DOING THINGS WITH THE LANGUAGE OF LAW AND GENDER: USING SPEECH ACT THEORY TO UNDERSTAND THE MEANING AND EFFECT OF THE GENDER IDENTITY BACKLASH

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TABLE OF CONTENTS

INTRODUCTION ........................................................................................................ 414
I. THE VALUE OF SPEECH ACT THEORY FOR UNDERSTANDING LAW AND GENDER .......................................................... 416
   A. Speech Acts and the Law ................................................................. 418
   B. Speech Acts and Gender Identity ................................................ 420
II. THE 2020–2023 BACKLASH ........................................................................... 421
III. BOSTOCK AS A CATALYST FOR THE BACKLASH ................................. 427
IV. THE PERFORMATIVE EFFECTS OF THE BACKLASH LEGISLATION AND REGULATION ......................................................... 432
   A. Sports .............................................................................................. 433
   B. Gender-Affirming Care ................................................................. 439
   C. Bathroom Bills .................................................................................. 448
   D. Responses in the Courts ................................................................. 452
V. PRONOUNS ........................................................................................................ 458
CONCLUSION .......................................................................................................... 471

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INTRODUCTION

In both legislation and judicial decisions, law creates change in the world through the vehicle of language. Language that makes change, that alters human relations, can properly be understood as a speech act.¹ Some of the effects of these speech acts can be direct: the serious consequences of a conviction, a prohibition, or an overruling. Other effects are more subtle: descriptions of precedent that prepare the ground for new approaches, or assertions of fact that change the way people regard phenomena in the world. The language people use to talk about gender also operates as a series of speech acts to affect how people view their own identity and the identity of others. These two powerful systems of speech acts have combined in recent years to fuel and reinforce a substantial backlash movement against the interests and progress of transgender individuals.²

Prior to 2021, the vindication of rights for transgender individuals seemed to be ascendant.³ Department of Education guidance under the Obama administration had supported the rights of transgender students to access bathrooms aligned with their gender identity,⁴ while federal courts had endorsed those same rights even after the Trump administration had withdrawn that guidance.⁵ Then, the United States Supreme Court’s 2020 decision in Bostock v. Clayton County held that Title VII’s prohibition of discrimination based on sex included discrimination on the basis of transgender status.⁶ These gains, however, have been followed by a significant backlash.⁷ The current movement against transgender rights, which comes mostly in the form of state legislation, but also includes state executive action and federal cases, seeks to limit access and participation by transgender individuals in several areas of everyday life. These areas of limitation include sports participation,

² See infra Part II.
⁴ COLLEAGUE LETTER, supra note 3, at 3.
⁵ Keller, supra note 3, at 30.
⁷ See infra Part II.
use of bathrooms, access to appropriate care, and even the right to be addressed appropriately in the classroom. This legal movement can best be understood as a political backlash—or a targeted action against a feared minority—that responds to those previous gains. Understanding the ways that the language of law and the language of gender operate to promote and normalize the gender identity backlash is a key first step to undermining the deleterious effects of these speech acts.

Language, including legal language, both describes circumstances and creates meaning. In his series of lectures entitled, How to Do Things With Words (1955), moral philosopher J.L. Austin developed and expanded upon this important distinction in the way we use language: the difference between what he called performative and constative utterances. In Austin’s lexicon, performative utterances are those that accomplish something in the world or alter human relations, that is they “do things.” By contrast, constative utterances are those that are descriptive, that can, if evidence were available, be proven true or false. An example of constative language is, “It’s a cloudy day,” which makes a claim about reality but has no effect on the weather. Postmodern literary critics such as J. Hillis Miller have mined these earlier distinctions to aid in the interpretation of literary texts. While Austin typically regards law as consisting of simple performative utterances—such as “guilty” or “dismissed”—the application of his distinctions to legal texts is in fact both complex and revealing. In examining legal texts, one finds that judges and legislators often use the constative form to accomplish performative acts. For example, case law that applies prior precedent to a new situation often uses constative language to make claims about the existing state of the law, yet those claims, and the language judges use in deploying that precedent, often have the performative effect of moving the law forward in a different direction. That is, judges use statements that have the same form as, “It’s a cloudy day,” but they actually do change the legal weather.

The language of gender identity has a similar cloaked quality. The statement, “it’s a boy!” is purportedly constative, a description of facts. And yet, that description is hugely performative in setting the future expectations for the individual so described. Similar to the manner in which they treat precedent, judges, legislators, and other legal actors also use constative language to convey beliefs about gender or to ascribe gender to litigants, but again the language serves important performative functions that are often obscured. The legislative acts as well as recent case law that are part of the backlash against transgender individuals use language to accomplish their backlash in ways that Austin’s key distinction helps illuminate.

8 AUSTIN, supra note 1, at 3–7.
9 Id.
10 Id. at 3.
11 See, e.g., id. at 153–57 (categorizing examples from both law and sports officiating of speech acts that are similar to verdicts and judgments).
This Article will apply Speech Act Theory to the recent legislation and judicial opinions that are part of this backlash. In Part I, I will elaborate on Austin’s Speech Act Theory and consider the ways in which it has been expanded and developed by other theorists, explaining how it can be of particular value to understanding both legal rhetoric and the rhetoric of gender. In Part II, I explain the mechanisms of the backlash that occurred during the years 2020–2023 and that has operated to reverse previous progress by transgender individuals, focusing on the role of power and privilege in defining and understanding political backlashes. In Part III, I examine the U.S. Supreme Court’s Bostock opinions—majority and dissent—demonstrating the value of Speech Act Theory to help illuminate the meaning of the disagreement between the justices and the ways in which both opinions inspired the ensuing backlash. In Part IV, I demonstrate the performative effects of the rhetorical choices legislators made in the legislation that makes up the 2020–2023 backlash. Finally, in Part V, I offer a close reading of Meriwether v. Hartop to demonstrate the multiple rhetorical strategies and performative speech acts the court uses to transform into protected speech and religious expression the professor’s refusal to honor a student’s preferred manner of address. By using Speech Act Theory to reveal the cloaked performatives in these texts, I hope to cast doubt on the validity of their logic, expose the power dynamic in which they operate, and potentially undermine their effectiveness.

I. THE VALUE OF SPEECH ACT THEORY FOR UNDERSTANDING LAW AND GENDER

Austin’s key distinction of performative utterances—those that “do things”—and constative statements—those that describe things—is applicable in complex ways to the legal field. Though Austin is not primarily concerned with law, many of Austin’s examples of performative statements come from the legal field. One relatively straightforward example is the statement, “I give and bequeath my watch to my brother,” contained in a will.\(^\text{12}\) Such a statement has the power of creating ownership rights under the right conditions, thus doing things with the words. By contrast, a statement in a conversation, “My brother has always admired this watch and I’d like him to have it after I’m gone,” which as a constative statement describes circumstances and wishes, does not have the same power to alter the relationship between individuals and things.

As the will example makes clear, for a performative to actually accomplish its “mission,” it needs to be made in an appropriate context.\(^\text{13}\) The will must meet the formal requirements of a will and be duly admitted into pro-

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\(^{12}\) Id. at 5.

\(^{13}\) Id. at 8.
bate following the death of the testator in order for the performative statement to change a party’s ownership rights. In the absence of these contextual elements, Austin describes the performative as “infelicitous,” or ineffective in achieving what it states. A good portion of the lectures is devoted to defining the various ways in which such infelicities can occur, and what the necessary conditions of felicity are. As Austin explains, “There must exist an accepted conventional procedure having a certain conventional effect.” In addition, the people speaking or writing the words need to have the appropriate authority for the circumstances, and the procedures must be followed correctly. Further, the procedure and the speaking may need to be done with an appropriate intent in the minds of those participating. For example, a wedding rehearsal does not have the legal effect of a wedding ceremony due to the intent of the parties involved. As the lectures progress, Austin uses additional examples to determine further conditions of felicity, and multiple ways in which performative communications can misfire, rendering them void or misdirected.

Austin acknowledges that the border between the performative and the constative can be murky. For example, Austin suggests that the issuance of a warning lies in an ambiguous region between the two categories. A server who says, “The plate is hot,” intends to have a performative effect on the listener. However, the assessment of the object’s heat may be verified or disproved, making it more like a constative statement. After several similar examples, Austin concludes that the performative and the constative rather than being strict, separate categories are more like opposing qualities that can be used to elucidate the effects of linguistic statements that sometimes combine the two in different amounts. Despite the blurring of these categories, Professor J. Hillis Miller argues that the insight one can derive from the study of Austin that performative acts lurk within seemingly constative statements provides “a precious clue for the inquiring reader” to discover the power of hidden performatives in various texts.

In cataloging performative statements, Austin further distinguishes between illocutionary acts and perlocutionary acts. An illocutionary act occurs when the words themselves immediately accomplish something (e.g., “case

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14 Id. at 16–17.
15 See id. at 18–23.
16 See id. at 14, 26.
17 Id. at 15.
18 Id. at 15–16.
19 For example, a promise, to be effective must be heard and understood by the promisee in addition to being spoken by the promisor with the appropriate state of mind. Id. at 22.
20 See id. at 16.
21 Id. at 141.
22 Id. at 145–47.
23 MILLER, SPEECH ACTS, supra note 1, at 17. In Miller’s analysis, the texts being read in this manner are literary texts.
affirmed”). A perlocutionary act occurs when the words have an effect upon another person, whether intended or not. A single statement could have both illocutionary and perlocutionary dimensions. For example, a warning about a hot plate is illocutionary in the sense that the saying of the words is the issuance of a warning. It is perlocutionary to the degree that it persuades the hearer not to touch the plate. As Judith Butler summarizes, illocutionary acts are performed “by virtue of words,” while perlocutionary acts are performed “as a consequence of words.” When constative statements are nonetheless performative it is sometimes because of their perlocutionary effect, that is, because of their consequences whether or not intended.

A. Speech Acts and the Law

Austin relies heavily on legal examples as he develops his theory in How to Do Things with Words. Often, Austin appears to admire law for a quality he perceives in it: that it offers a system of clear rules for creating felicity for performatives. As a non-lawyer, Austin seems to reify legal practice as being primarily about the formulaic utterances and the ritual trappings with which he is familiar. For example, in discussing the circumstances that make a particular legal pronouncement performative, Austin states that “the performative nature of the utterance still depends partly on the context of the utterance, such as the judge being a judge and in robes on a bench.” Here, he mistakes the ceremonial features, like the robe, as necessary conditions for the validity of the judgment. Not only does Austin in these statements ignore the ways in which law operates in fields of ambiguity and open-ended standards, he also appears to chide lawyers for failing to own the performative nature of their practice: “Lawyers usually prefer . . . to apply rather than to make law,” he notes with apparent disappointment. Of course, lawyers and judges often make law through the very process of applying it.

J. Hillis Miller suggests that this fascination with legal ritual reveals Austin’s purpose in trying to develop an elaborate schema for performative utterances:

The ultimate goal of Austin’s work is to secure the conditions whereby law and order may be kept. This explains the urgency and determination with

24 Austin, supra note 1, at 109.
25 Id.
27 See Miller, Speech Acts, supra note 1, at 56 & n.23 (describing and listing these examples).
28 See, e.g., Austin, supra note 1, at 44 (admiring legal formulas); Miller, Speech Acts, supra note 1, at 57 (noting this admiration).
29 Austin, supra note 1, at 89.
30 Id. at 32; see also Miller, Speech Acts, supra note 1, at 57 (cataloging and describing these examples).
which Austin seeks to establish a sound doctrine of performatory utterances. The stability of civil society and the security of the nation depends on it.\(^{31}\)

Miller suggests that Austin’s ultimate failure to achieve this goal—a failure characterized by repeated recognition of ways performatives may go wrong and repeated unsuccessful efforts to shore up these difficulties—means that Austin’s project ends up being “more subversive of law and order than supportive of them.”\(^{32}\)

What Austin’s project may more fully subvert is the idea that law “does things” only when it says it does, like “we hold,” “reversed and remanded,” or “guilty.” What Austin’s schema helps elucidate is that legal texts also do things when they purport to be only providing definitions and explanations. Miller argues that political ideology is often accomplished by exploiting the performative effects of constative statements.\(^{33}\) Using examples from political disputes of the early 2000’s he argues that a statement such as, “The American people do not want universal health care run by the government,” while seeming to be a constative statement of fact, “is actually a performative utterance tending to bring about the situation it pretends only to describe.”\(^{34}\) Constative statements in law have performative effects through a similar operation. When a court says, “This earlier precedent actually stands for a broader proposition,” it has the performative effect of revising and redirecting that earlier precedent, even though the statement is in constative form.

Just as seemingly performative statements can be rendered ineffective because of infelicities, seemingly constative statements can be rendered performative given the right context. For example, a constative statement explaining how a holding in a prior dispute is broad enough to include the current dispute will have a more potent effect on people’s lives in an appellate opinion than the same statement made in a student exam. Similarly, a statement about the nature of biological sex may have more of an impact as legislative findings in an act that restricts transgender student access to particular activities, than if it were stated in a newspaper opinion piece. As these examples illustrate, power—whether legally invested or socially endowed—is often a necessary ingredient for felicitous speech acts.

Miller also notes that Austin has complicated things to say about the relevance of intent;\(^{35}\) echoing some of its complexity in the legal field. At times, Austin seems to consider intent an important condition of felicity; as in the example of the wedding rehearsal, where the state of mind of all the players prevents the words from having a performative meaning.\(^{36}\) At another point,
however, Austin suggests that the true intent behind a performative act is not relevant to that act’s felicity: “Accuracy and morality alike are on the side of the plain saying that our word is our bond.”\textsuperscript{37} Citing a legal example, Miller agrees, suggesting that whether one truly intended to pay back a mortgage or not, the signature on the mortgage instrument would bind the signer to the debt.\textsuperscript{38} However, Miller also points out that intent and meaning do matter to a certain degree; the mortgage could be invalidated if it were coerced or the signature fraudulently obtained.\textsuperscript{39} Miller concludes that Austin’s work vacillates between a commitment to a powerful actor behind the words, and a commitment to the meaning of the words that exceeds what the actor intends.\textsuperscript{40} In this respect, Austin anticipates the U.S. Supreme Court’s debates and vacillation on what exactly it means to provide a textualist analysis of a given statute.\textsuperscript{41}

B. Speech Acts and Gender Identity

Just as legal texts use constative statements to create performative effects, rhetoric about gender is also rife with cloaked performatives. These effects serve to double one another when they occur within legal texts.

Naming is one of the early examples Austin provides of performative utterances. The specific example he gives is the naming of a ship,\textsuperscript{42} which he later explains is only an effective performative if certain conditions of felicity are present. For example, the person doing the naming has to be invested with the proper authority.\textsuperscript{43} It is thus relatively easy to see how the inscription of a baby’s name on a birth certificate is a performative speech act. Less readily apparent is the proper categorization of the notation of the baby’s gender, a secondary act to the initial utterance in the delivery room (in most but not all cases): “It’s a boy!” or “It’s a girl!” Although these statements purport to be constative, to the extent that they describe an observed reality—the form taken by the child’s genitalia—Butler argues that they actually serve the performative function of establishing the child’s gender and initiating the child into the norms of the asserted gender.\textsuperscript{44} The fact that approximately one in

\textsuperscript{37} Id. at 10.
\textsuperscript{38} Miller, Speech Acts, supra note 1, at 31.
\textsuperscript{39} Id.
\textsuperscript{40} Id. at 32–33.
\textsuperscript{41} See discussion about Bostock infra Part III.
\textsuperscript{42} Miller, Speech Acts, supra note 1, at 5.
\textsuperscript{43} Id. at 23–24; see also id. at 35 (regarding the felicity conditions for naming a baby); Miller, Speech Acts, supra note 1, at 23 (describing a child’s christening as a performative speech act).
\textsuperscript{44} Judith Butler, Gender Trouble: Feminism and the Subversion of Identity 141 (1990).
1,000 births, according to a recent study, involve a child with ambiguous genitalia that defy the easy categorization underlines this point. The pronoun use in this classic example—“It’s a girl!”—also highlights the performative nature of the declaration: the neutral pronoun “it” preceding the announcement of gender being the first and last time that most individuals will be referred to by a pronoun other than she or he. The ungendered “it” becomes fully gendered before the sentence is over, by virtue of the announcement.

Judith Butler more precisely describes this experience as the start of a series of performatives that continuously constitute one’s gender:

The one who speaks the performative effectively is understood to operate according to uncontested power [e.g., like the judge]. The doctor who receives the child and pronounces—“It’s a girl”—begins that long string of interpellations by which the girl is transitively girled; gender is ritualistically repeated, whereby the repetition occasions both the risk of failure and the congealed effect of sedimentation.

