

TRANS ANIMUS

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Abstract: Anti-transgender legislation is sweeping the nation with devastating consequences for trans lives. Each piece of legislation is generally challenged in isolation and conceptualized under the Equal Protection Clause as involving either impermissible sex classifications or classifications against transgender people. These frames are accurate but insufficient to fully capture the scope and harm of the laws on trans lives. These all-encompassing laws must be unequivocally identified for what they are: a product of animus violating the Equal Protection Clause. Through its detailed analysis of these laws and their legislative history, this Article demonstrates that animus is evident from the laws' overbreadth, underinclusiveness, fabricated or pretextual government interests, and direct legislative statements of animus. As this Article contends as its central thesis, framing anti-trans legislation as rooted in animus toward transgender people may help lead to greater—and more efficient—litigation success and will also avoid the pitfalls of Equal Protection suspect classification doctrine that essentializes and forces identities into rigid, exclusionary boxes. Drawing from principles of restorative, transformative, and transitional justice, the animus framing also has the potential, perhaps counterintuitively, to lead to greater social healing of the fissures being created by the culture war aimed at transgender people.

INTRODUCTION

At the turn of the twenty-first century, the U.S. Supreme Court began recognizing the humanity of people with queer sexualities by declaring bans on same-sex sexual conduct unconstitutional.¹ In response, some lamented that the Court had “taken sides in the culture war” and endorsed the “so-called homosexual agenda.”² Although handwringing about a “homosexual agenda” as

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¹ See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (holding that constitutional protections of liberty include the right for people of the same sex to engage in intimate sexual relations).

² *Id.* at 602 (Scalia, J., dissenting).

an existential threat was misplaced, there undoubtedly were—and are—organized efforts to advance the rights of LGBTQ individuals through law reform efforts.³

But equally significant was the *anti*-homosexual agenda, spearheaded by a group of activists, lawmakers, and organizations who worked sedulously to deny queer people legal recognition.⁴ Today, that movement has culminated in a well-organized anti-transgender agenda that has successfully enacted a broad range of legislation across many states seeking to render transgender people extinct.⁵ That language may seem extreme, but it is appropriate for two reasons: first, because, as will be unearthed in this Article, some of the advocates behind anti-trans legislation literally deny the existence of transgender people;⁶ second, the anti-transgender legislation is so totalizing in its scope that it seeks to regulate and remove trans people from public life.⁷ For these reasons, many of the groups involved in promoting anti-trans legislation have been deemed hate groups by the Southern Poverty Law Center.⁸ In the 2023 legislative session alone, over five hundred bills were introduced across the country targeting LGBTQ rights, with eighty-four passed into law.⁹ The 2024 legislative session, just underway at the time of publishing, appears headed in a similar direction.¹⁰

³ See generally Scott Skinner-Thompson, *The First Queer Right*, 116 MICH. L. REV. 881 (2018) [hereinafter Skinner-Thompson, *The First Queer Right*] (critiquing the conformist picture of the LGBTQ community painted by the marriage equality movement); Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010) (analyzing strategy behind the movement for marriage equality). To the extent you need further proof of the existence of the LGBTQ movement, refer no further than to Lil Nas X's MTV Video Music Award speech thanking the "gay agenda" for his victory. Oliver Browning, *Lil Nas X Thanks 'Gay Agenda' in 'Iconic' MTV VMAs Acceptance Speech*, INDEPENDENT (Sept. 15, 2021), <https://www.independent.co.uk/tv/culture/lil-nas-x-thanks-gay-agenda-in-iconic-mtv-vm-as-acceptance-speech-b2192455.html> [<https://perma.cc/F3QZ-VFSA>].

⁴ DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT 3* (1997) (documenting some of the social forces that resisted gay rights).

⁵ See 303 Creative LLC v. Elenis, 600 U.S. 570, 604 (2023) (Sotomayor, J., dissenting) (noting the nationwide backlash to transgender rights); Russell Contreras, *The Forces Behind Anti-Trans Bills Across the U.S.*, AXIOS (Mar. 31, 2023), <https://www.axios.com/2023/03/31/anti-trans-bills-2023-america> [<https://perma.cc/H2MD-9LPW>] (discussing the role of groups like the Alliance Defending Freedom, Liberty Counsel, and Family Research Council in promoting anti-trans legislation).

⁶ See *infra* notes 312–357 and accompanying text (providing examples of anti-transgender rhetoric from lawmakers who support anti-transgender legislation).

⁷ See *infra* notes 139–307 and accompanying text (analyzing the extreme breadth and depth of anti-transgender legislation).

⁸ *Anti-LGBTQ*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-lgbtq> [<https://perma.cc/W9WY-P5WY>] (listing groups that support anti-transgender legislation that the Center deems to be hate groups).

⁹ *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, ACLU, <https://www.aclu.org/legislative-attacks-on-lgbtq-rights> [<https://perma.cc/2KQK-8M2U>] (Nov. 3, 2023). Other counts place the number of anti-LGBTQ bills and statutes even higher. See, e.g., *2023 Anti-Trans Bill Tracker*,

For example, laws have been passed that prohibit gender-affirming healthcare, bar trans participation on sports teams, ban the use of bathrooms consistent with one's gender identity, prevent access to accurate identification documents, prohibit drag shows, prevent the discussion of queer identities in public schools, and ban queer books.¹¹ These laws often parrot one another across state lines and are written by anti-transgender groups.¹² Although the power of the anti-transgender movement has been noted in the context of political and social discussion of anti-transgender laws,¹³ the legal significance of their organized agenda, the broad-based legislative erasure of transgender people it seeks to instantiate, and the animus that undergirds these laws (and that they, in turn, foment) have often been elided or underemphasized.¹⁴ In particular, although

TRANS LEGIS. TRACKER, <https://translegislation.com/> [<https://perma.cc/8MJN-UR48>] (suggesting that close to six hundred bills targeting LGBTQ rights were introduced in 2023).

¹⁰ Erin Reed, *2023–2024 Anti-Trans Legislation Tracker Released*, ERIN IN THE MORNING (Dec. 18, 2023), <https://www.erininthemorning.com/p/2023-2024-anti-trans-legislation> [<https://perma.cc/FS8E-TUN5>].

¹¹ See *infra* notes 139–307 and accompanying text (providing examples of recent anti-transgender legislation and detailing the scope of those laws).

¹² Adam M. Rhodes, *Anti-Trans Bills Flood States in ‘Centrally Coordinated’ Attack on Transgender Existence*, THE APPEAL (Mar. 22, 2023), <https://theappeal.org/anti-trans-bills-transgender-state-legislation/> [<https://perma.cc/5VSJ-BS69>] (noting a concerted effort on behalf of anti-transgender groups to sweep the nation with a set of anti-transgender bills); Maggie Astor, *G.O.P. State Lawmakers Push a Growing Wave of Anti-Transgender Bills*, N.Y. TIMES, <https://www.nytimes.com/2023/01/25/us/politics/transgender-laws-republicans.html> [<https://perma.cc/K4QM-JL6E>] (June 20, 2023) (same).

¹³ See, e.g., Anya Zoledziowski, *How 2022 Became the Year Trans Hate Went Mainstream*, VICE (Dec. 21, 2022), <https://www.vice.com/en/article/5d383z/anti-trans-violence-2022> [<https://perma.cc/D8GQ-XHEB>] (noting, for example, anti-transgender activists’ attempts to “fearmonger and stifle trans existence altogether”).

¹⁴ Importantly, legal scholars have made compelling Equal Protection animus arguments regarding more longstanding, yet narrower, legislative attempts to exclude transgender people. These include, among others, as the Americans with Disabilities Act’s (ADA) exclusion of transgender people, the Trump Administration’s exclusion of trans people from the military, and the exclusion of trans people from domestic violence shelters. These arguments ought to be levied against the current wave of totalizing anti-transgender legislation. See, e.g., Jennifer L. Levi & Kevin M. Barry, *Transgender Tropes & Constitutional Review*, 37 YALE L. & POL’Y REV. 589, 620 (2019) (examining animus at play in various legal restrictions on transgender people, including with respect to the ADA); Eric Merriam, *Fire, Aim, Ready! Militarizing Animus: “Unit Cohesion” and the Transgender Ban*, 123 DICKINSON L. REV. 57, 60 (2018) (explaining that the Trump Administration’s exclusion of transgender individuals from the military was unconstitutional animus); Rishita Apsani, *Are Women’s Spaces Transgender Spaces? Single-Sex Domestic Violence Shelters, Transgender Inclusion, and the Equal Protection Clause*, 106 CALIF. L. REV. 1689, 1751 (2018) (conceptualizing claims to challenge domestic violence shelters’ exclusion of transgender individuals as rooted in unconstitutional animus); Kevin M. Barry, Brian Farrell, Jennifer L. Levi & Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 574 (2016) (describing the ADA’s exclusions as grounded in “moral animus”); Chan Tov McNamara, Note, *Striking Out Animus: A Framework to Remedy Batson’s Blind Spots*, 29 CORNELL J. L. & PUB. POL’Y 945, 977 (2021) (explaining that the exclusion of LGBT jurors is sometimes based on unconstitutional animus); Scott Skinner-Thompson, *Animus, Not*

many brilliant and brave LGBTQ activists and scholars have noted the depth and breadth of the anti-transgender legislation in popular discussion of the laws, scholarship and litigation tend to analyze each piece of legislation in isolation, understating the all-encompassing, cumulative impact of the laws on transgender lives and the motivation behind them.¹⁵

As this Article advances as its central thesis, longstanding Equal Protection doctrine that correlates overly broad and totalizing lawmaking (that is, structural overreach) as evidence of animus toward a particular population can be a useful tool in legally and rhetorically capturing the nature of the anti-transgender agenda.¹⁶ Under that jurisprudence, the Supreme Court has established that a law is unconstitutionally motivated by animus, or a “bare desire to harm,”¹⁷—even when it does not target a “suspect” classification that is entitled to heightened constitutional scrutiny—when such laws are significantly overbroad¹⁸ or under-inclusive in their approach to achieving their purported goals.¹⁹ The doctrine specifically links significant legislative overreach or underinclusiveness, as well as the presence of a fabricated or pretextual government interest, with animus.²⁰ Moreover, challenging anti-transgender laws as unconstitutional under the Equal Protection Clause primarily because they contain gender-based or trans-based classifications, as is often done by litigants and scholars, fails to conceptually or discursively capture why these laws are an affront to constitutional and social equality principles.²¹ As critical trans studies scholars have underscored, laws

Readiness: Trump & Mattis Move Full Steam Ahead on Unconstitutional Trans Military Ban, JUST SEC. (Sept. 1, 2017), <https://www.justsecurity.org/44650/animus-readiness-trump-mattis-move-full-steam-unconstitutional-trans-military-ban/> [<https://perma.cc/ZD8G-SPMF>] (finding unconstitutional animus in the Trump Administration’s exclusion of transgender individuals).

¹⁵ See *infra* note 362 and accompanying text (collecting and analyzing Equal Protection constitutional challenges to individual pieces of anti-transgender legislation).

¹⁶ See *infra* notes 57–100 and accompanying text.

¹⁷ E.g., *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”); see also WILLIAM D. ARAIZA, *ANIMUS 2* (2017) (“The intuition that improper government purposes constitute an especially problematic feature of some government actions reflects a great deal of embedded constitutional consciousness.”).

¹⁸ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 715 (5th ed. 2015). A law is overbroad when it regulates more conduct or people than necessary to achieve the goals of the legislation. *Id.*

¹⁹ *Id.* at 714. A law is underinclusive when it does not regulate enough conduct or people to achieve the goals of the legislation. *Id.*

²⁰ See *infra* notes 57–129 and accompanying text (discussing instances in which the Court has found animus where the law was overbroad, underinclusive, or where there was evidence of a pretextual governmental interest).

²¹ SA Smythe, *Black Life, Trans Study: On Black Nonbinary Method, European Trans Studies, and the Will to Institutionalization*, 8 *TRANSGENDER STUD. Q.* 158, 165 (2021) (“Trans people’s unruly bodies have been scrutinized, coercively medicated, exploited, historically relegated to the contemporary, and otherwise violated . . .”).

and policies enforcing gender essentialism and the gender binary are, in many respects, defining features of government and social control more broadly.²² Our legal understanding of the recent wave of anti-trans legislation should try to apprehend and explain that totalizing impact.²³ The use of Equal Protection animus doctrine also more fully describes the harm of these laws on trans and gender variant people while avoiding some of the conformist essentialism inherent in arguing that trans identity or gender identity is an immutable characteristic subject to heightened scrutiny.²⁴ Some may be concerned that describing these laws as rooted, in part, in animus may escalate rather than abate the culture wars at play.²⁵ Those wars, however, are already red hot—because of the anti-transgender agenda.²⁶ Further, identifying and naming the motivations behind the widespread harm to transgender people is the least punitive, least retributive, most rudimentary, and most basic form of justice that can be rendered.²⁷ Consistent with theories of restorative, transitional, and transformative justice, while punitive responses to violence and harm perpetuate the carceral state and often redistribute harms on the communities they are intended to protect,²⁸ a fulsome

²² See generally ERIC A. STANLEY, *ATMOSPHERES OF VIOLENCE* (2021).

²³ *Id.*

²⁴ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442–46 (1985) (demonstrating that, in determining whether a classification is “suspect” and therefore entitled to heightened protection, the Court analyzes whether the characteristic is immutable, is associated with political powerlessness, has suffered historical discrimination, and otherwise prevents a person from contributing to society).

²⁵ See *Obergefell v. Hodges*, 576 U.S. 644, 712 (2015) (Roberts, C.J., dissenting) (criticizing the majority for, in Chief Justice Roberts’ view, describing those who opposed same-sex marriage as disparaging gay people or otherwise bigoted); Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 40 (2014) (describing the Court’s invocation of animus in *United States v. Windsor*, 570 U.S. 744 (2013), as a “disturbing charge” and potentially “gratuitous,” particularly in circumstances where deeming the classification as “suspect” and therefore entitled to heightened scrutiny may achieve the same outcome); Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675, 700 (2014) (arguing that grounding equal protection analysis in “animus” is more likely to “undermine inclusiveness, destroy mutual respect, and promote cultural division”); see also Robert L. Tsai, *Abandoning Animus*, 74 ALA. L. REV. 755, 760 (2023) (exploring whether subjective notions of hatred and the deployment of the animus doctrine distract from more important questions of material inequality).

²⁶ See Zoledziowski, *supra* note 13 (noting how those in support of anti-transgender legislation have, themselves, created this culture war by specifically targeting LGBTQ individuals). Moreover, the term “animus” is, in many ways, a legally sanitized word, as it is part of the Supreme Court’s own terminology for describing when laws completely lack a rational purpose and instead are motivated by an impermissible purpose. See *infra* Part I (discussing the animus analysis of Supreme Court jurisprudence).

²⁷ Scott Skinner-Thompson, *Identity by Committee*, 57 HARV. C.R.-C.L. L. REV. 657, 713 (2022) [hereinafter Skinner-Thompson, *Identity by Committee*] (explaining that “given the current vehemence with which trans lives are already being attacked, a compelling argument can be made in favor of embracing the most emancipatory model” possible when trying to advance transgender freedom, rather than an incremental, harm reduction approach).

²⁸ Dean Spade, *Their Laws Will Never Make Us Safer* (explaining that increased criminalization of violence against trans people “just feeds the voracious law enforcement systems that devour our

and accurate accounting—or truth-telling—of motivations and harms inflicted on victims is a critical first step for any social healing to occur.²⁹

This Article explores these themes in three parts. Part I outlines the relevant constitutional Equal Protection jurisprudence prohibiting animus in law making and describes how to identify the presence of animus, including through structural overreach, legislative underinclusiveness, the presence of a false or pretextual government interest, and direct evidence of legislative animus.³⁰ Part II then comprehensively analyzes the breathtaking scope of the anti-transgender legislation being introduced and enacted in many states through the 2023 legislative sessions and uses examples from legislative history to demonstrate that these laws are, in fact, a product of anti-trans animus.³¹ Part III concludes by comparing the animus-based approach to conceptualizing the wave of anti-trans lawmaking with other Equal Protection approaches.³² In addition to doctrinal dividends, Part III draws from principles of transitional justice and restorative reconciliation to explore how unequivocal judicial naming of the normative basis for these laws as grounded in animus will, perhaps counterintuitively, be critical to social healing around issues of gender and sexuality.³³ In doing so, the Article makes several timely contributions to the existing scholarly literature. First, it underscores the need to consider law and policy holistically, not individually, when considering civil rights implications. Additionally, it thoroughly yet efficiently captures the full extent of laws targeting transgender people, including through detailed analysis of several difficult to access legislative testimony videos. Further, it explains the doctrinal implications of that all-encompassing regulation in terms of Equal Protection animus doctrine. Finally, it analyzes the comparative advantages of the animus framework in furthering transformative justice for trans communities.

communities”), in *AGAINST EQUALITY: PRISONS WILL NOT PROTECT YOU* 1, 1, 6 (Ryan Conrad ed., 2012); Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1034 (2021) (arguing that prosecutions of police violence legitimate and replay the pathologies of the carceral system).

²⁹ Cf. William D. Araiza, *Call It by Its Name*, 48 STETSON L. REV. 181, 185 (2019) [hereinafter, Araiza, *Call It by Its Name*] (explaining that discussing many equal protection cases “purely in terms of the lack of adequate fit between the challenged law and the government interest asserted in its defense denudes those cases of their underlying meaning”).

³⁰ See *infra* notes 34–129 and accompanying text.

³¹ See *infra* notes 130–357 and accompanying text.

³² See *infra* notes 358–428 and accompanying text.

³³ See *infra* notes 398–428 and accompanying text.

I. CONSTITUTIONAL PROHIBITIONS ON ANIMUS

Lawmaking involves line-drawing.³⁴ For that reason, the Supreme Court has concluded that most kinds of classifications will only be subject to rational basis review if challenged for violating the Equal Protection Clause.³⁵ Under such review, the government's action will generally be upheld so long as there is a conceivable legitimate government interest for the classification and the means chosen to achieve that goal or interest are reasonably related to the law.³⁶ If a law involves one of a handful of so-called "suspect" classifications, like race, or "quasi-suspect" classifications, like sex, it may be subjected to heightened scrutiny.³⁷ Such heightened scrutiny requires evidence of a compelling or important government interest and that the law be narrowly tailored or substantially related to that interest.³⁸ But the Supreme Court is loath to recognize additional classifications not already recognized as "suspect."³⁹ Nevertheless, the Court has established that, even if a law is subjected to generally permissive rational basis review because it does not draw lines based on one of the limited protected classifications entitled to heightened scrutiny, there are still limits.⁴⁰

One of the principal limits under rational basis review is when there is evidence of animus or a "bare desire to harm."⁴¹ Indeed, there is a strong argument that the prohibition on government lawmaking rooted in animus toward a particular group of people is at the heart of our Constitution's broader architecture.⁴²

³⁴ CHEMERINSKY, *supra* note 18, at 697.

³⁵ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

³⁶ *Id.*

³⁷ *Id.* at 440–41.

³⁸ *Id.* (noting that suspect classifications require a compelling government interest whereas quasi-suspect classifications require an important government interest).

³⁹ *Id.* at 441–42 ("[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant . . . to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.").

⁴⁰ See Katie R. Eyer, *Animus Trouble*, 48 STETSON L. REV. 215, 222–24 (2019) (detailing cases that have succeeded in invalidating various laws subjected to rational basis review).

⁴¹ *Romer v. Evans*, 517 U.S. 620, 634 (1996) ("If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973))). To be clear, the presence of animus is not the only way a law can fail rational basis review. Eyer, *supra* note 40, at 218–26. But, as explained in Part I, in many of the key Supreme Court rational basis cases the lack of rational justification for a law is seen as evidence of, or a proxy for, animus. See *supra* notes 34–40 and accompanying text; *infra* notes 42–128 and accompanying text.

⁴² Accordingly, Dale Carpenter has suggested that "the concept of animus has emerged from equal protection as an independent constitutional force." Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 183 [hereinafter Carpenter, *Windsor Products*].

That is, in a variety of constitutional contexts, whether it be free speech,⁴³ religious freedom,⁴⁴ the prohibitions on bills of attainder targeting specific people for criminal punishment,⁴⁵ or—as relevant here—equal protection, lawmaking grounded in animus toward a particular group is constitutionally anathema.⁴⁶ That prohibition protects people of all stripes from arbitrary, irrational, and dehumanizing laws.⁴⁷

Under Equal Protection doctrine specifically, animus can be evinced by statements or proclamations by lawmakers and bill sponsors, by the total lack of fit between the means chosen to achieve the purported legislative goal, and by the presence of a totally fabricated or pretextual legislative goal.⁴⁸ In such instances, the Court has concluded that the law is impermissibly motivated by animus.⁴⁹ To be clear, the Court has never required the presence of legislative overbreadth, underinclusiveness, a fabricated government interest, *and* direct evidence of animus in order to declare a law unconstitutionally motivated by a bare desire to harm. But each factor independently and also cumulatively consti-

More recently, however, Carpenter has noted that inertia in favor of a concept of animus as a stand-alone constitutional doctrine divorced from equal protection or due process concerns has fizzled. Dale Carpenter, *The Dead End of Animus Doctrine*, 74 ALA. L. REV. 585, 587–88 (2023) [hereinafter Carpenter, *Dead End*].

⁴³ Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (arguing that First Amendment law “has as its primary, though unstated, object the discovery of improper governmental motives” and that the “doctrine compromises a series of tools to flush out illicit motives and to invalidate actions infected with them”).

⁴⁴ *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617, 638–39 (2018) (underscoring that laws or regulations based on hostile attitudes toward a religion violate the First Amendment).

⁴⁵ Akhil Reed Amar, *Attainder and Amendment 2: Romer’s Rightness*, 95 MICH. L. REV. 203, 213 (1996) (explaining that the Constitution’s prohibition on bills of attainder that, in essence, declare a person guilty without process is rooted in part in constitutional suspicion of laws that name and single out groups of people for distinctive treatment).

