

# Foreword: The Current State-Federal Dichotomy in Transgender Law

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Kylar W. Broadus\*

Trans individuals, like most marginalized groups have not benefited from the protection of the law in most areas in the United States. However, as a result of concerted advocacy over the past 30 years, 22 states, the District of Columbia, and 374 municipalities have codified laws and ordinances prohibiting discrimination against trans adults and children.<sup>1</sup> In addition, through a host of federal policies as well as legislation and case law from the local, state, and federal levels, the trans rights movement has witnessed considerable progress in the United States. However, since 2015, conservative political extremists and the religious right (herein “the right”) have stalled that progress at the state level.<sup>2</sup> Conservative groups have spearheaded and passed laws meant to target transgender communities, and children especially by, for example, systematically preventing them from participating in school in a way that conforms with their gender identity. This disruption from the right has impacted progressive legislation across the country, particularly in the South and Midwest.<sup>3</sup> Such intervention from the right is leaving trans people unprotected and unsafe.

On the federal level, transgender protections remain—including President Biden’s Executive Orders, Title VII, Title IX, hate crimes protections, gender-recognition on passports, social security and limited

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\* Kylar William Broadus is a Black transmale advocate, lawyer and former professor of Business Law at Lincoln University of Missouri. Broadus was one of the first plaintiffs in the early 1990s to bring a transgender employment discrimination claim under Title VII of the 1964 Civil Rights Act relying on *Price Waterhouse v. Hopkins*. Broadus’ case was summarily dismissed because transgender claims were not recognized under “sex stereotyping” claims or under Title VII as they are today. Broadus wrote and published *Evolution of Employment Discrimination* in 2006. In 2012, he was the first transperson to testify before the Senate Health, Education, Labor and Pensions Committee. A hearty thanks to the *Harvard C.R.-C.L. Law Review* editors, especially to Kennedy Breanne Green for a sense of imagination, patience, and keeping the faith.

<sup>1</sup> *Nondiscrimination Laws*, Movement Advancement Project, [https://www.lgbtmap.org/equality-maps/non\\_discrimination\\_ordinances/](https://www.lgbtmap.org/equality-maps/non_discrimination_ordinances/) [<https://perma.cc/9CPW-ANAR>] (last visited Oct. 21, 2023).

<sup>2</sup> Dwight Adams, RFRA: *Why the ‘Religious Freedom Law’ Signed by Mike Pence was so Controversial*, INDIANAPOLIS STAR (Apr. 25, 2018), <https://www.indystar.com/story/news/2018/04/25/rfra-indiana-why-law-signed-mike-pence-so-controversial/546411002/> [<https://perma.cc/HJS3-3673>]; see also Ana Swanson, *Map: More Than Half of States May Roll Back LGBT Rights*, WASH. POST (Mar. 31, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/03/31/map-more-than-half-of-states-may-roll-back-lgbt-rights/> [<https://perma.cc/DW53-Y6UV>]; Katy Steinmetz, *States Battle Over Bathroom Access for Transgender People*, TIME (Mar. 6, 2015) <https://time.com/3734714/transgender-bathroom-bills-lgbt-discrimination/> [<https://perma.cc/E6DF-DC2A>].

<sup>3</sup> See sources cited *supra* note 2.

protection under the Affordable Care Act.<sup>4</sup> Yet, the religious right and political extremists have aggressively attacked protections in state ordinances and nondiscrimination laws from 2015 to the present.<sup>5</sup> This *Foreword* will map the connection between state and federal trans protections and the backlash from the right while introducing and being in conversation with the other pieces from this symposium.

The first state trans nondiscrimination law was passed in Minnesota in 1993.<sup>6</sup> In the late 1990s, trans people were primarily organizing in individual, local trans communities across the United States. While I, along with many others, had done some organizing with other trans people and LGB people across the country, resources were limited for nationwide trans-specific advocacy. Additionally, years passed before we in the trans rights movement engaged in any cross-movement work. Collaboration with the women's rights and reproductive justice movement, the disability rights movement, and communities of color, however, helped to build the much broader movement we see today.

The early 2000s in the United States were key for the trans movement due to the beginning of increasingly widespread protections for trans people throughout the country. Indeed, going into the 2000s, there were very few legal protections for trans people in the United States.<sup>7</sup> However, the 2000s were monumental for the trans-specific rights movement, during which it gained momentum across the country. As a lawyer and activist in the movement, I along with others initially took a two-tiered approach to examining rights for trans people. As I noted above, the first tier of advocacy at the local level and state level traditionally pursued nondiscrimination ordinances in employment to build protections but to also educate people on trans issues, with the intent of building consensus for then pursuing change at the federal

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<sup>4</sup> Exec. Order No. 13,988, 3 C.F.R. § 419 (2022); Exec. Order No. 14,075, 3 C.F.R. § 392 (2023); see also Exec. Off. of the President, FACT SHEET: President Biden to Sign Historic Executive Order Advancing LGBTQI+ Equality During Pride Month, THE WHITE HOUSE <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/15/fact-sheet-president-biden-to-sign-historic-executive-order-advancing-lgbtqi-equality-during-pride-month/> [https://perma.cc/245T-NYWC] (last visited Jan. 10, 2024).

<sup>5</sup> See Joshua Block, *A New Front in the Religious Right's Fight Against Transgender People*, AM. C. L. UNION, (Sep. 16, 2008) <https://www.aclu.org/news/lgbtq-rights/new-front-religious-rights-fight-against-transgender-people> [https://perma.cc/E8BG-V3K6]; David Sehat, *The Religious-Liberty Attack on Transgender Rights*, BOSTON REVIEW (May 27, 2016) <https://www.bostonreview.net/articles/david-sehat-lgbt-transgender-bathroom-bills/> [https://perma.cc/TK9T-SYWK]; Adam Nagourney & Jeremy W. Peters, *How a Campaign Against Transgender Rights Mobilized Conservatives*, N.Y. TIMES (Apr. 17, 2023), <https://www.nytimes.com/2023/04/16/us/politics/transgender-conservative-campaign.html> [https://perma.cc/HB5Z-MZD2].

