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McCrudden, Garreth W.

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TRANSGENDER STUDENTS AND THE FUNDAMENTAL RIGHT TO SELF-IDENTIFY AT SCHOOL

Garreth W. McCrudden

Abstract

Public schools across the United States are introducing name/pronoun policies that either limit or protect the ability of transgender students to choose the name and pronouns they use at school. This Article provides legal arguments both for transgender students wishing to challenge "identity-denying" name/pronoun policies and for school districts seeking to defend their adoption of "identity-affirming" name/pronoun policies. This Article develops these arguments in three parts. First, transgender children have a fundamental right to self-identify at school that is doubly protected by the Free Expression Clause and the Due Process Clause of the United States Constitution. Second, because identity-denying name/pronoun policies impermissibly infringe children's fundamental right to self-identify, they are unconstitutional under a strict scrutiny framework. Third, because identity-affirming name/pronoun policies protect transgender students' freedom to self-identify—without jeopardizing the rights of parents, teachers, or other students—they are constitutionally sound. Thus, this Article concludes, all public schools face a constitutional mandate to introduce identity-affirming name/pronoun policies.

About the Author

(he/him); Doctor of Philosophy (D.Phil.), University of Oxford, Department of Chemistry, 2017; Juris Doctor (J.D.), University of California, Berkeley, School of Law, 2024. I am especially grateful to Jonathan Glater for his encouragement, guidance, and support in preparing this Article. I would also like to thank Erwin Chemerinsky, Khiara Bridges, Caroline Lester, Amelia Smith, Caressa Tsai, Devanshi Patel, Kristina Chamorro, Nicolas Altemose, and the editors of the *UCLA Journal of Gender & Law* for their invaluable feedback and assistance.

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Table of Contents

I. Introduction 76
II. The Fundamental Right to Self-Identify 83
A. *Free Expression* 88
B. *Substantive Due Process* 91
C. *Children's Right to Self-Identify Under a Bellotti Framework* 96
1. Children's Vulnerability 96
2. Children's Immaturity 99
3. The Importance of Parental Control 104
III. The Unconstitutionality of Identity-Denying Name/Pronoun Policies 109
A. *The Nature of Identity-Denying Name/Pronoun Policies* 109
B. *Infringement of Children's Right to Self-Identify* 112
C. *Balancing the Interests of Children and the State* 114
IV. The Constitutionality of Identity-Affirming Name/Pronoun Policies 118
A. *The Nature of Identity-Affirming Name/Pronoun Policies* 119
B. *Constitutional Analysis* 120
1. Parents' Rights 120
2. Teachers' Rights 121
3. Other Students' Rights 126
V. Conclusion 131

I. Introduction

The rights of transgender students are in peril.[1] A national survey conducted by GLSEN in 2021 showed that over

1. In the context of this Article, the term "transgender" is defined broadly to include any person whose gender identity does not correspond to the sex assigned to that person at birth. The term "cisgender" refers to any person whose gender identity corresponds to the sex assigned to that person at birth. Note that "sex" is a label (such as male, female, or intersex) that is assigned at birth, usually based on phenotypic characteristics, such as external genitals. "Gender identity" is a subjective sense of belonging to a particular gender or genders (or none at all). *See Understanding Gender Identities*, Trevor Project (Aug. 23, 2021), https://www.thetrevorproject.org/resources/article/understanding-gender-identities [https://perma.cc/2J6Z-3BRC]. Thus, in the context of this Article, the term "transgender" would encompass any person who does not consider themselves to be "cisgender." For example, as used herein, the term "transgender" includes nonbinary individuals (people who identify outside of the traditional male/female gender binary), while, of course,

three-quarters of transgender students in the United States have experienced a discriminatory policy or practice at school.[2] Some schools restrict the ability of transgender students to access essential campus facilities. For example, more than three-fifths of the survey's transgender respondents reported that their school requires them to use the bathroom corresponding to their legal sex rather than their gender identity.[3] Other policies target transgender students' freedom to choose how they dress. Over a quarter of transgender students attested that they have been prevented from wearing "gender-inappropriate" clothing at school.[4] Still other policies seek to stifle even the most basic expressions of transgender identity. In fact, some 53.4 percent of transgender students who took part in the GLSEN survey reported that their schools prohibit them from using their chosen name and pronouns.[5]

This Article argues that transgender children, like all children, have a constitutional right to self-identify, which includes the freedom to choose the name and pronouns they use at school.[6] Though "identity-denying" name/pronoun policies vary in substance and severity across school districts, they all make it more difficult—if not impossible—for transgender students to exercise their constitutional rights.[7] To understand what identity-denying policies look like in practice, consider two recent examples. In August 2022, the Grapevine-Colleyville Independent School District in Texas adopted a policy specifying that no student, teacher, or administrator would be required "to use a title or pronoun in reference to another person that is inconsistent with the biological sex of such person."[8] One month later, Gardner-Edgerton Unified School

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understanding that some nonbinary people do not necessarily use the term "transgender" to describe themselves.

2. Joseph G. Kosciw, Caitlin M. Clark & Leesh Menard, The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation's Schools 91 (2022), https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf. [https://perma.cc/6F9D-WR55]. Note: (1) GLSEN, pronounced like the English word "glisten," is not an acronym; and (2) in GLSEN's survey, participants self-designated as transgender in their responses. Thus, some noncisgender participants (e.g., nonbinary individuals) may not have identified themselves as transgender.

3. *Id.* at 92.

4. *Id.*

5. *Id.*

6. *See infra* Part II.

7. *See infra* Part III.

8. Rebekah Riess, Raja Razek & Andy Rose, *A Texas School District Approved Limits on Books, Critical Race Theory and Gender Identity*, CNN (Aug. 23, 2022), https://www.cnn.com/2022/08/23/us/texas-grapevine-colleyville-school-district-policies-reaj/index.html#:~:text=Video-,A%20Texas%20

District 231 in Kansas debated introducing a new policy stating that all "[s]tudents and staff will be addressed and referenced according to official and legal documentation submitted during the time of employment or enrollment."[9] Although these Texas and Kansas policies are unique to their respective districts, they offer helpful insights into a broader class of identity-denying name/pronoun policies that are taking hold in America's public schools.[10]

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school%20district%20approved%20limits%20on%20books,race%20theory%20and%20gender%20identity&text=The%20trustees%20of%20the%20Grapevine,and%20pronoun%20usage%20on%20Monday [https://perma.cc/5PBG-LKM3].

9. Gardner-Edgerton Unified Sch. Dist. 231, General Statement of Policy 1 (2022), https://go.boarddocs.com/ks/usd231/Board.nsf/files/CGPMEU5AF06E/$file/General%20Statement%20of%20Policy%20-%20Amended%20Agenda%2011.14%20on%207-25-22.pdf [https://perma.cc/LL5T-T8GG]; *see also* Rachel Mipro, *ACLU Says Kansas School District's Planned Transgender Policy Could Violate Federal Laws*, NPR (Sept. 9, 2022, 10:02 AM), https://www.kcur.org/education/2022–09–09/aclu-says-kansas-school-districts-planned-transgender-policy-could-violate-federal-laws [https://perma.cc/S5SC-HDSS] (discussing the Gardner-Edgerton School District's policy); HRC Staff, *Human Rights Campaign Condemns the Kentucky Legislature for Overriding Gov. Beshear's Veto of Sweeping Anti-Trans Bill*, Hum. Rts. Campaign (Mar. 29, 2023, 10:05 AM), https://www.hrc.org/press-releases/breaking-human-rights-campaign-condemns-the-kentucky-legislature-for-overriding-gov-beshears-veto-of-sweeping-anti-trans-bill [https://perma.cc/DT6C-GURB].

10. *See* Kosciw et al., *supra* note 2, at 121 ("In 2019, we saw a decline in most forms of discrimination from prior years. In 2021, however, many of these forms of discrimination increased, specifically, restrictions on the use of names and pronouns . . . . It is important to note that two forms of discrimination that were specific to gender—prevented from using one's preferred name or pronouns and being prohibited from wearing clothes of another gender—increased from 2019 to 2021."); *see also* Stephen Sawchuk, *Beyond 'Don't Say Gay': Other States Seek to Limit LGBTQ Youth*, Teaching, Educ. Wk. (Apr. 6, 2022), https://www.edweek.org/policy-politics/beyond-dont-say-gay-other-states-seek-to-limit-lgbtq-youth-teaching/2022/04 [https://perma.cc/EY55-D7CL] ("The bills—nearly 30 of them in all—variously take aim at school clubs for LGBTQ students, would put limitations on teachers' and students' use of gender pronouns . . . . They are only a subset of what LGBTQ-rights organizations have described as a sudden explosion of legislation aimed at LGBTQ people in 2021 and 2022."); Laura Bult, *Why US Schools Are at the Center of Trans Rights*, Vox (July 27, 2022, 12:20 PM), https://www.vox.com/2022/7/27/23279760/trans-rights-school-boards-federal-law [https://perma.cc/34VK-FZWJ] ("In the past few years, an increasing number of state bills introduced in Republican legislatures have targeted the rights of LGBTQ Americans. Some of those laws are focused on what rights transgender school children have in public schools: what types of bathrooms they can use in school, whether their pronouns will be used, or whether they can participate in school sports."); Anthony Izaguirre, *Florida Republicans Pass School Bills on Pronouns, Diversity*, A.P. News (May 3, 2023, 7:01 PM), https://apnews.com/article/florida-ron-desantis-lgbtq-diversity-0495c7307668fe309d76badce2a65d63

Identity-denying name/pronoun policies harm transgender students. For one thing, they permit—or even encourage—misgendering. Misgendering is the "assignment of a gender with which a party does not identify, through the misuse of gendered pronouns, titles, names, and honorifics."[11] Because people generally have strong associations between names and gender, most people will naturally link first names with particular gender-specific pronouns.[12] Thus, for many transgender students, the consistent use of their birth name, and the pronouns that go with it, leads to unwelcome misgendering by others. Misgendering incidents, in turn, produce all sorts of negative outcomes for transgender young people. In 2018, Dr. Samantha Gridley and coauthors observed that misgendering in caregiving settings was distressing for many transgender children.[13] At school, misgendering events create unhealthy learning environments that trigger feelings of embarrassment.[14] And, most alarmingly, the rejection of identity that is inherent to all acts of misgendering has been found to exacerbate depression and suicidal ideation.[15]

[https://perma.cc/7RBT-TUUV] ("The Senate . . . [passed] a sweeping bill that prevents school staffers or students from being required to refer to people by pronouns that don't correspond to the person's sex.").

11. *See* Chan Tov McNamarah, *Misgendering*, 109 Calif. L. Rev. 2227, 2232 (2021).

12. For example, most people in the U.S. will assume that someone named "John" uses he/him pronouns and that someone named "Sarah" uses she/her pronouns. *See* Philip N. Cohen, *Taylor, Kim and the Declining Sex Binary in Names*, Fam. Inequality (June 3, 2019), https://familyinequality.wordpress.com/2019/06/03/taylor-kim-and-the-declining-sex-binary-in-names/ [https://perma.cc/2C8T-VB5Q] ("In 2018, 76% of babies were given names that were more than 99% male or female, according to data from the Social Security Administration.").

13. Samantha J. Gridley, Julia M. Crouch, Yolanda Evans, Whitney Eng, Emily Antoon, Melissa Lyapustina, Allison Schimmel-Bristow, Jake Woodward, Kelly Dundon, RaNette Schaff, Carolyn McCarty, Kym Ahrens & David J. Breland, *Youth and Caregiver Perspectives on Barriers to Gender-Affirming Health Care for Transgender Youth*, 59 J. Adolescent Health 254, 258 (2016).

14. C.T. v. Redondo Beach Unified Sch. Dist., No. CV1809749 DDP (JCx), 2019 WL 1557431, at *1 (C.D. Cal. Apr. 10, 2019) ("Word of C.T.'s name and gender identity spread throughout the school, causing C.T. embarrassment and distress.").

15. *See* McNamarah, *supra* note 11, at 2292–93 ("For persons experiencing gender dysphoria, rejection of their identity through misgendering further exacerbates feelings of distress, disquietude, and suicidal ideation."); Solana Lash-St. John, *Want to Save Lives? Stop Misgendering*, Berkshire Eagle (Feb. 15, 2022), https://www.berkshireeagle.com/opinion/columnists/solana-lash-st-john-want-to-save-lives-stop-misgendering/article_bd5e2252–8dcb-11ec-85ab-c7f79165a681.html [https://perma.cc/4FHG-B9GN] ("Like many genderqueer individuals, I also deal with suicidal thoughts. When I get

"Identity-affirming" name/pronoun policies, in contrast, protect the ability of transgender students to choose the name and pronouns they use in school and to have that choice respected by everyone in the school community.[16] The adoption of such policies is both necessary and urgent. In 2018, a team of researchers led by Professor Stephen Russell found a statistically significant decrease in depressive symptoms, suicidal ideation, and suicidal behavior for each additional social setting (including school) in which a transgender young person's chosen name and pronouns were used.[17] In the first instance, then, identity-affirming policies are urgently needed to protect transgender students' mental and physical wellbeing. But second, and relatedly, identity-affirming policies help alleviate the negative educational outcomes experienced by transgender students who are otherwise exposed to hostile school environments.[18]

Fortunately, many educational authorities across the United States are already embracing identity-affirming name/pronoun policies. For example, in October 2021, the Massachusetts Department of Elementary and Secondary Education renewed its guidance on tackling gender-based discrimination, noting that school personnel should always refer to students using their chosen name and

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misgendered repeatedly . . . these dark musings can worsen."). Note also that, in 2017, Perez-Brumer and co-workers found that rates of self-reported suicidal ideation, adjusted for risk factors, were almost three times higher in California transgender youth than among their cisgender peers. In fact, only two factors were significantly associated with the increased tendency for suicidal ideation in transgender children: school-victimization and depression. Amaya Perez-Brumer, Jack K. Day, Stephen T. Russell & Mark L. Hatzenbuehler, *Prevalence and Correlates of Suicidal Ideation Among Transgender Youth in California: Findings From a Representative, Population-Based Sample of High School Students*, 56 J. Am. Child & Adolescent Psychiatry 739, 739 (2017).

16. *See infra* Part IV.

17. Stephen T. Russell, Amanda M. Pollitt, Gu Li & Arnold H. Grossman, *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior Among Transgender Youth*, 63 J. Adolescent Health 503, 504 (2018); *see also* Jack L. Turban, Dana King, Jason J. Li & Alex S. Keuroghlian, *Timing of Social Transition for Transgender and Gender-Diverse Youth, K-12 Harassment, and Adult Mental Health Outcomes*, 69 J. Adolescent Health 991, 991 (2021) ("Although past research has shown [that transgender and gender-diverse] youth who undergo social transition have favorable mental health outcomes in the short term, they may have worse mental health in adulthood if not protected from K-12 harassment based on gender identity.").

18. *See* Kosciw et al., *supra* note 2, at 73 ("We found transgender and nonbinary students in schools who had [policies that provide access and support to transgender and nonbinary students] compared to those who did not, were less likely to miss school because of feeling unsafe (30.7% vs. 38.2% missed at least one day of school in the past month for safety reasons).").

gender-appropriate pronouns.[19] Likewise, in April 2022, the Linn-Mar Community School District in Iowa adopted Policy 504.13-R, specifying that "[e]very student has the right to be addressed by a name and pronoun that corresponds to their gender identity," without the need for court orders, changes to official records, or parental consent.[20]

As name/pronoun policies become increasingly common in public schools, various plaintiffs are asking courts to decide whether such policies are constitutional.[21] Given the novelty of name/pronoun policies, only a handful of cases had been filed when this Article was being written.[22] Even fewer had been decided on the merits.[23] However, the first judicial opinions addressing identity-affirming name/pronoun policies are slowly beginning to emerge. For example, in 2020, the district court for the Southern District of Indiana found that a school district's policy of requiring staff to use transgender students' "preferred name and pronouns" did not violate a teacher's free-expression or free-exercise rights under the

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19. Mass. Dep't Elementary & Secondary Educ., Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment (Oct. 28, 2021), https://www.doe.mass.edu/sfs/lgbtq/GenderIdentity.html#:~:text=In%20order%20to%20further%20a,trainings%2C%20and%20staff%20professional%20development [https://perma.cc/35WW-T3SQ].

