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Jessica Matsuda
Washington and Lee University School of Law, matsuda.s23@law.wlu.edu

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Jessica Matsuda*

Abstract

State legislatures across the nation are continually targeting the rights of transgender individuals with a variety of laws affecting everything from bathrooms to medical care. One particularly invasive type of legislation, the gender-affirming healthcare ban, seeks to prohibit all forms of healthcare that align a person's physical traits with their gender identity for individuals under eighteen. Bans like this severely impede the treatment necessary for transgender youth suffering from gender dysphoria, which carries serious physical consequences and sometimes fatal psychological repercussions. As legislative sessions pass, more and more states are introducing and actually enacting these bans.

Striking down these bans as constitutionally impermissible is vital to ensuring that transgender individuals have equal access to healthcare. As litigators bring important and crucial lawsuits to challenge these bans under the federal Constitution, this Note proposes and explores options under the lesser-known

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but highly valuable state constitution. Although often ignored, many state constitutions contain enforceable rights that could protect the existence of gender-affirming healthcare, especially if federal constitutional protection is denied at the Supreme Court. This Note specifically dives into the state constitutional right to health as an avenue for greater protection, and argues that the general principles of judicial federalism should protect the rights of transgender individuals in this context. As the federal landscape changes, this Note urges litigators to use all the resources available to prevent unwarranted state interference, including previously unenforced state constitutional provisions. State legislators cannot be allowed to violate their own constitutions in the campaign against transgender individuals, and litigators have the ability and obligation to hold them accountable.

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INTRODUCTION

Transgender people have always existed. They traveled to the Virginia territory during the early days of European settlement.[1] They fought for the Union during the Civil War.[2] They led the Stonewall riots.[3] Today, openly transgender leaders serve as government officials at the state and federal level, playing important roles in the growth and prosperity of the nation.[4] Transgender people will continue to exist at every stage of life—no law will ever be able to change this.

Regardless, many states are attempting to legislate transgender individuals out of existence by banning medical care that ensures full and happy lives for transgender youth.[5] Cloaked in language seemingly in defense of children, these

1. *See Life Story: Thomas(ine) Hall*, WOMEN & THE AM. STORY, https://perma.cc/UU36-4PMH (detailing the life of Thomasine Hall, a gender-nonconforming person who came to the colony of Virginia in the 1600s to work on a tobacco plantation).

2. *See* Kritika Agarwal, *What Is Trans History?: From Activist and Academic Roots, a Field Takes Shape*, PERSPECTIVES ON HIST. (May 1, 2018), https://perma.cc/5VG7-VVR6 (describing the story of Francis Clalin Clayton, who "bent gender norms to fight in the US Civil War").

3. *See Marsha Johnson, Sylvia Rivera, and the History of Pride Month*, SMITHSONIAN (June 7, 2021), https://perma.cc/H3JT-35ML (describing the leadership of Marsha P. Johnson and Sylvia Rivera in the Stonewall uprising).

4. *See, e.g.*, Sophie Tatum, *First Openly Transgender State Lawmaker Elected in Virginia*, CNN, https://perma.cc/T93S-K86S (last updated Nov. 8, 2017, 2:50 AM); Katelyn Burns, *Rachel Levine's Historic Confirmation to the Biden Administration, Explained*, VOX, https://perma.cc/UE9L-H32J (last updated Mar. 24, 2021, 6:22 PM) (explaining that President Biden's assistant secretary at the Department of Health and Human Services, Rachel Levine, is "now the highest-ranking openly transgender government official in US history").

5. *See infra* Part I.C.

gender-affirming healthcare bans prohibit medical professionals from treating minors suffering from gender dysphoria with procedures that alter or block physical sex characteristics.[6] The alleged purpose of these bans is to protect children from the "drastic" consequences of this type of healthcare, with many states invoking their duty to promote the health and safety of the public.[7] This is, of course, illusory.

Gender-affirming healthcare bans are mechanisms to demean and subjugate transgender individuals. They seek to strip away a transgender individual's autonomy while calling into question certain aspects of the medical profession. They do not promote health and do not protect anyone. Quite oppositely, withholding gender-affirming healthcare from transgender youth has serious physical and psychological consequences that can be deadly.[8] Without access to certain medications, transgender minors experiencing puberty are forced to endure permanent physical changes associated with a gender different than that of their identity.[9] And if that minor wishes to transition as an adult, those physical changes can only be reversed with expensive and invasive surgery.[10] The negative psychological consequences caused by this trauma put transgender youth at a high risk of violence, substance abuse, and suicide.[11]

This is unacceptable, and litigators have stepped in to challenge the bans that have managed to become enforceable law.[12] In Arkansas, the first state to successfully enact a gender-affirming healthcare ban, the American Civil Liberties Union (ACLU) quickly filed suit to challenge its constitutionality under the federal Constitution.[13] While this is a necessary and hopefully successful step, litigators need to consider more pathways to protect transgender youth, especially as the U.S. Supreme Court enters an era marked by a

6. *See infra* Part I.C.
7. *See infra* Part II.A.
8. *See infra* Part I.B.
9. *See infra* Part I.B.
10. *See infra* Part I.B.
11. *See infra* Part I.B.
12. *See infra* Part II.A.
13. *See infra* Part II.A.

conservative majority.[14] This Note explores another viable avenue for protection—the often forgotten but incredibly promising state constitution. More specifically, this Note argues that the right to health existing in some state constitutions should strike down gender-affirming bans as impermissible invasions of individual liberty.

This Note lays the groundwork for state constitutional challenges to gender-affirming healthcare bans in five parts. Part I will outline the current knowledge about gender dysphoria and its recommended medical treatment, as well as explain the basics of a gender-affirming healthcare ban.[15] Part II will describe the current litigation surrounding the Arkansas ban and the obstacles that the litigation may face at the Supreme Court.[16] Part III then details the applicable principles of judicial federalism, arguing that state courts could be optimal venues to protect transgender youth from invasive state interference.[17] Part IV explores the possibility of striking down bans with the state constitutional right to health.[18] Finally, as a case study, Part V challenges Montana's proposed gender-affirming healthcare ban by applying the right to health contained in the state's constitution.[19]

I. GENDER-AFFIRMING HEALTHCARE AND ITS OPPOSITION

To understand the benefits and limits of gender-affirming healthcare, a few key terms must be defined. First, the term "transgender" encompasses all individuals whose gender does not match their assigned biological sex at birth.[20] It is an umbrella term that includes persons transitioning from male-to-female or female-to-male, as well as individuals who do not identify with any gender.[21] "Transition" is the process where

14. *See infra* Part II.B.

15. *See infra* Part I.

16. *See infra* Part II.

17. *See infra* Part III.

18. *See infra* Part IV.

19. *See infra* Part V.

20. *Transgender*, *in* ENCYCLOPEDIA OF GENDER AND SOCIETY 843, 843 (Jodi O'Brien ed., 2009).

21. *See* ANTI-DEFAMATION LEAGUE, DEFINITIONS RELATED SEXUAL ORIENTATION AND GENDER IDENTITY 4 (2021), https://perma.cc/TTP5-LQBY

"a person begins living as the gender with which they identify" rather than the sex they were assigned at birth.[22] Depending on the individual, transition "may include changing one's first name and dressing and grooming differently."[23] It may also include medical aspects such as hormone therapy or surgery.[24] A person's transition "is not a one-step procedure," but instead "is a complex process that occurs over a period of time."[25]

A "minor" is defined as a person who has not reached full legal age, which in most states is eighteen years old.[26] A "child" is also anyone under eighteen years old,[27] and an "adolescent" describes anyone between puberty and adulthood.[28] Adolescence typically begins around ten years old.[29] For the purposes of this Note, the term "transgender youth" refers to an adolescent whose gender does not match their birth sex. The next three subparts will explain gender dysphoria and its medical treatment,[30] the consequences of withholding such treatment,[31] and the general structure of a gender-affirming healthcare ban.[32]

(PDF) ("Transgender [is] [a]n umbrella term for people whose gender identity differs from the sex they were assigned at birth.").

22. *Id.*

23. *Id.* at 4–5.

24. *See id.* at 5.

25. *Id.*

26. *Minor*, BLACK'S LAW DICTIONARY (11th ed. 2019).

27. *Child*, MERRIAM-WEBSTER, https://perma.cc/AY6J-C7MR.

28. *Adolescent*, MERRIAM-WEBSTER, https://perma.cc/8HTZ-Y8KW; *Adolescence*, MERRIAM-WEBSTER, https://perma.cc/AGQ8-VQW8.

29. *See Adolescence*, *supra* note 28; *Recognizing Adolescence*, WHO, https://perma.cc/2X22-YBDS (explaining that puberty begins around ten years old in high income countries).

30. *See infra* Part I.A.

31. *See infra* Part I.B.

32. *See infra* Part I.C.

A. *The Treatment of Gender Dysphoria*

Being transgender is not a mental health disorder.[33] Transgender youth are susceptible to gender dysphoria.[34] Gender dysphoria is a mental health condition in which an individual experiences emotional distress caused by a discrepancy between their gender identity and birth sex.[35] According to the Diagnostic and Statistical Manual of Mental Disorders (DSM-5),[36] gender dysphoria in adolescents consists of two criteria: 1) a marked incongruence between one's experienced or expressed gender and their assigned gender; and 2) associated clinically significant distress or impairment areas of functioning.[37] The DSM-5 indicates that adolescents with gender dysphoria will experience at least two of the following: 1) a marked incongruence between one's expressed gender and primary and/or secondary sex characteristics or anticipated secondary sex characteristics; 2) a strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics); 3) a strong desire for the primary and/or secondary sex characteristics of another gender; 4) a strong desire to be of the other gender (or an alternative gender different from one's assigned gender);

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33. Caroline Miller, *Transgender Kids and Gender Dysphoria*, CHILD MIND INST., https://perma.cc/9HZ2-DZLR.

34. *See id.* (stating that the disconnect between a child's experienced gender and their birth sex can result in an acute distress called gender dysphoria).

35. *See* WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 5 (7th ed. 2012) [hereinafter WPATH SOC] (defining gender dysphoria). "Gender dysphoria" was previously known as "Gender Identity Disorder," but was reclassified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5). *Gender Dysphoria Diagnosis*, AM. PSYCHIATRIC ASS'N, https://perma.cc/F3GS-DVVF. Because both terms are treated as generally interchangeable in scholarly work, this Note will use the most updated term.

36. The DSM-5 is the standard tool used by mental health professionals in the United States to diagnose mental health disorders. *See generally* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

37. *Id.* at 452–53.

5) strong desire to be treated as the other gender (or an alternative gender different from one's assigned gender); 6) a strong conviction that one has the typical feelings and reactions of the other gender (or an alternative gender different from one's assigned gender).[38]

Adolescents with gender dysphoria often suffer severe distress caused by the conflict between their expressed gender and their birth sex.[39] This distress is significantly worsened by puberty, the period where an adolescent's body experiences the physical maturation of secondary sex characteristics associated with their birth sex.[40] Many adolescents with gender dysphoria describe this experience as "unbearable."[41] Some adolescents endure this pain at such a high level that "the distress meets the criteria for a formal diagnosis as a mental disorder."[42] It should be noted here, though, that this diagnosis is not a "license for stigmatization."[43] A disorder is something a person might struggle with, not their identity.[44] A transgender person is not inherently disordered by virtue of being transgender; rather, the distress of gender dysphoria can rise to the level of a diagnosable condition for which many treatments are available.[45]

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38. *Id.* at 452.

39. Emily Ikuta, *Overcoming the Parental Veto: How Transgender Adolescents Can Access Puberty-Suppressing Hormone Treatment in the Absence of Parental Consent Under the Mature Minor Doctrine*, 25 S. CAL. INTERDISC. L.J. 179, 211 (2016). Children are assigned their gender the moment they are born, specifically when that assignment is marked on their birth certificate. *See* Emily Maxim Lamm, *Bye, Bye, Binary: Updating Birth Certificates to Transcend the Binary of Sex*, 28 TUL. J.L. & SEXUALITY 1, 2–3 (2019). This process automatically places children "into a binding, binary sex category that may or may not be true to them." *Id.* at 22.

40. *See Puberty*, CLEVELAND CLINIC, https://perma.cc/8M8L-LH2B.

41. Hembree et al., *Endocrine Treatment of Gender-Disphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869, 3880 (2017).

42. WPATH SOC, *supra* note 35, at 5.

43. *Id.*

44. *Id.*

45. *Id.* at 6.

Years of research have produced medical protocols to guide the treatment of gender dysphoria for transgender individuals.[46] The two major organizations to release such guidelines are the Endocrine Society and the World Professional Association for Transgender Health (WPATH). The Endocrine Society is an international professional organization devoted to the clinical practice of endocrinology, a branch of medicine that focuses on the human hormonal system.[47] Its guidelines specifically relate to the treatment of gender dysphoria with medical hormones.[48] WPATH is a multidisciplinary professional organization devoted to promoting evidence-based care, education, research, and advocacy in transgender health.[49] Its main function is to promote the best methods of treatment for transgender individuals by producing its Standards of Care ("WPATH SOC").[50] The WPATH SOC provides clinical guidance for health professionals to assist transgender people based on the "best available science" and "expert professional consensus."[51]

Both of these guidelines explain how gender dysphoria can and should be treated. The three primary categories of treatment options are: 1) psychotherapy to explore gender identity and expression; 2) physical interventions such as hormone therapy or surgery to change sex characteristics; and 3) changes in gender expression and role, which may involve living in another gender role consistent with one's identity.[52] It is important to remember, though, that treatment of gender dysphoria should be individualized—what helps one person may be very different from what helps another.[53] Although some individuals need physical interventions or hormone treatment to mitigate gender dysphoria, others may need neither to live

46. *See* Ikuta, *supra* note 39, at 189 ("Medical guidelines and protocols have been developed to guide the treatment of transsexual, transgender, or gender non-conforming people.").

47. *See Our History*, ENDOCRINE SOC'Y, https://perma.cc/E6RX-VCYK; *All About Endocrinology*, AM. ASS'N CLINICAL ENDOCRINOLOGY, https://perma.cc/Z39J-ZZU5.

48. *See generally* Hembree et al., *supra* note 41.

49. WPATH SOC, *supra* note 35, at 1.

50. *Id.*

51. *Id.* (citation omitted).

52. *Id.* at 9–10.

