

LGBTQ RIGHTS IN AN AGE OF DEMOCRATIC UNCERTAINTY: HOW TO COUNTER A POLITICS OF ERADICATION

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ABSTRACT

In this age of democratic uncertainty, the lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) community is facing its greatest challenge in decades—a Politics of Eradication premised on the conviction that LGBTQ people do not, or should not, exist. In 2021, the populist Make America Great Again (“MAGA”) movement began inundating state legislatures with bills designed to censor LGBTQ lives, remove LGBTQ people from public life, and, in the case of transgender people, literally define them out of existence. MAGA activists claimed these laws were necessary to protect women, children, and even national security. On January 20, 2025, this MAGA anti-LGBTQ agenda became the official policy of the United States.

There is nothing new about the Politics of Eradication. It is an old strategy long applied to unpopular groups that promises an appealing, and dangerous, finality. Today, a virulent anti-LGBTQ version of this strategy has galvanized the MAGA movement and motivated swing voters. It is both a symptom of democratic decline and a contributing factor. It represents an existential threat to LGBTQ people, but it also serves as a harbinger of what might lie ahead because the Politics of Eradication will not end with LGBTQ people.

This Article examines the Politics of Eradication as applied to LGBTQ people in the context of an authoritarian slide. The first section outlines the markers of democratic decline, including the rise of the MAGA movement and the consolidation of power at the executive level. The second section details the evolution of the MAGA movement’s anti-LGBTQ narrative and its embrace by the Trump administration. The final section provides a clear-eyed threat assessment and identifies the institutional levers and mechanisms of power that stand between LGBTQ people and certain erasure.

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INTRODUCTION

In this age of democratic uncertainty, the lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) community is facing its greatest challenge in decades—a Politics of Eradication premised on the conviction that LGBTQ

people do not, or should not, exist.¹ In 2021, the populist Make America Great Again (“MAGA”) movement began inundating state legislatures with bills designed to censor LGBTQ lives, remove LGBTQ people from public life, and, in the case of transgender people, literally define them out of existence.² MAGA activists claimed these laws were necessary to protect women, children, and even national security.³ On January 20, 2025, this MAGA anti-LGBTQ agenda became the official policy of the United States when President Trump issued executive orders rescinding nondiscrimination protections, cancelling all Diversity, Equity, and Inclusion (“DEI”) initiatives, and declaring “the immutable biological reality of sex.”⁴ The removal from government websites and databases of any mention of the ill-defined concepts of “gender ideology” or “DEI” swiftly followed these first-day executive orders, resulting in blanket deletions of LGBTQ people and references to any form of equity.⁵

During the first month of his second term, Trump issued executive orders banning transgender people from the military, sports teams, and bathrooms.⁶ He banned access to gender-affirming care for minors and pledged to stop the “indoctrination” of children in K-12 education.⁷ The federal government threatened school districts,⁸ states, municipalities, and hospitals with the loss of federal funding unless they abandoned their inclusive and welcoming

¹ Nancy J. Knauer, *The Politics of Eradication and the Future of LGBT Rights*, 21 GEO. J. GENDER & L. 615, 619 (2020).

² See *id.* See generally Kaleigh Rogers & Mary Radcliffe, *Over 100 Anti-LGBTQ+ Laws Passed in the Last Five Years — Half of Them This Year*, FIVE-THIRTY EIGHT (May 25, 2023, at 14:25 ET), <https://fivethirtyeight.com/features/anti-lgbtq-laws-red-states/> [<https://perma.cc/3UKE-87PE>] (“As waves of legislation have crested and receded, what’s left in their wake are red states with a new arsenal of restrictions on LGBTQ+ people.”).

³ See *infra* text accompanying notes 296–308 (detailing MAGA characterization of LGBTQ people as threat to children, women, and national security).

⁴ Exec. Order No. 14148, 90 Fed. Reg. 8237 (Jan. 20, 2025) (rescinding Biden-era protection); Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025) (defining “sex”); Exec. Order No. 14151, 90 Fed. Reg. 8339 (Jan. 20, 2025) (dismantling DEI initiatives).

⁵ Jeremy B. Merrill et al., *How Federal Agencies Have Already Changed Their Websites Under Trump*, WASH. POST (Jan. 31, 2025), <https://www.washingtonpost.com/politics/2025/01/31/federal-agencies-websites-trump/> [<https://perma.cc/4GKZ-VFBP>]; Jennifer Jacobs et al., *Agencies Asked to Scrub Federal Government Websites to Remove Diversity-Related Content*, CBS NEWS (Jan. 31, 2025, at 21:15 ET), <https://www.cbsnews.com/news/trump-officials-pausing-most-federal-government-websites-friday/> [<https://perma.cc/S4ZT-ZXYG>]; Ethan Singer, *Thousands of U.S. Government Web Pages Have Been Taken Down Since Friday*, N.Y. TIMES (Feb. 3, 2025), <https://www.nytimes.com/2025/02/02/upshot/trump-government-websites-missing-pages.html> [<https://perma.cc/9MVB-47LR>].

⁶ Exec. Order No. 14183, 90 Fed. Reg. 8757 (Jan. 27, 2025); Exec. Order No. 14201, 90 Fed. Reg. 9279 (Feb. 5, 2025); Exec. Order No. 14190, 90 Fed. Reg. 8771 (Jan. 29, 2025).

⁷ Exec. Order No. 14190, *supra* note 6; Exec. Order No. 14187, 90 Fed. Reg. 8771 (Jan. 28, 2025).

⁸ See, e.g., Zach Montague, *Education Dept. Gives Schools Two Weeks to Eliminate Race-Based Programs*, N.Y. TIMES (Feb. 17, 2025), <https://www.nytimes.com/2025/02/17/us/politics/education-dept-race-based-programs.html> [<https://perma.cc/7ACT-R253>].

LGBTQ policies, as well as other DEI practices.⁹ Many private sector companies opted to “obey in advance”¹⁰ and discontinued DEI programs that had become commonplace across corporate America after the 2020 protests for racial justice.¹¹ Throughout this period, Trump asserted a robust theory of executive power that claimed to transcend certain statutory and constitutional restraints, leading the United States ever closer to a full-blown constitutional crisis.¹²

To be clear, this current attack on LGBTQ people is not the predictable culture war backlash against LGBTQ rights that invariably counters for religious exemptions and argues against “special rights.”¹³ The Politics of

⁹ During the first month of his second term in office, President Trump issued a series of executive orders that prohibited the use of federal funds for DEI practices and “gender ideology.” *E.g.*, Exec. Order No. 14190, *supra* note 6 (directing federal agencies to prohibit the use of funds “to directly or indirectly support or subsidize the instruction, advancement, or promotion of gender ideology or discriminatory equity ideology” in K-12 education); see Troy Closson, *3 School Districts to Lose \$65 Million Over Gender and D.E.I. Policies*, N.Y. TIMES (Sep. 25, 2025), <https://www.nytimes.com/2025/09/25/nyregion/trump-dei-schools-federal-money.html> [https://perma.cc/N3K6-64FC]; Brooke Migdon, *Trump Threatens to Withhold Federal Funds from Maine Over Transgender Athletes*, THE HILL (Feb. 21, 2025, at 12:18 ET), <https://thehill.com/homenews/lgbtq/5157576-trump-federal-funds-maine-transgender-athletes/> [https://perma.cc/7HU8-EP2R]; Alex Zielinski, *Portland Mayor Orders Changes to City Equity Policies to Comply with Trump DEI Mandate*, OPB (July 31, 2025), <https://www.opb.org/article/2025/07/31/portland-oregon-politics-keith-wilson-diversity-equity-inclusion-donald-trump/> [https://perma.cc/946U-BCU2]; Caitlin Owens, *How Trump’s DEI Order Could Upend Hospitals’ Workforce Efforts*, AXIOS (Feb. 12, 2025), <https://www.axios.com/2025/02/12/trump-dei-executive-order-hospitals> [https://perma.cc/4X4D-57ZK].

¹⁰ TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 13, 17 (2017) (presenting “Do not obey in advance” as the first of “twenty lessons from the twentieth century” regarding how to respond to tyranny).

¹¹ See Wei Wei & Al Ghosh, Racial Diversity Discussions and DEI Commitments 6 (Nov. 25, 2024) (unpublished manuscript), <https://ssrn.com/abstract=5033569> [https://perma.cc/4V4N-6YYU]; Conor Murray & Molly Bohannon, *Citigroup Rolls Back Diversity Initiatives—Here Are All the Companies Cutting DEI Programs*, FORBES (Feb. 21, 2025, at 11:27 ET), <https://www.forbes.com/sites/conormurray/2025/02/21/pepsi-rolling-back-diversity-initiatives-here-are-all-the-companies-cutting-dei-programs/> [https://perma.cc/B6BR-MDRE].

¹² Adam Liptak, *Trump’s Actions Have Created a Constitutional Crisis, Scholars Say*, N.Y. TIMES (Feb. 12, 2025), <https://www.nytimes.com/2025/02/10/us/politics/trump-constitutional-crisis.html> [https://perma.cc/QXC5-4FAK]; see *infra* text accompanying notes 94–112 (explaining strong version of unitary executive theory advocated by Trump White House); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 65 (2018) (including rejection of “the Constitution or a willingness to violate it” as a “key indicator of authoritarian behavior”); see also Lisa Rein, *As Musk Reshapes the Government, Some Ask: Where Are the Guardrails?*, WASH. POST (Feb. 16, 2025), <https://www.washingtonpost.com/politics/2025/02/16/musk-doge-government-guardrails-safeguards/> [https://perma.cc/LBC4-MUYX]. See generally STEVEN G. CALABRESI ET AL., THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2009) (discussing evolution of the unitary executive theory).

¹³ Suzanne B. Goldberg, *Facing the Challenge: A Lawyer’s Response to Anti-Gay Initiatives*, 55 OHIO ST. L.J. 665, 670–72 (1994) (describing “civil rights/special rights equation”); Nancy J. Knauer, *Religious Exemptions, Marriage Equality, and the Establishment Clause*, 84 UMKC L. REV. 749, 749–50 (2016) (describing push for broad religious exemptions post-*Obergefell*).

Eradication is a much older strategy long applied to unpopular groups, which promises an appealing, and dangerous, finality.¹⁴ Its goal differs fundamentally from a campaign of subordination because it does not primarily seek to impose certain disabilities on, or otherwise denigrate, particular groups.¹⁵ It is not about state-imposed inferiority or presumed superiority.¹⁶ Rather, the goal of a Politics of Eradication is to erase or remove the target population and thereby make the problem go away.¹⁷ A virulent anti-LGBTQ version of this strategy has produced a dehumanizing narrative of LGBTQ people and their allies that has galvanized the MAGA base, motivated swing voters, and helped propel Trump to a second term in office.¹⁸

The populist embrace of an anti-LGBTQ Politics of Eradication in the United States is both a symptom of democratic decline and a contributing factor.¹⁹ It helps fuel a populist fury that demands conformity and a return to a golden age steeped in so-called traditional values.²⁰ The Politics of Eradication represents an existential threat to LGBTQ people, but it also serves as a harbinger of what might lie ahead because there is no reason to believe that the MAGA policy juggernaut will stop with LGBTQ people. Indeed, MAGA policy statements suggest otherwise.²¹ For example, the Politics of Eradication is already at work in the immigration context, where the call for mass deportations of undocumented immigrants in lieu of a proposal for amnesty or a pathway to citizenship evinces a clear intent to remove a population that has been subject to unrelenting demonization.²²

The implementation of a Politics of Eradication on the federal level has dealt the LGBTQ rights movement a devastating blow at a time when our democratic institutions and norms are fraying.²³ With signs of an authoritarian slide on the horizon, these are perilous times that require a clear-eyed threat assessment. It is imperative to untangle rhetoric from intention and determine

¹⁴ Knauer, *supra* note 1, at 619.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See, e.g., Editorial Board, Opinion, *Trump's Shameful Campaign Against Transgender Americans*, N.Y. TIMES (Feb. 9, 2025), <https://www.nytimes.com/2025/02/09/opinion/transgender-trump-orders.html> [<https://perma.cc/8XAS-YCRK>].

¹⁹ See *infra* text accompanying notes 35–61 (discussing markers of democratic decline).

²⁰ Robin S. Maril, *Power at the Fault Lines: A Queer and Transgender Model for Democratic Defense*, S. CAL. INTERDISC. L.J. (forthcoming 2025), <https://ssrn.com/abstract=4540725> [<https://perma.cc/6V6V-VMST>].

²¹ For example, the controversial policy blueprint *Project 2025* published by the Heritage Foundation takes direct aim at marriage equality and single-parent families. See *infra* text accompanying notes 251–60 (discussing *Project 2025*).

²² Hamed Aleaziz, *Trump Expands Quick Deportations Across the U.S.*, N.Y. TIMES (Jan. 25, 2025), <https://www.nytimes.com/2025/01/21/us/politics/trump-deportations-immigration.html> [<https://perma.cc/Z5HM-UMYW>].

²³ Editorial Board, Opinion, *Do We Still Have a Democracy?*, N.Y. TIMES (Oct. 31, 2025), <https://www.nytimes.com/interactive/2025/10/31/opinion/trump-autocracy-democracy-report.html> [<https://perma.cc/5NFS-BDJW>].

when to take the MAGA anti-LGBTQ narrative seriously, if not literally.²⁴ To the extent that the natural end goal of a platform of eradication is extermination, then how far will MAGA forces go to enforce their view of conformity and rid the United States of “gender ideology” and “DEI”? Will marriage equality and LGBTQ families be respected?²⁵ What penalties will they devise for so-called “groomers”?²⁶ Will they be satisfied with the civil death of transgender identities, or will they resort to criminal prohibitions like some states have already enacted for drag?²⁷ Will LGBTQ people be allowed to speak, publish, and read about their lives?²⁸

This Article examines the Politics of Eradication as applied to LGBTQ people in the context of an authoritarian slide. The first section outlines the markers of democratic decline, including the rise of the MAGA movement and the consolidation of power at the executive level. The second section details the evolution of the MAGA movement’s anti-LGBTQ narrative and its embrace by the Trump administration. The last section attempts to connect the dots and evaluate the extent of the threat posed by MAGA’s relentless demonization of LGBTQ people in terms of future policy initiatives. This section uses the lens of strategic institutional choice to assess which institutional mechanisms and levers of power could be used to stand between LGBTQ people and certain erasure.²⁹

²⁴ See, e.g., Eliot Wilson, Opinion, *Should We Take Trump 2.0 Literally, or Seriously?*, THE HILL (Jan. 21, 2025, at 15:00 ET), <https://thehill.com/opinion/white-house/5098051-after-the-inauguration-should-we-take-trump-2-0-literally-or-seriously/> [<https://perma.cc/NYW5-26VQ>].

²⁵ See *Obergefell v. Hodges*, 576 U.S. 644, 674–75 (2015) (explaining the denial of marriage to same-sex couples continues harm, disrespect, and works to subordinate them); *Respect for Marriage Act*, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

²⁶ Melissa Block, *Accusations of “Grooming” Are the Latest Political Attack — With Homophobic Origins*, NAT’L PUB. RADIO (May 11, 2025, at 05:27 ET), <https://www.npr.org/2022/05/11/1096623939/accusations-grooming-political-attack-homophobic-origins> [<https://perma.cc/Y8DE-S33C>].

²⁷ H.R. 359, 68th Leg., Reg. Sess. (Mont. 2023); Amy Beth Hanson, *Montana Judge Keeps in Place a Ban on Enforcement of Law Restricting Drag Shows, Drag Reading Events*, ASSOCIATED PRESS (Oct. 13, 2023, at 21:14 ET), <https://apnews.com/article/montana-drag-shows-ruling-ee8adb41c142718ec4b5047d0f3f36be> [<https://perma.cc/7SP9-YN8T>]; Adam Gabbatt, “Subtle and Sinister”: Republicans’ Anti-drag Crusade Seen as Assault on LGBTQ+ Rights, THE GUARDIAN (Sep. 19, 2023, at 06:00 ET), <https://www.theguardian.com/world/2023/sep/19/us-states-attack-drag-shows-lgbtq-rights> [<https://perma.cc/T2UK-QW3N>].

²⁸ See Catherine J. Ross, *Are “Book Bans” Unconstitutional? Reflections on Public School Libraries and the Limits of Law*, 76 STAN. L. REV. 1675, 1722 (2024).

²⁹ Nancy J. Knauer, *The Recognition of Same-Sex Relationships: Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice*, 28 U. HAW. L. REV. 23, 59–76 (2005) (describing strategic institutional choice as practiced by LGBTQ+ rights advocates).

I. DEMOCRATIC UNCERTAINTY

It should go without saying that democratic decline is especially dangerous for LGBTQ people and other marginalized groups who have benefited from the counter-majoritarian safeguards baked into liberal democracy. Despite the fact that our democratic system was built on inequality and was deeply flawed in many ways, its structure, institutions, and norms offered a path forward. Since the beginning of the twentieth century, various identity-based social movements have worked tirelessly within this system to secure formal equality and protections from discrimination.³⁰ Beginning in earnest in the 1970s, the LGBTQ rights movement built directly on the successes of both the civil rights movement and second wave feminism.³¹ It advanced a platform of legal reform on the state and federal levels that targeted not only the courts and legislatures, but also the executive branch.³² It closely monitored LGBTQ representation in the press and worked to make the private and nonprofit sectors inclusive and welcoming.³³ Thanks to these efforts, many LGBTQ people in the United States have had the opportunity to live authentic lives free from legal disabilities and largely protected from outright discrimination.

Our current democratic decline, however, has destabilized the democratic scaffolding that allowed and fostered this sort of forward momentum. It is no longer possible to rely on many of our democratic institutions or norms, including our system of checks and balances or even the rule of law. As a result, more than fifty years of advancements in LGBTQ rights are on the line, and there is the distinct possibility that LGBTQ people will be targeted for legal and other disabilities with little recourse. In order to assess the future of LGBTQ rights in the United States, it is imperative that we first understand the extent of the degradation of the system that in many ways has made it possible for LGBTQ people to live open and authentic lives. This section addresses the structural changes that lead to authoritarianism, the populist and nativist political philosophy that has fueled our slide towards authoritarianism, and the actions of the executive to consolidate power in a unitary presidency.³⁴

³⁰ See generally MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004) (exploring the civil rights movement).

³¹ See generally LILLIAN FADERMAN, *THE GAY REVOLUTION: THE STORY OF STRUGGLE* (2015) (describing the evolution of LGBTQ+ rights movement).

³² Nancy J. Knauer, *The LGBTQ Equality Gap and Federalism*, 70 AM. UNIV. L. REV. 1, 8 (2020).

³³ See FADERMAN, *supra* note 31, at 424 (noting that GLAAD was modeled on Jewish Anti-Defamation League).

³⁴ See Blake Emerson, *The Existential Challenge to the Administrative State*, 113 GEO. L.J. 1263, 1331–33 (2025) (proposing distributed rather than unitary approach to executive function).

A. *Markers of Democratic Decline*

The political scientists who study the rise of authoritarian regimes—“how democracies die”³⁵—tell us that there are certain bellwethers that can set the stage for would-be autocrats to consolidate power and neutralize their political opposition.³⁶ Doubts over election integrity, for example, can undermine the very foundation of a democracy—free and fair elections.³⁷ Increased partisan polarization is also a key factor in democratic decline, along with the erosion of democratic norms, such as seeing your opponents as legitimate and exercising forbearance in governance.³⁸ Since the 2016 presidential election, commentators have unnervingly applied these criteria to the United States and warned that we were poised for what is euphemistically referred to as a “democratic slide.”³⁹ Scholars have highlighted the need for vigilance because contemporary autocrats do not seize power in spectacular military *coups d’état*.⁴⁰ Instead, autocrats are democratically elected and then exploit their electoral mandate to systematically rewire the apparatus of the state.⁴¹ Contemporary examples of democratically elected autocrats include former President Hugo Chavez in Venezuela and former Prime Minister Viktor Orbán in Hungary, both of whom won popular elections only to demolish the very institutions that got them there in the first place.⁴²

In the United States, the checklist developed by the political scientists should be sobering, as we tick many, if not all, of the boxes. In terms of electoral integrity, we have long struggled with voter dilution through gerrymandering, as well as voter suppression.⁴³ Election denialism and the false claim that Donald Trump won the 2020 presidential election further denigrated our electoral system and inspired the January 6th insurrection

³⁵ LEVITSKY & ZIBLATT, *supra* note 12. See generally STEVEN LEVITSKY & DANIEL ZIBLATT, *TYRANNY OF THE MINORITY: WHY AMERICAN DEMOCRACY REACHED THE BREAKING POINT* 11 (2023) (“Why are threats to American democracy emerging now in the early twenty-first century?”).

³⁶ LEVITSKY & ZIBLATT, *supra* note 12, at 6–9.

³⁷ *Id.* at 23.

³⁸ *Id.* at 9.

³⁹ See Thomas M. Keck, *Erosion, Backsliding, or Abuse: Three Metaphors for Democratic Decline*, 48 LAW & SOC. INQUIRY 314, 315–18 (2023).

⁴⁰ LEVITSKY & ZIBLATT, *supra* note 12, at 5.

⁴¹ Kim L. Scheppelle, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 545 (2018). Adolf Hitler became Chancellor of Germany within the existing constitutional framework of the Weimar Republic but then dismantled German democracy in 53 days. Timothy W. Ryback, *How Hitler Dismantled a Democracy in 53 Days*, THE ATLANTIC (Jan. 8, 2025), <https://www.theatlantic.com/ideas/archive/2025/01/hitler-germany-constitution-authoritarianism/681233/> [https://perma.cc/2PVS-XXHF].

⁴² Scheppelle, *supra* note 41, at 549–50, 554.

⁴³ Vanessa Williamson, Commentary, *Democratic Decline in the United States: Strategic Manipulation of Elections*, BROOKINGS INST. (Oct. 23, 2023), <https://www.brookings.edu/articles/democratic-decline-in-the-united-states-strategic-manipulation-of-elections/> [https://perma.cc/Q92D-KQ3R] (tracing democratic decline to 2010).

at the Capitol.⁴⁴ Partisan polarization in the United States is at an all-time high and is amplified by social media platforms with algorithms designed to maximize our outrage at one another.⁴⁵ Our democratic norms of civility and deliberation have given way to name calling and villainization, ushering in a new normal of alternative facts, conspiracy theories, and a pugilistic politics overshadowed by the increasing threat of political violence.⁴⁶

A number of independent indices that track the health of democracies across the globe confirm this conclusion.⁴⁷ For example, the Economist Intelligence Unit's Democracy Index is a well-respected gauge that classifies governments as full democracies, flawed democracies, hybrid regimes, or authoritarian regimes.⁴⁸ The Index is both quantitative and comparative and focuses primarily on rights and democratic institutions, with an emphasis on pluralism, civil liberties, and political culture.⁴⁹ The United States was first downgraded from a full democracy to a flawed democracy in 2016, and its score has only decreased since then.⁵⁰ A wide range of non-governmental organizations and think tanks have also raised red flags regarding the state

⁴⁴ See generally H.R. REP. NO. 117-663 (2022) (including Final Report of Select Committee to Investigate the January 6th Attack on the United States Capitol).

⁴⁵ Jordan Steven Sher, *After Sharing a Phony Rachel Maddow Video, I Reflected on How Algorithms Are Dividing Us*, S.F. CHRON. (Feb. 18, 2026), <https://www.sfchronicle.com/opinion/openforum/article/social-media-misinformation-partisan-algorithms-21320519.php> [<https://perma.cc/GQ68-Q7HX>]; see also R. George Wright, *A Free Speech-Based Response to Media Polarization*, 18 FIU L. REV. 193, 199 (2023) ("The hyperpolarization of social media itself thus impairs any collective attempt at communicative rationality in public discourse and decision making."); Emily Kubin & Christian von Sikorski, *The Role of (Social) Media in Political Polarization: A Systematic Review*, 45 ANNALS INT'L COMM. ASS'N 188, 199 (2021).

⁴⁶ See Lauren Irwin, *Republicans' and Democrats' Ideology Most Extreme in Decades: Gallup*, THE HILL (Jan. 16, 2025, at 10:11 ET), <https://thehill.com/homenews/campaign/5089106-republicans-democrats-ideology-extremes-gallup-survey/> [<https://perma.cc/7VGF-D6HM>]; James A. Piazza, *Political Polarization and Political Violence*, 32 SEC. STUD. 476, 476–79 (2023); Ned Parker & Peter Eisler, *New Cases of Political Violence Roil US Ahead of Contentious Election*, REUTERS (Oct. 21, 2024, at 18:22 ET), <https://www.reuters.com/world/us/new-cases-political-violence-roil-us-ahead-contentious-election-2024-10-21/> [<https://perma.cc/9V95-BVQA>].

⁴⁷ See Sujata Gupta, *Is U.S. Democracy in Decline? Here's What the Science Says*, SCI. NEWS (Oct. 18, 2024, at 11:00 ET), <https://www.sciencenews.org/article/united-states-democracy-decline-science> [<https://perma.cc/Q67Y-FRST>].

⁴⁸ ECONOMIST INTEL. UNIT, DEMOCRACY INDEX 2023: AGE OF CONFLICT 3 65–66 (2024), <https://www.eiu.com/n/campaigns/democracy-index-2023/> [<https://perma.cc/BT8Y-8Q3T>].

⁴⁹ *Id.* at 63–67.

⁵⁰ *Id.* at 3, 5. In the 2023 report by the Freedom in the World Index, the United States made the list of countries that had experienced the greatest decline in the past ten years. YANA GOROKHOVSKAIA, ADRIAN SHAHBAZ & AMY SLIPOWITZ, FREEDOM HOUSE, FREEDOM IN THE WORLD 2023 12 (2023), https://freedomhouse.org/sites/default/files/2023-03/FIW_World_2023_DigitalPDF.pdf [<https://perma.cc/QJM9-33FE>]. Freedom House was founded by Eleanor Roosevelt and Wendell Wilkie in 1941 as a think tank and advocacy organization to combat fascism and promote civil liberties. *Our History*, FREEDOM HOUSE, <https://freedomhouse.org/about-us/our-history> [<https://perma.cc/53L9-4LSZ>].

of democracy in the United States since the 2016 election.⁵¹ In 2023, the foundations supporting thirteen presidential libraries going back to Herbert Hoover signed an unprecedented joint letter that sent out “an urgent call to action for all Americans.”⁵² The letter read:

We, the undersigned, represent a wide range of views across a breadth of issues. We recognize that these views can exist peaceably side by side when rooted in the principles of democracy. Debate and disagreement are central features in a healthy democracy. Civility and respect in political discourse, whether in an election year or otherwise, are essential.⁵³

In the 2024 presidential election, eighty-one percent of likely voters reported that democracy was threatened, albeit for different reasons.⁵⁴ The Democratic party, with the support of notable Republicans such as former U.S. Representative Liz Cheney (R-WY), characterized a second Trump presidency as presenting a clear and present danger to our democratic system.⁵⁵ Former members of Trump’s first administration joined the chorus to denounce Trump and his candidacy.⁵⁶ During the election, Trump did little to counter these claims. Trump made headlines when he declared during a

⁵¹ See, e.g., LEVITSKY & ZIBLATT, *supra* note 35, at 6; Audie Cornish, Mano Sundaresan & Justine Kenin, *How the U.S. Became a ‘Backsliding Democracy’ According to a European Think Tank*, NAT’L PUB. RADIO (Feb. 25, 2021), <https://www.npr.org/2021/11/25/1059262066/how-the-u-s-became-a-backsliding-democracy-according-to-a-european-think-tank#:~:text=Press,How%20the%20U.S.%20became%20a%20%20backsliding%20democracy%2C%20according%20to,as%20a%20%22backsliding%20democracy.%22> [https://perma.cc/UWG4-XSSY].

⁵² David J. Kramer, *Presidential Centers Affirm That “Democracy Holds Us Together,”* GEORGE W. BUSH PRESIDENTIAL CTR. (Sep. 7, 2023), <https://www.bushcenter.org/publications/reaffirming-americans-commitment-to-a-more-perfect-union> [https://perma.cc/D84E-W595]; Gary Fields, *Presidential Centers from Hoover to Bush and Obama Unite to Warn of Fragile State of US Democracy*, ASSOCIATED PRESS (Sep. 7, 2023, at 18:30 ET), <https://apnews.com/article/united-states-democracy-presidents-threats-joint-statement-5530a89df2c41d58a22961f63fb0e6ff> [https://perma.cc/5HYE-J9SB].

⁵³ Kramer, *supra* note 52 (representing six libraries for Republican Presidents and seven libraries for Democratic Presidents).

⁵⁴ See *New Poll: 81% of Voters Believe Democracy Is Threatened*, GEO. INST. OF POL. & PUB. SERV. (Mar. 21, 2024), <https://politics.georgetown.edu/2024/03/21/new-poll-81-of-voters-believe-democracy-is-threatened> [https://perma.cc/TYM3-N9L9]; Nick Corasaniti, Ruth Igielnik & Camille Baker, *Voters Are Deeply Skeptical About the Health of American Democracy*, N.Y. TIMES (Oct. 27, 2024), <https://www.nytimes.com/2024/10/27/us/politics/american-democracy-poll.html> [https://perma.cc/NJ6B-4ZEB] (noting that Democrats cite Trump, whereas Republicans cite Kamala Harris, voting by mail, voting machines, and immigration).

⁵⁵ Once the third highest ranking Republican in the House, Liz Cheney became a fierce critic of President Trump and served as the Vice Chair of the United States House Select Committee on the January 6th Attack on the United States Capitol. Lisa Mascaro, *After Investigating Jan. 6, House GOP Sides with Trump and Goes After Liz Cheney*, ASSOCIATED PRESS (Dec. 17, 2024, at 21:55 ET), <https://apnews.com/article/trump-cheney-capitol-attack-prosecution-0aaba7a8d01115410c544374dd0d57f> [https://perma.cc/ED7S-7H6T].

⁵⁶ Zachary B. Wolf, *24 Former Trump Allies and Aides Who Turned Against Him*, CNN (Oct. 3, 2023, at 16:30 ET), <https://www.cnn.com/2023/10/03/politics/donald-trump-former-allies-what-matters/index.html> [https://perma.cc/JAY2-RRBG].

