us/politics/trump-ukraine-russia-republicans.html> [https://perma.cc/9S6M-TCM].

³⁴² Dasha Litvinova, *Russia's LGBTQ+ Community Is Living in Fear Following New Laws and Court Rulings, Activists Say*, ASSOCIATED PRESS (Dec. 6, 2024, at 08:14 ET), <https://apnews.com/article/russia-lgbtq-crackdown-putin-moscow-aef5650c6fdadbe1ac13e0d0b9f93f3b> [https://perma.cc/JK28-JUUA].

³⁴³ David Folkenflik, *Hungary's Autocratic Leader Tells U.S. Conservatives to Join His Culture War*, NAT'L PUB. RADIO (Aug. 4, 2022, at 17:55 ET), <https://www.npr.org/2022/08/04/1115541985/why-hungarys-authoritative-leader-is-drawing-conservative-crowds-in-the-u-s> [https://perma.cc/CBM6-Y5NR]; Justin Spike, *Hungary Won't Back Down and Change LGBTQ+ and Asylum Policies Criticized By EU, Minister Says*, ASSOCIATED PRESS (Jan. 18, 2025, at 05:49 ET), <https://apnews.com/article/hungary-lgbtq-asylum-policies-df2e989e8e1ae91683e6f8512b4f39eb> [https://perma.cc/58MY-ADRH].

people, which states that LGBTQ people are well-adjusted and not pathological. Moreover, an explosion of empirical research into the lives of LGBTQ people has quantified significant disparities between LGBTQ people and non-LGBTQ people in terms of health, financial security, and general well-being.³⁴⁴ This sort of research can be invaluable when crafting targeted policies. For example, statistics regarding the rate of homelessness and suicidal ideation among LGBTQ children demonstrate the need for inclusive and supportive environments in our schools and child welfare agencies.³⁴⁵ The toll of “minority stress,” as expressed through data and surveys, can be used to justify nondiscrimination protections.³⁴⁶ The MAGA movement rejects this science just as it rejects vaccines and COVID-19 precautions.³⁴⁷ In its place, the movement offers its own “alternative facts” and statistics like the disingenuous “fact” asserted in *Project 2025* that same-sex marriages last only half as long as different-sex marriages.³⁴⁸ That “fact” is patently misleading because it fails to take into account the fact that marriage equality has only existed nationwide since 2015, so there is no way of knowing how long same-sex marriages last.³⁴⁹

³⁴⁴ See, e.g., M. V. Lee Badgett, Christopher S. Carpenter & Dario Sansone, *LGBTQ Economics*, 35 J. ECON. PER. 141, 141–42, 165–66 (2021) (mapping economic outcomes); Jake Miller, *Studies Deepen Understanding of LGBTQ Health Disparities*, HARV. MED. SCH. (Sep. 13, 2024), <https://hms.harvard.edu/news/studies-deepen-understanding-lgbtq-health-disparities> [<https://perma.cc/U6W7-W3LA>] (discussing research on LGBTQ+ health disparities).

³⁴⁵ See, e.g., Harmony Rhoades et al., *Homelessness, Mental Health and Suicidality Among LGBTQ Youth Accessing Crisis Services*, 49 CHILD PSYCHIATRY & HUM. DEV. 643, 649 (2018).

³⁴⁶ See, e.g., Ellen D. B. Riggle, Sharon S. Rostosky & Sharon Horne, *Does It Matter Where You Live? Nondiscrimination Laws and the Experiences of LGB Residents*, 7 SEXUALITY RSCH. & SOC. POL’Y 168, 173 (2010).

³⁴⁷ See, e.g., Claire Panosian, *It Can’t Happen Here (Or Can It?): The Deadly Rise of Anti-Science—A Scientist’s Warning*, 28 AM. J. TROPICAL MED. HYGIENE 216, 216–17 (2024).

³⁴⁸ *Project 2025*, *supra* note 107, at 481.

³⁴⁹ *Obergefell v. Hodges*, 576 U.S. 644, 665 (2015). Massachusetts became the first state to issue marriage licenses in 2004. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003). Connecticut approved same-sex marriage in 2008. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008). California temporarily allowed same-sex marriages in 2008, but the practice was stopped after a few months by a ballot measure, Proposition 8. *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008); Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES (Nov. 5, 2008), <https://www.nytimes.com/2008/11/06/us/politics/06marriage.html> [<https://perma.cc/B356-KDUL>] (noting twelve states recognized same-sex marriage by June 2013). New York recognized marriage equality in 2011. *Id.* By the time *Obergefell* was decided in 2015, same-sex marriage was legal in thirty-seven states. Bill Chappell, “Equal Dignity”: U.S. Map Shows the Impact of *Obergefell v. Hodges Decision*, NAT’L PUB. RADIO (June 26, 2025, at 05:01 ET), <https://www.npr.org/2025/06/26/nx-s1-5445033/obergefell-legal-same-sex-marriage-us-map> [<https://perma.cc/VSA7-K6G8>].

As noted earlier, Executive Order 14190, regarding the claimed indoctrination occurring in K-12 education, dismisses research and data on LGBTQ people as junk science.³⁵⁰ The casual disregard for peer-reviewed scholarship means that arguments based in science or best medical practices are unlikely to move MAGA enthusiasts, although, hopefully, the courts will be more receptive to these sorts of traditional arguments.³⁵¹ The MAGA production of its own partisan “science and data” raises a frightening scenario where the MAGA movement could attempt to re-pathologize LGBTQ people and identities.³⁵² Arguably, this attempt is already underway with respect to transgender identities. Executive Order 14183 establishing the new transgender military ban cites as authority DoD guidelines on mental illness and fitness to serve.³⁵³ There has been a parallel effort in Russia to reclassify homosexuality as a mental illness since 2023.³⁵⁴ In the 1960s and 1970s, the early gay liberationists in the United States worked tirelessly to declassify homosexuality as a mental illness and secure its deletion from the *Diagnostic and Statistical Manual*.³⁵⁵ They understood that declassification was a necessary prerequisite for all other advocacy on behalf of the LGBTQ community.³⁵⁶ If LGBTQ people were once again classified as mentally ill, it would create a tremendous barrier to advocating for LGBTQ rights and would wipe out over fifty years of progress. Such a classification would disqualify LGBTQ people from many occupations and raise questions regarding their fitness to parent their children.³⁵⁷

Despite its disdain for objective facts, the MAGA movement might take notice of a 2025 Gallup poll showing that the percentage of Americans eighteen years of age and older who identify somewhere on the LGBTQ spectrum has

³⁵⁰ Exec. Order No. 14190, *supra* note 6 (Ending Radical Indoctrination in K-12 Schooling).

³⁵¹ Claire Rush, *Federal Judge Blocks the Trump Administration from Pulling Funding for Sex Ed on Gender Diversity*, ASSOCIATED PRESS (Oct. 28, 2025, at 13:52 ET), <https://apnews.com/article/sex-ed-funding-gender-lawsuit-trump-7b74ae73a60b3900f4e-1c126abd4bf80> [<https://perma.cc/UE2M-WYM5>].

³⁵² *Team of Experts Provides Critical Review of Florida Medical Report on Transgender Care*, YALE L. SCH. (July 13, 2022), <https://law.yale.edu/yls-today/news/team-experts-provides-critical-review-florida-medical-report-transgender-care> [<https://perma.cc/K8HQ-636G>].

³⁵³ Exec. Order No. 14183, *supra* note 6 (Prioritizing Military Excellence and Readiness).

³⁵⁴ *Russian Sexologists to Target Homosexuality, Other “Disorders” Under New Rules*, REUTERS (June 29, 2023, at 14:31 ET), <https://www.reuters.com/world/europe/russian-sexologists-target-homosexuality-other-disorders-under-new-rules-2023-06-29/> [<https://perma.cc/D92N-4JKX>].

³⁵⁵ See RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 40 (1981).

³⁵⁶ Benjamin Ryan, *Behind the Movement That Brought Homosexuality — And Psychiatry’s Power — To a Vote 50 Years Ago*, NBC NEWS (Apr. 8, 2024, at 17:55 ET), <https://www.nbcnews.com/nbc-out/out-health-and-wellness/homosexuality-psychiatry-dsm-disorder-rcna146579> [<https://perma.cc/5G2K-NBUJ>].

³⁵⁷ Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCIS. 565, 572 (2014).

risen to an all-time high of 9.3 percent.³⁵⁸ This percentage has almost tripled since Gallup began counting in 2012, and it has increased by two-thirds since 2020.³⁵⁹ Nearly one in four members of Generation Z aged eighteen to twenty-seven identify as LGBTQ.³⁶⁰ It makes sense that the percentage of people who are willing to identify as LGBTQ on a survey increased during the same time that LGBTQ people were gaining greater acceptance in all aspects of their lives. The reduction in stigma naturally makes it easier and more welcoming for people to identify openly as LGBTQ. For the MAGA movement, however, these findings could be marshalled as proof of the disastrous impact of “groomers” and the “indoctrination” taking place in our public schools.

B. *Containing LGBTQ Lives and Stories*

The alarm over the spread of “gender ideology” and “divisive ideology” reflects the MAGA framing of LGBTQ identities as contagious and especially dangerous to children. This contagion model has a long history stretching back nearly a hundred years to the earliest obscenity trials involving LGBTQ-themed books.³⁶¹ It was a central feature of the psychoanalytic understanding of homosexuality that reigned during the mid-twentieth century when homosexuality was conflated with pedophilia.³⁶² The contagion model also drove the Lavender Scare in the 1950s when homosexuals were purged from the federal government on the grounds that they represented security risks.³⁶³ As a U.S. Senate report from 1950, titled *Employment of Homosexuals and Other Sex Perverts in Government*, explained, “[o]ne homosexual can pollute a Government office.”³⁶⁴ The belief in the contagious (and undesirable) nature of LGBTQ identities logically leads to a series of policy measures that are designed to contain the contagion—to contain LGBTQ lives and stories and keep them far away from children. These measures fall into two general categories: censorship and attacks on parenting.

³⁵⁸ Claire Cain Miller & Francesca Paris, *Nearly One in 10 U.S. Adults Identifies as L.G.B.T.Q., Survey Finds*, N.Y. TIMES (Feb. 20, 2025), <https://www.nytimes.com/2025/02/20/upshot/lgbtq-survey-results.html> [<https://perma.cc/E7JE-CG7V>].

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ See Nancy J. Knauer, *Homosexuality as Contagion: From The Well of Loneliness to the Boy Scouts*, 29 HOFSTRA L. REV. 401, 448 (2000).

³⁶² See, e.g., JENNIFER TERRY, AN AMERICAN OBSESSION: SCIENCE, MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY 322–23 (1999).

³⁶³ DAVID K. JOHNSON, THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT 16–17, 80 (2006).

³⁶⁴ S. SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON EXPENDITURES IN THE EXEC. DEP'TS, 81ST CONG., INTERIM REPORT: EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT 4 (1950).

1. *Censorship*

Censorship is a tried-and-true way to try to contain expressions of LGBTQ pride. As explained in greater detail later in this Article, attempts by the government to censor speech or the freedom of association will face stiff First Amendment challenges.³⁶⁵ However, First Amendment protections will not apply to government self-censorship or shifting priorities on DEI and will have limited reach in the case of alleged obscenity, child pornography, or child sexual abuse.³⁶⁶ At the federal level, Executive Order 14168, which established a binary definition of gender,³⁶⁷ set off a swift wave of self-censorship across the federal government as it scrubbed the term “transgender” and lopped the “T” off of the acronym LGBT in government program documents and on its websites. Government grants and research reports were also scoured for any reference of the offending terms, including references to gender equity.³⁶⁸ In perhaps the starkest erasure of LGBTQ history, the National Park Service removed the words “transgender” and “queer” from its website for the Stonewall National Monument commemorating the Stonewall Uprising, which was led by transgender activists, most notably Marsha P. Johnson and Sylvia Rivera.³⁶⁹ In terms of expressive speech, the federal government has also forbidden its embassies and consulates from flying or displaying the pride flag, which was done under the Obama and Biden administrations.³⁷⁰

Between the “Don’t Say Gay” bills and book bans, attempts to keep knowledge about LGBTQ identities away from children is rampant on the state level with nineteen states restricting how or whether LGBTQ issues can be taught

³⁶⁵ See, e.g., Michael L. Smith, *Moral Panic and the First Amendment*, 72 BUFF. L. REV. 455, 459 (2024). An anti-drag law in Texas that was declared unconstitutional was appealed to the Fifth Circuit, which vacated the ruling and remanded the case to the District Court. *Woodlands Pride, Inc. v. Paxton*, 694 F. Supp. 3d 820, 829 (S.D. Tex. 2023), *vacated and remanded*, 157 F.4th 775 (5th Cir. 2025). Similar laws have also been enjoined in Tennessee and Florida. Smith, *supra*, at 504.

³⁶⁶ Smith, *supra* note 365, at 506 (citing *Woodlands Pride*, 694 F. Supp. 3d at 845) (“Texas claimed that it had ‘a compelling interest in protecting children,’ and while the court [in the initial *Woodlands Pride* case] agreed that this interest was compelling, it disagreed with Texas’s claim that its bill was narrowly tailored to accomplish this goal.”).

³⁶⁷ Exec. Order No. 14168, *supra* note 4 (Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government).

³⁶⁸ Apoorva Mandavilli & Roni Caryn Rabin, *C.D.C. Site Restores Some Purged Files After “Gender Ideology” Ban Outcry*, N.Y. TIMES (Feb. 3, 2025), <https://www.nytimes.com/2025/02/03/health/trump-gender-ideology-research.html#:~:text=On%20Friday%2C%20the%20Centers%20for,that%20promoted%20%E2%80%9Cgender%20ideology.%E2%80%9D> [https://perma.cc/YL3E-9QPG].

³⁶⁹ Elizabeth Wolfe, “Transgender” and “Queer” Erased from Stonewall Uprising National Monument Website, CNN (Feb. 13, 2025, at 23:39 ET), <https://www.cnn.com/2025/02/13/us/stonewall-inn-national-monument-transgender/index.html> [https://perma.cc/S879-MV6K].

³⁷⁰ Christine Hauser & Neil Vigdor, *Trump Administration Tells Embassies That “Activist” Flags Won’t Fly*, N.Y. TIMES (Jan. 24, 2025), <https://www.nytimes.com/2025/01/24/us/embassy-us-flag-blm-gay-pride.html> [https://perma.cc/2PW8-JLSF].

in schools, ranging from outright bans to required parental notification.³⁷¹ Executive Order 14190, which aims to stop “radical indoctrination” in K-12 education, brings to bear the power of the federal government to investigate the offending school districts for supposed civil rights violations and suspend federal funding.³⁷² All of these measures are driven by something more sinister than simply restricting the dissemination of age-inappropriate material. These laws and policies purport to safeguard children from LGBTQ people and their allies who are claimed to be “grooming,” “sexualizing,” and “indoctrinating” children.³⁷³ Whereas the first two terms reference child sexual abuse and pedophilia, the third term makes it clear that the MAGA movement considers pro-LGBTQ messages to be propaganda, plain and simple.

Russia and Hungary have strict laws prohibiting pro-LGBTQ messaging. After several regions in Russia enacted bans on LGBTQ “propaganda,” Russia enacted a national ban, known as the Child Protection Law, in 2013 that made it illegal to tell minors that “non-traditional” relationships were equal to “traditional” relationships.³⁷⁴ The prohibition was interpreted broadly enough to ban LGBTQ pride parades because they might be viewed by minors.³⁷⁵ Hungary passed a similar law in 2021 that criminalized the depiction and promotion of “diverse gender identities and sexual orientations.”³⁷⁶ The Russian law was later expanded in 2022 to apply to all expressions of support for “non-traditional sexual relations” and information about gender transitions, regardless of whether a minor was involved.³⁷⁷ In 2024, Russia added what it refers to as the “LGBTQ movement” to its list of “extremist” and “terrorist organizations.”³⁷⁸ Under Russian criminal law, participating in or financing

³⁷¹ *LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/curricular_laws [http://perma.cc/B39P-JM6H]. In March 2024, Florida settled a lawsuit that limited the scope of the state’s “Don’t Say Gay” law to instruction only. Mazzei, *supra* note 164.

³⁷² Exec. Order No. 14190, *supra* note 6 (Ending Radical Indoctrination in K-12 Schooling).

³⁷³ Susanna Cassisa, Opinion, *The “Groomer” Anti-LGBTQ+ Panic Is Not New — And Has Caused Immense Harm*, WASH. POST (July 24, 2023), <https://www.washingtonpost.com/made-by-history/2023/07/24/groomer-lgbtq-germany-children/> [https://perma.cc/M8R2-MDRW].

³⁷⁴ Kathy Lally, *Russia’s Gay Law Isolates LGBT Teenagers*, WASH. POST (Sep. 2, 2013), https://www.washingtonpost.com/world/russias-gay-law-isolates-lgbt-teenagers/2013/09/01/9eec54fc-0c19-11e3-89fe-abb4a5067014_story.html [https://perma.cc/X25N-DXDE].

³⁷⁵ *Id.*

³⁷⁶ Balazs Pivarnyik & Bela Szandelszky, *Hungary: Lawmakers Pass Law Barring LGBT Content for Minors*, ASSOCIATED PRESS (June 15, 2021, at 14:47 ET), <https://apnews.com/article/government-and-politics-europe-hungary-laws-business-d093db541d1ad00bd4b28bb3a22cdb1b> [http://perma.cc/NTY4-MAKK].

³⁷⁷ Theo Farrant, *From Museums to Book Publishing: How Russia’s New Anti-LGBTQ Laws Will Impact Culture*, EURONEWS (June 12, 2022, at 14:01 GMT), <https://www.euronews.com/culture/2022/12/06/from-museums-to-book-publishing-how-russias-new-anti-lgbtq-laws-will-impact-culture> [http://perma.cc/27CK-MQQT].

³⁷⁸ *Russia Adds “LGBT Movement” to List of Extremist and Terrorist Organizations*, REUTERS (Mar. 22, 2024, at 08:42 ET), <https://www.reuters.com/world/europe/>

an extremist organization is punishable by up to twelve years in prison.³⁷⁹ An individual displaying a pride flag or other symbol of support faces fifteen days in detention for the first offense and up to four years in prison for the second offense.³⁸⁰ Individuals suspected of involvement with an extremist organization are placed on a nationwide “list of extremists,” and their bank accounts may be frozen.³⁸¹ By the end of 2024, Russian police orchestrated a crackdown on LGBTQ bars and nightclubs authorized by the new law and started to maintain a watch list of LGBTQ people.³⁸²

2. Parenting

Given the perceived danger to children, there are a number of ways that the policy goal of containment could disrupt the lives of LGBTQ people and their families, cutting deeply into parenting rights. These rights are already under assault in the context of gender-affirming care where the state is substituting its judgment for that of the parents of transgender children, who, according to the Texas Attorney General, may be guilty of child abuse.³⁸³ *Project 2025* claims to have data and research to support its assertion that families that do not have a mother and a father are deeply flawed.³⁸⁴ If that is the case, then it would not be surprising to see states attempt to prevent LGBTQ people from building their own families. For example, states could limit step-parent adoption to different-sex partners and stop listing the non-biological same-sex parent on the birth certificate.³⁸⁵ They could limit access to assisted reproductive technology (ART), restrict adoption rights, and prohibit LGBTQ people from serving as foster parents.³⁸⁶ Trump’s Executive Order 14216

russia-adds-lgbt-movement-list-extremist-terrorist-organisations-2024-03-22 [https://perma.cc/H83K-QKJR].

³⁷⁹ *Russia: First Convictions Under LGBT ‘Extremist’ Ruling*, HUM. RTS. WATCH (Feb. 15, 2024, at 00:00 ET), https://www.hrw.org/news/2024/02/15/russia-first-convictions-under-lgbt-extremist-ruling [https://perma.cc/A9PN-9EB9].

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² Josh Milton, *Kremlin Accused of “Creating a Database of LGBTQ+ Russians to Monitor Them,”* METRO (Apr. 2, 2025, at 11:26 ET), https://metro.co.uk/2025/02/21/kremlin-accused-creating-a-database-lgbtq-russians-monitor-them-22599911/ [http://perma.cc/XBT2-25HG].

³⁸³ Exec. Order No. 13985, *supra* note 155; Press Release, *supra* note 185; Jo Yucaba, *Texas AG Says Transition Care for Minors is Child Abuse Under State Law*, NBC NEWS (Feb. 23, 2022, at 13:55 ET), https://www.nbcnews.com/nbc-out/out-politics-and-policy/texas-ag-says-transition-care-minors-child-abuse-state-law-rcna17176 [https://perma.cc/3UEF-VXKN].

³⁸⁴ *Project 2025*, *supra* note 107, at 481.

³⁸⁵ Stepparent adoption for same-sex married couples is currently allowed in every state. *Parental Recognition Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/recognition/parenting/adoption [http://perma.cc/7DDW-CK6U]. The marital presumption of parenthood is currently extended to married same-sex couples in all states. *Id.*; Pavan v. Smith, 137 S. Ct. 2075, 2077 (2017).

³⁸⁶ Sixteen states have no protections against discrimination in foster care, and fourteen states have broad religious exemptions that allow discrimination. *Foster Care Laws &*

titled *Expanding Access to In Vitro Fertilization (IVF)* directs his Domestic Policy Adviser, who opposes marriage equality, to develop recommendations regarding access to IVF.³⁸⁷ The Executive Order references the need to make IVF more accessible for “loving and longing mothers and fathers.”³⁸⁸ All of these measures would be subject to equal protection challenges, as discussed in greater detail below, but *Project 2025* promises that there is a compelling state interest at stake.³⁸⁹

Even if there were not outright bans, the call for robust religious exemptions and increased privatization would make it much less likely that LGBTQ people could participate in family formation.³⁹⁰ In the absence of a direct attack on parental rights and the ability to form families, there are indications that the Trump administration is going to prioritize traditional family values in determining funding needs. For example, an early memo from the Department of Transportation stated that it was going to prioritize areas with both high birth rates and high marriage rates for federal projects and funding.³⁹¹

As a final note, it bears mentioning that, in the not-too-distant past, being homosexual was *per se* cause to be declared an unfit parent in the United States.³⁹² Most states backed off from this position after declassification because the purported mental illness of LGBTQ people was used as the disqualifying feature.³⁹³ However, being declared an unfit parent due to homosexuality remained a risk for parents in states with criminal sodomy laws until 2003, even though those laws were rarely enforced.³⁹⁴ The framing of gender identity as a delusion and the connection being made between so-called gender ideology and mental illness does not bode well for LGBTQ parents. After Russia enacted the Child Protection Law in 2013, LGBTQ parents became especially vulnerable and at risk of having their children taken away.³⁹⁵ In Hungary, like Russia, same-sex couples are not recognized as families. Hungary’s legislature passed a bill in 2023 that encouraged anonymous tips to report same-sex couples raising children to

Regulations, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/foster_care_laws [http://perma.cc/ZH9K-XKSS].

³⁸⁷ Exec. Order No. 14216, 90 Fed. Reg. 10451 (Feb. 18, 2025) (*Expanding Access to In Vitro Fertilization*).

³⁸⁸ *Id.*

³⁸⁹ *Project 2025*, *supra* note 107, at 481.

³⁹⁰ *Id.* at 494.

³⁹¹ Jeff McMurray & Susan Haigh, *Trump Official’s Directive Tying Transportation Grants to Birth Rates Could Hinder Blue States*, ASSOCIATED PRESS (Feb. 7, 2025, at 14:20 ET), <https://apnews.com/article/duffy-transportation-memo-birth-marriage-rates-trump-8de1f95efc97e8b585bb0c93857ec951> [https://perma.cc/D8WA-QKJV].

³⁹² See FADERMAN, *supra* note 31, at 241.

³⁹³ *Id.* at 241.

³⁹⁴ See, e.g., *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995). See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding criminal sodomy law unconstitutional).

³⁹⁵ Masha Gessen, *As A Gay Parent I Must Flee Russia or Lose My Children*, THE GUARDIAN (Aug. 11, 2013, at 06:31 ET), <https://www.theguardian.com/commentis-free/2013/aug/11/anti-gay-laws-russia> [https://perma.cc/F983-43U8].

the police and child welfare authorities.³⁹⁶ The President eventually vetoed the bill,³⁹⁷ but the enlistment of private citizens to inform on their neighbors represented a chilling turn of events. These sorts of legislative initiatives that encourage third-party informants have been increasingly proposed on the state level in the United States in the context of immigration, abortion, and transgender rights, discussed further below.³⁹⁸

C. Eradicating LGBTQ People from Public Life

Ultimately, the Politics of Eradication seeks to erase LGBTQ identities from public life—not simply contain them. This goal is not new. Efforts to “cure” LGBTQ people were an integral part of the psychoanalytic understanding of homosexuality, and they continue today with so-called “conversion therapy.”³⁹⁹ Policymakers have tried to define away the problem, as was the case with the Defense of Marriage Act, which provided a federal definition of marriage.⁴⁰⁰ President Trump took this approach with respect to transgender Americans when he willed them out of existence with a stroke of his Sharpie in Executive Order 14168.⁴⁰¹ LGBTQ people also have a long history of being disqualified from certain occupations, most notably the military.⁴⁰² Public accommodation laws and religious exemptions can remove LGBTQ people from specific public venues.⁴⁰³ Deportation removes an individual entirely from public life, as can criminalization. Although there are no mainstream MAGA voices calling for the outright extermination of LGBTQ people, there remains plenty of dehumanizing rhetoric and a high tolerance for political violence. The proposed “bounty” laws making the

³⁹⁶ Veronika Gulyas & Marton Kasnyik, *Hungary's New Law Lets Locals Report on Same-Sex Families*, BLOOMBERG (Apr. 13, 2024, at 15:46 ET), <https://www.bloomberg.com/news/articles/2023-04-13/hungary-s-new-law-allows-locals-to-report-on-same-sex-families> [https://perma.cc/EQ7C-9KFQ].

³⁹⁷ Leonie Kijewski, *Hungarian President Vetoes Anti-LGBTQ Law*, POLITICO (Apr. 22, 2023, at 13:27 CET), <https://www.politico.eu/article/hungary-president-katalin-novak-vetoes-viktor-orban-anti-lgbtq-law/> [https://perma.cc/UKU8-FYDV].

³⁹⁸ See, e.g., Sarah Geller, *The Personal (Jurisdiction) Is Political: The Reach and Overreach of Abortion Bounty-Hunter Laws*, 45 COLUM. J. GENDER & L. 81, 91–92 (2024).

³⁹⁹ See Clay Calvert, *Weaponizing Proof of Harm in First Amendment Cases: When Scientific Evidence and Deference to the Views of Professional Associations Collide in the Battle Against Conversion Therapy*, 2021 MICH. ST. L. REV. 765, 775–76.

⁴⁰⁰ The Defense of Marriage Act (DOMA), Pub. L. No. 104–99, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C), *invalidated by* Obergefell v. Hodges, 576 U.S. 644 (2015).

⁴⁰¹ See Exec. Order No. 14168, *supra* note 4 (Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government).

⁴⁰² See generally JANET HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY (1999) (discussing the Don't Ask Don't Tell policy).

⁴⁰³ Twenty-one states have no prohibitions against discrimination based on sexual orientation or gender identity in public accommodations. *Public Accommodation Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws#:~:text=Public%20accommodation%20nondiscrimination%20laws%20protect,sexual%20orientation%20or%20gender%20identity [https://perma.cc/C8JJ-WFLJ].

rounds in state legislatures provide monetary rewards to private citizens who identify and report transgender people they perceive to be in the “wrong” bathroom.⁴⁰⁴ Together, these efforts to erase LGBTQ people from public life can be broken down into three general categories: redefinition and conversion, physical separation and removal, and the threat of violence.

1. *Redefinition and Conversion*

For transgender people, who according to the MAGA rendering are both deceitful and delusional, the swift adoption of an immutable and binary definition of sex removes the ability to change gender markers on identity documents and mandates their exclusion from sex-segregated spaces.⁴⁰⁵ It has spelled an end to public funding for gender-affirming care and access for minors to such care, but it also raises the question as to whether there will be a complete bar on gender-affirming care across the board as was imposed in Russia in 2023.⁴⁰⁶ Similar bans have already been proposed on the state level.⁴⁰⁷ Beyond access to gender markers and health care, it remains to be seen whether more states will criminalize drag and whether there will be an attempt to return to some form of the criminal cross-dressing laws of the mid-twentieth century that were used to police LGBTQ people in public spaces.⁴⁰⁸ Currently two states have criminal prohibitions against drag performances, with one specifically targeting Drag Story Time, and four states have laws regarding “adult performances” that could be used to target drag performances.⁴⁰⁹ As discussed above, there is also the possibility of concerted efforts to re-pathologize LGBTQ identities, which would act as its own form of redefinition.

⁴⁰⁴ Prager, *supra* note 170. The Texas town of Odessa allows anyone reporting a transgender person using the “wrong” bathroom to recover “damages” of up to \$10,000. *Id.*

⁴⁰⁵ *Snapshot: LGBTQ Equality by States*, MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/equality-maps> [<https://perma.cc/4G53-QACY>] (showing sixteen states have a binary sex definition, six make it a felony to provide gender affirming care to minors, and eight states disallow the change of gender marker on birth certificates).

⁴⁰⁶ *Russian President Signs Legislation Marking the Final Step Outlawing Gender-Affirming Procedures*, ASSOCIATED PRESS (July 24, 2023, at 12:49 ET), <https://apnews.com/article/russia-lgbtq-transgender-procedures-banned-21b88f53b9a74a646400d63ce93b-de6f> [<https://perma.cc/J3YY-VLJG>].

⁴⁰⁷ Maya Goldman, *States Are Limiting Gender-Affirming Care for Adults, Too*, AXIOS (Jan. 10, 2024), <https://www.axios.com/2024/01/10/trans-care-adults-red-states> [<https://perma.cc/3PSC-VHWC>].

⁴⁰⁸ See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 225–26 (1999) (discussing the mid-century enactment of criminal cross-dressing laws).

⁴⁰⁹ *Restrictions on Drag Performances*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/criminaljustice/drag_restrictions [<https://perma.cc/H9ZQ-3CM7>]. Montana’s restriction of drag shows was ruled unenforceable via court order in July 2023; Tennessee’s ban was similarly ruled unenforceable in March 2023, and a subsequent decision ruled it unconstitutional for which Tennessee has appealed. *Id.*

With respect to LGB people, marriage is vulnerable to redefinition. *Project 2025* is very clear that not all marriages are created equal.⁴¹⁰ Moreover, it asserts that children who do not have nuclear families consisting of a mother and a father are severely disadvantaged.⁴¹¹ The end of marriage equality would require the U.S. Supreme Court to reverse *Obergefell*,⁴¹² the likelihood of which is discussed below. Even without overruling *Obergefell*, however, there are a number of disabilities that could be imposed on same-sex marriages, subject to equal protection challenges.⁴¹³ Although the Trump administration has not yet formally endorsed the *Project 2025* view on marriage, a number of states have been pushing back on marriage equality. In January, 2025, the Idaho House of Representatives passed a resolution by an overwhelming margin asking the U.S. Supreme Court to invalidate *Obergefell*.⁴¹⁴ Calling the *Obergefell* decision “illegitimate overreach,” the resolution provides that “the Idaho Legislature rejects the *Obergefell* decision. . . . [And] calls upon the Supreme Court of the United States to reverse *Obergefell* and restore the natural definition of marriage, a union of one man and one woman.”⁴¹⁵ Idaho’s displeasure with the *Obergefell* ruling is nothing new because there were a number of red states that only begrudgingly followed *Obergefell* in the first place.⁴¹⁶

It is likely that attempts to “cure” or “convert” LGBTQ people will increase in this current political climate. Once a prescribed therapeutic intervention for homosexuality,⁴¹⁷ conversion therapy has continued to be practiced by some therapists and in some religious settings⁴¹⁸ despite the fact

⁴¹⁰ *Project 2025*, *supra* note 107, at 481.

⁴¹¹ *Id.*

⁴¹² *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

⁴¹³ See *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017) (holding states may not exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples).

⁴¹⁴ Clark Corbin, *Idaho House Calls on U.S. Supreme Court to Reverse Same-Sex Marriage Ruling*, IDAHO CAPITOL SUN (Jan. 27, 2025, at 16:17 ET), <https://idahocapitalsun.com/2025/01/27/idaho-house-calls-on-u-s-supreme-court-to-reverse-same-sex-marriage-ruling/> [<https://perma.cc/KJ3M-69B3>]; Jo Yurcaba & Brooke Sopelsa, *Lawmakers in 9 States Propose Measures to Undermine Same-Sex Marriage Rights*, NBC NEWS (Feb. 25, 2025, at 17:24 ET), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/lawmakers-9-states-propose-measures-undermine-sex-marriage-rights-rcna193743> [<https://perma.cc/VM2J-EKWH>].

⁴¹⁵ H.J.M. 1, 68th Leg., 1st Reg. Sess. (Idaho 2025), <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2025/legislation/HJM001.pdf> [<https://perma.cc/VE5Z-L92D>].

⁴¹⁶ See Howard M. Wasserman, *Crazy in Alabama: Judicial Process and the Last Stand Against Marriage Equality in the Land of George Wallace*, 110 NW. U. L. REV. ONLINE 1 (2015).

⁴¹⁷ J. Seth Anderson, Opinion, *Why We Still Haven’t Banished Conversion Therapy in 2018*, WASH. POST (Aug. 5, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/08/05/why-we-still-havent-banished-conversion-therapy-in-2018/> [<https://perma.cc/7Q4W-PS6C>].

⁴¹⁸ See, e.g., Jean Marbella, *Federal Lawsuit Seeks to Overturn Maryland’s Ban on Conversion Therapy*, BALT. SUN (Jan. 18, 2019), <https://www.baltimoresun.com/politics/bs-md-conversion-therapy-lawsuit-20190118-story.html> [<https://perma.cc/7K3K-42LX>].

that it is condemned by the scientific and medical communities.⁴¹⁹ Twenty-three states have enacted bans against conversion therapy for minors,⁴²⁰ but the 2016 GOP Platform specifically endorsed protecting parental rights to subject children to controversial therapies—parental rights that apparently do not apply with respect to gender-affirming care.⁴²¹ Given the current emphasis on “indoctrination,” it would not be surprising to see conversion therapy rebranded as a necessary form of “deprogramming.”

By implementing an immutable and binary definition of sex that rejects the concept of gender identity, Trump was trying to eradicate transgender people. But, of course, deleting offending terms from websites and grant applications will not negate the reality of transgender lives and stories. Likewise, the redefinition of marriage will not stop same-sex couples from forming long-term committed partnerships and families. Conversion therapy will not stop individuals from identifying as LGBTQ because, not only is it immoral, it does not work. After decades of scientific inquiry, it is clear that LGBTQ people cannot “change,” nor should they be forced to try.⁴²² The containment and silencing of LGBTQ identities to stop “contagion” did not work in the 1950s when obscenity laws were used to stop the distribution of homophile newsletters,⁴²³ and it will definitely not work in the age of online communities and interconnectedness.⁴²⁴ These actions cannot erase the lived experience of LGBTQ people or their dignity,⁴²⁵ but they can inflict untold harm on communities, families, and individuals.

⁴¹⁹ See, e.g., Am. Acad. of Pediatrics, *Homosexuality and Adolescence*, 92 PEDIATRICS 631, 633 (1993); *Conversion Therapy*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Feb. 2018), https://www.aacap.org/aacap/Policy_Statements/2018/Conversion_Therapy.aspx [<https://perma.cc/K2RA-F8L4>]; AM. MED. ASS'N, H-160.991 HEALTH CARE NEEDS OF THE HOMOSEXUAL POPULATION (2018).

⁴²⁰ *Conversion “Therapy” Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/conversion_therapy [<https://perma.cc/2F6S-MUDE>].

⁴²¹ See Garrard Conley, *GOP’s Support of Conversion Therapy Is a “Death Sentence,”* TIME MAG. (July 18, 2016, at 16:45 ET), <http://time.com/4410894/rnc-conversion-therapy/> [<https://perma.cc/6GCX-KD4G>].

⁴²² See, e.g., Julie Compton, *Once-Prominent “Conversion Therapist” Will Now “Pursue Life as a Gay Man,”* NBC NEWS (Jan. 23, 2019, at 12:45 ET), <https://www.nbcnews.com/feature/nbc-out/once-prominent-conversion-therapist-will-now-pursue-life-gay-man-n961766> [<https://perma.cc/YD66-VU82>].

⁴²³ See *One, Inc. v. Olesen*, 241 F.2d 772, 774–75 (9th Cir. 1957), *overruled by* 355 U.S. 371, 371 (1958).

⁴²⁴ See Alexandra Samuel, *Nine Reasons for The LGBT Community to Take Pride Online*, JSTOR DAILY (June 13, 2017), <https://daily.jstor.org/9-reasons-for-the-lgbtq-community-to-take-pride-online> [<https://perma.cc/47EZ-KUBK>] (“Today, that teen doesn’t have to feel so alone—at least in theory—because the internet makes it possible to connect with other LGBTQ people all over the world.”).

⁴²⁵ See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (“[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”).

2. *Physical Separation and Removal*

In addition to attempts to erase LGBTQ people and their families by executive fiat and quackery, there are a number of options available to remove LGBTQ people from certain aspects of public life, as well as the more drastic options of complete removal in the case of deportation or incarceration. For example, many of the anti-LGBTQ laws and policies supported by the MAGA movement are designed to banish transgender people from specific sex-segregated venues, such as locker rooms and sports teams.⁴²⁶ Twenty-one states and the U.S. Capitol complex have bathroom bans, and Trump's executive orders have expanded bathroom bans to all federal property, federal contractors, federal grantees, and all schools receiving federal funding.⁴²⁷ As noted earlier, the Department of Education is already investigating a number of school districts regarding their inclusive bathroom policies for possible civil rights violations.⁴²⁸ Twenty-seven states have sports bans, but Trump's Executive Order 14201 has expanded sports bans to include higher education and all school districts and other entities receiving federal funds.⁴²⁹ In addition to bathrooms and sports teams, other sex-segregated spaces are also often targeted, including domestic violence shelters and correctional facilities.⁴³⁰ Executive Order 14168 specifically instructed the Director of the Bureau of Prisons to house incarcerated people in accordance with the sex they were assigned at birth.⁴³¹

Beyond sex-segregated spaces, twenty-one states currently do not extend protections on account of sexual orientation or gender identity in public accommodations,⁴³² and there are no protections at the federal level, which means that commercial establishments or other service providers in twenty-one states can refuse to serve LGBTQ customers. Even in the states

⁴²⁶ Exec. Order No. 14201, *supra* note 6 (Keeping Men Out of Women's Sports).

⁴²⁷ *Bans on Transgender People Using Public Bathrooms and Facilities According to Their Gender Identity*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/nondiscrimination/bathroom_bans [<https://perma.cc/W2YS-KMDR>]; Yurcaba, *supra* note 274; Sean Michael Newhouse, *Policy That Let Federal Employees Use Preferred Bathroom Formally Overturned by Trump Administration*, GOV'T. EXEC. (May 9, 2025), <https://www.govexec.com/workforce/2025/05/policy-let-federal-employees-use-preferred-bathroom-formally-overturned-trump-administration/405206/#:~:text=Civil%20Rights-,Sean%20Michael%20Newhouse,%2C%E2%80%9D%20according%20to%20Friday's%20notice> [<https://perma.cc/44R2-N6NK>]; Memorandum from Pam Bondi, U.S. Att'y Gen. to All Fed. Agencies, Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination 6 (July 29, 2025), <https://www.justice.gov/ag/media/1409486/dl> [<https://perma.cc/N4JL-D6AM>].

⁴²⁸ Karina Elwood, *Education Dept. Investigates Northern Virginia Districts over Transgender Policies*, WASH. POST (Feb. 14, 2025), <https://www.washingtonpost.com/education/2025/02/14/northern-virginia-transgender-school-investigation/> [<https://perma.cc/3JD7-Z6LG>].

⁴²⁹ Exec. Order No. 14201, *supra* note 6 (Keeping Men Out of Women's Sports).

⁴³⁰ Exec. Order No. 14168, *supra* note 4 (Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government).

⁴³¹ *Id.*

⁴³² MOVEMENT ADVANCEMENT PROJECT, *supra* note 403.

with public accommodations protections, exemptions based on religious or moral beliefs allow the exclusion of LGBTQ individuals without recourse.⁴³³ There are also instances where free speech rights might be implicated, as in the case of the wedding website designer in *303 Creative v. Colorado Civil Rights Commission*.⁴³⁴ During Trump's first term, his administration came out in support of allowing commercial establishments to put signs in their windows saying whether they would serve LGBTQ customers.⁴³⁵

To some extent the bans on drag performances near minors can be seen as an exclusion of LGBTQ people from a specific venue—areas surrounding children. Given the panic over protecting children from “groomers,” one could imagine rules about school zones similar to the school zone gun laws, such that there could be no open display of support for “gender ideology” within a certain number of yards from a school, subject to a First Amendment challenge.⁴³⁶ This could impact LGBTQ-themed or LGBTQ-friendly establishments or a neighbor who chooses to fly a pride flag. LGBTQ bars and community centers likewise could be impacted by laws criminalizing drag and positive portrayals of LGBTQ people, as was the case in Russia where such venues have been raided.⁴³⁷

In addition to banning LGBTQ people from specific places or services, there have long been efforts to exclude LGBTQ people from certain professions, with the military bans being perhaps the most prominent examples of blanket occupational disqualifications.⁴³⁸ As mentioned earlier, the Lavender Scare in the 1950s disqualified LGBTQ people from government service, but its impact had longstanding consequences.⁴³⁹ Homosexuality remained a disqualifying factor for security clearances until the 1990s.⁴⁴⁰ In the 1970s, California attempted to pass what was known as the Briggs Initiative that would have disqualified LGB people from teaching.⁴⁴¹ The rationale behind

⁴³³ *Id.*; Knauer, *supra* note 13, at 753.

⁴³⁴ *303 Creative v. Colo. C.R. Comm'n*, 143 S. Ct. 2298, 2308 (2023).

⁴³⁵ Neil Broverman, *Sarah Sanders: Trump OK with Businesses Hanging Antigay Signs*, THE ADVOCATE (Dec. 5, 2017), <https://www.advocate.com/politics/2017/12/05/sarah-sanders-trump-ok-businesses-hanging-antigay-signs> [https://perma.cc/BFC7-JN2F].

⁴³⁶ See, e.g., Nicole D. Porter & Tyler Clemons, *Drug-Free Zone Laws: An Overview of State Policies*, SENTENCING PROJECT (Dec. 2013), <https://www.sentencingproject.org/app/uploads/2022/08/Drug-Free-Zone-Laws.pdf> [https://perma.cc/P3EF-MS96].

⁴³⁷ *Russian Police Raid Moscow Nightclubs in LGBTQ+ Crackdown*, ASSOCIATED PRESS (Nov. 30, 2024, at 11:32 ET), <https://apnews.com/article/russia-lgbtq-crackdown-nightclub-raids-3e18ac20ef7386920a996b66be511ee7> [https://perma.cc/Z2RK-E93S]; see also Nataliya Vasilyeva & Alina Lobzina, *A Prison Death Highlights an L.G.B.T.Q. Crackdown in Russia*, N.Y. TIMES (Apr. 1, 2025), <https://www.nytimes.com/2025/04/01/world/europe/russia-lgbtq-gay-prison-death-andrei-kotov.html> [https://perma.cc/UX9U-G9VD] (discussing LGBTQ crackdown by Russian authorities).

⁴³⁸ See generally HALLEY, *supra* note 402 (discussing the Don't Ask/Don't Tell policy).

⁴³⁹ See generally JOHNSON, *supra* note 363 (describing the purge of LGBTQ people from federal service).

⁴⁴⁰ *High Tech Gays v. Def. Indus. Sec. Clearance Off.*, 895 F.2d 563, 570 (9th Cir. 1990) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)).

⁴⁴¹ FADERMAN, *supra* note 31, at 383.

the Briggs Initiative was the old false trope that homosexuals are pedophiles.⁴⁴² Under existing U.S. Supreme Court precedent, it would be unlawful to bar LGBTQ people from most teaching positions, with the exception of religious schools where religious liberty guarantees allow employers to fire LGBTQ teachers if they are responsible for a critical religious role at the school.⁴⁴³ The question of occupational disqualification, however, is something to flag in the current environment given the push to portray LGBTQ identities as deceitful, dangerous to children, and a threat to national security. That said, it would be difficult to reconcile the MAGA understanding of sexual orientation and gender identity with the extension of protections under Title VII guaranteed by *Bostock*.⁴⁴⁴

One of Trump's signature campaign promises was that he would institute mass deportations to address the United States' broken immigration policy. Although it has not yet been announced, it is a foregone conclusion that the administration will stop accepting asylum claims based on gender identity because, according to Executive Order 14168, gender identity does not exist.⁴⁴⁵ Prior to the order, transgender asylum seekers were able to claim that they were members of a "particular social group" who faced persecution in their home country.⁴⁴⁶ It remains to be seen whether existing asylum claims made on this basis would be dismissed and whether asylum claims would continue to be allowed based on sexual orientation, as such claims are also based on being a member of a "particular social group."⁴⁴⁷ The Williams Institute estimates that there were 11,400 asylum claims based on gender identity and sexual orientation filed between 2012 and 2017.⁴⁴⁸ There is also the possibility that the Trump administration could attempt to use its new concept of "gender ideology" as mental health grounds for removal, given the administration's efforts to tie "gender ideology" to mental illness in the transgender military ban.⁴⁴⁹

Criminalization is another potential way to remove LGBTQ people and their supporters from public life. However, even when sodomy laws were still constitutional, they were rarely enforced.⁴⁵⁰ They were used more often as an excuse to harass and impose other disabilities on LGBTQ people because

⁴⁴² *Id.*

⁴⁴³ See *Billard v. Charlotte Cath. High Sch.*, 101 F.4th 316, 326 (4th Cir. 2024).

⁴⁴⁴ See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

⁴⁴⁵ Exec. Order No. 14168, *supra* note 4 (Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government).

⁴⁴⁶ Conor Cory, *The LGBTQ Asylum Seeker: Particular Social Groups and Authentic Queer Identities*, 20 GEO. J. GENDER & L. 577, 578 (2019).

⁴⁴⁷ *Id.*

⁴⁴⁸ Ari Shaw et al., *LGBT Asylum Claims in the United States*, WILLIAMS INST. (Mar. 2021), <https://williamsinstitute.law.ucla.edu/publications/lgbt-asylum-claims/> [<https://perma.cc/BU23-U4Q4>].

⁴⁴⁹ Exec. Order No. 14183, *supra* note 6 (Prioritizing Military Excellence and Readiness).

⁴⁵⁰ Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 103–04 (2000).

someone who was technically a criminal surely would not qualify for certain jobs or be considered a fit parent.⁴⁵¹ If the Supreme Court were to overrule *Lawrence v. Texas*, as Justice Thomas has suggested it should, twelve states have sodomy laws still on their books that were not repealed after *Lawrence*.⁴⁵² The Texas Attorney General said in 2022 that he would enforce the Texas Homosexual Conduct law that had been invalidated in *Lawrence* if *Lawrence* were overruled because he believed that the Court had “stepped into issues that I don’t think there was any constitutional provision dealing with.”⁴⁵³ As an alternative to criminalization, civil commitment could also be used to remove LGBTQ people from public life, but that would presumably require the creation of a new classification of mental illness.⁴⁵⁴ Civil commitment was a risk when psychiatry still advocated therapeutic intervention for homosexuality, but today there are Due Process protections in place that have greatly reduced the prevalence of involuntary commitments.⁴⁵⁵

3. Violence

The threat of violence can also serve to keep LGBTQ people out of public life. The prospect that armed protestors might disrupt a children’s story hour is frightening and chilling. Far-right groups such as the Proud Boys and the Patriot Front have targeted LGBTQ events, marking a shift in tactics for organizations more closely associated with white supremacy.⁴⁵⁶ In 2022, police arrested thirty-one members of the Patriot Front who were planning to disrupt the Pride celebration in Coeur d’Alene, Idaho.⁴⁵⁷ Members of the Proud Boys and Patriot Front were among the over 1,500 individuals pardoned by Trump for criminal charges in connection with their participation

⁴⁵¹ *Id.* at 116.

⁴⁵² *Lawrence v. Texas*, 539 U.S. 558, 567 (2003); Amanda Holpuch, *The Supreme Court Struck Down Sodomy Laws 20 Years Ago. Some Still Remain*, N.Y. TIMES (July 21, 2023), <https://www.nytimes.com/2023/07/21/us/politics/state-anti-sodomy-laws.html> [<https://perma.cc/L5NA-8XAC>].

⁴⁵³ Brad Dress, *Texas AG Says He Would Back Law Banning Sodomy If Supreme Court Reconsiders Landmark Case*, THE HILL (June 29, 2022, at 18:05 ET), <https://thehill.com/regulation/court-battles/3541707-texas-ag-says-he-would-back-law-banning-sodomy-if-supreme-court-reconsiders-landmark-case/> [<https://perma.cc/FFB4-LB7B>].

⁴⁵⁴ See generally BAYER, *supra* note 355 (describing the struggle to declassify homosexuality as a mental illness).

⁴⁵⁵ Jonathan Cantarero, *The Ethics of Civil Commitment*, 16 J. HEALTH & BIOMED. L. 105, 107 (2020); see ESKRIDGE, *supra* note 408, at 62 (describing medical intervention in the form of civil commitment, electro-shock therapy, even “lobotomies, electrical and pharmacological shock therapy, and . . . castration”); TERRY, *supra* note 362, at 294–95 (discussing therapeutic interventions and aversion therapy).

⁴⁵⁶ Ayesha Rascoe, *Why Are White Nationalist Groups Targeting LGBTQ Groups?*, NAT’L PUB. RADIO (June 19, 2022, at 08:48 ET), <https://www.npr.org/2022/06/19/1106125400/why-are-white-nationalist-groups-targeting-lgbtq-groups> [<https://perma.cc/YW8U-2ZPQ>].

⁴⁵⁷ Odette Yousef, *31 Members of the White Nationalist Patriot Front Arrested Near an Idaho Pride Event*, NAT’L PUB. RADIO (June 12, 2022, at 11:38 ET), <https://www.npr.org/2022/06/11/1104405804/patriot-front-white-supremacist-arrested-near-idaho-pride> [<https://perma.cc/M665-78UV>].

in the January 6th attack on the Capitol.⁴⁵⁸ As noted earlier, commentators have warned that Trump's blanket pardon may have empowered an armed militia loyal to Trump and the MAGA movement.⁴⁵⁹

According to FBI statistics, hate crimes rose twenty percent during the first Trump administration, with some of the biggest jumps occurring with respect to crimes against LGBTQ people.⁴⁶⁰ Transgender women of color are especially vulnerable to hate crimes.⁴⁶¹ A 2021 study showed that transgender people were more than five times more likely than cisgender people to be victims of violent crime.⁴⁶² Given Trump's war on gender ideology and DEI, it is likely that we will no longer have access to nationwide statistics on hate crimes against transgender people and perhaps all LGBTQ people. The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009, which expanded the federal hate crimes law to include sexual orientation and gender identity, also requires the FBI to collect statistics on hate crimes motivated by the victim's sexual orientation or gender identity, which will be difficult to reconcile with the new executive actions.⁴⁶³ The Hate Crimes Prevention Act was the first time that federal protections were extended based on sexual orientation and gender identity.⁴⁶⁴

⁴⁵⁸ Alanna Durkin Richer et al., *Trump Pardons Upend Massive Jan. 6 Prosecution by Freeing Rioters and Dismissing Cases*, ASSOCIATED PRESS (Jan. 21, 2025, at 20:22 ET), <https://apnews.com/article/capitol-riot-trump-pardons-jan-6-f6e23bcd84eae672318c88f05286767> [<https://perma.cc/YJ3B-A98S>]; Ryan Nadeau, *DOJ: Richmond Man, Patriot Front Member Arrested in Connection to Jan. 6 Insurrection*, WRIC NEWS (Apr. 20, 2024, at 12:51 ET), <https://www.wric.com/news/local-news/richmond/doj-richmond-man-patriot-front-member-arrested-in-connection-to-jan-6-insurrection/#:~:text=DOJ:%20Richmond%20man%2C%20Patriot%20Front,6%20insurrection%20%7C%20WRIC%20ABC%20News> [<https://perma.cc/JR8V-6WX6>] (reporting arrest of Nathan Noyce, a member of the Patriot Front); Luca Powell, *87 Virginians Received Clemency for Jan. 6 Involvement*, RICHMOND TIMES-DISPATCH (Jan. 23, 2025), https://richmond.com/news/state-regional/crime-courts/article_2c715a82-d8f2-11ef-9c53-bbfcd72d5408.html [<https://perma.cc/GN5F-ZQ89>] (reporting the pardon of Nathan Noyce, a member of the Patriot Front).

⁴⁵⁹ See, e.g., Nathan Layne et al., *Trump's Pardons Will Embolden Proud Boys, Other Far-Right Groups, Say Experts*, REUTERS (Jan. 21, 2025, at 19:05 ET), <https://www.reuters.com/world/us/trumps-pardons-will-embolden-proud-boys-other-far-right-groups-say-experts-2025-01-21/> [<https://perma.cc/47BG-FYMW>].

⁴⁶⁰ Daniel Villarreal, *Hate Crimes Under Trump Surged Nearly 20 Percent Says FBI Report*, NEWSWEEK (Nov. 16, 2020, at 19:57 ET), <https://www.newsweek.com/hate-crimes-under-trump-surged-nearly-20-percent-says-fbi-report-1547870> [<https://perma.cc/EV6G-93C4>].

⁴⁶¹ See Carrie L. Buist, *LGBTQ Rights in the Fields of Criminal Law and Law Enforcement*, 54 U. RICH. L. REV. 877, 900 (2020).

⁴⁶² Press Release, Williams Institute, Transgender People Over Four Times More Likely Than Cisgender People to be Victims of Violent Crime (Mar. 23, 2021), <https://williamsinstitute.law.ucla.edu/press/ncvs-trans-press-release/> [<https://perma.cc/6U3J-3YUQ>].

⁴⁶³ The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. ch. 13 § 249a2.

⁴⁶⁴ *Hate Crimes Bill Signed into Law*, LAMBDA LEGAL (Oct. 31, 2011), https://lambdalegal.org/publication/fa_20091028_president-signs-hate-crimes-bill-into-law [<https://perma.cc/G7GJ-V4FE>] (noting the act was "the first time in the nation's history that Congress has passed explicit protections on the basis of sexual orientation and gender identity").

With the exception of some extremists on the far-right fringe, relatively few voices openly call for violence against LGBTQ people, but it is important to make sure that these voices are not emboldened to act. Their speech, no matter how offensive, enjoys broad First Amendment protections, as it should under existing free speech precedent. Take, for example, the Westboro Baptist Church, which is a fervently anti-LGBTQ organization.⁴⁶⁵ Its homophobic ravings and theatrical protests eventually targeted the funerals of non-LGBTQ service members, but even these demonstrations were still protected by the First Amendment.⁴⁶⁶ Beyond this far-right fringe, however, it is sometimes possible to hear calls to violence in community churches. The same year that the Patriot Front targeted the Pride celebration in Coeur d'Alene, a pastor in Boise, Idaho preached that "God wants to put all queers to death" because "when they die, that stops the pedophilia."⁴⁶⁷ Although these calls to violence remain relegated to far-right extremists, they do have the ability to encourage individual action, such as the 2023 murder in California, not of an LGBTQ person, but of someone who was simply displaying a pride flag as a symbol of support at her business.⁴⁶⁸

D. *Democratic Institutions and Strategic Institutional Choice*

As our institutions and norms fray during this time of democratic uncertainty, the pressing question is whether our democratic guardrails are sufficient to stop the Politics of Eradication. The LGBTQ rights movement has long practiced what I have referred to as "strategic institutional choice"—a process that assesses the strengths and weaknesses of various institutions in order to determine how best to further policy goals.⁴⁶⁹ Strategic institutional choice generally evaluates an institution across three measures: competence, responsiveness, and resilience.⁴⁷⁰ It has led the LGBTQ movement to pursue change on a multi-level front and seek reform from institutions that are most responsive to its requests, even when they are not competent to provide the full measure of reform requested (e.g., municipal domestic partnership

⁴⁶⁵ See Kate Dailey, *Fred Phelps: How Westboro Pastor Spread 'God Hates Fags,'* BBC NEWS (Mar. 21, 2014), <https://www.bbc.com/news/magazine-26582812> [<https://perma.cc/VX5S-CR4G>] (describing the evolution and activities of the Westboro Baptist Church).

⁴⁶⁶ *Snyder v. Phelps*, 562 U.S. 443, 458 (2011); Mark Strasser, *Funeral Protests, Privacy, and the Constitution: What Is Next After Phelps?*, 61 AM. U. L. REV. 279, 283 (2011).

⁴⁶⁷ Ryan Suppe, *Ahead of Pride Month, Idaho Pastor Says LGBTQ People Deserve to be Put to Death*, IDAHO STATESMAN (June 10, 2022, at 19:18 MT), <https://www.idahostatesman.com/news/local/community/boise/article262371997.html> [<https://perma.cc/266L-NN6Y>].

⁴⁶⁸ Timothy Bella, *Man Who Killed Shop Owner Over Pride Flag Wrote Anti-LGBTQ+ Posts, Authorities Say*, WASH. POST (Aug. 22, 2023), <https://www.washingtonpost.com/nation/2023/08/22/pride-flag-shooting-california-lgbtq-california/> [<https://perma.cc/9U47-5D69>].

⁴⁶⁹ Knauer, *supra* note 29, at 28–29.

⁴⁷⁰ *Id.*

ordinances) or their actions lack staying power because they are easily undone (e.g., executive actions extending civil rights protections). This method of public policy analysis recognizes that each institution is necessarily limited by its design, leaving only “imperfect alternatives.”⁴⁷¹

The rise of the MAGA movement has greatly complicated this policy calculus. MAGA control of the executive and legislative branches of our federal government, as well as the governorships and legislatures of twenty-three states, has effectively taken some institutions off the table because they would not be responsive to LGBTQ advocacy—at least not in the short term. With that in mind, this section discusses other democratic institutions—federalism, the courts, the media, and civil society organizations—through the lens of strategic institutional choice, but also in the context of our current democratic uncertainty. This section examines the extent to which each institution is competent to provide the requested relief, whether the institution will be responsive to LGBTQ advocacy, and whether the relief, if granted, will be resilient enough to withstand anti-LGBTQ attacks from the federal government. It is important to acknowledge that these remaining institutions are showing signs of wear and tear from our slide toward authoritarianism: The judicial branch is no longer the “rescue institution” that it once was perceived to be where individual rights are concerned,⁴⁷² federalism is buckling under funding pressures, the media is fragmented and press privileges are revoked by the whim of the administration, and other civil society institutions, such as higher education, are reeling from federal incursions. At the end of the day, we may be left with the most imperfect of all of our democratic institutions—the People.

1. *Federalism*

LGBTQ people are no strangers to the type of jokes that federalism can play, as evidenced by the persistent “equality gap” between states discussed earlier.⁴⁷³ Federalism calibrates the balance of power between state and national governments largely through court-made doctrine that attempts to flesh out

⁴⁷¹ See generally NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994) (examining the nature of comparative institutional choice and imperfect alternatives).

⁴⁷² Since the Warren Court (1953–1969), the Supreme Court has been considered by many to be the ultimate protector of individual civil rights. The Court’s decision in *Dobbs*, however, represents a stark retrenchment and signals the end of the Supreme Court’s perceived role as a rescue institution for individual rights. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (overturning the landmark decision *Roe v. Wade*, 410 U.S. 113 (1973)).

⁴⁷³ Knauer, *supra* note 32, at 1 (discussing the LGBTQ “equality gap”).

the framework of institutional authority outlined in the U.S. Constitution.⁴⁷⁴ Although federalism has long been associated with a conservative “states-rights” stance, it is not an ideology.⁴⁷⁵ Federalism represents an institutional choice that answers the all-important question: Who decides?⁴⁷⁶ “It can facilitate either a progressive or a conservative impulse, and in the case of LGBTQ rights, it has done both.”⁴⁷⁷ The result has been a patchwork of pro- and anti-LGBTQ laws that reflects the partisan divide over LGBTQ rights and splits the country, broadly speaking, between LGBTQ-friendly blue states and anti-LGBTQ red states.⁴⁷⁸ Justice Brandeis optimistically described this “laboratory of states” dynamic in his famous dissent in a *Lochner*-era case, *New State Ice Co. v. Liebmann*.⁴⁷⁹ He observed that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁴⁸⁰

Now that the LGBTQ-friendly blue states are on the defensive, the question is whether they will be able to shield their LGBTQ residents from federal overreach. The Trump administration has indicated that it will seek to reach into the inner workings of state and local matters in order to combat and eradicate “gender ideology,” “discriminatory equity ideology,” and “DEI.”⁴⁸¹ As a legal matter, the Trump administration asserts that “gender ideology” and “DEI” violate civil rights protections for women and the requirement that our laws remain “color-blind.”⁴⁸² In addition to federal civil rights enforcement mechanisms, the Trump administration has threatened states and other entities, such as universities, with the loss of federal funding, if they fail to comply.⁴⁸³ At the end of the day, although blue states are very responsive to LGBTQ advocacy, they may lack the institutional competence to enact reforms that

⁴⁷⁴ U.S. CONST. amend. X.

⁴⁷⁵ Knauer, *supra* note 32, at 6. (discussing LGBTQ “equality gap”).

⁴⁷⁶ *Id.* at 7.

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.* at 7–8.

⁴⁷⁹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁴⁸⁰ *Id.*

⁴⁸¹ Kayla Jimenez, *Public Schools That Refuse to Follow Trump’s DEI Directive Are Now in the Crosshairs*, USA TODAY (May 23, 2025, at 13:18 ET), <https://www.usatoday.com/story/news/politics/2025/05/23/trump-k-12-public-school-funding-dei-order/83458073007/> [<https://perma.cc/7MDQ-FL7T>]; Léonie Chao-Fong, *Trump Administration Threatens to Withhold Funding from Schools with DEI Programs*, THE GUARDIAN (Apr. 3, 2025, at 13:23 ET), <https://www.theguardian.com/us-news/2025/apr/03/trump-universities-dei-funding> [<https://perma.cc/PHD2-SLFK>].

⁴⁸² See, e.g., *Fact Sheet: President Donald J. Trump Protects Civil Rights and Merit-Based Opportunity by Ending Illegal DEI*, WHITE HOUSE (Jan. 22, 2025), <https://www.whitehouse.gov/fact-sheets/2025/01/fact-sheet-president-donald-j-trump-protects-civil-rights-and-merit-based-opportunity-by-ending-illegal-dei/> [<https://perma.cc/GZ26-GSNF>].

⁴⁸³ Zach Montague, *Education Dept. Gives Schools Two Weeks to Eliminate Race-Based Programs*, N.Y. TIMES (Feb. 17, 2025), <https://www.nytimes.com/2025/02/17/us/politics/education-dept-race-based-programs.html> [<https://perma.cc/XH3M-3LGG>].

will have the resilience to withstand a direct federal challenge and loss of federal funding.

Blue states' attorneys general have attempted to build a "Rainbow Wall" to safeguard LGBTQ people from state long-arm statutes, as discussed in Part III.⁴⁸⁴ They have also organized to defend democracy and challenge the breadth of some of Trump's executive actions,⁴⁸⁵ many of which arguably violate statutory or constitutional law, including the Tenth Amendment and its limits on the ability of the federal government to use the states as mere instruments of the federal government.⁴⁸⁶ That said, Congress generally has wide latitude to encourage states to adopt certain guidelines or regulations through its Spending Power.⁴⁸⁷ Congress can also act to pre-empt state law through the Commerce Clause.⁴⁸⁸ In this case, the Trump administration has changed the interpretation of existing civil rights laws and threatened states that fail to respect this interpretation with a loss of federal funding. It will be up to the courts to determine whether this sort of change in legal interpretation violates the anti-commandeering doctrine or falls within the discretion of the executive. The blue states could also argue that the administration's anti-LGBTQ policies are unconstitutional, which would tee up a direct challenge to the concept of "gender ideology."

The precedent for this sort of challenge harkens back to the last time the United States found itself in a constitutional crisis. After *Brown v. Board of Education*, the Southern states refused to recognize federal desegregation orders by asserting states' rights and the doctrines of nullification and interposition.⁴⁸⁹ Citing the Supremacy Clause of Article VI and *Marbury v. Madison*, the U.S. Supreme Court rejected these arguments and held in *Cooper v. Aaron* that the dissenting states were required to comply with the desegregation orders.⁴⁹⁰ It specifically rejected claims under the Tenth Amendment that a state could

⁴⁸⁴ Branigan, *supra* note 147.

⁴⁸⁵ Maeve Reston et al., *As Trump Pursues His Policies, Democratic States Block His Path*, WASH. POST (Feb. 22, 2025), <https://www.washingtonpost.com/nation/2025/02/22/trump-lawsuits-democratic-attorney-generals/> [<https://perma.cc/A4MB-BEVY>]; see also Reid J. Epstein, *Democratic Governors Form a Group to Oppose the Trump Administration*, N.Y. TIMES (Nov. 13, 2024), <https://www.nytimes.com/2024/11/13/us/politics/democratic-governors-trump.html> [<https://perma.cc/LH2Z-HA22>] (describing governors working in coalition to challenge Trump administration policies).

⁴⁸⁶ See generally *New York v. United States*, 505 U.S. 144 (1992) (explaining anti-commandeering principle).

⁴⁸⁷ *Printz v. United States*, 521 U.S. 898, 935 (1997) (invalidating "forced participation of the State's executive in the actual administration of a federal program").

⁴⁸⁸ See *New York*, 505 U.S. at 145.

⁴⁸⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (holding that racially segregated public schools violate the Fourteenth Amendment); *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (requiring the *Brown* decision to be implemented "with all deliberate speed"); *Cooper v. Aaron*, 358 U.S. 1, 4 (1958) (holding that states are bound by and must enforce Court decision even if they disagree with them).

⁴⁹⁰ *Cooper*, 358 U.S. at 4.

nullify federal laws or “interpose” itself between the federal government and the people of the state in order to prevent the enforcement of federal law.⁴⁹¹ The main difference, besides the substantive morality of the claims, is that the Supreme Court has not yet determined whether the anti-LGBTQ policies of the Trump administration are constitutional. As a threshold matter, however, it is clear that the efforts to erase protections for gender identity under Title IX are contrary to the holding in *Bostock*.⁴⁹²

Taking another page from the Civil Rights era, Trump has, in the past, threatened to invoke the Insurrection Act of 1807 against the states, which would directly violate state sovereignty.⁴⁹³ The Insurrection Act allows the President to deploy federal troops at the request of a governor or to do so against the wishes of a governor in very limited instances.⁴⁹⁴ The last time that the Insurrection Act was invoked against the wishes of a state Governor, as would be the case with a potential blue state standoff, was when segregationist governors attempted to stop the implementation of *Brown v. Board of Education*.⁴⁹⁵ Although Trump reportedly toyed with the idea of invoking the Insurrection Act during the 2020 protests for racial justice, he ultimately

⁴⁹¹ *Id.*

⁴⁹² See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

⁴⁹³ 10 U.S.C. § 254 (explaining The Insurrection Act is an exception to the Posse Comitatus Act of 1878 that was enacted post-Reconstruction to prevent the use of the U.S. military for domestic law enforcement); 18 U.S.C. § 1385.

⁴⁹⁴ 10 U.S.C. § 254. The last time the Insurrection Act was triggered was in 1992 during the Rodney King riots in Los Angeles, when the Governor of California requested federal assistance from President George W. Bush. Brian Duignan, *Insurrection Act*, BRITANNICA (Jan. 27, 2026), <https://www.britannica.com/topic/Insurrection-Act> [<https://perma.cc/J97V-XCES>].

⁴⁹⁵ 347 U.S. 483 (1954). The last time a President unilaterally invoked the Insurrection Act against the wishes of a state Governor was when President Kennedy mobilized the Alabama National Guard to protect black students who were attempting to desegregate schools over the objection of the Alabama Governor George Wallace. Proclamation No. 3554, 28 Fed. Reg. 9861 (Sep. 10, 1963); see also Hawa K. Allan, *Paradoxes of Sovereignty and Citizenship: Humanitarian Intervention at Home*, 20 CUNY L. REV. 389, 427–29 (2017) (discussing the unilateral use of the Insurrection Act in the context of school desegregation). There were four unilateral invocations of the Insurrection Act to enforce the mandate of *Brown v. Board of Education* and compel the desegregation of schools. *Id.* at 427. Some commentators mistakenly report that the last time a President unilaterally invoked the Insurrection Act was in 1965 when President Johnson moved to protect civil rights protestors in Selma, Alabama. See, e.g., Joseph Nunn & Elizabeth Goitein, *The Insurrection Act, Explained*, BRENNAN CTR. (Nov. 12, 2025), <https://www.brennan-center.org/our-work/research-reports/insurrection-act-explained> [<https://perma.cc/UM2D-W63W>] (saying that President Johnson acted “without a request from the state involved”). This characterization is incorrect because Governor Wallace requested federal intervention. Lyndon B. Johnson, The President’s News Conference at the LBJ Ranch (Mar. 20, 1965), <https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-the-lbj-ranch-2> [<https://perma.cc/Q64V-RXNJ>]; see also Allan, *supra*, at 431–32 (explaining the circumstances of Wallace’s “request” for federal assistance).

chose not to go that route.⁴⁹⁶ During the 2024 presidential campaign, however, Trump expressed his willingness to use the Insurrection Act to police the United States' southern border and to bring stability back to progressive cities.⁴⁹⁷

2. *Courts and the Rule of Law*

The federal courts are the only branch of the federal government that has not been fully captured by the MAGA movement. Many of the most important advancements in LGBTQ rights have come about as the result of Supreme Court decisions, including the end of sodomy laws, marriage equality, and nondiscrimination protections based on sexual orientation and gender identity.⁴⁹⁸ These decisions serve as powerful roadblocks if the MAGA movement attempts to ramp up its anti-LGBTQ laws, as discussed above. It remains to be seen whether the Court will continue to stand by these precedents when it is undoubtedly asked to opine on the constitutionality of the current rash of anti-LGBTQ measures and the scope of Trump's executive authority. Moreover, even if the Court were to rule in favor of LGBTQ people, it is not entirely clear that the Trump administration would continue to honor court orders, which would provoke a full-blown constitutional crisis. Some prominent conservative voices have also been pushing for a constitutional convention, which would upend the rules of engagement entirely.⁴⁹⁹

The ideological shift of the Court toward the right, along with its embrace of originalism as a method of constitutional interpretation, makes the future of many pro-LGBTQ precedents uncertain.⁵⁰⁰ In his concurrence in *Dobbs*, Justice Thomas argued that the Court should reconsider all of its

⁴⁹⁶ Dareh Gregorian et al., *Trump Says He Will Deploy Military If State Officials Can't Contain Protest Violence*, NBC NEWS (June 1, 2022, at 21:25 ET), <https://www.nbcnews.com/politics/politics-news/trump-considering-move-invoke-insurrection-act-n1221326> [<https://perma.cc/UG9L-VEMK>].

⁴⁹⁷ Genesis Magpayo, *What Is the Insurrection Act? Here's What Trump Has Said About Using It*, PBS NEWS (Jan. 15, 2026, at 09:36 ET), <https://www.pbs.org/newshour/politics/what-is-the-insurrection-act-heres-what-trump-has-said-about-using-it#:~:text=%22The%20next%20time%2C%20I%20am,mayors%20were%20holding%20us%20up.%22> [<https://perma.cc/D6NU-RFCX>]; Michael Waldman, *Trump's Insurrection Act Threat*, BRENNAN CTR. (Nov. 28, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/trumps-insurrection-act-threat> [<https://perma.cc/D88P-96VH>].

⁴⁹⁸ See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (sodomy laws); *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) (marriage equality); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020) (Title VII protections).

⁴⁹⁹ Ed Pilkington, *Inside Steve Bannon's "Disturbing" Quest to Radically Rewrite the US Constitution*, THE GUARDIAN (Oct. 19, 2022, at 06:00 ET), <https://www.theguardian.com/us-news/2022/oct/19/steve-bannon-us-constitution-tea-party-republican-state-legislatures> [<https://perma.cc/VYA5-6CXQ>].

⁵⁰⁰ See generally Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127 (2023) (detailing the Court's originalism doctrine).

substantive due process precedents, including *Lawrence* and *Obergefell*.⁵⁰¹ Thomas maintains that the opinions are “demonstrably erroneous” and that the Court has a duty to “correct the error.”⁵⁰² There are no cases currently pending that would give the Court the occasion to reconsider these precedents, but it would only take one district attorney to charge someone under a moribund sodomy statute or one court clerk to deny a marriage license to set the process in motion. As noted earlier, the Attorney General of Texas stands ready to enforce the Texas Homosexual Sodomy law.⁵⁰³ It is also inevitable that Trump’s anti-LGBTQ policies will be challenged, which will provide the Court the opportunity to chip away at the precedents, if not overrule them entirely. From an equal protection standpoint, *Romer v. Evans* ruled that animus against gays and lesbians was not a legitimate state interest, meaning any executive action based on animus should violate the equal protection guarantees of the Fifth Amendment implicit in its Due Process Clause.⁵⁰⁴ One important test for the Court will be whether to consider Trump’s attacks on “gender ideology” and “divisive ideology” through the lens of free speech protections. For LGBTQ rights, the reliance on free speech protection would represent a move back to basics because some of the earliest LGBTQ court victories were based on First Amendment freedoms.⁵⁰⁵

All of these points require further research and study to determine the best and most persuasive arguments to make at this difficult time in our nation’s history when there is so much at stake. Of course, this work will be irrelevant if the Trump administration refuses to comply with court orders, meaning that any relief from the federal courts would necessarily fail the resilience test. Although Trump has stated that “I always abide by the courts,” his proxies have taken a much harsher tone when referring to the federal judiciary.⁵⁰⁶ For example, Elon Musk, while working within the Trump administration, took to X to call for the impeachment of judges who stand in the way of the President’s policies, but the required two-thirds vote in the Senate to convict

⁵⁰¹ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2300–02 (2022) (Thomas, J., concurring).

⁵⁰² *Id.* at 2301. *See contra* Robin Maril, *Queer Rights After Dobbs v. Jackson Women’s Health Organization*, 60 SAN DIEGO L. REV. 45, 47 (2023) (arguing that LGBTQ+ rights cases stand on a distinct constitutional footing).

⁵⁰³ Dress, *supra* note 453.

⁵⁰⁴ *See Romer v. Evans*, 517 U.S. 620, 625 (1996) (holding Colorado’s State Constitutional Amendment 2 invalid under the Equal Protection Clause of the Fourteenth Amendment). Federal action is governed by the Fifth Amendment, which contains implicit equal protection guarantees within its Due Process Clause. *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) (affirming implicit equal protection guarantees within the Fifth Amendment).

⁵⁰⁵ *See One, Inc. v. Olesen*, 241 F.2d 772, 774–75 (9th Cir. 1957), *overruled by* 355 U.S. 371, 371 (1958) (reversing obscenity conviction against a homophile magazine).

⁵⁰⁶ Bret Samuels, *Trump Says He’ll Abide by Court Orders That Block Parts of His Agenda*, THE HILL (Feb. 11, 2025, at 17:09 ET), <https://thehill.com/homenews/administration/5139380-trump-agenda-court-orders/> [<https://perma.cc/WF2D-LZXB>].

would not likely be forthcoming.⁵⁰⁷ Vice President J.D. Vance has espoused the view that the executive has wide powers unfettered by judicial interference. In 2021, Vance referenced a quote that is often misattributed to President Jackson responding to a dispute between the state of Georgia and the Cherokee Nation. Vance said, “When the courts stop you, stand before the country like Andrew Jackson did and say: ‘The chief justice has made his ruling. Now let him enforce it.’”⁵⁰⁸

Finally, there is the doomsday possibility that the states could call a constitutional convention, as a number of conservative organizations and commentators have long advocated, which could be devastating for LGBTQ people and civil rights more generally because red states currently outnumber blue states and they would enjoy a greater say in the drafting process.⁵⁰⁹ Article V of the Constitution authorizes Congress, “on the application of the legislatures of two-thirds of the several states” (presently thirty-four), to “call a Convention of States for proposing amendments.”⁵¹⁰ There is no current consensus on how such a convention would be organized or led, or who would even serve at the convention.⁵¹¹ Although the Constitution says that this method is to be used for “proposing amendments,” it is thought that it could produce an entirely new Constitution. Any amendments proposed by the Convention of States would still require ratification of three-fourths (currently thirty-eight) of the states.⁵¹²

3. *Non-governmental Institutions*

With federalism offering limited protection and the courts potentially disinclined to preserve LGBTQ rights, it makes sense to think out of the box and consider other institutions that might be responsive to the appeals of LGBTQ advocates, such as the market, the media, and civil society organizations. The LGBTQ rights movement has a strong track record in this regard, such as when it convinced businesses to adopt domestic partnership and nondiscrimination policies long before state governments would even entertain the idea.⁵¹³ These non-governmental institutions may not be

⁵⁰⁷ Alex Gangitano, *Musk Calls for “Wave of Judicial Impeachments,”* THE HILL (Feb. 12, 2025, at 13:10 ET), <https://thehill.com/homenews/administration/5140939-elon-musk-calls-judges-impeached/> [https://perma.cc/CQ2S-QGNF].

⁵⁰⁸ Charlie Savage & Minh Kim, *Vance Says “Judges Aren’t Allowed to Control” Trump’s “Legitimate Power,”* N.Y. TIMES (Feb. 9, 2025), <https://www.nytimes.com/2025/02/09/us/politics/vance-trump-federal-courts-executive-order.html> [https://perma.cc/C5GB-PEWA].

⁵⁰⁹ Pilkington, *supra* note 499.

⁵¹⁰ U.S. CONST. art. V.

⁵¹¹ See Michael Stokes Paulsen, *How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention*, 34 HARV. J.L. & PUB. POL’Y 837, 838–40 (2011).

⁵¹² U.S. CONST. art. V.

⁵¹³ Knauer, *supra* note 29, at 43–44 (discussing development of “domestic partnership” policies).

competent to provide the level of protection or reform that LGBTQ advocates need right now, but their actions can potentially help resist the current wave of anti-LGBTQ measures and safeguard sectors of society where LGBTQ people are still welcomed and not vilified. Unfortunately, all of these institutions are under increasing pressure to roll back protections for, and even any mention of, LGBTQ lives and identities.

As noted in Section II above, the business world began beating a swift retreat from its support of LGBTQ rights even before the announcements of Trump's DEI restrictions.⁵¹⁴ Major business players are backing out of longstanding LGBTQ sponsorship agreements and no longer participating in equity surveys designed to gauge support for LGBTQ employees and issues.⁵¹⁵ This shift has been particularly stark in the case of social media companies, which have largely decided to obey Trump's executive orders in advance.⁵¹⁶ Not only have they cancelled all their DEI initiatives, but Google erased Pride Month from its popular calendar app, along with Black History Month and other cultural events.⁵¹⁷

The Trump administration has taken direct aim at what MAGA loyalists refer to as the "legacy" media. In what would appear to be a violation of the First Amendment, the Trump administration has banned the Associated Press ("AP") reporters from presidential briefings and Air Force One because the AP style guide does not adopt Trump's new name for the Gulf of Mexico—the Gulf of America.⁵¹⁸ The administration has also removed legacy media from their offices at the Pentagon in favor of right-wing alternative media outlets and it will now control the composition of the White House Press Corps.⁵¹⁹ The U.S. Attorney for the District of Columbia has opened Operation Whirlwind, which is designed to protect federal workers by investigating and stopping "the storm of threats against officials at all levels," many of which came from sitting Democrats in Congress and journalists.⁵²⁰

⁵¹⁴ Gibson, *supra* note 332.