53. *Id.* at 5.

comfortably.[54] Some individuals need only psychotherapy to reconcile their gender role with their birth sex and do not need to physically change their body.[55]

For many, however, counseling and therapy will not be enough to reduce the distress caused by gender dysphoria. In these cases, the "heart of the problem" is the development of unwanted and permanent sex characteristics that constantly reinforce the conflict between one's gender identity and birth sex.[56] For adolescents facing puberty, physical intervention to suppress sex characteristics may be the only way to "buy time" for them to think about their identity and meaningfully engage in additional therapy.[57] Before any physical interventions are considered for minors, both the WPATH SOC and the Endocrine Society recommend extensive mental health evaluation and an official diagnosis of gender dysphoria.[58] If physical interventions are necessary for treatment, three categories of care become relevant: fully reversible interventions, partially reversible interventions, and irreversible interventions.[59] Collectively, this Note will refer to these interventions as "gender-affirming healthcare."

Fully reversible interventions are the most important for transgender youth, primarily due to the urgency and importance of delaying puberty. Puberty is the period of time where individuals undergo sexual maturation, experiencing the hormonal, physical, and physiological changes associated with

54. *Id.* at 8 (citations omitted).

55. *Id.*

56. Ikuta, *supra* note 39, at 191.

57. *See Dateline: Hormone Treatment 'Buys Time' for Transgender Kids*, NBC NEWS (July 7, 2012), https://perma.cc/TVF4-AFV9 (detailing how Dr. Norman Spack, "one of the first American doctors to treat transgender children with hormone 'blockers,'" asserts that certain health treatments can delay secondary sex characteristics for transgender youth).

58. *See* WPATH SOC, *supra* note 35, at 18 ("Before any physical interventions are considered for adolescents, extensive exploration of psychological, family, and social issues should be undertaken . . . ."); Ikuta, *supra* note 39, at 216 ("The . . . Endocrine Society guidelines stipulate that puberty blockers be administered only after the child has been diagnosed with gender dysphoria . . . and after psychiatric or mental health evaluations.").

59. WPATH SOC, *supra* note 35, at 18.

the transition from childhood to adulthood.[60] For males, this process typically involves the development of secondary sex characteristics like chest and facial hair, deepening of the voice, and a considerable increase in height and mass.[61] For females, secondary sex characteristics may include menstrual periods, breast development, and widened hips.[62] Fully reversible interventions freeze these characteristics before they begin—or advance further—for the individual. This treatment consists of medications, colloquially known as puberty blockers, that suppress or inhibit puberty by blocking the production of estrogen or testosterone.[63]

To receive puberty blockers, adolescents must meet the following criteria set by the WPATH SOC: 1) the adolescent has demonstrated a long-lasting, intense pattern of gender nonconformity or dysphoria; 2) gender dysphoria has emerged or worsened with the onset of puberty; 3) any coexisting psychological, medical, or social problems that could interfere with treatment have been addressed; and 4) the adolescent has given informed consent.[64] Adolescents who meet this criteria can be treated with blockers at the beginning of puberty, when sex characteristics first begin to appear.[65] The Endocrine Society guidelines recommend starting treatment at Stage Two of the Tanner scale of physical development,[66] a method of describing development based on external primary and secondary sex

60. *See* Evan G. Graber, *Physical Growth and Sexual Maturation of Adolescents*, MERCK MANUAL, https://perma.cc/6G3J-5VN2 (last updated Apr. 2021); *supra* notes 28–29 and accompanying text.

61. *See id.*

62. *See id.*

63. *See* WPATH SOC, *supra* note 35, at 18.

64. *Id.* at 19. Additionally, the WPATH SOC recommends that if the adolescent has not reached the age of medical consent, usually sixteen years old, their parents or other caretakers should consent and be involved in supporting the adolescent throughout the treatment. *Id.*

65. *See* S. Giordano, *Lives in a Chiaroscuro. Should We Suspend the Puberty of Children with Gender Identity Disorder?*, 34 J. MED. ETHICS 580, 580 (2008).

66. *See* Hembree et al., *supra* note 41, at 3870 ("We recommend treating gender-dysphoric/gender-incongruent adolescents who have entered puberty at Tanner Stage G2/B2 . . . .").

characteristics.[67] Stage Two usually begins around eleven years old, when there is almost no breast development in girls or genital enlargement in boys.[68] Puberty blockers are most effective in delaying permanent secondary sex characteristics when employed at this point in an adolescent's development.[69]

For adolescents suffering from gender dysphoria, puberty blockers offer significant control over personal gender identity.[70] By suppressing secondary sex characteristics before they are truly wanted, puberty blockers give adolescents time to experience their identity without "becoming trapped in a body that feels alien and unnatural."[71] Delaying puberty is also a crucial part of the diagnosis process itself, as it helps identify children who want to transition.[72] Research on the effectiveness of puberty blockers shows promising results, as recent clinical studies show that suppressing puberty is associated with decreased "behavioral and emotional problems," and significant improvements to the general functioning of study participants.[73]

Adolescents who wish to proceed beyond puberty blockers may be eligible for the second category of treatment available to those suffering from gender dysphoria: partially reversible intervention. Partially reversible interventions frequently include cross-sex hormones that masculinize or feminize the body.[74] Transgender men who transition from female to male take testosterone preparations, while transgender women

67. Mickey Emmanuel & Brooke F. Bokor, *Tanner Stages*, NAT'L LIBR. OF MED., https://perma.cc/K3DA-SZU4 (last updated Dec. 15, 2021).

68. *See id.*

69. *See* Hembree et al., *supra* note 41, at 3881 ("Tanner Stage 2 is the optimal time to start pubertal suppression.").

70. *See* Ikuta, *supra* note 39, at 216 ("For adolescents diagnosed with gender dysphoria, puberty blockers offer them the best solution to their distress by allowing them to feel comfortable and in control of their identities by the time they reach adulthood . . . .").

71. *Id.* (citation omitted).

72. *See* Giordano, *supra* note 65, at 580.

73. Annelou L. C. de Vries & Peggy T. Cohen-Kettenis, *Clinical Management of Gender Dysphoria in Children and Adolescents: The Dutch Approach*, *in* TREATING TRANSGENDER CHILDREN AND ADOLESCENTS: AN INTERDISCIPLINARY DISCUSSION 7, 20 (Jack Drescher & William Byne eds., 2013).

74. WPATH SOC, *supra* note 35, at 20.

transitioning from male to female take estrogen.[75] Under the Endocrine Society's guidelines, adolescents can begin receiving these cross-hormones at sixteen years old.[76] If the adolescent has received puberty blockers up to this point, cross-hormones will belatedly start puberty in the desired gender instead of the individual's birth sex.[77]

After the age of eighteen, further considerations can be made for the last category of physical treatment: irreversible interventions. Irreversible interventions are surgical procedures that change the face or genitalia.[78] These include facial reconstruction surgery to make features more masculine or feminine, chest surgery to remove breast tissue or enhance breast size, and surgery to reconstruct genitalia.[79] The WPATH SOC guidelines recommend that irreversible interventions, particularly genital surgery, only be considered after an individual has turned eighteen.[80] If puberty blockers and cross-hormones have been administered throughout adolescence, surgical solutions pursued in adulthood are much easier to achieve.[81]

States attempting to enact gender-affirming healthcare bans threaten to interrupt this necessary care for transgender youth suffering from gender dysphoria. As the next Subpart explains, the consequences of these bans pose an immense threat to the existence and quality of life of transgender youth.

B. *Physical and Psychological Effects of Delayed Treatment*

Although some state lawmakers believe that the "most advised" method for treating gender dysphoria is "watchful

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75. *See What Is Cross-Sex Hormone Therapy*, INT'L SOC'Y FOR SEXUAL MED., https://perma.cc/3LUS-GXWF.

76. *See* Hembree et al., *supra* note 41, at 3871. The WPATH SOC guidelines provide similar direction. *See* WPATH SOC, *supra* note 35, at 20.

77. *See* Ikuta, *supra* note 39, at 215.

78. *See* WPATH SOC, *supra* note 35, at 21.

79. *Gender Affirmation (Confirmation) or Sex Reassignment Surgery*, CLEVELAND CLINIC, https://perma.cc/CXH5-DKJQ.

80. *See* WPATH SOC, *supra* note 35, at 21 ("Genital surgery should not be carried out until . . . patients reach the legal age of majority in a given country . . . .").

81. *See* Ikuta, *supra* note 39, at 215 ("Later, if surgery ensues, there is much less of the wrong adulthood to undo." (citation omitted)).

waiting,"[82] withholding treatment from transgender youth experiencing gender dysphoria "is not a neutral option."[83] It has serious physical and psychological consequences that not only prolong the harmful distress of gender dysphoria, but contribute to social abuse and stigmatization.[84] In the majority of cases, the possible risks associated with gender-affirming healthcare do not outweigh these consequences.

The adverse effects of delayed treatment on the physical body can be punishing for transgender youth. If allowed to complete its course, puberty is permanent.[85] The process perpetually marks the adolescent as a member of their birth sex, whether or not this matches their gender identity.[86] Without blockers, the physical changes endured during puberty can only be erased by difficult, expensive, and invasive surgery.[87] Even with cross-hormones and surgery, these changes may not be completely correctable.[88] Postoperative transgender people who surgically remove sex characteristics often deal with permanent scars that make it difficult to pass as their legitimate gender.[89] Some characteristics, like height and size, cannot be removed at all.[90]

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82. Ken Schneck, *14 of the Most Memorable Quotes from the HB 454 Hearing to Ban Trans Youth From Accessing Medical Care*, THE BUCKEYE FLAME (Feb. 17, 2022), https://perma.cc/9SVN-3DKB.

83. WPATH SOC, *supra* note 35, at 21 ("[W]ithholding puberty suppression and subsequent feminizing or masculinizing hormone therapy is not a neutral option for adolescents.").

84. *Id.*

85. *See* Giordano, *supra* note 65, at 582 ("It is in fact clear that puberty *cannot be suppressed if it has completed its course*." (emphasis in original)).

86. *See* Stephanie Brill & Jennifer Hastings, *Transgender Youth: Providing Medical Treatment for a Misunderstood Population*, NAT'L WOMEN'S HEALTH NETWORK (July 24, 2015), https://perma.cc/KS35-JNQ9 ("For transgender people, [puberty] means that they will permanently be a member of the sex opposite to the one they experience themselves to be.").

87. *See* David Alan Perkiss, *Boy or Girl: Who Gets to Decide? Gender-Nonconforming Children in Child Custody Cases*, 25 HASTINGS WOMEN'S L.J. 57, 63 (2014) ("Early commencement of sex reassignment by administering puberty-blocking hormones may be appropriate because puberty causes physical changes that are erased only with great difficulty, if at all, at a later age." (citation omitted)).

88. *See* Ikuta, *supra* note 39, at 213.

89. *See id.*

90. Giordano, *supra* note 65, at 580.

Withholding treatment also triggers negative psychological consequences for transgender youth. It is already common for youth suffering from gender dysphoria to have coexisting mental illnesses like anxiety and depression.[91] When forced to develop physical characteristics associated with their birth sex, these feelings of distress and body aversion intensify.[92] As many medical practitioners report, young patients trying to live as a gender different than their birth sex find this period "intolerable."[93]

The denial of necessary gender-affirming healthcare also creates a "sense of hopelessness" for transgender youth attempting to live comfortably in the world.[94] The stress associated with this hopelessness puts transgender youth at a high risk of substance abuse, violence, and suicide.[95] The suicide rate among transgender youth is particularly high, with one survey showing that 52% of transgender youth seriously contemplated committing suicide in 2021.[96]

The risks associated with gender-affirming healthcare do not outweigh the consequences of withholding it. There is always the concern that gender-affirming healthcare will be given to a minor who was incorrectly diagnosed with gender dysphoria. Both the WPATH SOC and Endocrine Society guidelines, however, recommend *fully reversible* puberty blockers as the first step in treatment.[97] And for partially reversible and irreversible treatments, the Endocrine Society and WPATH SOC recommend slow, staged processes that gradually increase treatment overtime with regular clinical

91. WPATH SOC, *supra* note 35, at 12 (citation omitted).

92. *See* Giordano, *supra* note 65, at 581.

93. Susan Scutti, *Transgender Youth: Are Puberty-Blocking Drugs an Appropriate Medical Intervention?*, MED. DAILY (July 24, 2013, 2:17 PM), https://perma.cc/PS6U-63LR.

94. Ikuta, *supra* note 39, at 212 (citation omitted).

95. Giordano, *supra* note 65, at 581.

96. *National Survey on LGBTQ Youth Mental Health 2021*, THE TREVOR PROJECT, https://perma.cc/F9V2-7JE7.

97. *See* WPATH SOC, *supra* note 35, at 18 (listing puberty blockers as fully reversible treatment); Hembree et al., *supra* note 41, at 3880 ("Pubertal suppression is fully reversible, enabling full pubertal development . . . after cessation of treatment, if appropriate.").

evaluations.[98] There is also a concern that only a small percentage of children experiencing gender dysphoria will physically transition in adulthood.[99] Although that may be true for *children*, the majority of *adolescents* who experience gender dysphoria do eventually become transgender adults.[100]

It is not unethical to treat youth suffering from gender dysphoria with gender-affirming healthcare—to the contrary, it is unethical to let them suffer when treatments exist to alleviate their pain.[101] It is crucial that healthcare professionals retain the freedom to assess their patients and provide competent care that is in their best interest.

C. *Gender-Affirming Healthcare Bans*

Regardless of the positive health benefits and treatment safeguards associated with gender-affirming healthcare, many states are attempting to wholesale ban it for minors. In 2021, twenty state legislatures attempted to pass laws prohibiting gender-affirming healthcare for individuals under eighteen.[102] These laws are substantively the same across the states and broadly prohibit medical professionals from performing

98. *See* Hembree et al., *supra* note 41, at 3871 (recommending a gradually increasing dose schedule and regular clinical evaluation every three to six months during the first year of treatment); WPATH SOC, *supra* note 35, at 18 (recommending a staged process "to keep options open through the first two [types of interventions]").

99. *See infra* Part II.A.

100. Giordano, *supra* note 65, at 581 (citation omitted).

101. *See id.* ("The appropriate response to a serious medical condition is medical treatment. Early treatment prevents these children from growing in an unwanted body, in a body that they would change anyway at a later stage, at much higher costs.").