<sup>6</sup> Emma Margolin, *How Minneapolis Became First U.S. City to Pass Trans Protection*, NBC NEWS (June 3, 2016, 10:28 AM), <https://www.nbcnews.com/feature/nbc-out/how-minneapolis-became-first-u-s-city-pass-trans-protections-n585291> [https://perma.cc/G8YW-K2WG].

<sup>7</sup> *Transgender: 2000-2020 Gains & Losses*, RAINBOW TIMES (Jan. 9, 2020) <https://www.therainbowtimesmass.com/transgender-2000-2020-gains-losses/> [https://perma.cc/LY8V-VLUZ].

level.<sup>8</sup> At one time, it appeared that both approaches were working in tandem to advance protections for trans people.

Although trans people were being attacked on many fronts, school issues related to dress codes, transition, use of facilities that conform with gender identity, and more, were of particular concern to trans children and their parents. Activists educated local school boards on trans issues and worked with them to provide relevant protections for trans students in schools. It took almost a decade for local education efforts to pay off and result in new protections being passed.<sup>9</sup> Parents had to educate each school and each school had an individual policy regarding trans students such that protections might change from elementary school to junior high or high school, causing problems for students and parents. Relatedly, on the federal level, progress continued with landmark education cases like *Grimm v. Gloucester Cnty. Sch. Bd.*<sup>10</sup> *Grimm*, importantly, served as a testament to the strength of the local movement and ordinances; following years of litigation and activism, the Fourth Circuit Court of Appeals affirmed restroom access rights for transgender students under Title IX and the Equal Protection Clause and offered insights into the intersection of education and transgender rights.<sup>11</sup>

The effort for local legislation to affirm trans rights made steady progress until about 2015, when a shift occurred. That year, fifteen anti-LGBTQ bills across the country were introduced and enacted into law, representing a marked increase in trans rights opposition.<sup>12</sup> The situation in Houston was particularly antagonistic, with all-out attacks on attempts to pass local trans protections.<sup>13</sup> In 2014, the Houston City Council passed the Houston Equal Rights Ordinance, also known as HERO, which extended nondiscrimination protections on the basis of sexual orientation and gender identity.<sup>14</sup> Opponents of HERO organized a petition campaign to bring the ordinance

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<sup>8</sup> This is from the author's lived experience as a pioneer in the Trans Rights Movement starting in the early 1990's until the present.

<sup>9</sup> See *supra* note 7.

<sup>10</sup> *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *as amended* (Aug. 28, 2020).

<sup>11</sup> See Madeleine Carlisle, *In Win For LGBTQ Rights, Supreme Court Declines to Hear Appeal Challenging Landmark Trans Rights Ruling*, TIME (June 28, 2021 1:27 PM EDT), <https://time.com/6076455/supreme-court-transgender-bathroom-ban/> [<https://perma.cc/75T3-VYVZ>].

<sup>12</sup> See Wyatt Ronan, *2021 Officially Becomes Worst Year in Recent History for LGBTQ State Legislative Attacks as Unprecedented Number of States Enact Record-Shattering Number of Anti-LGBTQ Measures Into Law*, HUM. RTS. CAMPAIGN (May 7, 2021), <https://www.hrc.org/press-releases/2021-officially-becomes-worst-year-in-recent-history-for-lgbtq-state-legislative-attacks-as-unprecedented-number-of-states-enact-record-shattering-number-of-anti-lgbtq-measures-into-law> [<https://perma.cc/V4FF-6VBY>].

<sup>13</sup> See Manny Fernandez & Mitch Smith, *Houston Voters Reject Broad Anti-Discrimination Ordinance*, N.Y. TIMES (Nov. 3, 2015), <https://www.nytimes.com/2015/11/04/us/houston-voters-repeal-anti-bias-measure.html> [<https://perma.cc/4FD5-EE85>].

<sup>14</sup> See *id.*

to city-wide vote.<sup>15</sup> HERO was expected to pass the city-wide vote but was met with well-organized anti-trans resistance in the form of picketing and testimony.<sup>16</sup> The anti-trans resistance worked hard to win and did win when HERO failed to pass the city-wide referendum.

Adding fuel to these attacks on trans youth and state legislation, the work done to educate on trans issues seems to have been wasted. The far right and conservative legislators have ignored findings<sup>17</sup> by the American Medical Association, the American Psychological Association, the American Psychiatric Association, and the World Professional Association of Transgender Health, which have concluded that being trans is no longer a mental condition, which was the way it had been previously treated, ignoring the reality of trans lives.<sup>18</sup> All these organizations have built a strong consensus that transgender people don't have a "medical condition" requiring protocols for treatment. The far-right movement and conservative state legislators are virtually ignoring this information, pushing the narrative that transgender care is child abuse, experimental, dangerous, or chemical castration.<sup>19</sup>

As a result, at the state level, the coordinated attacks on trans children began to take even sharper focus. In 2021, the Arkansas and Tennessee state legislatures and school districts banned trans women in women's sports by law and school policy.<sup>20</sup> Florida followed Arkansas and Tennessee with its own state laws and school policies, including those that prohibited words related to identity being spoken in school.<sup>21</sup> In addition to Florida, Iowa

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<sup>15</sup> *See id.*

<sup>16</sup> Alex Ura, *Bathroom Fears Flush Houston Discrimination Ordinance*, TEX. TRIB. (Nov. 3, 2015), <https://www.texastribune.org/2015/11/03/houston-anti-discrimination-ordinance-early-voting/> [<https://perma.cc/4W4Z-M5RE>]; Lisa Gray, *The Deal with Transgender People and Bathrooms*, HOUS. CHRON. (Nov. 6, 2015), <https://www.houstonchronicle.com/local/gray-matters/article/Transgenders-and-bathrooms-6613673.php> [<https://perma.cc/AM68-QDW6>]. Additionally, the author followed this event as part of his advocacy and observed the protest that occurred in Houston when this legislation was presented and followed the process to the end.

<sup>17</sup> *See* Cole Parke, *The Christian Right on the Gender Frontier: The Growing Anti-Trans Offensive*, POL. RSCH. ASSOCS. (Oct. 5, 2016), <https://politicalresearch.org/2016/10/05/the-christian-right-on-the-gender-frontier-the-growing-anti-trans-offensive> [<https://perma.cc/5ES5-6KLF>].