⁴⁶ Carpenter, *Windsor Products*, *supra* note 42, at 183.

⁴⁷ Carpenter, *Dead End*, *supra* note 42, at 589 (“All citizens are protected from animus-based government action.”).

⁴⁸ Other scholars may distill these core elements from the Supreme Court’s equal protection animus doctrine slightly differently, albeit consistently, with my framing. *See, e.g., id.* at 599 (suggesting that factors for locating the presence of animus include “(1) the statutory text (textual); (2) the political and legal context of passage (contextual); (3) the legislative proceedings . . . (procedural); (4) the law’s harsh real-world effects . . . (effectual); and (5) the utter failure of alternative explanations to offer legitimate ends along with means that really advance those ends (pretextual)”) (internal citations omitted); William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 184 (2019) [hereinafter Araiza, *Animus and Its Discontents*] (explaining that the Court’s equal protection animus cases reveal reliance on a contextual inquiry “that turns on both subjective and objective factors,” including an evaluation of legislative history, substantive and procedural irregularities, and strong negative reactions by those involved in lawmaking).

⁴⁹ *E.g., Romer v. Evans*, 517 U.S. 620, 627 (1996).

tutes evidence of animus.⁵⁰ Nor must the animus or irrationality be directed at a group at all. Even individuals, or so-called “class[es] of one,” are protected from lawmaking that singles them out for mistreatment.⁵¹

As in most things, examples are the best teachers.⁵² Section A of this Part discusses cases in which the Court has recognized structural overbreadth as evidence of animus.⁵³ Section B of this Part provides examples where the Court has recognized a law’s structural underinclusiveness as evidence of legislative animus.⁵⁴ Section C of this Part goes on to discuss how the Court has viewed pretextual government interests as evidence of animus.⁵⁵ Finally, Section D of this Part describes situations in which direct animus from lawmakers has been weighed by the Court.⁵⁶

A. Structural Overbreadth as Animus

Up to this point, the most glaring example of legislative overreach deemed animus by the Supreme Court under rational basis review was the Court’s decision to overturn a Colorado state constitutional amendment in 1996, in *Romer v. Evans*.⁵⁷ There, the citizen-passed Amendment 2 repealed any local ordinances that sought to “prohibit discrimination on the basis of homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”⁵⁸ The amendment also prohibited any state or local government from taking any action to protect this “class of persons.”⁵⁹ The government interests principally advanced by the state of Colorado for the amendment were that it “put[] gays and lesbians in the same position as all other persons,” or, as phrased slightly differently by Colorado: prevented them from having “special rights.”⁶⁰ Colorado also argued that the law purportedly preserved resources for the protection of other kinds of discrimination (for example, on the basis of race or sex).⁶¹

Notwithstanding the fact that sexual orientation was not protected by heightened scrutiny, the Court readily concluded that Amendment 2 failed ra-

⁵⁰ Araiza, *Animus and Its Discontents*, *supra* note 48, at 184 (noting that the Court’s animus analysis involves weighing a variety of factors, as opposed to requirements).

⁵¹ *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

⁵² *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296 (2001) (observing that, in a complicated and often inconsistent area of constitutional law, the state action doctrine, “[a]midst such variety, examples may be the best teachers”).

⁵³ See *infra* notes 57–88 and accompanying text.

⁵⁴ See *infra* notes 89–100 and accompanying text.

⁵⁵ See *infra* notes 101–113 and accompanying text.

⁵⁶ See *infra* notes 114–129 and accompanying text.

⁵⁷ 517 U.S. 620, 635–36 (1996).

⁵⁸ *Id.* at 624 (internal citations and quotations omitted).

⁵⁹ *Id.* (internal citations and quotations omitted).

⁶⁰ *Id.* at 626.

⁶¹ *Id.* at 635.

tional basis review.⁶² The Court pointed to the law's sheer overbreadth, impacting the legal status of gays and lesbians in both the public sphere and private sphere "both on its own terms and *when considered in light of the structure and operation of modern anti-discrimination laws*."⁶³

The Court gave two related reasons for overturning the law.⁶⁴ First, "the amendment ha[d] the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation."⁶⁵ Put differently by the Court, the law "impose[d] a special disability upon those persons alone" with a complete lack of fit between the purported goals of preventing "special rights" and the means chosen of identity classification.⁶⁶ The Court explained the importance of having a relationship between means and ends, underscoring that "[t]he search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass."⁶⁷ According to the Court, the lack of fit between identity characteristics and purported legislative goals is "why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare."⁶⁸

Second, and again relatedly, the Court overturned the law because it was overly broad.⁶⁹ According to the Court, the law's "sheer breadth [was] so discontinuous with the reasons offered for it that the amendment seem[ed] inexplicable by anything but animus toward the class it affects; it lack[ed] a rational relationship to legitimate state interests."⁷⁰ That is, the lack of fit "raise[d] an inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."⁷¹

The Court's analysis in *Romer* built on the Court's prior decision in 1973, in *United States Department of Agriculture v. Moreno*, where the Court invalidated as overbroad a law that excluded those living with unrelated people from food stamp eligibility.⁷² The overarching objectives of the Food Stamp Act were to alleviate hunger and malnutrition precipitated by poverty and to subsidize the agricultural economy.⁷³ The asserted interest served by the exclusion of people

⁶² *Id.* at 635–36.

⁶³ *Id.* at 627 (emphasis added).

⁶⁴ *Id.* at 632.

⁶⁵ *Id.*

⁶⁶ *Id.* at 631.

⁶⁷ *Id.* at 632.

⁶⁸ *Id.* at 633.

⁶⁹ *Id.* at 632.

⁷⁰ *Id.*

⁷¹ *Id.* at 634.

⁷² 413 U.S. 528, 538 (1973).

⁷³ *Id.* at 533.

living with unrelated people was to minimize fraud in the administration of the food stamp program.⁷⁴ The government argued that the classification could have been based on Congress's rational belief that households with unrelated individuals are more likely to misuse the program by not reporting income sources and that such households are "relatively unstable," making it more difficult to detect fraud.⁷⁵

The Court concluded that the wholesale exclusion of unrelated people from coverage was "clearly irrelevant" to the interests in combatting malnutrition and subsidizing big agriculture,⁷⁶ and, in fact, the exclusion counteracted the Act's overarching purposes by closing off certain populations from nutritional support. Nor did the exclusion of unrelated, cohabitating people advance the interest of preventing fraud, in part due to other provisions of the Act that specifically targeted fraud.⁷⁷ According to the Court, this "necessarily cast[] considerable doubt upon the proposition that [the exclusion] could rationally have been intended to prevent those very same abuses."⁷⁸ Put differently, there were narrower means of achieving those purported goals and the classification at issue "[was] not only 'imprecise', it [was] wholly without any rational basis."⁷⁹

Relatedly, in 2013, in *United States v. Windsor*, the Court analyzed the constitutionality of the so-called Defense of Marriage Act (DOMA), which, in pertinent part, defined marriage as exclusively between one man and one woman under federal law.⁸⁰ The purpose of this narrow definition of marriage was to exclude those in state-sanctioned same-sex marriages from recognition under more than one thousand federal laws.⁸¹ In part because the law was overly broad, insofar as it infringed on an area of traditional state governance (domestic relations) and excluded those in same-sex marriage made lawful by a state from over one thousand federal laws and related regulations, the Court concluded that the law disparaged and injured that class of people.⁸² Grounding its reasoning in both the Equal Protection Clause and Due Process protections for fundamental rights, the Court explained that:

DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State

⁷⁴ *Id.* at 535.

⁷⁵ *Id.*

⁷⁶ *Id.* at 534.

⁷⁷ *Id.* at 536.

⁷⁸ *Id.* at 537.

⁷⁹ *Id.* at 538.

⁸⁰ 570 U.S. 744, 752 (2013).

⁸¹ *Id.*

⁸² *Id.* at 771–75.

finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.⁸³

Also significant is the fact that, when policing discrimination, the Court has, at times, underscored the degree to which legislative enactments work together to disenfranchise certain groups, bolstering the claim that animus or hostility is the real motivation.⁸⁴ For example, in 1993, in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, a religious discrimination case, the Court emphasized how a series of ordinances might, when viewed individually, advance legitimate government interests in the humane treatment of animals.⁸⁵ But the “ordinances when considered together disclose[d] an object remote from these legitimate concerns”—religious animosity toward a specific religious group that practiced animal sacrifice as a religious ritual.⁸⁶ The Court underscored that “the effect of a law in its real operation is strong evidence of its object,” particularly when laws are drafted together.⁸⁷ As noted above, in *Windsor*, too, the Court underscored how DOMA worked with other laws to deny rights to same-sex couples.⁸⁸

B. Structural Underinclusiveness as Animus

The U.S. Supreme Court has also established that, when the classification is significantly underinclusive in its ability to advance the purported state interests at issue, there is evidence of irrational prejudice or animus rendering the law unconstitutional.⁸⁹

The leading example here is *City of Cleburne v. Cleburne Living Center*, where the Court, in 1996, concluded that the application of a law requiring homes for people with intellectual impairments to submit a special use permit

⁸³ *Id.* at 775.

⁸⁴ *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 535–36.

⁸⁸ 570 U.S. 744, 771 (2013) (noting that the law’s “operation in practice” was evidence of its purpose to relegate those in same-sex marriages to a lower status under federal law insofar as there were thousands of laws controlled by DOMA and its exclusionary definition of marriage).

⁸⁹ *Romer v. Evans*, 517 U.S. 620, 633 (1996) (overturning law under rational basis review because it was “at once too narrow and too broad”).

application in order to operate was unconstitutional.⁹⁰ Significantly, the Court noted that classifications based on cognitive abilities were not a suspect classification entitled to heightened scrutiny, but it nevertheless concluded that the application of the law was significantly underinclusive, thereby evidencing irrational prejudice.⁹¹

The purported state interests in denying a special use permit for a group home for those with intellectual impairments included, among others, (1) that it would operate in “a five hundred year flood plain”; (2) that the residents would not be able to take legal responsibility for their actions; and (3) that it would increase the density of the neighborhood in which it would operate.⁹² As to each of these interests, the Court noted that the special use permit requirement for homes for those with intellectual impairments was dramatically underinclusive because there were no restrictions on several other kinds of homes that would implicate the same state interests.⁹³

Specifically, the City did not require special use permits for the operations of “apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged . . . private clubs or fraternal orders, and other specified uses.”⁹⁴ According to the Court’s analysis, those living in a home for the elderly would be just as vulnerable to risks posed by flooding, but such homes were not required to seek a special permit. Similarly, a fraternity’s residents might (stereotypically) seek to avoid legal responsibility for their behavior but were not required to seek a special permit. Finally, all multi-unit housing units implicated the density concerns but, again, were not subject to any special permitting process.⁹⁵ As such, the application of the special permit requirement to the home for people with intellectual impairments was vastly underinclusive to achieve each of the purported government interests.⁹⁶ And that underinclusiveness served as evidence of “irrational prejudice.”⁹⁷

Similarly, in 2003, in *Lawrence v. Texas*, the Court evaluated the constitutionality of a Texas ban on same-sex sexual conduct, with the majority con-

⁹⁰ 473 U.S. 432, 450 (1985).

⁹¹ *Id.* at 446 (“The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”).

⁹² *Id.* at 448–50.

⁹³ *Id.*

⁹⁴ *Id.* at 447.

⁹⁵ *Id.* at 448–50.

⁹⁶ *Id.*

⁹⁷ *Id.* at 450; see also *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617, 636 (2018) (highlighting that “[a]nother indication of hostility is the difference in treatment” between similarly situated individuals).

cluding that such a law violated due process rights of sexual autonomy.⁹⁸ In her concurrence, however, Justice O'Connor concluded that the law violated equal protection prohibitions on animus because it applied only to conduct between people of the same sex, as opposed to people of different sexes.⁹⁹ In other words, the law was underinclusive—and therefore was not truly aimed at moral disapproval of particular conduct, but moral disapproval of a group, which is constitutionally impermissible.¹⁰⁰

*C. Pretextual Government Interests as Animus*¹⁰¹

In addition to structural overreach and legislative underinclusiveness, several of the Court's decisions dealing with equal protection animus suggest that, where the government is, in effect, manufacturing a pretextual government interest, that false purpose for the law can serve as evidence of animus.¹⁰² In other words, when the government, in essence, invents a problem to solve and gestures to an unreal harm as the basis for its law singling out a particular group, this is evidence of animus.¹⁰³ For example, in *Romer*, in addition to underscoring the sheer overbreadth of Colorado's Amendment 2, the Court concluded that the state's purported principal interest of doing no more than putting "gays and lesbians in the same position as all other persons" was simply "implausible."¹⁰⁴ Therefore, under rational basis review, although any conceivable legitimate government interest would typically suffice to uphold the constitutionality of a law,¹⁰⁵ that interest must still be conceivable and legitimate rather than manufactured or illegitimately based in animus.¹⁰⁶ The Court held that the purported interest advanced by the statute was not real because there was "nothing special in

⁹⁸ 539 U.S. 558, 578 (2003).

⁹⁹ *Id.* at 582 (O'Connor, J., concurring). Specifically, the law prohibited what it labeled "deviate sexual intercourse," defined as "any contact between any part of the genitals of one person and the mouth or anus of another person" or "the penetration of the genitals or the anus of another person with an object." *Id.* at 563 (majority opinion) (quoting TEX. PENAL CODE ANN. § 21.01(1) (2003)). All told, the law banned oral and anal sex but only between same-sex couples, even though different sex couples could also engage in much of that conduct. *See id.*

¹⁰⁰ *Id.* at 582–83 (O'Connor, J., concurring).

¹⁰¹ I am especially grateful to Helen Norton and Ronnell Anderson Jones for helping develop the analysis in this Section.

¹⁰² The Court's skepticism toward pretextual or false interests is also seen in its statutory employment discrimination law. *See, e.g.,* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973) (requiring that an individual alleging employment discrimination under Title VII be given the opportunity to show that the employer's proffered reasons for the adverse employment action were, in fact, pretext).

¹⁰³ *Romer v. Evans*, 517 U.S. 620, 631 (1996).

¹⁰⁴ *Id.* at 626.

¹⁰⁵ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 147 (1938) (requiring only that Congress reasonably conceive a legitimate purpose for a law to pass rational basis review).

¹⁰⁶ *Romer*, 517 U.S. at 631.

the protections Amendment 2 withholds.”¹⁰⁷ To the extent that the protections are “taken for granted by most people either because they already have them or do not need them[,] these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”¹⁰⁸ Put differently, there was no “there.” The law was not rational because the interest was not real.¹⁰⁹

Another prime example of courts rejecting classifications that serve only a manufactured or false government interest comes from the U.S. Court of Appeals for the Seventh Circuit’s 2014 decision in *Baskin v. Bogan*, which invalidated state bans on same-sex marriage within the Circuit.¹¹⁰ In an opinion authored by Judge Richard Posner, the court analyzed the government’s so-called “responsible creation” defense, which purported that “the only reason government encourages marriage is to induce heterosexuals to marry so that there will be fewer ‘accidental births,’ which when they occur outside of marriage often lead to abandonment of the child.”¹¹¹

In demonstrating that this could not plausibly be a real or rational interest, Judge Posner underscored its farcical nature:

In other words, Indiana’s government thinks that straight couples tend to be sexually irresponsible, producing unwanted children by the carload, and so must be pressured (in the form of governmental encouragement of marriage through a combination of sticks and carrots) to marry, but that gay couples, unable as they are to produce children wanted or unwanted, are model parents—model citizens really—so have no need for marriage. Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure.¹¹²

All told, in the Seventh Circuit’s view, “animus” was evident from the fact that the state could not articulate a cogent argument to justify its ban on same-sex marriage.¹¹³

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* The Court was also able to find that the interest was not real, in part, because of the law’s sheer overbreadth as discussed above. See *supra* notes 57–71 and accompanying text (analyzing the law’s overbreadth).

¹¹⁰ 766 F.3d 648, 672 (7th Cir. 2014).

¹¹¹ *Id.* at 654.

¹¹² *Id.* at 662.

¹¹³ *Id.* at 666.

D. Direct Evidence of Animus

Finally, in addition to overbreadth, underinclusiveness, and pretextual interests, the Court has established that animus can be proven through direct evidence on behalf of lawmakers or legislative sponsors of such prejudice.¹¹⁴ Indeed, in the context of hostility toward religious beliefs, the Court has underscored not just the statements of lawmakers, but other lawmakers' silence or lack of objection in the wake of any such animus, as evidence of hostility.¹¹⁵

For instance, in *Moreno*, the Court noted that, in addition to the overbroad nature of the ban on unrelated cohabitants receiving food stamps, the statements in the legislative history indicated that the classification "was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."¹¹⁶ The Court rejected this as a legitimate purpose, concluding that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."¹¹⁷ Therefore, the classification could not be sustained by a desire to prejudice "hippies" absent some other justification to further public interest.¹¹⁸

Similarly, in *Cleburne*, the final purported state interest to justify the special rules for group homes for those with intellectual impairments included the negative attitudes of neighbors, such as the concern that students at a nearby junior high school might harass the occupants of the group home.¹¹⁹ The Court concluded, however, that "denying a permit based on such vague, undifferentiated fears is . . . permitting some portion of the community to validate what would

¹¹⁴ *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 634–36 (2018) (emphasizing evidence of animus toward religion that surfaced at a government commission's hearings); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 541 (1993) (emphasizing how evidence from a city council meeting showed hostility on behalf of various members of the community, including city officials, toward those who practiced Santeria and religious animal sacrifice); see also Carpenter, *Dead End*, *supra* note 42, at 588 (noting that one can detect animus in governmental authorities' statements); Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159, 209 (2012) (explaining how government expressions of animus toward particular groups implicate equal protection concerns when such expressions facilitate private party discrimination or communicate to people that they are second class citizens).

¹¹⁵ *Masterpiece Cakeshop*, 584 U.S. at 636 (underscoring that the "record shows no objection to these [hostile] comments from other commissioners"); cf. *Trump v. Hawaii*, 585 U.S. 667, 701–08 (2018) (downplaying direct evidence of President Trump's animus toward Muslims when enacting the so-called "Muslim Ban" because of the president's broad power over national security concerns and because some of the statements were made before Trump was president; distinguishing factors not applicable to state regulation of gender identity).

¹¹⁶ *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 534–35.

¹¹⁹ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448–49 (1985).

otherwise be an equal protection violation.”¹²⁰ As the Court expounded, “the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic.”¹²¹ Put differently, “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”¹²²

As a final example, in the Supreme Court’s 2018 decision in *Masterpiece Cakeshop*, which dealt with whether state civil rights commissioners evidenced hostility toward a baker who refused to create a cake for a same-sex wedding due to his religious beliefs, the Court took a broad view of what could constitute evidence of animus.¹²³ The Court highlighted the following admittedly opaque comments, among others, as potentially hostile:

One commissioner suggested that [the baker] can believe “what he wants to believe,” but cannot act on his religious beliefs “if he decides to do business in the state.” A few moments later, the commissioner restated the same position: “[I]f a businessman wants to do business in the state and he’s got an issue with the—the law’s impacting his personal belief system, he needs to look at being able to compromise.”¹²⁴

The Court recognized that these statements, alone, are open to varying interpretations.¹²⁵ Under one view, the statements could “mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor’s personal views.”¹²⁶ Under the other view, however, the statements “might be seen as inappropriate and dismissive comments showing lack of due consideration for [the baker’s] free exercise rights and the dilemma he faced.”¹²⁷ In light of broader context, the Court concluded that these comments were evidence of animus.¹²⁸ Unfortunately, as detailed in Part II, these comments are

¹²⁰ *Id.* at 449.

¹²¹ *Id.* at 448 (internal citation omitted).

¹²² *Id.* (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

¹²³ See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617, 634–38 (2018).

¹²⁴ *Id.* at 634–35.

¹²⁵ *Id.*

¹²⁶ *Id.* at 635.

¹²⁷ *Id.*

¹²⁸ *Id.* (noting that, of these two possible interpretations of the commissioner’s statements, the latter seemed the most plausible). For important critiques of why these statements were not evidence of animus, see Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 139 (2018).

comparatively benign when compared to the animus articulated by lawmakers in favor of anti-transgender legislation.¹²⁹

II. THE BREADTH AND DEPTH OF ANTI-TRANS ANIMUS

The recent wave of legislation attacking transgender people implicates all four hallmarks of laws driven by animus: these bills are often overbroad, underinclusive, driven by pretextual government interests, and tainted by direct evidence of prejudice by lawmakers.¹³⁰ This Part maps the breadth and depth of anti-transgender legislation up through 2023 and shows how the legislation simultaneously overreaches and underregulates in its efforts to achieve its pretextual nondiscriminatory goals. This overbreadth and underinclusivity demonstrates that the laws are motivated by animus or a bare desire to harm.¹³¹ That conclusion is further supported by direct evidence of such animus from lawmakers and bill sponsors.

The analysis foregrounds Florida because it has been one of the principal instigators of anti-transgender legislation and because there is a large degree of similarity in bills across states, but is supplemented with reference to, and/or discussion of, other states' laws in order to be more comprehensive.¹³² Although the analysis explains why each law is, on its own terms, overbroad, underinclusive, or driven by animus, more important is that the laws are more than the sum of each statute. Taken together, the laws represent a totalizing effort to erase transgender people from public life: underscoring the animus behind the laws. Anti-transgender legislation prevents trans people from accessing healthcare, public spaces, education about queer histories, social and recreational activities

¹²⁹ See *infra* notes 310–357 and accompanying text (detailing the extent of lawmakers' animosity through an analysis of their statements in the context of anti-transgender legislation).

¹³⁰ In her recent dissent in *303 Creative LLC v. Elenis*, a case in which the U.S. Supreme Court created an exception to an LGBT anti-discrimination law for businesses engaged in expressive mediums, Justice Sotomayor went out of her way to signal that the wave of anti-trans legislation implicates the Court's Equal Protection animus jurisprudence. 600 U.S. 570, 638 (2023) (Sotomayor, J., dissenting) ("A slew of anti-LGBT laws have been passed in some parts of the country, raising the specter of a 'bare . . . desire to harm a politically unpopular group.'" (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996))).