102. *See Legislation Affecting LGBT Rights Across the Country*, ACLU [hereinafter ACLU Tracker], https://perma.cc/L7FM-36T7 (last updated July 9, 2021) (cataloging state legislation prohibiting healthcare for transgender youth). This number has steadily grown in recent years. *See Past Legislation Affecting LGBT Rights Across the Country 2020*, ACLU, https://perma.cc/ZT98-HKY5 (last updated Mar. 30, 2020) (noting that fifteen states tried to pass healthcare bans in 2020); *Past Legislation Affecting LGBT Rights Across Country 2019*, ACLU, https://perma.cc/ZD56-ZXXY (noting that four states tried to pass healthcare bans in 2019). Recent data shows that in the 2022 legislative season twenty-one states at least attempted to pass a gender-affirming healthcare ban. *Legislation Affecting LGBT Rights Across the Country*, ACLU, https://perma.cc/5TP2-T3PU (last updated Aug. 12, 2022).

procedures or prescribing medication intended to alter the appearance of a minor's gender.[103] The medical professionals typically encompassed under such legislation include licensed physicians, physician's assistants, nurses, psychologists, and behavioral health or human services professionals.[104]

The types of care prohibited by these bans are nearly identical to the medical procedures necessary to treat adolescents suffering from gender dysphoria. West Virginia's ban, for example, lays out the two categories of treatment generally prohibited by all gender-affirming healthcare bans.[105] The first category prevents medical professionals from prescribing puberty-blockers or cross-sex hormones.[106] The second category prohibits any surgery that removes "otherwise healthy or non-diseased body parts or tissue," specifically banning phalloplasty, vaginoplasty, and mastectomy.[107] All of these procedures are prohibited "for the purpose of attempting to change or affirm the minor's perception" of their gender.[108] West Virginia's law, like most others, does have an exception for minors who have "external biological sex characteristics that are irresolvably ambiguous."[109] This exception applies to intersex children, who may be born with sexual anatomy that does not fit the traditional boxes of female or male.[110] For this group, gender-affirming healthcare is permitted, ostensibly to fit them within one gender category.

States attempting to pass gender-affirming healthcare bans employ at least one of three strategies to enforce them.[111] The

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103. *See, e.g.*, S.B. 10, 2021 Leg., Reg. Sess. (Ala. 2021) (prohibiting "the performance of a medical procedure or the prescription . . . of medication, upon or to a minor child, that is intended to alter the appearance of the minor child's gender or delay puberty, with certain exceptions.").

104. *See, e.g.*, S.B. 224, 2021 Leg., Reg. Sess. (Ind. 2021).

105. H.B. 2171, 2021 Leg., Reg. Sess. (W. Va. 2021)

106. *Id.* at 1–2.

107. *Id.*

108. *Id.* at 1.

109. *Id.* at 2.

110. *What's Intersex?*, PLANNED PARENTHOOD, https://perma.cc/9UUC-K539.

111. Additionally, many laws prohibit the use of public funds for this care. *See, e.g.*, H.B. 454, 134th Gen. Assemb., Reg. Sess. (Ohio 2021). Unfortunately, the scope of this Note cannot cover the range of issues involved in public healthcare funding.

most serious strategy is the establishment of criminal penalties for medical professionals who violate the ban. Arizona's legislation, for example, assigns felony status to any healthcare professional who attempts to change, block, or affirm a minor's sex characteristics.[112] If done intentionally or knowingly—a state of mind a doctor *should* have when prescribing care—the resulting Class 2 felony comes with the possibility of a twelve-year imprisonment.[113] Other states punish violators by subjecting them to disciplinary action from the state's medical licensing agency. Oklahoma's ban exposes medical professionals to "suspension or revocation" of their license if they provide gender-affirming healthcare to a minor.[114] Some states additionally enable civil claims against medical professionals who violate these bans.[115] Georgia's law allows an "individual aggrieved" by a violation to bring a claim to recover damages, attorney's fees, litigation expenses, and punitive damages from healthcare professionals who provide gender-affirming treatment.[116]

The sudden appearance and identical nature of these laws across the states raises the question of who, if anyone, is responsible for starting this legislative movement. Although some may assume that these bans are a natural backlash to transgender issues becoming more prominent in mainstream media, the origin of these laws reveals a more insidious beginning. In 2019, the Heritage Foundation, one of the "most influential conservative think tanks in the United States," "hosted a series of events on the 'medical risks' of gender-affirming healthcare" at its Washington, D.C.

112. *See* S.B. 1511, 55th Leg., Reg. Sess. (Ariz. 2021) (assigning Class 2, Class 3, or Class 4 felony status to violators); *see also* H.B. 935, 2021 Leg., Reg. Sess. (Fla. 2021) (establishing "criminal penalties for health care practitioners who perform or cause [gender-affirming healthcare] practices to be performed on a minor").

113. *See* S.B. 1511, 55th Leg., Reg. Sess. (Ariz. 2021); ARIZ. REV. STAT. ANN. § 13-702 (2022) (stating that the term of imprisonment for an aggravated Class 2 felony ranges from three to twelve-and-a-half years).

114. S.B. 583, 58th Leg., Reg. Sess. (Okla. 2021).

115. *See, e.g.*, H.B. 336, 2021 Leg., Reg. Sess. (Ky. 2021).

116. *See* H.B. 401, 2021 Leg., Reg. Sess. (Ga. 2021). Georgia's law also explicitly excuses healthcare professionals who refuse to provide gender-based healthcare from any civil or criminal liability. *Id.*

headquarters.[117] The cohost of one of these events, the Family Policy Alliance, is a group that "works with legislators all over the country" to produce model gender-affirming healthcare bans for state legislatures.[118] With the text of these bans varying only slightly state to state, there is little "mystery" to how these bills got into the hands of state legislators during the same time period.[119]

Model legislation is not a new trend in the United States and it is not limited to conservative groups.[120] The connection of these bans to a powerful group like the Heritage Foundation, however, reveals the network of individuals at the heart of the anti-transgender movement.[121] This network, backed by an imposing revenue of over $122 million,[122] is launching one of the most "aggressive and serious set of attacks" on transgender people in years.[123] While many gender-affirming healthcare bans will hopefully never become law, the ones that do have extremely serious consequences.

II. THE INDIVIDUAL RIGHTS NIGHTMARE AT THE FEDERAL LEVEL

If left unchallenged, gender-affirming healthcare bans will eliminate the care necessary for transgender youth to alleviate the harsh effects of gender dysphoria and fully realize their individual identities. Fortunately, litigators have stepped in to

117. *Outlawing Trans Youth: State Legislatures and the Battle Over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2172–73 (2021).

118. Sydney Bauer, *The New Anti-Trans Culture War Hiding in Plain Sight*, NEW REPUBLIC (Feb. 11, 2020), https://perma.cc/G3MJ-49E5.

119. Although the bills may be substantively identical, many legislators have come up with their own unique, terrible legislative titles, including: the Protect Minors From Mutilation and Sterilization Act (Colorado), the Save Adolescents From Experimentation Act (Arkansas), and the Vulnerable Child Protection Act (South Dakota). *See Past Legislation Affecting LGBT Rights Across the Country 2020*, *supra* note 102; ACLU Tracker, *supra* note 102.

120. *See* Bauer, *supra* note 118.

121. *See id.* (exposing the groups attempting to pass anti-transgender state legislation).

122. *Heritage Foundation*, PROPUBLICA, https://perma.cc/26WJ-RMDQ.

123. Bauer, *supra* note 118.

challenge the bans that have become enforceable law.[124] Unfortunately, these suits may face resistance from higher federal courts as the Supreme Court's conservative jurisprudence continues to grow. The following Subparts will explain the legal challenges involved in the current gender-affirming healthcare litigation in Arkansas and evaluate the obstacles that litigation may face at the Supreme Court.

A. *The Federal Lawsuit in Arkansas*

Although four states have now enacted gender-affirming healthcare bans, this Note will focus on the current litigation surrounding the first state to do so, Arkansas.[125] On February 25, 2021, Representative Robin Lundstrum introduced the Save Adolescents From Experimentation (SAFE) Act[126] to the state legislature of Arkansas.[127] The SAFE Act prohibits licensed physicians from providing any gender-affirming healthcare to individuals under eighteen, including genital gender reassignment surgery, non-genital gender reassignment surgery, and hormone and puberty blocking drugs.[128] Any violation of the SAFE Act by a healthcare professional is considered "unprofessional conduct" subject to discipline by "the appropriate licensing entity"—the Arkansas State Medical Board.[129] The SAFE Act also creates a claim for relief for any violation, allowing individuals under eighteen to bring legal actions through their parent or guardian.[130]

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124. *See, e.g.*, *Families Sue Alabama Over Felony Ban on Gender-Affirming Care for Transgender Adolescents*, ACLU (Apr. 11, 2022), https://perma.cc/H7MZ-B4HY.

125. *See Attacks on Gender-Affirming and Transgender Health Care*, AM. COLL. OF PHYSICIANS (May 3, 2022), https://perma.cc/8NPC-CADG ("In 2021, Arkansas became the first state in the country to ban gender-affirming health care for transgender minors. Since then, Tennessee, Arizona, and Alabama have also enacted laws restricting access to gender-affirming care . . . .").

126. H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021).

127. *See HB1570—To Create the Arkansas Save Adolescents from Experimentation (SAFE) Act*, ARK. GEN. ASSEMBLY, https://perma.cc/A6Y4-CZEA.

128. H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021).

129. *Id.* at 9–10.

130. *Id.* at 10.

The legislative purpose attached to this bill is a good example of the typical formula—vilifying gender-affirming healthcare as inexcusably dangerous while painting the state as the protector of children. According to the SAFE Act, "Only a small percentage of [individuals] experience distress identifying with their biological sex," and because many come to identify with that sex, "physiological interventions [are] unnecessary."[131] The bill describes the state's concern with puberty blocking drugs, cross-sex hormones, and gender reassignment surgery with full pages listing associated health risks.[132] Leaning on the "compelling government interest in protecting the health and safety of . . . vulnerable children," the SAFE Act summarizes:

> It is of grave concern to the General Assembly that the medical community is allowing individuals who experience distress at identifying with their biological sex to be subjects of irreversible and drastic nongenital gender reassignment surgery and irreversible, permanently sterilizing genital gender reassignment surgery, despite the lack of studies showing that the benefits of such extreme interventions outweigh the risks[.] The risks of gender transition procedures far outweigh any benefit at this stage of clinical study on these procedures.[133]

The SAFE Act passed both the Arkansas House of Representatives and Senate in March 2021.[134] It met opposition from Governor Asa Hutchinson's, who vetoed the bill as "a vast government overreach."[135] In a stunning move, however, the legislature was able to push the SAFE Act past Governor Hutchinson with over three-fourths of each body voting to

131. *Id.* at 1–2.

132. *Id.* at 2–3.

133. *Id.* at 1, 5.

134. *See HB1570—To Create the Arkansas Save Adolescents from Experimentation (SAFE) Act*, *supra* note 127.

135. Vanessa Romo, *Arkansas Governor Vetoes Ban on Gender-Affirming Healthcare for Trans Youth*, NPR (Apr. 5, 2021, 5:46 PM), https://perma.cc/2JS6-JC54 (reporting Governor Hutchinson's statement that the bill would set "new standards of legislative interference with physicians and parents as they deal with some of the most complex and sensitive matters involving young people").

override his veto.[136] Apologizing for this outcome, Governor Hutchinson stated that the SAFE Act "puts a very vulnerable population in a more difficult position" and "sends the wrong signal."[137]

The ACLU immediately filed suit in federal court to block the ban from coming into effect.[138] The plaintiffs challenging the law included four families with children in need of gender-affirming healthcare and two doctors seeking to provide that care.[139] These parties alleged three constitutional violations in their complaint: 1) violation of the Equal Protection Clause under the Fourteenth Amendment through sex-based discrimination; 2) violation of the right to parental autonomy under the Due Process Clause of the Fourteenth Amendment; and 3) violation of the right to free speech under the First Amendment.[140] The District Court for the Eastern District of Arkansas granted the plaintiffs' preliminary injunction to prohibit the SAFE Act's enforcement,[141] and that injunction was recently upheld by the Eighth Circuit Court of Appeals.[142] With transgender youth in Arkansas currently safe from the SAFE Act, the suit is now moving through discovery in preparation for summary judgment or trial.[143]

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136. *See* Meredith Deliso, *Arkansas State Legislature Overrides Governor's Veto on Transgender Health Care Bill*, ABC NEWS (Apr. 6, 2021, 3:58 PM), https://perma.cc/3LB4-ZDEK.

137. Vanessa Romo, *Arkansas Gov. Asa Hutchinson on Transgender Health Care Bill: 'Step Way Too Far'*, NPR (Apr. 6, 2021, 7:36 PM), https://perma.cc/H8TM-7QMC.

138. *See* James Esseks, *We're Suing Arkansas Over its Ban on Health Care for Trans Youth*, ACLU (May 25, 2021), https://perma.cc/9CFK-WWAJ.

139. *See* Brandt et al. v. Rutledge et al., ACLU, https://perma.cc/3JX3-52ZU (last updated Feb. 14, 2022) (describing the personal stories of the plaintiffs involved in the federal lawsuit).

140. Complaint for Declaratory and Injunctive Relief at 41–46, Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021) (No. 4:21-cv-450-JM).

141. Supplemental Order at 13, Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021) (No. 4:21-cv-450-JM).

142. Brandt v. Rutledge, 47 F.4th 661, 672 (8th Cir. 2022); *see also Federal Court Upholds Preliminary Injunction Against Arkansas Ban on Gender-Affirming Care for Trans Youth*, ACLU (Aug. 25, 2022), https://perma.cc/439B-AHD4.

143. *See* Brandt et al. v. Rutledge et al.*, Docket No. 4:21-cv-00450 (E.D. Ark. May 25, 2021), Court Docket*, BLOOMBERG L., https://perma.cc/XMY3-TBAS.

The ACLU's suit is absolutely appropriate and necessary. But a cloud looms in the background of this lawsuit—a Supreme Court with six conservative justices. Should the preliminary injunction or the final decision reach the current Court, the outcome may not be as positive. In fact, there are signs that it could be much worse.