⁵¹⁵ See, e.g., Michael Schaffer, *Trump's Anti-DEI Edicts Just Scared a Big Sponsor Away from a Major Pride Event*, POLITICO (Feb. 14, 2025 at 10:00 ET), <https://www.politico.com/news/magazine/2025/02/14/booz-allen-worldpride-sponsor-00204059> [<https://perma.cc/SU34-J4RL>]; Neelakandan, *supra* note 333.

⁵¹⁶ SNYDER, *supra* note 10, at 17 (discussing the practice of obeying in advance).

⁵¹⁷ Nico Grant, *Google Calendar Deletes Women's History Month and Other Cultural Events*, N.Y. TIMES (Feb. 12, 2025), <https://www.nytimes.com/2025/02/12/technology/google-black-history-womens-history.html> [<https://perma.cc/TM9E-4H27>].

⁵¹⁸ Matt Sedensky, *Judge Rejects Immediately Restoring AP's Access to White House but Urges Government to Reconsider*, ASSOCIATED PRESS (Feb. 24, 2025, at 20:26 ET), <https://apnews.com/article/ap-lawsuit-trump-gulf-mexico-america-6b6f-ba488e7e420e5fcd28c44a755922> [<https://perma.cc/Z6GS-NJZQ>].

⁵¹⁹ David Bauder, *The Trump Administration Is Throwing More Pentagon Reporters Out of Their Workspaces*, ASSOCIATED PRESS (Feb. 7, 2025, at 23:18 ET), <https://apnews.com/article/pentagon-reporters-ejected-press-room-trump-administration-359d22d77ee22cb0f256170f8f67178c> [<https://perma.cc/WBD3-5FGZ>].

⁵²⁰ Spencer S. Hsu, *D.C. U.S. Attorney Probing Democrats Over Alleged Threats, Documents Show*, WASH. POST (Feb. 20, 2025), <https://www.washingtonpost.com/dc-md-vb/2025/02/19/trump-justice-operation-whirlwind-democrats/> [<https://perma.cc/5RXA-8ZTE>].

A number of media outlets have recently settled lawsuits that claimed they engaged in deceptive advertising or defamation while reporting.⁵²¹ The success of these claims could lead to more lawsuits and have a chilling effect on news reporting.⁵²² After CBS settled a lawsuit with Donald Trump in July 2025, the network announced the cancellation of its marquee late-night show due to financial reasons, but many speculated that the cancellation was politically motivated.⁵²³ In September 2025, ABC was pressured by the Trump administration to cancel its late-night show after the host, Jimmy Kimmel, made an insensitive comment about the assassination of a conservative activist.⁵²⁴ ABC suspended the show for a week, but did not cancel it.⁵²⁵

The institutions of civil society—advocacy groups, academia, community groups, unions—are reeling from Trump’s initial anti-DEI actions and the freezing of government funds. Academia, in particular, has been targeted by the Trump administration. It stands to lose billions of dollars in research funds and may be subject to a new tax on endowment funds.⁵²⁶ Many institutions are dismantling their DEI initiatives on their own accord.⁵²⁷ Advocacy organizations are scrambling to find their footing in this new world.⁵²⁸ The freeze on foreign aid and federal funding more generally has left many charities holding the bag.⁵²⁹ Vance has attacked religious organizations that work with immigrants and refugees.⁵³⁰ Major national LGBTQ and progressive advocacy

⁵²¹ David Enrich, *Trump’s New Line of Attack Against the Media Gains Momentum*, N.Y. TIMES (Feb. 7, 2025), <https://www.nytimes.com/2025/02/07/business/media/trump-media-lawsuits.html> [https://perma.cc/VZ3C-JSB5].

⁵²² *Id.*

⁵²³ David Bauder et al., *Stephen Colbert’s “Late Show” Is Canceled by CBS and Will End in May 2026*, ASSOCIATED PRESS (July 18, 2025, at 11:04 ET), <https://apnews.com/article/stephen-colbert-late-show-cbs-end-8bad9f16f076df62c0ffc50e9c8adbab> [https://perma.cc/4Z4S-ZMQ4].

⁵²⁴ Kailyn Rhone, *What to Know About the Suspension, and the Return, of Jimmy Kimmel’s Show*, N.Y. TIMES (Sep. 25, 2025), <https://www.nytimes.com/2025/09/20/business/jimmy-kimmel-show-abc-kirk-fcc.html> [https://perma.cc/NW9B-5HYF].

⁵²⁵ *Id.*

⁵²⁶ Susan Svrluga & Danielle Douglas-Gabriel, *Trump Threatened College Research, Culture and Funding. Confusion Reigns*, WASH. POST (Feb. 8, 2025), <https://www.washingtonpost.com/education/2025/02/08/trump-orders-impact-colleges-funding-research-culture/> [https://perma.cc/L3RE-KYG2].

⁵²⁷ See, e.g., Snyder, *supra* note 331.

⁵²⁸ Lisa Lerer et al., *Venting at Democrats and Fearing Trump, Liberal Donors Pull Back Cash*, N.Y. TIMES (Feb. 16, 2025), <https://www.nytimes.com/2025/02/16/us/politics/donors-democrats-trump.html> [https://perma.cc/DLH4-4CEU].

⁵²⁹ Missy Ryan & Dan Keating, *Funding Freeze Thrusts Foreign Aid Groups into Crisis*, WASH. POST (Feb. 1, 2025), <https://www.washingtonpost.com/national-security/2025/02/01/foreign-aid-freeze-state-department-usaid/> [https://perma.cc/GXV4-352H].

⁵³⁰ Michelle Boorstein, *Attacks on Catholics, Lutherans Suggest New Trump Approach on Religion*, WASH. POST (Feb. 8, 2025), <https://www.washingtonpost.com/nation/2025/02/08/catholic-lutheran-vance-flynn-musk-trump/> [https://perma.cc/2MEG-UYP8].

organizations have laid off significant percentages of their staff as they try to adjust to the new climate.⁵³¹

Many organizations have appealed to the courts, which will slow the progress of the actions of the Trump administration, allowing time for new, and perhaps uncomfortable, alliances to form.⁵³² The magnitude of the situation requires broad coalitions that are united in opposition to authoritarianism and not divided by differing policy priorities, identity politics, or old grudges—all of which can be sorted out once our democratic institutions and norms are back on an even keel. These coalitions can be powerful forces to organize opposition to the MAGA movement. By pooling knowledge and resources, they can work through the courts and with blue states to stop some of Trump's initiatives. They can revitalize efforts at the local level to take back school boards and city councils and secure our elections. They can fight misinformation with outreach and help channel collective outrage. LGBTQ organizations should play a vital role in these coalitions, and LGBTQ rights should be at the forefront of their shared agenda.

Ultimately, institutions and organizations are composed of people who make choices. It has been inspiring to see career civil servants at all levels of the federal government fight to regain their jobs after wrongful termination or choose to resign rather than violate their ethical obligations.⁵³³ Individual Americans will continue to stand up for their vision of democracy, and when they do, it is imperative that their vision includes LGBTQ rights. For LGBTQ people and their allies, it is time to connect the dots and make the case (once again) for their basic humanity. The future of LGBTQ rights, as well as the future of our democracy, rests with the People.

CONCLUSION

Whether we are standing in the twilight of American democracy or just going through a rough patch remains to be seen, but one thing is certain: It is time to say the quiet part out loud. A virulent anti-LGBTQ narrative has been embraced and strategically deployed by an ascendent populist movement with

⁵³¹ Molly Sprayregen, *Major LGBTQ+ Organizations Initiate Mass Layoffs in the Wake of Right-Wing Hate*, LGBTQ NATION (Feb. 11, 2025, at 14:00 ET), <https://www.lgbtqnation.com/2025/02/major-lgbtq-organizations-initiate-mass-layoffs-in-the-wake-of-right-wing-hate/> [<https://perma.cc/7CVU-6V67>] (stating that HRC laid off 20% of workforce and GLSEN laid off 60% of workforce).

⁵³² See, e.g., Daniel Wiessner, *Trump's Plan to Reclassify, Fire Federal Workers Challenged by Unions*, REUTERS (Jan. 29, 2025, at 21:50 ET), <https://www.reuters.com/world/us/trumps-plan-ease-firing-federal-workers-challenged-by-union-2025-01-29/> [<https://perma.cc/B6ZQ-ZHW9>].

⁵³³ Eileen Sullivan, *Federal Workers' "Emotional Roller Coaster": Fired, Rehired, Fired Again*, N.Y. TIMES (July 15, 2025), <https://www.nytimes.com/2025/07/15/us/politics/fired-federal-workers-trump.html> [<https://perma.cc/VQ4Q-6PTG>]; Walter Olson, *Officials Resign En Masse at Justice Department After Political Intervention in Adams Case*, CATO (Feb. 14, 2025, at 14:14 ET), <https://www.cato.org/blog/officials-resign-en-masse-justice-department-after-political-intervention-adams-case> [<https://perma.cc/CWJ5-DJM6>].

overtly fascist tendencies—the MAGA movement.⁵³⁴ The demonization of LGBTQ people helped propel Donald Trump to a second term in the White House and has defined much of his early policymaking.⁵³⁵ In our current age of democratic decline and unprecedented presidential power,⁵³⁶ the Politics of Eradication is potentially unbound, which is an extremely dangerous turn of events.

The scapegoating of unpopular groups and the urge to purge these groups from the body politic is, unfortunately, a reoccurring theme across human history.⁵³⁷ Eliminationist rhetoric frequently adopts the language of contagion to dehumanize the target population and justify the conclusion that the imagined toxin or vermin must be contained and eradicated.⁵³⁸ The Politics of Eradication translates these hateful views into practical policy solutions designed to address the manufactured danger. In the case of LGBTQ people, the MAGA movement has vilified the LGBTQ community by recycling long-discredited tropes that LGBTQ people are “groomers,” mentally unstable, and pose a threat to women, children, and national security.⁵³⁹ In his second term, Trump has elevated this far-right anti-LGBTQ rhetoric to the level of federal policy where it is now enshrined in executive orders,⁵⁴⁰ administrative memoranda,⁵⁴¹ and national security pronouncements.⁵⁴² Both the rhetoric and

⁵³⁴ See discussion *supra* Part I.B (discussing the rise of the MAGA movement).

⁵³⁵ See discussion *supra* Part II.C (examining Trump’s 2024 presidential campaign and early policymaking in his second administration).

⁵³⁶ See discussion *supra* Part I.A (exploring democratic decline and the consolidation of power).

⁵³⁷ See, e.g., ADAM JONES, *GENOCIDE: A COMPREHENSIVE INTRODUCTION* 3–13 (4th ed. 2024) (discussing genocide in prehistory, antiquity, and early modernity).

⁵³⁸ See DANIEL JONAH GOLDBACH, *WORSE THAN WAR: GENOCIDE, ELIMINATIONISM, AND THE ONGOING ONSLAUGHT ON HUMANITY* 14–21 (2009) (describing “eliminationism” beliefs and policies).

⁵³⁹ See discussion *supra* Part II.B.2 (discussing the MAGA characterization of LGBTQ people as a threat to children, women, and national security). The attempt to identify LGBTQ people as threats to national security took an especially dark turn in the federal government’s response to the killing of Renee Good, a queer mother of three, by a United States Immigration and Customs Enforcement officer in Minneapolis, Minnesota, on January 7, 2026. Alan Feuer, Glenn Thrush & Devlin Barrett, *F.B.I. Inquiry into ICE Shooting Is Examining Victim’s Possible Ties to Activist Groups*, N.Y. TIMES (Jan. 12, 2026), <https://www.nytimes.com/2026/01/12/us/politics/fbi-renee-good-ice-shooting.html> [<https://perma.cc/4T35-6ANB>]. Without waiting for the results of an investigation, administration officials characterized Good as a “domestic terrorist,” “professional agitator,” and “violent rioter” who was tied to an organized left-wing network. Melissa Gira Grant, Opinion, *Trump and ICE Want You to Think Renee Nicole Good Deserved It*, NEW REPUBLIC (Jan. 13, 2026), <https://newrepublic.com/article/205199/renee-good-shooting-misogyny> [<https://perma.cc/A5AR-N9NP>].

⁵⁴⁰ See discussion *supra* Part II.D (detailing the Presidential policies targeting gender identity and the LGBTQ community).

⁵⁴¹ See, e.g., U.S. OFF. OF PERS. MGMT., *UPDATED GUIDANCE REGARDING EXECUTIVE ORDER 14168, DEFENDING WOMEN FROM GENDER IDEOLOGY EXTREMISM AND RESTORING BIOLOGICAL TRUTH TO THE FEDERAL GOVERNMENT* 1 (July 10, 2025), <https://www.opm.gov/chcoc/transmittals/2025/Defending%20Women%20Guidance%20Memo%20207-10-2025.pdf> [<https://perma.cc/F6RG-PEQ2>]; Memorandum from Pam Bondi, *supra* note 427, at 6.

⁵⁴² Nat’l Sec. Presidential Mem. No. 7 on Countering Domestic Terrorism and Organized Political Violence, 90 Fed. Reg. 47225 (Sep. 30, 2025), <https://www.govinfo>.

the resulting policies should not be mistaken for the inevitable give-and-take of politics as usual. To the contrary, these attacks on LGBTQ people should set off alarm bells far and wide, as they already have in some corners of the international genocide prevention community.⁵⁴³

Scholars of genocide have identified warning signs that can serve as precursors to physical destruction, such as Professor Gregory Stanton's widely accepted ten (nonlinear) stages of genocide.⁵⁴⁴ When the current state of LGBTQ rights is viewed within this prevention framework, the result is quite sobering. The conditions facing LGBTQ people in the United States seem to tick a number of the boxes that experts say create a climate where eliminationist rhetoric and policies can turn into exterminationist action.⁵⁴⁵ This Article has documented conditions that arguably satisfy at least four of Stanton's stages, namely the classification and othering of LGBTQ people and the creation of an "us versus them" mentality (stage 1), discrimination against LGBTQ people (stage 3), the dehumanization of LGBTQ people through the

gov/content/pkg/FR-2025-09-30/pdf/2025-19141.pdf [https://perma.cc/M7NV-M9CT] (expanding definition of "domestic terrorism" to include "hostility towards those who hold traditional American views on family, religion, and morality"); *see also* Memorandum from Attorney General, Implementing National Security Presidential Memorandum-7: Countering Domestic Terrorism and Organized Political Violence (Dec. 4, 2025), <https://www.washingtonpost.com/documents/b610d753-733b-4eee-8a17-5035bc94cd6c.pdf> [https://perma.cc/3XQK-2GQD] (implementing NSPM-7 by expanding the official definition of "domestic terrorism" to include "hostility towards traditional views on family, religion, and morality").

⁵⁴³ In February 2025, the Lemkin Institute issued its first "Red Flag Alert" for genocide of transgender people in the United States in response to Trump's anti-trans executive orders, which was followed by a second alert in June 2025 after the U.S. Supreme Court decision *United States v. Skrametti*. *See Red Flag Alert for the Anti-Trans Agenda of the Trump Administration in the United States*, LEMKIN INST. FOR GENOCIDE PREVENTION & HUM. SEC. (Feb. 28, 2025), https://www.lemkininstitute.com/files/ugd/9bc553_d353ac-2c10f5404aa157bfbfa4fbd09f.pdf [https://perma.cc/U3AP-HQ5B]; *Red Flag Alert 2 for the Anti-Trans Agenda of the Trump Administration in the United States*, LEMKIN INST. FOR GENOCIDE PREVENTION & HUM. SEC. (June 30, 2025), <https://www.lemkininstitute.com/red-flag-alerts/red-flag-alert-2-for-the-anti-trans-agenda-of-the-trump-administration-in-the-united-states> [https://perma.cc/XZX5-S9PE]; *see also* *United States v. Skrametti*, 145 S. Ct. 1816, 1837 (2025) (upholding state bans on hormone therapy and puberty blockers for transgender youth). The Institute issues "Red Flag Alerts" for regions or countries "when developments . . . exhibit several red flags for genocide . . . that have the potential to radicalize and/or bring together destructive historical trajectories and move a society further towards a mass atrocity event aimed at destroying one or more collective identities." *Red Flag Alerts for Genocide*, LEMKIN INST. FOR GENOCIDE PREVENTION & HUM. SEC., <https://www.lemkininstitute.com/red-flag-alerts> [https://perma.cc/8LR8-7FH9]. The first Alert read: "[T]he recent spate of executive orders, which are in line with a genocidal process against the transgender community that has been emerging in the United States for over a decade, are meant to pave the way for greater state repression against all individuals and other groups in the future." *Red Flag Alert for the Anti-Trans Agenda of the Trump Administration in the United States*, *supra*.

⁵⁴⁴ Gregory H. Stanton, *The Ten Stages of Genocide*, GENOCIDE WATCH, <https://www.genocidewatch.com/tenstages> [https://perma.cc/3PN9-NVAM].

⁵⁴⁵ *See* GOLDHAGEN, *supra* note 538, at 29 (asking "How do eliminationist beliefs, or even an eliminationist ideology get translated in eliminationist action?").

vocabulary of contagion (stage 4), and extreme polarization and the spread of anti-LGBTQ propaganda (stage 6).⁵⁴⁶

Of course, as a matter of international law, the crime of genocide cannot be committed against LGBTQ people. LGBTQ people are not considered a protected class under the Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”), which covers certain “acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group” and triggers an obligation to intervene on the part of the global community.⁵⁴⁷ Although there are historical reasons why the Genocide Convention adopted such limited language, the failure to recognize LGBTQ people as a people highlights a much broader issue that goes directly to the crux of present day LGBTQ precarity.⁵⁴⁸ Even before the MAGA movement set its sights on the LGBTQ community, LGBTQ identities remained stubbornly contested and politicized in a way that the identity politics of the LGBTQ rights movement had never been able to resolve.⁵⁴⁹ In other words, the Politics of Eradication threatens to destroy an identity that a significant segment of Americans never accepted as valid in the first place.⁵⁵⁰

The Politics of Eradication is driven by the desire to contain and, if possible, remove an offending group from the *res publica*. To achieve this result, traditional tools of policy formulation and implementation are perverted

⁵⁴⁶ Stanton’s ten stages of genocide are classification, symbolization, discrimination, dehumanization, organization, polarization, preparation, persecution, extermination, and denial. Stanton, *supra* note 544.

⁵⁴⁷ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; S. Exec. Doc. O, 81-1 (1949). Atrocities committed against the LGBTQ community could be considered “crimes against humanity” under international law. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. The United States has not ratified the Rome Statute and, therefore, is not bound by its provisions. Eve Sampson, *Why Some Countries Won’t Join the I.C.C.*, N.Y. TIMES (Nov. 21, 2024), <https://www.nytimes.com/2024/11/21/world/middleeast/us-icc-member-countries.html> [<https://perma.cc/Q8CD-UTWS>].

⁵⁴⁸ Initial definitions of genocide included “political” groups as a protected class. JONES, *supra* note 537, at 20. A vocal minority of countries, including the Soviet Union, objected to the inclusion of political groups and argued that “political groups lack the stability of other groups,” did not have “the same homogeneity,” and “are less well defined.” *Id.* The language including “political” groups was eventually dropped from the definition of genocide. *Id.* However, a number of countries include political groups in the definition of genocide for the purposes of their domestic law. *Id.* at 21.

⁵⁴⁹ Even at the high-water point for approval of same-sex marriage in 2022 and 2023, a significant portion of the United States continued to believe that “gay or lesbian relations” were morally wrong. *LGBTQ+ Rights*, GALLUP, <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> [<https://perma.cc/7KPG-PSUU>]. During 2022 and 2023, seventy-one percent of people polled reported that they thought same-sex marriage should be legal, but between twenty-five percent and thirty-three percent of those polled believed that “gay or lesbian relations” were morally wrong. *Id.* The percentage of people polled who supported same-sex marriage in 2022 and 2023 represented the highest level of support measured to date. *Id.*

⁵⁵⁰ Tessa E.S. Charlesworth & Eli J. Finkel, *Americans Are Turning Against Gay People*, N.Y. TIMES (Jan. 19, 2026), <https://www.nytimes.com/2026/01/19/opinion/heated-rivalry-gay-prejudice.html> [<https://perma.cc/6S6M-ZN6T>] (reporting that anti-gay bias has risen by ten points in just four years).

to produce policies that reflect patently anti-democratic and eliminationist values. Under normal circumstances, it is possible to counter these policies through appeal to our democratic institutions and norms. Even then, countering a Politics of Eradication involves more than simply undoing bad policy. It requires the disruption or displacement of deep-seated beliefs that fuel the demand for such policies in the first place.

The anti-LGBTQ policies of the second Trump administration have swiftly unraveled decades of hard-fought civil rights protections, along with the lives and families that have been built around them. In our age of democratic uncertainty, the task of countering these policies and the views that animate them will be much more difficult. It is imperative to identify which remaining institutional mechanisms and levers of power can help reverse this trajectory and then work tirelessly to preserve those avenues of safety. It is also more important than ever to assert the shared humanity of LGBTQ people. Everyone can and should find their voice and help in some way. The days of resting assured that something like *that* could not happen *here* are, sadly, over.⁵⁵¹

⁵⁵¹ See generally SINCLAIR LEWIS, *IT CAN'T HAPPEN HERE* (1935) (dystopian novel about the rise of fascism in the United States).

SOME REALISM ABOUT PARENTAL RIGHTS

NICHOLAS SERAFIN*

ABSTRACT

For over a century, the Supreme Court has recognized the fundamental rights of parents to control their children's upbringing and education. Many legal scholars have argued that this fundamental right serves the normative value of pluralism. According to such views, by protecting parents and families from state interference, parental rights doctrine helps to foster and preserve a wide range of family types and cultures. In this way, parental rights doctrine advances a pluralistic conception of the American family.

In this Article, I argue that pluralistic interpretations of parental rights doctrine are untenable. Drawing on insights from American legal realism, I argue that the Supreme Court's parental rights jurisprudence is in fact largely indeterminate, containing both pluralistic and anti-pluralistic elements. In some cases, parental rights protect minority families; in many others, they reinforce traditionalist conceptions of family, authority, and gender roles. Ultimately, there is no overarching normative value or rule to which judges must appeal when deciding parental rights cases.

Yet if parental rights doctrine is largely indeterminate, how do judges decide such cases? Drawing on recent scholarship in American political development, this Article breaks new ground by identifying two primary family models that have long structured parental rights caselaw: a pluralist-egalitarian model, which is associated with secular humanism, gender equality, and state economic support for families; and a traditionalist-authoritarian model, which emphasizes religious values, patriarchal authority, and personal responsibility. Through case studies of Justices James Clark McReynolds and Clarence Thomas, this Article demonstrates that judges' cultural backgrounds and political affiliations lead them to adopt one of these family models, which then shapes their parental rights jurisprudence.

Finally, this Article contributes to current debates over how to engage with parental rights political movements. Parental rights are increasingly invoked by conservative political groups seeking to enforce traditionalist views of gender and the family. I argue that though progressive legal scholars rightly object to these aims, traditionalist concerns about the family should not be uniformly dismissed as mere pretext. Instead, legal scholars should

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recognize that some traditionalist arguments reflect genuine and legitimate concerns over family stability and economic deprivation. This Article defends a framework I call “progressive traditionalism.” This approach involves upholding pluralistic and egalitarian principles while acknowledging legitimate traditionalist concerns about family stability. Rather than simply reject traditionalist arguments, progressive traditionalists should demonstrate how pluralistic policies can strengthen traditional institutions like marriage and family.

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INTRODUCTION

The 2024 Presidential campaign was in significant part a competition between dueling visions of the American family. On the left, vice presidential candidate Tim Walz was presented as a “Midwestern dad,” a persona which combined traditional signifiers of masculinity (high school football coach, national guardsman) with support for women’s reproductive rights and LGBTQ+ youth.¹ On the right, then-candidate Donald Trump was hailed as a stern father figure who would impose strict discipline upon a wayward American public; at a rally in Georgia, Trump entered the stage to cries of

¹ Lyz Lenz, Opinion, *Tim Walz Embodies the Midwestern Values that Conservatives Never Talk About*, MSNBC (Aug. 21, 2024, at 06:00 ET), <https://www.msnbc.com/opinion/msnbc-opinion/celebrate-tim-walz-midwestern-dad-memes-rcna167422> [<https://perma.cc/WD45-YY3J>]; Emma Specter, *Tim Walz Is Overflowing with Midwestern-Dad Energy, and Social Media Can’t Get Enough of It*, VOGUE (Aug. 7, 2024), <https://www.vogue.com/article/tim-walz-midwestern-dad-energy-social-media-reactions> [<https://perma.cc/2H4X-BDNC>].

“Daddy’s home.”² Trump’s running mate, J.D. Vance, assailed democratic presidential candidate Kamala Harris as a member of the unpatriotic, “childless left.”³ These competing framings reflect genuine and polarizing disagreements among American voters over the nature of the ideal family type. At the same time, familial rhetoric has become a popular framing device for a variety of issues seemingly unrelated to the family, such as racial inequality, LGBTQ+ identity, and economic and public health policy.⁴

Family-centered political movements have grown tremendously in recent years, as have the legal claims made on their behalf. Such movements often combine familial themes with legal arguments drawing upon the fundamental right of parents to control the upbringing and education of the child. Given the numerous parental rights laws and lawsuits working their way through the legal system, family-centered political and legal arguments will likely remain at the center of debate for the foreseeable future. Yet how should legal scholars interpret the constitutional politics of parental rights movements? What are the precise boundaries of the parental right to control a child’s upbringing, and what sort of political projects does this right support?

A number of legal scholars have argued recently that contemporary parental rights movements distort parental rights doctrine in order to advance politically controversial policy goals. In previous work, I argued that parental rights laws targeting LGBTQ+ youth did not actually enforce parental rights but instead sought to re-impose a stigma upon LGBTQ+ individuals.⁵ In a recent article in the *Michigan Law Review*, Professors Mary Ziegler, Maxine Eichner, and Naomi Cahn argued similarly that parental rights movements had often utilized parental rights arguments merely in order to “roll back progress toward equality for women, Black, and queer Americans,” a strategy they referred to as “retrenchment by diversion.”⁶ For legal scholars working in this vein, many assertions of parental rights are not *really* about parental rights, and much political talk about the family is not *really* about the family. Rather, familial rhetoric is being used pretextually, often to conceal reactionary political ends.⁷

² Tucker Carlson *Compares Trump to Angry Dad ‘Spanking’ a ‘Bad Little Girl’ at Rally*, CNN, at 00:28 (Oct. 24, 2024), <https://www.cnn.com/2024/10/24/politics/video/tucker-carlson-trump-dad-spanking-digvid> [https://perma.cc/26XQ-WL27].

³ Sabrina Eaton, *Sen. JD Vance Trashed Teachers Union Head for Being Childless in Newly Surfaced 2021 Remarks*, CLEVELAND (Aug. 29, 2024, at 08:38 ET), <https://www.cleveland.com/news/2024/08/sen-jd-vance-trashed-teachers-union-head-for-being-childless-in-newly-surfaced-2021-remarks.html> [https://perma.cc/M2N4-3PKP].

⁴ See *infra* Part I.

⁵ Nicholas Serafin, *Born to Equality: Minor Children, Equal Protection, and State Laws Targeting LGBTQ Youth*, 75 U.C. L.J. 411, 464 (2024).

⁶ Mary Ziegler, Maxine Eichner & Naomi Cahn, *Retrenchment by Diversion: The New Politics of Parental Rights*, 123 MICH. L. REV. 669, 675 (2025).

⁷ See *id.* at 674 (asserting that parental rights arguments “divert[] attention from . . . rights-reversing motivations by supplying a more politically palatable rationale”); Serafin, *supra* note 5, at 434 (arguing that “leading defenses of laws targeting LGBTQ+ youth are indeed pretextual”).

But such arguments presuppose a view of what parental rights are *really* about. One longstanding view is that parental rights doctrine is structured around a normative principle of pluralism with respect to the family. According to this view, parental rights protect minority parents from interference by hostile outsiders, thereby permitting a variety of family cultures and structures to flourish.⁸ Legal scholars critical of conservative parental rights movements often draw upon this pluralistic conception of parental rights doctrine.⁹ Because parental rights doctrine is inherently pluralistic, the argument runs, anti-pluralistic parental rights movements must be using parental rights in an illegitimate or pretextual fashion.

In this Article, I call into question this interpretation of parental rights doctrine. In reality, parental rights doctrine is far less determinate than pluralistic interpretations suggest. While some parental rights cases promote the value of pluralism, parental rights and family law more generally have often enforced traditionalist, even reactionary, views of race, gender, and parental authority. Drawing on the arguments of the American Legal Realists, I offer a realist reading of parental rights caselaw that emphasizes the indeterminacy of parental rights jurisprudence.

Parental rights doctrine is indeterminate in two respects. First, surprisingly few clear doctrinal rules or principles have emerged from the Court's parental rights caselaw; indeed, even the applicable level of scrutiny for parental rights infringements is not formally settled.¹⁰ Second, parental rights do not possess

⁸ See *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015) (“By giving recognition and legal structure to their parents’ relationship, marriage allows children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives. . . . Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” (internal quotations and citation omitted)); see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Bartels v. Iowa*, 262 U.S. 404 (1923); *Farrington v. Tokushige*, 273 U.S. 284 (1927)) (describing “religious” and “national” minority groups as “discrete and insular minorities”); cf. *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977) (“[T]he Constitution prevents [the state] from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns.”).

⁹ See, e.g., Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 178 (2003) (“Parents’ freedom to raise their children is important not only to individuals but also to the welfare or even survival of ethnic, cultural, and religious groups.”); Serafin, *supra* note 5, at 451 (demonstrating that “early Supreme Court parental rights cases . . . protected parental rights most often in the name of cultural diversity and pluralism”); Ziegler, Eichner & Cahn, *supra* note 6, at 700 (arguing that respecting parental rights “facilitates pluralism”); Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 271 (arguing that “[i]n authorizing a grandmother to continue to live with and raise her grandson despite local zoning regulations, the Court articulated a relatively pluralistic account of the family relationships that merit due process protection”); Laurence Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1934 (2004) (noting that *Meyer* and *Pierce* “described what they were protecting from the standardizing hand of the state in language that spoke of the family as a center of value-formation and value transmission that was not to be commandeered by state power”).

¹⁰ *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring).

an inherent political morality. In some cases, parental rights arguments aid liberal and progressive causes, whereas in others parental rights arguments are marshaled in service of a traditionalist and conservative view of the family. Thus, on a realist view, the indeterminacy of parental rights caselaw suggests that precedents offer very limited value in terms of understanding and predicting how courts are likely to resolve contemporary parental rights disputes.

Instead, we must look to other sources to understand the law and politics of parental rights. While realist interpretations of parental rights have been proposed before, they have tended to focus only on a single justice or case, thus failing to provide a broader account for the indeterminacy across parental rights caselaw as a whole.¹¹ This Article breaks new ground by interpreting parental rights caselaw in light of the family-oriented political movements that have structured American political development since the early twentieth century.¹² In short, historically, American political parties have aligned with one of two primary, and opposing, family models. The first—the pluralist-egalitarian model of the family—is associated with secular-humanism, gender liberalism, and non-hierarchical views of marriage, and tends to view family morality in terms of state-supported economic security. The second—the traditionalist-authoritarian model—is more explicitly religious, traditionalist, and patriarchal, and tends to view family morality in terms of individual discipline and personal responsibility.

My argument in Part II is that it is these competing family models, rather than legal doctrine or precedent, that largely determine the outcomes in parental rights cases. More specifically, I argue that judges adopt a family model through socialization within particular regional or religious cultures and through participation in party politics. They then craft legal decisions that advance the values of their preferred model. In Part II.C., I take two Supreme Court Justices as case studies: Justice James Clark McReynolds, who authored a number of canonical, early parental rights cases, and Justice Clarence Thomas, who has advanced strikingly authoritarian views of parental authority. I demonstrate that both Justices' views of the family were deeply influenced by Southern traditionalist culture and by the party politics of their time, and that their parental rights adjudication can be understood only by recognizing their adherence to the traditionalist-authoritarian family model.

If this realist interpretation of parental rights doctrine is correct, how should legal scholars discuss parental rights moving forward? In Part III, I argue that legal scholars should not dismiss traditionalist parental rights arguments across the board as pretextual. First, judges who hold traditionalist-authoritarian views of the family are unlikely to be persuaded that their views of the family are mere pretext, especially given that parental rights caselaw can plausibly support either pluralist or traditionalist views of the family.

¹¹ See *infra* Part II.C.1.

¹² See *infra* Part II.B.

Second, many Americans express traditionalist sympathies regarding family structure and family-oriented policy, sympathies that partly reflect a genuine breakdown in community and marital norms over the past half century.¹³ Dismissing these concerns as pretextual is unlikely to persuade those who are traditionalists in their views of the family yet remain open to progressive causes.¹⁴

I propose a framework for progressive parental rights politics, which I call “progressive traditionalism.” Progressive traditionalism is a form of legal argument and political rhetoric that seeks to advance egalitarian views of sex and gender while affirming the traditional institutions—like marriage, family, and local community—that many Americans continue to revere. With respect to parental rights and LGBTQ+ identity, a progressive traditionalist approach would defend gender pluralism in terms that respect traditionalist concerns over parental authority and family stability. I conclude by discussing recent examples of progressive traditionalism, such as Justice Kennedy’s majority opinion in *Obergefell v. Hodges* and recent scholarship by religious therapists advocating for transgender acceptance in evangelical Christian communities.

I. THE POLITICS OF PARENTAL RIGHTS

Contemporary political discourse in the United States increasingly revolves around competing models of the family. Much of this discourse draws, directly or indirectly, upon the Supreme Court’s parental rights jurisprudence. For example, as I documented in my article, *Born to Equality: Minor Children, Equal Protection, and State Laws Targeting LGBTQ+ Youth*, states across the country have proposed or enacted hundreds of laws targeting LGBTQ+ youth—laws that supporters defend as protecting parents’ fundamental right to control their children’s upbringing, education, and socialization.¹⁵

In 2025, for example, Ohio enacted the “Parents’ Bill of Rights,” which not only limits mention of LGBTQ+ identity and “gender ideology” in school curriculum but also requires teachers and school counselors to notify parents if their child discloses that they are gay or gender non-conforming.¹⁶ Twice, the Bill cites “the fundamental right of parents to make decisions regarding the upbringing and control of their children,” once to justify the Bill’s provisions as a whole and again to defend the notification provision in particular.¹⁷ The Bill also requires that school districts “adopt a policy that authorizes a student to be excused from school to attend a released time course in religious

¹³ See *infra* Part III.C.

¹⁴ NAOMI CAHN & JUNE CARBONE, RED FAMILIES AND BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 11 (2010) (reviewing evidence demonstrating that while Black and Latino populations tend to vote for Democratic politicians, “[m]inority communities are neither united nor monochromatic on family issues”).

¹⁵ Serafin, *supra* note 5, at 416.

¹⁶ H.B. 8, 135th Gen. Assemb. (Ohio 2025).

¹⁷ *Id.*

instruction.”¹⁸ This bill exemplifies a broader trend in recent parental rights activism, which often conjoins opposition to non-traditional sex and gender identities with support for religious and traditionalist conceptions of the family.¹⁹

While there has been relatively less legislative activity at the federal level, the impact of parental rights rhetoric on the national political environment is no less pronounced.²⁰ During his campaign for re-election, for instance, then-candidate Donald Trump claimed that public school children were receiving gender-confirmation surgeries at the direction of public school authorities and without parental consent.²¹ Similarly, Republican Vice Presidential candidate J.D. Vance asserted that his opponent, Minnesota Governor Tim Walz, “signed legislation . . . that would take children away from their parents if their parents don’t want to do sex changes” and that Walz “want[ed] the government to steal your children from you if you don’t agree.”²² Such claims are straightforwardly false.²³ Yet, they neatly capture the emotional valence of conservative rhetoric surrounding LGBTQ+ identity and parental authority: the idea that children are being exposed to something harmful and dangerous, and that parents need the legal authority to stop it.

But LGBTQ+ identity is only one of many issues framed in terms of the family and parental rights. Debates over abortion, for example, have often been cast in parental rights terms. Prior to *Dobbs v. Jackson Women’s Health*, anti-abortion advocates invoked parental rights arguments for limiting minors’ access to abortion—some openly stating that such arguments would prove useful for eventually overturning *Roe v. Wade*.²⁴ Yet in the wake of *Roe*’s demise, anti-abortion parental rights arguments have not diminished but instead have taken on new forms. For example, three Republican Attorneys General recently filed a federal lawsuit seeking to restrict access to mifepristone and other abortifacients, on the grounds that “[s]tates may assert parental rights that would otherwise belong to the parents of minor girls in the foster care system.”²⁵ The injury to the state, the complaint alleges, stems from the fact that access to Mifepristone leads to a lower state population, resulting

¹⁸ *Id.*

¹⁹ See *infra* Part II.A.

²⁰ H.R. 9197, 117th Cong. § 4(e)(1) (2022) (enacted).

²¹ Daniel Dale, *Fact Check: Trump Falsely Claims Schools Are Secretly Sending Children for Gender-Affirming Surgeries*, CNN (Sep. 4, 2024, at 11:59 ET), <https://www.cnn.com/2024/09/04/politics/donald-trump-fact-check-children-gender-affirming-surgery/index.html> [https://perma.cc/SKQD-RYTD] (“Your kid goes to school and comes home a few days later with an operation. The school decides what’s going to happen with your child.”).

²² Chris Cameron, *Fact-Checking JD Vance’s Attacks on Tim Walz over a Transgender Sanctuary Law in Minnesota*, N.Y. TIMES (Sep. 5, 2024), <https://www.nytimes.com/2024/09/05/us/politics/jd-vance-tim-walz-transgender-care.html> [https://perma.cc/EC2A-8TJF].

²³ *Id.*

²⁴ See Ziegler, Eichner & Cahn, *supra* note 6, at 684.

²⁵ Amended Complaint at 151, *Missouri v. U.S. Food & Drug Admin.*, No. 2:22-CV-223-Z (N.D. Tex. Jan. 16, 2025).

in “diminishment of political representation,” “loss of federal funds,” and “potentially losing a seat in Congress.”²⁶ While here it is the state and not the parents themselves asserting parental rights, the logic of the argument—that granting minors access to abortion is a violation of parental authority—is essentially the same.

These new parental rights legal arguments are part of a recent and much wider-ranging politicization of the family itself. Parental rights arguments often operate within a broader political framework of views concerning family structure, procreative autonomy, and gender relations. Consider, for example, the rhetoric of Vice President Vance, who represents a “neo-traditionalist” approach to gender and family that now holds a significant place within contemporary conservative politics.²⁷ Neo-traditionalists like Vance often cite the decline of traditional, heterosexual, childbearing marriages, and the normative and legal systems that once privileged them, as one of the primary factors underlying a broader decline in American society.²⁸ Vance and his fellow neo-traditionalists thus support policies such as restricting no-fault divorce, which they argue would reduce incentives for couples to dissolve their marriages.²⁹

Neo-traditionalists also tend to decry the cultural and legal changes that have normalized non-traditional family structures and sexual orientations.³⁰

²⁶ *Id.* at 190.

²⁷ See, e.g., Ross Douthat, Opinion, *Masculinity Is on the Ballot*, N.Y. TIMES (Aug. 17, 2024), <https://www.nytimes.com/2024/08/17/opinion/masculinity-liberal-conservative.html> [<https://perma.cc/6KAT-X6L4>] (describing neo-traditionalism on right as comprising as “a strong, religiously motivated commitment to marriage and family”); see also Tim Sullivan, “*A Step Back in Time*”: America’s Catholic Church Sees an Immense Shift Toward the Old Ways, ASSOCIATED PRESS (May 1, 2024, at 00:07 ET), <https://apnews.com/article/catholic-church-shift-orthodoxy-tradition-7638fa2013a593f8cb07483ffc8ed487> [<https://perma.cc/5GYT-AH2E>] (describing rise of traditionalist Catholicism in United States); Rachel Treisman, *JD Vance Went Viral for “Cat Lady” Comments. The Centuries-Old Trope Has a Long Tail*, NPR (July 29, 2024, at 13:42 ET), <https://www.npr.org/2024/07/29/nx-s1-5055616/jd-vance-childless-cat-lady-history> [<https://perma.cc/B9QY-UGMN>]; Andrew Kaczynski & Em Steck, *It’s Not Just “Cat Ladies”: JD Vance Has a History of Disparaging People Without Kids*, CNN (July 30, 2024, at 08:54 ET), <https://edition.cnn.com/2024/07/30/politics/kfile-jd-vance-history-disparaging-people-without-kids/index.html> [<https://perma.cc/C8RQ-4H4N>].

²⁸ Emma Green, *The Rebirth of America’s Pro-Natalist Movement*, ATLANTIC (Dec. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/12/pro-natalism/547493/> [<https://perma.cc/956E-HJM6>] (showing that, for pro-natalists, “societal well-being—and democracy itself—depend on Americans’ willingness to procreate”).

²⁹ Ayesha Rascoe, *Conservatives in Red States Turn Their Attention to Ending No-Fault Divorce Law*, NPR (July 7, 2024, at 08:03 ET), <https://www.npr.org/2024/07/07/nx-s1-5026948/conservatives-in-red-states-turn-their-attention-to-ending-no-fault-divorce-laws> [<https://perma.cc/E2X9-LULC>].

³⁰ See, e.g., Robert George, *Gay Marriage, Democracy, and the Courts*, WALL ST. J. (Aug. 3, 2009, at 11:22 ET), https://www.wsj.com/articles/SB10001424052970204619004574322084279548434?st=flram24tizqol2o&reflink=desktopwebshare_permalink [<https://perma.cc/KFR3-8QDQ>] (asserting that “marriage culture, already wounded by widespread divorce, nonmarital cohabitation and out-of-wedlock childbearing” will collapse due to same sex marriages and polygamy); see also HERITAGE FOUND., MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 481 (2022) (asserting, without evidence, that

For example, in its *Mandate for Leadership*, the Heritage Foundation, a major conservative non-profit organization closely connected with the Trump administration, identifies “[r]estor[ing] the family as the centerpiece of American life” as the most important objective of a second Trump presidency.³¹ The Mandate urges the Department of Health and Human Services to “maintain a biblically based, social science-reinforced definition of marriage and family,”³² and calls for rescinding policies that promote “LGBTQ+ equity” or “[prohibit] discrimination on the basis of sexual orientation, gender identity, transgender status, and sex characteristics.”³³

Overall, parental rights arguments have become central to a new constitutional politics of the family. These arguments operate on multiple levels—legal, political, and normative. Legally, they provide litigators and legislators with a doctrinal basis for advancing policy outcomes through both the courts and the legislative process. Politically, parental rights rhetoric serves as a discursive framework through which actors articulate broader views about parental authority, gender roles, and sexual orientation. Normatively, while some on the political left have begun to adopt the language of parental rights, contemporary parental rights discourse remains overwhelmingly rightward leaning and traditionalist.³⁴

Two recent Court decisions suggest that this constitutional politics of parental rights will remain prominent for the foreseeable future. In *Mahmoud v. Taylor*, which I discuss further below, the majority held that religious parents possess “a right ‘to direct the religious upbringing of their children,’” a right that “can be infringed by laws that pose ‘a very real threat of undermining’ the religious beliefs and practices that parents wish to instill in their children.”³⁵ While the exact bounds of this newly identified right remain undefined, *Mahmoud* will surely bolster claims by religious and conservative parents seeking exemptions or changes to public school curricula that conflict with their religious views.

Moreover, although the Court declined to substantively address the parental rights issues involved in *United States v. Skrametti*,³⁶ which involves a challenge brought by parents of transgender children to Tennessee’s ban

non-traditional family forms “involve higher levels of instability (the average length of same-sex marriages is half that of heterosexual marriages); financial stress or poverty; or poorer behavioral, psychological, or educational outcomes”).

³¹ HERITAGE FOUND., *supra* note 30, at 3.

³² *Id.* at 481.

³³ *Id.* at 284, 584.

³⁴ Laura Meckler, Hannah Natanson & John D. Harden, *Liberals Try to Reclaim “Parents’ Rights” from Conservatives in Education*, WASH. POST (June 12, 2023), <https://www.washingtonpost.com/education/2023/06/12/progressive-education-activist-m4l/> [<https://perma.cc/C9QV-JMFN>] (describing groups on political left making parental rights arguments).

³⁵ *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2349 (2025) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 218, 233 (1972)).

³⁶ 145 S. Ct. 1816, 1846 (2025).

on transgender youth care,³⁷ at oral argument, Justice Barrett repeatedly emphasized that *Skrmetti*'s resolution would not affect the parental rights arguments previously addressed by the Sixth Circuit and that such claims could be revisited in a future case.³⁸

While the parental rights questions in *Skrmetti* remain unresolved, the contrast between the deference extended to religious parents in *Mahmoud* and the Court's unwillingness to grant similar deference to parents of gender-nonconforming children is striking. These two cases illustrate the general pattern of many recent parental rights political movements: the invocation of parental rights in service of religious traditionalism and in opposition to LGBTQ+ rights. Given the growing number of legal issues now framed as parental rights claims, as well as the resurgent traditionalism among national conservative political figures, it will be increasingly important for lawmakers and legal scholars going forward to understand and navigate this new constitutional politics of the family.

A. *Explaining Parental Rights Politics: Retrenchment by Diversion?*

Contemporary lawmakers and activists often cite the Court's parental rights jurisprudence as if it clearly supports their preferred policy outcomes. This creates a puzzle for interpreting the constitutional politics of parental rights. The Court's foundational parental rights cases were decided over a century ago and do not speak directly to contemporary debates over gender identity or sexual orientation. Why, then, do modern parental rights activists and lawmakers present their policy objectives as grounded in this older jurisprudence? And if the Court's parental rights doctrine lacks an obvious political valence, why are such arguments so often invoked in support of conservative and traditionalist political projects?

Drawing on the history of parental rights activism, legal scholars Mary Ziegler, Maxine Eichner, and Naomi Cahn argue that conservative groups have repeatedly invoked parental rights rhetoric as a strategic diversion to obscure the true nature of their political aims.³⁹

For example, in the decade following *Brown v. Board of Education*,⁴⁰ which required school districts across the country to implement desegregation remedies,⁴¹ white activist groups increasingly adopted the language of

³⁷ *Id.* at 1824.

³⁸ Transcript of Oral Argument at 142, *United States v. Skrmetti*, 145 S. Ct. 1816 (2025) (No. 23-477) (quoting Justice Barrett asking counsel whether he agreed that the "parental rights question is not before the Court, so it would be open to parents to continue to press that point in other cases?").

³⁹ See Ziegler, Eichner & Cahn, *supra* note 6, at 674.

⁴⁰ 347 U.S. 483 (1954).

⁴¹ *Id.*

parental rights to express their opposition to integration.⁴² These parental rights arguments failed to convince state or federal courts to halt integration.⁴³ At the same time, conservative politicians like Richard Nixon recognized the rhetorical power of parental rights claims and adopted this framing to attract voters opposed to public school integration.⁴⁴ Congressional Republicans followed suit, “invok[ing] parental rights in proposing to strip federal courts of jurisdiction in cases involving ‘busing.’”⁴⁵ While parental rights arguments opposing integration did not prevail in court, they were integral to the broader conservative political movement resisting public school integration—one that ultimately achieved a number of judicial victories limiting the remedies available to address segregation in public schools.⁴⁶

Parental rights arguments soon spread beyond opposition to school integration to other conservative causes, such as limiting access to abortion and undermining legal protections for LGBTQ+ individuals.⁴⁷ According to Ziegler, Eichner, and Cahn, underlying these disparate conservative aims was a common strategy they term “retrenchment by diversion.”⁴⁸ Conservative movements sought *retrenchment* insofar as they attempted to “stymie the future progress of equality-focused movements” by “roll[ing] back progress toward equality for women, Black, and queer Americans.”⁴⁹ Yet because such objectives were often deeply controversial, conservative activists and lawmakers deployed parental rights arguments as a *diversionary* tactic, distracting the public’s “attention from . . . rights-reversing motivations by supplying a more politically palatable rationale” for conservative policies.⁵⁰

The problem with this strategy, according to Ziegler, Eichner, and Cahn, is that conservative uses of parental rights conflict with the Court’s parental rights doctrine and its underlying normative justification. In their view, the Court has traditionally conceived of parental rights as a “shield, giving parents the autonomy to ‘de-standardize’ their children by opting out of the

⁴² Ziegler, Eichner & Cahn, *supra* note 6, at 678. Prior to *Brown* and the subsequent desegregation orders, white parents often sent their children to distant but segregated schools. After the desegregation orders, however, “white groups mounted opposition, not to integration itself but to ‘busing,’ which was defined as a novel and unprecedented affront to parental rights.” As Ziegler, Eichner, and Cahn note, such groups were often presented as asserting parental rights claims on behalf of all parents, despite the fact that many Black and Puerto Rican parents sought to place their children in integrated schools. *Id.*

⁴³ See, e.g., *Balsbaugh v. Rowland*, 290 A.2d 85, 91–92 (Pa. 1972) (“[Plaintiff’s complaint] seems to be premised on the assumption that there is some sort of inherent right, enforceable by parents, pupils and taxpayers, to a ‘neighborhood school.’ . . . We emphatically disagree.”).

⁴⁴ See Ziegler, Eichner & Cahn, *supra* note 6, at 679.

⁴⁵ *Id.* at 682.

⁴⁶ *Id.*

⁴⁷ *Id.* at 686 (noting that conservative groups “framed parental-involvement laws as part of an effort to create cases that will eventually overrule *Roe v. Wade*”).

⁴⁸ *Id.* at 675.

⁴⁹ *Id.* at 674–75.

⁵⁰ *Id.* at 674.

state's preferred course."⁵¹ By permitting parents to opt their children out of the state's preferred course, parental rights foster familial pluralism.⁵² Yet conservative parental rights policies do not merely offer parents an opt-out from a particular state policy; rather, they typically attempt to impose conservative policy preferences upon *all* families and are therefore anti-pluralistic in effect.⁵³

According to Ziegler, Eichner, and Cahn, genuine parental rights claims facilitate familial pluralism; in their view, parental rights laws that respect parental pluralism "authentically invoke our long tradition of parental rights."⁵⁴ By contrast, laws and policies that impose the same requirements upon all families undermine familial pluralism and thus constitute illegitimate uses of parental rights.⁵⁵ Ziegler, Eichner, and Cahn therefore propose a new test for assessing the legitimacy of proposed parental rights policies.⁵⁶ The test asks whether a parental rights policy would "allow parents individualized decisionmaking rights over their children," as opposed to standardizing all families and thereby undermining the principle of familial pluralism.⁵⁷ This pluralism-based test is intended both for courts, which can use it to "establish the constitutional authenticity of the parental rights" arguments,⁵⁸ and for legal scholars, who can assist the public in evaluating the arguments made by groups purporting to defend parental rights.⁵⁹

II. SOME REALISM ABOUT PARENTAL RIGHTS

Ziegler, Eichner, and Cahn's diagnosis of retrenchment by diversion fits within a long line of legal scholarship that conceives of parental rights as serving the normative value of pluralism.⁶⁰ While I have myself contributed to this scholarship, I believe that the pluralist view of parental rights is substantially incomplete. The truth is that the Court's parental rights jurisprudence contains multitudes, some of which is pluralistic and progressive but much of which is traditionalist and anti-pluralistic. To see parental rights doctrine clearly, we must first appreciate the multiplicity of normative principles embedded in

⁵¹ *Id.* at 701.

⁵² *Id.* at 711.

⁵³ *Id.* at 677 ("Rather than the government respecting parental pluralism and carving out space for a variety of parental decisions, the politics of parental rights establish state or federal policies binding on all parents.").

⁵⁴ *Id.* at 718.

⁵⁵ *Id.* at 711.

⁵⁶ *Id.* at 709–10. To be sure, Ziegler, Eichner, and Cahn put forward other diagnostic criteria for identifying illegitimate uses of parental rights. But the heart of their argument, and of their conception of parental rights, lies in the claim that parental rights facilitate pluralism. *Id.* at 711.

⁵⁷ *Id.* at 709–10.

⁵⁸ *Id.* at 720.

⁵⁹ *Id.* at 727.

⁶⁰ See sources cited *supra* note 9.

the caselaw, as well as the competing—and at times contradictory—ends to which parental rights caselaw leads.

In this Part, I defend a realist account of parental rights adjudication. Realist explanations of adjudication characteristically claim that the law is often indeterminate, in the sense that authoritative sources rarely yield a single, uniquely justified outcome.⁶¹ Indeterminacy may arise from various sources: precedents can be read narrowly or broadly; rights can be defined at higher or lower levels of generality; the historical record can be interpreted to support multiple positions.⁶² This is not to say that adjudication is entirely unconstrained. Especially in lower courts, the outcome is generally predictable to reflect meaningful constraint by existing law.⁶³ But realist explanations have greater purchase at the federal appellate level, and especially at the Supreme Court, where judicial discretion is broader, legal answers are less determinate, and the political morality of a particular judicial decision is far more consequential.⁶⁴

This Part argues that parental rights doctrine is indeterminate. More specifically, with respect to the parental rights controversies now at issue, existing parental rights precedents rarely yield legal rules or normative principles of sufficient determinacy to settle the legal question, at least at the federal appellate level. I demonstrate this in Part II.A., highlighting two major shortcomings of the pluralist account of parental rights: its inability to account for the systemic inequities in the child custody system and its failure to explain decisions such as *Michael H. v. Gerald D.*,⁶⁵ a parental rights case that has been hugely influential in entrenching traditionalist conceptions of the family.⁶⁶ Ultimately, I argue that parental rights doctrine is normatively indeterminate: in some instances it promotes pluralism, but in many others it manifestly does not.

But if parental rights doctrine is indeterminate, both in its legal rules and its underlying normative principles, what, exactly, explains parental rights adjudication? In other words, what is the normative standard upon which judges “*really* rely.”⁶⁷

In Parts II.B. and II.C., I argue that in parental rights cases, justices tend to rely on their own normative models of the family in reaching legal outcomes. In II.B., I introduce political science literature on the development of competing family models in American political history. This scholarship

⁶¹ See Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 50, 51–52 (Martin P. Golding & William A. Edmundson eds., 2005).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 52.

⁶⁵ 491 U.S. 110 (1989).

⁶⁶ See *infra* Part II.A.

⁶⁷ Brian Leiter, *Legal Realism and Legal Doctrine*, 163 U. PA. L. REV. 1975, 1975 (2015) (explaining that realists maintain that “the doctrine that courts invoke is not really the normative standard upon which they *really* rely”).

shows that, throughout the twentieth century, American political parties have adopted either a pluralist-egalitarian or a traditionalist-authoritarian model of the family. These models have shaped national political discourse, party platforms, congressional legislation, and public debates over the nature of the ideal family. They have also influenced political positions on issues seemingly unrelated to the family, such as economic policy, race, gender, immigration, and sexuality.⁶⁸ Part II.B. illustrates how these competing family models, rather than parental rights doctrine, best explain the outcomes in parental rights adjudication.

To demonstrate the explanatory power of a realist account of parental rights, Part II.C. presents two case studies: Justice James Clark McReynolds, who authored a number of canonical parental rights cases, and Justice Clarence Thomas, who authored several noteworthy influential opinions on the rights of parents and children. Each case study provides a powerful example of judges relying not on parental rights doctrine or even on a recognizable philosophy of adjudication; rather, what drives the outcome in both cases is each Justice's underlying model of the family. Additionally, both examples suggest a set of causal mechanisms by which judges come to adopt one or another model of the family—through socialization into a regional or religious family culture and allegiance to a political party platform.

A. *Some Problems for Pluralists*

Is parental rights doctrine inherently pluralistic? The evidence is decidedly mixed. As I argue below, there are competing interpretations of early parental rights cases like *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, and many pluralistic readings of those cases depend on overlooking the political contexts in which they were decided.⁶⁹ Yet even setting these interpretive disputes aside, there remains much that pluralistic accounts of parental rights cannot explain. Perhaps the starkest challenge to the pluralistic view is its failure to account for the inability of parental rights doctrine to protect minority families from what family law scholars now describe as the “family regulation system.”⁷⁰

⁶⁸ See *infra* Part II.B.

⁶⁹ See *infra* Part II.C.1. See generally *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) for information on these cases.

⁷⁰ Emily J. Stolzenberg, *Tribes, States, and Sovereigns’ Interests in Children*, 102 N.C. L. REV. 1093, 1142–43 (2024) (citing Emma Peyton Williams, *Dreaming of Abolitionist Futures, Reconceptualizing Child Welfare: Keeping Kids Safe in an Age of Abolition* (Apr. 27, 2020) (B.A. Honors thesis, Oberlin College), <https://digitalcommons.oberlin.edu/cgi/viewcontent.cgi?article=1711&context=honors> [<https://perma.cc/M9FB-GKMH>]; Dorothy Roberts, *Feminism, Race, and Adoption Policy*, in *ADOPTION MATTERS: PHILOSOPHICAL AND FEMINIST ESSAYS* 234, 234–46 (Sally Haslanger & Charlotte Witt eds., 2005)).

Legal scholars have long observed that this system disproportionately targets Black, brown, poor, and Indigenous parents.⁷¹ Since these inequities have been extensively documented, I note here only a few examples demonstrating how parental rights often fail racial and cultural minorities. As Professor Dorothy Roberts points out, Black children are removed from their homes “at four times the rate of white children,” a rate of separation that “could not be justified by any matching discrepancy in rates of child abuse and neglect.”⁷² Overall, Black and Indigenous children “are more than twice as likely as white children to experience the termination of both parents’ rights.”⁷³

The point is not that parental rights fail to protect minority and impoverished parents, though that is true. Rather, it is that the family regulatory system has historically ignored, disrespected, or actively suppressed the cultural practices of minority parents. One survey of affected parents, for example, found that three-quarters reported that “their cultural practices and values were not respected during their involvement.”⁷⁴ As Roberts and other legal scholars have shown, the family regulatory system has long served to coercively assimilate minority children into the cultural norms of white America.⁷⁵ These massive disparities suggest that some caution is warranted before ascribing to parental rights doctrine an overarching normative commitment to pluralism, given the doctrine’s ineffectiveness in protecting minority families from state intervention. At a minimum, we must carefully distinguish where the doctrine upholds pluralist values and where it violates them.

Examining parental rights caselaw, however, reveals a similarly uneven commitment to pluralist values. Consider, for example, *Michael H. v. Gerald D.*, a case in which the Court explicitly adopts a traditionalist understanding of the family.⁷⁶ *Michael H.* revolves around a California evidentiary statute that conclusively presumed any child born to a cohabiting married couple to be the biological child of the husband. However, Victoria, the child at the center of the dispute, was born of an extramarital affair. Victoria’s biological mother was cohabiting with her husband at the time of Victoria’s birth, and thus, under the California law, parental rights were granted to the husband. Yet shortly after Victoria’s birth, she and her mother went to live for a time with Victoria’s biological father, who maintained a loving relationship with her and thus, under Supreme Court precedent, appeared to have a colorable claim to

⁷¹ See generally DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022) (making this argument).

⁷² *Id.* at 4.

⁷³ *Id.* at 23.

⁷⁴ See RISE & TAKE ROOT JUST., *AN UNAVOIDABLE SYSTEM: THE HARMS OF FAMILY POLICING AND PARENTS’ VISION FOR INVESTING IN COMMUNITY CARE* 14 (2021).

⁷⁵ See, e.g., S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. 1523, 1530 (2023) (demonstrating that “[e]very year, thousands of Black and brown parents in marginalized communities all over the country are impacted by the family regulation system”).

⁷⁶ *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989).

custody.⁷⁷ In short, *Michael H.* required the Court to determine whether the law should recognize that multiple men had valid legal claims to maintain a paternal relationship with Victoria, or whether it should instead preserve the traditional marital family by recognizing only one legal father.

The dissent, however, argues that the facts in *Michael H.* present not only a conflict of law but also a conflict of values between pluralistic and traditionalist understandings of family and of parental rights.⁷⁸ By awarding visitation rights to Victoria's biological father, the Court would have acknowledged that many Americans simply do not conform to the traditionalist ideal of the heterosexual, monogamous, childbearing family. Prior to *Michael H.*, the Court had recognized—and at times even celebrated—non-traditional family structures.⁷⁹ Moreover, earlier parental custody cases had awarded custody on the basis of a biological connection and some involvement in the child's life, criteria that Victoria's biological father plainly satisfied.⁸⁰ Yet in his plurality opinion, Justice Scalia, in a blatant departure from precedent, denies those rights, on the grounds that parental rights exist “to preserve the integrity of the traditional family unit.”⁸¹

Michael H. is a deeply traditionalist decision. Consider, first, how the plurality describes the nature of the right at issue. While the plurality describes parental rights as protecting the traditional family unit, the sexual and romantic relationships that comprise the underlying facts of the case are anything but traditional. Victoria's mother is described as engaging in sexual relationships with three different men while married (men whose own sexual conduct goes largely unexamined by the Court).⁸² In other words, Victoria and her parents are not a traditional family in the relevant sense; by the time their case made its way into court, that ship had long since sailed. This is not to cast judgment on any of the parties to the case, but rather to point out that the traditionalist gloss Justice Scalia gives parental rights in *Michael H.* functions less to recognize existing traditional families and more to enforce a traditionalist *imagining* of the family, regardless of the underlying truth about the family in question. Rather than craft a precedent that would accommodate the complicated and messy reality of many romantic and childbearing relationships, the plurality opinion asserts that parental rights are justified insofar as they enact a traditionalist vision of the family. Parental rights, according to *Michael H.*,

⁷⁷ *Stanley v. Illinois*, 405 U.S. 645, 652 (1972).

⁷⁸ *Michael H.*, 491 U.S. at 141 (“We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies.”).

⁷⁹ See cases cited *supra* note 8.

⁸⁰ *Stanley*, 405 U.S. at 655.

⁸¹ *Michael H.*, 491 U.S. at 130.

⁸² *Id.* at 114 (observing that Victoria's mother “took up residence with yet another man, Scott K”).

serve not to facilitate familial pluralism by accommodating non-conforming families, but to mold such families into traditional archetypes.⁸³

It is telling, moreover, that the plurality assigns virtually no weight to Victoria's interests. To the extent that the plurality considers Victoria's perspective, it is primarily to dismiss her guardian ad litem's argument for retaining visitation with her biological father as "merit[ing] little discussion."⁸⁴ Despite the fact that Victoria's guardian argued that maintaining a relationship with the biological father "can be of great psychological benefit to a child," the plurality rejects this suggestion as incompatible with the "history or traditions of this country."⁸⁵ Even while acknowledging that Victoria might be harmed by losing her relationship with her biological father, the plurality nonetheless subordinates the child's best interests to maintaining the appearance of a traditional family.⁸⁶

The second respect in which *Michael H.* is deeply traditionalist concerns the plurality's conception of substantive due process. *Michael H.* is an early precedent for approaches to substantive due process that limit the Court to recognizing fundamental rights only when they have a basis in "concrete historical practices."⁸⁷ Yet as a number of legal scholars have demonstrated, the Court's history-and-tradition analysis is a thoroughly value-laden inquiry.⁸⁸ For example, as Professor Reva Siegel points out, the Court's history-and-tradition test "elevate[s] the significance of laws adopted at a time when women and people of color were judged unfit to participate and treated accordingly by constitutional law, common law, and positive law," and thereby "ties the Constitution's meaning to lawmaking from which women were excluded."⁸⁹

Michael H. presaged what later decisions like *Dobbs* would confirm—namely, that the history-and-tradition test reinscribes the gendered and hierarchical norms of the past onto contemporary legal practice. Consider, for example, the historical reality underlying the plurality's observation that there is no legal tradition of recognizing multiple fathers. For much of American history women had no legal or political power to shape custodial law. Worse, adultery was criminalized, domestic violence permitted, and a husband's discovery of his wife's infidelity served as a mitigating factor at trial if he beat or killed her.⁹⁰ Well into the 1990s, some judges still held that killing

⁸³ *Id.* at 132.

⁸⁴ *Id.* at 130.

⁸⁵ *Id.* at 131.

⁸⁶ *See id.*

⁸⁷ Linda C. McClain & James E. Fleming, *Ordered Liberty After Dobbs*, 35 J. AM. ACAD. MATRIM. LAWS. 623, 626 (2023).

⁸⁸ *See* Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 67–68 (2022) ("[T]he Court's historical investigation is not the value-free, apolitical exercise that the Court pretends it to be.").

⁸⁹ Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality: Dobbs on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 906 (2023).

⁹⁰ *See* Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 72 (1992).

one's unfaithful wife was justified and ought not be punished.⁹¹ The absence of a tradition recognizing multiple fathers does not reflect a democratically legitimate legal tradition; rather, it merely signifies women's traditional lack of political power as well as their reluctance to risk intimate partner violence by disclosing an extramarital affair.

Michael H. is thus an anti-pluralistic parental rights decision in two senses. First, *Michael H.* justifies parental rights in terms of preserving traditional family structures rather than accommodating non-conforming ones. Second, it articulates a "history and tradition" test for parental rights, and for substantive due process more generally, which would later be used to restrict the choices of women and LGBTQ+ individuals in cases like *Dobbs* and *Bowers v. Hardwick*.⁹² Overall, *Michael H.* can be seen as part of the Court's broader return to a traditionalist politics of the family—one that, as I argue below, has deep roots in American regional and political culture.⁹³

In sum, the family regulatory system and cases like *Michael H.* remind us that parental rights do not inherently serve pluralistic values. In many important respects, parental rights doctrine advances a traditionalist view of the family. Of course, defenders of the pluralistic account might accept this point. Some, for example, point to cases in which courts allow parents to opt their children out of state-enforced policies as examples of parental rights serving pluralism, or to the Court's famous pronouncement in *Pierce* that the state lacks the "general power . . . to standardize its children."⁹⁴ In other words, while the pluralistic values within parental rights doctrine are limited to certain cases, they nevertheless provide a foundation for arguments against policies that compel familial conformity.

Yet even here, we should be wary of concluding too quickly that parental rights—by permitting opt-outs from state policies—necessarily serve pluralistic values, at least not as those values are understood by left-leaning critics of conservative parental rights politics. Consider, for example, *Mahmoud v. Taylor*.⁹⁵ In *Mahmoud*, the majority grants religious parents the right to opt out of educational materials or lessons that would "substantially interfer[e] with the religious development of [their] children."⁹⁶ Justice Alito's opinion certainly appears to endorse pluralistic values: he emphasizes the religious, ethnic, and cultural diversity of the communities in which the case arose, while depicting the school board—which sought to introduce children to LGBTQ+-friendly reading materials—as pressuring traditionalist

⁹¹ *18-Month Sentence for Wife-Killer Sparks Outcry*, L.A. TIMES (Oct. 19, 1994, at 00:00 PT), <https://www.latimes.com/archives/la-xpm-1994-10-19-mn-52127-story.html> [<https://perma.cc/CUL5-UZLM>].

⁹² See generally *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) and *Bowers v. Hardwick*, 478 U.S. 186 (1986) for these cases.

⁹³ See *infra* Part II.B.

⁹⁴ *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); see Ziegler, Eichner & Cahn, *supra* note 6, at 700.

⁹⁵ *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025).

⁹⁶ *Id.* at 2338.

families to conform.⁹⁷ This is pluralism of a sort, but presumably not the type of pluralism that critics of conservative parental rights movements endorse.

I suspect that progressive critics understand “pluralism” as a shorthand for, or replacement of, what was once described as anti-subordination.⁹⁸ Yet *Mahmoud* reveals that pluralism is simply too indeterminate a normative principle to perform the work of anti-subordination on its own. Applied more broadly to parental rights doctrine, this lesson suggests that there is ultimately no single normative value the doctrine consistently advances, nor a single type of outcome that parental rights cases reliably yield. Parental rights doctrine is indeterminate both in the rules that judges apply and in the normative values to which they appeal.

B. *Two Models of the Family*

In this Part, I introduce political science literature on competing family models in American political history. I argue that these models provide the normative standard upon which judges rely in parental rights adjudication. To motivate that argument, it is important not only to describe the content of these family models but also to show how pervasively they have influenced American political discourse and political development. Competing conceptions of the family have long shaped the policy objectives, party platforms, and competitive strategies of American political parties. As political scientist Gwendolyn Alphonso has argued, while “family values” politics are often described as a contemporary phenomenon, predominant especially in the 1990s, family-centered political discourse has been a central feature of political party competition since at least the early twentieth century.⁹⁹ As Alphonso writes, “American party development is . . . at its core, a competition between dual political ideals of family.”¹⁰⁰

By analyzing party platforms, proposed and enacted congressional legislation, and congressional committee hearings, Alphonso demonstrates that American political parties have tended to cluster around one of two recurring models of the family: a pluralist-egalitarian model and a traditionalist-authoritarian model.¹⁰¹ The pluralist-egalitarian model views family morality

⁹⁷ *Id.*

⁹⁸ See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination*, 58 U. MIA. L. REV. 9, 9 (2003) (describing antisubordination theorists as arguing that “guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups”).

⁹⁹ GWENDOLINE M. ALPHONSO, POLARIZED FAMILIES, POLARIZED PARTIES: CONTESTING VALUES AND ECONOMICS IN AMERICAN POLITICS 13 (2018) (“[P]arty development—coherent, discernible shifts in the parties’ policy positions—is dependent on the kind of family ideologies the parties uphold.”).

¹⁰⁰ *Id.* at 6.

¹⁰¹ *Id.* at 14.

primarily in terms of economic stability.¹⁰² Pluralist-egalitarians maintain that the material wellbeing of the family is “a legitimate *national* public responsibility,” warranting expansive state regulatory authority over the economy and robust redistributive economic policies.¹⁰³ This approach to the family was particularly predominant during the New Deal era.¹⁰⁴ As Alphonso observes, during this time, protection of the family became one of the primary public justifications for major pieces of legislation expanding the powers of the national government to redistribute material resources.¹⁰⁵

Pluralist-egalitarian support for economic redistribution tended to be nested within a broader framework of values, some of which extend beyond the family proper. Early twentieth-century supporters of women’s suffrage, for example, often connected family-oriented economic policy to progressive views of marriage and gender relations, arguing that state economic support would allow healthy, egalitarian family dynamics to flourish.¹⁰⁶ Moreover, such arguments were often couched in terms of secular values such as equality, inclusion, and individual dignity.¹⁰⁷ This partly reflects the culture and material circumstances of the regions in which pluralist-egalitarian family models arose. Early twentieth-century pluralist-egalitarian proponents typically hailed from the urban and industrialized Midwest and Northeast, regions that were relatively less religiously oriented than other parts of the country and were grappling with the dramatic changes in family life, gender roles, and social conditions that industrialization wrought.¹⁰⁸

By contrast, the traditionalist-authoritarian approach to family policy views family wellbeing in terms of personal responsibility, religiosity, and parental authority.¹⁰⁹ Traditionalist opponents of women’s suffrage in Congress, for example, argued that suffrage would lead women to reject the ideal of a patriarchal, “indissoluble Christian marriage.”¹¹⁰ Proponents of the traditionalist-authoritarian model of the family tend to support state interventions that preserve traditional family values, particularly those concerning sexual morality. For southern opponents of suffrage, this concern often manifested as hostility toward miscegenation and immigration, both of

¹⁰² *Id.* at 8.

¹⁰³ *Id.* at 90.

¹⁰⁴ *See id.*

¹⁰⁵ *Id.* at 90–91 (“In the historic 1936 election, in which FDR (and his New Deal policies) received a resounding 60.8 percent of the vote, the Democratic Party platform asserted the ‘Protection of the family and home’ as the first of three new public obligations.”).

¹⁰⁶ *Id.* at 54 (“Progressive members of Congress who supported women’s suffrage attacked the traditional separateness of domestic and public spheres by using a predominantly economic family framework[,] . . . arguing that laws should actively intervene to improve primarily economic and, second, valuational conditions of home life.”).

¹⁰⁷ *Id.* at 111 (describing “a secular-humanistic set [of values] associated with more ‘modern,’ expert-driven, companionate families often at home in urban and suburban areas”).

¹⁰⁸ *See id.* at 74–75.

¹⁰⁹ *Id.* at 23.

¹¹⁰ *Id.* at 55.

which were condemned as threats not only to the continued existence of white families but also to the nation itself.¹¹¹

Although proponents of the traditionalist-authoritarian model of the family welcomed state intervention in some respects, they were typically hostile to state intervention that eroded parental autonomy or authority within the home. Anti-suffragists in Congress, for instance, opposed vaccine mandates, child labor laws, compulsory public schooling, and much else that, in their view, allowed the federal government to encroach upon parental autonomy.¹¹² Respecting parental autonomy, from this perspective, required minimal federal intervention in the economy and the public schooling system, and greater support for “local knowledge and the right of communities to regulate themselves.”¹¹³ As one anti-suffragist explained to Congress, state intervention between parent and child is misguided, for “no one has such vital interest and concern in the welfare of the child as the parents themselves.”¹¹⁴

As to parental authority inside the home, the traditionalist-authoritarian model embraces a strictly hierarchical view of the parent-child relationship and tends to support corporal punishment as a means of instilling discipline and respect for authority. As Alphonso points out, support for corporal punishment and for “instilling a sense of order and respect for authority among children” is much higher among southern parents “across sociodemographic groups, surpassing all other regional parent groups.”¹¹⁵ This endorsement of harsh punishment as a means of cultivating respect for authority applies both within the family and beyond it. From the 1980s forward, for example, conservative members of Congress advocating for stricter punishment of juvenile offenders often “emphasize[d] ‘discipline and tough love within the family, tying them to society-wide ideals of law and order.’”¹¹⁶

To be sure, the pluralist-egalitarian and traditionalist-authoritarian models are not strict party platforms; rather, they are idealizations around which political parties have tended to cluster. Moreover, for much of the twentieth century, both major parties contained elements of each. For example, Southern Democrats in the 1940s and 1950s supported greater economic redistribution while speaking the language of conventional, family-values moralism and traditionalism with respect to racial and gender hierarchies.¹¹⁷ Conversely, while most Republicans in the post-war period adopted a traditionalist-authoritarian approach to family policy, factions within the Republican party split over the state’s role in inculcating traditionalist values—with more religious and socially conservative republicans favoring greater state

¹¹¹ *Id.* at 21.

¹¹² *Id.* at 135.

¹¹³ *Id.* at 59.

¹¹⁴ *Id.* at 58.

¹¹⁵ *Id.* at 150.

¹¹⁶ *Id.*

¹¹⁷ *See id.* at 98.

intervention, and more business-friendly Republicans emphasizing secular and economic concerns.¹¹⁸

At the same time, by the early twenty-first century, these competing conceptions of the family had become central to increasing political polarization. As Professors Naomi Cahn and June Carbone have shown, while there are considerable variations by region, class, and race, at the national level there exists a deep partisan divide over pluralist-egalitarian and traditionalist-authoritarian family models, such that support for one or the other family model is now “one of the most accurate predictors of political loyalties.”¹¹⁹ Proponents of the pluralist-egalitarian model tend to reside in the Northeast and on the West Coast and tend to be “wealthier, more Democratic, more committed to a later age at family formation, and more tolerant of different family forms.”¹²⁰ Proponents of the traditionalist-authoritarian model tend to be more economically and socially marginal, “have become more Republican, more committed to traditionalist values, and more troubled by divorce and teen and nonmarital births.”¹²¹

Democratic and Republican Party policy platforms reveal a similar polarization over family-related values, with Republicans adopting a platform aimed at “restor[ing] a conservative social order” and emphasizing “strong family life, faith/traditional moral values, family self-determination, and self-reliance.”¹²² Democratic policy platforms, by contrast, tend to speak of the family in terms of “secular-humanist values of diversity, equal protection, fairness, the pursuit of personal fulfillment, and individual self-determination.”¹²³

In the following Part, I will argue that it is largely these competing family models, and not doctrinal rules or principles, that explain adjudication in parental rights cases at the Supreme Court level. Before making that argument, however, it is important to highlight three points about the family models discussed above.

The first is that they are pervasive, not only in the sense that they appear throughout public discourse and in the operations of government, but also because they reflect regional, religious, cultural, and material differences in many Americans’ lived experience. My argument in Part II.C. is premised on the reasonable assumption that judges, no less than other political figures, come to adopt one or another family model, either through individual socialization, adherence to a particular political party platform, or some combination of both.

¹¹⁸ *Id.* at 123 (“[P]rominent factions within the GOP disagreed over whether family values should limit or activate the state.”).

¹¹⁹ See CAHN & CARBONE, *supra* note 14, at 2, 61–62.

¹²⁰ *Id.* at 74.

¹²¹ *Id.*

¹²² ALPHONSO, *supra* note 99, at 40.

¹²³ *Id.*

Second, the history of these competing family models reveals that normative principles underlying parental rights adjudication do not have unitary meanings, but rather take on different meanings based upon the family model in which they are embedded. Consider, for example, the principle of “family autonomy.” Family autonomy, from a pluralist-egalitarian perspective, might require greater state intervention in the economy or in the family itself, as such interventions may foster family stability and egalitarian family dynamics. From a traditionalist-authoritarian perspective, however, family autonomy means something quite different: less regulation of the economy and economic redistribution, and more support for robust, and typically patriarchal, parental authority. This observation helps to explain why parental rights doctrine is indeterminate.¹²⁴ Parental rights decisions simply cannot be explained by reference to one overarching normative principle or value—at least not without specifying how the principle or value in question is being operationalized in law or policy.

Finally, throughout the historical periods mentioned above, family models have informed a wide variety of debates, only some of which immediately concerned marriage or the family. Many debates informed by family discourse—those surrounding, for example, criminal sentencing, vaccine mandates, and immigration—have seemingly little to do with the family, at least directly. This political history indicates that it is difficult, perhaps impossible, to separate policy proposals that are *really* about the family from those that are not. An individual’s position on abortion or immigration may be inextricably bound up with their adherence to one or another family model. As I argue in Part III, this insight should inform the work of legal scholars and activists who wish to engage in parental rights politics.

C. *Parental Rights Realism Applied*

In this Part, I argue that competing models of the family provide the normative standards upon which judges rely in parental rights cases. My claim is that in parental rights cases judges consciously or unconsciously craft legal outcomes that advance the values of their preferred family model. The pervasiveness of these family models in regional and religious cultures and in party politics suggests an underlying set of causal mechanisms: judges come to adopt these models either through individual socialization in a regional or religious culture, adherence to a political party, or some combination of both. The two examples I discuss below, those of Justice McReynolds and Justice Thomas, illustrate how these forces determine outcomes in cases dealing with parental rights and parental authority.

¹²⁴ See *supra* Part II.A.