Fox News interview that he would only be a dictator on “day one”⁵⁷ and told a group of conservative Christians that if they voted for him in November, they would never have to vote again.⁵⁸ Clearly, these anti-democratic statements did not stop his reelection. To the contrary, polls reported substantial support for authoritarian leaders, particularly among Republicans.⁵⁹

Looking on the bright side, the political scientists are also quick to point out that there is nothing inevitable about an authoritarian slide, even when the conditions seem right. Strong democratic institutions and norms can serve as essential guardrails to constrain even the most charismatic would-be authoritarian.⁶⁰ In their 2023 book *Tyranny of the Minority*, Steven Levitsky and Daniel Ziblatt report that whether a democracy survives can depend on the willingness of politicians and officials to break with their party and stand strong for democracy in the face of an authoritarian power grab.⁶¹

B. Rise of the MAGA Movement

As the alarm bells began to go off about the future of American democracy, it was not simply Trump’s authoritarian leanings that concerned observers, but also the political philosophy of the emerging MAGA movement. During Trump’s presidential campaign in 2016, his policies and proposals ignited a populist base of supporters that, broadly speaking, embraced strong nativist views, anti-globalism, isolationism, and so-called traditional values.⁶² The

⁵⁷ Jill Colvin & Bill Barrow, *Trump’s Vow to Only Be a Dictator on “Day One” Follows Growing Worry Over His Authoritarian Rhetoric*, ASSOCIATED PRESS (Dec. 7, 2023, at 19:58 ET), <https://apnews.com/article/trump-hannity-dictator-authoritarian-presidential-election-f27e7e9d7c13fabbe3ae7dd7f1235c72> [<https://perma.cc/Q7Z4-4HX5>].

⁵⁸ Maggie Astor, *Trump Declines to Back Away from “You Don’t Have to Vote Again” Line*, N.Y. TIMES (July 30, 2024), <https://www.nytimes.com/2024/07/30/us/politics/trump-christians-vote-ingraham.html> [<https://perma.cc/59WD-EQDW>].

⁵⁹ *Survey: Four in Ten Americans Are Susceptible to Authoritarianism, but Most Still Reject Political Violence*, PUB. RELIGION RSCH. INST. (Sep. 7, 2024), <https://www.prii.org/press-release/survey-four-in-ten-americans-are-susceptible-to-authoritarianism-but-most-still-reject-political-violence/> [<https://perma.cc/R32J-Z3N6>]. The poll of 5,000 Americans found that “support for authoritarian views is strongest among Republicans (particularly those who hold favorable views of former President Donald Trump), supporters of Christian nationalism, white evangelical Protestants, and weekly churchgoers.” *Id.*

⁶⁰ LEVITSKY & ZIBLATT, *supra* note 12, at 7–10.

⁶¹ LEVITSKY & ZIBLATT, *supra* note 35, at 125 (“Breaking with antidemocratic behavior is the third principle of democratic behavior.”).

⁶² See Kurt Weyland & Raúl L. Madrid, *Introduction - Donald Trump’s Populism: What Are the Prospects for US Democracy?* in WHEN DEMOCRACY TRUMPS POPULISM 1, 1 (Kurt Weyland & Raúl L. Madrid, eds., 2019) (“Not since Andrew Jackson has the United States had a populist leader as chief executive.”); Darrell Bricker et al., *Immigration, Nativism, and Changing Politics: Special Issue Introduction*, 100 SOC. SCI. Q. 409, 409 (2019) (stating “during the 2016 U.S. presidential campaign that Donald Trump’s appeal resided largely in his anti-immigrant stances and nativist appeals”); Liam Stack, *Globalism: A Far-Right Conspiracy Theory Buoyed by Trump*, N.Y. TIMES (Nov. 14, 2016), <https://www.nytimes.com/2016/11/15/us/politics/globalism-right-trump.html> [<https://perma.cc/DAW4-FQKD>] (discussing Trump’s dislike of globalism); Charles Kupchan, *The Deep Roots of Trump’s Isolationism*, FOREIGN AFFS. (Sep. 9, 2024), <https://www.foreignaffairs.com/>

movement, also sometimes referred to as Trumpism, takes its name from Trump's campaign slogan: "Make America Great Again."⁶³ The slogan epitomizes a core belief of the MAGA Movement—the United States was once great, but it has floundered under the weight of immigration, multiculturalism, permissive liberalism, and the breakdown of traditional family and gender roles.⁶⁴ In September 2023, President Biden, who at that time was still running for re-election, specifically addressed the rising tide of extremism in the Republican party:

There's something dangerous happening in America now. There's an extremist movement that does not share the basic beliefs of our democracy: the MAGA movement. . . . [T]here's no question that today's Republican Party is driven and intimidated by MAGA Republican extremists. Their extreme agenda, if carried out, would fundamentally alter the institutions of American democracy as we know it.⁶⁵

Slightly over a year later, presidential candidate Vice President Kamala Harris openly referred to her Republican opponent as a fascist—a term that was long considered a third rail in American politics.⁶⁶ Indeed, by the end of the 2024 election cycle, a number of notable politicians and commentators were openly calling the Republican nominee for President of the United States, who is now our 47th President, a fascist.⁶⁷ For example, John Kelly, Trump's

united-states/deep-roots-trump-isolationism-america-first [https://perma.cc/23ZN-68W4] (describing Trump as a "neo-isolationist"); Flavio R. Hickel Jr. & Andrew R. Murphy, *Making America Exceptional Again: Donald Trump's Traditionalist Jeremiad, Civil Religion, and the Politics of Resentment*, 15 POL. & REL. 247, 248 (2022) ("Trump's rhetoric contextualized disparate sources of social resentment as emblematic of a broader story of American decline whose restoration required a recommitment to a pre-1960s vision of American greatness [that] reflects a romanticized Golden Age predating transformative social changes with respect to sexuality, gender roles, and civil rights.").

⁶³ Sam Dangremond, *Who Was the First Politician to Use "Make America Great Again" Anyway?*, TOWN & COUNTRY (Nov. 14, 2018, at 07:00 ET), <https://www.townand-countrymag.com/society/politics/a25053571/donald-trump-make-america-great-again-slogan-origin/> [https://perma.cc/436T-ZBZQ].

⁶⁴ Adam Volle, *MAGA Movement*, ENCYC. BRITANNICA (Mar. 26, 2026), <https://www.britannica.com/topic/MAGA-movement> [https://perma.cc/87ZH-KACE].

⁶⁵ Excerpts of Remarks as Prepared for Delivery by President Joe Biden on Democracy in Tempe, AZ, 2023 DAILY COMP. PRES. DOC. 849 (Sep. 28, 2023), <https://www.govinfo.gov/content/pkg/DCPD-202300849/pdf/DCPD-202300849.pdf> [https://perma.cc/A8AC-JVXX]; see also Peter Baker, *Biden Issues a Blistering Attack on Trump*, N.Y. TIMES (Sep. 29, 2023), <https://www.nytimes.com/2023/09/28/us/politics/biden-mccain-library.html> [https://perma.cc/BV6F-MEAG] (discussing President Biden's accusation that MAGA is a threat to democratic institutions and the nation).

⁶⁶ Jonathan Weisman, *Harris and Democrats Lose Their Reluctance to Call Trump a Fascist*, N.Y. TIMES (Oct. 17, 2024), <https://www.nytimes.com/2024/10/17/us/politics/harris-trump-fascism.html> [https://perma.cc/4YK7-DRQG].

⁶⁷ *Id.* Some commentators initially dismissed the MAGA movement as a cult of personality, with then-presidential candidate Hillary Clinton famously calling Trump's followers a "basket of deplorables" during the 2016 campaign. Roxanne Roberts, *Hillary Clinton's 'Deplorables' Speech Shocked Voters Five Years Ago — But Some*

former Chief of Staff, told *The New York Times* less than a month before the 2024 election that Trump “falls into the general definition of fascist.”⁶⁸ Within days, thirteen high-ranking former Trump administration officials signed a letter in support of Kelly’s remarks.⁶⁹ The letter read:

We applaud General Kelly for highlighting in stark details the danger of a second Trump term. Like General Kelly, we did not take the decision to come forward lightly . . . We are all lifelong Republicans who served our country. However, there are moments in history where it becomes necessary to put country over party. This is one of those moments.⁷⁰

Once the shock of using the term wears off, it is relatively easy to see how the MAGA movement satisfies many elements of the textbook definition of fascism. Fascism is a populist political philosophy that promotes militaristic nationalism and seeks to recapture the glory of a nation’s supposed golden age.⁷¹ It expresses contempt for elites, liberalism, and electoral democracy.⁷² Fascism is also associated with a strong leader, racism, xenophobia, and political violence.⁷³ It places a premium on conformity and traditional gender roles that help subordinate the interests of the individual for the good of the nation.⁷⁴

The MAGA movement’s extreme partisanship and affinity for conspiracy theories have contributed to and accelerated the erosion of our democratic institutions and norms, along with its attacks on immigrants and minority rights more generally.⁷⁵ Its efforts to undermine election integrity have destabilized the core prerequisite of any democratic system—the guarantee

Feel It Was Prescient, WASH. POST (Aug. 31, 2021), <https://www.washingtonpost.com/lifestyle/2021/08/31/deplorables-basket-hillary-clinton/> [https://perma.cc/LLF9-FY3D].

⁶⁸ Zoe Richards, *Former White House Chief of Staff John Kelly Says Trump Praised Hitler While in Office*, NBC NEWS (Oct. 23, 2024, at 09:22 ET), <https://www.nbcnews.com/politics/2024-election/john-kelly-says-donald-trump-meets-definition-fascist-rcna176706> [https://perma.cc/KG5E-KB48] (quoting recording of the interview); Michael S. Schmidt, *As Election Nears, Kelly Warns Trump Would Rule Like a Dictator*, N.Y. TIMES (Oct. 22, 2024), <https://www.nytimes.com/2024/10/22/us/politics/john-kelly-trump-fitness-character.html> [https://perma.cc/Z85R-AQPB].

⁶⁹ Megan Liebowitz, *13 Former Trump Administration Officials Sign Open Letter Backing Up John Kelly’s Criticism of Trump*, NBC NEWS (Oct. 25, 2024, at 06:53 ET), <https://www.nbcnews.com/politics/2024-election/13-former-trump-administration-officials-sign-open-letter-backing-john-rcna177227> [https://perma.cc/N25C-7TKU].

⁷⁰ *Id.*

⁷¹ JASON STANLEY, *HOW FASCISM WORKS* 4–23 (2018).

⁷² *Id.* at 37–55.

⁷³ Jonathan Rauch, *Yes, It’s Fascism*, THE ATLANTIC (Jan. 25, 2026), <https://www.theatlantic.com/ideas/2026/01/america-fascism-trump-maga-ice/685751/> [https://perma.cc/HB9N-2HBB]; KEVIN PASSMORE, *FASCISM: A VERY SHORT INTRODUCTION* 5 (2014).

⁷⁴ STANLEY, *supra* note 71, at 7–12.

⁷⁵ Nancy J. Knauer, *Big Lies, Drag Shows, and Legal Fictions*, 36 L. & LITERATURE 653, 653 (2024); Tal Axelrod, *MAGA Lays Out Hardline Immigration Demands After National Guard Shooting*, AXIOS (Dec. 3, 2025), <https://www.axios.com/2025/12/03/trump-immigration-denaturalization-asylum-maga> [https://perma.cc/D8KP-PWYT]; Nikole Hannah-Jones, *How Trump Upended 60 Years of Civil Rights in Two Months*,

of free and fair elections—and increased our tolerance for political violence.⁷⁶ Trump first began expressing distrust in the U.S. electoral system during the 2016 presidential election, which he won.⁷⁷ His false assertions that he won the 2020 election led to widespread election denialism and inspired the January 6th, 2021 insurrection that threatened to disrupt the peaceful transfer of power.⁷⁸ Despite the fact that sixty court cases failed to reveal any fraud that would have changed the result of the 2020 election, Trump frequently repeats the “Big Lie”⁷⁹ that he won the election, and this Big Lie is now accepted as an article of faith by two-thirds of all Republicans.⁸⁰ In Trump’s second term, adherence to the belief that Trump did not lose the 2020 election has become a litmus test for members of his administration.⁸¹

Over 1,500 people were criminally charged in connection with the January 6th insurrection, including members of heavily armed right-wing militias and militant Christian nationalists.⁸² Trump faced a second impeachment for “inciting an insurrection” and was the subject of a damning

N.Y. TIMES (June 27, 2026), <https://www.nytimes.com/2025/06/27/magazine/trump-civil-rights-law-discrimination.html> [<https://perma.cc/AZ3H-9DLE>].

⁷⁶ In a 2023 poll, one-third of Republicans agreed with the statement that “American patriots may have to resort to political violence,” compared to only thirteen percent of Democrats—these figures are both up compared to a similar poll taken in 2021. PUB. RELIGION RSCH. INST., THREATS TO AMERICAN DEMOCRACY AHEAD OF AN UNPRECEDENTED PRESIDENTIAL ELECTION 6 (2023), <https://www.prri.org/research/threats-to-american-democracy-ahead-of-an-unprecedented-presidential-election/> [<https://perma.cc/UQ7M-ETWP>]; see also Garen J. Wintemute et al., *MAGA Republicans’ Views of American Democracy and Society and Support for Political Violence in the United States: Findings from a Nationwide Population-Representative Survey*, 19(1) PLOS ONE 1, 1, 2 (2024) (finding that MAGA Republicans were more likely than others to endorse political violence).

⁷⁷ JONATHAN LEMIRE, THE BIG LIE: ELECTION CHAOS, POLITICAL OPPORTUNISM, AND THE STATE OF AMERICAN POLITICS AFTER 2020 7 (2022).

⁷⁸ H.R. REP. NO. 117-663, *supra* note 44, at 110.

⁷⁹ Knauer, *supra* note 75, at 663 (stating that Trump loyalists do not use the term “Big Lie” to refer to the election denialism, but instead use the phrase “Stop the Steal”). For additional information on the origin of the term, see *id.* at 665.

⁸⁰ *After Three Years and Many Indictments, the “Big Lie” That Led to the January 6th Insurrection Is Still Believed by Most Republicans*, PUB. RELIGION RSCH. INST. (Jan. 5, 2024), <https://www.prri.org/spotlight/after-three-years-and-many-indictments-the-big-lie-that-led-to-the-january-6th-insurrection-is-still-believed-by-most-republicans/> [<https://perma.cc/F3NH-HPZS>]; Knauer, *supra* note 75, at 654 (describing how GOP-controlled states enacted new restrictive voting laws).

⁸¹ Patrick Marley & Colby Itkowitz, *Key Trump Cabinet Members Refuse to Acknowledge Trump Lost in 2020*, WASH. POST (Feb. 3, 2025), <https://www.washingtonpost.com/politics/2025/02/03/trump-cabinet-2020-election-deniers/> [<https://perma.cc/UKX8-TQ5C>].

⁸² Alexander Mallin, *Where the Jan. 6 Capitol Attack Investigation Stands, by the Numbers: DOJ*, ABC NEWS (Jan. 5, 2025), <https://abcnews.com/US/jan-6-capitol-attack-investigation-stands-numbers-doj/story?id=117353000> [<https://perma.cc/BQ52-NHHM>]; Alanna Durkin Richer & Michael Kunzelman, *A Look at Far-Right Extremists in Jan. 6 Riot*, ASSOCIATED PRESS (June 22, 2022, at 06:16 ET), <https://apnews.com/article/capitol-siege-proud-boys-donald-trump-congress-government-and-politics-a8baa24af07b20ab-792f4ef6f4481fac> [<https://perma.cc/5PAL-UHKW>]; Tom Gjeiten, *Militant Christian Nationalists Remain a Potent Force, Even After the Capitol Riot*, NAT’L PUB. RADIO (Jan. 19, 2021, at 09:59 ET), <https://www.npr.org/2021/01/19/958159202/militant-christian-nationalists-remain-a-potent-force> [<https://perma.cc/6F3H-5DTC>].

congressional report from the Select January 6th Committee, led by Representatives Bennie G. Thompson and Liz Cheney.⁸³ He was also indicted on federal and state charges of election interference, but the U.S. Department of Justice dismissed the federal charges against him in December 2024 after he won the election.⁸⁴ The Georgia election racketeering case remained open as of September 2025, pending a determination of whether state charges can be prosecuted against a sitting President.⁸⁵ On the first day of his second term in office, Trump pardoned all of the individuals who had been convicted in connection with the January 6th insurrection, even those who had been convicted of violent attacks against police officers, and ordered all pending cases related to the insurrection dismissed.⁸⁶ It remains unclear how close the United States came to a complete disruption in the peaceful transfer of power, especially now that the federal election interference charges have been dropped, but our democratic guardrails held. The attempt to overturn the results of the 2020 election failed because local election workers, career public servants, elected officials, and judges refused to accede to the pressure to ratify the Big Lie and made a choice to stand strong for democracy.⁸⁷

Much has changed since 2021. MAGA forces that were once a faction within the Republican party have now solidified control over the party of Lincoln. MAGA loyalists have been installed in positions of power at the Republican National Committee, and the 2024 GOP Platform was rebranded to include the catchphrase “Make America Great Again” in its title.⁸⁸ MAGA election deniers ran for state and local offices in great numbers and won, including ten governors, and eight state Attorneys General, all of whom could

⁸³ H.R. REP. NO. 117-663, *supra* note 44, at 566.

⁸⁴ Danny Hakim & Dan Simmons, *Prosecutors in Three States Press Ahead with Election Interference Cases*, N.Y. TIMES (Dec. 12, 2024), <https://www.nytimes.com/2024/12/12/us/trump-wisconsin-election-interference.html#:~:text=Other%20criminal%20cases%20involving%20Mr.,Trump's%20new%20term> [https://perma.cc/CYX7-J3FX].

⁸⁵ Richard Fausset & Danny Hakim, *Fani Willis Loses Bid to Continue Prosecuting Georgia Trump Case*, N.Y. TIMES (Sep. 16, 2025), <https://www.nytimes.com/2025/09/16/us/fani-willis-georgia-trump.html> [https://perma.cc/YK42-ZE6B] (“[T]he criminal case — once considered one of the most serious legal threats to Mr. Trump after he sought to overturn his 2020 election loss — will not move forward anytime soon, if ever.”).

⁸⁶ Granting Pardons and Commutation of Sentences for Certain Offenses Relating to the Events at or Near the United States Capitol on January 6, 2021, Proclamation No. 10887, 90 Fed. Reg. 8331 (Jan. 29, 2025), <https://www.govinfo.gov/content/pkg/FR-2025-01-29/pdf/2025-01950.pdf> [https://perma.cc/NT7V-W4Z4]; Ryan J. Reilly, *Meet Some of the Violent Jan. 6 Rioters Donald Trump Keeps Calling “Hostages,”* NBC NEWS (Apr. 4, 2024, at 11:54 ET), <https://www.nbcnews.com/politics/justice-department/trump-republicans-jan-6-hostages-violence-capitol-police-rcna143888> [https://perma.cc/AWV8-TYZC]. Before he left office, Biden pardoned Liz Cheney and all the other members of the House Select Committee on the January 6th Insurrection. Ivana Saric & Avery Lotz, *Biden Pardons Fauci, Cheney and Jan. 6 Panel Ahead of Trump Inauguration*, AXIOS (Jan. 20, 2025), <https://www.axios.com/2025/01/20/biden-pardon-fauci-cheney-jan-6-committee-trump> [https://perma.cc/9HTR-HYHP].

⁸⁷ Knauer, *supra* note 75, at 662.

⁸⁸ 2024 Republican Party Platform, AM. PRESIDENCY PROJECT (July 8, 2024), <https://www.presidency.ucsb.edu/documents/2024-republican-party-platform> [https://perma.cc/S9QS-KB2Z].

play a decisive role in future election controversies.⁸⁹ Trump often attacks some of his Republican critics as harshly as he goes after Democratic opponents, and he has denounced members of his former administration who have disagreed with him as “traitors.”⁹⁰

In his second term in office, Trump has pushed the boundaries of presidential power and launched new assaults on our democratic institutions, but Congressional Republicans, who control both houses, have remained silent in the face of the escalating threat to democracy.⁹¹ They have turned a blind eye to actions that arguably usurp their own constitutional authority, violate statutory law, and alienate our closest allies.⁹² They have blocked Democratic efforts to demand accountability as Elon Musk and his team of “special government employees” have dismantled the federal bureaucracy and gained access to classified government data systems.⁹³ Based on how things have been going in Congress, there is no indication that the MAGA Republicans are going to stand strong for democracy.

C. Unitary Executive Theory

From his first day in office as the 47th President of the United States, Donald Trump worked quickly to consolidate power and push out his MAGA political philosophy in a blizzard of executive orders, directives, and social media posts.⁹⁴ Many of his actions surpassed the traditionally recognized boundaries of presidential authority. Instead, they reflect a strong version of what is referred to as the unitary executive theory that was developed during the Reagan administration and later embraced by the George W. Bush administration in connection with the War on Terror.⁹⁵ According to this theory, the President’s control of the executive branch cannot be limited by Congress,

⁸⁹ *The Landscape of Election Denial in America*, REPLACING THE REFS, <https://election-deniers.org/#election-deniers-sitting-states> [<https://perma.cc/86K6-EQUJ>].

⁹⁰ See, e.g., Chris Cameron, *Trump Amplifies Calls to Jail Top Elected Officials, Invokes Military Tribunals*, N.Y. TIMES (July 1, 2024), <https://www.nytimes.com/2024/07/01/us/politics/trump-liz-cheney-treason-jail.html> [<https://perma.cc/8MX6-2B8F>].

⁹¹ Carl Hulse, *As Shutdown Drags and Trump Flexes, Congress Cedes Its Relevance*, N.Y. TIMES (Oct. 22, 2025), <https://www.nytimes.com/2025/10/22/us/politics/trump-shutdown-congress-power.html> [<https://perma.cc/CG95-EFRB>].

⁹² Susan Davis, *So Far Congress Has Stayed Out of Trump’s Way, but Pressure Tests Lie Ahead*, NAT’L PUB. RADIO (Apr. 30, 2025, at 17:50 ET), <https://www.npr.org/2025/04/30/g-s1-63360/first-100-days-congress-acquiesces-to-trump-but-pressure-tests-ahead> [<https://perma.cc/3TP8-BVY8>].

⁹³ The Republican Accountability Project estimated in 2021 that six percent of national Republicans politicians consistently stood up for democracy, with many of those who did losing reelection or retiring. LEVITSKY & ZIBLATT, *supra* note 35, at 130–32.

⁹⁴ Zachary Basu, *Trump’s Mega-MAGA Month Transforms America*, AXIOS (Feb. 20, 2025), <https://www.axios.com/2025/02/20/trump-maga-month-transforms-america> [<https://perma.cc/D4KM-DX6Y>].

⁹⁵ Mark Tushnet, *Reflections on Calabresi and Yoo’s the Unitary Executive: A Political Perspective on the Theory of the Unitary Executive*, 12 U. PA. J. CONST. L. 313, 317, 324 (2010).

which therefore has no authority to establish independent agencies.⁹⁶ In its strongest form, the theory suggests that the President need not always follow the law.⁹⁷

Since Trump has taken office, he has embarked on a slash and burn campaign against the federal government. Many of the actions of his administration violate longstanding democratic norms and potentially violate constitutional or statutory law.⁹⁸ He has shut down agencies without Congressional approval and instituted mass firings of civil service protected federal workers, including career prosecutors who worked on his election interference cases.⁹⁹ Trump summarily fired over a dozen Inspectors General—some of whom were still serving from his first administration—and dismissed the heads of independent agencies.¹⁰⁰ He greenlighted a new entity called the Department of Government Efficiency (“DOGE”) to access untold amounts of federal data.¹⁰¹ In a move that does not test legal limits, but is definitely a norm breaker, Trump dismissed the chair of the Kennedy Center and appointed himself chair in her place.¹⁰²

Trump has also frozen funding that had already been appropriated by Congress and cancelled federal contracts and grants, including stopping nearly all foreign aid.¹⁰³ Such actions violate the Impoundment Control Act

⁹⁶ Maggie Haberman, Charlie Savage & Jonathan Swan, *Trump Suggests No Laws Are Broken If He’s “Saving His Country,”* N.Y. TIMES (Feb. 15, 2025), <https://www.nytimes.com/2025/02/15/us/politics/trump-saves-country-quote.html> [https://perma.cc/45PR-HAUJ]. Supporters of the unitary executive theory cite as authority for broad presidential powers the Vesting Clause of Article II in the U.S. Constitution. Jed H. Shugerman, *Vesting*, 74 STAN. L. REV. 1479, 1481 (2022).

⁹⁷ Haberman et al., *supra* note 96 (noting that in the first month of his second term Trump posted on both Truth Social and X a quote often attributed to Napoleon Bonaparte: “He who saves his Country does not violate any Law.”).

⁹⁸ Francesca Paris & Charlie Savage, *Is That Legal? A Guide to Trump’s Big Moves So Far*, N.Y. TIMES (Feb. 20, 2025), <https://www.nytimes.com/2025/02/20/upshot/trump-executive-orders-legality.html> [https://perma.cc/DY79-FEMC].

⁹⁹ *Id.*

¹⁰⁰ Zeke Miller, Erick Tucker & Will Weissert, *Trump Uses Mass Firing to Remove Independent Inspectors General at a Series of Agencies*, ASSOCIATED PRESS (Jan. 25, 2025, at 22:33 ET), <https://apnews.com/article/trump-inspectors-general-fired-congress-unlawful-4e8bc57e132c3f9a7f1c2a3754359993> [https://perma.cc/B5QB-YBJB].

¹⁰¹ The president’s special commission now has an unprecedented ability to view and manipulate information at many federal agencies. Charlie Warzel, Ian Bogost & Matteo Wong, *DOGE Has “God Mode” Access to Government Data*, THE ATLANTIC (Feb. 24, 2025), <https://www.theatlantic.com/technology/archive/2025/02/doge-god-mode-access/681719/> [https://perma.cc/3EQZ-WZGE].

¹⁰² Elisabeth Bumiller, *Trump’s Revenge Now Includes His Takeover of the Kennedy Center*, N.Y. TIMES (Feb. 18, 2025), <https://www.nytimes.com/2025/02/18/us/politics/kennedy-center-trump.html> [https://perma.cc/ZKB8-B4LC].

¹⁰³ Michael Casey, *Federal Judge Considering a Request to Further Block Trump Administration from Freezing Funds*, ASSOCIATED PRESS (Feb. 21, 2025, at 18:20 ET), <https://apnews.com/article/trump-spending-freeze-judge-federal-grants-loans-64d5ebcc46548fb3194bfd027cd56d59> [https://perma.cc/BN9K-CTKN]; Edward Wong & Apoorva Mandavilli, *U.S. Halt to Foreign Aid Cripples Programs Worldwide*, N.Y. TIMES (Jan. 28, 2025), <https://www.nytimes.com/2025/01/28/us/politics/trump-rubio-foreign-aid.html> [https://perma.cc/3P4U-AZYS].

of 1974 that was enacted post-Watergate, as well as Article I of the Constitution that grants Congress the “power of the purse.”¹⁰⁴ Russell Vought, Director of the Office of Management and Budget (OMB), takes the position that the President has the power of impoundment under the Constitution and that the Impoundment Control Act is necessarily unconstitutional.¹⁰⁵ Vought authored the section on the power of the executive in the controversial *Project 2025*,¹⁰⁶ a conservative blueprint for reshaping the federal government published by the Heritage Foundation, as explained in greater detail in Section III. Not surprisingly, it endorses a strong version of the unitary executive theory that includes the power of impoundment.¹⁰⁷ Despite Trump’s efforts on the campaign trail to distance himself from *Project 2025*, many of his executive actions track very closely to the conservative playbook, including his clearly unconstitutional attempt to rescind “birthright citizenship,” as guaranteed under the Fourteenth Amendment, by executive order.¹⁰⁸

Less than three weeks into Trump’s second term, there were over forty pending lawsuits challenging Trump’s executive actions as *ultra vires*.¹⁰⁹ It is not clear whether Trump’s strategy is to litigate these cases up to the U.S. Supreme Court in the hope of expanding his powers through favorable court rulings or to eventually disregard an unfavorable court order and thereby take us irrevocably down the road to a constitutional crisis. Whatever Trump does while in office enjoys expanded immunity thanks to the 2024 Supreme Court decision in *Trump v. United States*, the 2020 election interference case.¹¹⁰ Although the Supreme Court did not fully endorse Trump’s claim of “absolute immunity,” its 6-3 decision greatly expanded the scope of presidential immunity.¹¹¹ The Court held that the President has immunity from

¹⁰⁴ U.S. CONST. art. I; Impoundment Control Act of 1974, Pub. L. 93-344, Title X, §1001, 88 Stat. 332.

¹⁰⁵ Tony Romm, *Senate Confirms Russell Vought to Lead White House Budget Office*, WASH. POST (Feb. 6, 2025), <https://www.washingtonpost.com/business/2025/02/06/russell-vought-confirmed-omb-director/> [<https://perma.cc/74NG-XZ8R>].

¹⁰⁶ *Id.*

¹⁰⁷ Russell Vought, *The Executive Office of the President of the United States*, in MANDATE FOR LEADERSHIP 2025: THE CONSERVATIVE PROMISE 43, 43–45 (Paul Dans & Steven Groves eds., 2023) [hereinafter *Project 2025*]; Bobby Kogan, *How Trump and a Project 2025 Lead Author Are Trying to Undermine Checks and Balances Central to U.S. Governance*, CTR. FOR AM. PROGRESS (Sep. 9, 2024), <https://www.americanprogressaction.org/article/how-trump-and-a-project-2025-lead-author-are-trying-to-undermine-checks-and-balances-central-to-u-s-governance/> [<https://perma.cc/5XT4-7QBY>].

¹⁰⁸ U.S. CONST. amend. XIV; see *infra* text accompanying notes 250–59 (discussing *Project 2025*); Exec. Order No. 14160, 90 Fed. Reg. 8449 (Jan. 20, 2025) (Protecting the Meaning and Value of American Citizenship).

¹⁰⁹ Mattathias Schwartz, Opinion, *Why Federal Courts May Be the Last Bulwark Against Trump*, N.Y. TIMES (Feb. 9, 2025), <https://www.nytimes.com/2025/02/09/us/trump-federal-courts-lawsuits.html> [<https://perma.cc/FG7G-BBCM>].

¹¹⁰ *Trump v. United States*, 144 S. Ct. 2312 (2024).