20. Linn-Mar Cmty. Sch. Dist., 504.13R Administrative Regulations Regarding Transgender and Students Nonconforming to Gender Role Stereotypes (Apr. 2022), https://iowatorch.com/wp-content/uploads/2022/04/Linn-Mar-Transgender-Policy.pdf [https://perma.cc/HS59-UBRZ].

21. Some plaintiffs also raise claims under federal antidiscrimination statutes, e.g., Title VII. Other plaintiffs allege, in addition or in the alternative, that name/pronoun policies are incompatible with state constitutions and state-level antidiscrimination statutes. *See, e.g.*, Katie Reilly, *'This Isn't Just About a Pronoun.' Teachers and Trans Students Are Clashing Over Whose Rights Come First*, Time (Nov. 15, 2019, 6:00 AM), https://time.com/5721482/transgender-students-pronouns-teacher-lawsuits (summarizing a number of state-court cases)) [https://perma.cc/Q83K-KGFZ]; Hannah Natanson, *Va. Supreme Court Affirms Judge's Ruling Reinstating Loudoun Teacher Who Refused to Use Transgender Pronouns*, Wash. Post (Aug. 31, 2021, 5:18 PM), https://www.washingtonpost.com/local/education/tanner-cross-virginia-supreme-court-transgender-pronouns/2021/08/31/52f94c62–0a71–11ec-9781–07796ffb56fe_story.html [https://perma.cc/3S5S-GEWJ] (describing the case of a teacher who claimed his school's name/pronoun policy violated his free-speech and free-exercise rights under the Virginia Constitution).

22. To find cases, the term (+transgender +pronoun +school) was searched periodically in Westlaw while this Article was in development—most recently on January 6, 2024. Similar keyword searches were used in other legal and generic search engines, including Google and Bloomberg Law.

23. *Id.*

First Amendment.[24] More recently, plaintiffs in Iowa,[25] Kansas,[26] Massachusetts,[27] and Wisconsin[28] filed suits against their respective school districts, alleging that identity-affirming name/pronoun policies infringe the constitutional rights of teachers, parents, or other students. In contrast, suits in which plaintiffs have questioned the constitutionality of identity-denying name/pronoun policies have yet to materialize.[29] But given the rapid rise in the enforcement of such policies across the country, those cases are sure to come—and soon.[30]

At bottom, much of the litigation in the context of name/pronoun policies in public schools will turn on one of two related—though distinct—questions. Are identity-denying policies constitutional? This Article argues that they are not. Are identity-affirming policies constitutional? This Article argues that they are. In fact, this Article goes further still: It posits that the Constitution requires public school districts across the country to implement identity-affirming name/pronoun policies as a matter of urgency.[31]

This Article ultimately hopes to achieve three things. First, it will demonstrate that the right of transgender students to self-identify, which includes the right to select their own name and pronouns at school, is firmly grounded in the Constitution. Second, it will highlight the significant harm to transgender students that will result if identity-denying name/pronoun policies continue to spread in America's public schools. Third, and most importantly, it will

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24. Kluge v. Brownsburg Cmty. Sch. Corp. (*Kluge I*), 432 F. Supp. 3d 823, 836–41 (S.D. Ind. 2020).

25. *See* Brooke Migdon, *Iowa School District Sued Over Transgender Student Policy*, Hill (Aug. 3, 2022), https://thehill.com/changing-america/respect/diversity-inclusion/3586960-iowa-school-district-sued-over-transgender-student-policy [https://perma.cc/DDS6-4ABZ].

26. *See* Margaret Stafford, *Kansas District Settles Lawsuit Over Student Pronouns*, AP News (Aug. 31, 2022, 3:16 PM), https://apnews.com/article/science-religion-education-lawsuits-kansas-4c7b4b65e9b3de4cd709abdcc82c57ca [https://perma.cc/L2NS-LAUJ].

27. *See* Conor Skelding, *Ludlow Public Schools Secretly Promoted Our Kids' Gender Transition, Parents Allege*, N.Y. Post (Apr. 16, 2022, 6:24PM), https://nypost.com/2022/04/16/ludlow-public-schools-secretly-promoted-our-kids-gender-transition-parents [https://perma.cc/E3FS-ZRRW].

28. *See* Leah Treidler, *Local Parents Sue Eau Claire School District Over Gender Identity Guidelines*, Wis. Pub. Radio (Sept. 9, 2022), https://www.wpr.org/local-parents-sue-eau-claire-school-district-over-gender-identity-guidelines [https://perma.cc/SCC5-DTRL].

29. *See supra* note 22.

30. *See* Sawchuk, *supra* note 10.

31. *See infra* Part IV.

provide legal arguments both for transgender students wishing to challenge identity-denying policies and for school districts seeking to defend their implementation of identity-affirming policies.

This Article proceeds as follows. Part II outlines a constitutional right to self-identify, which includes the right to choose one's own name and pronouns, that is independently grounded in both the Free Expression Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment. Part III explores the different types of identity-denying name/pronoun policies that are emerging in America's public schools. This Part details how, in implementing such identity-denying policies, the state harms transgender students and infringes their autonomy without a compelling interest in doing so. Thus, this Part concludes, all identity-denying name/pronoun policies are unconstitutional. Part IV analyzes the only viable alternative: identity-affirming policies. This Part ultimately finds that such policies are entirely compatible with the rights of teachers, parents, and other students under the First and Fourteenth Amendments. Thus, this Part argues, school districts across the country are constitutionally obligated to implement identity-affirming name/pronoun policies. Finally, Part V concludes by summarizing the key takeaways from Parts II, III, and IV.

II. The Fundamental Right to Self-Identify

This Part first establishes that the Constitution protects a fundamental right to self-identify that includes the right to choose one's name and pronouns. This fundamental right to self-identify is fully and independently protected by the Free Expression Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment.[32] Then, this Part uses the framework outlined in *Bellotti v. Baird* to show that adults' and children's right to self-identify are "virtually coextensive."[33]

Understanding the right to self-identify as protected by free expression and due process has important implications for plaintiffs seeking to challenge the infringement of that right by the state.[34]

32. *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech."); Gitlow v. New York, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech [is] among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."); U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."). For a discussion of *children's* constitutional right to self-identity, see *infra* Part II.C.

33. *See* Bellotti v. Baird, 443 U.S. 622, 634 (1979).

34. Note that the Court has relied on a combination of First and

First, when state action infringes a fundamental right, the government generally must satisfy strict scrutiny. In the First Amendment context, the Court has explained that strict scrutiny is invoked whenever the government burdens protected speech based on the content of that speech.[35] In the Fourteenth Amendment context, the Court has held that strict scrutiny applies whenever the government burdens a fundamental liberty that is protected under due process.[36] Indeed, the Court has found that the liberty component of the Due Process Clause protects, among others, the fundamental right to marry[37] and the fundamental right of consenting adults to engage in private sexual conduct[38]—even though such rights, like the fundamental right to self-identify, are not enumerated in the text of the Fourteenth Amendment. Part III.B. of this Article will explain how identity-denying name/pronoun policies infringe the fundamental right to self-identify and trigger strict scrutiny. But, for now, suffice it to say that, whenever strict scrutiny applies, the government must meet the highest possible burden imposed by the

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Fourteenth Amendment protections in the past. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("[I]n the context of this case—a prosecution for mere possession of printed or filed matter in the privacy of a person's own home—that [free-expression] right takes on added dimension. For also fundamental is the right to be free . . . from unwanted governmental intrusions into one's privacy."); Anderson v. Celebrezze, 460 U.S. 780, 786 n.7 (1983) ("[I]n this case we base our conclusions directly on the First and Fourteenth Amendments."); Williams v. Rhodes, 393 U.S. 23, 30 (1968) ("In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.").

35. *See, e.g.*, Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 658 (1994) ("[S]peaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say).").

36. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.").

37. *See, e.g.*, Loving v. Virginia, 338 U.S. 1, 12 (1967) ("These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

38. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the [Due Process Clause] allows homosexual persons the right to make this choice.").

Constitution: It must show that its action serves a compelling government interest and is narrowly tailored to achieving that interest.[39] Because the government is rarely able to meet such a burden, the plaintiff is more likely to prevail against the government under a strict scrutiny framework.[40]

Under current Fourteenth Amendment jurisprudence, a transgender student who challenges an identity-denying name/pronoun policy under the Equal Protection Clause alone is unlikely to trigger strict scrutiny. Equal-protection claims are, to be sure, available whenever the government discriminates between different groups of people.[41] But when the government's discriminatory action does not implicate a fundamental right, the level of scrutiny the government must satisfy depends solely on the characteristic that distinguishes the two groups. For example, when the government discriminates based on race, it must satisfy strict scrutiny.[42] In such cases, the government must demonstrate that its racially discriminatory action furthers a compelling interest and that its choices are narrowly tailored to achieving that interest.[43] In contrast, when the government discriminates based on sex, it need only pass intermediate scrutiny.[44] In those cases, the Constitution demands less of the state: The government need only show that its discriminatory action advances an important government interest and that its choices are substantially related to furthering that interest.[45]

Transgender schoolchildren have been successful in using equal-protection arguments to overturn discriminatory school bathroom policies.[46] However, to date, courts have assessed such

39. *See* Bowers v. Hardwick, 478 U.S. 186, 189 (1986) ("[T]o prevail, the State would have to prove that [its action] is supported by a compelling interest and is the most narrowly drawn means of achieving that end.").

40. *See* Bernal v. Fainter, 467 U.S. 216, 220 n.6 (1984) ("Only rarely are statutes sustained in the face of strict scrutiny.").

41. *See* U.S. Const. amend. XIV, § 1 ("[No State shall] deny to any person within its jurisdiction the equal protection of the laws.").

42. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 235 (1995) ("Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.").

43. *Id.*

44. Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

45. *Id.*

46. *See, e.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 606–19 (4th Cir. 2020) (finding that a school policy prohibiting transgender students from using the bathroom corresponding to their gender identity violated the students' equal protection rights); Whitaker by Whitaker v. Kenosha Unified

equal-protection claims using intermediate scrutiny because, in the courts' view, classification on the basis of transgender status is akin to classification on the basis of biological sex.[47] Thus, if plaintiffs challenging state action that curtails their ability to self-identify were limited to claims that sound in equal protection, the government would be more likely to prevail because it would only need to satisfy intermediate scrutiny. But if, as this Article proposes, courts were willing to hold that there is a fundamental right to self-identify, then state action that infringes such a right would be more vulnerable to invalidation because it would need to survive strict scrutiny.

Second, understanding the right to self-identify as rooted in due process acknowledges the reality of the Court's current jurisprudence with respect to matters of self-identity and self-expression—even if, as this Article argues, such matters should likewise be protected as free expression. If the Court were to embrace more capacious understandings of "identity," "expression," and the relationship between the two, then the constitutional right "to define and express [one's] identity" might more naturally be considered a First Amendment issue.[48] But, as things stand, the Court has long relied on the Due Process Clause to protect individuals from state interference in certain expressive acts.[49] Consequently,

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Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1055 (7th Cir. 2017) (affirming a preliminary injunction of a school policy that prevented a transgender male student from using the boys' bathroom because the student was likely to be successful in his Equal Protection claim). *But see* Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 803 (11th Cir. 2022) ("Adams argues that the bathroom policy unlawfully discriminates on both the basis of sex and transgender status. We address both of Adams's arguments in turn and hold that there has been no unlawful discrimination.").

47. *See, e.g.*, *Adams*, 57 F.4th at 803 ("Turning to the constitutional question, because the [bathroom] policy that Adams challenges classifies on the basis of biological sex, it is subject to intermediate scrutiny."); *Grimm*, 972 F.3d at 609 ("[W]e hold that the Board's [bathroom] policy constitutes sex-based discrimination as to Grimm and is subject to intermediate scrutiny.").

48. *See* Obergefell v. Hodges, 576 U.S. 644, 651–52 (2015) (holding that state prohibition on same-sex marriage violated the Due Process Clause because "[t]he Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity").

49. *See, e.g.*, *id.*; Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the [Due Process Clause] allows homosexual persons the right to make this choice."); Turner v. Safley, 482 U.S. 78, 95 (1987) (explaining that certain incarcerated persons enjoy the fundamental right to marry, in part because "inmate marriages, like others, are expressions of emotional support and public commitment").

the Due Process Clause continues to provide a useful doctrinal framework for defining a constitutional right to self-identify.

Third, if the right to self-identify is ultimately grounded in both the Free Expression Clause and the Due Process Clause, then it is "doubly protected" by the Constitution.[50] At bottom, the combination of due-process and free-expression rights should make it easier for the Court to invalidate identity-denying government action than if either right were operating in isolation.[51] But the free-expression component of this particular combination of rights may prove especially important for plaintiffs seeking to vindicate their fundamental right to self-identify. To be clear, if a right to self-identify were rooted in substantive due process alone, then certain members of the Court might have little difficulty in striking it down.[52] In fact, some Justices might even find such a proposition appealing.[53] However, those same Justices are often willing to uphold First Amendment rights even if the speaker's ideology clashes with their own.[54] In that sense, a constitutional right to

50. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 523 (2022) (explaining that the First Amendment "doubly protects religious speech" because the Free Expression and Free Exercise Clauses "work in tandem").

51. Professor Coenen refers to these instances of overlapping rights as a "right/right combinations." *See* Michael Coenen, *Combining Constitutional Clauses*, 164 U. Pa. L. Rev. 1067, 1078 (2016) ("[A] right/right combination of clauses sometimes yields a more restrictive set of limits on government action than what would exist in the combination's absence."); *see, e.g.*, Emp. Div. v. Smith, 494 U.S. 872, 881 (1990) ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."). For further examples of the Court employing a right/right combination analysis, see Bellotti v. Baird, 443 U.S. 622, 634 (1979).

52. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 240 (2022) ("On occasion, when the Court has ignored the '[a]ppropriate limits' imposed by 'respect for the teachings of history,' it has fallen into . . . freewheeling judicial policymaking . . . . The Court must not fall prey to such an unprincipled approach.") (citations omitted). This majority opinion was authored by Justice Alito and joined by Justices Thomas, Gorsuch, Kavanaugh, and Barrett. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 695 (2015) (Roberts, J., dissenting) ("The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way.").

53. *See, e.g.*, *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is demonstrably erroneous, we have a duty to correct the error established in those precedents.") (citations omitted).

54. *See* Lee Epstein, Christopher M. Parker & Jeffrey A. Segal, Do Justices Defend the Speech They Hate? 5 (2014), https://static1.squarespace.com/static/60188505fb790b33c3d33a61/t/60447e0a542add457ace8

self-identify that is grounded in free expression, and not just due process, ought to be one that all Justices—whatever their judicial philosophy—are open to protecting.

A. *Free Expression*

This Subpart argues that the right to self-identify is fully and independently protected by the Free Expression Clause of the First Amendment.[55] According to Martin Redish, "the constitutional guarantee of free speech ultimately serves only one true value . . . individual self-realization."[56] C. Edwin Baker similarly argued that "[t]o engage voluntarily in a speech act is to engage in self-definition."[57] Indeed, a person may actually choose to partake in speech *because* she wishes to "define herself publicly."[58] For Redish and Baker, then, some speech is not just expressive; rather, it is "self-expressive," in that it is used to further the self-fulfillment and self-realization of the speaker.[59]

Individual members of the Court have, at times, likewise indulged the notion that the First Amendment protects an individual's ability to express their identity.[60] Justice Marshall, for instance, writing a concurring opinion in *Procunier v. Martinez*, explained that the First Amendment serves the needs of "the human spirit—a spirit that demands self-expression."[61] In fact, Marshall posited, self-expression is foundational to the development of a personal identity.[62] Similarly, Justice White, writing in dissent in *First National Bank v. Bellotti*, argued that the "the principal function of the First

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1a3/1615101451572/InGroupBiasSummary.pdf [https://perma.cc/RZX9-2X7Z] (finding, for example, that, between the 1991 and 2010 terms: Justice Thomas supported the free-expression claims of "liberal" speakers in 23.1 percent of cases, Justice Roberts supported the free-expression claims of "liberal" speakers in 15.4 percent of cases, and Justice Alito supported the free-expression claims of "liberal" speakers in 9.1 percent of cases).

55. *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

56. Martin H. Redish, *The Value of Free Speech*, 130 U. Penn. L. Rev. 591, 594 (1982).

57. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964, 994 (1978).