In this explanation, Butler, by analogizing the doctor’s authority to that of the judge, suggests that law may also play a role in the performative creation of gender. Butler further addresses the “risk of failure,” which occurs when the authoritative figure repeatedly applies a name that is considered by the one so named to be inapt:

Imagine the quite plausible scene in which one is called by a name and one turns around only to protest the name: “That is not me, you must be mistaken!” And then imagine that the name continues to force itself upon you, to delineate the space you occupy, to construct a social positionality.

Butler’s thought exercise can be said to capture the experience of disconnect for those whose gender identity is not recognized by those in positions of authority, in which the perlocutionary effect of the naming speech act is to forcefully constrain the individual’s own expressions. In this respect, legal language about the meaning of gender similarly constrains what individuals may feel is possible, both when the power behind the language renders performative those edicts that reject and exclude, and also when the validation power invested in legal texts creates constraining categories that limit gender expression.

II. THE 2020–2023 BACKLASH

The backlash currently underway against transgender individuals has features similar to those in other political backlashes, including grievances by those with power against the perceived discomfort caused by those seeking to gain rights. In subsequent Parts, I will illustrate the performative role of

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45 See Banu Kucukemre Aydin et al., Frequency of Ambiguous Genitalia in 14,177 Newborns in Turkey, 3 J. ENDOCRINE SOC’y 1185, 1185–95 (2019).
46 BUTLER, EXCITABLE SPEECH, supra note 26, at 49.
47 Id. at 33.
rhetoric in structuring this phenomenon. This Part will explore the broader contours of the backlash and describe its more prominent components.

During the years 2016 to 2022, two parallel phenomena emerged regarding the legal treatment of transgender individuals. One was a trend of federal court victories for transgender rights. This trend included a series of cases in multiple district courts and federal circuit courts of appeals vindicating the rights of transgender public school students, under both Title IX and the Equal Protection clause, to use the bathroom aligned with their gender identity.\(^\text{48}\) This overall trend might be said to have culminated in the U.S. Supreme Court’s June 2020 decision of \textit{Bostock v. Clayton County}, in which the Court held, \textit{inter alia}, that Title VII’s prohibition of discrimination because of sex included discrimination on the basis of gender identity.\(^\text{49}\)

A countervailing trend was also occurring within this same timeframe. Even as transgender students were scoring victories in federal courts,\(^\text{50}\) the Trump administration had withdrawn Obama era guidance that would have provided greater support for those cases,\(^\text{51}\) and it had implemented, or tried to implement, several other measures designed to limit opportunities and rights of transgender individuals, including a ban on military participation.\(^\text{52}\)

In addition, conservative political groups were developing strategies to inflame interest in and then counteract perceived threats from the activities of transgender individuals participating in school and college sports, using bathrooms that aligned with their gender, and seeking medical care following well-established protocols to treat gender dysphoria. After public concern

\(^{48}\) See, e.g., \textit{Grimm v. Gloucester Cnty. Sch. Bd.}, 972 F.3d 586 (4th Cir. 2020); \textit{A.H. v. Minersville Area Sch. Dist.}, 408 F. Supp. 3d 536 (M.D. Pa. 2019); \textit{Whitaker v. Kenosha Unified Sch. Dist.}, 858 F.3d 1034 (7th Cir. 2017); \textit{I.A.W. v. Evansville Vanderburgh Sch. Corp.}, 323 F. Supp. 3d 1030 (S.D. Ind. 2018); \textit{Adams v. Sch. Bd. St. Johns Cnty.}, 968 F.3d 1286 (11th Cir. 2020); \textit{Parents for Privacy v. Barr}, 949 F.3d 1210 (9th Cir. 2020); \textit{Doe v. Boyertown Area Sch. Dist.}, 897 F.3d 518 (3rd Cir. 2018); \textit{Bostock v. Clayton Cnty.}, 140 S. Ct. 1731 (2020); \textit{Keller, supra} note 3, at 35. After the 2018 \textit{Adams} decision, there is now a split among circuits. \textit{Compare Grimm}, 972 F.3d 586, \textit{and Whitaker}, 858 F.3d 1030, \textit{with Adams v. Sch. Bd. of St. Johns Cnty.}, 57 F.4th 791 (11th Cir. 2022) (late December 2022 circuit court decision reversing district court and holding that a school policy to limit access to sex-designated bathrooms based on biological sex as reflected in school records did not violate equal protection or Title IX where transgender students had access to single stall sex-neutral bathrooms). See \textit{infra} notes 200–06 and accompanying text.

\(^{49}\) \textit{Bostock}, 140 S. Ct. at 1753.

\(^{50}\) \textit{See Grimm}, 972 F.3d at 593; \textit{see also A.H.}, 408 F. Supp. 3d at 582; \textit{Whitaker}, 858 F.3d at 1054–55; \textit{I.A.W.}, 323 F. Supp. 3d at 1042; \textit{Adams v. Sch. Bd. St. Johns Cnty.}, 318 F. Supp. 3d 1293, 1327 (2018); \textit{Parents for Privacy}, 949 F.3d at 1239–40; \textit{Boyertown Area}, 897 F.3d at 537–38; \textit{Bostock}, 140 S. Ct. at 1734.


had been stoked through well-publicized conferences and political advertise-
ments featuring the supposed threat of these activities, an organization calling
itself Alliance Defending Freedom engaged in a two-pronged approach to
challenge sports participation by transgender girls and women. 53 The orga-
ization developed and promulgated model legislation that would restrict such
participation, while at the same time engaging in litigation to challenge in-
clusive policies toward transgender athletes. 54

A flood of legislation that resulted from these efforts is the primary
marker of the backlash with which this Article is concerned. While states
began passing legislation targeting transgender athletes as early as 2020, 55 a
wave of legislation gained momentum in subsequent years, addressing gen-
der-affirming care, use of bathrooms by transgender students, and pronoun
usage as well as sports participation. 56 Some observers estimate that there
were 156 bills targeting transgender rights that were proposed in thirty-five
states in 2022 and 408 such bills that were proposed in forty-five states in
2023. 57 Of course, only a fraction of those bills were successful, 58 and those
are the ones discussed in subsequent Parts of this Article, but they still repre-
sent a substantial movement.

Professor Sharrow identifies the Obama administration efforts to combat
discrimination against transgender students as the impetus for this counter-
movement. 59 The movement’s potential origins in a 2019 Heritage Society
conference gives weight to this suggestion. 60 However, it is also possible to
see the spate of federal court victories for transgender youth that preceded
and followed the Obama administration actions as an additional factor. Fi-

Finally, the June 2020 Bostock decision also appears to have played a strong
role. Although the model legislation promulgated by the Alliance Defending
Freedom was first developed prior to this decis-

53 See Kimberly Kindy, GOP Lawmakers Push Historic Wave of Bills Targeting Rights of
LGBTQ Teens, Children and Their Families, WASH. POST (March 25, 2022, 6:00 AM),
https://www.washingtonpost.com/politics/2022/03/25/lgbtq-rights-gop-bills-dont-say-ga
y/ [https://perma.cc/92QQ-SN3Z] [hereinafter Kindy, GOP Lawmakers].
55 See IDAHO CODE ANN. § 33-6203 (Westlaw through 2023).
56 Kimberly Kindy, Historic Surge in Bills Targeting Transgender Rights Pass at Record
Speed, WASH. POST (Apr. 17, 2023, 6:00 AM), https://www.washingtonpost.com/politics/2
023/04/17/gop-state-legislatures-lgbtq-rights/ [https://perma.cc/728L-LD4D].
57 Id.
58 Id.
59 Elizabeth A. Sharrow, Sports, Transgender Rights and the Bodily Politics of Cisgender
60 See Kindy, GOP Lawmakers, supra note 53.
61 Id.
62 See IDAHO CODE ANN. § 33-6203 (Westlaw through 2023).
ered here came afterwards. The *Bostock* decision is notable for both substantially vindicating the rights of transgender employees in its majority opinion, and for occasioning a dissent by Justice Alito, heavily influenced by conservative amici briefs that expressed existing grievances against participation by transgender individuals in various aspects of society.\(^{63}\) That dissent sets out a list of perceived horrors that Justice Alito feared would flow from the majority decision. In this way, the *Bostock* majority decision can also be seen as producing a backlash catalyzed in part by the “to-do list” that Justice Alito produced in his dissent.\(^{64}\)

As early cases challenging the backlash legislation were brought, federal courts initially responded by issuing preliminary injunctions, relying on and broadening the *Bostock* majority opinion to find that statutes targeting transgender individuals are sex discrimination under either Title IX or the Equal Protection Clause.\(^{65}\) More recently, some courts have rejected those arguments,\(^{66}\) and reopened old controversies that had seemed settled at the federal level, like the question of whether transgender students should have access to bathrooms that align with their gender identity.\(^{67}\)

Breaking a long streak of victories for transgender individuals in federal courts, the Sixth Circuit’s decision of *Meriwether v. Hartop*\(^{68}\) in March 2021, upholding the right of a state university professor to refuse to address a transgender student by that student’s preferred pronoun and honorific, seemed to further entrench this backlash. At stake in Meriwether was whether the Plaintiff professor, who was reprimanded for refusing to follow his state university’s policy of addressing each student by the appropriate honorific (e.g., Mr., Ms.) and pronoun corresponding to that student’s gender identity, was subject to unconstitutional suppression of speech, and discrimination on the basis of his religious beliefs.\(^{69}\)

Decided on the basis of a motion to dismiss, the outcome of the *Meriwether* case, which allowed the professor’s claims to proceed to trial,\(^{70}\) was

\(^{63}\) See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1778–81 (2020) (Alito, J., dissenting) (relying on multiple amici briefs to warn against the consequences of the majority’s decision).

\(^{64}\) See *id.* at 1752.


\(^{67}\) See *Grimm v. Gloucester Cnty. Sch. Bd.*, No. 972 F.3d 586, 593 (4th Cir. 2020) (holding that both Equal Protection and Title IX require schools to permit transgender students to use bathrooms that align with their gender identity). But see *Adams v. Sch. Bd. of St. Johns Cnty.*, No. 57 F.4th 791, 796 (11th Cir. 2022) (holding the opposite).

\(^{68}\) *Meriwether v. Hartop*, 992 F.3d 492, 498 (6th Cir. 2021).

\(^{69}\) *Id.* at 499, 502.

\(^{70}\) *Id.* at 503.
not necessarily as momentous as its language or its critical reception would suggest. The actual uncloaked performative of the case is quite mild: let’s go to trial and see what the evidence actually reveals once contested.\textsuperscript{71} Indeed, certain aspects of the evidence presented by the Plaintiff, as well as controversial legal holdings in the district court decision being appealed, may have made that outcome—denial of the Defendant’s motion to dismiss—inevitable. For one, although the university merely argues that the speech at issue was not sufficiently meaningful to qualify for First Amendment protection, the district court held in a much broader fashion that a state university professor’s classroom speech, no matter its content, was unprotected in a manner similar to that of other state employees on the job, a question left explicitly open by the U.S. Supreme Court.\textsuperscript{72} The Meriwether appeals court joined other circuits in holding that university professors retain unique first amendment rights,\textsuperscript{73} which provided a significant basis for overturning the lower court’s decision dismissing the Plaintiff’s case.\textsuperscript{74} Further, the record as developed by the Plaintiff includes inflammatory statements by university administrators expressing hostility to the Plaintiff’s religious beliefs.\textsuperscript{75} Taken as true for purposes of a motion to dismiss, these statements lend credence to the circuit court’s decision that the dismissal of the professor’s claim of religious discrimination was improper. Finally, the university’s rejection of the professor’s proposed compromise to use students’ preferred pronouns while including a “disclaimer” in his syllabus setting out his beliefs about gender identity\textsuperscript{76} raises questions about both the harm such a statement might generate as well as the expressive rights to issue it. Such a conflict might indeed be better suited for a full evidentiary hearing where the sincerity of the offer, the need for it, and the harms occasioned by it might be more fully adjudicated.

The Sixth Circuit’s opinion, however, goes beyond these bases for rejecting the motion to dismiss. The court reflects more generally on the Plaintiff’s claim and endorses his view that the compulsion to address students by their preferred pronoun and honorific affects speech that is part of his job’s “core academic functions,” and amounts to viewpoint discrimination that is not overcome by a compelling state interest to avoid discriminating against transgender students.\textsuperscript{77} The discussion of these points aligns the court with a perspective on gender shared by the Alito dissent in \textit{Bostock} and the legislation enacted to restrict opportunities for transgender youth: namely, that the rights of those allegedly aggrieved by the activities or claims of transgender

\textsuperscript{71} \textit{Id.}.

\textsuperscript{72} \textit{See id.} at 504 (citing Garcetti v. Ceballos, 547 U.S. 410 (2006)).

\textsuperscript{73} \textit{Id.} at 505.

\textsuperscript{74} \textit{Id.} at 504 (identifying the issue of whether \textit{Garcetti} bars the Plaintiff’s claim as “the threshold question”).

\textsuperscript{75} \textit{Id.} at 512.

\textsuperscript{76} \textit{Id.} at 500.

\textsuperscript{77} \textit{See id.} at 505, 510–11. \textit{See generally infra} Part V.
individuals are of greater significance than the rights and interests of the transgender individuals themselves.

This notion of grievance on the part of the privileged majority is one of the key identifiers of political backlash. Lawrence Glickman, who traces current backlash movements to white grievance in the wake of Reconstruction, notes that the term “backlash,” in its metaphorical sense of political reaction, was first coined in 1963 in response to the civil rights movement.\footnote{Lawrence Glickman, How White Backlash Controls American Progress, The Atlantic, https://www.theatlantic.com/ideas/archive/2020/05/white-backlash-nothing-new/611914/ [https://perma.cc/MEW4-HJEE] (May 22, 2020, 10:41 AM).} By 1966, “[t]he word came to stand for a topsy-turvy rebellion in which white people with relative societal power perceived themselves as victimized by what they described as overly aggressive African Americans demanding equal rights.”\footnote{Id.} In later years, the term has been used for various reactionary responses to progressive social movements.\footnote{See id.} Indeed, Glickman identifies the anti-mask protests during the COVID-19 pandemic and even the Trump presidency itself as examples of backlash movements.\footnote{Id.} Glickman suggests that the main mechanism of backlash politics is to prioritize the equanimity of those with privilege and power over the interests of those fighting against oppression and powerlessness:

The elevation of “tranquility” over equal justice for all was a hallmark of backlash discourse, which ranked white feelings over black rights. . . . In this worldview, whites presented themselves as victims, the crimes perpetrated against them by campaigns for equality were anxiety, inconvenience, and fear.\footnote{Id.}

Similar qualities are evident in the current backlash against transgender rights, including Meriwether’s claim of victimization in not being able to misgender individuals as he pleases, and in the arguments presented by legislators seeking to restrict and exclude transgender individuals from various activities when their presence creates perceived complications for those who are cisgender.

Political backlashes, including the current one against transgender individuals, are also defined by a power dynamic. They occur when a group that has privilege and power experiences the claims of others as a threat to that power. According to Jane Mansbridge and Shauna Shames,

\footnote{Id.}
When a group of actors disadvantaged by the status quo works to enact change, that group necessarily challenges an entrenched power structure. The resistance of those in power to attempts to change the status quo is a “backlash,” a reaction by a group declining in a felt sense of power. It is notable that the mechanism by which the privileged group seeks to regain power through the backlash movement is by a claimed reversal of the power dynamic: they claim that those out of power seeking rights are in fact the oppressors and the privileged are in fact the victims.

Finally, Glickman identifies another feature of backlashes in American politics: a high degree of sensitivity by the political elite to the effects of backlash. He bemoans that:

[T]he preemptive politics of grievance and anti-egalitarianism . . . whereby the psychology of privilege takes center stage while the needs of the oppressed are forced to wait in the wings, has left a deforming and reactionary imprint on our political culture. It has done so not just by emboldening reactionaries but by making the fear of setting off backlashes a standard element of the political conversation.

Professor Stacey Sobel similarly suggests that efforts to implement policy initiatives to enhance LGBTQ rights should not be limited by fears of backlash, because historically these backlashes have been temporary and succeeded by subsequent gains. One way to help limit the effectiveness of these backlash efforts, I assert, is to expose the manner in which they attempt their characteristic power reversals by the use of rhetorical devices, including cloaked performatives. My hope is that revealing these mechanisms will help produce the infelicity that renders these performatives ineffective, or at least less effective.