B. *The New Majority on the Supreme Court*

To some extent, the writing is on the wall at the U.S. Supreme Court.[144] This writing signals that federal courts should not be the only, and may not be the optimal, place to attack gender-affirming healthcare bans. The trajectory of the Court's most recent individual rights cases should cause most litigators to stop and think about the true possibility of defeat at our highest court—and seriously consider alternatives.[145]

The current Supreme Court is the culmination of decades of conservative efforts to seize control of the highest judicial body in the United States.[146] Beginning in earnest with President Richard Nixon's promise to fill the bench with strict constructionists,[147] this movement ebbed and flowed until its current conclusion—President Donald Trump's appointment of Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett to form a 6 to 3 conservative majority.[148] For the first

144. *See* Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM), https://perma.cc/SYN6-5DJ5.

145. *See infra* notes 155–166 and accompanying text.

146. *See* Adam Serwer, *The Lie About the Supreme Court That Everyone Pretends to Believe*, THE ATL. (Sept. 28, 2021), https://perma.cc/FA3Y-R29H ("The current makeup of the Roberts Court is itself the outcome of a partisan battle that has spanned decades, one in which the conservative legal movement has won a tremendous victory that is certain to shape American life for generations to come.").

147. *See Nixon and the Court*, PBS, https://perma.cc/8X2A-FLAM ("In his campaign for president, Richard Nixon promised to respond to the social upheaval of the 1960's with a return to order, law enforcement and conservative rulings.").

148. *See* Erwin Chemerinsky, *Op-Ed: The Supreme Court's Conservatives Now Have Free Rein. Here's How Your Rights Will Change*, L.A. TIMES (Oct. 4, 2021, 3:15 AM), https://perma.cc/XT93-SR4K (detailing the Court's movement to a conservative majority from the Nixon presidency to the end of the Trump presidency). Another big player in the court packing movement is the Federalist Society, a group formed to develop and spread conservative legal philosophy. *See* Serwer, *supra* note 146. Part of the Federalist Society's goal is

time in decades, a single swing justice is not "holding the reins" on contentious decisions,[149] as the majority no longer depends on Chief Justice John Roberts to tie-break.[150] As Professor Lee Epstein points out, there are now "two courts in action."[151] One is the standard John Roberts court, leaning conservative but tempered with "a serious amount of consensus" that attempts to look nonpartisan.[152] The other is led by the "aggressive, socially conservative" Trump appointed justices joined by Justice Thomas and Justice Alito.[153] In practice, both of these courts could refuse to protect transgender individuals.[154]

The new majority has already dealt severe blows to certain fundamental rights. In its early voting rights decision, *Brnovich v. Democratic National Committee*,[155] the Court reinstated two Arizona laws that both have a discriminatory impact on minority voters.[156] Deciding that the disproportionate impact of these provisions was relatively small, the majority explained that just because voting was "inconvenient" for some did not mean that the entire system was "not equally open."[157]

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to promote certain judicial candidates for nomination during Republican presidencies. *See id.*

149. Amelia Thomson-DeVeaux & Laura Bronner, *The Supreme Court's Conservative Revolution Is Already Happening*, FIVETHIRTYEIGHT (Oct. 20, 2021, 6:00 AM), https://perma.cc/3WXE-R4K3.

150. *See* Ariane de Vogue, *The Year Supreme Court Conservatives Make Their Mark*, CNN [hereinafter de Vogue, *Court Conservatives*], https://perma.cc/X4X4-BB5V (last updated Dec. 28, 2021, 10:03 AM) (stating that Chief Justice John Roberts once joked that he "learn[ed] early on that when you are holding the reins of leadership you should be careful not to tug on them too much—you will find out they aren't connected to anything").

151. Thomson-DeVeaux & Bronner, *supra* note 149.

152. *Id.*

153. *Id.*

154. *See* Serwer, *supra* note 146.

155. 141 S. Ct. 2321 (2021).

156. *See* Nina Totenberg, *The Supreme Court Deals a New Blow to Voting Rights, Upholding Arizona Restrictions*, NPR, https://perma.cc/B8B6-7XUU (last updated July 1, 2021, 4:37 PM).

157. *Brnovich*, 141 S. Ct. at 2338 n.11, 2339; *see also id.* at 2339 ("But the mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote."). *But see* Ryan D'Ercole, Note, *Fighting a New Wave of Voter Suppression: Securing College Students' Right to Vote Through the Twenty-Sixth Amendment*, 78 WASH. & LEE L. Rev. 1659, 1685 (2021)

The 2021 to 2022 Supreme Court term—the first full term of the new majority—did not fare any better. With a docket full of cases altering several constitutional rights, many of the legal outcomes reflected the majority's conservative ideology. In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*,[158] the Court expanded the right to own a gun for self-defense from only inside the home[159] to outside the home as well.[160] Next, the Court's decision in *Carson v. Makin*[161] requires "the state of Maine to fund religious education at private religious schools as part of its [public] tuition assistance program."[162] Most controversially, *Dobbs v. Jackson Women's Health Organization*[163] dismantled the decades old constitutional principles protecting the right to abortion established by *Roe v. Wade*.[164] This trend shows no signs of stopping—in the upcoming term, the Court will hear *303 Creative LLC v. Elenis*[165] to decide whether a state anti-discrimination law violates the free speech rights of a

(criticizing the disproportionate impact of voting laws when enacted for "partisan motivations").

158. 142 S. Ct. 2111 (2022).

159. District of Columbia v. Heller, 554 U.S. 570 (2008); *see id.* at 636 (recognizing that the Second and Fourteenth Amendments protect the right to own a handgun in the home for self-defense).

160. *Bruen*, 142 S. Ct. at 2122 ("[T]he Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home").

161. 142 S. Ct. 1987 (2022).

162. *ACLU Comment on Supreme Court Decision in* Carson v. Makin, ACLU (June 21, 2022), https://perma.cc/R75M-7GU9; *see also Carson*, 142 S. Ct. at 2002.

163. 142 S. Ct. 2228 (2022); *see also* Chemerinsky, *supra* note 148 ("If the court allows a state to bar the procedure at 15 weeks, there is no reason why abortions cannot be outlawed at even earlier points in pregnancy . . . .").

164. 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228; *see Dobbs*, 142 S. Ct. at 2242 ("We hold that *Roe* and *Case*y must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment.").

165. *See Orders in Pending Cases*, U.S. SUP. CT. (Feb. 22, 2022), https://perma.cc/PS99-V8HT (PDF) (Granting certiorari to answer "[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment").

Christian web designer who refuses to produce websites for same-sex couples.[166]

This is not to say that every Justice in the conservative block will automatically vote the same way in every case concerning an individual right. Justices do differ on legal and political matters.[167] Justice Gorsuch's particular brand of textualism has led to unusual decisions, most notably his decision to uphold the Civil Rights Act's protections for homosexual and transgender people.[168] Chief Justice John Roberts's concern for the Court's legitimacy can lead him to join the liberal block of justices.[169] With the Court's approval rating reaching new lows,[170] other justices may be more willing to make the same ideological jump.[171] In the majority of cases concerning individual rights, however, conservative justices are expected to remain firm. As Justice Sonia Sotomayor stated at an American Bar Association event, "There is going to be a lot of disappointment in the law, a huge amount."[172]

The thought of this Supreme Court grappling with the deeply personal issues involved in gender-affirming healthcare

166. *See* Lawrence Hurley, *U.S. Supreme Court Takes Up Clash Between Religious and LGBT Rights*, REUTERS (Feb. 22, 2022, 12:13 PM), https://perma.cc/7TVT-B5Q5.

167. *See* Serwer, *supra* note 146.

168. *See id.* (explaining Justice Gorsuch's surprising stance in *Bostock v. Clayton County*). *But see* Elena Schiefele, Note, *When Statutory Interpretation Becomes Precedent: Why Individual Rights Advocates Shouldn't Be So Quick to Praise* Bostock, 78 WASH. & LEE L. REV. 1105, 1108 (2021) (explaining that Justice Gorsuch's method of statutory interpretation "results in a crabbed, formalistic, and narrow reading of the text that heightens the evidentiary burden of a plaintiff who has been wronged" (citation omitted)).

169. Serwer, *supra* note 146.

170. de Vogue, *Court Conservatives*, *supra* note 150.

171. Some Justices have recently taken the "unusual step of appearing publicly" and even openly defending the institution. *Id.* In an interview with CNN, Justice Breyer criticized court packing. *Id.* Justice Barrett, speaking at an event hosted by the University of Louisville's McConnell Center, said that her goal was to convince the audience that the Court "is not comprised of a bunch of partisan hacks." *Id.* Justice Barrett's insistence on the nonpartisan nature of the Court at this event teems with irony, considering its location at a center named for Senator Mitch McConnell, whose "procedural hardball" was key to securing her seat. Serwer, *supra* note 146.

172. Ariane de Vogue, *Justice Sonia Sotomayor: 'There Is Going To Be a Lot of Disappointment in the Law, a Huge Amount'*, CNN, https://perma.cc/C8PL-TNPV (last updated Oct. 7, 2021, 8:58 PM).

litigation is frightening. What may be worse is acknowledging that the new majority was created, at least in part, by the same group that constructed the gender-affirming healthcare bans. The Heritage Foundation played a key role in suggesting names for all of President Trump's Supreme Court nominations.[173] But understanding that the current Supreme Court is less likely to protect individual rights does not end the fight against gender-affirming healthcare bans—it just moves the location of the playing field.

III. APPLICABLE PRINCIPLES OF JUDICIAL FEDERALISM

The federal Constitution is not the only source of enforceable individual rights. As Justice William Brennan pointed out decades ago, state constitutions "are a font of individual liberties," and state supreme courts can extend those liberties beyond federal law.[174] This double source of individual rights is not only a strength of the federal system but a viable path to strike down gender-affirming healthcare bans.

The layered system of state and federal constitutions, coined "American federalism" by Justice Brennan and frequently referred to as "judicial federalism,"[175] involves several principles that can benefit gender-affirming healthcare litigation. This Part will cover two of the most applicable principles. Subpart A will discuss the reactionary rights-shifting framework between federal and state courts,[176] while Subpart B will discuss the laboratory of rights that gender-affirming healthcare litigators can access.[177]

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173. *See* Nathaniel Ward, *Donald Trump's Supreme Court List Includes Five Heritage Recommendations*, THE HERITAGE FOUND., https://perma.cc/45N5-FYV8 (celebrating the Heritage Foundation's success in attempting to pack the Supreme Court); David Montgomery, *Conquerors of the Courts*, WASH. POST (Jan. 2, 2019), https://perma.cc/888Y-Z5YQ.

174. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

175. *Id.* at 489.

176. *See infra* Part III.A.

177. *See infra* Part III.B.

A. *The Rights-Shifting Framework*

One key principle of judicial federalism is its demand that state courts step in when federal courts fail to recognize individual rights.[178] Under this principle, the federal Constitution becomes only the "starting point" for basic freedoms with state constitutions offering greater protection.[179] This dual protection should create competition in the rights marketplace, where state governments and courts cover the failures of the federal system to protect individual freedoms.[180] Over time, this principle has encouraged a reactionary relationship between the state and federal courts concerning individual rights protection.[181]

The protection of individual rights under state constitutions is not a new idea. At the nation's founding, state constitutions were the primary defense against state interference because the federal Constitution offered minimal protection.[182] Until the

178. *See* Brennan, *supra* note 174, at 491, 503 (stating that "cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach" and that "[s]tate courts cannot rest when they have afforded their citizens full protection of the federal Constitution").

179. Betsy Griffing, *The Rise and Fall of the New Judicial Federalism Under the Montana Constitution,* 71 MONT. L. REV. 383, 383 (2010) (explaining that the federal Constitution is the "baseline" for many basic freedoms and that state courts turn to state constitutions "to support broader protections" (citation omitted)).

180. *See* Ann M. Lousin, *Justice Brennan's Call to Arms—What Has Happened Since 1977*, 77 OHIO ST. L.J. 387, 406 (2016) ("It is this dual nature of individual rights in the United States that creates a competition in the interaction between federal and state rights." (citation omitted)).

181. One clear example of this relationship is the litigation surrounding the right to education. In *San Antonio Independent School District v. Rodriguez*, the U.S. Supreme Court refused to recognize an enforceable right to education under the federal Constitution. 411 U.S. 1, 36 (1973). Since then, several state courts have recognized the right to education under their own state constitutions. *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 201 (Ky. 1989) ("[O]ur citizens are given a fundamental right to education in our Constitution." (citation omitted)).

182. Cynthia Soohoo & Jordan Goldberg, *The Full Realization of Our Rights: The Right to Health in State Constitutions*, 60 CASE W. RSRV. L. REV. 997, 1036–37 (2010) ("[F]rom the beginning of the Founding period, state constitutions were viewed as the primary protector, and potentially creator, of individual rights in the states."(citation omitted)); G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1099 (1997)

Fourteenth Amendment began incorporating the federal Bill of Rights, state constitutions were *the only* protectors of individuals against state government.[183]

This relationship changed as the federal government assumed nearly exclusive responsibility for protecting individual rights between the 1930s and the 1970s. The federal government's increased involvement in domestic policy, gradual incorporation of the Bill of Rights, and the liberal Warren Court encouraged advocates to bring individual rights cases under the federal Constitution rather than state counterparts.[184] Accordingly, civil liberties law during this period became largely federal and the prospects of judicial federalism faded into the background.[185]

The current state of judicial federalism encouraged by Justice Brennan emerged after the appointment of Chief Justice Warren Burger to the Supreme Court in 1969.[186] As the Burger Court became rights restrictive and less likely to protect individual liberties, judicial federalism urged state courts to

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[hereinafter Tarr, *New Judicial Federalism*] (explaining that the federal Constitution offered "few protections against state violations of rights").

183. Soohoo & Goldberg, *supra* note 182, at 1036 ("Until 1897, when the Fourteenth Amendment . . . began to be 'incorporated' against the states, state constitutions were viewed as the sole protectors of individual rights against state governments." (citations omitted)); *see also* Rick Applegate, *The 1972 Montana State Constitution Declaration of Rights and the Opportunities on the Bumpy Road Ahead*, 43 PUB. LAND & RES. L. REV. 103, 107 (2020) (explaining that state constitutions "shield[] vulnerable minorities . . . from the sometimes-runaway intentions of unrestrained, even voracious majorities, which . . . frequently push[] the legitimate grievances and claims of minorities, indigenous people, and many others—generally the least advantaged among us—to the curb").

184. *See* Tarr, *New Judicial Federalism*, *supra* note 182, at 1100.