58. *See id.*

59. *See id.*

60. However, these Justices have never been in the majority when doing so.

61. Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

62. *Id.*

Amendment [is] the use of communication as a means of self-expression, self-realization, and self-fulfillment."[63]

Most people see their name and gender as integral aspects of their personal identity.[64] In that sense, continuing to use the name or pronouns that one was assigned at birth is as much a choice as the inclination to change them. Imagine, for example, a cisgender man, John, who uses "he/him" pronouns. One day, a colleague of John's decides to start referring to John by the name "Sarah" and the pronouns "she/her." John would likely find such a proposition disrespectful in the first instance and intolerable in the second.[65] That is precisely because John's choices of a name and pronouns—whether those choices feel momentous or mundane to John—are central to the development and preservation of his identity and dignity.[66]

According to Justice Marshall's and Justice White's reasoning, then, announcing one's names and gender-appropriate pronouns ought to be a form of self-expression that is protected by the First Amendment. But that is only half the story. As Baker explains, all people are equal and autonomous, so "people's choices—their definition and development of *themselves*, must be respected."[67] To

63. First Nat'l Bank v. Bellotti, 435 U.S. 765, 804 (1978) (White, J., dissenting).

64. *See* Julia Shear Kushner, *The Right to Control One's Name*, 57 UCLA L. Rev. 313, 324 (2009) ("The meanings of our names not only tell others about us, but can inform our own sense of who we are."); Jean M. Twenge & Manis Melvin, *First-Name Desirability and Adjustment: Self-Satisfaction, Others' Ratings, and Family Background*, 28 J. Applied Soc. Psych. 41, 45–46, 49 (1998) (finding that people who dislike their first name tend to show poorer psychological adjustment because we see "the name [as] a symbol of the self.").

65. *See* Jessica MacNamara, Sarah Glann & Paul Durlak, *Experiencing Misgendered Pronouns: A Classroom Activity to Encourage Empathy*, 45 Teaching Socio. 269, 273 (2017) (observing that cisgender college students experienced feelings of embarrassment, confusion, and dissonance during a "gender pronoun reversal" exercise).

66. *See Obergefell,* 576 U.S. 644, 663 (2015) (finding that certain expressive acts, like the choice of when and whom to marry, are "central to individual dignity and autonomy").

67. Baker, *supra* note 57, at 992; *see* Foote v. Town of Ludlow, No. CV 22–30041-MGM, 2022 WL 18356421, at *5 (D. Mass. Dec. 14, 2022) ("Addressing a person using their preferred name and pronouns simply accords the person the basic level of respect expected in a civil society."); State v. Cantrill, 2020-Ohio-1235, 2020 WL 1528013, at *8 (Ohio App. 6 Dist. Mar. 31, 2020) ("We agree . . . that using an individual's preferred pronouns demonstrates respect for that person's dignity, regardless of what the law may require or prohibit."); Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., No. 2:23-CV-01595, 2023 WL 4848509, at *18 (S.D. Ohio July 28, 2023) ("[U]sing pronouns contrary to an individual's preferences intentionally (or repeatedly) . . . evinces disrespect for the individual. It plays into stereotypes. It lacks basis in scientific reality. And it is deeply harmful."); *see also* Shon Faye, The Transgender

hold otherwise would be "to reject the basic human desire for recognition and affront the individual's worth and dignity."[68] It thus follows that the full measure of the right to self-identify, as guaranteed by the First Amendment, generally requires the state to respect a speaker's choice of name and pronouns.[69]

To be sure, many types of speech, including many types of nonverbal expression, are not protected by the First Amendment.[70] And, even if speech that nurtures or sustains a personal sense of identity is protected as free expression, there remains the need to articulate exactly what speech fits within that category.[71] That is no

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Issue: An Argument for Justice 26 (Allen Lane 2021) ("Naturally, using chosen names is not the only factor in improving the mental health of trans children—but they function as a pretty strong indicator of how much the person in question is accepted by those around them."); Lola Olufemi, Feminism, Interrupted: Disrupting Power 49 (Pluto Press 2020) (quoting Travis Alabanza) ("When I say trans, I mean . . . choice. I mean autonomy. I mean wanting something greater than what you told me. Wanting more possibilities than the one you forced on me.").

68. *See* Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring); *see also* Thomas I. Emerson, *Toward A General Theory of the First Amendment*, 72 Yale L.J. 877, 881 (1963) ("[T]hought and communication are the fountainhead of all expression of the individual personality. . . . Hence suppression of belief, opinion and expression is an affront to the dignity of man, a negation of man's essential nature.").

69. That is not to say that the state is required to adopt a speaker's choice of *any* name and/or pronouns in *every* instance. *See* Shear Kushner, *supra* note 64, at 334 ("[C]ourts have found substantial reasons to deny petitions for names that contained offensive or obscene references; could incite violence; were typographically unconventional; were bizarre or ridiculous; might defraud or mislead the public; might confuse the public; might interfere with the rights of others; or could be considered contrary to public policies.").

70. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) ("A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.") (citations omitted); Morse v. Frederick, 551 U.S. 393, 403 (2007) ("The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may."); Roth v. United States, 354 U.S. 476, 485 (1957) ("We hold that obscenity is not within the area of constitutionally protected speech."); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) ("Some forms of commercial speech regulation are surely permissible.").

71. *See, e.g.*, Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse* 39 N.Y.U. Rev. L. & Soc. Change 89, 121–23 (2015) (arguing that bathroom choice is "expressive-conduct-as-speech" that merits First Amendment protection); Dana E. Purvis, *Gender Stereotypes and Gender Identity in Public Schools*, 54 U. Richmond L. Rev. 927, 930–41 (2020) (arguing that clothing choice is a type of expressive conduct that merits First Amendment protection).

easy feat. For starters, "identity" is hardly a concept that enjoys a universally accepted definition.[72] That problem is then compounded by the fact that reasonable minds—including those on the Court—likely hold different views on the types of speech that can actually develop and sustain the speaker's identity (however defined). Imagine, for example, a city ordinance that bans the annual Fourth of July parade. The parade organizers sue the city, arguing, among other claims, that the ordinance infringes their First Amendment right to self-identify because organizing the Fourth of July parade is key to developing and sustaining their identity as Americans. Two Justices on the Court might well agree that one's sense of belonging to a particular nationality is a fundamental part of one's identity. But those same two Justices might disagree about whether that sense of American identity is developed and sustained by organizing a Fourth of July parade.

No doubt many other claims invoking a First Amendment right to self-identify will likewise present difficult questions that will merit careful consideration by the Court. But claims that arise when the government attempts to control an individual's choice of names and pronouns are of a fundamentally different nature. Whatever hard cases may exist, it is beyond question that choosing one's name and pronouns is entirely foundational to a person's sense of self. Because such choices are central to the development and maintenance of an individual's identity, they must enjoy First Amendment protection.[73]

B. *Substantive Due Process*

This Subpart argues that the right to self-identify is fully and independently protected by the Due Process Clause of the Fourteenth Amendment.[74] In *Obergefell v. Hodges*, Justice

72. *See* Eric T. Olson, *Personal Identity*, *in* The Blackwell Guide to Philosophy of Mind 352, 352 (Stephen P. Stich & Ted A. Warfield eds., 2008) ("It is hard to say what personal identity is. . . . To most people, the phrase 'personal identity' suggests what we might call one's individual identity. Your identity in this sense consists roughly of those attributes that make you unique as an individual and different from others. Or it is the way you see or define yourself, which may be different from the way you really are.").

73. *See* Baker, *supra* note 57, at 992 ("[P]eople's choices—their definition and development of themselves, must be respected."); *see also* Obergefell v. Hodges, 576 U.S. 644, 664 (2015) (noting that, as part of a substantive-due-process analysis, courts must "exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect").

74. U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

Kennedy, writing for the majority, proclaimed that the Constitution guarantees the freedom of each person "to define and express their identity."[75] Because the decision to marry—including the decision to marry someone of the same sex—is "one of life's great moments of self-definition," it finds protection from state interference in the Due Process Clause.[76] Likewise, this Article argues, the choice of one's name and pronouns is an important act of self-definition that enjoys stringent due-process protection.[77]

In the past, the Court has been receptive to the notion that the Due Process Clause creates certain "zones of privacy" into which the state generally cannot intrude.[78] Self-definition is often a purely private act that can be realized in the absence of any public manifestation. One can certainly "define [their] personal identity and beliefs" in complete solitude, never uttering a word to another person.[79] But because the majority in *Dobbs v. Jackson Women's Health Organization* seemed hostile to the notion that the Fourteenth Amendment safeguards the ability of an individual to make private decisions about their own life, it would perhaps be ill-advised,

75. 576 U.S. at 652; *see also* Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.").

76. *Obergefell*, 576 U.S. at 666.

77. *See* Michael Rosensaft, *The Right of Men to Change Their Names Upon Marriage*, U. Pa. J. Const. L. 186, 213 (2002) (arguing that the ability to change one's name upon marriage is a fundamental due-process right); Shear Kushner, *supra* note 64, at 342–57 (positing that the Due Process Clause protects an individual's ability to control their legal name); Laura K. Langley, *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 Tex. J. on C.L. & C.R. 101, 113–27 (2006) (arguing, pre-*Obergefell*, that the Due Process Clause protects the fundamental right to self-determine one's gender); Sheila M. Lake, *The Right to Gender Self-Identification—Post-*Obergefell, 19 W. Mich. Cooley J. Prac. & Clinical L. 293, 304–11 (2018) (positing, post-*Obergefell*, that the Due Process Clause protects the fundamental right to gender self-identification).

78. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[C]ases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.").

79. *See Obergefell*, 576 U.S. at 663 (2015); Shear Kushner, *supra* note 64, at 345 ("Names form part of one's own self-concept, whether or not that self-concept is communicated to the public."); Andrew M. Milz, *But Names Will Never Hurt Me?:* El-Hakem v. BJY, Inc. *and Title VII Liability for Race Discrimination Based on an Employee's Name*, 16 Temp. Pol. & C.R. L. Rev. 283, 293 (2006) ("One's name is the closest thing she has to a way to define her individuality, in essence, a shorthand for self-concept. The names we are given, be they our first names, surnames, or nicknames, significantly impact our development as individuals, crafting our personal identities and our perceptions of self.") (citations omitted).

at least in view of the current Court's make-up, to frame the due-process right to self-identify as a matter of purely private concern.[80]

Beginning with *Planned Parenthood v. Casey*, the Court has often framed substantive-due-process concerns in the context of liberty, a broader concept of which privacy is but one part.[81] For example, in *Lawrence v. Texas*, the Court found that a statute criminalizing certain intimate contact between consenting adults of the same sex was unconstitutional because it violated the "liberty of the person both in its spatial and in its more transcendent dimensions."[82] Likewise, in *Obergefell*, the Court outlawed state prohibitions on gay marriage because such measures violated the "liberty of same-sex couples."[83] In a world without *Dobbs*, it would arguably be irrelevant whether the right to self-identify were grounded in privacy or some broader notion of liberty. Since privacy is a subset of liberty, all private acts of self-identification would necessarily be liberatory in nature and, therefore, subject to the protections of the Fourteenth Amendment.[84] But such a world does not exist. The right to self-identify may not be protected by today's Court (or tomorrow's) if it is grounded in notions of privacy alone.[85] The Constitution, at least per the majority in *Dobbs*, may demand something more.

Yet, the *Obergefell* Court, in affirming the constitutional right to "define and express" one's identity, recognized an important reality: Identity, though delineable within a purely private sphere, is inherently public.[86] In other words, one can certainly define their sense of self (including one's name and gender) in strict isolation, but expression of that self-definition gives it life and substance.[87]

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80. *See Dobbs*, 597 U.S. 215, 235 (2022) ("*Roe*, however, was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned.").

81. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("[T]he most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.").

82. 539 U.S. 558, 562 (2003).

83. 576 U.S. at 675 (2015).

84. *See* Langley, *supra* note 77, at 115 (explaining that privacy is a subset of liberty).

85. *See Dobbs*, 597 U.S. at 235 ("*Roe*, however, was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned.").

86. *See* Langley, *supra* note 77, at 116 ("Gender is at once immensely personal and profoundly public.").

87. *See* Shear Kushner, *supra* note 64, at 345 ("Names form part of one's

Because there is an inherently expressive component to the right to self-identify, the constitutional footing of that right reaches beyond privacy and into a broader notion of liberty.[88] And, in a post-*Dobbs* world, that could make all the difference.[89]

That said, grounding the right to self-identify in due-process liberty—even liberty beyond privacy—is still far from foolproof. A self-styled "strict originalist" may well point to the two-part framework outlined in *Washington v. Glucksberg* and argue that the right to self-identify (especially, perhaps, the right to self-identify as transgender) is not worthy of due-process protection because such a right is not "deeply rooted in this Nation's history and tradition."[90] That argument certainly has some teeth to it. From the 1970s through the 1990s, dozens of state courts across the country denied transgender petitioners' requests for court-issued name and gender-marker changes.[91] And it was not until 1975 that Minneapolis became the first city in the United States to pass a law prohibiting discrimination against transgender people.[92] Indeed, it would take eighteen more years for the rest of Minnesota to follow suit: In 1993, the North Star State became the first in the Union to introduce

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own self-concept, whether or not that self-concept is communicated to the public.").

88. *See* Langley, *supra* note 77, at 115–16 (arguing that the right to self-determine one's gender is a liberty beyond privacy).

89. *See id.* at 115 (positing that grounding constitutional protections in privacy alone produces less liberatory results than basing such protections in a broader concept of liberty).

90. *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997); *see also Dobbs*, 597 U.S. at 237–50 (applying the *Glucksberg* standard to find that the Constitution does not protect a fundamental right to abortion). *But see* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 Tex. L. Rev. 1126, 1181 (2023) ("The [*Dobbs*] Court employed a remarkably broad and polarizing history-and-tradition standard that calls into question the continuing legitimacy of a wide range of other constitutional rights. In *Dobbs*, the Court transformed doctrinal standards for determining the scope of the Fourteenth Amendment's liberty guarantee, without acknowledging that it had just changed the scope of constitutionally protected liberties, or why."); Lake, *supra* note 77, at 309–11 (arguing that the fundamental right to gender self-identification passes the *Glucksberg* standard).

91. *See* Alyssa Bryant & Ezra Young, *Transgender Politics: The Civil Rights of Transgender Persons*, *in* Transgender and Gender Diverse Persons: A Handbook for Service Providers, Educators, and Families 72, 77 (Routledge 2019).

92. The Editorial Board, *Milestones in the American Transgender Movement*, N.Y. Times (Aug. 28, 2015), https://www.nytimes.com/interactive/2015/05/15/opinion/editorial-transgender-timeline.html [https://perma.cc/8GCX-CX5W].

statewide antidiscrimination laws for transgender people.[93] In that sense, even though transgender rights have continued to advance significantly over the last fifty years,[94] it is unlikely that the current Court would find such a timeframe sufficient to infer that the fundamental right to self-identify as transgender is deeply rooted in the Nation's history and tradition.[95]

But even if that were the case, the *Obergefell* Court found the universal application of the *Glucksberg* formula to be "inconsistent"[96] with its own substantive-due-process jurisprudence, including landmark cases like *Loving*,[97] *Zablocki*,[98] and *Turner*.[99] As Justice Kennedy, writing for the majority, explained: "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[100] The *Obergefell* Court thus rejected the use of the *Glucksberg* formula in the context of same-sex marriage, noting that fundamental "rights come not from ancient sources alone."[101] Accordingly, when a transgender individual asserts the right to self-identify under the Fourteenth Amendment, it is no answer to say that such a right is not deeply rooted in the Nation's history and tradition. Just like the fundamental right to marry someone of the same sex, the fundamental right to self-identify—including the right to self-identify as transgender—arises not from history and tradition, but rather from "a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[102]

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93. *Id.*

94. *See generally id*.

95. *See Dobbs*, 597 U.S. at 231 ("The right to abortion does not fall within [the category of rights protected under *Glucksberg*]. Until the latter part of the 20th century, such a right was entirely unknown in American law.").

96. *See* Obergefell v. Hodges, 576 U.S. 644, 671 (2015).

97. Loving v. Virginia, 388 U.S. 1, 12 (1967) (finding that state prohibitions on interracial marriage violated the Due Process Clause and the Equal Protection Clause).

98. Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (holding that the fundamental right to marry was infringed by a law prohibiting fathers who were behind on their child-support payments from marrying).

99. Turner v. Safley, 482 U.S. 78, 95–96 (1987) (holding that incarcerated persons have a fundamental right to marry unless such a right is "inconsistent with [their] status as a prisoner or with the legitimate penological objectives of the prison system").

100. *Obergefell*, 576 U.S. at 671.

101. *Id.*

102. *See id.* at 671–72.

C. *Children's Right to Self-Identify Under a Bellotti Framework*

The preceding Subparts established that the Constitution protects a fundamental right to self-identity under the First and Fourteenth Amendments. This Subpart uses a *Bellotti* framework to demonstrate that, in the context of the freedom to self-identify, the rights of children and adults are "virtually coextensive."[103]

In *Tinker v. Des Moines Independent Community School District*, the Court declared that children do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[104] And later, in *Bellotti v. Baird*, the Court explained that "[a] child, merely on account of his minority, is not beyond the protection of the Constitution."[105] In fact, per *Bellotti*, children's rights and adults' rights are "virtually coextensive" with respect to many state-sanctioned deprivations of liberty.[106]

But Justice Powell, writing for the plurality in *Bellotti*, was quick to caution that the constitutional rights of children are not, in every circumstance, commensurate in scope with the rights of adults.[107] Powell outlined three reasons why the rights of minors may be characterized differently than—though not necessarily inferior to—those of adults: children's vulnerability, children's immaturity, and the importance of parental control.[108] Accordingly, this Subpart proceeds by first determining whether a student's right to self-identify is diminished by one or more of the factors articulated in *Bellotti*.[109]

1. Children's Vulnerability

According to the *Bellotti* plurality, children's need for "concern" and "sympathy" may justify differential treatment under the Constitution.[110] An important upshot of this approach is that, in

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103. *See* Bellotti v. Baird, 443 U.S. 622, 634 (1979).

104. 393 U.S. 503, 506 (1969).

105. *Bellotti*, 443 U.S. at 633 (1979).

106. *Id.* at 634.

107. *Id.*; *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.").

108. *Bellotti*, 443 U.S. at 634.

109. This Article applies a *Bellotti* analysis to assess the constitutionality of identity-*denying* policies because such policies infringe students' fundamental right to self-identify at school. However, *Bellotti* is less relevant to evaluating the constitutionality of identity-*affirming* policies (*see infra* Part IV) because those policies instead implicate non-identity-based third-party rights (for example, those of the state, parents, teachers, and other students).

110. *Bellotti*, 443 U.S. at 635; *see also Fraser*, 478 U.S. at 684 ("[C]ases recognize the obvious concern on the part of . . . school authorities acting *in*

certain circumstances, the state may curtail a minor's constitutional freedoms if, in exercising those freedoms, the minor's vulnerability renders them particularly susceptible to harm.[111] To cite one example, in *In re Gault*, the Court found that, because children are generally more vulnerable than adults, the state may adjust its due-process procedures when criminally prosecuting offenders from each group.[112]

In the context of identity-denying name/pronoun policies, the analysis turns on whether choosing a name and pronouns at school risks negative outcomes from which children need to be protected on account of their vulnerability. It is true that "social transitioning" for transgender children remains, in some circles, a controversial issue.[113] Some people believe that affirming a child's desire to express a gender identity that is different from the one they were assigned at birth is psychologically harmful because it encourages long-term persistence of an identity that might otherwise be transient.[114] Other people harbor a sincerely held belief that the refusal to endorse a transgender child's identity is, as a moral or religious issue, in the child's best interests.[115] To cite one recent example, in September 2022, a group of parents sued the Eau Claire Area

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loco parentis[] to protect children.").

111. *See Bellotti*, 443 U.S. at 635 ("[T]he State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'") (citing McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971)).

112. 387 U.S. 1, 30–31 (1967).

113. *See* Eli Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People*, 23 Int'l J. Transgender Health S1, S75 (2022) ("Gender social transition refers to a process by which a child is acknowledged by others and has the opportunity to live publicly, either in all situations or in certain situations, in the gender identity they affirm and has no singular set of parameters or actions.").

114. *See, e.g.*, Kenneth Zucker, *The Myth of Persistence: Response to "A Critical Commentary on Follow-Up Studies and 'Desistance' Theories About Transgender and Gender Non-Conforming Children" by Temple Newhook et al. (2018)*, 19 Int'l J. Transgenderism 231, 237 (2018) ("I would hypothesize that when more follow-up data of children who socially transition prior to puberty become available, the persistence rate will be extremely high. This is not a value judgment—it is simply an empirical prediction.").

115. *See* Michael Lipka & Patricia Tevington, *Attitudes About Transgender Issues Vary Widely Among Christians, Religious 'Nones' in U.S.*, Pew Rsch. Ctr. (July 7, 2022), https://www.pewresearch.org/fact-tank/2022/07/07/attitudes-about-transgender-issues-vary-widely-among-christians-religious-nones-in-u-s [https://perma.cc/KTG9-D9VF] ("Growing shares of Americans believe that a person's gender is determined by their sex assigned at birth, according to a new Pew Research Center survey, which finds major differences by religion on this question and others about transgender issues.").

School District in Wisconsin over its policy of allowing students to adopt a new name and pronouns in school without parental consent.[116] The Eau Claire parents asserted, among other claims, that their faith required them to reject the school's name/pronoun policy so that the parents could instead "help their children . . . learn to accept and embrace their God-given sex."[117]

However, the World Professional Association for Transgender Health (WPATH) issued updated guidance in 2022 in which it recommended that parents and caregivers "respond positively to children who desire to be acknowledged as the gender that matches their internal sense of gender identity."[118] Citing a wealth of scientific and clinical evidence, WPATH advised that social transitioning, which includes the use of gender-appropriate names and pronouns, should "originate from the child and respect the child's wishes."[119] Further, and as noted in Part I, a 2018 study led by Professor Stephen Russell reported a statistically significant decrease in depressive symptoms, suicidal ideation, and suicidal behavior when a transgender young person's chosen name and pronouns were used at school.[120] Likewise, GLSEN's 2021 national survey found that transgender students who attended schools with "supportive" gender-identity policies were less likely to miss school because of feeling unsafe.[121] In the first instance, then, many transgender students' mental and physical wellbeing improves when they are free to self-identify at school. But second, and relatedly, protecting the right to self-identify can help mitigate the negative educational outcomes of hostile school environments.

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116. *See* Leah Treidler, *Local Parents Sue Eau Claire School District Over Gender Identity Guidelines*, Wis. Pub. Radio (Sept. 9, 2022), https://www.wpr.org/local-parents-sue-eau-claire-school-district-over-gender-identity-guidelines [https://perma.cc/SD29-YQVG]; *see also* Vesely vs. Ill. Sch. Dist. No. 45, No. 22 CV 2035, 2023 WL 2988833, at *2–5 (N.D. Ill. Apr. 18, 2023) (dismissing a father's claim that a school's student gender-identity guidelines violated his *Meyer-Pierce* right to control the upbringing of his child); John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., No. 8:2020cv03552 2022 WL 3544256, at *5–14 (D. Md. Aug. 18, 2022) (dismissing a claim brought by parents of public-school children that a school's student gender-identity guidelines violated their *Meyer-Pierce* rights).

117. Complaint at 19, Parents Protecting Our Children v. Eau Claire Area Sch. Dist. (W.D. Wis. 2022) (No. 3:22-CV-00508), https://will-law.org/wp-content/uploads/2022/09/FINAL-Complaint-v.-Eau-Claire-School-District-Final.pdf [https://perma.cc/N2QZ-MAGE] [hereinafter *Parents Protecting* Complaint].

118. *See* Coleman et al., *supra* note 113, at S75.

119. *See id.* at S76.

120. Russell, *supra* note 17, at 504.

121. Kosciw et al., *supra* note 2, at 73.

Considering such evidence, the state's desire to suppress children's freedom to self-identify is incongruent with *Bellotti*'s concern for children's vulnerability. Granted, some children may not experience significant harm when they are misgendered. And a small number will no doubt detransition, perhaps even coming to regret their decision to change their name or pronouns in the first place.[122] But, to borrow the Court's language in *Meyer v. Nebraska*, "[n]o emergency has arisen" which renders students' ability to choose names and pronouns "so *clearly harmful* as to justify its inhibition."[123] As explained above, exercising the right to self-identify does not, for the most part, cause children harm; in fact, for many young people, self-identification provides significant benefits. In that sense, there is nothing sinister from which vulnerable minors, under a *Bellotti* framework, need to be protected.[124]

2. Children's Immaturity

In *Ginsberg v. New York*, the Court held that a state could limit the ability of minors to purchase sexually explicit material, even if adults had a constitutional right to access the same information.[125] In the Court's view, the curtailment of children's rights was justified to "safeguard[] such minors from harm."[126] The *Bellotti* plurality later explained that children have limited freedom "to choose for themselves in the making of important, affirmative choices with potentially serious consequences."[127] Because "minors often lack

122. *See* Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, The Report of the 2015 U.S. Transgender Survey 111 (2016) (finding that only eight percent of the more than 27,000 transgender people surveyed had de-transitioned ("gone back to live as their sex assigned at birth") at some point in their life, and most had done so only temporarily). *But see* Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 Yale L.J. 1448, 1498 (2018) (arguing that, "[a]lthough children's characters undoubtedly evolve, the fact they are transitory need not imply that they are not deserving of recognition of respect" in the present).

123. *See* Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (emphasis added).

124. *See* Russell, *supra* note 17, at 504 (reporting a statistically significant decrease in depressive symptoms, suicidal ideation, and suicidal behavior when a transgender young person's chosen name and pronouns were used at school); Kosciw et al., *supra* note 2, at 73 (finding that transgender students who attended schools with "supportive" gender-identity policies were less likely to miss school because of feeling unsafe).

125. *See* Ginsberg v. New York, 390 U.S. 629, 637 (1968).

126. *See id.* at 643; *see also* New York v. Ferber, 458 U.S. 747, 757 (1982) ("It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling.") (citation omitted).

127. Bellotti v. Baird, 443 U.S. 622, 635 (1979); *see also* Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982) ("Our history is replete with laws and

the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," the state may limit their decision making capacity in certain instances.[128]

The *Bellotti* plurality's concerns over children's immaturity and children's vulnerability thus appear to share a common aim: harm reduction. Because immature minors are "most susceptible to influence and to psychological damage," the state may validly curtail minors' ability to make decisions for which the consequences are potentially serious or detrimental (or both).[129] In the context of name/pronoun policies, then, the first question is: Are the consequences of a transgender student choosing their name and pronouns so serious that the student's constitutional right to do so is undermined?[130]

This Article is concerned with students' ability to choose their names and pronouns for everyday use in school. It is not concerned with legal name/pronoun changes. This is an important distinction. The consequences of legal changes may well be more serious and more difficult to undo than "unofficial" changes. For example, a legal name/pronoun change may require updates to medical files, social security information, driver licenses, etc.[131] For the same reasons, a legal name/pronoun change could also be difficult and costly to reverse.[132] But the ability to make decisions about "unofficial" name/pronoun usage at school need not implicate any of those "serious" consequences.[133] Schools would presumably introduce carefully designed procedures by which students with sincere requests could update the name and/or pronouns they wish to use in class.[134] And those same procedures would, of course, accommodate

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judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.").

128. *Bellotti*, 443 U.S. at 635.

129. *See Eddings*, 455 U.S., 104, 115 (1982).

130. *See Bellotti*, 443 U.S. at 635.

131. *See* Shear Kushner, *supra* note 64, at 352 (explaining that legal names often must be used "to travel, seek employment, drive, acquire credit cards, open bank accounts, vote, and pay taxes").

132. For example, in California, the filing fee for a petition for a legal name change typically costs around $435–450. *See* Cal. Cts. Self-Help Guide, Change Your Name in California (2022), https://selfhelp.courts.ca.gov/name-change#:~:text=Basic%20steps%20to%20change%20a%20name&text=You%20pay%20a%20%24435%2D%24,judge%20will%20make%20a%20decision [https://perma.cc/XYW4-RWGW].

133. *See, e.g.*, Linn-Mar Cmty. Sch. Dist., *supra* note 20 (specifying that students can change their name and pronouns at school without amending official records).

134. For example, the Linn-Mar Community School District in Wisconsin has introduced "Gender Support Plans," which include the following provision:

those students if they later wished to revert to their "official" name and pronouns.[135] But no name/pronoun changes at school would necessitate any legal ramifications.[136] In that way, "unofficial" name and pronoun changes need not harbor any "potentially serious consequences" from which the state could legitimately aspire to shield children under a *Bellotti* rationale.[137]

Yet, even if the ramifications of adopting a change in name or pronouns at school are not particularly serious for a minor decision maker, they could still be harmful. Under *Bellotti*'s immaturity framework, then, the second question is: Are schoolchildren mature enough to recognize that name/pronoun changes, even nonserious ones, could be detrimental to them?[138]

Some opponents of identity-affirming name/pronoun policies argue that schoolchildren—especially young schoolchildren—lack the maturity required to make informed decisions about changing the name and pronouns they use at school. Indeed, as outlined above, some people believe that children's immaturity leads them to temporarily express a transgender identity that, because of caregivers' affirmations, inadvertently becomes permanent.[139] Others claim that children's immaturity prevents them from realizing that their transgender identity is incompatible with a certain moral or religious code.[140] Still others argue that children, on account of their

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"At the beginning of each semester, teachers may ask all students how they want to be addressed in class and in communications with their parent/guardian. Within 10 school days of receiving a request from a student, regardless of age, or a parent/guardian (with the student's consent), the district shall change a student's name and/or gender marker in student technology logins, email systems, student identification cards, non-legal documents such as diplomas and awards, yearbooks, and at events such as graduation. A student may make this request via their Gender Support Plan, if the student has requested one." Parents Defending Educ. v. Linn-Mar Cmty. Sch. Dist. (*Linn-Mar I*), No. 22-CV-78 CJW-MAR, 2022 WL 4356109, at *3 (N.D. Iowa Sept. 20, 2022).

135. *But see* James et al., *supra* note 122, at 111 (finding that only eight percent of the more than 27,000 transgender people surveyed had detransitioned ("gone back to live as their sex assigned at birth") at some point in their life, and most had done so only temporarily).

136. This Article does not decide whether children should have the right to make legal name/pronoun changes. That is a different question for a different day. *See, e.g.*, Sarah Steadman, *"That Name is Dead to Me": Reforming Name Change Laws to Protect Transgender and Nonbinary Youth*, 55 U. Mich. J.L Reform 1, 33–42 (2021) (arguing that a transgender minor should, in certain circumstances, be able to legally change their name).

137. *See* Bellotti v. Baird, 443 U.S. 622, 635 (1979), *supra* note 33.

138. *See id.*

139. *See* Zucker, *supra* note 114, at 237.

140. *See* Lipka & Tevington, *supra* note 115; *Parents Protecting* Complaint, *supra* note 117, at 19 (explaining that a group of parents objected to a school's

immaturity, are incapable of understanding that they may suffer negative outcomes as a result of changing the name and pronouns they use at school. A young transgender student might, for example, unexpectedly feel embarrassed when they disclose their new name or pronouns in class and, once they make their announcement, they might be surprised by the hurtful reactions they receive from their teachers or peers.[141] Opponents of identity-affirming policies thus contend that children should not be permitted to make such name and pronoun changes, at least when they are too immature to fully understand the potential consequences of doing so.

But many young transgender children both understand their gender identity and appreciate that expressing that identity through a new name or pronouns could subject them to transphobia. Indeed, by age three or four, most children have a stable sense of their own gender.[142] And, in transgender young people, gender dysphoria can begin just as early.[143] In 2021, Michael Zaliznyak and co-workers observed that, among a population of U.S. adults who were seeking genital gender-affirming surgery, over three-quarters of the study's participants experienced gender dysphoria for the first time between ages three and seven.[144] In fact, more than eighty percent of the transgender men and women surveyed reported that their earliest memory of gender dysphoria is also one of their earliest life memories.[145] And, given that transgender people typically encounter their first incidences of transphobia in the family home, it is likely that they begin their education with an understanding that expressing their transness can evoke undesirable reactions

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identity-affirming name/pronoun policy in part because, in the parents' view, their faith required them to "help their children . . . learn to accept and embrace their God-given sex").

