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## ESSAY

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### TRANS SEX EQUALITY RIGHTS AFTER *DOBBS*

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On July 8, 2023, in *L.W. v. Skrmetti*, the U.S. Court of Appeals for the Sixth Circuit provisionally gave Tennessee the green light to start enforcing its new ban on gender-affirming medical care for transgender youth.<sup>1</sup> The split decision on an emergency motion, written by Chief Judge Jeffrey Sutton, broke from an emerging judicial consensus treating trans medical care bans as constitutionally defective.<sup>2</sup> Notably, the *L.W.* majority rejects the argument

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<sup>1</sup> *L. W. ex rel. Williams v. Skrmetti*, 73 F.4th 408, 412–13 (6th Cir. 2023); Tenn. Code Ann. § 68-33-101 (West 2023). The Sixth Circuit panel has since extended its positions in *L.W.* in a ruling on an emergency stay motion in another case, *Doe 1 v. Thornbury*, No. 23-5609, 2023 WL 4861984, at \*1–\*2 (6th Cir. July 31, 2023), which has been joined with *L.W.* on appeal. The extension of the *L.W.* ruling similarly greenlights Kentucky’s ban on gender-affirming care. Ky. Rev. Stat. § 311.372(2) (West 2023). The observations here are also pertinent to the Eleventh Circuit’s recent decision concerning Alabama’s ban on gender-affirming care for trans youth in *Eknes-Tucker v. Alabama*, 2023 WL 5344981, at \*14–17 (11th Cir. Aug. 21, 2023), including that decision’s analysis of the trans sex equality rights claims in the case.

<sup>2</sup> *L. W.*, 73 F.4th at 412–14, 421. For commentary noting the consensus and *L.W.*’s break from it, see Mary Ziegler, *The Surprising Second Life of the Supreme Court’s Abortion Decision*, CNN (July 12, 2023), <https://www.cnn.com/2023/07/12/opinions/tennessee-trans-law-sixth-circuit-abortion-ziegler/index.html> [<https://perma.cc/8MZ6-6ELH>]. Additional perspective is offered by Mary Ziegler, *Fresh Fallout from the Supreme Court’s Dobbs Ruling Just Hit Trans People*, SLATE (July 19, 2023), <https://slate.com/news-and-politics/2023/07/supreme-court-dobbs-ruling-trans-backlash.html> [<https://perma.cc/QY8S-2A92>]. For a recent key set of deep reflections on trans sex equality in social theory and under law that strengthens the foundations of existing and future trans sex equality rights, see Catharine A. MacKinnon, *Exploring Transgender Law and Policy*, SIGNS: J.

that Tennessee's new law violates Fourteenth Amendment sex equality guarantees based largely on the authority of last year's Supreme Court decision in *Dobbs v. Jackson Women's Health Organization* on abortion rights.<sup>3</sup> In doing so, the *L.W.* majority highlights tensions between what *Dobbs*' language might suggest about the future of constitutional sex equality rights at the Court and what *Dobbs* plainly told the public, including lower courts, about the scope of its own reach.<sup>4</sup> How lower courts manage that tension—including in ongoing proceedings in *L.W.*, now consolidated with a similar case from Kentucky—may impact not only the run of sex equality cases and protections, but also the Supreme Court's institutional legitimacy and the American public's faith in the rule of law.<sup>5</sup>

Although the parties in *Dobbs* did not themselves ground their arguments in or around constitutional sex equality defenses for abortion rights, the *Dobbs* majority nevertheless reached out to describe—and dismiss—them.<sup>6</sup> In one brief paragraph, not strictly necessary to its decision to overturn *Roe v. Wade*, *Dobbs* observed that abortion was never formally part of the Court's constitutional sex equality jurisprudence.<sup>7</sup> Purporting merely to restate the rules of that body of law, *Dobbs* noted that heightened judicial skepticism about sex-based classifications ends where laws "simply" retrace biological sex differences.<sup>8</sup> This, according to *Dobbs*, includes laws involving pregnancy or ending it, as by abortion, which, *Dobbs* adds, didn't traditionally violate constitutional sex equality law's demands.<sup>9</sup>

*Dobbs*' description of the Supreme Court's sex equality jurisprudence left some of the decision's readers pondering the tea leaves. What did this perfunctory treatment of constitutional sex equality rules at the intersection of abortion rights portend for future cases at the Court? Some have seemed quietly confident this discussion prefigures a new conservative era in which the Court will soon begin placing new emphases on the limits to constitutional sex equality rights, which, before *Dobbs* and at the Court, had

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WOMEN IN CULTURE AND SOC'Y (2023), <https://signsjournal.org/exploring-transgender-law-and-politics/>.