1. *Justice McReynolds*

Justice McReynolds has long puzzled family law scholars.¹²⁵ Despite authoring seemingly pluralist-friendly majority opinions in *Meyer*, *Pierce*, and *Tokushige*, McReynolds was regarded by his peers to be a churlish reactionary—retrograde even by the standards of his own time. A vocal bigot, misogynist, and antisemite, he remains the unlikeliest of standard bearers for pluralism. Indeed, McReynolds's prejudices apparently extended even to the German immigrant communities whose parental rights were recognized in *Meyer*.¹²⁶

In her influential article on the “dark side” of the Court's early parental rights jurisprudence, legal scholar Barbara Woodhouse first proposed a realist solution to the puzzle of McReynolds.¹²⁷ The first part of the solution lies in reconstructing the political landscape in which McReynolds operated. As Woodhouse persuasively demonstrates, contemporary interpreters of cases like *Meyer* and *Pierce* have tended to read back into those cases political alignments that obscure the politics of the time.¹²⁸

For example, while some element of bigotry undoubtedly played a role in the laws at issue in *Meyer* and *Pierce*, the laws were also an outgrowth of the “common schools” movement—a movement that defended a pluralist, egalitarian vision of public education, albeit in terms that few pluralists would endorse today.¹²⁹ The common schools movement, which included progressive luminaries like John Dewey, defended public schooling as “essential if America was to realize the promise of equal opportunity.”¹³⁰ For many common school advocates, public schooling conducted in English would help socialize the children of newly arrived immigrants not only into a common language but also into a shared political tradition of equal citizenship.¹³¹

¹²⁵ As recently as 2011, legal scholars were still offering solutions to the puzzle of McReynolds. See, e.g., Louise Weinberg, *The McReynolds Mystery Solved*, 89 DENV. U. L. REV. 133, 157 (2011).

¹²⁶ In the 1921 case *Berger v. United States*, the Court reviewed a trial court judge's refusal to recuse himself from a criminal trial after making several prejudicial remarks against the German defendants, including the claim that it was difficult not to be “prejudiced against the German Americans” as “[t]heir hearts are reeking with disloyalty.” 255 U.S. 22, 28–29 (1921). McReynolds dissented from the Court's decision to disqualify the trial judge, on the grounds that “[a] public officer who entertained no aversion towards disloyal German immigrants during the late war was simply unfit for his place.” See Barbara B. Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1083–84 (1992).

¹²⁷ Woodhouse, *supra* note 126, at 1069.

¹²⁸ *Id.* at 998 (“Neither historians nor constitutional scholars have adequately studied the configurations of liberals, conservatives, radicals, progressives, and reactionaries.”).

¹²⁹ *Id.* at 1017 (“Past discussions have stressed that the laws were motivated by divisive, anti-Catholic prejudices exacerbated by the War. Yet, paradoxically, these laws proposed a radical plan for equality through class, race, and religious integration that makes *Brown v. Board of Education* seem tame.”).

¹³⁰ *Id.* at 1005.

¹³¹ *Id.* at 1004.

From a contemporary vantage point, language laws and parochial school bans represent a coercive assimilationism that few pluralists would defend today; in fact, even some supporters of the common schools movement raised such objections at the time.¹³² On the other hand, it is important not to overlook the genuinely pluralistic and egalitarian intentions of those who supported the common schools. As Woodhouse points out, an effect of “imparting a common language and political tradition” was a public recognition of the equal status of immigrant communities.¹³³ Indeed, it was thought that sharing a common language would allow immigrant communities to make their own distinctive “contribut[i]ons to American life.”¹³⁴

The second part of Woodhouse’s solution to McReynolds lies in contrasting the pluralism and egalitarianism of the common school movement, imperfect though it was, with McReynolds’s own moral and political views. Woodhouse’s most distinctive argument is that McReynolds’s opinions were based on the belief that parents, and particularly fathers, possessed property rights in their children. As she points out, the purchase and sale of human beings was, at the time *Meyer* and *Pierce* were decided, “a legal fact within living memory,” and thus there was some legal precedent for the idea that human beings could be treated like property.¹³⁵ Moreover, a variety of historical sources—religious, philosophical, and legal—could be interpreted as supporting the notion that parents in some sense owned their children.¹³⁶ For Woodhouse, *Meyer* and *Pierce* were essentially economic substantive due process decisions.¹³⁷ State laws banning the teaching of native languages inside the home interfered with the parents’ property right to “exercis[e] sole custody and control” over the child.¹³⁸ McReynolds gestures toward this understanding in *Meyer* when he compares such laws to the communal—and communistic—ownership of women and children depicted in Plato’s ideal commonwealth.¹³⁹

While Woodhouse’s recontextualization of *Meyer* and *Pierce* is compelling, there are two major problems with her theory of parental rights as property rights. First, McReynolds plainly understood that children were autonomous individuals, and that this autonomy places limits on state and parental control. As Professor Ann Dailey has pointed out, these ideas are present in both *Meyer* and *Pierce*, where McReynolds cites with approval a lower court statement that, for the good of the state, children should be taught democratic “ideas and sentiments”¹⁴⁰ as well as the prerequisites of

¹³² *Id.* at 1020 n.101.

¹³³ *Id.* at 1012.

¹³⁴ *Id.*

¹³⁵ *Id.* at 1041.

¹³⁶ *Id.* at 1043.

¹³⁷ *Id.* at 1042.

¹³⁸ *Id.* at 1046.

¹³⁹ See *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

¹⁴⁰ Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 439 (2006).

“good citizenship.”¹⁴¹ To be sure, McReynolds’s view of parental authority was undeniably patriarchal, centered around a vision of the father as a stern, disciplinary figure.¹⁴² Yet, he did not view children as mere property. To explain *Meyer* and *Pierce*, we need a framework that can account for McReynolds’s patriarchal conception of parental rights without attributing to him a belief that he apparently did not hold.

A second problem with Woodhouse’s framework stems from her reliance on legal realism—at least, the strain derived from Judge Jerome Frank. Frank argued that it was “[t]he peculiar traits, dispositions, biases and habits of the particular judge” that “often determine what he decides to be the law.”¹⁴³ The problem with this “idiosyncratic” version of legal realism, however, is that it cannot account for uniformity and predictability across cases.¹⁴⁴ If adjudication truly comes down to the personal idiosyncrasies of individual judges, the law would not exhibit much uniformity, given the innumerable personal and psychological differences across individual judges. As Professor Brian Leiter observes, while some legal outcomes are indeed difficult to foresee, judicial decision-making is often predictable in ways that suggest that “its determining factors [are] identifiable social forces, not opaque facts about personality.”¹⁴⁵

Woodhouse, drawing on Frank, contends that early parental rights cases can be explained by reference to McReynolds’s “values and personality,” specifically, his purported belief that children comprised a form of property.¹⁴⁶ Yet if the outcomes in *Meyer* and *Pierce* were truly the product of McReynolds’s values and personality, one would expect his traditionalist approach to parental rights to have remained confined to the cases he authored. Yet this is not how parental rights law (or parental rights politics) have unfolded.

As noted above, cases like *Michael H.* evince a traditionalist view of parental rights, and, as I discuss below, Justice Thomas defends a patriarchal view of the parent-child relationship that McReynolds undoubtedly would have endorsed. This suggests that traditionalist-authoritarian views of parental rights do not arise solely from a justice’s idiosyncratic personal beliefs. Rather, there must be some social and political forces that influence justices across time to adopt a traditionalist authoritarian model of the family. In fact, Woodhouse herself acknowledges that “we live in a time that no longer formalizes ownership of human beings” and in a culture which finds shocking the idea of a property right in children.¹⁴⁷ If the public—including judges—now widely rejects the idea of children as property, then some other,

¹⁴¹ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925).

¹⁴² See Steven J. Macias, *The Huck Finn Syndrome in History and Theory: The Origins of Family Privacy*, 12 J.L. & FAM. STUD. 87, 116 (2010) (describing McReynolds’s belief that “patriarchal control was essential for every family to be successful”).

¹⁴³ JEROME FRANK, *LAW AND THE MODERN MIND* 111 (1930).

¹⁴⁴ For a description of the “idiosyncratic wing” of legal realism, see Leiter, *supra* note 67, at 1975, 1979.

¹⁴⁵ See Leiter, *supra* note 61, at 54.

¹⁴⁶ See Woodhouse, *supra* note 126, at 1069.

¹⁴⁷ *Id.* at 1041.

non-idiosyncratic causal mechanism must account for the persistence of traditionalist parental rights adjudication.

Given that McReynolds did not in fact believe that children were property, what, then, explains his authorship of cases like *Meyer*? The solution to the puzzle of McReynolds is both simpler and more complex than the children-as-property theory would suggest. It is simpler in that McReynolds was, by all accounts, a thoroughly reactionary figure who believed deeply in the existence and preservation of what he saw as natural hierarchies of race, class, and gender.¹⁴⁸ The family, headed by a male breadwinner, was another natural hierarchy that, in McReynolds's view, was best left undisturbed.¹⁴⁹ His parental rights jurisprudence is thus best seen as of a piece with the Court's *Lochner*-era decisions denying the state the authority and power to intervene in economic or social life.¹⁵⁰ Permitting the state to redistribute property, regulate the economy, or intervene in the school system or the home in the name of fostering equality in social and political life ran precisely counter to McReynolds's entire worldview, and he issued legal rulings accordingly.

The more complex aspect of the solution lies in identifying how McReynolds's worldview coalesced into a coherent political and legal framework, one that has persisted through time and is independent of any individual justice's idiosyncrasies. Here, the political science literature on family politics from Part II.B. helps illuminate the mechanisms underlying parental rights adjudication. This literature shows that political parties compete for voters by adopting family models that draw upon regional and religious family cultures, combining "elements of state, economy, society, race, and gender . . . into apparently coherent political positions."¹⁵¹ In other words, political parties continuously adapt disparate ideals and values into roughly unified party platforms.

My realist explanation for McReynolds's parental rights jurisprudence, then, is that his view of the family was shaped by two forces: first, the Southern culture in which he grew up—often described as "aristocratic, patriarchal, and sympathetic to the Confederacy"—and second, the Southern Democratic party of the nineteenth century, which was deeply opposed to state intervention in economic and social life. While biographies of McReynolds have tended to emphasize his deep personal belief in traditional social hierarchies, less attention has been paid to the fact that McReynolds ran for Congress in 1896 as a Gold Democrat, a race he entered purely out of personal principle.¹⁵² The Gold Democrats, a long-forgotten splinter faction that arose

¹⁴⁸ See Macias, *supra* note 142, at 115 (describing McReynolds's "hierarchical view of social relations").

¹⁴⁹ *Id.* at 116.

¹⁵⁰ See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

¹⁵¹ See ALPHONSO, *supra* note 99, at 14.

¹⁵² STEPHEN TYREE EARLY, JAMES CLARK McREYNOLDS AND THE JUDICIAL PROCESS 65 (1954) ("[McReynolds'] entry into the race was the result of personal conviction, undertaken, as he explained, in order that the principles of 'the faithful and true Democrats

amid a controversy over the gold standard, were united primarily by their support for a minimalist government. The government, in their view, should be limited to enforcing contracts and protecting property rights. The Gold Democrats' party platform declared that they "profoundly disbelieved in the ability of government, through paternal legislation or supervision, to increase the happiness of the nation" and "opposed . . . all attempts to insure comfort in the homes of its citizens."¹⁵³ The National Democratic Party platform, in other words, provided a framework through which McReynolds's preexisting beliefs in hierarchy and tradition, and the state's lack of legitimate authority to disrupt either, could be translated into a coherent political orientation.

2. *Justice Thomas*

One criticism of Woodhouse's children-as-property framework was that while, as Woodhouse acknowledges, the belief that children are property is now widely rejected, traditionalist-authoritarian approaches to parental rights remain. I put forward two causal mechanisms that can explain this approach to parental rights: regional and religious cultures, through which individuals come to adopt a certain model of the family; and political party formation, which translates these family models into roughly coherent political frameworks. If this explanation is correct, then we should be able to explain the normative values underlying parental rights adjudication across time.

Justice Thomas provides an instructive example of how these two causal mechanisms continue to influence adjudication in parental rights cases. In many ways, Justice Thomas's upbringing and worldview are the polar opposite of those of Justice McReynolds. Thomas has written and spoken extensively about growing up in poverty in the segregated South and about the crushing experience of life at the bottom of the very hierarchies of race and class that McReynolds was born atop and sought to preserve.¹⁵⁴ Moreover, unlike McReynolds, the Confederate sympathizer, Thomas has written poignantly about the cruelty of slavery and the dignity of the enslaved.¹⁵⁵ While property rights in persons remained within living memory for those of McReynolds's generation, Thomas's ancestors were among the enslaved. It is therefore implausible to suppose Justice Thomas would entertain the notion of property

of the United States shall not be ruthlessly surrendered, nor the people be deprived of an opportunity to vote for candidates in accord therewith."').

¹⁵³ *Id.* at 62.

¹⁵⁴ CLARENCE THOMAS, MY GRANDFATHER'S SON 6, 8 (2007) (describing living in "rural poverty" and then "the foulest of urban squalor," in addition to "hunger without the prospect of eating, cold without the prospect of warmth").

¹⁵⁵ See *Obergefell v. Hodges*, 576 U.S. 644, 735 (2015) (Thomas, J., dissenting) ("Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved.").

rights in human beings, let alone children. In fact, his jurisprudence explicitly rejects the idea that children are mere property.¹⁵⁶

And yet, there is a surprising amount of overlap between McReynolds's approach to parental rights and that of Thomas. Thomas has repeatedly defended a strikingly authoritarian vision of parental authority over the child. While these cases primarily concern the rights of minor students in public schools, what makes them indicative of Thomas's conception of the family is that Thomas believes that public schools operate according to the common law doctrine of *in loco parentis*, through which teachers exercise within the classroom the authority that parents traditionally possess over children within the home. To be sure, legal historians have pointed out that Thomas's application of *in loco parentis* to public schools is historically inaccurate.¹⁵⁷ But for present purposes, the point is not to endorse or reject Thomas's understanding of the doctrine, but rather to demonstrate how it indirectly reveals his traditionalist-authoritarian conception of parental authority and of the family.

Thomas's view of educational authority, and by extension, of parental authority, is thoroughly authoritarian. Moreover, his purportedly originalist interpretations of historical sources are incomplete and inaccurate in ways that are best explained by his adherence to traditionalist-authoritarian family values. Consider, for example, his description of the doctrine of *in loco parentis*, which "limited the ability of schools to set rules and control their classrooms in almost no way."¹⁵⁸ According to Thomas, public school teachers, like parents, possess "total control" to "command obedience" from their children.¹⁵⁹ Throughout his public school jurisprudence, Thomas repeatedly emphasizes the "strict discipline," "self-control," and "absolute obedience" that purportedly characterized nineteenth century classrooms.¹⁶⁰ As he depicts the atmosphere of early public schools, "[t]eachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order."¹⁶¹

In terms of substantive rights, Thomas's view is that children have relatively few. Minor children have no First Amendment rights of expression in public schools, according to Thomas, nor First Amendment rights to receive information from anyone other than their parents.¹⁶² Nor do minor

¹⁵⁶ See *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 826 (2011) (Thomas, J., dissenting) ("[C]hildhood came to be seen as an important period of growth, development, and preparation for adulthood.").

¹⁵⁷ See generally David Blacker, *An Unreasonable Argument Against Student Free Speech*, 59 EDUC. THEORY 123 (2009) (demonstrating that Thomas's historical analysis of *in loco parentis* is dubious).

¹⁵⁸ *Morse v. Frederick*, 551 U.S. 393, 416 (2007) (Thomas, J., concurring).

¹⁵⁹ *Id.* at 413 (citing *State v. Pendergrass*, 19 N.C. 365, 365–66 (1837)).

¹⁶⁰ *Id.* at 411–12.

¹⁶¹ *Id.* at 412.

¹⁶² *Id.* at 410–11; see also *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 821 (2011) (Thomas, J., dissenting) (arguing that "[t]he practices and beliefs of the founding generation establish that 'the freedom of speech,' as originally understood, does not include a right to

children have rights to be free from strip searches in public schools, even for minor infractions.¹⁶³ As Thomas makes clear across his public school jurisprudence, children have few rights either in public schools or in the private home. Children's rights, for Thomas, are based on the "societal understanding of superior and inferior" whatever rights of expression or privacy that the child may be thought to possess are subordinated to the "overall dominance" of the parent.¹⁶⁴

Many legal scholars and historians have demonstrated that Thomas's historical arguments are inconsistent and ahistorical.¹⁶⁵ Yet rather than restate these critiques, I want to emphasize something more specific: in his parental-authority jurisprudence Thomas's historical analysis is informed not by originalist principles but by a traditionalist-authoritarian model of the family. Consider first Thomas's depiction of parental authority, which is not simply authoritarian but also explicitly gendered. His understanding of parental rights centers on the distinctly male prerogative of the "father, as the head of the household with the responsibility and the authority for the discipline, training and control of his children."¹⁶⁶ Indeed, the gendered nature of Thomas's conception of parental authority takes precedence over his adherence to originalist principles of interpretation.

For example, in *Brown v. Entertainment Merchants Association*, a case in which Thomas rejects the proposition that minor children possess First Amendment rights to receive information, he begins his historical analysis by noting that "[a]ttitudes toward children were in a state of transition around the time that the States ratified the Bill of Rights" and that his analysis must therefore "begin . . . in colonial New England."¹⁶⁷ Thomas's argument—that because Founding-era views of the family were in a state of transition it is necessary to consider the practices of Puritan communities—is a pure non-sequitur. He offers no argument for why constitutional interpretation should draw on the practices of a small religious community that predated the drafting and ratification of the Constitution by a century. It is also a highly damaging admission. That Founding-era views of the family were in flux undermines

speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians").

¹⁶³ *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 391 (2009) (Thomas, J., concurring in the judgement in part and dissenting in part) (comparing school searches to police searches and noting that "[t]he Fourth Amendment rule for searches is the same: Police officers are entitled to search regardless of the perceived triviality of the underlying law").

¹⁶⁴ *Id.* at 399–400 (citing *Georgia v. Randolph*, 547 U.S. 103, 114 (2006); 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §8.4(b), at 202 (4th ed. 2004)).

¹⁶⁵ See, e.g., William Nevin, *In the Weeds with Thomas: Morse, in Loco Parentis, Corporal Punishment, and the Narrowest View of Student Speech Rights*, 2 BYU EDUC. & L.J. 249 (2014).

¹⁶⁶ *Safford Unified Sch. Dist. #1*, 557 U.S. at 400 (Thomas, J., concurring in the judgement in part and dissenting in part) (citing LAFAVE, *supra* note 164, at 160).

¹⁶⁷ *Brown*, 564 U.S. at 823 (Thomas, J., dissenting).

the originalist attempt to draw firm conclusions from such views and would seem to suggest that legal constructions of the family should similarly evolve. Moreover, Thomas curiously demurs from describing *how* Founding-era views of the family were evolving, likely because they were evolving *away* from the patriarchal Puritans he cites with approval.

As Thomas describes the traditional Puritan family, “fathers ruled families with absolute authority.”¹⁶⁸ Children, in this tradition, were thought to be “not . . . fit to govern themselves,” and thus it was “[p]art of the father’s absolute power” to control a child’s education and a father’s duty to “suppress their child[]’s natural depravity.”¹⁶⁹ Thomas acknowledges that by the Founding era, “attitudes towards children changed,” and he cites Locke and Rousseau, whose views of early child education were highly influential to the Founding generation.¹⁷⁰ Yet despite having traversed several hundred years’ worth of philosophical reflection on democracy, authority, reason, and childrearing, Thomas simply concludes that “the same overarching principles remained,” namely, that “total parental control over children’s lives extended into the schools.”¹⁷¹ For all of its historical trappings his argument essentially ends where it began, with the Puritan patriarchs of New England.

Thomas’s adherence to the traditionalist-authoritarian family model plainly drives his historical analysis, which is riddled with omission and distortion. His reliance on Locke is especially instructive. Whereas Thomas portrays children as naturally depraved and incapable of self-governance, Locke argued that “children are to be treated as rational creatures,” for even the very young “love to be treated as rational creatures sooner than is imagined.”¹⁷² Thomas depicts childhood as a period of absolute submission to parental and public authority, yet Locke cautioned that “slavish discipline makes a slavish temper,” warned against punishment, and urged parents to ensure that their “rules . . . be as few as is possible, and rather fewer than more than seem absolutely necessary.”¹⁷³ And while Thomas describes the parent-child relationship as one of “superior and inferior,” Locke advised parents to “talk familiarly” with their children and to even seek their advice “about those things wherein [they have] any knowledge or understanding,” as this would lead to parent and child relating as friends.¹⁷⁴

Perhaps the most telling omission in Thomas’s analysis appears where he notes that Locke “articulated a new basis” for parental authority but declines

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 824.

¹⁷¹ *Id.* at 830.

¹⁷² JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION AND OF THE CONDUCT OF THE UNDERSTANDING 32, 35, 58 (Ruth W. Grant & Nathan Tarcov eds., Hackett Publishing Co., Inc. 1996) (1693). To be sure, Locke defended some physical punishments; yet, he generally advised against them and believed that “great severity of punishment does but very little good” and caused “great harm in the classroom.” *Id.* at 32.

¹⁷³ *Id.* at 34, 40.

¹⁷⁴ *Id.* at 72.

to identify what this new basis was.¹⁷⁵ Locke viewed education as a means for developing a child's rational faculties.¹⁷⁶ It was this principle, perhaps more than any other, that shaped early American views of childrearing and education. As historians of education have observed, "for many early Americans, the notion that education was the simple inculcation of values through obedience to authority was no longer tenable."¹⁷⁷ Since public authority was grounded in the rational autonomy of each individual, children required a moral education in the "principles of republican liberty and order and in the responsible individual exercise of their rights and responsibilities."¹⁷⁸ Though some early Americans undoubtedly embraced the old ways, Thomas's claim that Founding-era family values mirrored those of the Puritans is one-sided at best. But it is indicative of his interpretive methodology across parental rights cases, which is to selectively highlight authoritarian family traditions while ignoring and refusing to grapple with democratic ones.

Why does Thomas cite only the most authoritarian historical family practices? Thomas has repeatedly discussed his southern upbringing under a stern, physically punitive grandfather who commanded obedience, and he has suggested that the paternal discipline of the private home requires an analogue in the public sphere.¹⁷⁹ It is hardly an interpretive leap to suggest that the strict discipline so formative in Thomas's early life left a deep mark upon his parental rights jurisprudence.

At the same time, Thomas's upbringing is not sufficient to explain his political orientation, for it was only after he began to engage with party politics that his personal worldview could be structured into a coherent political framework. Just as the Gold Democrats of the 1890s provided this framework for Justice McReynolds, it was the Republican Party of the 1970s and 1980s that provided this political framework for Justice Thomas. As political scientist Jeffrey Dudas observes, by the time Thomas came to identify as a Republican, the "intellectual deans of the conservative movement" had begun to "locate national decay in faulty domestic and, especially, family structures."¹⁸⁰ In their view, a lack of "stern paternal authority" within the home was "leading to the production of undisciplined, deviant citizens," especially deviant youth.¹⁸¹ The conservative policy response was to call for discipline to be imposed upon a wayward public, which required cutting government benefits, enacting "tough on crime" policies, and ultimately replacing the missing paternal authority of the home with that of the state.¹⁸² As Dudas points out, such policies and

¹⁷⁵ *Brown*, 564 U.S. at 825 (Thomas, J., dissenting).

¹⁷⁶ See LOCKE, *supra* note 172, at 58.

¹⁷⁷ Bryan Warnick, Bradley Rowe & Sang Hyun Kim, *Student Rights, Clarence Thomas, and the Revolutionary Vision of Education*, 59 EDUC. THEORY 145, 153 (2009).

¹⁷⁸ *Id.* at 159.

¹⁷⁹ See THOMAS, *supra* note 154, at 12.

¹⁸⁰ Jeffrey R. Dudas, *All the Rage: Clarence Thomas, Paternal Authority, and Conservative Desire*, 12 CULTURE & HUMAN. 1, 79 (2016).

¹⁸¹ *Id.* at 74, 79.

¹⁸² *Id.* at 79.

rhetoric deeply appealed to Thomas, a self-described “strict law and order man.”¹⁸³

Ultimately, the parental rights jurisprudence of McReynolds and Thomas cannot be fully explained by recourse to legal precedent or historical sources alone. In McReynolds’s case, there simply was little parental rights precedent upon which to draw, and thus he effectively had free reign to craft doctrine according to his own vision of the family. But even attentiveness to history and precedent may do little to restrain adjudication, as Thomas’s example shows. Despite a wealth of historical evidence and legal precedents supporting a more pluralistic and egalitarian view of the family, Thomas’s parental authority jurisprudence is no less traditionalist and authoritarian than McReynolds’s. For both justices, the best explanation of their parental rights adjudication is that they adhere to a particular model of the family rooted in the culture and politics of their respective times.

III. RESPONDING TO PARENTAL RIGHTS POLITICS

In light of the contemporary parental rights political landscape described in Part I, it is incumbent upon legal scholars and legal activists, particularly those defending pluralist-egalitarian principles, to find ways to effectively interpret and engage with parental rights arguments. As I argued in Part II, parental rights law is often indeterminate and shaped less by doctrine than by a justice’s underlying conception of the family. How, then, should legal scholars engage with parental rights politics? In this Part, I argue that a realist account of parental rights points toward a strategy for defending a broadly pluralist-egalitarian approach to parental rights issues. The position I advance, which I call “progressive traditionalism,” is intended to address both parental rights political rhetoric and legal claims. It is not, strictly speaking, a doctrinal constitutional argument, but rather a framework for crafting such arguments and for addressing parental rights issues in public debate.

To demonstrate why such a framework is necessary, I will first briefly discuss some recent proposals concerning parental rights politics. While each offers valuable insights, a realist account of parental rights will also help illuminate their limitations. For example, as discussed in Part I, one influential approach is the theory of “retrenchment by diversion.”¹⁸⁴ One of the key points of this view is that it purports to offer criteria for distinguishing between legitimate and illegitimate usages of parental rights. Illegitimate usages of parental rights doctrine, the argument runs, are not really about pluralism or the family and can thus be dismissed, in public discourse and in court, as pretextual.¹⁸⁵

To be clear, legal arguments raising an inference of pretext ought to be made when there is evidence that the state is acting for constitutionally illicit

¹⁸³ *Id.* at 71.

¹⁸⁴ See Ziegler, Eichner & Cahn, *supra* note 6, at 675.

¹⁸⁵ *Id.* at 711.

reasons, and in public and academic writing I have made such arguments.¹⁸⁶ Yet I am skeptical that such arguments are sufficient to diagnose or productively engage with contemporary parental rights politics. As the political science literature surveyed in Part II.B. indicates, conservative parental rights political movements are not appealing to parental authority and the family merely as pretext; rather, these appeals are based on a traditionalist-authoritarian view of the family and of parental authority—a view that appeals to many Americans, to greater or lesser degrees. This is a sincerely held conception of the family, even if it is one that pluralist-egalitarians reject.

Before dismissing this type of family discourse as inherently pretextual, it is worth considering *why* this model of the family appeals to some. Part of the explanation is surely that, over the course of the twentieth century, marriage norms underwent a tremendous and rapid transformation.¹⁸⁷ Four factors in particular characterized this transformation: “decline in married-couple families, marital instability, shifting gender roles, and extramarital childbearing.”¹⁸⁸ While this transformation occurred nationwide, the economic and social effects of these shifts have been felt differently in different parts of the country.

As sociologist W. Bradford Wilcox has argued, support for traditionalist-authoritarian views of the family has both class-based and regional underpinnings. The rise of divorce and nonmarital childbearing within evangelical Protestant communities since the 1960s has had markedly different effects than in many other parts of the country, in part because “evangelical Protestants were more southern and working class than the nation as whole,” with substantially lower rates of educational attainment.¹⁸⁹ These changes in marital norms coincided with a dramatic increase in economic inequality, which particularly impacted individuals without a college degree.¹⁹⁰ Carbone and Cahn likewise observe that regions of the country where pluralist-egalitarian views of the family predominate have grown wealthier, whereas regions where traditionalist-authoritarian views of the family prevail have become economically and socially marginal. As they perceptively point out, “the conflict between [these two models] is, at its core, a disagreement on

¹⁸⁶ See Serafin, *supra* note 5, at 447–48.

¹⁸⁷ See CAHN & CARBONE, *supra* note 14, at 31 (“Family life has changed in the United States, it has changed unevenly across the country, and it is a major factor determining the life chances of the next generation.”).

¹⁸⁸ *Id.* at 133.

¹⁸⁹ W. Bradford Wilcox, *How Focused on the Family? Evangelical Protestants, the Family, and Sexuality*, in *EVANGELICALS AND DEMOCRACY IN AMERICA, RELIGION AND SOCIETY* 251, 256 (Steven G. Brint & Jean Reith Schroedel eds., 2009).

¹⁹⁰ See CAHN & CARBONE, *supra* note 14, at 74 (noting that “blue regions of the country, such as the Northeast and the West Coast, have over the last half-century become wealthier, more Democratic, more committed to a later age at family formation, and more tolerant of different family forms” whereas “red states, as they have lost ground economically and socially, have become more Republican, more committed to traditionalist values, and more troubled by divorce and teen and nonmarital births”).

how to rebuild family support on terms that can be applied to the nation as a whole.”¹⁹¹

To be sure, acknowledging that cultural upheaval and material inequality help explain the appeal of traditionalist-authoritarian conceptions of the family does not mean that pluralist-egalitarians should embrace traditionalist-authoritarian policy prescriptions. Some advocates of traditionalism advance empirically contested claims about the link between marriage and economic advancement or support policies of marriage promotion that have proven ineffective.¹⁹² Other traditionalist proposals, such as limiting access to divorce or denying legal status to nontraditional families, ought to be rejected because they violate egalitarian values. Pluralist-egalitarians can (and should) advocate for greater economic support for parents and children without privileging a particular familial ideal. As sociologist Philip Cohen argues, pluralist-egalitarians can advocate for greater material support for families while rejecting the idea that we must “build our social welfare system around the assumption that everyone does or should get married if they or their children want to be adequately cared for.”¹⁹³

At the same time, pluralist-egalitarians should not simply dismiss traditionalist concerns about the family as pretextual. While traditionalist policy proposals often do little to ameliorate material inequality, they speak to many voters’ anxieties about the real and dramatic decline in marital stability that has taken place over the last half century, particularly among those at the lower end of the socioeconomic spectrum.¹⁹⁴ In light of this reality, the claim that traditionalist policy proposals are not “really” about the family may appear not only mistaken but condescending to individuals who have witnessed firsthand the deleterious effects of widespread family instability within their communities.

Rather than dismiss traditionalist parental rights politics as pretextual, pluralist-egalitarians should consider how to engage individuals who share certain traditionalist concerns yet do not support traditionalist policies across the board. They should also take into account the fact that pluralist-egalitarian values can be defended in different ways, and some articulations of pluralism may be compelling only to those who already inhabit a secular worldview or enjoy sufficient economic stability to mitigate the financial risks of divorce and nonmarital childbirth.¹⁹⁵ Again, my point is not that pluralists should abandon their values or their policy proposals but that they should articulate them in ways that acknowledge, rather than dismiss, traditionalist concerns

¹⁹¹ *Id.*

¹⁹² PHILIP N. COHEN, *ENDURING BONDS* 75 (2018) (reviewing claims that marriage reduces family poverty and demonstrating that “poverty is reduced by income” and of marriage, employment, and education, “marriage has the least direct effect on income”).

¹⁹³ *Id.* at 98.

¹⁹⁴ See Wilcox, *supra* note 189, at 255 (describing “evangelical Protestant leaders” as “deeply concerned about the manifestations of” the decline of marital norms “in their own lives, the lives of friends and family, and their congregations and communities”).

¹⁹⁵ See *id.* at 256.

about familial and marital stability. In the following Parts, I examine several recent proposals concerning how pluralist-egalitarians might defend their values in a legal environment soon to be dominated by traditionalists, and then I offer my own.

A. *Pragmatic Parental Autonomy*

In her recent article *Due Care in a Conservative Court*, Professor Hila Keren defends an approach to parental rights politics that I will refer to as “pragmatic parental autonomy.”¹⁹⁶ Keren focuses on the Court’s recent decision to review the Sixth Circuit case *L.W. v. Skrmetti*, which affirmed the constitutionality of state bans of puberty blockers and hormone therapy for transgender youth.¹⁹⁷ The Sixth Circuit majority addressed both an Equal Protection sex discrimination challenge to the bans and a Substantive Due Process parental rights challenge, ultimately finding that the bans violated neither.¹⁹⁸ The Supreme Court, however, agreed only to review the Equal Protection challenge,¹⁹⁹ thus forgoing the opportunity to assess the parental rights arguments raised by the parents of transgender children seeking medical care. Keren maintains that this omission is a mistake and contends that taking up these claims “is necessary *and* could change the result of the litigation.”²⁰⁰

Although Keren’s article appeared before the Court’s decision in *Skrmetti*, her arguments are worth considering for the parental rights legal challenges that are likely to arise in *Skrmetti*’s wake. Keren’s starting point is pragmatic: while she believes the treatment bans are discriminatory, she is attempting to identify arguments against such bans that might appeal to conservative judges unlikely to be persuaded by Equal Protection claims.²⁰¹ As she points out, some conservative judges have been disturbed by the bans’ expansion of state authority over the parent-child relationship;²⁰² indeed, some have even dissented from upholding bans partly on the ground that allowing the state to encroach on parental autonomy could ultimately threaten policies that conservatives traditionally support, such as homeschooling.²⁰³ Keren thus urges liberal critics of the bans to exploit the tensions she perceives between

¹⁹⁶ See Hila Keren, *Due Care in a Conservative Court*, 2025 WIS. L. REV. 1, 1.

¹⁹⁷ See *id.* at 4.

¹⁹⁸ See generally *Williams v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023) (including the opinion).

¹⁹⁹ See generally *United States v. Skrmetti*, 145 S. Ct. 1816 (2025) (including the Court’s analysis).

²⁰⁰ Keren, *supra* note 196, at 12.

²⁰¹ *Id.* at 10 (“By uniquely examining the issue from a conservative perspective, this Article aspires to convince enough conservative Justices that the treatment bans are unconstitutional for reasons independent of their discriminatory intent and content.”).

²⁰² *Id.* at 45–49 (discussing examples of “conservative qualms centered on the bans’ rare level of intervention in parental rights . . . within the judiciary”).

²⁰³ *Id.* at 48 (noting that one judge “even hinted at which conservative interests might be at risk when all parental rights are weakened”).

“neoliberal” conservatives, who are generally resistant to expansive claims of state authority and government regulation, and traditionalist religious conservatives, who are generally more amenable to using state authority to promote or enforce traditional views of gender and marriage.²⁰⁴

Keren identifies several other points of tension between neoliberal and religious conservatives that liberal proponents of transgender care might exploit. She argues, for example, that while neoliberal conservatives generally champion deregulation, “to affirm the treatment bans promoting traditionalist morality, a goal of religious conservatism, the Court would have to *undermine* the [neoliberal] deregulatory project”²⁰⁵ Similarly, traditionalist conservative activist groups have decried transgender medical care as a money-driven amalgam of “Big Pharma, a vulnerable patient population, and physicians misled by medical organizations or tempted by wealth and prestige.”²⁰⁶ As Keren points out, however, this anti-capitalist rhetoric stands at odds with the neoliberal “belief in the power of a free and competitive market.”²⁰⁷ In light of these and other tensions, Keren argues, liberal proponents of transgender care may be able to persuade conservative judges who are more sympathetic to economic deregulation than to traditionalism to strike down state bans.²⁰⁸

While I agree that pluralist-egalitarians might find some traction by highlighting the intrusive nature of these state bans, this strategy also contains several shortcomings that must be acknowledged. First, as Keren herself points out, conservative judges who voice reservations about state bans on transgender care “are not dominant in a movement that is highly committed to opposing anything related to gender identity.”²⁰⁹ Similar to earlier traditionalist movements discussed in Part II, conservative political organizations, influential conservative legal thinkers, and some—perhaps even a majority—of the current Supreme Court embrace a form of traditionalism that is entirely comfortable using the machinery of state to enforce traditionalist principles.²¹⁰ I am thus wary of Keren’s insistence that the Supreme Court take up the parental rights argument, especially since the downside risk involves abrogating the rights of parents of transgender youth as a matter of Supreme Court precedent.

²⁰⁴ *Id.* at 77 (“[S]hifting the focus from equal rights to government intrusion into the private sphere could and should provoke more conservative skepticism of the treatment bans. This section turns to explaining why such a shift is indispensable to avoiding severe injustice.”).

²⁰⁵ *Id.* at 69.

²⁰⁶ *Id.* at 76 (quoting Brief Amicus Curiae of Public Advocates of the United States et al. in Support of Defendants-Appellants & Reversal at 24, *Brandt v. Griffin*, 47 F.4th 661 (8th Cir. 2022) (No. 23-2681)).

²⁰⁷ *See id.* at 74–75.

²⁰⁸ *Id.* at 82 (“[S]ome conservatives on the Court could and should—according to *their* jurisprudence—be more willing to rise above partisanship and join their liberal colleagues in invalidating the bans” (emphasis in original)).

²⁰⁹ *Id.* at 52.

²¹⁰ *See supra* Part II; *see also* Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/> [<https://perma.cc/MRP8-JCW9>] (“[T]he promotion of [traditionalist] morality is a core and legitimate function of authority.”).

The problem is that while the tensions between neoliberal and traditionalist conservatives that Keren identifies are real, they may be insufficient to change the views of a majority of the Court regarding transgender youth medical care, or the views of many right-leaning judges more generally. Consider, for instance, that many of the tensions that Keren sees in the neoliberal-traditionalist alliance are also present in the movement to restrict access to abortion. While neoliberal conservatives may oppose state regulation in the abstract, judicial opponents of abortion show no discomfort with sweeping and invasive state regulation of women's health. Similarly, while neoliberal conservatives generally oppose state regulatory authority and centralized expertise, conservative legal activists see no inconsistency in citing FDA expertise and FDA data to support their attempts to ban or limit access to mifepristone.²¹¹

My conclusion is not that pragmatic parental autonomy should be rejected, but that we must be clear-eyed about where it is likely to be most effective. Again, in light of the predominance of traditionalism in the contemporary conservative legal movement, I do not expect the strategy to succeed at the federal level, particularly as more federal judges appointed by President Trump take office. Avoiding asserting parental rights claims in federal litigation or resolving parental rights cases before they rise further in the federal appellate system might be the more prudent strategy. Pragmatic parental autonomy may instead find greater success at the state level, especially amid the recent movement among Democratic-led states to protect the rights of parents of LGBTQ+ youth. Given the likelihood of increased federal intervention in the parent-child relationship, state judges and state lawmakers may be more amenable to protecting parental autonomy from state overreach.

B. *Changing the Subject*

In their 2010 book *Red Families v. Blue Families: Legal Polarization and the Creation of Culture*, Professors June Carbone and Naomi Cahn offer several proposals for defusing the conflict between what I have been calling traditionalist-authoritarian and pluralist-egalitarian models of family. Carbone and Cahn are critical of traditionalist approaches to family regulation, which tend to be either ineffective in increasing marital stability or incompatible with egalitarian views of gender and sexuality.²¹² At the same time, they take seriously the concerns of traditionalist communities unsettled by the decline of traditional marriages and the rise in nonmarital childbirth, and they dissent from pluralist family discourse that pays insufficient attention to the value of

²¹¹ *Missouri v. U.S. Food & Drug Admin.*, No. 2:22-CV-223-Z, 2025 WL 2825980, at *1 (N.D. Tex. Sep. 30, 2025).

²¹² See CAHN & CARBONE, *supra* note 14, at 7 (discussing “abstinence-only efforts, which have proven to be ineffective or counterproductive”).

familial stability.²¹³ Carbone and Cahn also point out that pluralist-egalitarian values may not fully translate across communities separated by substantial economic and cultural gulfs.²¹⁴

While Carbone and Cahn's work is much richer than I can capture here, their proposals for defusing the conflict between competing family models can be divided roughly into two categories. The first involves identifying and building upon "potential overlap" between traditionalist-authoritarian and pluralist-egalitarian family models.²¹⁵ Despite their many real disagreements, both sides share "an appreciation of the value and fragility of commitment" and a desire to enact social policies that promote familial stability.²¹⁶ Carbone and Cahn point out that, despite much heated and polarizing rhetoric, the causal factors undermining communal norms regarding marriage and child-birth are largely structural and economic rather than ideological.²¹⁷ Promoting family stability and reducing nonmarital childbirths thus requires economic and political interventions—such as widespread access to contraception, comprehensive healthcare reform to cover fertility care, and a reconsideration of the relationship between work, education, and family formation.²¹⁸

Carbone and Cahn describe the second part of their approach as "changing the subject."²¹⁹ This strategy involves shifting political debate away from highly divisive issues, such as gay rights and abortion, and toward less polarizing topics that more directly promote familial stability, such as child-friendly workplace policies and access to contraception.²²⁰ "Changing the subject" also means settling polarized debates not at the national level but through local institutions, such as state courts.

As Carbone and Cahn observe, "[f]amily law decision making has traditionally belonged to the states," under the theory that state governments "can draw more effectively . . . on shared values to reshape community norms."²²¹ They urge lawmakers to "rediscover the ideal of more localized family law, and to embrace the shift in emphasis a federal system might facilitate."²²² Permitting regional variation in family law and policy that is reflective of local norms will encourage local institutions to craft family-friendly policies aligned with the community values, thereby avoiding or softening ideological conflict.

²¹³ *Id.* at 159 ("The blue family paradigm, with its emphasis on autonomy and equality, has given less voice to the need for stability (perhaps because of a recognition that the promotion of stability has often stood in the way of modernizing the institution).").

²¹⁴ *Id.* at 1 ("[T]he ability to realize the advantages of the new blue family system appears to be very much a class-based affair.").

²¹⁵ *Id.* at 157.

²¹⁶ *Id.*

²¹⁷ *Id.* at 9 ("The changing family is part of a long-term restructuring of the interaction between work and family.").

²¹⁸ *Id.* at 208 (declining "high-profile ideological fights" in favor of "focus[ing] on the pressure points that change family dynamics").

²¹⁹ *Id.* at 7.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

As I discuss in the following Part, I share with Carbone and Cahn the goal of finding areas in which pluralist and traditionalist family models overlap. Yet the second part of their strategy—changing the subject—warrants revisiting in light of several developments that have taken place since their work was first published in 2010. In that time, marital and gender norms have become even more contested, largely due to two related developments: the post-*Obergefell* backlash against transgender and queer individuals, especially youth, and the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization* to overturn *Roe v. Wade*.²²³ Both have dramatically thrust gender and family back onto the national public stage, making “changing the subject” on these issues seem less plausible as a path going forward. This is especially true given that while laws regulating transgender identity and abortion are now primarily a matter of individual states, federalism has not defused these conflicts; if anything, it has exacerbated them.

The problem is that both issues inevitably cross state lines in ways that intensify partisan divisions. Many traditionalists in conservative states who oppose abortion, for example, will never be satisfied with abortion policies that allow women to cross state lines or obtain abortion medication by mail, and thus they are seeking to limit the reach of blue-state policies.²²⁴ Similarly, whereas Carbone and Cahn cite custody disputes involving gay parents as an area where state courts might craft local remedies that foster compromise, custody disputes involving parents of transgender youth who are split between liberal and conservative states have become a site of partisan conflict.²²⁵ On both issues, state legislators are incentivized not only to respond to local values, but also to affirmatively reject those of neighboring states and to prevent or discourage their own citizens from crossing state lines. In other words, although federalism permits local variation, it does not appear to reliably mitigate national polarization.

Another related problem stems from the nationalization of American politics. As political scientist Daniel J. Hopkins shows, American political discourse and media coverage over the last century has become increasingly nationalized, in that voters “today are markedly more engaged with national and above all presidential politics than with state or local politics.”²²⁶ Two consequences of this trend are particularly noteworthy. First, there is now far less diversity among state-level political parties, which tend to follow the

²²³ 142 S. Ct. 2228 (2022).

²²⁴ See, e.g., Caroline Kitchener, *Antiabortion Groups Plan New Crackdowns, Emboldened After Election*, WASH. POST (Nov. 20, 2024), <https://www.washingtonpost.com/politics/2024/11/20/antiabortion-crack-down-pills/> [<https://perma.cc/V4BM-CSG2>].

²²⁵ Karen Brooks Harper, *His Public Custody Battle Helped Ignite a Movement Against Transgender Health Care for Kids. Will It Carry Him to the Texas House?*, TEX. PUB. RADIO (Mar. 14, 2022, at 09:42 CT), <https://www.tpr.org/texas/2022-03-14/his-public-custody-battle-helped-ignite-a-movement-against-transgender-health-care-for-kids-will-it-carry-him-to-the-texas-house> [<https://perma.cc/62R7-7385>].

²²⁶ DANIEL J. HOPKINS, *THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED* 86 (2018).

lead of their national counterparts.²²⁷ Second, because nationalized politics must appeal broadly, national political discourse often revolves around “symbolic issues imbued with meaning for the status of different social groups.”²²⁸ National political discourse, in other words, tends to command attention because it more often draws on “evocative symbols” that emphasize “identity, attachments, emotions, and narratives,” rather than material or local concerns.²²⁹

The recent campaign to stigmatize LGBTQ+ youth provides a telling example of how the political discourse surrounding gender identity has become both nationalized and more polarized. As I have discussed in previous work, hundreds of state laws targeting LGBTQ+ youth have been proposed or enacted, often with identical aims defended in similar rhetorical terms.²³⁰ At the national level, similar legislation has been proposed in Congress, and Donald Trump’s 2024 presidential campaign featured a shocking number of false and disparaging messages about transgender identity and transgender individuals.²³¹ Gender-related ideological conflict is perfectly suited for nationalization and polarization because it draws deeply on highly charged emotions and competing narratives of identity and group status.

While I am supportive of efforts to find localized solutions to debates over parental rights and youth gender identity, the two trends noted above—conflicts between states and the nationalization of local politics—are likely to persist in the near future. Consequently, any strategy for addressing parental rights politics that relies on state-level solutions to mitigate national polarization may fall short. For pluralist-egalitarians concerned about the national policy environment surrounding the family—and especially gender identity—there is little choice but to develop a moral vocabulary for defending pluralistic values at the national level in ways that do not simply reinforce existing ideological divides.

C. *Progressive Traditionalism*

Here I outline a political and legal strategy for responding to parental rights politics that I call “progressive traditionalism.” Progressive traditionalism is a discursive framework through which one can defend pluralist-egalitarian principles in terms that are respectful of traditionalist concerns.

²²⁷ *Id.* at 159 (“Far more than in the past, the state parties now shift their gaze in unison, from education to terrorism or gay marriage as national politics dictate. Both of these trends are evidence, in short, that the state parties are increasingly talking about the same issues nationwide.”).

²²⁸ *Id.* at 6.

²²⁹ *Id.* at 299 (“Nationalization is also likely to affect the types of issues that states address, as it advantages symbolic issues that resonate nationwide over more tangible distributive issues.”).

²³⁰ See Serafin, *supra* note 5, at 418.

²³¹ *Id.* at 420.

More specifically, a progressive-traditionalist approach aims to demonstrate that pluralist-egalitarian policies are not only compatible with but can also strengthen the institutions and social norms that traditionalists hold dear.

There are two parts to a progressive-traditionalist strategy. The first lies in *how* traditionalist concerns are addressed. As noted above, pluralists should acknowledge that some traditionalist concerns about the increasing instability and incoherence of traditional institutions such as marriage, family, and community are sincere and rooted in real social breakdown. They should also refrain from arguing that traditionalist policy proposals or legal arguments are not *really* about the family. There is more than a grain of truth in the claim that traditionalist political activists and advocacy organizations sometimes invoke parental rights to advance policies that harm minority groups, and pluralists are right to reject these policies. At the same time, however, these movements likely resonate with the traditionalist sympathies that many Americans embrace. Explaining to traditionalist communities that traditionalist policy proposals concerning gender, parental authority, or public education are not really about the family is likely to be received as out of touch with, if not disrespectful toward, traditionalist voter concerns.

The second aspect of this strategy lies in *which* moral values pluralists assert in defense of their policy objectives. Pluralists adopting a progressive-traditionalist strategy should articulate moral, political, and legal arguments that traditionalists could, in principle, support without abandoning their core values. To demonstrate how this aspect of the strategy works in practice, it is helpful to introduce some empirical work on value frames and political discourse. A rich literature on political discourse indicates that individuals often rely on conceptual associations, or “frames,” to connect their personal values to concrete policy outcomes.²³² Moreover, individuals often borrow these frames from public discourse and the surrounding media environment,²³³ suggesting that these sources may have an outsized influence over how individuals understand the political implications of their own values.

For example, as communications researcher Paul Brewer has demonstrated, during the gay marriage debates of the 1990s and early 2000s, media sources offered three predominant framing approaches: a pro-equality frame supporting gay marriage based on equal rights, an anti-equality frame opposing it as “special treatment,” and a traditionalist frame opposing it on moral grounds.²³⁴ Notably, there were no significant media frames linking traditional morality to *support* for gay marriage. Brewer’s study revealed that while politically informed individuals readily connected traditionalist

²³² Paul Brewer, *Values, Political Knowledge, and Public Opinion About Gay Rights: A Framing-Based Account*, 67 PUB. OP. Q. 173, 176 (2003) (“Recent experimental studies have shown that exposure to frames influences how citizens use values to form issue opinions . . . and explain those opinions.”).

²³³ *Id.* at 175 (“Citizens often rely on frames borrowed from public debate to draw connections between values and issues.”).

²³⁴ *Id.* at 178–80.

views with opposition to gay marriage, they were no more likely than the politically uninformed to connect equality-based arguments with support for gay rights.²³⁵ One interpretation of this finding is that competing equality frames encouraged more active public deliberation about principles and policies concerning gay rights, whereas unopposed traditionalist frames led people to view traditional morality as inherently incompatible with sexual and gender pluralism.²³⁶ In other words, because no traditionalist alternative was offered, the public was more likely to view a commitment to traditional values as ruling out support for gay rights.

Pluralists should not cede this territory so easily. As George Lakoff argued in his influential work on political framing, pluralists must learn to reclaim traditional value framings.²³⁷ With respect to gay marriage, for example, Lakoff, writing in 2004, urged pluralists to speak in traditional value terms, emphasizing the sanctity of marriage, the importance of commitment amid rising divorce rates among heterosexuals, and the dignity of gay couples seeking to join this traditional institution.²³⁸ A decade later, this rhetorical strategy would receive judicial endorsement in Justice Kennedy's majority opinion in *Obergefell v. Hodges*, where Kennedy repeatedly emphasizes the "sacred" nature of marriage and the dignity of same-sex couples seeking to join this foundational social institution.²³⁹ At times, Kennedy's opinion adopts an explicitly egalitarian framing; he does not shy away, for example, from describing the dignitary injuries that gays and lesbians have endured.²⁴⁰ Yet his opinion subtly weaves together egalitarian and traditionalist themes. The entrance of gays and lesbians into the institution of traditional marriage will not only heal the dignitary wounds wrought by exclusion, Kennedy argues, it will also strengthen ties between parent and child and between family and community.²⁴¹

To be sure, some aspects of *Obergefell*'s veneration of marriage may rankle pluralists. As Professor Melissa Murray has argued, for example, in *Obergefell* "the majority's quest to concretize marriage's dignity . . . comes at the expense of the unmarried and nonmarital relationships."²⁴² But a progressive-traditionalist argument need not imply that nonmarital relationships are somehow less worthy. Rather, it would demonstrate how

²³⁵ *Id.* at 192.

²³⁶ *Id.*

²³⁷ See generally GEORGE LAKOFF, HOWARD DEAN & DON HAZEN, DON'T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE—THE ESSENTIAL GUIDE FOR PROGRESSIVES (2004) (making this argument).

²³⁸ *Id.* at 50 (asserting that, with the divorce rate for heterosexual marriage skyrocketing, pluralists should defend the "sanctity of marriage" for all couples who seek to marry).

²³⁹ *Obergefell v. Hodges*, 576 U.S. 644, 656 (2015).

²⁴⁰ *Id.* at 678 ("Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.").

²⁴¹ *Id.* at 646.

²⁴² Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1215 (2016).

pluralistic values can be inclusive of nontraditional relationships and family structures while supporting policies that strengthen traditional institutions like marriage, family, and community.

Pluralists have a variety of framing devices available and should not simply abandon traditionalist value framings. Progressive traditionalism offers a framing that is pluralistic with respect to gender norms yet sincerely affirms family stability, community cohesion, and healthy parental authority as important values. A progressive-traditionalist framing would not emphasize child autonomy as a basis for gender pluralism, since parents in traditionalist communities likely already feel threatened by the perception that their children inhabit a deeply unfamiliar gender landscape. Rather, a progressive-traditionalist framing would emphasize that state policies that seek to regulate gender expression are deeply harmful to families and to communities.

Sending state agents to a child's school to investigate a family for providing gender-affirming care, for example, not only undermines parental authority but also traumatizes families.²⁴³ Similarly, attempts by religious conservatives to ban innocuous books and to impose their religious values onto public school curriculums have turned school board meetings into arenas of conflict, eroding community cohesion.²⁴⁴ At the same time, while progressive traditionalists are right to resist the encroachment of traditionalist religious morality into the classroom, they should also take seriously parents' concerns about how children are introduced to contemporary gender norms. Recognizing that gender norms carry different meanings across communities, some degree of local variation in school policies may be not only inevitable but constructive, helping to defuse conflict.

Progressive traditionalists should also seek allies within traditionalist communities, especially as conversations around queer- and trans-inclusion have shown at least some early signs of promise. The Baptist pastor and Christian ethicist David Gushee, for example, defends "full LGBTQ inclusion," arguing that exclusion not only harms LGBTQ+ individuals but also ruptures ties between families, neighbors, and church communities.²⁴⁵ Similarly, the Christian psychologist Julia Sadusky has counseled a number of Christian families and communities on learning to accept and embrace their gender non-conforming members.²⁴⁶ But neither approach rejects traditionalist morality

²⁴³ Madeleine Carlisle, "I'm Just Waiting for Someone to Knock on the Door." *Parents of Trans Kids in Texas Fear Family Protective Services Will Target Them*, TIME (May 19, 2022, at 18:24 ET), <https://time.com/6178947/trans-kids-texas-families-fear-child-abuse-investigations> [<https://perma.cc/X29M-ABLX>].

²⁴⁴ Diana Lambert, *Conflict over Race, LGBTQ Issues Cost Schools More Than \$3 Billion Last School Year*, EDSource (Dec. 6, 2024), <https://edsources.org/2024/conflict-over-race-lgbtq-issues-cost-schools-more-than-3-million-last-school-year/723154> [<https://perma.cc/9F4R-UCQE>].

²⁴⁵ See generally DAVID P. GUSHEE, *CHANGING OUR MIND: DEFINITIVE 3RD EDITION OF THE LANDMARK CALL FOR INCLUSION OF LGBTQ CHRISTIANS WITH RESPONSE TO CRITICS* (2017) (making this argument).

²⁴⁶ Ruth Graham, *Some Conservative Christians Are Stepping Away from the Gender Wars*, N.Y. TIMES (May 17, 2024), <https://www.nytimes.com/2024/05/17/us/>

entirely. Gushee, for instance, argues that Christian sexual morality is based on a “covenantal-marital ethic,” which forbids “all non-marital sex, infidelity, abandonment and divorce (with rare exceptions).”²⁴⁷ For Gushee, the collapse in marital stability that began in the mid-to-late twentieth century was due in part to the abandonment of this ideal.²⁴⁸ Sadusky likewise offers religious families resources for accepting their gender-nonconforming children without rejecting their religious commitments or their belief in parental authority and traditional gender differences.²⁴⁹

Of course, pluralist egalitarians will not agree with all of these claims. But the point is not to expect unanimity with regard to sexual ethics, but to find common ground between pluralists and traditionalists. Progressive traditionalism offers precisely such a common ground. When parental rights politics yields policy proposals that threaten vulnerable sex and gender minorities, progressive traditionalists should resist the urge to dismiss these proposals as unrelated to the family. However much one might object to these proposals, they speak to traditionalist fears about the very real breakdown in marital and communal norms. Progressive traditionalists should not abandon this language. Rather, they must demonstrate that exclusionary policies are harmful to traditionalist and pluralistic values alike.

CONCLUSION: HOW *NOT* TO BE A PROGRESSIVE TRADITIONALIST

From a legal realist perspective, the line between parental rights law and parental rights politics is vanishingly thin. Parental rights do not inherently serve the value of pluralism; nor, for that matter, do they inherently favor religious traditionalism. Rather, parental rights case law can be made to serve either value. Ultimately what determines the outcome in a parental rights case is the underlying family model to which a judge or group of judges adhere.

For scholars and advocates working to defend LGBTQ+ rights, this conclusion may seem fatalistic, in light of the recent rise to power of the neo-traditionalist right. However, and despite many real and worrying setbacks to LGBTQ+ rights, I remain skeptical that the American public will accept much of what the neo-traditionalist right has to offer. Conflicts over the nuances of trans-inclusion have not sparked a broader abandonment of LGBTQ+ rights, nor is there significant public enthusiasm for neo-traditionalist policy proposals, such as ending no-fault divorce.²⁵⁰ While it is far too early for pluralists to declare victory, it is surely too soon to concede defeat.

conservative-christian-transgender-religion.html [https://perma.cc/66RL-CV86].

²⁴⁷ See GUSHEE, *supra* note 245, at 72.

²⁴⁸ See *id.*

²⁴⁹ See Graham, *supra* note 246.

²⁵⁰ Kimberlee Kruesi, *Repealing No-Fault Divorce Has So Far Stalled Across the US. Some Worry That It'll Change Under Trump*, ASSOCIATED PRESS (Nov. 26, 2024), <https://www.ap.org/news-highlights/spotlights/2024/repealing-no-fault-divorce-has-so-far-stalled-across-the-us-some-worry-that-itll-change-under-trump/> [https://perma.cc/8FVX-ZLD9].

To address the current impasse, I introduced progressive traditionalism as a rhetorical framework with which pluralists might defend pluralistic values while speaking to the breakdown in traditional social institutions that understandably concerns many Americans. Of course, many voices are currently urging moderation upon the political left, and liberals have attempted to claim the mantle of traditionalism before.²⁵¹ Thus, it is important to be clear about what progressive traditionalism is *not*.

First and foremost, progressive traditionalism, as I envision it, is *not* a call to abandon LGBTQ+ rights. The key insight of progressive traditionalism is that support for LGBTQ+ rights is compatible with core traditionalist commitments, such as a respect for healthy parental authority and support for familial and marital stability. That some conservative Christian communities are now moving towards greater acceptance of their queer members demonstrates that this is not merely an abstract possibility. Indeed, traditionalist religious communities have made great strides over the last several decades toward accepting their gay and lesbian members.²⁵² Pluralists should encourage this progress while acknowledging traditionalist concerns over the contemporary declines in family and community cohesion.

Second, progressive traditionalism is *not* a solution to the material and regional inequalities that lie at the root of contemporary social and familial instability. Indeed, prior iterations of progressive traditionalism made precisely this mistake, namely, speaking the language of traditional values while enacting policies—such as welfare reform—that merely lead to greater poverty and familial instability.²⁵³ Progressive traditionalism provides a framework for articulating pluralistic values to individuals who harbor traditionalist leanings. Yet absent robust economic support for families and children, it cannot, on its own, remedy the social dysfunction of the present day. Genuine economic support for all families will go some way towards convincing traditionalists that pluralistic values serve everyone, not merely the privileged few.

²⁵¹ Adam Wren, Liz Crampton & Holly Otterbein, *Moderate Dems Message to Progressives: We're Not Backing Down*, POLITICO (Mar. 18, 2025, at 13:54 ET), <https://www.politico.com/news/2025/03/18/centrist-democrats-success-00234606> [<https://perma.cc/P5CE-K93E>] (reviewing evidence suggesting that moderate Democrats are relatively more successful electorally); *Thinking of Family Values*, NEWSWEEK (Mar. 13, 2010, at 16:34 ET), <https://www.newsweek.com/thinking-family-values-175482> [<https://perma.cc/P8BZ-AVSK>] (describing political strategy of President Bill Clinton as form of “tolerant traditionalism”).

²⁵² David J. Neumann, “*A Definitive but Unsatisfying Answer*”: *The Evangelical Response to Gay Christians Religion and American Culture*, 32 RELIGION & AM. CULTURE 108, 131 (2022) (reviewing evidence demonstrating that “[y]ounger evangelicals are even more accepting in their views” of gay individuals and that “[a]cceptance of LGBTQ people and same-sex relationships will eventually characterize evangelicalism”).

²⁵³ Dylan Mathews, “*If the Goal Was to Get Rid of Poverty, We Failed*”: *The Legacy of the 1996 Welfare Reform*, VOX (June 20, 2016), <https://www.vox.com/2016/6/20/11789988/clintons-welfare-reform> [<https://perma.cc/G3HW-GBP9>] (reviewing evidence showing that President Bill Clinton’s 1996 welfare reform increased extreme poverty while minimally affecting family cohesion).

ERASING IDENTITIES IN SCHOOL

NOY NAAMAN*

ABSTRACT

*Since 2022, the United States has witnessed an unprecedented surge of curriculum policies restricting the use and availability of LGBTQ-related materials in public schools. These laws affect subjects across the entire curriculum, impacting the classroom, school libraries, and extracurricular spaces, and create mechanisms that enable individuals to challenge or block LGBTQ-related content through notification requirements, opt-out provisions, and formal complaint processes. Legal challenges are proliferating nationwide, and, following the recent Supreme Court's decision in *Mahmoud*, endorsing a parental right to remove children from LGBTQ-affirming instruction, the stakes for young people's educational experiences could not be higher. At the heart of this national battle lies a core question: What is the law's legitimate role in shaping children's lived experience of identity exploration in schools?*

This Article offers a multifaceted analysis—doctrinal, conceptual, and normative—of this question. It begins by providing a comprehensive mapping of the regulation of LGBTQ curriculum policies in all 50 states and the District of Columbia. This novel typology indicates how these rapidly-evolving censorship laws are becoming systematically embedded in the daily life of public education through the interlocking actions of various stakeholders, including school districts, libraries, educators, suppliers of educational and instructional materials, parents, and state residents.

The Article then analyzes the respective limitations of the two constitutional doctrines most relevant to this terrain—the Free Speech Clause and the Equal Protection Clause—and identifies their shared conceptual blind spot: Neither centers students' present developmental needs. Free Speech doctrine frames children primarily as future citizens in need of civic preparation, sidelining their age-appropriate need for identity exploration. Equal Protection doctrine's reliance on static identity categories limits its ability to challenge exclusionary policies cloaked in neutral terms—again, overlooking the here-and-now needs of young people.

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In response, the Article advances a novel conceptual framework, grounded in three theoretical pillars distilled from socio-legal theories of childhood, to position identity exploration as a normative foundation for curriculum regulation. To demonstrate the framework's practical viability, the Article operationalizes it through several guiding principles and identifies multiple doctrinal entry points for its implementation. In doing so, the Article offers a principled yet workable pathway toward reimagining how constitutional law can facilitate identity exploration, while remaining attentive to the concerns—legal, pedagogical, or otherwise—that such a vision may raise.

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INTRODUCTION

A teacher in New Jersey quietly removes Pride rainbow stickers from her classroom walls.¹ A librarian in Iowa faces potential criminal charges for failing to remove books featuring LGBTQ characters.² In Texas, a school district's Pride Week activities draw warnings of state intervention and even death threats against school staff.³ These, and many more, widely-reported incidents exemplify the effects of what I term *the new curriculum laws*—a rapidly-expanding set of legislative efforts across multiple U.S. states in recent years that aim to restrict LGBTQ-related content being made available to children in public education.

The scope and speed of this expansion are unprecedented. In just three years, since 2022, no fewer than 22 U.S. states⁴ have enacted laws that either exclude LGBTQ educational content from the public school curriculum (or restrict it),⁵ or otherwise require parental notification before topics related

¹ Tina Kelley, *Rainbow Signs to be Replaced in N.J. Middle School*, NJ.COM (Jan. 4, 2023, at 11:04 ET), <https://www.nj.com/education/2023/01/rainbow-signs-to-be-replaced-in-nj-middle-school.html> [<https://perma.cc/4LB5-EQSQ>].

² Kelly Jensen, *Iowa Rushes, Advances Librarian Criminalization Bill*, BOOK RIOT (Feb. 19, 2025), <https://bookriot.com/iowa-rushes-advances-librarian-criminalization-bill/?utm> [<https://perma.cc/GM97-8S57>].

³ Chuck Lindell, *Pride Week at School District Breaks State Law, Says Texas AG*, USA TODAY (Mar. 24, 2022, at 14:39 ET), <https://www.usatoday.com/story/news/education/2022/03/24/texas-ag-pride-week-lgbtq-austin/7154530001/> [<https://perma.cc/4CSX-AUHK>]; Claire McNerny, *Doss Elementary School Administrators Threatened over Pride Week Activities*, KUT NEWS (Mar. 23, 2022, at 17:14 CT), <https://www.kut.org/education/2022-03-23/austin-isd-lgbtq-death-threats> [<https://perma.cc/4CSX-AUHK>].

⁴ At the time of writing, the states are: Alabama, Arizona, Arkansas, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Missouri, Montana, New Hampshire, North Carolina, Ohio, Tennessee, Texas, Utah, West Virginia, and Wyoming. See *infra* Appendices A & B.

⁵ This exclusion operates through multiple mechanisms. On the classroom level, see FLA. STAT. ANN. §1001.42(8)(c)(3) (2022); N.C. GEN. STAT. ANN. § 115C-76.55 (2023); IOWA CODE § 279.80(2) (2025); OHIO REV. CODE ANN. § 3313.473(E) (2025); KY. REV. STAT. ANN. § 158.1415(d)(2) (2023); ARK. CODE ANN. § 6-16-157(c) (2023); IND. CODE ANN. § 20-30-17-2 (2023); LA. STAT. ANN. § 17:412(A) (2024); ALA. CODE §16-40A-5(a) (2022); TEX. EDUC. CODE ANN. § 28.0043(A) (2025); OHIO REV. CODE ANN. § 3313.473(B)(1)(a) (2025). On the library level, see FLA. STAT. ANN. § 1006.28(2)(a)(2)(b) (2022); UTAH CODE ANN.

to sexual orientation or gender identity are discussed or mentioned in school.⁶ And this wave is far from over: At the time of writing, dozens of similar bills have been introduced, either to broaden restrictions within the same states or to enact them in new ones⁷—including in at least seven additional states.⁸

While part of broader restrictive curriculum legislation targeting race, gender, sexuality, and contested topics,⁹ LGBTQ-specific measures continue—and transform—the “no promo homo” statutes enacted mostly during the 1990s, reflecting dynamics that warrant focused analysis.¹⁰ Yet, much like earlier laws, these measures are often justified by the belief that acknowledging LGBTQ identities in schools will endanger children’s moral development.¹¹ Unlike earlier statutes that targeted sex education specifically,¹² the new

§§ 53G-10-103(2)(a)–(b) (2025) (prohibiting “sensitive materials” in any “school setting,” defined to include school libraries under *id.* § 53G-10-103(1)(g)(i)(B)); IOWA CODE ANN. § 256.11(9)(a)(2) (2025); GA. CODE ANN., § 20-2-324.6 (2024); T.C.A. § 49-6-3803(b)(1) (2024); S.C. CODE ANN. REGS. 43-170 (2024); TEX. EDUC. CODE ANN. § 35.002 (West 2024), *implementation enjoined by* *Book People, Inc. v. Wong*, 692 F. Supp. 3d 660 (W.D. Tex. 2023), *aff’d in part, vacated in part, and remanded*, 91 F.4th 318 (5th Cir. 2024); Act 372, 94th Gen. Assemb., Reg. Sess. (Ark. 2023), *invalidated by* *Fayetteville Pub. Libr. v. Crawford Cnty.*, 684 F. Supp. 3d 879 (W.D. Ark. 2023). On the student club level, see LA. STAT. ANN. § 17:412(A) (2024); TEX. EDUC. CODE ANN. § 33.0815 (2025); *infra* Appendix B.

⁶ ARK. CODE ANN. § 6-16-1006 (2025); ARIZ. REV. STAT. ANN. § 15-102(A)(6) (2021); FLA. STAT. ANN. § 1014.05(d) (2022); MONT. CODE ANN. § 20-7-120 (2021); N.H. REV. STAT. ANN. § 186:11 IX-c (2024); OHIO REV. CODE ANN. § 3313.473(B)(1)(b) (2025); WYO. STAT. ANN. § 21-3-135(a)(v) (2024); TENN. CODE ANN. §§ 49-6-1031, 49-6-1308 (2023); TEX. EDUC. CODE ANN. § 35.005 (2023); FLA. STAT. ANN. § 1014.05(d) (2022); GA. CODE ANN. § 20-2-324.6 (2022).

⁷ See, e.g., H.B. 244, 2025 Leg., Reg. Sess. (Ala. 2025); H.B. 2868, 56th Leg., 1st Reg. Sess. (Ariz. 2025) (vetoed May 13, 2025); H.B. 1045, 157th Gen. Assembly, Reg. Sess. § 1 (Ga. 2024) (to be codified at O.C.G.A. § 20-2-324.7(c)(1)); S.B. 74, 2025 Gen. Assembly, Reg. Sess. (Ga. 2025); S.B. 88, 2023–2024 Leg., Reg. Sess. (Ga. 2024); H.B. 2236, 2023 Leg., Reg. Sess. (Kan. 2023) (vetoed Apr. 24, 2023); S.B. 489, 2023–2024 Leg., Reg. Sess. (Wis. 2023) (introduced Oct. 16, 2023); H.B. 1201, 2025 Reg. Sess. (S.D. 2025); H.B. 3728, 125th Gen. Assembly, Reg. Sess. (S.C. 2023–2024); S.B. 397, 59th Leg., 1st Reg. Sess. (Okla. 2023); S.B. 30, 59th Leg., 1st Reg. Sess. (Okla. 2023); S.B. 2820, 2023 Reg. Sess. (Miss. 2023); S.B. 1024, 102d Gen. Assembly, 2d Reg. Sess. (Mo. 2024); H.B. 595, 2025 Gen. Assembly, Reg. Sess. (N.C. 2025).

⁸ At the time of writing, the states that have proposed, but not yet enacted, similar restrictions are: Kansas, South Dakota, South Carolina, Oklahoma, Minnesota, New Jersey, and Pennsylvania. See *infra* Appendix C.

⁹ See Jonathan Feingold & Joshua Weishart, *Discriminatory Censorship Laws*, 99 TUL. L. REV. 585, 592–615 (2025) (analyzing the scope and origins of this wave of laws).

¹⁰ See *infra* notes 68–78 and accompanying text.

¹¹ See *infra* notes 223–29 and accompanying text.

¹² For analyses of the earlier generation of “no promo homo” laws that have informed legal scholarship over the past decade, see, e.g., Ashley E. McGovern, Note, *When Schools Refuse to “Say Gay”: The Constitutionality of Anti-LGBTQ “No-Promo-Homo” Public School Policies in the United States*, 22 CORNELL J.L. & PUB. POL’Y 465, 467 (2012); Leora Hoshall, *Afraid of Who You Are: No Promo Homo Laws in Public School Sex Education*, 22 TEX. J. WOMEN & L. 219, 222 (2013); Jillian Lenson, *Litigation Primer Attacking State “No Promo Homo” Laws: Why “Don’t Say Gay” Is Not O.K.*, 24 TUL. J.L. & SEXUALITY 145, 149–50 (2015); Amanda Harmon Cooley, *Constitutional Representations of the Family in Public Schools: Ensuring Equal Protection for All Students Regardless of Parental Sexual Orientation or Gender Identity*, 76 OHIO ST. L.J. 1007, 1012–24 (2015); Ronny Hamed-Troyansky, *Erasing “Gay” from the Blackboard: The Unconstitutionality of “No*

curriculum laws operate more insidiously and on a far broader scale. They affect a wide range of subjects, extend censorship to include school libraries and extracurricular spaces, and impose civil—sometimes criminal—liability on various stakeholders in public education. They also establish multifaceted school governance mechanisms that empower parents to intervene directly in curriculum-content decisions.¹³ In this climate, the message to students is clear: Some identities are too controversial, illegitimate, or even dangerous, to be acknowledged in school.

For LGBTQ students and their families, the harms of these laws are direct and profound.¹⁴ But the consequences extend beyond these collectives. These laws deny *all* students opportunities for exploring diverse ways of being, beyond prescribed social roles, while cultivating empathy and the critical thinking that emerges when encountering marginalized perspectives—skills essential to both democratic citizenship and the experience of childhood itself.¹⁵ It is this broader impact—the law’s role in curbing children’s capacity for identity exploration in school—that this Article analyzes.

Legal challenges are rapidly unfolding across the country.¹⁶ In June 2025, the debate over LGBTQ-related content reached the Supreme Court, which,

Promo Homo” Education Laws, 20 U.C. DAVIS J. JUV. L. & POL’Y 85, 91–115 (2016); Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1468–75 (2017); Kameron Dawson, *Teaching to the Test: Determining the Appropriate Test for First Amendment Challenges to “No Promo Homo” Education Policies*, 13 TENN. J.L. & POL’Y 407, 439–49 (2019). This Article extends that scholarly foundation to address the broader and more systematic restrictions that have emerged since 2022.

¹³ See *infra* Part I.

¹⁴ See, e.g., Nathaniel Frank, Opinion, *What the Science Says About ‘Don’t Say Gay’ and Young People*, N.Y. TIMES (Apr. 20, 2023), <https://www.nytimes.com/2023/04/20/opinion/dont-say-gay-bill-florida.html> [<https://perma.cc/BG9A-N3EL>] (citing studies demonstrating that LGB students experiencing school-based victimization report significantly higher rates of substance use, suicidal behavior, and sexual risk-taking; that LGB youth in unsupportive school environments are 20% more likely to attempt suicide than peers in supportive settings; and that a positive school climate and parental support reduce mental health risks among students, including those questioning their sexual orientation). For a similar argument, see Maxine Eichner, *Free-Market Family Policy and the New Parental Rights Law*, 101 N.C. L. REV. 1305, 1337–38 (2023).

¹⁵ See *infra* Part III.C.

¹⁶ See *GLBT Youth in Iowa Schs. Task Force v. Reynolds*, 709 F. Supp. 3d 664 (S.D. Iowa 2023), *rev’d and vacated*, 114 F.4th 660 (8th Cir. 2024); *Smiley v. Jenner*, 684 F. Supp. 3d 835 (S.D. Ind. 2023), *appeal docketed*, No. 23-2543 (7th Cir. Aug. 8, 2023) (argued Feb. 2024); *Cousins v. Sch. Bd. of Orange Cnty.*, 687 F. Supp. 3d 1251 (M.D. Fla. 2022); *Equal. Fla. v. Fla. State Bd. of Educ.*, No. 4:22-cv-134-AW-MJF, 2022 WL 19263602 (N.D. Fla. Sep. 29, 2022); *M.A. v. Fla. State Bd. of Educ.*, No. 4:22-cv-134-AW-MJF, 2023 WL 2631071 (N.D. Fla. Feb. 15, 2022); *PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd.*, 711 F. Supp. 3d 1325 (N.D. Fla. 2024); *Penguin Random House LLC v. Gibson*, No. 6:24-cv-01573 (M.D. Fla. filed Aug. 29, 2024); *Fayetteville Pub. Libr. v. Crawford Cnty.*, 684 F. Supp. 3d 879 (W.D. Ark. 2023); *Parnell v. Sch. Bd. of Lake Cnty.*, 731 F. Supp. 3d 1298 (N.D. Fla. 2024); *Book People, Inc. v. Wong*, 692 F. Supp. 3d 660 (W.D. Tex. 2023), *aff’d in part, vacated in part, and remanded*, 91 F.4th 318 (5th Cir. 2024); *Cousins v. Grady*, No. 6:22-cv-01312-WWB-LHP (M.D. Fla. Nov. 3, 2022); *First Am. & Supp. Compl. for Declaratory & Injunctive Relief, Schools v. Reynolds*, No. 4:23-cv-00474 (S.D. Iowa Oct. 18, 2024); *EmpowerMT v. State*, No. DV-25-2024-0000230-CR (Mont. 1st Jud. Dist. Ct. filed Apr. 9, 2024).

in *Mahmoud v. Taylor*, held that schools must allow parents the option to opt their children out of LGBTQ-affirming content.¹⁷ With national censorship emerging as a real possibility,¹⁸ the stakes of these new laws and the constitutional questions they raise have never been higher.

Despite the growing scholarly attention being paid to these questions,¹⁹ the literature has yet to fully account for the scope, structure, and normative logic of this emerging censorship regime.²⁰ This Article therefore offers a three-part intervention by (i) mapping the architecture of these new laws (based on the material presented in Appendix C);²¹ (ii) analyzing the limits of the two primary constitutional doctrines that govern today's curriculum regulation²²—the Free Speech Clause and the Equal Protection Clause;²³ and (iii) proposing a new jurisprudential framework, grounded in three theoretical pillars distilled from socio-legal theories of childhood, that operates within the two aforementioned constitutional doctrines while adapting them to better

¹⁷ *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025).

¹⁸ See Stop the Sexualization of Children Act, H.R. 9197, 117th Cong. (2022); Ending Radical Indoctrination in K-12 Schooling, Exec. Order No. 14190, 90 Fed. Reg. 8853 (Jan. 29, 2025) (directing withdrawal of federal funds for schools teaching “gender ideology” or critical race theory and empowering enforcement).

¹⁹ This Part situates itself within this body of scholarship by highlighting the limitations of the dominant constitutional doctrines—the Free Speech Clause and the Equal Protection Clause—when assessed through the lens of children’s distinctive developmental need for identity exploration. For notable works addressing these questions, see, e.g., Zachary A. Kayal, *He/She/They “Say Gay”: A First Amendment Framework for Regulating Classroom Speech on Gender and Sexuality*, 57 COLUM. J.L. & SOC. PROBS. 63, 105–11 (2023) (arguing that restrictions on incorporating LGBTQ issues in the classroom are constitutionally impermissible); Catherine J. Ross, *Are “Book Bans” Unconstitutional? Reflections on Public School Libraries and the Limits of Law*, 76 STAN. L. REV. 1675, 1711–22 (2024) (analyzing six potential constitutional paths for challenging targeted book removals); Dara E. Purvis, *Transgender Students and the First Amendment*, 104 B.U. L. REV. 435, 446–60 (2024) (showing that student speech doctrine affords schools substantial discretion in regulating school-sponsored student expression); Thomas M. Cassaro, *A Student’s First Amendment Right to Receive Information in the Age of Anti-CRT and “Don’t Say Gay” Laws*, 99 N.Y.U. L. REV. 280, 287 (2024) (contending that curricular restrictions like anti-CRT and “Don’t Say Gay” laws likely violate students’ First Amendment rights). See generally Sarah Ryan, *Liberty and Equality Under the First Amendment: Scrutinizing Book Bans Through an Equal Protection Framework*, 90 BROOK. L. REV. 299 (2024) (arguing that courts should analyze the constitutionality of book bans under the Equal Protection framework).