185. *See id.* (stating that the federal government assumed "primary—indeed, almost exclusive—responsibility for protecting rights" during the twentieth-century); *see also* Brennan, *supra* note 174, at 495 ("[I]t was only natural that when during the 1960's our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions."). Among the reasons state constitutional litigation remains underused is the nature of legal education itself. Law schools rarely teach state constitutional law, leaving prospective attorneys without the familiarity or applicable knowledge to invoke their own state constitutions. Soohoo & Goldberg, *supra* note 182, at 1035 (citation omitted).

186. Tarr, *New Judicial Federalism*, *supra* note 182, at 1097.

cover the difference.[187] Because judicial federalism compels federal and state courts to provide a healthy balance of individual protection, the federal courts' shift into a rights-restrictive position should reflect oppositely in the state courts.[188]

Judicial federalism's reactionary rights-shifting framework could be beneficial to gender-affirming healthcare litigation. It is uncertain whether federal courts will be able to institute meaningful protections for transgender youth under the current Supreme Court.[189] Transgender people are not considered a suspect class entitled to heightened protection under the Equal Protection Clause,[190] and the Court's increasing conservativism may decrease the chances of positive outcomes under other federal constitutional principles. Although the ACLU has put forward appropriate and valuable arguments in its Arkansas suit, a scenario exists where the Court overvalues the state's traditional power over the health of its citizens and ignores the individual rights of transgender youth.

The absence of federal involvement, however, should force state courts to prioritize their own state constitutional protections for transgender individuals. This protection would not be a groundbreaking shift or an overreach of state court power—it would be a return to the initial era of judicial federalism where the state court stood as the only shield against government interference. If litigators bring state constitutional claims to protect gender-affirming healthcare after failing at the federal level, judicial federalism's rights-shifting framework demands that state courts step in to enforce these protections.

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187. *See* Brennan, *supra* note 174, at 495–98 (explaining the Burger Court's failure to establish fundamental rights in multiple areas, from welfare rights to prison rights).

188. *Cf.* Tarr, *New Judicial Federalism*, *supra* note 182, at 1111 ("[T]he Burger Court's anticipated—and to some extent actual—retreat from Warren Court activism encouraged civil liberties litigants to look elsewhere for redress, the experience of the preceding decades had laid the foundation for the development of state civil liberties law.").

189. *See supra* Part II.B.

190. *See* Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 509 (2016) ("[N]o court or agency has ever addressed the critical question of whether statutory transgender classifications should be subject to 'heightened scrutiny' . . . .").

Despite this principle, several scholars have noted that state constitutional claims involving individual rights are severely under-litigated.[191] This issue needs to be remedied in the context of gender-affirming healthcare litigation. Federalism is at its weakest when litigators allow state courts to abdicate their power to protect rights, leaving individuals to rely solely on an absent federal government.[192] The competitive rights market created by the rights-shifting framework cannot exist if federal courts get the final word on what rights are or are not protected. To fully protect transgender individuals from gender-affirming healthcare bans, litigators need to use the rights-shifting framework in their favor to invoke the full gambit of existing legal rights.

B. *The States as Laboratories*

The familiar idea of states as laboratories of rights is another principle of judicial federalism that is beneficial to striking down gender-affirming healthcare bans.[193] States have long been considered useful laboratories to experiment with rights not present in the federal Constitution.[194] There are several reasons for this structure,[195] but a particularly

191. *See* Tarr, *New Judicial Federalism*, *supra* note 182, at 1113 ("[R]ecent studies have concluded that the new judicial federalism has had a rather limited impact on civil liberties litigation in state courts . . . ."); Anthony Sanders, *Why Don't We See More State Constitutional Claims in Federal Court? Money and Prudence.*, INST. FOR JUST., https://perma.cc/4RG7-BE7R ("[P]laintiffs still rarely raise state constitutional claims in federal court.").

192. *See* Brennan, *supra* note 174, at 503 ("With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them.").

193. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("It is one of the happy incidents of the federal system 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.").

194. *See* Applegate, *supra* note 183, at 106 ("[S]tates have often been considered to be useful laboratories for experimentation with new rights that may be vetted before being offered for addition to the federal Bill of Rights or otherwise reflected in some way in federal law."). An example of this experimentation is women's suffrage—several states adopted a full or partial right for women to vote before the changes to the federal Constitution. *Id.* (citation omitted).

195. *See* RICK APPLEGATE, MONT. CONST. CONVENTION COMM'N, BILL OF RIGHTS 4 (1972), https://perma.cc/9PPD-88VA (PDF) ("[S]tates could function

important one for gender-affirming healthcare litigation is the greater adaptability of state constitutions.

State constitutions are generally easier to amend and more frequently revised than the federal Constitution. The federal Constitution has been amended only twenty-seven times since its creation.[196] State constitutions are amended at a much higher frequency—some have over two hundred amendments.[197] During the nineteenth century alone, the states adopted ninety-four different constitutions.[198] As Dr. Alan Tarr notes, "[T]he history of American state constitutionalism is emphatically a history of constitutional change."[199]

The difference in flexibility between the federal Constitution and state constitutions informs the states' role as laboratories for enforceable rights. While the federal Constitution retains "almost sacred" and unchangeable status, state constitutions stand for the opposite.[200] State constitutions are progressive enterprises and their drafters are generally aware that future generations may be better situated to deal with the issues of modern government.[201] Comfort with more

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to test a number of potential new rights—a function quite difficult, if not impossible, at the federal level."); *see also* Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 276–77 (1994) (noting that state constitutions are usually longer, more detailed, and include many more areas of concern than the federal Constitution).

196. G. Alan Tarr, *The Montana Constitution: A National Perspective*, 64 MONT. L. REV. 1, 2 (2003) [hereinafter Tarr, *The Montana Constitution*].

197. Soohoo & Goldberg, *supra* note 182, at 1042; *see also* Robert F. Williams, *Should the Oregon Constitution Be Revised, and If So, How Should It Be Accomplished?*, 87 OR. L. REV. 867, 869 (2008) (noting that the constitution of Oregon "has been amended on average nearly one-and-a-half times per year" (citation omitted)).

198. Tarr, *The Montana Constitution*, *supra* note 196, at 8 (describing nineteenth-century state constitution-making as an "epidemic").

199. *Id.* at 7.

200. *Id.* at 8–9 (stating that the reluctance to amend or completely scrap the original federal Constitution shows its "sacred status" as "the crowning work of an extraordinary political generation").

201. *See id.* at 9 (explaining that state constitutions "require[] a constant readjustment of past practices and past institutional arrangements in light of changes in circumstances and in political thought"); *see also id.* ("[State constitution-makers] insisted that . . . later generations were better situated to frame constitutions than were their less experienced, and hence presumably less expert, predecessors.").

frequent amendment ensures that a state constitution better reflects the wishes of its current citizenry.[202]

The state laboratory principle can be useful when state courts tackle controversial topics. Issues affecting transgender minors are unquestionably controversial.[203] Gender-affirming healthcare bans are not solely about medical procedures. They involve deeply-held prejudices and sincere beliefs that transgender individuals, and specifically transgender children, should not exist.[204] Unfortunately, this viewpoint is still widely debated across the country.[205] A familiar refrain among federal judges concerning such controversial topics is that legislatures, not courts, should determine the correct course of action.[206]

In areas of controversy, though, the state laboratory principle could turn this harsh debate into a strength. Because state constitutions are easier to amend, the public has a more involved role in deciding if a constitutional right reflects their values.[207] A state court recognizing a new or expanded right to

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202. *See* Soohoo & Goldberg, *supra* note 182, at 1042 ("[S]tate constitutions [are] more responsive to changing values and progressive developments than the federal Constitution, and allow[] each state to ensure that its governing document accurately reflects the citizens' wishes." (citation omitted)).

203. *See* Katelyn Burns, *What the Battle Over a 7-Year-Old Trans Girl Could Mean for Families Nationwide*, VOX (Nov. 11, 2019, 9:00 AM), https://perma.cc/S5V6-V75P (detailing the vicious threats individuals sent to the mother of a transgender girl).

204. *See* Kristin Lam, *National Firestorm on Horizon as States Consider Criminalizing Transgender Treatment for Youths*, USA TODAY (Feb. 6, 2020, 2:21 PM), https://perma.cc/W8AH-9YGT (last updated Feb. 6, 2020, 4:03 PM) (reporting that a sponsor of South Dakota's gender-affirming healthcare ban stated that "[t]he solution for children's identification with the opposite sex isn't to poison their bodies with mega-doses of the wrong hormones, to chemically or surgically castrate and sterilize them, or to remove healthy breasts and reproductive organs").

205. *See* Justin McCarthy, *Mixed Views Among Americans on Transgender Issues*, GALLUP (May 26, 2021), https://perma.cc/3NKH-GWB5.

206. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 686 (2015) (Roberts, C.J., dissenting) ("But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be."); *id.* at 687 ("Stealing this issue from the people will for many cast a cloud over same-sex marriage, making dramatic social change that much more difficult to accept.").

207. *See* Soohoo & Goldberg, *supra* note 182, at 1043 (explaining that "state constitutions may grant broad rights to state residents or citizens, but those rights can be taken away with greater ease" through constitutional amendment).

protect gender-affirming healthcare can therefore rely on the state legislative process as a backstop to address any residual controversy. Any state constitutional right that strikes down a gender-affirming healthcare ban will be controversial. But judicial protection of transgender youth may receive better public treatment if allowed to "slowly . . . percolate" at the state level, rather than being adopted by a "broad, federal pronouncement" more susceptible to backlash.[208] In this way, state court judges concerned about social controversy can feel secure in state legislatures' more flexible political process.

Of course, the state laboratory principle is a double-edged sword. Even if a state supreme court strikes down a gender-affirming healthcare ban under a state constitutional protection, there is the risk that the state's legislature will amend its constitution to reverse that protection. But there is hope that the conversation between a state's supreme court and its citizens will eventually result in permanent protection for transgender individuals. This hope should not be left unrealized by advocates afraid of backlash—in fact, they should face this area head on. With both the rights-shifting framework and the state laboratory principle in mind, litigators need to consider state constitutional provisions to protect gender-affirming healthcare.

IV. STATE CONSTITUTIONS AND THE RIGHT TO HEALTH

State constitutions are vast and complex documents that can be hard to compare.[209] Although there are several state constitutional provisions that could protect the right to gender-affirming healthcare for transgender youth, one avenue with potential is the right to health. This Part discusses the benefits of pursuing the right to health in the context of gender-affirming healthcare litigation[210] and provides a general layout of the right to health as it currently exists in state constitutions.[211]

208. Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325, 1344 (2010) (citation omitted).

209. *See supra* notes 197–199 and accompanying text.

210. *See infra* Part IV.A.

211. *See infra* Part IV.B.

A. *Pursuing the Right to Health*

The establishment of a right to health fits well within the beneficial principles of judicial federalism.[212] The federal Constitution does not recognize a right to health—it never expressly references the word "health" and the Supreme Court has never interpreted the Constitution to implicitly encompass a health right.[213] Absent explicit guidance from the nation's highest court, the lower federal courts have been reluctant to recognize constitutional rights related to individual health.[214] Under the rights-shifting framework of judicial federalism,[215] absence of the right at the federal level should trigger state constitutional protection where the appropriate language exists. And, because the right to health invokes state constitutional values, the additional benefits of the state laboratory principle should be triggered as well.[216]

There are several other reasons to target a right to health over other applicable liberties. Significantly, pursuing the right to health prevents detrimental lockstepping with federal jurisprudence. Generally, there are three approaches that state supreme courts use when interpreting their constitutions in comparison to the federal Constitution: lockstep, limited lockstep, and independent jurisprudence.[217] Each of these approaches recognizes federal constitutional jurisprudence to a different extent,[218] and the corresponding levels of federal power could either adversely or positively affect gender-affirming healthcare litigation.

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212. *See supra* Part III.A.

213. *See* Leonard, *supra* note 208, at 1329–30. As Professor Elizabeth Leonard points out, any federal constitutional right would likely come from the Equal Protection and Due Process Clauses, either when the government voluntarily assumes a role in providing healthcare services or when a protected group challenges a discriminatory provision of services. *See id.* at 1334–37.

214. *See id.* at 1330 ("Federal courts have been increasingly reluctant to recognize new fundamental constitutional rights bearing on individual health, such as the right of terminally ill patients to assisted suicide or to access unapproved drugs to prolong their lives." (citations omitted)).

215. *See supra* Part III.A.

216. *See supra* Part III.B.

217. Lousin, *supra* note 180, at 392.

218. *See id.* at 392–95.

When purely lockstepping, a state supreme court will interpret its state constitutional provision in line with the federal jurisprudence of the corresponding federal provision.[219] Although state courts commonly look to federal courts for some guidance when interpreting their own constitutional provisions,[220] pure lockstepping negates the beneficial effects of judicial federalism by causing state courts to produce ostensibly the same protection as federal courts.[221] Under limited lockstep, state courts presumptively follow the lockstep approach unless it is clear from the state constitution's language and history that a different analysis was intended.[222] This approach leaves some room for independent state analysis where state constitutional language is not directly analogous to the federal Constitution.[223] The final approach, independent jurisprudence, gives state constitutional provisions the greatest amount of power. Under this approach, state courts consider the state constitutional provision without reference to federal jurisprudence, only looking to the federal courts *after* deciding the issue according to state law.[224] This approach is most necessary when the state court must interpret a right without any federal counterpart, as it would be difficult to lockstep alone.[225] Because the right to pursue health has no counterpart in the federal Constitution, state courts interpreting the state's constitution would be forced to rely on their own independent analysis, free from federal limitations. This is particularly helpful for gender-affirming healthcare litigation considering the restrictive approach federal courts may take in this area.

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219. *Id.* at 392.

220. Tarr, *New Judicial Federalism*, *supra* note 182, at 1116.

221. *See id.* ("[R]eliance on state grounds to decide cases does not necessarily translate into more rights-affirming decisions.").

222. Lousin, *supra* note 180, at 393.

223. Under this approach, the burden is on the party claiming different analysis to show that the state constitution's framers intended for state court jurisprudence to differ from federal jurisprudence. *Id.* Assumedly, this would be clear if the language in both constitutions differed.

224. *Id.* at 394.

225. *See id.* at 395 ("If there is no federal counterpart to a state constitutional right, how can there be any role for the lockstep or limited lockstep approach?"). The constitutional right to hunt and fish, for example, is a right present under some state constitutions with no federal counterpart. *Id.* at 395–96.