<sup>18</sup> *See generally* Medical Organization Statement, Transgender Legal Defense and Educational Fund, <https://transhealthproject.org/resources/medical-organization-statements/>, [<https://perma.cc/8QCR-UCKZ>]; *American Psychological Association Statements*, TRANSGENDER LEGAL DEFENSE AND EDUCATIONAL FUND, <https://transhealthproject.org/resources/medical-organization-statements-american-psychological-association-statements/> [<https://perma.cc/NRJ4-8HEZ>].

<sup>19</sup> Daniel Trotta, *US Republican Transgender Laws Pile Up, Setting 2024 Battle Lines*, REUTERS (May 18, 2023, 6:45 AM), <https://www.reuters.com/world/us/us-republican-transgender-laws-pile-up-setting-2024-battle-lines-2023-05-18/> [<https://perma.cc/T5HF-XQHA>].

<sup>20</sup> *See* Catherine Whelan, *Tennessee Becomes 3rd State This Month To Enact Restrictions For Transgender Athletes*, NPR (Mar. 27, 2021 2:03 PM), <https://www.npr.org/2021/03/27/981913132/tennessee-becomes-3rd-state-this-month-to-enact-restrictions-for-transgender-ath> [<https://perma.cc/G8FN-6H98>].

<sup>21</sup> *See* Steve Contorno, *Florida bans teaching of gender identity and sexual orientation through 12th grade*, CNN (Apr. 19, 2023 3:01 PM), <https://www.cnn.com/2023/04/19/politics/florida-bans-teaching-gender-identity-sexual-orientation/index.html> [<https://perma.cc/B6KK-U8CS>].

passed “Don’t Say Trans” and “Don’t Say Gay” bills, which banned school board policies allowing trans children to use the appropriate sex-specific restroom and changing rooms.<sup>22</sup> That year, the number of bills surged, 19, with 144 being introduced, double the number from the previous year.<sup>23</sup> In 2022, 174 anti-trans bills were introduced in state legislatures.<sup>24</sup> Finally, in 2023, there were 583.<sup>25</sup> These numbers are just one example of a broader uptick in anti-trans activism in just the last three years.

An important step on the federal level was passed by Congress in 2009, the Matthew Shepard and James Byrd, Jr. Hate Crimes Act was a historic win for the trans rights movement, becoming the first federal legislative protection for trans people.<sup>26</sup> This was a LGBTQ+ federal rights law, which expanded the federal criminal code to criminalize conduct that causes bodily injury to others because of “religion, national origin, gender, sexual orientation, or disability.”<sup>27</sup> At that time, Congress had not been successful in passing other measures to address trans rights. For example, the Employment Nondiscrimination Act (ENDA), designed to protect LGBTQ+ employment rights, came before Congress in several sessions but failed to pass.<sup>28</sup>

Further, in 2012, the Obama Administration’s Department of Education Office for Civil Rights issued guidance under Title IX<sup>29</sup>—a law prohibiting sex-based discrimination in education—aimed at providing protection for trans students.<sup>30</sup> Title IX, itself an amendment to the Higher Education

<sup>22</sup> See Ileana Garnand, ‘Young People are Being Harmed’: the Effect of Anti-Trans Legislation, CTR. PUB. INTEGRITY (June 6, 2023), <https://publicintegrity.org/inequality-poverty-opportunity/young-people-harmed-anti-trans-legislation/> [<https://perma.cc/TZ4Y-ELBN>]; Valeree Dunn, *Iowa Safe Schools Responds After Iowa House’s “Don’t Say Trans” Bill Moves Forward*, CBS2IOWA (Feb. 15, 2023), <https://cbs2iowa.com/news/local/iowa-safe-schools-responds-after-iowas-dont-say-trans-bill-moves-forward> [<https://perma.cc/U3Q4-V5Y5>].

<sup>23</sup> *Tracking the Rise of Anti-Trans Bills in the U.S.*, TRANS LEGISLATION TRACKER, <https://translegislation.com/learn> [<https://perma.cc/XK3F-LE6J>].

<sup>24</sup> *2022 Anti-Trans Legislation*, TRANS LEGISLATION TRACKER, <https://translegislation.com/bills/2022> [<https://perma.cc/BX6R-C27G>].

<sup>25</sup> *2023 Anti-Trans Legislation*, TRANS LEGISLATION TRACKER, <https://translegislation.com/bills/2023> [<https://perma.cc/JZ2L-KTDZ>].

<sup>26</sup> Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2838 (2009) (codified as amended at 18 U.S.C. § 249); see also *The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009*, U.S. DEP’T OF JUST. (May 30, 2023), <https://www.justice.gov/crt/matthew-shepard-and-james-byrd-jr-hate-crimes-prevention-act-2009-0> [<https://perma.cc/2EL2-UV8H>].

<sup>27</sup> 18 U.S.C. § 249(a)(2).

<sup>28</sup> See Jeff Lax & Justin Phillips, *Memo to Senate Republicans: Your Constituents Want You to Vote for ENDA*, WASH. POST (Nov. 3, 2013), <https://www.washingtonpost.com/news/monkey-cage/wp/2013/11/03/memo-to-senate-republicans-your-constituents-want-you-to-vote-for-enda/> [<https://perma.cc/9D8P-M8Y4>].

<sup>29</sup> Title IX, Education Amendments of 1972, 20 U.S.C. § 1681.