¹¹¹ See *id.* at 2347.

criminal prosecution for acts conducted under his core constitutional authority and presumptive immunity for all official acts, but does not have immunity for any private acts.¹¹² The question of what constitutes “core” constitutional authority will depend on whether the Court adopts the strong version of the unitary executive theory asserted by the Trump administration.

II. THE POLITICS OF ERADICATION

The Politics of Eradication, as applied to LGBTQ people, is based on the conviction that LGBTQ people should not, or do not, really exist.¹¹³ It is not interested in a deliberation over how (or whether) to address existing disparities experienced by LGBTQ people or how (or whether) to protect LGBTQ people from discrimination. It opposes any government recognition of LGBTQ people or their families that might risk legitimizing and acknowledging the reality of LGBTQ lives and identities. To the contrary, its goal is to contain the perceived contagious nature of LGBTQ identities. The Politics of Eradication is certainly not unique to LGBTQ issues. It is an old strategy applied to unpopular groups that offers an appealing finality because it promises to just literally make the problem go away.

The MAGA movement has been very successful in reframing the understanding of sexual orientation and gender identity in a way that works to its political advantage. The movement’s anti-LGBTQ policy proposals take on an immediate sense of urgency because the movement claims that reforms are necessary to protect women, children, and the nation.¹¹⁴ After first capturing the red, or predominantly Republican-voting, states, the MAGA movement has now successfully enshrined this warped understanding of sexual orientation and gender identity in official U.S. policy. At the federal level, the definitions of “gender ideology” and “divisive ideology” are prime examples of gaslighting designed to make LGBTQ people question their own reality and invite others to deny it. Both definitions are based on Trump’s signature “commonsense” and reflect the growing influence of the global anti-gender movement in U.S. politics, which represents a shift from the Biblical justifications that had traditionally underpinned much of the anti-LGBTQ rhetoric on the far-right.¹¹⁵

¹¹² *Id.* at 2340–42. This ruling did not end the criminal prosecution pending against Trump at the time because the question remained as to whether Trump’s acts were official acts or private acts. Seth Barrett Tillman & Josh Blackman, *What We Did and Did Not Argue in Trump v. United States*, 25 HARV. J.L. & PUB. POL’Y PER CURIAM 1, 8 (2024).

¹¹³ Knauer, *supra* note 1, at 617.

¹¹⁴ See *infra* text accompanying notes 296–306 (detailing the MAGA characterization of LGBTQ people as a threat to children, women, and national security).

¹¹⁵ See Benjamin Wallace-Wells, *The Political Strategy of Ron DeSantis’s “Don’t Say Gay” Bill*, NEW YORKER (June 28, 2022), <https://www.newyorker.com/news/the-political-scene/the-political-strategy-of-ron-desantiss-dont-say-gay-bill> [<https://perma.cc/EHB5-4JXC>]. See generally JUDITH BUTLER, WHO’S AFRAID OF GENDER? (2024) (discussing the global anti-gender movement and its influence in political discourse).

This section charts how the MAGA movement came to embrace anti-LGBTQ initiatives during the first Trump administration, flooded state legislatures with anti-LGBTQ bills during the Biden administration, and then elevated an anti-LGBTQ Politics of Eradication into some of the central talking points of the 2024 presidential campaign and an effective strategy to reach swing voters. In the first months of his second term in office, Trump made good on his campaign promises and implemented many of these talking points through executive orders and other administrative actions.

A. *The First Trump Administration (2017–2021)*

In 2016, Trump had waged a campaign that was deceptively inclusive and friendly to LGBTQ people, as he repeatedly vowed to protect and value LGBTQ Americans. In his acceptance speech at the 2016 Republican Convention, Trump said: “As your President, I will do everything in my power to protect our LGBTQ citizens from the violence and oppression of a hateful foreign ideology.”¹¹⁶ He delivered a campaign speech in Colorado while holding and waving a LGBTQ pride flag that said “LGBTs for Trump” in black marker.¹¹⁷ He also famously said that transgender media personality and former Olympian, Caitlin Jenner, could use “any bathroom she chooses” at Trump Tower.¹¹⁸

Early in his first term, Trump returned to the theme of protecting LGBTQ people from the “hateful foreign ideology” that he first referenced at the 2016 Convention. His controversial travel ban for Muslim-majority countries, Executive Order 13769, lists protecting LGBTQ people from “acts of bigotry or hatred” as one of the justifications for the ban.¹¹⁹ It states:

In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the

¹¹⁶ Eugene Scott, *Trump’s Response to the Pulse Shooting in 2016 Gave False Hope About His LGBT Agenda*, WASH. POST (June 12, 2019), <https://www.washingtonpost.com/politics/2019/06/12/trumps-response-pulse-shooting-gave-false-hope-about-his-lgbt-agenda/> [<https://perma.cc/DH2X-GBCD>] (detailing Trump’s statement after reference to mass shooting at Pulse nightclub in Orlando, Florida).

¹¹⁷ Michael Lambert, *Donald Trump Waves LGBT Rainbow Flag at Colorado Rally*, ADVOCATE (Oct. 31, 2016), <https://www.advocate.com/2016/10/31/donald-trump-waves-lgbt-rainbow-flag-colorado-rally> [<https://perma.cc/TW8T-QQ7R>].

¹¹⁸ Helena Andrews-Dyer, *Donald Trump Says Caitlyn Jenner Can Use Whatever Bathroom She Wants at Trump Tower*, WASH. POST (Apr. 21, 2016), <https://www.washingtonpost.com/news/reliable-source/wp/2016/04/21/donald-trump-says-caitlyn-jenner-can-use-whatever-bathroom-she-wants-at-trump-tower/> [<https://perma.cc/6BQP-G8D6>].

¹¹⁹ Exec. Order No. 13769, 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017); see Earl M. Matlz, *The Constitution and the Travel Ban*, 22 LEWIS & CLARK L. REV. 391, 391–92 (2018) (discussing controversy and constitutional challenges to the travel ban).

United States should not admit those who engage in acts of bigotry or hatred (including “honor” killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, *or sexual orientation*.¹²⁰

When Trump became the first Republican president to recognize Pride Month in 2019,¹²¹ he again drew a comparison between the United States’ relative tolerance for LGBTQ people and other countries that continue to criminalize LGBTQ people, many of which are Muslim-majority countries.¹²² He tweeted:

As we celebrate LGBT Pride Month and recognize the outstanding contributions LGBT people have made to our great Nation, let us also stand in solidarity with the many LGBT people who live in dozens of countries worldwide that punish, imprison, or even execute individuals on the basis of their sexual orientation.¹²³

These episodic expressions of support, however, were overshadowed by Trump’s actions to reverse many of the Obama-era initiatives that recognized and protected LGBTQ identities, especially rights for transgender people. Under the Obama administration, there were tremendous policy gains within the executive branch to advance LGBTQ rights,¹²⁴ but it was relatively easy for the Trump administration to reverse many of these gains because they were not statutory or regulatory.¹²⁵ For example, in 2016, the Obama administration directed public schools to allow students to use bathrooms that align with their gender identity, even if that conflicted with the gender on their

¹²⁰ Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (emphasis added).

¹²¹ Tim Fitzsimmons, *Trump Recognizes LGBTQ Pride Month for First Time*, NBC NEWS (May 31, 2019, at 16:01 ET), <https://www.nbcnews.com/feature/nbc-out/trump-recognizes-lgbtq-pride-month-first-time-n1012611> [<https://perma.cc/P8SQ-2ZTL>].

¹²² All countries that impose capital punishment for homosexuality are Muslim-majority with the exception of Uganda. See *Legal Frameworks*, ILGA DATABASE WORLD, <https://database.ilga.org/criminalisation-consensual-same-sex-sexual-acts> [<https://perma.cc/2Z9Q-LYKU>] (Brunei, Iran, Mauritania, Nigeria, Saudi Arabia, Uganda, Yemen).

¹²³ Donald J. Trump (@realDonaldTrump), X (May 31, 2019, at 15:12 ET), <https://x.com/realDonaldTrump/status/1134538166919204865> [<https://perma.cc/B85T-JXMF>]; see Exec. Order No. 13769, 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017) (emphasis added).

¹²⁴ See generally Scott Horsley, *Not Always a “Thunderbolt”: The Evolution of LGBT Rights Under Obama*, NAT’L PUB. RADIO (June 9, 2016, at 05:02 ET), <https://www.npr.org/2016/06/09/481306454/not-always-a-thunderbolt-the-evolution-of-lgbt-rights-under-obama> [<https://perma.cc/7MPG-A3FM>] (“President Obama’s years in office have seen a flowering of gay and lesbian rights.”).

¹²⁵ See generally Emma Green, *How Trump Is Reversing Obama’s Nondiscrimination Legacy*, THE ATLANTIC (Aug. 14, 2019), <https://www.theatlantic.com/politics/archive/2019/08/trump-lgbtq-rules/596116/> [<https://perma.cc/W45J-WK8P>] (explaining the rationale for the administration’s “single-minded focus on administrative rulings and executive orders”).

birth certificates.¹²⁶ The Department of Education announced the policy in the form of a “Dear Colleague” letter, which is a common form of sub-regulatory guidance used by the Department of Education to explain how the Department interprets the relevant laws and regulations that apply to educational contexts.¹²⁷ At the time, the issue of access to bathrooms and locker rooms for transgender students was the subject of several ongoing and high-profile court cases, most notably the case brought by Gavin Grimm.¹²⁸ In February 2017, a little more than a month into the Trump administration, the Department of Education rescinded the bathroom guidance by issuing a new “Dear Colleague” letter, stating that the first one had been based on insufficient legal analysis.¹²⁹ Numerous other agencies also rescinded Obama-era protections for transgender people in a variety of spaces, including in prisons, homeless shelters, and schools.¹³⁰

One of the most significant gains that President Trump reversed was the Obama-era policy that allowed transgender people to serve openly in the military.¹³¹ Under the Trump policy, transgender individuals could continue to serve, but they had to do so in the gender they were assigned at birth.¹³² Moreover, they needed a doctor’s certificate stating that they have been stable in their sex assigned at birth for at least thirty-six months and have not transitioned.¹³³ In addition to reversing these Obama-era initiatives that recognized and protected LGBTQ identities,¹³⁴ the Trump administration

¹²⁶ U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUST., DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS 3 (2016), <https://www.justice.gov/opa/file/850986/dl> [<https://perma.cc/3AF7-28MK>] (extending protections under Title IX for transgender students).

¹²⁷ In this case, the interpretation announced in the letter was based on a determination that barring transgender students from public school bathrooms that matched their gender identities was a form of sex discrimination prohibited under Title IX. *Id.*

¹²⁸ See, e.g., Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 586 (4th Cir. 2020), *as amended* (Aug. 28, 2020); see also Grimm v. Gloucester School Board, Am. C.L. UNION (Oct. 6, 2021), <https://www.aclu.org/cases/grimm-v-gloucester-county-school-board?redirect=cases/gg-v-gloucester-county-school-board> [<https://perma.cc/H32A-H8JU>] (summarizing litigation).

¹²⁹ U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUST., *supra* note 126, at 1 (withdrawing policy guidance on transgender students).

¹³⁰ German Lopez, *The Trump Administration Just Rescinded Obama-Era Protections for Transgender Prisoners*, VOX (May 14, 2018), <https://www.vox.com/policy-and-politics/2018/5/14/17351636/trump-transgender-prison-lgbtq> [<https://perma.cc/QLD7-GW6Q>]; Chris Cameron, *Trump Presses Limits on Transgender Rights Over Supreme Court Ruling*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/24/us/politics/trump-transgender-rights-homeless.html> [<https://perma.cc/PL4T-X4GT>]. See generally ROBIN KNAUER MARIL, HUM. RTS. CAMPAIGN FOUND., TRUMP’S ADMINISTRATIVE ABUSE AND THE LGBTQ COMMUNITY (2017), <https://assets2.hrc.org/files/assets/resources/HRC-Trump-Administrative-Abuse-Sept2017.pdf> [<https://perma.cc/F9FY-RRS3>] (describing instances where first Trump administration rescinded Obama’s policies).

¹³¹ See Rebecca Kheel, *Pentagon Signs Directive to Implement Transgender Military Ban*, THE HILL (Mar. 12, 2019, at 20:22 ET), <https://thehill.com/policy/defense/433788-pentagon-signs-directive-to-implement-transgender-military-ban> [<https://perma.cc/A8MY-CBSB>]. Transgender servicemembers had been serving openly since 2016. *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ President Trump tweeted the policy change in 2017. *Id.*

tried to remove any acknowledgment of transgender people or identities from federal programs and civil rights protections.¹³⁵ Beginning in 2018, there was an interagency discussion about creating a federal definition of sex as a biological and immutable fact determined at birth for purposes of Title IX.¹³⁶ As explained below, Trump imposed just such a definition on transgender Americans on the first day of his second term in office—one that applies for all federal purposes, not just Title IX. He also renewed his ban on transgender service members several days later.¹³⁷

Shortly before Trump left office, he signed Executive Order 13950 that presaged his attack on DEI in his second term.¹³⁸ The order, titled *Combating Race and Sex Stereotyping*, prohibited the federal government, federal contractors, and federal grant recipients from providing employee training on “divisive concepts,”¹³⁹ which was understood at the time to be directed at “critical race theory,” an academic concept designed to study the systemic nature of racism twisted by the MAGA movement into an unrecognizable assault on white males.¹⁴⁰ As directed by the order, the U.S. Department of Labor set up a hotline for tips about noncompliance,¹⁴¹ and its now largely defunct Office of Federal Contract Compliance Programs announced that it would require federal contractors and subcontractors to submit for review the content of diversity and inclusion training programs, as well as their duration and expense.¹⁴² Three days prior to issuing Executive Order 13950, Trump had announced that he was going to create the “1776 Commission,” an advisory committee to promote “patriotic education.”¹⁴³ The 1776 Commission was designed to counter the influential 1619 Project undertaken by the *New York Times* commemorating the 400th anniversary of the beginning of American slavery.¹⁴⁴ Both the 1776 Commission and the ban on including “divisive concepts” in employee training appeared to be part of Trump’s response to the

¹³⁵ See Erica L. Green, Katie Benner & Robert Pear, “Transgender” Could Be Defined Out of Existence Under Trump Administration, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html> [<https://perma.cc/7C52-ZPZ9>].

¹³⁶ *Id.*

¹³⁷ Exec. Order No. 14183, *supra* note 6 (Prioritizing Military Excellence and Readiness).

¹³⁸ Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sep. 22, 2020).

¹³⁹ *Id.*

¹⁴⁰ See Caroline Mala Corbin, *A Critical Race Theory Analysis of Critical Race Theory Bans*, 14 U.C. IRVINE L. REV. 57, 59 (2024).

¹⁴¹ Exec. Order No. 13950, *supra* note 138; *U.S. Department of Labor Launches Hotline to Combat Race and Sex Stereotyping by Federal Contractors*, U.S. DEP’T OF LAB. (Sep. 28, 2020), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20200928-0> [<https://perma.cc/EQW4-VQ6P>].

¹⁴² Exec. Order No. 13950, *supra* note 138, at sec. 4.

¹⁴³ Donald J. Trump, U.S. President, Remarks at a White House Conference on American History 2 (Sep. 17, 2020), <https://www.govinfo.gov/content/pkg/DCPD-202000691/pdf/DCPD-202000691.pdf> [<https://perma.cc/7XCE-T3P7>].

¹⁴⁴ *Id.*; *The 1619 Project*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> [<https://perma.cc/XAM4-FTJY>].

racial justice protests following the murder of George Floyd.¹⁴⁵ In his speech announcing the creation of the 1776 Commission, Trump stated, “the left-wing rioting and mayhem are the direct result of decades of left-wing indoctrination in our schools.”¹⁴⁶ As explained below, Trump has revisited these issues in his second term with several executive orders dealing with “DEI” and “divisive ideology” that are much more expansive and cover “gender ideology,” directly implicating LGBTQ rights.

B. *The Interregnum (2021–2025)*

The period between Trump’s first and second terms was, in retrospect, a study in contrast and contradiction. The Biden administration and certain blue, or predominantly Democratic-voting, states continued to expand protections for LGBTQ people, offering unprecedented levels of protection and integration.¹⁴⁷ At the same time, however, the number of anti-LGBTQ bills proposed on the state level soared to staggering numbers, as explained below. Skirmishes on the local level disrupted school board meetings, threatened to close libraries, and saw armed militias disrupt drag story hours for children.¹⁴⁸

1. *The Biden Administration*

It was no surprise that President Biden used his term in office to advance LGBTQ rights given that it had been one of his gaffes as Vice President that eventually pushed the Obama administration to come out in favor of marriage equality.¹⁴⁹ Biden and his running mate Kamala Harris ran on a platform that expressed strong support for LGBTQ people, including a promise to pass the Equality Act, which would have amended the Civil Rights Act of 1964 to include sexual orientation and gender identity as protected classes.¹⁵⁰

¹⁴⁵ Michael Crowley & Jennifer Schuessler, *Trump’s 1776 Commission Critiques Liberalism in Report Derided by Historians*, N.Y. TIMES (Jan. 18, 2021), <https://www.nytimes.com/2021/01/18/us/politics/trump-1776-commission-report.html> [<https://perma.cc/HBL9-86G4>]; see Trump, *supra* note 143, at 1.

¹⁴⁶ Trump, *supra* note 143, at 1.

¹⁴⁷ See, e.g., Anne Branigan, *These LGBTQ Lawmakers Want to Make Their States a Refuge for Trans Kids*, WASH. POST (May 7, 2022), <https://www.washingtonpost.com/nation/2022/05/07/lgbtq-lawmakers-refuge-states-trans-kids/> [<https://perma.cc/JJF5-EKEH>].

¹⁴⁸ See, e.g., *Drag Story Time at Oregon Pub Draws Gun-Carrying Protesters*, NBC NEWS (Oct. 25, 2022, at 11:30 ET), <https://www.nbcnews.com/nbc-out/out-news/drag-story-time-oregon-pub-draws-gun-carrying-protesters-rcna53901> [<https://perma.cc/C83T-PYYK>].

¹⁴⁹ Steven Leviston, *Speaking from the Heart*, WASH. POST (Jan. 11, 2021), <https://www.washingtonpost.com/nation/2021/01/11/gay-marriage-joe-biden/> [<https://perma.cc/NP3D-2DF4>].

¹⁵⁰ Jeff Taylor, *Biden Talked a Big Game on LGBTQ Rights. Here’s What His Agenda May Look Like*, NBC NEWS (Nov. 11, 2020, at 15:29 ET), <https://www.nbcnews.com/feature/nbc-out/biden-talked-big-game-lgbtq-rights-here-s-what-his-n1247451> [<https://perma.cc/U9A8-CZRJ>]. The Equality Act would amend the Civil Rights Act of 1964

As President, Biden reversed Trump's anti-LGBTQ executive policies and expanded on the pro-LGBTQ protections that had been extended under the Obama administration.

On his first day in office, Biden issued Executive Order 13988, titled *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*.¹⁵¹ It prohibited discrimination in the federal government and by federal contractors on account of sexual orientation and gender identity, but it covered private employers as well.¹⁵² The expansion of protections to private employers was based on a 2020 U.S. Supreme Court case, *Bostock v. Clayton County*, that extended Title VII nondiscrimination protections in employment to include sexual orientation and gender identity.¹⁵³ Building off *Bostock*, the executive order also expanded nondiscrimination coverage to include protections for sexual orientation and gender identity in Title IX of the Education Amendments of 1972 and the Fair Housing Act of 1968 because those statutes were traditionally interpreted in concert with Title VII.¹⁵⁴

In another reversal of Trump policy, the Biden administration enthusiastically embraced DEI initiatives and programming across the federal government. On his first day in office, Biden issued Executive Order 13985, titled *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*.¹⁵⁵ It announced a "whole-of-government equity agenda" to "pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality."¹⁵⁶ LGBTQ people were included in the list of marginalized identities.¹⁵⁷ As this federal embrace of DEI was taking place, DEI was also being widely adopted in the private and non-profit sectors in response to the 2020 protests for racial justice.¹⁵⁸

(including Titles II, III, IV, VI, VII, and IX) to prohibit discrimination on the basis of sex, sexual orientation and gender identity in employment, housing, public accommodations, education, federally funded programs, credit, and jury service. The Equality Act, H.R.5, 117th Cong. (2021).

¹⁵¹ Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

¹⁵² *Id.*

¹⁵³ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

¹⁵⁴ Exec. Order No. 13988, *supra* note 151 ("Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love.").

¹⁵⁵ Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Which US Companies Are Pulling Back on Diversity Initiatives?*, ASSOCIATED PRESS (Feb. 5, 2025, at 19:59 ET), <https://apnews.com/article/dei-trump-race-gender-ethnicity-diversity-equity-inclusion-companies-policies-8b22129bab630e62be36aa447a2bd47b> [<https://perma.cc/EKC9-5UKK>] ("A number of prominent companies have scaled back or set aside the diversity, equity and inclusion initiatives that much of corporate America endorsed following the protests that accompanied the Minneapolis police killing of George Floyd, a Black man, in 2020.").

2. State Level Anti-LGBTQ Bills

Beginning in 2021, there was a precipitous uptick in anti-LGBTQ bills introduced in state legislatures just as the country was shaking off its COVID-19 pandemic lockdown.¹⁵⁹ The proposed bills touched on many aspects of LGBTQ lives. The vast majority of the bills were directed at transgender people, especially transgender children.¹⁶⁰ The bills sought to establish a binary and immutable definition of sex, censor classroom discussion, ban books, prohibit access to gender-affirming medical care, prohibit transgender students from participating in sports, require transgender people to use the bathroom of the sex they were assigned at birth, and establish expansive religious exemptions to allow open discrimination against LGBTQ people.¹⁶¹

Given the partisan polarization over LGBTQ rights, these bills were most successful in red states, with Florida being a notable first-mover in the new anti-woke war on LGBTQ people.¹⁶² Florida's Governor, Ron DeSantis, declared in his second inaugural speech, "We will never surrender to the woke mob. Florida is where woke goes to die."¹⁶³ DeSantis grabbed national headlines in 2022 with Florida's "Don't Say Gay" law and later with his efforts to revamp public higher education in the state.¹⁶⁴ However, what was going on in Florida was just the tip of the iceberg.

¹⁵⁹ 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/U3A5-EQNN>]; Cullen Peele, *Roundup of Anti-LGBTQ+ Legislation Advancing in States Across the Country*, HUM. RTS. CAMPAIGN (May 23, 2023), <https://www.hrc.org/press-releases/roundup-of-anti-lgbtq-legislation-advancing-in-states-across-the-country> [<https://perma.cc/GB8G-HGQY>].

¹⁶⁰ Ronan, *supra* note 159.

¹⁶¹ *Id.*

¹⁶² Jeff Weiner & Kathryn Varn, Opinion, *Why Florida Is America's Least Gay-Friendly State*, AXIOS (June 1, 2024), <https://www.axios.com/2024/06/01/florida-pride-month-desantis-anti-lgbtq-restrictions> [<https://perma.cc/K94N-FT6X>].

¹⁶³ Matt Dixon & Gary Fineout, "Where Woke Goes to Die": DeSantis, *With Eye Toward 2024, Launches Second Term*, POLITICO (Jan. 3, 2023, at 14:24 ET), <https://www.politico.com/news/2023/01/03/desantis-2024-second-term-00076160> [<https://perma.cc/3S8F-HR3X>]. The term "woke" means different things to different people from awareness of social injustice to more pejorative and dismissive connotations toward progressive values and priorities. Kiara Alfonseca, *What Does "Woke" Mean and Why Are Some Conservatives Using It?*, CBS NEWS (Mar. 4, 2025, at 22:42 ET), <https://abcnews.go.com/Politics/woke-conservatives/story?id=93051138> [<https://perma.cc/85JE-9CGG>].

¹⁶⁴ Clifford Rosky, *Don't Say Gay: The Government's Silence and the Equal Protection Clause*, 2022 U. ILL. L. REV. 1845, 1852 (2022); Patricia Mazzei, *Legal Settlement Clarifies Reach of Florida's "Don't Say Gay" Law*, N.Y. TIMES (Mar. 11, 2024), <https://www.nytimes.com/2024/03/11/us/florida-dont-say-gay-law-settlement.html> [<https://perma.cc/R5L4-NHEU>]; Rebecca Carballo, Andrew Atterbury & Bianca Quilantan, *Trump Is Betting on DeSantis' College Oversight Revamp. It's Shaping Up to Be a Red-state Revolution*, POLITICO (Feb. 21, 2026), <https://www.politico.com/news/2026/02/21/trump-fuels-desantis-college-oversight-shakeup-00788295> [<https://perma.cc/F2SQ-DM7T>].

In state legislatures across the country, there was an all-out assault on the rights of LGBTQ people and their ability to move freely through their daily lives. Broadly speaking, the proposed legislation was focused on four different goals:

- Censor and silence LGBTQ identities, such as Florida’s “Don’t Say Gay” bill, parental approval curricular bills, book bans, and criminal prohibitions against drag;¹⁶⁵
- Exclude LGBTQ people from public life, such as bathroom bans and sports bans;¹⁶⁶
- Erase LGBTQ identities, such as binary sex definitions, bills prohibiting access to gender-affirming care, and parental rights bills authorizing conversion therapy;¹⁶⁷ and
- Provide expansive religious and moral exemptions, such as in the context of adoption and foster care.¹⁶⁸

From 2021 to 2024, the number of anti-LGBTQ bills introduced in state legislatures increased over three-fold.¹⁶⁹ During that period, the nature of the bills evolved, often borrowing from concepts that were being introduced in the abortion context, such as third-party reporting.¹⁷⁰ In 2021 and 2022, the number of anti-LGBTQ bills introduced at the state level were 164 and 278, respectively, with twenty enacted each year.¹⁷¹ The volume of anti-LGBTQ legislation increased dramatically in 2023 when 510 bills were introduced

¹⁶⁵ See, e.g., *LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/curricular_laws [http://perma.cc/B39P-JM6H] (listing nineteen states that have at least one school censorship law).

¹⁶⁶ See, e.g., *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans [https://perma.cc/D8DB-VCZB] (listing twenty-seven states prohibiting transgender students from participating in sports consistent with their gender identity).

¹⁶⁷ See, e.g., *Regulating Gender to Allow Discrimination*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/nondiscrimination/defining_sex [https://perma.cc/6NTT-5B6P] (listing sixteen states with restrictive definitions of “sex”).

¹⁶⁸ See, e.g., *Religious Exemptions*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/religious_exemptions/medical [https://perma.cc/77KV-E7N2] (listing ten states with religious exemptions that allow medical professionals to refuse to serve LGBTQ patients).

¹⁶⁹ See *infra* note 171 (reporting 164 anti-LGBTQ laws introduced in 2021); *infra* note 174 (reporting 533 anti-LGBTQ laws introduced in 2024).

¹⁷⁰ Sarah Prager, *More Bounty Laws Offering Cash for Reporting Trans People, Abortions, and Librarians Expected in 2025*, PRISM (Jan. 8, 2025), <https://prismreports.org/2025/01/08/bounty-laws-texas-trans-rights-abortion/> [https://perma.cc/45H6-2SER].

¹⁷¹ See *Legislation Affecting LGBT Rights Across the Country 2021*, AM. C.L. UNION (Dec. 17, 2021), <https://www.aclu.org/documents/legislation-affecting-lgbtq-rights-across-country-2021> [https://perma.cc/3EXT-5S5Z]; *Past Legislation Affecting LGBT Rights Across the Country 2022*, AM. C.L. UNION (Dec. 2, 2022), <https://www.aclu.org/documents/legislation-affecting-lgbtq-rights-across-country-2022> [https://perma.cc/TW6T-CDHN].

and eighty-eight of them were signed into law.¹⁷² A new development that year concerned restrictions on speech and expression relating to drag shows.¹⁷³ The number of anti-LGBTQ bills continued to increase in 2024 when there were 533 anti-LGBTQ bills introduced, forty-seven of which were signed into law.¹⁷⁴ One notable change in the bills introduced in 2024 is that bills seeking to restrict curricular offerings started to use the term “DEI.”¹⁷⁵ By this time, a number of red states had enacted multiple anti-LGBTQ laws.¹⁷⁶ Tennessee, for example, had enacted a total of twenty-one anti-LGBTQ laws by mid-2024.¹⁷⁷ As of September 2025, the American Civil Liberties Union reported that it was tracking 616 anti-LGBTQ bills as they make their way through state legislatures.¹⁷⁸ Many of these bills have been introduced in states that already have multiple anti-LGBTQ laws on the books.¹⁷⁹ For example, Texas has a full slate of anti-LGBTQ laws, but thirty-two specifically anti-transgender (“anti-trans”) bills were introduced on the first day of the pre-filing period ahead of the 2025 legislative session.¹⁸⁰

This frenzied legislative activity greatly exacerbated the LGBTQ equality gap in the United States, creating stark disparities in rights and protections from one state to another.¹⁸¹ A similar type of equality gap can be found with respect to abortion rights, which now vary widely from state to state.¹⁸² As in the case of abortion rights, the differing levels of state protection have led to inter-state disputes that raise important questions regarding the extent to which sister states must accede to out-of-state judgments in the context of state

¹⁷² See *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2023*, AM. C.L. UNION (Dec. 21, 2023), <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2023> [https://perma.cc/2UZW-H5TR].

¹⁷³ Adam Gabbatt, “Subtle and Sinister”: Republicans’ Anti-Drag Crusade Seen as Assault on LGBTQ+ Rights, THE GUARDIAN (Sep. 19, 2023, at 06:00 ET), <https://www.theguardian.com/world/2023/sep/19/us-states-attack-drag-shows-lgbtq-rights> [https://perma.cc/PZ5L-RY26].

¹⁷⁴ See *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2024*, AM. C.L. UNION (Dec. 6, 2024), <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2024> [https://perma.cc/DG4X-F3LK].

¹⁷⁵ Mary Ellen Flannery, *Anti-DEI Laws Take Aim at Students of Color and LGBTQ+ Students*, NEA TODAY (Feb. 14, 2024), <https://www.nea.org/nea-today/all-news-articles/anti-dei-laws-take-aim-students-color-and-lgbtq-students> [https://perma.cc/529F-PLV4].

¹⁷⁶ Rogers & Radcliffe, *supra* note 2.