Another benefit associated with the right to health is its position within the negative rights context, an area where courts are more comfortable with judicial action. Unlike positive rights that direct the government to take certain actions, negative rights only serve to stop state interference in a certain area without establishing any new judicially-determined duties.[226] Although many state constitutions have unique provisions establishing new rights, most of these rights go unrecognized because courts fear that recognition will force the judiciary to make affirmative policy decisions it has neither the competency nor resources to develop in the absence of a federal counterpart.[227] Claims seeking to prevent state interference, however, are easier for courts to manage because the remedy is simply stopping the government's action.[228] Considering this, it is unsurprising that state constitutional law is already oriented toward negative rights, especially in the healthcare context.[229]

Gender-affirming healthcare litigation fits neatly into the negative rights position. A challenge to one of these bans under the right to health would seek to prevent the government from interfering with one's personal choice to pursue certain medical care without invoking a positive right to the health services themselves. A court's only action would be determining whether the government's ban constitutes an impermissible interference under a certain level of scrutiny, which it is well equipped to

226. *See* Leonard, *supra* note 208, at 1331 ("[W]e have negative rights to be free from government interference, but not affirmative rights to government services or protection." (citation omitted)).

227. *See* Soohoo & Goldberg, *supra* note 182, at 1047 ("[S]tate courts have been reluctant to fully enforce unique state constitutional rights." (citation omitted)); *id.* at 998–99 ("The failure of state courts to enforce socio-economic rights provisions can be traced [to] a reluctance to enforce state constitutional rights where there is no clear federal analogue.").

228. *See* Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321, 345 (2007) (stating that negative rights claims involving individual rights violations are easier for courts to manage because "they involve discrete cases" and "their remedies implicate only a cessation of action by government").

229. *See* Leonard, *supra* note 208, at 1396 ("State constitutional law strongly suggests a strong negative rights orientation, leaving individuals to pursue their own health care but not obligating the state to provide for them."). This framing allows state courts to "draw careful lines to avoid recognizing broad, enforceable [positive] rights to health." *Id.* at 1348.

do.[230] Along with preventing lockstep, this negative rights framing indicates that a state constitutional right to health has serious potential to strike down a gender-affirming healthcare ban. In order to invoke this right, though, it is necessary to understand its current existence within state constitutions.

B. *Existence of the Right to Health in State Constitutions*

Although it has never been fully enforced as a right, a number of state constitutions address health.[231] This makes sense based on the structure of the federal system. As the Supreme Court has stated several times, states hold the power to "promote the health, safety, and general welfare" of their citizens, and health falls undoubtedly within the Tenth Amendment's reserved powers.[232] State constitutional language reflecting this power is applicable to establishing a right to health. Thirteen state constitutions explicitly mention "health,"[233] and while some merely recognize healthcare as an important value, others likely trigger enforceable rights.[234] State provisions addressing health fall into the following three categories.

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230. State courts are not only well equipped, but they have an "obligation to enforce state constitutional rights." Soohoo & Goldberg, *supra* note 182, at 1071. As the Kentucky Supreme Court noted, "To allow the General Assembly . . . to decide whether its actions are constitutional is literally unthinkable." Rose v. Council for Better Educ., 790 S.W.2d 186, 209 (Ky. 1989).

231. *See* Mariah McGill & Gillian MacNaughton, *The Struggle to Achieve the Human Right to Health Care in the United States*, 25 S. CAL. INTERDISC. L.J. 625, 667 (2016); *see also* Leonard, *supra* note 208, at 1369 ("It is significant that several states enshrine health explicitly in their constitutions, unlike the U.S. Constitution.").

232. *See* Soohoo & Goldberg, *supra* note 182, at 1037 (explaining that the Supreme Court has assigned the power to promote health and safety to the states on numerous occasions); *see, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) ("[The Supreme Court] has distinctly recognized the authority of a state to enact . . . health laws of every description . . . ." (internal quotation omitted)). Most states have exercised this power by establishing public departments that regulate the practice of medicine and other health professions. *See* Leonard, *supra* note 208, at 1339–40.

233. Leonard, *supra* note 208, at 1347.

234. *See* McGill & MacNaughton, *supra* note 231, at 667 ("While some provisions merely recognize health care as an important value of public concern, others arguably contain enforceable rights." (citing Leonard, *supra* note 208, at 1348)).

The first category of provisions merely identifies health as a matter of "public value, concern, or aspiration."[235] Louisiana's constitution, for example, simply states that, "The legislature may establish a system of . . . public health."[236] Provisions like this indicate that health is a concern of the state but do not contain any mandatory language, making them all but worthless to establish even a negative right to health.

State constitutional health provisions in the second category contain mandatory language.[237] These provisions retain the aspirational language about public health and additionally compel the state to act in furtherance of this concern.[238] Some provisions in this group require the state to serve the general public.[239] Michigan's constitution, for example, directs the legislature to "pass suitable laws for the protection and promotion of the public health" because general health and welfare "are matters of primary public concern."[240] Other states' provisions single out particularly vulnerable groups that the state must provide for, such as disabled individuals or those living in poverty.[241] Some provisions address both.[242] When judicially interpreted, most courts have declined to recognize a

235. Leonard, *supra* note 208, at 1348.

236. LA. CONST. art. XII, § 8; *see also* ALA. CONST. amend. 53 (The state . . . may acquire, build, establish, own, operate and maintain hospitals, health centers, sanatoria and other health facilities.").

237. *See* Leonard, *supra* note 208, at 1348.

238. *See, e.g.*, *id.* at 1348–49 (explaining that Michigan's constitution includes provisions with both aspirational and mandatory language).

239. *See, e.g.*, S.C. CONST. art. XII, § 1; *see also, e.g.*, ALASKA CONST. art. VII § 4; HAW. CONST. art. IX, § 1; N.Y. CONST. art. XVII, § 3; WYO. CONST. art. 7, § 20.

240. MICH. CONST. art. 4 § 51.

241. *See, e.g.*, ARK. CONST. art. 19 § 19 ("It shall be the duty of the General Assembly to provide by law for the support of institutions for the education of the deaf and dumb and the blind, and also for the treatment of the insane."); *see also, e.g.*, MISS. CONST. art. IV, § 86 (providing for the "care of [the] indigent sick"); N.C. CONST. art. XI, § 4 (providing for "the poor, the unfortunate, and the orphan").

242. *See, e.g.*, HAW. CONST. art. IX, §§ 1, 3 (stating that the state shall provide for "the protection and promotion of the public health" and "financial assistance, medical assistance and social services for persons who are found to be in need of and are eligible for such assistance"); *see also* N.Y. CONST. art. XVII, §§ 1, 3 (providing for "[t]he protection and promotion of the health of the inhabitants of the state" and "[t]he aid, care and support of the needy").

positive right to healthcare services from these provisions, refusing to require authorities to provide certain types of medical care.[243] These provisions, however, may still be applicable to enforce a negative right preventing government infringement on available health services.[244] These provisions therefore have more potential to protect the right to gender-affirming healthcare from state interference.

The final category of state constitutional provisions is the most likely to protect the right to gender-affirming healthcare in litigation. These provisions expressly elevate health to the status of a fundamental, enforceable right.[245] Montana's constitution provides a clear example, stating:

> All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways.[246]

Like the second category, the limited judicial interpretation of these provisions has been restricted to the negative rights context rather than an affirmative right to government services.[247] Provisions in this category nonetheless provide the most textual support for state supreme courts to enforce a right to health that protects transgender youth from a state healthcare ban.

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243. *See* Leonard, *supra* note 208, at 1351–53 (explaining that "[m]ost cases merely recognize local public health departments' authority to promulgate rules and regulations" but that courts have "declined the opportunity to recognize enforceable rights" to health in the positive rights context (citations omitted)).

244. *See supra* notes 229–230 and accompanying text.

245. *See* Leonard, *supra* note 208, at 1348.

246. MONT. CONST. art. II, § 3. For a less clear example that still may indicate a fundamental right to health, see ILL. CONST. pmbl. ("We, the People of the State of Illinois—grateful to Almighty God for the civil, political and religious liberty which He has permitted us to enjoy and seeking His blessing upon our endeavors—in order to provide for the health, safety and welfare of the people . . . .").

247. *See* Leonard, *supra* note 208, at 1361 ("[J]udicial interpretation of [Montana's] provision limits [it] to negative rights to be free from governmental interference, not affirmative rights to government services.")

Montana is an interesting case study for gender-affirming healthcare litigation. Although its constitution contains the most robust language to protect individual health rights, its legislature attempted to pass a gender-affirming healthcare ban in 2021.[248] The next Part addresses this ban as a case study for assessing possible state constitutional litigation.

V. MONTANA AND THE RIGHT TO HEALTH

In assessing whether Montana's constitution contains an enforceable right to health, it is important to understand the constitution itself as well as the state's constitutional jurisprudence. This Part explains the broader history of Montana's constitution within the principles of judicial federalism discussed above, and then applies its health provision to the state's proposed gender-affirming healthcare ban.

A. *Montana's Constitution and Its Interpretation*

Montana's current constitution is not its first. The state's first constitution was adopted so that Montana could join the Union as part of the "class of 1889," the largest group of states to adopt constitutions since 1776.[249] This constitution was more of a "tool to achieve statehood" than a "well-thought-out structure" of government.[250] But Montana's second constitution, adopted in 1972,[251] is much more than a tool for statehood. It is a "marvelous and surprising" collection of individual rights more extensive than any other American constitution.[252] The 1972 constitution affords "broader than usual anti-discrimination, equal protection, and individual dignity provisions"[253] and

248. H.B. 113, 67th Leg., Reg. Sess. (Mont. 2021) [hereinafter Montana Law].

249. Tarr, *The Montana Constitution*, *supra* note 196, at 2 (citation omitted).

250. *Id.* at 3 (internal quotation omitted).

251. *Id.* at 6.

252. Applegate, *supra* note 183, at 107.

253. *Id.* Mr. Applegate worked for the Chairman of the Montana State Senate's Judiciary Committee, and researched civil liberties and political freedoms for the 1972 Montana Constitutional Convention Commission. *Id.* at 103.

recognizes a number of rights not usually afforded any protection.[254] In total, there are seventeen express rights in Montana's constitution that have no federal counterpart.[255]

Applying the principles of judicial federalism to Montana's constitution and its interpretation reveals both successes and failures relevant to gender-affirming healthcare litigation. A significant success of Montana's current constitution is its embodiment of the laboratory of rights principle. The drafters of Montana's 1889 constitution were aware that future generations would eventually amend it. The chairman of Montana's 1889 constitutional convention, Williams Andrews Clark, acknowledged that "[a]s the generations come and go, developing rapidly successive changes and conditions, requiring new methods and additional powers and restraints, we may expect that the genius and wisdom of our successors will eliminate, supplement, and amend" the constitution.[256] This endorsement of the laboratory of rights principle is especially important when considering that the new rights added to the 1972 constitution represented a substantial leap in individual rights protection.

Montana's 1972 framers also ensured that citizens had the appropriate tools to adjust the constitution. Several changes to the 1972 constitution made it easier to amend than its predecessor, adding options to propose amendments by initiative and removing restrictions on the number of amendments that could be proposed.[257] The 1972 constitution also requires that voters periodically decide whether to call a new constitutional convention,[258] a question that was denied

254. *See* Tarr, *The Montana Constitution*, *supra* note 196, at 17 ("[T]he 1972 constitution recognized a number of rights not mentioned in the 1889 constitution and not usually accorded state constitutional protection."). Examples include the explicit right to privacy, bans on discrimination from private entities, and the positive right to a clean and healthful environment. *Id.* (citations omitted).

255. Griffing, *supra* note 179, at 385. This indicates that the Montana constitution was not intended to mirror the federal Constitution. *Id.*

256. JAMES J. LOPACH ET AL., WE THE PEOPLE OF MONTANA: THE WORKINGS OF A POPULAR GOVERNMENT 7 (1983).

257. Tarr, *The Montana Constitution*, *supra* note 196, at 19–20.

258. *See* MONT. CONST. art. XIV § 3 ("If the question of holding a convention is not otherwise submitted during any period of 20 years, it shall be submitted as provided by law at the general election in the twentieth year following the

when last raised in 2010.[259] These mechanisms, combined with the forward-looking thinking of the constitution's drafters, have fashioned Montana into an optimal laboratory to create and test previously unrecognized rights.

Interpretation of Montana's constitution, however, reveals an essential problem with judicial federalism's rights-shifting framework—state courts must actively choose to recognize individual rights not covered by the federal Constitution. When the state's highest court abdicates this responsibility, the negative consequences of lockstepping prevent the promise of constitutional protection.[260] The history of the Montana Supreme Court's constitutional jurisprudence demonstrates this complication.

During the "Golden Age" of Montana's constitutional jurisprudence, the state's Supreme Court was willing to recognize the state constitution's expansive rights.[261] In this period, the judiciary confirmed that Montana's unique constitutional provisions were "neither hortatory nor decorative."[262] The Montana Supreme Court retained an independent analysis approach to interpreting its constitution, stating that it would "not be bound by the decisions of the United States Supreme Court where independent state grounds exist for developing heightened and expanded rights under our state constitution."[263] The court also explicitly recognized that federal constitutional precedent would have little value for state

last submission."); *id.* § 4 ("If a majority of those voting on the question answer in the affirmative, the legislature shall provide for the calling thereof at its next session.").

259. *See 2010 Ballot Issues*, MONT. SEC'Y OF ST., https://perma.cc/57YD-MB9B.

260. *See supra* notes 219–221 and accompanying text.

261. *See* Griffing, *supra* note 179, at 386–90 (describing several cases from the Montana Supreme Court that recognized broader protections than those under the U.S. Constitution).

262. Tarr, *The Montana Constitution*, *supra* note 196, at 18 (citation omitted); *see also* Applegate, *supra* note 183, at 126 ("Montana courts have issued a number of rulings over the years on the Constitution's provisions, generally giving them force and fuller meaning.").