<sup>3</sup> *L. W.*, 73 F.4th at 419.

<sup>4</sup> For *Dobbs*' sex equality discussion, see *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245–46 (2022). For *Dobbs*' discussion of its own limits, see *id.* at 2243, 2261, 2266–68, 2277–78, 2280–81; see also *infra* Part I.

<sup>5</sup> For the consolidation order, see Order, *L. W. ex rel. Williams v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023) (No 23-5600), PACER No. 45.

<sup>6</sup> *Dobbs*, 142 S. Ct. at 2245–46.

<sup>7</sup> *Id.* at 2242, 2245–46. A differently inflected point about why *Dobbs*' sex equality discussion is dictum is in Brief of GLBTQ Legal Advocates & Defenders, The National Women's Law Center, and Twelve Additional Organizations as *Amici Curiae* in Support of Plaintiffs-Appellees at 21 n.6, *L. W. ex rel. Williams v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023) (No. 23-5600).

<sup>8</sup> *Dobbs*, 142 S. Ct. at 2245–46.

<sup>9</sup> *Id.*

been dwindling in operative legal significance.<sup>10</sup> These potential reversals of sex equality law's fortunes might never come to pass, of course, not least of all in view of widespread public resistance to *Dobbs*. They are, however, broadly in keeping with *Dobbs*' erasure of women's and other pregnant people's abortion rights, which materially sets back their individual and collective ability to participate in the nation's economic and social life on equal terms with everyone else.<sup>11</sup>

Enter the *L.W.* majority opinion. This new ruling builds on *Dobbs*' sex equality discussion to declare that Tennessee's ban on gender-affirming medical care for trans youth is consistent with constitutional sex equality requirements, because the ban is biologically based and also applicable to "minors of both sexes."<sup>12</sup> As the opinion observes, "[t]he [Tennessee] ban . . . applies to all minors, regardless of their biological birth with male or female sex organs. That prohibition does not prefer one sex to the detriment of the other."<sup>13</sup> The legal upshot within the *L.W.* opinion is that, "[i]f a law restricting a medical procedure [like abortion] that applies only to women does not trigger heightened scrutiny, as in *Dobbs*, [then] a law equally applicable to all minors, no matter their sex at birth, does not require such scrutiny either."<sup>14</sup> One translation: Now that *Dobbs* allows women's reproductive biology once again to be legally transformed into their social

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<sup>10</sup> One account of the dwindling operative legal significance of biologically-based or anyway biologically-inflected limits to the Court's sex equality jurisprudence is in Cary Franklin, *Biological Warfare: Constitutional Conflict over "Inherent Differences" Between the Sexes*, 2017 SUP. CT. REV. 169, 171-75, 177-205 (2017). A closely related vision is suggested by Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as *Amici Curiae* in Support of Respondents at 7-11, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

<sup>11</sup> The language here borrows from *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (opinion of the Court), which observed that: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." For commentary engaging *Dobbs*' larger implications for women's and other people's sex equality rights, see generally Courtney Megan Cahill, *Sex Equality's Irreconcilable Differences*, 132 YALE L. J. 1065 (2023); Cary Franklin & Reva B. Siegel, *Equality Emerges as a Ground for Abortion Rights In and After Dobbs* (Dec. 31, 2022), available at <https://ssrn.com/abstract=4315876>; Darren Lenard Hutchinson, *Thinly Rooted: Dobbs, Tradition, and Reproductive Justice*, 65 ARIZ. L. REV. 385 (2023); Paula A. Monopoli, *Situating Dobbs*, 14 CONLAWNOW 45 (2023); Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799 (2023); Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality: Dobbs on Abortion's Nineteenth Century Originalism*, 60 HOUS. L. REV. 901 (2023); and Marc Spindelman, *Dobbs' Sex Equality Troubles*, 32 WM. & MARY BILL OF RTS. J. (forthcoming 2023) (on file with author). One recent example of political pushback against *Dobbs* is discussed in Kati Perry, Tim Meko & Rachel Roubein, *Where So Many Republicans Voted 'No' on Issue 1 in Ohio*, WASH. POST (Aug. 10, 2023), <https://www.washingtonpost.com/politics/2023/08/10/why-so-many-republicans-voted-no-issue-1-ohio/> [<https://perma.cc/927Q-UFGS>].