<sup>30</sup> DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS FROM THE U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION AND U.S. DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>, [<https://perma.cc/3HZE-AA9N>]; see also Katie McLaughlin, *Student Project: Title IX and Transgender Students: Obama Administration*, PACE

Act, was initially enacted in 1972 to prevent sex discrimination in education programs, including sports, at the height of the women's rights movement of the 1960s and 1970s.<sup>31</sup> Since its passage, Title IX's prohibition on sex-discrimination has been interpreted to include the protection of trans people.<sup>32</sup> Unfortunately, like the advancements in trans rights on state and local levels, the Obama Administration's guidance was met with national anti-trans pushback from the far-right movement and, ultimately, was rescinded by the Trump Administration in 2017.<sup>33</sup>

Other branches of the federal government during the Obama Administration attempted to provide additional protection through legislative and administrative anti-discrimination measures but were not successful. For instance, in 2015, Representative David Cicilline from Rhode Island introduced the Equality<sup>34</sup> which offered a comprehensive plan that would provide protection from discrimination for sexual orientation and gender identity in employment, public accommodations, jury service, consumer credit, housing, and<sup>35</sup> Although the bill was unsuccessful in 2015, it was reintroduced and passed the House in 2019. After moving to the Senate, it was referred to the committee but has not advanced<sup>36</sup>

Some protective measures, however, were successful. One such example of promoting transgender rights and equality was the Obama-era policy ensuring that same-sex couples could travel nationally and internationally under the names recognized by their states through marriages or civil unions.<sup>37</sup> Another such policy, starting in 2010, allowed a passport applicant to present a certification from a physician so their passport would reflect their gender

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UNIVERSITY ELISABETH HAUB SCHOOL OF LAW, <https://libraryguides.law.pace.edu/c.php?g=731201&p=5277099>, [<https://perma.cc/7MWF-YZBL>] (last updated Jul. 28, 2023).

<sup>31</sup> *Id.*; see, e.g., *Title IX of the Education Amendments of 1972: Resources from the Law Library*, LIBRARY OF CONGRESS RESEARCH GUIDES, <https://guides.loc.gov/title-IX-law-library-resources/legislative-path>, [<https://perma.cc/XNV7-GPL2>] (last visited Nov. 4, 2023).

<sup>32</sup> *U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity*, U.S. DEPARTMENT OF EDUCATION (Jun. 16, 2021), <https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity> [<https://perma.cc/653K-SM8H>]; *Title IX Protections for LGBTQ Students*, KNOW YOUR IX, <https://knowyourix.org/college-resources/title-ix-protections-lgbtq-students/>, [<https://perma.cc/6S6D-UWHV>] (last visited Nov. 4, 2023).

<sup>33</sup> Andrew Kreighbaum, *Transgender Protections Withdrawn*, INSIDE HIGHER ED (Feb. 22, 2017), <https://www.insidehighered.com/news/2017/02/23/trump-administration-reverses-title-ix-guidance-transgender-protections> [<https://perma.cc/NXM6-HEUH>].

<sup>34</sup> Equality Act, H.R. 3185, 114th Cong. (2015) (as referred to Subcomm. on the Const. & Civ. Just. in 2015).

<sup>35</sup> *Id.*

<sup>36</sup> Equality Act, H.R. 5, 116th Congress (2019) (as passed by House, May 20, 2019).

<sup>37</sup> During the Obama Administration, the State Department revised its Foreign Affairs Manual "to allow same-sex couples to obtain passports under the names recognized by their state through their marriages or civil unions." Office of the Press Secretary, *FACT SHEET: Obama Administration's Record and the LGBT Community*, THE WHITE HOUSE (Jun. 9, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/09/fact-sheet-obama-administrations-record-and-lgbt-community> [<https://perma.cc/5SVL-HBNF>].

identity.<sup>38</sup> Additionally, in 2010, one of the major pieces of legislation to impact trans and nonbinary lives, the Affordable Care Act (ACA)'s Section 1557(a), was passed.<sup>39</sup> Section 1557(a)<sup>40</sup> applies to any health program that the Department of Health and Human Services (HHS) itself administers. Moreover, it applies to Health Insurance Marketplaces and to all plans offered by insurers that participate in those Marketplaces.<sup>41</sup> Under Section 1557(a)'s scheme, individuals cannot be denied health care or health coverage based on their sex, defined by the Office of Civil Rights in a 2012 opinion letter to include their gender identity.<sup>42</sup> Section 1557(a) was invalidated by a Texas court on October 1, 2022; however the Biden Administration still may file a claim under this provision and where appropriate the Office of Civil Rights is enforcing claims.<sup>43</sup>

Following the Obama Administration, the federal government's continued efforts to develop a legal framework to protect trans rights faced persistent challenges and challengers. For example, the Social Security Administration (SSA) allowed name changes but did not allow gender changes, and it was not until 2021 that the SSA announced that gender markers could be changed without documentation.<sup>44</sup> A year later, on October 20, 2022, the

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<sup>38</sup> Office of the Spokesperson, *New Policy on Gender Change in Passports Announced*, U.S. DEPARTMENT OF STATE (June 9, 2010), <https://2009-2017.state.gov/r/pa/prs/ps/2010/06/142922.htm> [<https://perma.cc/GTB8-F35A>]. The physician certification requirement was eliminated in 2021. See *Know Your Rights*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, <https://transequality.org/know-your-rights/passports> [<https://perma.cc/G3GU-X2G9>] (last visited Jan. 10, 2024).

<sup>39</sup> *Section 1557: Frequently Asked Questions*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (May 18, 2017), <https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/index.html#General%20Questions> [<https://perma.cc/6FVV-7JJ3>].

<sup>40</sup> Section 1557 makes it “unlawful for any health care provider that receives funding from the Federal government to refuse to treat an individual – or to otherwise discriminate against the individual – based on race, color, national origin, sex, age or disability.” *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Katie Keith, *HHS Proposed Revised ACA Anti-Discrimination Rule*, HEALTH AFFAIRS (Jul. 27, 2022), <https://www.healthaffairs.org/content/forefront/hhs-proposes-revised-aca-anti-discrimination-rule> [<https://perma.cc/XR9G-XKUG>].

<sup>43</sup> *Section 1557 of the Patient Protection and Affordable Care Act*, U.S. Dep't Hum. Servs., <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html> (last visited Jan. 12, 2023) (noting that “OCR will continue to receive complaints and conduct investigations under its authorities prohibiting sex discrimination to the full extent not prohibited by court order”).