²⁰ Cf. Feingold & Weishart, *supra* note 9, at 605–17 (focusing primarily on race-related censorship laws and diversity-related content, and offering a valuable, though distinct, typology of three *classroom*-focused regulatory modes). Other articles, while addressing the implications raised by these laws, tend to offer only general descriptions of them. See, e.g., Nicholas Serafin, *Born to Equality: Minor Children, Equal Protection, and State Laws Targeting LGBTQ+ Youth*, 75 UC LAW SF L.J. 411, 417 (2024) (arguing that these laws reflect “animus towards and impose a stigma upon LGBTQ+ minor children”).

²¹ See *infra* Part I.

²² See *infra* Part II.

²³ While other federal and state challenges, including Due Process claims, may be available, this Article focuses on Free Speech (particularly the right to receive information) and Equal Protection claims brought by or on behalf of students, as these doctrines’ strengths and limits form the foundation for the framework proposed here.

reflect the realities of childhood development.²⁴ Notably, this framework builds on these doctrines' core commitments but reinterprets their application through the lens of children's developmental need for identity exploration.²⁵

To map the architecture of these laws, this Article provides a comprehensive typological analysis of their infrastructure—outlining how this censorship structures students' access to identity-related content and conditions the possibilities for self-exploration throughout their journey in public education.²⁶ Based on a meticulous review of state statutes and bills, administrative policies, court decisions, litigation documents, and amicus briefs across all 50 states²⁷ (presented in Appendix C), this typology identifies two primary regulatory pathways: (a) mandates enacted by legislatures and carried out by school districts, school boards, and educators, along with vendors supplying educational materials to schools,²⁸ and (b) parent-driven mechanisms that enable individuals to challenge or block content through opt-out provisions, notification requirements, and formal complaint processes.²⁹ Juxtaposing these pathways illustrates how the new curriculum laws embed *de facto* state censorship into the operational life of public education centers—systemically, and through the interlocking actions of a variety of stakeholders.³⁰

²⁴ See *infra* Part III.

²⁵ While the analysis focuses on U.S. developments, reflecting its distinctive constitutional and sociopolitical landscape, the framework proposed in this Article is intended to achieve broader applicability for future comparative analysis into education disputes across other jurisdictions.

²⁶ This typological account builds on, and extends, foundational works by legal scholars such as Clifford Rosky and Nancy Tenney, who have focused primarily on sex education and classroom instruction. This Article interprets the recent expansion of LGBTQ-related school curriculum regulation as part of a broader and more integrated regime—one that reaches beyond sex education and operates through multifaceted but interconnected mechanisms of practitioner-delivered policies and parental oversight policies. See Nancy Tenney, *The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment*, 60 BROOK. L. REV. 1599, 1641–43 (1995) (identifying three categories of curricular restrictions related to homosexuality: total bans on the topic, prohibitions on positive viewpoints, and mandates to present homosexuality as unacceptable). See generally Rosky, *supra* note 12 (proposing a five-category typology of anti-gay curriculum laws: “Don’t Say Gay”; “No Promo Homo”; “Anti-Homo”; “Promo Hetero”; and “Abstinence until Marriage”).

²⁷ Some policies are not easily identifiable, particularly those enacted at the local level by school boards. This is especially true for library censorship, where districts often rely on board-level complaint processes rather than explicit state-mandated content restrictions. See Eliot T. Tracz, *Censorship and Book Bans: Two Non-Constitutional Arguments Against Queer Erasure*, 52 HOFSTRA L. REV. 903, 913–15 (2024). See generally TAIFHA ALEXANDER ET AL., UCLA SCH. L., CRT FORWARD: TRACKING THE ATTACK ON CRITICAL RACE THEORY (2023), https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law_CRT-Report_Final.pdf [<https://perma.cc/T97K-B63H>] (noting a similar challenge in tracking race-related curriculum censorship policies). To mitigate this challenge, I draw on a wide range of formal and informal sources, including media reports and advocacy databases.

²⁸ See *infra* Part I.A.

²⁹ See *infra* Part I.B.

³⁰ See *infra* Part I.

Building on this analysis, the Article demonstrates how the two primary constitutional doctrines—Free Speech and Equal Protection—which have also been invoked in petitions challenging these restrictions, struggle to meaningfully constrain this emerging censorship regime. Each one advances foundational values—democratic participation³¹ and anti-subordination equality³²—yet, in their current doctrinal form, both are ill-equipped to adequately address the harms imposed by the new curriculum laws.

Notably, Free Speech jurisprudence suffers from substantial doctrinal uncertainty. Federal courts are divided over whether school curriculum decisions are subject to constitutional review or shielded as government speech, which, under the government speech doctrine, is not covered by the Free Speech Clause.³³ But, more importantly, even where review is permitted, courts apply deferential standards that too readily validate exclusion that is framed, for example, as a “legitimate pedagogical concern.”³⁴ This judicial position risks leaving curricular exclusions effectively immune. Equal Protection jurisprudence faces parallel constraints. While doctrinal uncertainty persists about whether curriculum restrictions constitute government speech (and, thus, are subject to Equal Protection review, even if not First Amendment review)³⁵ and about the appropriate level of scrutiny for LGBTQ discrimination,³⁶ the primary obstacle lies in formidable evidentiary requirements that, in practice, result in broad judicial deference.³⁷ Because the new curriculum laws increasingly rely on facially neutral language and pedagogical justifications to mask their underlying aims,³⁸ plaintiffs must demonstrate disparate impact and discriminatory intent—burdens that prove particularly difficult to satisfy in the current legal landscape.³⁹

The Article argues that these limitations should be understood as exemplifying deeper conceptual blind-spots—gaps that become especially consequential when it comes to children’s rights.⁴⁰ Free Speech doctrine is primarily motivated by the value of preparing students for future democratic citizenship,⁴¹ but it largely overlooks children’s present developmental needs—particularly, their need to explore and create a sense of identity during their formative years. Such concerns are frequently sidelined in the name of

³¹ See *infra* notes 186–92, 371–72 and accompanying text.

³² See *infra* notes 289–94 and accompanying text.

³³ See *infra* Part II.A.1.

³⁴ See *infra* Part II.A.2.

³⁵ See *infra* Part II.B.1.

³⁶ See *infra* Part II.B.1.

³⁷ See *infra* Part II.B.2.

³⁸ See *infra* notes 274–78 and accompanying text.

³⁹ See *infra* notes 268–73 and accompanying text.

⁴⁰ Throughout this Article, I use the term “child” to refer to a person under the legal age of majority and not fully emancipated under the law. While the presumptive age of majority is eighteen in all U.S. states, this threshold can vary depending on the legal context—for example, it may be higher for alcohol consumption or lower for consensual sexual activity. See Susan Frelich Appleton, *Restating Childhood*, 79 BROOK. L. REV. 525, 526–27 (2014).

⁴¹ See *infra* notes 186–92, 371–72 and accompanying text.

purportedly neutral pedagogical concerns.⁴² Equal Protection doctrine falls into a different, but equally persistent, conceptual trap: It operates from the premise that identity categories are rigid and stable reference points for legal analysis. This assumption underlies the two doctrines' competing prominent visions of equality: anti-classification theory, which regards any consideration of identity categories as inherently suspect and promotes formal neutrality, versus an anti-subordination theory, which aims to expose and remedy legal structures that reinforce social hierarchies by foregrounding those very categories.⁴³ As the Supreme Court has increasingly sidelined the anti-subordination theory,⁴⁴ the risk is that this doctrine will struggle to account for how curricular exclusions—especially when justified through neutral-sounding pedagogical aims—compromise equal access to educational opportunity.⁴⁵

In response, this Article proposes a legal framework that seeks to mitigate these shortcomings by working within the existing constitutional doctrines, and particularly their core commitments, but reinterpreting them so that they are attuned to students' diverse developmental realities.⁴⁶ The proposed approach draws on interdisciplinary dialogue between three interconnected theoretical pillars: child development theory, multiculturalism, and anti-essentialism. All these pillars foreground children's fundamental need for identity exploration and, together, form the normative foundation of the proposed framework for regulating school curricula.

To translate this foundation into actionable guidance, the Article sets out three guiding principles—scaffolded child agency,⁴⁷ balancing parental authority,⁴⁸ and doctrinal integration⁴⁹ (that is, interpreting Free Speech and Equal Protection in light of children's developmental needs)—that, together, offer a structured approach to creating the conditions necessary to support children's identity exploration. This orientation advocates repositioning the state's role to one of fostering structural conditions that support open-ended

⁴² See *infra* notes 222–32 and accompanying text.

⁴³ See *infra* notes 287–88 and accompanying text.

⁴⁴ See *infra* note 291 and accompanying text.

⁴⁵ See *infra* notes 279–86 and accompanying text.

⁴⁶ Some of the limitations discussed in this Article have led scholars to propose reforms to the standards governing the application of these constitutional doctrines in school settings more broadly. This Article, however, takes a different approach by reframing the normative underpinnings of these doctrines—interpreting and expanding them through the lens of the proposed conceptual understanding of developmental self-exploration. For notable contributions addressing these constitutional issues, see, e.g., Caroline Mala Corbin, *The Government Speech Doctrine Ate My Class: First Amendment Capture and Curriculum Bans*, 76 STAN. L. REV. 1473, 1506–10 (2024) (proposing a four-factor test to determine when students' rights as listeners should outweigh the government's typical immunity under the government speech doctrine); Dylan Salzman, *The Constitutionality of Orthodoxy: First Amendment Implications of Laws Restricting Critical Race Theory in Public Schools*, 89 U. CHI. L. REV. 1070, 1092–96 (2022) (arguing for heightened scrutiny when curriculum limits oppose ideological views).

⁴⁷ See *infra* Part III.B.1.

⁴⁸ See *infra* Part III.B.2.

⁴⁹ See *infra* Part III.B.3.

identity exploration—a formative process through which children engage with diverse ways of being without being confined to predetermined identity categories.

To demonstrate the practical viability of this approach, the Article identifies several doctrinal entry points for its operationalization—including reinterpretation of the right to information embedded in the Free Speech clause,⁵⁰ recalibration of judicial review standards applied in curriculum decisions,⁵¹ and a reframe of the legal debate over parental opt-out provisions.⁵² While promoting children's identity exploration through each of these pathways, the proposed framework remains attentive to children's developmental limits,⁵³ acknowledging that such openness must be supported by guidance⁵⁴ and seamlessly integrated into the existing constitutional structures through established doctrinal pathways.⁵⁵ This implementation strategy reflects the Article's methodology: supplementing the existing doctrines with conceptual insights that are grounded in this understanding of children's identity exploration, thereby proposing a shift in how these doctrines are applied to better reflect developmental realities.⁵⁶

Specifically, in response to the limitations of Free Speech jurisprudence, this framework broadens the current focus on future-oriented civic preparation to include present-tense developmental needs. This approach emphasizes the understanding that supporting such needs, including identity exploration, in educational environments is valuable in its own right, while also recognizing that such present-focused engagement naturally cultivates the capacities essential to democratic readiness.⁵⁷

In response to the internal tension within the Equal Protection jurisprudence—its reliance on fixed identity categories across both anti-classification and anti-subordination theories—the proposed framework advances an anti-essentialist inquiry into how legal regimes constrain children's capacity to explore selfhood.⁵⁸ This approach treats identity not as a fixed trait to be ignored or affirmed but as a dynamic and socially constructed process shaped by institutional conditions.⁵⁹ It advances a vision of equality that is neither oblivious to identity nor constrained by it. In doing so, it shares anti-subordination's concern with structural inequality and anti-classification's skepticism of rigid categorization, while ultimately departing from both by

⁵⁰ See *infra* Part III.C.1.

⁵¹ See *infra* Part III.C.2.

⁵² See *infra* Part III.C.3.

⁵³ See *infra* Part III.B.1.

⁵⁴ See *infra* Part III.B.2.

⁵⁵ See *infra* Part III.B.3.

⁵⁶ Indeed, this strategy reflects the view that legal reform is more feasible and effective when it is achieved through doctrinal adaptation—rather than by inventing complementary doctrine—while showing how existing legal tools, properly interpreted, can already serve children's developmental needs.

⁵⁷ See *infra* notes 375–76 and accompanying text.

⁵⁸ See *infra* Part III.A.3.

⁵⁹ See *infra* notes 332–39 and accompanying text.

centering the legal conditions that enable identity-in-formation rather than merely responding to existing group classifications.⁶⁰

Such conceptual reorientation is urgent at a time when educational content is increasingly weaponized against marginalized youth.⁶¹ As legislative restrictions multiply and constitutional challenges intensify, courts face mounting pressure to respond, yet lack the conceptual tools to do so adequately. While the framework proposed here is not equipped to resolve all doctrinal conflicts or settle every constitutional question at stake, it does offer a critical starting point: reframing the stakes of curriculum regulation in terms of children's developmental agency.⁶² This approach situates the current constitutional debate over curriculum laws within a wider socio-legal understanding of childhood. Furthermore, it advances a much-needed productive dialogue between Free Speech and Equal Protection doctrines,⁶³ uniting them through a shared inquiry that is informed by this understanding.⁶⁴ And the core question this analysis tackles—regarding what role public schools should play in shaping children's capacity for identity exploration—will only become more pressing as American society grows more diverse and politically polarized.⁶⁵

⁶⁰ See *infra* notes 329–31 and accompanying text.

⁶¹ See, e.g., Kristine L. Bowman, *The New Parents' Rights Movement, Education, and Equality*, 91 U. CHI. L. REV. 399, 402 (2024); Mary Ziegler, Maxine Eichner & Naomi Cahn, *Retrenchment by Division: The New Law and Politics of Parental Rights*, 123 MICH. L. REV. 669, 710 (2025).

⁶² Emily Buss has argued that the law should function as a developmental agent, structuring conditions that support children's healthy emotional and psychological growth. See generally Emily Buss, *Allocating Developmental Control Among Parent, Child, and the State*, 2004 U. CHI. LEGAL F. 27, 28 (making this argument). For scholars who adopt a similar lens in different areas including juvenile sentencing, social welfare, parentage matters, and custody, see, e.g., Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 436 (2006); ELIZABETH SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 13–16 (2008); Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2103–05 (2011); Susan Frelich Appleton, Deanna M. Barch & Anneliese M. Schaefer, *The Developing Brain: New Directions in Science, Policy, and Law*, 57 WASH. U. J.L. & POL'Y 1, 1–4 (2018); Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1397–1412 (2020); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1810–12 (1993); Anne L. Alstott, Anne C. Dailey & Douglas NeJaime, *Psychological Parenthood*, 106 MINN. L. REV. 2363, 2382–87 (2022). This Article builds on and amplifies this lens by focusing on one central developmental domain: identity formation—a process that, I argue, carries significant implications for contemporary debates over the public school curriculum.

⁶³ In doing so, this Article also contributes to the growing scholarship analyzing the intersection between Freedom of Speech and Equal Protection. For notable works in the context of LGBTQ rights, see, e.g., Timothy Zick, *The Dynamic Relationship Between Freedom of Speech and Equality*, 12 DUKE J. CONST. L. & PUB. POL'Y 13, 43–57 (2016); Luke A. Boso, *Anti-LGBT Free Speech and Group Subordination*, 63 ARIZ. L. REV. 341, 353–66 (2021).

⁶⁴ See *infra* note 297 and accompanying text.

⁶⁵ See, e.g., Levi Boxell, Matthew Gentzkow & Jesse M. Shapiro, *Cross-Country Trends in Affective Polarization*, 106 REV. ECON. & STAT. 557, 558 (2024) (finding that the United States has experienced the largest increase in affective polarization among the countries studied).

The Article is structured around three Parts. Part I provides a timely descriptive account of the emerging body of law governing curriculum content related to sexual and gender identities in the United States. It begins by mapping the regulatory trends documented by others (in sex- and health-related education).⁶⁶ It then outlines the new curriculum laws—the empirical core of the Article—using a typology that distinguishes key elements of these de facto censorship mechanisms.⁶⁷ Part II analyzes the prevailing constitutional doctrines applicable to these laws, highlighting their limitations, particularly in addressing the developmental needs of children. Against this backdrop, Part III proposes a new legal framework to re-imagine this landscape, informed by the limitations identified in the previous Part. It outlines the theoretical pillars of this framework and elaborates on its guiding principles for reconceptualizing educational rights and responsibilities. It then illustrates the framework’s practical implications by applying it to contemporary curriculum disputes and addresses the foreseeable objections to its implementation.

I. THE RISE OF THE NEW CURRICULUM LAWS

When it comes to sexual orientation and gender identity, the laws that govern school curricula in the U.S. have undergone a notable transformation over the past few decades. Early iterations, enacted between 1987 and 2001, typically adopted a narrow focus on restricting discussions of “homosexuality” within sex- and health-related school education. This targeted approach has since evolved into more comprehensive policies that reflect growing polarization among states. Over the years, some jurisdictions have not only repealed exclusionary provisions but implemented inclusive legislation encouraging LGBTQ-positive content in sex education classes, and a few have done so across all subject areas. Others have moved toward more extensive censorship, expanding restrictions beyond sex education to prohibit LGBTQ content throughout the entire curriculum.

To understand this increasingly fragmented terrain, this Part identifies and discusses two interconnected mechanisms intended to curtail LGBTQ content in U.S. schools: (1) practitioner-delivered provisions implemented by educational authorities, teachers, librarians, and booksellers; and (2) parental-oversight provisions that empower parents to have LGBTQ materials restricted or removed through notification systems, consent requirements, and formal complaint procedures.

⁶⁶ See *infra* Part I.A.1.i. The survey builds on prior analyses, *supra* note 26, and extends them by introducing updates to reflect recent legislative developments.

⁶⁷ See *infra* Parts I.A–B.

A. *Practitioner-Delivered Policies*

This Section surveys and maps three settings where discussion of LGBTQ-related topics is regulated: the classroom, the school library, and student clubs. While often treated as distinct, these sites function together to shape students' access to knowledge and identity-affirming content. The typology developed here captures how legal mandates, administrative policies, and informal deterrents, shaped by these laws, converge across these domains to form a cohesive regulatory architecture. What distinguishes this typology is not only its coverage of multiple regulatory domains but also its broader understanding of the curriculum—one that extends beyond classroom instruction to encompass the full range of educational materials and experiences that shape student learning and identity.⁶⁸

1. *Classroom*

The most direct form of LGBTQ-related curriculum regulation occurs at the classroom level, where state laws systematically control how—and whether—teachers can discuss LGBTQ-related topics during formal instruction. These regulations have proliferated across multiple states, creating a patchwork of restrictions that range from a blanket silence on such topics to what amounts to mandated stigmatization.

i. Sex- and Health-Related Contexts. Sex education constituted the initial regulatory focus for LGBTQ-related curriculum restrictions, and it remains the most heavily regulated. A review of state legislation reveals that these laws generally follow one of three approaches that can be characterized as: a no-mention policy; mandated condemnation; or an inclusive mandate.

a) No-Mention Policy. The State of Louisiana maintains a law, enacted in 1987, that prohibits public schools from including any materials depicting homosexual activity in their sex education programs.⁶⁹ South Carolina previously had a similar restriction⁷⁰

⁶⁸ Wiel Veugelaers, *Citizenship Education for a Diverse Europe*, in *HANDBOOK OF MORAL AND CHARACTER EDUCATION* 379, 382–83 (Larry Nucci, Tobias Krettenauer & Winston C. Thompson eds., 3d ed. 2024) (discussing the term “hidden curriculum”). Restrictions on library books, for example, not only limit access to information but also signal which identities—be they related to sexual orientation or gender—are considered legitimate. Though not part of formal instruction, library holdings serve a curricular function by supporting the school's pedagogical mission, and libraries face similar political pressures as the wider school, including parental objections. Student clubs, likewise, function as extensions of the curriculum by providing peer education, resources, and discussions that supplement classroom learning and student development.

⁶⁹ LA. STAT. ANN. § 17:281(A)(3) (1987).

⁷⁰ S.C. CODE ANN. § 59-32-30(A)(5) (1988).

that was repealed in 2020 following a lawsuit challenging it as unconstitutional.⁷¹

b) Mandated Condemnation. Several states have enacted provisions requiring schools to present homosexuality in a negative or condemnatory light within sex- or health-education contexts. Texas maintains statutory requirements compelling schools to characterize homosexuality as not an acceptable lifestyle and to classify it as “a criminal offense.”⁷² Similar laws previously existed in Mississippi,⁷³ Alabama,⁷⁴ and Utah,⁷⁵ though they have been repealed in response to judicial interventions. Oklahoma continues to mandate that schools present homosexuality as a primary vector for AIDS transmission,⁷⁶ a requirement that Arizona maintained until 2021.⁷⁷ Several states have adopted more subtle approaches to reinforce heteronormative standards. North Carolina⁷⁸ and Florida⁷⁹ maintain provisions that require schools to teach children that heterosexual marriage is the default standard for avoiding sexual health risks, with Florida’s recent law requiring that sex-ed materials teach that these reproductive roles are “binary, stable, and unchangeable.”⁸⁰ Illinois, too, followed similar policies, which were repealed only recently.⁸¹

c) Inclusive Mandates. In contrast to the two aforementioned approaches, a set of inclusive statutes in at least nine states—California, Colorado, Connecticut, New Jersey, Oregon, Illinois, Rhode Island, Maryland, and Washington—plus the District of Columbia—promote affirming instruction for LGBTQ youth and the discussion of sexual health education tailored to their needs.⁸² In some states, such as California, the Department of Education has adopted guidelines to support school districts in implementing these

⁷¹ See *Gender and Sexuality All. v. Spearman*, No. 2:20-CV-00847-DCN, 2020 WL 1227345 (D.S.C. Mar. 11, 2020).

⁷² TEX. HEALTH & SAFETY CODE ANN. § 163.002 (1991). This requirement compels schools to provide inaccurate information, as homosexual conduct has not been criminal anywhere in the U.S. since the Supreme Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁷³ MISS. CODE ANN. § 37-13-171(2)(e) (1998).

⁷⁴ ALA. CODE § 16-40A-2(c) (1992) (repealed 2021).

⁷⁵ UTAH CODE ANN. § 53A-13-101(1)(c)(iii)(A) (2016). This law was repealed by Health Education Amendments, S.B. 196, 62d Leg., Gen. Sess. (Utah 2017), in response to Am. Compl. for Declaratory and Injunctive Relief at 1–4, Equal. Utah v. Utah State Bd. of Educ., No. 2:16-cv-01081-BCW, 2016 WL 9113536 (D. Utah Nov. 15, 2016).

⁷⁶ OKLA. STAT. ANN. tit. 70, § 11-103.3(D)(A) (1987).

⁷⁷ ARIZ. REV. STAT. ANN. § 15-716(C) (1991), *repealed* by H.B. 2184, 55th Leg., 1st Reg. Sess. (Ariz. 2021).

⁷⁸ N.C. GEN. STAT. ANN. § 115C-81.30(a)(5) (2017).

⁷⁹ FLA. STAT. ANN. § 1003.46 (2022).

⁸⁰ FLA. STAT. ANN. § 1003.46(2)(a) (2025).

⁸¹ 105 ILL. COMP. STAT. ANN. 5/27-9.1(c)(2) (1990).

⁸² SIECUS, SEX ED STATE LAW AND POLICY CHART 17–19 (2022), <https://siecus.org/wp-content/uploads/2023/12/2022-Sex-Ed-State-Law-and-Policy-Chart.pdf> [<https://perma.cc/M45W-EDN3>].

requirements.⁸³ Other states that do not prohibit these discussions (such as Massachusetts, Nevada, Montana, and Nebraska) leave decisions, vis-à-vis whether and how to include LGBTQ-related content in the curriculum, up to the local school boards instead.⁸⁴

ii. All Contexts

In recent years, several states have enacted laws that regulate classroom discussions about sexual orientation and gender identity in public school curricula, spanning from Kindergarten to 12th Grade.⁸⁵ These laws can be classified into three primary categories: (a) complete prohibitions; (b) developmentally conditioned restrictions; and (c) inclusive policies. Details of these categories are set out in Appendix C and summarized in Appendix A.

a) Complete Prohibition. Five states, Kentucky,⁸⁶ Louisiana,⁸⁷ Idaho,⁸⁸ West Virginia,⁸⁹ and Texas,⁹⁰ impose a blanket prohibition across all Grades, and similar legislation has been introduced in Alabama.⁹¹ Six states—Florida,⁹² North Carolina,⁹³ Iowa,⁹⁴ Ohio,⁹⁵

⁸³ See, e.g., HEALTH EDUCATION FRAMEWORK, CAL. DEP'T OF EDUC., at ch. 1, 14 (2019), <https://www.cde.ca.gov/ci/he/cf/> [<https://perma.cc/GR2A-FXTW>].

⁸⁴ SIECUS, *supra* note 82, at 17–19.

⁸⁵ In the U.S. education system, this spans elementary school (Kindergarten–5th Grade, ages 5–11), middle school (6–8th Grade, ages 11–14), and high school (9–12th Grade, ages 14–18).

⁸⁶ KY. REV. STAT. ANN. § 158.1415(d)(2) (2023).

⁸⁷ LA. STAT. ANN. § 17:412(A) (2024).

⁸⁸ IDAHO CODE ANN. § 33-6001(5) (2025).

⁸⁹ W. VA. CODE ANN. § 18-5-29 (2025) (including narrow exceptions for student questions, historical references, bullying, and instruction as part of Advanced Placement or dual enrollment courses).

⁹⁰ TEX. EDUC. CODE ANN. § 28.0043(A) (2025).

⁹¹ H.B. 244, 2025 Leg., Reg. Sess. (Ala. 2025) (engrossed version) (proposing to extend the ban to all pre-K-12 Grades and to prohibit related flags or symbols on school property), engrossed Apr. 17, 2025, died in Senate.

⁹² FLA. STAT. ANN. § 1001.42(8)(c)(3) (2022) (prohibiting classroom instruction on sexual orientation or gender identity in Kindergarten through 3rd Grade).

⁹³ N.C. GEN. STAT. ANN. § 115C-76.55 (2023) (prohibiting classroom instruction on sexual orientation or gender identity in Kindergarten through 4th Grade); see H.B. 595, 2025 Gen. Assemb., Reg. Sess. (N.C. 2025) (pending expansion to 6th Grade).

⁹⁴ IOWA CODE § 279.80(2) (2023) (prohibiting curriculum or instruction relating to gender identity or sexual orientation to students in Kindergarten through 6th Grade); see *GLBT Youth in Iowa Schs. Task Force v. Reynolds*, 709 F. Supp. 3d 664 (S.D. Iowa 2023) (partially granted a preliminary injunction, enjoining enforcement of the prohibition on instruction related to gender identity and sexual orientation), *rev'd and vacated*, 114 F.4th 660 (8th Cir. 2024), *on remand sub nom.* *Iowa Safe Schs. v. Reynolds*, 788 F. Supp. 3d 969, at 975–76 (S.D. Iowa 2025) (holding that the statute may constitutionally bar mandatory classroom instruction on these topics), *appeal docketed*, No. 25-02186 (8th Cir. June 13, 2025).

⁹⁵ OHIO REV. CODE ANN. § 3313.473(e) (2025) (prohibiting instruction that includes sexuality-related content to students in Kindergarten through 3rd Grade; “sexuality-related content” is defined as “any oral or written instruction, presentation, image, or description of sexual concepts or gender ideology provided in a classroom setting,” *id.* § 3313.473(g)(1)).

Arkansas,⁹⁶ and Indiana⁹⁷—prohibit such instruction only at Elementary level, with specific cutoffs. While differing in scope, these laws uniformly rely on facially neutral terms, such as sexual orientation” and “gender identity,” without explicit reference to LGBTQ content.⁹⁸

b) Developmentally Conditioned Prohibition. Other states have adopted, ostensibly, a more limited scope in this censoring of discussion. Alabama prohibits discussion of such content according to the age of the pupil, alluding to content that is “not age appropriate or developmentally appropriate.”⁹⁹ Florida and Ohio, which completely prohibit classroom discussions about sexual orientation and gender identity before Grade 3, allow such topics for older students as long as the conversations are “age-appropriate.”¹⁰⁰

The “age-appropriate” requirement sounds neutral in principle, but, in practice, it can both be confusing and exert a chilling effect. It does not clarify what qualifies as appropriate, and nor does it specify who is to make this determination. Faced with potential penalties and no clear guidance, many educators predictably err on the side of caution, avoiding even basic acknowledgment of LGBTQ families and their children or the displaying of supportive symbols in their classrooms.¹⁰¹

⁹⁶ ARK. CODE ANN. § 6-16-157(c) (2023) (prohibiting classroom instruction on gender identity, sexual orientation, or related topics pre-5th Grade).

⁹⁷ IND. CODE ANN. § 20-30-17-2 (2023) (prohibiting classroom instruction on human sexuality in pre-Kindergarten through 3rd Grade). *But see* Smiley v. Jenner, 684 F. Supp. 3d 835, 842 (S.D. Ind. 2023) (denying injunctive relief to an elementary school teacher challenging this law, stating that “informal conversation” and other “interactions, even when spontaneous and not part of official curriculum, are within the scope of [the] duties and responsibilities [of] an elementary school teacher and therefore not protected by the First Amendment”), *appeal pending*, No. 23-2543 (7th Cir. argued Feb. 2024).

⁹⁸ *See infra* Appendix A.

⁹⁹ ALA. CODE § 16-40A-5(a) (2024); *see* H.B. 244, 2025 Leg., Reg. Sess. (Ala. 2025).

¹⁰⁰ FLA. STAT. ANN. § 1001.42(8)(c)(3) (2022). Legal challenges to the law have been dismissed for lack of standing. *See generally* Equal. Fla. v. Fla. State Bd. of Educ., No. 4:22-cv-134-AW-MJF, 2022 WL 19263602 (N.D. Fla. Sep. 29, 2022); M.A. v. Fla. State Bd. of Educ., No. 4:22-cv-134-AW-MJF, 2023 WL2631071 (N.D. Fla. Feb. 15, 2022). While those dismissals were on appeal, the parties reached a settlement clarifying that this law applies only to “teaching,” not to mere discussion. Teachers may, for example, respond to student-initiated conversations about identity or family life and evaluate student work that references the prohibited topics. *See* Patricia Mazzei, *Legal Settlement Clarifies Reach of Florida’s ‘Don’t Say Gay’ Law*, N.Y. TIMES (Mar. 11, 2024), <https://www.nytimes.com/2024/03/11/us/florida-dont-say-gay-law-settlement.html> [<https://perma.cc/SN3D-MBD3>]; OHIO REV. CODE ANN. § 3313.473(B)(1)(a) (2025).

¹⁰¹ *See, e.g.*, GLBT Youth in Iowa Schs. Task Force v. Reynolds, 709 F. Supp. 3d 664, 677 (S.D. Iowa 2023) (discussing that in response to the new Iowa’s law “teachers are hesitant to purchase new books for students that even arguably might contain prohibited material . . . [they] have reduced or eliminated book collections in their classrooms out of fear of retaliation or discipline”); *see also* Corbin, *supra* note 46, at 1481 nn.34–37 (2024) (referring to Florida teachers who “are hesitant to discuss same-sex families or display LGBTQ symbols like pride flags or rainbows” or another school district who “took down a video about LGBTQ bullying”).

c) *Inclusive Policies*. This recent wave of prohibitive legislation stands in contrast to earlier—and, at times, concurrent—policies in certain states that have mandated LGBTQ-inclusive educational content. California led the way in 2012 by adding LGBTQ individuals to the list of historically underrepresented groups that must be accurately depicted in history and the social sciences.¹⁰² Following its lead, other states—including New Jersey,¹⁰³ Colorado,¹⁰⁴ Illinois,¹⁰⁵ Oregon,¹⁰⁶ Nevada,¹⁰⁷ and Washington¹⁰⁸—emphasize the inclusion of LGBTQ figures, events, and perspectives in history and social science curricula. Additionally, other states—including Massachusetts,¹⁰⁹ Vermont,¹¹⁰ Connecticut,¹¹¹ Delaware,¹¹² Maryland,¹¹³ Maine,¹¹⁴ and Michigan¹¹⁵—as well as the District of

¹⁰² CAL. EDUC. CODE § 51204.5 (2012).

¹⁰³ N.J. STAT. ANN. § 18A:35-4.35 (2019).

¹⁰⁴ COLO. REV. STAT. ANN. § 22-1-104 (2021). The Board approved the revised standards on November 10, 2022. See *Colorado State Board of Education Approves New Inclusive Social Studies Standards*, COLO. PUB. RADIO (Nov. 10, 2022, at 17:42 ET), <https://www.cpr.org/2022/11/10/colorado-state-board-of-education-approves-new-inclusive-social-studies-standards/> [<https://perma.cc/JBG7-WUEA>].

¹⁰⁵ 105 ILL. COMP. STAT. ANN. 5/27-21(a) (2019).

¹⁰⁶ OR. REV. STAT. ANN. § 329.045(1)(a) (2021). See generally OR. DEP'T OF EDUC., LGBTQ2SIA+ STUDENT SUCCESS PLAN (2020), <https://www.oregon.gov/ode/students-and-family/equity/Documents/LGBTQ2SIA+%20Student%20Success%20Plan.pdf> [<https://perma.cc/T85N-CXYE>] (state plan outlining strategies to support the safety, inclusion, and academic success of LGBTQ2SIA+ students in Oregon schools).

¹⁰⁷ NEV. REV. STAT. ANN. § 389.061(1)(b) (2021).

¹⁰⁸ WASH. REV. CODE ANN. § 28A.345.130 (2024).

¹⁰⁹ See MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC., 2018 MASSACHUSETTS HISTORY AND SOCIAL SCIENCE CURRICULUM FRAMEWORK 41, 78, 136, 156, 159 (2018), <https://www.doe.mass.edu/frameworks/hss/2018-12.pdf> [<https://perma.cc/PN8N-874U>]; *Safe Schools Program for LGBTQ Students*, MASS. DEP'T OF ELEMENTARY AND SECONDARY EDUC. (Feb. 11, 2025), <https://www.doe.mass.edu/sfs/lgbtq/> [<https://perma.cc/Z66G-QWTZ>].

¹¹⁰ An Act Relating to Ethnic and Social Equity Studies Standards for Public Schools, No. 1, H.3, 2019 Leg., Reg. Sess. (Vt. 2019); Vt. State Bd. of Educ., *Rule Series 2000: Education Quality Standards* 12 (Apr. 17, 2024), <https://education.vermont.gov/sites/aoe/files/documents/edu-state-board-rule-series-2000.pdf> [<https://perma.cc/S5HZ-ZYHD>] (final rule adopted by the Vermont State Board of Education setting education quality standards, including requirements that students demonstrate proficiency in “ethnic and social equity studies”).

¹¹¹ 2021 CONN. PUB. ACTS 21-2 (June Spec. Sess.) § 374(b)(3)(D).

¹¹² *Culturally Responsive Resources*, DEL. DEP'T OF EDUC., <https://education.delaware.gov/educators/academic-support/standards-and-instruction/digital-de/instructional-resources/culturally-responsive-resources/> [<https://perma.cc/YC4R-YX2D>].

¹¹³ MD. STATE DEP'T OF EDUC., SAFE AND SUPPORTIVE SCHOOLS FOR ALL STUDENTS: CREATING INCLUSIVE SPACES FOR LGBTQIA+ YOUTH 9–20 (2024), <https://marylandpublicschools.org/about/Documents/DSFSS/SSSP/SafeSpaces/LGBTQ-Guidelines-for-Gender-Identity.pdf> [<https://perma.cc/VC5L-UZWC>].

¹¹⁴ *LGBTQ+ Studies*, ME. DEP'T OF EDUC., <https://www.maine.gov/doe/learning/content/socialstudies/resources/DEI/LGBTQ> [<https://perma.cc/9Q3L-63R3>].

¹¹⁵ Memorandum from Michael F. Rice, Mich. State Superintendent, to the Local and Intermediate School District Superintendents and Public School Academy Directors (Feb. 13, 2025), <https://www.michigan.gov/-/media/Project/Websites/mde/Year/2025/02/13/LGBTQ-Student-Guidance-Memo.pdf> [<https://perma.cc/J48P-E8PY>].

Columbia¹¹⁶—implemented similar but non-binding initiatives through State Education Agency guidance rather than mandatory legislation.

Despite their shared commitment to LGBTQ inclusion, these states' policies vary significantly in their implementation approaches across three key dimensions. First, states diverge in their grade-level implementation. Most target middle- and high-school curricula, as often explicitly specified in their statutory language.¹¹⁷ Nevada, though, stands out for mandating an inclusive curriculum beginning in Kindergarten—a bold policy choice in an area that typically generates the most controversy when implemented in early education.¹¹⁸

Second, governance approaches reveal different balances of state versus local control. While most states' laws mandate integration through official state curriculum content, they often defer to local districts regarding specific materials and implementation methods.¹¹⁹ This local discretion is likely to result in uneven compliance based on district priorities.¹²⁰ Washington's approach differs in this regard, exemplifying a top-down enforcement model that requires districts to adopt state-developed inclusive curriculum policies by a firm deadline.¹²¹

¹¹⁶ D.C. STATE BD. OF EDUC., SOC. STUD. STANDARDS ADVISORY COMM., SOCIAL STUDIES STANDARDS GUIDING PRINCIPLES 8 (2020), <https://sboe.dc.gov/sites/default/files/dc/sites/sboe/publication/attachments/2020-12-16-FINAL-SSSAC-Guiding-Principles.pdf> [<https://perma.cc/LPQ6-464W>].

¹¹⁷ See, e.g., N.J. STAT. ANN. § 18A:35-4.35 (2019) (“requiring that the . . . board of education shall include instruction on the political, economic, and social contributions of persons with disabilities and lesbian, gay, bisexual, and transgender people, in an appropriate place in the curriculum of middle school and high school students”); 105 ILL. COMP. STAT. ANN. 5/27-21(b) (2023) (“No pupils shall be graduated from the *eighth grade* of any public school unless the pupils have received instruction in the history of the United States as provided in this Section . . .”).

¹¹⁸ NEV. REV. STAT. ANN. § 389.061(1)(b) (2021). While Nevada requires early LGBTQ-related curriculum implementation, other states merely encourage it. See, e.g., 2021 CONN. PUB. ACTS 21-2 (June Spec. Sess.) § 374(b)(3)(D), at 592–93 (directing development of a K–8 model curriculum to include LGBTQ studies, though local adoption is not mandated). Although California does not mandate LGBTQ content specifically for primary Grades, in 2017, it approved LGBTQ-inclusive K–8 history textbooks to comply with the 2011 FAIR Education Act. See Michael Schaub, *California Will Be the First State to Use LGBT-Inclusive History Textbooks in Schools*, L.A. TIMES (Nov. 13, 2017, at 10:00 PT), https://www.latimes.com/books/jacketcopy/la-et-jc-lgbt-textbooks-20171113-story.html?utm_content=buffera1863&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer [<https://perma.cc/ZS7L-HUBM>].

¹¹⁹ The laws of California, New Jersey, Illinois, Oregon, Nevada, and Washington amended state standards to ensure that textbooks, materials, and instruction adequately reflect LGBTQ individuals. This is as opposed to policies, originating from the State Education Agency, that offer only guidance and optional materials.

¹²⁰ According to an Equality California survey, while 60% of districts had taken some steps toward implementation, fewer than one-third had fully adopted the mandated curriculum changes. See Matthew S. Bajko, *CA Schools Falling Short on Teaching LGBTQ Content*, BAY AREA REP. (Oct. 23, 2024), <https://www.ebar.com/story.php?ch=news&id=336057> [<https://perma.cc/PL7T-FY3F>].

¹²¹ WASH. REV. CODE ANN. § 28A.345.130 (2024).

Third, resource allocation varies considerably between states, directly affecting implementation quality. Most states provide only basic curriculum frameworks or resource repositories without dedicated funding,¹²² which can result in variable quality of implementation. Well-resourced districts or those with strong local commitment (sometimes partnering with nonprofits) and stronger funding or partnerships are more likely to deliver more robust programs.¹²³ Meanwhile, other states, such as Colorado¹²⁴ and Connecticut,¹²⁵ designate specific funds to help schools develop or acquire instructional materials and training resources.

2. School Libraries

Classroom textbooks and discussion are not the sole sources of student learning; libraries also constitute a critical forum where knowledge is curated. While book-bans in school libraries have historically reflected a pattern in which LGBTQ content is disproportionately censored, the wave of restrictions over the last three years or so marks an unprecedented escalation of this practice. Florida, a leading state in this censorship movement, requires school librarians to remove books containing anything that could be construed as “sexual conduct”¹²⁶—a standard that recently the Middle District of Florida struck down as unconstitutionally overbroad and vague.¹²⁷ Similarly, Iowa’s recent law requires libraries to contain only “age-appropriate materials,”¹²⁸

¹²² The state boards of education in Oregon, Illinois, and Colorado issued implementation guides aligning LGBTQ content with existing state standards. *See* 105 ILL. COMP. STAT. ANN. 5/27-21(c) (2023); OR. DEP’T OF EDUC., *supra* note 106. *See generally* COLO. DEP’T OF EDUC., COMMISSION ON LGBTQ+ INCLUSION (Nov. 9, 2022), <https://www.cde.state.co.us/standardsandinstruction/hb191192commissionreport> [<https://perma.cc/T3YE-KWC8>] (commission report recommending integration of LGBTQ+ history and contributions into state social-studies standards).

¹²³ For example, in New Jersey, the state’s partnership with advocacy groups like Garden State Equality led to the development and pilot implementation of an LGBTQ-inclusive curriculum across multiple subjects. *See* Garden State Equality & Make It Better for Youth, *LGBTQ-Inclusive Curriculum Media Kit*, INSIDERNJ.COM (2020), https://www.insidernj.com/wp-content/uploads/2020/01/Curriculum_Media_Kit.pdf [<https://perma.cc/RUY7-KYLW>].

¹²⁴ COLO. REV. STAT. ANN. § 22-1-104(5)(b) (2021).

¹²⁵ *Connecticut Funds K-8 Model Curriculum that Includes LGBTQ+ Studies*, GLISTEN (July 2, 2021), <https://glisten.org/news/connecticut-funds-k-8-model-curriculum-that-includes-lgbtq-studies/> [<https://perma.cc/EU2R-ZWJ8>].

¹²⁶ FLA. STAT. ANN. § 1006.28(2)(a)(2)(b) (2025). The District Court for the Northern District of Florida court has allowed a First Amendment challenge to proceed against Escambia County School Board for allegedly engaging in viewpoint-based removal of LGBTQ- and race-related books. *See* PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., 711 F. Supp. 3d 1325, 1331 (N.D. Fla. 2024).

¹²⁷ *Penguin Random House LLC v. Gibson*, 796 F. Supp. 3d 1052, 1081 (M.D. Fla. 2025).

¹²⁸ IOWA CODE ANN. § 256.11(9)(a)(2) (2025). The term “age-appropriate” was amended to exclude “any material with descriptions or visual depictions of a sex act,” as defined by Iowa Code § 702.17, which lists six examples of qualifying sexual contact. *See id.* § 19(a)(1). The enforcement of this book-removal mandate was preliminarily

while Georgia allows local governments to censor books based on the criterion of “harmful to minors.”¹²⁹ A similar approach has been taken by Alabama,¹³⁰ Missouri,¹³¹ Indiana,¹³² Utah¹³³ and Idaho¹³⁴ (and by Arkansas, before its law was struck down in December 2024).¹³⁵ States employ varying enforcement

enjoined as facially unconstitutional under the First Amendment in *Penguin Random House LLC v. Robbins*, 774 F. Supp. 3d 1001, 1036 (S.D. Iowa 2025). On remand in a related case, the court in *Iowa Safe Schs. v. Reynolds*, 788 F. Supp. 3d 969, 994–95 (S.D. Iowa 2025), continued to enjoin enforcement of the library provision on similar grounds.

¹²⁹ GA. CODE ANN. § 20-2-324.6 (2024) (nullifying existing schoolbook challenge policies and mandating new complaint procedures; defining “harmful to minors” to include nudity, sexual conduct, sexual excitement, or sadomasochistic abuse but leaving “sexual conduct” undefined, allowing for subjective enforcement).

¹³⁰ Since May 2024, the Alabama Public Library Service has required all state-funded public libraries to adopt policies that restrict access to “obscenity, sexually explicit, or other material deemed inappropriate for children” in youth-designated sections. The rule itself did not define “sexually explicit,” and the Alabama Public Service board adopted a new definition following concerns of vagueness. See Press Release, Ala. Library Ass’n, Exec. Council Statement on the May 8th, 2025 APLS Meeting and May 12, 2025 APLS Memo (May 15, 2025), <https://www.allanet.org/alla-statement-state-library-board-decisions-and-actions-may-2025-> [https://perma.cc/A5GR-PZ9V]; Letter from John Wahl, Chair, Ala. Pub. Libr. Serv. Exec. Bd., to Pub. Libr. Dirs. (May 12, 2025), https://aplsws2.apls.state.al.us/Wahl_2025-05-12_memo_10_.pdf [https://perma.cc/PGF9-CC8H]; Ralph Chapoco, *Alabama Board Overseeing Local Libraries Further Defines Term “Sexually Explicit”*, ALA. REFLECTOR (May 9, 2025, at 7:01 ET), <https://alabamareflector.com/2025/05/09/alabama-board-overseeing-local-libraries-further-defines-term-sexually-explicit/> [https://perma.cc/XT62-3UGX]. This policy has prompted concerns that it will lead to over-zealous removal of LGBTQ-related books and create a chilling effect on access to diverse materials. See, e.g., Mike Cason, *Which Books Get Challenged in Alabama Libraries? See the List*, AL.COM (Mar. 7, 2024, at 14:07 ET), <https://www.al.com/news/2024/03/which-books-get-challenged-in-alabama-libraries-see-the-list.html> [https://perma.cc/2ZCX-59ZE].

¹³¹ MO. ANN. STAT. § 573.550 (2022); see Pet. for Injunctive and Declaratory Relief, Mo. Ass’n of Sch. Librs. v. Baker, No. 2316-cv-05732 (Mo. Cir. Ct. Jackson Cnty. filed Feb. 16, 2023) (challenging Missouri Revised Statute § 573.550 as unconstitutional; case was removed to federal court but subsequently remanded to state court, where it remains pending).

¹³² IND. CODE ANN. § 35-49-3-3 (2023).

¹³³ UTAH CODE ANN. §§ 53G-10-103(2)(a)–(b) (2025) (prohibiting “sensitive materials” in any “school setting,” defined to include school libraries under *id.* § 53G-10-103(1)(g)(i)(B)) and defining “sensitive material” to include instructional materials constituting “pornographic or indecent material” under Utah law). Though facially neutral, the statute’s implementation disproportionately affected LGBTQ-themed books: of thirty-nine titles removed by one district, eighteen (46%) featured LGBTQ characters. See *Banned in the USA: State Laws Supercharge Book Suppression in Schools*, PEN AM. (Apr. 20, 2023), <https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools/> [https://perma.cc/9DPU-5MFA].

¹³⁴ IDAHO CODE ANN. §§ 18-1514, 18-1517B(2) (2024) (requiring libraries to “take reasonable steps to restrict access by minors to materials [deemed] harmful to minors; incorporates Idaho Code § 18-1514’s definition of “sexual conduct,” which includes *homosexuality*); see Compl. for Injunctive and Declaratory Relief, *Penguin Random House LLC v. Labrador*, No. 1:25-cv-00061-DCN, 2025 WL 392456 (D. Idaho Feb. 4, 2025) (First Amendment challenge to Idaho’s book restriction law).

¹³⁵ Act 372, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (restricting access to materials in public libraries deemed “harmful to minors” and imposing liability on booksellers by requiring them to restrict or segregate such materials to prevent access by minors), *invalidated by Fayetteville Pub. Libr. v. Crawford Cnty.*, 684 F. Supp. 3d 879, 896–903 (W.D. Ark. 2023) (struck down as facially unconstitutional).

mechanisms. Some states, like Alabama, rely on budget enforcement by threatening to withhold funding from non-compliant libraries.¹³⁶ Others—Indiana,¹³⁷ Missouri,¹³⁸ and Georgia¹³⁹ (plus North Carolina,¹⁴⁰ which is considering new legislation)—are moving toward harsher penalties that would expose school staff to potential criminal liability.

Such sweeping and ill-defined language increases the disproportionate restrictions on LGBTQ content.¹⁴¹ Some libraries purge all or most LGBTQ-themed books,¹⁴² moving them to “adults-only” sections to deter access,¹⁴³ and some state review processes actively block parents from challenging such actions.¹⁴⁴ In the states that implement such policies, librarians shoulder the responsibility for implementing these unclear rules with little guidance,¹⁴⁵ faced with this unenviable task and the scrutiny that goes with it, they may

¹³⁶ See *supra* note 130.

¹³⁷ IND. CODE ANN. § 35-49-3-3 (2023) (violation of this law constitutes a Level 6 felony).

¹³⁸ MO. ANN. STAT. § 573.550 (2022) (violation of this law constitutes a Class A misdemeanor).

¹³⁹ S.B. 74, 2025 Gen. Assemb., Reg. Sess. (Ga. 2025) (effective July 1, 2025).

¹⁴⁰ H.B. 595, 2025 Gen. Assemb., Reg. Sess. (N.C. 2025).

¹⁴¹ According to PEN America, 41% of books targeted for bans between 2021 and 2022 contained LGBTQ themes, protagonists, or significant secondary characters. See *PEN America Index of School Book Bans – 2021-2022*, PEN AM., <https://pen.org/book-bans/banned-book-list-2021-2022/> [<https://perma.cc/24W3-9FRK>].

¹⁴² For Iowa, see, e.g., *GLBT Youth in Iowa Schs. Task Force v. Reynolds*, 709 F. Supp. 3d 664, 679 (S.D. Iowa 2023). For Florida, see, e.g., *Compl. at 45–46*, *PEN Am. Ctr. v. Escambia Cnty. Sch. Bd.*, 711 F. Supp. 3d 1325 (N.D. Fla. 2024). In the case of Utah, in 2022, even prior to the law’s implementation, Utah’s Alpine School District removed fifty-two books from its libraries; 42% of these titles featured LGBTQ characters or themes. See Suzanne Trimel, *Utah School District’s Reversal on Decision to Remove 52 Books from School Libraries Is an Important Step in Recognizing Students’ Speech Rights*, PEN AM. (Aug. 12, 2022), <https://pen.org/press-release/utah-school-districts-reversal-on-decision-to-remove-52-books-from-school-libraries-is-an-important-step-in-recognizing-students-speech-rights/> [<https://perma.cc/ZB38-GJQZ>]. In Tennessee, following the enactment of new legislation, seven out of nine challenged books feature LGBTQ themes or authors. See ALY CHAPMAN, TENN. EQUAL PROJ., *BOOK CENSORSHIP IN TENNESSEE: ADVOCATES FOR PUBLIC SCHOOLS AND LIBRARIES: A TOOLKIT 2* (2024), https://assets.nationbuilder.com/tnep/pages/1239/attachments/original/1715613029/Final_Report_TEPBookBan_5_10_24.pdf?1715613029 [<https://perma.cc/LXVX-8LLV>].

¹⁴³ This mechanism existed under a previous Arkansas law, which, as the plaintiffs noted, was used—at least in Crawford County—to single out LGBTQ content. See *Compl. at 25–26*, *Fayetteville Pub. Libr. v. Crawford Cnty.*, No. 5:23-cv-05086 (W.D. Ark. June 2, 2023).

¹⁴⁴ For complaints challenging Florida’s library book review process as structurally biased toward removal (by making special-magistrate review available only when a district overrules an objection and retains a book, but not when it removes the book), see e.g., *Compl. at 26*, *Penguin Random House LLC v. Gibson*, No. 6:24-cv-01573 (M.D. Fla. Aug. 29, 2024); *PEN Am. Ctr.*, 711 F. Supp. 3d at 1330 (noting that the special magistrate process “cannot be used to challenge the board’s decision granting an objection and removing a book from the library”); see also *Parnell v. Sch. Bd. of Lake Cnty.*, 731 F. Supp. 3d 1298, 1314–15 (N.D. Fla. 2024) (allowing certain First Amendment claims challenging school library book removals to proceed).

¹⁴⁵ Georgia’s Senate Bill 74, for example, requires librarians to prove “good faith attempts” to remove “harmful” materials using vague criteria, while facing criminal charges for misjudgments. See S.B. 74, 2025 Reg. Sess. (Ga. 2025). Further, Arkansas law has also

tend toward excessive removal. This has contributed to a widespread chilling effect on the presence of LGBTQ-friendly books—a pattern reflected in reported library removals and legal challenges, even before these laws have fully taken effect.¹⁴⁶

Some states, like Ohio, pursue censorship indirectly by attaching restrictive provisions to budget legislation. A 2025 House proposal would have required public libraries to relocate LGBTQ-themed materials out of minors' view—imposing costly compliance burdens without additional funding and signaling that such content is inherently inappropriate.¹⁴⁷

Others go further by targeting the supply chain itself, imposing a preemptive censorship procedure on booksellers.¹⁴⁸ Texas law, for example, required booksellers to rate books sold to public schools based on the sexual references they contain—“sexually explicit,” “sexually relevant,” or “no rating”—in accordance with the state’s Penal Code definition of “sexual conduct,”¹⁴⁹ until federal courts recently blocked its enforcement.¹⁵⁰ Booksellers who refused to rate their books under this procedure or who misclassified them, deliberately or otherwise, risked being barred from selling them to Texas schools.¹⁵¹ Given the possible financial ramifications and the heavy burden placed on booksellers in having to rate these books in the first place,¹⁵² this system clearly holds the potential to incentivize the censorship of books that could be interpreted as “sexually relevant” even if they hold educational, historical, or literary value.

imposed this risk on booksellers. *See* Act 372, 94th Gen. Assemb., Reg. Sess. (Ark. 2023), *invalidated by Fayetteville Pub. Libr.*, 684 F. Supp. 3d at 896–903.

¹⁴⁶ *GLBT Youth*, 709 F. Supp. 3d at 667 (stating that more than “500 books . . . have been removed from at least one school library” in response to Iowa’s bill); *Am. Compl. at 59*, *PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd.*, No. 3:23-cv-10385 (N.D. Fla. July 7, 2023) (arguing that “[o]f the 218 books that have been targeted for removal, approximately 40% have authors who are non-white and/or identify as LGBTQ, while approximately 60% address themes relating to race or LGBTQ identity”). This chilling effect has been especially tangible in Arkansas, where the law makes it a potential criminal offense for librarians who fail to comply with the new standards. *Act 372*, 94th Gen. Assemb., Reg. Sess. (Ark. 2023); *see Fayetteville Pub. Libr. v. Crawford Cnty.*, 760 F. Supp. 3d 811, 821 (W.D. Ark. 2024) (ruling that “[t]he vague and undefined terms . . . subject the librarian and bookstore Plaintiffs to a credible fear of prosecution, as they are uncertain what lengths they must go to in order to comply with the law”).

¹⁴⁷ Susan Tebben, *Ohio Library Systems, Advocates Push Back on House Provision to Hide Certain Materials*, *OHIO CAP. J.* (May 19, 2025, at 5:00 ET), <https://ohiocapitaljournal.com/2025/05/19/ohio-library-systems-advocates-push-back-on-house-provision-to-hide-certain-materials/> [<https://perma.cc/3CRU-54NB>].

¹⁴⁸ *See* TEX. EDUC. CODE ANN. § 35.002 (2023), *implementation enjoined by Book People, Inc. v. Wong*, 692 F. Supp. 3d 660, 672 (W.D. Tex. 2023), *aff’d in part, vacated in part, and remanded*, 91 F.4th 318 (5th Cir. 2024).

¹⁴⁹ TEX. EDUC. CODE ANN. § 35.002(c) (2023). Enforcement was enjoined. *Book People, Inc. v. Wong*, 692 F. Supp. 3d 660 (W.D. Tex. 2023), *aff’d in part, vacated in part, and remanded*, 91 F.4th 318 (5th Cir. 2024). The rating requirements in sections 35.001–35.003 were subsequently held unconstitutional and permanently enjoined. *Book People, Inc. v. Wong*, 807 F. Supp. 3d 677, 691–96 (W.D. Tex. 2025), *appeal filed* (5th Cir. Oct. 30, 2025).

¹⁵⁰ *See Book People*, 692 F. Supp. 3d at 672 n.1.

¹⁵¹ *See id.* at 684–85 (“Booksellers that fail to comply with TEA’s requirements are barred from doing business with public schools.”).

¹⁵² *Id.*

Even in states without explicit library bans, classroom restrictions have prompted large-scale removals of LGBTQ-themed books. In Kentucky, for instance, one district removed over 100 titles from its libraries based solely on its interpretation of the state's anti-LGBTQ curriculum law.¹⁵³

3. *Extracurricular Level*

Two states explicitly restrict or limit pro-LGBTQ discussions in student clubs. While Louisiana prohibits any discussion of sexual orientation or gender identity during extracurricular academic, athletic, or social activities,¹⁵⁴ Texas bans the formation or sponsorship of student clubs based on sexual orientation or gender identity, targeting association rather than discussion.¹⁵⁵

Other states create implicit barriers on the extracurricular level, albeit through broader legislation, such as *classroom* bans on LGBTQ-positive discussions. In other words, they effectively discourage pro-LGBTQ student organizations by creating a generalized environment of uncertainty and fear, despite not directly targeting extracurricular activities. Vaguely worded laws, such as that of Florida, have also created a chilling effect on LGBTQ clubs.¹⁵⁶ Similarly, Iowa's law, banning instruction on gender identity or sexual orientation in K-6 education (spanning from Kindergarten to 6th Grade), has led to LGBTQ alliances shutting down or limiting activities involving discussions of identity, relationships, or sexuality¹⁵⁷—paralleling the approach of restricting “human sexuality” discussions in student clubs.¹⁵⁸

¹⁵³ Jess Clark, *Kentucky School District Bans More than 100 Books, Citing Anti-LGBTQ + Law*, LOUISVILLE PUB. MEDIA (Oct. 19, 2023, at 15:50 ET), <https://www.lpm.org/news/2023-10-19/kentucky-school-district-bans-more-than-100-books-citing-anti-lgbtq-law> [<https://perma.cc/EKC8-E4JW>].

¹⁵⁴ LA. STAT. ANN. § 17:412(A) (2024).

¹⁵⁵ TEX. EDUC. CODE ANN. § 33.0815 (2025).

¹⁵⁶ FLA. STAT. § 1001.42(8)(c) (2021); see Second Am. Compl. at 3–4, 24–25, 44, *Cousins v. Grady*, No. 6:22-cv-01312-WWB-LHP, 2022 WL 19348704 (M.D. Fla. Nov. 3, 2022) (noting that students feared their GSAs would be disbanded due to retaliation against teachers who sponsored them, reduced participation among GSA advisors, and limitations on GSA activities as a result of the law's chilling effect on speech and school policies). A 2024 settlement clarified that the law does not prohibit student clubs like GSAs from operating. Students and faculty can participate in these clubs without violating the law. See, e.g., Nina Totenberg, *Settlement Clarifies Florida's "Don't Say Gay" Law, Allowing LGBTQ+ Student Clubs*, NAT'L PUB. RADIO (Mar. 11, 2024, at 19:16 ET), <https://www.npr.org/2024/03/11/1237730819/florida-dont-say-gay-law-settlement-lgbtq>. [<https://perma.cc/YAH4-6X9M>].

¹⁵⁷ IOWA CODE § 279.80(2) (2025); see First Am. & Supp. Compl. for Declaratory & Injunctive Relief, at 40–42, 44–46, *Schools v. Reynolds*, No. 4:23-cv-00474 (S.D. Iowa Oct. 18, 2024) (noting that the new law has led to the closure of some LGBTQ student alliances, imposed restrictions on their ability to advertise and recruit members, required parental permission for 7th- and 8th-Grade students to join, and created a chilling effect on student and teacher participation in such clubs).

¹⁵⁸ UTAH CODE ANN. § 53G-7-705(1)(b)(iii) (2019). While the *Equality Utah v. Utah State Board of Education* lawsuit challenged restrictions on LGBTQ student clubs (UTAH CODE ANN. § 53A-11-1206(1)(b)(iii)), the Utah Legislature did not repeal § 53A-11-1206. Instead, they renumbered it in 2018 as part of a general reorganization of the education code. Thus, the restriction remains in effect under the new code section.

B. Parental Oversight Policies

Recent legislative trends across multiple states have established increasingly robust mechanisms enabling parental control over LGBTQ-related content in schools. These mechanisms operate through two primary channels: notification systems for classroom instruction and student activities, and restrictions on library materials. While parents have historically maintained some oversight of their children's education, these new laws significantly expand both the scope of parental authority and the specific targeting of LGBTQ content.¹⁵⁹ Opt-out provisions, in particular, tend to accelerate censorship, as schools often preemptively avoid materials that might trigger objections.¹⁶⁰ Details of these categories are set out in Appendix C and summarized in Appendix B.

1. Classroom and Student Clubs

A number of states have recently enacted laws with mandatory parental options to control their child's exposure to LGBTQ-related content in schools, either in the classroom or in student clubs. Some states, including Arkansas,¹⁶¹ Florida,¹⁶² Montana,¹⁶³ New Hampshire,¹⁶⁴ Ohio,¹⁶⁵ and Idaho,¹⁶⁶ include opt-out options, whereby children are automatically enrolled but parents can request their removal from such instruction. Other states, including Arizona,¹⁶⁷ Wyoming,¹⁶⁸ Tennessee,¹⁶⁹ and, recently, Montana,¹⁷⁰ prefer *opt-in*

¹⁵⁹ See Bowman, *supra* note 61, at 402–33 (critiquing the expansion of parental control over curriculum and warning of its anti-egalitarian and fragmentary effects, particularly regarding race, gender, and sexuality).

¹⁶⁰ See Eileen AJ Connelly, *How Opt-Outs in Classrooms Create Educational Chaos and Advance Censorship*, PEN AM. (June 26, 2025), <https://pen.org/how-opt-outs-in-classrooms-create-educational-chaos-and-advance-censorship/> [<https://perma.cc/5JSN-GSCG>].

¹⁶¹ ARK. CODE ANN. § 6-16-1006 (2021).

¹⁶² FLA. STAT. ANN. § 1014.05(d) (2022).

¹⁶³ MONT. CODE ANN. § 20-7-120(1)(a) (2021); see Plaintiffs' First Am. Compl. at 33–41, *EmpowerMT v. State*, No. DV-25-2024-0000230-CR (Mont. 1st Jud. Dist. Ct. filed Apr. 9, 2024) (challenging the constitutionality of the statute on free speech, privacy, and equal educational opportunity grounds).

¹⁶⁴ N.H. REV. STAT. ANN. § 186:11 IX-c (2024). The legislature subsequently enacted a companion statute consolidating parental rights into a single enforceable framework, see *id.* § 189-B:4 (2025), which preserves the opt-out right by cross-reference to § 186:11, IX-b and IX-c, § 189-B:4(i), requires schools to establish procedures enabling parents to object to any classroom materials on grounds of morality, sex, or religion, *id.* § 189-B:5(c), and provides for civil enforcement through declaratory and injunctive relief and monetary damages, *id.* § 189-B:7(II).

¹⁶⁵ OHIO REV. CODE ANN. § 3313.473(B)(1)(b) (2025).

¹⁶⁶ IDAHO CODE ANN. §§ 33-6001(2)(c), (4) (2025). Although not specific to clubs, the law permits withdrawal from any activity conflicting with parental beliefs and may extend to LGBTQ extracurricular events if seen as educational or school-affiliated.

¹⁶⁷ ARIZ. REV. STAT. ANN. § 15-102(A)(6) (2021).

¹⁶⁸ WYO. STAT. ANN. § 21-3-135(a)(v) (2024).

¹⁶⁹ TENN. CODE ANN. §§ 49-6-1031, 1308 (2023).

¹⁷⁰ MONT. CODE ANN. § 20-7-120(1)(b) (2025). Subsection (1)(a), enacted in 2021, adopts an opt-out model for "human sexuality instruction." Subsection (1)(b), added in

options, requiring explicit parental permission before students can participate in any lessons or activities containing LGBTQ-related content. These laws expand on existing state frameworks for parental notification regarding sex education,¹⁷¹ but are notably more expansive as they apply to all LGBTQ or sexuality-related materials across the curriculum, not just within dedicated sex education classes.¹⁷²

Further, some states provide parents with a private right of action to sue school staff for violations, such as a recent Idaho law that includes a provision for lawsuits seeking damages and injunctive relief.¹⁷³ Others, like North Carolina, have introduced legislation that would escalate enforcement by imposing criminal penalties and mandatory license revocation for noncompliant educators.¹⁷⁴

While often framed as neutral procedural safeguards, such mechanisms may produce chilling effects that distort school curricula in practice. As Justice Sotomayor cautioned in her dissent in *Mahmoud*, school districts—particularly those with limited resources—may preemptively censor LGBTQ-related materials to avoid the legal and administrative burdens created by opt-out requirements.¹⁷⁵ In this sense, opt-out and opt-in policies may function less as tools of parental empowerment than as backdoor instruments of content-suppression.

2. School Libraries

Library access has become another contested frontier for parental control over LGBTQ content. Texas law requires books rated as “sexually relevant” to be accessible to students only with explicit written parental consent and only “outside the school library,” thus creating an opt-in system

2025, imposes an opt-in requirement for “identity instruction,” thus placing identity-related instruction under a distinct parental-consent structure. *See* Plaintiffs’ Second Am. Compl. at 3, *Mont. Sch. Counselors Ass’n v. State*, No. DV 2024-230 (Mont. 1st Jud. Dist. Ct. filed Oct. 28, 2025) (alleging that the 2025 amendment expands prior restrictions and “aim[s] to further inhibit the discussion and curricula pertaining to sexual orientation, gender identity, and human sexuality” in Montana’s K–12 schools).

¹⁷¹ Melody Alemansour et al., *Sex Education in Schools*, 20 *GEO. J. GENDER & L.* 467, 476–78 (2019).

¹⁷² A few states, including Utah and Oregon, allow parents to opt their children out of required educational programs, not necessarily related to Sex Education (but may include sexual orientation or gender identity), on the grounds of religious beliefs, provided they submit written requests with proposed alternative learning activities that meet educational goals. *See* UTAH CODE ANN. § 53G-10-205 (2025); OR ADMIN. R. 581-021-0009 (2025).

¹⁷³ IDAHO CODE ANN. §§ 33-6001(10), (11) (2025).

¹⁷⁴ *See* H.B. 595, 2025 Gen. Assemb., Reg. Sess. (N.C. 2025) (requiring age-restricted access and imposing Class 1 misdemeanor penalties for exposing minors to “harmful material”).

¹⁷⁵ *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2394–95 (2025) (Sotomayor, J., dissenting, joined by Kagan & Jackson, J.J.) (dissenting from the Court’s holding that the school board’s refusal to allow religious opt-outs from LGBTQ-inclusive instruction violated the Free Exercise Clause).

that restricts access by default.¹⁷⁶ A similar approach has been taken recently by Idaho.¹⁷⁷

Beyond access restrictions, states have established varying procedures for challenging library materials. Georgia mandates expedited reviews, within strict timeframes, of any material deemed “harmful to minors” but limits complaint-filing to parents or permanent guardians of students enrolled in the local school system.¹⁷⁸ Other states, including Florida¹⁷⁹ and Indiana¹⁸⁰ (and currently pending in North Carolina),¹⁸¹ have expanded the authority to challenge the presence of books deemed “harmful to minors” or containing references to “sexual conduct”: Now, not only parents but any county resident may lodge a complaint. These broader challenge mechanisms require immediate removal of the material within a few school days—even before due evaluation and regardless of whether the objector has children in the school—enabling swift censorship with little oversight.

Similar to the classroom and student-club context, these laws are likely to create anticipatory censorship in school libraries.¹⁸² Faced with the threat of public challenges and the very real possibility of losing professional licensure or even imprisonment, many districts may choose to avoid acquiring or displaying books with LGBTQ content altogether.¹⁸³ The outcome transforms what appear to be procedural safeguards into mechanisms for wholesale library-content restriction.

The account provided in this Part underscores how contemporary LGBTQ-related curriculum laws operate across multiple layers of education—from classroom instruction and library holdings to extracurricular spaces and parental gatekeeping. Far from isolated policy initiatives, these measures form a cohesive regulatory landscape that constrains students’ access to LGBTQ-related knowledge. This regulatory backdrop sets the stage for the analysis that follows, which examines the constitutional doctrines governing such restrictions and assesses their capacity to protect students’ access to diverse perspectives on gender and sexuality.

¹⁷⁶ TEX. EDUC. CODE ANN. § 35.005 (2023).

¹⁷⁷ IDAHO CODE ANN. §§ 18-1514, 18-1517B (2024).

¹⁷⁸ GA. CODE ANN., § 20-2-324.6 (2022).

¹⁷⁹ FLA. STAT. ANN. § 1006.28(2)(a)(2)(b) (2022).

¹⁸⁰ IND. CODE ANN. § 20-26-5.5-1 (2023).

¹⁸¹ H.B. 595, 2025 Gen. Assemb., Reg. Sess. (N.C. 2025).

¹⁸² See, e.g., Hannah Natanson, *Objection to Sexual, LGBTQ Content Propels Spike in Book Challenges*, WASH. POST (June 9, 2023), <https://www.washingtonpost.com/education/2023/05/23/lgbtq-book-ban-challengers> [<https://perma.cc/2MPG-KXAN>] (reporting that a 2021–2022 study found most of the 1,000 book challenges analyzed stemmed from complaints by just eleven individuals, illustrating how removals often reflect the actions of a small minority rather than broad community interests).

¹⁸³ See *supra* notes 141–46.

II. THE PROMINENT CONSTITUTIONAL DOCTRINES AND THEIR LIMITATIONS

After charting the multi-layered landscape of the new curriculum laws, this Part turns to the constitutional doctrines most directly governing their legality: the Free Speech and Equal Protection Clauses. It highlights their promises but also their limitations, demonstrating how both fall short when it comes to meaningfully constraining the exclusionary new laws. Despite their differing doctrinal logics, both Clauses share a common conceptual shortcoming: They present insufficient recognition of the importance of developmental identity exploration among young people in school. By pinpointing this shortcoming, the present analysis lays the groundwork for the normative vision advanced in Part III.

A. *Free Speech Jurisprudence*

Current restrictions on LGBTQ-related curriculum content have direct implications for students' First Amendment right to receive information and ideas.¹⁸⁴ This right is founded on the principle that the dissemination of ideas becomes meaningless if willing recipients cannot freely access and consider them.¹⁸⁵ Granted, public schools represent a distinct First Amendment context where constitutional protections must be balanced against institutional functionality.¹⁸⁶ Schools require appropriate, though not unlimited, authority to regulate expression to fulfill their educational mission, including establishing curricular boundaries that prevent teachers from pursuing or promoting topics to satisfy personal interests. Nonetheless, the Supreme Court has repeatedly affirmed that students retain free speech rights within school settings,¹⁸⁷ as these rights remain fundamental to schools' core purpose of developing future citizens equipped with the knowledge and exposure needed for meaningful democratic participation.¹⁸⁸

In *Tinker*, the Court characterized the classroom environment as “peculiarly the ‘marketplace of ideas’” where “leaders are trained through wide exposure to that robust exchange of ideas which discovers truth out of

¹⁸⁴ The Supreme Court has recognized that the Free Speech Clause protects listeners as well as speakers. *See, e.g.,* *Martin v. Struthers*, 319 U.S. 141, 143 (1943).

¹⁸⁵ *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

¹⁸⁶ *See, e.g.,* Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 406 (2011).

¹⁸⁷ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). As later reinforced in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

¹⁸⁸ *Cf. Caitlin Millat, The Education-Democracy Nexus and Educational Subordination*, 111 GEO. L.J. 529, 529 (2023) (contending that the Supreme Court’s education jurisprudence has increasingly elevated consumer and private interests at the expense of democratic values, civic engagement, and equal opportunity).

a multitude of tongues.”¹⁸⁹ Similarly, in *Yoder*, the Court acknowledged that compulsory education is “necessary to prepare citizens to participate effectively and intelligently in our open political system.”¹⁹⁰ A plurality of the Court in *Pico* further declared that allowing access to a diversity of ideas in a school library context was an important aspect of preparing students “for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.”¹⁹¹ This understanding has remained central to the Supreme Court’s educational philosophy, as evidenced in recent decisions on free speech. In *Mahanoy*, the Court reaffirmed that schools serve as “nurseries of democracy,” highlighting their role as institutions for the unfettered exchange of ideas that teach the value of free speech.¹⁹²

The Supreme Court, despite emphasizing schools’ democratic function, has not yet addressed whether the Free Speech Clause permits students or teachers to challenge state-mandated curriculum restrictions in classroom settings.¹⁹³ The Court has opined on only two cases involving students’ First Amendment challenges to curriculum decisions outside the classroom—specifically regarding school libraries and student newspapers, in *Pico* and *Hazelwood*, respectively.¹⁹⁴ While these landmark decisions provide some guidance, they leave unresolved two distinct sources of judicial deference that now shape the lower courts’ approach. First, several circuits have treated curricular content as government speech, thereby removing it from First Amendment scrutiny altogether. Second, even in jurisdictions that recognize some First Amendment review, students face formidable legal obstacles. This is due to the standards developed in the judicial cases, which grant wide latitude to educational authorities and effectively insulates most curriculum-based exclusions from meaningful constitutional scrutiny. This Section discusses each of these concerns in turn.

1. *Doctrinal Uncertainties*

Although First Amendment jurisprudence recognizes an individual right to receive information without impediment, considerable ambiguity surrounds the application of these rights in educational contexts. The Supreme Court addressed the rights of students as information recipients in *Board of Education*,

¹⁸⁹ *Tinker*, 393 U.S. at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

¹⁹⁰ *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

¹⁹¹ *Bd. of Educ. v. Pico*, 457 U.S. 853, 867–68 (1982).

¹⁹² *Mahanoy Area Sch. Dist. v. B. L. ex rel. Levy*, 141 S. Ct. 2038, 2046 (2021).

¹⁹³ Grounded in a child-centric framework, this Article limits its analysis to students’ speech rights, setting aside claims asserted by teachers or creators of excluded content.

¹⁹⁴ *Pico*, 457 U.S. at 853; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 260 (1988).

Island Trees Union Free School District No. 26 v. Pico,¹⁹⁵ but the decision's limited application has created substantial interpretative challenges.

In *Pico*, a school board removed nine books from its libraries, characterizing them as “anti-American, anti-Christian, anti-Semitic, and just plain filthy,” and citing a “moral obligation” to shield students from this perceived “moral danger.”¹⁹⁶ The Court held that, while school boards retain substantial discretion regarding library materials, they cannot remove books simply because officials disagree with the ideas expressed—when such actions are taken in a “narrowly partisan or political manner.”¹⁹⁷ Any removal must, instead, be grounded in legitimate educational objectives,¹⁹⁸ such as “educational suitability,” “relevance,” or “appropriateness to age and grade level.”¹⁹⁹

Crucially, *Pico* specifically addressed optional library resources rather than required curriculum materials, with the plurality explicitly noting that schools might justifiably assert greater control over mandatory curricular content.²⁰⁰ This distinction has produced significant disagreement among circuit courts regarding *Pico*'s reach.²⁰¹ The decision's precedential authority has been further diminished by its plurality status, with Justice Blackmun specifically criticizing the plurality for unnecessarily restricting its holding to library contexts.²⁰² Multiple circuits have subsequently questioned *Pico*'s precedential weight, with some explicitly declaring it non-binding.²⁰³

The second landmark case, *Hazelwood School District v. Kuhlmeier* (1988), established a more concrete standard than *Pico*'s “partisan or political manner” test. The case involved a school principal who had removed two articles addressing teen pregnancy and divorce from a student newspaper produced in a Journalism class.²⁰⁴ The Court ruled that school officials may exercise editorial control over school-sponsored expressive activities when their actions are “reasonably related to legitimate pedagogical concerns.”²⁰⁵ It found the school's decision justified on the grounds of maintaining age-appropriate content.²⁰⁶ Unlike *Pico*'s focus on optional library materials, *Hazelwood* established that administrators possess broad discretion to regulate student

¹⁹⁵ 457 U.S. 853 (1982) (plurality opinion).

¹⁹⁶ *Id.* at 856–58.

¹⁹⁷ *Id.* at 870–71.

¹⁹⁸ *Id.* at 871.

¹⁹⁹ *Id.* at 873.

²⁰⁰ *Id.* at 869.

²⁰¹ See *infra* notes 208–16 and accompanying text.

²⁰² *Pico*, 457 U.S. at 881.

²⁰³ See, e.g., *Griswold v. Driscoll*, 616 F.3d 53, 57 (1st Cir. 2010) (“*Pico*'s rule of decision, however, remains unclear.”); *Virgil v. Sch. Bd. of Columbia Cnty.*, 862 F.2d 1517, 1520–21 (11th Cir. 1989) (“Courts that have addressed the issue have failed to achieve a consensus on the degree of discretion to be accorded school boards to restrict access to curricular materials.”); *Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1200 (11th Cir. 2009) (“*Pico* is of no precedential value as to the application of the First Amendment to these issues.”).

²⁰⁴ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263–64 (1988).

²⁰⁵ *Id.* at 273.

²⁰⁶ *Id.* at 274–75.

expression in curricular contexts, including internal newspapers and required coursework. Nevertheless, substantial uncertainty persists regarding *Hazelwood*'s application to today's curricular restrictions, including the critical question of whether the decision permits viewpoint discrimination—an issue on which federal circuits remain divided.²⁰⁷

In the decades following these two landmark cases, the First and Fifth Circuits have decided that textbook and curricular decisions are pure government speech and, therefore, immune to review for First Amendment purposes.²⁰⁸ Under the government speech doctrine, expression by the state lies outside the scope of the First Amendment and therefore triggers no Free Speech Clause scrutiny. A significant example is *Chiras v. Miller*, where the Fifth Circuit upheld the Texas School Board's refusal to approve a particular environmental science textbook.²⁰⁹ The court declined to apply *Pico*, emphasizing that that case specifically addressed school-library books while explicitly exempting classroom textbooks from its scope.²¹⁰ The court also thoroughly evaluated *Hazelwood*'s potential applicability, acknowledging the widespread disagreement among circuit courts regarding how First Amendment principles should apply to school boards' curricular material selections.²¹¹ Ultimately, the court refused to apply the *Hazelwood* standard as "the selection and use of textbooks in the public school classrooms constitutes government speech."²¹²

Conversely, the Eighth, Ninth, and Eleventh Circuits interpreted the Supreme Court precedents as permitting judicial review of certain curriculum decisions under the First Amendment.²¹³ In *Arce v. Douglas*, for example,

²⁰⁷ Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 76 (2008) (arguing that "[t]he case law surrounding *Hazelwood*'s applicability to curriculum selection, as opposed to textbook selection, is murkier").

²⁰⁸ See *Griswold*, 616 F.3d at 58–59 (refusing to apply *Pico* to Massachusetts' curricular guidelines regarding Armenian Genocide materials); *Chiras v. Miller*, 432 F.3d 606, 614–20 (5th Cir. 2005) (holding that textbook selection is government speech and rejecting claims that students or authors have a First Amendment right to demand inclusion of specific curricular material). This approach mirrors the stance taken in pre-*Hazelwood* decisions by the Third, Sixth, and Seventh Circuits. See *Seyfried v. Walton*, 668 F.2d 214, 216–17 (3d Cir. 1981) (upholding administrators' authority to cancel a student theatrical performance, determining that such action did not constitute a significant infringement of students' constitutional freedoms); *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 578–80 (6th Cir. 1976) (upholding a school board's decision to reject specific textbooks, ruling that curricular selection remains within administrative discretion, absent evidence of imposing ideological conformity); *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980) (rejecting a student complaint against removing certain books from English courses and the library of high school because it "nowhere suggests that in taking these actions defendants have been guided by an interest in imposing some religious or scientific orthodoxy or a desire to eliminate a particular kind of inquiry generally").