<sup>12</sup> *L. W. ex rel. Williams v. Skrmetti*, 73 F.4th 408, 419 (6th Cir. 2023).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

destinies without violating constitutional sex equality rules, those same rules can't possibly block the government from locking transgender people, or at least transgender youth, into what the *L.W.* opinion terms their "biological birth" fate.<sup>15</sup>

However plausible as an extrapolation from *Dobbs'* brief sex equality discussion, the *L.W.* opinion's sex equality analysis runs headlong into at least two different, though related, obstacles found in *Dobbs*.<sup>16</sup> One involves how the *L.W.* decision overlooks *Dobbs'* repeated insistence—its veritable promises—that abortion is unique and hence that "[n]othing in [the] opinion should be understood to cast doubt on precedents that do not concern abortion."<sup>17</sup> While many people simply place no stock in this kind of declaration from the Supreme Court, it nevertheless states binding law for lower courts to follow. The other problem relates to what *Dobbs'* promises mean for how courts should analyze trans sex equality arguments under existing Supreme Court sex equality precedents in *Dobbs'* wake, a problem that ultimately recasts *Dobbs'* promises and the legal conditions they impose on lower courts in a new substantive light.

### I. *DOBBS'* PROMISES

*Dobbs* does not simply declare—it cross-your-heart swears—that it is a unique ruling about and only about abortion rights.<sup>18</sup> *Dobbs* emphasizes abortion's uniqueness as a practice that ends potential or actual human life along the way to announcing that its reasoning encompasses, but goes no further than, eliminating constitutional abortion protections.<sup>19</sup>

*Dobbs* affirms these limits and the reasons underlying them while spotlighting the implications of its conservative originalist method of decision—focused on history and tradition—for other substantive due

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<sup>15</sup> *Id.*

<sup>16</sup> Of course, plausible doesn't mean without doubt, as discussed *infra* Part II.

<sup>17</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2277–78 (2022).

<sup>18</sup> For relevant notations in *Dobbs* about its limits as to abortion rights, see, for example, *id.* at 2243, 2261, 2266–2268, 2277–78, 2280–81; *id.* at 2309 (Kavanaugh, J., concurring).

<sup>19</sup> As the *Dobbs* opinion explains:

What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the life of an "unborn human being." None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right [to abortion] does not undermine them in any way.

*Id.* at 2258 (internal citations omitted). Later, *Dobbs* reiterates that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." *Id.* at 2277–78.

process cases and the rights they cover.<sup>20</sup> Evidently attempting to de-radicalize itself, *Dobbs* trumpets that, abortion aside, other substantive due process rights, no matter their historical and traditional pedigree, remain safe, both unaffected and undiminished by the new ruling.<sup>21</sup>

*Dobbs*' position on this front includes ongoing protections for pro-LGBTQ substantive due process cases involving intimacy and marriage rights, as recognized in *Lawrence v. Texas* and *Obergefell v. Hodges*.<sup>22</sup> *Obergefell* famously built on earlier pro-LGBTQ rights decisions, including *Lawrence*, to announce a far-reaching constitutional vision of individual liberties and equal civil rights for LGBTQ people.<sup>23</sup> If the Court's pro-LGBTQ substantive due process rulings, which condition this ambitious equal-liberty vision, are in fact unaffected and undiminished by *Dobbs*, it stands to reason that *Dobbs* does not impact or shrink LGBTQ rights encompassed by different Supreme Court doctrines, including—relevant for *L.W.*—the Court's sex equality jurisprudence.<sup>24</sup>

*Dobbs* points to this same conclusion via another route. If abortion's uniqueness underwrites *Dobbs*' limits as a ruling only affecting constitutional abortion rights, then *Dobbs*' brief discussion of constitutional sex equality principles, never more than dicta anyway, doesn't announce any changes to the Court's sex equality doctrine—at least not yet. *Dobbs*' position surfaces prior Court holdings refusing to accept abortion rights as constitutional sex

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<sup>20</sup> *Id.* at 2258, 2277–78, 2280.