¹³¹ See *infra* notes 139–357 and accompanying text (tracking anti-transgender legislation and uncovering how it is rooted in animus); ARAIZA, *supra* note 17, at 151–52 (explaining that "[t]ransgender discrimination often reflects a moral judgment condemning the transgender person" and that "transgender discrimination presents a promising candidate for an animus analysis," which this Article undertakes).

¹³² See Aaron Navarro, *DeSantis Signs Flurry of Anti-Trans Bills, Including Ban on Gender-Affirming Care for Minors*, CBS NEWS (May 17, 2023), <https://www.cbsnews.com/news/florida-ron-desantis-anti-trans-bills-ban-gender-affirming-care-minors-drag-shows/> [<https://perma.cc/8YXV-GCU2>] (noting Florida's many anti-transgender bills signed by Governor Ron DeSantis in 2023 and stating that at least nineteen other states have enacted similar laws, such as those banning gender-affirming care).

like sports, and, indeed, literally seekss to deny the truth of transgender people.¹³³ All told, as emphasized by ACLU attorney Chase Strangio, laws targeting transgender people are “part of a coordinated effort at all levels of government to challenge trans existence, criminalize our bodies, and push us into the shadows.”¹³⁴ Section A of this Part consists of twelve subsections categorizing and analyzing different types of anti-transgender legislation.¹³⁵ Each category of law is analyzed in depth to show how the laws are overbroad, underinclusive, and/or contain evidence of pretextual interests.¹³⁶ Section B of this Part provides examples of various lawmakers’ statements in support of anti-transgender legislation.¹³⁷ Those anti-transgender statements further show how these laws are grounded in animus, or a bare desire to harm transgender individuals.¹³⁸

A. Anti-Trans Overbreadth, Underinclusiveness & Pretextual Interests

Over the past few years, legislation has been introduced and passed that is all-encompassing in its attempts to control, and cumulatively deny or eliminate, the lives of transgender people.¹³⁹ At the same time, these laws often are underinclusive in that they permit cisgender people to engage in the same kind of allegedly problematic conduct.¹⁴⁰ They also routinely rely on fabricated or false government interests and are aimed at invented harms supposedly caused by the existence of transgender people and their presence in public life. Subsections 1 through 12 of this Section analyze examples of anti-transgender legislation,

¹³³ See, e.g., FLA. STAT. § 1006.205(3)(a)–(c) (2023) (banning transgender females from participating on sports teams that correspond with their gender identities); S.B. 254, 2023 Leg. (Fla. 2023) (prohibiting gender-affirming care for minors); H.B. 1521, 2023 Leg. (Fla. 2023) (banning the use of public bathrooms consistent with trans individuals’ gender identities); H.B. 1557, 2022 Leg. (Fla. 2022) (prohibiting discussion of “sexual orientation or gender identity” in certain grade levels of Florida’s public schools).

¹³⁴ Chase Strangio, *Trump’s Attack on Transgender Health Care Is an Attack on Trans People’s Existence*, SLATE (May 9, 2018), <https://slate.com/human-interest/2018/05/trumps-attack-ontransgender-health-care-is-an-attack-on-trans-peoples-existence.html> [<https://perma.cc/EE7J-Q6JN>].

¹³⁵ See *infra* notes 139–307 and accompanying text. Many of the enacted laws have been challenged in court and, because of the varied pace of litigation, readers should confirm whether the laws are currently in force.

¹³⁶ See *infra* notes 139–307 and accompanying text.

¹³⁷ See *infra* notes 308–357 and accompanying text.

¹³⁸ See *infra* notes 308–357 and accompanying text.

¹³⁹ See *infra* notes 142–307 and accompanying text (detailing this all-controlling anti-transgender legislation, including bathroom bills, carceral system segregation, prohibitions on gender-affirming care, and much more).

¹⁴⁰ See, e.g., S.B. 254, 2023 Leg. (Fla. 2023) (banning gender-affirming care for minors but otherwise allowing similar medical procedures to take place in order to make patients conform to gender norms).

showing how those laws are overly broad, underinclusive, and contain pretextual interests.¹⁴¹

1. Bathroom Bills

Transgender people are being forced from public space through so-called “bathroom bills,” which prevent them from using sex-segregated restrooms that correspond with their gender identity. When North Carolina first passed such a law in 2016, it was met with widespread protest and backlash, and the law was ultimately repealed.¹⁴² Now, other states, such as Florida, are passing their own bathroom bills as part of their broader regulation of gender identity.¹⁴³ Florida’s H.B. 1521, passed in May 2023, prohibits anyone from using a restroom in a public building¹⁴⁴ that does not correspond with their “sex.”¹⁴⁵ The statute defines sex narrowly as “the classification of a person as either female or male based on the organization of the body of such person for a specific reproductive role, as indicated by the person’s sex chromosomes, naturally occurring sex hormones, and internal and external genitalia *present at birth*.”¹⁴⁶ This definition excludes transgender people, including those who have had gender affirmation surgery to conform their external genitalia with their gender identity or that otherwise physically conform with their gender identity.¹⁴⁷ The effects of such bills on the lives of trans people are manifold. They out transgender people who may be forced to use restrooms that do not correspond to their gender expression,¹⁴⁸ potentially subjecting them to harassment and violence.¹⁴⁹ More broadly, such privacy violations deter transgender people from entering the public sphere in the first instance—including government buildings that are the touchstone of

¹⁴¹ See *infra* notes 142–307 and accompanying text.

¹⁴² Mark Berman & Amber Phillips, *North Carolina Governor Signs Bill Repealing and Replacing Transgender Bathroom Law Amid Criticism*, WASH. POST (Mar. 30, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/03/30/north-carolina-lawmakers-say-theyve-agreed-on-a-deal-to-repeal-the-bathroom-bill/> [<https://perma.cc/6SUS-FUL7>].

¹⁴³ H.B. 1521, 2023 Leg. (Fla. 2023). In addition to Florida, Idaho and North Dakota passed laws restricting transgender people’s ability to use restrooms consistent with their gender identity in 2023. S.B. 1016, 67th Leg., 1st Reg. Sess. (Idaho 2023); H.B. 1473, 68th Leg., Reg. Sess. (N.D. 2023).

¹⁴⁴ H.B. 1521, 2023 Leg. (Fla. 2023) (defining a public building as one owned or leased by state or local governments).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (emphasis added).

¹⁴⁷ *Id.*

¹⁴⁸ Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159, 192 (2015).

¹⁴⁹ See James Esseks, *Anti-Trans Bathroom Bills Have Nothing to Do with Privacy and Everything to Do with Fear and Hatred*, ACLU (Apr. 19, 2016), <https://www.aclu.org/news/lgbtq-rights/anti-trans-bathroom-bills-have-nothing-do-privacy-and-everything> [<https://perma.cc/CUU7-8B97>] (noting the “obvious risk of harassment and violence” resulting from requiring transgender women to use men’s restrooms when such violence is “already a daily reality for transgender people”).

democratic decision making—and thereby discourage them from influencing the norms of that public sphere.¹⁵⁰ To the extent bathroom bills in other jurisdictions differ from Florida’s by permitting those that have had gender affirmation surgery to use restrooms corresponding with their gender identity, the laws may also coerce transgender people—who may not desire, need, or be medically indicated for such surgery—to undergo such procedures (in turn, counteracting the states’ purported interests in preventing people from having unnecessary surgeries).¹⁵¹ That is, many states decry gender-affirming surgery at the same time they require it for transgender people to enter the public square or otherwise receive legal recognition.¹⁵²

The Florida bathroom bill is overbroad in its effort to achieve its purported goal of privacy because restroom stalls already offer privacy protection for those who do not want their genitalia to be seen by others or who do not want to see others in a state of undress.¹⁵³ And many public buildings contain single-occupancy bathrooms that can be used by anyone who is concerned about privacy.¹⁵⁴ Moreover, if the concern is about exposure to people whose external genitalia may be different than one’s own, the law is overbroad because it excludes those who have had gender affirmation surgery from using a bathroom consistent with their gender identity by defining sex as “external genitalia *present at birth*.”¹⁵⁵ In terms of its purported purpose of advancing public safety,¹⁵⁶ the law

¹⁵⁰ Cf. Scott Skinner-Thompson, *Agonistic Privacy & Equitable Democracy*, 131 YALE L.J.F. 454 (2021), <https://www.yalelawjournal.org/forum/agonistic-privacy-equitable-democracy> [<https://perma.cc/S84T-AF3W>] (describing how the inability to obtain accurate identification documents deters trans people from entering the public square on their own terms).

¹⁵¹ Scott Skinner-Thompson & Ilona M. Turner, *Title IX’s Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC’Y 271, 291 (2013) (noting that policies requiring medical interventions in order for a transgender woman to be part of a women’s sports team fail to consider that such procedures are often unaffordable, unnecessary, or inappropriate for a given individual).

¹⁵² See *infra* notes 209–220 and accompanying text (discussing restrictions on gender-affirming care for adults).

¹⁵³ See SCOTT SKINNER-THOMPSON, *PRIVACY AT THE MARGINS* 38 n.162 (2021) (underscoring that “the existence of transgender people does not pose a privacy threat to anyone”). See generally Susan Hazeldean, *Privacy as Pretext*, 104 CORNELL L. REV. 1719 (2019) (explaining why the privacy arguments raised in opposition to the presence of transgender people in gendered facilities are pre-textual).

¹⁵⁴ *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3d Cir. 2018) (rejecting a constitutional privacy challenge to a school district policy allowing transgender students to use bathrooms consistent with their gender identity because the district already had single-user bathrooms and bathroom stalls, such that those who were not comfortable changing around others had other options available to them).

¹⁵⁵ H.B. 1521, 2023 Leg. (Fla. 2023) (emphasis added).

¹⁵⁶ *Id.* (explaining that the purpose of the bill is “to maintain public safety, decency, decorum, and privacy”).

is overbroad because there are already laws criminalizing sexual violence¹⁵⁷ and there is no evidence suggesting that trans people are any more likely to commit acts of sexual violence than other members of the population.¹⁵⁸ The law's overbreadth serves as evidence that the purported government interests here are entirely manufactured.

The overbreadth of the law is also evident from the scope of its punishments. Anyone who is over the age of eighteen and violates the prohibition is guilty of a second-degree misdemeanor punishable by up to sixty days' imprisonment and a \$500 fine.¹⁵⁹ Schools are also required to create procedures for punishing anyone under the age of eighteen who uses a restroom in violation of the statute.¹⁶⁰ Finally, the Attorney General can bring a civil action against any entity that does not comply with the statute by providing for sex-segregated restrooms or unisex restrooms—allowing the Attorney General to seek an injunction and a fine of up to \$10,000.¹⁶¹ As Justice Kennedy noted in *Lawrence v. Texas*, even though the Texas law criminalizing same-sex sexual intimacy was “a class C misdemeanor, a minor offense in the Texas legal system,” it nevertheless “remain[ed] a criminal offense with all that imports for the dignity of the persons charged,” which imposed a “not trivial” stigma on queer people.¹⁶² Put differently, the Court has, at times, underscored the degree of punishment when analyzing laws that demean certain groups' lives.¹⁶³

Bathroom bills are also often underinclusive in their purported efforts to achieve privacy and safety. For example, the Florida bill contains exceptions for people assisting or chaperoning a minor child under the age of twelve, an elderly person, or a disabled person; for law enforcement or government regulatory persons; for emergency medical assistance; and for custodial, maintenance, or inspection purposes.¹⁶⁴ These exceptions show that there are many instances where Florida is willing to tolerate people potentially being exposed to people whose bodies are different than their own. Moreover, if the problem of transgender people existing in restrooms was so exigent, legislatures' concern ought to extend not just to buildings owned or leased by the government, but also to private-

¹⁵⁷ E.g., FLA. STAT. § 794.011(1)(j) (2022) (defining prohibited sexual battery for purposes of Florida criminal law).

¹⁵⁸ Erin Fitzgerald, *A Comprehensive Guide to the Debunked “Bathroom Predator” Myth*, MEDIA MATTERS FOR AM. (May 5, 2016), <https://www.mediamatters.org/sexual-harassment-sexual-assault/comprehensive-guide-debunkedbathroom-predator-myth> [<https://perma.cc/A3LH-GRAE>] (documenting the lack of evidence that people take advantage of LGBTQ non-discrimination laws to attack women in restrooms).

¹⁵⁹ H.B. 1521, 2023 Leg. (Fla. 2023).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² 539 U.S. 558, 575 (2003).

¹⁶³ *Id.*

¹⁶⁴ H.B. 1521, 2023 Leg. (Fla. 2023).

ly-owned public restrooms. The Florida law, however, does not extend to such buildings.¹⁶⁵ Likewise, to the extent the law is animated by concerns about people's privacy and safety interests, it ignores issues of sexuality by assuming that the lynchpin of all privacy concerns is being seen by people with anatomy different than their own or seeing people whose anatomy is different. Nevertheless, people's idiosyncratic predilections in those regards will also be driven by their sexuality. For example, a gay cis male may actually be more uncomfortable in a state of undress being seen by another cis male than a cis female. The Florida law, however, does not regulate these concerns, evidencing its underinclusive nature.¹⁶⁶

2. Carceral System Segregation

Related to so-called "bathroom bills," states have excluded trans people from accessing sex-segregated spaces consistent with their gender identity within the carceral system.¹⁶⁷ This is particularly problematic because trans people are overrepresented in the carceral system due to the targeted policing of queer identities, structural racism, and poverty.¹⁶⁸ Additionally, as with bathroom bills, forcing people to use spaces that are inconsistent with their gender expression can result in outing and physical violence.¹⁶⁹ These are not hypotheticals, as trans people experience an astounding number of assaults by other prisoners and prison officials once incarcerated.¹⁷⁰ It is for this reason that, under the Obama and Biden Administrations, federal prisons have been required not to reflexively treat inmates based on their external genitalia or sex-assigned at birth but instead to consider the individual's safety.¹⁷¹ For many of the same reasons that bath-

¹⁶⁵ See *id.* (extending only to limited covered entities).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Eric A. Stanley, *Fugitive Flesh: Gender Self-Determination, Queer Abolition, and Trans Resistance* (describing the frequency with which queer people were targeted by police in the mid-1990s), in CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 1, 1 (Eric A. Stanley & Nat Smith eds., 2011); Leonore F. Carpenter & R. Barrett Marshall, *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 WM. & MARY J. WOMEN & L. 5, 6 (2017) (noting how transgender women are often profiled and harassed by law enforcement, resulting in arrests for low-level offenses).

¹⁶⁹ Lihi Yona & Ido Katri, *The Limits of Transgender Incarceration Reform*, 31 YALE J.L. & FEMINISM 201, 242–43 (2020) (advocating for a change in the way carceral systems view gender insofar as the prevailing gender segregations threaten the safety of prisoners).

¹⁷⁰ Gráinne Donohue, Edward McCann & Michael Brown, *Views and Experiences of LGBTQ+ People in Prison Regarding Their Psychosocial Needs: A Systematic Review of the Qualitative Research Evidence*, 18 INTL. J. ENV'T RSCH. & PUB. HEALTH 9335, 9335 (2021) (documenting the "unique psychological and social experiences of LGBTQ+" prisoners).

¹⁷¹ See generally FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., NO. 5200.08, CHANGE NOTICE: TRANSGENDER OFFENDER MANUAL (2022), <https://www.bop.gov/policy/progstat/5200-08-cn-1.pdf> [<https://perma.cc/D7LA-A2PP>]. A more efficacious approach to the problem of gender violence in

room bills are both overly broad and underinclusive, carceral segregation based on sex assigned at birth can put trans prisoners at risk, exacerbating privacy and security concerns, rather than abating them.¹⁷²

3. Prohibitions on Gender-Affirming Care for Minors

Florida is one of over twenty states that has also singled out transgender youth under the age of eighteen for exclusion from medically necessary gender-affirming care.¹⁷³ Five of these states, including Florida, make it a felony to provide best practice medical care for transgender youth.¹⁷⁴ Specifically, Florida bans what it labels “sex-reassignment prescriptions or procedures,” defined as including the “prescription or administration of puberty blockers,” the “prescription or administration of hormones,” and “[a]ny medical procedure, including a surgical procedure” used “to affirm a person’s perception of his or her sex if that perception is inconsistent with the person’s sex.”¹⁷⁵ Like Florida’s bathroom bill, the statute defines “sex” as “the classification of a person as either male or female based on the organization of the human body of such person for a specific reproductive role, as indicated by the person’s sex chromosomes, naturally occurring sex hormones, and internal and external genitalia present at birth.”¹⁷⁶ Notably, the statute prohibits such medical interventions only if they are for the

prisons would be a dramatic reduction in the scope of the carceral system and incarceration. Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons Is to End Prisons: A Response to Russell Robinson’s “Masculinity as Prison,”* 3 CALIF. L. REV. CIRC. 182, 184 (2012).

¹⁷² DANIEL BASSICHIS, SYLVIA RIVERA L. PROJECT, “IT’S WAR IN HERE”: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISONS 15, 35 (Dean Spade ed., 2007) (documenting that “[i]n men’s facilities, transgender women, gender non-conforming people, and intersex people are frequent and visible targets for discrimination and violence, and are subject to daily refusals by correctional officers and other prisoners to recognize their gender identity” and recommending that trans people be housed “based on their own assessment of where they will be most safe” based on their gender identity).

¹⁷³ S.B. 254, 2023 Leg. (Fla. 2023); S.B. 140, 2023 Leg., Reg. Sess. (Ga. 2023); H.B. 71, 67th Leg., 1st Reg. Sess. (Idaho 2023); S.B. 480, 123d Gen. Assemb., 1st Reg. Sess. (Ind. 2023); S.F. 538, 90th Gen. Assemb. (Iowa 2023); S.B. 150, Reg. Sess. (Ky. 2023); H.B. 648, Reg. Sess. (La. 2023); H.B. 1125, Reg. Sess. (Miss. 2023); S.B. Nos. 49, 236 & 164, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023); S.B. 99, 68th Leg., Reg. Sess. (Mont. 2023); L.B. 574, 2023 Leg. (Neb. 2023); H.B. 808, 2023 Sess. (N.C. 2023); H.B. 1254, 68th Leg. Assemb., Reg. Sess. (N.D. 2023); S.B. 613, Reg. Sess. (Okla. 2023); H.B. 1080, 98th Leg. Sess. (S.D. 2023); S.B. 14, 88th Leg., Reg. Sess. (Tex. 2023); S.B. 16, 2023 Gen. Sess. (Utah 2023); H.B. 2007, Reg. Sess. (W. Va. 2023); S.B. 184, Reg. Sess. (Ala. 2022); S.B. 1138, 55th Leg., 2d Reg. Sess. (Ariz. 2022); H.B. 1570, 93d Gen. Assemb., Reg. Sess. (Ark. 2021); S.B. 1, 113th Gen. Assemb. (Tenn. 2023).

¹⁷⁴ S.B. 254, 2023 Leg. (Fla. 2023). The other states are Oklahoma, Alabama, North Dakota, and Idaho. *Equality Maps: Bans on Best Practice Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT, https://www.mapresearch.org/equality-maps/healthcare/youth_medical_care_bans [<https://perma.cc/2U4C-W9HL>] (Nov. 29, 2023).

¹⁷⁵ S.B. 254, 2023 Leg. (Fla. 2023).

¹⁷⁶ *Id.*

purpose of affirming someone's gender identity that is not consistent with, in essence, the sex they were assigned at birth.¹⁷⁷ But the statute specifically excludes medical interventions for those with a "disorder of sexual development" including "external biological sex characteristics that are unresolvably ambiguous."¹⁷⁸ In other words, presumably safe medical interventions are permitted to make patients conform to gender norms and standards.¹⁷⁹ As noted, the punishments for violating the statute are severe. Doctors who violate the statute in Florida are guilty of a felony and subject to immediate license suspension.¹⁸⁰ Minors who have had such medical treatment are entitled to a civil action with a twenty-year statute of limitation, and there are no limits on punitive damages.¹⁸¹

Bans on providing healthcare, be it hormonal interventions or surgical ones, are often justified in the name of protecting transgender youth—whom the legislatures believe lack the capacity to identify their gender—from purportedly unsafe and experimental medical treatment.¹⁸² Or, as Florida Governor Ron DeSantis put it, the laws are designed to prevent the "mutilation of minors."¹⁸³

Transgender children and adolescents, however, know who they are.¹⁸⁴ Further, the medical care at issue has been "endorsed by nearly every professional

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *See id.* (excluding from the definition of "[s]ex-reassignment prescriptions or procedures" treatment performed by a physician who in their "good faith clinical judgment[] performs procedures upon or provides therapies to a minor born with a medically verifiable genetic disorder of sexual development").

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *E.g.*, S.B. 99, 68th Leg., Reg. Sess. (Mont. 2023) (stating that the purpose of the law is "to enhance the protection of minors and their families . . . from any form of pressure to receive harmful, experimental puberty blockers and cross-sex hormones and to undergo irreversible, life-altering surgical procedures prior to attaining the age of majority").

¹⁸³ Daniel Trotta, *DeSantis Signs Florida Ban on Transgender Treatment for Minors*, REUTERS (May 18, 2023), <https://www.reuters.com/world/us/desantis-signs-florida-ban-gender-affirming-treatment-transgender-minors-2023-05-17/> [<https://perma.cc/YE5Q-WCP4>]. As Judge Robert Hinkle recently observed in a hearing challenging the constitutionality of Florida's ban on gender-affirming care for minors, DeSantis repeatedly spread lies about gender-affirming care and the purported mutilation of children's genitals, asking "When I'm analyzing the governor's motivation, what should I make of these statements? . . . This seems to be more than just hyperbole." Brendan Farrington, *DeSantis Spread False Information While Pushing Trans Health Care Ban and Restrictions, a Judge Says*, ASSOCIATED PRESS (Dec. 22, 2023), <https://apnews.com/article/florida-desantis-transgender-law-trial-61639592d4c5e8512af3d3b078e40862> [<https://perma.cc/E98F-WFHJ>].