²⁰⁹ *Chiras*, 432 F.3d 606.

²¹⁰ *Id.* at 619.

²¹¹ *Id.* at 616.

²¹² *Id.*

²¹³ See, e.g., *Monteiro v. Tempe Union High Sch. Distr.*, 158 F.3d 1022, 1027–28 (9th Cir. 1998) (holding that *Pico* plurality extended to students' right to receive information in the context of the school curriculum, where a third-party—a parent or group of

the Ninth Circuit invalidated Arizona's ban on Mexican American Studies in school curricula, affirming that students maintain the First Amendment right to receive information and ideas in curricular contexts.²¹⁴ Applying *Hazelwood*'s "legitimate pedagogical concern" standard,²¹⁵ the court found that the state's enforcement actions were not reasonably related to legitimate educational objectives and, instead, stemmed from a racial and political animus.²¹⁶

The varying interpretations of *Pico*'s persuasive authority and *Hazelwood*'s applicability across the circuit courts create significant uncertainty in this area of law.²¹⁷ However, scholars have underscored an important pattern: States and school districts rarely, if ever, lose such cases.²¹⁸ Since *Pico* was decided in 1982, First Amendment jurisprudence has evolved considerably—including the development of the government speech doctrine and a series of Supreme Court rulings that have progressively narrowed the speech rights of public school students.²¹⁹ The Supreme Court has yet to clarify the degree to which curricular decisions are reviewable under the Free Speech Clause, resulting in an unsettled doctrinal landscape. In practice, then, this has left students vulnerable to unreviewed institutional control over what ideas they are permitted to encounter. As Professor Caroline Mala Corbin rightly contends, "[c]ourts disposed towards upholding these laws might find it easier to rely on the government speech reasoning instead, forgoing any review at all."²²⁰

2. Judicial Deference

Even in the few circuits (Ninth, Eleventh, and Eighth) that do recognize students' First Amendment claims regarding the curriculum, students still face substantial practical barriers to successful challenges. The application of *Pico* and *Hazelwood* precedents frequently produces diverging conclusions from identical factual scenarios, as evidenced by the stark disagreements

parents—attempts to limit the materials that a school furnishes to students and requires them to read); *Virgil v. Sch. Bd.*, 862 F.2d 1517, 1522–23 (11th Cir. 1989) (applying the *Hazelwood* standard to uphold a school board's decision to remove a textbook from the curriculum because the board's actions were reasonably related to legitimate pedagogical concerns regarding the book's sexual and vulgar content); *Pratt v. Indep. Sch. Dist. No. 831*, 670 F.2d 771, 777–79 (8th Cir. 1982) (requiring the return of films to the high school curriculum that had been removed by the school board over objections related to violence and potential influence on students' religious and familial beliefs). In *Pratt*, the Eighth Circuit formulated a standard akin to those later articulated in *Hazelwood* and *Pico*. *Id.* at 777–79.

²¹⁴ *Arce v. Douglas*, 793 F.3d 968, 985 (9th Cir. 2015).

²¹⁵ *Id.* at 982–83.

²¹⁶ *Id.* at 986.

²¹⁷ *Chiras*, 432 F.3d at 616 ("We note that there is no strong consensus among the circuit courts regarding the application of First Amendment principles to the selection of curricular materials by school boards.").

²¹⁸ See, e.g., Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 247 (2013); Corbin, *supra* note 46, at 1498.

²¹⁹ Bowman, *supra* note 218, at 247.

²²⁰ Corbin, *supra* note 46, at 1498 n.150.

among justices in the *Pico* decision itself.²²¹ Moreover, under the *Hazelwood* framework, courts require educational authorities to demonstrate that curriculum restrictions arise from “legitimate pedagogical concerns,” and only then do they assess whether such restrictions are “reasonably related” to those concerns. This standard still grants extraordinary deference to educational authorities’ judgment. As Catherine Ross explains, “[i]t is easier for schools to hide behind pretextual substantial and reasonable interests when the legal standard does not require courts to examine actual motives.”²²²

The broad failure to challenge curriculum restrictions based on the “legitimate pedagogical concerns” standard is especially pronounced in the context of LGBTQ-positive content. Proponents often justify these restrictions as serving the purportedly legitimate purpose of “protecting children’s innocence”—a rationale built on deeply entrenched cultural narratives portraying LGBTQ content as threatening to children’s moral development, supposedly indoctrinating them into a hyper-sexualized worldview and potentially encouraging them toward same-sex desire or gender-non-conforming behavior. This framing has been explicitly articulated by proponents of these curricular restrictions across multiple jurisdictions. In Florida and Alabama, legislative sponsors of their anti-LGBTQ-related curriculum laws have candidly acknowledged that preventing the “normalization” of LGBTQ identities and avoiding any semblance of “indoctrination” underpin these measures.²²³ Similarly, in Texas, when the Austin school district planned activities acknowledging Pride Week, Attorney General Ken Paxton intervened with formal objections, characterizing even basic inclusive educational content as inappropriate “human sexuality instruction” from which children must be protected.²²⁴ The characterization of age-appropriate LGBTQ-inclusive materials as unhealthy indoctrination was further amplified when Ronna McDaniel, then Republican National Committee Chair, published her view that children were “being indoctrinated with anti-American and sexually-explicit propaganda” in

²²¹ *Bd. of Educ. v. Pico*, 457 U.S. 853, 907 (1982) (Rehnquist, J., dissenting); see also *Chiras*, 432 F.3d at 620 (finding that *arguendo*—assuming for the sake of argument that *Pico* applies to curricular decisions—students “fail to plead any specific facts which demonstrate that the SBOE’s decision was motivated by ‘narrowly partisan or political’ considerations” despite allegations about board members’ comments regarding the rejected textbook).

²²² Ross, *supra* note 19, at 1694.

²²³ *From Gender Theory Guides to ‘Transition’ Questionnaires—Florida State Rep. Joe Harding on the Fight for Parental Rights in Education*, AM. THOUGHT LEADERS (Oct. 15, 2022) (Spotify); Patrick Darrington, *Opponents Speak Out in Public Hearing on Expansion of ‘Don’t Say Gay’ Law*, ALA. POL. REP. (May 25, 2023, at 9:28 CT), <https://www.alreporter.com/2023/05/25/opponents-speak-out-in-public-hearing-on-expansion-of-dont-say-gay-law/> [https://perma.cc/H2J9-PCRE].

²²⁴ Ken Paxton (@KenPaxtonTX), X (Mar. 22, 2022, at 20:18 ET), https://x.com/KenPaxtonTX/status/1506425186219929608?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1506425186219929608%7Ctwgr%5E09505bc1f1697339f99b81b7245f222358ad6ce7%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fglaad.org%2Fgap%2Fken-paxton%2F [https://perma.cc/RA79-8Y7Y].

schools discussing LGBTQ-related topics.²²⁵ Furthermore, the federal version of these bills, literally entitled the “Stop the Sexualization of Children Act,” objects to the simple acknowledgment of sexual minorities in educational materials, specifically lamenting that “[m]any newly implemented sexual education curriculums encourage discussion of sexuality, sexual orientation, transgenderism, and gender ideology as early as kindergarten.”²²⁶

These contemporary legislative efforts continue a decades-long campaign to “shield” children from exposure to homosexuality. This impulse has a substantial historical lineage, beginning with the “Save Our Children” campaigns of the late 1970s, led by anti-LGBTQ advocates such as Anita Bryant and John Briggs, who portrayed “homosexual schoolteachers” as “dangerous role models” intent on corrupting innocent children.²²⁷ This framing evolved into the “no promo homo” laws of the 1980s and 1990s, enacted amid the HIV/AIDS epidemic and widespread state-sanctioned homophobia.²²⁸ These earlier restrictions were justified by their proponents on the grounds of the same underlying fear that remains central to contemporary legislation: that any recognition of LGBTQ identities in schools poses a danger to children’s moral development and must be preemptively suppressed. Clifford Rosky eloquently described this anxiety a decade ago as “the fear of the queer child.”²²⁹

While mere moral discomfort with LGBTQ content may not be easily qualified as a legitimate pedagogical concern, the *Hazelwood* standard creates ample room for judicial deference to arguments framed around “shielding children’s innocence.”²³⁰ Because this narrative is deeply embedded in cultural and political discourse,²³¹ courts that are inclined toward restraint may find it persuasive, even when the asserted pedagogical rationale is pretextual. We should be mindful that *Hazelwood* itself upheld censorship of high school newspaper articles alluding to students’ experiences with pregnancy—content far less controversial than today’s debates over gender and sexuality. Given

²²⁵ Ronna McDaniel, Opinion, *Parental Rights Bill: Teach Kindergartners the ABCs, Not S-E-X*, FOX NEWS (Apr. 4, 2022, at 07:00 ET), <https://www.foxnews.com/opinion/parental-rights-bill-teach-abcs-not-sex-ronna-mcdaniel> [<https://perma.cc/A2RB-FFBH>].

²²⁶ Stop the Sexualization of Children Act, H.R. 9197, 117th Cong. (2022).

²²⁷ Rosky, *supra* note 12, at 1477–78 (citing ANITA BRYANT, *THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION’S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY* 113–20 (1977)).

²²⁸ *Id.* at 1487–88.

²²⁹ See Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 608 (2013).

²³⁰ See generally *Safe Schs. v. Reynolds*, 788 F. Supp. 3d 969 (S.D. Iowa 2025) for a recent example of such judicial deference. There, the court upheld Iowa’s ban on LGBTQ content for elementary students by invoking *Hazelwood*’s language about protecting students from “material that may be inappropriate for their level of maturity,” stating that “reasonable minds may disagree about whether elementary school students are too young to study sexual orientation and gender identity as part of mandatory curriculum, but it is the job of state and local officials, not federal courts, to resolve that disagreement.” *Id.* at 992.

²³¹ See, e.g., Brief of Amici Curiae Advancing Am. Freedom et al. in Support of Petitioners at 3, *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025) (No. 24-297) (supporting parents challenging school curriculum and stating that “parents of diverse religious backgrounds sued to protect their elementary school-aged children from indoctrination into a hyper-sexualized worldview”).

that today's anti-LGBTQ restrictions often target much younger students—broadly, from pre-Kindergarten (typically ages 4–5) through to 8th Grade (generally ages 13–14), the doctrine's deferential posture makes it particularly easy for courts to treat LGBTQ-related content as presumptively inappropriate for those age groups.²³²

But courts' willingness to uphold curricular restrictions under the guise of neutrality obscures the structural harms inflicted on students. This outcome not only compromises the fundamental purpose of public education but also directly contradicts the core principles of the First Amendment itself. When teachers cannot discuss sexual orientation or gender identity in the classroom, students lose access to essential knowledge about the historical marginalization of LGBTQ people and their ongoing fight for equal rights. Even more perniciously, heterosexuality and cisgender identity are routinely affirmed—without being named as such—thereby reinforcing them not as one human experience among many, but as the only legitimate or intelligible norm. This outcome not only compromises the fundamental purpose of public education as a marketplace of ideas but also preserves existing power structures—the very abuse of authority that the Free Speech Clause was intended to prevent.

These dual deficiencies—first, doctrinal uncertainty, and second, persistent challenges in practical enforcement—are particularly concerning. This is especially the case if we consider that the democratic self-governance rationale is critical in relationships characterized by institutional power asymmetries in which the less powerful party is subject to mandatory authority.²³³ Under such circumstances, individuals require strong protections for their right—essential for democratic decision-making—to access information that they otherwise could not independently discover or comprehend. Importantly, the teacher–student relationship exemplifies this dynamic, as education is mandatory and educators exercise considerable authority over students, who depend on schools for knowledge they may otherwise be deprived of. As Professor Caitlin Millat recently argued, the state's increasing use of public education to advance a subordinating agenda—especially through the regulation of curricular content—risks transforming schools from sites of democratic preparation into instruments of ideological control.²³⁴ Rather than supporting students' critical engagement with systems of power, this trend suppresses identity-related

²³² While challenges to blanket bans on LGBTQ-related topics may succeed under the *Pico-Hazelwood* framework, laws restricting content based on asserted “age-appropriateness” pose greater challenges.

²³³ See, e.g., Francesca Procaccini, *(E)Racing Speech in School*, 58 HARV. C.R.-C.L. L. REV. 457, 472 (2023) (discussing the nature of this relationship vis-à-vis the First Amendment).

²³⁴ Millat, *supra* note 188, at 532; Caroline Mala Corbin, *A Critical Race Theory Analysis of Critical Race Theory Bans*, 14 U.C. IRVINE L. REV. 57, 57 (2024) (“Ultimately, critical race theory bans reinscribe racial inequalities. By chilling classroom discussions about the creation and maintenance of racial hierarchies, these bans leave unaddressed all the structural issues that critical race theory aims to uncover. It is a perfect vicious circle.”).

discourse and entrenches dominant hierarchies. In this context, education that raises students' awareness of structural heteronormativity—just as much as other social structures relating to identity—is *essential*. It equips students with the analytical tools necessary to recognize how norms surrounding gender and sexuality influence access to social, political, and economic resources—such as employment protections and housing policies. Equipped with this critical awareness, students can better navigate these systems when they encounter discrimination or exclusion. They will also be better placed to challenge and reshape them, when old enough to do so, thereby enabling them to more fully participate in the institutions that mold their everyday lives.

Yet, I argue, current Free Speech doctrine in schools, rooted primarily in preparing students for future democratic participation, inadequately accounts for students' present-day developmental interests in exploring fundamental questions of identity and belonging. By framing educational value primarily in future-oriented terms, it neglects students' present developmental need to explore questions of identity and belonging. This narrow temporal framing enables courts to defer to claims of pedagogical necessity without adequately weighing the immediate educational harms that curriculum restrictions impose on students' developmental processes.²³⁵ Building on this critique, this Article adds a developmental perspective that is attuned to students' present needs.²³⁶ It recognizes students not solely as future citizens requiring civic preparation but also as developing individuals needing to safely explore questions of identity, self-perception, and difference within educational settings. Before turning to this conceptual understanding, though, it is necessary to examine the promises and limitations of the other major constitutional doctrine governing curriculum law: Equal Protection jurisprudence.

B. *Equal Protection Jurisprudence*

The recent surge in LGBTQ-related curriculum laws implicates the Equal Protection Clause of the Fourteenth Amendment, which prohibits U.S. states from discriminating against individuals based on protected

²³⁵ This critique may also be understood in terms of scope rather than timing. Even if Free Speech doctrine's civic-preparation rationale is sound, it construes that mission too narrowly by excluding engagement with identity, difference, and belonging from the realm of "pedagogically appropriate" learning. Reframing those subjects as integral to democratic education would expand, rather than replace, the doctrine's civic focus.

²³⁶ In response to some of the deficiencies discussed here, scholars advanced proposals to recalibrate the standards underlying First Amendment application in school settings. See, e.g., Salzman, *supra* note 46, at 1092–96 (arguing for heightened scrutiny when a curriculum limits opposing political or ideological views); Corbin, *supra* note 46, at 1506–10 (proposing a four-factor test to determine when students' rights as listeners should outweigh the government's typical immunity). This Article, however, takes a different approach by reframing the normative underpinnings of this framework—interpreting it through the lens of the developmental self-exploration framework.

characteristics without adequate justification.²³⁷ Throughout history, the Equal Protection Clause has served as a significant pathway to addressing educational issues, including racial segregation and desegregation,²³⁸ language barriers,²³⁹ and sex discrimination,²⁴⁰ among others. Furthermore, the Clause has offered an important framework for LGBTQ rights in schools—compelling them to address, for example, harassment motivated by anti-LGBTQ sentiment with the same urgency as other forms of discriminatory abuse,²⁴¹ and to protect transgender students' access to restrooms aligned with their gender identity.²⁴²

This doctrinal foundation has led scholars to argue that the Equal Protection Clause offers a promising avenue for challenging curriculum restrictions.²⁴³ Yet, as this Section demonstrates, this scholarly optimism warrants closer scrutiny for two main reasons. First, the Supreme Court has never ruled on the constitutionality of anti-LGBTQ-related curriculum laws under the Equal Protection Clause, having addressed only Establishment Clause challenges in cases such as *Epperson* and *Edwards*.²⁴⁴ The uncertainty around both the Equal Protection Clause's applicability to curriculum laws and the appropriate standard of review leaves this area vulnerable to judicial inconsistency and interpretative debate. More fundamentally, however, even assuming

²³⁷ U.S. CONST. amend. XIV, § 1 (“[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”). Restrictions on extracurricular activities, such as student clubs and organizations that operate outside the formal curriculum, *see supra* notes 154–55 and accompanying text, may also implicate the Equal Access Act of 1984, 20 U.S.C. § 4071. This Act prohibits public secondary schools that receive federal funding from denying equal access to non-curricular student groups based on the content of their speech. State laws that ban or restrict LGBTQ student clubs may therefore violate federal law by denying students equal access to school facilities and resources, based on the clubs' expressive content.

²³⁸ *See, e.g., Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954) (holding that racial segregation in public schools violated the Equal Protection Clause).

²³⁹ *See, e.g., Lau v. Nichols*, 414 U.S. 563, 563 (1974) (holding that denying non-English-speaking students meaningful access to education violates equal protection principles).

²⁴⁰ *See, e.g., Brenden v. Indep. Sch. Dist.* 742, 477 F.2d 1292, 1303 (8th Cir. 1973) (holding that excluding girls from school sports competitions violated the Equal Protection Clause).

²⁴¹ *See, e.g., Nabozny v. Podlesny*, 92 F.3d 446, 461 (7th Cir. 1996) (holding that a school violated the Equal Protection Clause by failing to protect a student from anti-gay harassment); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1138 (9th Cir. 2003) (holding that school officials may be liable under Equal Protection for deliberate indifference to anti-gay harassment, requiring meaningful investigation and response).

²⁴² *See, e.g., Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619–20 (4th Cir. 2020) (holding that the school board's policy prohibiting a transgender boy from using the boys' restroom violated both the Equal Protection Clause and Title IX), *cert. denied*, 141 S. Ct. 2878 (2021).

²⁴³ *See, e.g., Rosky, supra* note 12, at 1467 (contending that anti-gay laws violate the Constitution's equal protection guarantees “regardless of what level of scrutiny applies to them”).

²⁴⁴ *Epperson v. Arkansas*, 393 U.S. 97, 107–09 (1968) (holding states could not ban the teaching of Darwin's theory of evolution in public schools); *Edwards v. Aguillard*, 482 U.S. 578, 597 (1987) (holding that states could not require the teaching of creationism in public schools).

doctrinal hurdles are overcome, Equal Protection claims face steep evidentiary barriers in practice—barriers compounded by the standards that courts apply to curricular decisions, especially in light of the legislative rhetoric and broader campaign framing anti-LGBTQ-related curriculum laws as protecting parental rights or ensuring age-appropriateness. This Section elaborates on each of these concerns in turn.²⁴⁵

1. *Doctrinal Uncertainties*

Two key doctrinal uncertainties complicate Equal Protection analysis of LGBTQ-related curriculum laws.²⁴⁶ The first relates to whether curriculum-related laws, assuming they constitute government speech, are subject to review under the Equal Protection Clause. The Supreme Court has yet to clarify the extent to which government speech is constrained by Equal Protection principles, and lower courts have often declined to find that discriminatory government expression, alone, amounts to unequal treatment under the law.²⁴⁷

Furthermore, assuming anti-LGBTQ-related curriculum laws *are* subject to Equal Protection review, a second layer of ambiguity arises: What level of judicial scrutiny should apply to laws that discriminate on the basis of sexual orientation? Should courts invoke heightened scrutiny (intermediate review)²⁴⁸ or adhere to the more deferential rational-basis test?²⁴⁹

²⁴⁵ Highlighting these limitations is not intended to deter litigants from pursuing this avenue but, rather, to acknowledge its constraints—and to prompt a redirection of vision toward more expansive conceptions of substantive equality. Indeed, Equal Protection arguments have gained strategic value: States such as Utah, Arizona, South Carolina, and Florida repealed curriculum restrictions after their attorneys-general warned that continued enforcement would likely lead to costly litigation and constitutional defeat. *See* Clifford Rosky, *Don't Say Gay: The Government's Silence and the Equal Protection Clause*, 2022 U. ILL. L. REV. 1845, 1849. Yet, to some extent, these outcomes reflect political calculation more than judicial vindication of LGBTQ rights. The real stakes lie deeper: As contemporary LGBTQ-related curriculum laws adopt apparently neutral language while continuing to serve exclusionary functions through increasingly sophisticated mechanisms, the ground-level reality of marginalization that LGBTQ students have long faced remains. This underscores why more transformative conceptions of substantive equality are warranted.

²⁴⁶ As for book removals, courts have typically defaulted to the First Amendment framework established in *Pico*. One lower court—the District Court of Arizona—invalidated a state curriculum law that restricted discussion of race issues under the Equal Protection Clause. Yet the Ninth Circuit does not treat curriculum laws as government speech. *See* González v. Douglas, 269 F. Supp. 3d 948, 972–73 (D. Ariz. 2017) (treating the removal of books from school curricula as raising First Amendment concerns).

²⁴⁷ Johany G. Dubon, *Rereading Pico and the Equal Protection Clause*, 92 FORDHAM L. REV. 1567, 1597–98 (2024) (listing several circuit courts that have rejected Equal Protection challenges to government speech). Still, scholars have advanced arguments that such expression may, in specific contexts, trigger Equal Protection concerns. *See, e.g.,* Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 679 (2013); Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 752–54 (2011); HELEN NORTON, *THE GOVERNMENT'S SPEECH AND THE CONSTITUTION* 101, 124–25 (2019).

²⁴⁸ *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

²⁴⁹ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985).

The standard of review is critical: The more rigorous it is, the more likely the restriction will be found unconstitutional. Notably, to satisfy heightened scrutiny, which applies to classifications involving quasi-suspect classes (such as sex),²⁵⁰ the state must demonstrate that the classification serves “important governmental objectives” and is “substantially related” to achieving those ends.²⁵¹ In contrast, under the more deferential rational-basis review—applied to classifications that do not involve suspect or quasi-suspect classes—the government need only show that the law is “rationally related to a legitimate governmental interest.”²⁵² The Court has made clear that, under rational-basis review, it will uphold state action if any conceivable legitimate purpose can be imagined—even if the legislature did not articulate one or offered a justification the Court finds unpersuasive.²⁵³ Given the permissive nature of the rational-basis review, it often functions as a near-automatic validation of legislation.²⁵⁴

There are persuasive normative arguments for applying the heightened scrutiny to anti-LGBTQ-related curriculum laws.²⁵⁵ However, because the Court has neither recognized sexual orientation discrimination as a form of sex discrimination, nor classified LGBTQ individuals as members of a suspect or quasi-suspect class, nor treated education as a fundamental right triggering elevated scrutiny,²⁵⁶ the prevailing expectation is that such anti-LGBTQ-related curriculum laws will be evaluated under the more deferential rational-basis review. Arguments have been made for extending the reasoning applied in *Bostock*—where the Court held that discrimination “because of sex” includes LGBTQ employees²⁵⁷—to Equal Protection claims.²⁵⁸ Yet, such an extension is likely to face resistance from the current Conservative majority of the Court, as evidenced in recent cases relating to LGBTQ rights.²⁵⁹

²⁵⁰ *Castillo*, 477 U.S. at 638 (holding that “heightened scrutiny” applies to suspect and quasi-suspect classes—those which have been historically subject to discrimination, “exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group”).

²⁵¹ *Craig v. Boren*, 429 U.S. 190, 197 (1976).

²⁵² *City of Cleburne*, 473 U.S. at 440 (1985); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976).

²⁵³ *See, e.g., Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487 (1955).

²⁵⁴ Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755–56 (2011).

²⁵⁵ Some scholars argue that the constitutional inquiries involving education might carry special significance that can elevate the level of scrutiny. *See, e.g., Cooley, supra* note 12, at 1043–44; Ryan, *supra* note 19, at 307.

²⁵⁶ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

²⁵⁷ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1744 (2020).

²⁵⁸ *See, e.g., Erik Fredericksen, Note, Protecting Transgender Youth After Bostock: Sex Classification, Sex Stereotypes, and the Future of Equal Protection*, 132 YALE L.J. 1149, 1154 (2023).

²⁵⁹ *See, e.g., United States v. Skrmetti*, 145 S. Ct. 1816, 1829 (2025).

2. *Evidentiary Barriers and Judicial Deference*

The Equal Protection Clause presents significant hurdles for plaintiffs attempting to challenge state actions, primarily because it demands a fact-intensive inquiry. Plaintiffs must marshal concrete evidence rather than rely on abstract accusations. While a facially discriminatory law—one that invokes a suspect classification on its face—will trigger heightened scrutiny, a facially neutral law that produces a disparate impact often will not. This evidentiary burden becomes even more daunting when legislators deliberately craft laws using facially neutral language to obscure potentially discriminatory aims—a strategy increasingly evident in contemporary education policy. Unlike their predecessors, dubbed “any-gay” curriculum bans, some of the recent LGBTQ-related curriculum restrictions employ more neutral terminology, prohibiting discussions of sexuality broadly and limiting teaching about “gender identity” rather than specifically mentioning “transgenderism.” This linguistic shift toward ostensibly impartial terminology complicates Equal Protection claims and exemplifies what Reva Siegel has termed “preservation-through-transformation”—a process by which systems of inequality adapt under legal pressure by transforming their outward form while retaining exclusionary effects.²⁶⁰ In this context, neutrality functions as a legal shield: Where a law is not facially discriminatory, plaintiffs must meet two high evidentiary thresholds to prevail. First, they must demonstrate that the law has a disparate impact on a protected group; second, they must prove that it was enacted or maintained for a discriminatory purpose.²⁶¹ Only when both elements are satisfied will a court apply heightened scrutiny. Each of these requirements poses formidable challenges in the context of LGBTQ-related curriculum restrictions.

Proving disproportionate harm under the Equal Protection Clause is especially tricky when a law formally applies to all students equally.²⁶² In *PEN America v. Escambia County School District*, where the plaintiffs challenged Florida’s LGBTQ-related curriculum restriction, the court dismissed the Equal Protection count on other grounds,²⁶³ while implicitly leaving open *universal* restrictions. The net result of such a move, when *all* students (rather than certain groups) lose access equally to particular books,

²⁶⁰ Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status Enforcing State Action*, 49 STAN. L. REV. 1111, 1119 (1997).

²⁶¹ *Washington v. Davis*, 426 U.S. 229, 239 (1976).

²⁶² See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 220–21 (1971) (holding that a city’s closure of all public pools, rather than integrating them, did not violate the Equal Protection Clause because access was denied equally to all races and there is no constitutional right to public swimming facilities); *Skrmetti*, 145 S. Ct. at 1827 (upholding the Sixth Circuit’s decision that a law restricting transition-related treatments for minors did not classify based on sex, as it applied equally to all minors by prohibiting them from “receiv[ing] puberty blockers or hormones or surgery in order to transition from one sex to another”).

²⁶³ *PEN Am. Ctr. v. Escambia Cnty. Sch. Bd.*, 711 F. Supp. 3d 1325, 1332 (N.D. Fla. 2024).

is that disparate-impact claims are defeated.²⁶⁴ An Arkansas court took that step explicitly in *Walls v. Arkansas Dept. of Education*.²⁶⁵ When challenging Arkansas' LEARNS Act "anti-indoctrination" rule, which prohibits teachings on inherent racial superiority, the plaintiffs failed to offer data demonstrating that Black students bore a heavier curricular burden than their white peers. The court emphasized that "the generalized focus of the provision makes it nearly impossible to believe that the provision has a disparate impact on African Americans."²⁶⁶ Such broad statutory language deliberately dilutes statistical contrasts, making disparate-impact claims increasingly difficult to substantiate with empirical evidence.²⁶⁷

But perhaps the most formidable hurdle in Equal Protection challenges lies in proving discriminatory intent. Under the *Arlington Heights* precedent, a neutral law violates the Clause only if enacted *because of*, not merely *in spite of*, its adverse effect on a protected group.²⁶⁸ Courts examine impact, historical background, procedural anomalies, and legislative history²⁶⁹—but, without this robust factual foundation, Equal Protection claims could easily fail at the pleading stage. It is not enough for plaintiffs to show that lawmakers were aware of the disparate impact; rather, that impact must have served, as a minimum, as a partial motivation for the state action.

Cases involving curriculum restrictions illustrate how this high bar enables educational disparities to persist unremedied. In *Monteiro v. Tempe Union High School District*, a parent claimed that psychological harm was done to African-American students when they were required to read books containing racial slurs.²⁷⁰ Although none of the works assigned by the school similarly disparaged white students, the Ninth Circuit upheld dismissal due to the complaint's lack of specific evidence of discriminatory intent.²⁷¹ Likewise, in *California Parents for Equalization of Educational Materials*, the plaintiffs demonstrated that certain passages contained in mandatory textbooks negatively impacted Hindu students,²⁷² but they failed to produce evidence that the

²⁶⁴ See Dubon, *supra* note 247, at 1601 (arguing that schools may claim universal book removals defeat disparate impact claims by analogy to *Palmer v. Thompson*, 403 U.S. 217 (1971), where the Supreme Court held that closing all public pools rather than integrating them did not violate equal protection because access was denied to all groups equally).

²⁶⁵ *Walls v. Sanders*, 760 F. Supp. 3d. 766, 803 (E.D. Ark. 2024).

²⁶⁶ *Id.* at 802.

²⁶⁷ Indeed, even when a statute formally applies to all students, the exclusion of materials depicting LGBTQ characters may uniquely burden LGBTQ youth by erasing representations of their identities from the educational environment. Such differential impact may nonetheless signal a form of expressive or dignity-related harm that current equal protection doctrine should (but not necessarily does) recognize.

²⁶⁸ *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977); *see also* *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

²⁶⁹ *Arlington Heights*, 429 U.S. at 266–68.

²⁷⁰ *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1024 (9th Cir. 1998).

²⁷¹ *Id.* at 1026.

²⁷² *Cal. Parents for Equalization of Educational Materials v. Noonan*, 600 F. Supp. 2d 1088, 1096–104 (E.D. Cal. 2009).

state board had adopted the reading materials that contained those passages with discriminatory intent.²⁷³

At the heart of this problem is the judiciary's tendency to treat facially neutral *pedagogical justifications* as sufficient to defeat claims of discriminatory purpose under the Equal Protection Clause. In *Walls*, for example, the Arkansas legislature justified its prohibition on teaching concepts such as inherent racial superiority by invoking the pedagogical goal of protecting students from ideological coercion and preserving educational neutrality.²⁷⁴ The court deferred to this "colorblind" rationale, concluding that the law was more plausibly aimed at viewpoint neutrality than racial exclusion.²⁷⁵ By contrast, in *California Parents*, Hindu parents objected to certain 6th-Grade history textbooks that, they alleged, portrayed Hinduism inaccurately and stereotypically, thereby placing disproportionate emphasis on caste and gender-related practices in ways, they argued, that stigmatized Hindu students.²⁷⁶ Because the plaintiffs could not show that the content was selected or retained for the *purpose* of harming this collective,²⁷⁷ the court deferred to the state's educational rationale regarding the materials' importance,²⁷⁸ thereby precluding any inference of animus toward Hindu students. In both of the aforementioned cases, courts relied on the presence of pedagogical justifications—whether to restrict (as in *California Parents*) or retain (as in *Walls*) contested material—to shield curricular decisions from Equal Protection scrutiny.

Such judicial deference to apparently neutral rationales creates a particularly troubling precedent for LGBTQ-related curriculum restrictions, whereby states frequently invoke ostensibly neutral objectives to justify what they know to be exclusionary policies. One prominent justification is parental authority over children's educational exposure. Proponents of this authority argue that LGBTQ-related curriculum restrictions simply protect parents' fundamental right to shield their children (or others' children) from content that conflicts with their values and beliefs.²⁷⁹ That this framing is strategic is evident in how these laws deliberately appropriate language from foundational Supreme Court parental rights precedents,²⁸⁰ positioning restrictions not as novel impositions but as extensions of established constitutional

²⁷³ *Id.* at 1113.

²⁷⁴ *Walls v. Sanders*, 760 F. Supp. 3d. 766, 807–08 (E.D. Ark 2024).

²⁷⁵ *Id.*

²⁷⁶ *Cal. Parents*, 600 F. Supp. 2d at 1096–104.

²⁷⁷ *Id.* at 1121.

²⁷⁸ *Id.* at 1120.

²⁷⁹ As an example, consider Governor Ron DeSantis's statement that parents do not "want their kids to have transgenderism or something injected into classroom instruction." *Florida Governor DeSantis Defends Controversial 'Don't Say Gay' Bill*, CBS News (Mar. 5, 2022, at 09:26 ET), <https://www.cbsnews.com/news/florida-governor-desantis-defends-dont-say-gay-bill/> [<https://perma.cc/84DD-M7YA>]. Yet, these laws often reach beyond the boundaries of parental authority as defined by the courts.

²⁸⁰ See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925).

principles.²⁸¹ Scholars have increasingly critiqued this rhetorical maneuver as a sophisticated attempt to weaponize parental rights against the equality interests of marginalized groups.²⁸² The underlying legal strategy becomes apparent: By characterizing anti-LGBTQ-related curriculum measures as merely protecting parents' existing constitutional prerogatives rather than creating new authorities, proponents establish a facially neutral justification that courts may find difficult to dismiss.²⁸³ Although the Supreme Court has not definitively addressed whether this justification legitimately supports comprehensive LGBTQ-discussion bans, its recent signals in *Mahmoud*—a case challenging the denial of parental opt-out rights from LGBTQ-inclusive instruction—suggest a growing receptivity to parental authority claims in this context.²⁸⁴ By indicating that constitutional protection of parental authority warrants opt-out provisions, the Court could be viewed as signaling that parental authority may broaden curricular restrictions in the future.

A second, potentially more constitutionally defensible, justification centers on ensuring “age-appropriateness” in educational materials. This rationale presents varying degrees of vulnerability to Equal Protection challenges, depending on implementation. In states imposing blanket LGBTQ-discussion bans across all Grade levels, this justification appears pretextual and unlikely to withstand meaningful scrutiny.²⁸⁵ However, states that establish graduated, developmentally-calibrated policies present more formidable targets for constitutional challenges.²⁸⁶ By implementing differentiated approaches based on student age and developmental readiness, these states more convincingly demonstrate reasonable pedagogical rationales tied to legitimate educational design principles rather than a discriminatory motivation.

The evidentiary standards and judicial deference described here reveal more than just pragmatic limits—they can be understood as exemplifying a fundamental tension between competing visions of equality in constitutional

²⁸¹ Several of these statutes explicitly invoke parental rights in their titles or opening provisions. *See, e.g.*, OHIO REV. CODE ANN. § 3313.473 (2025) (titled “Parent’s fundamental right to make decisions concerning upbringing, education, and care of child . . .”); FLA. STAT. § 1001.42(8)(c)(1) (2023) (referencing the “fundamental right of parents to make decisions regarding the upbringing and control of their children” as a basis for restricting classroom instruction on certain topics).

²⁸² *See, e.g.*, Bowman, *supra* note 61, at 402; Ziegler, *supra* note 61, at 710.

²⁸³ Sponsors of Ohio’s H.B. 8, for example, maintain that the bill does not confer any new authority on parents. Rather, they assert that the legislation merely codifies parents’ preexisting right to direct the upbringing and education of their children. *See* Representative D.J. Swearingen, Testimony on H.B. 8 Before the H. Primary & Secondary Educ. Comm., 135th Gen. Assemb., Reg. Sess. (Ohio 2023); *see* David Rees, *Crisis Calls from LGBTQ Youth in Ohio Surge After Outing Bill Signed into Law*, WTRF.COM (Jan. 14, 2025, at 03:47 ET), <https://www.wtrf.com/ohio/crisis-calls-from-lgbtq-youth-in-ohio-surge-after-outing-bill-signed-into-law/>, [https://perma.cc/YL8U-W6CN].

²⁸⁴ *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025).

²⁸⁵ *See infra* Appendix A.

²⁸⁶ *Id.*

law.²⁸⁷ This jurisprudence has been shaped by two principal theoretical commitments: anti-classification and anti-subordination.²⁸⁸ The anti-classification approach views the Equal Protection Clause as a mandate for formal neutrality, requiring the state to treat individuals without regard to their group belonging, emphasizing individualism alongside symmetrical treatment. In contrast, the anti-subordination approach interprets the Clause as a tool to dismantle systemic structures that entrench the inferior social standing of historically marginalized groups, prioritizing structural equality and redress of collective harms.²⁸⁹ Within school curriculum battles, these logics diverge. An anti-classification approach is likely to permit content restrictions that apply universally without explicit identity-based distinctions. In contrast, an anti-subordination stance would question even ostensibly neutral curriculum policies that disproportionately silence historically marginalized voices and experiences.

Justices have long disagreed over whether the Equal Protection Clause should be interpreted through a formal, colorblind lens or through a substantive lens attentive to group-based inequality.²⁹⁰ The Supreme Court's recent decisions, especially in *Students for Fair Admissions*, which found race-affirmative admission programs in college unconstitutional,²⁹¹ exemplify the growing dominance of the anti-classification approach. Yet, as many scholars have argued, anti-subordination values have historically coexisted with, and in some cases shaped, the application of anti-classification doctrine.²⁹² Further, this principle remains vital today, as anti-subordination reasoning continues to surface in lower federal courts²⁹³ and in influential dissents from the Supreme Court.²⁹⁴ That the Clause has moved away from this transformative vision in recent years does not render it obsolete—only in pressing need of reconceptualization.

²⁸⁷ See generally Siegel, *supra* note 260, at 1142–43 (criticizing Equal Protection's formalist fixation on intent and classification, and observing that courts defer to facially neutral laws while scrutinizing affirmative action, thereby perpetuating systemic inequality).

²⁸⁸ Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10–11 (2003).

²⁸⁹ *Id.*

²⁹⁰ Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1470–78 (2004).

²⁹¹ See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2176 (2023).

²⁹² See, e.g., Balkin & Siegel, *supra* note 288, at 10–11.

²⁹³ See, e.g., *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1049–51 (7th Cir. 2017) (recognizing that policies targeting transgender students can constitute impermissible sex discrimination); *Republican Party v. Pritzker*, 973 F.3d 760, 771 (7th Cir. 2020).

²⁹⁴ *Students for Fair Admissions*, 143 S. Ct. at 2234 (Sotomayor, J., dissenting) (“Ignoring race will not equalize a society that is racially unequal. What was true in the 1860s, and again in 1954, is true today: Equality requires acknowledgment of inequality.”); *id.* at 2263 (Jackson, J., dissenting) (noting that “[g]ulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens” that “have indisputably been passed down to the present day through generations”).

One possible path out of this impasse is to move beyond the fixed identity categories that both approaches presuppose.²⁹⁵ Rather than viewing students as static members of identity categories requiring either formal neutrality or protective treatment, this Article argues for recognizing identity as a dynamic developmental process—one that is particularly salient during childhood when students are actively exploring and constructing their sense of self. The next Part elaborates on this reconceptualization and considers how it might transform constitutional approaches to curriculum law.

III. TOWARD A LEGAL FRAMEWORK OF DEVELOPMENTAL SELF-EXPLORATION

As demonstrated by the analysis provided in Part II, the main constitutional doctrines are ill-equipped to respond adequately to the harms of the new curriculum restrictions. Viewed together, they reveal their shared conceptual blind-spot: Neither centers students' *present* developmental need for experimentation during childhood itself, not merely in preparation for adulthood.²⁹⁶ Notably, the Free Speech Clause treats students primarily as future citizens in need of civic preparation, framing their educational interests around adult-defined visions of democratic participation. The Equal Protection Clause treats students as members of identity categories requiring equal treatment, thereby overlooking identity as a dynamic developmental *process*.²⁹⁷ Both doctrines thus conceptualize childhood merely as a transitional stage toward adulthood, undervaluing its present developmental importance as a critical period of identity formation.²⁹⁸ Yet, their underlying commitments—to democratic participation (as embedded in the Free Speech Clause) and to anti-subordination principles of equality (as per the Equal Protection Clause)—remain essential.

²⁹⁵ See *infra* notes 328–31 and accompanying text.

²⁹⁶ Philosophers of childhood distinguish between developmental or future-oriented needs and the intrinsic goods of childhood—present-tense goods that make childhood itself go well, such as play and being carefree. See Gareth Matthews & Amy Mullin, *The Philosophy of Childhood*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 31, 2023), <https://plato.stanford.edu/entries/childhood/> [<https://perma.cc/E58V-M76B>]. This Article employs the term “developmental needs” in this broader sense, encompassing both children’s immediate goods and the capacities they are in the process of developing. This broader usage reflects the main conceptual aim of the Article: to bridge distinctions between “being” and “becoming” by framing children’s present and future-oriented needs as mutually reinforcing rather than conceptually opposed. See, e.g., NOAM PELEG, *THE CHILD’S RIGHT TO DEVELOPMENT* 193–94 (2019).

²⁹⁷ I do not argue that identity exploration is exclusively a childhood phenomenon. However, while identity exploration certainly continues throughout adulthood, this Article focuses on young people due to their particular developmental vulnerability to the state’s insistence on shaping identity through mandatory education.

²⁹⁸ While identity formation could be understood as a forward-looking process directed toward adult selfhood, this Article conceives it as an open-ended process of becoming—one

Rather than discarding these foundations, the legal framework proposed in this Part builds on them to develop a more responsive and transformative approach to curriculum law.

At its heart, the proposed framework reimagines the school as a site for developmental self-exploration.²⁹⁹ Grounded in several theories of childhood and equality, it emphasizes the law's desirable—and feasible—role in cultivating structural conditions that support children's open-ended exploration with personal identity in its broadest sense in school. It foregrounds children's need for identity *exploration*—not merely identity-based recognition or democratic preparation—as a normative foundation for regulating curricula.³⁰⁰

As this Part further illustrates, the framework can serve as a jurisprudential lens through which to refine the application of the aforementioned constitutional doctrines by supplementing them with interpretive insights grounded in a developmental understanding of identity formation. Specifically, it offers interpretative guidance at multiple levels of analysis: refining the rationales underlying constitutional doctrines,³⁰¹ informing the standards of judicial review,³⁰² and addressing challenges surrounding opt-out provisions governing LGBTQ-inclusive curricula³⁰³—one of which, as noted earlier, recently came before the Supreme Court.³⁰⁴

A. Theoretical Pillars

My proposed framework draws on principles distilled from three complementary socio-legal approaches: child development theory, multiculturalism, and anti-essentialism. Rather than treating these approaches as discrete or competing foundations for curriculum law, I bring them into interdisciplinary dialogue to create a broader lens through which to analyze curriculum law—one grounded in the evolving capacities and lived experiences of children. This synthetic approach acknowledges that each theoretical strand both illuminates and compensates for the limitations of the others, generating a more balanced account of children's rights. Doing so could better address the law's fragmented nature—built upon layers of political compromise and competing values (a reality that is particularly pronounced in child-related

that holds intrinsic value in the present and constitutes a substantive part of children's lived experience of selfhood.

²⁹⁹ See *infra* Part III.A.

³⁰⁰ See *infra* Part III.B.

³⁰¹ See *infra* Part III.C.1.

³⁰² See *infra* Part III.C.2.

³⁰³ See *infra* Part III.C.3.

³⁰⁴ See *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025).

jurisprudence)³⁰⁵—and grounds arguments for legal reforms in diverse, overlapping, mutually-reinforcing perspectives.³⁰⁶

1. *Child Development Theory*

Child development theory, whose introduction to legal scholarship is widely attributed to a 2004 article by Emily Buss, shifts analysis from viewing children as passive subjects of the law to recognizing how it actively shapes their development.³⁰⁷ This theory highlights the state's special role—and duty—in cultivating children's ability to engage meaningfully in democratic life.³⁰⁸ Accordingly, when addressing legal questions involving children, we must evaluate how legal rules either support or constrain their evolving capacities.³⁰⁹ As a foundational premise, then, the law should attend not only to skills the children will need as adults but also to the active process of development itself—acknowledging that children are continually *becoming*, rather than already fully formed. In particular, legal doctrines or standards should embrace childhood experiences as important in their own right, not merely as stepping-stones toward adulthood, and should allow for the fact that meaningful development continues throughout childhood and beyond.³¹⁰

More specifically, in the context of public education, a developmental approach would recognize, on the one hand, the state's legitimate interest in preparing children for civic participation and economic self-sufficiency—for example, by helping them acquire knowledge and build intellectual capabilities needed for adulthood. On the other hand, this approach would equally

³⁰⁵ This is particularly pronounced in child-related jurisprudence. See, e.g., Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 3–14 (1986) (including an excellent analysis of the “contradictions in the legal treatment of children”); Huntington & Scott, *supra* note 62, at 1373 (arguing that “[o]ver the past several decades, the law's treatment of children has become increasingly complex and uncertain in ways that can seem to verge on incoherence”); Catherine E. Smith, Brown's *Children's Rights Jurisprudence and How It Was Lost*, 102 B.U. L. REV. 2297, 2300 (2022) (arguing that it is an area that “lacks focus, vision, substance, and unifying principles”).

³⁰⁶ Cf. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1734–35 (1995) (“[P]erhaps government should seek an ‘overlapping consensus’ among reasonable people, thus allowing agreement to be made among Kantians, utilitarians, Aristotelians, and others. . . . [P]articipants in law may be unwilling to commit themselves to large-scale theories of any kind, and they will likely disagree with one another if they seek to agree on such theories.”).

³⁰⁷ Buss, *supra* note 62. For more recent contributions of developmental jurisprudence in various contexts, see generally Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448 (2018); PELEG, *supra* note 296; Ruth Zafran, *Children's Rights as Relational Rights: The Case of Relocation*, 18 AM. U. J. GENDER & SOC. POL'Y & L. 163, 203 (2010); Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 CONN. L. REV. 741, 749, 783 (2016).

³⁰⁸ Buss, *supra* note 62, at 32.

³⁰⁹ *Id.* at 35.

³¹⁰ PELEG, *supra* note 296, at 193–94 (2019); Dailey & Rosenbury, *supra* note 307, at 1480.

acknowledge both the child's present need to explore their sense of self and to be allowed to encounter diverse human experiences during their formative years—diversity that can, in its own right, be seen as essential for fostering inclusive citizenship.

The child-development approach remains incomplete, though, if it presumes a uniform experience of childhood. By overlooking the heteronormative and other majoritarian ideologies that shape prevailing notions of childhood, it risks rendering invisible the needs and lived realities of children whose identities diverge from dominant expectations. To realize its transformative potential, developmental jurisprudence should adopt an intersectional lens—one that attends to how children's positions within overlapping systems of power shape their conditions. Such jurisprudence should also recognize that, beyond age-based metrics, children navigate complex matrices of identity—including sexuality, gender, class, race, ethnicity, and disability—that structure both the challenges they face and the support they can access.³¹¹

LGBTQ youth exemplify this intersectional reality: Their developmental experiences are simultaneously shaped by age-related vulnerability and sexual- and/or gender-minority status, resulting in disproportionate rates of homelessness, high rates of bullying in school, educational disruption, and mental health disparities that traditional age-focused frameworks fail to address adequately.³¹² Further, unlike many other minority groups, whose members often learn about their culture through their families, LGBTQ

³¹¹ The intersectional approach to children's rights has gained increasing attention in recent years. See, e.g., Katrien De Graeve, *Children's Rights from a Gender Studies Perspective: Gender, Intersectionality and Ethics of Care*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF CHILDREN'S RIGHTS STUDIES 147 (Wouter Vandenhoe et al. eds., 2015); Sofia Frödén & Ann Quennerstedt, *The Child as a Gendered Rights Holder*, 27 CHILDHOOD 143, 145 (2020).

³¹² See, e.g., Daniel Bontempo & Anthony R. D'Augelli, *Effects of At-School Victimization and Sexual Orientation on Lesbian, Gay, or Bisexual Youths' Health Risk Behavior*, 92 AM. J. PUB. HEALTH 364, 372 (May 2002) (finding that LGB students who experienced anti-gay victimization at school reported significantly higher rates of substance use, suicidal behavior, and sexual risk-taking); Mark L. Hatzenbuehler, *The Social Environment and Suicide Attempts in Lesbian, Gay, and Bisexual Youth*, 127 PEDIATRICS 896, 896 (Apr. 2011) (reporting that LGB youth in unsupportive school environments were 20% more likely to attempt suicide than peers in supportive settings); Dorothy L. Espelage et al., *Homophobic Teasing, Psychological Outcomes, and Sexual Orientation Among High School Students: What Influence Do Parents and Schools Have?*, 37 SCH. PSYCH. REV. 202, 202 (2008) (finding that a positive school climate and parental support reduced mental health risks among high school students, including those questioning their sexual orientation); JOSEPH G. KOSCIW ET AL., THE 2021 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LGBTQ+ YOUTH IN OUR NATION'S SCHOOLS 10, 16, 19–20 (2022) (reporting a 2021 national survey of LGBTQ students found that 68% felt unsafe at school because of their sexual orientation, gender identity, and/or gender expression, and 76% had been verbally harassed, 31.5% had been physically harassed, and 12.5% had been physically assaulted at school in the past year based on sexual orientation, gender identity, and/or gender expression); Michelle Johns et al., *Strengthening Our Schools to Promote Resilience and Health Among LGBTQ Youth: Emerging Evidence and Research Priorities from the State of LGBTQ Youth Health and Wellbeing Symposium*, 6 LGBT HEALTH 146, 147 (2019) (demonstrating that transgender students "may be as much as four times more likely to experience bullying and harassment as cisgender students").

youth often receive no such cultural reinforcement or even adequate support at home.

This reality highlights the importance of incorporating a multicultural lens into the theoretical foundation of the proposed framework³¹³—one that recognizes the centrality of cultural belonging and communal recognition in the process of identity formation.³¹⁴

2. *Multiculturalism*

Community plays a central role in childhood identity formation, particularly for youth who may not find validation or belonging within their immediate families. This principle has received robust support from prominent psychosocial models of identity formation as well as other subsequent theories in psychology and the philosophy of childhood.

Erik Erikson, among the foundational psychologists of the twentieth century, was an early proponent of viewing identity formation as a life-long developmental process that begins in early childhood and continues through adolescence,³¹⁵ with adolescence representing one particularly intense period.³¹⁶ According to Erikson and later psychologists, identity extends beyond a personal notion of self; it is shaped through engagement with culturally embedded values and life goals tied to political ideology, gender, religion, sexuality, race, ethnicity, occupational roles, and other social structures.³¹⁷ Meaningful interactions beyond the family are thus essential for young people to consolidate a stable identity.³¹⁸ Urie Bronfenbrenner's "ecological systems" theory of childhood reinforces this community-centered approach, based on the idea that healthy development emerges through the

³¹³ The communitarian vision remains underemphasized in much of LGBTQ rights discourse, which often centers on individualist narratives such as the "born this way" trope. More than two decades ago, Carlos A. Ball called for the incorporation of this vision—though not specifically in relation to youth—as it situates sexual identity within shared cultural meanings, communal ties, and historical continuity. Carlos A. Ball, *Communitarianism and Gay Rights*, 85 CORNELL L. REV. 443, 447–49 (2000).

³¹⁴ Multiculturalism is one among several group-based approaches to bridging this gap. See Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 320 (2007) (discussing the value of integrating pluralism into children's rights). While both pluralism and multiculturalism result in allowing children to explore and express identity-formative values, they differ in their underlying rationales: multiculturalism grounds this outcome primarily in the preservation of group-based cultural heritage and frames identity through the lens of collective political recognition, whereas pluralism emphasizes individual autonomy and the right to encounter diverse worldviews.

³¹⁵ ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* 91–96 (1968).

³¹⁶ *Id.* at 128–34.

³¹⁷ See, e.g., James E. Marcia, *Identity in Adolescence*, in HANDBOOK OF ADOLESCENT PSYCHOLOGY 159–60 (Joseph Adelson ed., 1st ed. 1980); Yanghee Lee & Sangwon Kim, *Contemporary Children's Rights Issues in Adolescence*, in CHILDREN'S RIGHTS AND CHILDREN'S DEVELOPMENT: AN INTEGRATED APPROACH 255 (Jonathan Todres & Ursula Kilkelly eds., 2025).

³¹⁸ ERIK H. ERIKSON, *IDENTITY AND THE CYCLE OF LIFE* 109–10 (W.W. Norton & Co. 1980) (1959).

child's dynamic interconnections with diverse facets of their immediate settings: family, school, and community organizations.³¹⁹ These settings, and the relationships formed within them, provide the social infrastructure that supports or constrains this process of development, of which identity exploration is an essential part. Moreover, as the educational philosopher Kevin McDonough argues, autonomous practical reasoning requires children's ability to "imagine different possible futures" for themselves. Building this capacity, McDonough contends, depends on exposure to concrete communities, stories, and identities that provide expansive visions of future possibilities, particularly for marginalized youth who may lack such exposure in their immediate family and social environments.³²⁰

These theoretical insights become especially palpable for LGBTQ youth, who face distinctive developmental challenges. Unlike members of many minority groups who benefit from familial cultural transmission, LGBTQ youth may lack this resource if they are raised in heterosexual families that lack understanding of diverse sexual orientations and gender identities—understanding that child development theory identifies as crucial for healthy identity formation. Conversely, for LGBTQ youth who are fortunate to have supportive families, excluding books with LGBTQ characters from educational settings, for instance, would delegitimize these family structures and relationships in the school environment. Hence, whether exposure or opportunity *is* absent from the young person's family or caregiving setting, or whether it exists but is contradicted by institutional exclusion, this can limit their ability to imagine authentic futures beyond dominant heteronormative expectations. This, in turn, may render them more vulnerable to pressures to suppress core aspects of their identity in order to "fit in."³²¹ Such pressures can be particularly damaging during childhood, when identity is far from fully formed, making individuals especially susceptible to the psychological harms of forced assimilation³²² and further widening the developmental gap that supportive community connection becomes uniquely positioned to address.³²³

Given these developmental vulnerabilities, educational institutions emerge as critical sites where the supportive community connections LGBTQ youth need can be intentionally fostered. This potential reflects a communitarian vision that underscores the value of establishing safeguards for minority students, whose collective characteristics often leave them disproportionately

³¹⁹ See, e.g., Urie Bronfenbrenner, *Ecology of the Family as a Context for Human Development: Research Perspectives*, 22 DEV. PSYCHOL. 723, 723 (1986).

³²⁰ Kevin McDonough, *The "Futures" of Queer Children and the Common School Ideal*, 41 J. PHIL. EDUC. 795, 800–04 (2007).

³²¹ KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 184–96 (2006).

³²² Lau, *supra* note 314, at 322–35 (discussing how the harms of coerced assimilation especially affect children).

³²³ While some degree of conformity may be necessary for children to internalize basic social norms and function within society, socialization becomes harmful when it demands the suppression of core aspects of identity. Such suppression can impose significant psychological burdens on children. *Id.* at 324.

vulnerable to systemic marginalization.³²⁴ Without such safeguards, schools risk perpetuating the very conditions that marginalize these students, while depriving them of the intellectual tools needed to understand and challenge those constraints as they progress toward adulthood.³²⁵ Adopting this communitarian ethic, therefore, requires actively cultivating institutional spaces where marginalized students can envision futures beyond the limitations imposed by their families or society. At the same time, inclusive educational environments serve a critical civic function for all students—including those from dominant identity groups—equipping them with the tools to engage with difference, challenge bias, and participate meaningfully in a pluralistic society.³²⁶ Indeed, this culturalism-centered vision of schools has already begun to find expression in state legislation. California, Illinois, and New Jersey, for instance, have all enacted laws requiring schools to teach children about LGBTQ histories and contributions, symbolically positioning LGBTQ individuals as integral to the collective civic identity.³²⁷

This communitarian vision, however, confronts a longstanding tension at the heart of Equal Protection jurisprudence. On the one hand, it resonates with anti-subordination theorists by affirming group-based belonging and seeking to redress historic erasure through the recognition of marginalized identities within shared cultural narratives. On the other hand, it raises concerns for anti-classification theorists, as it relies on the very identity categories that have historically structured exclusion and reinforced essentialist assumptions. From this standpoint, the emphasis on cultural recognition risks reifying the very categorical distinctions that equality law seeks to overcome, suggesting

³²⁴ This rationale echoes corrective justice principles, which justify special protections for historically disadvantaged groups as morally necessary responses to structural harms. The philosophical roots of this principle can be traced back to Aristotle's notion of corrective justice, as well as Robert Nozick's theory of rectification for past injustice. Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1991); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 152–53 (reprint ed. 2013).

³²⁵ See, e.g., Kevin G. Welner, *Locking Up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. REV. 959, 973 (2003) (explaining that if schools “expose children only to values and ideas that buttress the status quo and legitimize the position of those in power, it is unlikely that those who are presently oppressed will learn the cause of their oppression or the means of overcoming it”).

³²⁶ Studies demonstrate that LGBTQ-inclusive curricula are beneficial to all youth. See V. Paul Poteat, Jillian R. Scheer & Ethan H. Mereish, *Factors Affecting Academic Achievement Among Sexual Minority and Gender-Variant Youth*, 47 ADVANCES IN CHILD DEV. & BEHAV. 261, 290 (2014) (“[A]n inclusive curriculum that promotes respect for [gender and sexual orientation] diversity stands to benefit all youth along indices of psychological and social well-being.”); Shannon D. Snapp et al., *Students' Perspectives on LGBTQ-Inclusive Curriculum*, 48 EQUITY & EXCELLENCE IN EDUC. 249, 251 (2015) (“[W]hen schools teach LGBTQ-inclusive curriculum, all students, including heterosexual . . . students felt safer, experienced less victimization, reported hearing fewer homophobic slurs, and experienced greater peer acceptance.”).

³²⁷ See *supra* notes 103–08 and accompanying text. Indeed, this approach to inclusive education can be justified on entirely liberal grounds as well.

the need for an approach that supports marginalized students without reinforcing the structures that have sustained their exclusion.

3. *Anti-essentialism*

In light of the theoretical tension, equality law scholars have proposed a third paradigm from which to promote the goals of equality law: anti-essentialism.³²⁸ Rather than treating identity categories as natural or fixed, this approach understands them as historically contingent, socially constructed, and open to transformation. It views group-based identities as emerging from social interaction and cultural processes rather than standing as fixed, internal properties that individuals simply possess.³²⁹ In this way, anti-essentialism shares anti-subordination theory's commitment to dismantling entrenched power structures and exposing how identity categories have been used as tools of marginalization. Yet, it also aligns with anti-classification critiques in its skepticism of rigid identity-based policymaking. While group membership remains critical for visibility and recognition, it represents only a partial and contingent dimension of personhood. From this perspective, promoting an anti-essentialist reading of equality means shifting the focus from identity-based recognition to challenging the *ideologies* that constrain how identity is regulated.³³⁰ This move reorients the legal inquiry away from affirming fixed identity categories and toward creating conditions that support ongoing processes of self-understanding.³³¹

Such an approach aligns with the child development theory, which frames this life-phase as a period of exploration and self-construction. This exploratory process benefits *all* children—not only those who challenge normative expectations—by cultivating authentic self-understanding. As Tamar Schapiro captures it, childhood is a time of experimentation aimed at creating a self,

³²⁸ See, e.g., Lauren Sudeall Lucas, *Identity as Proxy*, 115 COLUM. L. REV. 1605, 1613 (2015) (examining how equal protection law might be restructured to reflect the underlying values that identity categories are meant to serve, without relying on those categories to define the boundaries of permissible and impermissible discrimination); Karen Knop et al., *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 65 STAN. L. REV. 589, 603 (2012) (discussing a strategic form of essentialism in which marginalized groups adopt generalized or essentialized community identities—such as “Indigenous”—to advance specific political goals); Lihi Yona, *Identity at Work*, 43 BERKELEY J. EMP. & LAB. L. 139, 140 (2022) (arguing that anti-essentialism can offer Title VII a stronger normative foundation, especially for liminally recognized groups—those still in the process of attaining legal recognition).

³²⁹ Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 145 (2017).

³³⁰ *Id.* at 148.

³³¹ Because of its skepticism toward the foundational categories of equality law, anti-essentialism might initially seem too blunt an instrument to guide legal reform. Yet, this Article does not engage with versions of anti-essentialism that deny the lived reality of group membership or seek to erase identity from social life. Rather, it draws on strands of anti-essentialist thought that recognize identity as both historically contingent and socially constructed, yet materially consequential and subjectively meaningful.

or voice, of one's own.³³² While identity formation is integral to this process, it is the ongoing *exploration*—rather than any predetermined outcome—that constitutes what is essential. Expressions of gender and sexuality—through clothing, personal pronouns, curriculum content, social affiliation, use of sex-segregated spaces, and more—are central to the process of becoming one's authentic gendered and sexual self.³³³ This approach therefore prioritizes creating conditions that support unhindered identity exploration—even experimentation—rather than imposing fixed categorical frameworks. It thus shifts the focus from mere inclusion to structural transformation—from simply recognizing (or tolerating) diverse identities to dismantling the ideological constraints that cast a shadow over how difference is perceived and validated within school settings. In doing so, it circumvents the familiar tensions in Equal Protection law between anti-classification and anti-subordination theories, redirecting attention from safeguarding discrete categories toward challenging the *structures* that constrain children's identity exploration—the *heteronormative fear* of the queer child being one such structure.³³⁴ The proposed approach thus offers a broader vision of childhood freedom—one that affirms every child's need to become.

The anti-essentialist reading is further understood—and supported—through queer approaches to childhood. Queer theorists, at least in the canonical sense, critique the fact that stable identity categories have historically maintained the binary of sex/gender and sexuality, and call for liberatory frameworks that free individuals from limiting scripts based on these categories.³³⁵ This body of literature underscores what might be called a “queer sensibility”:³³⁶ a mode of openness to varied ways of being that are not necessarily oppositional to heterosexual or cisgender norms, but are instead defined by a commitment to curiosity and to imagining what is not yet—but might someday be—possible outside these norms.³³⁷ This sensibility does not

³³² Anca Gheaus, *Unfinished Adults and Defective Children: On the Nature and Value of Childhood*, 9 J. ETHICS & SOC. PHIL. 8–14 (2015) (citing Tamar Schapiro, *What Is a Child?*, 109 ETHICS 729, 737 (1999)).

³³³ See, e.g., Florence Ashley, *Thinking an Ethics of Gender Exploration: Against Delaying Transition for Transgender and Gender Creative Youth*, 24 CLINICAL CHILD PSYCH. & PSYCHIATRY 223, 227 (2019).

³³⁴ See, e.g., *supra* notes 224–30 and accompanying text.

³³⁵ ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION* 106 (1996).

³³⁶ Brenda Cossman, *Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick (and Others)*, 6 CRITICAL ANALYSIS L. 23, 24 (2019).

³³⁷ In their seminal work, *Gender Trouble* (1990), Judith Butler introduces the concept of “becoming” through performativity: gender is not something one is but something one does—an ongoing process that involves a continuous state of becoming rather than achieving a fixed identity. JUDITH BUTLER, *GENDER TROUBLE* 1–11 (1990). According to Sedgwick, “queer” is defined by “the open mesh of possibilities, gaps, overlaps, dissonances and resonances, lapses and excesses of meaning” regarding gender and sexuality. EVE KOSOF-SKY SEDGWICK, *TENDENCIES* 8 (1993). Similarly, Jack Halberstam, discusses how queer lives unfold outside the normative structures of time and space, emphasizing becoming in terms of exploring non-normative identities. JACK HALBERSTAM, *IN A QUEER TIME AND PLACE: TRANSGENDER BODIES, SUBCULTURAL LIVES* 4–7 (2005).

presuppose same-sex attraction or gender non-conformity; rather, it signals a broader openness to alternative ways of being in the world.

Building on these insights, queer theories of childhood focus on the idea of continuous identity experimentation that resists normative trajectories—experimentation that embraces the possibility of detours, pauses, and alternative paths.³³⁸ These theories highlight the harm inflicted on children by dominant cultural expectations when they show signs of becoming something other than what cultural norms would encourage—those who, in Kathryn Bond Stockton’s words, are “growing sideways,” developing in directions that challenge the cultural ideal.³³⁹ From this perspective, the value of childhood lies in its dynamic, unfolding nature, as a time in which self-exploration—with all its ambivalence, changeability, and uncertainty—is not merely tolerated but actively nurtured. Yet, despite being hallmarks of childhood more broadly, these qualities are often constrained when they fail to conform to culturally legible forms of development.

An anti-essentialist orientation has implications far beyond LGBTQ youth. When schools restrict what can be discussed, they limit all students’ ability to interrogate and understand the social categories that structure their lives. Suppressing LGBTQ content narrows the conceptual vocabulary available to every child, reducing their capacity for critical reflection. Just as importantly, it deprives children of opportunities to engage with diverse ways of life in ways that cultivate empathy, tolerance, and respect for difference. By contrast, an anti-essentialist approach fosters open-ended exploration—for those who resist dominant norms and for those who might otherwise never think to question them—while creating environments that promote healthy development through meaningful engagement with diversity.

B. Normative Principles

By synthesizing insights from child development theory, multiculturalism, and anti-essentialism, the proposed framework offers a new approach to regulating curriculum laws—one that de-emphasizes fixed identity recognition and fosters the structural conditions necessary for children’s open-ended processes of self-understanding. This framework calls for an environment in which every child can explore ideas of identity without fear of discipline, censure, or marginalization.

Central to this vision is the recognition that identity formation is a core developmental need—one that public education is well-positioned, and arguably institutionally obligated, to support. The centrality of school in children’s lives extends beyond its instructional function; school as an institution

³³⁸ See, e.g., KATHRYN BOND STOCKTON, *THE QUEER CHILD, OR GROWING SIDEWAYS IN THE TWENTIETH CENTURY* 1–8 (2009); JACK HALBERSTAM, *THE QUEER ART OF FAILURE* 2–3 (2011).

³³⁹ STOCKTON, *supra* note 338, at 11.

constitutes a structured public space where children encounter the broader social world³⁴⁰ and develop critical thinking skills.³⁴¹ This institutional role gives schools a formative influence that few other environments can replicate—particularly for students whose home contexts may lack familiarity with, or affirmation of, diverse identities. As education philosopher Joan Goodman highlights, public schools are uniquely charged with cultivating a sense of “we-ness” that places students in dialogue with norms beyond the particularistic values of the home.³⁴²

While peer networks, after-school activities, and online spaces may offer opportunities for self-exploration,³⁴³ they are often unstructured, unevenly accessible, and lacking the sustained adult guidance and legitimacy that formal schooling provides.³⁴⁴ In contrast, schools are not only universal in reach—they are also accountable. They operate under legal and pedagogical frameworks that entrust them with shaping the conditions under which children come to understand themselves and others.

Given their highly formative role, day after day, in children’s lives, schools bear a structural responsibility to create environments where those

³⁴⁰ See, e.g., *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (emphasizing the role of public education in bringing together “diverse and conflicting” constituencies “on a broad but common ground”); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (highlighting how public schools cultivate “tolerance of divergent political and religious views” as well as a “consideration of the sensibilities of others”).

³⁴¹ Legal scholars have long argued that courts have embraced the understanding that public schools are intended to help develop students into critical thinkers equipped to participate in the marketplace of ideas. See, e.g., Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 708 (1987) (suggesting that schools play a key role in providing students with opportunities for self-discovery, self-definition, and a robust exchange of views); Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL’Y REV. 169, 201 (1996) (explaining that “[t]he court implies that independent thought, i.e., critical thinking, is a permissible mode of analysis, and tolerance is a permissible value to be inculcated through the school curriculum, even when these offend the religious beliefs of some students and parents in the school”). Similarly, education scholars have called for a pedagogy of citizenship that fosters students’ critical consciousness by enabling self-determination and encouraging them to challenge systemic inequalities. See, e.g., PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 35–36 (1990); Joel Westheimer & Joseph Kahne, *What Kind of Citizen? The Politics of Educating for Democracy*, 41 AM. EDUC. RSCH. J. 237, 239, 264–65 (2004); Ralph Leighton, *Radical Citizenship Education*, 18 EDUC. CITIZENSHIP & SOC. JUST. 246, 249 (2023).

³⁴² Joan F. Goodman, *Should Schools Be in Loco Parentis? Cautionary Thoughts*, 16 ETHICS & EDUC. 407, 407 (2021).

³⁴³ Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 834 (2007). This argument does not suggest that identity formation depends exclusively on public schooling; it highlights the distinctive civic obligations of public education as the only institution mandated to provide a shared social space for all children, making it a uniquely powerful site of identity development.

³⁴⁴ Of course, teachers’ structuring role is not uniformly benign. Educators bring their own ideological and moral commitments into the classroom; and, in some settings—including religious or conservative ones—this authority can constrain rather than support students’ identity development. Yet, this concern underscores the need for public accountability: precisely because schools wield such influence, they require legal and community oversight to navigate competing values.

in their care can encounter, question, and reflect upon multiple forms of difference. This obligation flows from both the state's interest in educational equity³⁴⁵ and the custodial authority schools hold under *in loco parentis*.³⁴⁶ Per this view, school curricula should not aim to predict or prescribe future identities but to support children's present engagement with difference—racial, sexual, gendered, or otherwise—as a vital component of their developmental well-being.

Translating this theoretical framework into actionable normative guidance requires addressing several foundational concerns that emerge when we consider its implementation. Each of these concerns illuminates a normative principle that should guide the framework's application.

1. *Scaffolded Child Agency*

One potential concern about the proposed framework may be that it presents the risk of endorsing *harmful* exploration in identity formation. Critics may worry that encouraging children—especially at young ages—to explore questions of gender and sexuality could expose them to ideological or social pressures they are not developmentally equipped to navigate.³⁴⁷ This concern engages with the framework's first guiding principle: Supporting exploration does not mean granting children full decisional autonomy. Rather, it means creating safe conditions in which children can, should they wish to, engage with difference—especially the unexpected or non-normative—without fear of marginalization or coerced conformity.

³⁴⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (explaining how “education is perhaps the most important function of state and local governments . . . [and] is a right which must be made available to all on equal terms”).

³⁴⁶ This long-standing doctrine has roots in early American case law and Blackstone's Commentaries, where the delegation of parental authority was expressly related to discipline and restraint. See 1 WILLIAM BLACKSTONE, COMMENTARIES *453; *State v. Pendergrass*, 19 N.C. 365, 365 (1837) (holding that teachers possess “analogous” authority to parents for “correction of their pupils”). The scope and application of *in loco parentis* have evolved significantly from its origins, generating considerable contestation in American jurisprudence. See, e.g., Susan H. Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 979–85 (2010) (criticizing courts for invoking the doctrine to justify violations of student rights, especially in the context of searches and seizures, while neglecting protections against harms such as bullying and harassment); Barbara Fedders, *The Constant and Expanding Classroom: Surveillance in K-12 Public Schools*, 97 N.C. L. REV. 1673, 1684–701 (2019) (documenting how districts invoke *in loco parentis* to justify expansive digital monitoring as parental power). Even so, recent case law continues to recognize the doctrine's relevance while also acknowledging its limitations. See, e.g., *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021) (explaining that *in loco parentis* treats “school administrators as standing in place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them”). Properly understood, the doctrine's emphasis on schools' tutelary responsibilities supports their obligation to foster educational settings that serve students' developmental needs.

³⁴⁷ See, e.g., Ernie Walton, *Gender Identity Ideology: The Totalitarian, Unconstitutional Takeover of America's Public Schools*, 34 REGENT U. L. REV. 219, 261–62 (2022).

The principle draws on well-established developmental research showing that children become aware of their gender identity early in life,³⁴⁸ and that they may begin reproducing gender/sexual stereotypes and exclusionary behaviors as early as pre-school.³⁴⁹ These developmental realities underscore that deliberately delaying engagement with identity questions does not protect children—it often deprives them of the tools and support they need to make sense of the social world around them.³⁵⁰ Developmental research confirms that elementary school pertains to a critical period in children’s internalization of social norms and the emergence of early gender and identity awareness.³⁵¹ Schools, therefore, can scaffold identity development by fostering open-ended engagement while offering age-appropriate guidance and protection.

Like learning to walk, communicate, or engage in imaginative play, identity formation is an early expression of agency—one that develops not in isolation but through structured interaction with adults. The principle of scaffolded child agency recognizes this dynamic interplay between autonomy and dependency as fundamental to healthy development.³⁵² Rather than dismissing the legitimate concerns about children’s vulnerability or their need for protection, this principle rejects the false dichotomy between protection and autonomy that characterizes many current approaches.³⁵³ Pursuant to

³⁴⁸ See, e.g., Michael Zalitznyak, Catherine Bresee, & Maurice M. Garcia, *Age at First Experience of Gender Dysphoria Among Transgender Adults Seeking Gender-Affirming Surgery*, JAMA NETWORK OPEN, Mar. 16, 2020, at 1, 3 (“[G]ender identity typically becomes constant at ages 5-7 years.”); Michael Zalitznyak et al., *How Early in Life Do Transgender Adults Begin to Experience Gender Dysphoria? Why This Matters for Patients, Providers, and for Our Healthcare System*, SEXUAL MED., Sep. 17, 2020, at 1, 4 (finding that the average onset of gender dysphoria occurs before age 7).

³⁴⁹ See, e.g., Carol Lynn Martin & Diane N. Ruble, *Patterns of Gender Development*, 61 ANNUAL REV. PSYCH. 353, 357–61 (2010) (surveying studies demonstrating the tendency among preschoolers to feel more positively about their own sex and to respond negatively to gender norm violations).

³⁵⁰ See, e.g., Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 100–01 (2021) (distinguishing agency from autonomy and emphasizing that even young children possess agency—the capacity to express their will and engage with the world—while still relying on adults for support).

³⁵¹ See, e.g., Melissa J. Smith & Elizabeth Payne, *Binaries and Biology: Conversations with Elementary Education Professionals After Professional Development on Supporting Transgender Students*, 80 EDUC. F. 34, 37 (2016).

³⁵² The term “scaffolding” originates in the context of fostering children’s participation, referring to the process by which adults offer support during participatory experiences and gradually reduce their involvement as children gain competence and independence. Tali Gal, *An Ecological Model of Child and Youth Participation*, 79 CHILD. & YOUTH SERVS. REV. 57, 59 (2017) (reviewing the literature on scaffolding in the context of child participation).

³⁵³ See, e.g., Minow, *supra* note 305, at 3–5 (challenging rigid dichotomies in children’s rights discourse and advocating for recognition of children’s evolving capacity); Emily Buss, *Developmental Jurisprudence*, 88 TEMPLE L. REV. 741, 758 (2016) (discussing how legal frameworks that acknowledge children’s evolving capacities can provide appropriate protections while still respecting their growing autonomy); Shmueli Benjamin & Ayelet Blecher-Prigat, *Privacy for Children*, 42 COLUM. HUM. RTS. L. REV. 759, 763 (2011) (arguing for legal recognition of children’s independent privacy rights aligned with their developing autonomy interests).

this principle, the framework of developmental self-exploration directs us to consider how many school environments may hinder children's exploratory capacity, and, conversely, how they might be better attuned to nurture it. Reflecting on these questions ensures attentiveness to children's evolving capacities while affirming the intrinsic value of self-exploration as a vital dimension of healthy development.

2. *Balancing Parental Authority*

A second potential concern about the proposed framework involves the risk of state overreach, particularly regarding conservative families' values.³⁵⁴ Critics may worry that a framework emphasizing identity exploration in school could authorize unprecedented governmental intrusion into the family sphere, undermining parents' fundamental right to direct their children's upbringing as they see fit, including in matters of gender or sexuality.³⁵⁵

While constitutionally protected, parental rights are not absolute. As the Supreme Court has held, those rights may be limited where the state advances sufficiently weighty interests in protecting children's welfare³⁵⁶ and ensuring their preparation for democratic citizenship.³⁵⁷ In *Prince v. Massachusetts*, the Court established the state's "wide range of power for limiting parental freedom and authority in things affecting the child's welfare."³⁵⁸

This principle has guided educational jurisprudence for many years, leading courts to uphold curricular exposure to contested ideas, provided that such exposure does not rise to the level of coercion or indoctrination. In *Parker v. Hurley*, for example, the First Circuit reaffirmed that schools may expose students to diverse viewpoints, including those related to sexual orientation and gender identity, so long as participation is not coercive.³⁵⁹

³⁵⁴ See, e.g., Emily J. Brown, *When Insiders Become Outsiders: Parental Objections to Public School Sex Education Programs*, 59 DUKE L.J. 109, 135 (2009).

³⁵⁵ This tension is not unique to gender and sexuality; it lies at the core of liberal education. See, e.g., Jeffrey Shulman, *The Parent as (Mere) Educational Trustee: Whose Education Is It, Anyway?* 89 NEB. L. REV. 290, 319 (2010) (arguing that "this emphasis on education as a means for children to achieve intellectual and moral autonomy often conflicted with parental authority, as it encouraged children to question and potentially reject the beliefs and values held by their parents"). See generally MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* REPRINT (2021) (addressing the challenge of maintaining both pluralism and parental autonomy within liberal democratic frameworks).

³⁵⁶ See, e.g., Dailey & Rosenbury, *supra* note 350, at 77.

³⁵⁷ Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 458 (2006).

³⁵⁸ *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944).

³⁵⁹ *Parker v. Hurley*, 514 F.3d 87, 106 (1st Cir. 2008) (rejecting parents' claims that public schools violated their constitutional rights by using books depicting same-sex relationships, holding that parents do not have a constitutional right to exempt their children from exposure to classroom materials—so long as the school acts within its legitimate educational mission and does not coerce belief or violate religious exercise). Whether *Parker v. Hurley* survives as good law following *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025), which seems to mark a departure from *Parker's* approach, remains an open question.

Parker's reasoning reflects the Supreme Court's longstanding recognition that, for public schools to function, it is inescapable that some students will be exposed to ideas and concepts that their parents may find objectionable.³⁶⁰ A parallel rationale appears in *Skrametti*, where the Supreme Court upheld a ban on gender-affirming care for minors, reasoning that parental consent alone cannot override the state's role in regulating decisions that have a bearing on children's long-term welfare.³⁶¹ Although the Court did not address parents' substantive due process claim, its reasoning nonetheless underscores a familiar theme in education and family-law jurisprudence: The state may regulate decisions affecting children's development even when parents object. Despite their opposite outcomes, *Parker* and *Skrametti* share a common premise—namely, that parental rights are made to yield when the state asserts its duty to safeguard child development.

The proposed framework builds on this constitutional logic in the context of identity-related curriculum content. It does not aim to abolish parental authority, but it does set limits on how far that authority extends within public schools.³⁶² Specifically, it proscribes parental control when exercised to deny children access to perspectives that are vital for identity exploration and democratic preparation. This is not intended to compel children to adopt any particular identity or to diminish the role of their families. Rather, it affirms the need for schools to remain open spaces for self-exploration, where children can encounter diverse ways of being and begin to make sense of who they are becoming. Properly structured, such environments support—not supplant—children's developing autonomy within a shared civic context.