<sup>21</sup> *Id.* A version of this argument, ventured in the context of discussing the substantive due process parental rights claims involved in *L.W.*, is in Plaintiffs-Appellees' Response to Defendant-Appellant's Emergency Motion for Stay of Preliminary Injunction Pending Appeal at 16, *L. W. ex rel. Williams v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023). For another argument that the *L.W.* court didn't honor *Dobbs*' limitations, see Brief of Plaintiffs-Appellees at 17-18, *L. W. ex rel. Williams v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023) (No. 23-5600). Additional arguments explaining why *Dobbs* does not properly determine the sex equality conclusions at issue in *L.W.*, 73 F.4th at 419, and *Doe 1 v. Thornbury*, 2023 WL 4861984, at \*1 (6th Cir. July 31, 2023), are found in Brief for the United States as Intervenor-Appellee in No. 23-5600 and Amicus Curiae in No. 23-5609 at 34-36, *L. W. ex rel. Williams v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023) (No. 23-5600), and Brief of GLBTQ Legal Advocates & Defenders, The National Women's Law Center, and Twelve Additional Organizations as *Amici Curiae* in Support of Plaintiffs-Appellees, *supra* note 7, at 21-22.

<sup>22</sup> *Dobbs*, 142 S. Ct. at 2261; *Lawrence*, 539 U.S. 558, 574-75 (2003); *Obergefell*, 576 U.S. 644, 672-76 (2015).

<sup>23</sup> A brief discussion of the Court's trajectory in this area of law is in Marc Spindelman, *Bostock's Paradox: Textualism, Legal Justice, and the Const.*, 69 BUFF. L. REV. 553, 613-14 (2021). As *Obergefell* made clear, its respect for the right to marry was founded on both the Fourteenth Amendment's Due Process and Equal Protection Clauses: "[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty." *Obergefell*, 576 U.S. at 675.

<sup>24</sup> For a more comprehensive engagement with *Dobbs* and its treatment of the Court's constitutional sex equality jurisprudence, see Spindelman, *supra* note 11, at 10-23.

equality guarantees.<sup>25</sup> Accepting *Dobbs*' view that the Court's sex equality jurisprudence has nothing to do with abortion rights, how could *Dobbs*, itself limited to abortion rights, alter constitutional sex equality protections? Harder to fathom is how *Dobbs* could reconfigure constitutional sex equality guarantees in ways that don't merely capacitate but, as *L.W.* suggests, require lower courts to begin pursuing a newly energized and biologically focused conservatism on constitutional sex equality rights.<sup>26</sup>

This is not to deny that *Dobbs* could be setting the table for future Supreme Court decisions that will sap existing constitutional sex equality protections of their current strengths. These possibilities, however, potentially operationalized through future Court rulings announcing new biological limits to the Court's existing sex equality jurisprudence, aren't presently the law on the table for lower courts, including *L.W.*, to follow.

What is on the table is *Dobbs*' ruling that the reasons it gives for eliminating constitutional abortion protections are limited to that context. To the extent that cases like *L.W.* do not involve trans people's abortion rights, and thus do not involve medical care that ends potential or actual life in that sense—or any other—*Dobbs*' sex equality reasoning at present has no legal bearing on what constitutional sex equality rules mean for bans on gender-affirming medical care.<sup>27</sup>

## II. *L.W.*'S SEX EQUALITY PATH

Against this backdrop, the *L.W.* opinion's analysis of trans rights as sex equality rights starts down the wrong path. It practically but inadvisedly treats *Dobbs* as requiring lower courts to start actualizing the conservative constitutional moment in which biology becomes a newly activated—or, in view of the relevant history here, reactivated—basis for judges to impose novel constraints on constitutional sex equality rights.<sup>28</sup> Until the Court makes that pronouncement clearly—an announcement that *Dobbs* doesn't lock the Court into ever making—the sex equality approach that the *L.W.* court

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<sup>25</sup> *Dobbs*, 142 S. Ct. at 2235 (citing *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974), and *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273-74 (1993)).

<sup>26</sup> For the relevant point in the *L.W.* opinion indicating what it believes *Dobbs* requires the court to do, see *L. W. ex rel. Williams v. Skrmetti*, 73 F.4th 408, 421 (6th Cir. 2023).