III. BOSTOCK AS A CATALYST FOR THE BACKLASH

At the time that the U.S. Supreme Court decided Bostock v. Clayton County, there seemed to be a movement within the legal sphere away from anti-transgender rhetoric and toward more inclusion and acceptance. The Bostock majority decision, with its announcement that Title VII’s prohibition of discrimination because of sex included discrimination on the basis of gender identity and sexual orientation, seemed to ride that wave. That decision, however, appears to have been a catalyst in a backlash already underway, aided in part by the “to-do list” Justice Alito produces in his dissent. That backlash consists of the efforts described in the previous Part in legislation

84 Glickman, supra note 78.
86 See Keller, supra note 3, at 38–40.
87 See supra Part II.
and litigation to restrict opportunities for transgender individuals and affirm the rights of those who oppose their rights and identity claims.\(^88\)

Both the majority and dissenting opinions in \textit{Bostock} illustrate the complex interconnection of performative and constative statements. The majority and dissenting \textit{Bostock} opinions also provide an excellent model of the ways in which the performative quality of legal interpretation echoes and is echoed in discussions of gender identity. This Part will examine these approaches and explore their further expression in the backlash material and the legal responses to it.

In his opening paragraph of the \textit{Bostock} majority opinion, Justice Gorsuch appears to issue a stunning performative that transforms the future of federal civil rights law. He introduces the announcement by saying, “Today, we must decide whether an employer can fire someone simply for being homosexual or transgender.”\(^89\) He follows that with a verbal drumroll declaring, “The answer is clear.”\(^90\) He then provides the syllogism that is the central point of his opinion: firing someone for being homosexual or transgender necessarily involves firing them because of their sex.\(^91\) Because Title VII forbids negative employment actions taken because of sex, it follows that Title VII forbids firing someone (or taking other negative employment action) because of their sexual orientation or transgender status.\(^92\) The illocutionary intent of issuing this statement is to change the way lower courts have previously considered these cases, and the dramatic quality of this announcement is meant to so suggest. The perlocutionary effect will be to change the lives of potentially millions of gay and transgender people whose work lives will become more predictable and less fraught when their employers must suppress discriminatory impulses directed at them. Because of these real world effects, this part of the opinion offers a classic performative.

In a manner typical of many legal opinions, Justice Gorsuch immediately backtracks from any suggestion that he and his colleagues have newly imposed this application of discrimination law through a performative speech act. While the opinion is the vehicle that serves to announce this result, Justice Gorsuch insists that it is a result that was always already inside the text of Title VII.\(^93\) It is not the 2020 Supreme Court that has performed this liberation, but the 1964 congressional authors of the statute who created its logical inevitability. The message of the statute, not the interpretation of the modern Court, leads to the result: “The statute’s message for our cases is equally simple and momentous: An individual’s homosexuality or transgender status is not

\(^{88}\) See \textit{supra} Part II.

\(^{89}\) \textit{Bostock v. Clayton Cnty.}, 140 S. Ct. 1731, 1737 (2020).

\(^{90}\) \textit{Id.}

\(^{91}\) \textit{Id.}

\(^{92}\) See \textit{id.}

\(^{93}\) \textit{Id.} at 1741 (crediting the outcome to “[t]he statute’s message for our cases”).
relevant to employment decisions.”94 It also makes no difference that these legislators had no such illocutionary intent, meaning that they did not conceive of this result as the effect of the language they used: “Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. . . . But the limits of the drafters’ imagination supply no reason to ignore the law’s demands.”95 As an avowed textualist, Gorsuch holds legislators to the performative effects of their enactments. In this respect, Gorsuch is echoing Austin’s suggestion, contradicted elsewhere in Austin’s own work, that the performative effects of language are unrelated to the intent behind them.96 However, Gorsuch’s discovery of this earlier performative is itself presented as purely constative; he describes what the statute means and how its logic compels the Court’s holding. This quality of locating a performative in a receding past is emblematic of the cloaked quality of legal analysis in the Anglo-American legal system. Judges persistently insist that they are merely constative messengers describing a performative act previously made by others.

In dissent, Justice Alito accuses the majority of hiding a performative in constative clothing: “There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive.”97 Alito positions himself by contrast as the true textualist, the one who discerns the real meaning of the text based on the understanding of the legislators at the time, an understanding that would, in Alito’s view, exclude the logical extension Gorsuch posits. What Alito shares with Gorsuch, however, as well as with the other dissenter, Justice Kavanaugh, is the impetus to present his own view as constative, as a description of what the text actually means. Of course, that interpretation would itself have had performative effects if only it had the felicity of enough votes by other justices, by denying the very opportunities for inclusion the majority opinion’s result provides.

In their dispute over the “real” meaning of the underlying statutory text, and in their deployment of cloaked performatives, the justices mirror disputes reflected in other settings over how to read the “real” gender of an individual. When Gorsuch opines that the statute always included discrimination against transgender and homosexual individuals, even if it was not obvious at the time, he takes a view of statutory interpretation similar to one accepted view of transgender identity: although the individual may have appeared to have had conflicting anatomy at the time of birth, the real gender identity has always been there.98 This is a view supported by consensus medical opinion of

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94 Id.
95 Id. at 1737.
96 See Austin, supra note 1, at 10.
97 Bostock, 140 S. Ct. at 1754 (Alito, J., dissenting).
98 See id. at 1741 (crediting the outcome to “[t]he statute’s message for our cases”).
those treating gender dysphoric individuals.\footnote{See Brief of the Am. Med. Ass’n et al. as Amici Curiae in Support of the Emps. at 7–8, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107); see also Bostock, 140 S. Ct. at 1741–42.} By contrast, Alito’s approach suggests that what was interpreted about the statute’s meaning “at birth” is the correct and only interpretation no matter how people feel about it today. His accusations that Gorsuch is bowing to contemporary mores reflects the position taken by other legal actors who declare that the only true gender identity is the so called “biological” identity established at birth.\footnote{See, e.g., Bostock, 140 S. Ct. at 1772 (Alito, J., dissenting) (“Even if discrimination based on sexual orientation or gender identity could be squeezed into some arcane understanding of sex discrimination, the context in which Title VII was enacted would tell us that this is not what the statute’s terms were understood to mean at that time.”).} For example, this view is presented in legislative findings supporting a range of restrictions, including those excluding transgender girls and women from school sports, and those prohibiting the provision of gender affirming care.\footnote{Id. at 1767 (Alito, J., dissenting); \textit{id.} at 1824–25 (Kavanaugh, J., dissenting).}

The majority and dissenting justices further deploy constative descriptions of each other’s interpretive acts in order to cast aspersions on them. Each of the three opinions purports to adopt a textualist approach that is designed to discover the ordinary meaning (sometimes “ordinary public meaning” or “ordinary plain meaning”) of a phrase in the relevant statute.\footnote{Id. at 1744–45.} Unsurprisingly, they disagree about which interpretation qualifies as the ordinary meaning, with the majority opinion asserting that the ordinary meaning of “discrimination because of sex” logically implicates transgender and sexual orientation discrimination,\footnote{Id. at 1750.} while each dissent asserts that the ordinary meaning of that same phrase excludes transgender and sexual orientation discrimination.\footnote{Id. at 1755–56 (Alito, J., dissenting).}

All three opinions deploy rhetoric to question one another’s bona fides in a manner similar to rhetoric about gender. To cast the majority opinion as false textualism, Alito uses the word “update” (complete with scare quotes) in the form of a slur against Gorsuch’s interpretation:

The Court’s opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should “update” old statutes so that they better reflect the current values of society.\footnote{See infra Sections IV.A & IV.B.}

The accusation that another textualist’s approach is an \textit{update} to a statute rather than a perhaps misguided interpretation is as much of an insult as calling Gorsuch a pirate. This maneuver denies Gorsuch his identity as a textualist, much as a deliberate mis-gendering denies an individual their claim of gender identity. In that respect, the pirate accusation displays performative intent.
In his dissent, Justice Kavanaugh is similarly dismissive, using the verbs *update* and *expand* to characterize the interpretive act of the majority opinion.\(^\text{106}\)

In return, Gorsuch labels the interpretations of the other justices as “extratextual” and result oriented because they focus on the intentions of the drafters rather than on the meaning of the language they chose:

This Court has explained many times over many years that, when the meaning of the statute’s terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.\(^\text{107}\)

In the context of the justice’s mutual, competing claims to the late Justice Scalia’s textualist mantle, the accusation of being extratextual or result-focused is another potent missile. To deflect that missile, Kavanaugh draws a distinction between literal meaning and ordinary meaning, arguing that the majority’s position is too literal an interpretation of a phrase that was understood differently at the time the statute was drafted.\(^\text{108}\) While the back and forth hurling of insults in the form of adjectival phrases may seem petty, what is at stake in this battle is hugely important at the performative level. Because it seems that most justices now accept that the “ordinary meaning” of the text will govern,\(^\text{109}\) which interpretation qualifies as being the ordinary meaning is of great performative consequence to those whose claims will be either included or excluded by the interpretation.

Just as the competing claims for textualist identity mirror different approaches to understanding gender identity, the struggle over what term to use to describe an interpretive approach resembles conflicts over accurately describing an individual’s gender. The second half of Alito’s dissent sets out the many potential further consequences he envisions flowing from the majority’s interpretation. While Alito pointedly disavows the majority’s characterization of his view that these consequences are “undesirable,”\(^\text{110}\) his compendium of these consequences relies on various amicus briefs, as Alito acknowledges, in which these potential consequences are indeed presented as undesirable.\(^\text{111}\) They also form a to-do list of sorts for the legislative backlash that followed the *Bostock* decision. As part of that compendium, Alito considers the effect on interscholastic sports and cites approvingly from an amicus brief:

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\(^{106}\) See, e.g., *id.* at 1822, 1824 (Kavanaugh, J., dissenting).

\(^{107}\) Id. at 1749.

\(^{108}\) Id. at 1825 (Kavanaugh, J., dissenting).

\(^{109}\) See *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Before the Comm. on the Judiciary, 111th Cong. 62* (2010) (statement of Kagan, J., suggesting “we are all originalists”).

\(^{110}\) *Bostock*, 140 S. Ct. at 1778 n.43 (Alito, J., dissenting).

\(^{111}\) See, e.g., *id.* at 1780 & nn.49–52 (Alito, J., dissenting).
Since 2017, two biological males [in Connecticut] have collectively won 15 women’s state championship titles (previously held by ten different Connecticut girls) against biologically female track athletes.\textsuperscript{112}

These two Connecticut student athletes, whose accomplishments also formed the basis for a lawsuit against the Connecticut Interscholastic Athletic Conference, and are the source of grievance cited in the legislative history of anti-transgender legislation in the wake of the \textit{Bostock} decision, identify as female, and have been permitted by their schools’ athletic association to compete as women.\textsuperscript{113} The description of these athletes as “biological males,” while presented in constative form, has a performative intent—to cast them as imposters seeking unfair advantage—in a manner similar to the performative intent of the dueling descriptions in the \textit{Bostock} opinions of the other justices’ approach to legislative interpretation. They are, in the view of the amici, and approved by Alito in his reference, the equivalent of pirates flying a false gender flag, much as Alito considers Gorsuch to be the pirate flying the false textualist flag.

The fears Alito echoes from amici about the consequences for bathroom use in schools or elsewhere similarly raise the specter of the gender pirate: “Thus, a person who has not undertaken any physical transitioning may claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies at that particular time.”\textsuperscript{114} This expressed concern about false gender claims is a more guarded version of those made by proponents of various bills that purport to limit access to restrooms based only on the occupant’s “biological sex.”

The \textit{Bostock} majority opinion is of course the one that has the felicitous circumstances to performatively alter and vindicate the rights of affected individuals. However, that outcome is part of what has further fueled or reinvigorated the resulting backlash. Although in dissent, the power Alito wields—in both casting aspersions on the appropriateness of the majority’s interpretation and in validating the claims of grievance in the amici briefs—helps to further support that backlash.

\textbf{IV. THE PERFORMATIVE EFFECTS OF THE BACKLASH LEGISLATION AND REGULATION}

The backlash legislation of the years 2021 through 2023 reveals multiple speech acts that have the performative effect of instating a gender binary and

\textsuperscript{112} \textit{Id.} at 1780 n.49 (Alito, J., dissenting) (alterations in original) (citing Brief for Independent Women’s Forum et al. as Amici Curiae at 14–15, \textit{Bostock} v. Clayton Cnty., 140 S.Ct. 1731 (2020) (No. 18-1073)).

\textsuperscript{113} \textit{Soule} v. Conn. Ass’n of Schs., 57 F.4th 43, 48 (2d Cir. 2022).

\textsuperscript{114} \textit{Bostock}, 140 S. Ct. at 1779 (Alito, J., dissenting).
undermining the identity claims of transgender individuals. This Part will examine these mechanisms in legislation and executive actions affecting sports, gender-affirming healthcare, and bathroom use, among other areas.

A. Sports

The most prevalent target of legislative backlash has been the participation of a very small number of transgender girls and women in school sports. Despite the vanishingly small number of trans women and girls with any documented participation or success in interscholastic or intercollegiate athletics, the opportunities and potential for success that they are perceived to enjoy have generated a flood of responsive legislation designed to restrict or eliminate those opportunities, in the name of rights for cisgender women. According to estimates, fifty-six bills designed to prevent transgender girls and women from participating in sports were introduced in the 2020 and 2021 legislative sessions combined, and nearly fifty in 2022. Unsurprisingly, all the bills share similar performative language because only a few think tanks are responsible for promulgating the models on which the bills are based. For purposes of analysis, this Article will focus on those bills that achieved the condition of passage and enactment, for which I have identified legislation in twenty-two states.

Many of these enactments use language suggesting that the opportunity afforded transgender students to participate in women’s sports represents a form of peril. Several versions of the proposed legislation, including three that were enacted, bear the title Save Women’s Sports Act, suggesting that women’s sports will be lost or eliminated in the absence of such restrictive legislation. The other common designation, Fairness in Women’s Sports Act, also suggests that it is transgender student participation (not the foreclosure of opportunities for them) that represents unfairness.

In contrast to this ominous language, Professor Sharrow suggests that “the need for women’s

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116 Kindy, GOP Lawmakers, supra note 53.
117 Sharrow, supra note 59, at 63.
118 Kindy, supra note 53. These numbers include multiple bills within individual states. A comparable number of bills targeting transgender participation in youth sports were introduced in 2023. See 2023 Anti-Trans Legislation, TRACK TRANS LEGIS., https://www.tracktranslegislation.com/ [https://perma.cc/8A2E-XKFL].
119 See Deborah L. Brake, Title IX’s Trans Panic, 29 WM. & MARY J. RACE, GENDER, & SOC. JUST. 41, 53 (2022) (describing similar rhetoric).
sports to be ‘protected’ from transgender athletes is a dubious claim.’” As she states, “None of the bills present evidence of transgender athletes competing in their states (much less ‘harming’ girls or women in the process). In most states, lawmakers have been unable to identify how many transgender girls currently participate in school-sponsored athletics.”

The threat, however, seems to be conceptual rather than documented. In reviewing the country’s first fully enacted version of the legislation signed into Idaho law in 2020, the court in *Hecox v. Little* notes that the act’s legislative history included a statement by one of the sponsors, asserting that the Idaho bill addressed the threat presented to female athletes by the mere fact that three athletes were allowed to participate in athletics in Connecticut. However, as dubious as the factual predicate for this threat is, the names given to the bills and the description of the peril create the perception of a threat even where none exists.

The sense of unfairness and threat is spelled out in the preamble to one of the Tennessee acts:

> WHEREAS, it is unfortunate for some girls that those dreams, goals, and opportunities for participation, recruitment, and scholarships can be directly and negatively affected by new school policies permitting boys who are male in every biological respect to compete in girls’ athletic competitions if they claim a female gender identity.