3. *Doctrinal Integration*

A third concern that can be anticipated centers on whether the proposed framework aligns with prevailing constitutional norms. Critics may contend that a model that affirms children's right to identity exploration imposes positive duties on the state—duties that exceed the traditional boundaries of American constitutional law. Yet, integrating this framework into existing doctrine requires neither a repudiation of established principles nor the invention of wholly new rights.

³⁶⁰ See, e.g., *Lee v. Weisman*, 505 U.S. 577, 591 (1992) (observing students may be “expos[ed]” or “subjected during the course of their educations to ideas deemed offensive and irreligious”); cf. *Mahmoud*, 145 S. Ct. at 2381 (Sotomayor, J., dissenting, joined by Kagan & Jackson, J.J.) (stating that the Court's majority decision to require opt-out accommodations for LGBTQ-inclusive materials departs from this longstanding precedent permitting exposure to contested ideas in public education).

³⁶¹ 83 F.4th 460, 475 (2023), *aff'd*, *United States v. Skrametti*, 145 S. Ct. 1816 (2025).

³⁶² See Anne C. Dailey, *In Loco Reipublicae*, 133 YALE L.J. 419, 426 (2023) (arguing that parental duties include “allow[ing] children meaningful exposure to ideas outside the home, including ideas that might conflict with parental beliefs and values,” and that children's free speech rights exemplify “parental duties to ensure children's access to ideas outside the home”).

American constitutional law has long operated within a libertarian paradigm, viewing the Constitution primarily as a charter of negative liberties—one that imposes limits on government action rather than affirmatively obligating it.³⁶³ This orientation has shaped the limited legal recognition afforded to children³⁶⁴ and helps explain much of the U.S.’s resistance to ratifying the United Nations Convention on the Rights of the Child—a treaty that affirms children’s entitlements to have certain fundamental needs fulfilled, particularly with regard to nutrition, clothing, and housing.³⁶⁵

The proposed framework does not seek to overturn this normative structure but to supplement it.³⁶⁶ It offers a jurisprudential lens that operates within established doctrines while adapting them to reflect the realities of childhood development. This Dworkinian endeavor seeks to present existing constitutional doctrines in their best light,³⁶⁷ to reveal how they can better serve children’s developmental need for identity exploration within educational settings. As the next section demonstrates, this approach is not only normatively necessary but also feasible: The legal building blocks are already in place. What remains to be built is the commitment to bring them to life.

Still, convincing the current Court to advance children’s self-exploration will not be easy; recent decisions reflect a judiciary more inclined to expand parental religious rights than to recognize students’ in-school interests.³⁶⁸ Precisely for that reason, it becomes all the more crucial to consider how to frame aspects of the framework to resonate with traditional jurisprudential values. Further, advocates can pursue parallel strategies outside the federal courts. Although this Article does not elaborate on such state-level avenues, it is worth noting that several state constitutions, with their more explicit

³⁶³ See, e.g., Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS. 25, 26–28 (2014).

³⁶⁴ The Supreme Court has affirmed that the U.S. Constitution does not confer affirmative entitlements on children. See *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197–201 (1989).

³⁶⁵ G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989).

³⁶⁶ I acknowledge that fully realizing the potential of the framework requires moving beyond interpretative supplementation and recognizing a modest but affirmative duty on educational institutions to support identity exploration. While such a move may stretch the contours of current U.S. constitutional doctrines, it remains well within reach. As several scholars have shown, American jurisprudence already contains doctrinal seeds of positive entitlement for children—seeds that invite extension rather than invention. See, e.g., Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 13–14 (2004) (arguing that, although courts have not explicitly framed protection as a positive right, the logic of existing precedents supports its recognition). For prominent recent scholarly accounts illustrating how such an extension might be developed, see, e.g., Buss, *supra* note 353, at 751–52 (contending that the law should serve as a developmental agent to promote children’s healthy growth); Huntington & Scott, *supra* note 62, at 1371 (reconceptualizing legal childhood to impose affirmative responsibilities on the state in areas such as education, caregiving, and protection); Dailey & Rosenbury, *supra* note 307, at 1448 (calling for a legal paradigm shift to recognize children’s agency, relational interests, and affirmative rights beyond dependency and autonomy).

³⁶⁷ RONALD DWORKIN, LAW’S EMPIRE 53–54, 90, 226, 338 (1986).

³⁶⁸ See, e.g., *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025).

commitments to education, offer fertile ground for advancing a developmental understanding of children's rights.³⁶⁹

C. Application

The proposed framework can be translated through multiple legal pathways, three of which I will identify here: (1) reinterpreting the existing rationales underpinning constitutional clauses; (2) reassessing the standards of judicial review used to evaluate these restrictions; and (3) rethinking the statutory framework governing parental opt-out provisions.³⁷⁰ While not exhaustive, these examples demonstrate how the framework can guide federal judicial analysis—addressing the two mechanisms of restriction previously identified in Part A, by working within existing constitutional doctrines while simultaneously adapting them to evolving understandings of childhood development.

1. Reinterpreting the Rationales Underlying Constitutional Clauses

Reinterpreting the rationales that underpin existing constitutional protections—such as the Free Speech Clause—would enable them to account for identity exploration as a core democratic value. This reinterpretation is particularly necessary, given the Supreme Court's prevailing emphasis on civic preparation, which largely overlooks children's present developmental needs.

The Court has primarily framed education—and, by extension, the justification for students' right to receive information—as a tool for preparing children for future citizenship.³⁷¹ Its repeated references to schools as “marketplaces of ideas”³⁷² and “nurseries of democracy”³⁷³ reinforce this forward-looking rationale. While such future-oriented goals are undoubtedly important, this vision offers only a partial account of what meaningful development requires. Realizing a child's fullest potential demands educational environments that affirm children's emerging identities or, at the very least, facilitate engagement with diverse perspectives throughout childhood—an

³⁶⁹ See, e.g., *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997) (interpreting the North Carolina Constitution to guarantee each child the opportunity to attain a “sound basic education”); *Hoke Cnty. Bd. of Educ. v. State*, 599 S.E.2d 365 (N.C. 2004) (reaffirming and enforcing that duty).

³⁷⁰ While related, each legal path offers a distinct path toward a more developmentally responsive constitutional approach.

³⁷¹ See, e.g., *Bd. of Educ. v. Pico*, 457 U.S. 853, 868 (1982) (“[A]ccess to ideas . . . prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.”).

³⁷² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (acknowledging students' right to express personal views in schools).

³⁷³ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021) (recognizing schools' role in protecting student expression that facilitates identity development).

imperative that complements, rather than replaces, the future-oriented civic rationale.

Today's prevalent narrow focus, however, misses the deeper connection between identity development and democratic capacity. The right to receive information has traditionally been grounded in the idea that exposure to diverse viewpoints equips students for informed civic participation.³⁷⁴ But democratic readiness requires more than familiarity with competing political perspectives; it also entails developing the emotional, cognitive, and ethical capacities necessary for navigating pluralism.³⁷⁵

When students are allowed to explore questions of identity—including sexual orientation and gender identity—they develop precisely these capacities. Through such engagement, students gain knowledge about marginalized perspectives while learning to reflect critically on their own assumptions and recognize the legitimacy of others' self-understandings.³⁷⁶ This process equips them to participate in democratic life from a place of personal authenticity and respect for human diversity, rather than imposed conformity. From this perspective, identity exploration is an imperative that furthers the very rationale behind the right to information and its application in school.

2. *Reinterpreting Existing Standards of Judicial Review*

A second possible legal pathway involves rethinking the standards that courts apply to evaluate educational restrictions, particularly those justified on pedagogical grounds. Courts have routinely accepted curriculum restrictions framed in ostensibly neutral terms as sufficient to defeat claims under the Equal Protection Clause³⁷⁷ and to satisfy the "legitimate pedagogical concern" test under the Free Speech Clause.³⁷⁸

However, this deference becomes problematic when it obscures the developmental impact of exclusion on students' identity formation. The proposed framework challenges this deferential baseline by reconceptualizing education not merely as a vehicle for knowledge transmission but as a sphere where students encounter differences and learn to navigate moral complexity.

³⁷⁴ See *supra* notes 189–92 and accompanying text.

³⁷⁵ See, e.g., Emily Buss, *Developing the Free Mind*, in THE OXFORD HANDBOOK OF U.S. EDUCATION LAW 81, 87–88 (Kristine L. Bowman ed., 2021) ("Critical to the successful functioning of our democracy is the development, in our citizens, of the ability and inclination to share their views with one another . . . to fulfill the political duty [of] public discussion." (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring))).

³⁷⁶ Scholars have underscored the importance of a pedagogy that fosters critical awareness, affirms self-determination, and encourages active resistance to systemic inequalities. See, e.g., FREIRE, *supra* note 341; Westheimer & Kahne, *supra* note 341, at 239, 264–65; Leighton, *supra* note 341, at 249.

³⁷⁷ See *supra* notes 262–75 and accompanying text.

³⁷⁸ See *supra* notes 205, 230 and accompanying text.

Viewed through this lens, pedagogical justifications must therefore be assessed not only by their stated aims but also by their effect on students' developmental capacities. By positioning identity exploration as integral to the educational mission, this reframing raises the threshold for judicial scrutiny: Pedagogical claims must be evaluated in light of their contribution to—or obstruction of—students' capacity for pluralistic thinking, critical inquiry, and relational autonomy. A restriction can hardly be considered pedagogically legitimate if it systematically undermines these developmental functions—for example, by removing materials that allow students to see themselves reflected in the curriculum, prohibiting discussion of topics central to students' lived experiences, or creating measurably disparate impacts on student engagement based on identity.

While such an approach would require courts to evaluate potential developmental harms, it would counter the tendency to accept pedagogical rationales at face value. In doing so, it could help expose those cases in which such justifications—though cloaked in educational terms—are not pedagogically sound but, rather, inhibit the very developmental goals schools are meant to advance.

3. *Reconceptualizing the Debate Around Opt-Out Provisions*

Recent legal disputes have increasingly turned not only on whether LGBTQ content may appear in schools (practitioner-delivered policies) but also on whether parents have a constitutional right to prevent their children from being exposed to such content by the school (parental oversight policies). At the center of these disputes are opt-out provisions—statutory or administrative tools allowing parents to withdraw their children from specific instructional content.

Unlike earlier opt-out debates, which focused on discrete sex education learning units, today's discussions of sexual orientation and gender identity arise naturally across subject areas—when students read books with diverse families, discuss historical figures, or engage in classroom conversations. In this diffuse curricular landscape, selective exemptions are not only difficult to manage but also carry expressive harms: They reinforce stigma against LGBTQ topics, undermining schools' efforts to cultivate inclusive learning environments.

These tensions crystallized in the aforementioned *Mahmoud*, a case the Supreme Court decided very recently.³⁷⁹ There, the Montgomery County School Board declined to allow parents to exempt their children from classroom instruction using books that depict LGBTQ characters and families. The parents argued that this refusal infringes their First Amendment right to

³⁷⁹ *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025).

direct their children's religious and moral upbringing.³⁸⁰ The Board contended that mandated opt-outs would increase absenteeism, complicate administration, and stigmatize LGBTQ students.³⁸¹ While the District Court accepted the Board's argument, the Supreme Court reversed, holding that the Board's refusal to grant opt-outs imposed an unconstitutional burden on the parents' rights to the free exercise of religion.³⁸² Thus far, both courts have framed the issue narrowly, as a question of religious coercion,³⁸³ thereby failing to consider the constitutional interests of children.

Reframing the debate through the lens offered in this Article brings those overlooked interests—in particular, children's developmental need for identity exploration—into focus. From this perspective, both those students who are allowed to remain in classrooms and those whose parents seek to withdraw them possess independent constitutional interests—interests that courts have yet to fully address. The framework strengthens the case against opt-outs on two levels. First, it strengthens the school boards' current position by looking beyond administrative feasibility to highlight the *constitutional* harms that opt-outs may inflict—the infringement of students' First Amendment right to encounter a diversity of ideas, as discussed earlier,³⁸⁴ and the Fourteenth Amendment's guarantee of Equal Protection. By reinforcing harmful stereotypes about LGBTQ individuals, opt-outs constrain the space for identity exploration and mark certain identities as inherently undesirable to society, if not dangerous.³⁸⁵ Second, the framework draws attention to the often-ignored harm suffered by children whose parents demand exemptions. These children will grow up in a society shared with LGBTQ neighbors, coworkers, and peers. State-facilitated removal from the classroom curtails their ability to engage with diverse perspectives and may pressure them to suppress or disavow emerging understandings of identity. For children in unsupportive home environments, this not only weakens civic literacy but also deprives them of essential developmental resources that are made available to them only through inclusive public education.

³⁸⁰ *Mahmoud v. McKnight*, 102 F.4th 191, 201 (4th Cir. 2024).

³⁸¹ *Id.* at 220. Other arguments raised in response to the parents' constitutional claims emphasize that the asserted harm does not rise to the level of a constitutional violation. These include: (1) the absence of direct coercion of religious beliefs (*id.* at 198); (2) the continued ability of parents to teach their religious values at home (*id.* at 209); and (3) that mere exposure to differing viewpoints does not, in itself, constitute a constitutional burden (*id.* at 223).

³⁸² *Mahmoud*, 145 S. Ct. at 2360.

³⁸³ *McKnight*, 102 F.4th at 220–27; *Mahmoud*, 145 S. Ct. at 2381–402 (Sotomayor, J., dissenting).

³⁸⁴ *See supra* Part III.C.1.

³⁸⁵ Petitioners repeatedly framed LGBTQ characters and themes as inherently sexual and thus objectionable—invoking, for example, a “sacred duty” to teach “religiously grounded sexual ethics.” *See Mahmoud v. McKnight*, 688 F. Supp. 3d 265, 274–76 (D. Md. 2023). This framing reinforces reductive stereotypes that erase the complexity and full humanity of LGBTQ individuals, reducing their representation to sexual conduct in ways not applied to heterosexual or cisgender portrayals.

Current judicial analysis minimizes these harms by focusing narrowly on parental rights, producing doctrinal inconsistencies with established precedent. Under *Tinker*, the First Amendment prohibits restrictions on students' expression—or, by extension, students' right to receive information—unless it “materially and substantially disrupt[s]” the learning environment.³⁸⁶ By analogy, it is doubtful that parental rights—however sincerely held—may be exercised in ways that materially and substantially disrupt other students' educational experiences. Mandating opt-outs, however, *does* impose such disruption, effectively granting parents a veto over curricular inclusion. This is an authority that courts have not clearly recognized,³⁸⁷ and which risks fragmenting public education along ideological lines.³⁸⁸

Likewise, under the Fourteenth Amendment, mandatory opt-outs give legal effect to private beliefs that contravene constitutional anti-discrimination principles. As the Supreme Court emphasized in *Palmore v. Sidoti*, while private bias may lie beyond the law's reach, “the law cannot, directly or indirectly, give [such bias] effect.”³⁸⁹ Permitting opt-outs in this context allows discrimination to operate through state-sanctioned parental discretion, thereby circumventing Equal Protection guarantees.

Viewed through a developmental self-exploration lens, the opt-out dilemma reveals far more than a clash over parental authority. It brings into focus the full range of interests that courts should meaningfully consider when evaluating the legitimacy of opt-out provisions concerning identities in schools—whether related to sexual orientation, gender, or other characteristics that may arise in future disputes.

It is also important to consider the possibility that the open-ended identity-exploration framework could, itself, be invoked to justify opt-out policies. The concern is that progressive curricula might constrain children's

³⁸⁶ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

³⁸⁷ Numerous Circuit Courts of Appeals have consistently held that once parents enroll their children in public schools, they relinquish meaningful control over instructional content. Courts have repeatedly rejected the notion that parents possess a legal right—beyond participating in local school board elections—to direct or veto the curriculum used in public classrooms. See Rosenbury, *supra* note 343, at 869–70 (collecting cases illustrating this principle). Yet, courts have been inconsistent in applying this principle, sometimes subordinating students' own constitutional rights to parental consent requirements. See, e.g., Caroline Mala Corbin, *The Pledge of Allegiance and Compelled Speech Revisited: Requiring Parental Consent*, 97 IND. L.J. 967, 970 (2022) (analyzing the Eleventh Circuit's decision allowing Florida to require parental consent for students to exercise their *Barnette* rights against compelled speech and critiquing this doctrinal departure).

³⁸⁸ See Bowman, *supra* note 61, at 429–32.

³⁸⁹ *Palmore v. Sidoti*, 466 U.S. 429, 429–33 (1984) (invalidating a custody transfer based on concerns about societal bias toward interracial families and holding that although the Constitution cannot eliminate private prejudice, it must not allow the state to give that prejudice legal force). See also, in this regard, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (holding that the government may not sidestep equal protection requirements by yielding to private objections or community prejudice); *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (rejecting the idea that moral disapproval, even if long-standing, is a constitutionally sufficient basis for legal restrictions on intimate conduct).

identity formation by exposing them only to pro-LGBTQ perspectives, thereby stigmatizing conservative religious values. This is a legitimate concern, but it misapprehends the framework's aim. The aim of open-ended exploration is to expand, not restrict, the range of ideas and experiences available to children. Opting-out, by contrast, constrains exploration by removing children from opportunities to encounter and critically engage with difference. This potential misinterpretation underscores the importance of clarifying the framework's normative coherence and practical feasibility—issues addressed in the following section.

D. Objections

The application of the framework advanced here may be met with skepticism by scholars who question either its normative coherence or its feasibility. This section addresses each of these objections.

1. Normative Coherence

The first possible objection, which includes several interrelated concerns, relates to the normative coherence of the framework. Critics may argue that an anti-essentialist approach to identity development creates internal contradictions—simultaneously rejecting fixed categories while still needing to recognize meaningful differences among children. This concern echoes a longstanding challenge in equality theory: what Professor Martha Minow called the “dilemma of difference”—the risk that treating individuals differently may reinforce stigma, while treating them the same may erase meaningful distinctions.³⁹⁰

This Article does not purport to resolve that tension. Instead, it offers courts and policymakers a means for understanding and navigating how legal categories—particularly within childhood development contexts—simultaneously enable and constrain children's identity formation. Rather than choosing between recognition and sameness, the framework proposed here seeks to provide a way forward that is responsive to children's present identities while fostering the ongoing process of exploration. This interplay between freely *being* (how the child currently understands themselves) and freely *becoming* (the child's evolving potential) reflects what child-rights scholars have emphasized as a desirable feature of meaningful child-oriented theory.³⁹¹

Some may contend that the framework, despite its anti-essentialist foundations, functionally resembles existing group-based approaches like multiculturalism, which recognize a broad range of differences in educational

³⁹⁰ MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 20, 19–23 (1990).

³⁹¹ PELEG, *supra* note 296, at 193–94; Dailey & Rosenbury, *supra* note 307, at 1480.

settings. Yet, even where outcomes may converge, it differs fundamentally in its underlying rationale. As Professor Margaret Jane Radin notes, “different frameworks of analysis cannot reach the ‘same result.’”³⁹² The rationale for recognizing or denying rights *matters*—it shapes not only how we understand children’s needs but also how we craft legal and educational responses. Unlike frameworks that are outcome-driven or focused on affirming fixed-identity multiculturalism, for example, the approach I advance here is also process-oriented. It privileges open-ended exploration and the speculative dimensions of becoming over the affirmation of predetermined group membership. This may raise concerns particularly among parents who seek to preserve their children’s affiliation with particular cultural communities. But the framework does not seek to displace existing identities; rather, it creates space for critical reflection, allowing children to embrace inherited beliefs as informed choices rather than as passive legacies. It treats self-exploration not as a means to a predetermined outcome but as a moral good in itself.

2. *Legal Indeterminacy*

A second potential objection is that the proposed framework may be too conceptually diffuse to support legal action, given the indeterminacy of identity formation processes themselves. Without anchoring in stable identity classifications, some may say, courts and policymakers may struggle to articulate enforceable rights or identify actionable harms.³⁹³

Yet, the framework does not reject identity categories outright, nor does it propose that enforceable protections be eliminated. Instead, it reframes these identity categories as historically contingent and socially constructed tools—starting-points for interrogating the ideological structures that define and regulate identity, not end-points of legal analysis. Importantly, this framework is not intended to displace existing protections based on identity categories but to supplement them—by expanding the legal imagination to include the developmental conditions that facilitate identity formation itself. Per this view, identity categories are not discarded but situated within a broader inquiry into the structural conditions that enable or inhibit children’s capacity to engage in self-exploration.

This shift reorients legal scrutiny. Instead of requiring courts to define which identities deserve protection, one way to implement the proposed framework is to ask whether educational policies protect children’s developmental capacity to engage with diverse possibilities for selfhood. Courts

³⁹² Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right*, 16 DUKE J. GENDER L. & POL’Y 1, 36 (2009) (citing Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1878–87 (1987)).

³⁹³ Cf. Yoshino, *supra* note 254, at 800 (acknowledging similar concerns about the enforcement challenges posed by individualized, liberty-based approaches as compared to categorical equal protection, but arguing that the practical “closure of the heightened scrutiny canon” has significantly diminished the effectiveness of categorical strategies).

can thus evaluate, for example, whether policies artificially constrain identity exploration, whether disciplinary policies disproportionately target gender-non-conforming or sexually diverse students, and whether school environments provide the *free* “marketplace of ideas” necessary for authentic identity formation.

Still, a persistent challenge remains: Identity exploration is culturally contingent and often contested. Policies justified on these grounds may reflect lawmakers’ implicit biases or political preferences. That is, even when the goal—supporting healthy development—is uncontested, the path to achieving it is not always clear. Furthermore, the vision behind the proposed framework carries practical implications for educational settings. What kinds of classroom discussions support identity exploration without overstepping into persuasion or undue influence? How can schools create pedagogically sound environments that support student self-discovery while maintaining sufficient neutrality to avoid accusations of ideological indoctrination? How should educators communicate with parents about identity exploration in ways that preserve both student development and family relationships? And, when students begin to explore identities that conflict with familial values, what protocols should guide teacher responses?

Such questions are already being actively addressed by education scholars, attesting to a growing recognition that identity formation in schools is not incidental but central to pedagogical responsibility.³⁹⁴ Yet, existing legal doctrine lacks the conceptual tools to engage fully with these implications. This is why a legal framework that translates the developmental conditions necessary for identity exploration into cognizable normative principles is needed.

CONCLUSION

The rapid expansion of new curriculum laws in recent years has already affected—and is poised to further affect—millions of children and young people. The teacher being asked to remove rainbow stickers from the classroom, the librarian facing criminal charges, and the school district threatened for holding Pride Week—these moments capture what is at stake when the law casts identity exploration as a threat rather than a developmental necessity.

This Article provides a novel typology of this legal trend, demonstrates where existing constitutional doctrines fall short in responding adequately to the harms of the new curriculum restrictions, and advances a new, complementary legal framework grounded in children’s developmental need for identity exploration. This framework builds on the core commitments underpinning these constitutional doctrines, while supplementing them with crucial insights into the developmental needs of children, informed by socio-legal theories

³⁹⁴ See generally Bethy Leonardi & Michele S. Moses, *Understanding Democratic Education Policy Queerly: Toward a Queer Democratic Framework*, 29 EDUC. POL’Y ANALYSIS ARCHIVES 1 (2021) for an example.

of childhood. By translating this theoretical understanding into an actionable legal framework and illustrating its operationalization through multiple entry points, the Article demonstrates that the normative vision behind this framework is not only desirable but also feasible. Equipped with this thicker understanding, advocates may be better positioned to challenge the surge in curriculum-related restrictions, working toward a more developmentally responsive interpretation of the principles and standards embedded in current constitutional doctrines.

The normative vision advanced here may hold more transformative potential than one might assume. It may ultimately guide policymakers and courts not only in curriculum decisions but also in the full spectrum of school policies that intersect with identity formation—pronoun use, dress codes, and facility access—creating a more coherent and developmentally informed jurisprudence across all domains of educational regulation. The breadth of this transformation, however, also potentially heightens the institutional resistance it may encounter. Yet, what I envision here offers a conceptual paradigm that does not seek to dictate endpoints. It does not necessarily call on schools to actively promote identity exploration; rather, the proposed framework would ensure that the opportunities for such exploration remain routine and accessible throughout all facets of school life and actively supported whenever children themselves seek them. And it calls for expanding this horizon of potential by cultivating spaces that facilitate exploration, while remaining attentive to the concerns—legal, pedagogical, or otherwise—that such a vision may raise in its implementation.

APPENDIX A: PRACTITIONER-DELIVERED POLICIES

This appendix summarizes the practitioner-delivered aspects of the new curriculum laws, as presented in Part I.A

Table A: Classroom

Table A summarizes the laws and administrative guidance regulating LGBTQ-related instruction at the classroom level. It categorizes them by their approach—ranging from complete bans to developmentally conditioned restrictions, inclusive mandates, or guidance—and indicates the applicable Grade levels.

Regulatory Approach	Complete Prohibition All Grades Elementary		Develop- mentally Conditioned Prohibition	Inclusive Ad- ministrative Guidance	Inclusive Statutory Mandate
State	- Kentucky - Louisiana - Idaho - West Virginia - Texas *Alabama (proposed 2025 expansion; died in Senate)	- Florida (K-3) - North Carolina (K-4) - Iowa (K-6) - Ohio (K-3) - Arkansas (K-5) - Indiana (K-3)	- Alabama - Florida (>3rd Grade) - Ohio (>3rd Grade)	- Massachu- setts - Vermont - Connecticut - Delaware - Maryland - Maine - Michigan - District of Columbia	- California - New Jersey - Colorado - Illinois - Oregon - Nevada - Washington

Table B: Library

Table B presents restrictions on library activities. Though focusing mostly on the state level,³⁹⁵ many, if not most, policies relating to libraries are regulated at the local level, particularly through school board regulations.³⁹⁶

Regulatory Approach	State
<i>Mandatory Restrictions</i> Restriction based on “age-appropriate materials” or “harmful to minors” standards.	Alabama, Florida, Iowa, and Idaho
<i>Mandatory Restrictions Subject to Criminal Liability</i> Restrictions based on “harmful to minors” or “explicit sexual material” standards.	Indiana, Missouri, North Carolina (<i>pending</i>) Georgia (<i>pending</i>)
<i>Pre-emptive Materials Rating System</i>	Texas (<i>enforcement has been blocked</i>)

³⁹⁵ Alabama’s restriction has been implemented through the Public Library Service Executive Council.

³⁹⁶ See *supra* note 27.

APPENDIX B: PARENTAL OVERSIGHT POLICIES

This Appendix summarizes the key parental oversight mechanisms of the new curriculum laws, discussed in Part I.B. It distinguishes between classroom/student club policies and library regulation.

Level of Curriculum	Regulatory Approach	State
Classroom & Student Clubs	Opt-out	Arkansas, Florida, Montana, New Hampshire, Ohio, and Idaho
	Opt-in	Arizona, Wyoming, Tennessee, and Montana
	Enforcement through Legal Sanctions	Idaho and New Hampshire (civil lawsuits) North Carolina (criminal penalties) (<i>pending</i>)
Library	Opt-in	Texas and Idaho
	Parent/Guardian Challenges	Georgia
	Public Challenge (including any county resident	Florida and Indiana (<i>pending</i> in North Carolina)

APPENDIX C: U.S. JURISDICTIONS WITH STATUTORY OR ADMINISTRATIVE MEASURES

This Appendix documents existing and proposed measures regulating LGBTQ-related content in all 50 states and the District of Columbia in public schools. It includes enacted and pending statutes, administrative guidance, and failed legislative proposals.³⁹⁷

	Practitioner-delivered Policies			Parental Oversight Policies	
State (Year of Enactment)	Classroom	Library	Extracurricular	Classroom and Student Clubs	Library
Alabama (2022)	Age-based restriction conditioned on “appropriateness” (K-5) ³⁹⁸ <i>Proposed expansion to complete prohibition (K-12); died in Senate (2025)</i> ³⁹⁹	Mandatory restriction of material deemed “sexually explicit” ⁴⁰⁰	—	—	—
Alaska	—	—	—	—	—
Arizona (2021)	—	—	— ⁴⁰¹	Opt-in ⁴⁰²	—

³⁹⁷ The inclusion of failed bills illustrates the full scope of political efforts and the extent of legislative appetite for censoring identity-related content in schools.

³⁹⁸ ALA. CODE § 16-40A-5(a) (2024) (“An individual or group of individuals providing classroom instruction to students in kindergarten through the fifth grade at a public K-12 school shall not engage in classroom discussion or provide classroom instruction regarding sexual orientation or gender identity in a manner that is not age appropriate or developmentally appropriate for students in accordance with state standards.”).

³⁹⁹ H.B. 244, 2025 Leg., Reg. Sess. (Ala. 2025) (*engrossed version*) (proposing to extend the ban to all Grades pre-K-12 and to prohibit related flags or symbols on school property), engrossed Apr. 17, 2025; died in Senate.

⁴⁰⁰ Since May 2024, the Alabama Public Library Service has required all state-funded public libraries to adopt policies that restrict access to “obscenity, sexually explicit, or other material deemed inappropriate for children” in youth-designated sections. The rule itself did not define “sexually explicit,” and the Alabama Public Service board adopted a new definition following concerns of vagueness. *See* Ala. Library Ass’n Exec. Council, *supra* note 130; Letter from John Wahl, Chair, Ala. Pub. Libr. Serv. Exec. Bd., *supra* note 130; Chapoco, *supra* note 130.

⁴⁰¹ H.B. 2868, 56th Leg., 1st Reg. Sess. (Ariz. 2025) (proposed law that would have prohibited the use of public funds to promote content related to race, gender identity, or sexual orientation in educational institutions; vetoed by Governor Katie Hobbs).

⁴⁰² ARIZ. REV. STAT. ANN. § 15-102(A)(6) (2021) (schools must follow “procedures by which parents will be notified in advance of and given the opportunity to opt their children in to any instruction, learning materials or presentations regarding sexuality, in courses other than formal sex education curricula”).

	Practitioner-delivered Policies			Parental Oversight Policies	
State (Year of Enactment)	Classroom	Library	Extracurricular	Classroom and Student Clubs	Library
Arkansas (2021, 2024)	Complete prohibition for K-4) ⁴⁰³	— ⁴⁰⁴	—	Opt-out ⁴⁰⁵	—
California (2012)	Legislatively mandated inclusive curriculum ⁴⁰⁶	—	—	—	—
Colorado (2019)	Legislatively mandated inclusive curriculum ⁴⁰⁷ (K-12) State-supported Programming for Students ⁴⁰⁸	—	—	—	—
Connecticut (2021)	Non-binding inclusive administrative guidance (K-8), ⁴⁰⁹ supported by state funding. ⁴¹⁰	—	—	—	—

⁴⁰³ ARK. CODE ANN. § 6-16-157(c) (2023) (prohibiting classroom instruction on gender identity, sexual orientation, and related topics before fifth Grade).

⁴⁰⁴ Act 372, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (restricted access to materials in public libraries deemed “harmful to minors” imposed liability on booksellers by requiring them to restrict or segregate such materials to prevent access by minors), *invalidated by* Fayetteville Pub. Libr. v. Crawford Cnty., 684 F. Supp. 3d 879, 896–903 (W.D. Ark. 2023) (struck down as facially unconstitutional).

⁴⁰⁵ ARK. CODE ANN. § 6-16-1006 (2021) (requiring schools to allow parental review and written opt-out for any content or activity addressing sex education, sexual orientation, or gender identity).

⁴⁰⁶ CAL. EDUC. CODE § 51204.5 (2012) (adding LGBTQ individuals to the list of historically underrepresented groups that must be accurately depicted in history and the social sciences). Although California does not mandate LGBTQ content specifically for primary Grades, in 2017, it approved LGBTQ-inclusive K–8 history textbooks to comply with the 2011 FAIR Education Act. *See* Schaub, *supra* note 118.

⁴⁰⁷ COLO. REV. STAT. ANN. § 22-1-104 (2019). The Board approved the revised standards on November 10, 2022. *See Colorado State Board of Education Approves New Inclusive Social Studies Standards*, *supra* note 104.

⁴⁰⁸ COLO. REV. STAT. ANN. § 22-1-104(5)(b) (2019) (allocating funds for educational materials and training in elementary and secondary schools).

⁴⁰⁹ 2021 CONN. PUB. ACTS 21-2 (June Spec. Sess.) § 374(b)(3)(D) (requiring the State Department of Education to develop a K-8 model curriculum that includes LGBTQ studies among other required topics, though schools are not mandated to use it).

⁴¹⁰ *Connecticut Funds K-8 Model Curriculum that Includes LGBTQ+ Studies*, *supra* note 125.

	Practitioner-delivered Policies			Parental Oversight Policies	
State (Year of Enactment)	Classroom	Library	Extracurricular	Classroom and Student Clubs	Library
Delaware (2022)	Non-binding inclusive administrative guidance (7th–12th Grade) ⁴¹¹	—	—	—	—
Florida (2022)	Complete prohibition for pre-K–3 ⁴¹² Age-based prohibition conditional on “developmentally appropriate” standards (9th–12th Grade) ⁴¹³ (<i>partly enjoined</i>)	Removal of books containing anything construed as “sexual conduct” ⁴¹⁴	—	Opt-out ⁴¹⁵	Public challenge system ⁴¹⁶

⁴¹¹ *Culturally Responsive Resources*, *supra* note 112 (providing age-appropriate LGBTQ history lessons for Grades 7–12).

⁴¹² FLA. STAT. ANN. § 1001.42(8)(c)(3) (2021) (prohibiting classroom instruction on sexual orientation or gender identity in pre-K through 8th Grade, unless part of state standards or reproductive health instruction). Legal challenges to the law have been dismissed for lack of standing. *See generally* Equal. Fla. v. Fla. State Bd. Of Educ., No. 4:22-cv-134-AW-MJF, 2022 WL 19263602 (N.D. Fla. Sep. 29, 2022); M.A. v. Fla. State Bd. of Educ., No. 4:22-cv-134-AW-MJF, 2023 WL2631071 (N.D. Fla. Feb. 15, 2022). While those dismissals were on appeal, the parties reached a settlement clarifying that HB 1557 applies only to “teaching,” not to mere discussion. Teachers may, for example, respond to student-initiated conversations about identity or family life and evaluate student work that references the prohibited topics. *See Mazzei, supra* note 100.

⁴¹³ FLA. STAT. ANN. § 1001.42(8)(c)(3) (2022).

⁴¹⁴ FLA. STAT. ANN. § 1006.28(2)(a)(2)(b) (2022); *see* PEN Am. Ctr. v. Escambia Cnty. Sch. Bd., 711 F. Supp. 3d 1325, 1331 (N.D. Fla. 2024) (allowing a First Amendment challenge to proceed against the school board for allegedly removing LGBTQ- and race-related books based on viewpoint discrimination); Penguin Random House LLC v. Gibson, 796 F. Supp. 3d 1052, 1081 (M.D. Fla. 2025) (holding that § 1006.28’s prohibition on materials that “describe sexual conduct” is facially unconstitutional and overbroad in violation of the First Amendment).

⁴¹⁵ FLA. STAT. ANN. § 1014.05(d) (2022) (requiring each district school board to develop procedures for parents to object to instructional materials used in the classroom relating to sex education or sexuality; these objections can be based on beliefs regarding morality, sex, and religion).

⁴¹⁶ FLA. STAT. ANN. § 1006.28(2)(a)(2)(b) (2022) (any county resident can challenge books with “sexual conduct,” requiring removal within five days before evaluation). For complaints challenging Florida’s library book review process as structurally biased toward removal, *see e.g.*, Compl. at § 81, Penguin Random House LLC v. Gibson, No. 6:24-cv-01573 (M.D. Fla. Aug. 29, 2024); *PEN Am. Ctr.*, 711 F. Supp. 3d at 1330 (noting that the special magistrate process “cannot be used to challenge the board’s decision granting an objection and removing a book from the library”); *see also* Parnell v. Sch. Bd. of Lake Cnty., 731 F. Supp. 3d 1298, 1314–15 (N.D. Fla. 2024) (allowing certain First Amendment claims challenging school library book removals to proceed).

	Practitioner-delivered Policies			Parental Oversight Policies	
State (Year of Enactment)	Classroom	Library	Extracurricular	Classroom and Student Clubs	Library
Georgia (2025, 2022)	—	Criminal liability for materials “harmful to minors” ⁴¹⁷	—	— ⁴¹⁸	Parental challenge system ⁴¹⁹
Hawaii (2021)	Principal approval required for “controversial” topics ⁴²⁰	—	—	Opt-out (triggered by controversial topics) ⁴²¹	—

⁴¹⁷ S.B. 74, 2025 Gen. Assemb., Reg. Sess. (Ga. 2025). The bill removes existing legal immunity for librarians and educators under Georgia’s obscenity law, thereby exposing them to potential criminal liability for knowingly distributing material deemed “harmful to minors,” subject only to a limited affirmative defense for good-faith efforts to restrict minors’ access to such materials.

⁴¹⁸ Several bills have been proposed in this regard. *See, e.g.*, H.B. 1045, 157th Gen. Assemb., Reg. Sess. § 1 (Ga. 2024) (would have required parental notification and opt-out for instruction on sexual orientation or gender identity in K–12 schools, among other restrictions); S.B. 88, 2023–2024 Leg., Reg. Sess. (Ga. 2024) (proposing to require parental notification and restrict instruction on gender identity and queer theory).

⁴¹⁹ GA. CODE ANN. § 20-2-324.6 (2022).

⁴²⁰ Memorandum from Christina M. Kishimoto, Superintendent, to all Department of Education Employees on Notice on Board of Education Policy 101-13 – Controversial Issues (May 3, 2021), <https://www.hsta.org/wp-content/uploads/2021/08/HIDOE-BOE-Policy-Controversial-Issues-050321.pdf> [<https://perma.cc/VH8F-HCJJ>] (administrative policy requiring teacher consultation with principals before addressing controversial issues in class).

⁴²¹ *Id.* (“Requir[ing] instructional staff or administration to notify parents or legal guardians of controversial issues discussed in the classroom or through other school activities.”).

	Practitioner-delivered Policies			Parental Oversight Policies	
State (Year of Enactment)	Classroom	Library	Extracurricular	Classroom and Student Clubs	Library
Idaho (2025)	Complete prohibition for all Grades ⁴²²	Mandated removal of materials “harmful to minors” ⁴²³	—	Complaint and legal remedy ⁴²⁴ Opt-out for extra-curricular activities ⁴²⁵	Parental challenge system ⁴²⁶
Illinois (2019)	Legislatively mandated inclusive curriculum ⁴²⁷	—	—	—	—

⁴²² IDAHO CODE ANN. § 33-6001(5) (2025) (“A public school shall be required to adopt procedures and policies that prohibit classroom instruction by public school personnel on sexual orientation or gender identity from kindergarten through grade 12 or in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards.”).

⁴²³ IDAHO CODE ANN. §§ 18-1514, 18-1517B(2) (2024) (requiring libraries to “take reasonable steps to restrict access by minors to materials [deemed] harmful to minors;” incorporates Idaho Code § 18-1514’s definition of “sexual conduct,” which includes homosexuality); *see* Compl. for Injunctive and Declaratory Relief, Penguin Random House LLC v. Labrador, No. 1:25-cv-00061-DCN (D. Idaho Feb. 4, 2025) (First Amendment challenge to Idaho’s book restriction law).

⁴²⁴ IDAHO CODE ANN. §§ 33-6001(10), (11) (2025) (parents can file complaints if their rights are violated; if unresolved, they may bring a “private cause of action for “injunctive relief, damages, and any other relief available under law”).

⁴²⁵ IDAHO CODE ANN. §§ 33-6001(2)(c), (4) (2025) (although not specific to clubs, the law permits withdrawal from any activity conflicting with parental beliefs and may extend to LGBTQ extracurricular events if seen as educational or school-affiliated).

⁴²⁶ IDAHO CODE ANN. §§ 18-1514, 18-1517B (2024) (requiring school and public libraries to move books deemed “harmful to minors”—including those depicting “homosexuality”—to an adult-only section within 60 days of complaint which can be submitted by parents; allowing parents or youth to sue libraries for noncompliance and mandates minimum \$250 in damages).

⁴²⁷ 105 ILL. COMP. STAT. ANN. 5/27-21(a) (2019).

	Practitioner-delivered Policies			Parental Oversight Policies	
State (Year of Enactment)	Classroom	Library	Extracurricular	Classroom and Student Clubs	Library
Indiana (2023)	Complete prohibition for K-3 ⁴²⁸	Criminal liability for materials “harmful to minors” ⁴²⁹	—	—	Public challenge system ⁴³⁰
Iowa (2023)	Complete prohibition for K-6 ⁴³¹	“Age appropriate” materials only ⁴³² (<i>partly enjoined</i>)	—	—	—
Kansas	—	—	—	— ⁴³³	—

⁴²⁸ IND. CODE ANN. § 20-30-17-2 (2023) (prohibiting classroom instruction on “human sexuality” in pre-Kindergarten through 3rd Grade). *But see* Smiley v. Jenner, 684 F. Supp. 3d 835, 842 (S.D. Ind. 2023) (denying injunctive relief to an elementary school teacher challenging this law, stating that “informal conversation” and other “interactions, even when spontaneous and not part of official curriculum, are within the scope of [the] duties and responsibilities [of] an elementary school teacher and therefore not protected by the First Amendment”), *appeal pending*, No. 23-2543 (7th Cir. filed Aug. 2023; argued Feb. 2024).

⁴²⁹ IND. CODE ANN. § 35-49-3-3 (2023) (exposing school staff to criminal charges if they provide materials that are considered “obscene” or “harmful to minors,” eliminating prior protections for educational use).

⁴³⁰ *Id.* § 20-26-5.5-1 (requiring school boards to establish procedures for parents or community members to challenge library materials deemed “obscene” or “harmful to minors”).

⁴³¹ IOWA CODE § 279.80(2) (2023) (prohibiting curriculum or instruction relating to gender identity or sexual orientation to students in Kindergarten through 6th Grade); *see* GLBT Youth in Iowa Schs. Task Force v. Reynolds, 709 F. Supp. 3d 664 (S.D. Iowa 2023) (preliminarily enjoining the ban), *rev’d and vacated*, 114 F.4th 660 (8th Cir. 2024), *on remand*, Iowa Safe Schs. v. Reynolds, 788 F. Supp. 3d 969, 994–96 (S.D. Iowa 2025) (holding that the law may constitutionally bar mandatory classroom instruction on these topics).

⁴³² IOWA CODE ANN. § 256.11(9)(a)(2) (2025) (redefining “age-appropriate” to exclude any material describing or depicting a sex act). *But see* Penguin Random House LLC v. Robbins, No. 4:23-cv-00478, 2025 WL 1156545, at 24 (S.D. Iowa 2025) (holding that the book-removal mandate was preliminarily enjoined as facially unconstitutional); Iowa Safe Schs. v. Reynolds, 788 F. Supp. 3d 969, 994–96 (S.D. Iowa 2025) (continuing the injunction).

⁴³³ H.B. 2236, 2023 Leg., Reg. Sess. (Kan. 2023) (vetoed Apr. 24, 2023) (proposed legislation that would have permitted parents to opt their child out of any K–12 lesson or activity that “impairs the parent’s sincerely held beliefs, values or principles”).

	Practitioner-delivered Policies			Parental Oversight Policies	
State (Year of Enactment)	Classroom	Library	Extracurricular	Classroom and Student Clubs	Library
Kentucky (2023)	Complete prohibition for all Grades ⁴³⁴	—	— ⁴³⁵	—	—
Louisiana (2024)	Complete prohibition for all Grades ⁴³⁶	—	Limits on GSA ⁴³⁷	—	—
Maine	Non-binding inclusive administrative guidance ⁴³⁸	—	—	—	—
Maryland	Non-binding inclusive administrative guidance ⁴³⁹	—	—	—	—
Massachusetts	Non-binding inclusive administrative guidance ⁴⁴⁰	—	—	—	—
Michigan	Non-binding inclusive administrative guidance ⁴⁴¹	—	—	—	—

⁴³⁴ KY. REV. STAT. ANN. § 158.1415(d)(2) (2023) (prohibiting instruction or presentations aiming to explore gender identity, gender expression, or sexual orientation “regardless of grade level”).

⁴³⁵ While there is no statewide library ban, local removals occurred through misapplied classroom restrictions. *See, e.g.*, Clark, *supra* note 153.

⁴³⁶ LA. STAT. ANN. § 17:412(A) (2024) (prohibiting K–12 school staff from discussing sexual orientation or gender identity in ways that “deviate” from state-approved standards or curricula).

⁴³⁷ *Id.* § 17:412(A)(2) (“bans discussion of sexual orientation or gender identity during any K–12 extracurricular academic, athletic, or social activity under school authority”).

⁴³⁸ *LGBTQ+ Resources for Maine Schools*, ME. DEP’T OF EDUC., <https://www.maine.gov/doe/learning/content/socialstudies/resources/DEI/LGBTQ> [<https://perma.cc/9Q3L-63R3>] (listing resources for teachers).

⁴³⁹ MD. STATE DEP’T OF EDUC., *supra* note 113 (providing non-binding administrative guidance on creating inclusive educational environments for LGBTQ students).

⁴⁴⁰ MASS. DEP’T OF ELEMENTARY & SECONDARY EDUC., *supra* note 109, at 41, 78, 136, 156, 159; *Safe Schools Program for LGBTQ Students*, *supra* note 109 (noting that this program “offer[s] newly-created curricula materials to help schools provide for LGBTQ-inclusive lessons,” aiming to “help students value the contributions of LGBTQ people and understand their place in history, literature, and other fields”).

⁴⁴¹ Memorandum from Michael F. Rice, *supra* note 115 (outlining practices for supporting LGBTQ students and encouraging inclusive environments).

	Practitioner-delivered Policies			Parental Oversight Policies	
State (Year of Enactment)	Classroom	Library	Extracurricular	Classroom and Student Clubs	Library
Minnesota	___ ⁴⁴²	—	—	—	—
Mississippi	—	—	—	___ ⁴⁴³	—
Missouri (2022)	___ ⁴⁴⁴	Criminal liability for “explicit sexual material” ⁴⁴⁵	—	—	—
Montana (2021, 2025)	—	—	—	Opt-in + opt-out ⁴⁴⁶	—
Nebraska	—	—	—	—	—
Nevada	Legislatively mandated inclusive curriculum (pre-K-12) ⁴⁴⁷	—	—	—	—

⁴⁴² Minn. H.F. 3022, 93rd Leg., Reg. Sess. (2023–2024) (would have barred classroom instruction on sexual orientation or gender identity in K–4 and required any such instruction thereafter to be age- or developmentally appropriate; introduced Mar. 20, 2023).

⁴⁴³ Miss. S.B. 2820, 2023 Reg. Sess. (2023) (would have required parental opt-in for “identity curriculum,” including instruction on gender identity and sexual orientation; failed to pass).

⁴⁴⁴ S.B. 1024, 102d Gen. Assemb., 2d Reg. Sess. (Mo. 2024) (would have prohibited classroom instruction on gender identity or sexual orientation in Grades K–3 or in a manner deemed not age- or developmentally appropriate; did not advance beyond committee).

⁴⁴⁵ MO. ANN. STAT. § 573.550 (2022) (prohibiting providing or loaning “explicit sexual material” to students at public and private elementary and secondary schools; violations constitute a Class A misdemeanor; this law is limited to pictures and visual representations of sexual content only); *see* Pet. for Injunctive and Declaratory Relief at 1–2, Mo. Ass’n of Sch. Librs. v. Baker, No. 2316-cv-05732 (Mo. Cir. Ct. Jackson Cnty. filed Feb. 16, 2023) (challenging Missouri Revised Statute § 573.550 as unconstitutional; case was removed to federal court but subsequently remanded back to state court, where it remains pending).

⁴⁴⁶ MONT. CODE ANN. §§ 20-7-120(1)(b), (8)(a)(ii), (b) (2025) (retaining an opt-out model for human sexuality instruction (enacted in 2021), which includes sexual orientation and gender identity among other topics, but imposing a stricter opt-in requirement for “identity instruction”—defined as teaching about gender identity, gender expression, or sexual orientation—which students may not attend without written parental consent); *see* Plaintiffs’ Second Am. Compl. at 3, Mont. Sch. Counselors Ass’n v. State, No. DV 2024-230 (Mont. 1st Jud. Dist. Ct. filed Oct. 28, 2025) (alleging that the 2025 amendment expands prior restrictions and “aim[s] to further inhibit the discussion and curricula pertaining to sexual orientation, gender identity, and human sexuality” in Montana’s K–12 schools).

⁴⁴⁷ NEV. REV. STAT. ANN. § 389.061(1)(b) (2021).

	Practitioner-delivered Policies			Parental Oversight Policies	
State (Year of Enactment)	Classroom	Library	Extracurricular	Classroom and Student Clubs	Library
New Hampshire (2024, 2025)	—	—	—	Opt-out (with professional sanctions; private cause of action) ⁴⁴⁸	— ⁴⁴⁹
New Jersey	Legislatively mandated inclusive curriculum (6th–12th Grade) ⁴⁵⁰	—	—	—	—
New Mexico	—	—	—	—	—
New York	—	—	—	—	—

⁴⁴⁸ N.H. REV. STAT. ANN. § 186:11 IX-c (2024) (requiring schools to notify parents two weeks in advance of instruction on sexual orientation or gender identity; parents may opt out in writing and request alternative materials at their own expense); *see also* N.H. REV. STAT. ANN. § 189-B:4 (2025), which preserves the opt-out right by cross-reference to § 186:11, IX-b and IX-c, § 189-B:4(i), requires schools to establish procedures enabling parents to object to any classroom materials on grounds of morality, sex, or religion, § 189-B:5(c), and provides for civil enforcement through declaratory and injunctive relief and monetary damages, § 189-B:7(II).

⁴⁴⁹ N.H. REV. STAT. ANN. § 189-B (2025) does not explicitly impose obligations or penalties on library staff. However, librarians could plausibly be indirectly affected, as the statute broadly applies to “school personnel,” defined to include “any teacher, administrator, employee, or other individual acting in furtherance of or on behalf of any public school,” § 189-B:2(V), and its parental disclosure requirements, § 189-B:4(e), could plausibly encompass library-related decisions, depending on how enforcement is interpreted.

⁴⁵⁰ N.J. STAT. ANN. § 18A:35-4.35 (2019) (referring to middle school and high school students).

	Practitioner-delivered Policies			Parental Oversight Policies	
State (Year of Enactment)	Classroom	Library	Extracurricular	Classroom and Student Clubs	Library
North Carolina (2023, 2025)	Complete prohibition for K-4 ⁴⁵¹ <i>Pending</i> expansion to 6th Grade ⁴⁵²	<i>Pending</i> criminal liability for materials “harmful to minors” ⁴⁵³	—	<i>Pending</i> opt-in (7th–12th Grade) ⁴⁵⁴	<i>Pending</i> public challenge system ⁴⁵⁵ <i>Pending</i> opt-in system ⁴⁵⁶
North Dakota	—	—	—	—	—
Ohio (2023)	Complete prohibition for K-3 ⁴⁵⁷ “Developmentally appropriate” restriction for all Grades ⁴⁵⁸		—	Opt-out ⁴⁵⁹	—

⁴⁵¹ N.C. GEN. STAT. ANN. § 115C-76.55 (2023) (prohibiting classroom instruction on sexual orientation or gender identity in Kindergarten through 4th Grade).

⁴⁵² H.B. 595, 2025 Gen. Assemb., Reg. Sess. (N.C. 2025).

⁴⁵³ *Id.* (requiring public libraries to place library books containing material “harmful to minors” in an age-restricted portion of the library that is accessible only to those 18 years of age and older; exposing minors to “harmful material” is considered a Class 1 misdemeanor).

⁴⁵⁴ *Id.* (requiring students in Grades 7 through 12 to get prior written parental permission before receiving instruction on gender identity, sexual activity, or sexuality).

⁴⁵⁵ *Id.* (allowing parents and other individuals to submit objections to specific school library books; any book receiving 10 or more objection letters must be reviewed by the local board of education in a public meeting before it may be selected or retained).

⁴⁵⁶ *Id.* (establishing an opt-in requirement to access library materials deemed “harmful to minors”; written parental consent is required).

⁴⁵⁷ OHIO REV. CODE ANN. § 3313.473(e) (2025) (“No school district or third party acting on behalf of a district shall provide instruction that includes sexuality content to students in grades kindergarten through three; sexuality content is defined to “any oral or written instruction, presentation, image, or description of sexual concepts or gender ideology provided in a classroom setting,” *id.* § 3313.473(g)(1)).

⁴⁵⁸ *Id.* § 3313.473(B)(1)(a) (requiring the board of education to “ensure that any sexuality content is age-appropriate and developmentally appropriate for the age of the student receiving the instruction, regardless of the age or grade level of the student”).

⁴⁵⁹ *Id.* § 3313.473(B)(1)(b) (requiring parental notification and opt-out rights for any “sexuality content” instruction).

	Practitioner-delivered Policies			Parental Oversight Policies	
State (Year of Enactment)	Classroom	Library	Extracurricular	Classroom and Student Clubs	Library
Oklahoma	___ ⁴⁶⁰	___ ⁴⁶¹	—	—	___ ⁴⁶²
Oregon (2021)	Legislatively mandated inclusive curriculum (K-12) ⁴⁶³	—	—	—	—
Pennsylvania	___ ⁴⁶⁴	—	—	—	—
Rhode Island	—	—	—	—	—
South Carolina	___ ⁴⁶⁵	___ ⁴⁶⁶	___ ⁴⁶⁷	—	—
South Dakota	___ ⁴⁶⁸	—	—	—	—
Tennessee	—	—	—	Opt-in ⁴⁶⁹	—

⁴⁶⁰ S.B. 30, 59th Leg., 1st Reg. Sess. (Okla. 2023) (would have prohibited classroom instruction on sexual orientation or gender identity in Grades K–6 and limited such instruction in Grades 7–12 to “age-appropriate or developmentally appropriate” content).

⁴⁶¹ S.B. 397, 59th Leg., 1st Reg. Sess. (Okla. 2023) (would have required libraries to rate materials by age group, restricted student access without parental consent; passed both chambers but failed to become law).

⁴⁶² *Id.*

⁴⁶³ OR. REV. STAT. ANN. § 329.045(1)(a) (2021) (requiring inclusive education aligned with the LGBTQ2SIA+ Student Success Plan). The state board of education issued implementation guides. *See* OR. DEP’T OF EDUC., *supra* note 106.

⁴⁶⁴ H.B. 319, 2023–2024 Gen. Assemb., Reg. Sess. (Pa. 2023) (would have banned instruction on sexual orientation and gender identity in K–5 and required parental notification; introduced Mar. 13, 2023, and died in committee).

⁴⁶⁵ S.C. H.B. 3728, 125th Gen. Assemb., Reg. Sess. (2023–2024) (would have prohibited mandatory gender or sexual diversity training unless part of a corrective action plan and required instructional, extracurricular, library, and media materials to be “age appropriate, grade appropriate, or appropriate to the academic grade level of the student”).

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ H.B. 1201, 2025 Reg. Sess. (S.D. 2025) (would have prohibited school employees from instructing students on gender identity or expression and required parental notification of gender-related disclosures).

⁴⁶⁹ TENN. CODE ANN. § 49-6-1031 (2023) (prohibiting students from joining any student club or organization without prior written parental consent); TENN. CODE ANN. § 49-6-1308 (2023) (requiring advance parental notice and written, informed consent before providing instruction on sexual orientation or gender identity).

	Practitioner-delivered Policies			Parental Oversight Policies	
State (Year of Enactment)	Classroom	Library	Extracurricular	Classroom and Student Clubs	Library
Texas (2023, 2025)	Complete prohibition for all Grades ⁴⁷⁰	Bookseller rating system (<i>unconstitutional; enforcement enjoined</i>) ⁴⁷¹	Limits on GSA ⁴⁷²		Opt-in for books rated “sexually explicit” ⁴⁷³
Utah (2023, 2025)	Removal of books deemed “pornographic or indecent” from classroom ⁴⁷⁴	Removal of books deemed “pornographic or indecent” from public school libraries ⁴⁷⁵	—	Opt-out ⁴⁷⁶	—

⁴⁷⁰ TEX. EDUC. CODE ANN. § 28.0043(A) (2025) (prohibiting instruction, guidance, activities, or programming related to gender identity or sexual orientation in public schools pre-K–12).

⁴⁷¹ *Id.* § 35.002(c) (2023) (prohibiting booksellers from selling books rated as “sexually explicit” to schools, and allowing students to access books rated as “sexually relevant” only with written parental consent), *implementation enjoined by Book People, Inc. v. Wong*, 692 F. Supp. 3d 660 (W.D. Tex. 2023), *aff’d in part, vacated in part, and remanded*, 91 F.4th 318 (5th Cir. 2024). The rating requirements in sections 35.001–35.003 were subsequently held unconstitutional and permanently enjoined. *Book People, Inc. v. Wong*, 807 F. Supp. 3d 677, 691–96 (W.D. Tex. 2025), *appeal filed*, (5th Cir. Oct. 30, 2025).

⁴⁷² TEX. EDUC. CODE ANN. § 33.0815(b) (2025) (stating that “[a] school district or open-enrollment charter school may not authorize or sponsor a student club based on sexual orientation or gender identity”).

⁴⁷³ *Id.* § 35.005 (2023) (restricting access to books rated “sexually relevant” without written parental consent).

⁴⁷⁴ UTAH CODE ANN. §§ 53G-10-(2)(a)–(b) (2025) (prohibiting “sensitive materials” in any “school setting,” defined to include classroom under *id.* § 53G-10-103(1)(g)(i)(A); defining “sensitive material” to include instructional materials constituting “pornographic or indecent material” under Utah law).

⁴⁷⁵ *Id.* §§ 53G-10-(2)(a)–(b) (prohibiting “sensitive materials” in any “school setting,” defined to include school libraries under *id.* § 53G-10-103(1)(g)(i)(B); defining “sensitive material” to include instructional materials constituting “pornographic or indecent material” under Utah law). Under this law, once at least three school districts or two districts and five charter schools determine that a book constitutes “objective sensitive material,” the statute mandates its removal from student access statewide, requiring every remaining district and charter school to remove the material, unless the State Board votes to overturn the determination.

⁴⁷⁶ *Id.* § 53G-10-205 (2023) (allowing parents to opt their children out of required educational programs, not necessarily related to Sex Education (but may include sexual

	Practitioner-delivered Policies			Parental Oversight Policies	
State (Year of Enactment)	Classroom	Library	Extracurricular	Classroom and Student Clubs	Library
Vermont (2019; 2024)	Mandatory administrative inclusive curriculum (K-12) ⁴⁷⁷	—	—	—	—
Virginia	—	—	—	—	—
Washington (2024)	Legislatively mandated inclusive curriculum (K-12) ⁴⁷⁸	—	—	—	—
West Virginia	Complete prohibition for all Grades ⁴⁷⁹	—	—	—	—
Wisconsin	—	—	—	— ⁴⁸⁰	—
Wyoming	—	—	—	Opt-in ⁴⁸¹	—

orientation or gender identity), on the grounds of religious beliefs, provided they submit written requests with proposed alternative learning activities that meet educational goals).

⁴⁷⁷ An Act Relating to Ethnic and Social Equity Studies Standards for Public Schools, No. 1, H.3, 2019 Leg., Reg. Sess. (Vt. 2019); Vt. State Bd. of Educ., *Rule Series 2000: Education Quality Standards* 12 (Apr. 17, 2024), <https://education.vermont.gov/sites/aoe/files/documents/edu-state-board-rule-series-2000.pdf> [<https://perma.cc/S5HZ-ZYHD>] (final rule adopted by the Vermont State Board of Education setting education quality standards, including requirements that students demonstrate proficiency in “ethnic and social equity studies”).

⁴⁷⁸ WASH. REV. CODE ANN. § 28A.345.130 (2024).

⁴⁷⁹ W. VA. CODE ANN. § 18-5-29 (2025) (prohibiting public school instruction related to sexual orientation or gender identity, with narrow exceptions for “responses to student questions,” “contextual references to the identity of historical or public figures,” “discussion necessary to address bullying or disciplinary matters,” and “instruction as part of AP or dual enrollment courses”).

⁴⁸⁰ Wis. S.B. 489, 2023–2024 Leg., Reg. Sess. (introduced Oct. 16, 2023) (failed Apr. 15, 2024) (prohibiting instruction on sexual orientation and gender identity unless parents receive advance written notice and consent and requiring notification to parents of student gender-identity accommodations).

⁴⁸¹ WYO. STAT. ANN. § 21-3-135(a)(v) (2024) (requiring schools to obtain written or electronic parental consent at least one day before providing instruction on sexual orientation or gender identity).

THE MEDICALIZATION OF ABORTION RIGHTS

B. JESSIE HILL*

ABSTRACT

In the decades between Roe v. Wade and Dobbs v. Jackson Women's Health Organization, advocates brought numerous constitutional challenges throughout the country to laws restricting abortion. In general, these cases were brought by abortion clinics and providers, and they foregrounded substantive due process claims that relied heavily on medical and scientific evidence and expertise. This abortion litigation, which was carried out in a relatively centralized and coordinated fashion, was configured in this way for good strategic reasons, but it increasingly resulted in committing reproductive rights advocates to a medicalized understanding of abortion rights.

However, the medicalization of abortion rights has had troubling long-term doctrinal and political effects, resulting at least in part from its failure to center the pregnant individuals who are most affected by abortion restrictions. It situated control with medical professionals rather than the affected individuals, thus sidelining religious freedom and equality-based arguments. It may have been incompatible with other advocacy frameworks, such as reproductive justice, that prioritize the voices and needs of pregnant individuals. In the wake of Dobbs, this Article argues that advocates may benefit from a more flexible approach, strategically alternating between medical and non-medical framings and including a wider range of claims and plaintiffs. This approach could address past limitations of medicalization, fostering an abortion rights discourse that is more grounded in individual autonomy and dignity.

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INTRODUCTION

On March 7, 2023, four women who had been unable to access medical care for complicated pregnancies as a result of Texas's near-total abortion ban stood before microphones and television cameras and announced their lawsuit against the state.¹ Their stories were compelling and tragic; several of the women had suffered severe health consequences as a result of the denial of care or had come close to dying before accessing care out of state.² Yet, this

¹ See *Remarks at Press Conference by Plaintiffs in Zurawski v. State of Texas*, CTR. FOR REPROD. RTS. (Mar. 8, 2023), <https://reproductiverights.org/zurawski-texas-plaintiffs-remarks-press-conference/> [https://perma.cc/ZFG8-VUB6]. The original *Zurawski* complaint, filed on March 6, 2023, included five women and two physicians as plaintiffs. Plaintiffs' Original Petition for Declaratory Judgment and Application for Permanent Injunction, *Zurawski v. Texas*, No. D-1-GN-23-000968 (Tex. Dist. Ct. Travis Cnty. Mar. 6, 2023). The complaint was later amended to add new plaintiffs, bringing the total to 22 women. Plaintiffs' Second Amended Verified Petition for Declaratory Judgment and Application for Temporary and Permanent Injunction, *Zurawski v. Texas*, No. D-1-GN-23-000968 (Tex. Dist. Ct. Travis Cnty. Nov. 14, 2023).

² *Remarks at Press Conference by Plaintiffs*, *supra* note 1.

powerful visual of women suing to vindicate their rights, both articulating and embodying the severe harm of abortion restrictions on women's bodies and lives, is one that the public has rarely seen in abortion rights litigation since *Roe v. Wade*.³ Instead, challenges to abortion restrictions have largely been brought by abortion clinics and physicians, suing and speaking on behalf of their patients. Medical evidence and expertise have been foregrounded, while individual patients' stories are largely absent, or at least relegated to hearsay and amicus briefs.⁴

Why did abortion rights litigators between *Roe* and the Supreme Court's overruling of *Roe* in *Dobbs v. Jackson Women's Health Organization* nearly fifty years later tend to construct lawsuits around abortion provider plaintiffs rather than patients, and what has been the impact of this decision? To some extent, it has been a conscious choice that has brought numerous advantages in the litigation context.

Indeed, a common refrain of the abortion rights movement is that "Abortion is Healthcare."⁵ One implication of this framing is to suggest that abortion is primarily a medical phenomenon—one that is subject to the jurisdiction and expertise of physicians and other medical providers.⁶ This framing—while potentially advantageous to abortion rights advocates—is not inevitable, however. Abortion could be understood as primarily a matter of moral or religiously motivated decision-making, for example.⁷ Or, like pregnancy itself, it could be viewed as a matter of individual control over one's body that is not necessarily subject to medical management.⁸

Numerous scholars have highlighted the fact that abortion has often—but not exclusively—been framed as primarily medical in public discussion and advocacy discourse.⁹ Some scholars have analyzed the extent to which this medicalized framing has penetrated legal doctrine and its impact on abortion

³ 410 U.S. 113 (1973).

⁴ See, e.g., Brief for Michele Coleman Mayes, et al. as Amici Curiae Supporting Petitioners, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460).

⁵ See, e.g., *Facts Are Important: Abortion Is Healthcare*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare> [<https://perma.cc/93P8-9NAA>]; *Abortion Is Essential Health Care, Even with Wanted Pregnancies*, CTR. FOR REPROD. RTS. (Aug. 1, 2023), <https://reproductiverights.org/abortion-health-care-wanted-pregnancies/> [<https://perma.cc/2S93-D44Q>].

⁶ See *infra* Part I.A (defining medicalization).

⁷ See, e.g., B. Jessie Hill, *The First Amendment and the Politics of Reproductive Health Care*, 50 WASH. U. J.L. & POL'Y 103, 111 (2016) (discussing some ways in which abortion is framed as "a moral or ideological choice and a matter of public concern rather than as private health care"); see also Elizabeth Sepper, *Free Exercise of Abortion*, 49 B.Y.U. L. REV. 177, 183–96 (2023) (discussing relationship of religious liberty to abortion rights).

⁸ See, e.g., K.K. Barker, *A Ship Upon a Stormy Sea: The Medicalization of Pregnancy*, 47 SOC. SCI. & MED. 1067, 1067–68, 1070–71 (1998); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 290 (1992) ("[T]radition and common law both viewed the unborn as 'part and parcel' of the pregnant woman.").

⁹ See sources cited *infra* notes 10–11.

access for pregnant individuals.¹⁰ Others have criticized the medicalization of abortion, expressing concern about the extent to which it hands authority over women's bodies and reproductive lives to medical professionals.¹¹

However, none of this work has focused specifically on the medicalization of abortion *rights*—that is, the process by which legal doctrine came to analyze the constitutional right to abortion in a predominantly medical framework. This Article seeks to fill this gap by examining the ways in which advocates' strategic litigation decisions over decades of abortion rights jurisprudence have tended to favor a predominantly medical understanding of the constitutional right to abortion. This Article further seeks to trace the origins of and reasons for that medicalized framing within legal doctrine and then to consider how this medicalized legal discourse may have shaped the abortion rights movement. In other words, it primarily examines the inputs to, rather than the outputs of, legal opinions that frame abortion in medical terms in order to understand how and why courts have adopted medicalized language, with attendant positive and negative effects.

This Article argues that the medicalized framing of abortion in legal discourse persisted even when it was no longer politically advantageous, because this framing was highly beneficial from a litigation standpoint.¹² That strategic legal decision ultimately failed to preserve abortion rights, and it carried other costs in both the political and legal domains.¹³ This is not to say, of course, that litigation strategy was the only—or even the predominant—reason for the ultimate loss of abortion rights. Undoubtedly, numerous other actors played a significant role, including anti-abortion politicians and judges, supported by well-funded conservative legal organizations.¹⁴ But this underexplored aspect of the story of abortion rights leading up to *Dobbs*—the framing strategies used in abortion rights litigation—is the primary focus of this Article.

Finally, this Article proceeds to consider whether a demedicalized legal doctrine might serve the abortion rights movement in the wake of the Supreme

¹⁰ See, e.g., Maya Manian, *A Health Justice Approach to Abortion*, 34 HEALTH MATRIX: J.L.-MED. 261, 278–98 (2024) (describing how medicalization has proven both advantageous and disadvantageous for vindicating individual reproductive autonomy). See generally Drew Halfmann, *Political Institutions and the Comparative Medicalization of Abortion*, 60 J. HEALTH & SOC. BEHAV. 138 (2019) (arguing that abortion is less medicalized in U.S. law than in U.K. law due to differences in medical organizations, political decentralization, and constitutionalism); Lois Shepherd & Hilary D. Turner, *The Over-Medicalization and Corrupted Medicalization of Abortion and Its Effect on Women Living in Poverty*, 46 J.L. MED. & ETHICS 672 (2018) (arguing that over-medicalization of abortion has disproportionately limited access for women living in poverty).

¹¹ Shepherd & Turner, *supra* note 10, at 672–73; Sheelagh McGuinness & Michael Thomson, *Medicine and Abortion Law: Complicating the Reforming Profession*, 23 MED. L. REV. 177, 180–82 (2015).

¹² See *infra* Part II.B–C.

¹³ See *infra* Part III.

¹⁴ See, e.g., Mary Ziegler, *The History of Neutrality: Dobbs and the Social-Movement Politics of History and Tradition*, 133 YALE L.J.F. 161, 175–78 (2023) (discussing role of The Federalist Society in developing “history and tradition” test used by Supreme Court in eliminating constitutional right to abortion).

Court's ruling in *Dobbs*,¹⁵ or whether it instead entails more problems than it solves—and briefly sketches what a demedicalized abortion doctrine might look like.¹⁶ This question matters for abortion access and abortion advocates because *Dobbs* ushered in a new era of abortion rights litigation, which seeks, in some cases, to advance abortion rights under state constitutional provisions and, in others, to mobilize various legal theories to preserve a modicum of abortion access for exceptional cases in states where abortion is banned, such as in *Zurawski v. Texas*,¹⁷ the lawsuit discussed at the start of this Article. This new era of litigation presents an opportunity to recreate the foundation of abortion rights. Ultimately, this Article concludes that advocates may benefit from a more flexible approach, strategically alternating between medical and non-medical framings and including a wider range of claims and plaintiffs.¹⁸

This Article proceeds as follows. Part I describes the concepts of medicalization and demedicalization and gives a brief overview of the literature discussing these concepts, particularly with respect to abortion rights. While neither medicalization nor demedicalization fully captures the trajectory of abortion or abortion rights, medicalization has been the dominant framework. Part II then traces the history of the medical framing of abortion rights within abortion rights litigation, demonstrating how particular strategic decisions by abortion rights advocates have supported that framing. Part III considers the effects that this medicalization has had on the reproductive rights movement. Part IV of this Article looks forward, considering how abortion rights advocates might utilize the strategies of medicalization and demedicalization to advance reproductive freedom and justice in the post-*Dobbs* world. This Part of the Article argues that advocates in the future might consider different claims and different plaintiffs from those who have traditionally initiated proactive abortion rights litigation, as well as making other adjustments to terminology and framing.

I. OVERVIEW OF MEDICALIZATION AND DEMEDICALIZATION

The concept of medicalization is derived from social science; it refers to the practice of framing an issue or problem as a medical one—as opposed to, say, a moral or criminal or spiritual one.¹⁹ This Part draws on social science

¹⁵ 142 S. Ct. 2228 (2022).

¹⁶ This Article approaches the question of medicalization from the perspective of the abortion rights movement. It thus situates itself to some extent within the literature on social movements and the role of lawyers within those movements. See *infra* Part II.C (discussing literature on social movements and law). It does not examine medicalization and demedicalization from the anti-abortion perspective, though it is certainly possible to do so.

¹⁷ No. D-1-GN-23-000968 (Tex. Dist. Ct. Travis Cnty. Sep. 15, 2023), *rev'd sub nom.*, *State v. Zurawski*, 690 S.W.3d 644, 654 (Tex. 2024).

¹⁸ See *infra* Part IV.B.

¹⁹ Drew Halfmann, *Recognizing Medicalization and Demedicalization: Discourses, Practices, and Identities*, 16 HEALTH 186, 187 (2012). Of course, even this relatively

literature to delve more deeply into the concepts of medicalization and its opposite, demedicalization. It then addresses the trajectory of medicalization and demedicalization specifically with respect to American abortion doctrine. As explained below, the Supreme Court's abortion rights doctrine has swung between medicalization and demedicalization over the past five decades, but the medicalized framework has predominated.

A. Definitions

The term “medicalization,” as it is used in this Article, refers to the practice of “defining a problem in medical terms, using medical language to describe a problem, adopting a medical framework to understand a problem, or using a medical intervention to ‘treat’ it.”²⁰ Demedicalization is the opposite practice: that is, defining, describing, and managing a problem that has previously been seen as a medical one using non-medical language and interventions.²¹ A key feature of medicalization is that it is partly a rhetorical or discursive act, though it is one that is bound up with real-world power, with implications that extend beyond the merely rhetorical.

The definition of medicalization implies that medicalization is largely a rhetorical or linguistic phenomenon. It emphasizes the tendency to describe or discuss a particular social phenomenon in a medical way.²² This understanding of medicalization recognizes the “constitutive” function of language, which refers to the way in which language “not only *describes* our experience of reality, but actually *creates* it.”²³ Indeed, as Professor Lucy Williams and Mason Spedding explain, drawing on theorists of language and rhetoric, “the act of naming affects the way humans understand and perceive their situations.”²⁴

However, sociologists have observed that, partly as a result of this linguistic framing, medicalization also expands the domain of medicine and its legitimate scope of authority.²⁵ In this sense, “medicalization” is like the term “criminalization,” which implies not only framing acts as criminal, but also expanding the jurisdiction of the criminal justice system over those acts.²⁶

straightforward definition of medicalization is not universally accepted; there are conflicting definitions that may be found in the vast literature on the subject. *See, e.g.*, Joseph E. Davis, *How Medicalization Lost Its Way*, 43 Soc. Sci. & Mod. Soc'y 51, 51 (2006).

²⁰ Halfmann, *supra* note 19, at 187.

²¹ *Id.*; *see also* Peter Conrad, *Medicalization and Social Control*, 18 ANN. REV. SOCIO. 209, 224–26 (1992) (describing demedicalization and noting that it generally occurs only after “some type of organized movement that challenges medical definitions and control”).

²² *See, e.g.*, Halfmann, *supra* note 19, at 187.

²³ Lucy Williams & Mason Spedding, *The First Amendment and Constitutive Rhetoric: A Policy Proposal*, 99 N.Y.U. L. REV. 1338, 1353 (2024).

²⁴ *Id.* at 1353–54 (citing KENNETH BURKE, *THE PHILOSOPHY OF LITERARY FORM: STUDIES IN SYMBOLIC ACTION* 4 (3d ed. 1973)).

²⁵ *See* Davis, *supra* note 19, at 51.

²⁶ *Id.*; F. Meyer, *Towards A Modest Legal Moralism: Concept, Open Questions, and Potential Extension*, 8 CRIM. L. & PHIL. 237, 239 (2014) (“Criminalization processes are

This suggests that the process of medicalization involves acceptance of the medical nature of a particular issue by the medical establishment and others, and thus a widespread agreement that it is properly the subject of medical intervention.²⁷ The assertion that something is properly the subject of medical expertise and intervention, in turn, positions medical professionals as gatekeepers with the power to define illness, prescribe treatment, and determine who receives that treatment.²⁸

The act of extending medical jurisdiction over an issue or problem is largely accomplished through the acts of *officially* naming and describing the problem in medical terms.²⁹ Particular conditions make the transition from social problem or moral failing to medical condition by being identified as medical conditions in medical textbooks and through the development of medical discourse aimed at studying, understanding, and treating the condition.³⁰ Thus, medicalization is primarily, if not exclusively, a discursive act, but one that is bound up with power and authority.³¹ Discourse itself is necessary, but not sufficient, to medicalize an issue.³²

It is significant that medicalization is necessarily, at least in part, a discursive act, because the use of medicalizing discourse is effective only if it is supported by medical authority—such as medical consensus and recognized medical institutions. Whereas someone might claim to be “addicted” to a particular television series, for example, the mere use of a medical term does not “medicalize” the phenomenon of television-watching. The inclusion of drug addiction (or the contemporary version, substance use disorder) in the *Diagnostic and Statistical Manual of Mental Disorders* (“DSM”), together with the acts by established medical professionals such as the opening of clinics dedicated to treating this order, *does* accomplish its medicalization, and thus its transition from being perceived as a moral failing to being understood as an illness.³³ Consequently, medicalization is a discursive process that ultimately relies on official sanction: It is not possible unless the medicalizing discourse

defined as those through which conduct comes to be or to be treated as criminal.” (citing R. A. Duff, *Towards a Modest Legal Moralism*, 8 CRIM. L. & PHIL. 217, 224 (2012))).

²⁷ Davis, *supra* note 19, at 51–52.

²⁸ *Id.* at 52; see also Irving Kenneth Zola, *Medicine as an Institution of Social Control*, 20 SOCIO. REV. 487, 489–91 (1972).

²⁹ See Davis, *supra* note 19, at 54–55 (discussing role of medical profession in medicalization process).

³⁰ *Id.* at 54.

³¹ *Id.* at 54–55.

³² Cf. Seumas Miller, *Foucault on Discourse and Power*, THEORIA: J. SOC. & POL. THEORY 115, 119 (1990) (“Thus, in the case of, say, a hospital, there is clearly an embedded medical discourse in place; but there are also other features and practices characteristic of a hospital which are non-discursive: for instance, the practice of amputating limbs.”).

³³ See generally Sean M. Robinson & Bryon Adinoff, *The Classification of Substance Use Disorders: Historical, Contextual, and Conceptual Considerations*, 6 BEHAV. SCIS. 18 (2016) (describing evolution of attitudes toward substance use within mental health field).

is accepted and promoted by people and institutions with authority to speak for the medical industry and to be trusted by broad swaths of society.³⁴

Similarly, some phenomena have been demedicalized. Perhaps most famously, homosexuality was long considered a mental disorder and included in the DSM.³⁵ This framing continued into the twentieth century; eventually, however, it was recognized as simply one sexual orientation among others. Homosexuality was removed from the DSM in 1973, and the American Psychological Association (“APA”) recognized in 1975 that homosexuality was not an abnormal or pathological condition.³⁶ As explained in the APA’s amicus curiae brief in *Obergefell v. Hodges*, “[f]or decades, the consensus of mainstream mental health professionals and researchers has been that homosexuality and bisexuality are normal expressions of human sexuality”³⁷ Because of their connection to power and authority, medicalization and demedicalization are rhetorical practices that inevitably mobilize certain forms of societal power in the interest of particular groups. As such, considering the phenomenon of medicalization requires asking who is benefited and who is centered by it. Does the exercise of rhetorical and jurisdictional authority primarily benefit the medical professionals who exercise it, or can medicalization nonetheless empower patients? Since medicalization by definition involves the drawing of jurisdictional lines—distinguishing what is legitimately within the domain of medicine and what is not—and since the drawing of jurisdictional lines assumes someone has the authority to draw those lines, medicalization entails an act of gatekeeping.³⁸ Moreover, in that act of gatekeeping—the act of distinguishing the moral from the medical, for example—moral considerations themselves often play a role. The judgment that something is a medical problem—again, using the example of substance use disorder—necessarily implies that those suffering from it are relieved, at least to some degree, of moral culpability for their actions.³⁹ It is generally understood that when an individual suffers from a medical condition, that suffering is not chosen—it is beyond the individual’s control.⁴⁰ Moral failings,

³⁴ Davis, *supra* note 19, at 54–55 (explaining that medicalization requires medical professional consensus). It is noteworthy that simply *claiming* to have the authority or credentials to practice medicine may constitute “unauthorized practice of medicine,” whether or not a patient is harmed as a result. Thus, unauthorized practice is defined, at least in part, as involving a purely rhetorical act. See, e.g., OHIO REV. CODE § 4731.34 (2025); CAL. BUS. & PROF. CODE § 2052(a) (2025); W. VA. CODE ANN. § 30-3-13 (West 2018).