<sup>44</sup> Eduardo Medina, *Social Security Will Now Allow People to Select Their Gender in Records*, *The New York Times* (Oct. 19, 2022), <https://www.nytimes.com/2022/10/19/us/social-security-gender-identity.html> [<https://perma.cc/9RQ4-DE2Q>]; Darlynda Bogle, *Social Security to Offer Self-Attestation of Sex Marker in Social Security Number Records*, *Social Security Matters* (Mar. 31, 2022), <https://blog.ssa.gov/social-security-to-offer-self-attestation-of-sex-marker-in-social-security-number-records/> [<https://perma.cc/E64P-ZURH>]. Additionally, the author was a part of this process as trans people were receiving social security cards for the very first time. I was considered one of the few experts at the time that most people across the U.S. looked to for assistance. Initially, individual Social Security cards were given out regionally before the national office formulated a policy. It took advocacy from numerous people and places including myself to get a national policy.

process went online for several states,<sup>45</sup> allowing users to self-select their own gender marker on their Social Security Card without the need for documentation. In 2022, the State Department followed suit by adding “X” as a choice of gender marker to passports.<sup>46</sup> Changes like these continue to set policy precedent for subsequent administrations to proactively and meaningfully address transgender issues.

Alongside local, state, and federal legislation and policy, impact litigation at the federal level has been extremely effective in securing transgender protections. In particular, key landmark cases such as *Price Waterhouse v. Hopkins*<sup>47</sup>, *Obergefell v. Hodges*<sup>48</sup>, *Harris Funeral Homes v. Equal Employment Opportunity Commission*,<sup>49</sup> and *Bostock v. Clayton County*<sup>50</sup> have given trans individuals a clear path to the right to protections under Title VII of the 1964 Civil Rights Act,<sup>51</sup> which prohibits employment discrimination based on race, color, religion, sex (sexual orientation and gender identity), and national origin.<sup>52</sup> It has taken time for courts to get to this conclusion, and the process for attaining these jurisprudential wins has been a personal battle for many, including the author of this *Foreword*.

Indeed, most advocates for transgender rights underestimated the length of time it would take the Supreme Court to reach a decision like *Price Waterhouse v. Hopkins*, wherein litigants solidified in law the concept of sex stereotyping under Title VII. In *Price Waterhouse*, the plaintiff, Ann Hopkins, was a female employee who didn’t conform to the rigid female dress codes of the time at work and smoked cigars.<sup>53</sup> During this time, work roles and wardrobes were traditional and complied with the gender binary. Hopkins’ male coworkers commented negatively on how she dressed.<sup>54</sup> In response, Hopkins sued under Title VII on a theory of gender-based

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<sup>45</sup> See sources cited *supra* note 44.

<sup>46</sup> Ned Price, *Issuance of the First U.S. Passport with an X Gender Marker*, U.S. DEPARTMENT OF STATE (Oct. 27, 2021), <https://www.state.gov/issuance-of-the-first-u-s-passport-with-an-x-gender-marker/> [https://perma.cc/V7EL-VX7T]. Anthony J. Blinken, *X Gender Market Available on U.S. Passports Starting April 11*, U.S. Department of State (Mar. 31, 2022), <https://www.state.gov/x-gender-marker-available-on-u-s-passports-starting-april-11/> [https://perma.cc/6VK4-WCZZ].

<sup>47</sup> 490 U.S. 228 (1989).

<sup>48</sup> 576 US \_ (2015).

<sup>49</sup> *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019).

<sup>50</sup> 140 S. Ct. 1731 (2020).

<sup>51</sup> *Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/wysk/examples-court-decisions-supporting-coverage-lgbt-related-discrimination-under-title-vii#:~:text=Price%20Waterhouse%20v.,sex%20discrimination%20under%20Title%20VII> [https://perma.cc/BV52-6T43].

<sup>52</sup> 42 U.S.C.A. § 2000e-2(a)(1).

<sup>53</sup> *Price Waterhouse v. Hopkins*, 490 U.S. at 235 (1989). The cigar smoking is from the author’s personal knowledge of Ann Hopkins.

<sup>54</sup> *Id.*

discrimination.<sup>55</sup> Hopkins won, generating a precedent engaged to argue in favor of trans rights in many cases since.<sup>56</sup>

Years later, the Court reaffirmed this principle in *Obergefell v. Hodges*. In *Obergefell*, Justice Kennedy prominently wrote, “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm to define and express their identity.”<sup>57</sup> This proclamation made clear that the Constitution promises every individual the freedom to define and express their identity under American law. Writing as he did, Justice Kennedy opened the door for trans people to be included in Title VII jurisprudence, among other legal areas.

Following *Obergefell* and *Hopkins*’ victories, the reasoning in *Bostock v. Clayton County* continued to forge a clear path for trans individuals to gain access to Title VII protections.<sup>58</sup> The Supreme Court in *Bostock*, as well as in *Harris Funeral Homes v. Equal Employment Opportunity Commission*, made clear that Title VII protections apply to employees claiming discrimination based on sexual orientation and gender identity. Collectively, these legal victories were major advances for trans individuals and our allies in the LGBTQ+ movement towards equality, but there is still much to do. As advocates and allies become eager to be involved in the fight for trans rights and liberation, there are lessons that I and others can share as we continue moving forward.

In that vein, it is my pleasure to introduce the outstanding work provided by the participants from the *Symposium* by attorney Mia Yamamoto, Shelby Chestnut, executive director of the Transgender Law Center, Katie Eyer, professor of law at Rutgers Law School, and Kendra Albert, Clinical Instructor at the Cyberlaw Clinic at Harvard Law School, and a Lecturer in the Program on Studies of Women, Gender, and Sexuality at Harvard University.

## I. MIA YAMAMOTO & SHELBY CHESTNUT *IN CONVERSATION*

CR-CL hopes to amplify the voices of people such as Mia Yamamoto and Shelby Chestnut, who have dedicated their careers to advancing civil rights not only through scholarship, but also through practice.<sup>59</sup> To that end, Mia and Shelby’s conversation will push our audience to think critically about their legal and advocacy work. Both Mia and Shelby have always fought for civil rights; their stories intertwine and complement each other as they answer the questions posed by the *C.R.-C.L.* Solicited Content Editors. Their dialogue

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<sup>55</sup> *Id.* at 231–32.

<sup>56</sup> *Id.* at 258.

<sup>57</sup> *Id.* at 651–52.