<sup>27</sup> Indications of how gender-affirming medical care may be lifesaving are found, among other sources, in the Brief of Amici Curiae American Academy of Pediatrics and Additional National and State Medical and Mental Health Organizations in Support of Plaintiffs-Appellees and Affirmance at 21-22, *L. W. ex rel. Williams v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023) (No. 23-5600).

<sup>28</sup> A succinct engagement with aspects of the relevant legal history of women's inequality is in Ruth Bader Ginsburg, *Gender and the Const.*, 44 U. CIN. L. REV. 1, 2-8 (1975). Historical examples coming from the Supreme Court include *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring), and *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908).

should have followed is the one found in Judge White's separate opinion in the case, dissenting on this score.<sup>29</sup>

Appropriately, in light of *Dobbs*' formal self-limitation to abortion rights, Judge White's opinion follows the pre-*Dobbs* constitutional contouring of robust constitutional sex equality guarantees.<sup>30</sup> In keeping with this contouring, and the dwindling significance at the Court of biological limits to constitutional sex equality rights, lower court decisions, including some from the Sixth Circuit, have, for years now, recognized and protected trans people's legal rights in sex equality terms.<sup>31</sup>

Judge White's *L.W.* opinion applies the Court's constitutional sex equality machinery in conventional ways to reject Tennessee's "equal application" argument.<sup>32</sup> This was the position—seemingly approved by the *L.W.* majority—that the state's ban on gender-affirming care for trans youth "appl[ies] equally to males and females," and, therefore, doesn't implicate constitutional sex equality protections.<sup>33</sup> If correct, the state's law would be analyzed in rational basis terms before likely being upheld.<sup>34</sup>

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<sup>29</sup> See *L. W.*, 73 F.4th at 422 (White, J., concurring in part, dissenting in part).

<sup>30</sup> For reflections on these developments, including their history, as well as observations on the shifting and sometimes porous boundaries of the Court's constitutional sex equality doctrine, see generally Franklin, *supra* note 10.

<sup>31</sup> Pre-*Dobbs* caselaw contouring robust constitutional sex equality protections includes *Sessions v. Morales-Santana*, involving sex and the transmission of U.S. citizenship. 582 U.S. 47, 51-52, 72 (2017). Also relevant is *Pavan v. Smith*, which dealt with a sex-based rule involving what parents would be listed on children's birth certificates. 582 U.S. 563, 566-67 (2017). *Sessions* and *Pavan* are discussed and historicized by Franklin, *supra* note 10, as is the modern constitutional sex equality standard found in *United States v. Virginia*, striking down the Virginia Military Institute's (cis)males-only admissions policy, 518 U.S. 515, 533-34 (1996). For additional relevant discussion of pre-*Dobbs* sex equality caselaw focused on the status of pregnancy discrimination as actionable sex discrimination under law, see generally Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae, *supra* note 10. For a post-*Dobbs* perspective on constitutional sex equality rules, including trans sex equality rights, see Cahill, *supra* note 11, at 1068-73, 1095-1106. Relevant Sixth Circuit caselaw on transgender rights as sex equality rights includes *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004), and *Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom. Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020).

<sup>32</sup> *L. W.*, 73 F.4th at 422 (White, J., concurring in part, dissenting in part). Additional perspective on the "equal application" argument in this setting is provided by Katie Eyer, *Transgender Equality and Geduldig 2.0*, 54 ARIZ. ST. L.J. 305, 331-33 (2023).

<sup>33</sup> *L. W.*, 73 F.4th at 422 (White, J., concurring in part, dissenting in part). For Judge White's opinion's treatment of the argument, see *id.*, and for the majority's treatment of it, see *id.* at 419.

<sup>34</sup> As the majority opinion explains:

It's highly unlikely . . . that the plaintiffs could show that the Act lacks a rational basis. . . . The challengers [thus] pin their main claims for likelihood of success on the assumption that heightened scrutiny applies. They first argue that the Tennessee Act discriminates on the basis of sex and thus requires the State to satisfy intermediate scrutiny. We are skeptical.

*Id.* at 419.