This statement, presented in constative fashion (merely describing a state of affairs denoted as “unfortunate”), exemplifies well the range of speech acts that legislators across these various states use in order to convert the participation by transgender students into a threat. First, reference to binary gender categories determined on the basis of biology is key. The “new school policies” that the act targets are not presented as offering opportunities to transgender girls, but instead are said to allow “boys who are male in every biological respect” to participate. Having identified transgender girls as biological boys, the statement then reduces their gender identity to a “claim” of femaleness. This constative statement has the performative effect of prioritizing what the legislators see as a biological identity over the mere claim of gender identity. The language has the further performative effect of casting transgender students’ efforts to participate in line with their gender identity as a duplicitous masquerade that tramples on the “dreams, goals and opportunities” of (real) girls. In contending that “dreams, goals, and opportunities . . . can be directly and negatively affected,” the hedging language of “can be,” which is factually necessary because there is no evidence of any actual claims within the state

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122 Sharrow, *supra* note 59, at 18.
123 Id.
126 Id.
of Tennessee, is overshadowed by the “direct” and “negative” effects that are hypothesized.\footnote{Id.; see also S.B. 44, 2022 Leg., Reg. Sess. (La. 2022) (“Requiring a biological female to compete against a biological male on a team that is designated as a [female] team is inherently discriminatory to biological females . . . .”).}

The acts also seek to performatively reinforce a strict gender binary. Most of the statutes that include legislative findings cite approvingly dicta from \textit{U.S. v. Virginia} for the proposition that there are “inherent differences” between men and women.\footnote{See, e.g., SB 354, Sec. 1(a)(1), 93rd Gen. Assemb., Reg. Sess. (Ark. 2021). What Justice Ginsburg wrote was, “‘Inherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.” United States \textit{v. Virginia}, 518 U.S. 515, 533 (1996).}

The statutes rely on this notion of inherent difference to support the efforts to police the sex segregation of school sports. Accordingly, the reference to biological sex and the concomitant erasure of gender identity pervades all these bills. As Professor Sharrow determines, having reviewed the spate of proposed bills in 2020 and 2021, “The language employed . . . routinely and narrowly focuses on ‘biological sex’ instead of gender identity, and rarely explicitly acknowledges the existence of ‘transgender’ people who identify as such. Instead, transgender girls and women are regularly misgendered as ‘biological males.’”\footnote{Sharrow, \textit{supra} note 59, at 13 (citation omitted). The same is true of the 2022 bills.}


This concept of “biological sex” is one not recognized by medical professionals, because it fails to adequately recognize the many different indicators of sex and gender.\footnote{Katrina Karkazis, \textit{The Misuses Of “Biological Sex”}, 394 \textit{Lancet} 1898, 1898 (2019); see also Keller, \textit{supra} note 3, at 38–39 (reviewing federal court decisions rejecting biological sex as a meaningful category for policing sex-separated bathrooms in schools).} In defying the commonly accepted medical approach to sex and gender, these acts perform the instatement of a strict sexual binary that has the illocutionary effect of either excluding those who do not conform or forcing them into
its definitions. Accordingly, all the acts make it clear that only "biological females" are allowed to participate in teams or competitions designated for girls or women, and "biological males" are excluded from such teams.\textsuperscript{133}

While some of the acts assume that "biological sex" has a self-evident meaning, several acts provide a definition that further enshrines a mythic sexual binary at the moment of birth. For example, one of the two Arkansas acts addressing this topic states, "'Sex' means a person’s immutable biological sex as objectively determined by anatomy and genetics existing at the time of birth."\textsuperscript{134} The adjective "immutable" and adverb "objectively," while constitutive in form, performatively convert this statement into a fact that belies medical consensus, suggesting there is a moment of uncomplicated, self-revealing certainty about gender for all individuals at the time of birth. Similarly, in Indiana, a student will be deemed male and thereby ineligible to participate in teams designated for girls or women "based on a student’s biological sex at birth in accordance with the student’s genetics and reproductive biology."\textsuperscript{135}

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\textsuperscript{134} S.B. 450, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021). To add an extra exclamation point to this homage to a gender binary, the act is entitled Gender Integrity Reinforcement Legislation for Sports, abbreviated GIRLS. Id.

\textsuperscript{135} H. Enrolled Act 1041, 112nd Gen. Assemb., 2d Reg. Sess. (Ind. 2022); see also H.B. 3293, 2021 Leg., Reg. Sess. (W. Va. 2021) (defining "biological sex" as "an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth"); H.F. 2416, 89th Gen. Assemb., Reg. Sess. (Iowa 2022) (Teams are to be designated "based on the sex at birth of the participating students."); S.B. 228, 2021 Gen. Assemb. (Tenn. 2021) ("A student’s gender for purposes of participation in a public middle school or high school interscholastic athletic activity or event must be determined by the student’s sex at the time of the student’s birth."); S.B. 39, 102nd Gen. Assemb., 1st Reg. Sess. (Mo. 2023) (defining "sex" as "the two main categories of male and female into which individuals are divided based on an individual’s reproductive biology at birth and the individual’s genome"); H.B. 1249, 68th Leg. Assemb., Reg. Sess. (N.D. 2023) (defining "sex" as "the biological state of being female or male, based on an individual's nonambiguous sex organs, chromosomes, and endogenous hormone profile at birth"); S.F. 0133, 67th Leg., Gen. Sess. (Wyo. 2023) ("Sex means the biological, physical condition of being male or female, determined by an individual’s genetics and anatomy at birth.").
Of course, few newborns are subjected to a rigorous examination of their genetic makeup or reproductive biology; rather their sex is announced (performatively) on the basis of the appearance of their external genitalia. Yet, these legislative statements link this external examination to the other medical indicators in a way to suggest that the decision made about the child at birth reveals a fixed sex that is both internal and eternal.\(^\text{136}\)

The Kansas statute goes further, providing not just a definition of “biological sex” similar to those of other states (“the biological indication of male and female in the context of reproductive potential or capacity, such as sex chromosomes, naturally occurring sex hormones, gonads and nonambiguous internal and external genitalia present at birth”), but contrasts those physical indicators with what the statute says is not sex, adding “without regard to an individual’s psychological, chosen or subjective experience of gender.”\(^\text{137}\) This final clause has the performative function of rendering gender identity as unimportant and as something to be disregarded. The modifiers of that identity (psychological, chosen, subjective) are cast as weak opposites to the supposed inevitable, objective quality of the biological indicators.

Several state statutes provide no mechanism by which those administering athletic teams are to determine the student’s “biological sex.”\(^\text{138}\) That raises the specter that an even more remote proxy of “biological sex” than the genital examination of newborns will be used to police the binary that those statutes instate. For example, perhaps administrators will rely only on appearance or on a physical ability that exceeds expectations. Other states rely on birth certificates, or in some cases adoption certificates, as indicators of biological sex, as long as those documents are filed at or near the time of birth.\(^\text{139}\) This latter caveat is meant, presumably, to forestall a transgender student from qualifying by way of an updated birth certificate. Oklahoma requires parents

\(^{136}\) Sharrow, supra note 59, at 15 (Concluding that many of the proposed bills from 2020 and 2021 “link the moment of sex assignment at birth to innate gender.”).


The Alabama statute was later updated to apply also to intercollegiate athletics with no further changes in other language. H.B. 261, 2023 Leg., Reg. Sess. (Ala. 2023).

of participating students to submit sworn affidavits attesting to the child’s biological sex. In Idaho, the statute provides:

A dispute regarding a student’s sex shall be resolved by the school or institution by requesting that the student provide a health examination and consent form or other statement signed by the student’s personal health care provider that shall verify the student’s biological sex. The health care provider may verify the student’s biological sex as part of a routine sports physical examination relying on one (1) or more of the following: the student’s reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels.

As the court in Hecox v. Little noted, in approving a preliminary injunction against the Idaho statute, routine sports physicals of young girls do not normally include examination of any of these three criteria. The fact that another student may initiate a dispute requiring such verification creates a further risk that external factors like appearance and performance will serve as the de facto basis for exclusion, rather than what the statute itself defines as biological sex.

All of the statutes have the effect of erasing transgender identity, as well as the experience and identity of those athletes who identify as non-binary, or who were born intersex. As previously described, it is biological males claiming female identity that are portrayed as the threat that the statutes guard against. This misgendering of transgender girls is consistent with the litigation strategy pursued by those groups defending these statutes against challenge, or challenging the policies of states that welcome transgender girls into athletic endeavors; in their court submissions, transgender female athletes are similarly referred to as males and by male pronouns, in a constative manner that has performative effects.

144 Sharrow, supra note 59, at 15 (“Lawmakers . . . erroneously suggest that transgender women are the same as cisgender men, and are and always will be ‘biological men.’”).
The gender binary is further shored up in these statutes by false or incomplete medical information. In those states that included legislative findings, the statutes rely on a common set of references to claim that biological males have physical advantages that provide them with an unfair advantage and that also potentially endanger female participants.\(^{146}\) Most of these studies merely compare the performance of cisgender males to that of cisgender females, ignoring the effects of feminizing medical interventions transgender women undergo, which are required by most athletic organizations.\(^{147}\) Those findings that do address hormonal intervention focus on limited studies that have been overstated or that are contradicted by other studies not mentioned.\(^{148}\) Similarly, the legislative findings also ignore the effects of puberty blocking medications, which prevent the enhancing effects of male hormones in young transgender athletes.\(^{149}\) By relying on incomplete or outdated information, these statutes provide statements in constative form that have the performative effect of alerting state residents to a peril that would otherwise be insignificant.

While having achieved the felicity of enactment, most of these pieces of legislation addressing athletics are unlikely to have much of the direct effect they are purportedly designed to have. That is because the supposed threat they address involves a vanishingly small number of people. As salvos in an ongoing attack on transgender progress, however, these statutes operate to reinforce the sense of grievance among a segment of cisgender society in response to that grievance, and to reinforce a rigid gender binary.

**B. Gender-Affirming Care**

The medical treatment that transgender youth access to address their diagnosis of gender dysphoria has provided another target for backlash legislation, or, as in the case of Texas, executive action. The 2021 Arkansas legislation and 2021 Alabama legislation prohibiting health care providers from


\(^{147}\) See Hecox, 479 F. Supp. 3d at 947 (describing the policies of the NCAA and Idaho High School Activities Association that allow transgender women or girls to compete on women’s teams only after “completing one year of hormone therapy suppressing testosterone under the care of a physician”).

\(^{148}\) See Expert Declaration of Joshua D. Safer, MD, FACP, FACE, in Support of Plaintiffs’ Motion for Preliminary Injunction at 15–17, Hecox v. Little, 479 F. Supp. 3d 930 (D. Idaho 2020) (No. 20-cv-184); see also Sharrow, supra note 59, at 15 n.51.

\(^{149}\) Expert Declaration, supra note 148, at 15–17.
delivering gender affirming care to minors provide further examples of performative speech acts. These earlier acts were followed by several similar bills in other states enacted during the 2023 legislative session. As with the other legislation discussed in this Article, the legislation banning gender-affirming care that was enacted in these states and proposed in several other states follows templates distributed by national conservative interest groups. As a result, much of the language is similar among the bills enacted.

The titles of the acts themselves often serve as performative speech acts. For example, the Arkansas Act, entitled Save Adolescents from Experimentation (“SAFE”), traffics in the same kind of euphemistic or exploitive “backronym” that is illustrated in the other acts discussed above, and indeed is a staple of modern American legislation. The use of the word “experimentation” in the title is a particularly notable use of a speech act that converts what is currently accepted by the medical community as appropriate treatment protocols into something demonic.

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153 See id.


155 “An acronym deliberately formed from a phrase whose initial letters spell out a particular word or words, either to create a memorable name or as a fanciful explanation of a word’s origin.” Backronym, OXFORD Dictionaries (2022), https://web.archive.org/web/20190301074616/https://en.oxforddictionaries.com/definition/backronym [https://perma.cc/TH39-U7KH].

156 See-Philip Bump, All the Silly Legislative Acronyms Congress Came Up with This Year, ATLANTIC (Aug. 2, 2013), https://www.theatlantic.com/politics/archive/2013/08/congress-acronyms-reins/312565/ [https://perma.cc/5BQM-CLZ3].

157 See Brandt v. Rutledge, 551 F. Supp. 3d 882, 890 (E.D. Ark. 2021), aff’d, 47 F.4th 661 (8th Cir. 2022) (describing the medical care banned by the act as “potentially life-saving
denoted the Vulnerable Child Compassion and Protection Act in order to cast the children whose medical care the act seeks to prohibit as victims of their own parents and doctors.

In their legislative findings, several of the acts provide detailed descriptions, in constative form, of the medical treatment they purport to prohibit, and assertions about the negative effects of that treatment. In fact, these descriptions are inaccurate both as to the nature of the treatment currently provided to adolescents experiencing gender dysphoria, and with respect to the demonstrated outcomes of the gender-affirming treatment that is provided. For example, the Arkansas findings state that referrals for surgical interventions are increasingly common when the medical protocols for adolescent gender-affirming care for carefully screened patients include only puberty blocking in young adolescents and, when appropriate, cross sex hormones in older adolescents, and no surgical intervention for minors. Similarly, the findings rely on outdated or inaccurate research to suggest that outcomes for teens receiving the gender-affirming care are poor, when in fact recent studies suggest they are very favorable. Similarly, several statutes suggest that the treatments are “experimental,” despite wide acceptance in the medical community. As the court in *Eknes*, reviewing the Alabama act, states: “While Defendants offer some evidence that transitioning medications pose certain risks, the uncontradicted record evidence is that at least twenty-two major medical associations in the United States endorse transitioning medications as well-established, evidence-based treatments for gender dysphoria in minors.” Additionally, the Alabama and North Carolina acts’ findings include the statement:

Some in the medical community are aggressively pushing for interventions on minors that medically alter the child’s hormonal balance and remove healthy

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158 S.B. 184, 2022 Leg., Reg. Sess. § 1 (Ala. 2022); see also S.B. 99, 68th Leg., Reg. Sess., § 1 (Mont. 2023) (“Youth Health Protection Act”).

159 H.R. 1570, 93rd Gen. Assemb., Reg. Sess., § 2(9) (Ark. 2021); see also S.B. 1, 113th Gen. Assemb., Reg. Sess., §§ 1(g), (j) (Tenn. 2023) (“The legislature finds that healthcare providers in this state have sought to perform such surgeries on minors because of the financial incentive associated with the surgeries.”).


external and internal sex organs when the child expresses a desire to appear as a sex different from his or her own.\textsuperscript{165}

As the court in \textit{Eknes} noted, the state was able to produce no evidence of such aggressive pushing on the part of the medical professionals who instead provide extensive screening to those who seek their care in order to treat only those for whom it is medically appropriate.\textsuperscript{166}

These falsehoods have the performative effect of convincing the interested reader, whether voter or legislator, that there is a problem that the legislation will solve. Although falsity may render a traditional performative infelicitous (say a wedding officiant has lied about the validity of their credentials), the falsity of a constative statement does not necessarily limit its felicity; indeed the lie itself may be seen as the performative act.\textsuperscript{167} The recent spate of death threats and other harassment aimed at children’s hospitals, spurred by misinformation about their role in providing gender affirming care\textsuperscript{168} provides evidence of the effectiveness of these performative speech acts in channeling public perception.

Like other legislation from the backlash, these acts also encode a notion of “biological sex” that is not recognized medically, and is defined as the sex assigned at birth. For example, they prohibit any medical care or medical referral that assists a person who seeks to live as or identify with “a gender different from his or her biological sex.”\textsuperscript{169} They often further define sex in ways that establish a supposedly natural binary that is the default against which the disfavored ministrations operate, as in the 2023 legislation from Idaho, which states, “‘\textit{S}ex’” means the immutable biological and physiological characteristics, specifically the chromosomes and internal and external reproductive anatomy, genetically determined at conception and generally recognizable at

\begin{footnotesize}
\textsuperscript{165} Ala. S.B. 184 § 2(6); N.C. H.B. 808.
\textsuperscript{166} \textit{Eknes-Tucker}, 603 F. Supp. 3d at 1145–46.
\textsuperscript{167} \textsc{Miller, Literature as Conduct}, supra note 33, at 229–30, 286.
\textsuperscript{169} According to the definitions section for the Arkansas legislation, “‘Biological sex’ means the biological indication of male and female in the context of reproductive potential or capacity, such as sex chromosomes, naturally occurring sex hormones, gonads, and nonambiguous internal and external genitalia present at birth, without regard to an individual’s psychological, chosen, or subjective experience of gender.” H.R. 1570, 93rd Gen. Assemb., Reg. Sess. §§ 3(1), (5) (Ark. 2021); \textit{see also} S.B. 1138, 55th Leg., 2d Reg. Sess. § 1(C)(1) (Ariz. 2022) (defining “biological sex” as “the biological indication of male and female in the context of reproductive potential or capacity, such as sex chromosomes, naturally occurring sex hormones, gonads and nonambiguous internal and external genitalia present at birth, without regard to an individual’s psychological, chosen or subjective experience of gender”). \textit{But see} Ariz. S.B. 1138 § 1(C)(2) (recognizing in its definitions that gender “means the psychological, behavioral, social and cultural aspects of being male or female”).
\end{footnotesize}
birth, that define an individual as male or female.” 170 Offering a similar definition, the Iowa statute specifically excludes gender from the definition of sex, which it states is “the biological indication[s] of male and female . . . present at birth without regard to an individual’s psychological, chosen, or subjective experience of gender.” 171

Indeed, defining biological sex becomes logically necessary because these acts seek to restrict access by transgender youth to hormonal treatments that are otherwise allowed for cisgender teens who may require hormone treatment, for example, to address unwanted secondary sex characteristics associated with a different gender. 172 In order to target only transgender teens, the legislation defines them as seeking to alter rather than confirm the gender with which they are aligned. The constative definition of biological sex serves then to exclude one category of people from treatment that is available to others, and also serves the function of shoring up a belief in the gender binary.