<sup>58</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

<sup>59</sup> Mia Yamamoto & Shelby Chestnut, *Mia Yamamoto & Shelby Chestnut In Conversation*, 59 *HARV. C.R.-C.L. L. REV.* 17 (2024).

offers two unique perspectives on the trans rights movement. Mia transitioned late in life—she became the first openly trans trial lawyer in the state of California when she came out at 60—and she shares a powerful life story traversing her and her Japanese American family’s journey in the United States.<sup>60</sup> Shelby is equally compelling in sharing their journey as a nonbinary mixed-race Assiniboine and Norwegian person having been raised in rural America.<sup>61</sup> Shelby’s life story takes us on a similarly powerful journey that centers them and their family. Both Mia and Shelby have powerful career trajectories in law and activism. Mia has practiced law for most of her career.<sup>62</sup> Shelby has not practiced law but has been an organizer in the trans community and now serves as the executive director of the Transgender Law Center.<sup>63</sup>

Mia and Shelby’s conversation enlightens readers from the very beginning and keeps us on our toes throughout. Starting with the first question, they cover the arc of recent trans history in discussing the vulnerability of trans people today. The crux of the narrative is that trans people might be vulnerable but have fought for equal access to employment, housing, and schools. This was done by “barg[ing] into the scene very openly,” as Mia puts it.<sup>64</sup> Trans people have had to fight for access in every arena—the bold act that Mia speaks of has had to happen in almost every space. Shelby speaks of the key tools in the fight for trans rights, which has increasingly included litigation as part of its arsenal over the past 20 years.

Mia and Shelby then discuss the need for access to resources that was evident early in the movement and that continues today.<sup>65</sup> LGB people need to understand that trans needs must be a priority in order for us all to move forward. I agree with Shelby’s point that, collectively, we have more trans power than ever before.<sup>66</sup> Trans people are everywhere, and it is time for more resources to be invested in the trans movement. That philanthropy needs to make sure there are Black, Indigenous, people of color and trans people in the decision-making process. Despite having several allies, the trans movement has received nominal investment.<sup>67</sup>

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<sup>60</sup> *See id.* at 18.

<sup>61</sup> *Id.*

<sup>62</sup> *See id.*

<sup>63</sup> *See id.*

<sup>64</sup> *Id.* at 19.

<sup>65</sup> *See generally id.*

<sup>66</sup> *Id.* at 24–25.

<sup>67</sup> *See* Aldita Gallardo, *Trans Communities Are Under Attack. Here’s How Philanthropy Must Respond*, INSIDE PHILANTHROPY (Mar. 10, 2022), <https://www.insidephilanthropy.com/home/2022/3/10/trans-communities-are-under-attack-heres-how-philanthropy-must-respond> [<https://perma.cc/D3GY-V2M4>] (“Smaller, emerging groups—the ones on the ground and providing necessary services and resources directly to trans people at great risk—are often overlooked entirely by funders seeking larger, more established organizations that lack trans leadership and close relationships with trans and gender-nonconforming communities. In fact, a 2018 report published by Funders for LGBTQ Issues states that ‘for every \$100 awarded by U.S. foundations, less than 3 cents focuses on trans communities.’”).

Access to resources extends to gender-affirming care. As Shelby points out, COVID-19 taught us that our health care systems are flawed.<sup>68</sup> As I have known and as others have learned, trans healthcare is medically necessary for so many members of this community.<sup>69</sup> We have been fighting for years to make healthcare trans affirming, but we must also make it accessible. Trans lives are lost every day due to a lack of accessible healthcare.

The trans community intersects with so many others—communities of color, including Black and Indigenous communities, the women’s movement, people with disabilities, and various religious affinity groups. We could go on and on listing all the intersectional identities within the trans community. Today, more people are out than ever before, and the number of trans people is larger than anyone who has been doing this work for the past 15 years could have imagined. Trans people have learned and are learning to work across all of these intersectional identities, and as Mia references, the size and intersectionality of the trans community has helped form many types of coalitions to help move us forward.<sup>70</sup>

At various points in their conversation, Mia and Shelby discuss their own experiences with intersectionality and the challenges of existing within multiple communities at once. Being in communities of color and being trans is particularly difficult. It is already difficult to navigate racism in the rest of the world, much less to couple that with being trans. For example, some members within our own communities of color consider trans people as shameful and less than human.<sup>71</sup> When members of our own communities of color don’t understand trans people, this subjects us to all kinds of abuse, violence, homelessness, and death in some cases.

The lessons Mia and Shelby share about organizing intentionally are extremely important. Many people do not realize that, in any successful movement, organizing isn’t just about getting out there with a sign and a few friends. The most effective organizing is coordinated and planned with a specific outcome in mind. Many assume Ms. Rosa Parks just got on the bus one day and then events unfolded, but that was not the case. To the contrary, this historic moment was part of a broader pattern of intentional organizing that propelled the civil rights movement over the 1950s and 60s. For us to be successful, we must be similarly strategic and intentional in our organizing efforts.

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<sup>68</sup> Yamamoto & Chestnut *supra* note 59 at 23.

<sup>69</sup> See Caroline Medina, *Fact Sheet: Protecting and Advancing Health Care for Transgender Adult Communities*, CTR. AM. PROGRESS (Aug. 25, 2021), <https://www.americanprogress.org/article/fact-sheet-protecting-advancing-health-care-transgender-adult-communities/> [<https://perma.cc/D5WW-9QLC>].

<sup>70</sup> Yamamoto & Chestnut, *supra* note 59 at 23–27.

<sup>71</sup> See, e.g., Nicole Chavez, *Black Americans are Split on Trans and Nonbinary Issues, Report Finds*, CNN (Feb. 16, 2023, 2:13 PM), <https://www.cnn.com/2023/02/16/us/black-americans-transgender-views-poll-reaj/index.html> [<https://perma.cc/85W8-MVTM>].

This intentionality will benefit us on the local and national levels in fighting back against forces of trans oppression.