141. *See* Linda K. Wertheimer, *'A Very Scary Thing to Tell Someone': The Debate Over Gender Pronouns in Schools, Explained*, Bos. Globe (Sept. 28, 2021), https://www.bostonglobe.com/2021/09/28/magazine/very-scary-thing-tell-someone-why-gender-pronouns-matter-schools [https://perma.cc/GX45-SW6X] ("[Names and pronouns] can be a very scary thing to tell someone when you don't know them at all . . . you don't know how accepting they will be.").

142. Susan J. Bradley & Andrew Kenneth Zucker, *Gender Identity Disorder: A Review of the Past 10 Years*, 36 J. Am. Acad. Child Adolescent Psychiatry 872, 872 (1997).

143. Michael Zaliznyak, Nance Yuan, Catherine Bressee, Andrew Freedman & Maurice M. Garcia, *How Early in Life do Transgender Adults Begin to Experience Gender Dysphoria? Why This Matters for Patients, Providers, and for Our Healthcare System*, 9 Sexual Med. 100448, 100448 (2021).

144. *Id.*

145. *Id.*

from others.[146] As a consequence, some transgender schoolchildren may be considered both mature enough to have a sense of their own gender and, unfortunately, to anticipate that expressing their gender publicly "could be detrimental to them."[147] At least for those students, then, *Bellotti*'s concerns over children's immaturity are inapplicable, meaning the state cannot curtail those students' right to self-identify.

Further, even if a transgender student lacks the social savviness to successfully predict the outcome of making a public change to their name and pronouns, it does not follow that the student should be refused the opportunity to make such a change in the first place. For one thing, counting negative third-party reactions among the detrimental consequences of immature decision making would be akin to permitting a heckler's veto, which the Court has been reluctant to do in other instances.[148] For another, children are autonomous beings—separate and distinct from their parents and caregivers—whose constitutional rights, including the right to self-identify, do not "come into being magically" when they attain a certain age.[149] For those reasons, this Article does not endorse the notion that the freedom to self-identify at school should be subject to some sort of lower age limit.[150] In fact, if a child, whatever their age, is mature enough to perceive themselves in such a way that they realize their true identity is incongruent with the name or pronouns they were assigned at birth, then a request by that child

146. Alida Bouris & Brandon J. Hill, *Exploring the Mother-Adolescent Relationship as a Promotive Resource for Sexual and Gender Minority Youth*, 73 J. Soc. Issues 618, 621 (2017).

147. Bellotti v. Baird, 443 U.S. 622, 635 (1979).

148. According to the heckler's veto doctrine, the government may not cite the reactions of a hostile audience to justify silencing a speaker. For further discussion of the heckler's veto, *see infra* Part IV.B.3.

149. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).

150. Some school districts and education authorities have already endorsed this view. *See, e.g.*, Cal. Dep't Educ., School Success and Opportunity Act (Assembly Bill 1266) Frequently Asked Questions (Sept. 16, 2021), https://www.cde.ca.gov/re/di/eo/faqs.asp [https://perma.cc/Q742-XJYM] ("The student's age is not a factor. For example, children as early as age two are expressing a different gender identity."); *Linn-Mar I*, No. 22-CV-78 CJW-MAR, 2022 WL 4356109, at *3 (N.D. Iowa Sept. 20, 2022) ("Within 10 school days of receiving a request from a student, *regardless of age*, or a parent/guardian (with the student's consent), the district shall change a student's name and/or gender marker.") (emphasis added). *But see* Mass. Dep't Elementary & Secondary Educ., *supra* note 19 ("As with most other issues involved with creating a safe and supportive environment for transgender students, the best course is to engage the student, and in the case of a younger student, the parent, with respect to name and pronoun use.").

to have their true identity recognized at school should—indeed, must—be honored.[151]

3. The Importance of Parental Control

Bellotti further provided that, in some instances, the need for parental control is sufficiently important to override the interests of children.[152] In the plurality's view, parental control can serve two key functions. First, parents sometimes need to protect their children "from adverse governmental action and from their own immaturity" in making major decisions.[153] But a second and "more important justification for state deference to parental control" is that "those who nurture [a child] and direct [their] destiny have the right" to instill in their children, among other things, "moral standards [and] religious beliefs."[154]

Consider first the notion that parental consent for state action is sometimes needed to protect minors from adverse government conduct.[155] In other words, parents must be able to withhold or withdraw their consent to government-sanctioned harm of their children. But the converse is certainly not true: *Bellotti* does not require parental consent for state action that improves children's wellbeing. As outlined above, permitting transgender children to self-identify generally does not cause those children harm; in reality, it has been shown to significantly improve many transgender students' health and wellbeing. Thus, there is no state-sanctioned mistreatment from which parents need to shield their children.[156] Likewise, *Bellotti*'s parental-consent requirement is not triggered by concerns over children's immaturity. As explained above, transgender schoolchildren are often mature enough to make important decisions about their gender identity and expression. And since, in any case, they rarely experience the type of serious or detrimental consequences that would be implicated in a *Bellotti* framework, the state has no

151. *See* Foote v. Town of Ludlow, No. CV 22–30041-MGM, 2022 WL 18356421, at *5 (D. Mass. Dec. 14, 2022) ("Addressing a person using their preferred name and pronouns simply accords the person the basic level of respect expected in a civil society . . . . This is true regardless of an individual's age, provided the individual does not have a fraudulent purpose for using a new preferred name or pronouns.").

152. *See also Danforth*, 428 U.S. at 75 ("It remains, then, to examine whether there is any significate state interest in conditioning an abortion on the consent of a parent or person in loco parentis that is not present in the case of an adult.").

153. Bellotti v. Baird, 443 U.S. 622, 637 (1979).

154. *Id.*

155. *Id.*

156. *See supra* Part II.C.1.

compelling interest in curtailing even young transgender children's freedom to self-identify.[157]

That said, *Bellotti*'s second and "more important" justification for parental control is also more challenging for proponents of a minor's right to self-identify at school.[158] The Court has long been protective of the right of parents to control different aspects of their children's upbringing—including their education.[159] In *Meyer v. Nebraska*, the Court held that parents have the right to educate their children in a foreign language.[160] Later, in *Pierce v. Society of Sisters*, the Court found that the Constitution permits parents to remove their children from the public school system entirely (and opt instead for private education).[161]

But the Court has also stressed that the state may curtail parental action that harms children's welfare.[162] For example, in *Prince v. Massachusetts*, the Court found that a state law prohibiting child labor was constitutional because it protected minors from the "crippling effects of child employment."[163] Justice Rutledge, writing for the Court, explained that the state's ability to restrict parental authority "is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or

157. *See supra* Part II.C.2.

158. *See Bellotti*, 443 U.S. at 637.

159. But the circuit courts have disagreed on the proper scope of parents' constitutional rights. *See, e.g.*, Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1206 (9th Cir. 2005) ("[O]nce parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished"); Arnold v. Bd. of Educ. of Escambia Cnty., 880 F.2d 305, 313 (11th Cir. 1989) ("We recognize that parental autonomy to direct the education of one's children is not beyond limitation."); C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 184 (3d Cir. 2005) ("We . . . recognize a distinction between actions that strike at the heart of parental decision-making authority on matters of the greatest importance and other actions that, although perhaps unwise and offensive, are not of constitutional dimension.").

160. 262 U.S. 390, 403 (1923).

161. Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534–35 (1925).

162. *See* New York v. Ferber, 458 U.S. 747, 757 (1982) ("It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling. . . . Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.") (citation omitted). *But see* Troxel v. Granville, 530 U.S. 57, 75 (2000) (holding that it was unconstitutional for a state court to grant visitation rights to a child's grandparents against the wishes of the child's parent, even when doing so was in the child's best interests).

163. 321 U.S. 158, 168 (1944).

conscience."[164] Since, in reality, "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare," it was permissible for Massachusetts to curtail a mother's ability to make her child engage in (even religious) work.[165]

In *Wisconsin v. Yoder*, the Court considered *Meyer*, *Pierce*, and *Prince* in overturning a state-level compulsory education law.[166] In that case, the Court found that Amish parents could validly withdraw their children from formal education after the eighth grade.[167] Because compulsory schooling would have a "severe" and "inescapable" impact on the practice of the Amish faith, including the risk of censure by the church community, Amish parents had a right to instead instruct their children in "the Amish way of life."[168] In reaching its decision, the Court emphasized that, even if Amish children were to miss out on two years of traditional education, the typical Amish traits of reliability, self-reliance, and dedication to work would nonetheless allow children who later left the community "to survive and prosper in contemporary society."[169]

The *Yoder* Court acknowledged that parental control "may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child."[170] However, the Court also found that, in that instance, Wisconsin had failed to carry its burden of demonstrating that an Amish education would be detrimental to children's welfare.[171] But Justice Douglas, writing partly in dissent, was not so sure.[172] Douglas expressed concern that, if a fourteen-year-old child could be "harnessed to the Amish way of life by those in authority . . . his entire life may be truncated and deformed."[173] In Douglas's view, it would be "an invasion of the child's rights" to permit his parents to remove him from compulsory education—at least when the child is mature enough to express an opposing point of view.[174] After all, it was "the future of the student, not the future of his parents," that would be imperiled by an inadequate education.[175]

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164. *Id.* at 166.
165. *Id.* at 167.
166. Wisconsin v. Yoder, 406 U.S. 205 (1972).
167. *See id.* at 234.
168. *Id.* at 218.
169. *Id.* at 225.
170. *Id.* at 233–34.
171. *See id.* at 230.
172. *See id.* at 243 (Douglas, J., dissenting in part).
173. *Id.* at 245–46 (Douglas, J., dissenting in part).
174. *Id.* at 242 (Douglas, J., dissenting in part).
175. *Id.* at 245 (Douglas, J., dissenting in part); *see also* Troxel v. Granville, 530 U.S. 57, 86 (2000) (Stevens, J., dissenting) ("Cases like this do not present a

Some supporters of identity-denying name/pronoun policies contend that all parents, just like the Amish in *Yoder*, have the right to make decisions that implicate matters of religion or conscience—including beliefs about gender identity and expression—on behalf of their children.[176] To revisit one recent example discussed above, in September 2022, a group of parents sued the Eau Claire Area School District in Wisconsin over its policy of allowing students to adopt a new name and pronouns in school without parental consent.[177] The plaintiffs claimed that the school's policy "interfere[d] with a parent's religious freedom to raise their children according to their religious beliefs."[178] In fact, the Eau Claire parents asserted, their faith required them to reject the school's name/pronoun policy so that the parents could instead "help their children . . . learn to accept and embrace their God-given sex."[179]

Yet even the *Yoder* Court's deference to parental control offers little support for the Eau Claire parents' claim. First, the *Yoder* Court specified that its opinion was limited to situations in which the parents and the child agree on the best course of action for the minor's education.[180] In fact, *Yoder* expressly disclaimed any implication that its holding is necessarily applicable to cases in

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bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child."); Marie-Amélie George, *Exploring Identity*, 55 Fam. L.Q. 1, 31–53 (2021) (arguing, based on case law relating to issues of sexual orientation, race, and religion, that "children have a judicially recognized interest in exploring their identities because doing so best serves their needs").

176. *See* 406 U.S. 205, 214 (1972) (acknowledging "the traditional interest of parents with respect to the religious upbringing of their children"). *But see* Prince v. Massachusetts, 321 U.S. 158, 167 (1944) ("[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.").

177. *See* Treidler, *supra* note 28; *see also* Vesely vs. Ill. Sch. Dist. No. 45, No. 22 CV 2035, 2023 WL 2988833, at *2–5 (N.D. Ill. Apr. 18, 2023) (dismissing a father's claim that a school's student gender-identity guidelines violated his *Meyer-Pierce* right to control the upbringing of his child); John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., No. 8:2020cv03552 2022 WL 3544256 at *5–14 (D. Md. Aug. 18, 2022) (dismissing a claim brought by parents of public-school children that a school's student gender-identity guidelines violated their *Meyer-Pierce* rights).

178. *Parents Protecting* Complaint, *supra* note 117, at 10.

179. *Id.* at 19.

180. Wisconsin v. Yoder, 406 U.S. 205, 231 (1972) ("The dissent argues that a child who expresses a desire to attend public high school in conflict with the wishes of his parents should not be prevented from doing so. There is no reason for the Court to consider that point since it is not an issue in the case.").

which parents and children are in conflict.[181] In that sense, *Yoder* is of questionable relevance to the instance in which a parent seeks to prevent their child from using the name and pronouns the child has chosen for themselves.[182]

Second, and relatedly, while Amish children (like all children) do not have a fundamental right to an education,[183] transgender children (like all children) do have a fundamental right to self-identify.[184] Thus, while the Court viewed the dispute in *Yoder* as one arising primarily between the state and parents, name/pronoun policies necessarily implicate children's fundamental rights, too.[185] After all, it is children's autonomy to self-identify, not that of their parents, that is the principal casualty of an identity-denying name/pronoun policy.[186] And, on balance, parental control—while important—must give way to the constitutional freedom of transgender children to be "masters of their own destiny."[187]

Third, identity-denying name/pronoun policies, which exacerbate the occurrence of misgendering incidents at school, may produce more detrimental outcomes than a truncated formal education.[188] The *Yoder* Court held that the Amish alternative to formal schooling was acceptable in part because it still prepared children to succeed—even in the secular world.[189] And, as a result, the Court rejected Wisconsin's attempt to analogize an exemption from compulsory education to the child labor practices in question in *Prince*.[190] To be sure, a court reviewing an identity-denying name/

181. *Id.* ("Our holding in no way determines the proper resolution of possible competing interests [when] Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary.").

182. *See id.*

183. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) ("We have carefully considered each of the arguments . . . that education is a fundamental right or liberty and have found those arguments unpersuasive.").

184. *See supra* Part II.C.1.

185. *Yoder*, 406 U.S. at 230–31 ("It is the parents who are subject to prosecution here . . . and it is their right of free exercise, not that of their children, that must determine Wisconsin's power.").

186. *See id.* at 245 (Douglas, J., dissenting in part) ("It is the future of the student, not the future of the parents, that is imperiled by today's decision.").

187. *Id.*

188. To be clear, this Article does not opine on whether the *Yoder* Court was correct in concluding that missing out on two years of formal education was not harmful to Amish children. Instead, this Article acknowledges that *Yoder* is still good law and contrasts it with the impact of identity-denying name/pronoun policies.

189. Wisconsin v. Yoder, 406 U.S. 205, 225 (1972).

190. *Id.* at 230.

pronoun policy may likewise consider the negative consequences of misgendering to be less severe than the "crippling effects of child employment."[191] Few people would argue, for instance, that the sting of embarrassment that might come from announcing a new name and pronouns in class is equivalent in severity to the "physical injur[ies]" that can result from forcing a child to work on the street.[192] But the *Prince* Court was quick to acknowledge that child labor practices have significant psychological impacts, too.[193] And, as explained above, many transgender children likewise experience some form of "psychological . . . injury" whenever they are misgendered because of an identity-denying name/pronoun policy at school.[194] In that sense, a court reviewing the constitutionality of such a policy should readily apply *Prince* and distinguish *Yoder*.

In concluding this Subpart, it bears repeating: None of the three factors outlined by the plurality in *Bellotti*—children's vulnerability, children's immaturity, and the importance of parental control—is sufficient to curtail the fundamental right of children to self-identify at school. As far as the Constitution is concerned, the rights of children and adults to self-identify are "virtually coextensive."[195]

III. The Unconstitutionality of Identity-Denying Name/Pronoun Policies

This Part provides legal arguments for transgender students wishing to challenge their school district's identity-denying name/pronoun policy. It first outlines the different types of identity-denying policies that are being implemented by public schools. It then details how the state, in implementing these identity-denying name/pronoun policies, infringes transgender students' right to self-identify—and often causes them significant harm—without a sufficiently compelling interest in doing so. This Part thus concludes that all identity-denying name/pronoun policies are unconstitutional.

A. *The Nature of Identity-Denying Name/Pronoun Policies*

Identity-denying name/pronoun policies vary between school districts and across the states. However, as the name would suggest, these policies typically introduce at least one of three

191. *See* Prince v. Massachusetts, 321 U.S. 158, 168 (1944).
192. *See id.* at 170.
193. *See id.*
194. *See id.*; *supra* Part II.C.1.
195. *See* Bellotti v. Baird, 443 U.S. 622, 634 (1979).

identity-denying provisions. Each type of provision is discussed below along with illustrative examples.