The Alabama act makes an explicit finding that instates the gender binary: “The sex of a person is the biological state of being female or male, based on sex organs, chromosomes, and endogenous hormone profiles, and is genetically encoded into a person at the moment of conception, and it cannot be changed.” 173 Like so many of the other acts discussed in this Section, this statement wishes away the greater variety and complex expression of these different indicators in many individuals, while seeking to summon into existence a rigid binary to which all should conform or else be unrecognized and rejected. It accomplishes all this with a statement that appears in its form to be constative—merely a description.

In Texas, a similar effort to restrict access to gender-affirming care has been accomplished through a combination of constative and performative

170 H.B. 71, 67th Leg., 1st Reg. Sess. § 1(8) (Idaho 2023); see also S.B. 1, 113th Gen. Assemb., Reg. Sess. § 1(9) (Tenn. 2023) (near identical language); S.B. 254, 2023 Leg., 125th Reg. Sess. § 4(8) (Fla. 2023) (“‘Sex’ means the classification of a person as either male or female based on the organization of the human body of such person for a specific reproductive role, as indicated by the person’s sex chromosomes, naturally occurring sex hormones, and internal and external genitalia present at birth.”); S.B. 14, 88th Leg., Reg. Sess. § 2 (Tex. 2023) (defining “biological sex as determined by the sex organs, chromosomes, and endogenous profiles of the child”).


rhetoric. When the Texas legislature failed to pass a bill explicitly declaring that performing or consenting to a minor’s gender-affirming care is child abuse, the state’s executive branch intervened with a series of speech acts. First, the Attorney General, Ken Paxton, issued an opinion letter, in response to a request from a legislator, asserting that such treatments, including puberty blocking medications and hormone therapy “can legally constitute child abuse” under existing Texas law. The letter is constative in form, purporting to merely present its author’s opinion about the current state of Texas law. That letter was followed by a letter from Governor Greg Abbott that converts the seemingly constative opinion letter into performative speech acts in a couple different ways. First, Abbott’s letter removes the conditional tense found throughout AG Paxton’s letter, stating that the AG opinion had “confirmed” that these procedures “constitute child abuse” (no “can”). This deliberate change in meaning has the same performatve effect as the falsehoods previously discussed in connection with the legislation outlawing gender affirming care. Second, the Governor offered a classic performatve by stating to the Director of the Texas Department of Family and Protective Services (“DFPS”), “I hereby direct your agency to conduct a prompt and thorough investigation of any reported instances of these abusive procedures in the State of Texas.”

The Texas Attorney General’s opinion letter is constative in form, purporting to merely present its author’s opinion about the current state of Texas law. Yet there are many cloaked performatives. Some of these performatives mirror statements seen in the legislation, declaring sex to be biological and fixed at conception. For example, the letter states, “it is important to note that it remains medically impossible to truly change the sex of an individual because this is determined biologically at conception.” Like the legislative findings in several of the bills already discussed, this letter also cites support for this and similar conclusions from several studies that are either outdated or that have been discredited.

177 See supra Part IV.
179 See, e.g., Paxton Opinion Letter, supra note 175, at 2–3.
180 Id. at 2.
181 See id. at 3–4. These misleading studies include those asserting that transgender youth will outgrow their gender dysphoria, and those that purport to establish that the outcomes of treatment are poor. See also Sara Reardon, New Arkansas Law—and Similar Bills—Endanger Transgender Youth, Research Shows, Sci. Am. (Apr. 9, 2021), https://www.sciencemag.org/article/new-arkansas-law-and-similar-bills-endanger-transgender-youth-research-shows/ [https://perma.cc/T6QG-G9KT] (for a review of the current medical consensus).
Much of the rhetorical effect of the letter occurs in the way the Attorney General manipulates conditional language. By layering multiple conditional statements, he avoids directly false statements and declares merely that because certain treatments can cause mental or emotional injury, that means they can legally be considered child abuse. This is not to say that such treatments do cause such injury or that they actually constitute abuse. Nonetheless, the effect of this presentation is to suggest, inaccurately, that these conditionals are regularly realized. The Executive Summary includes the letter’s basic thesis that each of the procedures enumerated “can legally constitute child abuse” under applicable Texas law. However, that conditional statement is itself supported by several bullets meant to identify the basis for this conclusion, each of which is also grammatically conditional. For example, one bullet states that “These procedures and treatments can cause ‘mental or emotional injury to a child.’” The cited provision from the Texas Family Code, however, does not use the conditional in establishing the basis for a finding of child abuse on the basis of mental or emotional injury. The layering of these conditional statements renders the actual logical conclusion of this letter quite meaningless, because it simply states that certain experiences have the mere potential to cause harm that might, under appropriate circumstances, be sufficient to justify a finding of child abuse. Many different experiences have the potential to cause mental or physical injury to a child (e.g., visiting a circus, traveling by automobile, playing kickball), but such experiences are normally not considered to be child abuse because of these potential effects. And yet, as the Governor’s subsequent reframing demonstrates, these conditionals may nonetheless have the intended or unintended effect of convincing the reader that the statements in which they occur are more meaningful and definitive than they actually are.

The letter also deploys language of sterilization to malign the medical procedures under consideration, conflating historical atrocities of forced sterilization—the examples he utilizes as illustrations of potential abuse—with the side effects on fertility of gender affirming care. The obfuscation created by this connection is most clear when the letter cites studies of women who were sterilized at a young age for reasons unrelated to gender dysphoria, and who later experience regret, as a basis for suggesting that similar regret will attend those receiving gender-affirming care. Then, in order to suggest that treatment done on children is permanent and potentially damaging, the letter conflates surgical treatments, which are rarely performed on minors, with the more common treatment of puberty blockers and hormone

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182 Paxton Opinion Letter, supra note 175 at 2.
183 Id. (emphasis added) (quoting TEX. FAM. CODE § 261.001(1)(A)).
184 See TEX. FAM. CODE § 261.001(1)(A) (2023).
185 Paxton Opinion Letter, supra note 175 at 3, 7.
186 Id. at 7.
therapy.¹⁸⁷ The letter gathers all of these procedures under a description that calls them “irreversible sterilization procedures,” relying again on the potency of the descriptor “sterilization” to cast them all in the most negative light possible.

Finally, the letter conflates medically unnecessary treatments with those treatments under review, which are prescribed by doctors to address a serious medical and psychological issue. For example, the letter cites prosecutions of parents who suffered from Munchausen syndrome by proxy for subjecting their children to unnecessary medical procedures on the basis of symptoms exaggerated or invented by the parents.¹⁸⁸ Because medical professionals who treat gender dysphoria employ elaborate protocols to establish the genuineness and medical necessity of any treatment, this juxtaposition is inapt except for its performative rhetorical effect. In other places the letter recognizes that the hypothetical child abuse it describes will legally apply only to medically unnecessary treatment.¹⁸⁹ For this reason, references to medical treatment that is by definition unnecessary serves the rhetorical purpose of suggesting, without directly stating, a conclusion far broader than warranted by the laws cited, namely that gender-affirming care, in contradiction to the medical consensus, is unnecessary.

The Governor’s letter that followed neatly illustrates the performative effect of the Attorney General’s letter in conveying this broader conclusion. The Governor’s letter not only removes the conditional language of the Attorney General’s letter, but further removes, by ignoring, any hedging about medical necessity found there. The Governor writes in his directive to the Commissioner of the Department of Family and Protective Services,

As [the Attorney General’s Opinion Letter] makes clear, it is already against the law to subject Texas children to a wide variety of elective procedures for gender transitioning, including . . . administration of puberty-blocking drugs or supraphysiologic doses of testosterone or estrogen.¹⁹⁰

This misrepresentation of the substance of the Attorney General’s letter is presented in constative fashion, purporting to describe the letter, and also to describe the state of the law. In a rhetorical maneuver that is reminiscent of the majority opinion in Bostock, the Governor purports to rely on a fact already established in the past: that gender affirming care “already” is against the law. In this false constative discovery of an existing fact, he instead brings the fact performatively into existence. In its misrepresentation of the Attorney General letter, the passage from the Governor’s letter has a performative

¹⁸⁷ Id. at 3.
¹⁸⁸ Id. at 7–8.
¹⁸⁹ See, e.g., id. at 8 (“[W]here a factual scenario involving non-medically necessary, gender-based procedures or treatments on a minor causes or threatens to cause harm or irreparable harm . . . a court could find such procedures to constitute child abuse . . . .”).
¹⁹⁰ Gov. Abbott Letter, supra note 176. The Governor in this passage also lists surgical procedures that doctors rarely consider appropriate for transgender minors. Id.
effect to the extent that its statement is believed by those who might act upon it, influencing public opinion with the supposed authority of certainty and legal credibility.

Abbott finishes the letter with a classic performative speech act: “I hereby direct your agency to conduct a prompt and thorough investigation of any reported instances of these abusive procedures in the State of Texas.”\(^{191}\) This statement is clearly designed to make real changes in the world, but its ability to do so is effectuated just as much through the authority of the constative (but false) statements that come earlier in the letter.

As explained above, Austin explored the concepts of felicity and infelicity to categorize the conditions necessary to ensure that performative speech acts were able to “do things” in the world as intended. Here, the effectiveness of the Governor’s performative speech act seemed assured when the Department of Family and Protective Services (“DFPS”) responded in a media statement that the Governor’s directive would be followed.\(^{192}\) Indeed, a DFPS investigations supervisor testified in subsequent litigation that DFPS took immediate steps to prioritize and require investigations of relevant cases in a manner different from the approach taken in other child abuse cases,\(^{193}\) thus completing the conversion of the conditionals in the Attorney General’s letter to unconditional effects in the world.

The prospect of these effects on the medical care of their transgender child gave rise to a suit by the child’s parents against the Governor and the Department, resulting in a state-wide injunction against such investigations, which was upheld by the intermediate appeals court.\(^{194}\) In an interesting twist, the Texas Supreme Court found on appeal that the injunctions were improper precisely because the speech acts by the Attorney General and Governor lacked the necessary conditions—what Austin would call felicity—to have actually created a new rule:

[N]either the Governor nor the Attorney General has statutory authority to directly control DFPS’s investigatory decisions. They have every right to express their views on DFPS’s decisions and to seek, within the law, to influence those decisions—but DFPS alone bears legal responsibility for its decisions.\(^{195}\)

The court further found that DFPS, not being legally bound by the governor’s directive, had the same discretion to investigate child abuse under its

\(^{191}\) Id.

\(^{192}\) In re Abbott, 645 S.W. 3d 276, 279 (Tex. 2022) (“DFPS then issued the following statement to the media: ‘In accordance with Governor Abbott’s directive today to Commissioner Masters, we will follow Texas law as explained in [Paxton Opinion Letter]’, ”).


\(^{194}\) Abbott, 645 S.W. 3d at 279–80. The basis for the injunction was that the proper procedure for a new agency rule had not been followed.

\(^{195}\) Id. at 281.
reading of the relevant statutes as it had prior to the executive branch correspondence, so no new rule had been created that could be enjoined.\textsuperscript{196} The court left in place the injunction against DFPS pertaining specifically to the Plaintiffs, but provided mandamus relief against the state-wide injunction. The Texas Supreme Court’s finding that the speech acts of the Governor and Attorney General had no legal effect hardly defanged them, as the result of the opinion is that the investigations they instigated may continue.\textsuperscript{197} Indeed, the court’s speech act had the performative effect of enabling their felicity by the very act of declaring them infelicitous and thus not subject to review. A typical headline announcing the result demonstrates how the Texas Supreme Court’s action rendered the Governor’s speech act felicitous even while declaring it otherwise: “Texas Supreme Court OKs state child abuse inquiries into the families of trans kids,”\textsuperscript{198} stated the NPR headline.\textsuperscript{199} In this respect, the Texas Supreme Court joined the Texas executive branch and the legislation described throughout this Section to ensure that constative rhetoric had serious performative effects on the lives of transgender youth.

\textbf{C. Bathroom Bills}

Perhaps because earlier efforts to regulate sex-separated bathroom use by transgender students in public schools had been repeatedly rebuffed by federal courts at both the district court and circuit court levels,\textsuperscript{200} only two new bathroom bills proposed during the legislative sessions of 2021 and 2022 were enacted. Both the Oklahoma and Tennessee legislation require public school districts to maintain the types of exclusionary restroom policies that had been previously invalidated by several federal courts in recent years, most recently

\textsuperscript{196} Id. at 281–82.
\textsuperscript{197} Id.
\textsuperscript{199} Following this outcome, additional plaintiffs have successfully obtained injunctions in the lower courts against ongoing investigations. The latest injunction was brought on behalf of all members of PFLAG, an organization that supports LGBTQ youth and their families. \textit{See} Masters v. PFLAG, Inc., No. 03-22-00587-CV, 2022 WL 4473903 (Tex. App. Sep. 26, 2022) (intermediate appeals court reinstating temporary injunction). These additional injunctions have not yet been reviewed by the Texas Supreme Court. Further subsequent to these lawsuits the Texas legislature passed SB 14 in the 2023 legislative session. That act prohibits gender affirming care and empowers the Attorney General to bring enforcement actions. \textit{See} Loe v. Texas, No. 23-0697 (Tex. Aug. 31, 2023), rejecting request to maintain an injunction.
by the Fourth Circuit in *Grimm v. Gloucester County*. In Oklahoma, the requirement is made directly. There, “each public school . . . shall require every multiple occupancy restroom or changing area” to be designated as either for “exclusive use of the male sex” or “exclusive use of the female sex.”

In Tennessee, the mandate is effectuated by providing a private cause of action to any teacher, employee, or student who “encounters a member of the opposite sex” in a restroom if the school facility “intentionally allowed” that person to be there. Both statutes provide for “reasonable accommodations” to those who decline to follow the strict sexual segregation of the bathrooms, presumably the same type of single user alternative that the court in *Grimm* found unacceptable for the transgender Plaintiff because of the stigma associated with it when other students were able to use multi-user facilities that aligned with their gender identity, but which was recently found to provide adequate accommodation in *Adams*. Following the *Adams* decision in late 2022, several additional states passed bills during the 2023 legislative session that regulate student use of bathrooms and include similar features.

The bathroom ban statutes use performative speech acts to reinforce a gender binary in a manner familiar from the statutes already discussed. For example, in Tennessee, the definition of “sex” is “a person’s immutable biological sex as determined by anatomy and genetics existing at the time of birth.” In some states, the “original birth certificate” is the basis for determining the individual’s sex for bathroom purposes, while others do not specify how one’s biological sex is determined. The application of this binary definition and method of proof to transgender students illustrates a central paradox about such efforts to regulate bathroom usage. A transgender student who identifies as male and appears male, but whose original birth certificate

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201 *Grimm*, 972 F.3d at 619; see also Keller, *supra* note 3, at 41. *But see Adams*, 57 F.4th at 803–08.


204 *Grimm*, 972 F.3d at 618–19.

205 *Adams*, 57 F.4th at 817.


207 H.B. 1233, 112th Gen. Assemb., § 3(4) (Tenn. 2021); see also Okla. S.B. 615 § 1(A)(1) (“‘Sex’ means the physical condition of being male or female based on genetics and physiology, as identified on the individual’s original birth certificate . . . .”); Fla. H.B. 1521, § 3(f), (h) (defining "female" as "a person belonging, at birth, to the biological sex which has the specific reproductive role of producing eggs" and "male" as "a person belonging, at birth, to the biological sex which has the specific reproductive role of producing sperm"); Idaho S.B. 1100 (using again the definition of sex as "immutable" found at *supra* n.135).

208 Tenn. H.B. 1233 § 3(4); see also Okla. S.B. 615, § 1(A)(1); Ark. H.B. 1156, § 2(a)(2)(B).
lists his sex as female, would be in full compliance with the school rules required by this statute if he used the girls’ locker room or bathroom. And yet this choice, rather than using the bathroom that aligns with his gender identity, would be more likely to give rise to the experience that is supposed to trigger the cause of action in Tennessee: when a student, teacher, or employee “encounters a member of the opposite sex” in a restroom. It is the double bind of this set of scenarios that banishes transgender students to the bathrooms described in several bills as “reasonable accommodations,” and which under the circumstances of sex-separated bathrooms for everyone else is understandably perceived by transgender students as stigmatizing. So, the perlocutionary effect of these statutes will not be to relegate everyone to the bathroom that aligns with their birth certificate, but rather to call out, shame, and stigmatize transgender students.

In addition to the bathroom bill discussed above, Tennessee enacted further legislation that appears to exploit and performatively reinforce the same anxieties these bills also address. This act added language to the section of the state’s statutes addressing public restrooms in businesses open to the public, and imposed a notice requirement on those businesses that “as a matter of formal or informal policy, allows a member of either biological sex to use any public restroom within the building or facility.” The required notice—the wording, placement, dimensions, typeface, and color of which were mandated in the act—reads: “THIS FACILITY MAINTAINS A POLICY OF ALLOWING THE USE OF RESTROOMS BY EITHER BIOLOGICAL SEX, REGARDLESS OF THE DESIGNATION ON THE RESTROOM.” This notice is required to be posted near restrooms that are “designated for a specific biological sex.”