Dismissing this line of argument, Judge White's opinion explains that Tennessee's law actually "discriminates based on sex because 'medical procedures that are permitted for a minor of one sex are prohibited for a minor of another sex.'"<sup>35</sup> Clarifying while quoting from an Eighth Circuit ruling also involving trans youths' rights to gender-affirming medical care, Judge White's opinion takes up a formal but-for-sex sex-equality argument to explain that "a person identified male at birth could receive testosterone therapy to conform to a male identity, but a person identified female at birth could not."<sup>36</sup> Presumably the opinion's thinking holds equally in another direction: A person "identified [fe]male at birth" might receive estrogen "therapy to conform to a [fe]male identity, while a person identified [m]ale at birth could not."<sup>37</sup> In these terms, Tennessee's "equal application" argument does not so much state conditions for finding no sex discrimination at all so much as it effectively concedes that its new ban on gender-affirming medical care for trans youth is sex discrimination at least twice over.<sup>38</sup>

The "but-for sex" logics that structure Judge White's opinion's sex equality analysis and drive its conclusions are not of her making. They reflect but one established sex equality analytic discoverable in pre-*Dobbs* cases as well as post-*Dobbs* rulings that, in different ways, have treated *Dobbs* as having generated no new constitutional obstacles to an otherwise established, and still developing, background jurisprudence of trans sex equality rights.<sup>39</sup>

The most significant decision in the relevant pre-*Dobbs* caselaw is the Supreme Court's blockbuster 2020 ruling in *Bostock v. Clayton County*, holding

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<sup>35</sup> *Id.* at 422 (White, J., concurring in part, dissenting in part).

<sup>36</sup> *Id.* (citing *Brandt v. Rutledge*, 47 F.4th 661, 669 (8th Cir. 2022)).

<sup>37</sup> *Id.*

<sup>38</sup> For an analogue and discussion in the Title VII context, where the Supreme Court reasoned that an "equal application" argument was not a means of "avoiding Title VII exposure," but rather of "doub[ling] it," see *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1741 (2020).

<sup>39</sup> For a pre-*Dobbs* version of the analytic, see *Bostock*, 140 S. Ct. at 1731. For a post-*Dobbs* illustration that distinguishes *Dobbs*, while noting that Tennessee's reliance on *Dobbs* was "directly contrary to Defendants' argument that [Tenn. Code Ann. § 68-33-101] treats all sexes equally," see *L. W. et al. v. Skrmetti*, No. 3:23-cv-00376, 2023 WL 4232308, at \*15 (M.D. Tenn. Jun. 28, 2023). For relevant cases that, at least in part, analyze trans rights as sex equality rights in *Dobbs*' wake without expressly mentioning *Dobbs*, see *Brandt v. Rutledge*, No. 4:21CV00450 JM, 2023 WL 4073727 (E.D. Ark. June 20, 2023), and *Doe v. Ladapo*, No. 4:23CV114-RH-MAF, 2023 WL 3833848 (N.D. Fla. June 6, 2023). Other cases that do mention *Dobbs* include *Doe 1 v. Thornbury*, No. 3:23-CV-230-DJH, 2023 WL 4230481, at \*4 (W.D. Ky. June 28, 2023), and *K. C. v. Individual Members of Med. Licensing Bd. of Ind.*, No. 1:23-cv-00595-JPH-KMB, 2023 WL 4054086, at \*11 (S.D. Ind. June 16, 2023). The district court's decision in *Doe 1* suggested *Dobbs* was "inapposite" since *Dobbs* didn't involve a law that "bar[red] access to treatment for some patients but not others depending on the patient's sex." *Doe 1*, 2023 WL 4230481, at \*4. For wider context involving a "systematic exploration of transgender constitutional law cases, decided under the Equal Protection and/or Due Process Clauses (or their state counterparts), between 2017 and 2021," see Katie Eyer, *Transgender Const. Law*, 171 U. PA. L. REV. (forthcoming 2023) (manuscript at 4).

that anti-gay and anti-trans discrimination are by definition sex discrimination under Title VII of the 1964 Civil Rights Act.<sup>40</sup> Judge White's opinion describes *Bostock*, which endorses but-for-sex sex-equality logics, as "directly on point here and highly persuasive" on the form that its own constitutional sex equality analysis should take.<sup>41</sup> Not incidentally, *Bostock* validated lower court rulings, including one on appeal from the Sixth Circuit, which built on earlier rulings holding anti-trans discrimination to be sex discrimination under Title VII's sex discrimination rules and the Fourteenth Amendment's sex equality provisions.<sup>42</sup>