¹⁸⁴ JULIAN GILL-PETERSON, HISTORIES OF THE TRANSGENDER CHILD, at vii (2018) ("[P]arents, so-called interested observers, or even allies and advocates, tarry within the dangerously limiting circumstances of a system that continues to assay the value of trans children's being in terms not of their humanity and personhood but via questions absurd in their abstraction for how they ask us instead to wonder if trans children 'prove something' about the biological basis of sex and gender . . .").

medical association in the country,”¹⁸⁵ including specialists in transgender care like the World Professional Association for Transgender Health and broader professional medical authorities like the American Academy of Pediatrics.¹⁸⁶ Those same associations do not even recommend medical or surgical interventions for young children.¹⁸⁷ As for adolescents, the associations already impose significant requirements before the initiation of medical or surgical interventions.¹⁸⁸ This shows that, as in *Romer* and *Baskin*, the government is inventing a problem to solve in order to justify its discrimination.¹⁸⁹

Moreover, the healthcare bans are grossly underinclusive and often specifically permit medical interventions to make people with ambiguous or nonbinary physical compositions rigidly conform to binary anatomical norms, demonstrating that the safety concern is pretextual.¹⁹⁰ In fact, those with so-called intersex conditions are often operated on as mere infants who completely lack agency

¹⁸⁵ Developments in the Law, *Outlawing Trans Youth: State Legislatures and the Battle Over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2181 (2021).

¹⁸⁶ Doe v. Ladapo, No. 23cv114-RH, 2023 WL 3833848, at *4 (N.D. Fla. June 6, 2023) (enjoining Florida’s prohibition on the prescription of puberty blockers for transgender adolescents and noting that such treatment is the widely-accepted standard of care recognized by “the American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, American Academy of Family Physicians, American College of Obstetricians and Gynecologists, American College of Physicians, American Medical Association, American Psychiatric Association, and at least a dozen more”).

¹⁸⁷ E.g., E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT’L J. TRANSGENDER HEALTH, at S69 (2022) (including no recommendations for medical or surgical interventions for young children).

¹⁸⁸ *Id.* at S48 (recommending that gender-affirming medical and surgical treatment only be initiated for adolescents after all of the following are satisfied: (1) when the “diagnostic criteria of gender incongruence” were met; (2) the gender incongruence is “marked and sustained over time”; (3) when “the adolescent demonstrates the emotional and cognitive maturity required to provide informed consent”; (4) that any mental health concerns “that may interfere with diagnostic clarity” or “capacity to consent” have been addressed; (5) when “the adolescent has been informed of the reproductive effects” of any treatment; (6) when “the adolescent has reached Tanner stage 2” for pubertal suppression; and (7) if necessary “to achieve desired surgical result for gender-affirming procedures,” that the adolescent have “had at least 12 months of gender-affirming hormone therapy” prior to surgery).

¹⁸⁹ *Romer v. Evans*, 517 U.S. 620, 631 (1996); *Baskin v. Bogan*, 766 F.3d 648, 666 (7th Cir. 2014). Indeed, as noted by GLAAD, Governor DeSantis has lied about gender-affirming care—simultaneously fabricating government interests—by falsely claiming that “[t]hey will actually take a young boy and castrate the boy. They will take a young girl and do a mastectomy, or they will sterilize her because of the gender dysphoria.” *Ron DeSantis*, GLAAD, <https://glaad.org/gap/ron-desantis> [<https://perma.cc/P223-RSRW>] (Oct. 31, 2023). But, as noted above and by GLAAD, “[l]ongstanding best practices medical care for trans youth does not include surgeries or sterilization on young children.” *Id.*

¹⁹⁰ E.g., S.B. 254, 2023 Leg. (Fla. 2023) (allowing such procedures in those instances); see also *Outlawing Trans Youth*, *supra* note 185, at 2181 (explaining that “even as [the statutes] identify gender-affirming medical interventions as ‘dangerous and uncontrolled human medical experiment[s],’ they allow the same procedures to be performed on children who have medically verifiable disorder[s] of sex development” (quoting H.B. 303, 2020 Leg. Reg. Sess. § 2(1) (Ala. 2020))).

when compared to transgender youth seeking medical care.¹⁹¹ In the eyes of anti-transgender legislators, however, that hypocrisy is justified because the permitted genital-normalizing surgeries are bringing infants into purported alignment or conformation with the gender binary.¹⁹² Indeed, in explaining Mississippi's ban on gender-affirming care for trans youth, Senator Joey Fillingane, who introduced the bill, explicitly noted that nothing in the law would prevent a cis-gender teenage male from having a breast reduction surgery if he had "naturally" developed large breasts.¹⁹³ Fillingane noted that such a surgery is "fine" because "that child is not trying to gender transition; just the opposite. He is wanting to look like all the other boys in the class and less like the girls in the class."¹⁹⁴ Similarly, as noted by a court that enjoined Florida's health care ban, the banned medications—puberty blockers, testosterone, and estrogen—are permitted by Florida for use in other circumstances, including treating youth who have started puberty prematurely (central precocious puberty).¹⁹⁵ In other words, "[i]f the bans are actually motivated by concern over the supposed dangers of puberty blockers, HRT, and GCS, providing an exception allowing those treatments to be performed for practically any medical condition other than gender dysphoria is hardly" related to preventing those harms.¹⁹⁶

4. Kidnapping Children from Gender-Affirming Parents

In addition to imposing criminal penalties on doctors who provide gender-affirming care to youth, states have enacted laws designed to intimidate, deter, and penalize parents who seek to support their trans children, in some instances sanctioning removal of the children from their parents' custody.¹⁹⁷ For example,

¹⁹¹ Anne Tamar-Mattis, Note, *Exceptions to the Rule: Curing the Law's Failure to Protect Intersex Infants*, 21 BERKELEY J. GENDER L. & JUST. 59, 62 (2006) (proposing court involvement for such procedures to be performed on intersex infants).

¹⁹² See *infra* notes 193–196 and accompanying text.

¹⁹³ Mississippi Senate Floor Session, *HB1125: Regulate Experimental Adolescent Procedures (REAP) Act; Create to Regulate Transgender Procedures and Surgeries—02/21 (S) Amendment Failed; 02/21 (S) Passed*, at 35:50, MISS. COLL. SCH. L. LEGIS. HIST. PROJECT (Feb. 21, 2023), https://law-db.mc.edu/legislature/bill_details.php?id=11775&session=2023 [https://web.archive.org/web/20240217054558/https://law-db.mc.edu/legislature/bill_details.php?id=11775&session=2023].

¹⁹⁴ *Id.* at 36:00.

¹⁹⁵ *Doe v. Ladapo*, No. 23cv114-RH, 2023 WL 3833848, at *5 (N.D. Fla. June 6, 2023).

¹⁹⁶ *Outlawing Trans Youth*, *supra* note 185, at 2181.

¹⁹⁷ Texas led the way in this regard in 2022 when Governor Greg Abbott ordered the state Department of Family and Protective Services to conduct investigations into reported instances of gender-affirming care to determine if they constituted child abuse. Ken Paxton, Attorney General of Texas, Opinion No. KP-0401, Opinion Letter Re: Whether Certain Medical Procedures Performed on Children Constitute Child Abuse (RQ-0426-KP) (Feb. 18, 2022), <https://texasattorneygeneral.gov/sites/default/files/global/KP-0401.pdf> [<https://perma.cc/JD4E-HF59>]; see *In re Abbott*, 645 S.W.3d 276, 279–80 (Tex. 2022) (describing the background of Texas's efforts to investigate families of transgender children).

a Florida law gives its courts emergency jurisdiction over a child “if the child has been subjected to or is threatened with” gender-affirming medical care.¹⁹⁸ The law allows for the issuance of warrants to take physical custody of the child under the same instances.¹⁹⁹ Such practices are part of a tragic history of so-called child welfare or child protective systems being used to police and dispossess minoritized communities of their children, whether it be based on race,²⁰⁰ sexuality,²⁰¹ disability,²⁰² or other characteristics.

The government interests asserted here are often the same as those asserted in the context of prohibitions on gender-affirming care for youth—medical safety.²⁰³ But when the same interventions are provided to non-transgender youth, they are not deemed child abuse.²⁰⁴ This differential treatment demonstrates the laws’ underinclusiveness and that medical safety is a pretextual justification for the discriminatory laws.²⁰⁵ Moreover, as discussed below with respect to legislatively-forced outing of trans kids to their parents by schools and parentally-enforced bans on queer-themed books in schools,²⁰⁶ anti-trans laws are often passed in the name of parental rights.²⁰⁷ Here, however, the most fundamental of parental rights—custody and the right to control a child’s upbringing—is being eviscerated, demonstrating again an improper legislative pretext.²⁰⁸

¹⁹⁸ S.B. 254, 2023 Leg. (Fla. 2023).

¹⁹⁹ *Id.*

²⁰⁰ DOROTHY ROBERTS, *KILLING THE BLACK BODY* 177–79 (Vintage 2017) (1997) (underscoring the extensive policing of Black mothers and pregnant women).

²⁰¹ Emily Haney-Caron & Kirk Heilburn, *Lesbian and Gay Parents and Determination of Child Custody: The Changing Legal Landscape and Implications for Policy and Practice*, 1 PSCYH. SEXUAL ORIENTATION & GENDER DIVERSITY 19, 20 (2014) (analyzing cases considering the sexuality of a parent when determining child custody).

²⁰² SCOTT SKINNER-THOMPSON, *AIDS AND THE LAW* § 13.08, at 13-99 to -110 (6th ed. 2020) (discussing examples of the termination of parental rights when either parent and/or child was HIV positive).

²⁰³ *See, e.g.*, S.B. 99, 68th Leg., Reg. Sess. (Mont. 2023) (stating that the purpose of the law is to protect minors from “experimental” and “life-altering” procedures).

²⁰⁴ Plaintiffs’ Original Petition and Application for Temporary Restraining Order, Temporary Injunction, Permanent Injunction, and Request for Declaratory Relief at 45, *Doe ex rel. Doe v. Abbott*, No. D-1-GN-22-000977 (Tex. 353d Dist. Mar. 1, 2022) (asserting, at paragraph 173, that the policies at issue “unlawfully discriminate against transgender youth by deeming the medically necessary care for the treatment of their gender dysphoria as presumptively abuse because they are transgender when the same treatment is permitted for non-transgender youth”).

²⁰⁵ *See id.*

²⁰⁶ *See infra* notes 252–283 and accompanying text.

²⁰⁷ *See, e.g.*, Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education, FLGOV.COM (Mar. 28, 2022), <https://www.flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education/> [<https://perma.cc/T4X2-M6GJ>] (claiming that Florida’s so-called “Don’t Say Gay” law “reinforces parents’ fundamental rights to make decisions regarding the upbringing of their children”).

²⁰⁸ *Troxel v. Granville*, 530 U.S. 57, 72 (2000) (describing parents’ “fundamental right to make decisions concerning the care, custody, and control” of their children); *cf. Poe ex rel. Poe v. Labrador*,

5. Restricting Gender-Affirming Care for Adults

States such as Missouri have also instituted what amount to bans on gender-affirming care for adults.²⁰⁹ States have additionally prohibited the use of Medicaid funds for gender-affirming care, meaning that, for low-income transgender people (of which there are many due to societal discrimination),²¹⁰ this care is not available.²¹¹ States have also prohibited the provision of gender-affirming care to anyone incarcerated by the state.²¹² But even in states that have not outright banned such care as to certain adult populations, such as the poor or incarcerated, states have instituted extremely onerous informed consent requirements not applicable to the provision of other medical treatment.²¹³ For example, in Florida, as it pertains to both the provision of gender-affirming medicine (e.g., hormones) and any surgical intervention, the state defines informed consent in a very detailed and burdensome way:

[The] consent must be voluntary, informed, and in writing on forms adopted in rule by the Board of Medicine and the Board of Osteopathic Medicine. Consent to sex-reassignment prescriptions or procedures is voluntary and informed only if the physician who is to prescribe or administer the pharmaceutical product or perform the procedure has, at a minimum, while physically present in the same room:

(a) Informed the patient of the nature and risks of the prescription or procedure in order for the patient to make a prudent decision;

No. 23-cv-00269, 2023 WL 8935065, at *17–18 (D. Idaho Dec. 26, 2023) (concluding that Idaho’s ban on gender-affirming care for minors likely violates parental rights to make decisions regarding their children’s care).

²⁰⁹ Azeen Ghorayshi, *Many States Are Trying to Restrict Gender Treatments for Adults, Too*, N.Y. TIMES (Apr. 22, 2023), <https://www.nytimes.com/2023/04/22/health/transgender-adults-treatment-bans.html> [<https://perma.cc/5WXV-BYKN>] (noting that a Missouri law “severely restrict[s] gender treatments for people of all ages”).

²¹⁰ See generally BIANCA D.M. WILSON, LAUREN J.A. BOUTON, M.V. LEE BADGETT & MORIAH L. MACKLIN, *THE WILLIAMS INSTITUTE: UCLA SCH. OF L., LGBT POVERTY IN THE UNITED STATES: TRENDS AT THE ONSET OF COVID-19* (2023), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Poverty-COVID-Feb-2023.pdf> [<https://perma.cc/QC6G-VDVP>].

²¹¹ S.B. 254, 2023 Leg. (Fla. 2023) (prohibiting expenditure of state funds, including Medicaid payments, for gender-affirming care). Other states that exclude the use of Medicaid for gender-affirming care include: Texas, Nebraska, Arizona, Missouri, Ohio, Kentucky, Tennessee, and South Carolina. See *Equality Maps: Healthcare Laws and Policies: Medicaid*, MOVEMENT ADVANCEMENT PROJECT, <https://www.mapresearch.org/equality-maps/healthcare/mcicaid> [<https://perma.cc/35CT-Y2RQ>] (Nov. 29, 2023) (mapping state policies regarding the use of Medicaid for transgender medical care).

²¹² E.g., H.E.A 1569, 123d Gen. Assemb., 1st Reg. Sess. (Ind. 2023) (prohibiting the use of state resources for “sexual reassignment surgery to an offender patient”).

²¹³ E.g., S.B. 254, 2023 Leg. (Fla. 2023).

(b) Provided the informed consent form, as adopted in rule by the Board of Medicine and the Board of Osteopathic Medicine, to the patient; and

(c) Received the patient's written acknowledgment, before the prescription or procedure is prescribed, administered, or performed, that the information required to be provided under this subsection has been provided.²¹⁴

In much the same way that the medical treatments at issue are available for purposes other than treating gender dysphoria, bans or restrictions on medical care are likewise significantly underinclusive, evincing animus.²¹⁵ Moreover, to the extent these kinds of informed consent requirements that go beyond the standards of care are not in place for procedures that are just as, if not more, medically risky, the restrictions are also overbroad. For example, the requirement that the patient be physically present in the room prevents using telehealth services and is a needless impediment to those that do not live near or cannot readily physically access their providers.²¹⁶ The informed consent forms created by the Boards also contain many false statements designed to deter trans people from accessing care, including the following:

Medical treatment for people with gender dysphoria is based on very limited, poor-quality research with only subtle improvements seen in some patient's psychological functioning in some, but not all, research studies. This practice is purely speculative, and the possible psychological benefits may not outweigh the substantial risks of medical treatments and, in many cases, the need for lifelong medical treatments.²¹⁷

Additionally, to the extent that funding restrictions on gender-affirming care are often justified in the name of fiscal responsibility, the fact that some legislatures have specifically rejected amendments that would, for example, allow incarcerated people to pay for the medical care themselves, demonstrates that government fiscal responsibility is not the real purpose of these statutes.²¹⁸ Perhaps most significantly, the bans and restrictions on adult medical care also rely on pretextual or fabricated government interests to the extent that they rest on the

²¹⁴ *Id.*

²¹⁵ *E.g.*, Plaintiff's Memorandum of Law & Request for Argument at 8, *Doe v. Ladapo*, No. 23-cv-00114 (N.D. Fla. July 24, 2023) (noting that hormone therapies are commonly used to treat non-transgender patients when appropriate and that it is well-established that such therapies are safe).

²¹⁶ *Id.* at 10.

²¹⁷ *Id.* (quoting Florida's new informed consent forms for gender affirming care).

²¹⁸ *E.g.*, S. Motion, Amendment 2, H.B. 1569, 2023 Leg. (Ind. 2023).

premise that transgender people do not exist²¹⁹ and that gender-affirming care is never medically appropriate.²²⁰

6. Prohibiting Accurate Identification Documents

For several years, many states have restricted the ability of transgender people to obtain identification documents, such as birth certificates and/or driver's licenses, that accurately reflect their gender identity and/or name.²²¹ According to the Movement Advancement Project, which tracks anti-LGBTQ legislation in each state, five states do not permit changes to gender markers on birth certificates under any circumstances and twelve states require proof of "sex reassignment surgery" before a birth certificate can be modified.²²² Similarly, with respect to driver's licenses, two state do not permit any gender marker updates, and nine require "proof of surgery, [a] court order, or [an] amended birth certificate."²²³ In the wave of anti-transgender animus, new restrictions are also being instituted.²²⁴ For example, in 2023, North Dakota passed a law prohibiting amendments to birth certificates to accurately correspond an individual's listed sex with their gender identity.²²⁵ Instead, the law only allows an amendment for transgender people if the "sex of the individual was changed with anatomically correct genitalia for the identified sex as certified by a medical provider."²²⁶

States often attempt to justify onerous restrictions for changing one's gender marker or name on government identification as furthering its interest in having accurate identification and, relatedly, "preventing fraud or falsification of identity documents."²²⁷ But, as some courts evaluating restrictive identification

²¹⁹ LESLIE FEINBERG, *TRANSGENDER WARRIORS* 125 (1996) (demonstrating that people now referred to as "transgender" have existed throughout history).

²²⁰ See Coleman et al., *supra* note 187, at S32 (outlining conditions for gender-affirming medical or surgical care of adults).

²²¹ Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 400–01 (2013) (documenting jurisdictions with a surgery requirement for birth certificates as of a decade ago).

²²² *Equality Maps: Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/identity_documents [<https://perma.cc/T2N6-ZKUZ>] (Mar. 20, 2024).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ H.B. 1297, 68th Leg., Reg. Sess. (N.D. 2023) (specifically providing that the "sex designation on a birth record of an individual born in this state may not be amended . . . due to a gender identity change").

²²⁶ *Id.*

²²⁷ *K.L. v. State, Dep't of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431 CI., 2012 WL 2685183, at *8 (Super. Ct. Alaska Mar. 12, 2012). The author provided early research assistance to the ACLU, plaintiff's counsel in *K.L.* on fertile jurisdictions for an informational privacy lawsuit challenging strict gender marker modification requirements.

policies have concluded, having an identification policy based on external but concealed genitalia or sex assigned at birth “can undermine the accuracy of identification of individuals based on driver’s licenses.”²²⁸ In other words, to the extent a transgender person’s gender expression is consistent with their gender identity and does not correlate with sex assigned at birth or external genitalia,

[T]heir license will inaccurately describe the discernable appearance of the license holder by not reflecting the holder’s lived gender expression of identity. Thus, when such individuals furnish their license to third-persons for purposes of identification, the third-person is likely to conclude that the furnisher is not the person described on the license.²²⁹

That is, the law is actually counterproductive and undermines the state’s interest in being able to accurately match an individual with their identification document.²³⁰ Courts have also noted that the concern about falsification or fraud being perpetuated through changes on sex designations is without evidence.²³¹ In other words, there is a fabricated or manufactured government interest, and people are not readily changing their sex designation in order to perpetuate fraud.²³²

Finally, to the extent that an identification policy only permits a gender designation change after gender affirmation surgery, the law is actually at cross-purposes with the state’s purported interests—expressed in the context of its bans on gender-affirming care—of preventing the so-called “mutilation” of people’s bodies because it nudges or coerces people into medical interventions, which, although often appropriate, should be freely chosen.²³³

7. Prohibitions on Accurate Pronouns in Schools

Supplementing preexisting bans on accurate identification documents, some states have also taken aim at how students are referred to in schools.²³⁴ In Florida, a recent law prohibits any employee or student in a public K-12 school from being required “to refer to another person using that person’s preferred per-

²²⁸ *Id.* at *7.

²²⁹ *Id.*

²³⁰ *See id.*

²³¹ *Id.* at *8.

²³² *Id.*

²³³ Jon Ostrowsky, Note, *Birth Certificate Gender Corrections: The Recurring Animus of Compulsory Sterilization Targeting Transgender Individuals*, 27 UCLA WOMEN’S L.J. 273, 308 (2020) (noting that, although the laws do not mandate surgery, they functionally have that effect for people wishing to change their gender designation on identification documents).

²³⁴ H.B. 1468, 94th Gen. Assemb., Reg. Sess. (Ark. 2023); H.B. 1069, 2023 Leg. (Fla. 2023); S.B. 150, Reg. Sess. (Ky. 2023); H.B. 1522, 68th Leg., Reg. Sess. (N.D. 2023); S.B. 466, 113th Gen. Assemb., 1st Reg. Sess. (Tenn. 2023).

sonal title or pronouns if such personal title or pronouns do not correspond to that person's sex."²³⁵ The term "sex" here is again narrowly defined based on a person's reproductive role, chromosomes, "naturally occurring sex hormones, and internal and external genitalia present at birth."²³⁶ Not only does the Florida law prevent employees and students from being required to use a person's preferred or accurate pronouns, but it also prohibits employees from using pronouns that do not correspond to the state's narrow definition of sex.²³⁷ The Florida law also prohibits schools from asking students for their preferred pronouns.²³⁸ Further, North Dakota has extended its prohibition on accurate pronoun use to all government entities such that no state employee can be required to use a transgender person's accurate pronouns.²³⁹

Bills passed in other states seek to prevent accurate pronoun use in schools in other ways.²⁴⁰ For example, a 2023 Montana law prevents punishing students for misgendering or deadnaming their peers, specifically declaring that doing so is "not an unlawful discriminatory practice."²⁴¹ Remarkably, the statute being amended is otherwise geared toward defining what *does* count as discrimination by an *educational institution*, and the new amendment is the only one of its variety both declaring what does NOT count as discrimination and speaking to student, as opposed to educational institution, behavior.²⁴² In other words, much like Colorado's exclusion of protections for gay and lesbian people in *Romer*,²⁴³ the Montana legislature went out of its way to exclude anti-trans behavior from its scope. In the same vein, an Indiana law requires schools to tell parents if their children ask the school to call them by a different name or pronoun.²⁴⁴ These laws, in effect, amount to an erasure of the trans students currently in school, preventing them from asserting their own identities and sanctioning their mistreatment and outing.²⁴⁵

²³⁵ Fla. H.B. 1069.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ N.D. H.B. 1522.