I was overjoyed to see Mia and Shelby sharing some reflections on major figures and milestones in the history of the trans rights movement—from Marsha P. Johnson and Sylvia Rivera to the 1980s’ ACT UP activism surrounding the AIDS crisis—while commenting on the present and future.<sup>72</sup> Regarding the future, I want to highlight two particularly salient pieces of advice from Mia and Shelby to all activists, lawyers or not. Mia’s advice is galvanizing: “You better be spectacular. . . . You’re obligated to put in hard work and fight back.”<sup>73</sup> I agree with all of this. I have done this for seven days a week most years without a vacation. Embracing this obligation was not only the beginning of something powerful in my life but also a transition from a movement where we were hidden into one where we are visible and not in fear. Shelby offers equally powerful advice: “You deserve to be here. If you don’t see the thing that needs to be happening, you should make it happen.”<sup>74</sup> Alongside this, I will insert my own advice that self-care is important. Otherwise, we cannot do the work.

Finally, we all agreed it is time for more resources to be invested in the trans movement. It is long overdue that philanthropy needs to make sure there are Black, Indigenous, people of color and trans people are involved in the decision-making process and receive more funding. Trans people continue to be slighted in philanthropy and have been for far too long, but this must change now to move forward for equality.

This piece is a definite win for *CR-CL*. This is a must-read interview.

## II. *AS-APPLIED EQUAL PROTECTION* BY KATIE EYER

The next piece in the *C.R.-C.L. Symposium* is by Professor Katie Eyer, a trailblazing thinker and litigator in anti-discrimination law.<sup>75</sup> Eyer’s 2019 article, *Statutory Originalism and LGBT Rights*, has been credited with originating the textualist argument that the Supreme Court adopted in the landmark case of *Bostock v. Clayton County*.<sup>76</sup> In this symposium, Professor Eyer’s essay argues that “not only are as-applied Equal Protection claims cognizable but indeed that the availability of as-applied assessment of individual circumstances is a defining feature of intermediate scrutiny.”<sup>77</sup>

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<sup>72</sup> Yamamoto & Chestnut, *supra* note 59, at 36–37.

<sup>73</sup> *Id.* at 32, 33.

<sup>74</sup> *Id.* at 33.

<sup>75</sup> Katie Eyer, UNIV. OF CHI. L. SCH., <https://www.law.uchicago.edu/people/katie-eyer> [<https://perma.cc/AKD2-RF32>].

<sup>76</sup> *Id.*

<sup>77</sup> Katie Eyer, *As-Applied Equal Protection*, 59 HARV. C.R.-C.L. L. REV. 49, 49 (2024).

Eyer discusses the 1987 Supreme Court case, *United States v. Salerno*,<sup>78</sup> in which the Court explained the difficulty of prevailing in a facial constitutional challenge.<sup>79</sup> However, Eyer highlights how the Supreme Court's modern-day jurisprudence, though riddled with facial challenges, in Equal Protection Clause doctrine there is space for targeted and cognizable *as-applied* challenges, which are central to modern Equal Protection jurisprudence and trans rights litigation.<sup>80</sup>

Importantly, Eyer notes the change in the Court's precedent from "a two-tier system" of Equal Protection scrutiny to a three-tier one, which includes intermediate scrutiny.<sup>81</sup> And one of the distinctive features of this new tier of "intermediate scrutiny" was the special significance that the Court afforded to the availability of "as-applied" challenges.<sup>82</sup> Eyer writes these claims have been most visible in "non-marital father cases largely because these cases are one of the few contexts in which the Court has continued to find sex or illegitimacy classifications to be permissible at all."<sup>83</sup>

Critical for the progress of the movement, Eyer assesses how as-applied Equal Protection cases brought by trans rights litigants "have typically challenged the treatment of trans individuals within existing systems of sex-separation, such as prisons, restrooms, and homeless shelters."<sup>84</sup> Eyer notes that this precedent is encouraging for institutions, like schools, that wish to grant access to gender-affirming facilities to students.<sup>85</sup> Additionally, Eyer explains why it is important to understand the contours of an as-applied challenge, showing that they sometimes can even be used to contest "pretextual" procedures, like requiring genital surgery to access gender-affirming and appropriate facilities.<sup>86</sup>

Professor Eyer's Article is critical for litigators to understand the true differences between as-applied and facial challenges for trans litigants. With Eyer's guidance in mind, many trans rights and accommodations claims could even be considered facial rather than as applied in the first instance. We must, as lawyers, look below the surface of facial and as-applied challenges. If we are to take on these deeply entrenched systems of sex separation to empower trans individuals, it makes sense to better define our Equal Protection analyses and improve how we bring these cases in court.

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<sup>78</sup> 481 U.S. 739 (1987).

<sup>79</sup> *Id.* at 745 (1987). *Salerno* involved challenges to the Due Process Clause and the Eighth Amendment but not the Equal Protection Clause. *Id.*

<sup>80</sup> Eyer, *supra* note 77, at 49.

<sup>81</sup> *See id.* at 55.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 58.

<sup>84</sup> *Id.* at 59.

<sup>85</sup> *Id.* at 62.

<sup>86</sup> *Id.*

III. *YOU SHOULD BE ASHAMED* BY KENDRA ALBERT

Next, the *Symposium* features a piece from Kendra Albert on how transness touches on the law of privacy and legal narratives, and how we can be better advocates for trans litigants. Albert's piece is interesting and appealing in the context of the broader trans rights movement for two major reasons. The first is that, in my practice, especially when people are concerned about their privacy, often, I have requested to not have certain documents published, among other measures, for the individual safety of my clients. Outside of the importance of these requests for my clients' privacy and safety, they challenge and change the legal system's safeguards for trans litigants. Second, Albert's article touches on the fact that the legitimacy of trans people has always been measured in the U.S. legal system against a cishnormative standard.<sup>87</sup> I often see the perennial issues of "trans narratives" that people have to put forward, under the auspices of authenticity, which rely again on cishnormativity. The ways in which trans lives are devalued and look different than cishgendered ones are what courts need to learn to accept.