First, some school districts require that minor students obtain parental consent to use either a name that is different from that listed in their official records or pronouns that do not match the biological sex listed in their official records. For example, in September 2022, the Arrowhead Union High School District in Wisconsin approved Policy 651, which stipulates that "[s]taff shall not refer to or address minor students by a different name(s) or pronoun(s) that differ from their biological sex during school hours, without written authorization from a parent."[196] Relatedly, some schools require parental notification (which is, in practical terms, a proxy for parental consent) when students ask to use names or pronouns that differ from their official records.[197] For instance, in July 2023, the Chino Valley Unified School District in California adopted a new policy requiring schools to inform parents if their child requests a name or pronoun change—even if the student does not grant the school permission to do so.[198]

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196. Arrowhead Union High School District, Series 600 – Students 16 (Sept. 14, 2022), https://www.arrowheadschools.org/cms_files/resources/Pol600.pdf; *see also* Alec Johnson, *Arrowhead Students Must Have Parental Permission to Use Different Names and Pronouns at School, New Policy Says*, Milwaukee J. Sentinel (Sept. 16, 2022), https://www.jsonline.com/story/communities/lake-country/news/hartland/2022/09/16/arrowhead-students-need-parental-permission-change-names-pronouns/10378343002 [https://perma.cc/JG5S-SM69] (explaining the origin of the Arrowhead district policy).

197. It is worth noting that, in *Bellotti v. Baird*, which provides the children's rights framework used in Part II.C., the Court found that it was constitutional for Massachusetts to require parental notification and/or consent for an unmarried minor to procure an abortion so long as a direct judicial bypass was also available. 443 U.S. at 650–51. This Article does not endorse a similar "notification/consent-plus-bypass" approach for identity-denying name/pronoun policies because, in practical terms, such an approach would infringe the liberty of at least some transgender students to change their name/pronouns at school. Further, this Article considers it appropriate to use *Bellotti*'s framework without being bound by its holding. The *Dobbs* Court was clear that it is "inapposite" to draw comparisons between the constitutional right (or lack thereof) to have an abortion and other fundamental rights. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 256 (2022). Thus, while the children's rights framework outlined in *Bellotti* remains useful, *Bellotti*'s abortion-specific holding and reasoning are not directly applicable to name/pronoun policies that concern the fundamental right to self-identity. *See id.* at 290 ("And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.").

198. *See, e.g.*, Shawn Hubler, *California Attorney General Seeks to Block Transgender Notification Policy*, N.Y. Times (Aug. 28, 2023), https://www.nytimes.

Second, some school districts allow teachers to exercise discretion in deciding whether to honor a student's request to use either a different name or pronouns. For example, in August 2022, the Grapevine-Colleyville Independent School District in Texas adopted a policy specifying that no student, teacher, or administrator would be required "to use a title or pronoun in reference to another person that is inconsistent with the biological sex of such person" as listed on their birth certificate or other government records.[199]

Third, certain school districts are at least considering policies that would place an outright ban on students using names or pronouns that differ from official records.[200] To cite one example, in September 2022, Gardner-Edgerton Unified School District 231 in Kansas debated introducing a new policy stating that all "[s]tudents and staff will be addressed and referenced according to official and legal documentation submitted during the time of employment or enrollment."[201]

Whenever a school district—that is, the state[202]—adopts a name/pronoun policy that incorporates one or more of these identity-denying provisions, it will likely limit the ability of at least some transgender students to self-select their name and pronouns (and to have that choice respected) at least some of the time.[203] The key question, then, is whether such a limitation is constitutionally permissible.

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com/2023/08/28/us/california-attorney-general-transgender-policy.html [https://perma.cc/9FW7-WMTM]; Nick Robertson, *New Jersey Sues School Districts Over Trans Notification Policy*, HILL (June 23, 2023), https://thehill.com/homenews/state-watch/4064289-new-jersey-sues-school-districts-over-trans-notification-policy [https://perma.cc/B9GG-GHAK].

199. Riess et al., *supra* note 8.

200. This Article acknowledges that name/pronoun policies could, of course, affect cisgender students. For example, if a cisgender male student, assigned the name "John" at birth, decided that he wanted to be called "Joseph" in class, his request might technically violate a school policy requiring students to use the name listed in their official records. *See, e.g.*, Zach Fisher, *Parents, Guardians React to Local School Districts' Name Policies*, WHO 13 NEWS (Aug. 30, 2023), https://who13.com/news/parents-guardians-react-to-local-school-districts-nickname-policies [https://perma.cc/C34J-HUCM]. Such a request may be of great importance to Joseph for any number of valid reasons. Nonetheless, this Article focuses on the experiences of transgender students who are, more often than not, the target of identity-denying name/pronoun policies in schools.

201. GARDNER-EDGERTON UNIFIED SCH. DIST. 231, *supra* note 9, at 1.

202. The Constitution applies to public schools because they are an apparatus of the state. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.").

203. *See supra* note 9.

B. *Infringement of Children's Right to Self-Identify*

All identity-denying name/pronoun policies infringe the right to self-identify to a greater or lesser extent.[204] As a result, all identity-denying name/pronoun policies are presumptively offensive to two different constitutional provisions: the First and Fourteenth Amendments.[205]

In the context of the First Amendment, identity-denying name/pronoun policies are presumptively unconstitutional because they are content-based regulations of protected speech.[206] Consider, for example, a school whose policy would permit a transgender student to use the name and pronouns that match their official records but would prohibit that same student from using a name or pronouns that differ from their official records.[207] Now imagine that a student's official records provide that their name is "Jessica" and that they are female. If the student says: "My name is Jessica and I use she/her pronouns," the school will permit the student's speech. But if the student says: "My name is Mark and I use he/him pronouns," the school will punish the student's speech (or at least ignore it). Because the school's policy regulates the student's speech based on its subject matter, the policy is content based. And, since the policy restricts speech that implicitly endorses a belief that transgender identities are valid, while permitting speech that rejects such a belief, the school's policy is likely a viewpoint-based restriction on speech, too. Under the First Amendment, subject-matter- and viewpoint-based restrictions on speech both trigger strict scrutiny.[208]

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204. For a description of different types of identity-denying name/pronoun policies, *see supra* Part III.A.

205. *See supra* Part II.

206. *See, e.g.*, Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 658 (1994) ("[S]peaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)."). It is true that, while content-based restrictions typically trigger strict scrutiny, such restrictions "have been repeatedly permitted in the public school setting as long as they are reasonable." Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., No. 2:23-CV-01595, 2023 WL 4848509, at *15 (S.D. Ohio July 28, 2023). However, for the reasons outlined in Part III.C., this Article contends that identity-denying name/pronoun policies would fail to pass muster even under a more lenient reasonableness standard.

207. *See, e.g.*, GARDNER-EDGERTON UNIFIED SCH. DIST. 231, *supra* note 9, at 1.

208. *Turner*, 512 U.S. at 642 ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. . . . Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny.").

In the context of the Fourteenth Amendment, identity-denying name/pronoun policies are presumptively unconstitutional because they curtail the due-process liberty of transgender students to self-identify.[209] Consider again the relatively extreme example of a school whose policy requires all students' names and pronouns to match their official records. If a transgender child does not (or cannot) update their official or legal records, they lose their due-process liberty to self-identify and must instead tolerate being misgendered at school on a daily basis.

But appreciating the relative severity of such a policy need not undermine the serious deprivation of transgender students' rights that also occurs in schools with more facially lenient name/pronoun policies. Some schools, for instance, will permit a transgender student to change their name or pronouns with parental consent.[210] However, that remedy provides little recourse to a child whose parents are complicit in the school's denial of their fundamental right to self-identify.[211] And, even if the child were able to secure parental consent, some schools would still permit staff to continue using the student's official name and pronouns as a matter of discretion.[212]

In reality, then, all identity-denying name/pronoun policies infringe students' fundamental right to self-identify. Or, more

209. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain fundamental rights are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.") (citations omitted).

210. *See, e.g.*, Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 822 (S.D. Ind. 2021) ("Transgender students could change their first names . . . if they presented a letter from a parent and a letter from a healthcare professional.").

211. In the past, the Court has held that the state's imposition of strict parental-consent requirements as a prerequisite for a minor exercising certain constitutional rights is sufficient to infringe that right. For example, before *Dobbs*, the Court repeatedly held that introducing absolute parental-consent requirements for a minor to terminate a pregnancy was an infringement of the minor's constitutional right to obtain an abortion. *See, e.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) ("We agree . . . that the State may not impose a blanket provision . . . requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy."); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 452 (1983) (holding that a state could only implement a one-parent notice system as a prerequisite for a minor to obtain an abortion if the system also had a direct judicial bypass); Hodgson v. Minnesota, 497 U.S. 417, 423 (1990) (holding that a state could only implement a two-parent notice system as a prerequisite for a minor to obtain an abortion if the system also had a direct judicial bypass).

212. *See, e.g.*, Riess et al., *supra* note 8.

precisely, all identity-denying policies infringe the expressive component of the right to self-identify. To be sure, school districts are not attempting to control how students define themselves privately.[213] But they are limiting students' ability to substantiate that self-definition through public expression.[214] As established in Part II, the right to self-identify requires that an individual be allowed both to define and to express their identity. Consequently, any name/pronoun policy that curtails the expressive component alone infringes the identity right as a whole and is presumptively unconstitutional. Determining whether this presumption of unconstitutionality holds true requires balancing children's right to self-identify against the state's interest in local control of schools.[215]

C. *Balancing the Interests of Children and the State*

The Court has repeatedly held that school districts have a valid interest in local control.[216] Indeed, in *Milliken v. Bradley*, the Court described local control as "essential both to the maintenance of community concern and support for public schools and to quality of the educational process."[217] Seemingly motivated by the latter of these two goals, the Gardner-Edgerton school district, when drafting its proposed name/pronoun policy in September 2022, specified

213. This would be somewhat analogous to the thought-crime doctrine in criminal law which, at its base, posits that people cannot be subject to criminal punishment for intention or belief alone. *See* Gabriel S. Mendlow, *Thoughts, Crimes, and Thought Crimes*, 118 Mich. L. Rev. 841, 847 (2020) (explaining that, per the thought-crime doctrine, "you may not be punished for a *mere* thought—a belief, desire, fantasy, or unexecuted intention") (emphasis in original); *see also* Reynolds v. United States, 98 U.S. 145, 164 (1878) ("Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.").

214. For examples of such policies, see *supra* Part III.A.

215. *See* Cruzan v. Dir., Mo. Dep't Health, 497 U.S. 261, 279 (1990) ("[D]etermining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.'") (citations omitted).

216. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("[Boards of Education] have, of course, important, delicate, and *highly discretionary* functions.") (emphasis added); Wright v. Council of City of Emporia, 407 U.S. 451, 469 (1972) ("Direct control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49 (1973) ("In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived.").

217. Milliken v. Bradley, 418 U.S. 717, 741–42 (1974).

that the purpose of the new measures was to "achieve an effective learning and working environment."[218] Likewise, the Virginia Department of Education, in describing its "2022 Model Policies," indicated that the needs of transgender students, while important, must be balanced against "the practical requirements of the teaching and learning environment."[219]

A school district may be motivated to adopt particular classroom policies that its leaders believe will improve pedagogical efficacy—even if a sister district's leaders consider a different set of policies to be better suited to achieving those same ends.[220] It is likewise reasonable to expect that all schools harbor an interest in reducing classroom disruption.[221] In the context of name/pronoun policies, then, a school may well believe that favoring congruence with official records will minimize classroom interruptions in two different ways. First, other students will be less likely to experience confusion (and, therefore, require clarification) over differences between official records and informal classroom name/pronoun usage.[222] Second, teachers will be able to avoid the discomfort and disruption that may arise from other students who, because of their personal beliefs about gender identity, refuse to adopt a transgender student's correct name and pronouns in class.[223]

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218. *See* Gardner-Edgerton Unified Sch. Dist. 231, *supra* note 9, at 1.

219. Va. Dep't Educ., 2022 Model Policies on the Privacy, Dignity, and Respect For All Students and Parents in Virginia's Public Schools 3 (2022), https://www.doe.virginia.gov/home/showpublisheddocument/36603/638059383089400000 [https://perma.cc/5MYT-WQL7].

220. *See* Gardner-Edgerton Unified Sch. Dist. 231, *supra* note 9, at 1 (explaining that the purpose of its identity-denying name/pronoun policy was to "achieve an effective learning and working environment").

221. *See* Va. Dep't Educ., *supra* note 219, at 3 (indicating that the needs of transgender students, while important, must be balanced against "the practical requirements of the teaching and learning environment.").

222. *But see* Ellen Friedrichs, *Using a Child's Identified Pronouns Might Feel Complicated, But It's Crucial. Here's Why.*, Wash. Post (Jan. 16, 2020), https://www.washingtonpost.com/lifestyle/2020/01/16/using-childs-identified-pronouns-might-feel-complicated-its-crucial-heres-why [https://perma.cc/RK8Z-WNU4] ("This issue is often raised by adults who are themselves uncomfortable or confused. Unlike many adults, a lot of today's young people are perfectly at ease with identities their parents don't understand.").

223. *See* R.C. Reis, *Exeter Student Sues School District Over One-Game Suspension, Arguing Gender Policy Infringes Speech and Religious Rights*, N.H. Union Leader (Nov. 17, 2021), https://www.unionleader.com/news/courts/exeter-student-sues-school-district-over-one-game-suspension-arguing-gender-policy-infringes-speech-and/article_75290592-aaa5-573b-b2f6-002179483147.html [https://perma.cc/6QWH-U9FS] (noting that a Catholic student's refusal to use a nonbinary student's chosen pronouns led to a dispute with his fellow

However, concern over the reactions of other pupils cannot justify the suppression of transgender students' right to self-identify. The *Tinker* Court held that, while public schools may validly regulate student speech that would "materially and substantially disrupt the work and discipline of the school," schools cannot preemptively curtail student speech—even speech that other students are very likely to find deeply objectionable—over fears of how listeners will respond.[224] Accordingly, a school cannot defend its implementation of an identity-denying name/pronoun policy by claiming that it minimizes the occurrence of disruptive reactions from other students.[225] That, in effect, "would be a heckler's veto, [and] no can do."[226]

To be clear, the fact that the heckler's veto doctrine precludes notions of disruptive reaction from bolstering local-control arguments says nothing about other interests. For instance, a school that chooses to implement an identity-denying policy may alternatively argue that deference to locally popular beliefs about gender identity is "essential . . . to the maintenance of community concern" for public schooling.[227] And it seems that at least some school districts do indeed consider locally popular viewpoints when designing and implementing identity-denying name/pronoun policies. For example, in 2022, the Virginia Department of Education modified its "Model Policies" to introduce identity-denying name/pronoun provisions in response to the more than 9,000 comments it received from the general public in response to its transgender-inclusive 2021 policies.[228]

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classmates).

224. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (holding that a school wishing to suppress student speech must provide "more than a mere desire to avoid . . . discomfort and unpleasantness"); *see also* Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180, 206 (2021) (Alito, J., concurring) ("[E]ven if . . . speech is deeply offensive to members of the school community and may cause a disruption, the school cannot punish the student who spoke out."); Street v. New York, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

225. *See* Weatherby, *supra* note 71, at 125–27 (arguing that the heckler's veto doctrine precludes schools from citing negative reactions from other students as a reason to prevent transgender students from using the bathroom corresponding to their gender identity); Dana E. Purvis, *Transgender Students and the First Amendment*, 104 B.U. L. Rev. (forthcoming 2024).

226. *See B.L.*, 594 U.S. at 206 n.17 (Alito, J., concurring).

227. *See* Milliken v. Bradley, 418 U.S. 717, 741 (1974).