¹⁷⁷ Kimberly Kindy, *Tennessee Leads Charge in Passing Laws Targeting LGBTQ Rights*, WASH. POST (Apr. 7, 2023), <https://www.washingtonpost.com/politics/2023/04/07/tennessee-republicans-lgbtq-laws-legislature/> [https://perma.cc/Z3HE-2WRQ].

¹⁷⁸ *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2025*, AM. C.L. UNION (Dec. 29, 2025), <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2025> [https://perma.cc/6QFQ-NHFG].

¹⁷⁹ See *id.*

¹⁸⁰ Erin Reed, *Republicans File 32 Anti-Trans Bills on First Day in Texas*, ERIN IN THE MORNING (Nov. 18, 2024), <https://www.erininthemorning.com/p/republicans-file-32-anti-trans-bills> [https://perma.cc/SZ4L-X2V8].

¹⁸¹ Knauer, *supra* note 32, at 3–5.

¹⁸² Allison McCann & Amy Schoenfeld Walker, *Tracking Abortion Laws Across the Country*, N.Y. TIMES (Mar. 9, 2026, at 19:20 ET), <https://www.nytimes.com/interactive/2024/us/abortion-laws-roe-v-wade.html> [https://perma.cc/4NSU-A5C9].

long-arm statutes.¹⁸³ Texas, for example, has aggressively enforced its prohibition on gender-affirming care for minors, suing out-of-state hospitals for medical records.¹⁸⁴ Texas has also targeted the parents of transgender children.¹⁸⁵ The Texas Attorney General takes the position that gender-affirming care for a minor constitutes child abuse and that anyone who has “reasonable cause” to believe that such “abuse” is occurring must report the “abuse” to the authorities or face potential criminal charges.¹⁸⁶ The opinion has triggered social service investigations into families, causing some families with transgender children to move out of state rather than risk having their children placed in foster care.¹⁸⁷ However, it is unclear whether these parents could still face prosecution.

As red states ramp up their enforcement of anti-LGBTQ laws, many blue states have enacted increased protections for LGBTQ people. Twenty blue states have pledged to work together to create a “rainbow wall” to protect transgender children, their families, and doctors who provide gender-affirming care from out-of-state judgements.¹⁸⁸ But it remains to be seen whether these laws can blunt the impact of state long-arm statutes. At the same time, the disparity among the states has set in motion a much larger clash over foundational principles of federalism. As discussed in Section III, Trump’s aggressive enforcement of his anti-LGBTQ agenda has placed blue states with LGBTQ-protective legislation in a tenuous position because many of their state laws are at odds with federal policy. For example, seven

¹⁸³ See generally Joseph William Singer, *Conflict of Abortion Laws*, 16 NE. U. L. REV. 313, 325 (2024) (discussing “complex conflict of laws issues” raised in the wake of *Dobbs v. Jackson Women’s Health Organization*); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (overturning the landmark decision *Roe v. Wade*, 410 U.S. 113 (1973), and ruling that the authority to regulate access to abortion rests with the states).

¹⁸⁴ Marin Wolf, *Paxton Drops Inquiries into Seattle Children’s over Gender-Affirming Care in New Agreement*, DALL. NEWS (Apr. 22, 2024, at 18:04 CT), <https://www.dallas-news.com/news/public-health/2024/04/22/seattle-childrens-hospital-to-leave-texas-over-gender-affirming-care-inquiries/> [https://perma.cc/HHF3-4G67]; María Luisa Paúl, *Judge Blocks Texas AG’s Probe for Youth Transgender Records After Lawsuit*, WASH. POST (Mar. 1, 2024), <https://www.washingtonpost.com/nation/2024/02/29/pflag-transgender-texas-lawsuit-ken-paxton/> [https://perma.cc/6DL4-8XMD].

¹⁸⁵ See Press Release, Ken Paxton, AG Paxton Declares So-Called Sex-Change Procedures on Children and Prescription of Puberty Blockers to be “Child Abuse” Under Texas Law (Feb. 21, 2022), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-declares-so-called-sex-change-procedures-children-and-prescription-puberty-blockers-be> [https://perma.cc/EXH2-D3AF].

¹⁸⁶ Amir Vera & Ashley Killough, *Texas AG Declares Pediatric Gender-Affirming Procedures To Be Child Abuse, Legal Opinion Says*, CNN (Feb. 23, 2022, at 23:26 ET), <https://www.cnn.com/2022/02/23/us/texas-attorney-general-gender-affirmation-child-abuse/index.html> [https://perma.cc/Y7G4-AHLX].

¹⁸⁷ See Emma Tucker, *Anguish Lingers as Transgender Kids’ Families Seek Medical Care Outside Texas — And Fight a State Ban*, CNN (Jan. 27, 2024, at 11:35 ET), <https://www.cnn.com/2024/01/27/us/texas-families-transgender-youth-gender-affirming-care-ban/index.html> [https://perma.cc/5RBH-QKLG].

¹⁸⁸ Branigan, *supra* note 147.

states affirmatively mandate an inclusive LGBTQ curriculum,¹⁸⁹ and fourteen states protect a minor's right to access gender-affirming care.¹⁹⁰ In these states, schools and hospitals must now follow federal guidelines or face a complete loss of federal funding, but if they choose to follow the federal guidelines, they will break state law.¹⁹¹ For example, the Attorney General of New York has warned hospitals that discontinuing access to gender-affirming care in accordance with federal guidance may violate state law.¹⁹²

3. *Local Skirmishes*

The MAGA movement has been very invested in local politics since the COVID-19 pandemic-related disputes regarding school shutdowns, mask requirements, and vaccine mandates.¹⁹³ Beyond those concerns, conservative organizations poured unprecedented amounts of money into local school board races, often seeking to recall elected members and replace them with far-right ideologues who would object to the teaching of "critical race theory" in K-12 education and any expressions of LGBTQ inclusivity.¹⁹⁴ For example, Moms for Liberty ("M4L") was formed in 2021 and quickly gained prominence within the MAGA movement.¹⁹⁵ M4L describes itself as a parents' rights organization, but the Southern Poverty Law Center classifies the organization as an anti-government "extremist group."¹⁹⁶ The activities of M4L and other conservative parents' rights groups were confrontational and could easily

¹⁸⁹ Matt Laviertes, *Amid Book Bans, DEI Cuts and "Don't Say Gay" Laws, 7 States Will Mandate LGBTQ-Inclusive Curricula*, NBC NEWS (Mar. 25, 2024, at 17:41 ET), <https://www.nbcnews.com/nbc-out/out-news/washington-lgbtq-history-schools-governor-law-rcna144991> [<https://perma.cc/NUA7-VGXP>].

¹⁹⁰ *Bans on Best Practice Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT (Mar. 3, 2026), https://www.lgbtmap.org/equality-maps/healthcare_youth_medical_care_bans [<https://perma.cc/6VMP-VH87>].

¹⁹¹ See, e.g., Joseph Goldstein, *N.Y. Attorney General Warns Hospitals Against Canceling Transgender Care*, N.Y. TIMES (Feb. 3, 2025), <https://www.nytimes.com/2025/02/03/nyregion/ny-attorney-general-transgender-care.html> [<https://perma.cc/K7Y8-FT7C>].

¹⁹² *Id.*

¹⁹³ Amelia Nierenberg, *The Conservative School Board Strategy*, N.Y. TIMES (Oct. 27, 2021), <https://www.nytimes.com/2021/10/27/us/the-conservative-school-board-strategy.html> [<https://perma.cc/WFP2-3E2U>].

¹⁹⁴ Andrew Atterbury, *National Conservative Groups Pour Money into Local School Board Races*, POLITICO (Sep. 19, 2022), <https://www.politico.com/news/2022/09/19/conservative-school-board-fundraising-florida-00057325> [<https://perma.cc/W2C7-5NL6>]; Elizabeth Miller, *Candidates, Statewide Organizations Focus on Inclusive Policies in Oregon School Board Races*, OPB (May 13, 2023), <https://www.opb.org/article/2023/05/13/oregon-school-board-races-inclusive-policies/> [<https://perma.cc/294X-BUY8>].

¹⁹⁵ See Jonathan Weisman, *Moms for Liberty's School Board Antagonism Draws G.O.P. Heavyweights*, N.Y. TIMES (June 29, 2023), <https://www.nytimes.com/2023/06/29/us/politics/moms-for-liberty-republicans.html> [<https://perma.cc/GW5M-Y5Z2>].

¹⁹⁶ *Id.*; *Moms for Liberty*, S. POVERTY L. CTR., <https://www.splcenter.org/resources/extremist-files/moms-liberty/> [<https://perma.cc/85LE-RKUP>].

throw school board meetings into chaos, as school boards across the country became embroiled in curricular disputes over pride flags and bathrooms.¹⁹⁷

In addition to its focus on schools, the MAGA movement targeted public libraries and there was a sharp increase in attempts to ban books, with the American Library Association reporting a sixty-five percent jump in the number of unique titles that were challenged in 2023.¹⁹⁸ According to PEN America, the majority of the titles challenged involved issues related to race and/or LGBTQ identities.¹⁹⁹ The number one banned book in 2023 was *Gender Queer* by Maia Kobabe, a graphic memoir that follows Kobabe's journey exploring their own gender and queer identity.²⁰⁰ Some municipalities even considered defunding and closing their libraries entirely, which was reminiscent of the days when municipalities would choose to close their community pool rather than comply with a desegregation order.²⁰¹ Although book bans played out mostly at the local level, some states also enacted blanket laws designed to protect minors.²⁰² In 2024, four states enacted new laws or regulations designed to protect minors from what they deem to be inappropriate material.²⁰³ The law enacted by Utah uniquely recognizes the importance of local school districts.²⁰⁴ It provides that if a book is removed by a certain number of districts, then the State Board of Education will order the book removed statewide.²⁰⁵

¹⁹⁷ Weisman, *supra* note 195; see, e.g., Emily Rizzo, *This School Board Made News for Banning Books. Voters Flipped It to Majority Democrat*, NAT'L PUB. RADIO (Nov. 11, 2023, at 14:00 ET), <https://www.npr.org/2023/11/11/1212185489/election-pennsylvania-school-board> [<https://perma.cc/SH4Z-8FLN>] (reporting longstanding school board dispute).

¹⁹⁸ *American Library Association Reports Record Number of Unique Book Titles Challenged in 2023*, AM. LIBR. ASS'N (Mar. 14, 2024), <https://www.ala.org/news/2024/03/american-library-association-reports-record-number-unique-book-titles> [<https://perma.cc/GPK8-ABJC>].

¹⁹⁹ Jo Yurcaba, *More Than Half of Books Banned Last Year Featured LGBTQ Characters or People of Color, Report Finds*, NBC NEWS (Feb. 27, 2025, at 08:30 ET), <https://www.nbcnews.com/news/nbcblk/banned-books-lgbtq-transgender-black-people-of-color-pen-america-rcna193879> [<https://perma.cc/W7RX-N7QG>].

²⁰⁰ Alexander Alter, *How a Debut Graphic Memoir Became the Most Banned Book in the Country*, N.Y. TIMES (June 22, 2023), <https://www.nytimes.com/2022/05/01/books/maia-kobabe-gender-queer-book-ban.html> [<https://perma.cc/2N5H-PZM8>]; *Maia Kobabe's 'Gender Queer' Tops List of Most Criticized Library Books for Third Straight Year*, ASSOCIATED PRESS (Apr. 8, 2024, at 06:00 ET), <https://apnews.com/article/maia-kabobe-gender-queer-challenged-library-book-d3e4de3fc0243e42f6ca7bc7fac65979> [<https://perma.cc/S4B6-SKYY>].

²⁰¹ Librarians have also assumed a central role in many of these debates, facing vitriol and personal harassment when they stand for free speech. Emily Williamson, *Cast as Criminals, America's Librarians Rally to Their Own Defense*, N.Y. TIMES (Feb. 6, 2024), <https://www.nytimes.com/2024/02/03/us/book-bans-librarians.html> [<https://perma.cc/G8FZ-NNZL>].

²⁰² Elizabeth A. Harris, *More States Are Passing Book Banning Rules. Here's What They Say*, N.Y. TIMES (Aug. 7, 2024), <https://www.nytimes.com/2024/07/29/books/book-banning-south-carolina-tennesse-idaho-utah.html> [<https://perma.cc/8FD6-P2E3>].

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

The issue of book banning was elevated to the federal level under the Biden administration. When Biden announced his later-discarded plan to run for re-election in 2024, he specifically mentioned the surge in attempts to ban books and said that books were part of our “bedrock freedoms” that were under threat from “MAGA extremists.”²⁰⁶ Biden had earlier directed the U.S. Department of Education’s Office of Civil Rights (“OCR”) to investigate cases of book banning as potential civil rights violations and created the position of the Book Ban Coordinator within the OCR.²⁰⁷ On January 24, 2025, just two weeks into Trump’s second term, the U.S. Department of Education issued a press release titled: *U.S. Department of Education Ends Biden’s Book Ban Hoax*.²⁰⁸ The Press Release explained that upon investigation:

Books are not being “banned,” but that school districts, in consultation with parents and community stakeholders, have established commonsense processes by which to evaluate and remove age-inappropriate materials. Because this is a question of parental and community judgment, not civil rights, OCR has no role in these matters.²⁰⁹

As M4L targeted school boards and libraries, armed militias attempted to disrupt or intimidate LGBTQ inclusive programming.²¹⁰ The scene of heavily armed protestors wearing militia-type clothing first surfaced during the COVID-19 pandemic.²¹¹ In states with open carry laws, such as Michigan, armed protestors railing against COVID-19 pandemic lockdown rules were frequent sights outside state capitols.²¹² In the LGBTQ context, the armed protestors specifically targeted events called Drag Story Hours, run by a nonprofit organization created in 2015 to promote storytelling and

²⁰⁶ Manuela López Restrepo, *Book Bans Are Getting Everyone’s Attention — Including Biden’s. Here’s Why*, NAT’L PUB. RADIO (Apr. 25, 2023, at 17:32 ET), <https://www.npr.org/2023/04/25/1172024559/book-bans-spike-biden-culture-wars-lgbtq-gender-queer-libraries> [<https://perma.cc/8XFY-MT6X>].

²⁰⁷ Zach Montague, *Education Dept. Ends Book Ban Investigations*, N.Y. TIMES (Jan. 24, 2025), <https://www.nytimes.com/2025/01/24/us/politics/education-dept-ends-book-ban-investigations.html> [<https://perma.cc/HJZ7-2ST4>].

²⁰⁸ Press Release, U.S. Dep’t of Educ., Department of Education Ends Biden’s Book Ban Hoax (Jan. 24, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-ends-bidens-book-ban-hoax> [<https://perma.cc/PZH4-2RJP>].

²⁰⁹ *Id.*

²¹⁰ See *Drag Story Time at Oregon Pub*, *supra* note 148 (discussing armed militias).

²¹¹ See, e.g., Manny Fernandez & David Montgomery, *Businesses Chafing Under Covid-19 Lockdowns Turn to Armed Defiance*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2020/05/13/us/coronavirus-businesses-lockdown-guns.html> [<https://perma.cc/WP8X-FFU4>].

²¹² Abigail Censky, *Heavily Armed Protesters Gather Again at Michigan Capitol To Decry Stay-At-Home Order*, NAT’L PUB. RADIO (May 14, 2020, at 10:01 ET), <https://www.npr.org/2020/05/14/855918852/heavily-armed-protesters-gather-again-at-michigans-capitol-denouncing-home-order> [<https://perma.cc/34MF-GXA7>].

diversity.²¹³ The events are geared toward “kids and teens of all ages.”²¹⁴ A character dressed in drag reads a story to the children and engages in other learning activities.²¹⁵ Opponents of Drag Story Hours argue that the events are inappropriate for children and constitute “grooming” and the sexualization of children.²¹⁶ They claim that they are protecting the children by trying to shut down the events.²¹⁷ Members of the Proud Boys, a far-right hate group, have participated in many of the protests.²¹⁸

As mentioned earlier, one of Trump’s first actions during his second term was to appoint himself chair of the Kennedy Center after dismissing the chair and eighteen board members.²¹⁹ One of the rationales that he gave for the unusual move was that the Kennedy Center had hosted a drag event for LGBTQ youth under 18 called Dragtastic Dressup.²²⁰ The now-deleted description on the Kennedy Center website described the event as “LGBTQ+ youth under 18 and their parents/caregivers are invited to come learn the history of drag and watch these incredible performers strut their stuff.”²²¹ When Trump announced his plan to “Make the Kennedy Center Great Again” on his social media platform, Truth Social, he posted: “Just last year, the Kennedy Center featured Drag Shows specifically targeting our youth—THIS WILL STOP.”²²²

²¹³ *About*, DRAG STORY HOUR, <https://www.dragstoryhour.org/about> [<https://perma.cc/F434-8GJ3>].

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Jeff McMillian, *Analysis: Political Rhetoric, False Claims Obscure the History of Drag Performance*, PBS NEWS (Oct. 30, 2022, at 09:30 ET), <https://www.pbs.org/newshour/politics/political-rhetoric-false-claims-obscure-the-history-of-drag-performance> [<https://perma.cc/6XVE-AUW3>]; Kiara Alfonseca, *Drag Story Hours Continue To Be Targets Amid Conservative Backlash*, ABC NEWS (Mar. 25, 2024, at 17:06 ET), <https://abcnews.go.com/US/drag-story-hours-continue-targets-amid-conservative-backlash/story?id=108471808> [<https://perma.cc/4AZP-UB67>].

²¹⁷ Alfonseca, *supra* note 216.

²¹⁸ See *Drag Story Time at Oregon Pub*, *supra* note 148 (discussing armed militias); *UPDATED Report: Drag Events Faced More Than 160 Protests and Significant Threats Since Early 2022*, GLAAD (Apr. 25, 2023), <https://glaad.org/anti-drag-report/> [<https://perma.cc/5JCB-96KX>].

²¹⁹ Javier C. Hernández, Robin Pogrebin & Shawn McCreesh, *Trump Names Loyalist Interim Leader of Kennedy Center as He Strengthens His Grip*, N.Y. TIMES (Feb. 10, 2025), <https://www.nytimes.com/2025/02/10/arts/music/trump-kennedy-center-board-removed.html> [<https://perma.cc/XR53-3HLX>]; Shawn McCreesh, Maggie Haberman & Javier C. Hernández, *Trump Says He Will Dismiss Kennedy Center Board Members and Install Himself as Chair*, N.Y. TIMES (Feb. 9, 2025), <https://www.nytimes.com/2025/02/07/us/politics/trump-kennedy-center.html> [<https://perma.cc/H4LJ-2TWA>].

²²⁰ *Dragtastic Dress-up*, PRINCE GEORGE’S SUITE MAG. & MEDIA, <https://pgsuite.com/calendar/rnha29rabay2y8g-tgw2e-5bfzw-thaye-b48lj-wmsaj-9apcl> [<https://perma.cc/UQJ4-PW58>].

²²¹ *Id.*

²²² Bob Mondello, *Trump Plans to Become Chair of the Kennedy Center: Here Are 3 Things to Know*, NAT’L PUB. RADIO (Feb. 8, 2025, at 18:06 ET), <https://www.npr.org/2025/02/08/nx-s1-5290955/three-takeaways-from-president-trumps-kennedy-center-takeover> [<https://perma.cc/Z7HZ-26SY>].

C. *The 2024 Campaign*

By 2024, it was clear to Republicans that anti-LGBTQ initiatives, particularly anti-trans initiatives, could be a winning strategy, and what would have once been far-right fringe sentiments were now legitimate GOP talking points. The Trump campaign went all-in and placed anti-trans policies at the forefront of Trump's domestic policy proposals, along with his proposals for the mass deportation of immigrants and anti-DEI measures.²²³ Trump even remarked that he was surprised by the broad appeal anti-trans rhetoric had for his MAGA supporters, saying that they would rather hear about transgender "insanity" than cutting taxes.²²⁴ The MAGA commitment to enacting anti-LGBTQ policies, and particularly anti-trans policies, was spelled out in two important documents: the 2024 GOP Platform and *Project 2025*, the controversial report published by the Heritage Foundation, as discussed below.

1. *Trump Rallies and Campaign Advertising*

Trump's 2024 campaign wholeheartedly embraced the virulent anti-LGBTQ rhetoric and policies that had been percolating through the states during the Biden administration. Trump started talking about transgender issues straight out of the gate.²²⁵ In his announcement that he was running for President, Trump promised that schools teaching "radical civics and gender insanity" would lose federal funding.²²⁶ He continued, "We will not let men, as an example, participate in women's sports. No men! My people tell me 'Sir, that's politically incorrect to say.' I say, 'that's okay, I'll say it anyway.'"²²⁷ Asserting his executive authority, Trump added, "As commander-in-chief, I will get Biden's radical left ideology out of our military."²²⁸ Trump's defiant anti-trans narrative was echoed by many speakers at the 2024 Republican Convention²²⁹ and was, as explained below, stated plainly in the official GOP party platform.

²²³ Bill Barrow, *What Trump Has Promised for His 2nd Administration*, PBS NEWS (Jan. 19, 2025, at 13:23 ET), <https://www.pbs.org/newshour/politics/what-trump-has-promised-for-his-2nd-administration> [<https://perma.cc/DJ8R-XWNM>].

²²⁴ Ewan Palmer, *Trump Says Supporters More Concerned About Transgender Issues Than Taxes*, NEWSWEEK (June 11, 2023, at 07:04 ET), <https://www.newsweek.com/trump-transgender-supporters-north-carolina-1805783> [<https://perma.cc/LS76-JLCG>] (reporting Trump said, "I talk about transgender, everyone goes crazy. Who would have thought? Five years ago, you didn't know what the hell it was.").

²²⁵ Christopher Kane, *Trump Reiterates Anti-LGBTQ Themes in Presidential Campaign Announcement*, WASH. BLADE (Nov. 15, 2022), <https://www.washingtonblade.com/2022/11/15/trump-reiterates-anti-lgbtq-themes-in-presidential-campaign-announcement> [<https://perma.cc/9DAN-8MXF>].

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Matt Laviertes, *RNC Speakers Lean into Homophobic and Transphobic Rhetoric*, NBC NEWS (July 18, 2024, at 22:06 ET), <https://www.nbcnews.com/>

Trump consistently highlighted the issue of transgender rights at his campaign rallies, perhaps only overshadowed by his promise of mass deportations.²³⁰ For example, he often aired a degrading and mean-spirited video about transgender service members that interspersed profanity-laced clips from Stanley Kubrick's classic 1987 Vietnam movie about an abusive drill sergeant, *Full Metal Jacket*, with clips of drag performers and others expressing support for LGBTQ rights.²³¹ At a rally in North Carolina, Trump said: "If you want to have a sex change or a social justice seminar, then you can do it somewhere else, but you're not going to do it in the Army, Navy, Coast Guard, Air Force, Space Force, or the United States Marines."²³² Trump, as President-elect, later aired the video at his pre-inauguration rally.²³³

The Trump campaign also used anti-trans messaging to reach voters beyond those who reliably turned out for his rallies. It launched an anti-trans advertising blitz that rivaled the infamous, and much reviled, Willie Horton advertisement from 1988, which was widely criticized for exploiting racial stereotypes and stoking irrational fears.²³⁴ Republicans spent an estimated \$215 million on anti-trans attack advertisements in the 2024 election cycle.²³⁵ The Trump campaign commissioned several variations of an advertisement featuring clips of Kamala Harris' 2019 interview by the transgender rights advocate Mara Keisling where Harris discusses her support for the legal requirement to provide gender-affirming care for incarcerated people.²³⁶ The advertisements

nbc-out/out-politics-and-policy/rnc-speakers-lean-homophobic-transphobic-rhetoric-rcna162505 [https://perma.cc/993M-8RXH].

²³⁰ Bill Barrow, *Trump and Vance Make Anti-Transgender Attacks Central to Their Campaign's Closing Argument*, ASSOCIATED PRESS (Nov. 1, 2024, at 13:56 ET), https://apnews.com/article/trump-harris-transgender-politics-61cff97a64fac581ffc5f762be4c57d3 [https://perma.cc/M57J-2UCA].

²³¹ Donald Trump Uses "Full Metal Jacket" Clips to Portray His Ideal Military, ASSOCIATED PRESS (Oct. 14, 2024, at 16:19 ET), https://apnews.com/article/donald-trump-full-metal-jacket-kubrick-3910423bc7d5fbc6269f07462f45409c [https://perma.cc/RP98-P99Y].

²³² Michelle L. Price & Jill Colvin, *Trump Speaks from Behind Bulletproof Glass at First Outdoor Rally Since His Attempted Assassination*, ASSOCIATED PRESS (Aug. 21, 2024, at 22:25 ET), https://apnews.com/article/trump-vance-north-carolina-60de08931c1a964e8e1fb21d3778d35e [https://perma.cc/2LC2-B5XX].

²³³ Isaac Arnsdorf et al., *Trump Promises Pardons, Blasts Enemies at Rally Before Inauguration*, WASH. POST (Jan. 19, 2025), https://www.washingtonpost.com/politics/2025/01/19/blocks-capitol-attack-trump-rally-will-symbolize-his-reinvention/ [https://perma.cc/YPF7-34MK].

²³⁴ Noah Bierman, *In Campaign's Final Weeks, Trump Airs Anti-Transgender Ads During Football Games*, L.A. TIMES (Oct. 13, 2024, at 03:00 PT), https://www.latimes.com/politics/story/2024-10-13/2024-election-trump-anti-transgender-ad [https://perma.cc/VVG5-VD8F]; see also Steve Harrison, *On Football Saturdays and Sundays, It's Anti-Trans Ads All the Time*, WFAE (Oct. 14, 2024, at 09:13 ET), https://www.wfae.org/politics/2024-10-14/on-football-saturdays-and-sundays-its-anti-trans-ads-all-the-time [https://perma.cc/WEG8-4J2Z] (comparing anti-trans ads to the 1988 Willie Horton ad).

²³⁵ Maham Javadi & Casey Parks, *LGBTQ+ Americans Stockpile Meds and Make Plans to Move After Trump's Win*, WASH. POST (Dec. 9, 2024), https://www.washingtonpost.com/nation/2024/12/09/lgbtq-trump-reactions-preparations/ [https://perma.cc/96FG-HB2H].

²³⁶ Christopher Wiggins, *Donald Trump Punches Down on Transgender People in Hypocritical New Kamala Harris Attack Ad*, THE ADVOCATE (Oct. 22, 2024), https://

end with an ominous and divisive takeaway: “Kamala is for they/them, President Trump is for you.”²³⁷ Beginning in October 2024, the advertisements were aired more than 30,000 times, including in key swing states.²³⁸ The Trump campaign put the advertisements into heavy rotation during sporting events, including NFL and college football games.²³⁹ According to an analysis by Super PAC Future Forward, “Kamala is for they/them” was one of Trump’s most effective thirty-second attack advertisements, shifting the race 2.7 percentage points in favor of Trump after viewers watched it.²⁴⁰ The Democrats did not respond directly to the advertisements, and some Democrats have questioned the extent to which the party’s seemingly unconditional embrace of transgender rights cost Harris the election.²⁴¹

2. *The 2024 GOP Platform*

Once Trump and his MAGA followers had secured control of the Republican party, it was a foregone conclusion that the 2024 GOP Platform would reflect MAGA priorities. The result, however, was striking. Whereas past GOP Platforms were long, policy-heavy documents, the 2024 GOP Platform was a brief sixteen-page endorsement of MAGA philosophy with eccentric capitalization that mimicked the style of Trump’s social media posts.²⁴² Some LGBTQ advocates were relieved to see that the 2024 Platform dropped the GOP’s longstanding explicit objection to marriage equality in favor of affirming what it refers to as the “Sanctity of Marriage.”²⁴³ In a

www.advocate.com/election/trump-transgender-kamala-harris-attack [<https://perma.cc/H68A-7X6G>].

²³⁷ Susan Davis, *GOP Ads on Transgender Rights Are Dominating Airwaves in the Election’s Closing Days*, NAT’L PUB. RADIO (Oct. 19, 2024, at 05:00 ET), <https://www.npr.org/2024/10/19/g-s1-28932/donald-trump-transgender-ads-kamala-harris> [<https://perma.cc/86QY-7KKT>].

²³⁸ *Id.*

²³⁹ Shane Goldmacher, *Trump and Republicans Bet Big on Anti-Trans Ads Across the Country*, N.Y. TIMES (Oct. 8, 2024), <https://www.nytimes.com/2024/10/08/us/politics/trump-republican-transgender-ads.html> [<https://perma.cc/SH7M-G4BE>].

²⁴⁰ Shane Goldmacher, Maggie Haberman & Jonathan Swan, Opinion, *How Trump Won, and How Harris Lost*, N.Y. TIMES (Nov. 16, 2024), <https://www.nytimes.com/2024/11/07/us/politics/trump-win-election-harris.html> [<https://perma.cc/D6A9-G73Y>].

²⁴¹ Matt Laviertes, *Some Democrats Blame Party’s Position on Transgender Rights in Part for Harris’ Loss*, NBC NEWS (Nov. 8, 2024, at 18:16 ET), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/democrats-blame-partys-position-transgender-rights-part-harris-loss-rcna179370> [<https://perma.cc/QD83-2UMY>].

²⁴² Republican Party, *2024 GOP Platform Make America Great Again!*, AM. PRESIDENCY PROJECT (July 8, 2024), <https://www.presidency.ucsb.edu/documents/2024-republican-party-platform> [<https://perma.cc/PCH6-8GPM>] [hereinafter *GOP Platform*]; see also Megan Pratz, *With Just One Mention of Abortion, Republican Party Lays Out Its 2024 Policy Platform*, NAT’L PUB. RADIO (July 8, 2024, at 14:21 ET), <https://www.npr.org/2024/07/08/nx-s1-5033015/rnc-republican-party-platform-2024> [<https://perma.cc/3TEB-EKRU>] (explaining GOP policy positions).

²⁴³ Jo Yurcaba, *GOP’s 2024 Platform: A Shift on Same-Sex Marriage or the Same Old Stance?*, NBC NEWS (Aug. 2, 2024, at 12:25 ET), <https://www.nbcnews.com/nbc-out/>

section titled “Empower American Families,” the Platform promised that “Republicans will promote a Culture that values the Sanctity of Marriage, the blessings of childhood, the foundational role of families, and supports working parents. We will end policies that punish families.”²⁴⁴ Although this language could be read as a concession in favor of marriage equality, “Sanctity of Marriage” is a conservative term of art.²⁴⁵ It is used throughout right-wing religious and political circles to express an exclusionary view of marriage as a unique institution that can only be between one man and one woman.²⁴⁶ In this way, the Platform signaled a clear disapproval to right-wing voters familiar with the term.