The *L.W.* majority squares off with Judge White's sex equality discussion in different ways. One of the most significant involves the majority's understanding of the implications for *L.W.* of a key Sixth Circuit precedent, *Smith v. City of Salem*, which figured anti-trans discrimination as sex discrimination under both Title VII of the 1964 Civil Rights Act and the Fourteenth Amendment's Equal Protection Clause.<sup>43</sup>

The *L.W.* majority insists that the *Smith* decision cannot be extended to cover "every claim of transgender discrimination."<sup>44</sup> The reason ultimately offered by the *L.W.* majority opinion goes beyond anything that *Smith* itself states.<sup>45</sup> Nor does the *L.W.* majority opinion engage *Smith*'s basic reaffirmation by, and its consistency with, the Supreme Court's *Bostock* decision. No, the reason that the *L.W.* majority opinion finally offers for not applying *Smith* to the case at hand is the Supreme Court's decision in *Dobbs*. As the *L.W.* majority puts it: "*Dobbs* prevents us from extending *Smith* [to cover a law like Tennessee's], as [*Dobbs*] held that medical treatments that affect only one sex receive rational-basis review."<sup>46</sup>

Leaving aside that what *L.W.* says *Dobbs* "held" was merely dicta, the deeper issue with the *L.W.* court relying on *Dobbs* to say that *Smith* cannot be

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<sup>40</sup> 140 S. Ct. 1731, 1737, 1754 (2020).

<sup>41</sup> *L. W.*, 73 F.4th at 422 (White, J., concurring in part, dissenting in part). Both Title VII-based and Equal Protection-based sex equality protections for trans rights turn on what "sex" is held to mean, a point that's engaged and evaluated as to different sex equality analytics and possibilities in Catharine A. MacKinnon, *A Feminist Defense of Transgender Sex Equality Rights*, 34 YALE J. L. & FEMINISM 88, 92-94 (2023).

<sup>42</sup> For the Sixth Circuit decision consolidated into *Bostock*, see *Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom.* *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020). See *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 572-74, 576-79, 580 n.7, for discussion of the earlier precedents.

<sup>43</sup> *Smith v. City of Salem*, 378 F.3d 566, 571-75, 576-77 (6th Cir. 2004). The *L.W.* majority notes the equal protection dimensions at play in *Smith*. *L. W.*, 73 F.4th at 420.

<sup>44</sup> *L. W.*, 73 F.4th at 420-21.

<sup>45</sup> *L.W.* does, however, mention in passing some other possibly distinguishing features of *Smith*. See *id.* This is not to concede the legal significance or aptness of those features of *Smith* as a proper basis for limiting it in *L.W.* and *Doe 1*.

<sup>46</sup> *Id.* at 421.

read to place Tennessee's new anti-trans law into doubt as constitutional sex discrimination triggering heightened scrutiny is the basic problem encountered before. *Dobbs* itself insists that it doesn't extend beyond the status of constitutional abortion rights. *Dobbs* thus does not "prevent" a lower court from applying a pre-existing, pro-trans sex equality ruling like *Smith* in a principled fashion to another case, like *L.W.*, involving another kind of anti-trans discrimination. By *Dobbs*' own terms and logics, its sex equality reasoning has no implications for cases that are not about abortion rights.

### III. *DOBBS*' INSTITUTIONAL AND RULE-OF-LAW DIMENSIONS

Over and above the standard agency principles directing lower courts to heed *Dobbs*' instruction that it is a ruling limited to abortion rights, *Dobbs*' promises serve practical functions that should be considered in trans sex equality cases. The functions of *Dobbs*' position on its own limits supply lower courts with additional reasons for continuing to recognize that anti-trans discrimination violates constitutional sex equality demands.

*Dobbs*' position about abortion's uniqueness and its own limits as constitutional precedent helped the *Dobbs* Court to manage the potential damage that its elimination of nearly fifty years of repeatedly reaffirmed constitutional precedents might have on both the Court's institutional legitimacy and the American people's ongoing faith in the rule of law. *Dobbs*' pledge about its limited scope and its repeated promises that other constitutional protections remain safe in the ruling's wake provide an institutionalist case—beyond a simplistic, order-taking literalism—for lower courts to uphold *Dobbs*' word.