228. VA. DEP'T EDUC., *supra* note 219, at 1 ("The 2022 Model Policies also consider over 9,000 comments submitted to the Department during the public comment period for the 2021 Model Policies."); *see* VA. DEP'T EDUC., MODEL POLICIES FOR THE TREATMENT OF TRANSGENDER STUDENTS IN

But the Court has been reluctant to defer to local control when the school board's action causes children harm. Perhaps most famously, in the landmark case of *Brown v. Board of Education*, the Court declared de jure racial segregation of American public schools to be plainly unconstitutional—despite its ongoing popularity in many parts of the country.[229] Chief Justice Warren, writing for a unanimous Court, explained that separating Black children from their white peers "generate[d] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[230] Indeed, Chief Justice Warren noted, the Court's concern over the ability of Black students to study and engage in discussions with other students applied "with added force to children in grade and high schools" as compared to adult law students.[231] Almost thirty years later, in *Plyer v. Doe*, the Court held unconstitutional a Texas policy that denied public education to the children of undocumented immigrants.[232] Because depriving these children of an education had an "inestimable toll" on their "social, economic, intellectual, and psychological well-being," the Texas policy violated the Equal Protection Clause.[233]

Again, a common theme emerges. The state, like parents, certainly has varied and valid interests—but the strength of those interests is undermined when the state, acting to further its own

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VIRGINIA'S PUBLIC SCHOOLS 13–15 (2021), https://ewscripps.brightspotcdn.com/a2/d6/6e5a524742bf94beea571d5b6d5b/model-policies-for-the-treatment-of-transgender-students-in-public-elementary-and-secondary-schools.pdf [https://perma.cc/SR2Q-BTFG]. *But see* CAL. DEP'T EDUC., *supra* note 150 (explaining that the California Department of Education bases its support of identity-affirming name/pronoun policies on Assembly Bill 1266 (AB1266), also known as the "School Success and Opportunity Act," which protects transgender and gender-nonconforming K-12 students in public schools against gender identity- and gender expression-based discrimination). AB1266 was passed by the California State Legislature and signed into law by Governor Brown in August 2013. Attempts to overturn AB1266 by popular referendum were ultimately unsuccessful. GLSEN, *What You Need to Know About AB1266* (2014), https://www.glsen.org/blog/ab1266-californias-trans-student-equality-law [https://perma.cc/LM3Q-88NR].

229. *See Brown I*, 347 U.S. 483, 495 (1954); Cooper v. Aaron, 358 U.S. 1, 8 (1958) ("While the School Board was thus going forward with its preparation for desegregating the Little Rock school system, other state authorities, in contrast, were actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation which this Court had held violated the Fourteenth Amendment.").

230. *Brown I*, 347 U.S. at 494.

231. *Id.*

232. *See* 457 U.S. 202, 230 (1982).

233. *Id.* at 222.

ends, causes harm to children.[234] Curtailing the rights of transgender young people may be popular with the local community, but the rights of transgender young people are not bargaining chips that can be traded for local support. In the end, the state's interest in adopting identity-denying name/pronoun policies to minimize classroom disruption and amass local support is insufficiently compelling to overcome transgender students' right to self-identify because the state, in enacting such policies, causes harm to transgender children and undermines their autonomy.[235] In that way, all identity-denying name/pronoun policies impermissibly infringe the fundamental right to self-identify—and all are unconstitutional.[236]

IV. The Constitutionality of Identity-Affirming Name/Pronoun Policies

This Part provides legal arguments for school districts wishing to defend their implementation of identity-affirming name/pronoun policies. It first describes the nature of such policies. It then explains how the arguments advanced by parents, teachers, and other students in opposition to identity-affirming policies are inadequate, under longstanding Supreme Court precedent, to overcome transgender students' fundamental right to self-identify at school. Thus, this Part argues, identity-affirming name/pronoun policies are constitutionally sound. In fact, this Part concludes, the First and Fourteenth Amendments *require* public schools to implement identity-affirming policies as a matter of urgency.[237]

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234. Note that a student whose parents are complicit in the state's infringement of their fundamental right to self-identify may benefit from representation by a court-appointed guardian ad litem.

235. *See* Troxel v. Granville, 530 U.S. 57, 86 (2000) (Stevens, J., dissenting) ("While, as the Court recognizes, the Federal Constitution certainly protects the parent-child relationship from arbitrary impairment by the State . . . we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm.").

236. Note that, because the state's interests are not sufficiently compelling to overcome transgender students' right to self-identify, there is no need to reach the question of tailoring. *See, e.g.*, Richmond v. J.A. Croson Co., 488 U.S. 469, 504–05 (1989).

237. *See supra* Part III; Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300 (1955) ("The burden rests upon the defendants to establish that [any delay in desegregating public schools] is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.").

A. *The Nature of Identity-Affirming Name/Pronoun Policies*

A number of educational authorities across the United States are already embracing identity-affirming name/pronoun policies. For example, in October 2021, the Massachusetts Department of Elementary and Secondary Education renewed its guidance on tackling gender-based discrimination, noting that school personnel should always refer to students using their chosen name and gender-appropriate pronouns.[238] Likewise, in April 2022, the Linn-Mar Community School District in Iowa adopted Policy 504.13-R, specifying that "[e]very student has the right to be addressed by a name and pronoun that corresponds to their gender identity," without the need for court orders, changes to official records, or parental consent.[239]

These efforts are commendable. As explained by the Massachusetts Department of Elementary and Secondary Education, school districts implement identity-affirming name/pronoun policies to "create a culture in which transgender and gender nonconforming students feel safe, supported, and fully included."[240] But identity-affirming policies seem to be the exception, not the rule. In fact, only 7.5 percent of transgender and nonbinary respondents to GLSEN's 2021 national survey reported that they attend a school with a "supportive" name/pronoun policy.[241]

In essence, identity-affirming policies robustly protect the freedom of all students—including transgender students—to choose the name and pronouns they use at school.[242] Importantly, identity-affirming policies permit students to make choices about their names and pronouns that do not require parental consent. Likewise, identity-affirming policies mandate that the entire school community respect each student's choice of name and pronouns—whether that choice is to keep the name and pronouns that they were assigned at birth or to change them.[243]

B. *Constitutional Analysis*

Determining the constitutionality of identity-affirming name/pronoun policies requires an assessment of the rights of teachers, parents, and other students in opposition to such policies. This

238. Mass. Dep't Elementary & Secondary Educ., *supra* note 19.

239. Linn-Mar Cmty. Sch. Dist., *supra* note 20.

240. *See* Mass. Dep't Elementary & Secondary Educ., *supra* note 19.

241. Kosciw et al., *supra* note 2, at 57.

242. *Id.* at 74 ("Transgender and nonbinary students had a 70.5% lower likelihood of experiencing discrimination regarding name or pronoun at school if they had a school policy or guideline that covered name or pronoun use.").

243. *See supra* Part II.A.

Subpart considers the interests of the various parties in turn, ultimately finding each plaintiff's arguments to be fatally inadequate under longstanding Supreme Court precedent.

1. Parents' Rights

As outlined in Part III, parents have a valid and important interest in controlling the upbringing of their children.[244] However, when it comes to public-school students' names and pronouns, the Constitution does not require the state to defer to parental decision-making that, in many instances, would cause harm to transgender children and, in all instances, would undermine their autonomy.[245] In fact, the state's power reaches further still.[246] According to the Court in *Prince*, the Constitution permits the state, in certain circumstances, to use its power as *parens patriae* to affirmatively limit parents' ability to make decisions that would jeopardize their children's welfare.[247] Likewise, in *Bethel School District No.*

244. Note that the legal arguments outlined in Part III with respect to parents' rights are equally available to school districts wishing to defend their implementation of *identity-affirming* name/pronoun policies.

245. *See supra* Part II.B.3.; Troxel v. Granville, 530 U.S. 57, 86 (2000) (Stevens, J., dissenting), ("While, as the Court recognizes, the Federal Constitution certainly protects the parent-child relationship from arbitrary impairment by the State . . . we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm.").

246. *See* New York v. Ferber, 458 U.S. 747, 757 (1982) ("It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling. . . . Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.") (citation omitted).

247. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's well-being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways."). Note, as a helpful comparison, that states such as California have successfully introduced compulsory vaccination requirements for children that do not provide exemptions based on the parents' religious or personal beliefs. *See* Dorit Reiss, *California Court of Appeal Rejects Challenge to Vaccine Law*, Bill of Health (July 30, 2018), https://blog.petrieflom.law.harvard.edu/2018/07/30/california-court-of-appeal-rejects-challenge-to-vaccine-law [https://perma.cc/FS3Q-MGW9]; Erwin Chemerinsky & Michele Bratcher Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 Nw. U. L. Rev. 589, 609 (2016) ("Parents who oppose medical care on religious grounds contend that their beliefs require a constitutional exemption from mandatory inoculation requirements. Under current First Amendment law this claim is groundless, without even needing to consider whether the state has a sufficient interest in requiring vaccinations.").

403 v. Fraser, the Court "recognize[d] the obvious concern on the part of . . . school authorities acting *in loco parentis*[] to protect children."[248] In the context of name/pronoun policies, then, the state, "[a]cting to guard the general interest in youth's well-being," is constitutionally permitted to adopt an identity-affirming name/pronoun policy.[249] Because such policies uniquely protect both the welfare of transgender students and their constitutional freedom to self-identify, the state may implement identity-affirming policies as *parens patriae*—without the need for parental involvement.[250]

2. Teachers' Rights

Teachers, like their students, do not "shed their constitutional rights . . . at the schoolhouse gate."[251] On that basis, a teacher who disagrees with their school's implementation of an identity-affirming name/pronoun policy may well contend that such a policy infringes their free-expression rights or free-exercise rights—or both.[252] For any combination of claims, the teacher's argument is relatively straightforward: Identity-affirming policies violate the Free Expression Clause because they simultaneously restrict the teacher's speech (in prohibiting them from using a student's official—though incorrect—name and pronouns) and compel the teacher's speech (in requiring them to then adopt that same student's chosen name and pronouns). And, when that speech involves matters of religious conscience, which is quite often the case for beliefs about gender identity, the school's policy is additionally offensive to the Free Exercise Clause.[253] Indeed, as Justice

248. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986). Under the doctrine of *in loco parentis*, school administrators "stand[] in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them." Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180, 189 (2021). *See also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654–55 (1995) ("When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that status.").

249. *See Prince*, 321 U.S. at 166.

250. *See supra* Part II.C.3.

251. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

252. *See* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

253. *See* Lipka & Tevington, *supra* note 115; Kennedy v. Bremerton Sch.

Gorsuch, writing for the Court in *Kennedy v. Bremerton School District*, explained: The Free Exercise Clause "does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts."[254]

In the free-expression context, some teachers argue that forcing them to use a transgender student's chosen name and pronouns in the classroom could lead others to conclude that the teacher is endorsing the student's gender expression. The Sixth Circuit considered such a claim in March 2021 in *Meriwether v. Hartop*.[255] In that case, Nicholas Meriwether, a college professor, objected so strongly to his university's identity-affirming name/pronoun policy that he asked whether he could add a disclaimer to his syllabus explaining that he was using students' chosen pronouns "under compulsion and setting forth his personal and religious beliefs about gender identity."[256]

In the public-school context, Elizabeth Mirabelli and Lori West, two teachers at Rincon Middle School in California, filed a similar free-speech claim against the Escondido Union School District in April 2023.[257] The district's name/pronoun policy stated that "a teacher ordinarily may not disclose to a parent the fact that a student identifies as a new gender, or wants to be addressed by

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Dist., 597 U.S. 507, 523 (2022) ("These Clauses work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities.").

254. *Kennedy*, 597 U.S. at 524 (citation omitted).

255. Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021); *see also* Gabrielle Dohmen, *Academic Freedom and Misgendered Honorifics in the Classroom*, 89 U. Chi. L. Rev. 1557, 1565 (2022) (arguing that "courts should consider the student's interest in gaining access to the marketplace of ideas when determining whether the professor or the university is able to claim protection under the First Amendment using academic freedom").

256. *Meriwether*, 992 F.3d at 500. The Court of Appeals for the Sixth Circuit found that the university's name/pronoun policy violated Professor Meriwether's free-expression and free-exercise rights under the First Amendment. *Id.* at 511–12. Note, however, that the facts of *Meriwether* render it inapplicable in the context of name/pronoun policies in public schools. *See* Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., No. 2:23-CV-01595, 2023 WL 4848509, at *15 (S.D. Ohio July 28, 2023) ("*Meriwether* involved a university professor who taught a political philosophy course . . . . [W]hile the use of pronouns . . . implicated [Meriwether's] personal beliefs on gender identity . . . the use of pronouns when talking to others in everyday situations is not so inherently fraught.") (citations omitted).

257. Mirabelli v. Olson, No. 323-CV-00768-BENWVG, 2023 WL 5976992, at *11 (S.D. Cal. Sept. 14, 2023).

a new name or new pronouns during the school day."[258] Mirabelli and West claimed that such a policy violated the Free Expression Clause because it "force[d] them to adhere to an ideological orthodoxy (with which they directly disagree[d]), as a condition of their employment."[259]

In *Pickering v. Board of Education*, the Court explained that, when a public employee speaks on a matter of public concern, the Court must balance the employee's free-expression right against the employer's interest in a workplace free from disruption.[260] And later, in *Garcetti v. Ceballos*, the Court held that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[261]

In the context of identity-affirming name/pronoun policies, a teacher's free-expression arguments fall at the first hurdle. Under the *Pickering-Garcetti* framework, as applied by the *Kennedy* Court to public schoolteachers, the threshold inquiry is whether a public employee is speaking "pursuant to [their] official duties."[262] Thus, in the case of name/pronoun policies, the relevant question is whether referring to students by their chosen name and pronouns is "ordinarily within the scope" of an educator's job description.[263] The *Kluge I* court put it best:

> While addressing students by name may not be part of the . . . curriculum, it is difficult to imagine how a teacher could perform his teaching duties on any subject without a method by which to address individual students. Indeed, addressing students is necessary to communicate with them and teach them the material.[264]

Since referring to students by their name and pronouns is undeniably part of a teacher's official duties, the Free Expression

258. *Id*. at *2.

259. *Id.* at *11.

260. Pickering v. Bd. of Ed. of Tp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968).

261. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

262. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 527 (2022).

263. *See* Lane v. Franks, 573 U.S. 228, 240 (2014).

264. *See Kluge I*, 432 F. Supp. 3d 823, 839 (S.D. Ind. 2020); Mirabelli v. Olson, No. 323-CV-00768-BENWVG, 2023 WL 5976992, at *12 (S.D. Cal. Sept. 14, 2023) ("[T]he plaintiffs are public school government teachers. . . . Included among their duties as teachers is the duty to communicate with a student's parents from time to time . . . . It is difficult to say that their speech during the school day as teachers is their own and not the school district's during the regular course of their employment duties.").

Clause offers that teacher no refuge from complying with their employer's identity-affirming name/pronoun policy.[265] At bottom, "that kind of speech is—for constitutional purposes at least—the government's own speech."[266]

Affirming a transgender student's identity might be deeply offensive to a teacher's sincere religious beliefs, too. In the *Mirabelli* case, discussed above, Elizabeth Mirabelli and Lori West claimed that the Escondido Union School District's identity-affirming name/pronoun policy burdened their free-exercise rights in two ways. First, the policy required teachers to withhold information from a transgender student's parents, which conflicted with the plaintiffs' belief that "the relationship between parents and children is an inherently sacred and life-long bond, ordained by God, in which the parents have the ultimate right and responsibility to care for and guide their children."[267] Second, the policy, by prohibiting teachers from disclosing a transgender student's true identity to the student's parents, compelled Mirabelli and West to engage in "lying and deceit," which, according to the plaintiffs' religious beliefs, "God forbids."[268]

Similarly, in March 2022, Pamela Ricard, a math teacher at Fort Riley Middle School in Kansas, brought a free-exercise claim against the USD 475 Geary County School Board's identity-affirming name/pronoun policy.[269] The policy stated that students were to be "called by their preferred name and pronouns" and that teachers were prohibited from "revealing to parents that a student ha[d] requested use of a preferred name or different set of pronouns at school," unless the student had given the teacher permission to do so.[270] Ricard claimed that the school board's policy was incompatible with her Christian belief that "God immutably creates each person as male or female."[271] Because sex and gender were, in Ricard's view, inextricably linked, using pronouns that were inconsistent with a student's biological sex would be equivalent to lying, which was also prohibited by Ricard's religious beliefs.[272]

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265. *See* Caroline Mala Corbin, *When Teachers Misgender: The Free Speech Claims of Public School Teachers*, 1 J. Free Speech 615, 630–41 (2022) (arguing that public schoolteachers' misgendering speech is "pursuant to their official duties" under *Garcetti*).