The GOP 2024 Platform did not mince words regarding its views on transgender Americans. The Platform began by outlining “twenty promises that we will accomplish very quickly when we win the White House and Republican Majorities in the House and Senate.”²⁴⁷ Two of these “promises” involved restricting the rights of transgender people: keeping “men out of women’s sports” and stopping federal funds for schools “pushing . . . gender ideology . . . on our children.”²⁴⁸ The Platform also advocated for eliminating Title IX protections and defunding school districts that maintain LGBTQ-inclusive policies, but it stopped short of calling for the binary and immutable definition of sex that Trump imposed on January 20, 2025—his first day in office.²⁴⁹

3. *Project 2025*

As mentioned earlier, Trump tried to distance himself throughout his campaign from *Project 2025*, the conservative blueprint for reshaping the United States government published by the Heritage Foundation that is based on far-right principles of governance and economic and social policies.²⁵⁰ The different sections of the 900-page report are organized by government

out-politics-and-policy/gop-2024-platform-shift-same-sex-marriage-rcna164517 [https://perma.cc/G8W7-Z56N].

²⁴⁴ GOP Platform, *supra* note 242.

²⁴⁵ Yurcaba, *supra* note 243.

²⁴⁶ *Id.*

²⁴⁷ GOP Platform, *supra* note 242.

²⁴⁸ *Id.*

²⁴⁹ In a section titled “Republicans Will End Left-wing Gender Insanity,” the GOP Platform says Republicans will continue to support efforts to ban transgender girls and women in women’s sports, ban taxpayer funding for gender-affirming surgeries, “stop Taxpayer-funded Schools from promoting gender transition, reverse Biden’s radical rewrite of Title IX Education Regulations, and restore protections for women and girls.” *Id.* A section of the updated platform titled “Knowledge and Skills, Not CRT and Gender Indoctrination” says Republicans will “defund schools that engage in inappropriate political indoctrination of our children using Federal Taxpayer Dollars,” alluding to the conservative effort in recent years to restrict LGBTQ-inclusive curricula. *Id.*

²⁵⁰ Neil Vigdor & Simon J. Levien, *What Is Project 2025, and Why Did Trump Distance Himself from It During the Campaign?*, N.Y. TIMES (Nov. 23, 2024), <https://www.nytimes.com/2024/11/06/us/politics/trump-project-2025.html> [https://perma.cc/LVB8-ZPEK].

function or Cabinet department, and many of them are written by former officials from the first Trump White House.²⁵¹ Despite Trump's protestations on the campaign trail, many of his early executive actions seem to follow the *Project 2025* playbook.²⁵² He has also appointed a number of the authors of *Project 2025* to important roles within his administration, suggesting that *Project 2025* may provide important clues regarding the administration's next steps, as well as provide additional background for policies that Trump has already implemented.²⁵³

Trump's early anti-trans initiatives closely track *Project 2025*'s recommendations. For example, *Project 2025* proposes erasing federal workplace and other protections despite *Bostock*, creating a biological binary definition of sex, imposing a transgender ban in the military, and ending federal funding for both gender-affirming care and DEI programs.²⁵⁴ Trump implemented each of these proposals within his first week in office.²⁵⁵ However, he has not yet implemented the proposals *Project 2025* makes with respect to marriage equality and LGBTQ families, as detailed below.

The section of *Project 2025* on the U.S. Department of Health and Human Services (HHS) devotes the most attention to LGBTQ issues. The section was written by Roger Severino, who served as Director of the HHS Office of Civil Rights during the first Trump administration and spearheaded the 2018 effort to promulgate an administrative definition of sex.²⁵⁶ Severino is a staunch opponent of LGBTQ rights and an early adopter of the term "gender ideology."²⁵⁷ He begins his chapter by listing five overreaching goals for HHS. The first goal is titled "Protecting Life, Conscience, and Bodily Integrity."²⁵⁸ Not surprisingly, this goal includes the need to "uphold bodily integrity rooted

²⁵¹ *Project 2025*, *supra* note 107, at xv–xxii (listing biographical material for the authors).

²⁵² Alison Durkee, *Here's How Trump's Executive Orders Align with Project 2025*, FORBES (Mar. 17, 2025, at 14:29 ET), <https://www.forbes.com/sites/alisondurkee/2025/02/06/heres-how-trumps-executive-orders-align-with-project-2025-as-co-author-nears-senate-confirmation/> [<https://perma.cc/FBS7-834A>].

²⁵³ Bill Barrow, *After Trump's Project 2025 Denials, He Is Tapping Its Authors and Influencers for Key Roles*, ASSOCIATED PRESS (Nov. 23, 2024, at 17:22 ET), <https://www.yahoo.com/news/trumps-project-2025-denials-tapping-222200810.html> [<https://perma.cc/Z5TY-D5GQ>].

²⁵⁴ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020); *Project 2025*, *supra* note 107, at 103, 450, 582–85.

²⁵⁵ Durkee, *supra* note 252.

²⁵⁶ Green et al., *supra* note 135; *Project 2025*, *supra* note 107, at 449.

²⁵⁷ Mary Anne Case, *Trans Formations in the Vatican's War on "Gender Ideology,"* 44 SIGNS 639, 639 (2019).

²⁵⁸ The first goal articulated by Roger Severino warns that: Radical actors inside and outside government are promoting harmful identity politics that replaces biological sex with subjective notions of "gender identity" and bases a person's worth on his or her race, sex, or other identities. This destructive dogma, under the guise of "equity," threatens American's fundamental liberties as well as the health and well-being of children and adults alike. The next Secretary must ensure that HHS programs protect children's minds and bodies and that HHS programs respect parents' basic right to direct the upbringing, education, and care of their children. *Project 2025*, *supra* note 107, at 450.

in biological realities, not ideology” and to “protect children’s minds and bodies” from what Severino describes as “harmful identity politics that replace biological sex with subjective notions of ‘gender identity.’”²⁵⁹ Throughout the chapter, Severino disparages transgender people and gender-affirming care, referring to the “radical redefinition of sex”²⁶⁰ and linking “gender identity” to the “ideologically motivated sexualization of [] children.”²⁶¹

Unlike the 2024 GOP Platform, *Project 2025* does not try to hide its disdain for same-sex marriage. Goal #3 is titled “Promoting Stable and Flourishing Married Families.”²⁶² It bears quoting at length:

Families comprised of a married mother, father, and their children are the foundation of a well-ordered nation and healthy society. Unfortunately, family policies and programs under President Biden’s HHS are fraught with agenda items focusing on “LGBTQ+ equity[.]” . . . These policies should be repealed and replaced by policies that support the formation of stable, married, nuclear families.

Working fathers are essential to the well-being and development of their children, but the United States is experiencing a crisis of fatherlessness that is ruining our children’s futures. In the overwhelming number of cases, fathers insulate children from physical and sexual abuse, financial difficulty or poverty, incarceration, teen pregnancy, poor educational outcomes, high school failure, and a host of behavioral and psychological problems. . . .

In the context of current and emerging reproductive technologies, HHS policies should never place the desires of adults over the right of children to be raised by the biological fathers and mothers who conceive them.²⁶³

Severino later doubles down on the primacy of the nuclear family, composed of a father and a mother, when talking about the need for broad religious exemptions for grant recipients that “maintain a biblically based, social science–reinforced definition of marriage and family.”²⁶⁴ Severino asserts inaccurately that:

Social science reports that assess the objective outcomes for children raised in homes aside from a heterosexual, intact marriage are clear: All other family forms involve higher levels of instability (the average length of same-sex marriages is half that

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 475.

²⁶¹ *Id.*

²⁶² *Id.* at 451.

²⁶³ *Id.*

²⁶⁴ *Id.* at 481.

of heterosexual marriages); financial stress or poverty; or poorer behavioral, psychological, or educational outcomes.

For the sake of child well-being, programs should affirm that children require and deserve both the love and nurturing of a mother and the play and protection of a father.²⁶⁵

He also expresses his contempt for the Respect for Marriage Act that attempts to codify the holding in *Obergefell v. Hodges*.²⁶⁶ He argues that HHS program grants should be available to “recipients who affirm that marriage is between not just any two adults, but one man and one unrelated woman.”²⁶⁷

Toward the end of his chapter, Severino sums up what he sees as “The Family Agenda” for HHS:

The Secretary’s antidiscrimination policy statements should never conflate sex with gender identity or sexual orientation. Rather, the Secretary should proudly state that men and women are biological realities that are crucial to the advancement of life sciences and medical care and that married men and women are the ideal, natural family structure because all children have a right to be raised by the men and women who conceived them.²⁶⁸

The direction not to “conflate sex with gender identity or sexual orientation” stands in direct contravention to the holding in *Bostock*.²⁶⁹ As explained below, Trump has issued executive orders that adopt this position.

D. Trump’s Second Term (2025–?)

Trump’s victory in 2024 established that villainizing transgender people could also be a winning political strategy on the national stage. His victory emboldened the MAGA movement to double down on its anti-trans agenda and left the Democrats questioning their strong support for transgender rights as they second-guessed the campaign.²⁷⁰ For many LGBTQ people, the

²⁶⁵ *Id. Contra* Charlotte J. Patterson, Rachel H. Farr & Abbie E. Goldberg, *LGBTQ+ Parents and Their Children*, NAT. COUNCIL ON FAM. RELS. (Oct. 2021), <https://www.ncfr.org/system/files/2021-10/Policy%20Brief%20Oct%202021.pdf> [<https://perma.cc/9AC8-HEJT>] (concluding that “both parents and children are generally well adjusted and that they do not differ in well-being or in multiple developmental outcomes from parents and children in the general population”); *NCFR Board of Directors Statement on Project 2025*, NAT. COUNCIL ON FAM. RELS. (Oct. 1, 2024), <https://www.ncfr.org/news/ncfr-board-directors-statement-project-2025> [<https://perma.cc/7KE2-62RG>] (“If Project 2025 reaches full implementation, it will do real and lasting harm to families as they exist in our pluralistic, diverse, and democratic society.”).

²⁶⁶ See *Project 2025*, *supra* note 107, at 481. See generally *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) for its holding.

²⁶⁷ *Project 2025*, *supra* note 107, at 481.

²⁶⁸ *Id.* at 489.

²⁶⁹ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

²⁷⁰ Lavietes, *supra* note 241.

election of Trump to a second term inspired dread and the finger pointing by the Democrats seemed like scapegoating.²⁷¹ Two weeks after the election, Rep. Nancy Mace (R-SC) introduced an amendment to the U.S. House of Representatives rules to restrict access to single-sex facilities at the U.S. Capitol, meaning bathroom and locker room, to “biological sex.”²⁷² The proposed rules change was directed at Sarah McBride (D-DE), who had just been elected the first openly transgender member of Congress.²⁷³ No Republican member of Congress came out against the proposed rules change, which took effect at the beginning of the 119th Congress.²⁷⁴

Although it was clear from the campaign that LGBTQ Americans were going to be in for a bumpy ride, it remained an open question whether Trump’s anti-trans narrative on the campaign trail was merely performative or whether he would follow through on his promises. Trump clarified any doubts in his inaugural speech. After declaring that “the Golden Age of America begins now,” Trump announced that “it will henceforth be the official policy of the United States government that there are only two genders: male and female.”²⁷⁵ Later that day, Trump signed his first batch of executive orders that were directed at not only transgender Americans, but also LGBTQ people more generally. He imposed a federal definition of sex as immutable and binary, rescinded Biden-era protections for LGBTQ people, and took aim at DEI practices.²⁷⁶ In a remarkable about-face, the private sector had already begun to reverse its support for DEI initiatives in advance of the inauguration.²⁷⁷ There was no discernible Republican pushback to any of these efforts.

²⁷¹ Casey Parks, “People Are Afraid”: Trump’s Actions Targeting Trans Rights Lead to Confusion, Fear, WASH. POST (Jan. 29, 2025), <https://www.washingtonpost.com/nation/2025/01/29/trump-trans-executive-orders-fear-confusion/> [<https://perma.cc/7HM8-GYGR>]; Christopher Wiggins, ‘Morning Joe’ Continues Fixation on Trans Issues in Post-Election Blame Game Without Talking to Trans People, THE ADVOCATE (Nov. 13, 2024), <https://www.advocate.com/election/morning-joe-transgender-election-fixation> [<https://perma.cc/VD9Z-4LCE>].

²⁷² H.R. 1579, 118th Cong. (2025); Syedah Asghar & Rebecca Shabad, *Rep. Nancy Mace Says Her Anti-Trans Bathroom Bill ‘Absolutely’ Targets Rep.-Elect Sarah McBride*, NBC NEWS (Nov. 19, 2024, at 11:50 ET), <https://www.nbcnews.com/politics/congress/nancy-mace-defends-anti-trans-bathroom-bill-says-absolutely-targets-sa-rcna180805> [<https://perma.cc/4F83-6Q3Q>].

²⁷³ *Id.*

²⁷⁴ Jo Yurcaba, *Speaker Mike Johnson Maintains House Transgender Bathroom Ban*, NBC NEWS (Jan. 7, 2025), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/speaker-mike-johnson-maintains-house-transgender-bathroom-ban-rcna186669> [<https://perma.cc/2AKG-WLUE>].

²⁷⁵ Donald J. Trump, U.S. President, The Inaugural Address 1, 4 (Jan. 20, 2025), <https://www.govinfo.gov/content/pkg/DCPD-202500103/pdf/DCPD-202500103.pdf> [<https://perma.cc/V4NF-PHDV>].

²⁷⁶ Exec. Order No. 14148, *supra* note 4 (rescinding Biden-era protections); Exec. Order No. 14168, *supra* note 4 (defining “sex”); Exec. Order No. 14151, *supra* note 4 (dismantling DEI initiatives).

²⁷⁷ Katie Paul & Juby Babu, *Meta, Amazon Scale Back Diversity Programs Ahead of Trump Inauguration*, REUTERS (Jan. 10, 2025, at 17:38 ET), <https://www.reuters.com/sustainability/society-equity/meta-end-diversity-programs-ahead-trump-inauguration-2025-01-10/> [<https://perma.cc/96V3-DW3M>].

1. *Gender Ideology*

In his initial hours as the 47th President of the United States, Trump signed an unprecedented number of first-day executive orders.²⁷⁸ The second executive order Trump signed was titled *Initial Rescissions of Harmful Executive Orders and Actions*.²⁷⁹ It rescinded seventy-eight of Biden's executive orders, including Executive Order 13988 and Executive Order 14004.²⁸⁰ Executive Order 13988 had extended broad nondiscrimination protections based on sexual orientation and gender identity consistent with *Bostock v. Clayton County*.²⁸¹ Executive Order 14004 had reversed the prior ban on transgender service members that Trump had imposed during his first term.²⁸²

Beyond these expected reversals of Biden-era policies, Trump issued a number of executive orders directed specifically at transgender Americans. The orders, *inter alia*, establish a federal binary and immutable definition of sex,²⁸³ prohibit transgender athletes from serving on teams that correspond with their gender identity,²⁸⁴ ban access to gender-affirming care for minors,²⁸⁵ impose penalties on schools and teachers who practice inclusive policies,²⁸⁶ and prohibit transgender troops from serving in the military.²⁸⁷ The anti-trans orders are notable because they do not use the term transgender, but instead refer to the ill-defined concept of "gender ideology."²⁸⁸ The orders also disparage the prevailing medical consensus regarding gender identity and suggest that transgender people are somehow being dishonest and untruthful.²⁸⁹ Following

²⁷⁸ Megan Forrester & Bill Hutchinson, *Trump's Record-Breaking Day 1 Executive Actions Prompt Legal Challenges*, ABC NEWS (Jan. 22, 2025, at 12:27 ET), <https://abcnews.go.com/Politics/trumps-record-breaking-day-1-executive-actions-prompt/story?id=117933368> [<https://perma.cc/ZR8K-RGJJ>].

²⁷⁹ Exec. Order No. 14148, *supra* note 4 (Initial Rescissions of Harmful Executive Orders and Actions).

²⁸⁰ *Id.*; Exec. Order 14004, 86 Fed. Reg. 7471 (Jan. 25, 2021); Exec. Order No. 13988, *supra* note 151.

²⁸¹ Exec. Order No. 13988, *supra* note 151; *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

²⁸² Exec. Order No. 14004, *supra* note 280 (Enabling All Qualified Americans to Serve Their Country in Uniform).

²⁸³ Exec. Order No. 14168, *supra* note 4 (Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government).

²⁸⁴ Exec. Order No. 14201, *supra* note 6 (Keeping Men Out of Women's Sports).

²⁸⁵ Exec. Order No. 14187, *supra* note 7 (Protecting Children from Chemical and Surgical Mutilation).

²⁸⁶ Exec. Order No. 14190, *supra* note 6 (Ending Radical Indoctrination in K-12 Schooling).

²⁸⁷ Exec. Order No. 14183, *supra* note 6 (Prioritizing Military Excellence and Readiness).

²⁸⁸ *See, e.g.*, Exec. Order No. 14168, *supra* note 4 (Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government).

²⁸⁹ Exec. Order No. 14183, *supra* note 6 (Prioritizing Military Excellence and Readiness).

the MAGA anti-trans strategy, the orders claim to be necessary in order to protect children, women, and national security.²⁹⁰

The first anti-trans executive order that Trump signed, for example, frames anti-trans policy as a civil rights measure necessary to protect women and restore faith in government.²⁹¹ It has wide-reaching ramifications, ranging from disallowing gender markers on official documents to reflect an individual's gender identity to requiring the Federal Bureau of Prisons to force the estimated 1,500 transgender women in custody to be housed with men.²⁹² The Executive Order established a definition for "gender ideology" that is maddeningly vague. It provides that:

"Gender ideology" replaces the biological category of sex with an ever-shifting concept of self-assessed gender identity, permitting the false claim that males can identify as and thus become women and vice versa, and requiring all institutions of society to regard this false claim as true. Gender ideology includes the idea that there is a vast spectrum of genders that are disconnected from one's sex. Gender ideology is internally inconsistent, in that it diminishes sex as an identifiable or useful category but nevertheless maintains that it is possible for a person to be born in the wrong sexed body.²⁹³

All other executive orders that target "gender ideology" refer back to this definition.²⁹⁴

The executive orders evince a clear disregard for mainstream medical opinions that is consistent with the vein of scientific denialism and conspiratorial thinking that runs through the MAGA movement and that was on full display during the COVID-19 pandemic.²⁹⁵ For example, Executive Order 14187, titled *Protecting Children from Chemical and Surgical Mutilation*, which provides that the United States will not fund or otherwise support gender-affirming care for minors, claims to protect children from "junk science."²⁹⁶ Perhaps even more troubling is the picture of transgender people that

²⁹⁰ *Id.*; Exec. Order No. 14168, *supra* note 4 (Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government); Exec. Order No. 14187, *supra* note 7 (Protecting Children from Chemical and Surgical Mutilation).

²⁹¹ Exec. Order No. 14168, *supra* note 4.

²⁹² *Id.*; Shaila Dewan & Amy Harmon, *Trump Bars Transgender Women from U.S. Prisons for Female Inmates*, N.Y. TIMES (Jan. 23, 2025), <https://www.nytimes.com/2025/01/23/us/trump-transgender-inmates-prison.html> [<https://perma.cc/S9BH-CT54>].

²⁹³ *Id.*

²⁹⁴ *See, e.g.*, Exec. Order No. 14190, *supra* note 6 (Ending Radical Indoctrination in K-12 Schooling).

²⁹⁵ Thomas B. Edsall, Opinion, *MAGA vs. Science Is No Contest*, N.Y. TIMES (Sep. 11, 2024), <https://www.nytimes.com/2024/09/11/opinion/republicans-science-denial.html> [<https://perma.cc/4469-5872>].

²⁹⁶ Exec. Order No. 14187, *supra* note 7 (Protecting Children from Chemical and Surgical Mutilation).

emerges from these executive pronouncements. Executive Order 14183, titled *Prioritizing Military Excellence and Readiness*, bans transgender troops from serving in the military, but not before disparaging their character.²⁹⁷ By way of background, the United States military is the largest employer of transgender people, with an estimated 15,000 to 25,000 transgender service members.²⁹⁸ The Executive Order asserts that these transgender service members are *per se* not “honorable.” It provides:

adoption of a gender identity inconsistent with an individual’s sex conflicts with a soldier’s commitment to an honorable, truthful, and disciplined lifestyle, even in one’s personal life. A man’s assertion that he is a woman, and his requirement that others honor this falsehood, is not consistent with the humility and selflessness required of a service member.²⁹⁹

It also contends that using pronouns that align with one’s gender identity is not compatible with military readiness and, by extension, threatens national security:³⁰⁰

It is the policy of the United States Government to establish high standards for troop readiness, lethality, cohesion, honesty, humility, uniformity, and integrity. This policy is inconsistent with the medical, surgical, and mental health constraints on individuals with gender dysphoria. This policy is also inconsistent with shifting pronoun usage or use of pronouns that inaccurately reflect an individual’s sex.³⁰¹

Finally, the Executive Order asserts that transgender troops suffer from disqualifying mental illness. It states:

Longstanding Department of Defense (DoD) policy (DoD Instruction (DoDI) 6130.03) provides that it is the policy of the DoD to ensure that service members are “[f]ree of medical conditions or physical defects that may reasonably be expected to require excessive time lost from duty for necessary treatment or hospitalization.” As a result, many mental and physical health conditions are incompatible with active duty, from conditions that require substantial medication or medical treatment to bipolar and

²⁹⁷ See Exec. Order No. 14183, *supra* note 6 (Prioritizing Military Excellence and Readiness).

²⁹⁸ The Editorial Board, Opinion, *Trump’s Shameful Campaign Against Transgender Americans*, N.Y. TIMES (Feb. 9, 2025), <https://www.nytimes.com/2025/02/09/opinion/transgender-trump-orders.html> [<https://perma.cc/F3LD-YDYU>].

²⁹⁹ *Id.*

³⁰⁰ Exec. Order No. 14183, *supra* note 6 (Prioritizing Military Excellence and Readiness).

³⁰¹ *Id.*

related disorders, eating disorders, suicidality, and prior psychiatric hospitalization.³⁰²

This characterization of transgender service members who have signed up to put their lives on the line for our country provides a telling preview of how the MAGA movement plans to paint transgender people going forward: deceitful, mentally ill, and a risk to national security.

With respect to protecting children from “indoctrination,” Executive Order 14190 titled *Ending Radical Indoctrination in K-12 Schooling* focuses on gender ideology and also “discriminatory equity ideology.”³⁰³ It ends federal funding for schools with inclusive policies and threatens administrators, teachers, and staff with potential criminal penalties for respecting a student’s gender identity.³⁰⁴ The U.S. Department of Education wasted no time getting to work. In a letter dated January 28, 2025, it notified the Denver Public School District that it was under investigation for violating the civil rights of its female students by installing an “all-gender” bathroom.³⁰⁵ Similar investigations are underway in five northern Virginia school districts.³⁰⁶

2. Diversity, Equity, and Inclusion

On Trump’s first day in office, he also took aim at what the MAGA movement currently refers to as DEI.³⁰⁷ These actions build on the measures Trump put in place toward the end of his first term after the 2020 racial justice protests, but they have a much greater reach.³⁰⁸ Although DEI is often paired with its evil twin of “gender ideology,” a number of Trump’s executive orders focused solely on DEI, framing it as a form of reverse discrimination that is

³⁰² *Id.*

³⁰³ The Executive Order defines “discriminatory equity ideology” as “an ideology that treats individuals as members of preferred or disfavored groups, rather than as individuals, and minimizes agency, merit, and capability in favor of immoral generalizations.” Exec. Order No. 14190, *supra* note 6 (*Ending Radical Indoctrination in K-12 Schooling*).

³⁰⁴ *Id.*

³⁰⁵ *U.S. Department of Education Launches Investigation into Denver Public Schools for Converting Girl’s Restroom to All-Gender Facility*, U.S. DEP’T OF EDUC. (Jan. 28, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-launches-investigation-denver-public-schools-converting-girls-restroom-all-gender-facility> [<https://perma.cc/Y76V-HHL7>].

³⁰⁶ Brooke Migdon, *Education Department Investigating Northern Virginia School Districts for Transgender Support Policies*, THE HILL (Feb. 17, 2025, at 14:50 ET), <https://thehill.com/homenews/lgbtq/5149578-education-department-northern-virginia-schools-transgender-students-trump-executive-order/> [<https://perma.cc/XN7H-NCHC>].

³⁰⁷ Exec. Order No. 14151, *supra* note 4 (requiring end of all DEI “mandates, policies, programs, preferences, and activities” across the federal government, including all equity-related grants and contracts); Exec. Order No. 14170, 90 Fed. Reg. 8621 (Jan. 30, 2025) (targeting hiring practices of the federal government).

³⁰⁸ The use of the acronym DEI represents an evolution of MAGA thinking and messaging from Trump’s first term when these sorts of objections were couched in terms of “critical race theory” or “diversity.” See *supra* text accompanying notes 138–46.

undermining our meritocracy and, ultimately, our democracy.³⁰⁹ Given that the Biden administration had included sexual orientation and gender identity in all DEI efforts, along with other groups that have historically experienced barriers in employment and education, all of Trump's anti-DEI measures directly impact LGBTQ people.³¹⁰ That said, DEI is also a powerful "dog whistle" that conjures images of racial preferences in the right-wing brain.³¹¹

Trump's anti-DEI executive orders initially focused on the activities of the federal government by discontinuing DEI programs and hiring practices.³¹² Federal government workers involved in DEI initiatives were among the first to be placed on administrative leave amidst the ongoing race to decrease the size of the federal workforce.³¹³ As with the anti-trans executive orders, the anti-DEI executive orders are framed not only in terms of civil rights, but also in terms of national security. For example, Executive Order 14170, titled *Reforming the Federal Hiring Process and Restoring Merit to Government Service*, prohibits taking diversity into account in any government hiring because such hiring is said to "put[] critical government functions at risk" and be contrary to our democratic system.³¹⁴ Immediately after the tragic mid-air collision between a commercial jet and a military Black Hawk helicopter in Washington, DC on January 30, 2025, Trump cast the blame for the collision that claimed sixty-seven lives on "DEI hiring," without any evidence.³¹⁵ MAGA Republicans had also blamed the 2024 collapse of the Francis Scott Key Bridge in Baltimore on DEI, pointing to the race and sex of one of the Commissioners overseeing the Port of Baltimore. Representative Phil Lyman (R-UT) posted on social media "DEI=DIE."³¹⁶

³⁰⁹ See, e.g., Exec. Order No. 14170, *supra* note 307 (Reforming the Federal Hiring Process and Restoring Merit to Government Service).

³¹⁰ See, e.g., Exec. Order No. 13985, *supra* note 155 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government).

³¹¹ Andrew Lawrence, *Racist Dog Whistle: The Right Wing Has Weaponized "DEI,"* THE GUARDIAN (Apr. 21, 2024, at 10:00 ET), <https://www.theguardian.com/culture/2024/apr/21/dei-language-conservatives-baltimore> [<https://perma.cc/4V9G-USSS>].

³¹² Exec. Order No. 14151, *supra* note 4 (Ending Radical and Wasteful Government DEI Programs and Preferencing); Exec. Order No. 14170, *supra* note 307 (Reforming the Federal Hiring Process and Restoring Merit to Government Service).

³¹³ Alexandra Olson & Zeke Miller, *Trump Administration Moves to Begin Cutting All Federal DEI Staff*, PBS (Jan. 22, 2025, at 09:59 ET), <https://www.pbs.org/newshour/politics/trump-administration-moves-to-begin-cutting-all-federal-dei-staff> [<https://perma.cc/LX2Z-HSV6>].

³¹⁴ Exec. Order No. 14170, *supra* note 307 (Reforming the Federal Hiring Process and Restoring Merit to Government Service).

³¹⁵ David E. Sanger, *Trump Blames D.E.I. and Biden for Crash Under His Watch*, N.Y. TIMES (Jan. 30, 2025), <https://www.nytimes.com/2025/01/30/us/politics/trump-plane-crash-dei-faa-diversity.html> [<https://perma.cc/3D4N-X4DX>].

³¹⁶ Curtis Bunn, *Utah Lawmaker Blames "Diversity" for Baltimore Bridge Collapse*, NBC NEWS (Mar. 27, 2024, at 16:27 ET), <https://www.nbcnews.com/news/nbcblk/utah-lawmaker-blames-diversity-baltimore-bridge-collapse-rcna145261> [<https://perma.cc/M5VE-RAB3>].

The anti-DEI orders were extended to apply to government contractors and federal grantees.³¹⁷ Generally, they prohibit any DEI programs or initiatives, calling them “dangerous, demeaning, and immoral race- and sex-based preferences.”³¹⁸ Trump also rescinded a longstanding Johnson-era executive order that had extended nondiscrimination protection to the employees of federal contractors and required certain data reporting to the Department of Labor.³¹⁹ The same anti-DEI executive order requires agencies to recommend private and nonprofit sector entities to audit for potential noncompliance with the DEI prohibitions.³²⁰

The anti-DEI executive orders set off a mad dash across agencies and government websites to identify and delete anything remotely related to DEI.³²¹ Federal workers were placed on leave and offices and programs were shuttered.³²² The lack of a meaningful definition of what constitutes DEI may have led to some overkill, or perhaps the intention was to keep the definition vague and cast a very broad net. Federal grants were paused, purportedly to allow time to determine whether the grants were consistent with “Presidential priorities,” including his anti-DEI orders.³²³ Federal websites were purged of any reference of LGBTQ people, sexual orientation, or gender identity, but other concepts such as gender equity in health outcomes also disappeared

³¹⁷ Naftali Bendavid & Cleve R. Wootson Jr., *Trump’s Fierce Attacks on DEI Reflect a Longtime GOP Focus*, WASH. POST (Feb. 1, 2025), <https://www.washingtonpost.com/politics/2025/02/01/dei-trump-republicans-diversity/> [<https://perma.cc/GQ7F-NJVJ>].

³¹⁸ Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 31, 2025) (Ending Illegal Discrimination and Restoring Merit-Based Opportunity).