²⁴⁰ H.E.A. 1608, 123d Gen. Assemb., 1st Reg. Sess. (Ind. 2023); H.B. 361, 68th Leg., Reg. Sess. (Mont. 2023).

²⁴¹ Mont. H.B. 361; *see also* H.B. 1468, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (forbidding disciplinary action against students who decline to use a name for a student other than the name on that student's birth certificate or refer to them with a pronoun that is inconsistent with the student's so-called "biological sex").

²⁴² MONT. CODE ANN § 49-2-307 (2021) (containing provisions setting out what constitutes "unlawful discriminatory practice" for educational institutions).

²⁴³ *Romer v. Evans*, 517 U.S. 620, 624 (1996) (describing Colorado's Amendment 2).

²⁴⁴ Ind. H.E.A. 1608.

²⁴⁵ Chan Tov McNamara, *Misgendering as Misconduct*, 68 UCLA L. REV. DISC. 40, 44 (2020), <https://www.uclalawreview.org/misgendering-as-misconduct/> [<https://perma.cc/U34T-NHVJ>] (characterizing intentional misgendering as "premeditated disrespect of gender minorities").

The purported state interest for requiring school employees to use pronouns that are inconsistent with transgender students' gender identities is that doing so protects the employees' freedom from compelled speech. For example, Arkansas' legislation specifically says that the "selection and use of pronouns in classrooms, on campuses, and elsewhere is a matter of free speech and academic freedom because it communicates a message on a matter of public concern and shapes classroom discussions and debates."²⁴⁶ That law, however, goes on to require that school employees use the pronouns consistent with the "student's biological sex" and the name listed on their birth certificate.²⁴⁷ Put differently, the law actually runs directly counter to its stated purpose of "free speech" by requiring employees to use certain pronouns, thereby demonstrating that it is arbitrary and motivated by animus.²⁴⁸

8. Dictating Peoples' Genders

Florida has taken control of peoples' sexual and gender identities even further. A statute passed in 2023 seeks to dictate what is true and false about a person's sex and pronouns.²⁴⁹ According to that law, "[i]t shall be the policy of every public K–12 educational institution . . . that a person's sex is an immutable biological trait and that it is *false* to ascribe to a person a pronoun that does not correspond to such person's sex."²⁵⁰ Yet in the next sentence, the law admits that its attempt to reify sex as an immutable biological fact is itself false, overinclusive, and incoherent by recognizing that the required "policy" regarding sex and pronouns "does not apply to individuals born with a genetically or biochemically verifiable disorder of sex development."²⁵¹

²⁴⁶ Ark. H.B. 1468.

²⁴⁷ *Id.*

²⁴⁸ McNamarah, *supra* note 245, at 67–71 (explaining why, in the context of legal proceedings, requiring lawyers to refer to parties by their preferred pronouns does not violate the First Amendment). See generally Linnea Kelly, Comment, *Call Me by My Name: Protecting Chosen Name and Pronoun Policies in the Face of First Amendment Challenges*, 95 TEMP. L. REV. 327 (2023) (explaining why requiring teachers to use people's preferred pronouns does not violate the First Amendment because it is a matter of private concern and the compelling interests in preventing dehumanization override any speech concerns).

²⁴⁹ H.B. 1069, 2023 Leg. (Fla. 2023).

²⁵⁰ *Id.* (emphasis added); see also H.B. 1474, 68th Leg. Assemb., Reg. Sess. (N.D. 2023) (defining sex as "mean[ing] the biological state of being male or female, based on the individual's nonambiguous sex organs, chromosomes, or endogenous hormone profiles at birth"); H.B. 239, 2023 Leg., 113th Gen. Assemb. (Tenn. 2023) (defining "sex" for the purpose of Tennessee law as "person's immutable biological sex as determined by anatomy and genetics existing at the time of birth and evidence of a person's biological sex"). But see Florence Ashley, *Thinking an Ethics of Gender Exploration: Against Delaying Transition for Transgender and Gender Creative Youth*, 24 CLINICAL CHILD PSYCH. & PSYCHIATRY 223, 226 (2019) ("[A]nyone who claims to have a clear [or complete] understanding of gender is a liar, liar pants on fire . . .").

²⁵¹ H.B. 1069, 2023 Leg. (Fla. 2023).

9. Erasure of Queer People from the Curriculum

In addition to erasing queer students within public schools by misgendering them and explicitly attempting to dictate what is true and false about particular students' identities, states have also erased queer people from the curriculum in several ways.²⁵² For instance, Florida's now notorious "Don't Say Gay" Bill, passed in 2022, bans all instruction on topics of "sexual orientation or gender identity" from kindergarten through third grade.²⁵³ In 2023, Florida expanded that prohibition all the way from pre-kindergarten through eighth grade.²⁵⁴ Also in 2023, Florida began requiring that, regardless of grade, when instruction is being provided on issues of human sexuality in the context of health education and discussion of sexually-transmitted diseases, the materials and instruction shall "[c]lassify males and females . . . and teach that biological males impregnate biological females by fertilizing the female egg with male sperm; that the female then gestates the offspring; and that these reproductive roles are binary, stable, and unchangeable."²⁵⁵ To be clear, this completely erases the discussion of trans people from discussion on HIV prevention and other sexually-transmitted diseases, endangering their lives.

Relatedly, Florida has also given parents of K–12 children the ability to object to "[a]ny material used in a classroom, made available in a school or classroom library, or included on a reading list" that "[d]epicts or describes sexual conduct."²⁵⁶ Here, "sexual conduct" is defined broadly to mean:

[A]ctual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the

²⁵² For examples of so-called "Don't Say Gay" curriculum bills and statutes, some of which are of an older vintage, see LA. STAT. ANN. § 17:281A(3) (2023); MISS. CODE ANN. § 37-13-171 (2023); 2023 N.C. Sess. Laws 106; OKLA. STAT. tit. 70, § 11-103.3(D) (2023); TEX. HEALTH & SAFETY CODE ANN. § 85.007 (2023); H.B. 322, Reg. Sess. (Ala. 2022); S.B. 294, 94th Gen. Assemb., Reg. Sess. (Ark. 2023); H.E.A. 1608, 123d Gen. Assemb., 1st Reg. Sess. (Ind. 2023); S.F. 496, 90th Gen. Assemb. (Iowa 2023); S.B. 150, Reg. Sess. (Ky. 2023). These bills vary in scope, as some prohibit discussion of queer identities in sexual education and others throughout the curriculum. For a thorough analysis of why such laws are grounded in anti-queer animus, see generally Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461 (2017) (categorizing curriculum laws that prohibit such classroom discussions according to their scope).

²⁵³ H.B. 1557, 2022 Leg. (Fla. 2022). Although this law is of course geared toward preventing even the acknowledgement that queer people exist in the classroom, if taken literally, the law would also require the elimination of discussion of heteronormative couples as well. *See id.*

²⁵⁴ H.B. 1069, 2023 Leg. (Fla. 2023).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.²⁵⁷

By way of enforcement, the material must be removed within five days until the objection is resolved.²⁵⁸ In effect, this gives any parent who objects to the discussion of queer sexuality or identities the ability to veto its presence in the school altogether—even if just optionally available to students for their own independent learning in the library.²⁵⁹ The parental veto legislation builds on a law passed in 2022 that requires that all books in school district libraries be vetted by employees that have undergone special training/certification proffered by the state,²⁶⁰ extending the state government’s control and intimidation over library content.²⁶¹ Together, these regulations amount to book bans forbidding the presence of materials that mention the existence of queer people.²⁶²

In the higher education context, Florida has also taken aim at queer people through its prohibition on using state or federal funds to “[a]dvocate for diversity, equity, and inclusion, or promote or engage in political or social activism.”²⁶³ As to curriculum, Florida law now provides that postsecondary general education classes cannot “distort significant historical events or include a curriculum that teaches identity politics . . . or is based on theories that systematic racism, sexism, oppression, and privilege are inherent in the institutions of the United States and were created to maintain social, political, and economic inequities.”²⁶⁴

Often lumping together mere acknowledgement of the existence of gay and trans people, on the one hand, with pornography and sexually explicit content, on the other, proponents of “Don’t Say Gay” bills, like Florida Governor Ron DeSantis, argue that these laws are needed to prevent the “sexualiz[ing]” of

²⁵⁷ FLA. STAT. § 847.001(19) (2023).

²⁵⁸ H.B. 1069, 2023 Leg. (Fla. 2023).

²⁵⁹ *Id.*

²⁶⁰ H.B. 1467, 2022 Leg. (Fla. 2022); see Patricia Mazzei, Elizabeth A. Harris & Alexandra Alter, *Florida at Center of Debate as School Book Bans Surge Nationally*, N.Y. TIMES (Apr. 23, 2023), <https://www.nytimes.com/2023/04/22/books/book-ban-florida.html> [<https://perma.cc/BWP8-G94P>] (discussing how the 2022 law drew wide criticism for its anticipated far-reaching negative effects).

²⁶¹ See Samantha Laine Perfas, *Who’s Getting Hurt Most by Soaring LGBTQ Book Bans? Librarians Say Kids.*, HARV. GAZETTE (June 28, 2023), <https://news.harvard.edu/gazette/story/2023/06/lgbtq-book-challenges-are-on-the-rise-heres-why/> [<https://perma.cc/TPV8-DQ4F>] (noting that nearly half of the 1,300 attempts to ban library books in 2022 were targeted at books “written by or about LGBTQ people”).

²⁶² See *id.* (observing that the wave of such targeted book bans “eradicate[s] the visible presence of queer people,” making it difficult for students to obtain books regarding LGBTQ issues and thereby hurting students’ ability to learn about pertinent issues).

²⁶³ S.B. 266, 2023 Leg. (Fla. 2023).

²⁶⁴ *Id.*

kids.²⁶⁵ Indeed, a federal version of these bills literally entitled the “Stop the Sexualization of Children Act,” includes lamentation over the mere acknowledgement of sexual minorities in curriculum: “[m]any newly implemented sexual education curriculums encourage discussion of sexuality, sexual orientation, transgenderism, and gender ideology as early as kindergarten.”²⁶⁶

Thus, to the extent that “sexualization” is designed to mean simply presenting examples of human sexuality and people in relationships,²⁶⁷ the law is counterproductive to its stated purpose because the laws are enforcing already pervasive heteronormativity. That is, the “Don’t Say Gay” laws are actually “sexualizing” youth, just in a heteronormative way.²⁶⁸ If that purported government interest is a dog whistle playing on a history of policing queer people in education²⁶⁹ and suggesting falsely that queer people are sexual predators, then that reasoning is simply direct evidence of animus. At the very least, as Representative Carlos Guillermo Smith explained in opposition to Florida’s initial “Don’t Say Gay” bill, “[t]his law doesn’t solve any problems that exist.”²⁷⁰

Proponents of “Don’t Say Gay”-style bills also argue that the laws advance parental rights.²⁷¹ But on the contrary, instead of creating space for local control of education with parental involvement, the laws ban any space for discussion about queer identities in school and give one group of parents veto power over parents who would like to see a more accurate and well-rounded presentation of

²⁶⁵ Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education, *supra* note 207.

²⁶⁶ H.R. 9197, 117th Cong. (2022).

²⁶⁷ As Disney CEO Bob Iger explained when responding to DeSantis’s corollary critique that Disney, by having queer characters, was sexualizing children: “The notion that Disney is in any way sexualizing children is preposterous and inaccurate.” Terry Collins & Kayla Jimenez, *Bob Iger Responds to Florida Gov. Ron DeSantis’ Claims: ‘Disney Is Not Sexualizing Children,’* USA TODAY (July 13, 2023), <https://www.usatoday.com/story/news/nation/2023/07/13/bob-iger-ron-desantis-disney-sexualizing-children-florida/70412346007/> [<https://perma.cc/HC6A-WLLA>].

²⁶⁸ Dara E. Purvis, *Transgender Kids and the First Amendment*, 104 B.U. L. REV. (forthcoming 2024) (explaining that it is the regulatory efforts to stifle expression of non-normative gender identities that are, in fact, sexualizing children).

²⁶⁹ Skinner-Thompson, *The First Queer Right*, *supra* note 3, at 887–88 (noting examples of such policing, such as the dismissal of a school teacher for publicly discussing his sexual orientation); Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF L. REV. 607, 640 (2013) (discussing the role of political movements such as Anita Bryant’s “Save Our Children” campaign that perpetuated fear about purported gay indoctrination of children).

²⁷⁰ Patricia Mazzei, *DeSantis Signs Florida Bill That Opponents Call ‘Don’t Say Gay,’* N.Y. TIMES (Mar. 28, 2022), <https://www.nytimes.com/2022/03/28/us/desantis-florida-dont-say-gay-bill.html> [<https://perma.cc/7U38-2EMQ>].

²⁷¹ Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education, *supra* note 207.

the richness of human experience and identity—including the existence of queer people.²⁷²

10. Outing to Parents

Under the guise of parental rights, Florida law now also requires that schools have procedures for affirmatively notifying a student's parent "if there is a change in the student's services or monitoring related to the student's mental, emotional, or physical health or well-being."²⁷³ The law further provides that the school "may not prohibit parents from accessing any of their student's education and health records created, maintained, or used by the school district."²⁷⁴ Although this may seem relatively benign at first blush, the law was intended to ensure that parents are informed if their child is asserting a queer identity at school.²⁷⁵ This much is evident from the fact that the notification requirements are directly followed by the prohibition on classroom instruction on "sexual orientation or gender identity" prior to high school.²⁷⁶ Other states have been much more explicit in their purpose of outing trans kids to their parents. For example, Alabama forbids schools employees from "[w]ithhold[ing] from a minor's parent or legal guardian information related to a minor's perception that his or her gender or sex is inconsistent with his or her sex."²⁷⁷ Iowa requires that any student-requested "accommodation that is intended to affirm the student's gender identity" be reported to "the student's parent or guardian."²⁷⁸ Finally, North Carolina requires notice to parents prior to a student changing their name and/or pronouns.²⁷⁹

Here, too, the purported state interest is parental rights.²⁸⁰ But the law is overbroad because it puts queer children's well-being in danger by exposing them to potential shame and violence at home should their parents not be sup-

²⁷² See Suzanne Nossel, *Parents Should Have a Voice in Their Kids' Education but We've Gone Too Far*, TIME (Sept. 20, 2022), <https://time.com/6215119/parents-rights-education-gone-too-far/> [<https://perma.cc/E9S3-B95K>] (noting that an "overwhelming majority of parents" disagree with such discriminatory laws, like book bans, that control school curricula).

²⁷³ H.B. 1557, 2022 Leg. (Fla. 2022).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ S.B. 184, Reg. Sess. (Ala. 2022).

²⁷⁸ S.F. 496, 90th Gen. Assemb. (Iowa 2023); see also H.E.A. 1608, 123d Gen. Assemb., 1st Reg. Sess. (Ind. 2023) (requiring schools to notify parents if the student requests to change their name or pronouns); H.B. 1522, 68th Leg., Reg. Sess. (N.D. 2023) (prohibiting concealment of "information about a student's transgender status from the student's parent or legal guardian").

²⁷⁹ S.B. 49, 2023 Sess. (N.C. 2023).

²⁸⁰ See, e.g., Fla. H.B. 1557 (stating that the law is "in accordance with the rights of parents" and reinforces parental fundamental rights regarding decision-making as it pertains to their children's upbringing).

portive.²⁸¹ The law is also counterproductive to the state's proffered rationale for other anti-trans laws, such as bathroom bills, which are advocated in the name of privacy.²⁸² Moreover, as noted, the parental rights justification for the bill is pretextual given the fact that other anti-trans legislation, like prohibitions on gender-affirming care for minors, directly violate the parental rights of those who support their transgender children.²⁸³

11. Banning Trans Female Athletes

At least twenty-three states have also banned trans females from competing on sex-segregated sports teams corresponding to their gender identity.²⁸⁴ In Florida, the ban extends to all competitive, intramural, or club teams in secondary schools and postsecondary schools.²⁸⁵ Further, although teams or sports designated for males may be open to female students, teams or sports designated for females are only open to those students whose "biological sex at birth" is female as determined by their birth certificate, as filed at the time of the student's birth.²⁸⁶ The statute creates a private cause of action for injunctive relief and damages for any student who is deprived of an athletic opportunity as a result of a violation of the statute.²⁸⁷ The stated purpose of the ban is, "to maintain opportunities for female athletes to demonstrate their strength, skills, and athletic abilities and to provide them with opportunities to obtain recognition and accolades,

²⁸¹ Cf. *Sterling v. Borough of Minersville*, 232 F.3d 190, 192–93 (3d Cir. 2000) (detailing how a police officer threatened to tell a teenage boy's grandfather that the boy was gay after being found with another boy in a parked car and, after his release from custody, the boy died by suicide).

²⁸² See, e.g., H.B. 1521, 2023 Leg. (Fla. 2023) (stating that the purpose of Florida's bathroom bill is "to maintain public safety, decency, decorum, and privacy").

²⁸³ See *supra* notes 206–208 and accompanying text (describing how the state interests asserted in the context of prohibitions on gender-affirming care are pretextual insofar as they run afoul of the fundamental right of parents to make decisions regarding the upbringing of their children).

²⁸⁴ 2023 N.C. Sess. Laws 109; H.B. 2238, Reg. Sess. (Kan. 2023); S.B. 39, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023); H.B. 1249, 68th Leg., Reg. Sess. (N.D. 2023); S.B. 15, 88th Leg. (Tex. 2023); S.F. 133, 67th Leg., Gen. Sess. (Wyo. 2023); S.B. 1165, 55th Leg., 2d Reg. Sess. (Ariz. 2022); H.E.A. 1041, 122d Gen. Assemb., 2d Reg. Sess. (Ind. 2022); H.F. 2416, 89th Gen. Assemb. (Iowa 2022); S.B. 83, Reg. Sess. (Ky. 2022); S.B. 44, Reg. Sess. (La. 2022); S.B. 2, Reg. Sess. (Okla. 2022); H. 4608, 124th Sess. (S.C. 2022); S.B. 46, 97th Leg. Sess. (S.D. 2022); H.B. 11, Gen. Sess. (Utah 2022); H.B. 391, Reg. Sess. (Ala. 2021); H.B. 1570, 93d Gen. Assemb., Reg. Sess. (Ark. 2021); S.B. 2536, Reg. Sess. (Miss. 2021); H.B. 112, 67th Leg., Reg. Sess. (Mont. 2021); H.B. 3, 112th Gen. Ass. (Tenn. 2021); H.B. 25, 87th Leg., 3d. Spec. Sess. (Tex. 2021); H.B. 3293, Reg. Sess. (W. Va. 2021); H.B. 500, 65th Leg., 2d Reg. Sess. (Idaho 2020).

²⁸⁵ FLA. STAT. § 1006.205(3)(a) (2023).

²⁸⁶ *Id.* § 1006.205(3).

²⁸⁷ *Id.* § 1006.205(3)(a). For a discussion of how these kinds of private enforcement regimes themselves operate as a form of vigilante subordination, see generally Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187 (2023).

college scholarships, and the numerous other long-term benefits that result from participating and competing in athletic endeavors.”²⁸⁸

But the bans on transgender female athletic position are extremely overbroad to achieve the purpose of female empowerment. For starters, the bans exclude some females—trans females—so it is directly counter to its purported purpose of preserving athletic opportunity for “females.”²⁸⁹ Second, given that the overarching purposes of scholastic sports are to help build teamwork, sportsmanship, social skills, and healthy lifestyles, excluding trans females from this opportunity and thereby teaching students that exclusion is consistent with teambuilding, is actually counter to those overarching purposes.²⁹⁰ Third, sex-assigned at birth or so-called “biological sex” is an incredibly poor proxy for size, strength, or ability in any given sport.²⁹¹ That is, “[e]ven among adults, the range of physical differences within [any] sex is far broader than the average differences between men and women.”²⁹² As Olympic gold medal runner Caster Semenya puts it, “there are plenty of men with typical male testosterone levels who can only dream of beating a female athlete with typical female levels.”²⁹³ For that reason, courts have often permitted integration of cis males with cis females, and vice-versa, refusing essentialist assumptions that physiological differences preclude females from competing with males in athletics.²⁹⁴

Finally, even if there are isolated examples of trans females outcompeting all cis females in a given activity, there is no widespread problem to solve, meaning once again that this is a manufactured or fabricated rationale for discrimination.²⁹⁵ For instance, although South Dakota recently banned trans fe-

²⁸⁸ FLA. STAT. § 1006.205(2)(a).

²⁸⁹ *Id.*

²⁹⁰ See Skinner-Thompson & Turner, *supra* note 151, at 298 (discussing how denying transgender students the opportunity to participate on sports teams consistent with their gender identity denies them the benefits that accompany playing sports, such as higher academic achievement, and also leads to further isolation of those already-vulnerable students).

²⁹¹ *Id.* at 286; see also Chan Tov McNamara, Essay, *Cis-Woman-Protective Arguments*, 123 COLUM. L. REV. 845, 880–88 (2023) (dispelling concerns regarding trans women’s purported “natural biological advantages” in female athletics); Nancy Leong, *Against Women’s Sports*, 95 WASH. U. L. REV. 1251, 1286 (2018) (explaining that non-sex-based means for categorizing athletic competition will often be more narrowly tailored to ensuring fairness).

²⁹² Skinner-Thompson & Turner, *supra* note 151, at 286.