The mandated message on the sign itself is stated in constative form. It purports to merely describe the policy of the business required to post it. Yet the language is highly performative in the connections it makes between identity and bathroom use. The use of the phrase “biological sex” in the requirements and in the language of the sign itself, as in the other legislation previously discussed, is performative by instating a supposed natural binary. As the business owner Plaintiff in the ensuing litigation attests, the term also resonates with him and his transgender clientele as conveying animus and stigma toward both transgender and intersex individuals. This act makes the further connection that the terms “women” and “men” on public restroom

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209 See Whitaker v. Kenosha Unified Sch. Bd., 858 F.3d 1034, 1040 (7th Cir. 2017); see also Keller, supra note 3, at 49.
210 See Tenn. H.B. 1233 § 3(2); see also Okla. S.B. 615 § 1(C); Ark. H.B. 1156, § 2(b)(2)(A); Iowa S.F. 482, § 2(4); Idaho S.B. 1100.
212 Id. at § 1(b)3.
213 Id. at § 1(d)(2)(A)(ii).
doors are references to a biological sex that is not elsewhere defined in this particular statute. This whatever performative quality the words or pictures on restroom doors already have, this act endows those signs with an extra performative statement: by the logic of the act, and assuming the meaning of “biological sex” defined in other statutes, an image of a figure in a dress means “enter only if a doctor observed that you had a vagina when you were born.” So, while the illocutionary effect of the act is to mandate the posting of a sign, the intended perlocutionary act is to reinforce the sorting of individuals by anatomical features present at birth.

The adverb “regardless” also plays an important role in conveying hostility toward those that do not conform to the biological binary the act endorses. As the reviewing court explains, the language of the sign converts compliance with the restroom indicators into defiance:

the plaintiffs object to . . . the suggestion that individuals using the bathroom that corresponds to their gender identity are doing so "REGARDLESS OF THE DESIGNATION ON THE RESTROOM," when, in fact, the plaintiffs believe that such an individual would, if anything, actually be complying with the designation of the restroom, not ignoring it.

The verb “allow” also plays an interesting role in the sign’s characterization of the businesses to which it applies. By limiting the requirement for the mandated sign only to those businesses that “allow” individuals to use a restroom with a designation different from their biological sex, the act assumes into existence a set of businesses to whom the act would not apply; those that do not allow such uses.

The suggestion that some businesses allow and others do not allow use of the restrooms by occupants whose biological sex does not conform to the relevant designation begs the question about what verification process a business would use to justify not having to display the sign. Presumably the business would not be required to employ a birth certificate checker at the door to each restroom to enforce its policy. This question connects back to the central paradox in the efforts to police bathroom use. While the proponents of those policies, like the sponsors of the Tennessee bill, cite as a basis for the policies the specter of a masculine appearing individual in a women’s room (or vice versa), the logic of their requirements to conform with biological sex means that a masculine appearing transgender man would be required to use the women’s room (if he were assigned female sex at birth), rather than the men’s

215 See Bongo Prods., LLC v. Lawrence, 603 F. Supp. 3d 584, 593 (M.D. Tenn. 2022) (“The language stating that the Act applies only to restrooms ‘[d]esignated for a specific biological sex’ is somewhat confusing, given that few, if any, public restrooms in Tennessee make any express reference to ‘biological sex’ in their signage. The legislative history of the Act, however, . . . makes clear that the General Assembly intended the Act to reach any restroom with a verbal designation such as ‘men’ or, by extension, a visual designation such as an icon appearing to wear gendered clothing.” (alteration in original)).

216 See Keller, supra note 3, at 36 (describing restroom signage).

217 Bongo Prods., 548 F.Supp. 3d at 681–82.
room where he would be more comfortable and would raise no alarm. For example, the act’s sponsor suggested that one reason for enacting the mandated sign was because the experience is “shocking and a danger to people when they walk into a restroom marked ‘men’ or ‘women’ and [someone of] the opposite sex is standing there. It could scare them. It could provoke violence.”

But those entities that have a policy requiring individuals to use the bathroom associated with their biological sex rather than the gender with which they identify and to which their appearance most likely conforms, would, if that policy were effective, subject their customers to more of this “shocking” experience rather than less. To the extent that the legislation’s sponsors rely on the threat of a cisgender man exploiting inclusive policies to gain access to women’s rooms for predatory purposes, the reviewing court notes that no evidence of an existing problem of that nature is presented in either the legislative history or the case record, nor any explanation of how a sign would address the problem if it existed. All of which suggests that the illocutionary purpose of this legislation is not to police bathrooms, or inform users, but rather to express the animus and stigma that the Plaintiff and his clientele accurately perceive.

D. Responses in the Courts

Many of the legislative acts considered in this Part have also been challenged in federal court. Challengers in many of those cases have succeeded in winning preliminary injunctions or summary judgment. In these cases, district court judges have countered the false statements in the acts by relying on modern medical opinion and other sources.

To the extent that the performative purpose of the acts under review was to actually prevent the activities addressed by the statutes, the reception in the federal courts has significantly impacted the felicity of those performatives. The cases are of course performative speech acts themselves. In addition to the performative language that creates the injunction and halts the effects of the legislation, the

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218 Id. at 673 (alteration in original).
219 Id.
220 Id. at 681.
221 See cases cited infra notes 223, 235, 249.
222 See, e.g., Koe v. Noggle, No. 23-CV-2904, 2023 WL 5339281, at *7 (N.D. Ga. Aug. 20, 2023) (relying on expert testimony to counteract Defendant’s arguments about gender affirming care); Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1141 (M.D. Ala. 2022) (relying on the endorsements by multiple major medical organizations to support the value of gender affirming care). But see Eknes-Tucker v. Gov. of Ala., 80 F.4th 1205, 1232 (11th Cir. 2023) (finding that “these types of issues are quintessentially the sort that our system of government reserves to legislative, not judicial, action” and vacating district court injunction on the basis that intermediate scrutiny does not apply to the regulation of gender affirming care). The injunction in Koe was also lifted following the circuit court decision in Eknes-Tucker: Koe, 2023 WL 5339281, at *31.
language cases use to describe the basis of their decisions also has performative effects.

Preliminary injunctions have been issued in four federal cases and one state case considering the statutes restricting participation in women’s sports.\textsuperscript{223} In three cases, the courts applied heightened scrutiny to find that the statutes were likely to be found unconstitutional under the Equal Protection Clause.\textsuperscript{224} In reaching this conclusion, the cases note the disconnect between the sponsors’ assertion that the legislation is needed to protect women’s and girls’ athletic opportunities and the exceedingly small number of potential transgender participants seeking similar opportunities.\textsuperscript{225} They further engage in the performative act of returning the transgender girls who have brought the complaint to the category of women. For example, in \textit{B.P.J.}, the court refuted the state’s contention that there was no discrimination because the Plaintiff, a transgender girl, was similarly situated with other “biological males” by stating this claim was “misleading.”\textsuperscript{226} The court noted, “Plaintiff is not most similarly situated with cisgender boys; she is similarly situated to other girls.”\textsuperscript{227} In \textit{Hecox v. Little}, the court draws on the state’s purported mission to support women athletes because of the historical discrimination they have faced to note that transgender women “like women generally” have also faced discrimination historically.\textsuperscript{228} Notably, the cases also broaden the \textit{Bostock} holding, that discrimination on the basis of gender

identity is a form of sex discrimination under Title VII, by applying that holding to Equal Protection analysis and to Title IX claims. Although distinguishing cases and broadening them are always stated in constative form—presented as merely descriptions of the earlier case’s applicability—these rhetorical acts are performative in the ways in which they affect future interpretations of the earlier cases in addition to how they affect the outcome of the current dispute.

By contrast, in a later decision considering the facial challenge to the West Virginia law, the B.P.J. court instead concluded that separation of sports teams on the basis of biological sex, with the effect of excluding transgender girls, did not violate Title IX. In this later case, the same court contradicts its earlier statements, suggesting now that “transgender girls are biologically male,” and that as a category (rather than on an individual basis), they are “not similarly situated to biological females for purposes of athletics.” These constative statements, reinterpreting the precedent, of course serve as additional speech acts to support the new outcome that allows the state to restrict athletic opportunity.

The Title IX changes proposed by the U.S. Department of Education to address eligibility for athletic teams will likely provide, if they are made final, an additional basis for courts to enjoin the statutes described in this Section. Although the proposed regulations would allow exclusion of transgender women from certain categories of women’s sports, the requirements imposed for permitting such exclusion are unlikely to be met by any of the current legislation. Those requirements include limiting the exclusion to sports where the exclusion is “substantially related to the achievement of an important educational objective” and providing additional measures that “minimize harms to students whose opportunity to participate on a male or

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229 See id. at 974–75.


female team consistent with their gender identity would be limited or denied.”

The first of these requirements addresses differences in the types of sports and level of competition, as well as the role of sport governing bodies in setting rules for competition. This requirement calls for a fact-based, sport-by-sport inquiry that blanket legislation does not address. The second requirement prioritizes the needs of the transgender athletes themselves in a manner unaddressed by any of the recent legislation. In using the phrase “their gender identity,” the proposed regulations deploy a speech act that builds respect for transgender students into the very basis of any decision that may result in their exclusion. By contrast, the state enactments banning transgender participation in women’s sports achieve the opposite result by deploying speech acts that erase the gender identity of these would-be athletic participants.

Statutes in Arkansas, Alabama, Florida, Georgia, and Montana prohibiting gender affirming care have also been enjoined after successful challenges. Like *Hecox*, these decisions rely on *Bostock*’s definition of discrimination to broaden that holding and conclude that the relevant statutes likely violate the plaintiff patients’ equal protection rights. They also find that the statutes likely violate the due process rights of the parents to direct the medical care of their children. Indeed, all three cases find that the justification the states offer that their laws protect children from experimental procedures are pretextual, because of the substantial consensus among medical organizations in support of the current treatment protocols. In *Lapado*, the court pushes back against the speech acts of the Florida statute and those found in the briefs

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234 Id.
236 Brandt, 551 F. Supp. 3d at 893; Eknes-Tucker, 603 F. Supp. 3d at 1145; Preliminary Injunction, *supra* note 235, at 27.
237 Brandt, 551 F. Supp. 3d at 893; Eknes-Tucker, 603 F. Supp. 3d at 1146; Preliminary Injunction, *supra* note 235, at 27. Brandt also found that that the First Amendment rights of the healthcare providers were also likely violated because of the Arkansas statutes ban on referrals. *Brandt*, 551 F. Supp. 3d at 893. Subsequent to *Brandt*, Arkansas passed more limited legislation, apparently designed to cabin gender affirming care as much as possible within the confines of that decision, creating a cause of action for malpractice against doctors providing gender affirming care unless they adhere to protocols set out in the legislation that exceed what is recommended by major medical organizations, including a mandatory statement as part of “informed consent” that contradicts that consensus. See S.B. 199, 94th Gen. Assemb., 2023 Reg. Sess., § 4 (Ark. 2023). Given *Brandt*’s holding that the earlier legislation violated the First Amendment rights of healthcare providers, *Brandt*, 2023 U.S. Dist. LEXIS 106517, at *113, this statute will likely also be enjoined.
and publications cited in support of the statute by asserting that “[g]ender identity is real.” With this language, the Lapado court confronts the use of language suggesting transgender identity is chosen or the result of a “woke idea,” stating that “[d]og whistles ought not be tolerated.”

By contrast, more recent litigation in Tennessee and Kentucky has resulted in gender-affirming care bans remaining in place. In Tennessee, the Sixth Circuit Court of Appeals granted a stay of the statewide preliminary injunction the trial court had granted. In part, the stay was granted due to the breadth of the lower court’s preliminary injunction, which prohibited enforcement of the law against any individual in the state, not just the Plaintiffs. But the Sixth Circuit also averred that the Plaintiffs were unlikely to prevail on either their due process argument that the parents’ rights to direct the care of their children had been violated, or on the equal protection claim of discrimination on the basis of sex. In Kentucky, a federal district court stayed its own recently issued injunction on the strength of the Sixth Circuit’s decision. These cases were later consolidated on appeal in a Sixth Circuit decision that overturned the preliminary injunctions.

In questioning the strength of the Plaintiff’s due process claim, the Sixth Circuit in L.W. accepts many of the legislation’s speech acts at face value, including assertions that the treatments under review are “developing” and “experimental,” stating that a “presumption of legislative authority to regulate healthcare gains strength in areas of ‘medical and scientific uncertainty.’” The Sixth Circuit further declined to follow other courts in expanding the holding of Bostock beyond Title VII, rejecting heightened scrutiny for discrimination against transgender individuals. The strength of

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238 Preliminary Injunction, supra note 235, at 4.
239 Id. at 5–6.
240 L.W. v. Skrmetti, 73 F.4th 408, 422 (6th Cir. 2023); see also L.W. v. Skrmetti, 83 F.4th 460, at 491 (6th Cir. 2023).
241 L.W., 73 F.4th at 415.
242 Id.
244 L.W., 83 F.4th at 491.
245 Id. at 488 (describing treatments as “unsettled, developing, in truth still experimental”); see also id. at 489 (crediting the “considerable evidence” presented in the legislative findings of both states regarding the risks of treatment).
246 Id. at 473 (quoting Gonzalez v. Carhart, 550 U.S. 124, 163 (2007)).
247 Id. at 484; see also Roe v. Critchfield, No. 23-2807 at *6, *20 (9th Cir. Oct. 26, 2023). An Idaho statute regulating the use of bathrooms is the subject of litigation, which is stayed while on appeal to the Ninth Circuit. The lower court appeared to credit legislative findings as part of its decision to deny a preliminary injunction. Relying on “the inherent difference between male and female bodies,” the district court found privacy to be sufficient justification for the statute under Equal Protection analysis, while also declining to extend Bostock to Title IX.
the performative speech acts in the legislative findings of both statutes is evidenced by their acceptance in the appellate decision.

Tennessee’s mandated restroom policy sign was challenged in federal court as a violation of the First Amendment rights of the businesses subjected to the requirement. In *Bongo Productions, LLC v. Lawrence*, the federal district court agreed first to issue a preliminary injunction against the act on that basis, and then to grant the Plaintiff’s motion for summary judgment, permanently enjoining the mandate’s implementation. The court’s decisions take on the question about the expressive and performative nature of language about gender.

Because the Tennessee act compels specific speech on the part of private businesses, the court finds that it implicates the First Amendment right not to speak, and will only be upheld if the mandate is “narrowly tailored to serve compelling state interests.” The court found the exception that applies to laws mandating disclosure of “purely factual and uncontroversial information” in a commercial setting to be unavailing. In noting that the mandated language conveyed a particular ideological message about gender, the court concluded, Through this language, the court not only exposes the cloaked performative speech act of the government—which claimed through its assertion of this exception that its mandated words were merely constative—but also undertakes its own performative speech act in the uncloaking of the government’s.

In arriving at its conclusion that the mandate for the sign infringes free speech, the court explains that the content of the message is neither factual, because of its misleading qualities, nor uncontroversial. Supporting the controversial nature of the sign’s message, the court notes “that there is a well-established recent history of controversy, not merely around gender identity generally, but specifically surrounding the issue of how gender identity relates to public restrooms.” In making this acknowledgement, the court undoes some of the speech acts in the original legislation. Of course, the outcome of the case means that the original speech acts are ineffective. In

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249 Bongo Prods., LLC v. Lawrence, 603 F. Supp. 3d 584, 594 (M.D. Tenn. 2022).
250 Id. at 604 (quoting EMW Women’s Surgical Ctr., P.S.C. v. Beshear, 920 F.3d 421, 425 (6th Cir. 2019)).
251 Id. at 605 (quoting Zauderer v. Off. of Disc. Couns., 471 U.S. 626, 651 (1985)).
252 Id. at 606.
253 Id. at 607.
254 Id. at 608.
addition, the court’s acknowledgment of a variety of appropriate approaches to maintaining sex-separated restrooms helps neutralize the animus and stigma of the original act.

The mixed response in federal and state courts to the legislation that makes up much of the backlash suggests that the effects of the backlash, while muted in some quarters, will remain potent in others. Even when successfully challenged, these acts and executive orders have performative effects. They create counterfactual social narratives about victims and peril, and they serve to entrench belief in a strict gender binary so that those who fall outside of it are rendered abject and unrecognized.

V. PRONOUNS

Efforts have also been made, both through litigation and legislation, to limit the rights of transgender students to be addressed by the pronouns and title with which their gender aligns. As discussed earlier, names and pronouns are powerful speech acts in helping define identity and gender.