³¹⁹ *Id.*; Exec. Order No. 11245, 3 C.F.R. 336 (1964–1965). The Office of Federal Contract Compliance Programs in the Department of Labor collected demographic information from federal contractors in order to monitor compliance with the affirmative action requirements of Executive Order 11245. See LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 116.04 (2d ed. 2024) (describing the reporting requirement and public disclosure under the rescinded Executive Order). See generally Heather Timmons, *Why LBJ Signed Executive Order 11246 that Trump Rescinded*, REUTERS (Jan. 23, 2025, at 09:25 ET), <https://www.reuters.com/world/us/why-president-johnson-signed-executive-order-1965-that-trump-rescinded-2025-01-23/> [<https://perma.cc/J4X7-27VS>] (describing rescinded Executive Order).

³²⁰ Exec. Order No. 14173, *supra* note 318 (Ending Illegal Discrimination and Restoring Merit-Based Opportunity).

³²¹ Singer, *supra* note 5.

³²² Donald Judd & Katelyn Polantz, *White House Orders Government DEI Employees To Be Placed on Leave*, CNN (Jan. 22, 2025, at 18:08 ET), <https://www.cnn.com/2025/01/21/politics/white-house-government-dei-employees-on-leave> [<https://perma.cc/Q4AT-QG48>].

³²³ OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-25-13, MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (2025); Jonathan Swan & Zolan Kanno-Youngs, *Inside the Chaotic Rollout of Trump’s Federal Funding*, N.Y. TIMES (Jan. 29, 2025), <https://www.nytimes.com/2025/01/29/us/politics/trump-funding-freeze-rollout.html> [<https://perma.cc/W4KA-BCJU>].

from the CDC and NIH websites.³²⁴ The FBI training center in Quantico, Virginia painted over its “core values” mural in its lobby, which had included the words “diversity,” “fairness,” “compassion” and “integrity.”³²⁵

In addition, all affinity groups, organizations meant to foster a sense of belonging for workers who share a common identity or interest, across the federal government were suspended.³²⁶ At West Point, twelve affinity groups were discontinued, including the National Society of Black Engineers Club and Society of Women Engineers.³²⁷ At the U.S. Department of Defense, also known as the Department of War, Secretary of Defense Pete Hegseth has long been a vocal critic of DEI. In a memo to employees, Hegseth wrote that DEI efforts “are incompatible with the values of DoD.”³²⁸ The memo continued that DoD would no longer celebrate Black History Month, Asian American Pacific Islander Heritage Month, National American Indian Heritage Month, LGBTQ Pride Month, Women’s History Month, Juneteenth, Martin Luther King Jr. Day or Holocaust Remembrance Day.³²⁹

³²⁴ Lena H. Sun, Dan Keating & Fenit Nirappil, *CDC Removes Gender, Equity References in Public Health Material*, WASH. POST (Feb. 1, 2025), <https://www.washingtonpost.com/health/2025/01/31/cdc-website-gender-lgbtq-data/> [https://perma.cc/W3LB-XJ7N]; Carter Sherman & Jessica Glenza, *CDC Webpages Go Dark as Trump Targets Public Health Information*, THE GUARDIAN (Feb. 4, 2025, at 08:32 ET), <https://www.theguardian.com/us-news/2025/feb/04/cdc-pages-trump-public-health> [https://perma.cc/V256-TRFC]; Julie Steenhuysen & Ted Hesson, *US Health Agencies Scrubbing Websites to Remove “Gender Ideology,”* REUTERS (Jan. 31, 2025, at 15:13 ET), <https://www.reuters.com/world/us/us-health-agencies-scrubbing-websites-remove-gender-ideology-2025-01-31/> [https://perma.cc/CLD6-7F4Q].

³²⁵ Bendavid & Wootson, *supra* note 317, at 4; Perry Stein & Jeremy Roebuck, *Several Senior FBI Leaders Told to Leave Agency or Be Fired, People Familiar with Matter Say*, WASH. POST (Jan. 30, 2025), <https://www.washingtonpost.com/national-security/2025/01/30/fbi-leadership-removed-kash-patel-trump/> [https://perma.cc/AL48-2BVL].

³²⁶ Kimmy Yam, *Trump’s Anti-DEI Executive Orders Target Employee Resource Groups, Federal Workers Say*, NBC NEWS (Jan. 27, 2025, at 18:43 ET), <https://www.nbcnews.com/news/asian-america/trump-anti-dei-orders-target-federal-employee-groups-rcna189212> [https://perma.cc/3Z2X-E3NS].

³²⁷ Anemona Hartocollis & Eve Sampson, *The Military Led Diversity Efforts. West Point’s Club Ban Is a Shift*, N.Y. TIMES (Feb. 7, 2025), <https://www.nytimes.com/2025/02/07/us/west-point-clubs-minorities-women-trump.html> [https://perma.cc/78V5-Y6UE].

³²⁸ Memorandum from Pete Hegseth, U.S. Sec’y of Def., to Senior Pentagon Leadership Commanders of the Combatant Commands Defense Agency and DoD Field Activity Directors, *Restoring America’s Fighting Force* (Jan. 29, 2025), <https://media.defense.gov/2025/Jan/29/2003634987/-1/-1/1/RESTORING-AMERICAS-FIGHTING-FORCE.PDF> [https://perma.cc/GV74-8X35]; Will Steakin & Matt Seyler, *Pentagon Intelligence Agency Pauses Events, Activities Related to MLK Day, Black History Month*, ABC NEWS (Jan. 29, 2025, at 19:13 ET), <https://abcnews.go.com/Politics/pentagon-intelligence-agency-pauses-events-activities-related-mlk/story?id=118244237> [https://perma.cc/2MYD-H7JF]. President Trump signed an Executive Order in September 2025 that authorized the use of the secondary title of the Department of War, but only Congress can officially change the name of the department. Exec. Order No. 14347, 90 Fed. Reg. 43893 (Sep. 5, 2025) (Restoring the United States Department of War).

³²⁹ *Id.*

3. *Obedying in Advance*³³⁰

In the private and non-profit sectors, many entities have rushed to comply with the anti-DEI orders in the hope of avoiding federal scrutiny.³³¹ But change was in the air even before Trump's inauguration. The corporate enthusiasm for DEI policies that increased dramatically after the murder of George Floyd had started to wane in the summer of 2024 when several high-profile corporations discontinued their diversity programs.³³² In the days preceding Trump's second inauguration, tech giants that had been part of the Trump resistance in 2020 began to join the Trump bandwagon. Meta, Amazon, and Target all announced in January 2025 that they were discontinuing their DEI programs and many Fortune 500 companies stopped participating in external surveys to gauge LGBTQ inclusivity, such as the HRC workplace equity index.³³³ Major universities also began unceremoniously dismantling their DEI offices and programs lest they risk alienating the already shrinking pool of federal grants and research funds.³³⁴

Trump's executive actions take the position that any sort of engagement with DEI violates civil rights laws in our newly color-blind society. His actions indicate that the federal government will use whatever tools it has at its disposal, including stopping funding and canceling government contracts, to root out DEI practices. This drastic about-face in policy has left many entities scrambling, wondering what could be next.

III. WHAT'S NEXT?

The speed with which Trump set about erasing transgender people from public life and dismantling DEI has taken some commentators by surprise.³³⁵

³³⁰ SNYDER, *supra* note 10, at 17 (including "[Lesson No.] 1: Do not obey in advance").

³³¹ See, e.g., Susan Snyder, *Penn Scrubs Diversity Initiatives from Its Website to Comply with Trump's Order*, PHILA. INQUIRER (Feb. 15, 2025, at 05:00 ET), <https://www.inquirer.com/education/university-pennsylvania-dei-donald-trump-order-20250215.html> [<https://perma.cc/E3WU-EL5F>].

³³² See, e.g., Kate Gibson, *John Deere & Co. Backs Off Diversity Policies, Following Tractor Supply*, CBS NEWS (July 18, 2024, at 13:37 ET), <https://www.cbsnews.com/news/john-deere-dei-policies-tractor-supply-robby-starbuck/> [<https://perma.cc/NU89-QYMG>].

³³³ Paul & Babu, *supra* note 277; Anne D'Innocenzio, *Target Says It Is Ending Its DEI Goals and Programs, Citing an 'Evolving External Landscape'*, PBS NEWS (Jan. 24, 2025, at 16:40 ET), <https://www.pbs.org/newshour/politics/target-says-it-is-ending-its-dei-goals-and-programs-citing-an-evolving-external-landscape> [<https://perma.cc/9S42-HT8H>]; Laya Neelakandan, *Corporate DEI Index Sees 65% Drop in Participation from Fortune 500 Companies*, CNBC (Feb. 4, 2026, at 15:43 ET), <https://www.cnbc.com/2026/02/04/corporate-dei-index-hrc.html> [<https://perma.cc/4PWQ-2G5D>].

³³⁴ Snyder, *supra* note 331.

³³⁵ Patrick Healy & M. Gessen, Opinion, *There's a Reason Even "Smart" People Surrender to Trump*, N.Y. TIMES (Feb 13, 2025), <https://www.nytimes.com/2025/02/13/opinion/trump-authoritarianism-surrender.html> [<https://perma.cc/TJ54-JU5W>].

Some groups that supported Trump have recoiled from his actions in office.³³⁶ The disconnect reflects the enduring question about Trump: When should we take his statements literally and when are they just belligerent showmanship? In the case of LGBTQ rights (as well as immigration, tariffs, and the federal bureaucracy) Trump's words on the campaign trail were clear and supported by both the 2024 GOP Platform and *Project 2025*. His early days in office have left little daylight between official U.S. policy and Trump's MAGA rallies.³³⁷ Not only have his policies tested the contours of the separation of powers, but they promise to reach deep into state and local concerns and strain the limits of federalism. Far from stemming the tide of anti-trans legislation on the state level, Trump's victory and the stunning change in U.S. policy seem to have accelerated these efforts.³³⁸ At this juncture, it is crucial to consider what lies ahead for LGBTQ people in this new MAGA-dominated world and ask what we can do about it.

It is unrealistic to assume that Trump and the MAGA movement will stand down and be satisfied with the current slate of legal disabilities that they have imposed on LGBTQ people, particularly transgender people. The topic of LGBTQ rights has motivated voters, especially suburban educated white women whose support for Trump had been elusive.³³⁹ The topic has also proven to be red meat for the nativist and populist forces that make up important portions of the MAGA movement. It would be magical thinking to expect that Trump would turn his back on something that delivers on election day and so energizes his base. As with all scapegoating, continuing to point the finger at transgender people provides a convenient distraction from the price of eggs and further solidifies the "them versus us" mentality that fuels populist hatred.³⁴⁰ There is also no reason to assume that the Trump administration will limit its attacks to transgender people, but rather that targeted attacks on LGB

³³⁶ Filip Timotija, *Pro-Trump Arab American Group Changing Name After Gaza Remarks*, THE HILL (Feb. 5, 2025, at 16:42 ET), <https://thehill.com/homenews/campaign/5128941-trump-arab-american-group-name-change/> [<https://perma.cc/2MPZ-2SB6>].

³³⁷ Stephen Collingson, *Trump Is Imposing MAGA Rule on the Government Hour-by-Hour*, CNN (Jan. 23, 2025, at 07:45 ET), <https://www.cnn.com/2025/01/23/politics/maga-rule-government-trump-analysis/> [<https://perma.cc/9WYR-6ST2>].

³³⁸ Dave Lawler & Erica Pandey, *Trump Win Emboldens GOP's Anti-Trans Blitz*, AXIOS (Nov. 21, 2024), <https://www.axios.com/2024/11/21/trump-anti-trans-bathroom-laws-gop/> [<https://perma.cc/3H57-JYUR>].

³³⁹ See Hugh Tomlinson, *The Two Sentences That Doomed Kamala Harris's Campaign*, THE TIMES (Nov. 15, 2025, at 20:00 GMT), <https://www.thetimes.com/world/us-world/article/kamala-harris-trans-gender-democrat-election-campaign-kvzqz9d6c> [<https://perma.cc/H7AW-YJMK>].

³⁴⁰ Odette Yousef, *Trump's Anti-Trans Effort Is an Agenda Cornerstone with Echoes in History*, NAT'L PUB. RADIO (Feb. 6, 2025, at 10:27 ET), <https://www.npr.org/2025/02/06/nx-s1-5288145/trump-anti-trans-executive-order> [<https://perma.cc/3GGD-YGJX>].

people and their families will follow. The issues are twined, not only in the umbrella acronym that defines the LGBTQ community, but also in the minds of those who mean the community harm.

Signs of what may be on the horizon are all around us: the increasingly punitive nature of state anti-trans legislation, the characterization of transgender people emerging from the executive orders, the administration's expansive yet vague definition of "gender ideology" and "DEI," the rejection of scientific and medical expertise, the language of the 2024 GOP Platform and *Project 2025*, the voices of the rabidly anti-LGBTQ segments of the MAGA movement, the resounding silence of the Republican party, and the disarray of the Democratic Party. Trump's turn toward Russia and away from our European allies underscores the uncomfortable fact that we should also take note of what has happened in other countries that have experienced an authoritarian slide.³⁴¹ LGBTQ people under Russian President Vladimir Putin, for example, have suffered severe repression.³⁴² Viktor Orbán in Hungary proudly touts his country's anti-LGBTQ stance as providing a positive example for American conservatives.³⁴³

This section discusses what might be coming down the pike next in terms of anti-LGBTQ initiatives. This section also uses the lens of strategic institutional choice to identify the democratic institutions that could potentially help LGBTQ people counter future attempts to contain supposedly contagious ideologies and eradicate LGBTQ people from public life. With Republicans in control of both houses of Congress and the presidency, the courts and the states stand as the most obvious bulwarks against further attacks. But in this period of democratic decline, both judicial independence and federalism may be uncertain allies.

A. Good Policy Requires Good Data, Not Alternative Facts

As they say, "good policy requires good data." In order to establish the MAGA theory of "gender ideology" and "indoctrination," it is necessary to disregard accepted scientific and medical consensus regarding LGBTQ

³⁴¹ See Robert Jimison, *As Trump Turns Toward Russia and Against Ukraine, Republicans Are Mum*, N.Y. TIMES (Feb. 19, 2025), <https://www.nytimes.com/2025/02/19/us/politics/trump-ukraine-russia-republicans.html> [https://perma.cc/9S6M-TCM].

³⁴² Dasha Litvinova, *Russia's LGBTQ+ Community Is Living in Fear Following New Laws and Court Rulings, Activists Say*, ASSOCIATED PRESS (Dec. 6, 2024, at 08:14 ET), <https://apnews.com/article/russia-lgbtq-crackdown-putin-moscow-aef5650c6fdadbe1ac13e0d0b9f93f3b> [https://perma.cc/JK28-JUUA].

³⁴³ David Folkenflik, *Hungary's Autocratic Leader Tells U.S. Conservatives to Join His Culture War*, NAT'L PUB. RADIO (Aug. 4, 2022, at 17:55 ET), <https://www.npr.org/2022/08/04/1115541985/why-hungarys-authoritative-leader-is-drawing-conservative-crowds-in-the-u-s> [https://perma.cc/CBM6-Y5NR]; Justin Spike, *Hungary Won't Back Down and Change LGBTQ+ and Asylum Policies Criticized By EU, Minister Says*, ASSOCIATED PRESS (Jan. 18, 2025, at 05:49 ET), <https://apnews.com/article/hungary-lgbtq-asylum-policies-df2e989e8e1ae91683e6f8512b4f39eb> [https://perma.cc/58MY-ADRH].

people, which states that LGBTQ people are well-adjusted and not pathological. Moreover, an explosion of empirical research into the lives of LGBTQ people has quantified significant disparities between LGBTQ people and non-LGBTQ people in terms of health, financial security, and general well-being.³⁴⁴ This sort of research can be invaluable when crafting targeted policies. For example, statistics regarding the rate of homelessness and suicidal ideation among LGBTQ children demonstrate the need for inclusive and supportive environments in our schools and child welfare agencies.³⁴⁵ The toll of “minority stress,” as expressed through data and surveys, can be used to justify nondiscrimination protections.³⁴⁶ The MAGA movement rejects this science just as it rejects vaccines and COVID-19 precautions.³⁴⁷ In its place, the movement offers its own “alternative facts” and statistics like the disingenuous “fact” asserted in *Project 2025* that same-sex marriages last only half as long as different-sex marriages.³⁴⁸ That “fact” is patently misleading because it fails to take into account the fact that marriage equality has only existed nationwide since 2015, so there is no way of knowing how long same-sex marriages last.³⁴⁹

³⁴⁴ See, e.g., M. V. Lee Badgett, Christopher S. Carpenter & Dario Sansone, *LGBTQ Economics*, 35 J. ECON. PER. 141, 141–42, 165–66 (2021) (mapping economic outcomes); Jake Miller, *Studies Deepen Understanding of LGBTQ Health Disparities*, HARV. MED. SCH. (Sep. 13, 2024), <https://hms.harvard.edu/news/studies-deepen-understanding-lgbtq-health-disparities> [<https://perma.cc/U6W7-W3LA>] (discussing research on LGBTQ+ health disparities).

³⁴⁵ See, e.g., Harmony Rhoades et al., *Homelessness, Mental Health and Suicidality Among LGBTQ Youth Accessing Crisis Services*, 49 CHILD PSYCHIATRY & HUM. DEV. 643, 649 (2018).

³⁴⁶ See, e.g., Ellen D. B. Riggle, Sharon S. Rostosky & Sharon Horne, *Does It Matter Where You Live? Nondiscrimination Laws and the Experiences of LGB Residents*, 7 SEXUALITY RSCH. & SOC. POL’Y 168, 173 (2010).

³⁴⁷ See, e.g., Claire Panosian, *It Can’t Happen Here (Or Can It?): The Deadly Rise of Anti-Science—A Scientist’s Warning*, 28 AM. J. TROPICAL MED. HYGIENE 216, 216–17 (2024).

³⁴⁸ *Project 2025*, *supra* note 107, at 481.

³⁴⁹ *Obergefell v. Hodges*, 576 U.S. 644, 665 (2015). Massachusetts became the first state to issue marriage licenses in 2004. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003). Connecticut approved same-sex marriage in 2008. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008). California temporarily allowed same-sex marriages in 2008, but the practice was stopped after a few months by a ballot measure, Proposition 8. *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008); Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES (Nov. 5, 2008), <https://www.nytimes.com/2008/11/06/us/politics/06marriage.html> [<https://perma.cc/B356-KDUL>] (noting twelve states recognized same-sex marriage by June 2013). New York recognized marriage equality in 2011. *Id.* By the time *Obergefell* was decided in 2015, same-sex marriage was legal in thirty-seven states. Bill Chappell, “Equal Dignity”: *U.S. Map Shows the Impact of Obergefell v. Hodges Decision*, NAT’L PUB. RADIO (June 26, 2025, at 05:01 ET), <https://www.npr.org/2025/06/26/nx-s1-5445033/obergefell-legal-same-sex-marriage-us-map> [<https://perma.cc/VSA7-K6G8>].

As noted earlier, Executive Order 14190, regarding the claimed indoctrination occurring in K-12 education, dismisses research and data on LGBTQ people as junk science.³⁵⁰ The casual disregard for peer-reviewed scholarship means that arguments based in science or best medical practices are unlikely to move MAGA enthusiasts, although, hopefully, the courts will be more receptive to these sorts of traditional arguments.³⁵¹ The MAGA production of its own partisan “science and data” raises a frightening scenario where the MAGA movement could attempt to re-pathologize LGBTQ people and identities.³⁵² Arguably, this attempt is already underway with respect to transgender identities. Executive Order 14183 establishing the new transgender military ban cites as authority DoD guidelines on mental illness and fitness to serve.³⁵³ There has been a parallel effort in Russia to reclassify homosexuality as a mental illness since 2023.³⁵⁴ In the 1960s and 1970s, the early gay liberationists in the United States worked tirelessly to declassify homosexuality as a mental illness and secure its deletion from the *Diagnostic and Statistical Manual*.³⁵⁵ They understood that declassification was a necessary prerequisite for all other advocacy on behalf of the LGBTQ community.³⁵⁶ If LGBTQ people were once again classified as mentally ill, it would create a tremendous barrier to advocating for LGBTQ rights and would wipe out over fifty years of progress. Such a classification would disqualify LGBTQ people from many occupations and raise questions regarding their fitness to parent their children.³⁵⁷

Despite its disdain for objective facts, the MAGA movement might take notice of a 2025 Gallup poll showing that the percentage of Americans eighteen years of age and older who identify somewhere on the LGBTQ spectrum has

³⁵⁰ Exec. Order No. 14190, *supra* note 6 (Ending Radical Indoctrination in K-12 Schooling).

³⁵¹ Claire Rush, *Federal Judge Blocks the Trump Administration from Pulling Funding for Sex Ed on Gender Diversity*, ASSOCIATED PRESS (Oct. 28, 2025, at 13:52 ET), <https://apnews.com/article/sex-ed-funding-gender-lawsuit-trump-7b74ae73a60b3900f4e-1c126abd4bf80> [<https://perma.cc/UE2M-WYM5>].

³⁵² *Team of Experts Provides Critical Review of Florida Medical Report on Transgender Care*, YALE L. SCH. (July 13, 2022), <https://law.yale.edu/yls-today/news/team-experts-provides-critical-review-florida-medical-report-transgender-care> [<https://perma.cc/K8HQ-636G>].

³⁵³ Exec. Order No. 14183, *supra* note 6 (Prioritizing Military Excellence and Readiness).

³⁵⁴ *Russian Sexologists to Target Homosexuality, Other “Disorders” Under New Rules*, REUTERS (June 29, 2023, at 14:31 ET), <https://www.reuters.com/world/europe/russian-sexologists-target-homosexuality-other-disorders-under-new-rules-2023-06-29/> [<https://perma.cc/D92N-4JKX>].

³⁵⁵ See RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 40 (1981).

³⁵⁶ Benjamin Ryan, *Behind the Movement That Brought Homosexuality — And Psychiatry’s Power — To a Vote 50 Years Ago*, NBC NEWS (Apr. 8, 2024, at 17:55 ET), <https://www.nbcnews.com/nbc-out/out-health-and-wellness/homosexuality-psychiatry-dsm-disorder-rcna146579> [<https://perma.cc/5G2K-NBUJ>].

³⁵⁷ Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCIS. 565, 572 (2014).

risen to an all-time high of 9.3 percent.³⁵⁸ This percentage has almost tripled since Gallup began counting in 2012, and it has increased by two-thirds since 2020.³⁵⁹ Nearly one in four members of Generation Z aged eighteen to twenty-seven identify as LGBTQ.³⁶⁰ It makes sense that the percentage of people who are willing to identify as LGBTQ on a survey increased during the same time that LGBTQ people were gaining greater acceptance in all aspects of their lives. The reduction in stigma naturally makes it easier and more welcoming for people to identify openly as LGBTQ. For the MAGA movement, however, these findings could be marshalled as proof of the disastrous impact of “groomers” and the “indoctrination” taking place in our public schools.

B. *Containing LGBTQ Lives and Stories*

The alarm over the spread of “gender ideology” and “divisive ideology” reflects the MAGA framing of LGBTQ identities as contagious and especially dangerous to children. This contagion model has a long history stretching back nearly a hundred years to the earliest obscenity trials involving LGBTQ-themed books.³⁶¹ It was a central feature of the psychoanalytic understanding of homosexuality that reigned during the mid-twentieth century when homosexuality was conflated with pedophilia.³⁶² The contagion model also drove the Lavender Scare in the 1950s when homosexuals were purged from the federal government on the grounds that they represented security risks.³⁶³ As a U.S. Senate report from 1950, titled *Employment of Homosexuals and Other Sex Perverts in Government*, explained, “[o]ne homosexual can pollute a Government office.”³⁶⁴ The belief in the contagious (and undesirable) nature of LGBTQ identities logically leads to a series of policy measures that are designed to contain the contagion—to contain LGBTQ lives and stories and keep them far away from children. These measures fall into two general categories: censorship and attacks on parenting.

³⁵⁸ Claire Cain Miller & Francesca Paris, *Nearly One in 10 U.S. Adults Identifies as L.G.B.T.Q., Survey Finds*, N.Y. TIMES (Feb. 20, 2025), <https://www.nytimes.com/2025/02/20/upshot/lgbtq-survey-results.html> [<https://perma.cc/E7JE-CG7V>].

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ See Nancy J. Knauer, *Homosexuality as Contagion: From The Well of Loneliness to the Boy Scouts*, 29 HOFSTRA L. REV. 401, 448 (2000).

³⁶² See, e.g., JENNIFER TERRY, AN AMERICAN OBSESSION: SCIENCE, MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY 322–23 (1999).

³⁶³ DAVID K. JOHNSON, THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT 16–17, 80 (2006).

³⁶⁴ S. SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON EXPENDITURES IN THE EXEC. DEP'TS, 81ST CONG., INTERIM REPORT: EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT 4 (1950).

1. *Censorship*

Censorship is a tried-and-true way to try to contain expressions of LGBTQ pride. As explained in greater detail later in this Article, attempts by the government to censor speech or the freedom of association will face stiff First Amendment challenges.³⁶⁵ However, First Amendment protections will not apply to government self-censorship or shifting priorities on DEI and will have limited reach in the case of alleged obscenity, child pornography, or child sexual abuse.³⁶⁶ At the federal level, Executive Order 14168, which established a binary definition of gender,³⁶⁷ set off a swift wave of self-censorship across the federal government as it scrubbed the term “transgender” and lopped the “T” off of the acronym LGBT in government program documents and on its websites. Government grants and research reports were also scoured for any reference of the offending terms, including references to gender equity.³⁶⁸ In perhaps the starkest erasure of LGBTQ history, the National Park Service removed the words “transgender” and “queer” from its website for the Stonewall National Monument commemorating the Stonewall Uprising, which was led by transgender activists, most notably Marsha P. Johnson and Sylvia Rivera.³⁶⁹ In terms of expressive speech, the federal government has also forbidden its embassies and consulates from flying or displaying the pride flag, which was done under the Obama and Biden administrations.³⁷⁰

Between the “Don’t Say Gay” bills and book bans, attempts to keep knowledge about LGBTQ identities away from children is rampant on the state level with nineteen states restricting how or whether LGBTQ issues can be taught

³⁶⁵ See, e.g., Michael L. Smith, *Moral Panic and the First Amendment*, 72 BUFF. L. REV. 455, 459 (2024). An anti-drag law in Texas that was declared unconstitutional was appealed to the Fifth Circuit, which vacated the ruling and remanded the case to the District Court. *Woodlands Pride, Inc. v. Paxton*, 694 F. Supp. 3d 820, 829 (S.D. Tex. 2023), *vacated and remanded*, 157 F.4th 775 (5th Cir. 2025). Similar laws have also been enjoined in Tennessee and Florida. Smith, *supra*, at 504.

³⁶⁶ Smith, *supra* note 365, at 506 (citing *Woodlands Pride*, 694 F. Supp. 3d at 845) (“Texas claimed that it had ‘a compelling interest in protecting children,’ and while the court [in the initial *Woodlands Pride* case] agreed that this interest was compelling, it disagreed with Texas’s claim that its bill was narrowly tailored to accomplish this goal.”).

³⁶⁷ Exec. Order No. 14168, *supra* note 4 (Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government).

³⁶⁸ Apoorva Mandavilli & Roni Caryn Rabin, *C.D.C. Site Restores Some Purged Files After “Gender Ideology” Ban Outcry*, N.Y. TIMES (Feb. 3, 2025), <https://www.nytimes.com/2025/02/03/health/trump-gender-ideology-research.html#:~:text=On%20Friday%2C%20the%20Centers%20for,that%20promoted%20%E2%80%9Cgender%20ideology.%E2%80%9D> [https://perma.cc/YL3E-9QPG].

³⁶⁹ Elizabeth Wolfe, “Transgender” and “Queer” Erased from Stonewall Uprising National Monument Website, CNN (Feb. 13, 2025, at 23:39 ET), <https://www.cnn.com/2025/02/13/us/stonewall-inn-national-monument-transgender/index.html> [https://perma.cc/S879-MV6K].

³⁷⁰ Christine Hauser & Neil Vigdor, *Trump Administration Tells Embassies That “Activist” Flags Won’t Fly*, N.Y. TIMES (Jan. 24, 2025), <https://www.nytimes.com/2025/01/24/us/embassy-us-flag-blm-gay-pride.html> [https://perma.cc/2PW8-JLSF].

in schools, ranging from outright bans to required parental notification.³⁷¹ Executive Order 14190, which aims to stop “radical indoctrination” in K-12 education, brings to bear the power of the federal government to investigate the offending school districts for supposed civil rights violations and suspend federal funding.³⁷² All of these measures are driven by something more sinister than simply restricting the dissemination of age-inappropriate material. These laws and policies purport to safeguard children from LGBTQ people and their allies who are claimed to be “grooming,” “sexualizing,” and “indoctrinating” children.³⁷³ Whereas the first two terms reference child sexual abuse and pedophilia, the third term makes it clear that the MAGA movement considers pro-LGBTQ messages to be propaganda, plain and simple.

Russia and Hungary have strict laws prohibiting pro-LGBTQ messaging. After several regions in Russia enacted bans on LGBTQ “propaganda,” Russia enacted a national ban, known as the Child Protection Law, in 2013 that made it illegal to tell minors that “non-traditional” relationships were equal to “traditional” relationships.³⁷⁴ The prohibition was interpreted broadly enough to ban LGBTQ pride parades because they might be viewed by minors.³⁷⁵ Hungary passed a similar law in 2021 that criminalized the depiction and promotion of “diverse gender identities and sexual orientations.”³⁷⁶ The Russian law was later expanded in 2022 to apply to all expressions of support for “non-traditional sexual relations” and information about gender transitions, regardless of whether a minor was involved.³⁷⁷ In 2024, Russia added what it refers to as the “LGBTQ movement” to its list of “extremist” and “terrorist organizations.”³⁷⁸ Under Russian criminal law, participating in or financing

³⁷¹ *LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/curricular_laws [http://perma.cc/B39P-JM6H]. In March 2024, Florida settled a lawsuit that limited the scope of the state’s “Don’t Say Gay” law to instruction only. Mazzei, *supra* note 164.

³⁷² Exec. Order No. 14190, *supra* note 6 (Ending Radical Indoctrination in K-12 Schooling).

³⁷³ Susanna Cassisa, Opinion, *The “Groomer” Anti-LGBTQ+ Panic Is Not New — And Has Caused Immense Harm*, WASH. POST (July 24, 2023), <https://www.washingtonpost.com/made-by-history/2023/07/24/groomer-lgbtq-germany-children/> [https://perma.cc/M8R2-MDRW].