It isn't just that cases like *L.W.*—ruling by attempting to predict where the Court has already taken or may yet take its sex equality jurisprudence post-*Dobbs*—tacitly expose *Dobbs*' promises about abortion's uniqueness and its own decisional limits as false. Far from innocuously joining others who, from different points of view, never credited *Dobbs*' promises as anything but empty ones, judicial decisions like *L.W.* actively push the calculated constitutional equilibrium that *Dobbs* has established off its axis.<sup>47</sup>

To be sure, this is, at most or at best, an uneasy balance. It is also one that is already facing growing pressures on the Court to yield to its conservative constitutional originalist commitments even more deeply and ambitiously than in *Dobbs*. While the *L.W.* majority opinion might accurately be

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<sup>47</sup> For illustrations of views that converge from very different perspectives, compare *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2301–02 (2022) (Thomas, J., concurring), with Mark Joseph Stern, *The Supreme Court's Next Target Is Marriage Equality. It Won't Be the Last.*, SLATE (June 24, 2022), <https://slate.com/news-and-politics/2022/06/supreme-court-dobbs-roe-wade-obergefell-marriage-equality.html> [<https://perma.cc/5DR3-6Q5D>].

predicting where the Court is itself considering taking its sex equality jurisprudence, that doesn't settle the matter. Nor does the possibility that the *L.W.* majority opinion might be correct that at least some justices are ready to impose new constraints on existing constitutional sex equality protections. Even accepting all that, if only *arguendo*, it does not—without more—mean the *L.W.* majority opinion is faithfully following the governing law about *Dobbs*' limits that *Dobbs* has announced.

Consistent with what *Dobbs* has said, the prerogative of modifying or abandoning *Dobbs*' promises, as true in the sex equality setting as anywhere else, belongs to the Court.<sup>48</sup> In conventional legal terms, *Dobbs*' promises also instruct legal actors bound by the ruling that the Court meant—and means—to keep hold of the constitutional reins where *Dobbs*' meaning, and its potential impact on the Court's institutional legitimacy and the nation's faith in the rule of law, are concerned. *Dobbs* did not beckon lower courts to force its hand by translating its reasoning outside of, or beyond, the abortion setting.

Interestingly, and perhaps somewhat hopefully, the *L.W.* majority opinion ends on a humble and realist note. It says not once, but twice, that its conclusions are only “initial” ones.<sup>49</sup> The court's ruling in the case, the opinion explains, came quickly, in just a week's time, on an emergency appeal.<sup>50</sup> The standard of review that the court employed required the plaintiffs to satisfy the high burden of making a “clear showing” that the law was—and is—on their side.<sup>51</sup> *L.W.* thus, by its own account, reflects a provisional legal judgment in the case, one the court expressly acknowledges may be in error, requiring a course correction as the case proceeds.<sup>52</sup>

With a fuller picture of *Dobbs* now in view and additional time to reflect upon its meaning and its implications for a case like *L.W.*, the Sixth Circuit could yet choose to abandon its outlier status. It could still join other courts in similar cases to recognize that bans on gender-affirming medical care for trans youth implicate—and likely or actually run afoul of—established constitutional sex equality guarantees that *Dobbs* does not authorize, much less require, lower courts to cut back on. Preserving the pre-*Dobbs* status quo where sex equality rights, including trans sex equality rights, are at issue is

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<sup>48</sup> The *L.W.* opinion itself makes a version of this point, but in a different direction and context, citing *Rodriguez de Quijas v. Shearson/Am. Ex., Inc.*, 490 U.S. 477, 484 (1989), and describing it as a ruling teaching “that the Supreme Court alone exercises the prerogative of overruling its decisions.” *L.W.*, 73 F.4th at 414 (internal quotation marks omitted).

<sup>49</sup> *L.W.*, 73 F.4th at 422.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 421.

<sup>52</sup> The Sixth Circuit panel's extension of its *L.W.* opinion's reasoning to *Doe 1 v. Thornbury*, No. 23-5609, 2023 WL 4861984 (6th Cir. July 31, 2023), doesn't itself foreclose the prospects of course correction upon further deliberation in the ways that the *L.W.* opinion flags.

and ought to be the path ahead in *L.W.* and other cases involving trans sex equality rights after *Dobbs*.