²⁹³ Caster Semenya, *Running in a Body That’s My Own*, N.Y. TIMES (Oct. 21, 2023), <https://www.nytimes.com/2023/10/21/opinion/running-body-semenya.html> [<https://perma.cc/F4ZU-343X>].

²⁹⁴ *E.g.*, *Brenden v. Indep. Sch. Dist.* 742, 477 F.2d 1292, 1299 (8th Cir. 1973).

²⁹⁵ Morgan Matzen, *Gov. Kristi Noem Signs ‘Fairness’ Bill, Limiting Transgender Athletes’ Access to Sports*, SIOUX FALLS ARGUS LEADER (Feb. 4, 2022), <https://www.argusleader.com/story/news/2022/02/03/south-dakota-anti-transgender-athlete-fairness-bill-passed-gov-kristinoem/6654261001> [<https://perma.cc/2VC3-J72T>] (noting South Dakota representative Arthur Rusch’s comment that the South Dakota ban was “designed to solve a problem that doesn’t exist”).

male participation in high school sports,²⁹⁶ in the decade-long period prior to that ban, only one trans female athlete even successfully participated in high school athletics consistent with her gender identity.²⁹⁷ Moreover, as explained, “[r]egardless of who participates, only a handful of students ‘win a championship’ in any given year. Being assigned an accurate sex at birth does not mean victory is a birthright. Nor should being assigned an inaccurate sex at birth render you perpetually excluded.”²⁹⁸

12. Drag Show Bans

States are also targeting drag shows—long a staple of queer community building and expression—for regulation or prohibition.²⁹⁹ Florida banned the issuance of operating licenses to businesses and instituted criminal penalties for individuals that host “adult live performance[s]” that admit children, though “children” is not defined in the statute.³⁰⁰ “Adult live performance” is defined as “any show, exhibition, or other presentation in front of a live audience which, in whole or in part, depicts or simulates nudity, sexual conduct, sexual excitement, or specific sexual activities . . . or the lewd exposure of prosthetic or imitation genitals or breasts when it” principally appeals to a “prurient, shameful, or morbid interest” that “is patently offensive to the prevailing standards in the adult community” of Florida as a whole and lacks “serious literary, artistic, political, or scientific value for the age of the child present.”³⁰¹

²⁹⁶ S.B. 46, 97th Leg. Sess. (S.D. 2022).

²⁹⁷ Matzen, *supra* note 295 (noting that the South Dakota High School Activities Association had a transgender policy in operation since 2013 and that, since then, one transgender student utilized the process).

²⁹⁸ Skinner-Thompson, *Identity by Committee*, *supra* note 27, at 710. Demonstrating the degree to which anti-trans forces overstate the purported physical advantages of trans females, trans females have been attacked for their purported biological advantages at sports ranging from darts to pool to Irish dance. *E.g.*, Erin Reed, *Conservatives Target Trans Kid for “Natural Advantage” at... Competitive Irish Dancing?*, ERIN IN THE MORNING (Dec. 12, 2023), <https://www.erininthemorning.com/p/conservatives-target-trans-kid-for> [<https://perma.cc/2PK7-UM3W>]; Erin Reed, *Anti-Trans Activists Now Claim Trans Women Have an Advantage at Darts*, ERIN IN THE MORNING (Dec. 5, 2023), <https://www.erininthemorning.com/p/anti-trans-activists-now-claim-women> [<https://perma.cc/XV4J-796S>]; Erin Reed, *Now Trans Women Supposedly Have an Unfair Biological Advantage at... Pool?*, ERIN IN THE MORNING (Nov. 13, 2023), <https://www.erininthemorning.com/p/now-trans-women-supposedly-have-an> [<https://perma.cc/X3BN-MYVR>].

²⁹⁹ *See, e.g.*, H.B. 359, 68th Leg., Reg. Sess. (Mont. 2023) (prohibiting, among other things, “drag story hour” at schools or libraries); S.B. 3, 113th Gen. Assemb. (Tenn. 2023) (prohibiting “male or female impersonators” on “public property or in a location where the adult cabaret entertainment could be viewed by a person who is not an adult”); *see also* S.B. 43, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (regulating location of “adult-oriented performance[es]”); H.B. 1333, 68th Leg. Assemb., Reg. Sess. (N.D. 2023) (same); S.B. 12, 88th Leg., Reg. Sess. (Tex. 2023) (regulating location of “sexually oriented performances”).

³⁰⁰ S.B. 1438, 2023 Leg. (Fla. 2023).

³⁰¹ *Id.*

The purported government interests advanced by these laws is to protect children from content that is, in the states' view, prurient or not age-appropriate.³⁰² The laws, however, are often incredibly broad and/or vague. For example, the Montana ban specifically prohibits schools or libraries that receive public funds from permitting "drag story hour" on its premises.³⁰³ "Drag story hour" is defined as an "event hosted by a drag queen or drag king who reads children's books and engages in other learning activities with minor children present."³⁰⁴ In turn, "drag queen" is defined in a very broad way to mean "a male or female performer who adopts a flamboyant or parodic feminine persona with glamorous or exaggerated costumes and makeup."³⁰⁵ The result is that the law bans a tremendous amount of activity that poses no risk of communicating sexually explicit material to students.³⁰⁶ Put differently, the existence of people who dress in drag or are otherwise gender nonconforming is not itself a threat to children. The law is also incredibly underinclusive because students themselves have a First Amendment right to dress in drag or in clothes that conform to their gender identity at school.³⁰⁷ This means that, even if students are not permitted to attend drag shows or drag story hours, the state must permit those same students to encounter people who are gender nonconforming while at school.

B. Anti-Trans Rhetoric

The overbreadth, underinclusiveness, and pretextual rationales of the anti-transgender legislation is accompanied by direct evidence of lawmakers' animus toward transgender people.³⁰⁸ Collating and reading these statements can be difficult and overwhelming, with lawmakers at times denying the existence and openly making fun of transgender people.³⁰⁹ Confronting the scope of this rhetorical animus, however, is critically important because it is powerful evidence that these laws are motivated by little more than a bare desire to harm and because, as will be discussed in Part III, acknowledging the animus is a key step toward restorative justice, accountability, and social healing.³¹⁰ The below quota-

³⁰² See, e.g., *id.* (stating, at the outset, that the Florida law relates to protecting children).

³⁰³ Mont. H.B. 359.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ See *id.* (similarly defining "drag king" broadly as "a male or female performer who adopts a flamboyant or parodic male persona with glamorous or exaggerated costumes and makeup").

³⁰⁷ Skinner-Thompson, *The First Queer Right*, *supra* note 3, at 902 (discussing First Amendment challenges to dress codes used by public schools and government employers).

³⁰⁸ See *infra* notes 312–357 and accompanying text.

³⁰⁹ See *infra* notes 312–357 and accompanying text.

³¹⁰ See *infra* notes 358–428 and accompanying text.

tions constitute some recent examples of alarming and overtly anti-transgender rhetoric by lawmakers across the country:³¹¹

- In the House Commerce Committee hearing regarding Florida’s bathroom bill, H.B. 1521, Representative Webster Barnaby denigrated transgender people at length in explaining his support for the bill. He said:

To all the folks that are in the audience that consider themselves gender dysphoria, um, cis—I don’t know what all of that means. I really don’t know what all that means. I’m looking at society today, and it’s like I’m watching an X-Men movie with people that, when you watch the X-Men movies, or Marvel Comics, it’s like we have mutants living among us on planet Earth. And, you know, some people don’t like that, but that’s a fact. We have people that live among us today on planet Earth that are happy to display themselves as if they were mutants from another planet. This is the planet Earth! Where God created men male and women female! I’m a proud, Christian, conservative Republican! I’m not on the fence. Not on the fence! . . . It’s time to push back! There is so much darkness in our world today, so much evil in our world today, and so many people who are afraid to address the evil, the dysphoria; the dysfunction. I’m not afraid to address the dysphoria or the dysfunction. The Lord rebuke you, Satan, and all of your demons, and all of your imps, will come parade before us. That’s right, I called you demons and imps—will come and parade before us, and pretend that you are part of this world. So, I’m saying my righteous indignation is stirred. I am sick and tired of this. I’m not going to put up with it. You can test me and try to take me on, but I promise you I’ll win every time.³¹²

- In the floor debate regarding an Oklahoma bill seeking to ban healthcare for trans youth, co-author Representative Jim Olsen described trans adolescents as “misguided children” engaged in “delusional play acting” who needed “wise and clear biblical guidance.”³¹³

³¹¹ The examples do not purport to be an exhaustive list of all instances of anti-trans animus across every jurisdiction and, given time constraints, my research team and I were not able to watch every legislative hearing from the 2023 legislative session.

³¹² Florida House Commerce Committee, *House Commerce Committee Hearing—April 10, 2023*, at 2:30:37, FLA. H.R. (April 10, 2023), <https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=8804> [<https://perma.cc/4KMN-QMT8>].

³¹³ Complaint for Declaratory, Injunctive, and Other Relief, para 112, at 31, *Poe v. Drummond*, No. 23-cv-00117 (N.D. Okla. May 2, 2023).

- Similarly, when discussing the ban on medical care that was enacted, Oklahoma S.B. 613, Olsen argued that “being transgender was a path of ‘desolation, destruction, degeneracy and delusional play acting.’”³¹⁴
- During a hearing on an Oklahoma bill seeking to ban healthcare for trans youth, Representative Justin Humphrey argued that providing gender-affirming care was tantamount to “starving your child to death.”³¹⁵
- In a committee hearing on an Arkansas bill that requires school employees to refer to students by their deadnames and to misgender them, the bill sponsor invited Matt Sharp from the Alliance Defending Freedom to testify to the Committee, who argued that trans affirming policies were part of a “radical gender ideology.”³¹⁶
- When introducing North Dakota’s ban on accurate gender markers for transgender people on their birth certificates, H.B. 1297, at a committee hearing, Representative James Kasper, one of the bill’s sponsors, explained that he introduced the bill because “God created the human race and created two genders male and female.”³¹⁷
- Kasper also approvingly referenced Mark Jorritsma, the Executive Director of the North Dakota Family Alliance, who testified as follows in support of the bill:

House Bill 1297 simply seeks to ensure that sex is indicated on a birth certificate. We realize that every person has defining biological characteristics that identify them as male or female and we want to ensure there is an official foundational document indicating this. If the person wants to later in life identify as their biological birth sex, a different gender, non-binary, a cat, or a toaster, that is their choice and limited only by never-ending and imaginative societal trends. North Dakotans are not relativists. We know the difference between hard work and laziness, common sense and foolishness, right and wrong. Let’s not tumble down the rabbit hole on something as fundamental as a document that states a scientific fact. Playing games is fine, but playing with the truth is simply foolish.³¹⁸

³¹⁴ *Id.* para 114, at 31.

³¹⁵ *Id.* para 113, at 31.

³¹⁶ Arkansas House Education Committee, *House Education Committee Hearing—March 9, 2023*, at 10:06:43, ARK. H.R. (Mar. 9, 2023), https://sg001-harmony.sliq.net/00284/harmony/en/PowerBrowser/PowerBrowserV2/20160329/-1/27705#agenda_ [<https://perma.cc/BFB5-K2X2>].

³¹⁷ North Dakota House Human Services Committee, *House Human Services Committee Hearing—January 25, 2023*, at 9:03:40, N.D. H.R. (Jan. 25, 2023), <https://video.ndlegis.gov/en/PowerBrowser/PowerBrowserV2/20230718/-1/28688?startposition=20230125090115> [<https://perma.cc/5ZGK-94NS>].

³¹⁸ *Hearing on H.B. 1297 Before the H. Hum. Servs. Comm.*, 2023–2024 Leg., 68th Sess. (N.D. 2023) (statement of Mark Jorritsma, Exec. Dir., N.D. Fam. All. Legis. Action).

- In the Senate Floor session regarding Mississippi's H.B. 1125, which bans gender-affirming care for trans youth, Senator David Jordan remarked as follows:

I don't understand, Mr. Chairman, why we are dealing with something like this, when biblical history teach God made man and woman and it gave them both a set of organs to support to replenish the earth. Why is this before us and why is this . . . this is a hormonal type of thing . . . why would any professional want to get involved in something like this when biblical history teach against it?

Senator Joey Fillingane, who presented the bill to the Senate, replied, "You know, Senator Jordan, I find myself agreeing more and more with you this session." Jordan continued,

Well it's written, you don't have to agree with me, it's written for all of us to read, who can and will. Why are we trying to dignify a change God taught us? . . . I'm totally confused on why this is before us when God has already spoken what we ought to be.

Fillingane then responds, "Exactly. It is to stop that from happening." Fillingane later continued,

As Senator Jordan so eloquently pointed out, these are unnatural things that are being done in our state . . . but there are instances where surgeries are taking place in our state. There are lots of instances where hormones are being given to the opposite sex to try to make bodies do things that God did not intend for those bodies to do.³¹⁹

- In committee testimony in support of an Arkansas law creating a private cause of action against those who violate the state's ban on gender-affirming care for minors, S.B. 199,³²⁰ Judiciary Committee Chair and lead sponsor Senator Gary Stubblefield testified as follows:

You know if I came in here today and I advocated for the chemical castration, the sterilization, the mutilation of young adults, most of y'all would consider me crazy, and yet that's exactly what a lot of our medical professionals, these activists, they're promoting and defending gender affirmation care. And the problem with these gender ideo-

³¹⁹ Mississippi Senate Floor Session, *HB1125: Regulate Experimental Adolescent Procedures (REAP) Act; Create to Regulate Transgender Procedures and Surgeries—02/21 (S) Amendment Failed; 02/21 (S) Passed*, at 29:23, MISS. COL. SCH. L. LEGIS. HIST. PROJECT (Feb. 21, 2023), https://law-db.mc.edu/legislature/bill_details.php?id=11775&session=2023 [<https://perma.cc/PCF9-N7YK>].

³²⁰ S.B. 199, 94th Gen. Assemb., Reg. Sess. (Ark. 2023).

logies is that while it's possible to identify as anything, it's not possible for a man to become a woman or a woman to become a man. To obscure this fact, these activists have manufactured a small dictionary of sweet-sounding terms like transgender, gender fluidity and nonbinary.³²¹

He continued testifying that “a society that allows [children to transition] is a deeply broken society.”³²² He further stated that, “[t]here is no such thing as having a place on a gender spectrum . . . There is no such thing as gender-affirming care. You cannot affirm something that does not exist. What does exist is chemical castration, sterilization, and surgical mutilation.”³²³ Finally, he called it an “act of barbarism,” arguing that “[i]t is vital that we must win . . . because there is an entire generation of boys and girls being told to believe that irreversibly changing their bodies will fix the social and emotional anxieties that they experience.”³²⁴

- Similarly, in committee testimony in support of Arkansas's attempt to prohibit drag shows through a ban on so-called “adult-oriented performances,”³²⁵ defined as including people who wear “prosthetic genitalia or breasts” in public spaces, with public funds, or in the presence of people under eighteen years old, lead sponsor Senator Gary Stubblefield testified as follows: “Scaring our children, stealing their innocence . . . creating addictive torturings, putting children in situations like this is a violation of personal boundaries. It confuses a child about their own identity and body.”³²⁶ He continued, explaining that “[a]s a Christian I believe differently . . . I believe the Bible. I believe that the Bible says that if a man dresses like a woman and a woman dresses like a man, it is an abomination to God.”³²⁷
- On the Senate floor, Senator Stubblefield's testimony in support of the drag ban included the following: “I can't think of any redeeming quality, anything good, that can come from taking children and putting them in front of a bunch

³²¹ Arkansas Senate Judiciary Committee, *Senate Judiciary Committee Hearing—February 13, 2023*, at 10:04:00, ARK. H.R. (Feb. 13, 2023), [https://sg001-harmony.sliq.net/00284/harmony/en/PowerBrowser/PowerBrowserV2/20160329/-1/26533?mediaStartTime=20230213100404#agenda_\[https://perma.cc/LF2D-ADUA\]](https://sg001-harmony.sliq.net/00284/harmony/en/PowerBrowser/PowerBrowserV2/20160329/-1/26533?mediaStartTime=20230213100404#agenda_[https://perma.cc/LF2D-ADUA]).

³²² *Id.* at 10:10:15.

³²³ *Id.* at 10:10:44.

³²⁴ *Id.* at 10:11:35.

³²⁵ S.B. 43, 94th Gen. Assemb., Reg. Sess. (Ark. 2023).

³²⁶ Arkansas Senate City, County, & Local Affairs Committee, *Senate City, County, & Local Affairs Committee Hearing—January 19, 2023*, at 10:43:20, ARK. H.R. (Jan. 19, 2023), [https://sg001-harmony.sliq.net/00284/harmony/en/PowerBrowser/PowerBrowserV2/20160329/-1/26404?mediaStartTime=20230119104245#agenda_\[https://perma.cc/LP2G-7S57\]](https://sg001-harmony.sliq.net/00284/harmony/en/PowerBrowser/PowerBrowserV2/20160329/-1/26404?mediaStartTime=20230119104245#agenda_[https://perma.cc/LP2G-7S57]).

³²⁷ *Id.* at 11:47:47.

of grown men who are dressed like women.”³²⁸ He concluded by addressing his colleagues: “I hope that you will ask yourself one question before you vote: would God approve of this? Just ask yourself this one question.”³²⁹

- Co-sponsor of Arkansas’ drag ban, Senator Tyler Dees, testified as follows on the Senate floor:

We have an issue that is a cultural battleground right now and our children are at the forefront of that. . . . I believe when I see drag queen story hours, when I see drag performances nationally or in our area, I think about: What do I want my children exposed to? What are the things that I want to be encouraging them to be a part of? I think: What is pure? What is holy? What is noble? What is aspiring? And I don’t push them into those areas. This gives the correct categorization for these activities.³³⁰

- In the House Floor Session where she explained Arkansas’ drag ban, bill sponsor Representative Mary Bentley said that her constituents were concerned about their children being “sexually groomed” and that one of the things the legislature could do to prevent such grooming would be to institute the drag ban.³³¹ She said this was “not about anyone’s rights but about protecting our kids and not sexualizing our children.”³³² To bolster her support of the bill, she also read a constituent letter that included the following: “When deciding on our forever home we desired to find a safe harbor where to weather the current tide of crazy culture wokeness and progressivism,” settling on the small city of Batesville, Arkansas.³³³ The letter continued,

This is the second oldest city in the state with some of the houses dating to the antebellum times. Surely the strange affiliations ailing the rest of the country wouldn’t be here, and if they were, surely it would be minimal. Sadly, this is not the case. This disease has found its way to Batesville.³³⁴

³²⁸ Arkansas Senate, *Arkansas Senate Floor Session—January 24, 2023*, at 1:17:26, ARK. S. (Jan. 24, 2023), https://sg001-harmony.sliq.net/00284/harmony/en/PowerBrowser/PowerBrowserV2/20160329/-1/26427?mediaStartTime=20230124131605#agenda_ [https://perma.cc/G487-KFXB].

³²⁹ *Id.* at 1:26:41.

³³⁰ *Id.* at 1:35:00.

³³¹ Arkansas House of Representatives, *Meeting in House—February 6, 2023*, at 2:50:07, ARK. H.R. (Feb. 6, 2023), https://sg001-harmony.sliq.net/00284/harmony/en/PowerBrowser/PowerBrowserV2/20160329/-1/26494?mediaStartTime=20230206145005#agenda_ [https://perma.cc/M89J-BZL6].

³³² *Id.* at 2:51:20.

³³³ *Id.* at 2:51:50.

³³⁴ *Id.* at 2:52:30.

The “disease” to which the constituent referred was a drag queen show at the local pride event, at which children were brought up on stage to dance with drag queens who allegedly had their “genital areas exposed.”³³⁵ The letter further stated:

The further erosion of our society must come to an end. The pillars of our great state and our nation are rotting. What happens when these pillars fall? What do we tell our grandchildren when the nation they inherit resembles nothing like the nation we enjoyed? What will you do to correct small town Arkansas and keep them from becoming San Francisco?³³⁶

Representative Bentley then continued, “I believe there’s plenty we can do to push back against the woke agenda and protect the values we love in this state and keep it strong for our children and our grandchildren.”³³⁷

- In the House Floor Session discussion on Arizona’s ban on gender-affirming care for minors, S.B. 1138, Representative John Kavanaugh likened such care to genital mutilation, testifying that genital mutilation is “a heinous, vicious act . . . horrific mutilation . . . part of an overall procedure that would reassign sex, gender. What we’re banning today goes far beyond genital mutilation, which is bad enough. . . . This is mutilation of children . . . it is horrific.”³³⁸
- In support of Montana’s bill banning gender-affirming care for minors, S.B. 99, primary sponsor Senator John Fuller said that “transgender ideology is not scientific” but is instead a “spiritual dogma” and “medicine cannot make a man into a woman or a woman into a man.”³³⁹ He also compared gender-affirming care to someone being a “cutter” and argued that “every child deserves a natural childhood.”³⁴⁰
- Likewise, Senator Barry Usher, speaking in support of Montana’s S.B. 99, emphasized that he “won [his] election on this issue” and characterized doctors’ performance of gender-affirming care as “mutilating” children.³⁴¹
- In a committee hearing regarding Tennessee’s ban on gender-affirming care for minors, bill co-sponsor Representative Paul Sherrell mocked:

³³⁵ *Id.* at 2:53:05.

³³⁶ *Id.* at 2:53:17.

³³⁷ *Id.* at 2:53:40.

³³⁸ Arizona House of Representatives, 03/24/2022—*House Floor Session*, at 1:38:18, ARIZ. H.R. (Mar. 24, 2022), <https://www.azleg.gov/video/player/?eventID=2022031131&startStreamAt=5873> [<https://perma.cc/34K4-9XKS>].

³³⁹ Montana Senate, *Senate Floor Session—February 7, 2023*, at 13:14:34, MONT. S. (Feb. 7, 2023), <https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230207/-1/46207#agenda> [<https://perma.cc/2PTD-3FUJ>].

³⁴⁰ *Id.* at 13:15:20 (suggesting that a “cutter” is one who is “prone to self-injury”).