263. Butte Cmty. Union v. Lewis, 712 P.2d 1309, 1313 (Mont. 1986).

constitutional interpretations.[264] Several significant decisions from this period reflect these sentiments, notably the court's use of the state's express constitutional right to privacy to invalidate a criminal sodomy statute—a decision made well before the federal Supreme Court came to the same conclusion under the federal Constitution.[265]

Recent years, however, have seen the Montana Supreme Court increasingly rely on inhibitive federal precedent when interpreting its state constitution, resulting in less protection for individual rights.[266] In a decision regarding the state's constitutional takings clause, the Montana Supreme Court found that the provision was coextensive with the federal takings clause.[267] Similarly, in *State v. Schneider*,[268] the Montana Supreme Court explained that it would look to federal precedent when reviewing the right to counsel in Montana's constitution, unless the constitution's history expressly stated that courts should not follow federal precedent.[269] This trend toward lockstep, especially during a time when the federal Supreme Court is becoming more rights-restrictive, can be detrimental to invoking or expanding the protections explicitly stated in the state's constitution.

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264. *See* Griffing, *supra* note 179, at 387 ("[T]he Court recognized that federal constitution precedent would have little sway over state constitutional interpretation.").

265. *Compare* Gryczan v. State, 942 P.2d 112, 122 (Mont. 1997) ("[A]ll adults regardless of gender, fully and properly expect that their consensual sexual activities will not be subject to the prying eyes of others or to governmental snooping or regulation."), *with* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").

266. *See* Griffing, *supra* note 179, at 390 ("Despite this earlier willingness to test and implement the new language in the Montana Constitution, the Montana Supreme Court has retreated in recent years to a reliance upon federal precedent.").

267. *See* Buhmann v. State, 201 P.3d 70, 85 (Mont. 2008).

268. 197 P.3d 1020 (Mont. 2008)

269. *See id.* at 1026 (explaining that Montana's right to counsel provisions are "consistent with the characteristics of the Sixth Amendment right" because deliberations during the 1972 Constitutional Convention "indicated an intention on the part of the delegates to align" its provision with the federal Sixth Amendment).

The recent movement in Montana's constitutional jurisprudence does not outright deny the potential for relief in the context of gender-affirming healthcare bans.[270] As noted, utilizing the right to health at least partially avoids the detriments associated with lockstepping.[271] But when determining whether its constitution protects transgender youth, the Montana Supreme Court will still face the essential rights-shifting framework problem—it can either embrace its own rights-expansive jurisprudence to protect individuals or continue its more restrictive path, leaving fewer avenues for relief. The next section will explain the state's gender-affirming healthcare ban and apply Montana's constitutional jurisprudence to both sides of this crossroad.

B. *Potential Litigation in Montana*

Montana's gender-affirming healthcare ban, the Youth Health Protection Act,[272] was introduced by Representative John Fuller on the second day of the state's 2021 legislative session.[273] Like the bans discussed above, Montana's ban forbids healthcare professionals from providing gender-affirming healthcare—including puberty blockers, cross-sex hormones, and surgical gender-reassignment procedures—to individuals under eighteen years old.[274] Violators are subject to "discipline by the appropriate licensing entity" and an individual aggrieved by a violation can bring a civil claim for damages.[275]

The state legislature's purpose for pursuing such a ban "is to enhance the protection of minors . . . who experience distress at identifying with their biological sex."[276] According to the Bill, it is Montana's duty to protect children from "irreversible and

270. *See* Griffing, *supra* note 179, at 392.

271. *See supra* Part IV.A.

272. H.B. 113, 67th Leg., Reg. Sess. (Mont. 2021).

273. *See Montana House Bill 113*, LEGISCAN, https://perma.cc/GP2J-3NR6.

274. Montana Law, *supra* note 248.

275. *Id.* at 4–5 ("A referral for or provision of gender transition procedures to a minor is considered unprofessional conduct and the health care provider is subject to discipline by the appropriate licensing entity . . . ."); *id.* at 5 ("A person may assert an actual or threatened violation of [the Act] as a claim or defense in a judicial or administrative proceeding and obtain compensatory damages, injunctive relief, declaratory relief, or any other appropriate relief.").

276. *Id.* at 1.

drastic nongenital gender reassignment surgery" because there is a "lack of studies showing that the benefits of these extreme interventions outweigh the risks."[277] Speaking about his legislation, Representative Fuller said that "[c]hildren should be free from either parental, peer or cultural pressure to deal with their gender confusion by starting down a one-way road to lifelong medical intervention."[278] Although this bill died in process at the end of the 2021 session,[279] time will tell how successful its progeny will be.

Striking down a ban like this under Montana's right to health would involve three steps. First, the right to health must be firmly established as enforceable. Second, the court must assign a level of scrutiny to determine whether the right has been infringed on by the gender-affirming healthcare ban. Finally, the court must enforce the right to strike down the ban.[280] The next three sections will discuss each of these in turn.

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277. *Id.*

278. Shaylee Ragar, *Lawmakers Advance Revised Bill Restricting Trans Health Care*, MONT. PUB. RADIO (Feb. 22, 2021, 6:47 PM), https://perma.cc/H98G-H63D.

279. *See Bill Actions*, MONT. LEGISLATURE DETAILED BILL INFO., https://perma.cc/KNK4-EZME.

280. Litigators challenging Montana's gender-affirming healthcare ban will also need to establish standing to bring suit. The youth affected by the law are likely able to establish standing under current Montana constitutional jurisprudence. To establish standing for a constitutional challenge, the complaining party must satisfy two criteria: 1) they must clearly allege past, present, or threatened injury to a property or civil right; and 2) the alleged injury must be distinguishable from the injury to the public generally. Mont. Env't Info. Ctr. v. Dep't of Env't Quality, 988 P.2d 1236, 1242 (Mont. 1999). Psychological injuries caused by a challenged law satisfy the first prong of standing. *See* Gryczan v. State, 942 P.2d 112, 120 (Mont. 1997). The Montana Supreme Court has broadened the second prong to include harm that could be common to the general public but that affect the individual in ways not common to the public. *See* Armstrong v. State, 989 P.2d 364, 369 (Mont. 1999). Essentially, plaintiffs must simply be individuals against whom the statute is intended to operate. *Gryczan*, 942 P.2d at 119–20. The severe consequences caused by the absence of gender-affirming healthcare easily establish standing because they are both psychological and individual to the child suffering from gender dysphoria. *See supra* Part I.B.

1. Establishing the Right

The right to pursue health can be firmly enforceable under the Montana constitution. In *Wadsworth v. State*,[281] the Montana Supreme Court established a test to determine whether a right is fundamental and therefore enforceable.[282] Under this test, a right is fundamental if it is either: 1) found in the constitution's Declaration of Rights; or 2) is a right without which other constitutionally guaranteed rights would have little meaning.[283] The right to pursue health likely satisfies either of these prongs.

Language concerning the right to health appears in Montana's Declaration of Rights, which is Article II of the state's constitution.[284] Article II includes several individual rights provisions,[285] but § 3 is the most relevant to the gender-affirming healthcare litigation. As noted in Part IV's discussion of state constitutional health provisions, this section states that all persons "have certain inalienable rights," including "the rights of pursuing life's basic necessities . . . and seeking their safety, health and happiness in all lawful ways."[286]

Because the "inalienable" right to seek "safety, health and happiness" is explicitly enumerated in Montana's Declaration of Rights,[287] the state court should easily recognize it as enforceable.[288] The Montana Supreme Court has established a judicially protected right solely from Article II's text before—in *Montana Environmental Information Center v. Department of Environmental Quality*,[289] it found the right to a "clean and healthful environment" under the same section.[290]

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281. 911 P.2d 1165 (Mont. 1996).

282. *See id.* at 1171–72.

283. *Id.*

284. MONT. CONST. art. II.

285. *See generally id.*

286. MONT. CONST. art. II., § 3.

287. *Id.*

288. *See supra* notes 282–283 and accompanying text.

289. 988 P.2d 1236 (Mont. 1999).

290. *See id.* at 1246 ("[W]e conclude that the right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of Montana's Constitution . . . .").

Although not necessary, the right to health also fulfills the second prong of the fundamental right analysis as a right without which other rights would have little meaning.[291] In *Wadsworth*, the Montana Supreme Court used a "practical matter" indicator to determine whether a right not explicitly written in the Declaration of Rights should be considered fundamental.[292] In explaining why the right to pursue employment was fundamental despite its lack of textual support, the *Wadsworth* court reasoned:

> As a practical matter, employment serves not only to provide income for the most basic of life's necessities, such as food, clothing, and shelter for the worker and the worker's family, but for many, if not most, employment also provides their only means to secure other essentials of modern life, including health and medical insurance, retirement, and day care.[293]

Because the right to pursue employment practically affected the attainment of other enumerated rights, like the right to pursue life's basic necessities, it was deemed fundamental.[294] This reasoning applies similarly to the right to health, and the Montana Supreme Court has already noted the importance of making personal health decisions. In *Armstrong v. State*,[295] for example, the court noted that:

> One's health is a uniquely personal possession. . . . "[A health] decision can either produce or eliminate physical, psychological, and emotional ruin. It can destroy one's economic stability. It is, for some, the difference between a life of pain and a life of pleasure. It is, for others, the difference between life and death."[296]

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291. Wadsworth v. State, 911 P.2d 1165, 1171–72 (Mont. 1996).

292. *Id.* at 1172 (explaining that the right to employment should be considered a fundamental right even when not enumerated in the Declaration of Rights).

293. *Id.*

294. *Id.* at 1173 ("Article II, section 3 of Montana's constitution encompasses the right to the opportunity to pursue employment generally as a necessary incident of the fundamental right to pursue life's basic necessities . . . .").

295. 989 P.2d 364 (Mont. 1999).

296. *Id.* at 378 (quoting Andrews v. Ballard, 498 F. Supp. 1038, 1047 (S.D. Tex. 1980)).

This language strongly suggests that the freedom to make personal health decisions implicates several enumerated rights, including the right to pursue life's basic necessities and the right to pursue happiness.[297] For youth specifically, a violation of the right to health could also implicate the right to education, which the Montana Supreme Court established as fundamental in *Columbia Falls Elementary School District No. 6. v. State*.[298] Regardless of the avenue, an enforceable right to health can be established under Montana's constitution for the purpose of striking down gender-affirming healthcare bans.

2. Assigning Scrutiny

After formally establishing the right to health, the court must then assign a level of scrutiny by which to determine whether a state action violates that right. Under Montana's constitutional jurisprudence, the level of scrutiny assigned to a right "depends both on the nature of the interest and the degree to which it is infringed."[299] Accordingly, the Montana Supreme Court assigns one of three levels of scrutiny. Strict scrutiny, the most stringent standard, is imposed when the challenged action "interferes with the exercise of a fundamental right or discriminates against a suspect class."[300] Under strict scrutiny, a piece of government legislation must be justified by a "compelling state interest and must be narrowly tailored to effectuate only that compelling interest."[301] A middle-tier level of scrutiny applies when the implicated right is not in the Declaration of Rights, but appears in the state's constitution as

297. MONT. CONST. art. II., § 3.

298. 109 P.3d 257 (Mont. 2005); *see id.* at 312–13 (Mont. 2005). The scope of this Note cannot adequately cover the implications that a violation of the right to health may have on the right to education, but this question certainly merits further scholarship.

299. *Wadsworth*, 911 P.2d at 1173 (citations omitted).

300. *Id.* at 1174 (citation omitted); *see id.* (applying strict scrutiny to an administrative rule that interfered with the fundamental right to employment); *see also* Mont. Env't Info. Ctr. v. Dep't of Env't Quality, 988 P.2d 1236, 1245–46 (Mont. 1999) (applying strict scrutiny to any statute or rule implicating the right to a clean and healthful environment).

301. *Armstrong*, 989 P.2d at 374 (citations omitted).

a directive to the legislature.[302] If the right does not fall into either of these categories, the court assigns it rational basis review.[303]

Because the right to pursue health is fundamental, the court should apply a strict scrutiny analysis. Strict scrutiny in Montana requires the government to show a compelling state interest for its action.[304] Additionally, the state's action must be closely tailored to effectuate only that interest and be the "least onerous path."[305] To justify its gender-affirming healthcare ban, the Montana legislature would have to meet all these qualifications.

Much of this may sound easy to establish so far. That may be because arguing that the freedom to make personal health decisions without state interference feels both morally and legally right to many litigators. But in deciding whether to invalidate a gender-affirming healthcare ban under the right to health, the Montana Supreme Court will face the same essential crossroad previously discussed—it can protect transgender youth by enforcing the right or abdicate responsibility entirely.

3. Invalidating the Law

The Montana Supreme Court has precedential support to either enforce or forego the right to health in the context of striking down a gender-affirming healthcare ban. There are two key cases illustrating both of these choices: *Armstrong v. State* and *Montana Cannabis Industry Ass'n v. State*.[306]

Armstrong v. State would be the strongest jurisprudence to invalidate a gender-affirming healthcare ban. In *Armstrong*, the Montana Supreme Court invalidated two statutes that prohibited certain medical professionals from performing abortions.[307] The petitioners argued that these statutes violated

302. *Mont. Env't Info. Ctr.*, 988 P.2d at 1245. It would be interesting to see how this level of scrutiny would interact with the second category of healthcare provisions noted in Part IV.B.

303. *See* Wadsworth v. State, 911 P.2d 1165, 1178 (Mont. 1996) (Trieweiler, J., concurring).

304. *Wadsworth*, 911 P.2d at 1170.

305. *Id.* at 1174.

306. 286 P.3d 1161 (Mont. 2012).

307. Armstrong v. State, 989 P.2d 364, 370 (Mont. 1999).

the right to privacy by preventing a woman from obtaining a lawful medical procedure from the healthcare provider of her choosing.[308] Though *Armstrong* struck down the laws under the constitutional right to privacy, its language is applicable to the right to health in three ways. First, *Armstrong* acknowledged the importance of individual medical decision-making.[309] Second, the *Armstrong* court connected this importance directly to the right to health.[310] Finally, the court established a test directly applicable to gender-affirming healthcare litigation.[311]

Armstrong clearly lays out the significance of personal medical decision-making. The court explicitly stated that "[f]ew matters more directly implicate personal autonomy and individual privacy than medical judgments affecting one's bodily integrity."[312] It also noted that constitutional rights can be violated "by the withholding of . . . physical treatment."[313] Given that individual medical decisions have a direct impact on one's health, this language necessarily applies to the right to health in the context of gender-affirming healthcare. Further, asserting that one's right to health is violated when the government withholds gender-affirming healthcare necessarily implies that these services are *healthy* for an individual to pursue. This could be an extremely powerful statement, especially during a period when transgender individuals are publicly accused of being "sick."[314]

Although in dicta, the *Armstrong* court connected the importance of medical decision-making to the right to health. After completing its primary constitutional analysis under the right to privacy, the court further explained that other portions of Montana's constitution could also be implicated by the

308. *Id.* at 368.