³⁷⁴ Kathy Lally, *Russia’s Gay Law Isolates LGBT Teenagers*, WASH. POST (Sep. 2, 2013), https://www.washingtonpost.com/world/russias-gay-law-isolates-lgbt-teenagers/2013/09/01/9eec54fc-0c19-11e3-89fe-abb4a5067014_story.html [https://perma.cc/X25N-DXDE].

³⁷⁵ *Id.*

³⁷⁶ Balazs Pivarnyik & Bela Szandelszky, *Hungary: Lawmakers Pass Law Barring LGBT Content for Minors*, ASSOCIATED PRESS (June 15, 2021, at 14:47 ET), <https://apnews.com/article/government-and-politics-europe-hungary-laws-business-d093db541d1ad00bd4b28bb3a22cdb1b> [http://perma.cc/NTY4-MAKK].

³⁷⁷ Theo Farrant, *From Museums to Book Publishing: How Russia’s New Anti-LGBTQ Laws Will Impact Culture*, EURONEWS (June 12, 2022, at 14:01 GMT), <https://www.euronews.com/culture/2022/12/06/from-museums-to-book-publishing-how-russias-new-anti-lgbtq-laws-will-impact-culture> [http://perma.cc/27CK-MQQT].

³⁷⁸ *Russia Adds “LGBT Movement” to List of Extremist and Terrorist Organizations*, REUTERS (Mar. 22, 2024, at 08:42 ET), <https://www.reuters.com/world/europe/>

an extremist organization is punishable by up to twelve years in prison.³⁷⁹ An individual displaying a pride flag or other symbol of support faces fifteen days in detention for the first offense and up to four years in prison for the second offense.³⁸⁰ Individuals suspected of involvement with an extremist organization are placed on a nationwide “list of extremists,” and their bank accounts may be frozen.³⁸¹ By the end of 2024, Russian police orchestrated a crackdown on LGBTQ bars and nightclubs authorized by the new law and started to maintain a watch list of LGBTQ people.³⁸²

2. Parenting

Given the perceived danger to children, there are a number of ways that the policy goal of containment could disrupt the lives of LGBTQ people and their families, cutting deeply into parenting rights. These rights are already under assault in the context of gender-affirming care where the state is substituting its judgment for that of the parents of transgender children, who, according to the Texas Attorney General, may be guilty of child abuse.³⁸³ *Project 2025* claims to have data and research to support its assertion that families that do not have a mother and a father are deeply flawed.³⁸⁴ If that is the case, then it would not be surprising to see states attempt to prevent LGBTQ people from building their own families. For example, states could limit step-parent adoption to different-sex partners and stop listing the non-biological same-sex parent on the birth certificate.³⁸⁵ They could limit access to assisted reproductive technology (ART), restrict adoption rights, and prohibit LGBTQ people from serving as foster parents.³⁸⁶ Trump’s Executive Order 14216

russia-adds-lgbt-movement-list-extremist-terrorist-organisations-2024-03-22 [https://perma.cc/H83K-QKJR].

³⁷⁹ *Russia: First Convictions Under LGBT ‘Extremist’ Ruling*, HUM. RTS. WATCH (Feb. 15, 2024, at 00:00 ET), https://www.hrw.org/news/2024/02/15/russia-first-convictions-under-lgbt-extremist-ruling [https://perma.cc/A9PN-9EB9].

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² Josh Milton, *Kremlin Accused of “Creating a Database of LGBTQ+ Russians to Monitor Them,”* METRO (Apr. 2, 2025, at 11:26 ET), https://metro.co.uk/2025/02/21/kremlin-accused-creating-a-database-lgbtq-russians-monitor-them-22599911/ [http://perma.cc/XBT2-25HG].

³⁸³ Exec. Order No. 13985, *supra* note 155; Press Release, *supra* note 185; Jo Yucaba, *Texas AG Says Transition Care for Minors is Child Abuse Under State Law*, NBC NEWS (Feb. 23, 2022, at 13:55 ET), https://www.nbcnews.com/nbc-out/out-politics-and-policy/texas-ag-says-transition-care-minors-child-abuse-state-law-rcna17176 [https://perma.cc/3UEF-VXKN].

³⁸⁴ *Project 2025*, *supra* note 107, at 481.

³⁸⁵ Stepparent adoption for same-sex married couples is currently allowed in every state. *Parental Recognition Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/recognition/parenting/adoption [http://perma.cc/7DDW-CK6U]. The marital presumption of parenthood is currently extended to married same-sex couples in all states. *Id.*; Pavan v. Smith, 137 S. Ct. 2075, 2077 (2017).

³⁸⁶ Sixteen states have no protections against discrimination in foster care, and fourteen states have broad religious exemptions that allow discrimination. *Foster Care Laws &*

titled *Expanding Access to In Vitro Fertilization (IVF)* directs his Domestic Policy Adviser, who opposes marriage equality, to develop recommendations regarding access to IVF.³⁸⁷ The Executive Order references the need to make IVF more accessible for “loving and longing mothers and fathers.”³⁸⁸ All of these measures would be subject to equal protection challenges, as discussed in greater detail below, but *Project 2025* promises that there is a compelling state interest at stake.³⁸⁹

Even if there were not outright bans, the call for robust religious exemptions and increased privatization would make it much less likely that LGBTQ people could participate in family formation.³⁹⁰ In the absence of a direct attack on parental rights and the ability to form families, there are indications that the Trump administration is going to prioritize traditional family values in determining funding needs. For example, an early memo from the Department of Transportation stated that it was going to prioritize areas with both high birth rates and high marriage rates for federal projects and funding.³⁹¹

As a final note, it bears mentioning that, in the not-too-distant past, being homosexual was *per se* cause to be declared an unfit parent in the United States.³⁹² Most states backed off from this position after declassification because the purported mental illness of LGBTQ people was used as the disqualifying feature.³⁹³ However, being declared an unfit parent due to homosexuality remained a risk for parents in states with criminal sodomy laws until 2003, even though those laws were rarely enforced.³⁹⁴ The framing of gender identity as a delusion and the connection being made between so-called gender ideology and mental illness does not bode well for LGBTQ parents. After Russia enacted the Child Protection Law in 2013, LGBTQ parents became especially vulnerable and at risk of having their children taken away.³⁹⁵ In Hungary, like Russia, same-sex couples are not recognized as families. Hungary’s legislature passed a bill in 2023 that encouraged anonymous tips to report same-sex couples raising children to

Regulations, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/foster_care_laws [http://perma.cc/ZH9K-XKSS].

³⁸⁷ Exec. Order No. 14216, 90 Fed. Reg. 10451 (Feb. 18, 2025) (*Expanding Access to In Vitro Fertilization*).

³⁸⁸ *Id.*

³⁸⁹ *Project 2025*, *supra* note 107, at 481.

³⁹⁰ *Id.* at 494.

³⁹¹ Jeff McMurray & Susan Haigh, *Trump Official’s Directive Tying Transportation Grants to Birth Rates Could Hinder Blue States*, ASSOCIATED PRESS (Feb. 7, 2025, at 14:20 ET), <https://apnews.com/article/duffy-transportation-memo-birth-marriage-rates-trump-8de1f95efc97e8b585bb0c93857ec951> [https://perma.cc/D8WA-QKJV].

³⁹² See FADERMAN, *supra* note 31, at 241.

³⁹³ *Id.* at 241.

³⁹⁴ See, e.g., *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995). See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding criminal sodomy law unconstitutional).

³⁹⁵ Masha Gessen, *As A Gay Parent I Must Flee Russia or Lose My Children*, THE GUARDIAN (Aug. 11, 2013, at 06:31 ET), <https://www.theguardian.com/commentis-free/2013/aug/11/anti-gay-laws-russia> [https://perma.cc/F983-43U8].

the police and child welfare authorities.³⁹⁶ The President eventually vetoed the bill,³⁹⁷ but the enlistment of private citizens to inform on their neighbors represented a chilling turn of events. These sorts of legislative initiatives that encourage third-party informants have been increasingly proposed on the state level in the United States in the context of immigration, abortion, and transgender rights, discussed further below.³⁹⁸

C. *Eradicating LGBTQ People from Public Life*

Ultimately, the Politics of Eradication seeks to erase LGBTQ identities from public life—not simply contain them. This goal is not new. Efforts to “cure” LGBTQ people were an integral part of the psychoanalytic understanding of homosexuality, and they continue today with so-called “conversion therapy.”³⁹⁹ Policymakers have tried to define away the problem, as was the case with the Defense of Marriage Act, which provided a federal definition of marriage.⁴⁰⁰ President Trump took this approach with respect to transgender Americans when he willed them out of existence with a stroke of his Sharpie in Executive Order 14168.⁴⁰¹ LGBTQ people also have a long history of being disqualified from certain occupations, most notably the military.⁴⁰² Public accommodation laws and religious exemptions can remove LGBTQ people from specific public venues.⁴⁰³ Deportation removes an individual entirely from public life, as can criminalization. Although there are no mainstream MAGA voices calling for the outright extermination of LGBTQ people, there remains plenty of dehumanizing rhetoric and a high tolerance for political violence. The proposed “bounty” laws making the

³⁹⁶ Veronika Gulyas & Marton Kasnyik, *Hungary's New Law Lets Locals Report on Same-Sex Families*, BLOOMBERG (Apr. 13, 2024, at 15:46 ET), <https://www.bloomberg.com/news/articles/2023-04-13/hungary-s-new-law-allows-locals-to-report-on-same-sex-families> [https://perma.cc/EQ7C-9KFQ].

³⁹⁷ Leonie Kijewski, *Hungarian President Vetoes Anti-LGBTQ Law*, POLITICO (Apr. 22, 2023, at 13:27 CET), <https://www.politico.eu/article/hungary-president-katalin-novak-vetoes-viktor-orban-anti-lgbtq-law/> [https://perma.cc/UKU8-FYDV].

³⁹⁸ See, e.g., Sarah Geller, *The Personal (Jurisdiction) Is Political: The Reach and Overreach of Abortion Bounty-Hunter Laws*, 45 COLUM. J. GENDER & L. 81, 91–92 (2024).

³⁹⁹ See Clay Calvert, *Weaponizing Proof of Harm in First Amendment Cases: When Scientific Evidence and Deference to the Views of Professional Associations Collide in the Battle Against Conversion Therapy*, 2021 MICH. ST. L. REV. 765, 775–76.

⁴⁰⁰ The Defense of Marriage Act (DOMA), Pub. L. No. 104–99, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C), *invalidated by* Obergefell v. Hodges, 576 U.S. 644 (2015).

⁴⁰¹ See Exec. Order No. 14168, *supra* note 4 (Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government).

⁴⁰² See generally JANET HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY (1999) (discussing the Don't Ask Don't Tell policy).

⁴⁰³ Twenty-one states have no prohibitions against discrimination based on sexual orientation or gender identity in public accommodations. *Public Accommodation Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws#:~:text=Public%20accommodation%20nondiscrimination%20laws%20protect,sexual%20orientation%20or%20gender%20identity [https://perma.cc/C8JJ-WFLJ].

rounds in state legislatures provide monetary rewards to private citizens who identify and report transgender people they perceive to be in the “wrong” bathroom.⁴⁰⁴ Together, these efforts to erase LGBTQ people from public life can be broken down into three general categories: redefinition and conversion, physical separation and removal, and the threat of violence.

1. *Redefinition and Conversion*

For transgender people, who according to the MAGA rendering are both deceitful and delusional, the swift adoption of an immutable and binary definition of sex removes the ability to change gender markers on identity documents and mandates their exclusion from sex-segregated spaces.⁴⁰⁵ It has spelled an end to public funding for gender-affirming care and access for minors to such care, but it also raises the question as to whether there will be a complete bar on gender-affirming care across the board as was imposed in Russia in 2023.⁴⁰⁶ Similar bans have already been proposed on the state level.⁴⁰⁷ Beyond access to gender markers and health care, it remains to be seen whether more states will criminalize drag and whether there will be an attempt to return to some form of the criminal cross-dressing laws of the mid-twentieth century that were used to police LGBTQ people in public spaces.⁴⁰⁸ Currently two states have criminal prohibitions against drag performances, with one specifically targeting Drag Story Time, and four states have laws regarding “adult performances” that could be used to target drag performances.⁴⁰⁹ As discussed above, there is also the possibility of concerted efforts to re-pathologize LGBTQ identities, which would act as its own form of redefinition.

⁴⁰⁴ Prager, *supra* note 170. The Texas town of Odessa allows anyone reporting a transgender person using the “wrong” bathroom to recover “damages” of up to \$10,000. *Id.*

⁴⁰⁵ *Snapshot: LGBTQ Equality by States*, MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/equality-maps> [<https://perma.cc/4G53-QACY>] (showing sixteen states have a binary sex definition, six make it a felony to provide gender affirming care to minors, and eight states disallow the change of gender marker on birth certificates).

⁴⁰⁶ *Russian President Signs Legislation Marking the Final Step Outlawing Gender-Affirming Procedures*, ASSOCIATED PRESS (July 24, 2023, at 12:49 ET), <https://apnews.com/article/russia-lgbtq-transgender-procedures-banned-21b88f53b9a74a646400d63ce93bde6f> [<https://perma.cc/J3YY-VLJG>].

⁴⁰⁷ Maya Goldman, *States Are Limiting Gender-Affirming Care for Adults, Too*, AXIOS (Jan. 10, 2024), <https://www.axios.com/2024/01/10/trans-care-adults-red-states> [<https://perma.cc/3PSC-VHWC>].

⁴⁰⁸ See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 225–26 (1999) (discussing the mid-century enactment of criminal cross-dressing laws).

⁴⁰⁹ *Restrictions on Drag Performances*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/criminaljustice/drag_restrictions [<https://perma.cc/H9ZQ-3CM7>]. Montana’s restriction of drag shows was ruled unenforceable via court order in July 2023; Tennessee’s ban was similarly ruled unenforceable in March 2023, and a subsequent decision ruled it unconstitutional for which Tennessee has appealed. *Id.*

With respect to LGB people, marriage is vulnerable to redefinition. *Project 2025* is very clear that not all marriages are created equal.⁴¹⁰ Moreover, it asserts that children who do not have nuclear families consisting of a mother and a father are severely disadvantaged.⁴¹¹ The end of marriage equality would require the U.S. Supreme Court to reverse *Obergefell*,⁴¹² the likelihood of which is discussed below. Even without overruling *Obergefell*, however, there are a number of disabilities that could be imposed on same-sex marriages, subject to equal protection challenges.⁴¹³ Although the Trump administration has not yet formally endorsed the *Project 2025* view on marriage, a number of states have been pushing back on marriage equality. In January, 2025, the Idaho House of Representatives passed a resolution by an overwhelming margin asking the U.S. Supreme Court to invalidate *Obergefell*.⁴¹⁴ Calling the *Obergefell* decision “illegitimate overreach,” the resolution provides that “the Idaho Legislature rejects the *Obergefell* decision. . . . [And] calls upon the Supreme Court of the United States to reverse *Obergefell* and restore the natural definition of marriage, a union of one man and one woman.”⁴¹⁵ Idaho’s displeasure with the *Obergefell* ruling is nothing new because there were a number of red states that only begrudgingly followed *Obergefell* in the first place.⁴¹⁶

It is likely that attempts to “cure” or “convert” LGBTQ people will increase in this current political climate. Once a prescribed therapeutic intervention for homosexuality,⁴¹⁷ conversion therapy has continued to be practiced by some therapists and in some religious settings⁴¹⁸ despite the fact

⁴¹⁰ *Project 2025*, *supra* note 107, at 481.

⁴¹¹ *Id.*

⁴¹² *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

⁴¹³ See *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017) (holding states may not exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples).

⁴¹⁴ Clark Corbin, *Idaho House Calls on U.S. Supreme Court to Reverse Same-Sex Marriage Ruling*, IDAHO CAPITOL SUN (Jan. 27, 2025, at 16:17 ET), <https://idahocapitalsun.com/2025/01/27/idaho-house-calls-on-u-s-supreme-court-to-reverse-same-sex-marriage-ruling/> [<https://perma.cc/KJ3M-69B3>]; Jo Yurcaba & Brooke Sopelsa, *Lawmakers in 9 States Propose Measures to Undermine Same-Sex Marriage Rights*, NBC NEWS (Feb. 25, 2025, at 17:24 ET), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/lawmakers-9-states-propose-measures-undermine-sex-marriage-rights-rcna193743> [<https://perma.cc/VM2J-EKWH>].

⁴¹⁵ H.J.M. 1, 68th Leg., 1st Reg. Sess. (Idaho 2025), <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2025/legislation/HJM001.pdf> [<https://perma.cc/VE5Z-L92D>].

⁴¹⁶ See Howard M. Wasserman, *Crazy in Alabama: Judicial Process and the Last Stand Against Marriage Equality in the Land of George Wallace*, 110 NW. U. L. REV. ONLINE 1 (2015).

⁴¹⁷ J. Seth Anderson, Opinion, *Why We Still Haven’t Banished Conversion Therapy in 2018*, WASH. POST (Aug. 5, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/08/05/why-we-still-havent-banished-conversion-therapy-in-2018/> [<https://perma.cc/7Q4W-PS6C>].

⁴¹⁸ See, e.g., Jean Marbella, *Federal Lawsuit Seeks to Overturn Maryland’s Ban on Conversion Therapy*, BALT. SUN (Jan. 18, 2019), <https://www.baltimoresun.com/politics/bs-md-conversion-therapy-lawsuit-20190118-story.html> [<https://perma.cc/7K3K-42LX>].

that it is condemned by the scientific and medical communities.⁴¹⁹ Twenty-three states have enacted bans against conversion therapy for minors,⁴²⁰ but the 2016 GOP Platform specifically endorsed protecting parental rights to subject children to controversial therapies—parental rights that apparently do not apply with respect to gender-affirming care.⁴²¹ Given the current emphasis on “indoctrination,” it would not be surprising to see conversion therapy rebranded as a necessary form of “deprogramming.”

By implementing an immutable and binary definition of sex that rejects the concept of gender identity, Trump was trying to eradicate transgender people. But, of course, deleting offending terms from websites and grant applications will not negate the reality of transgender lives and stories. Likewise, the redefinition of marriage will not stop same-sex couples from forming long-term committed partnerships and families. Conversion therapy will not stop individuals from identifying as LGBTQ because, not only is it immoral, it does not work. After decades of scientific inquiry, it is clear that LGBTQ people cannot “change,” nor should they be forced to try.⁴²² The containment and silencing of LGBTQ identities to stop “contagion” did not work in the 1950s when obscenity laws were used to stop the distribution of homophile newsletters,⁴²³ and it will definitely not work in the age of online communities and interconnectedness.⁴²⁴ These actions cannot erase the lived experience of LGBTQ people or their dignity,⁴²⁵ but they can inflict untold harm on communities, families, and individuals.

⁴¹⁹ See, e.g., Am. Acad. of Pediatrics, *Homosexuality and Adolescence*, 92 PEDIATRICS 631, 633 (1993); *Conversion Therapy*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Feb. 2018), https://www.aacap.org/aacap/Policy_Statements/2018/Conversion_Therapy.aspx [<https://perma.cc/K2RA-F8L4>]; AM. MED. ASS'N, H-160.991 HEALTH CARE NEEDS OF THE HOMOSEXUAL POPULATION (2018).

⁴²⁰ *Conversion “Therapy” Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/conversion_therapy [<https://perma.cc/2F6S-MUDE>].

⁴²¹ See Garrard Conley, *GOP’s Support of Conversion Therapy Is a “Death Sentence,”* TIME MAG. (July 18, 2016, at 16:45 ET), <http://time.com/4410894/rnc-conversion-therapy/> [<https://perma.cc/6GCX-KD4G>].

⁴²² See, e.g., Julie Compton, *Once-Prominent “Conversion Therapist” Will Now “Pursue Life as a Gay Man,”* NBC NEWS (Jan. 23, 2019, at 12:45 ET), <https://www.nbcnews.com/feature/nbc-out/once-prominent-conversion-therapist-will-now-pursue-life-gay-man-n961766> [<https://perma.cc/YD66-VU82>].

⁴²³ See *One, Inc. v. Olesen*, 241 F.2d 772, 774–75 (9th Cir. 1957), *overruled by* 355 U.S. 371, 371 (1958).

⁴²⁴ See Alexandra Samuel, *Nine Reasons for The LGBT Community to Take Pride Online*, JSTOR DAILY (June 13, 2017), <https://daily.jstor.org/9-reasons-for-the-lgbtq-community-to-take-pride-online> [<https://perma.cc/47EZ-KUBK>] (“Today, that teen doesn’t have to feel so alone—at least in theory—because the internet makes it possible to connect with other LGBTQ people all over the world.”).

⁴²⁵ See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (“[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”).

2. *Physical Separation and Removal*

In addition to attempts to erase LGBTQ people and their families by executive fiat and quackery, there are a number of options available to remove LGBTQ people from certain aspects of public life, as well as the more drastic options of complete removal in the case of deportation or incarceration. For example, many of the anti-LGBTQ laws and policies supported by the MAGA movement are designed to banish transgender people from specific sex-segregated venues, such as locker rooms and sports teams.⁴²⁶ Twenty-one states and the U.S. Capitol complex have bathroom bans, and Trump's executive orders have expanded bathroom bans to all federal property, federal contractors, federal grantees, and all schools receiving federal funding.⁴²⁷ As noted earlier, the Department of Education is already investigating a number of school districts regarding their inclusive bathroom policies for possible civil rights violations.⁴²⁸ Twenty-seven states have sports bans, but Trump's Executive Order 14201 has expanded sports bans to include higher education and all school districts and other entities receiving federal funds.⁴²⁹ In addition to bathrooms and sports teams, other sex-segregated spaces are also often targeted, including domestic violence shelters and correctional facilities.⁴³⁰ Executive Order 14168 specifically instructed the Director of the Bureau of Prisons to house incarcerated people in accordance with the sex they were assigned at birth.⁴³¹

Beyond sex-segregated spaces, twenty-one states currently do not extend protections on account of sexual orientation or gender identity in public accommodations,⁴³² and there are no protections at the federal level, which means that commercial establishments or other service providers in twenty-one states can refuse to serve LGBTQ customers. Even in the states

⁴²⁶ Exec. Order No. 14201, *supra* note 6 (Keeping Men Out of Women's Sports).

⁴²⁷ *Bans on Transgender People Using Public Bathrooms and Facilities According to Their Gender Identity*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/nondiscrimination/bathroom_bans [<https://perma.cc/W2YS-KMDR>]; Yurcaba, *supra* note 274; Sean Michael Newhouse, *Policy That Let Federal Employees Use Preferred Bathroom Formally Overturned by Trump Administration*, GOV'T. EXEC. (May 9, 2025), <https://www.govexec.com/workforce/2025/05/policy-let-federal-employees-use-preferred-bathroom-formally-overturned-trump-administration/405206/#:~:text=Civil%20Rights-,Sean%20Michael%20Newhouse,%2C%E2%80%9D%20according%20to%20Friday's%20notice> [<https://perma.cc/44R2-N6NK>]; Memorandum from Pam Bondi, U.S. Att'y Gen. to All Fed. Agencies, Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination 6 (July 29, 2025), <https://www.justice.gov/ag/media/1409486/dl> [<https://perma.cc/N4JL-D6AM>].

⁴²⁸ Karina Elwood, *Education Dept. Investigates Northern Virginia Districts over Transgender Policies*, WASH. POST (Feb. 14, 2025), <https://www.washingtonpost.com/education/2025/02/14/northern-virginia-transgender-school-investigation/> [<https://perma.cc/3JD7-Z6LG>].

⁴²⁹ Exec. Order No. 14201, *supra* note 6 (Keeping Men Out of Women's Sports).

⁴³⁰ Exec. Order No. 14168, *supra* note 4 (Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government).

⁴³¹ *Id.*

⁴³² MOVEMENT ADVANCEMENT PROJECT, *supra* note 403.

with public accommodations protections, exemptions based on religious or moral beliefs allow the exclusion of LGBTQ individuals without recourse.⁴³³ There are also instances where free speech rights might be implicated, as in the case of the wedding website designer in *303 Creative v. Colorado Civil Rights Commission*.⁴³⁴ During Trump's first term, his administration came out in support of allowing commercial establishments to put signs in their windows saying whether they would serve LGBTQ customers.⁴³⁵

To some extent the bans on drag performances near minors can be seen as an exclusion of LGBTQ people from a specific venue—areas surrounding children. Given the panic over protecting children from “groomers,” one could imagine rules about school zones similar to the school zone gun laws, such that there could be no open display of support for “gender ideology” within a certain number of yards from a school, subject to a First Amendment challenge.⁴³⁶ This could impact LGBTQ-themed or LGBTQ-friendly establishments or a neighbor who chooses to fly a pride flag. LGBTQ bars and community centers likewise could be impacted by laws criminalizing drag and positive portrayals of LGBTQ people, as was the case in Russia where such venues have been raided.⁴³⁷

In addition to banning LGBTQ people from specific places or services, there have long been efforts to exclude LGBTQ people from certain professions, with the military bans being perhaps the most prominent examples of blanket occupational disqualifications.⁴³⁸ As mentioned earlier, the Lavender Scare in the 1950s disqualified LGBTQ people from government service, but its impact had longstanding consequences.⁴³⁹ Homosexuality remained a disqualifying factor for security clearances until the 1990s.⁴⁴⁰ In the 1970s, California attempted to pass what was known as the Briggs Initiative that would have disqualified LGB people from teaching.⁴⁴¹ The rationale behind

⁴³³ *Id.*; Knauer, *supra* note 13, at 753.

⁴³⁴ *303 Creative v. Colo. C.R. Comm'n*, 143 S. Ct. 2298, 2308 (2023).

⁴³⁵ Neil Broverman, *Sarah Sanders: Trump OK with Businesses Hanging Antigay Signs*, THE ADVOCATE (Dec. 5, 2017), <https://www.advocate.com/politics/2017/12/05/sarah-sanders-trump-ok-businesses-hanging-antigay-signs> [<https://perma.cc/BFC7-JN2F>].

⁴³⁶ See, e.g., Nicole D. Porter & Tyler Clemons, *Drug-Free Zone Laws: An Overview of State Policies*, SENTENCING PROJECT (Dec. 2013), <https://www.sentencingproject.org/app/uploads/2022/08/Drug-Free-Zone-Laws.pdf> [<https://perma.cc/P3EF-MS96>].

⁴³⁷ *Russian Police Raid Moscow Nightclubs in LGBTQ+ Crackdown*, ASSOCIATED PRESS (Nov. 30, 2024, at 11:32 ET), <https://apnews.com/article/russia-lgbtq-crackdown-nightclub-raids-3e18ac20ef7386920a996b66be511ee7> [<https://perma.cc/Z2RK-E93S>]; see also Nataliya Vasilyeva & Alina Lobzina, *A Prison Death Highlights an L.G.B.T.Q. Crackdown in Russia*, N.Y. TIMES (Apr. 1, 2025), <https://www.nytimes.com/2025/04/01/world/europe/russia-lgbtq-gay-prison-death-andrei-kotov.html> [<https://perma.cc/UX9U-G9VD>] (discussing LGBTQ crackdown by Russian authorities).

⁴³⁸ See generally HALLEY, *supra* note 402 (discussing the Don't Ask/Don't Tell policy).

⁴³⁹ See generally JOHNSON, *supra* note 363 (describing the purge of LGBTQ people from federal service).

⁴⁴⁰ *High Tech Gays v. Def. Indus. Sec. Clearance Off.*, 895 F.2d 563, 570 (9th Cir. 1990) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)).

⁴⁴¹ FADERMAN, *supra* note 31, at 383.

the Briggs Initiative was the old false trope that homosexuals are pedophiles.⁴⁴² Under existing U.S. Supreme Court precedent, it would be unlawful to bar LGBTQ people from most teaching positions, with the exception of religious schools where religious liberty guarantees allow employers to fire LGBTQ teachers if they are responsible for a critical religious role at the school.⁴⁴³ The question of occupational disqualification, however, is something to flag in the current environment given the push to portray LGBTQ identities as deceitful, dangerous to children, and a threat to national security. That said, it would be difficult to reconcile the MAGA understanding of sexual orientation and gender identity with the extension of protections under Title VII guaranteed by *Bostock*.⁴⁴⁴

One of Trump's signature campaign promises was that he would institute mass deportations to address the United States' broken immigration policy. Although it has not yet been announced, it is a foregone conclusion that the administration will stop accepting asylum claims based on gender identity because, according to Executive Order 14168, gender identity does not exist.⁴⁴⁵ Prior to the order, transgender asylum seekers were able to claim that they were members of a "particular social group" who faced persecution in their home country.⁴⁴⁶ It remains to be seen whether existing asylum claims made on this basis would be dismissed and whether asylum claims would continue to be allowed based on sexual orientation, as such claims are also based on being a member of a "particular social group."⁴⁴⁷ The Williams Institute estimates that there were 11,400 asylum claims based on gender identity and sexual orientation filed between 2012 and 2017.⁴⁴⁸ There is also the possibility that the Trump administration could attempt to use its new concept of "gender ideology" as mental health grounds for removal, given the administration's efforts to tie "gender ideology" to mental illness in the transgender military ban.⁴⁴⁹

Criminalization is another potential way to remove LGBTQ people and their supporters from public life. However, even when sodomy laws were still constitutional, they were rarely enforced.⁴⁵⁰ They were used more often as an excuse to harass and impose other disabilities on LGBTQ people because

⁴⁴² *Id.*

⁴⁴³ See *Billard v. Charlotte Cath. High Sch.*, 101 F.4th 316, 326 (4th Cir. 2024).

⁴⁴⁴ See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

⁴⁴⁵ Exec. Order No. 14168, *supra* note 4 (Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government).

⁴⁴⁶ Conor Cory, *The LGBTQ Asylum Seeker: Particular Social Groups and Authentic Queer Identities*, 20 GEO. J. GENDER & L. 577, 578 (2019).

⁴⁴⁷ *Id.*

⁴⁴⁸ Ari Shaw et al., *LGBT Asylum Claims in the United States*, WILLIAMS INST. (Mar. 2021), <https://williamsinstitute.law.ucla.edu/publications/lgbt-asylum-claims/> [<https://perma.cc/BU23-U4Q4>].