As Albert notes, transgender people in the United States have long used privacy claims to vindicate their substantive rights, and have done so through constitutional law or utilizing the law of privacy torts.<sup>88</sup> Privacy claims offer a lens to understand how trans litigants try to be seen by the legal system, often by combating cishnormativity (which Albert defines as the default presumption that everyone is cisgender) with "transnormative" narratives, meaning governed by an ideology where "the legitimacy of trans people's identities is socially evaluated, and trans individuals are rewarded or sanctioned based on how closely their experience aligns with these normative standards."<sup>89</sup>

Albert points out, in framing a case we must consider the needs of our trans clients, especially concerning privacy.<sup>90</sup> Litigators must be proactive and explore whether it is necessary to affirmatively incorporate routine privacy protections in their cases involving trans litigants and when producing scholarship analyzing the rights and liberties of trans people. As Albert notes, initial privacy protections can include use of a pseudonym or requesting waiver of publication in a name change case because someone is trans.<sup>91</sup> As evidenced in Albert's piece, an attorney can request a judge to use their powers to protect the identities of trans people who appear

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<sup>87</sup> Kendra Albert, *You Should be Ashamed of Yourself: Privacy Claims by Transgender Litigants and Navigating Transnormativity*, 59 HARV. C.R.-C.L. L. REV. 73, 74 (2024) (manuscript at 2).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 74 (quoting Jamison Green, *Look! No Don't! The Visibility Dilemma for Transsexual Men*, in THE TRANSGENDER STUDIES READER 501, 501 (Susan Stryker & Stephen Whittle eds., 2006)).

<sup>90</sup> *Id.* at 98–99.

<sup>91</sup> *See id.* at 76.

before them, based on concerns about the potential for stigma.<sup>92</sup> Similar privacy concerns, as Albert notes, arise in even the simplest of administrative procedure cases, like when trans community members seek to change their name. Problematically, as Albert rightly notes, many states require court-recognized name changes to be publicly published, horrifically this is sometimes done in a newspaper.<sup>93</sup>

Interestingly, Albert highlights *Myers v. United Consumer Financial Services*,<sup>94</sup> which is an example of a more typical case where privacy is used with a trans litigant.<sup>95</sup> As Albert shares, Susan Renee Myers was a temp-to-hire with United Consumer Financial Services and was asked for high school identity records to verify her gender,<sup>96</sup> and later, for identity documentation and medical proof of her transition.<sup>97</sup> For my own purposes, I use this case to point out that as I noted above, what brought Myers to court still remains a struggle for many trans people. It is a hurdle to get in *any* door when you lack documentation with matching identifying information, which for many is still so difficult to get. Myers was interrogated due to this documentation error.<sup>98</sup> Although Myers' privacy claim was ultimately partially successful, it is important to note that in over twenty years, I still see how often documentation remains a contentious hurdle for trans individuals.<sup>99</sup>

Additionally, attorneys need to weigh the cost of litigation on trans clients, in particular. The *Myers* case, for instance, was deeply detrimental to Myers herself.<sup>100</sup> While organizations or lawyers may decide a case may be a good impact case for the movement, we must also ask, "Is it right for the client?" Also, what is best for the movement and not just the one impact case? We need well-thought-out cases to have a real and lasting impact on the trans community. To organizations that are looking for the perfect trans person who fits a model or the binary, the model trans person doesn't exist, and these stereotypes are causing harm to a whole community. As Albert challenges us to do, the work of trans advocacy and advocating for trans clients must evolve and be recognized so that people can be valued and acknowledged not for who we want them to be, but instead, who they are.

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<sup>92</sup> *Id.* at 76–77.

<sup>93</sup> *Id.* at 73, 77.

<sup>94</sup> No. 1:01 CV 1112, 2001 WL 34350174, at \*1 (N.D. Ohio Nov. 9, 2001).

<sup>95</sup> Albert, *supra* note 87, at 79.

<sup>96</sup> *Id.* at 80.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *United Consumer Fin. Servs.*, 2001 WL 34350174, at \*6 (finding awarding the client emotional distress for such an intrusion into her private affairs).

<sup>100</sup> This is a remark based on the author's personal knowledge.

## CONCLUSION

I believe that so many readers will find this a very engaging and informative *Symposium*. I have been honored to be a part of this feature along with its very talented contributors. Mia and Shelby's conversation and experience brings to light a world for us to explore, from the history of the movement to the present and the tactics used to organize. Professor Eyer's article discussing the use of Equal Protection as-applied challenges as a way to gain protections for trans people is enlightening and yet another tool for litigators. Finally, Professor Albert's piece discusses the use of privacy protections in cases for trans people and its importance for the safety of trans people. These protections have particularly been used in identity documents cases with the most success. The tools provided by this issue's *Symposium* participants should provide readers with a well-rounded take on trans rights today.

To navigate the current backlash, and to hopefully prevent further attacks on trans rights, legal advocates and activists should continue to employ a multifaceted approach to protections for trans individuals. First, advocates and activists must continue to use litigation to challenge discriminatory state laws by relying on the wins that the movement still has at its disposal, such as *Bostock v. Clayton County*. Next, public education campaigns, which are extremely helpful to counter misinformation and stereotypes, highlight the lived experiences of trans individuals to build empathy and understanding. These have worked to help raise public opinion of trans people in the past, and as the trans community is navigating a time of increased hostility, these strategies can be useful again. Further, legislative efforts of the past must be revived, advocating for comprehensive federal legislation that would provide robust comprehensive protections for all LGBTQ+ individuals like the Equality Act.<sup>101</sup> This would provide a legal remedy that we do not currently have in place. Then lastly, making our legislatures more reflective of the broader populace by registering people to vote and voting. Please consider running for office, getting good people to run for office, and supporting campaigns of those that support trans rights causes. All of these actions will bolster the effort to protect trans rights.

The road forward has always involved strategy, hard work, intersectionality, and a multifaceted approach. The fight must continue for trans rights. When trans rights are protected, trans people can live safe and productive lives. Trans people have always been here and are never going anywhere. All human beings are entitled to be treated humanely. Litigation, public education campaigns, legislative efforts and activeness in our political process will continue to push us forward. The time is now to make a change. Lives are on the line every day. Children and adults are dying. All who care, know and love trans people must act before it's too late. We all must act now.

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<sup>101</sup> Equality Act, H.R. 5, 116th Congress (2019) (as passed by House, May 20, 2019).