The Sixth Circuit case of Meriwether v. Hartop illustrates the performative nature of both language about gender and the language of law. There, the court gives voice to the view that efforts recognizing and promoting the interests of transgender individuals may have performative effects on those who are discomfited by these assertions of gender identity. In recognizing the claims of the professor, who was disturbed by the request that he identify a student by her preferred gender, the court makes constative statements about gender and belief that have the performative effect of converting an error of gender attribution into legally protected speech. As explained in Part II, the legal outcome of the case—its decision to reverse the grant of the Defendant’s motion to dismiss—can be justified on the basis of errors of law made by the district court and needlessly inflammatory statements made by university administrators that were part of the record. However, the court goes beyond these points to issue a more thorough endorsement of the professor’s claim that his expression of viewpoint and religious belief were suppressed. In this respect, the case merits attention as a prominent development in the backlash described in this Article. Indeed, the decision offers a significant example of the role of speech acts in enforcing and naturalizing the backlash against transgender rights.

By endorsing the perspective of the aggrieved professor, the Meriwether decision offers a strong illustration of speech acts operating in the context of power to fuel a backlash against transgender individuals. The dispute arises because the professor is reacting to a policy the university put in place, requiring that instructors address students by pronouns that reflect their gender

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255 See supra text accompanying notes 46–47.
257 See supra text accompanying notes 74–77.
identity. This policy, we learn, is designed, at least in part, to protect the interests of transgender students against discrimination. Professor Meriwether enjoys privilege and power in the status quo not only because he is cisgender, but because of his role as a professor, which has allowed him to experience relative freedom in structuring his relationships with his students. He responds negatively to the university’s requirement to address those out of power with respect and equal dignity, describing it as an assault on his own deeply entrenched beliefs that “God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and that it cannot be changed,” a claim of religious discrimination the court endorses. Professor Meriwether has thus completed the power reversal emblematic of backlash politics, proclaiming himself the aggrieved victim of the efforts to address the victimization of the less powerful. His success in completing this reversal is enabled by a series of speech acts by both himself and the court, the effectiveness of which are enhanced by both the power he has in his role as professor and by the court’s institutional power.

In its opinion, the court uses constative descriptions of the Plaintiff’s as well as the university’s positions in a performative manner to advance the Plaintiff’s case. There are at least two constative layers, and consequently two performative layers in the case. At one level, there is Professor Meriwether, quoted as describing his beliefs, his teaching philosophy, and his approach to gender identity. At another level, there is the court commenting on and analyzing these views. However, below each of those layers is the actual exchange in the classroom that created the dispute. This exchange itself reveals the performative nature of language about gender, which informs each of the additional layers. The way in which the exchange is presented and mediated through the other layers illustrates the performative function of constative language and plays a significant role in the opinion’s efforts to cast doubt on the validity of the transgender student’s own claims and to bolster the professor’s claim of engaging in protected expression by ignoring the student’s claims.

A starting point for understanding the highly mediated nature of the court’s discussion is to consider the court’s own choices with respect to pronouns and gendered address. The Plaintiff professor is referred to throughout as “he,” an uncontroversial choice because he appears to identify with that pronoun. In keeping with normal usage, the court uses that pronoun instead of the name in any circumstance in which there was an appropriate antecedent. For example: “Professor Meriwether is also a devout Christian. He strives

258 Meriwether, 992 F.3d at 498.
259 Id. at 510.
261 Meriwether, 992 F.3d at 498.
to live out his faith each day.”262 By contrast, the court uses no gendered pronoun in referring to the student at the center of the controversy. Indeed, although the student, an intervenor in the case, is given the appellation “Jane Doe” in the caption of the case, she is referred to throughout the case as simply “Doe.”263 We infer from the context that she is a transgender woman, though that is never made explicit in the text of the opinion. Every time ordinary language would call for a pronoun, the court merely repeats Doe’s name. For example: “Meriwether called on Doe using Doe’s last name.”264 The court seemingly seeks to back up its assessment that the choice to not honor an individual’s preferred pronoun is expressive by engaging in this parallel speech act to render Jane Doe genderless. This choice also makes Doe a blank slate rather than an individual with an existing gender identity, which then helps the court decide that Meriwether’s choice to deny Jane Doe’s gender identity is more understandable and less egregious.

The classroom exchange, as mediated through Plaintiff’s affidavits and the court’s descriptions, reveals the performative nature of constative descriptions about gender. These rhetorical maneuvers, on the part of the Plaintiff and the court, bolster the Plaintiff’s claim to being in the right by sticking to his initial error in gender ascription, thus transforming his reflexive assumptions into meaningful expression. Relying on Meriwether’s filings, the court describes the causative chain of the encounter with the following language:

In that first class, one of the students Meriwether called on was Doe. According to Meriwether, “no one . . . would have assumed that [Doe] was female” based on Doe’s outward appearances. Thus, Meriwether responded to a question from Doe by saying, “Yes, sir.” This was Meriwether’s first time meeting Doe, and the university had not provided Meriwether with any information about Doe’s sex or gender identity.265

The passage, in the way it excerpts and summarizes Meriwether’s experience illustrates the mechanisms of gender ascription. A person is identified (“called on”). That person is then gendered, but not just in a tentative way, as one might form an initial opinion about another person’s age, but in a definitive way that references cultural gender norms. It is not just that Meriwether assumed the student was male; no one, in his retrospective opinion, would have assumed otherwise. It was experienced, in the telling, as an automatic, and seemingly natural reaction. The gendered form of address followed as a logical consequence (“Thus”). This assessment of gender, and a response to it with either pronoun, honorific, or address is a common one. It happens in

262 Id. at 499.
263 See id. at 492–518.
264 See id. at 500.
265 Id. at 499 (citations omitted).
many contexts automatically and in a manner that often seems devoid of performative meaning.\textsuperscript{266} The process is performative, as much as it is performed by all of us every day, to the extent that the process establishes a dynamic between the addressee and the addressee, and a sharp perlocutionary experience of discord in the addressee when the gender ascribed contradicts the individual’s gender identity.

But the interaction in the case has an even more performative character. As described, the initial interaction began when the professor responded to a question Jane Doe asked in class by answering, “Yes, Sir.” Although the case presents the controversy as one of pronoun use, and use of honorifics, this first encounter is one in which a form of unnecessary gendered address is used. “Yes” alone would have sufficed to convey an affirmative answer to the question, without “Sir.” But the professor chose to add language conveying both gender and formality. According to the court, Meriwether addressed his students as “Mr.” or “Ms.,” as well as “Sir” or “Ma’am” in part because he believed “this formal manner of addressing students . . . foster[s] an atmosphere of seriousness and mutual respect.”\textsuperscript{267} Here, formal address is meant by the professor to have a performative effect on his students and one that purports to be anti-hierarchical by fostering “mutual respect.” The facts of the case illustrate one way in which this performative effect can misfire: when the gender attribution of the honorific is contrary to the individual’s identity, it hardly fosters mutual respect. In addition, it is worth questioning whether the illocutionary and perlocutionary effect of this form of address within the power dynamic of the classroom is ever to foster mutual respect. Contrary to Professor Meriwether’s claim, these terms of formal address may actually reinforce classroom hierarchies while merely play acting “mutual respect.”

One reason that these expressions operate against mutuality is that their deployment within the context of the classroom is parodic. Because the classroom is inherently hierarchical—the professor has the power to grade and to validate—the use of these terms is more accurately perceived by students as a play act that only re-emphasizes the hierarchy it pretends to displace. In addition, its use in the modern classroom further re-enacts a historical play act that was both hierarchical and exclusionary. Borrowing from a law school tradition (in this undergraduate class), the practice harkens back to an era in which all faculty and students were white men.\textsuperscript{268} In that context, the parodic use of sir and mister might have felt like a benign signal that the addressees were future members of a club in which the mutual respect dramatized in the classroom would become real. For those in the modern classroom who identify as women and for people of color generally, the terms may have a more complicated performative effect, even when the gender valence aligns with

\textsuperscript{266} See Jeffner Allen, \textit{A Review of Gender: An Ethnomethodological Approach} Suzanne J. Kessler and Wendy McKenna, 3 \textit{HUM. STUD.} 107, 112 (1978).

\textsuperscript{267} Meriwether, 992 F.3d at 499 (alteration in original).

\textsuperscript{268} Kennedy, \textit{supra} note 260, at 605.
identity. For example, being addressed in the classroom as “Miss” or “Ma’am” may feel for a person identifying as female like a double dress-up: I am being treated as an equal which I currently am not, and I am being treated the way a man has historically been treated, when I am not a man.

The seemingly factual—and constative—description of the first classroom encounter set out above is key for both Meriwether and the court to establish that Meriwether has certain rights to continue to disregard Jane Doe’s gender preference even after she corrects him. This performative connection, however, relies on a combination of the constative statements about the classroom encounter and other constative statements about Meriwether’s belief system. Earlier in the opinion, the court quoted Meriwether to describe his religious beliefs, which animate the controversy: “Meriwether believes that ‘God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual’s feelings or desires.’”

This earlier passage is constative on multiple levels. First, it is presented, by both court and Plaintiff, as a factual description of Meriwether’s beliefs. Second, it is presented as a constative description of God’s creative actions. The performative work of this set of constative statements is accomplished by the adverb “regardless,” which operates to create a hierarchy in a manner similar to the mandated restroom sign in the Tennessee legislation.

In the context of the Meriwether case, that adverb creates a hierarchy between one person’s beliefs and the other’s, which are to be disregarded.

The later constative statement, “no one would have assumed that [Doe] was female,” provides the supposed basis for enacting the ensuing disregard of Doe’s gender identity that Meriwether’s stated beliefs are said to require. The expression about Doe’s appearance is constative in the same way as it would be to say, “no one would have said it was a warm day,” an expression that only describes a sense impression and has no effect on the weather. However, this moment of assumption arising from Jane Doe’s appearance is, remarkably, the only basis provided in the court opinion for establishing any disconnect between Meriwether’s belief about Doe’s gender and Doe’s asserted gender identity. As the court notes, at the time of this encounter, “the university had not provided Meriwether with any information about Doe’s sex or gender identity.”

Where Meriwether’s stated religious belief about gender references the moment of conception, and presumably relates to the arrangement of chromosomes that occurs at that moment, his sole basis for concluding that Doe had been created male at conception turns out to be cul-

269 Meriwether, 992 F.3d at 498.
270 See supra text accompanying notes 207–20. There, those using the restroom whose biological sex deviated from the notation on the door were said to be doing so “regardless” of the notation.
271 Meriwether, 992 F.3d at 499.
tural norms about her current outward appearance. For that reason, this statement about Doe’s appearance performs an unwarranted justification for Meriwether’s actions if his beliefs rely on chromosomal information that he does not possess, creating an interpretive gap between the predicate for his beliefs and the actual facts on which he relies. Had the court instead stated that Meriwether’s deeply held belief was to call anyone with a masculine appearance by masculine pronouns, it would not have provided the same level of persuasiveness that his disregard of the student’s preferences was protected speech. Instead, the court’s rhetoric leaps the interpretive gap that Meriwether has created in a performative fashion to establish a religious basis for the error.

A similar interpretive leap occurs in a following passage, where the court describes Meriwether’s actions once Doe informed him of her preference for address, honorifics, or pronouns aligning with her female gender. The court states that Meriwether “paused before responding because his sincerely held religious beliefs prevented him from communicating messages about gender identity that he believes are false.”\(^\text{272}\) Again, this is a constative statement about the facts; it explains what he did and how he felt and the causative relationship between those two aspects. However, the word “because” and its suggestion that the pause was supported by the religious beliefs previously described does performative work in this statement for both the court and for Meriwether. It is important to remember that at this juncture in the events, as described by the Plaintiff in the record and quoted by the court, Meriwether had no further information about Doe’s gender at this time than his assumptions about her appearance on the one hand, and her own assertion of her gender identity on the other hand. So, his only basis for believing that Doe’s gender identity did not align with the sex that God had fixed at conception (his previously stated religious belief) is that he credited his own assessment of her appearance over her correction. If Meriwether had instead assumed that he had accidentally used the wrong address for a cisgender female with a masculine appearance, a response to the correction presumably would not have implicated his religious beliefs. The word “because” transforms his appearance-based assumptions about gender into religious meaning.

Despite the logical lacunae in this passage, or perhaps because of them, this episode provides a paradigmatic example of the mechanisms of gender attribution that occur regularly in everyday life. In assessing someone’s gender either casually or in circumstances in which gender is thought to be important, such as finding a person of a seeming “opposite” gender in sex-sep- rated bathroom, we attribute gender not on the basis of knowledge of that person’s chromosomes or intimate anatomy, but instead on the basis of outward appearance. We then assume, as Meriwether did, that the outward appearance is an accurate proxy for the so-called “biological” markers. In this manner, the Tennessee legislator who sought to enact legislation to prevent

\(^{272}\) Id.
encountering a member of the “opposite sex” in a restroom was operating on a similar set of assumptions.\(^{273}\) When we make assertions based on those assumptions, like the court in *Meriwether*, we are engaging in performative speech acts that instate these gender assumptions on the individuals addressed, even when they are stated in constative form.

A key dispute in the case is whether pronoun usage in general is sufficiently expressive so that erroneous use of pronouns or honorifics can be endowed with First Amendment rights. In essence, the debate between the parties lies in the question of whether the professor’s use of a pronoun is performative. If it is routine and ministerial, it is not performative; if it conveys meaning, it is performative and subject to First Amendment protection. In addition to the assumption that the student’s appearance accords with her sex at conception and is at odds with her requested pronouns and honorifics, the Plaintiff’s contention that the student’s request and the university’s requirement to address her as female has infringed his rights lies in further performative speech acts relating to pronoun use, cloaked again as constative statements. To support the contention that pronoun use is expressive, the Plaintiff and the court conflate two ideas: that addressing a transgender student in the classroom by her preferred pronoun is the same as making a performative statement endorsing her gender identity.

The university argues that the routine use of pronouns that align with the students’ preferences is not the equivalent of such an endorsement; rather it is “ministerial.”\(^{274}\) In this view, using the preferred pronoun is no different in conveying a message than using the name listed for each student in calling roll. The court instead asserts that the university has ceded the point about pronoun use being performative by the imposition of the very rule it uses as the basis to discipline the professor. The court states that, “The university recognizes that [titles and pronouns carry a message] and wants its professors to use pronouns to communicate a message: People can have a gender identity inconsistent with their sex at birth.”\(^{275}\) While accusing the university of engaging in a performative act, the court’s ascription of this particular message to the university is itself performative. It is possible that the prescribed message of using a person’s preferred pronoun is simply, “you asked me to call you by this pronoun, and so I am following those wishes.” It could also even be, “The University wants to avoid liability for discriminating against a legally protected class, and acceding to people’s wishes in regard to pronouns helps in that effort.”

One of the ironies of the *Meriwether* case and the various responses to it is that there is a transposition in the positions taken about whether pronoun use is routine and thus non-performative, or full of meaning and therefore

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\(^{273}\) *See supra* text accompanying notes 207–10.

\(^{274}\) *Meriwether*, 992 F.3d at 507.

\(^{275}\) *Id.*
performative. Because Professor Meriwether asserts that his ascription of gender through pronoun use is expressive of beliefs at the core of First Amendment protection, and thus forms the basis for his free speech claim against the university, the university argues the opposite: that the university’s policy promoting use of pronouns and honorifics that align with an individual’s gender identity is routine and ministerial and thus compliance with that policy is not performative at all.\textsuperscript{276} The irony lies in the fact that an important rationale for the university having a pronoun policy in the first place is to prevent the negative performative effects that misgendering causes, particularly for transgender individuals.\textsuperscript{277} The irony is further highlighted by the outcome in\textit{ Bongo}, where the court struck down a law that required businesses to post a sign with mandated language commenting on the policies of the establishment with respect to inclusive bathroom policies.\textsuperscript{278} There the court relied on the controversial nature of gender identity and bathroom policies to hold that the compelled speech violated the First Amendment rights of the affected businesses that wished to respect the choice of individuals to use the bathroom associated with their gender identity.\textsuperscript{279} Meriwether argues similarly that the controversial nature of gender identity and pronoun use makes the compelled speech of addressing students according to their gender identity equally problematic.\textsuperscript{280}

This irony or contradiction only exists, however, if one accepts, as the court does, that the importance of pronouns is reciprocal. By the court’s reasoning, if being addressed by the pronoun one prefers is meaningful to the addressee, and is meaningful because of important public policies, then ignoring that preference is equally meaningful to the one who refuses to use the preferred pronoun. Indeed, the court relies on controversies that have arisen in other contexts when individuals’ preferred pronouns have not been used to assert that “[p]ronouns can and do convey a powerful message implicating a sensitive topic of public concern.”\textsuperscript{281} However, Professor Meriwether and the court are only able to convert the choice by Meriwether to ignore the student’s preferred pronoun as commentary on a controversial subject by a series of performative speech acts. These speech acts establish the reciprocity required for asserting that pronoun use by the addressee is expressive, and they conflate the act of using the wrong pronoun in the classroom with the rationale for so doing.