³⁵ *Obergefell v. Hodges*, 576 U.S. 644, 661 (2015).

³⁶ Brief for the American Psychological Association et al. as Amici Curiae Supporting Petitioners at 8, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, 14-575).

³⁷ *Id.*

³⁸ See Conrad, *supra* note 21, at 216.

³⁹ Cf. Erlend P. Kvaale, Nick Haslam & William H. Gottdiener, *The “Side Effects” of Medicalization: A Meta-Analytic Review of How Biogenetic Explanations Affect Stigma*, 33 CLIN. PSYCH. REV. 782, 790 (2013) (discussing evidence that “biogenetic explanations for psychological problems typically decrease blame”).

⁴⁰ *Id.* at 783 (“[A]ttributing a problem to uncontrollable causes reduces blame among observers.”).

by contrast, may be viewed as stemming from poor character or lack of will-power. But, ironically, the decision whether someone is morally culpable and relatedly, the decision whether someone is deserving of care, are themselves moral judgments.⁴¹

The discursive nature of medicalization suggests that medicalization may be carried out through legal practice, because law functions through discourse.⁴² Fundamentally, law is carried out through language, and the way courts speak about a phenomenon may therefore either influence or be influenced by its framing in other contexts.⁴³ As discussed below, the “inputs” to legal decision-making have tended to embrace a predominantly medicalized framing of abortion rights.⁴⁴ This medicalized framing by legal advocates on both sides of the abortion issue likely also influenced courts to discuss abortion in predominantly medical terms.⁴⁵

To summarize, medicalization is partly but not entirely a discursive practice involving the framing of certain conduct or phenomena in medical terms. This practice necessarily involves an appeal to, and an assertion of, medical authority and expertise.⁴⁶ As such, medicalization can take power from non-medical actors—including affected individuals—and hand it to medical professionals. As explored more fully below, the decision by legal advocates to frame abortion and abortion rights primarily in medical terms has had significant impacts on both the development of doctrine and the abortion rights movement more broadly.

B. Medicalization in Abortion Jurisprudence

The history of abortion regulation and jurisprudence in the United States is well-known, but it bears reprising briefly here to set the stage for this Article’s discussion of how the process of medicalization has occurred. Abortion first became the subject of widespread statutory prohibitions in the

⁴¹ See, e.g., Zola, *supra* note 28, at 489–91 (noting that while medicalization appears to remove certain conditions from moral realm into medical one, moral judgments re-enter medical discourse around reasons why people become ill and the effectiveness of treatment).

⁴² See, e.g., Benjamin Baez, *The Supreme Court and Affirmative Action: Narratives About Race and Justice*, 18 ST. LOUIS U. PUB. L. REV. 413, 414 (1999) (“Law might be characterized as a ‘discursive field,’ which consists of competing ways of giving meaning to the world and of organizing social institutions and processes.”); Lisa C. Bower, *Queer Acts and the Politics of “Direct Address”*; *Rethinking Law, Culture, and Community*, 28 L. & SOC’Y REV. 1009, 1019 (1994) (describing law as “discourse” and “discursive practice”).

⁴³ See, e.g., Sally Engle Merry, *Culture, Power, and the Discourse of Law*, 37 N.Y.L. SCH. L. REV. 209, 211–16 (1992) (discussing how law can produce meaning in social relationships and how popular understandings can shape law).

⁴⁴ See *infra* Part II.

⁴⁵ See *infra* Part II.C (discussing how advocates’ rhetoric permeates into judicial opinions).

⁴⁶ Of course, legal authority can play a significant role in medicalization as well. For example, if the law punishes a particular activity as criminal, such as substance abuse, this criminalization could serve as a counterweight to medicalization, and vice versa.

mid- to late-nineteenth century in the United States.⁴⁷ Most of those laws banned abortion throughout pregnancy, with an exception only to preserve the pregnant person's life.⁴⁸ This state of play remained the same until the late 1960s and early 1970s, when some states began "liberaliz[ing]" their abortion laws by permitting abortion under additional exceptional circumstances, such as fetal anomalies or risks to the pregnant person's physical or mental health.⁴⁹ In addition, four states decriminalized early abortion altogether by repealing their abortion bans.⁵⁰ Then, in 1973, the Supreme Court decided *Roe v. Wade* and its companion case *Doe v. Bolton*, which respectively struck down an old-style, near-total abortion ban and a newer, more liberal abortion ban.⁵¹ In so doing, the Court held that the Fourteenth Amendment's Due Process Clause protected the fundamental right to privacy, which included the right to decide whether to end a pregnancy, and that restrictions on that right would be subject to strict scrutiny.⁵²

In the wake of *Roe*, advocates successfully challenged a number of abortion restrictions, such as mandatory waiting periods before an abortion, spousal consent requirements, blanket parental consent requirements for minors, bans on particular methods of abortion, and requirements that abortions be performed in hospitals after the first trimester.⁵³ But as a series of challenges to abortion restrictions made their way up to the Supreme Court, resulting mostly but not exclusively in victories for the challengers, the composition of the Court was changing. By the time a challenge to Pennsylvania's omnibus abortion regulation statute reached the Court in *Planned Parenthood v. Casey*,⁵⁴ three Republican-appointed justices—Anthony Kennedy, Sandra Day O'Connor, and David Souter—were widely expected to join other anti-abortion justices in voting to overturn *Roe*.⁵⁵ Instead, the trio of justices

⁴⁷ JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 200 (1978); *see also id.* at 43 (noting that as of 1841, only ten of twenty-six states had addressed abortion at all in their statutes); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2252–53 (2022) (describing adoption of abortion bans in all states between 1850 and 1919).

⁴⁸ MOHR, *supra* note 47, at 205–20.

⁴⁹ *Roe v. Wade*, 410 U.S. 113, 139–40 (1973); *Doe v. Bolton*, 410 U.S. 179, 183 (1973).

⁵⁰ *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 380 (1985) (noting that by 1973, New York, Washington, Alaska, and Hawaii had passed legislation permitting abortion in first trimester "with virtually no restrictions").

⁵¹ *Roe*, 410 U.S. at 155, 162–64; *Doe*, 410 U.S. at 201.

⁵² *Roe*, 410 U.S. at 155, 162–64; *Doe*, 410 U.S. at 209–14 (Douglas, J., concurring).

⁵³ *See, e.g.,* *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (spousal consent); *id.* at 75 (blanket parental consent); *id.* at 79 (ban on saline method of abortion); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 437–38 (1983) (hospitalization requirement), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (replacing trimester framework on which *Akron* relied with "undue burden" standard); *id.* at 450–51 (24-hour waiting period).

⁵⁴ 505 U.S. 833 (1992).

⁵⁵ Jeremy Roebuck, *Thirty Years Ago, the Supreme Court Nearly Struck Down Roe v. Wade in a Pennsylvania Case. The Justices Chose Another Way*, PHILA. INQUIRER (May 3,

joined together in upholding the “essence” of *Roe* by ensuring that abortion remained a constitutional right and that the pregnant person possessed the right to make the “ultimate decision.”⁵⁶ At the same, however, they replaced *Roe*’s demanding strict scrutiny standard with the more amorphous and lax “undue burden” standard, which permitted any abortion restrictions that did not impose a “substantial obstacle” in the path of an abortion seeker.⁵⁷ Following *Casey*, the undue burden test remained the standard for reviewing abortion restrictions until the Supreme Court overruled both *Roe* and *Casey* and held in *Dobbs* that the Constitution did not protect the right to abortion.⁵⁸

This evolution of the legal regulation of abortion has been tied in many ways to the increasing medicalization of abortion.⁵⁹ For example, it has been widely documented that the initial passage of laws banning abortion in the United States was intertwined with its medicalization: The physicians’ anti-abortion campaign of the nineteenth century, which led to the widespread criminalization of abortion, was part and parcel of a broader attempt to claim the domain of pregnancy for medicine and to wrest it away from more traditional or “irregular” practitioners such as midwives.⁶⁰ Indeed, as Professor Yvonne Lindgren has explained:

[Early abortion] laws reflected the interests of the medical professionals who pushed for them: Rather than criminalizing abortion outright, the laws made it a crime for anyone but a *licensed physician* to perform an abortion and left wide discretion to doctors to determine when an abortion was “necessary” to preserve the life or health of the pregnant person. In so doing, the physicians’ lobby created a category of “justifiable” or “therapeutic” abortions and designated themselves as the sole custodians and arbiters of that decision.⁶¹

Thus, while courts and scholars may speak of the criminalization of abortion in the nineteenth-century United States,⁶² it may in fact be more accurate to speak of the medicalization of abortion during this time. During

2022, at 13:43 ET), <https://www.inquirer.com/news/planned-parenthood-v-casey-abortion-ruling-pennsylvania-alito-20220503.html> [<https://perma.cc/NHC6-632V>].

⁵⁶ *Casey*, 505 U.S. at 869, 879.

⁵⁷ *Id.* at 876–77.

⁵⁸ 142 S. Ct. 2228, 2284 (2022).

⁵⁹ The “medicalization” of abortion and pregnancy has been a theme for scholars examining these processes from legal and social science perspectives. For an excellent overview, see Manian, *supra* note 10, at 268–80; see also Ellie Lee, *Medicalizing Motherhood*, 43 Soc’y 47, 47–50 (2006) (describing medicalization of pregnancy).

⁶⁰ MOHR, *supra* note 47, at 160–63; Yvonne Lindgren, *When Patients Are Their Own Doctors: Roe v. Wade in an Era of Self-Managed Care*, 107 CORNELL L. REV. 151, 162 (2021); Siegel, *supra* note 8, at 283–84, 300–02.

⁶¹ Lindgren, *supra* note 60, at 164 (footnotes omitted) (citing KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 32–33 (1984)).

⁶² *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2252–53 (2022) (citing JOSEPH DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 315–19 (2006)).

that period, abortion was *not* subject to prosecution in virtually all circumstances—instead, it was functionally legal whenever a physician saw fit to perform it.⁶³

The Supreme Court's opinion in *Roe v. Wade* continued this medicalizing trend, as it centered the physician-patient relationship and the role of the physician's medical judgment in the abortion decision.⁶⁴ For example, the Court described abortion as "inherently, and primarily, a medical decision," insisting that "basic responsibility for it must rest with the physician."⁶⁵ Indeed, as Professor Ruth Colker has recognized, the *Roe* Court's recitation of the relevant legal rules explains that, during the first trimester, the abortion decision must be "left to the medical judgment of the pregnant woman's attending physician"—without even mentioning the pregnant person's role in the decision.⁶⁶

Moreover, *Roe* appears to treat the right to an abortion almost as a natural extension of the broad interpretation of the "life" exception in the nineteenth century—itself an essentially unrestricted delegation of authority to physicians over the abortion decision.⁶⁷ Interestingly, at the same time that *Roe* framed the abortion right as a privacy right, it retained the life-or-health exception for abortions after viability.⁶⁸ This post-viability life-or-health exception, which appears to have been adopted wholesale from the pre-*Roe* common law understanding of when abortion was permitted, was essentially introduced and codified without explanation⁶⁹ after the opinion spent pages justifying its

⁶³ LUKER, *supra* note 61, at 32; LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, at 13 (2022); Reva B. Siegel & Mary Ziegler, *Abortion's New Criminalization: A History-and-Tradition Right to Health-Care Access After Dobbs*, 111 VA. L. REV. 413, 439 (2025) ("Today, laws criminalizing abortion allow physicians relatively little discretion. But such discretion was a key feature of the criminal abortion laws in place across the United States by the end of the nineteenth century." (citation omitted)).

⁶⁴ See Lindgren, *supra* note 60, at 176 ("[T]he framing of the abortion right as a medical decision between pregnant patients and their doctors established the role of doctors as gatekeepers in accessing the constitutional right of abortion."); B. Jessie Hill, *Reproductive Rights as Health Care Rights*, 18 COLUM. J. GENDER & L. 501, 507 (2009) (describing *Roe*'s "predominance of the medical model of abortion").

⁶⁵ *Roe v. Wade*, 410 U.S. 113, 166 (1973).

⁶⁶ Ruth Colker, *Overmedicalization?*, 46 HARV. J.L. & GENDER 205, 256 (2023).

⁶⁷ See Siegel, *supra* note 8, at 273 ("*Roe* describes a woman's interest in terminating a pregnancy in terms consonant with the logic of the therapeutic exception . . . [by] repeatedly suggest[ing] that states should defer to private decisions respecting abortion because they reflect the expertise of a medical professional.").

⁶⁸ See *Roe*, 410 U.S. at 163–64.

⁶⁹ *Id.* at 164–65 (holding that state's interest in life becomes compelling at the point of viability and, therefore, that state may ban abortion after that point "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother"); *id.* at 139–40 (describing exception to early abortion bans for life-saving abortions).

recognition of an individual privacy right to end a pregnancy.⁷⁰ This exception remained part of abortion jurisprudence until *Dobbs*.⁷¹

Roe's lengthy historical exegesis further reinforced this medical framing. The Court's discussion of attitudes toward abortion beginning with ancient times focused almost entirely on medical perspectives—covering the views of ancient gynecologists, Hippocrates (“the Father of Medicine”), and nineteenth century common law, including the physicians’ campaign to criminalize abortion.⁷²

The physicians’ push to outlaw abortion was part of a broader campaign to increase the professional stature of physicians more generally.⁷³ Both the then-newly-formed American Medical Association and individual physicians such as Horatio Storer pushed in every state for legislation outlawing abortion.⁷⁴ The connection between this campaign to the physicians’ professionalization mission is reflected in the statements of medical societies distinguishing “regulars” (trained physicians)⁷⁵ from “irregulars” and closely identifying irregulars with the practice of abortion.⁷⁶ Thus, the history of abortion rights was characterized by increasing medicalization, as abortion was a key pawn in the struggle of physicians to wrest control of pregnancy and childbirth from (predominantly female) care providers.⁷⁷

Perhaps due to this longstanding framing within American law of abortion as a medical decision and the health law background of Justice Harry Blackmun, the opinion’s author,⁷⁸ *Doe v. Bolton*,⁷⁹ the companion case to *Roe* also penned by Blackmun, likewise medicalized abortion. The *Doe* Court emphasized that under the state abortion statute at issue in that case, the abortion decision should be “made in the exercise of [the physician’s] professional, that is, his ‘best clinical,’ judgment in the light of all the attendant circumstances . . . [that is,] wherever his medical judgment, properly and professionally exercised, so dictates and directs him.”⁸⁰ The Court then went on to describe the

⁷⁰ *Id.* at 129–62 (setting forth Court’s basis for recognizing right to abortion, drawn from historical sources, views of professional organizations, and precedent).

⁷¹ *See, e.g.,* *Gonzales v. Carhart*, 550 U.S. 124, 161 (2007) (noting that, according to precedent, an abortion restriction is unconstitutional if it subjects patients to “significant health risks”) (citing *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328 (2006); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 880 (1992), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022)).

⁷² *Roe*, 410 U.S. at 130–41.

⁷³ *See, e.g.,* MOHR, *supra* note 47, at 147–70.

⁷⁴ *Id.*

⁷⁵ *See id.* at 33–34.

⁷⁶ *See id.* at 160–61.

⁷⁷ *Id.* at 161 (noting non-physician abortion providers were described by 19th-century anti-abortion crusaders as “old woman” and “her”).

⁷⁸ *See infra* note 215.

⁷⁹ 410 U.S. 179 (1973), *abrogated by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2252–53 (2022).

⁸⁰ *Id.* at 191. The Georgia statute at issue in *Doe* provided that an abortion could be provided when, in the physician’s “best clinical judgment,” it was necessary because of a risk to the pregnant patient’s life or health, because of a fetal anomaly, or because the pregnancy resulted from rape. *Id.* at 183. However, the trial court had enjoined the language

domain of medical jurisdiction quite expansively, as including consideration of “physical, emotional, psychological, [and] familial [factors], and the woman’s age.”⁸¹ This sweeping recitation, intended to “allow[] the attending physician the room he needs to make his best medical judgment,” brought much more than just the pregnant person’s physical wellbeing within the realm of medical authority in the abortion context.⁸² It implied that physicians possess authority over even the moral and social aspects of the abortion decision.⁸³

As Professor Mary Ziegler has documented, both abortion advocates and abortion opponents initially embraced this medicalized understanding of the abortion right after *Roe* and *Doe*. On one hand, for abortion advocates, this framing highlighted that abortion was both a common medical procedure and one that is under the supervision of “responsible” professionals.⁸⁴ It also meshed well with sex equality advocates’ disability-framing of pregnancy—another example of medicalization.⁸⁵ On the other hand, for anti-abortion activists, medicalizing abortion allowed them to suggest that the abortion right was not really about promoting gender equality, since it primarily empowered male physicians.⁸⁶ By framing *Roe* in this way, abortion opponents hoped to attract more women to their cause.⁸⁷ They wanted women to see *Roe*, with its focus on physicians’ role in the abortion decision, as primarily benefitting “the medical establishment against women’s best interests.”⁸⁸ Thus, anti-abortion advocates, in rejecting *Roe*, “could effectively claim to have women’s best interests at heart.”⁸⁹

In response to the assertion that a medicalized approach to abortion does, in fact, de-center women, some abortion rights activists embraced an understanding of *Roe* that centered on women rather than physicians.⁹⁰ As Ziegler explains, just a few years after *Roe*, national pro-choice organizations “dramatically reversed course” from their prior embrace of the medical framing, instead “insisting that *Roe* stood for women’s interests in decisional

restricting permissible abortions to only the three specified circumstances, preserving statutory language that allowed an abortion whenever it was necessary in the physician’s “best clinical judgment.” *Id.* at 191. The plaintiffs had challenged this remaining language as unconstitutionally vague. *Id.*

⁸¹ *Id.* at 192.

⁸² *Id.*

⁸³ *Cf.* Zola, *supra* note 28, at 493–94 (describing medicalizing tendency to consider more and more aspects of everyday life as being relevant to medical practice).

⁸⁴ MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* 160 (2015). Professor Yvonne Lindgren also notes that in a line of cases following *Roe*, the Court’s reasoning was “reliant upon a doctor acting as a gatekeeper to ensure that the abortion decision is appropriate.” Lindgren, *supra* note 60, at 175.

⁸⁵ *See* ZIEGLER, *supra* note 84, at 195–96 (discussing feminists’ efforts in 1970s to define pregnancy as temporary disability).

⁸⁶ *Id.* at 158–59.

⁸⁷ *Id.* at 165–66.

⁸⁸ *Id.* at 166.

⁸⁹ *Id.*

⁹⁰ *Id.* at 169, 172–75.

freedom and bodily integrity.”⁹¹ One reason for this shift may have been that some abortion opponents had claimed the mantle of feminism for their own cause and had begun arguing that abortion harms rather than benefits women.⁹² Thus, it was particularly important for abortion rights advocates to oppose those arguments and “present themselves as the real champions of sex equality.”⁹³

Re-framing abortion rights as woman-centered rather than physician-centered was thus politically advantageous to abortion advocates, particularly as the feminist movement gained ascendancy in the 1970s.⁹⁴ Yet despite these advantages, as explained below, medicalization remained surprisingly resilient within a women-centered abortion advocacy approach. Indeed, the persistence of the medical framework in abortion rights advocacy is a phenomenon that seems to call out for explanation and that has not previously been explained in the legal literature.

While feminism’s political power may have faded throughout the 1980s, this did not mean that a return to a medical framing of abortion was inevitable or politically advantageous. Indeed, feminists remained the face of the abortion rights movement.⁹⁵ Abortion-providing physicians were stigmatized as “abortionists” in anti-abortion rhetoric that made its way into legal opinions.⁹⁶ Abortion providers had also become both legally and socially isolated, as they tended to provide abortions in freestanding clinics rather than hospital settings and were, therefore, often seen as practicing apart from the medical establishment.⁹⁷ Yet, as explained in greater depth below, the medical framework persisted because it provided significant litigation advantages to legal advocates, who were largely driving the abortion rights movement.⁹⁸

Indeed, the influence of the feminist, woman-centered framing of abortion rights arguably showed in *Casey*.⁹⁹ There, the Court foregrounded both decisional autonomy (describing the abortion decision in terms of its impact on individuals’ identity and life course) and sex equality (discussing abortion

⁹¹ *Id.*

⁹² *Id.* at 170–72.

⁹³ *Id.* at 173–75.

⁹⁴ Serena Mayeri, *After Suffrage: The Unfinished Business of Feminist Legal Advocacy*, 129 *YALE L.J.F.* 512, 528 (2020) (describing feminist gains of 1970s, which ultimately began to erode by the end of that decade).

⁹⁵ Professor Mary Ziegler describes how abortion advocacy became identified with feminism, while feminists were largely pushed out of the anti-abortion movement. ZIEGLER, *supra* note 84, at 201–18.

⁹⁶ See, e.g., *Colautti v. Franklin*, 439 U.S. 379, 403, 409 (1979) (White, J., dissenting), *abrogated by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

⁹⁷ See B. Jessie Hill, *The Geography of Abortion Rights*, 109 *GEO. L.J.* 1081, 1109 (2021) (explaining “the legal and cultural isolation of abortion from health care in general”).

⁹⁸ See *infra* Part II.B–C.

⁹⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); see ZIEGLER, *supra* note 84, at 224 (“To an unprecedented extent, *Casey* linked abortion rights to women’s interest in equal citizenship.”); Manian, *supra* note 10, at 285–89.

in relation to women's ability to plan their reproductive lives).¹⁰⁰ For example, the plurality opinion insisted in soaring terms that "[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."¹⁰¹ *Casey's* framing of abortion in philosophical, spiritual, and social terms rather than primarily medical terms minimized the role of the physician and centered the pregnant person much more than prior jurisprudence. Indeed, in discussing the abortion-provider plaintiffs' challenge to certain state-mandated counseling requirements, *Casey's* plurality opinion went so far as to state that "[w]hatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position."¹⁰²

It is difficult to know why, exactly, *Casey's* approach is markedly different from other cases. One factor may have been that sex equality arguments figured prominently in the *Casey* plaintiffs' Supreme Court brief.¹⁰³ Indeed, Kathryn Kolbert, who argued the case on behalf of the plaintiffs, saw abortion rights as part of a sex equality agenda.¹⁰⁴ This sex-equality framing contrasted the plaintiffs' framing in *Webster v. Reproductive Health Services*,¹⁰⁵ which is arguably the most important abortion rights case decided between *Roe* and *Casey*.¹⁰⁶ Indeed, sex equality was mentioned in the *Webster* plaintiffs' Supreme Court brief only once in passing, in a single sentence.¹⁰⁷

¹⁰⁰ *Casey* famously stated:

[T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.

505 U.S. at 852; *see also id.* at 856 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

¹⁰¹ *Id.* at 852.

¹⁰² *Id.* at 884.

¹⁰³ *See* Brief for Petitioners and Cross-Respondents at 15–16, 31–34, 46–48, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (No. 91-744). While it is tempting to point to the presence of Justice Sandra Day O'Connor, the first woman to serve on the Supreme Court, this explanation does not have much force. O'Connor joined the Court in 1981 and sat on numerous abortion rights cases before *Casey*. *Sandra Day O'Connor: First Woman on the Supreme Court*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/visiting/exhibitions/SOCExhibit/Section3.aspx#SOCExhibit3> [<https://perma.cc/Y4DW-FV5X>]; *see Timeline of Important Reproductive Freedom Cases Decided by the Supreme Court*, AM. C.L. UNION (Dec. 1, 2003), <https://www.aclu.org/documents/timeline-important-reproductive-freedom-cases-decided-supreme-court> [<https://perma.cc/E4B3-DHBE>] (listing several cases between 1981 and 1992).

¹⁰⁴ Kathryn Kolbert, *A Reproductive Rights Agenda for the 1990s*, 1 YALE J.L. & FEMINISM 3, 3 (1989) ("Only with the freedom to control their fertility, are women free to participate fully and equally in our society.").

¹⁰⁵ 492 U.S. 490 (1989).

¹⁰⁶ Brief for Appellees at 18, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605).

¹⁰⁷ *Id.* ("[T]he right of choice in childbearing may be grounded in other constitutional rights in addition to the 'liberty' guarantee of the fourteenth amendment [sic]: *equal*

At the same time, *Casey*'s embrace of sex equality should not be overstated. The opinion centered pregnant people, but it also set the stage for the return of medicalization to abortion rights litigation. In particular, the Court's adoption of the "undue burden" framework—which asked whether particular restrictions prevent or significantly deter a large number of pregnant people from accessing abortion¹⁰⁸—invited fights over the impact of particular laws on large numbers of patients, as discussed below.¹⁰⁹ The undue burden test thus did not focus primarily on the autonomy of individuals. Moreover, in lowering the level of scrutiny applicable to abortion restrictions,¹¹⁰ it opened the door to pretextual regulations that purportedly protected patient health or supported their autonomy (such as biased "informed consent" and counseling regulations).¹¹¹ In fighting back against such restrictions, advocates had to rely on medical evidence.¹¹²

In the decades after *Casey*, however, the medical framing grew even more prominent in abortion rights cases. A pair of cases—*Stenberg v. Carhart*,¹¹³ decided in 2000, and *Gonzales v. Carhart*,¹¹⁴ decided in 2007—dealt with state and federal laws, respectively, aimed at banning a particular method of abortion used later in pregnancy, known as intact dilation and evacuation ("D&E"), or dilation and extraction ("D&X").¹¹⁵ A key issue in both cases was whether the law must allow the procedure to be used when, due to particular health conditions or circumstances experienced by particular patients, it would be safer than other available methods of abortion.¹¹⁶ In *Stenberg*, abortion was discussed primarily as a medical procedure; indeed, the patient herself was largely invisible in the Court's discussion.¹¹⁷ *Stenberg*, for example, engaged in a detailed description of abortion procedures that the Supreme Court even acknowledged could "seem clinically cold or callous to some."¹¹⁸ Ultimately, the Court in *Stenberg* held that an exception to the law's

protection, the right to be free of involuntary servitude and cruel and unusual punishment, and . . . the ninth amendment [sic]." (emphasis added)).

¹⁰⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992).

¹⁰⁹ See *infra* Part II.A.4.

¹¹⁰ *Casey*, 505 U.S. at 877–88 ("Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.").

¹¹¹ See, e.g., *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889, 905–06 (8th Cir. 2012) (upholding requirement that abortion patients be told that they face heightened risk of suicide).

¹¹² *Id.* at 894–96 (discussing medical evidence presented in trial court regarding abortion and risk of suicide).

¹¹³ 530 U.S. 914 (2000).

¹¹⁴ 550 U.S. 124 (2007).

¹¹⁵ Intact D&E, also sometimes called D&X, is a method used for later abortions in which the fetus is kept as intact as possible when removed from the patient's uterus, which minimizes risk of harm to the patient. See *Stenberg*, 530 U.S. at 927–28.

¹¹⁶ *Id.* at 930; *Gonzales*, 550 U.S. at 161.

¹¹⁷ See, e.g., B. Jessie Hill, *Dangerous Terrain: Mapping the Female Body in Gonzales v. Carhart*, 19 COLUM. J. GENDER & L. 649, 667 (2010) (explaining how in *Gonzales*, "the woman disappears from the scene and provides merely a backdrop for the drama that occurs inside her").

¹¹⁸ *Stenberg*, 530 U.S. at 923.

prohibition for health-threatening circumstances was required, based on the district court's "finding that [the procedure] significantly obviates health risks in certain circumstances, a highly plausible record-based explanation of why that might be so, a division of opinion among some medical experts . . . , and an absence of controlled medical studies that would help answer these *medical questions*."¹¹⁹

The Supreme Court took a slightly different tack in *Gonzales*. With a newly-formed majority of justices that were more hostile to abortion, the Court reached the opposite conclusion regarding the constitutionality of a federal statute that was very similar in effect to the law struck down in *Stenberg*.¹²⁰ In so doing, the Court upheld the ban as reflecting the state's interest in regulating the medical profession, and particularly in ensuring that the medical profession maintained high standards of ethics and integrity—that is, "in order to promote respect for life, including life of the unborn" by outlawing what it considered to be an immoral procedure.¹²¹ Professor Maya Manian describes the Supreme Court's rhetoric as "deprofessionalization" because it disrespects abortion-providing physicians while emphasizing moral over medical concerns.¹²² And indeed, at times the Court's description of the abortion procedure at issue makes it sound more like a violent, criminal act than like a surgery, as it even borrows language from the law of criminal conspiracy.¹²³ Yet, the overarching framing still emphasizes the medical aspects of the abortion decision and the role of the physician in it, as well as the state's traditional role in regulating the medical profession.¹²⁴ Thus, *Gonzales* could perhaps be better described as an example of selective medicalization. The Court relied on the medical aspects of the abortion procedure to bolster the government's power to regulate it.¹²⁵ At the same time, the Court painted abortion providers as illegitimate and unprofessional to justify the specific regulations at issue, which were designed to advance aesthetic or moral concerns rather than patient health or physical wellbeing.¹²⁶

¹¹⁹ *Id.* at 936–37 (emphasis added).

¹²⁰ *Gonzales*, 550 U.S. at 156. Between the Court's rulings in *Stenberg* and *Gonzales*, O'Connor—a member of the *Casey* plurality and a relatively reliable pro-choice vote—retired and was replaced with Justice Samuel Alito, a staunch abortion opponent. See, e.g., MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT 177 (2020) ("Alito . . . appeared to be a potential ally for abortion opponents.").

¹²¹ *Gonzales*, 550 U.S. at 158.

¹²² Manian, *supra* note 10, at 291–92; see also ZIEGLER, *supra* note 120, at 162 (discussing "grip" of abortion opponents on discourse surrounding D&X and its necessity, noting that public was not convinced "that D&X was medically valuable—or that pro-choice doctors or advocates were the best source of information about the procedure").

¹²³ See, e.g., Hill, *supra* note 117, at 662–63 (discussing, *inter alia*, Court's use of term "overt act").

¹²⁴ *Gonzales*, 550 U.S. at 157 ("Under our precedents it is clear the State has a significant role to play in regulating the medical profession.").

¹²⁵ *Id.*

¹²⁶ *Id.* at 157–58. The Supreme Court hinted that the ban would protect patients' mental health by preventing them from later learning of the nature of the procedure they had undergone and suffering regret from it. *Id.* at 159. As Ginsburg pointed out, however, this

Subsequent Supreme Court cases related primarily to the regulation of abortion clinics, not patients or procedures, and, therefore, again invited a medicalizing framework. For example, in *Whole Woman's Health v. Hellerstedt*, decided in 2016, and *June Medical Services v. Russo*, decided in 2020, the Supreme Court struck down onerous abortion clinic regulations that provided no health or safety benefit to patients but threatened to shutter numerous clinics.¹²⁷ Medical evidence was at the center of those cases, with very little focus on the implications of the challenged abortion restrictions—which threatened to decimate access and deprive low-income individuals in particular of necessary health care¹²⁸—for women's equality or their lives. Indeed, these cases can be seen as examples of “overmedicalization,” as they emphasized medical questions to the exclusion of all else.¹²⁹

Finally, in *Dobbs v. Jackson Whole Women's Health Organization*,¹³⁰ the Supreme Court appeared to divorce abortion from the practice of medicine altogether and, in the process, completely eradicated the constitutional right to abortion under the Due Process Clause of the Fourteenth Amendment.¹³¹ The majority opinion discussed abortion in terms of criminal law, the termination of “life or potential life,” and generic “health and welfare laws,” but the medical nature of the act and the abortion decision were barely mentioned.¹³² In reviewing pre-colonial sources on abortion regulation, Justice Alito used the word “abortionist,” a non-medical term, and emphasized that these legal sources “treated abortionists differently from *other* physicians or surgeons” by subjecting them to possible conviction for manslaughter or murder if the patient died during the procedure.¹³³ In addition, because the Court applied only rational basis review to determining the constitutionality of the Mississippi law that was challenged, the Court did not examine any of the medical or scientific rationales supporting the law. Those rationales included the “findings” regarding stages of “human prenatal development” and the “barbaric”

rationale would at most support a more robust informed consent requirement, not a complete ban on a particular method of abortion. *See id.* at 184 (Ginsburg, J., dissenting) (“The solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks[.] . . . Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.”).

¹²⁷ *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 624 (2016); *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2133 (2020).

¹²⁸ Admittedly, the Court in *Whole Woman's Health* mentioned, albeit in passing, the impact on women, particularly including poor women, of the challenged regulations. *Whole Woman's Health*, 579 U.S. at 594, 623.

¹²⁹ Manian, *supra* note 10, at 292–95 (describing *Whole Woman's Health* and *June Medical Services* as examples of “over-medicalization” that fails to recognize racialized and gendered impact of state's regulations); *cf.* Lindgren, *supra* note 60, at 187–88 (arguing that *Whole Woman's Health* and *June Medical Services* reflect legislatures' and courts' view of doctors as being in opposition to patients).

¹³⁰ 142 S. Ct. 2228 (2022).

¹³¹ Manian, *supra* note 10, at 295 (describing *Dobbs* as “a complete erasure of medicalization in the abortion context”); Colker, *supra* note 66, at 257.

¹³² *See Dobbs*, 142 S. Ct. at 2249–54, 2277, 2284.

¹³³ *Id.* at 2250.

nature of abortions after 15 weeks, which the legislature also considered “dangerous for the maternal patient, and demeaning to the medical profession.”¹³⁴ Thus, *Dobbs* represents a break with the medicalization trajectory.

Viewing this overview of the framing of abortion rights in several key decisions between *Roe* and *Dobbs*, it appears that medicalization has been the dominant framing of abortion in the Supreme Court case law. Indeed, *Casey*’s overt attention to the equality implications of abortion rights appears to be a mere blip in a long line of medicalizing cases. Regardless of whether that medicalization resulted in the expansion or contraction of abortion access, the Supreme Court’s rhetoric time and again framed the abortion right primarily as a medical one until the eradication of the abortion right altogether in *Dobbs*.

After *Dobbs*, the debate over the framing of abortion continues at the Supreme Court. For example, in the fight over mifepristone—the first medication used in a two-drug abortion pill regimen—the battle lines are again drawn around medicalization. In *Alliance for Hippocratic Medicine v. FDA*, anti-abortion physicians challenged the FDA’s original decision to approve mifepristone, arguing in part that pregnancy was not an “illness,” and, therefore, that mifepristone had no “therapeutic benefit,” thus placing its approval beyond the FDA’s statutory authority.¹³⁵ In even more demedicalizing terms, the challengers described the function of mifepristone in ending a pregnancy as “block[ing] nutrition to the developing baby.”¹³⁶ In response, the FDA pointed out that “pregnancy ‘can be a serious medical condition in some women.’”¹³⁷ It also leaned heavily into the agency’s scientific expertise as the basis for its decisions regarding the accessibility of mifepristone.¹³⁸ The Supreme Court has not yet weighed in on the merits of mifepristone’s approval, however, as it found the plaintiffs lacked standing to sue and remanded the case to the lower court.¹³⁹

Medicalization is a practice that entails both the rhetorical framing and actual treatment of a particular phenomenon as a medical one, rather than (for example) a moral or religious one. Medicalization has been the predominant approach in both nineteenth-century criminal regulation of abortion in the

¹³⁴ *Id.* at 2284.

¹³⁵ Compl. at ¶¶ 7–8, *All. for Hippocratic Med. v. FDA*, 668 F. Supp. 3d 507 (N.D. Tex. 2022) (No. 2:22-CV-223-Z). The FDA approved mifepristone in 2000 under a provision then known as “subpart (H),” which allowed for expedited approval in the case of medications that “have been studied for their safety and effectiveness in treating serious or life-threatening illnesses and that provide meaningful therapeutic benefit to patients over existing treatments.” *Id.* at ¶ 50; see also 21 C.F.R. § 314.500.

¹³⁶ Brief for Respondents at 3, *FDA v. All. for Hippocratic Med.*, 144 S. Ct. 1540 (2024) (Nos. 23-235, 23-236). To be clear, the “nutrition” in question, which is denied to embryos in the first trimester of pregnancy, is the hormone progesterone. *Cf. All. for Hippocratic Med.*, 668 F. Supp. 3d at 520 (“Mifepristone . . . is a synthetic steroid that blocks the hormone progesterone, halts nutrition, and ultimately starves the unborn human until death.”).

¹³⁷ Brief for Federal Appellants at 45, *All. for Hippocratic Med. v. FDA*, 78 F.4th 210 (5th Cir. 2023) (No. 23-10362).

¹³⁸ See *id.* at 47–51.

¹³⁹ *All. for Hippocratic Med.*, 144 S. Ct. at 1563.

United States and American abortion jurisprudence from *Roe* until *Dobbs*. While *Casey* deviated from this model and abortion opponents have sometimes framed abortion in non-medical terms, abortion advocates have almost universally embraced the medical framework of abortion. As discussed in Part II, this framing has carried significant consequences in abortion rights litigation.

II. HOW ABORTION RIGHTS BECAME MEDICALIZED: LEGAL STRATEGY BETWEEN *ROE* AND *DOBBS*

Framing abortion rights in medical terms is not inevitable. Abortion can be conceptualized in many different ways. For example, mid-twentieth-century abortion law reformers worked closely with the population control movement, conceptualizing abortion as one necessary tool in the population control toolbox.¹⁴⁰ Early abortion rights activists also made arguments in favor of abortion rights that were grounded in religious freedom.¹⁴¹ At least one prominent scholar has suggested a public-health framework for protecting abortion access.¹⁴² Others have placed abortion rights in a global human-rights context¹⁴³ or a sex-equality framework.¹⁴⁴ And these are just a few examples.¹⁴⁵

¹⁴⁰ See, e.g., ZIEGLER, *supra* note 84, at 4–9. On the other hand, abortion opponents have long sought to tie abortion rights to eugenics. *Id.* at 113 (discussing abortion opponents' efforts in 1970s to connect "abortion rights activism, population control, and eugenics"); Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2030 (2021) (discussing Justice Clarence Thomas's use of anti-abortion tropes relating abortion to eugenics in *Box v. Planned Parenthood*, 587 U.S. 490 (2019) (per curiam)).

¹⁴¹ See, e.g., Michael A. Helfand, *Using Jewish Law: Jewish Religious Liberty Advocacy for the Right to Abortion*, 70 WAYNE L. REV. 51, 60 (2024); Olivia Roat, *Free-Exercise Arguments for the Right to Abortion: Reimagining the Relationship Between Religion and Reproductive Rights*, 29 UCLA J. GENDER & L. 1, 33–45 (2022).

¹⁴² See generally Rachel Rebouché, *The Public Health Turn in Reproductive Rights*, 78 WASH. & LEE L. REV. 1355 (2021) (arguing in favor of public health approach to abortion rights, linking abortion access to greater equality and better health outcomes).

¹⁴³ See, e.g., Rachel Rebouché, *Reproducing Rights: The Intersection of Reproductive Justice and Human Rights*, 7 U.C. IRVINE L. REV. 579, 583 (2017) ("Safe and legal abortion, though still contentious, is now a priority for a range of international bodies and features prominently in contemporary human rights declarations."); Martha F. Davis, *In Context: Foreign and International Law in Abortion Litigation*, 64 SANTA CLARA L. REV. 393, 410 (2024); Cynthia Soohoo, *Turning Away from Criminal Abortion Laws and Towards Support for Pregnant People and Their Families*, 104 B.U. L. REV. ONLINE 109, 116 (2024); Lance Gable, *Reproductive Health as a Human Right*, 60 CASE W. RES. L. REV. 957, 973 (2010).

¹⁴⁴ See, e.g., Cary Franklin & Reva B. Siegel, *Equality Emerges as a Ground for Abortion Rights in and After Dobbs*, in *ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION* 22, 23–24 (Lee C. Bollinger & Geoffrey R. Stone eds., 2024); Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67, 69 (2022); Ginsburg, *supra* note 50, at 382.

¹⁴⁵ For example, some scholars have discussed the issue of abortion rights in relation to the concepts of federalism and separation of powers—particularly with respect to judicial activism and the role of the courts in interpreting the Constitution. See, e.g., William N.

Indeed, this diversity of understanding should be unsurprising given that individuals who choose abortion may frame that experience in various ways, even all at once—for example, as a medical event, as a moral or religious decision, as a private family choice, and as an economic one.¹⁴⁶

Up to and even in some of the briefings for *Roe*, there remained significant inconsistency among jurists in identifying the constitutional basis for reproductive rights. Both the meaning and the textual basis for the right to privacy were disputed. *Griswold v. Connecticut* had famously located the right to “privacy”—which was arguably understood in that case, at least in part, as an interest in literally keeping the government from physically invading private spaces such as the marital bedroom—in the “penumbras” of several amendments to the Constitution.¹⁴⁷ Then, in *Eisenstadt v. Baird*, the Court avoided the issue by finding an equal protection violation, using the rational-basis standard, in a Massachusetts contraceptives law’s discrimination between married and unmarried people.¹⁴⁸ And the amicus briefs filed in *Roe*, such as those from pro-choice advocacy organizations, included an “array of legal arguments” extending well beyond the Fourteenth Amendment’s Due Process Clause.¹⁴⁹

Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1286 (2005); Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 339, 341–43 (1985).

¹⁴⁶ See Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110, 113 (2005) (reporting that study participants—women seeking abortions—gave an average of five reasons for ending their pregnancy).

¹⁴⁷ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”).

¹⁴⁸ *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) (“The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under [the challenged statute]. For the reasons that follow, we conclude that no such ground exists.”). Justice William Douglas thought *Eisenstadt* was really a free speech case, since Baird had been arrested for giving away a contraceptive device in the course of an educational lecture on contraception. *Id.* at 455 (Douglas, J., concurring) (“This to me is a simple First Amendment case.”).

¹⁴⁹ Jamie R. Abrams & Amanda Potts, *The Rhetoric of Abortion in Amicus Briefs*, 89 MO. L. REV. 399, 428 (2024) (noting that these briefs grounded their arguments in Fourteenth, Thirteenth, and Eighth Amendments). In his concurrence to *Roe* and *Doe*, Douglas continued to rely on the Ninth Amendment as a source of unenumerated rights, including the right to abortion, which he considered to encompass three elements: (1) “autonomous control over the development and expression of one’s intellect, interests, tastes, and personality,” which he argued was also protected by the First Amendment; (2) “freedom of choice in the basic decisions of one’s life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children”; and (3) “the freedom to care for one’s health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.” *Doe v. Bolton*, 410 U.S. 179, 211–15 (1973) (Douglas, J., concurring); see RISA KAUFMAN, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* 318–20 (2016) (describing Douglas and Justice William Brennan as “doctrinally ambivalent” in *Roe* and connecting *Roe*’s concept of liberty to the vagrancy case *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), argued same term).

Given the multifaceted understanding of pregnancy-related decision-making and the political incentives to adopt an equality framing, how did abortion rights fall into a predominantly medical framing? This Part argues that legal strategy was a major driver of this medicalizing move in abortion rights. Medicalization was likely a logical consequence of particular decisions that increased the likelihood of successful legal challenges to abortion restrictions in the decades between *Roe* and *Dobbs*. As discussed below, this litigation relied heavily—and savvily—on medical authority and expertise as a counterweight to legal and political trends threatening abortion rights.

The medical framework thus became the dominant one in abortion rights litigation. On both sides, but especially on the abortion rights side, legal questions were answered with medical evidence and expertise, and reproductive decision-making was understood as a form of medical decision-making. Abortion rights litigation before *Dobbs* was largely centralized and focused on federal courts, so alternative framings of abortion rights could not gain much traction. At the same time, the framework became dominant in social and political discourse surrounding abortions rights due to lawyers' outsized role in the abortion rights movement.

Parts II.A and B describe two aspects of legal strategy that favored a largely medicalized approach: the choice of legal claims and the choice of plaintiffs. In each of these areas, advocates pushed a framing of abortion rights as predominantly medical in nature. Part II.C then takes a wider lens, considering how the medicalized framing embraced by legal advocates interacted with the broader reproductive rights movement and public discourse around abortion.

A. Legal Claims

Initially, lawyers advocating for courts to recognize a constitutional right to abortion identified multiple theories and constitutional clauses to ground such a right. Numerous lawsuits were filed in the years leading up to *Roe*, relying on a variety of legal arguments and framing the abortion right in a variety of ways. They invoked claims under different parts of the Constitution: Indeed, one law review article from 1972 observed that abortion laws have been challenged on theories of “vagueness, cruel and unusual punishment, deprivation of life without due process, denial of equal protection, violation of the right to privacy, violation of the right to control one’s own body and violation of the right to decide whether or not to bear children.”¹⁵⁰ One amicus curiae brief submitted in *Roe* and *Doe* sought to raise a Thirteenth Amendment argument that forced pregnancy and childbirth were tantamount

¹⁵⁰ Joseph S. Oteri, Mitchell Benjoia & Jonathan Z. Souweine, *Abortion and the Religious Liberty Clauses*, 7 HARV. C.R.-C.L. L. REV. 559, 559–60 (1972).

to involuntary servitude.¹⁵¹ There was also a substantial tradition of framing abortion rights in terms of religious freedom.¹⁵² Over time, however, as courts foreclosed particular avenues for legal advocacy, challenges to abortion restrictions came to focus on substantive due process theories, funneling most challenges through the strict scrutiny and undue burden frameworks laid out by the Supreme Court.¹⁵³ Indeed, when advocates did attempt to place abortion rights into frameworks outside of substantive due process doctrine, courts largely resisted these efforts.¹⁵⁴ And as explained below in Part II.A.4, substantive due process doctrine invited medicalization to a larger extent than those other doctrines.

1. *Religious Freedom Claims*

While *Griswold* was the apparent progenitor of *Roe*, the panoply of legal sources for the abortion right went well beyond the right to privacy. For example, there is a history of religious freedom arguments in favor of the abortion right both before and after *Roe*.¹⁵⁵ Much of this religion-focused advocacy was in the realm of public discourse, conducted primarily by non-lawyers, but some of these arguments made their way into lawsuits challenging abortion bans before *Roe*.¹⁵⁶ Two cases—*Abramowicz v. Lefkowitz*¹⁵⁷ and *Women v. Connecticut*¹⁵⁸—were brought by individual women who claimed that abortion bans violated their rights to both equal protection of the laws and the free exercise of religion.¹⁵⁹ Courts rarely reached the merits of these claims, however, and they likely seemed less pressing once *Roe* recognized a broad right to abortion regardless of whether the individual patient or provider is religiously motivated to seek or provide it.¹⁶⁰

¹⁵¹ Motion for Leave to File Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case, and Brief Amici Curiae at *6, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), 1972 WL 126045.

¹⁵² See *infra* Part II.A.1.

¹⁵³ All of the major Supreme Court cases dealing with the constitutionality of abortion restrictions after *Roe* analyzed them primarily or exclusively in terms of substantive due process. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 509 (1989); *Planned Parenthood Se. Pa. v. Casey*, 505 U.S. 833, 846–51 (1992); *Stenberg v. Carhart*, 530 U.S. 914, 929–31 (2000); *Gonzales v. Carhart*, 550 U.S. 124, 156 (2007); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 607 (2016).

¹⁵⁴ See *infra* text accompanying notes 197–202.

¹⁵⁵ Roat, *supra* note 141, at 29–57; see also Sepper, *supra* note 7, at 183–84 (“The idea that reproductive regulation puts the pregnant person’s free exercise of religion at stake has a long history.”).

¹⁵⁶ Roat, *supra* note 141, at 33–45.

¹⁵⁷ 305 F. Supp. 1030 (S.D.N.Y. 1969).

¹⁵⁸ *Abele v. Markle (Women v. Connecticut)*, 342 F. Supp. 800 (D. Conn. 1972).

¹⁵⁹ Roat, *supra* note 141, at 43–44. As Olivia Roat explains, neither court reached the merits of these claims: the New York case was dismissed as moot after the state repealed its abortion ban, and the Connecticut law was struck down on privacy grounds. *Id.*

¹⁶⁰ See *id.*; *Roe v. Wade*, 410 U.S. 113, 164 (1973).

Advocates continued to press religious freedom arguments even after *Roe*, but the doctrinal landscape eventually grew hostile toward them. In *Harris v. McRae*,¹⁶¹ individual women, abortion providers, representatives of the United Methodist Church's Women's Division, and the Women's Division itself challenged the federal Hyde Amendment, which prohibited the use of federal Medicaid funds to cover the costs of an abortion except when the abortion was necessary to save the life of the pregnant person.¹⁶² The Supreme Court in *Harris* seemed to definitively (if cursorily) reject constitutional arguments challenging abortion restrictions under the religion clauses of the First Amendment.¹⁶³ In a single paragraph, the Supreme Court dismissed the claim that the Hyde Amendment violated the Establishment Clause by advancing the beliefs of particular religions (particularly Roman Catholicism) over others about when life begins.¹⁶⁴ The mere fact that a law "happens to coincide or harmonize with the tenets of some or all religions," the Court explained, does not entail that it violates the Establishment Clause; indeed, the mindset behind the Hyde Amendment "is as much a reflection of 'traditionalist' values as it is an embodiment of the views of any particular religion."¹⁶⁵ Thus, the Court analogized to larceny laws, which arguably reflect the "Judeo-Christian" prohibition on stealing but could not reasonably be understood to be a religiously motivated law.¹⁶⁶ Turning next to the plaintiffs' argument that the Hyde Amendment violated their right to free exercise of religion, the Court declined to reach the merits of the claim because it found that neither the individual pregnant women nor the UMC plaintiffs had standing to challenge the Hyde Amendment under the Free Exercise Clause.¹⁶⁷ The Court appeared to be saying that the only sort of plaintiff who would have standing was an individual Medicaid-eligible pregnant person whose religious beliefs motivated them to seek an abortion.¹⁶⁸

While this narrowing of the doctrinal scope for religious freedom arguments apparently did not put an end to them entirely, they were rarely raised and quickly rejected in most abortion cases thereafter.¹⁶⁹ For example, clergy members were among the plaintiffs in a challenge to a Pennsylvania abortion

¹⁶¹ 448 U.S. 297 (1980).

¹⁶² *Id.* at 304. The Hyde Amendment was later expanded to include coverage for abortion in cases of rape or incest. *Id.* at 302.

¹⁶³ *See id.* at 319–20.

¹⁶⁴ *Id.* at 319–20.

¹⁶⁵ *Harris*, 448 U.S. at 319 (quoting *McGowan v. Md.*, 366 U.S. 420, 442 (1961), and *McRae v. Califano*, 491 F. Supp. 630, 741 (E.D.N.Y. 1980)).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 320–21.

¹⁶⁸ *Id.* (rejecting plaintiffs' standing because they were not pregnant, could not show their religious beliefs drove their decision, or failed to meet the requirements for organizational standing).

¹⁶⁹ *See, e.g.*, *Akron Ctr. for Reprod. Health, Inc. v. City of Akron*, 651 F.2d 1198, 1201 & n.1 (6th Cir. 1981) (ruling explicitly in accordance with *Harris*), *aff'd in part, rev'd in part*, 462 U.S. 416 (1983); *Am. Coll. of Obstetricians & Gynecologists (ACOG) v. Thornburgh*, 552 F. Supp. 791, 795 (E.D. Pa. 1982) (quoting *Harris*, 448 U.S. at 320), *aff'd*, 737 F.2d 283 (3d Cir. 1984), *aff'd*, 476 U.S. 747 (1986).

law in the subsequent case *American College of Obstetricians & Gynecologists v. Thornburgh*, but the trial court held that they lacked standing to raise both their own and their congregants' free exercise rights, relying on *Harris* for the proposition that only a "woman who seeks 'an abortion under compulsion of religious belief'" can assert a free exercise claim.¹⁷⁰ The clergy members did not appeal this ruling.¹⁷¹ Nor does it appear that a subsequent free exercise challenge to the Pennsylvania legislation was brought on behalf of an individual pregnant patient.¹⁷² It is somewhat unclear why no religiously-motivated individual pregnant plaintiffs could be found to bring a free exercise claim challenging an abortion restriction, as apparently demanded by the Court's holding on standing. Numerous factors may have been at play,¹⁷³ but one factor mitigating the attractiveness of religious free exercise claims may well have been that the scope of relief that could be won is likely somewhat limited; the usual remedy for a free exercise violation is an exemption for the individual plaintiff from the challenged law, not facial invalidation of the law.¹⁷⁴ Given the possibility of facial invalidation when a statute is found to violate the patient's right to privacy, it may not have seemed worthwhile to pursue more limited relief on behalf of individual pregnant plaintiffs, or even a class composed solely of religiously-motivated abortion seekers.

2. Sex Equality Claims

Another path initially explored and then abandoned in abortion rights jurisprudence was to ground abortion rights in the right to sex equality. Of course, in the early 1970s, when early abortion rights litigation was making its way through the courts, there was no established sex equality jurisprudence.¹⁷⁵ The Supreme Court didn't seriously consider or scrutinize sex equality challenges until *Reed v. Reed*¹⁷⁶ in 1971 and did not officially adopt heightened

¹⁷⁰ *ACOG*, 552 F. Supp. at 795.

¹⁷¹ *ACOG*, 737 F.2d at 290 n.6.

¹⁷² After the Supreme Court's ruling, the district court considered only one remaining provision—a requirement that minors seeking abortions obtain either parental consent or judicial authorization; that ruling did not discuss standing or the First Amendment. *Am. Coll. of Obstetricians & Gynecologists, Pa. Section v. Thornburgh*, 656 F. Supp. 879, 881 (E.D. Pa. 1987).

¹⁷³ For example, the timeframe for pre-enforcement litigation is somewhat condensed, so it may have been difficult to locate religiously motivated pregnant individuals to challenge laws before they went into effect; another factor surely relates to the difficulty of relying upon individual pregnant plaintiffs in general. *See infra* Part II.B. (discussing reasons for relying on third-party standing rather than individual plaintiffs).

¹⁷⁴ Jay Wexler, *Government Disapproval of Religion*, 2013 B.Y.U. L. REV. 119, 125 ("However, the remedy for a free exercise violation is to grant an exemption to the plaintiff, not to prohibit the government from taking the action altogether.").

¹⁷⁵ *See* Lenora Lapidus, *Ruth Bader Ginsburg and the Development of Gender Equality Jurisprudence Under the Fourteenth Amendment*, 43 N.Y.U. REV. L. & SOC. CHANGE 149, 149 (2019) ("*Reed v. Reed* [is] the first case in which the Supreme Court held that the Fourteenth Amendment prohibits discrimination on the basis of sex.").

¹⁷⁶ 404 U.S. 71.

scrutiny until *Craig v. Boren*¹⁷⁷ in 1976.¹⁷⁸ Nonetheless, sex equality claims were litigated before *Roe* and gained some traction in vindicating abortion rights. In *Abele v. Markle* (also known as *Women v. Connecticut*), 858 women brought suit challenging Connecticut's abortion ban under numerous constitutional provisions, including the Equal Protection Clause of the Fourteenth Amendment.¹⁷⁹ *Abramowicz*, one of the two pre-*Roe* religious freedom challenges to abortion bans,¹⁸⁰ likewise included arguments grounded in sex equality,¹⁸¹ as did lawsuits brought in other district courts.¹⁸²

Prominent scholars have argued for gender equality as an alternative basis for abortion rights.¹⁸³ Justice (then-Judge) Ginsburg pointed out, for example, that an equality approach might have better supported claims to public funding for abortion, which the Supreme Court rejected in the decade following *Roe*.¹⁸⁴ Professor Reva Siegel has argued that an equal protection framework is a viable one for attacking abortion restrictions, and one that better captures the harm wrought by such restrictions.¹⁸⁵ While abortion restrictions are of course an attack on the privacy and autonomy of individuals to make reproductive

¹⁷⁷ 429 U.S. 190.

¹⁷⁸ Lapidus, *supra* note 175, at 149, 151.

¹⁷⁹ *Abele v. Markle*, 452 F.2d 1121, 1123 (2d Cir. 1971) (noting plaintiffs' claim that statutes "discriminate against women on basis of sex"). See generally Reva B. Siegel, *Roe's Roots: The Women's Rights Claims that Engendered Roe*, 90 B.U. L. REV. 1875, 1886–94 (2010) (describing litigation in *Women v. Connecticut* and noting that "[t]he organizers of the Connecticut case recruited 858 individual female plaintiffs").

¹⁸⁰ Roat, *supra* note 141, at 43–45.

¹⁸¹ Hall v. Lefkowitz, 305 F. Supp. 1030, 1031 (S.D.N.Y. 1969); Siegel, *supra* note 179, at 1885; LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 143–45 (2010) (excerpting portion of plaintiffs' brief arguing that abortion ban violates Equal Protection Clause because it discriminates against women).

¹⁸² See, e.g., Young Women's Christian Ass'n of Princeton v. Kugler, 342 F. Supp. 1048, 1056 (D.N.J. 1972) (noting that plaintiffs claimed violations of Fourteenth Amendment's equal protection guarantee and of Nineteenth Amendment, in that "the effect of the statute in compelling them to bear unwanted children is to perpetuate an inferior status"), *vac'd*, 475 F.2d 1398 (3d Cir. 1973), *aff'd*, 493 F.2d 1402 (3d Cir. 1974); Siegel, *supra* note 179, at 1887 & nn.52–55 (citing additional cases raising sex equality arguments: *Women of R.I. v. Israel*, No. 4605 (D.R.I. May 14, 1971); *Women of Mass. v. Quinn*, Civ. No. 71-2420-W (D. Mass. Nov. 1, 1971); *Ryan v. Specter*, 321 F. Supp. 1109 (E.D. Pa. 1971)).

¹⁸³ Siegel, *supra* note 8, at 263; see Ruth Colker, *Feminist Litigation: An Oxymoron?—A Study of the Briefs Filed in William L. Webster v. Reproductive Health Services*, HARV. WOMEN'S L.J. [NOW HARV. J.L. & GENDER] 137, 174–75 (1990); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1200 (1992) ("The *Roe* decision might have been less of a storm center had it both homed [sic] in more precisely on the women's equality dimension of the issue and [been decided more narrowly].").

¹⁸⁴ See Ginsburg, *supra* note 50, at 384–85 ("[If the Court] had acknowledged a woman's equality aspect, not simply a patient-physician autonomy constitutional dimension to the abortion issue, a majority perhaps might have seen the public assistance cases as instances in which, . . . the sovereign had violated its 'duty to govern impartially.'" (quoting *Harris v. McRae*, 448 U.S. 397, 357 (1980) (Stevens, J., dissenting))); see also Ginsburg, *supra* note 183, at 1199–200 (contrasting *Roe*, which "coupled with the rights of the pregnant woman the free exercise of her physician's medical judgment," with *Casey's* acknowledgement of connection between women's ability to control their reproductive capacity and their equality).

¹⁸⁵ Siegel, *supra* note 8, at 350–51, 369–70; see Siegel, *supra* note 179, at 1879–86.

decisions, they also disproportionately affect women and hamper their ability to participate in society.¹⁸⁶ Moreover, they rely upon and reinforce stereotypes about women's inherent destiny to become mothers and caregivers.¹⁸⁷ Thus, according to Professors Reva Siegel, Serena Mayeri, and Melissa Murray, abortion bans clearly involve sex discrimination and should be subject to heightened scrutiny under well-established equal protection doctrine.¹⁸⁸

Advocates in the pre-*Roe* era understood the sex equality-focused approach as distinct from the medicalized understanding of abortion and abortion rights, which focused on the rights of the physician.¹⁸⁹ While, as Siegel has observed, traces of the women's rights discourse appeared in *Roe*, in the form of Justice Blackmun's recognition of the harms to women caused by unwanted pregnancy,¹⁹⁰ the Court's version of this argument became medicalized in *Roe*, as it was filtered through the lens of physicians' medical judgment and professional discretion.¹⁹¹

Once *Roe* identified a robust privacy right and located it in the Fourteenth Amendment's Due Process Clause, advocates may have chosen to deprioritize equality-based arguments. But the Supreme Court also seemed to cut those arguments off at the pass shortly after *Roe* was decided. In *Geduldig v. Aiello*¹⁹²—argued in the wake of *Roe* and decided less than 18 months after *Roe*—the Court held that discrimination on the basis of pregnancy in a state disability insurance program did not constitute sex discrimination under the Equal Protection Clause.¹⁹³ By distinguishing invidious sex-based classifications from those based on biological differences, *Geduldig* appeared to put an end to sex-equality claims as a basis for abortion rights.¹⁹⁴ Later, the Supreme Court in *Dobbs* treated *Geduldig* as doing exactly that, asserting in a drive-by ruling on an Equal Protection claim that no party had raised that, absent evidence of pretext or invidious purpose, “regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional

¹⁸⁶ Cf. Lindgren, *supra* note 60, at 172–73 (noting that some pre-*Roe* abortion cases and briefs “argued that abortion was a woman’s right based on equal protection of law and the right of bodily autonomy rather than a right sourced in privacy”).

¹⁸⁷ See Siegel, Mayeri & Murray, *supra* note 144, at 78–79.

¹⁸⁸ *Id.* The authors view *United States v. Virginia*, 518 U.S. 515 (1996) and *Nevada v. Hibbs*, 538 U.S. 721 (2003) as superseding *Geduldig v. Aiello*, 417 U.S. 484 (1974), which held that discrimination on the basis of pregnancy did not violate the Equal Protection Clause. Siegel, Mayeri & Murray, *supra* note 144, at 69, 73.

¹⁸⁹ Siegel, *supra* note 179, at 1881–82, 1892.

¹⁹⁰ *Id.* at 1895–96.

¹⁹¹ *Supra* Part I.B (describing how *Roe* and *Doe* treated abortion as primarily a matter of physician’s professional medical judgment).

¹⁹² 417 U.S. 484 (1974).

¹⁹³ *Id.* at 496 n.20.

¹⁹⁴ *Id.* (describing law that excluded pregnancy from certain disability benefits as simply “divid[ing] potential recipients into two groups—pregnant women and nonpregnant persons” rather than discriminating based on sex).

scrutiny.”¹⁹⁵ Indeed, *Geduldig* exemplifies a medicalized approach to pregnancy, sidelining equality arguments by suggesting they are somehow irrelevant to or incompatible with physiological reality.¹⁹⁶ In other words, treating pregnancy as a purely physical and medical phenomenon is precisely what allowed the Court to essentially ignore the sex discrimination argument in its sparsely reasoned decision.¹⁹⁷ The lynchpin of the Court’s reasoning was the distinction between drawing a line based on a “physical condition” and “gender discrimination.”¹⁹⁸

3. *Other Claims*

Given the doctrinal difficulties with continuing to pursue religious freedom and equal protection claims, it should be unsurprising that advocates instead relied primarily on substantive due process (privacy) claims to challenge abortion restrictions after *Roe*. Indeed, even when advocates attempted to raise other kinds of constitutional challenges to abortion restrictions after *Roe*, courts largely batted them away, insisting on assimilating them to the substantive due process framework.

For example, in *Casey*, the plaintiffs argued that Pennsylvania violated abortion providers’ First Amendment free speech rights by compelling them to convey state-prescribed information.¹⁹⁹ The Court chose instead to focus primarily on whether the information requirement constituted an “undue burden” on abortion access.²⁰⁰ In the years after *Casey*, abortion providers likewise attempted to challenge laws requiring them to carry the state’s message under

¹⁹⁵ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245–46 (2022) (citing *Geduldig*, 417 U.S. at 496 n.20).

¹⁹⁶ *Geduldig*, 417 U.S. at 496 n.20 (describing pregnancy as similar to “any other physical condition” due to “lack of identity between the excluded disability and gender,” thus drawing a distinction between exclusion of medical conditions that affect only women and invidious discrimination based on sex).

¹⁹⁷ Although the sex discrimination argument was discussed at length by the dissent, the majority relegated its analysis of the sex discrimination claim to a footnote. *Id.*; *id.* at 501 (Brennan, J., dissenting).

¹⁹⁸ *Id.* at 496 n.20. While *Geduldig* seemed to go dormant—it was not cited by a Supreme Court majority for several decades before *Dobbs* and some scholars argued it was superseded by subsequent case law, it has since returned, and its medicalizing force has been revitalized. See Franklin & Siegel, *supra* note 144, at 10 (“We have not found a majority opinion (prior to *Dobbs*) invoking *Geduldig* to interpret the Equal Protection Clause since Congress repudiated its reasoning in the late 1970s.”); Siegel, Mayeri & Murray, *supra* note 144, at 76 (“Before the Court’s dicta in *Dobbs*, there had been no majority opinion invoking *Geduldig* to interpret the Equal Protection Clause since the era of its repudiation by Congress in the PDA.”). Indeed, the Supreme Court relied on *Geduldig* in *United States v. Skrametti* to reject the argument that a ban on gender-affirming care for minors constituted sex discrimination, framing *Geduldig* as a case about “medical procedure[s] that only one sex can undergo.” *United States v. Skrametti*, 145 S. Ct. 1816, 1833 (2025) (citing *Geduldig*, 417 U.S. at 486, 492–97).

¹⁹⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

²⁰⁰ *Id.* at 881–84.

the First Amendment—such as laws mandating ultrasounds accompanied by a narrative description of the fetus and laws requiring scientifically questionable or inaccurate information to be provided to abortion patients.²⁰¹ In those cases, too, courts often declined to straightforwardly apply First Amendment doctrine.²⁰² Instead, they analyzed those claims under the substantive due process framework.²⁰³ Courts have behaved similarly when plaintiffs have brought challenges to abortion restrictions on other theories as well, such as equal protection and bodily integrity.²⁰⁴

Perhaps the only other dominant claim in abortion cases has been vagueness.²⁰⁵ Even before *Roe*, advocates raised vagueness claims regarding particular statutory language, often in addition to more substantive claims.²⁰⁶ These vagueness claims generally asserted that laws did not provide sufficient guidance to health care providers to allow them to conform their conduct to the law or that the laws' ambiguous wording invited arbitrary enforcement,²⁰⁷ and they have often been successful.²⁰⁸ While statutory vagueness arguments are in some ways less central to the abortion issue because they do not specifically involve reproductive liberty or equality, it is nonetheless notable that they focus primarily on the physician rather than the patient.²⁰⁹ Indeed, unlike privacy claims, vagueness claims need not rely on third-party standing,²¹⁰

²⁰¹ See, e.g., *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 423 (6th Cir. 2019); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 573 (5th Cir. 2012); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889, 892 (8th Cir. 2012); *Stuart v. Camnitz*, 774 F.3d 238, 242 (4th Cir. 2014).

²⁰² See, e.g., *EMW*, 920 F.3d at 432–34 (following *Lakey* and *Rounds* in assimilating compelled-speech analysis to *Casey*'s analysis); *Tex. Med. Providers Performing Abortion Servs.*, 667 F.3d at 574; *Planned Parenthood Minn., N.D., S.D.*, 686 F.3d at 893 (describing legal standards for compelled speech and undue burden claims as identical and citing *Lakey*). But see *Stuart*, 774 F.3d at 249–50 (disagreeing with *Lakey* and *Rounds* and applying intermediate scrutiny to mandatory ultrasound requirement).

²⁰³ See sources cited *supra* note 202.

²⁰⁴ See, e.g., *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 506–07 (6th Cir. 2012) (declining to squarely rule on plaintiffs' bodily integrity claim because "abortion regulations, even those limiting access to a certain kind of procedure, are analyzed under the undue-burden framework and not the classic physical-intrusion framework discussed above"); see also Caitlin E. Borgmann, *Abortion Exceptionalism and Undue Burden Preemption*, 71 WASH. & LEE L. REV. 1047, 1055–56 (2014) (describing how courts have "preempted" "bodily integrity, equal protection, and compelled speech" claims by insisting on analyzing them under the undue burden framework).

²⁰⁵ See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 147 (2007); *Carhart v. Stenberg*, 192 F.3d 1142, 1146 (8th Cir. 1999), *aff'd on other grounds*, 530 U.S. 914 (2000); *Colautti v. Franklin*, 439 U.S. 379, 389; *United States v. Vuitch*, 402 U.S. 62, 63 (1971).

²⁰⁶ See, e.g., *Gonzales*, 550 U.S. at 147; *Stenberg*, 192 F.3d at 1146; *Colautti*, 439 U.S. at 389.

²⁰⁷ See, e.g., *Gonzales*, 550 U.S. at 148–49; *Stenberg*, 192 F.3d at 1146; *Colautti*, 439 U.S. at 390–91.

²⁰⁸ *Colautti*, 439 U.S. at 390; *Stenberg*, 192 F.3d at 1149 (listing several cases in which courts found "partial-birth" abortion statutes unconstitutionally vague).

²⁰⁹ See, e.g., Siegel, *supra* note 179, at 1884–85 (noting that early vagueness claims focused on physicians' constitutional rights rather than those of their patients).

²¹⁰ See *infra* Part II.B (discussing third-party standing).

precisely because they focus on the law's violation of providers', not patients', due process rights.

4. *Substantive Due Process and Abortion Medicalization*

Unsurprisingly, Supreme Court case law largely reflects advocates' decision to frame their challenges in substantive due process terms after *Roe*. All of the major Supreme Court cases after *Roe* revolved primarily or exclusively around substantive due process privacy claims seeking to vindicate the constitutional right to terminate a pregnancy, whether under *Roe*'s strict scrutiny framework or *Casey*'s undue burden framework.²¹¹ And this substantive due process framing, in turn, embodied and entrenched *Roe*'s medicalized approach.

Advocates on both sides in *Roe* framed their arguments in heavily medical terms. As Professor David Garrow recounts in his comprehensive legal history of *Roe*, a significant portion of Wade's Supreme Court brief was drawn from a proposed amicus brief on behalf of physicians in support of the abortion ban.²¹² Similarly, *Roe*'s 145-page brief included nearly thirty pages of medical background before launching into the constitutional argument, with a section arguing that Texas's abortion ban violated a freestanding "personal right to care for and protect one's health in the manner one deems best," and citing a case about compulsory vaccination laws at the very beginning of the argument.²¹³ It then likewise devoted a section of the argument to the "[f]undamental [r]ight" of physicians "to [a]dminister [h]ealth [c]are [w]ithout [a]rbitrary [s]tate [i]nterference."²¹⁴

²¹¹ See *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2132 (2020) (holding that Louisiana's law requiring abortion providers to have hospital admitting privileges "imposes an 'undue burden' on a woman's constitutional right to choose to have an abortion"); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 624 (2016) (holding that surgical center requirements placed on abortion providers pose "substantial obstacle to women seeking abortions, and constitutes an 'undue burden' on their constitutional right to do so"); *Gonzales*, 550 U.S. at 161–67 (rejecting plaintiffs' claim that federal Partial-Birth Abortion Ban Act imposed undue burden on abortion right); *Stenberg*, 530 U.S. at 921, 945–46 (holding Nebraska's "partial birth abortion" ban unconstitutional because it creates an undue burden on pregnant people); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) ("[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed."); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 520 (1989) (holding Missouri law did not violate Due Process Clause of Fourteenth Amendment because Missouri has state interest in protecting potential life at viability); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (holding Pennsylvania's Abortion Control Act violated right to privacy); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 449–51 (1983) (finding City of Akron's abortion ordinance violated constitutional right to privacy).

²¹² DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 510–12 (1994).

²¹³ Brief of Appellants at 94–96, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18) (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 26–31 (1904)).

²¹⁴ *Id.* at 110.

The *Roe* opinion's medical orientation is thus unsurprising, given the way advocates framed the issue—also likely in part due to its author Justice Blackmun's known background in health law.²¹⁵ Additionally, the medical orientation may well have been partially inherited from *United States v. Vuitch*²¹⁶—the predecessor case to *Roe* and *Doe* and technically the first abortion case to reach the Supreme Court. In *Vuitch*, the Supreme Court rejected a physician's vagueness challenge to the District of Columbia's abortion ban based on the wording of its exception for abortions performed to preserve the patient's life or health.²¹⁷ As noted above, the vagueness claim is a physician-centric claim, focused on the physician's ability to exercise medical judgment to determine when an abortion was necessary, rather than one focused on the patient.

The substantive due process framing of the abortion right is inherently more medically focused than other possible framings. *Roe* conceived it as a sort of relational right—one that acknowledges the roles of both physician and patient in carrying out the patient's entitlement to medical care.²¹⁸ In this way, it is quite different from a claim based on religious freedom, which would focus specifically on the motivations and values of the pregnant person, or sex equality, which would focus on the impact of abortion restrictions on individual women and pregnant people.²¹⁹ Instead, the privacy right as conceived in *Roe* focused on the physician's judgment and expertise.

Subsequent developments in substantive due process doctrine furthered the medicalization trajectory. In the wake of *Casey*'s adoption of the undue burden standard, advocates and courts placed increasing emphasis on developing a robust record of medical facts, as plaintiffs were tasked with proving either that an abortion restriction actually operated to prevent a "large fraction" of pregnant people from accessing abortion, or that the burdens imposed by the abortion regulation were disproportionate to its benefits.²²⁰ And cases

²¹⁵ GARROW, *supra* note 212, at 474 (stating that Blackmun represented Mayo Clinic before becoming a federal judge and "a few abortion litigators had heard talk that Blackmun was a good friend of Dr. Joseph H. Pratt, Jane Hodgson's most prominent Minnesota medical supporter"). Hodgson was a Minnesota-based obstetrician and gynecologist and an abortion rights advocate. *See id.* at 428–30 (discussing Jane Hodgson's role in abortion rights movement).

²¹⁶ 402 U.S. 62 (1971).

²¹⁷ *Id.* at 71.

²¹⁸ *See, e.g., Roe*, 410 U.S. at 162, 165, *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (recognizing both "rights of the pregnant woman" and "right of the physician to administer medical treatment according to his professional judgment"); *id.* at 219 (Douglas, J., concurring) ("The right of privacy has no more conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relationship.").

²¹⁹ *Cf. ZIEGLER, supra* note 120, at 146 (noting some advocates' concerns that "by presenting abortion as one more medical service, political organizations and lawyers ignored the experiences of real patients, who understood their choice to be both important and more morally complex than many other health care decisions").

²²⁰ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884–85 (1992), *overruled by Dobbs*, 142 S. Ct. 2228 ("Since there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, we conclude that it is not an undue

such as *Stenberg* and *Gonzales*, which dealt with the constitutionality of bans on a particular abortion method, further entrenched the medicalization framework, as the central legal question under the undue burden standard as applied in those cases was whether the procedure had any meaningful health benefits.²²¹ Answering this question obviously required extensive appeal to medical and scientific expertise.

By contrast, religious freedom claims brought by individual patients focus on the moral, ethical, and spiritual aspects of the abortion decision, rather than on its medical character.²²² They also center the decision-making of individual abortion seekers rather than the medical expertise and decision-making of physicians.²²³ Similarly, gender equality claims focus on women—on the impact of unwanted pregnancies on their bodies, futures, and right to equal citizenship. While medical information, such as the impact of pregnancy on health, may have some relevance to such claims, it is not at the center of those claims.²²⁴

B. *Plaintiffs and Third-Party Standing*

Abortion litigation has historically relied heavily on third-party standing, rather than traditional standing. Traditional standing doctrine requires a plaintiff challenging an abortion law in federal court to show three things: (1) that the plaintiff is suffering present or imminent injury, (2) that the injury is caused by the challenged law, and (3) that the relief sought—usually injunctive or declaratory relief—will redress the injury.²²⁵ In *Roe*, Jane Roe could claim injury because she was facing an unwanted pregnancy that she was unable to terminate; Texas's near-total abortion ban was the cause of this

burden.”); *id.* at 926 (Blackmun, J., concurring in part) (observing that “[t]he joint opinion makes clear that its specific holdings are based on the insufficiency of the record before it,” and expressing confidence that “in the future evidence will be produced to show that ‘in a large fraction of the cases in which [these regulations are] relevant, [they] will operate as a substantial obstacle to a woman’s choice to undergo an abortion.’”); *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582, 607 (2016), *as revised* (June 27, 2016), and *abrogated by Dobbs*, 142 S. Ct. 2228 (“The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.”); *see also* ZIEGLER, *supra* note 120, at 128 (explaining that *Casey*’s emphasis on factual record led advocates to focus on “defin[ing] abortion as a beneficial medical procedure”).

²²¹ *Gonzales v. Carhart*, 550 U.S. 124, 161–66 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 931–38 (2000); *supra* Part I.B; ZIEGLER, *supra* note 120, at 178–79.

²²² *See* Sepper, *supra* note 7, 180.

²²³ *See id.*

²²⁴ *See* Siegel, *supra* note 179, at 1883 (“[A]bortion rights meant something very different on the medical and women’s rights models. . . . [F]eminists understood the criminalization of abortion to inflict harms, *in addition to* the threats it might pose for women’s health.”).

²²⁵ *See, e.g.,* *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (“To establish Article III standing, an injury must be ‘concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.’” (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010))).

injury; and an injunction barring enforcement of the law or a declaration of its unconstitutionality would redress this harm.²²⁶

Generally, a party with standing may assert only their own constitutional rights as a basis for invalidating a law.²²⁷ But the Supreme Court has also long recognized the doctrine of third-party standing, in which a party who is suffering an injury from a challenged law may assert the rights of another—that is, challenge a law on the basis that it violates someone else’s constitutional rights.²²⁸ To meet the requirements of third-party standing, a plaintiff who can meet the requirements of injury, causation, and redressability with respect to the law must also show two other elements: that they share a close relationship with the person whose rights are being raised, and that the rights-possessor faces a hindrance to asserting their own rights.²²⁹

Reproductive health care providers have raised the rights of their patients in litigation since before *Roe v. Wade*. For example, *Griswold v. Connecticut*, in which the Supreme Court vindicated the rights of married couples to use contraception, arose from the prosecution of a physician and the director of a Planned Parenthood clinic, who defended on the ground that their prosecution under a statute banning the use of contraceptives violated their patients’ rights to privacy.²³⁰ And while *Roe v. Wade* famously involved a lawsuit by an individual woman seeking to terminate her pregnancy, its companion case *Doe v. Bolton* found that *both* the individual pregnant woman *and* several individual, state-licensed physicians had standing to challenge Georgia’s abortion ban.²³¹ Uniformly since *Roe* and *Doe*, the Supreme Court has accepted the standing of abortion providers to vindicate the rights of their patients, finding that they meet the doctrinal requirements for third-party standing.²³² Indeed, while earlier cases were brought by an array of plaintiffs, almost every major abortion case to reach the Supreme Court since *Casey* involved only abortion provider plaintiffs, usually asserting third-party standing to raise the rights of their patients.²³³

²²⁶ See *Roe v. Wade*, 410 U.S. 113, 124 (1973).

²²⁷ See *Singleton v. Wulff*, 428 U.S. 106, 114 (1976).

²²⁸ See, e.g., *Barrows v. Jackson*, 346 U.S. 249, 259 (1953) (permitting property owner to raise equal protection rights of potential buyers in challenging racially restrictive covenant); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (permitting private schools to assert Fourteenth Amendment rights of their students and their parents).

²²⁹ *Singleton*, 428 U.S. at 114–16.

²³⁰ *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965). A prior attempt by individual plaintiffs to achieve Supreme Court review of the same state law had been turned away by the Court in *Poe v. Ullman* on the ground that for decades it had been “uniformly and without exception unenforced” against individual patients. 367 U.S. 497, 508 (1961).