266. *Kennedy*, 597 U.S. at 527.

267. 2023 WL 5976992, at *12.

268. *Id.*

269. Ricard v. USD 475 Geary Cnty., KS Sch. Bd., No. 522-CV-04015-HLTGEB, 2022 WL 1471372 (D. Kan. May 9, 2022).

270. *Id.* at *3–4.

271. *Id.* at *1.

272. *Id.*

With respect to free exercise, the constitutional analysis turns on whether an identity-affirming name/pronoun policy is one of both neutrality and general applicability.[273] As explained by the Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, a "neutral" state policy is one that does not "discriminate on its face" on the basis of religion or otherwise target religious exercise as its "object."[274] And, as noted by the Court in *Fulton v. City of Philadelphia*, a "generally applicable" state policy is one that does not "prohibit religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[275]

Identity-affirming name/pronoun policies are both neutral and generally applicable. Identity-affirming policies are neutral because they do not facially discriminate with respect to religion: All staff members—religious or otherwise—are asked to comply with a purely secular practice. Likewise, the "object" of such policies is to safeguard student welfare, not to derogate religious exercise.[276] Identity-affirming policies are also generally applicable because they require every staff member—religious or otherwise—to address students using their chosen name and pronouns, "nothing more, nothing less, and without room for individualized judgments."[277] In

273. *See* Emp. Div. v. Smith, 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).") (citation omitted).

274. Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993).

275. 593 U.S. 522, 534 (2021).

276. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 533.

277. *See Kluge I*, 432 F. Supp. 3d 823, 841 (S.D. Ind. 2020); *see also Fulton*, 593 U.S. at 544 (Barrett, J., concurring) ("A longstanding tenet of our free exercise jurisprudence . . . is that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions."). Note that, in both *Ricard* and *Mirabelli*, discussed above, the district courts granted the plaintiffs' requests for preliminary injunctions against the schools' policies to the extent that they prohibited teachers from disclosing to parents a transgender student's request to use a new name and pronouns at school. In both cases, the courts found that the plaintiffs were likely to succeed on at least one of their free-exercise claims—in part because the schools' policies were not generally applicable. Ricard v. USD 475 Geary Cnty., KS Sch. Bd, No. 522-CV-04015-HLTGEB, 2022 WL 1471372, at *5 (D. Kan. May 9, 2022) ("The Court concludes the policy is not generally applicable because the District has created multiple exceptions that either necessitate consideration of the putative violator's intent or the District has exempted conduct for secular reasons but is unwilling to exempt Plaintiff for religious reasons."); Mirabelli v. Olson, No. 323-CV-00768-BENWVG, 2023 WL 5976992, at *13 (S.D. Cal. Sept. 14, 2023) ("EUSD argues the policy is generally applicable because it provided

these ways, identity-affirming name/pronoun policies exhibit both neutrality and general applicability, and they do not burden a teacher's free-exercise rights.[278]

3. Other Students' Rights

Under *Tinker*, children maintain their constitutional rights to free expression while at school.[279] Much like their teachers, then, students who disagree with their school's identity-affirming name/pronoun policy might assert (perhaps through their parent or guardian) that such a policy infringes their First Amendment rights.[280]

In August 2022, Parents Defending Education (PDE), a national organization working to prevent the "politicization of K-12 education," filed suit against the Linn-Mar Community School District in the Northern District of Iowa.[281] PDE argued, among other claims, that the school district's name/pronoun policy, which required all staff and pupils to address transgender children using their chosen name and pronouns, violated the First Amendment rights of other students.[282] In fact, PDE alleged the violation of

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training on the policy to all staff—not just to teachers. However, this does not appear to be wholly accurate. . . . Evidence is lacking showing the policy is being applied to instructional aides, substitute teachers, office staff, or non-teaching administrators."). In that sense, schools implementing identity-affirming name/pronoun policies should be mindful that such policies must apply to all staff members—not just teachers—without room for individualized exceptions.

278. Of course, this Article further posits that, even if identity-affirming name/pronoun policies were found to lack neutrality or general applicability (or both), they would still be able to pass strict scrutiny. *See Smith*, 494 U.S. at 878–82 (explaining that laws burdening religious exercise are ordinarily not subject to strict scrutiny when they are *both* neutral *and* generally applicable). Public schools have a compelling interest in protecting transgender students' welfare. *See supra* Part II.C.3. And, in the context of name/pronouns, the *only* way to achieve that compelling goal is to consistently use the name and pronouns a student chooses for themselves.

279. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (holding that children do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

280. As detailed below, most plaintiffs challenge the constitutionality of identity-affirming policies on free-expression grounds. But if such conduct were viewed as a matter of free association, the constitutional analysis would likely turn on whether the Court finds the interaction of schoolchildren to be an intimate association. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984) ("Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.").

281. *Linn-Mar I*, No. 22-CV-78 CJW-MAR, 2022 WL 4356109 (N.D. Iowa Sept. 20, 2022).

282. Complaint at 2, Parents Defending Educ. v. Linn-Mar Cmty.

overlapping First Amendment protections.[283] In their view, Linn-Mar's policy "punishe[d] students for expressing their sincerely held beliefs[,] compel[led] them to affirm the beliefs of administrators and their fellow students," and "prohibit[ed] speech that doesn't respect a student's gender identity."[284]

In May 2023, PDE brought a second suit in federal court—this time, in the Southern District of Ohio.[285] PDE sought a preliminary injunction of the Olentangy Local School District's newly adopted Code of Conduct, which "prohibit[ed] speech that involves discriminatory language, including the intentional misgendering of transgender students."[286] In PDE's view, the district's policies were unconstitutional because they both restricted students' speech (by preventing them from using a classmate's official—though incorrect—name and pronouns) and compelled students' speech (by requiring them to adopt the classmate's chosen name and pronouns) in violation of the First Amendment.[287]

The problem for plaintiffs such as PDE is that schools have the ability under *Tinker* to prohibit all intentionally misgendering speech.[288] According to the *Tinker* framework, public schools may

Sch. Dist. (N.D. Iowa 2022) (No. 1:22-CV-00078), https://defendinged.org/wp-content/uploads/2022/08/Parents-Defending-Education-V-Linn-Mar-Community-School-District.pdf. [https://perma.cc/3VFF-7FKQ].

283. *Id.*

284. *Id.* (emphasis added). On September 20, 2022, the District Court for the Northern District of Iowa denied PDE's request for a preliminary injunction of Linn-Mar's identity-affirming name/pronoun policy, finding that the "alleged harms to protected speech and child-rearing here are not imminent harms and cannot be said to tip the scales in favor of an injunction." *Linn Mar I*, 2022 WL 4356109, at *13. On September 29, 2023, the Court of Appeals for the Eighth Circuit vacated the district court's ruling in part. Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist., 83 F.4th 658, 668 (8th Cir. 2023) ("Parents Defending argues that the policy's requirement that a child 'respect a student's gender identity' violates the First Amendment on several grounds. We conclude that Parents Defending is likely to succeed on its claim that this portion of the policy is void for vagueness.").

285. Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., No. 2:23-CV-01595, 2023 WL 4848509, at *10 (S.D. Ohio July 28, 2023). The district court denied PDE's Motion for a Preliminary Injunction, finding that it had "failed to establish a strong likelihood of success on the merits of its constitutional claims." *Id.* at *23.

286. *Id.* at *7.

287. *Id.* at *19.

288. *See* Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 774 (9th Cir. 2014) (applying *Tinker* to find that a school could permissibly require students to *remove* clothing bearing the American flag during Cinco de Mayo celebrations because the school's policy was "tailored to the circumstances," including concerns over race-related violence); West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1366 (10th Cir. 2000) (upholding a school

limit the speech of schoolchildren that "colli[des] with the rights of other students to be secure and to be let alone."[289] The Ninth Circuit expounded the notion that schoolchildren have a right to be secure in *Harper v. Poway Unified School District*.[290] There, the court explained that "[b]eing secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society."[291]

Intentionally misgendering speech[292] is incompatible with the right to be secure because it "reinforc[es] feelings of isolation and inferiority [and] impos[es] substantial psychological injuries."[293] To be sure, banning intentionally misgendering speech is likely a content-based restriction of speech that, in most instances, would prove presumptively unconstitutional. Imagine, for example, a school whose policy requires all students to refer to each other using their chosen name and pronouns.[294] Now imagine a transgender student who wishes to use the name "Mark" and the pronouns "he/him," despite the fact that Mark's official records say his name is "Jessica" and that he is female. If another student, as part of a classroom discussion, says: "I agree with Mark: He makes a good point," the teacher will permit the student's speech. But if the student says: "I agree with Jessica: She makes a good point,"

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district's policy of *prohibiting* the display of the Confederate flag because the school "had reason to believe that a student's display of the Confederate flag might . . . interfere with the rights of other students to be secure and let alone").

289. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) *supra* note 104.

290. *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006), *cert. granted, judgment vacated sub nom.* Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 549 U.S. 1262 (2007); *see also* David L. Hudson Jr., *Harper v. Poway Unified School District (9th Cir.) (2006)*, Free Speech Ctr. (Jan. 1, 2009), https://firstamendment.mtsu.edu/article/harper-v-poway-unified-school-district-9th-cir/ ("In March 2007, the Supreme Court . . . vacated the judgment 'with instructions to dismiss the case as moot.' The mootness question arose because Harper since had graduated from high school. . . . Although [the] opinion was vacated, numerous lower courts have cited the opinion, which continues to engender substantial academic debate.").

291. *Id.* at 1178.

292. *See* Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., No. 2:23-CV-01595, 2023 WL 4848509, at *18 (S.D. Ohio July 28, 2023) ("[S]incere questions about an individual's preferred pronouns, civil discussions about transgender issues, and accidental misgendering are considered neither harassment nor derogatory. But using pronouns contrary to an individual's preferences intentionally (or repeatedly) poses a different issue. It evinces disrespect for the individual. . . . And it is deeply harmful.").

293. *See id.* at *8.

294. *See, e.g.*, Linn-Mar Cmty. Sch. Dist., *supra* note 20.

the school will punish the student's speech. Because the school's policy regulates the student's speech based on its subject matter, the policy is content based. And, since the policy restricts speech that implicitly rejects a belief that transgender identities are valid while permitting speech that endorses such a belief, the school's policy is likely a viewpoint-based restriction on student speech, too. Both subject-matter- and viewpoint-based restrictions of speech are, for the most part, presumptively unconstitutional.[295]

Yet, in the public-school context, "traditional First Amendment prohibitions against content- and viewpoint-based speech regulation must also be viewed against the backdrop of *Tinker*."[296] Thus, while content-based restrictions on speech typically trigger strict scrutiny, "such restrictions have been repeatedly permitted in the public school setting as long as they are reasonable."[297] In that sense, the fact that identity-affirming name/pronoun policies are content based is of little import. The Court has recognized time and again that the government has a compelling interest in eliminating discrimination.[298] And, as explained by the district court in *Olentangy*, schools that introduce identity-affirming name/pronoun policies "reasonably believe that [they will] reduce discrimination against transgender students."[299] As a result, the First Amendment presents no barrier to public schools implementing identity-affirming name/pronoun policies.

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295. Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. . . . Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny.").

296. *See Olentangy*, 2023 WL 4848509, at *15.

297. *Id.*; *see also* Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180, 196 (2021) (Alito, J., concurring) ("[I]t is impossible to see how a school could function if administrators and teachers could not regulate on-premises student speech, including by imposing content-based restrictions in the classroom."); Morse v. Frederick, 551 U.S. 393, 403 (2007) ("The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is *reasonably* viewed as promoting illegal drug use. We hold that she may.") (emphasis added).

298. *See, e.g.*, 303 Creative LLC v. Elenis, 600 U.S. 570, 590 (2023) ("This Court has recognized that governments in this country have a 'compelling interest' in eliminating discrimination in places of public accommodation.") (citation omitted); Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984) ("[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent.").

299. *Olentangy*, 2023 WL 4848509, at *16.

Further, schools that prohibit intentionally misgendering speech may likewise require that their students instead use a transgender classmate's chosen name and pronouns. As Justice Alito, writing in concurrence in *B.L.*, explained: Schools certainly may compel at least some speech—especially, it seems, when that speech furthers academic goals.[300] And, as noted by the court in *Olentangy*, schools in general aim to "maintain a safe and civil learning environment, which has long been considered a legitimate pedagogical concern."[301] To that end, learning to adopt identity-affirming speech is an important lesson that schools can—and should—impart on their students.[302] After all, requiring students to use their classmates' chosen name and pronouns invokes "nothing more than respect for others' right to choose a path for themselves—not agreement with the choices."[303] It is "part of learning how to live in a pluralistic society, a trait of character essential to a tolerant citizenry."[304] In that sense, identify-affirming name/pronoun policies "promote[] 'legitimate pedagogical concerns,' without 'compel[ling] the speaker's affirmative belief.'"[305] And, in so doing, they pose no threat to other students' First Amendment rights.[306]

In summary, it is certainly true that parents, teachers, and other students who object to identity-affirming name/pronoun policies have important interests. But those interests are insufficient to overcome transgender students' fundamental right to self-identify at school. As a result, identity-affirming name/pronoun policies, which

300. *See B.L.*, 594 U.S. at 196–97 (Alito, J., concurring) ("In a math class, for example, the teacher can insist that students talk about math, not some other subject."); Wood v. Arnold, 915 F.3d 308, 319 (4th Cir. 2019) ("Although a student's right against compelled speech in a public school may be asserted under various circumstances, that right has limited application in a classroom setting in which a student is asked to study and discuss materials with which she disagrees."); Brinsdon v. McAllen Indep. Sch. Dist., 863 F.3d 338, 350 (5th Cir. 2017) ("[I]t is clearly established that a school may compel some speech.").

301. *Olentangy*, 2023 WL 4848509, at *20.

302. *See B.L.*, 594 U.S., *supra* note 224, at 191 (noting that schools have an "interest in teaching good manners").

303. *Olentangy*, 2023 WL 4848509, *supra* note 67, at *20.

304. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 538 (2022) (citations omitted) (describing the importance of "learning how to tolerate . . . speech of all kinds").

305. *Olentangy*, 2023 WL 4848509, at *20 (quoting *Brindson*, 863 F.3d at 350).

306. *See, e.g.*, Parents Defending Educ. v. Linn-Mar Cmty. Sch. Dist. (*Linn-Mar I*), No. 22-CV-78 CJW-MAR, 2022 WL 4356109, at *13 (N.D. Iowa Sept. 20, 2022) (denying the plaintiff's Motion for Preliminary Injunction of a school's identity-affirming name/pronoun policy); *Olentangy*, 2023 WL 4848509, *id.,* at *23 (same); Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees, No. 23-CV-069-SWS, 2023 WL 4297186, at *26 (D. Wyo. June 30, 2023) (same).

protect transgender children's fundamental rights, are constitutionally sound. In fact, as this Article concludes, the constitutionality of identity-affirming policies, when coupled with the unconstitutionality of identity-denying policies, gives rise to a constitutional mandate for all public schools to introduce identity-affirming policies as a matter of urgency.[307]

V. Conclusion

Transgender children—like all children—have a fundamental right to self-identify, which includes the freedom to choose the name and pronouns they use at school. When, on the one hand, public schools implement identity-denying name/pronoun policies, they infringe transgender students' constitutional rights—without a compelling reason for doing so. When, on the other hand, public schools adopt identity-affirming name/pronoun policies, they protect transgender students' fundamental freedom to self-identify. And, because such policies are entirely compatible with the rights of parents, teachers, and other students, they are constitutionally sound.

Fortunately, some public schools have already begun implementing identity-affirming name/pronoun policies. But they seem to be the exception, not the rule.[308] The time has come for school districts across the country to fulfill their constitutional duty and adopt identity-affirming name/pronoun policies that protect the wellbeing and autonomy of America's transgender schoolchildren. Change can come from school districts, or the courts, or both. But it must indeed come—and soon.

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307. *See Brown II*, 349 U.S. 294, 300 (1955) ("The burden rests upon the defendants to establish that [any delay in desegregating public schools] is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.").

308. *See* Kosciw et al., *supra* note 2, at 57 (noting that only 7.5 percent of transgender and nonbinary respondents to GLSEN's 2021 national survey reported that they attended a school with a "supportive" name/pronoun policy).