309. *See infra* notes 312–314 and accompanying text.

310. *See infra* notes 315–316 and accompanying text.

311. *See infra* notes 317–325 and accompanying text.

312. *Armstrong*, 989 P.2d at 378.

313. *Id.* (internal quotation omitted).

314. *See* Dillon Richards, *Oklahoma Lawmaker Accused of Bigotry After Saying Transgender People 'Have Mental Illness'*, ABC, https://perma.cc/UA79-Q7SC (last updated Apr. 15, 2021, 5:08 PM) (quoting an Oklahoma lawmaker as staying that "I understand transgender people have mental illness . . . your insanity certainly is scary").

impermissible legislation.[315] The court noted that Article II, § 3's right to safety, health, and happiness would also be applicable when the right to make personal medical judgments suffers governmental interference.[316] This language easily serves as a paradigm to attach legislation affecting medical decisions directly to the right to health.

Past these foundational pieces, *Armstrong* is especially advantageous to gender-affirming healthcare litigation because it establishes an applicable test to determine whether legislation violates the right to health. To decide whether state abortion laws violated the right to privacy, the *Armstrong* court devised what this Note calls the "*bona fide* test." The court articulated:

> Except in the face of a medically-acknowledged, *bona fide* health risk, clearly and convincingly demonstrated, the legislature has no [compelling] interest . . . to justify its interference with an individual's fundamental privacy right to obtain a particular lawful medical procedure from a health care provider that has been determined by the medical community to be competent to provide that service and who has been licensed to do so.[317]

This test applies strict scrutiny analysis directly to legislation affecting medical decisions, balancing the individual's interest with the state's regulatory power. The right to health could largely borrow this language, asserting the "health right" in place of the "privacy right."

In establishing this test, the court further explained that a state's action is impermissible when the "legislature thrusts itself" upon individuals "under the guise" of protection, but in reality is attempting to "promot[e] their own beliefs."[318] Here,

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315. Here, the court noted that Montana's Declaration of Rights "is not simply a cook book of disconnected and discrete rules written with the vitality of an automobile insurance policy," but rather "a cohesive set of principles, carefully drafted and committed to an abstract ideal of just government." *Armstrong*, 989 P.2d at 383.

316. *See id.* ("Article II, Section 3, guarantees . . . the inalienable right to seek safety, health and happiness in all lawful ways—i.e., . . . the right to seek and obtain medical care from a chosen health care provider and to make personal judgments affecting one's own health and bodily integrity without government interference.").

317. *Id.* at 380.

318. *Id.*

the court criticized the "unrelenting pressure" from "organizations promoting their own particular values."[319]

The *bona fide* test should definitively strike down Montana's gender-affirming healthcare ban. There is no bona fide health risk, let alone one that is clearly and convincingly demonstrated, that justifies withholding all gender-affirming healthcare from transgender youth. The relevant medical community has confirmed that these procedures are the primary treatment for severe cases of gender dysphoria, which have dangerous physical and psychological consequences for transgender youth.[320] Two recognized institutions have established medical guidelines for prescribing and administering gender-affirming healthcare, each with multiple safeguards to protect the patient.[321] And even with these safeguards, most of the medical procedures for individuals under eighteen are *reversible* with few health consequences.[322] Puberty blockers are completely reversible if the patient decides they do not want to transition.[323] Cross-sex hormones are also partially reversible and have few health risks.[324] Surgical interventions, the only irreversible treatment, are not permitted *until an individual turns eighteen*, making Montana's law wholly inapplicable.[325] Simply stated, the absence of a bona fide health risk means Montana has no compelling interest to interfere with the lives of transgender youth. The Montana legislature, along with the other legislatures attempting to pass a similar ban, is using a bogus concern about health to force its own misguided beliefs about transgender individuals onto the general public—this is not only constitutionally impermissible, but serves only to *worsen* the health of the citizens the state is *obligated* to protect.

While it would be optimal if the precedent set by *Armstrong* eliminated Montana's gender-affirming healthcare ban, *Armstrong* does have its analogue. Precedent beginning in *Wiser*

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319. *Id.*

320. *See supra* Parts I.A, I.B.

321. *See supra* Part I.A.

322. *See supra* note 97–98 and accompanying text; *supra* Part I.A.

323. *See supra* Part I.A.

324. *See, e.g.*, *Feminizing Hormone Therapy*, MAYO CLINIC, https://perma.cc/D62E-5SZ7.

325. *See* Montana Law, *supra* note 248; *supra* Part I.A.

v. State[326] and solidified by *Montana Cannabis Industry Ass'n v. State* could deny relief altogether.

In *Wiser*, the court began to cabin the individual rights implicated by state health laws. The law challenged in *Wiser* required denturists, specialized dental care professionals who work exclusively with tooth replacement, to refer partial denture patients to dentists "as needed."[327] Immediately, dentists claimed that denturists were required to refer all partial denture patients, while denturists claimed that referrals were discretionary.[328] After the state Board of Dentistry promulgated a rule requiring denturists to refer all partial denture patients to dentists, denturists sued on grounds that the rule impermissibly infringed on the patient's right to privacy.[329]

Finding the rule constitutionally permissible, the *Wiser* court explained that although individuals have the right to seek their own medical treatment, they do not have the right to obtain medical care free of regulation.[330] Because the court framed the issue as denturists' desire to establish the right to be free from regulation instead of patients' right to make medical choices, *Armstrong*'s *bona fide* test was inapplicable.[331] Unsurprisingly, the right to be free from regulation does not exist in Montana's constitution, so the court used rational basis scrutiny to determine whether the rule was constitutionally permissible.[332] Finding that the state's interest in regulating health outweighed an individual's interest in privacy, the court upheld the rule.[333] The *Wiser* court further emphasized that Article II, § 3's phrasing that individuals have the right to seek "[safety, health and happiness] *in all lawful ways*"[334] indicated

326. 129 P.3d 133 (Mont. 2006).

327. *Id.* at 136; *see also Denturist vs Dentist: Why You Need Both*, FUTURE SMILES DENTURE CLINIC, https://perma.cc/2G6H-8PRP.

328. *Wiser*, 129 P.3d at 136.

329. *Id.* at 136–37.

330. *Id.* at 137–38.

331. *See id.*

332. *See id.* at 138–39.

333. *Id.*

334. *Id.* at 139 (emphasis in original).

that pursuit of an enumerated right is "necessarily subordinate to reasonable restraint and regulation by the state."[335]

Wiser alone does not endanger gender-affirming healthcare litigation. For one thing, Montana's ban is not mere regulation, but an outright prohibition on medical services.[336] More troubling is that *Wiser* was a shift from the Montana Supreme Court's previous protection of individual rights—a shift that continued to gain momentum in *Montana Cannabis*.

In *Montana Cannabis*, the court examined a medical marijuana law that prohibited providers from assisting more than three authorized medical marijuana users.[337] The law was challenged on several grounds, including an allegation that it violated the medical marijuana user's fundamental right to pursue health.[338] In this context, the Montana Supreme Court briefly acknowledged, but immediately dismissed, the right to health. While it noted that the "[f]undamental right to seek health" exists in Montana's constitution, it extinguished that right by emphasizing the "in all lawful ways" language.[339] Extending *Wiser*, the court stated, "The Constitution is clear that the right to seek health is circumscribed by the state's police power to protect the public's health and welfare."[340] Accordingly, the court rejected the right to health argument, explaining that although "an individual has a fundamental right to obtain . . . medical treatment," they do not have "a fundamental right to use any drug, regardless of its legality."[341] Failing to apply even rational basis scrutiny, the court found that "[a] patient's selection of a particular treatment . . . is within the [government's] interest in protecting public health,

335. *Id.* (internal quotation omitted).

336. *See* Montana Law, *supra* note 248; *supra* Part I.A.

337. Mont. Cannabis Indus. Ass'n v. State, 286 P.3d 1161, 1163 (Mont. 2012); *see also* MONT. CODE ANN. § 50-46-308 (2021) (repealed 2022) ("A provider or marijuana-infused products provider may assist a maximum of three registered cardholders.").

338. *Mont. Cannabis*, 286 P.3d at 1164 ("The District Court found that these sections substantially implicated the Plaintiffs' fundamental rights to pursue employment, to seek one's own health in all lawful ways, and to privacy.").

339. *Id.* at 1166.

340. *Id.* (citation omitted).

341. *Id.*

and regulation of that [treatment] does not implicate a fundamental constitutional right."[342]

As with *Wiser*, *Montana Cannabis*'s implications do not extinguish relief for transgender youth under a right to health. There are several key differences between a law regulating the number of users for a certain treatment and an all-out ban of a certain medical service. Moreover, during a subsequent appeal, the Montana Supreme Court emphasized the state's goal of introducing medical marijuana into society legally because the court was concerned with marijuana's federal status as an illegal Schedule I controlled substance.[343] Certainly, no similar circumstances exist in the gender-affirming healthcare context. But *Montana Cannabis*'s treatment of the right to health illustrates a dangerous avenue the court could take to stand idly by as the legislature regulates what it pleases. If the gender-affirming healthcare bans were challenged under the right to health, the court would have to decide whether the state's power to protect health can circumscribe an individual's right to pursue it.

The answer to this question may lie in Justice James Nelson's dissent in *Montana Cannabis*. Justice Nelson, the author of *Armstrong* and the sole dissenter in *Montana Cannabis*, summarized aptly that "the Montana Constitution generally, and the Declaration of Rights especially, serve as a restraint on governmental power."[344] Because of this, the court's insistence that constitutional rights can be circumscribed by legislative action is not only "grave[ly] concern[ing]" but "renders meaningless" the rights themselves.[345] According to Justice Nelson, the power of the constitution to restrain the

342. *Id.* (internal quotation omitted).

343. *See* Mont. Cannabis Indus. Ass'n v. State, 368 P.3d 1131, 1138 (Mont. 2016) ("We begin by acknowledging the proverbial 'elephant in the room.' Marijuana is a Schedule I Controlled Substance under the federal Controlled Substances Act . . . ." (citation omitted)).

344. *Mont. Cannabis*, 286 P.3d at 1172–73 (Nelson, J., dissenting) (citing State *ex rel.* James v. Aronson, 314 P.2d 849, 852 (1957) ("[T]he State Constitution is a limitation upon the power of the legislature and not a grant of power to that body.")).

345. *Id.* at 1172 ("I have grave concerns with the Court's suggestions that the rights enumerated in Article II, Section 3 are circumscribed by the State's police power. . . . If this proposition were true, then the constitutional rights at issue would be rendered meaningless." (citations omitted)).

state from interfering with an individual's fundamental rights is destroyed if those rights are dictated by the "changing compositions of the legislative and executive branches."[346] These ideals could not be more applicable to gender-affirming healthcare litigation. A state must ensure that its citizens live healthy and full lives, not police them according to certain discriminatory opinions. Although Montana's Supreme Court has precedent to either enforce or forego the protection of transgender youth under the right to health, it should step in to protect them.

CONCLUSION

Gender-affirming healthcare, and health itself, is important and difficult to constitutionally protect. An individual's health depends not only on equal access to the appropriate medical care, but requires a social and political climate that ensures the full rights of citizenship for all.[347] Health can only be benefitted by public policies and legal reforms that eliminate prejudice, discrimination, and stigma.[348] Transgender individuals will continue to exist regardless of state legislatures but it is the law's duty to ensure that they have the ability to live healthy, full lives. In the current war against this ideal, lawyers must invoke innovative strategies to explore every possible avenue for constitutional success. Courts too must contribute by enforcing protections for transgender individuals against invasive laws, especially if they become the last line of defense.

Action is needed on all fronts. As legislative sessions pass, gender-affirming healthcare bans mutate to invade further into the personal liberties of transgender individuals. Texas Governor Greg Abbott recently directed his state's Department of Family and Protective Services to investigate any parent who "subjects" their child to gender transition procedures for child

346. *Id.* at 1173.

347. *See* WPATH SOC, *supra* note 35, at 1 ("[H]ealth is dependent upon not only good clinical care, but also social and political climates that provide and ensure social tolerance, equality, and the full rights of citizenship.").

348. *See id.* at 1–2 ("Health is promoted through public policies and legal reforms that promote tolerance and equity for gender and sexual diversity and that eliminate prejudice, discrimination, and stigma.").

abuse.[349] And gender-affirming healthcare bans are not the only laws states attempt to pass in order to punish transgender individuals. There are efforts to exclude transgender youth from participating in school activities,[350] to prevent them from using their gender's public bathroom,[351] and to erase their history from educational instruction.[352]

In the face of these challenges, lawyers need to take advantage of state constitutional protections.[353] They should apply the principles of judicial federalism in their favor to invoke the power and protection that state courts have the ability to give.[354] They should pragmatically search through relevant provisions and confidently assert new rights to protect transgender youth from invasive state interference.[355] They must challenge state courts to enforce the merits of their constitutions, and in return, state courts should provide protection.[356] These are no doubt difficult calls to action. But like gender-affirming healthcare itself, these actions are vital, necessary, and carry the hope for a better future.

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349. Letter from Greg Abbot, Governor of Tex., to Jamie Masters, Comm'r of the Tex. Dep't of Fam. & Protective Servs. (Feb. 22, 2022), https://perma.cc/5TRZ-RPNF ("Because the Texas Department of Family and Protective Services (DFPS) is responsible for protecting children from abuse, I hereby direct your agency to conduct a prompt and thorough investigation of any reported instances of [gender-affirming healthcare] procedures in the State of Texas.").

350. *See, e.g.*, S.B. 766, 2022 Leg., Reg. Sess. (Va. 2022) ("Male students shall not be permitted to participate on any school athletic team or squad designated for 'females,' 'women,' or 'girls.'").

351. *See* H.B. 1005, 97th Leg., Reg. Sess. (S.D. 2022) ("The school administrator shall designate any multi-occupancy shower room, changing room, or rest room, located in a public school, for use exclusively by members of the same sex.").

352. *See* H.F. 2054, 2022 Gen. Assemb., Reg. Sess. (Iowa 2022) (allowing parents to remove their children from classes that discuss gender identity or sexuality).

353. *See supra* Part IV.

354. *See supra* Part III.

355. *See supra* Parts IV, V.

356. *See supra* Part V.