²³¹ *Doe v. Bolton*, 410 U.S. 179, 188 (1973). However, several other plaintiffs had also joined *Roe*, including a physician who was being prosecuted for performing abortions and a married couple that needed to avoid pregnancy for health reasons. *Roe*, 410 U.S. at 120–21.

²³² See, e.g., *Singleton*, 428 U.S. at 113–18; *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2139 n.4 (2020).

²³³ See e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2244 (2022); *June Med. Servs.*, 140 S. Ct. at 2113; *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582,

There are many reasons that relying on physician and clinic plaintiffs made strategic sense.²³⁴ To begin with, physicians and clinics have greater incentives than patients to sue: Criminal abortions laws generally, if not universally, exempt the pregnant individual from any adverse legal consequences; thus, the physician is the main, if not only, party who faces legal risk if an abortion is performed.²³⁵ Indeed, the Supreme Court has explained that this structure creates the paradigm case for third-party standing: “In several cases, this Court has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction *against the litigant* [i.e., physician or clinic] would result indirectly in the violation of third parties’ [i.e., patients’] rights.”²³⁶ This statutory scheme means that the provider has a very real incentive to vigorously prosecute the case, which is one of the main purposes of standing doctrine.²³⁷

By contrast, the first priority for a person seeking to end an unwanted pregnancy—especially given the time-sensitive nature of abortion care—will generally be to access that care as quickly as possible, even if it means traveling out of state. It is almost unimaginable that such a person would be equally inclined to hire an attorney and bring a lawsuit—or even if so inclined, that the plaintiff would have any incentive to continue the lawsuit after the pregnancy has ended, whether through abortion or childbirth.²³⁸ Nor would the adversarial system be well served by deciding cases in such a posture, where the individual patient plaintiff (unlike a repeat player, such as a physician or clinic) no longer has any stake in the outcome. In addition, the lawsuit may seriously compromise the pregnant person’s privacy, even if it is possible to sue under pseudonyms (as Jane Roe and Mary Doe did). While a pseudonym protects the plaintiff’s identity from the public, it does not guarantee that the plaintiff will be able to keep their identity hidden from friends, family, employers, or the state.²³⁹ This circumstance creates an additional disincentive for individual plaintiffs to bring suit.

These are the classic reasons cited for extending third-party standing to physicians and clinics, and they are good reasons for advocates to rely on

591 (2016), *as revised* (June 27, 2016); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 324 (2006); *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000).

²³⁴ For many of the same reasons, abortion opponents attacked third-party standing in abortion cases prior to *Dobbs*, though without success. *See, e.g., June Med. Servs.*, 140 S. Ct. at 2117–20.

²³⁵ *See, e.g., ALA. CODE* § 26-23H-5–6 (2026); *IND. CODE ANN.* § 16-34-2-7 (2025).

²³⁶ *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 510 (1975) (alterations and emphasis added)).

²³⁷ *See June Med. Servs.*, 140 S. Ct. at 2119 (explaining that person against whom enforcement is directed is most natural challenger of statute).

²³⁸ *See Singleton v. Wulff*, 428 U.S. 106, 117 (1976). Note that standing is determined at the outset of the lawsuit, *Friends of the Earth, Inc. v. Laidlaw Env’t Servs., Inc.*, 528 U.S. 167, 191 (2000), and pregnancy falls under the “capable of repetition yet evading review” exception to mootness doctrine, *Roe v. Wade*, 410 U.S. 113, 125 (1973), so an individual plaintiff would only need to be pregnant at the time the complaint is filed.

²³⁹ *See, e.g., Nw. Mem’l Hosp. v. Ashcroft*, 362 F.3d 923, 928–29 (7th Cir. 2004) (detailing the limitations of redaction and pseudonyms for protecting patients’ privacy).

physicians and clinics to challenge abortion restrictions. But there are other reasons why the structure of abortion legislation and litigation increasingly encouraged reliance on third-party plaintiffs.

One factor is that, after *Roe*, states generally passed laws restricting abortion in various incremental ways rather than attempting to ban it outright. These included so-called Targeted Regulation of Abortion Providers (TRAP) laws that regulated clinics, rather than the abortion procedure, in onerous and medically unjustifiable ways.²⁴⁰ These laws often had the result (and likely the purpose) of severely limiting abortion access by forcing clinic closures.²⁴¹ However, it is difficult to imagine an individual plaintiff who would have an incentive, or in some cases even meet the standing requirements, to sue to enjoin such laws.²⁴² Even if such a plaintiff were to be found, standing requires a showing both that the injury to the plaintiff—in this case, inability to access abortion—was caused by the defendant's actions (the restrictive TRAP laws) and that the injury could be redressed by the relief sought, i.e., an order enjoining enforcement of the laws.²⁴³ A plaintiff would likely have difficulty demonstrating a causal relationship between the particular abortion restrictions at issue and their own difficulty accessing care, or that their own medical needs would be redressed by an injunction against the problematic regulations. Moreover, any challenge would need to be brought before the regulations are enforced, since the case would essentially become moot once the regulations

²⁴⁰ For a discussion of such so-called TRAP laws, see generally Hill, *supra* note 97, at 1083; Mary Ziegler, *Liberty and the Politics of Balance: The Undue-Burden Test After Casey/Hellerstedt*, 52 HARV. C.R.-C.L. L. REV. 421, 451–52 (2017); Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics—and the Women They Serve—Pay the Price*, 16 GUTTMACHER POL'Y REV. 7, 8 (2013).

²⁴¹ Hill, *supra* note 97, at 1100–01.

²⁴² It is possible that this strategy of regulating clinics out of existence will continue to be used by abortion-hostile legislatures in states where the state constitution protects abortion rights (for example, as a result of a state supreme court ruling or a ballot initiative). In 2024, Missourians adopted a ballot initiative protecting the right to abortion. Anna Sporre, *Missouri Voters Approve Amendment 3, Overturn State's Abortion Ban*, MO. INDEP. (Nov. 5, 2024, at 22:37 CT), <https://missouriindependent.com/2024/11/05/missouri-voters-overturn-states-near-total-abortion-ban/> [<https://perma.cc/24LK-4CVC>]. However, a judge ruling on a request to preliminarily enjoin several abortion restrictions found that, while many of the state's abortion restrictions were likely unconstitutional, the abortion facility licensing law—which has been impossible for abortion providers to comply with—was not clearly unconstitutional. *Comprehensive Health of Planned Parenthood Great Plains v. State*, No. 2416-CV31931, 2024 WL 5709712, at *5–11 (Mo. Cir. Ct. Dec. 20, 2024). The court declined to enjoin that law. *Id.* Similarly, Ohioans voted to enshrine a right to reproductive freedom in the Ohio Constitution in November 2023, but the Ohio state legislature remains one of the most anti-abortion bodies in the country. Jeremy Kohler, *Red State Voters Approved Progressive Measures. GOP Lawmakers Are Trying to Undermine Them*, PROPUBLICA (May 30, 2025, at 05:00 ET), <https://www.propublica.org/article/red-state-ballot-initiatives-gop-republicans-florida-missouri> [<https://perma.cc/54LD-H7PW>]; cf. Orlaith Heymann et al., *Unlimited Discretion: How Unchecked Bureaucratic Discretion Can Threaten Abortion Availability*, 48 J. HEALTH POL., POL'Y & L. 629, 636–40 (2023) (describing how administrative agencies in Ohio wielded discretion against abortion clinics).

²⁴³ See *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013); *Roe*, 410 U.S. at 124–25.

performed their expected function of closing all or most clinics within the state—which further aggravates the difficulties in proving both causation and redressability. Thus, third-party standing provides significant advantages for challenging TRAP laws.

Another significant advantage of third-party standing is the breadth of factual development that is permitted when abortion providers rather than pregnant people bring suit. An individual plaintiff brings a specific set of facts that may or may not touch on all of the relevant legal issues in a case. For example, a pregnant person might challenge a state's ban on abortion after fifteen weeks of pregnancy, asserting that she was raped and that she only learned of her pregnancy at the fifteen-week mark. While she could bring a facial challenge, claiming the abortion ban is unconstitutional in all of its applications, a court might issue a narrower ruling, holding the law unconstitutional only as to people who are pregnant as a result of nonconsensual sex or only those who only learned of their pregnancy after fifteen weeks.²⁴⁴

The Supreme Court's 2024 ruling in *Poe v. Labrador*²⁴⁵ illustrates the problem in an analogous situation. In that case, the trial court had preliminarily enjoined in its entirety an Idaho law broadly banning all gender-affirming medical care for minors.²⁴⁶ The lawsuit was brought by parents on behalf of their children who were seeking access to puberty-blocking hormones but not surgery.²⁴⁷ On a motion to stay the preliminary injunction while the litigation continued, the defendants requested that the preliminary injunction be limited to as to apply only to the two named minor plaintiffs and their access to hormone therapy.²⁴⁸ The Supreme Court granted the motion.²⁴⁹ Thus, notwithstanding the trial court's finding that the ban likely violated the Equal Protection and Due Process Clauses,²⁵⁰ no one except the two minor plaintiffs in *Poe* can access gender-affirming medical care in Idaho—and those minors had access only to hormones, not surgery—while the case played out.²⁵¹

²⁴⁴ Cf. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 331 (2006) (holding that lower court should have considered more “modest remedy” than facial invalidation of abortion statute).

²⁴⁵ 144 S. Ct. 921 (2024).

²⁴⁶ *Poe by & through Poe v. Labrador*, 709 F. Supp. 3d 1169, 1199 (D. Idaho 2023) (enjoining defendant officials “from enforcing any provision of House Bill 71 during the pendency of this litigation”); see also *Poe*, 144 S. Ct. at 921–22 (Gorsuch, J., concurring).

²⁴⁷ *Poe*, 709 F. Supp. 3d at 1178.

²⁴⁸ *Poe*, 144 S. Ct. at 922.

²⁴⁹ *Id.* at 921.

²⁵⁰ *Poe*, 709 F. Supp. 3d at 1195, 1198.

²⁵¹ If the law is declared to be unconstitutional on its face once the case reaches final judgment, it then becomes unlikely that the state would attempt to enforce it against anyone, as the accused would have a solid defense based on *res judicata*, and attempts to argue otherwise would likely be deemed frivolous. See, e.g., Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1340 (2000) (“The binding effect of a federal judgment depends on doctrines of claim and issue preclusion and of precedent. Within those doctrines, it generally does not matter whether a court purports to hold a statute unconstitutional or merely pronounces that conclusion in ruling on an as-applied challenge.”).

(In this case, the suit was voluntarily dismissed after the Supreme Court upheld a similar law in *United States v. Skrmetti*.)²⁵²

Theoretically, this difficulty may be surmountable. Attorneys could add more plaintiffs—for example, with abortion, they could add someone who had discovered medical indications for an abortion after fifteen weeks, as well as someone who simply became pregnant unintentionally and had not been able to save up enough money to pay for the procedure by the fifteen-week mark. But the practical barriers to locating such plaintiffs, all of whom are pregnant simultaneously—and willing to sign onto a lawsuit—are obvious. Alternatively, they could seek to certify a class of patients, but this would require meeting the elements of factual and legal commonality and typicality among the plaintiffs in the class, as well as locating one or more representative plaintiffs.²⁵³

By contrast, when abortion providers serve as plaintiffs, they can provide a relatively complete factual picture regarding abortion at various stages of pregnancy and the patients who seek it for various reasons. For example, in *Stenberg v. Carhart*²⁵⁴ and *Gonzales v. Carhart*,²⁵⁵ the Court considered the constitutionality of state and federal laws, respectively, banning a particular method of abortion without making an exception for situations in which the procedure was the safest method of abortion for a particular plaintiff.²⁵⁶ In both cases, brought by abortion providers, the factual record included extensive evidence about numerous different medical indications for which the procedure might be needed, which was essential to determining whether the law required a health exception.²⁵⁷ It would be nearly impossible to assemble a group of individual patients with this diverse group of medical conditions who would be willing to bring a federal lawsuit rather than attend to (or while attending to) their own urgent medical needs. Third-party plaintiffs are thus more suited to claims raising facial challenges and seeking facial relief. Such claims avoid the need to repeatedly bring new lawsuits based on new factual permutations, only to receive as-applied relief against the same law. Perhaps for this reason, courts have—almost without exception—allowed providers rather than individual patients to bring substantive due process challenges to abortion restrictions.²⁵⁸

²⁵² *United States v. Skrmetti*, 145 S. Ct. 1816, 1837 (2025) (holding Tennessee’s ban on gender-affirming care for minors does not violate Equal Protection Clause); *Poe by & through Poe v. Labrador*, No. 24-142, 2025 WL 1872749, at *1 (9th Cir. June 18, 2025) (granting voluntary dismissal).

²⁵³ FED. R. CIV. P. 23(a).

²⁵⁴ 530 U.S. 914 (2000).

²⁵⁵ 550 U.S. 124 (2007).

²⁵⁶ *Stenberg*, 530 U.S. at 930; *Gonzales*, 550 U.S. at 143.

²⁵⁷ *Gonzales*, 550 U.S. at 189–90 (Ginsburg, J., dissenting) (“[T]he record already includes hundreds and hundreds of pages of testimony identifying ‘discrete and well-defined instances’ in which recourse to [the challenged method] would better protect the health of women with particular conditions.”); *Stenberg*, 530 U.S. at 934.

²⁵⁸ See generally 16 AM. JUR. 2D CONST. L. § 157 (noting that physicians generally have standing on behalf of patients to challenge statutes that threaten physicians with criminal

Finally, practical considerations inevitably come into play when choosing plaintiffs. As the plaintiffs with the greatest incentive to litigate abortion restrictions, physicians and clinics become repeat players—an unlikely scenario for individual patients who serve as plaintiffs.²⁵⁹ Providers thus develop relationships with the attorneys working for the organizations that regularly initiate abortion rights litigation.²⁶⁰ They become familiar with the demands of constitutional litigation and become comfortable serving in this role. They also contribute expertise, since they generally have significant relevant medical training and knowledge, minimizing the need for external paid experts in some cases.²⁶¹ These factors have undoubtedly contributed to the preference for abortion-provider plaintiffs over patient plaintiffs.

What has been the impact of this reliance on pre-enforcement facial challenges by abortion-provider plaintiffs asserting the rights of their patients? At a minimum, it has contributed to the medicalized understanding of abortion rights and reinforced the gatekeeping role of medical professionals. As the central players in the lawsuit, abortion providers tend to put forth evidence that focuses on medical aspects of the case and highlights their medical expertise.²⁶² They also tend to frame the issues around medical concepts, such as informed consent and medical ethics.²⁶³

For example, in *Stuart v. Camnitz*, abortion providers challenged a North Carolina law requiring them to perform an ultrasound; describe the fetus in detail; and play the fetal heart tones before an abortion on substantive due process, vagueness, and First Amendment free speech grounds.²⁶⁴ Specifically, the plaintiffs argued that the law violated the providers' rights against compelled speech insofar as it required disclosure of information that

penalties). *But see* *Cameron v. EMW Women's Surgical Ctr.*, P.S.C., 664 S.W.3d 633, 658 (Ky. 2023) (holding abortion providers lacked third-party standing to challenge the state's abortion ban on behalf of patients). By contrast, courts have held that religious freedom challenges to abortion restrictions are best brought by individuals, expressing skepticism about the viability of third-party claims in that context. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 320–21 (1980); *Am. Coll. of Obstetricians & Gynecologists (ACOG) v. Thornburgh*, 552 F. Supp. 791, 795 (E.D. Pa. 1982), *aff'd*, 737 F.2d 283 (3d Cir. 1984), *aff'd*, 476 U.S. 747 (1986).

²⁵⁹ Many lawsuits challenging different abortion restrictions and brought in different years bear the names of the same plaintiffs. For example, Dr. LeRoy Carhart was the lead plaintiff in both *Stenberg*, 530 U.S. at 922, and *Gonzales*, 550 U.S. at 133.

²⁶⁰ *See infra* Part II.C (discussing role of attorneys in reproductive rights movement).

²⁶¹ *See, e.g.*, *Scheinberg v. Smith*, 550 F. Supp. 1112, 1116 n.14 (S.D. Fla. 1982) (noting that physician plaintiff was also qualified as expert witness).

²⁶² *See* *Whole Woman's Health v. Hellerstedt*, 591 U.S. 299, 340–41 (2020); *Gonzales*, 550 U.S. at 189–90 (Ginsburg, J., dissenting); *Stenberg*, 530 U.S. at 931–32 (summarizing record before trial court on safety of abortion procedure banned by state).

²⁶³ *See, e.g.*, *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 429 (6th Cir. 2019) (“Does H.B. 2 relate to a medical procedure? Yes—abortion. Are the mandated disclosures truthful and not misleading? Yes—no one argues that the heartbeat, sonogram, or its description is false or misleading.”).

²⁶⁴ *Stuart v. Loomis*, 992 F. Supp. 2d 585, 587–88 (M.D.N.C. 2014), *aff'd sub nom.*, *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014).

goes well beyond traditional informed consent requirements.²⁶⁵ There may have been other ways to frame this challenge, however. For example, the law could have been challenged as violating the patients' First Amendment rights against being compelled to receive certain information as "captive audience" members, as Professor Caroline Mala Corbin has argued.²⁶⁶ While similar in many respects to a compelled-speech claim, a compelled-listening claim would focus primarily on the pregnant person's experience rather than that of the health care provider. Alternatively, and relatedly, mandatory ultrasound requirements could be challenged as interfering with the pregnant individual's deliberative process and thus their right to privacy.²⁶⁷ On their face, these framings are no less legally plausible than centering on providers' First Amendment rights. Indeed, the only Supreme Court precedent addressing health care providers' free speech rights in the abortion context more or less summarily rejected the claim, suggesting that a different approach might have found greater success.²⁶⁸

Thus, while providing significant advantages in litigation, centering medical professionals in abortion rights litigation has contributed to the medicalization of abortion rights and has arguably led to a decreased focus on the needs and experiences of abortion seekers themselves. Not only are individual pregnant people missing as plaintiffs, but their experiences and their reasons for needing abortions are rarely discussed in legal opinions.²⁶⁹ Indeed, very few of the Supreme Court cases between *Roe* and *Dobbs* mentioned or

²⁶⁵ *Id.* at 588; see also Brief of Biomedical Ethicists Ruth R. Faden, Ph.D., M.P.H., et al., as Amici Curiae in Support of Petitioners at 3–13, *EMW Women's Surgical Center, P.S.C. v. Meier*, 589 U.S. 1104 (2019) (No. 19-417); Nadia N. Sawicki, *Tort Law Implications of Compelled Physician Speech*, 97 IND. L.J. 939, 942 (2022) (describing how abortion-specific disclosure laws "require physicians to go beyond the traditional disclosures required under the common law of informed consent").

²⁶⁶ Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U.L. REV. 939, 980–81, 1007 (2009).

²⁶⁷ See Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 386 (2008).

²⁶⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (rejecting in one-paragraph claim that mandated-disclosure requirement violates physicians' free speech rights), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

²⁶⁹ This de-centering of women in legal opinions is not much different from how abortion is discussed in public discourse, as indicated by studies of news sources both before and after *Dobbs*. One study found that only 4% of news stories included the experiences of people who have abortions. Katie Woodruff, *Coverage of Abortion in Select U.S. Newspapers*, 29 WOMEN'S HEALTH ISSUES 80, 83 (2018). However, some high-profile stories that appeared in the wake of *Dobbs* highlighted the experiences of individual women unable to access abortions. See, e.g., *She Spent 13 Weeks Carrying a Baby that Was 'Sure to Die.' This Is Why*, CNN (May 2, 2023), <https://www.cnn.com/videos/health/2023/05/02/abortion-florida-law-family-pregnancy-cohen-lead-contd-vpx.cnn> [<https://perma.cc/93WE-HW4W>]; *Texas Woman Speaks Out After Being Forced to Carry Her Dead Fetus for 2 Weeks*, CNN (July 18, 2022), <https://www.cnn.com/videos/health/2022/07/18/woman-carried-dead-fetus-texas-anti-abortion-ban-cohen-new-day-dnt-vpx.cnn> [<https://perma.cc/2Q6E-PKMJ>]; Elizabeth Cohen & Amanda Musa, *Ohio Abortion Law Meant Weeks of 'Anguish,' 'Agony' for Couple Whose Unborn Child Had Organs Outside Her Body*, CNN (Feb. 8, 2023, at 23:36 ET), <https://www.cnn.com/2023/02/08/health/ohio-abortion-long> [<https://perma.cc/24XB-G2CL>].

discussed the stories of any individual abortion seekers, their situations, or their reasons for seeking abortions.²⁷⁰ The absence of individual patients arguably gives the rulings a detached, scientific quality. This result may be desirable, insofar as it ostensibly moves cases from the emotional and politicized realms into the scientific one. And it certainly has legal strategic advantages, as just explained. But it unquestionably centers the medical aspects of abortion and the role of physicians as gatekeepers and experts over the needs and perspectives of those who seek abortions.

C. *Medicalized Abortion Litigation and the Abortion Rights Movement*

There are good reasons to think that the medicalized framing in abortion rights litigation had an outsized influence on how the abortion rights movement itself conceived of the right. First, law is a rhetorical practice; it accomplishes its work first and foremost through language—through motions and briefs, oral arguments and testimony, which ultimately make their way, in some form, into authoritative written rulings. But the importance of law as a rhetorical practice reaches beyond simply acknowledging that particular linguistic framings make their way into legal opinions. As Professor James Boyd White has argued, for example, law is a form of “constitutive rhetoric”—it not only conveys meaning but also helps to create that meaning and the community in which that meaning functions.²⁷¹ Language can not only explain and communicate truth, but also shape and create reality and how individuals perceive it.²⁷² Thus, says Boyd, “the lawyer is always saying not only, ‘Here is how this case should be decided,’ but also, ‘Here—in this language—is the way this case and similar cases should be talked about.’”²⁷³ And that language is always situated within a social context where it speaks to a particular audience, such that legal pronouncements may reshape understanding within that community.²⁷⁴

²⁷⁰ In *Roe*, the Court briefly described the situation of the pseudonymous plaintiff Jane Roe:

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion ‘performed by a competent, licensed physician, under safe, clinical conditions’; that she was unable to get a ‘legal’ abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions.

Roe v. Wade, 410 U.S. 113, 120 (1973), *overruled by Dobbs*, 142 S. Ct. 2228. *H.L. v. Matheson* also discussed an abortion seeker. 450 U.S. 398, 400–01 (1981). In that case, a person challenged a Utah law requiring pregnant minors to obtain parental consent to receive an abortion. *Id.*

²⁷¹ James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 688 (1985).

²⁷² *Id.* at 691–92.

²⁷³ *Id.* at 690.

²⁷⁴ *Id.* at 691–92; cf. Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1250–51 (2016) (describing professions of both law and medicine, as “knowledge communities,” which are “network[s] of individuals who share common knowledge and experience as a

Second, the reproductive rights movement has been largely lawyer-driven, with a strategy that focuses heavily on vindicating abortion rights through the courts.²⁷⁵ In this way, it is much like many other progressive social movements in the United States.²⁷⁶ Because of the importance of litigation to effect legal change, lawyers and their organizations often play a leading role in those social movements: Professor Sandra Levitsky notes, for example, that litigating organizations often have access to various kinds of resources that grassroots organizations lack, which may greatly impact their ability to influence the movement's direction.²⁷⁷ Indeed, one standard critique of the abortion rights movement in the United States—whether accurate—has been that, like other social movements, it has been “lawyer-driven, elite-oriented, and court-centered.”²⁷⁸ Thus, decisions made by lawyers have shaped not only legal understandings of abortion rights, but also the strategies and priorities of the movement, and ultimately the reality of abortion access on the ground. And when courts adopt lawyers' framing, they place the weight of their authority behind that constitutive rhetoric.

Third, in the period between *Roe* and *Dobbs*, legal advocates for abortion rights pursued a highly centralized strategy focused on federal courts and federal constitutional law. Decision-making by advocacy organizations was

result of training and practice,” which they also “help define and to which they contribute,” resulting in “shared notions of validity and a common way of knowing and reasoning”).

²⁷⁵ See, e.g., Dawn Johnsen, *State Court Protection of Reproductive Rights: The Past, the Perils, and the Promise*, 29 COLUM. J. GENDER & L. 41, 41 (2015) (noting “role of the federal courts in protecting reproductive rights”).

²⁷⁶ See, e.g., Austin Sarat & Stuart A. Scheingold, *What Cause Lawyers Do For, and To, Social Movements: An Introduction*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 1, 1 (Austin Sarat & Stuart A. Scheingold eds., 2006) (“The last half of the twentieth century in the United States was, in part, a story of law’s role in movements for social change.”); see also *id.* (describing central, and ultimately problematic, role of lawyers and litigation in civil rights movement).

²⁷⁷ Sandra Levitsky argues, in the context of a study of the LGBT movement in Chicago, that:

while legal advocacy organizations do assist other organizations in the movement, interorganizational relations are not defined by reciprocal but by unilateral cooperation. As a result, many activists in the movement perceive legal advocacy organizations as operating independently from the rest of the movement, imposing their agendas without consultation with grassroots activists and with few opportunities for input from the rest of the GLBT community.

Sandra Levitsky, *To Lead with Law: Reassessing the Role of Legal Advocacy Organizations in Social Movements*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 276, at 145, 146. More directly relevant to the reproductive rights and justice movement, an open letter from state-based abortion funds published in *The Nation* directly criticized national reproductive rights groups for setting priorities without consulting the expertise of state-based groups and noted that national groups have resources that “dwarf anything local funds can provide,” whereas “[l]ocal and regional abortion funds are often underfunded, understaffed, or volunteer-led.” Chelsea Williams-Diggs et al., *National Abortion Rights Groups Have the Wrong Priorities for Our Movement*, THE NATION (Aug. 7, 2024), <https://www.thenation.com/article/activism/abortion-funds-movement-crisis/> [https://perma.cc/3JQR-388C].

²⁷⁸ Scott L. Cummings, *Law and Social Movements: Reimagining the Progressive Canon*, 2018 WIS. L. REV. 441, 451.

largely centralized and concentrated in a small number of groups, leading to a national strategy that was more or less uniform. Attorneys from a very small group of litigating organizations—the American Civil Liberties Union, the Center for Reproductive Rights (formerly known as the Center for Reproductive Law and Policy), and the Planned Parenthood Federation of America—have served as counsel for the plaintiffs in nearly every major abortion rights case to reach the Supreme Court between *Roe* and *Dobbs*, including every such case in the past twenty-nine years, and they have also argued a significant number of them.²⁷⁹

Additionally, given that substantive due process claims under the federal Constitution were the dominant framework for most of that litigation, litigation strategy was inevitably formulated with an eye to the development of that doctrine in the context of the centralized federal system. Of course, unlike the state courts, the federal courts in every state are all part of one unified legal system.²⁸⁰ A decision in a federal district court may be appealed to the circuit court, which will then pronounce the law for a several-state region, and that ruling may then be taken up by the Supreme Court, which can standardize the doctrine for the entire country.²⁸¹ And while circuit courts are not bound by decisions in other circuits, their decisions are treated as persuasive precedent in other circuits, thus reinforcing the standardizing effect. This structure inherently creates an incentive for a centralized and nationalized legal strategy. A litigation decision, such as one to frame a claim or argument in a particular way, that leads to an unfavorable ruling in one district or circuit could thus affect the outcome in a different court, emphasizing the benefits of a highly centralized and well-thought-out litigation strategy. And indeed, the legal

²⁷⁹ A search for the attorneys of record and attorneys who argued key Supreme Court cases on abortion in the Westlaw database reveals significant involvement of attorneys from one of the three organizations in every such case. The author searched the Westlaw U.S. Supreme Court cases database for cases in which the word “abortion” appeared in the syllabus or digest, resulting in 98 cases. Westlaw Database Search, <https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=%28sc.Default%29> (select Cases, U.S. Supreme Court; then search “adv: sy,di (abortion).” The author then eliminated cases that did not adjudicate a challenge to a law restricting abortion procedures or regulating abortion providers or clinics and considered consolidated cases together as single cases. The author then examined the “Attorneys and Law Firms” fields for the twenty-five remaining cases decided between *Roe* and *Dobbs*. Where insufficient information was provided, the affiliation of the attorneys involved in the Supreme Court litigation was verified through review of the briefs submitted in those cases. In all but five cases, all of which were decided in 1997 or earlier, at least one of the three groups appeared on the merits briefing; in two of those five cases, it could not be verified whether any of the three groups participated in the merits briefing due to a lack of accessible documentation.

²⁸⁰ JOANNA R. LAMPE & LAURA DEAL, CONG. RSCH. SERV., R47641, FEDERAL AND STATE COURTS: STRUCTURE AND INTERACTION 4 (2023) (“The federal judiciary operates as a relatively unified system subject to substantive laws and procedural rules that usually apply nationwide.”).

²⁸¹ See generally *Introduction to the Federal Court System*, U.S. ATT’YS OFFS., <https://www.justice.gov/usao/justice-101/federal-courts> [<https://perma.cc/LWZ2-U3G9>] (describing federal court system at trial and appellate levels).

movement for reproductive rights has also resembled other progressive social movements in its centralized structure.²⁸²

Post-*Dobbs*, a more diverse body of litigation has emerged. The majority of cases have been brought in state courts, with challenges tailored to the specifics of each state's constitution.²⁸³ Some individuals and groups have brought religious freedom challenges to abortion bans in a smattering of states.²⁸⁴ In addition, attorneys have filed suits simultaneously in different courts, sometimes leading to differing outcomes. For example, this disparity has occurred with lawsuits dealing with EMTALA, a federal law requiring emergency medical treatment for those with emergency medical conditions, which expressly includes those in labor.²⁸⁵ Thus, the litigation landscape became considerably more fractured after *Dobbs*.

III. THE EFFECTS OF MEDICALIZATION

The decision to embrace a medical framing has had some negative impacts on the long-term health and success of the abortion rights movement. Some of these negative impacts were doctrinal. For example, it entrenched the medicalized history of abortion rights told by Justice Blackmun in *Roe*, which was easily recast as an anti-abortion rights narrative by Justice Alito in *Dobbs*. It also may have narrowed the sorts of legal arguments that advocates were willing or able to make. In the political realm, the medicalization of abortion rights has made it more difficult to reconcile traditional

²⁸² STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 54 (2008) (“[C]entralization of government matched the centralization of the [liberal] public interest law movement, [which] . . . allowed for strategies and information to be quickly disseminated, networks to form, and ideas to be shared.”).

²⁸³ See Mabel Felix, Laurie Sobel & Alina Salganicoff, *Legal Challenges to State Abortion Bans Since the Dobbs Decision*, KFF (Jan. 20, 2023), <https://www.kff.org/womens-health-policy/legal-challenges-to-state-abortion-bans-since-the-dobbs-decision/> [<https://perma.cc/U83N-QZTU>] (“[T]he legal landscape at the state level has been activated as never before [with respect to abortion rights.] . . . [T]he types of challenges on state constitutional grounds have varied, [as] . . . each state has its unique judicial history and binding precedent.”).

²⁸⁴ See, e.g., *Sobel v. Coleman*, No. 2024-CA-0849-MR, 2025 WL 1909448, at *6 (Ky. Ct. App. July 11, 2025); *Bingham v. Wilson*, 786 F. Supp. 3d 959, 964 (D.S.C. 2025); Order & J. at 2, *Blackmon v. State of Missouri*, No. 2322-CC00120 (Mo. Cir. Ct. June 14, 2024); *Individual Members of Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1*, 233 N.E.3d 416, 429–32 (Ind. Ct. App. 2024), *transfer denied*, 246 N.E.3d 271 (Ind. 2024).

²⁸⁵ The Emergency Medical Treatment and Labor Act, known as EMTALA, requires stabilizing treatment to be provided to patients at emergency rooms receiving Medicare funds. 42 U.S.C. § 1395dd; *Texas v. Becerra*, 89 F.4th 529, 533 (5th Cir. 2024). The Biden Administration interpreted this law to require an abortion to be provided, irrespective of state law, when necessary to stabilize a patient. *Id.* In one case, the Biden Administration sued to enforce its interpretation despite an Idaho state law to the contrary. *Moyle v. United States*, 144 S. Ct. 2015, 2016 (2024). In *Becerra*, private plaintiffs and the State of Texas sued to enjoin the Biden Administration's interpretation. 89 F.4th at 533. And in yet a third case, an individual sued a hospital system under a state-law analog to EMTALA in California state court for denying her emergency abortion care. Complaint at 11, *Nusslock v. St. Joseph Health*, No. 25-CV-00675 (Cal. Super. Ct. Humboldt Cnty. Apr. 1, 2025).

reproductive rights advocacy with advocacy grounded in reproductive justice. It also drew the focus of reproductive rights advocacy away from individual pregnant people, thus forgoing an opportunity to gain public sympathy for the cause and making it harder for lawyer-led reproductive rights organizations to build coalitions with grassroots organizations that work directly with abortion seekers.²⁸⁶ This Part explores each of these impacts in further detail.

A. Doctrinal Effects

Medicalization has shaped abortion doctrine in significant ways. The focus on medical discretion and expertise was highly compatible with the substantive-due-process framework, minimizing the incentive to develop other doctrinal approaches to abortion rights. Advocates' reliance on medical facts created a self-perpetuating narrative that framed abortion primarily as a medical procedure, calling out for deference to medical experts. But this approach, for all its strategic advantages, did not save abortion rights. This Part highlights two important ways in which the strong commitment to a medicalized framing for abortion rights may have weakened doctrinal protections.

First, the *Roe* Court delineated a historical narrative of the history of abortion regulation in America that centered on the role of physicians. Noting that abortion bans were gradually adopted during the latter half of the nineteenth century, but with "therapeutic" exceptions allowing them to be performed when medically necessary, the Supreme Court essentially adopted the story of the physicians' campaign to criminalize abortion as the dominant narrative explaining American legal attitudes toward abortion.²⁸⁷ It then turned to the American Medical Association, which had played a central role in the physicians' campaign against abortion²⁸⁸—as an authoritative voice in this history.²⁸⁹

Of course, the same history that the *Roe* Court described was to some degree repeated and recast in *Dobbs*.²⁹⁰ And to the extent it is used to justify an originalist understanding of the Fourteenth Amendment's Due Process Clause, this history of abortion regulation as medicalization seems to hinge

²⁸⁶ See *infra* Part III.B (describing how reproductive rights advocacy failed to center individual pregnant people and how this approach conflicted with the approach of reproductive justice organizations); see also Abigail Abrams, "We Are Grabbing Our Own Microphones": How Advocates of Reproductive Justice Stepped into the Spotlight, TIME (Nov. 21, 2019, at 07:33 ET), <https://time.com/5735432/reproductive-justice-groups/> [<https://perma.cc/VDH6-NMNM>] ("Over the years, SisterSong and other reproductive justice groups have remained separate from more mainstream reproductive rights groups. While they support each other's work, reproductive justice leaders have sometimes felt that the bigger organizations wanted to collaborate only when it was convenient.").

²⁸⁷ *Roe v. Wade*, 410 U.S. 113, 138–41 (1973).

²⁸⁸ Siegel, *supra* note 8, at 286–318.

²⁸⁹ *Roe*, 410 U.S. at 141–44.

²⁹⁰ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246–54 (2022).

on a particular historical contingency: the temporal coincidence between the adoption of the Fourteenth Amendment and the physicians' campaign to criminalize abortion.²⁹¹

This history was never a strong basis on which to build a robust right to abortion, grounded in bodily integrity and personal autonomy. At most, it simply showed that abortion had not been consistently banned throughout American history; it did nothing to suggest a right to access the procedure. It should therefore be unsurprising that *Dobbs* largely repeated this same history more expansively in holding that there was no history or tradition of protecting access to abortion in American history.²⁹² Indeed, even the brief of the American Historical Association in support of the plaintiffs largely told the same story and simply focused on impugning the motives of the physicians who sought to outlaw abortion, rather than moving them off the center stage.²⁹³ Section titles such as “The Common Law Did Not Criminalize Abortions In All Stages Of Pregnancy” and “Pre-1700 Cases Do Not Support The View That The Common Law Or Early America Criminalized All Abortion” do not even appear calculated to convince the originalist Supreme Court that abortion ever enjoyed affirmative legal protection.²⁹⁴ As explained above, the criminalization of abortion and the medicalization of abortion in the nineteenth century went hand-in-hand.²⁹⁵

Not only did this historical narrative fail to center pregnant people, but it also ignored the roles of non-medical personnel in the management of pregnancy throughout the same era, stretching significantly further back in time. Indeed, there is substantial historical support for viewing abortion as an uncontroversial and health-promoting practice in which women largely engaged with the help of others, including midwives.²⁹⁶ For centuries, pregnancy and pregnancy-related care, including abortion, were managed by pregnant women and their helpers—relatives and midwives—who did not necessarily have any formal medical training.²⁹⁷ There is thus an entirely different history of pregnancy and abortion that could have been told—one that may have

²⁹¹ *Id.* at 2252–53. (“By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening.”). *But see* Monica E. Eppinger, *The Health Exception*, 17 *GEO. J. GENDER & L.* 665, 673 (2016) (“Common law doctrines on abortion still referenced today are not properly legible to twenty-first century minds unless we understand underlying ideas of health and life and the practices they inspired.”).

²⁹² *Dobbs*, 142 S. Ct. at 2246–54.

²⁹³ Brief for Amici Curiae American Historical Association and Organization of American Historians in Support of Respondents at 18–31, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

²⁹⁴ *Id.* at 5, 11.

²⁹⁵ *Supra* text accompanying notes 59–63.

²⁹⁶ Eppinger, *supra* note 291, at 676–87; MOHR, *supra* note 47, at 11.

²⁹⁷ PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE: THE RISE OF A SOVEREIGN PROFESSION AND THE MAKING OF A VAST INDUSTRY* 32 (2d ed. 2017) (explaining that prior to professionalization of medicine in nineteenth century, women were largely charged with responsibility for providing health care in home); Elizabeth Kukura, *Birthing Alone*, 79 *WASH. & LEE L. REV.* 1463, 1475 (2022) (“In contrast to typical modern childbirth

drawn a stronger historical connection between abortion and protections for privacy and autonomy within the home.²⁹⁸ While this alternative history may not have convinced a conservative Supreme Court determined to end *Roe v. Wade*, it may have been worth telling, as an alternative narrative that may one day lay the groundwork for a new and patient-centered right.

By the same token, the commitment of advocates to framing abortion almost exclusively in medical terms gave them less flexibility in legal arguments than abortion opponents, who moved easily back and forth between medical and non-medical framings of abortion. In *Gonzales*, for example, the Supreme Court alternated between medicalized and demedicalized framings. It juxtaposed “an abortion doctor’s clinical description” of an abortion procedure with a nurse’s graphic narrative using highly emotional language and referring to the fetus as a “baby.”²⁹⁹ While exuding disrespect for medical professionals and declining to defer to their expertise with respect to medical facts, the Court also relied on the state’s traditional and “significant role . . . in regulating the medical profession” in justifying the federal ban on a particular abortion procedure.³⁰⁰ In a similar vein, Professor Caitlin Borgmann has shown how anti-abortion advocates move seamlessly between varying understandings of “life” when used in connection with a fetus or embryo—sometimes using it to mean full, human personhood, and at other times using it to mean something less robust, such as a medical or biological part of the human species.³⁰¹

By doubling down on a purely medicalized understanding of abortion and related concepts, abortion advocates may have foreclosed opportunities to consider other understandings and to mobilize them strategically. For example, in the pre-*Dobbs* era, abortion advocates embraced a medical understanding of the “life” exception in abortion restrictions post-viability, partly to reassure courts that these exceptions were not broad enough to undermine the law’s limits. But post-*Dobbs*, they are relying on natural-law concepts in attempts to broaden the concept of “life,” arguing that draconian abortion restrictions harming a patient’s physical or mental health undermine pregnant people’s right to “life” in the sense of a right to self-determination and pursuit of happiness.³⁰²

experiences in the United States, birth in colonial America was a social experience at home with midwives, family members, and neighbors supporting the laboring woman.”).

²⁹⁸ Cf. Yvonne Lindgren, *The Doctor Requirement: Griswold, Privacy, and At-Home Reproductive Care*, 32 CONST. COMMENT. 341, 344 (2017) (“[R]estrictions on reproductive self-care in the home are incongruous with privacy law’s traditional articulation in both common law and constitutional law.”).

²⁹⁹ *Gonzales v. Carhart*, 550 U.S. 124, 138 (2007).

³⁰⁰ *Id.* at 157.

³⁰¹ Caitlin E. Borgmann, *The Meaning of “Life”: Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 587, 592 (2009) (“To the extent it is rooted in fact, it refers to the fact that a blastocyst, or embryo, or fetus, is a human organism that is in the process of developing into a full person.”).

³⁰² See *Okla. Call for Reprod. Just. v. Drummond*, 543 P.3d 110, 116 (Okla. 2023), *reh’g denied*, (Feb. 5, 2024) (finding measures that burdened patient’s health violated right

B. Political Effects

The medicalization of the abortion right may have had negative impacts on political advocacy as well. On the most basic level, medical plaintiffs—physicians and clinics—are less appealing to the public than individual patients. Indeed, it seems possible that the steady flow of stories about individuals who suffered and even died from a lack of abortion care after *Dobbs* accounts for at least some of the increase in public support for abortion rights post-*Dobbs*.³⁰³ But beyond public sympathy, centering providers rather than patients may make it harder to see the human costs of abortion bans.³⁰⁴

Decentering pregnant individuals in abortion legal strategy also may have increased the gap between the traditional reproductive rights movement and the reproductive justice movement.³⁰⁵ Reproductive justice is an approach to understanding reproduction within a social justice-oriented framework that centers people of color and other marginalized groups and criticizes the failures of the health care system to recognize and address the needs of those groups.³⁰⁶ The reproductive justice approach centers the needs and the agency of the individual receiving care rather than the medical professional.³⁰⁷ It stands in contrast to the traditional reproductive rights framework, which has

to life); *Wrigley v. Romanick*, 988 N.W.2d 231, 246 (N.D. 2023) (Tufte, J., concurring) (arguing that right to life protected by North Dakota Constitution protects both right to self-defense and pregnant person’s “fundamental right to preserve her life and health with the aid of a physician,” at least when “a pregnancy raises a similar threat of serious bodily injury or death”). See generally B. Jessie Hill, *Medical Authority and the Right to Life*, 104 B.U. L. REV. ONLINE 67, 69–75 (2024) (describing different meanings of “life” in constitutional doctrine).

³⁰³ See, e.g., *Where Do Americans Stand on Abortion*, GALLUP (Oct. 7, 2025), <https://news.gallup.com/poll/321143/americans-stand-abortion.aspx> [<https://perma.cc/K9V6-A8XC>] (“For the fourth consecutive year, a majority of Americans (51%) identify as ‘pro-choice,’ while 43% say they are pro-life. Between 2007 and 2021, no more than 50% of Americans identified as ‘pro-choice.’”).

³⁰⁴ People who are denied access to abortion on average suffer a number of adverse impacts, including worsening economic status, greater likelihood of remaining with a violent partner, greater health risks, and less stable parenting conditions for existing children. DIANA GREENE FOSTER, *THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION 18–19* (2020).

³⁰⁵ The mainstream reproductive rights movement has been criticized by reproductive justice advocates for its failure to advocate for social justice, as evidenced by the reproductive rights movement’s commitment to the neo-liberal concept of “choice” and its failure to engage in sustained advocacy against the Hyde Amendment. See, e.g., Dorothy Roberts, *Reproductive Justice, Not Just Rights*, DISSENT (Fall 2015), <https://dissentmagazine.org/article/reproductive-justice-not-just-rights/> [<https://perma.cc/5BRL-92BY>].

³⁰⁶ See, e.g., LORETTA J. ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* 65–66 (2017); Gemma Donofrio, *Exploring the Role of Lawyers in Supporting the Reproductive Justice Movement*, 42 N.Y.U. REV. L. & SOC. CHANGE 221, 224–25 (2018) (noting goal of reproductive justice movement is to ensure that “all people can exercise the rights and access the resources they need to thrive and to decide if, when, and how to create and sustain their families with dignity, free from discrimination, coercion, or violence” (quoting *What is RJ?*, IF/WHEN/HOW LAWYERING FOR REPROD. JUST., <https://www.ifwhenhow.org/about/what-is-rj/> [<https://perma.cc/LR49-BFBL>])).

³⁰⁷ See Bianca Hall, Cynthia Akwatu & Antoinette Danvers, *Reproductive Justice as a Framework for Abortion Care*, 66 CLINICAL OBSTETRICS & GYNECOLOGY 655, 662 (2023)

primarily worked to protect the legality of abortion without ensuring its accessibility, garnering criticism from some reproductive justice advocates.³⁰⁸

Thus, the reproductive rights movement has largely focused on abortion rights and other negative constitutional rights that predominantly benefit those who have the means to take advantage of them.³⁰⁹ Reproductive justice, by contrast, emphasizes the government's responsibility to ensure meaningful reproductive choice, which includes both the ability to parent and the right not to parent.³¹⁰ As Loretta Ross and Rickie Solinger explain, historically, "women of color were largely seen as *objects* of reproductive control by family planners, elected officials, demographers, and eugenicists"; the reproductive justice framework, however, "demonstrated the agency of women color and the power of [that] movement to produce new theories, new knowledge, and new forms of activism."³¹¹ Indeed, some reproductive justice organizations have sought to make self-managed abortion (abortion outside the formal medical system) more accessible.³¹² They have also led efforts to increase access to non-medical health care providers and settings, such as doulas and birthing centers.³¹³

Focusing on providers and medical expertise rather than patients puts patients' life circumstances on the sidelines and makes claim for access to resources to make truly autonomous reproductive decisions almost invisible. And focus on abortion as primarily a medical procedure sidelines the distinctly non-medical claims of individuals to access public funding so that they can create the families they wish to have. Indeed, ironically, the medicalized approach may even minimize the actual physical health impacts of pregnancy: Decentering the voice of the pregnant person and their experience makes it

(advocating patient-centered framework for clinicians seeking to support reproductive justice).

³⁰⁸ See Cynthia Soohoo, *Reproductive Justice and Transformative Constitutionalism*, 42 CARDOZO L. REV. 819, 825 (2021) (summarizing reproductive justice critique of dominant reproductive rights framework, "which emphasizes individual rights and choice within a negative rights tradition"); ASIAN CMTYS. FOR REPROD. JUST., A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS AND REPRODUCTIVE JUSTICE 3–5 (2005) (critiquing reproductive rights and reproductive health frameworks).

³⁰⁹ See, e.g., Roberts, *supra* note 305.

³¹⁰ DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 296 (1998) ("Liberals frame the issue of access to abortion or reproductive technologies, for example, as freedom from government interference with private decisions to use them, rather than a claim to public resources to make these options truly available."); see also Donofrio, *supra* note 306, at 226.

³¹¹ ROSS & SOLINGER, *supra* note 306, at 68; see also Colker, *supra* note 183, at 209–10 (noting that some Black women mistrust formal medical system, particularly when it comes to reproductive health care due to history of exploitation and negative personal experiences with clinical care).

³¹² Lindgren, *supra* note 298, at 359–60; see B. Jessie Hill, *De-Medicalizing Abortion*, 22 AM. J. BIOETHICS 57, 58 (2022). Unlike abortions performed in hospitals or clinics, self-managed abortion can be performed at home, sometimes accompanied by a non-physician support person. *Id.*

³¹³ Julie Johnson Searcy, Ellen Block & Angela N. Castañeda, *Strategic Advocacy: Doula Care, Liminality, and Reproductive Justice*, 60 STUD. COMP. INT'L DEV. 863, 877–80 (2024).

difficult to highlight the very real, demanding, highly individual physical experience of pregnancy. Instead, pregnancy becomes reduced to terms such as “uterus” and a listing of medical conditions, such as ectopic pregnancy and preeclampsia.³¹⁴ This framing reduces even the individual experience of pregnancy to a set of generic medical terms, rather than viewing it as a part of an individual’s life course and self-determination.³¹⁵

The medicalization of abortion rights, driven in part by the strategic decision to shape litigation around substantive due process claims brought by third-party plaintiffs, thus widened rather than closed the gap between the lawyer-driven reproductive rights movement and the reproductive justice movement. This reaction may have stymied an opportunity for the legal wing of the reproductive rights movement to find common cause with a broader and more diverse set of advocacy organizations, including those with explicit reproductive justice missions. After *Dobbs*, now that the center of gravity for reproductive freedom litigation and activism moved from the federal to the state level, the centralized, lawyer-led reproductive rights movement may benefit from greater connectedness to these nonlawyer groups, many of which operate in a more decentralized, state-based fashion.

IV. IS DEMEDICALIZATION THE ANSWER?

Given the costs of medicalization to the reproductive rights movement, it is reasonable to ask whether the medicalized framework is still the most desirable one for advocates seeking to advance reproductive rights. The overturning of *Roe* and *Casey* provides an opportunity to rethink the meaning and scope of reproductive freedom, as well as to consider fresh strategies that may avoid mistakes of the past. As the history of abortion rights demonstrates, whatever its advantages, the medicalized framing of abortion rights, grounded in substantive due process, has not succeeded in insulating the doctrine from attacks that themselves have been framed in both medicalized and non-medicalized terms. This Part therefore considers whether post-*Dobbs* advocates should focus less on medical framing and medical expertise in future work to restore or retain abortion rights.

³¹⁴ See, e.g., *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 926 (9th Cir. 2004).

³¹⁵ See Colker, *supra* note 183, at 157 (“[Privacy arguments] make[] it appear as if the pro-life movement is standing on higher moral ground because it is concerned about broad social welfare while feminists are concerned about liberal individualism and not social welfare.”).

A. Arguments Against Demedicalization

As others have pointed out, greater demedicalization of abortion in the legal domain has not always entailed empowering abortion seekers.³¹⁶ Ironically, while *Roe* focused primarily on the physician and utilized perhaps the most medicalized discourse, it set forth a legal standard that was significantly more protective of reproductive autonomy than that adopted by the Court in *Casey*, which embraced more equality-focused rhetoric.³¹⁷ Indeed, as Professor Maya Manian explains, *Casey* shifted control over pregnant people's decision-making away from doctors, but handed it to courts by inviting more legal regulation of abortion, the constitutionality of which was then repeatedly evaluated by courts under an amorphous legal standard.³¹⁸ Therefore, Manian concludes, while medicalization sometimes protects patients' access to abortion because it essentially delegates oversight of those decisions to doctors, "abortion jurisprudence does not allow women to exercise decisional autonomy without supervision by either medicine or law."³¹⁹ To counter this problem, Manian advocates for a medicalized approach to abortion that nonetheless centers and empowers vulnerable pregnant people rather than physicians. She argues for applying a "health justice" lens to abortion rights.³²⁰ This approach, which Manian defines as "an emerging framework for eradicating unjust health disparities . . . caused by discrimination, poverty, and other forms of subordination," infuses medicalization with a concern for equality.³²¹ According to Manian, this approach would have many salutary effects, including a renewed focus on public health and social justice concerns, as it seeks to address numerous factors that contribute to health, some of which—such as poverty and other social factors—are not purely physiological or medical.³²²

Other recent scholarship also argues for a health-justice approach to reproductive and other civil rights.³²³ The health-justice approach can be understood as a form of medicalization that moves power out of the medical

³¹⁶ Manian, *supra* note 10, at 279–80.

³¹⁷ *Id.*

³¹⁸ *Id.* at 288–89.

³¹⁹ *Id.* at 298; *see also* Colker, *supra* note 66, at 257 ("Although health-care providers are the named plaintiffs in the *Dobbs* lawsuit and the only entities directly subjected to the law's reach, the Court never explores how this statute, and the overturning of *Roe*, implicates health care services in states that banned abortion.").

³²⁰ Manian, *supra* note 10, at 261.

³²¹ *Id.* at 310 (quoting Emily A. Benfer et al., *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19*, 19 YALE J. HEALTH POL'Y L. & ETHICS 122, 126–27 (2020)).

³²² *Id.* at 307–20.

³²³ *See, e.g.*, Manian, *supra* note 10, at 307–08; Katie Watson, *The Ethics of Access: Reframing the Need for Abortion Care as a Health Disparity*, 22 AM. J. BIOETHICS, 22, 27–28 (2022); Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 806 (2020); *cf.* Craig Konnoth, *Medicalization and the New Civil Rights*, 72 STAN. L. REV. 1165, 1212–13 (2020) (arguing that medicalized framing can help advance civil rights claims).

establishment and places it in the hands of public health professionals and marginalized groups. This scholarship emphasizes social determinants of health—such as access to employment, education, safe living conditions, and discrimination—in considering the relationship between law or policy and the health of individuals or populations.³²⁴ For example, Professor Katie Watson argues that access to abortion should be reframed as a health disparity, both because unintended pregnancy affects only women and, more importantly, because it disproportionately affects people of color and people with low incomes.³²⁵ Professor Rachel Rebouché argues that access to abortion should be placed in a broader framework grounded in human rights and reproductive justice that addresses structural barriers to accessing reproductive health care—albeit with a healthy dose of skepticism about whether these goals can be achieved through the courts.³²⁶ Others have made similar pitches.³²⁷

There are nonetheless important lessons to be gleaned from this Article's historical narrative describing and explaining the reasons for the medicalization of abortion rights. First, medicalization has proven advantageous to abortion advocates for several reasons relating to the structure and development of reproductive rights litigation, including that it is most compatible with the substantive due process framework and that it allows litigators to rely on third-party plaintiffs.³²⁸ However, the choice to adopt and entrench this medicalized framework for litigation has been a strategic choice and not an inevitable one, and it has become so dominant in large part due to the need for a centralized litigation strategy.

Second, while strategic medicalization has led to a number of legal victories, as the trajectory of the Supreme Court's case law has demonstrated, it has not guaranteed access—much less equitable access—to abortion.³²⁹ On one hand, medicalization treats the authority of the medical profession as a sort of counterweight to the authority and power of courts and legislatures. Medicalization does not, however, render abortion rights immune to attack. Instead, hostile courts have used strategies of overmedicalization or strategic demedicalization in response to abortion advocates' medicalized framing. In this way, courts have increased their own authority over individuals' reproductive decisions at the expense of medical professionals' or individuals'.³³⁰

In the wake of *Dobbs*, it may be time for advocates to reconsider this strategy, both because it has not succeeded in protecting abortion rights, and

³²⁴ See sources cited *supra* note 323.

³²⁵ Watson, *supra* note 323, at 23–24; cf. Michelle Oberman, *Motherhood, Abortion, and the Medicalization of Poverty*, 46 J.L. MED. & ETHICS 665, 666 (2018) (stating that “poverty under-girds the entire reproductive life cycle” for low-income individuals).

³²⁶ Rebouché, *supra* note 143, at 591–96.

³²⁷ See Manian, *supra* note 10, at 307–08; Watson, *supra* note 323, at 27–28; Harris & Pamukcu, *supra* note 323, at 809.

³²⁸ See *supra* Part II.

³²⁹ See *supra* Part I.B.

³³⁰ Colker, *supra* note 66, at 259 (“Both overmedicalization and demedicalization suffer from the same problem: leaving pregnant people out of the analysis.”).

because some of the underlying premises of this strategy are no longer true. In particular, now that abortion policy has been returned to the states, a centralized strategy is neither possible nor desirable.³³¹ Indeed, while some federal action was taken to protect reproductive rights in the wake of *Dobbs*,³³² its impact has been limited and its future uncertain. The Supreme Court's ruling in *Loper Bright Enterprises v. Raimondo*, holding that courts no longer need to defer to agency expertise, may imperil administrative agency rules protecting reproductive health care access, giving further reason to doubt the wisdom of a centralized federal strategy.³³³ Indeed, as an amicus brief filed in *Loper Bright* indicated, numerous federal regulations—including those relating to health care privacy, emergency abortions, abortion medication access, and comprehensive options counseling by federally funded family-planning centers—may be on the chopping block after *Loper Bright*.³³⁴

As Part III.B outlines, abortion rights advocates may be better served by a heterogenous strategy of selective medicalization and demedicalization that advances a multitude of different claims and relies on various sorts of plaintiffs, taking advantage where possible of unique features of law, culture, and history in various states. While describing a comprehensive fifty-state strategy for vindicating abortion rights in the post-*Dobbs* era is beyond the scope of this analysis, the rest of this Article sketches in broad strokes what a selective and decentralized strategy might look like.

B. Strategic Medicalization and Demedicalization

Rather than remaining committed to a medicalized understanding, abortion rights advocates should use medicalizing discourse and framing as tools to advance particular goals. As advocates restart the fight for recognition of abortion rights in various states, the most advantageous approach will be one that leaves room for different kinds of claims, plaintiffs, and narratives.

³³¹ Cf. David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 9 (2023) (“[T]he heterogeneity that characterized abortion regulation for the past half century will be nothing like the complexity of [the post-*Dobbs* landscape].”).

³³² The Biden-Harris Administration took several regulatory actions with respect to health care privacy, access to the abortion medication mifepristone, and attempting to require emergency rooms that receive Medicare funds to provide emergency abortions. See, e.g., *Fact Sheet: Biden-Harris Administration Continues the Fight for Reproductive Freedom*, WHITE HOUSE (Mar. 7, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/03/07/fact-sheet-biden-harris-administration-continues-the-fight-for-reproductive-freedom/> [<https://perma.cc/7TBM-A88K>].

³³³ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024) (“The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA.”).

³³⁴ Brief of Christian Employers Alliance as Amicus Curiae Supporting Petitioners at 7–21, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024) (No. 22-451).

1. *Legal Claims*

Post-*Dobbs*, a substantial amount of abortion rights litigation is being initiated under state constitutions. In the short-term, any attempt to recreate the federal constitutional right to abortion by locating it in a different constitutional provision or doctrine is likely a non-starter. However, some of the claims described here may find sympathetic audiences in state courts, relying on analogous state constitutional provisions.³³⁵ State constitutions may be interpreted differently from the federal Constitution even when they contain similarly-worded provisions, creating an opportunity to urge new interpretations of concepts such as due process and equal protection.³³⁶ A strategic medicalization approach would allow advocates to take advantage of unique features of particular state constitutions or particular precedents unique to those states. For example, an approach firmly grounded in the language of medical “privacy” rather than in “liberty” might work well in states that have recognized a constitutional right to privacy.³³⁷

Other states have provisions—initially adopted as a symbolic form of resistance to the Affordable Care Act’s individual health insurance mandate—that protect healthcare freedom. These provisions on their face appear to protect a right to abortion access, and advocates have had some success in relying on them. For example, in Wyoming, a state trial court found that the state’s constitutional guarantee that “[e]ach competent adult shall have the right to make his or her own health care decisions,” according to its “plain and ordinary meaning,” protected the right to access abortion.³³⁸ Although the Wyoming legislature subsequently passed a new law explicitly stating that abortion was not health care, the trial court rejected this attempt to make an end-run around the constitution’s clear text, noting that even the legislature used medical terminology in its abortion regulations, and that Wyoming’s abortion ban itself, which included an exception for abortions to save the life

³³⁵ See, e.g., JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 16–21 (2018) (arguing for consideration of state constitutions by lawyers seeking to vindicate or expand civil rights).

³³⁶ *Id.*

³³⁷ See JON L. MILLS, PRIVACY: THE LOST RIGHT 339–41 (2008) (listing ten states that protect a right to privacy in their constitutions). Some state courts have recognized a right to privacy in their state constitutions even in the absence of specific privacy protections. See, e.g., *Right to Choose v. Byrne*, 450 A.2d 925, 933 (N.J. 1982) (observing right to privacy is grounded in constitutional rights to life, liberty, safety, and happiness); *Moe v. Sec’y of Admin. & Fin.*, 417 N.E.2d 387, 399 (Mass. 1981). Some states, by contrast, have adopted constitutional provisions indicating that the right to privacy does *not* include a right to abortion. TENN. CONST. art I § 36; W. VA. CONST. art. VI § 57.

³³⁸ Order Granting Prelim. Inj. at 13–15, *Johnson v. Wyoming*, Civ. Action No. 18732 (Wyo. Dist. Ct. Aug. 10, 2022). See generally Julia R. Livingston, *Abortion and Trans Rights Advocates Turn to Unlikely Tool in State Constitutions*, STATE CT. REP. (May 2, 2025), <https://statecourtreport.org/our-work/analysis-opinion/abortion-and-trans-rights-advocates-turn-unlikely-tool-state> [<https://perma.cc/R9CC-ZMDQ>] (discussing trans rights and abortion advocates’ use of state constitutional amendments protecting health care freedom, which were originally proposed in response to the Affordable Care Act).

of the pregnant person, “acknowledges the medical necessity of abortion in the lives of Wyoming women.”³³⁹

On the other hand, advocates may wish to revisit some legal framings that fell by the wayside after *Roe*, such as sex equality claims. While it is exceedingly unlikely that the Supreme Court will hold that abortion bans violate the right to equal protection anytime soon, state courts may decide differently.³⁴⁰ Before *Roe*, abortion rights advocates regularly argued, viewing abortion in a nonmedical frame, that “taking control over pregnancy from women not only took control over women’s bodies but also took control over women’s lives in matters of sex, health, family relations, education, work, and politics.”³⁴¹ In addition to centering the pregnant person rather than the medical professional, an equal protection approach has other advantages. Perhaps most importantly, it places abortion rights firmly within an intersectional framework, as it allows advocates to highlight the ways in which abortion restrictions disproportionately affect not only women but also people of color, people with low incomes, people with disabilities, and other marginalized groups.³⁴² Likewise, a sex-equality approach may reinforce claims for protection of individuals from discrimination based on sexual orientation and gender identity. This approach has the advantage of allowing advocates to broaden their political coalition beyond those who prioritize access to abortion—which includes mostly middle- and upper-class white women.

Similarly, advocates in some states—particularly those where abortion is all but completely banned—are revisiting religious freedom arguments for abortion rights, and there are reasons to think the time is ripe to make such claims. In recent years, the Supreme Court has shown greater sympathy for religious freedom arguments, requiring the government to treat religiously-motivated conduct as favorably as secular conduct.³⁴³ Sometimes referred to as a “most-favored nation” requirement, this approach suggests that virtually any time a law forbidding certain conduct makes an exception allowing that conduct for any secular reason, it must also allow the conduct to occur for religious reasons, unless the government can show that the law is narrowly tailored to advance a compelling government interest, in a way that is not

³³⁹ Order Granting Mot. for Temp. Restraining Order at 22, *Johnson v. Wyoming*, Civ. Action No. 18853 (Wyo. Dist. Ct. Apr. 17, 2023). The trial court subsequently granted summary judgment to the plaintiffs, and the Wyoming Supreme Court affirmed. *Johnson v. State*, No. 2023-CV-18853, 2024 WL 5456519, at *21 (Wyo. Dist. Nov. 18, 2024), *aff’d*, 582 P.3d 380 (Wyo. 2026).

³⁴⁰ See, e.g., *Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Hum. Servs.*, 309 A.3d 808, 867 (Pa. 2024) (holding that exclusion of abortion services from state’s public insurance program constitutes sex discrimination).

³⁴¹ Franklin & Siegel, *supra* note 144, at 26.

³⁴² Marc Spindelman, *Dobbs’ Sex Equality Troubles*, 32 WM. & MARY BILL RTS. J. 117, 176 (2023) (suggesting that *Dobbs* may be provoking more intersectional equality movement that extends well beyond traditional movement for reproductive rights).

³⁴³ Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299, 2322 (2023).

undermined by the existence of secular exceptions.³⁴⁴ Since many abortion bans contain exceptions, including for rape and incest, they arguably must also allow abortion that is motivated by the pregnant person's religious beliefs—unless the state can produce a compelling rationale for making the distinction.

For another reason, too, religious freedom arguments may be more powerful post-*Dobbs*. Before *Dobbs*, states could not ban abortion entirely; they could only regulate it in various ways. Thus, those who wished to challenge abortion restrictions under the Religion Clauses had to show that the challenged law—which by definition merely regulated rather than banned abortion—substantially burdened their religiously motivated decision to seek an abortion. For example, in one widely publicized case, a member of a Satanic Temple in Missouri argued that a law requiring her to receive certain state-provided information about abortion before having the procedure violated both the Establishment Clause and the Free Exercise Clause.³⁴⁵ She argued that the state-mandated information contained statements that reflected a particular religious viewpoint and that being forced to receive this information burdened her own religious exercise. The Eighth Circuit Court of Appeals was not convinced on either count.³⁴⁶ However weak or strong such claims might have been pre-*Dobbs*, the existence of flat-out bans on abortion in numerous states post-*Dobbs* opens up a greater possibility of conflict between individuals' religious beliefs and state abortion laws. While it may be difficult to show that being forced to receive state-mandated information before an abortion violates one's religious exercise, it is far less difficult to show that a total ban on abortion conflicts with one's religiously motivated decision to seek or provide one.

Of course, the same caveats apply to religious freedom claims as to equal protection claims. The Supreme Court, notwithstanding its current enthusiasm for religious freedom, is unlikely to embrace the First Amendment as an alternate path to protection for abortion rights.³⁴⁷ However, religious freedom arguments in support of abortion rights may resound with the public. Religiosity is often intertwined with attitudes toward, and decisions about, abortion.³⁴⁸ Indeed, the early abortion rights movement recognized this reality, as activists often framed abortion rights in the language of conscience.³⁴⁹ And religious freedom arguments de-emphasize the medical aspects of abortion and the role

³⁴⁴ *Id.* Or, to be more precise, the Court will apply strict scrutiny to a law that allows conduct to occur for secular but not religious reasons.

³⁴⁵ *Doe v. Parson*, 960 F.3d 1115, 1119 (8th Cir. 2020).

³⁴⁶ *Id.* at 1119–20.

³⁴⁷ Schwartzman & Schragger, *supra* note 343, at 2323.

³⁴⁸ Amy Adamczyk, *Understanding the Effects of Personal and School Religiosity on the Decision to Abort a Premarital Pregnancy*, 50 J. HEALTH & SOC. BEHAV. 180, 192 (2009).

³⁴⁹ Sepper, *supra* note 7, at 184 (“The fact that decisions to conceive, carry, or end a pregnancy could be decisions of conscience was so commonly understood that the early abortion rights movement debated whether to use the term ‘choice’ or ‘conscience.’”).

of medical professionals, while foregrounding the role of pregnant individuals as moral agents.³⁵⁰ Thus, making these arguments—and perhaps even losing on them in court—may nonetheless pay dividends for abortion rights.

Finally, abortion rights advocates have also begun, with some success, to advance claims grounded in state constitutional rights to life and health.³⁵¹ These claims may be understood narrowly, in a medicalized framework that seeks simply to carve out particular health conditions as requiring exemption from a state's near-total abortion ban, drawing on medical expertise and emphasizing the need to rely on physicians' specialized knowledge and expertise to manage the wide and unpredictable array of situations that can arise during a pregnancy.³⁵² The broader understanding would rely on a demedicalized concept of "life" that draws on the natural law and human rights traditions, conceptualizing the right to life as a right to choose one's own life course and to live life with dignity.³⁵³ There is room for both versions of the right to life in abortion rights litigation, and very little benefit in sticking with one definition, as different meanings may advance different kinds of claims. Indeed, abortion opponents have long recognized the power of this ambiguity—at times relying on a narrow understanding of the right to life to argue for a fetus's or embryo's right to bare physiological existence, and at the same time trading on "thicker" moral understandings of life—for example, by speaking of "innocent" life or "infant" life to evoke particular images and emotional responses in the audience.³⁵⁴

2. *Forms of Legal Advocacy*

Reliance on physicians and clinics brings powerful strategic legal advantages,³⁵⁵ and, therefore, this approach should not be abandoned. At the same time, the moment may be ripe to bring litigation that involves different

³⁵⁰ Indeed, Olivia Roat describes how the Clergy Consultation Service "helped open the nation's first freestanding abortion clinic, which provided an inviting atmosphere, low-cost services, and compassionate care." Roat, *supra* note 141, at 38. They also fought against early TRAP regulations, which unnecessarily medicalized clinics, such as a New York City rule requiring clinics to transform into "mini-hospitals." *Id.*

³⁵¹ See, e.g., Okla. Call for Reprod. Just. v. Drummond, 526 P.3d 1123, 1130 (Okla. 2023) (holding that Oklahoma constitutional rights to "life" and "liberty" provide "basis for protecting a pregnant woman's right to terminate a pregnancy in order to preserve her life").

³⁵² See generally Hill, *supra* note 302, at 72–73 (stating that advocates usually interpret exceptions for life-saving abortions quite narrowly, as applying only where medical condition threatens to cause imminent death).

³⁵³ See Martha F. Davis, *Annotated Bibliography: "Persons Born" and the Jurisprudence of "Life"*, 104 B.U. L. REV. ONLINE 161, 163–64 (2024); Hill, *supra* note 302, at 69–71.

³⁵⁴ Borgmann, *supra* note 301, at 585 ("The term 'life,' and its variants 'human life' or 'human being,' are slippery terms, and conservatives have skillfully exploited their ambiguities to suggest that the embryo or fetus is a person without committing fully to this view.").

³⁵⁵ See *supra* Part II.B.

kinds of plaintiffs, who are more likely to focus courts' and the public's attention on pregnant people and their needs. To alleviate the need to rely upon individual abortion seekers, advocates could work with non-profit organizations that provide funding and other forms of assistance to people seeking abortions (often called "abortion funds"). Similarly, providers of health care, counseling, and emotional support other than physicians and clinics—such as abortion doulas, social workers, and perhaps in some cases midwives—could serve as plaintiffs in cases challenging abortion bans.³⁵⁶ These individuals and groups would likely still be asserting third-party standing—thus preserving the many advantages of that approach—but would likely be well-positioned to provide evidence focusing on the stories of pregnant people.³⁵⁷ Similarly, religious leaders who feel religiously compelled to counsel patients to seek abortions in certain circumstances could seek to assert some claims on behalf of themselves and their congregants.³⁵⁸

For example, in *Yellowhammer Fund v. Marshall*, a reproductive justice organization that provides funding for patients who cannot afford to access abortion, collaborated with two clinics and a physician to challenge the Alabama Attorney General's threat of prosecution directed toward those who help Alabamians access abortion in another state.³⁵⁹ Since constitutional challenges generally require only one plaintiff to have standing in order to reach the merits of a case, the strategy of including—and foregrounding as the named plaintiff—a non-clinic, non-physician party could be replicated in

³⁵⁶ Even pre-*Dobbs*, some cases were brought with non-provider plaintiffs. See, e.g., *SisterSong Women of Color Reprod. Just. Collective v. Kemp*, 472 F. Supp. 3d 1297, 1307 (N.D. Ga. 2020) (challenging Georgia's abortion ban, with the reproductive justice organization SisterSong as a plaintiff), *rev'd and vac'd sub nom.*, *SisterSong Women of Color Reprod. Just. Collective v. Governor of Georgia*, 40 F.4th 1320 (11th Cir. 2022); *Nat'l Ass'n for Advancement of Colored People v. Horne*, No. CV13-01079-PHX-DGC, 2013 WL 5519514, at *2 (D. Ariz. Oct. 3, 2013) (challenging Arizona law banning sex- and race-selective abortions, with civil rights organizations as plaintiffs), *aff'd*, 626 F. App'x 200 (9th Cir. 2015). This Author was counsel in litigation challenging an Ohio city's anti-abortion ordinance, representing the state's abortion fund and the state chapter of the National Association of Social Workers as Plaintiffs. See Complaint at 29, *Nat'l Ass'n of Soc. Workers v. City of Lebanon*, No. 22-CV-258 (S.D. Ohio May 11, 2022). The case settled without any published ruling. See also *Fund Tex. Choice v. Paxton*, 658 F. Supp. 3d 377, 384 (W.D. Tex. 2023) (describing a challenge to Texas abortion restrictions brought by non-profit abortion funds and one physician); *State v. Zurawski*, 690 S.W.3d 644, 653–54 (Tex. 2024) (noting that the challenge to Texas's abortion laws was brought by several physicians and two doctors); cf. Russell K. Robinson & David M. Frost, "Playing It Safe" with Empirical Evidence: Selective Use of Social Science in Supreme Court Cases About Racial Justice and Marriage Equality, 112 Nw. U. L. REV. 1565, 1568 (2018) (arguing that choice of certain type of "safe" plaintiff in cases challenging same-sex marriage bans affected Supreme Court's ultimate holding and rationale).

³⁵⁷ *Yellowhammer Fund v. Att'y Gen.*, 733 F. Supp. 3d 1167, 1184 (M.D. Ala. 2024).

³⁵⁸ Lawsuits asserting a religious freedom right to abortion have already begun to appear. See Alice Miranda Ollstein, *The Sleeper Legal Strategy That Could Topple Abortion Bans*, POLITICO (June 21, 2023, at 19:30 ET), <https://www.politico.com/news/2023/06/21/legal-strategy-that-could-topple-abortion-bans-00102468> [<https://perma.cc/MD6R-R7SK>].

³⁵⁹ *Yellowhammer Fund*, 733 F. Supp. 3d at 1174.

future cases.³⁶⁰ The court has affirmed the plaintiffs' standing in rejecting a motion to dismiss.³⁶¹

Moreover, given that medicalization, like legal advocacy, is fundamentally a discursive practice—albeit one that is bound up with real-world consequences—the choice to medicalize or demedicalize abortion rights will be reflected in the terminology advocates use. Thus, advocates may consider whether to use medicalizing or demedicalizing language in relation to abortion, depending on the broader legal strategy they are pursuing. For example, one notable terminological shift has been using the term “procedural abortion” instead of “surgical abortion” (as contrasted with medical or medication abortion). As one court explained in 2021:

The terms “surgical abortion,” “procedural abortion,” and “abortion procedure” are used interchangeably in modern medicine. Although many in the medical field still use the term “surgical abortion” to refer to all abortions that use instruments rather than medications, [non-medication] abortions are more accurately referred to as “procedural abortions” or “abortion procedures,” because neither entail what is commonly considered to be a “surgery,” i.e., an incision into bodily membranes.³⁶²

The term “procedural abortion” is thus a sort of partial demedicalization of abortion, which emphasizes that abortion does not involve the sort of methods that are generally associated with surgery and performed in hospitals. Framing abortion in this way may assist advocates in arguing against stringent requirements such as only performing abortions in so-called “ambulatory surgical centers” or hospitals.³⁶³

On the other hand, a variety of terms have been deployed to refer to the individuals whose pregnancy is at issue. Initially, courts referred to the “mother” or the “woman.”³⁶⁴ The word “mother” is particularly loaded, as it implies that the fetus or embryo is already a child. And using the word

³⁶⁰ See, e.g., *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 52 n.2 (2006) (“[T]he presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement.”).

³⁶¹ *Yellowhammer Fund*, 733 F. Supp. 3d at 1179–85.

³⁶² *Hopkins v. Jegley*, 510 F. Supp. 3d 638, 654 n.3 (E.D. Ark. 2021), *vac’d and remanded*, No. 21-1068, 2022 WL 18228718 (8th Cir. July 12, 2022).

³⁶³ *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582, 619 (2016), *as revised* (June 27, 2016), *and abrogated by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2315 (2022) (noting that abortions “typically involve either the administration of medicines or procedures performed through the natural opening of the birth canal, which is itself not sterile” and “do not use general anesthesia or deep sedation,” making certain requirements that typical apply to surgical centers unnecessary for abortion clinics). *But cf.* *Planned Parenthood S. Atl. v. Stein*, 742 F. Supp. 3d 472, 477 (M.D.N.C. 2024) (“[North Carolina’s] requirement that surgical abortions after 12 weeks of pregnancy be performed in a hospital does not violate the plaintiffs’ constitutional rights to equal protection or due process.”).

³⁶⁴ Justice Harry Blackmun’s majority opinion in *Roe* and the plurality opinion in *Casey* used both “woman” and “mother.” *Roe v. Wade*, 410 U.S. 113, 118, 120 (1973),

“woman” may tend to erase the existence of transmen, who often can become pregnant and need abortions. Thus, more recently, advocates and some courts have adopted more gender-neutral language, using instead the medicalized term “patient” or the less medical but wordier “pregnant person” or “pregnant individual.”³⁶⁵ Advocates may choose to mobilize particular terms in particular contexts, depending on whether their strategy favors a medicalized approach or not.³⁶⁶

It may also be time to tell a new historical narrative about pregnancy and abortion. Advocates need not continue to accept the historical framing of both the *Roe* and *Dobbs* Courts, which placed the history of abortion firmly in the context of the nineteenth-century physicians’ campaign for their own professionalization and for the criminalization of abortion.³⁶⁷ Thus, before telling the history of abortion in America, a decision must be made as to *what* the history is: Is it a history of medicalized abortion, which focuses on physicians and their drive for professionalization, or a history of health care pertaining to pregnancy, which would acknowledge the role of non-physicians—many of whom were women—in pregnancy care? The *Roe* and *Dobbs* Courts assumed they were telling the history of abortion, without justifying its framing in terms of physicians and their roles. But an alternative history could embrace the tradition of pregnancy, childbirth, and abortion being managed by and among pregnant women themselves, usually with the help of non-professionals such as midwives, doulas, and family members, and draw on their own bodily knowledge and experiences.³⁶⁸ Or, it could trace the history of women’s equality—from the era of nineteenth-century abortion bans before women acquired the vote or to independent legal status, through the new constitutional rights and liberties for women that the Court recognized in the second half of the twentieth century.³⁶⁹

overruled by Dobbs, 142 S. Ct. 2228; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

³⁶⁵ See, e.g., *Individual Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1*, 233 N.E.3d 416, 450 (Ind. Ct. App. 2024); *Matsumoto v. Labrador*, 701 F. Supp. 3d 1032, 1061 (D. Idaho 2023); *Texas v. Becerra*, 89 F.4th 529, 536 (5th Cir. 2024).

³⁶⁶ But see Julia Neuberger, *Let’s Do Away with “Patients”*, 318 BRIT. MED. J. 1756, 1756 (1999) (arguing that “patient,” which derives from Latin word for suffering, constructs individuals seeking health care as passive and ill).

³⁶⁷ See *supra* Part I.B.

³⁶⁸ Cf. STARR, *supra* note 297, at 32 (explaining that prior to professionalization of medicine in nineteenth century, women were largely charged with responsibility for providing health care at home).

³⁶⁹ *Dobbs*, 142 S. Ct. at 2323–27 (Breyer, J., dissenting) (recounting evolving understandings of women’s legal status).

CONCLUSION

Commentators have criticized the “medical model” of abortion rights as insufficiently attentive to the autonomy and equality interests of individual pregnant people.³⁷⁰ But now that *Roe* and *Casey* have been overruled, the moment has arrived in which new frameworks for abortion rights can and should be tested, particularly at the state level. This Article thus explains how and why abortion rights became medicalized in the first place and then attempts to sketch out some broad principles for future litigation based upon strategic medicalization and demedicalization of abortion rights. Experimenting with multiple new approaches to abortion rights in a decentralized way has become an imperative in the post-*Dobbs* world. And while in some respects this new strategy may bring new and unfamiliar risks, in many states, there is now little left for abortion rights advocates—and patients—to lose.

³⁷⁰ Many of these critiques have been around for quite a long time. See, e.g., LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 45 (1990); LUKER, *supra* note 61, at 33 (noting that in late nineteenth and early twentieth centuries, “physicians wanted to create a category of ‘justifiable’ abortion and to make themselves the custodians of it”); Siegel, *supra* note 8, at 273–79.