³⁴¹ *Id.* at 14:16:52.

You may not know, or you may not think you know, what you are today. And if you don't know, and our preacher would say, if you don't know what you are, a boy or girl, male or female, just go in the bathroom and take your clothes off and look in the mirror and you'll find out, you'll find out what you are. If you look in the mirror you'll find out.³⁴²

- In the House Session regarding Florida's so-called "bathroom bill," H.B. 1521, co-sponsor Representative Dean Black argued as follows, with belittling sarcasm that is best appreciated by his tone of voice:

But from time immemorial there have been men and there have been women, and before confusion entered the land, we all knew what bathroom to go to. Men went to the men's restroom and women to the women's. And that worked just fine. There wasn't trauma because people could not go to the bathroom. They went to the bathroom of their sex or they went to a unisex restroom. And for centuries, that worked just fine. And so I submit to you that passing this bill will likewise be just fine. And moreover, women and men for that matter will have their privacy respected. And women will also find the toilet seat will remain in its proper down position. And so therefore I recommend you all be up on this bill.³⁴³

- At the signing ceremony for Florida's ban on accurate pronoun usage for students, H.B. 1069, Florida Governor Ron DeSantis also mocked transgender students desire for accurate pronouns:

We never did this through all of human history until like what two weeks ago? Now this is something they're having third graders declare pronouns. We're not doing the pronoun Olympics in Florida. It's not happening here and so that will be protections for people. Again, let the kids be kids. Let them be in school like normally. And it's inappropriate to force them to try to choose these pronouns and to do that.³⁴⁴

³⁴² Tennessee House of Representatives, *Health Subcommittee—1/31/2023*, at 1:07:00, TENN. H.R. (Jan. 31, 2023), https://tnga.granicus.com/player/clip/27344?view_id=703&redirect=true&h=944b83e9d7a8df5d20868afb44366a1a [https://perma.cc/6FGF-XS2Z].

³⁴³ Florida House of Representatives, *House Session Held at 1:30 PM on 4/19/2023*, at 46:30, FLA. H.R. (Apr. 29, 2023), https://www.flsenate.gov/media/VideoPlayer?EventID=1_6lzzc253-202304191330&Redirect=true [https://perma.cc/WNZ5-5S2Y].

³⁴⁴ WEAR Channel 3 News, *Florida Gov. DeSantis Signs Bills Targeting Drag Shows, Pronouns, Bathroom Use, Transgender Children*, at 5:52, YOUTUBE (May 17, 2023), <https://www.youtube.com/watch?v=Ij68b85aaRg> [https://perma.cc/Z8R9-HF5Y].

- Similarly, when signing Florida’s ban on gender-affirming care for minors, S.B. 254, DeSantis said that “[y]ou have a movement amongst I would say rogue elements of the medical establishment to do things that is basically the mutilation of minors.”³⁴⁵
- When signing S.B. 266, Florida’s ban on programs designed to promote diversity, equity, and inclusion, DeSantis said, “DEI is better viewed as standing for discrimination, exclusion, and indoctrination . . . Florida’s getting out of that game. If you want to do things like gender ideology, go to Berkeley.”³⁴⁶
- In testimony supporting Indiana’s “Don’t Say Gay” bill banning discussion of “human sexuality”³⁴⁷ before the House Education Committee, Jay Hart, previously a Republican candidate for the Indiana House of Representatives, said that “[t]he government has no business taking part in psychotic fantasies or behaviors with children in our schools” and lamented that he was “tired of coming to this building to beg government to stay out of our children’s bedrooms.”³⁴⁸
- In the House floor session regarding Louisiana’s H.B. 648, which banned gender-affirming care for minors, bill sponsor Representative Michael “Gabe” Firment repeatedly referred to the existence of transgender children as a “social contagion.”³⁴⁹
- In the House floor session regarding Iowa’s H.F. 2416, which banned trans females from interscholastic athletic participation, Representative Jeff Shipley likened those contending with gender dysphoria to substance abuse, chemical addiction, and a malignant sarcoma.³⁵⁰ Shipley asked,

What other mental illness is treated with unquestioning affirmation?
 . . . If a person had a malignant sarcoma, would the proper treatment be affirmation? No, a sarcoma would be treated with aggressive therapies to remove or heal the cancerous growth. And that same medical

³⁴⁵ *Id.* at 3:27.

³⁴⁶ 10 Tampa Bay, *DeSantis Signs Bills to Defund Diversity, Equity and Inclusion in Public Colleges: Remarks*, at 2:06, YOUTUBE (May 15, 2023), <https://www.youtube.com/watch?v=Hzebvad2bA&t=126s> [<https://perma.cc/C46G-4U8Y>].

³⁴⁷ H.E.A. 1608, 123d Gen. Assemb., 1st Reg. Sess. (Ind. 2023).

³⁴⁸ Indiana House Committee on Education, *House Committee on Education—Monday, Feb. 20—8:00 AM*, at 3:43:09, IND. GEN. ASSEMB. (Feb. 20, 2023), https://iga.in.gov/session/2023/video/committee_education_0400/ [<https://perma.cc/HS9X-XQK2>].

³⁴⁹ Louisiana House of Representatives, *LA House Chamber—May 16, 2023*, at 3:26:21, LA. H.R. (May 16, 2023), https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2023/may/0516_23_Day22_2023RS [<https://perma.cc/29KF-QMJU>].

³⁵⁰ Iowa House of Representatives, *House Video (2022-02-21)*, at 4:25:00, IOWA LEGIS. (Feb. 21, 2022), <https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=h20220221033945505&dt=2022-02-21&offset=1757&bill=HF%202416&status=i&ga=89> [<https://perma.cc/VK9B-AXYA>].

framework should be provided to the epidemic of identity disorders affecting our children.³⁵¹

Shipley went on to suggest that public institutions are “aiding and abetting in the formation of mental illness” and expressed that “we must ensure that we are not bending the world to conform with the mental illness of others.”³⁵²

- In a committee hearing in support of the House companion bill to Texas’s ban on gender-affirming care for minors, Representative Tony Tinderholt, one of the bill’s coauthors, referred to social transitioning and non-surgical transitioning “as child abuse”³⁵³ and elsewhere said that “the medical field is using the wrong term” of “gender dysphoria,” rather than referring to transgender people as “delusional.”³⁵⁴
- When questioning a brave agender person testifying in opposition to North Dakota’s H.B. 1474, which narrowly defined sex for purposes of North Dakota law as “the biological state of being male or female, based on the individual’s nonambiguous sex organs, chromosomes, or endogenous hormone profiles at birth,” Representative Dwight Kiefert mockingly asked the individual: “I have a question about this group that wants to identify as cats. Do you think that they should have the right to change their birth certificate to be born as a cat too?”³⁵⁵

Outside the formal context of considering specific pieces of anti-trans legislation during the legislative process—the most probative form of evidence³⁵⁶—conservative lawmakers around the country, including multiple presidential candidates and Speaker of the U.S. House of Representatives Mike Johnson, have

³⁵¹ *Id.*

³⁵² *Id.* at 4:26:15.

³⁵³ Texas House Committee on Public Health, *Committee on Public Health—March 25, 2023*, at 4:43:00, TEX. H.R. (Mar. 27, 2023), https://tlchouse.granicus.com/MediaPlayer.php?view_id=78&clip_id=24207 [<https://perma.cc/6Y27-D9MM>].

³⁵⁴ *Id.* at 5:30:15.

³⁵⁵ North Dakota House Human Services Committee, *House Human Services Committee—January 25, 2023*, at 9:53:20, N.D. H.R. (Jan. 25, 2023), https://video.ndlegis.gov/en/PowerBrowser/PowerBrowserV2/20240206/-1/28688?startposition=20230125093042#agenda_ [<https://perma.cc/X7VE-SVDW>]. Indeed, as introduced, N.D. H.B. 1522 literally equated the existence of transgender people with being non-human: proposing to prohibit schools from adopting “a policy establishing a place, facility, school program, or accommodation that caters to a student’s perception of being any animal species other than human.” H.B. 1522, 68th Leg. Assemb., Reg. Sess. (N.D. 2023).

³⁵⁶ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (“The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.”).

also engaged in hateful rhetoric toward transgender people, including when discussing federal legislation to regulate trans people.³⁵⁷

III. FROM ANIMUS TO JUSTICE

The prior Parts have, together, explained why the anti-transgender legislation sweeping parts of the nation violate well-established Equal Protection doctrine prohibiting legislation that is driven by animus or a bare desire to harm. Just because a legal argument may be a doctrinally sound one, however, does not mean it is the most strategic one compared to alternatives. This Part explains why challenging these laws in the tenor of animus carries both doctrinal and discursive/social advantages to other equality frames.³⁵⁸ Specifically, Section A of this Part charts how framing the legislation in terms of equal protection animus may lead to greater and more efficient litigation success compared to arguments that the laws should be subject to heightened scrutiny because they involve suspect classifications.³⁵⁹ Section A also explains how the animus framing better captures the scope of the attacks on transgender lives while avoiding some of the pitfalls of equal protection suspect classification analysis.³⁶⁰ Finally, Section B of this Part explains how the animus framing may, counterintuitively, also lead to greater social healing, borrowing from theories of transitional, transformative,

³⁵⁷ Lauren Gambino, *Anti-trans Rhetoric Took Center Stage at CPAC Amid Hostile Republican Efforts*, THE GUARDIAN (Mar. 7, 2023), <https://www.theguardian.com/us-news/2023/mar/07/cpac-anti-trans-rhetoric> [<https://perma.cc/2WT8-GF2K>] (describing the “vitriolic rhetoric” of Donald Trump, Congresswoman Marjorie Taylor Greene, and Senator John Kennedy, among others); Faith E. Pinho, *GOP Candidates Outlined Sweeping Anti-Trans Agenda at Presidential Debate*, L.A. TIMES (Sept. 28, 2023), <https://www.latimes.com/politics/story/2023-09-28/trans-youth-gop-republicans-transgender-people-ban-debate> [<https://perma.cc/ZPN8-MLLA>] (“[T]ransgenderism, especially in kids, is a mental health disorder It is not compassionate to affirm a kid’s confusion. That is not compassion; that is cruelty.” (quoting presidential candidate Vivek Ramaswamy)); Orion Rummier, *Republicans in Midterm Races Are Embracing Anti-Trans Rhetoric Like Never Before*, THE 19TH (Nov. 3, 2022), <https://19thnews.org/2022/11/election-transgender-rhetoric-gop-campaign-ads/> [<https://perma.cc/4GV2-MWAY>] (noting that a Republican candidate for Nevada’s attorney general position “called for fewer transgender people to exist” and Texas Governor Greg Abbott’s promise to support anti-transgender legislation if re-elected); Andrew Kaczynski & Allison Gordon, *New Speaker of the House Mike Johnson Once Wrote in Support of the Criminalization of Gay Sex*, CNN (Oct. 27, 2023), <https://www.cnn.com/2023/10/25/politics/mike-johnson-gay-sex-criminalization-kfile/index.html> [<https://perma.cc/J76F-2U3W>] (noting that Speaker of the House Mike Johnson “has a history of harsh anti-gay language,” including writing that homosexuality is “inherently unnatural” and a “dangerous lifestyle” that could possibly destroy “the entire democratic system” and that “[y]our race, creed and sex are what you are, while homosexuality and cross-dressing are things you do . . . [t]his is a free country, but we don’t give special protections for every person’s bizarre choices”).

³⁵⁸ See *infra* notes 362–428 and accompanying text.

³⁵⁹ See *infra* notes 362–395 and accompanying text.

³⁶⁰ See *infra* notes 362–395 and accompanying text.

and restorative justice that foreground the need for truth-telling when confronting widespread social divisions.³⁶¹

A. The Doctrinal and Discursive Advantages of Animus

Although animus has, at times, featured in the legal discussion challenging anti-transgender legislation, it has not been the focal point of the litigation, with equal protection arguments focusing more regularly on how the laws are a sex-based or transgender-based classification entitled to heightened scrutiny.³⁶² The laws are also rarely challenged collectively, notwithstanding that, in cases like *Windsor* and *Lukumi Babalu Aye*, the Court underscored the interlocking relationship of statutes.³⁶³ Foregrounding the ways in which the anti-transgender

³⁶¹ See *infra* notes 396–428 and accompanying text.

³⁶² See generally, e.g., Second Amended Complaint for Declaratory and Injunctive Relief, *Doe v. Ladapo*, No. 23-cv-00114 (N.D. Fla. May 19, 2023) (challenging constitutionality of Florida’s ban on gender-affirming care for minors in isolation and not discussing other anti-trans legislation passed by Florida or the role of animus in the complaint); Class Action Complaint for Declaratory and Injunctive Relief / Notice of Challenge to Constitutionality of Indiana Statute, *K.C. v. Individual Members of Med. Licensing Bd. of Ind.*, No. 23-cv-00595 (S.D. Ind. Apr. 5, 2023) (same with regard to Indiana’s ban on gender-affirming care for minors); Memorandum in Support of Plaintiffs’ Motion for Temporary Restraining Order & Preliminary Injunction, *Koe v. Noggle*, No. 23-cv-02904 (N.D. Ga. June 29, 2023) (same with regard to Georgia’s medical care ban); Memorandum of Law in Support of Motion for Preliminary Injunction, *L.W. v. Skrmetti*, No. 23-cv-00376 (M.D. Tenn. Apr. 21, 2023) (challenging the constitutionality of Tennessee’s ban on gender-affirming medical care in isolation and not emphasizing other anti-trans legislation passed by Tennessee or the role of animus in the brief, even though the other legislation is noted in the original complaint); Plaintiffs’ Motion for Preliminary Injunctive Relief, *Doe v. Thornbury*, No. 23-cv-00230 (W.D. Ky. May 22, 2023) (challenging Kentucky’s medical care ban in isolation but explaining why it is motivated by animus); Complaint for Declaratory, Injunctive, and Other Relief, *Poe v. Drummond*, No. 23-cv-00117 (N.D. Okla. May 2, 2023) (challenging Oklahoma’s medical care ban in isolation but noting other anti-trans legislation passed by the state and anti-trans rhetorical animus of lawmakers); First Amended Complaint for Declaratory and Injunctive Relief, *Van Garderen v. Montana*, No. DV 23-541 (4th Jud. Dist. Mont. July 17, 2023) (challenging Montana’s ban on gender-affirming care for minors on the basis of classification but noting the anti-trans rhetoric of lawmakers). The lawsuit challenging Florida’s bathroom bill, *H.B. 1521*, does feature animus prominently. See Complaint for Declaratory and Injunctive Relief at 64, *Women in Struggle v. Bain*, No. 23-cv-01887 (M.D. Fla. Sept. 29, 2023) (“Fla. Stat. § 553.865 is a by-product of . . . private animus . . .”). Similarly, in the lawsuit challenging Florida’s 2022 “Don’t Say Gay” bill, *H.B. 1557*, the original complaint highlighted animus prominently, but that discussion was watered down in the Second Amended Complaint. Compare Complaint, *Equality Florida v. DeSantis*, No. 22-cv-00134 (N.D. Fla. Mar. 31, 2022), with Second Amended Complaint, No. 22-cv-00134 (N.D. Fla. Oct. 27, 2022). Depending on the nature of the law, the laws may also be challenged on due process grounds.

³⁶³ See *United States v. Windsor*, 570 U.S. 744, 771 (2013) (observing that the existence of the many statutes controlled by DOMA and its narrow definition of marriage demonstrated that the purpose of the law was to discriminate against those in same-sex marriages under federal law); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) (noting that, when considering the laws at issue in coordination with one another, it becomes clear that the laws were grounded in a “religious gerrymander” rather than any legitimate concerns (quoting *Walz v. Tax Comm’n of N.Y.C.*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring))).

legislation as a whole implicates animus doctrine could pay dividends both in terms of litigation success, but also in terms of educating the bench and society about the motivations and harms caused by this legislation.

In terms of doctrinal advantages of the animus approach to equal protection compared to the “suspect classification” approach, it is important to bear in mind a key insight from Professor William Araiza in his groundbreaking work on animus: “At a very practical level, animus has become one of the Supreme Court’s favorite tools when considering claims that a plaintiff’s equality rights have been violated.”³⁶⁴ Put more concretely, it has been decades since the Supreme Court last recognized a particular identity classification as “suspect” and therefore entitled to heightened scrutiny,³⁶⁵ and the Court has professed itself as “reluctant” to do so.³⁶⁶ Yet, as detailed in Part I, the Court has relied on the existence of animus to deem laws unconstitutional with some regularity, particularly when targeting people based on sexual orientation.³⁶⁷

To the extent that animus doctrine could allow litigants to challenge many of these laws collectively, rather than individually, it could also preserve scarce resources being expended by LGBTQ movement organizations, avoiding the current game of whack-a-mole filing lawsuits against each individual law.³⁶⁸

Suspect classification arguments also involve several pitfalls. There have been two principal ways that litigants and scholars have conceptualized anti-transgender laws as triggering a suspect classification entitled to strict scrutiny. First, anti-transgender legislation is sometimes characterized as being a “sex”-based classification, which, in the context of discrimination between males and

³⁶⁴ ARAIZA, *supra* note 17, at 3. For other scholarship discussing the potential for meaningful rational basis review, including through the demonstration of animus, see Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 299–300 (2015) (noting, for example, the role of the rational basis review in achieving constitutional rights for LGBTQ individuals and how that standard of review “allowed courts to proceed incrementally and contextually”).

³⁶⁵ ARAIZA, *supra* note 17, at 3–4 (describing the suspect classification approach to equal protection as having “largely run out of steam”); see also CHEMERINSKY, *supra* note 18, at 700 (noting, in 2015, that “the Court has shown little willingness in the past three decades to subject additional classifications to strict or intermediate scrutiny”); Kenji Yoshino, *The New Equal Protection*, 123 HARV. L. REV. 747, 757 (2011) (observing that attempts to gain heightened scrutiny for additional classifications “have an increasingly antiquated air in federal constitutional litigation, as the last classification afforded heightened scrutiny by the Supreme Court was that based on nonmarital parentage in 1977”).

³⁶⁶ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985). As catalogued by Katie Eyer, however, transgender litigants have had meaningful success in lower courts in arguing that transgender status is itself a suspect or quasi-suspect classification, raising the possibility that “[n]ew [p]rotected [c]lasses [a]re [p]ossible.” Katie Eyer, *Transgender Constitutional Law*, 171 U. PENN. L. REV. 1405, 1460–61 (2023).

³⁶⁷ See *supra* Part I.

³⁶⁸ Amy L. Stone, *Rethinking the Tyranny of the Majority: The Extra-Legal Consequences of Anti-Gay Ballot Measures*, 19 CHAP. L. REV. 219, 235 (2016) (explaining how anti-LGBT ballot measures divert LGBTQ movement resources).

females, the Supreme Court has already recognized as quasi-suspect and therefore entitled to intermediate scrutiny under the Equal Protection Clause.³⁶⁹ This approach often relies on the argument that, because laws or practices treating transgender people differently necessarily involve discussion or analysis of their “sex” or “gender,” they are a sex-based classification.³⁷⁰ For example, the Seventh Circuit concluded that requiring students to use bathrooms consistent with the sex listed on their birth certificate inherently relied on a sex-based classification.³⁷¹ Another gloss on the sex classification approach has been to argue that if the same behavior was done by a cis person rather than a trans person—for example, a transwoman is fired for wearing a dress to work when a ciswoman was not—then it is sex discrimination because “we know that her employer would not have objected to her attire but-for her sex assigned at birth.”³⁷² The “transgender discrimination is sex discrimination” approach has been met with meaningful, albeit not uniform, success in the lower courts under the Equal Protection Clause.³⁷³ Similar success occurred at the Supreme Court when evaluating whether transgender discrimination is sex discrimination under Title VII of the Civil Rights Act of 1964.³⁷⁴

This approach, however, has significant shortcomings. To begin, it fails to conceptually capture the nature of the discrimination—that is, transgender people are often targeted because they are *transgender* (male, female, or nonbinary). And, although it is accurate to say this is a form of sex discrimination, or that sex discrimination is an element of the discrimination, it is not the most precise or descriptively fulsome way to capture the nature of the motivation at issue.³⁷⁵ Relatedly, the “sex discrimination” frame often reinforces the gender binary, with, as discussed above, discussion centering on whether, had the person been male as opposed to female (or vice versa), the treatment would have been differ-

³⁶⁹ *E.g.*, *United States v. Virginia*, 518 U.S. 515, 545–46 (1996) (applying intermediate scrutiny to exclusion of women from Virginia Military Institute).

³⁷⁰ Eyer, *supra* note 366, at 1433–35.

³⁷¹ *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (noting that this level of scrutiny required the school district to supply an exceedingly persuasive justification for its bathroom policy); *see also* *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020) (holding that a heightened level of scrutiny applies to an equal protection challenge to a school’s transgender bathroom policy both because the policy is sex-based and because “transgender people constitute at least a quasi-suspect class”), *as amended* (Aug. 28, 2020).

³⁷² Eyer, *supra* note 366, at 1440.

³⁷³ *Id.* at 1438–42 (collecting cases that treat transgender discrimination as sex-based discrimination and discussing the rationale behind this treatment).

³⁷⁴ *E.g.*, *Bostock v. Clayton County*, 590 U.S. 644, 683 (2020) (holding that terminating a person’s employment because that employee is gay or transgender violates Title VII’s prohibitions on sex discrimination).