The court’s position that pronoun use is meaningful for the professor relies on the assumption that the meaning of personal pronouns is reciprocal

\textsuperscript{276} \textit{Id.}
\textsuperscript{277} \textit{Id.}
\textsuperscript{278} \textit{Bongo Prods., LLC v. Lawrence, 603 F. Supp. 3d 584, 609 (M.D. Tenn. 2022); see also supra} notes 253–54 and accompanying text.
\textsuperscript{279} \textit{Id.} at 608–09, 611.
\textsuperscript{280} \textit{Meriwether}, 992 F.3d at 506.
\textsuperscript{281} \textit{Id.} at 508.
between addressor and addressee. However, this is not necessarily the case. The meaning to me of the pronoun I choose may be profound because it goes to my own identity, but the meaning to you of the pronoun I choose is not nearly so profound because it does not or should not affect your own sense of identity. Similarly, the meaning to me of my name may also be profound; it may convey for me aspects of my own identity related to family and culture. But my name on a roll sheet read out loud by you, would carry none of that same meaning for you.\footnote{An example about a naming error I experienced helps illustrate this point: I was once cited approvingly in a book chapter by an author I much admire with my name incorrectly stated as “Susan Evita Keller.” My reaction to this error, which included a complex mixture of chagrin, humor, and pride (I assumed the replacement of my middle name with Evita occurred because I had written about Madonna, the star of the movie version of the “Evita” musical), all of which was meaningful to me, did not convert the author’s error into something that was expressive of anything to her except the ministerial act of citation.}

It is on this basis that the university can hold that getting someone’s pronoun correct is very important for the addressed individual while simultaneously asserting that the act of using that pronoun correctly by the professor is ministerial. The power dynamic across which the pronoun use occurs further highlights the non-reciprocal nature of the transaction. When a person in power misidentifies someone either by the wrong name or the wrong pronoun, that may have perlocutionary effects, often unintended, on the one addressed that are incommensurate with the meaning of the experience for the one making the error.

The Meriwether court gathers evidence for its claim that acceding to a person’s preferred pronoun choice is expressive and controversial by citing the negative reactions that occur when the preference is ignored. In United States v. Varner,\footnote{United States v. Varner, 948 F.3d 250 (5th Cir. 2020).} a case cited by the Meriwether court as evidence of the controversial nature of pronoun usage and its public importance,\footnote{Meriwether, 992 F.3d at 508.} the Fifth Circuit considered a request by an appellant to address her by the pronoun that aligned with her gender identity.\footnote{Varner, 948 F.3d at 254.} The Varner court replies both that there is no precedent for obligating courts and litigants to use a party’s preferred gender, and that to “compel” such usage, or even to honor the request would “raise delicate questions about judicial impartiality,” and could “unintentionally convey [the court’s] tacit approval of the litigant’s underlying legal position.”\footnote{Id. at 256.} The expressive nature of pronoun usage is implicated in the Varner decision in two different ways. First, the appellant’s petition asking for the use of appropriate pronouns illustrates the performative effects of mis-gendering. She writes, “I am a woman and not referring to me as such leads
me to feel that I am being discriminated against based on my gender identity.” 287 It is the appellant’s contention that being misgendered has the perlocutionary effect of making her feel a victim of bias. By contrast, the majority takes the view that using the party’s preferred pronoun is the choice that potentially conveys bias (i.e., that agreeing to the appellant’s request will have the perlocutionary effect of creating the appearance of bias). It is this symmetrical view of the meaning of the pronoun choice that aligns Varner with the position taken in Meriwether, suggesting that the perlocutionary effects of a pronoun choice on the addressee renders the court’s agreement to her request expressive because of those meaningful effects.

In order to get to the position that acceding to a request conveys bias, the Varner majority engages in its own performative speech acts. In refusing the litigant’s request, the court states, “But Congress has said nothing to prohibit courts from referring to litigants according to their biological sex, rather than according to their subjective gender identity.” 288 Though stated in constative form, this statement is a performative effort to embrace and thereby instill a familiar dichotomy between an underlying “biological sex” and an individual’s “subjective gender identity.” By prioritizing the seeming objective fact of biological sex in contrast with a gender identity described as “subjective” and impliedly less worthy of weight for that reason, this statement helps set up the court’s view that agreeing to call the appellant by her chosen pronoun would be construed as bias. Only once biological sex is established as the default and therefore neutral basis for pronoun ascription, can deviation from that default be seen as improper favoritism. If the individual’s stated preference is seen as an appropriate default, then complying with that preference would convey no message of bias at all.

According to the Meriwether court, controversies such as the one illustrated by Varner “point[] to one conclusion: Pronouns can and do convey a powerful message implicating a sensitive topic of public concern.” 289 However, this statement performatively assumes without basis that expressive reactions to offensive behavior vest the behavior that sparks the reaction with expressive content. 290 In this respect, the applicability of the principle announced in the Bongo case is inapt. In Bongo, the businesses were required to post a specific message dictated by the state that conveyed a distinct position on a controversial topic, which made it impermissible compelled

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287 Id. at 259.
288 Id. at 256.
289 Meriwether, 992 F.3d at 508.
290 There are many topics that can illustrate this point. In my suburban community, a topic of great controversy is the dangers presented by middle school students riding electronic bikes in a manner that endangers themselves and others and flouts rules of the road. But the fact that adults on social media have lots to say about the riders’ supposed ill manners and disregard for others does not convert the running of a stop sign into an expressive act on the part of the teenage rider.
speech. If addressing an individual by their preferred pronoun does not convey a distinct message about gender identity, the same conclusion would not follow.

The Meriwether court suggests not only that pronoun use by a classroom professor is expressive, but that what it expresses is sufficiently meaningful that it goes to "core academic functions." That is because the court holds that "professors at public universities retain First Amendment protections at least when engaged in core academic functions." By calling Jane Doe "Sir," the professor is not just saying, "I don't believe you are female," he is saying, according to the court, "I have some important views about gender I seek to convey." For the court to be able to make that connection, to cover that gap in meaning between what motivates the pronoun choice and what the pronoun choice conveys, more performative speech acts are necessary. For example, the court states that "[t]hrough [Meriwether’s] continued refusal to address Doe as a woman, he advanced a viewpoint on gender identity." Again, although motivated by his viewpoint on gender identity, the refusal itself does not directly advance this position in terms of conveying all that information to a listener. But here, the court uses grammatical structure to create an ambiguity that conflates the motivation with the message: he is not advancing a viewpoint by the refusal (which would not be accurate), but rather through the refusal. Nonetheless, the court concludes that "[t]he 'focus,' 'point,' 'intent,' and 'communicative purpose' of the speech in question was a matter of public concern." Similarly, the court states that the First Amendment interests are sufficiently strong under the relevant balancing test, because the speech in question—the use of Sir, Mr. and he—relates to [Meriwether’s] core religious and philosophical beliefs. The easy phrase "relates to" obscures the key difference between what motivates the choice and what the choice expresses.

The court also uses performative sleights of hand to support Meriwether’s contention that pronoun refusal is performative of expressive ideas in a manner quite similar to how Meriwether formed the belief (on which he acted)

291 Bongo Prods., LLC v. Lawrence, 603 F. Supp. 3d 584, 605 (M.D. Tenn. 2022).
292 Meriwether, 992 F.3d at 505.
293 Id.
294 Id. at 509.
295 Id. (quoting Farhat v. Jopke, 370 F.3d 580, 592 (6th Cir. 2004)).
296 Id. at 508. The Meriwether court uses the Pickering-Connick framework, which it describes as follows: "Under that framework, we ask two questions: First, was Meriwether speaking on 'a matter of public concern?' Connick v. Myers, 461 U.S. 138, 146, 103 S. Ct. 1684, 75 L.Ed.2d 708 (1983). And second, was his interest in doing so greater than the university's interest in 'promoting the efficiency of the public services it performs through' him? Pickering v. Bd. of Educ., 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968)."
297 Id. at 509.
that Doe was not really female. The following passage helps the court establish that pronoun use goes to “core academic function”:

As [the university and the intervenors] would have it, the use of pronouns has nothing to do with the academic-freedom interests in the substance of classroom instruction. But that is not true. Any teacher will tell you that choices about how to lead classroom discussion shape the content of the instruction enormously. That is especially so here because Meriwether’s choices touch on gender identity—a hotly contested matter of public concern.298

The statement embedded within this passage—“Any teacher will tell you that choices about how to lead classroom discussion shape the content of the instruction enormously”—is an illustration of the use of the same technique of reference to cultural unanimity as Professor Meriwether’s statement that “no one . . . would have assumed that [Doe] was female.”299 In both instances, there is a reference to a set of unspecified but united others (no one, any teacher) and a constative statement about their belief. That constative statement is used performatively to bolster the underlying claim that Doe was really male, or that pronoun choices in the classroom are meaningful for academic freedom. Furthermore, the statement assumes, but elides, a connection between pronoun use and “choices about how to lead classroom discussion.” Although Meriwether may have made a conscious choice to use honorifics as a pedagogical tool, how the gender valence of the honorific advances the learning goals in a political philosophy class is not at all specified. The vague verb “touch,” in stating that “Meriwether’s choices touch on gender identity,” does the work here of connecting his misgendering to a topic that could be part of a core academic function in a class that addressed gender directly, but there is no indication that gender was part of the syllabus in the relevant course.

The court also uses similar techniques to mischaracterize the university’s arguments to make them easier to shoot down. For example, the university relied on the Sixth Circuit’s decision in Harris300 (which was later affirmed as Bostock by the U.S. Supreme Court) for the proposition that discrimination against transgender students is illegal.301 The point of the original citation in the university’s brief was to support its claim that protecting transgender students from illegal discrimination is a compelling interest for regulating speech.302 The court responds,

But Harris does not resolve this case . . . . The panel did not hold—and indeed, consistent with the First Amendment, could not have held—that the govern-

298 Id. at 506.
299 Id. at 499, 506.
301 Meriwether, 992 F.3d at 510.
302 Id.
ment always has a compelling interest in regulating employees’ speech on matters of public concern. Doing so . . . would allow universities to discipline professors, students, and staff any time their speech might cause offense.303

Of course, *Harris* had nothing to say about regulating employee speech because the case concerned illegal discrimination with respect to the terms and conditions of employment, nor did the university cite it for that proposition. In addition to mischaracterizing the point of the citation, the *Meriwether* court generalizes the university’s specific argument into a claim of universal application—“that the government *always* has a compelling interest in regulating employees’ speech on matters of public concern” and that the university seeks to discipline its members “*any time* their speech might cause offense”—that again mischaracterizes the university’s arguments.304 Through its constative statements inaccurately describing and exaggerating the university’s position, the *Meriwether* court performatively undermines the persuasiveness of the university’s position.

Like the backlash litigation with which it is aligned, the *Meriwether* case uses performative speech acts in constative form to validate the grievances of those who are cisgender. The examination of these speech acts in detail reveals their logical deficits and hopefully undermines their potency.

Following the *Meriwether* decision, a few states also sought to codify its holding for the purpose of limiting the ability of educational institutions to require educators to respect the preferred pronouns and titles of their students. For example, Arkansas passed the Given Name Act in 2023, which includes in its findings the following statement echoing all the components of the *Meriwether* holding:

The selection and use of pronouns in classrooms, on campuses, and elsewhere is a matter of free speech and academic freedom because it communicates a message on a matter of public concern and shapes classroom discussions and debates, and is not merely an administrative or ministerial act by faculty members, teachers, and employees of public schools.305

Despite this effort to enshrine pronoun use as expressive, the act also prohibits teachers or other employees from addressing underage students by their preferred pronoun when the pronoun “is inconsistent with the . . . [student’s] biological sex” unless there is written parental permission,306 suggesting that pronoun use is only expressive when it violates rather than conforms to a transgender individual’s gender identity. The act further states that teachers

303 Id.

304 Id. (emphasis added).


306 Ark. H.B. 1468 § 1(d)(1)(A); see also Tenn. S.B. 468 § 1(b) (providing similar protections); S.B. 150, 2023 Gen. Assemb., Reg. Sess., § 5(c) (Ky. 2023) (“A local school district shall not require [the use of pronouns] that do not conform to that particular student’s biological sex . . . .”).
may, with impunity, decline to use the student’s preferred pronoun “inconsistent with the person’s biological sex” even where such permission has been provided.\(^{307}\)

In Florida, the legislature issued an even more specific performative speech act, stating: “It shall be the policy of every public K-12 educational institution . . . that a person’s sex is an immutable biological trait and that it is false to ascribe to a person a pronoun that does not correspond to such person’s sex.”\(^{308}\) By declaring what is “false,” this provision operates as a more obviously performative speech act. This act does not purport to consider expressive rights of educators, but rather expressly prohibits school personnel from “provid[ing] to a student his or her preferred personal title or pronouns if such preferred personal title or pronouns do not correspond to his or her sex.”\(^{309}\) These acts, like the Meriwether decision itself, use speech acts to in-state a sexual binary that privileges the expressive rights of its adherents over those whose identity calls that binary into question.

CONCLUSION

Austin’s nomenclature regarding speech acts provides a useful heuristic for understanding legal texts. It is true that the distinctions between performative and constative speech acts that Austin labors to make meaningful break down when applied to legal texts, particularly because of the abundant use in both legislation and appellate decisions of constative speech acts that do performative work. Nonetheless, the distinction he creates aids in the identification of these cloaked performatives in legal texts. Similarly, an understanding of the performative nature of language about gender reveals the many ways in which legal texts use constative descriptions about gender to reinforce belief in a gender binary.

Uncovering the cloaked performatives in legal texts is valuable as a means toward undermining their potency. When stated in constative form, statements about the nature of gender identity actually gain performative felicity. For example, legislative findings that support outcomes based on purported science about biological sex, though constative, help convince the public and legislators within and outside the state of the appropriateness of the edicts. Similarly, the many ways in which the Meriwether court converts a mistake and a refusal into a core academic function through constative statements serve to establish the seeming appropriateness of the professor’s actions. There is evidence that the speech acts contained in the backlash bills, along with those contained in the political rhetoric promoting the legislation, have had real world effects on public perception. In an NPR/PBS NewsHour/Marist


\(^{308}\) H.B. 1069, 2023 Leg., Reg. Sess. § 2(1) (Fla. 2023).

\(^{309}\) \textit{Id.} at § 2(3).
poll released in June 2023, opinions about transgender rights have experienced a significant shift: by a 61 to 36 percent margin, respondents now favored a statement saying that “the only way to define male and female in society is by the sex listed on a person’s original birth certificate.” According to NPR, that represented “a 16-point net change in favor” of that definition from the previous poll in 2022. My hope is that when statements from the backlash materials are revealed to be performative, the understanding that they are creating the reality they purport to describe will go at least part of the way toward negating for the effectiveness of their performative effect.

Power dynamics play an important role in the processes discussed in this Article. Although not explicitly discussed by Austin, power is a necessary precondition for the felicity of performative texts. At a very basic level, political power is important; having the majority votes necessary to pass legislation is necessary for the felicity of the performative contents contained within that legislation. Similarly, power within relationships or power within societal relations will enhance the effectiveness of performative language.

Power is also a key element in defining and creating backlashes like the one considered in this Article. As previously discussed, backlashes are responses by those with privilege and power to the perceived erosion of that power by the advancement of those out of power. The vociferousness of the current backlash response to gains in transgender rights demonstrates that those participating in the backlash (or perceiving political value in participating in it) find the increased acceptance of and thriving by transgender individuals to be substantially threatening to their own investments in the gender binary. That in turn suggests that the rhetoric of the successful efforts of the previous several years to advance the interests and rights of transgender youth and adults has itself had perlocutionary performative effects on those generating the backlash.

Although the effects these earlier gains had on the deployers of backlash are unfortunate, it is also likely that the performative effects that the dismantling and undermining of rigid gender binaries have had will continue to be positive and powerful in other quarters. In order to help maintain those positive effects, it is necessary to be vigilant in exposing and hopefully undermining the effectiveness of cloaked performatives in legislation and cases that comprise the current backlash.

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310 Domenico Montanaro, Majority of Americans Say it was Wrong for the Supreme Court to Overturn Roe, NPR (June 21, 2023, 5:00 AM), https://www.npr.org/2023/06/21/1183253121/roe-dobbs-abortion-affirmative-action-gender-supreme-court [https://perma.cc/TCU9-SK6D].

311 Id.