³⁷⁵ *See, e.g.*, *supra* notes 312–357 and accompanying text (exposing lawmakers’ extreme animus towards transgender individuals when sponsoring and supporting anti-transgender legislation).

ent.³⁷⁶ Moreover, as we have seen in the context of equal protection prohibitions on race discrimination where the Court has more or less concluded that any reference to race is race discrimination subject to heightened scrutiny (even if for the purposes of anti-subordination),³⁷⁷ an overly broad conceptualization of sex discrimination that, in essence, evokes robust constitutional scrutiny any time sex or gender identity is referenced could stymie efforts to proactively combat discrimination against sexual and gender minorities.³⁷⁸ An animus approach avoids these problems by rigorously policing classifications on the basis of sex or transgender status when motivated by animus (but not for purposes of anti-subordination).³⁷⁹

The second way in which transgender rights are litigated under the suspect classification approach is to argue that transgender status itself is a suspect classification entitled to heightened review.³⁸⁰ Under this approach, because the Supreme Court has not determined whether transgender identity is a suspect classification, litigants in favor of equal protection guarantees are required to analyze the four factors that courts use to determine whether a classification is suspect or not.³⁸¹ Those factors include: (1) whether the characteristic is immutable; (2) whether those with the characteristic have suffered a history of discrimination; (3) whether those with the characteristic are politically powerless; and (4) whether the characteristic otherwise prevents a person with it from contributing to society.³⁸² As with efforts to argue that queer sexual orientations satisfy these criteria, there are significant conceptual shortcomings when trying to make the case that transgender status satisfies these factors.

³⁷⁶ Cf. Marie-Amélie George, *Framing Trans Rights*, 114 NW. U. L. REV. 555, 610–11 (2019) (discussing how the “privileging of binary transgender rights” results from how those rights are typically established based on “a medical model that assumes individuals will transition from one gender to another”).

³⁷⁷ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023) (overturning the constitutionality of race-based affirmative action in college admissions in an equal protection challenge to such policies because “[e]liminating racial discrimination means eliminating all of it”).

³⁷⁸ Bambauer & Massaro, *supra* note 364, at 299–300 (discussing the importance of the application of rational basis review to achieving milestone “gay” rights insofar as this lower level of scrutiny allowed courts to make incremental change, which has largely avoided the issues of so-called “reverse discrimination” that has harmed the progress of race-based and gender-based anti-subordination efforts).

³⁷⁹ Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 928–29 (2013) (explaining that an animus approach to equal protection analysis brings a rigorous anti-caste approach to the doctrine).

³⁸⁰ E.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020) (noting, in the context of an equal protection challenge to a school bathroom policy, that classifications based on transgender identity are at least quasi-suspect and thus entitled to a heightened level of scrutiny), *as amended* (Aug. 28, 2020).

³⁸¹ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442–46 (1985).

³⁸² *Id.*

As to immutability, many litigants and advocates have fully embraced the notion that gender identity is fixed or immutable.³⁸³ As I have explained in prior work, “[t]he discursive essentialization or fixing of gender identity is likely partially a tactical and self-preserving reaction to persistent historical questioning of the legitimacy of people whose existence beautifully undermines either the gender binary or essentialist views of certain physical sex characteristics as determining gender.”³⁸⁴ But it is also “explained by its instrumental and short-term harm-reducing role in helping queer and trans people take advantage of constitutional equality protections rewarding identities that are not changeable, but rather immutable.”³⁸⁵ And, though many people’s gender identity may be immutable, such universalizing essentialization constricts the possibilities of exploration and evolution in people’s gender identity, constricting the wonderful possibilities for gender and excluding those whose gender identities are not static.³⁸⁶

The suspect classification factor requiring proof of a history of discrimination is also problematic.³⁸⁷ Although charting that history can serve important educational role for courts, in practice, it often devolves into a reductive, non-intersectional comparison of different minoritized communities to see who has been suffered more.³⁸⁸ For example, the Court has, at least rhetorically, pitted minoritized groups against each other, rejecting strict scrutiny for classifications based on sex³⁸⁹ and the elderly.³⁹⁰ According to the Court, “such persons, unlike, say, those who have been discriminated against on the basis of race or national

³⁸³ See, e.g., Memorandum of Law in Support of Plaintiff’s Motion for Preliminary Injunction, at 3, 18, *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, No. 2:16-cv-00943 (E.D. Wis. Aug. 15, 2016) (describing gender identity as an “innate” and “core, immutable aspect of one’s sex”); see also TEY MEADOW, *TRANS KIDS 3* (2018) (“Gender is no longer simply sutured to biology; many people now understand it to be a constitutive feature of the psyche that is fundamental, immutable, and not tied to the materiality of the body.”).

³⁸⁴ Skinner-Thompson, *Identity by Committee*, *supra* note 27, at 673.

³⁸⁵ *Id.* at 674.

³⁸⁶ Heron Greenesmith, *What if We Weren’t Born That Way?*, XTRA* (May 26, 2021), <https://xtra.magazine.com/power/sexuality-fluidity-legal-rights-201664> [<https://perma.cc/AX3A-P2D4>] (“As long as the primary legal and moral argument for queer and trans rights is based on immutable and either/or characteristics, it will exclude those who are fluid, bisexual and non-binary. As long as the foundation of trans and queer rights is the belief that everyone’s sexual orientation and gender identity are inherent and fixed, there will be gatekeepers of our identities.”).

³⁸⁷ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 443–44 (1985) (describing historical discrimination against a class as requisite for that class to be entitled to heightened scrutiny).

³⁸⁸ ARAIZA, *supra* note 17, at 130 (explaining that, given intersectional identities and pluralism, suspect classification analysis itself is insufficiently granular and unmanageable).

³⁸⁹ *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (holding that intermediate scrutiny applies to classifications on the basis of sex).

³⁹⁰ *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976) (applying the rational basis standard of review to a law that draws distinctions on the basis of age).

origin, have not experienced a ‘history of purposeful unequal treatment’ or been subjected to unique disabilities on the basis of stereotyped characteristics.”³⁹¹

Finally, the requirement that a group be “politically powerless” is also often deployed in perverse, counterintuitive ways.³⁹² For example, in the 1985 Supreme Court decision in *City of Cleburne v. Cleburne Living Center*, the Court used the fact that there were statutory protections for people living with disabilities in order to combat historical discrimination as a justification for concluding that constitutional protections were not warranted.³⁹³ That is, rather than relying on the existence of democratically enacted statutory protections as evidence of a popular constitutional interpretation in favor of protecting a particular minoritized identity,³⁹⁴ the Court uses that social consensus as a reason to deny robust constitutional protection to a group.³⁹⁵

B. The Restorative Potential of Animus

In addition to the significant advantages of the animus approach in terms of doctrinal litigation success and avoiding discursive essentialism of gender identity, the animus framing has the potential, perhaps surprisingly, to help facilitate social healing of the deep fissures created by anti-transgender legislation.³⁹⁶ Consistent with theories of both restorative justice (which focuses primarily on

³⁹¹ *Id.* at 313 (citing and quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

³⁹² See *City of Cleburne*, 473 U.S. at 445 (stating that a class’s political powerlessness is an important characteristic for that class of individuals to be entitled to a heightened level of constitutional scrutiny).

³⁹³ *Id.* (“The legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers.”).

³⁹⁴ Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 959 (2004) (explaining that “[i]n a system of popular constitutionalism, the role of the people is not confined to occasional acts of constitution making, but includes active and ongoing control over the interpretation and enforcement of constitutional law”).

³⁹⁵ As Susannah Pollvogt has explained, an animus approach “does not require judges to engage in the dangerous business of making broad assessments about the relative political power of particular groups, the degree of discrimination they have suffered, etc. (i.e., the factors of suspect classification analysis).” Pollvogt, *supra* note 379, at 928. Pollvogt explains that “[s]uch assessments are best avoided because they rest in the shifting sands of political and social reality and should not be cemented in precedent” and “also suggest that discrimination against some (non-suspect or quasi-suspect) social groups is permissible.” *Id.*

³⁹⁶ As scholars have pointed out, in post-atrocity societies seeking to rebuild trust, too often the rights of sexual and gender minorities have been left out of efforts at transitional justice. Maria Martin de Almagro & Philipp Schulz, *Gender and Transitional Justice*, in OXFORD ENCYCLOPEDIA OF INTERNATIONAL STUDIES (2022); Katherine Fobear & Erin Baines, *Pushing the Conversation Forward: The Intersections of Sexuality and Gender Identity in Transitional Justice*, 24 INT’L J. HUM. RTS. 307, 307 (2020).

redemptive, nonpunitive approaches to individual acts of harm),³⁹⁷ transitional justice (which focuses more broadly on facilitating healing in the wake of societal violence at scale, such as apartheid),³⁹⁸ and transformative justice (which focuses, in part, on everyday practices by “people in the name of not relying on police state intervention when it comes to dealing with harm”),³⁹⁹ a key component of moving forward between survivors and perpetrators is truthfully acknowledging the harm inflicted. Such truth-telling advances at least five important goals. Importantly, although truth-telling from the perpetrators of harm themselves may be particularly impactful in advancing these goals, truth-telling by victims, their lawyers, and courts can also have these same palliative effects.⁴⁰⁰

First, truth-telling operates as a form of justice for survivors/victims. Anti-transgender legislation inflicts direct harm on the trans and queer community,⁴⁰¹ with particularly dire consequences for queer youth, who already face disproportionate rates of social isolation, stigma, and violence.⁴⁰² Indeed, in states with widespread anti-trans legislation, queer people are leaving, seeking safe harbor elsewhere.⁴⁰³ Although judicial conceptualization of the anti-transgender legisla-

³⁹⁷ DESMOND TUTU, *NO FUTURE WITHOUT FORGIVENESS* 54–55 (1999) (explaining that under restorative justice approaches, “the central concern is not retribution or punishment,” but rather “the healing of breaches, the redressing of imbalances, the restoration of broken relationships, a seeking to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community” they have injured by their offense).

³⁹⁸ COLLEEN MURPHY, *THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE* 1 (2017) (“The term *transitional justice* is generally taken to refer to formal attempts by postrepressive or post-conflict societies to address past wrongdoing in their efforts to democratize.”).

³⁹⁹ Sandra J., *Survivors “Surviving Well” and “Surviving Poorly”: Reflections on the Limitations and Possibilities of Transformative Justice*, 9 QED 201, 202 (2022).

⁴⁰⁰ C. Quince Hopkins, *Tempering Idealism with Realism: Using Restorative Justice Processes to Promote Acceptance of Responsibility in Cases of Intimate Partner Violence*, 35 HARV. J. L. & GEN. DER 311, 327 (2012) (explaining that “[w]hile a conviction alone may send this message [that the conduct was wrong in the eyes of society], and a statement from the bench acknowledging the wrongfulness of the offender’s conduct may as well, the offender’s public admission has symbolic value and can further aid a victim in her healing process”).

⁴⁰¹ Amy Novotney, *‘The Young People Feel It’: A Look at the Mental Health Impact of Antitrans Legislation*, AM. PSYCH. ASS’N (June 29, 2023), <https://www.apa.org/topics/lgbtq/mental-health-anti-transgender-legislation> [<https://perma.cc/XA29-337V>] (noting the negative health implications of anti-transgender laws for those in the LGBTQ community, especially younger members of that community); see also Stone, *supra* note 368, at 236 (“[A]nti-gay ballot measures have dramatic psychological impacts not only on individuals involved in campaigns, but also lesbian, gay, and bisexual individuals in the broader community. Religious Right campaigns often rely on existing homophobia or transphobia in public opinion in order to win a campaign.”).

⁴⁰² 2023 U.S. *National Survey on the Mental Health of LGBTQ Young People*, THE TREVOR PROJECT, <https://www.thetrevorproject.org/survey-2023/> [<https://perma.cc/QKY4-BV6J>] (surveying the mental health statistics of LGBTQ youth).

⁴⁰³ Kiara Alfonseca, *‘Genocidal’: Transgender People Begin to Flee States with Anti-LGBTQ Laws*, ABC NEWS (June 11, 2023), <https://abcnews.go.com/US/genocidal-transgender-people-begin-flee-states-anti-lgbtq/story?id=99909913> [<https://perma.cc/WK7C-GZ2Y>] (providing examples of

tion as based in animus may not make trans communities whole in the sense of compensating them for their injuries any more than other litigation frames, it can nonetheless begin to help repair the trauma and emotional damage caused by the legislation.⁴⁰⁴ At the same time, it can avoid the traumatization that could come from social amnesia regarding the harms that have been inflicted.⁴⁰⁵

Second, it serves as a form of non-punitive accountability for the perpetrators of the animus. Truth-telling avoids impunity—that is, it does not let perpetrators off free.⁴⁰⁶ Instead, it operates as a form of social accountability for those who perpetuated harm while avoiding the problems inherent to punitive responses.⁴⁰⁷ Or, as put by transitional justice scholar Priscilla B. Hayner, “[o]fficial acknowledgement can be powerful precisely because official denial can be so pervasive.”⁴⁰⁸

Third, to prevent the social accountability from turning into a perpetuation of cancel culture, truth-telling opens the door to reconciliation among the groups and rehabilitation of the individuals involved, helping society move forward productively toward a more humane future.⁴⁰⁹ Acknowledgment of wrongdoing can serve as a critical first order step in greater dialogue among perpetrators and victims, helping to arrive at better understanding of each other and to progress as a society with increased harmony and trust.⁴¹⁰

Fourth, by publicly acknowledging animus, society can help normatively signal that it is subject to opprobrium, helping to prevent recurrence, recidivism, backlash, and preventing further harm.⁴¹¹ An animus-based approach to challenging anti-transgender legislation also has the benefit of, in effect, drawing a

families who have relocated to different states after their home states passed anti-transgender legislation in order to protect their transgender or gender nonconforming children).

⁴⁰⁴ Cf. RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 146 (2000); TUTU, *supra* note 397, at 23 (emphasizing that transitional approaches to justice do not lead to perfect compensation for individual harms, but instead involve balancing “the requirements of justice, accountability, stability, peace, and reconciliation”).

⁴⁰⁵ TUTU, *supra* note 397, at 29.

⁴⁰⁶ *Id.* at 27.

⁴⁰⁷ PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS* 122 (2d ed. 2010) (explaining, in the context of determining whether to single out perpetrators for identification, even if no criminal penalties follow, the individuals will be publicly understood as guilty).

⁴⁰⁸ *Id.* at 21.

⁴⁰⁹ MURPHY, *supra* note 398, at 22 (underscoring that the “insight at the core of restorative justice—that relationships and their repair is a central concern of justice—is important”).

⁴¹⁰ *Id.* at 135.

⁴¹¹ TEITEL, *supra* note 404, at 8 (“Historical inquiry and narrative play an important transitional role in linking past to present. Transitional accountings incorporate a state’s repressive legacy and by their very account draw a line that both redefines a past and reconstructs a state’s political identity. Transitional historical justice illuminates the constructive relation between truth regimes and political regimes, clarifying the dynamic relation of knowledge to political power.”).

line in the sand and calling out problematic lawmaking, helping to shame it and make sure it is not repeated.⁴¹² As underscored by Professor Araiza,

The reality of our current politics is that racism, xenophobia, and bias of all types have acquired a new respectability. If perhaps in the past it might have been good enough—or even affirmatively appropriate—to refrain from [such a direct assessment], there may be more reason today for courts [and society] to forthrightly call it what it is.⁴¹³

As Araiza continues, “when backlash [to the advancement of tolerance and rights] comes out of the shadows—it behooves those in power to call it what it is.”⁴¹⁴ In the same way that seminal civil rights decisions, such as the 1954 Supreme Court case, *Brown v. Board of Education*,⁴¹⁵ have been criticized for not being direct in their moral condemnation of racial segregation and subjugation⁴¹⁶ and therefore permitted the practice to continue albeit simply in new forms, unequivocally calling out problematic policy and practice for what it is can operate as a form of positive normative law that helps to prevent the practice from recurring. In other words, sugarcoating injustice allows it to continue, and punitive responses only replicate it.⁴¹⁷ As those who supported the Truth and Reconciliation Commission in South Africa put it in the course of their work gathering testimonials regarding the horrors of apartheid: “The Truth Hurts, But Silence Kills.”⁴¹⁸

Finally, at the risk of essentializing queer culture, a truth-telling animus approach to the harms being inflicted on transgender lives has the added benefit of being consistent with certain veins of queer peacebuilding that prioritize the voices of queer people in telling their histories of violence as a form of healing and justice⁴¹⁹ while avoiding the replication of state-based violence in the name of queer people.

⁴¹² Cf. TEITEL, *supra* note 395, at 52 (“Mere deliberations over justice may serve important purposes of deterrence”); Hopkins, *supra* note 400, at 328 (“[O]thers who witness the public admission are both on notice and better equipped to confront future offending behavior and hold the offender accountable.”).

⁴¹³ Araiza, *Call It by Its Name*, *supra* note 29, at 186.

⁴¹⁴ *Id.* at 187.

⁴¹⁵ 347 U.S. 483 (1954).

⁴¹⁶ E.g., Derrick A. Bell Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y. L. SCH. L. REV. 1053, 1066 (2004).

⁴¹⁷ Spade, *supra* note 28, at 6 (stating that the United States’ prison system “hasn’t made us safer from violence, it *is* violence”); TEITEL, *supra* note 404, at 54–55 (“[I]t is the restraint in the punishment power that heralds the return to the rule of law.”); Levine, *supra* note 28 at 1034 (noting how police prosecutions can allow the carceral system to perpetuate its own racism).

⁴¹⁸ TUTU, *supra* note 397, at 107.

⁴¹⁹ See generally Samuel Ritholtz, José Fernando Serrano-Amaya, Jamie J. Hagen & Melanie Judge, *Under Construction: Toward a Theory and Praxis of Queer Peacebuilding*, 83 REVISTA DE

Of course, the animus approach is not a panacea.⁴²⁰ As noted in the Introduction, some argue that labeling activity as motivated by animus only deepens social fissures by denigrating those behind the legislation.⁴²¹ But, as stated by Professor Araiza, that concern is “overstate[d],”⁴²² in part because it ignores that animus doctrine, as outlined in Part I, “does not rely exclusively on the sort of subjective ill will” that critics “find so discomfiting.”⁴²³ Instead, there is a significant objective component to the inquiry that relies on statutory overbreadth and underinclusiveness to identify animus.⁴²⁴ Moreover, it is also important to observe that the critique of animus doctrine as denigrating legislative sponsors operates as a form of social gaslighting or victim blaming, wherein the parties responsible for perpetuating the initial harm are rhetorically transformed into the victim.⁴²⁵

The concern about deepening social fissures is blunted further by an important closing point: I am not suggesting that everyone that opposes transgender rights does so from a place of malice or that even those that act with animus in a particular context should be condemned as immoral writ large.⁴²⁶ Many good-hearted and well-intentioned people no doubt act out of misunderstanding, lack of exposure, or, in some instances, overstated concerns about cisgender females’

ESTUDIOS SOCIALES 3 (2023); S.M. Rodriguez, H Rakes, Kennedy Healy & Liat Ben-Moshe, *Depathologization as Healing Justice*, 9 QED 11 (2022).

⁴²⁰ TUTU, *supra* note 397, at 17 (“No one possesses a magic wand which the architects of the new dispensation could wave and, ‘Hey presto!’ things will be changed overnight into a promised land flowing with milk and honey. Apartheid, firmly entrenched for a long half century and carried out with ruthless efficiency, was too strong for that. It is going to take a long time for the pernicious effects of apartheid’s egregiousness to be eradicated.”).

⁴²¹ See *supra* notes 25–29 and accompanying text.

⁴²² ARAIZA, *supra* note 17, at 129.

⁴²³ Araiza, *Animus and Its Discontents*, *supra* note 48, at 190.

⁴²⁴ See *supra* notes 57–88 and accompanying text (detailing the overbreadth component); *supra* notes 89–100 and accompanying text (detailing the underinclusiveness component).

⁴²⁵ Cf. Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257, 282 (explaining how the reasoning of *Masterpiece* can be critiqued as inverting traditional antidiscrimination law by protecting those not part of a “discrete and insular” minority (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938))); see also Kyle C. Velte, *The Supreme Court’s Gaslight Docket* (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4405367 [<https://perma.cc/MEE6-LLTQ>] (explaining how recent Supreme Court jurisprudence operates as a form of gaslighting wherein members of the White Christian nationalist movement have been transformed into victims of, among other things, the LGBTQ rights movement); Yuvraj Joshi, *Weaponizing Peace*, 123 COLUM. L. REV. 1411, 1413 (2023) (explaining how appeals to peace have been used to quell demands for racial justice historically and today).

⁴²⁶ Carpenter, *The Dead End of Animus Doctrine*, *supra* note 42, at 636 (“The animus doctrine itself requires an objective inquiry. People can act from bad motives—like hatred—and still be essentially good people. Maybe they suffer from a moral blind spot with respect to some group or some issues but are otherwise good folks. I see no reason why condemning their particular actions requires condemning them *in toto*.”).

athletic opportunities.⁴²⁷ And, as some scholars who have made these claims acknowledge, at times, their arguments have been wrongly weaponized by those who do view transgender people with animus.⁴²⁸ The argument here, however, is that those spearheading the broad-based, overreaching anti-transgender legal agenda are motivated by animus as that term is used in equal protection jurisprudence, and there are both doctrinal and societal benefits to framing the anti-transgender legislation as such.

CONCLUSION

Trans lives are under attack. That attack is driven by an anti-transgender agenda rooted in animus. By articulating the scope and motivation of these laws in the tenor of equal protection animus doctrine, society has the potential to not only stop the harms inflicted by these laws through efficient and morally clear litigation, but also to prevent the legislation's replication by drawing an unequivocal line in the sand. It is a line that has been drawn before with some success in constitutional litigation. And when it has not been drawn, the harms of discrimination have been permitted to continue. For the sake of trans lives, we cannot let that happen here.

⁴²⁷ *E.g.*, Doriane Lambelet Coleman, *Sex in Sport*, 80 LAW & CONTEMP. PROBS. 63, 66 (2017) (making the argument that biological sex should remain the basis for classification of women's sports to protect opportunities for cisgender females).

⁴²⁸ Doriane Coleman, Juniper Eastwood & Martina Navratilova, *N.C. Bill Goes Too Far in Banning Transgender Girls from Female Sports. There Are Options*, NEWS & OBSERVER (Apr. 5, 2021), <https://www.newsobserver.com/opinion/article250396106.html> [<https://perma.cc/8G6S-Y42J>] (noting that a North Carolina bill excluding transgender females from female athletic teams named the authors specifically, thereby "cherry pick[ing]" and misconstruing the authors' previous stances).