⁴⁴⁹ Exec. Order No. 14183, *supra* note 6 (Prioritizing Military Excellence and Readiness).

⁴⁵⁰ Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 103–04 (2000).

someone who was technically a criminal surely would not qualify for certain jobs or be considered a fit parent.⁴⁵¹ If the Supreme Court were to overrule *Lawrence v. Texas*, as Justice Thomas has suggested it should, twelve states have sodomy laws still on their books that were not repealed after *Lawrence*.⁴⁵² The Texas Attorney General said in 2022 that he would enforce the Texas Homosexual Conduct law that had been invalidated in *Lawrence* if *Lawrence* were overruled because he believed that the Court had “stepped into issues that I don’t think there was any constitutional provision dealing with.”⁴⁵³ As an alternative to criminalization, civil commitment could also be used to remove LGBTQ people from public life, but that would presumably require the creation of a new classification of mental illness.⁴⁵⁴ Civil commitment was a risk when psychiatry still advocated therapeutic intervention for homosexuality, but today there are Due Process protections in place that have greatly reduced the prevalence of involuntary commitments.⁴⁵⁵

3. Violence

The threat of violence can also serve to keep LGBTQ people out of public life. The prospect that armed protestors might disrupt a children’s story hour is frightening and chilling. Far-right groups such as the Proud Boys and the Patriot Front have targeted LGBTQ events, marking a shift in tactics for organizations more closely associated with white supremacy.⁴⁵⁶ In 2022, police arrested thirty-one members of the Patriot Front who were planning to disrupt the Pride celebration in Coeur d’Alene, Idaho.⁴⁵⁷ Members of the Proud Boys and Patriot Front were among the over 1,500 individuals pardoned by Trump for criminal charges in connection with their participation

⁴⁵¹ *Id.* at 116.

⁴⁵² *Lawrence v. Texas*, 539 U.S. 558, 567 (2003); Amanda Holpuch, *The Supreme Court Struck Down Sodomy Laws 20 Years Ago. Some Still Remain*, N.Y. TIMES (July 21, 2023), <https://www.nytimes.com/2023/07/21/us/politics/state-anti-sodomy-laws.html> [<https://perma.cc/L5NA-8XAC>].

⁴⁵³ Brad Dress, *Texas AG Says He Would Back Law Banning Sodomy If Supreme Court Reconsiders Landmark Case*, THE HILL (June 29, 2022, at 18:05 ET), <https://thehill.com/regulation/court-battles/3541707-texas-ag-says-he-would-back-law-banning-sodomy-if-supreme-court-reconsiders-landmark-case/> [<https://perma.cc/FFB4-LB7B>].

⁴⁵⁴ See generally BAYER, *supra* note 355 (describing the struggle to declassify homosexuality as a mental illness).

⁴⁵⁵ Jonathan Cantarero, *The Ethics of Civil Commitment*, 16 J. HEALTH & BIOMED. L. 105, 107 (2020); see ESKRIDGE, *supra* note 408, at 62 (describing medical intervention in the form of civil commitment, electro-shock therapy, even “lobotomies, electrical and pharmacological shock therapy, and . . . castration”); TERRY, *supra* note 362, at 294–95 (discussing therapeutic interventions and aversion therapy).

⁴⁵⁶ Ayesha Rascoe, *Why Are White Nationalist Groups Targeting LGBTQ Groups?*, NAT’L PUB. RADIO (June 19, 2022, at 08:48 ET), <https://www.npr.org/2022/06/19/1106125400/why-are-white-nationalist-groups-targeting-lgbtq-groups> [<https://perma.cc/YW8U-2ZPQ>].

⁴⁵⁷ Odette Yousef, *31 Members of the White Nationalist Patriot Front Arrested Near an Idaho Pride Event*, NAT’L PUB. RADIO (June 12, 2022, at 11:38 ET), <https://www.npr.org/2022/06/11/1104405804/patriot-front-white-supremacist-arrested-near-idaho-pride> [<https://perma.cc/M665-78UV>].

in the January 6th attack on the Capitol.⁴⁵⁸ As noted earlier, commentators have warned that Trump's blanket pardon may have empowered an armed militia loyal to Trump and the MAGA movement.⁴⁵⁹

According to FBI statistics, hate crimes rose twenty percent during the first Trump administration, with some of the biggest jumps occurring with respect to crimes against LGBTQ people.⁴⁶⁰ Transgender women of color are especially vulnerable to hate crimes.⁴⁶¹ A 2021 study showed that transgender people were more than five times more likely than cisgender people to be victims of violent crime.⁴⁶² Given Trump's war on gender ideology and DEI, it is likely that we will no longer have access to nationwide statistics on hate crimes against transgender people and perhaps all LGBTQ people. The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009, which expanded the federal hate crimes law to include sexual orientation and gender identity, also requires the FBI to collect statistics on hate crimes motivated by the victim's sexual orientation or gender identity, which will be difficult to reconcile with the new executive actions.⁴⁶³ The Hate Crimes Prevention Act was the first time that federal protections were extended based on sexual orientation and gender identity.⁴⁶⁴

⁴⁵⁸ Alanna Durkin Richer et al., *Trump Pardons Upend Massive Jan. 6 Prosecution by Freeing Rioters and Dismissing Cases*, ASSOCIATED PRESS (Jan. 21, 2025, at 20:22 ET), <https://apnews.com/article/capitol-riot-trump-pardons-jan-6-f6e23bcd84eae672318c88f05286767> [<https://perma.cc/YJ3B-A98S>]; Ryan Nadeau, *DOJ: Richmond Man, Patriot Front Member Arrested in Connection to Jan. 6 Insurrection*, WRIC NEWS (Apr. 20, 2024, at 12:51 ET), <https://www.wric.com/news/local-news/richmond/doj-richmond-man-patriot-front-member-arrested-in-connection-to-jan-6-insurrection/#:~:text=DOJ:%20Richmond%20man%2C%20Patriot%20Front,6%20insurrection%20%7C%20WRIC%20ABC%208News> [<https://perma.cc/JR8V-6WX6>] (reporting arrest of Nathan Noyce, a member of the Patriot Front); Luca Powell, *87 Virginians Received Clemency for Jan. 6 Involvement*, RICHMOND TIMES-DISPATCH (Jan. 23, 2025), https://richmond.com/news/state-regional/crime-courts/article_2c715a82-d8f2-11ef-9c53-bbfdc72d5408.html [<https://perma.cc/GN5F-ZQ89>] (reporting the pardon of Nathan Noyce, a member of the Patriot Front).

⁴⁵⁹ See, e.g., Nathan Layne et al., *Trump's Pardons Will Embolden Proud Boys, Other Far-Right Groups, Say Experts*, REUTERS (Jan. 21, 2025, at 19:05 ET), <https://www.reuters.com/world/us/trumps-pardons-will-embolden-proud-boys-other-far-right-groups-say-experts-2025-01-21/> [<https://perma.cc/47BG-FYMW>].

⁴⁶⁰ Daniel Villarreal, *Hate Crimes Under Trump Surged Nearly 20 Percent Says FBI Report*, NEWSWEEK (Nov. 16, 2020, at 19:57 ET), <https://www.newsweek.com/hate-crimes-under-trump-surged-nearly-20-percent-says-fbi-report-1547870> [<https://perma.cc/EV6G-93C4>].

⁴⁶¹ See Carrie L. Buist, *LGBTQ Rights in the Fields of Criminal Law and Law Enforcement*, 54 U. RICH. L. REV. 877, 900 (2020).

⁴⁶² Press Release, Williams Institute, Transgender People Over Four Times More Likely Than Cisgender People to be Victims of Violent Crime (Mar. 23, 2021), <https://williamsinstitute.law.ucla.edu/press/ncvs-transpress-release/> [<https://perma.cc/6U3J-3YUQ>].

⁴⁶³ The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. ch. 13 § 249a2.

⁴⁶⁴ *Hate Crimes Bill Signed into Law*, LAMBDA LEGAL (Oct. 31, 2011), https://lambdalegal.org/publication/fa_20091028_president-signs-hate-crimes-bill-into-law [<https://perma.cc/G7GJ-V4FE>] (noting the act was "the first time in the nation's history that Congress has passed explicit protections on the basis of sexual orientation and gender identity").

With the exception of some extremists on the far-right fringe, relatively few voices openly call for violence against LGBTQ people, but it is important to make sure that these voices are not emboldened to act. Their speech, no matter how offensive, enjoys broad First Amendment protections, as it should under existing free speech precedent. Take, for example, the Westboro Baptist Church, which is a fervently anti-LGBTQ organization.⁴⁶⁵ Its homophobic ravings and theatrical protests eventually targeted the funerals of non-LGBTQ service members, but even these demonstrations were still protected by the First Amendment.⁴⁶⁶ Beyond this far-right fringe, however, it is sometimes possible to hear calls to violence in community churches. The same year that the Patriot Front targeted the Pride celebration in Coeur d'Alene, a pastor in Boise, Idaho preached that "God wants to put all queers to death" because "when they die, that stops the pedophilia."⁴⁶⁷ Although these calls to violence remain relegated to far-right extremists, they do have the ability to encourage individual action, such as the 2023 murder in California, not of an LGBTQ person, but of someone who was simply displaying a pride flag as a symbol of support at her business.⁴⁶⁸

D. *Democratic Institutions and Strategic Institutional Choice*

As our institutions and norms fray during this time of democratic uncertainty, the pressing question is whether our democratic guardrails are sufficient to stop the Politics of Eradication. The LGBTQ rights movement has long practiced what I have referred to as "strategic institutional choice"—a process that assesses the strengths and weaknesses of various institutions in order to determine how best to further policy goals.⁴⁶⁹ Strategic institutional choice generally evaluates an institution across three measures: competence, responsiveness, and resilience.⁴⁷⁰ It has led the LGBTQ movement to pursue change on a multi-level front and seek reform from institutions that are most responsive to its requests, even when they are not competent to provide the full measure of reform requested (e.g., municipal domestic partnership

⁴⁶⁵ See Kate Dailey, *Fred Phelps: How Westboro Pastor Spread 'God Hates Fags,'* BBC NEWS (Mar. 21, 2014), <https://www.bbc.com/news/magazine-26582812> [<https://perma.cc/VX5S-CR4G>] (describing the evolution and activities of the Westboro Baptist Church).

⁴⁶⁶ *Snyder v. Phelps*, 562 U.S. 443, 458 (2011); Mark Strasser, *Funeral Protests, Privacy, and the Constitution: What Is Next After Phelps?*, 61 AM. U. L. REV. 279, 283 (2011).

⁴⁶⁷ Ryan Suppe, *Ahead of Pride Month, Idaho Pastor Says LGBTQ People Deserve to be Put to Death*, IDAHO STATESMAN (June 10, 2022, at 19:18 MT), <https://www.idahostatesman.com/news/local/community/boise/article262371997.html> [<https://perma.cc/266L-NN6Y>].

⁴⁶⁸ Timothy Bella, *Man Who Killed Shop Owner Over Pride Flag Wrote Anti-LGBTQ+ Posts, Authorities Say*, WASH. POST (Aug. 22, 2023), <https://www.washingtonpost.com/nation/2023/08/22/pride-flag-shooting-california-lgbtq-california/> [<https://perma.cc/9U47-5D69>].

⁴⁶⁹ Knauer, *supra* note 29, at 28–29.

⁴⁷⁰ *Id.*

ordinances) or their actions lack staying power because they are easily undone (e.g., executive actions extending civil rights protections). This method of public policy analysis recognizes that each institution is necessarily limited by its design, leaving only “imperfect alternatives.”⁴⁷¹

The rise of the MAGA movement has greatly complicated this policy calculus. MAGA control of the executive and legislative branches of our federal government, as well as the governorships and legislatures of twenty-three states, has effectively taken some institutions off the table because they would not be responsive to LGBTQ advocacy—at least not in the short term. With that in mind, this section discusses other democratic institutions—federalism, the courts, the media, and civil society organizations—through the lens of strategic institutional choice, but also in the context of our current democratic uncertainty. This section examines the extent to which each institution is competent to provide the requested relief, whether the institution will be responsive to LGBTQ advocacy, and whether the relief, if granted, will be resilient enough to withstand anti-LGBTQ attacks from the federal government. It is important to acknowledge that these remaining institutions are showing signs of wear and tear from our slide toward authoritarianism: The judicial branch is no longer the “rescue institution” that it once was perceived to be where individual rights are concerned,⁴⁷² federalism is buckling under funding pressures, the media is fragmented and press privileges are revoked by the whim of the administration, and other civil society institutions, such as higher education, are reeling from federal incursions. At the end of the day, we may be left with the most imperfect of all of our democratic institutions—the People.

1. *Federalism*

LGBTQ people are no strangers to the type of jokes that federalism can play, as evidenced by the persistent “equality gap” between states discussed earlier.⁴⁷³ Federalism calibrates the balance of power between state and national governments largely through court-made doctrine that attempts to flesh out

⁴⁷¹ See generally NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994) (examining the nature of comparative institutional choice and imperfect alternatives).

⁴⁷² Since the Warren Court (1953–1969), the Supreme Court has been considered by many to be the ultimate protector of individual civil rights. The Court’s decision in *Dobbs*, however, represents a stark retrenchment and signals the end of the Supreme Court’s perceived role as a rescue institution for individual rights. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (overturning the landmark decision *Roe v. Wade*, 410 U.S. 113 (1973)).

⁴⁷³ Knauer, *supra* note 32, at 1 (discussing the LGBTQ “equality gap”).

the framework of institutional authority outlined in the U.S. Constitution.⁴⁷⁴ Although federalism has long been associated with a conservative “states-rights” stance, it is not an ideology.⁴⁷⁵ Federalism represents an institutional choice that answers the all-important question: Who decides?⁴⁷⁶ “It can facilitate either a progressive or a conservative impulse, and in the case of LGBTQ rights, it has done both.”⁴⁷⁷ The result has been a patchwork of pro- and anti-LGBTQ laws that reflects the partisan divide over LGBTQ rights and splits the country, broadly speaking, between LGBTQ-friendly blue states and anti-LGBTQ red states.⁴⁷⁸ Justice Brandeis optimistically described this “laboratory of states” dynamic in his famous dissent in a *Lochner*-era case, *New State Ice Co. v. Liebmann*.⁴⁷⁹ He observed that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁴⁸⁰

Now that the LGBTQ-friendly blue states are on the defensive, the question is whether they will be able to shield their LGBTQ residents from federal overreach. The Trump administration has indicated that it will seek to reach into the inner workings of state and local matters in order to combat and eradicate “gender ideology,” “discriminatory equity ideology,” and “DEI.”⁴⁸¹ As a legal matter, the Trump administration asserts that “gender ideology” and “DEI” violate civil rights protections for women and the requirement that our laws remain “color-blind.”⁴⁸² In addition to federal civil rights enforcement mechanisms, the Trump administration has threatened states and other entities, such as universities, with the loss of federal funding, if they fail to comply.⁴⁸³ At the end of the day, although blue states are very responsive to LGBTQ advocacy, they may lack the institutional competence to enact reforms that

⁴⁷⁴ U.S. CONST. amend. X.

⁴⁷⁵ Knauer, *supra* note 32, at 6. (discussing LGBTQ “equality gap”).

⁴⁷⁶ *Id.* at 7.

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.* at 7–8.

⁴⁷⁹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁴⁸⁰ *Id.*

⁴⁸¹ Kayla Jimenez, *Public Schools That Refuse to Follow Trump’s DEI Directive Are Now in the Crosshairs*, USA TODAY (May 23, 2025, at 13:18 ET), <https://www.usatoday.com/story/news/politics/2025/05/23/trump-k-12-public-school-funding-dei-order/83458073007/> [<https://perma.cc/7MDQ-FL7T>]; Léonie Chao-Fong, *Trump Administration Threatens to Withhold Funding from Schools with DEI Programs*, THE GUARDIAN (Apr. 3, 2025, at 13:23 ET), <https://www.theguardian.com/us-news/2025/apr/03/trump-universities-dei-funding> [<https://perma.cc/PHD2-SLFK>].

⁴⁸² See, e.g., *Fact Sheet: President Donald J. Trump Protects Civil Rights and Merit-Based Opportunity by Ending Illegal DEI*, WHITE HOUSE (Jan. 22, 2025), <https://www.whitehouse.gov/fact-sheets/2025/01/fact-sheet-president-donald-j-trump-protects-civil-rights-and-merit-based-opportunity-by-ending-illegal-dei/> [<https://perma.cc/GZ26-GSNF>].

⁴⁸³ Zach Montague, *Education Dept. Gives Schools Two Weeks to Eliminate Race-Based Programs*, N.Y. TIMES (Feb. 17, 2025), <https://www.nytimes.com/2025/02/17/us/politics/education-dept-race-based-programs.html> [<https://perma.cc/XH3M-3LGG>].

will have the resilience to withstand a direct federal challenge and loss of federal funding.

Blue states' attorneys general have attempted to build a "Rainbow Wall" to safeguard LGBTQ people from state long-arm statutes, as discussed in Part III.⁴⁸⁴ They have also organized to defend democracy and challenge the breadth of some of Trump's executive actions,⁴⁸⁵ many of which arguably violate statutory or constitutional law, including the Tenth Amendment and its limits on the ability of the federal government to use the states as mere instruments of the federal government.⁴⁸⁶ That said, Congress generally has wide latitude to encourage states to adopt certain guidelines or regulations through its Spending Power.⁴⁸⁷ Congress can also act to pre-empt state law through the Commerce Clause.⁴⁸⁸ In this case, the Trump administration has changed the interpretation of existing civil rights laws and threatened states that fail to respect this interpretation with a loss of federal funding. It will be up to the courts to determine whether this sort of change in legal interpretation violates the anti-commandeering doctrine or falls within the discretion of the executive. The blue states could also argue that the administration's anti-LGBTQ policies are unconstitutional, which would tee up a direct challenge to the concept of "gender ideology."

The precedent for this sort of challenge harkens back to the last time the United States found itself in a constitutional crisis. After *Brown v. Board of Education*, the Southern states refused to recognize federal desegregation orders by asserting states' rights and the doctrines of nullification and interposition.⁴⁸⁹ Citing the Supremacy Clause of Article VI and *Marbury v. Madison*, the U.S. Supreme Court rejected these arguments and held in *Cooper v. Aaron* that the dissenting states were required to comply with the desegregation orders.⁴⁹⁰ It specifically rejected claims under the Tenth Amendment that a state could

⁴⁸⁴ Branigan, *supra* note 147.

⁴⁸⁵ Maeve Reston et al., *As Trump Pursues His Policies, Democratic States Block His Path*, WASH. POST (Feb. 22, 2025), <https://www.washingtonpost.com/nation/2025/02/22/trump-lawsuits-democratic-attorney-generals/> [<https://perma.cc/A4MB-BEVY>]; see also Reid J. Epstein, *Democratic Governors Form a Group to Oppose the Trump Administration*, N.Y. TIMES (Nov. 13, 2024), <https://www.nytimes.com/2024/11/13/us/politics/democratic-governors-trump.html> [<https://perma.cc/LH2Z-HA22>] (describing governors working in coalition to challenge Trump administration policies).

⁴⁸⁶ See generally *New York v. United States*, 505 U.S. 144 (1992) (explaining anti-commandeering principle).

⁴⁸⁷ *Printz v. United States*, 521 U.S. 898, 935 (1997) (invalidating "forced participation of the State's executive in the actual administration of a federal program").

⁴⁸⁸ See *New York*, 505 U.S. at 145.

⁴⁸⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (holding that racially segregated public schools violate the Fourteenth Amendment); *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (requiring the *Brown* decision to be implemented "with all deliberate speed"); *Cooper v. Aaron*, 358 U.S. 1, 4 (1958) (holding that states are bound by and must enforce Court decision even if they disagree with them).

⁴⁹⁰ *Cooper*, 358 U.S. at 4.

nullify federal laws or “interpose” itself between the federal government and the people of the state in order to prevent the enforcement of federal law.⁴⁹¹ The main difference, besides the substantive morality of the claims, is that the Supreme Court has not yet determined whether the anti-LGBTQ policies of the Trump administration are constitutional. As a threshold matter, however, it is clear that the efforts to erase protections for gender identity under Title IX are contrary to the holding in *Bostock*.⁴⁹²

Taking another page from the Civil Rights era, Trump has, in the past, threatened to invoke the Insurrection Act of 1807 against the states, which would directly violate state sovereignty.⁴⁹³ The Insurrection Act allows the President to deploy federal troops at the request of a governor or to do so against the wishes of a governor in very limited instances.⁴⁹⁴ The last time that the Insurrection Act was invoked against the wishes of a state Governor, as would be the case with a potential blue state standoff, was when segregationist governors attempted to stop the implementation of *Brown v. Board of Education*.⁴⁹⁵ Although Trump reportedly toyed with the idea of invoking the Insurrection Act during the 2020 protests for racial justice, he ultimately

⁴⁹¹ *Id.*

⁴⁹² See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

⁴⁹³ 10 U.S.C. § 254 (explaining The Insurrection Act is an exception to the Posse Comitatus Act of 1878 that was enacted post-Reconstruction to prevent the use of the U.S. military for domestic law enforcement); 18 U.S.C. § 1385.

⁴⁹⁴ 10 U.S.C. § 254. The last time the Insurrection Act was triggered was in 1992 during the Rodney King riots in Los Angeles, when the Governor of California requested federal assistance from President George W. Bush. Brian Duignan, *Insurrection Act*, BRITANNICA (Jan. 27, 2026), <https://www.britannica.com/topic/Insurrection-Act> [<https://perma.cc/J97V-XCES>].

⁴⁹⁵ 347 U.S. 483 (1954). The last time a President unilaterally invoked the Insurrection Act against the wishes of a state Governor was when President Kennedy mobilized the Alabama National Guard to protect black students who were attempting to desegregate schools over the objection of the Alabama Governor George Wallace. Proclamation No. 3554, 28 Fed. Reg. 9861 (Sep. 10, 1963); see also Hawa K. Allan, *Paradoxes of Sovereignty and Citizenship: Humanitarian Intervention at Home*, 20 CUNY L. REV. 389, 427–29 (2017) (discussing the unilateral use of the Insurrection Act in the context of school desegregation). There were four unilateral invocations of the Insurrection Act to enforce the mandate of *Brown v. Board of Education* and compel the desegregation of schools. *Id.* at 427. Some commentators mistakenly report that the last time a President unilaterally invoked the Insurrection Act was in 1965 when President Johnson moved to protect civil rights protestors in Selma, Alabama. See, e.g., Joseph Nunn & Elizabeth Goitein, *The Insurrection Act, Explained*, BRENNAN CTR. (Nov. 12, 2025), <https://www.brennan-center.org/our-work/research-reports/insurrection-act-explained> [<https://perma.cc/UM2D-W63W>] (saying that President Johnson acted “without a request from the state involved”). This characterization is incorrect because Governor Wallace requested federal intervention. Lyndon B. Johnson, The President’s News Conference at the LBJ Ranch (Mar. 20, 1965), <https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-the-lbj-ranch-2> [<https://perma.cc/Q64V-RXNJ>]; see also Allan, *supra*, at 431–32 (explaining the circumstances of Wallace’s “request” for federal assistance).

chose not to go that route.⁴⁹⁶ During the 2024 presidential campaign, however, Trump expressed his willingness to use the Insurrection Act to police the United States' southern border and to bring stability back to progressive cities.⁴⁹⁷

2. *Courts and the Rule of Law*

The federal courts are the only branch of the federal government that has not been fully captured by the MAGA movement. Many of the most important advancements in LGBTQ rights have come about as the result of Supreme Court decisions, including the end of sodomy laws, marriage equality, and nondiscrimination protections based on sexual orientation and gender identity.⁴⁹⁸ These decisions serve as powerful roadblocks if the MAGA movement attempts to ramp up its anti-LGBTQ laws, as discussed above. It remains to be seen whether the Court will continue to stand by these precedents when it is undoubtedly asked to opine on the constitutionality of the current rash of anti-LGBTQ measures and the scope of Trump's executive authority. Moreover, even if the Court were to rule in favor of LGBTQ people, it is not entirely clear that the Trump administration would continue to honor court orders, which would provoke a full-blown constitutional crisis. Some prominent conservative voices have also been pushing for a constitutional convention, which would upend the rules of engagement entirely.⁴⁹⁹

The ideological shift of the Court toward the right, along with its embrace of originalism as a method of constitutional interpretation, makes the future of many pro-LGBTQ precedents uncertain.⁵⁰⁰ In his concurrence in *Dobbs*, Justice Thomas argued that the Court should reconsider all of its

⁴⁹⁶ Dareh Gregorian et al., *Trump Says He Will Deploy Military If State Officials Can't Contain Protest Violence*, NBC NEWS (June 1, 2022, at 21:25 ET), <https://www.nbcnews.com/politics/politics-news/trump-considering-move-invoke-insurrection-act-n1221326> [<https://perma.cc/UG9L-VEMK>].

⁴⁹⁷ Genesis Magpayo, *What Is the Insurrection Act? Here's What Trump Has Said About Using It*, PBS NEWS (Jan. 15, 2026, at 09:36 ET), <https://www.pbs.org/newshour/politics/what-is-the-insurrection-act-heres-what-trump-has-said-about-using-it#:~:text=%22The%20next%20time%2C%20I%20am,mayors%20were%20holding%20us%20up.%22> [<https://perma.cc/D6NU-RFCX>]; Michael Waldman, *Trump's Insurrection Act Threat*, BRENNAN CTR. (Nov. 28, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/trumps-insurrection-act-threat> [<https://perma.cc/D88P-96VH>].

⁴⁹⁸ See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (sodomy laws); *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) (marriage equality); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020) (Title VII protections).

⁴⁹⁹ Ed Pilkington, *Inside Steve Bannon's "Disturbing" Quest to Radically Rewrite the US Constitution*, THE GUARDIAN (Oct. 19, 2022, at 06:00 ET), <https://www.theguardian.com/us-news/2022/oct/19/steve-bannon-us-constitution-tea-party-republican-state-legislatures> [<https://perma.cc/VYA5-6CXQ>].

⁵⁰⁰ See generally Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127 (2023) (detailing the Court's originalism doctrine).

substantive due process precedents, including *Lawrence* and *Obergefell*.⁵⁰¹ Thomas maintains that the opinions are “demonstrably erroneous” and that the Court has a duty to “correct the error.”⁵⁰² There are no cases currently pending that would give the Court the occasion to reconsider these precedents, but it would only take one district attorney to charge someone under a moribund sodomy statute or one court clerk to deny a marriage license to set the process in motion. As noted earlier, the Attorney General of Texas stands ready to enforce the Texas Homosexual Sodomy law.⁵⁰³ It is also inevitable that Trump’s anti-LGBTQ policies will be challenged, which will provide the Court the opportunity to chip away at the precedents, if not overrule them entirely. From an equal protection standpoint, *Romer v. Evans* ruled that animus against gays and lesbians was not a legitimate state interest, meaning any executive action based on animus should violate the equal protection guarantees of the Fifth Amendment implicit in its Due Process Clause.⁵⁰⁴ One important test for the Court will be whether to consider Trump’s attacks on “gender ideology” and “divisive ideology” through the lens of free speech protections. For LGBTQ rights, the reliance on free speech protection would represent a move back to basics because some of the earliest LGBTQ court victories were based on First Amendment freedoms.⁵⁰⁵

All of these points require further research and study to determine the best and most persuasive arguments to make at this difficult time in our nation’s history when there is so much at stake. Of course, this work will be irrelevant if the Trump administration refuses to comply with court orders, meaning that any relief from the federal courts would necessarily fail the resilience test. Although Trump has stated that “I always abide by the courts,” his proxies have taken a much harsher tone when referring to the federal judiciary.⁵⁰⁶ For example, Elon Musk, while working within the Trump administration, took to X to call for the impeachment of judges who stand in the way of the President’s policies, but the required two-thirds vote in the Senate to convict

⁵⁰¹ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2300–02 (2022) (Thomas, J., concurring).

⁵⁰² *Id.* at 2301. *See contra* Robin Maril, *Queer Rights After Dobbs v. Jackson Women’s Health Organization*, 60 SAN DIEGO L. REV. 45, 47 (2023) (arguing that LGBTQ+ rights cases stand on a distinct constitutional footing).

⁵⁰³ Dress, *supra* note 453.

⁵⁰⁴ *See Romer v. Evans*, 517 U.S. 620, 625 (1996) (holding Colorado’s State Constitutional Amendment 2 invalid under the Equal Protection Clause of the Fourteenth Amendment). Federal action is governed by the Fifth Amendment, which contains implicit equal protection guarantees within its Due Process Clause. *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) (affirming implicit equal protection guarantees within the Fifth Amendment).

⁵⁰⁵ *See One, Inc. v. Olesen*, 241 F.2d 772, 774–75 (9th Cir. 1957), *overruled by* 355 U.S. 371, 371 (1958) (reversing obscenity conviction against a homophile magazine).

⁵⁰⁶ Bret Samuels, *Trump Says He’ll Abide by Court Orders That Block Parts of His Agenda*, THE HILL (Feb. 11, 2025, at 17:09 ET), <https://thehill.com/homenews/administration/5139380-trump-agenda-court-orders/> [<https://perma.cc/WF2D-LZXB>].

would not likely be forthcoming.⁵⁰⁷ Vice President J.D. Vance has espoused the view that the executive has wide powers unfettered by judicial interference. In 2021, Vance referenced a quote that is often misattributed to President Jackson responding to a dispute between the state of Georgia and the Cherokee Nation. Vance said, “When the courts stop you, stand before the country like Andrew Jackson did and say: ‘The chief justice has made his ruling. Now let him enforce it.’”⁵⁰⁸

Finally, there is the doomsday possibility that the states could call a constitutional convention, as a number of conservative organizations and commentators have long advocated, which could be devastating for LGBTQ people and civil rights more generally because red states currently outnumber blue states and they would enjoy a greater say in the drafting process.⁵⁰⁹ Article V of the Constitution authorizes Congress, “on the application of the legislatures of two-thirds of the several states” (presently thirty-four), to “call a Convention of States for proposing amendments.”⁵¹⁰ There is no current consensus on how such a convention would be organized or led, or who would even serve at the convention.⁵¹¹ Although the Constitution says that this method is to be used for “proposing amendments,” it is thought that it could produce an entirely new Constitution. Any amendments proposed by the Convention of States would still require ratification of three-fourths (currently thirty-eight) of the states.⁵¹²

3. *Non-governmental Institutions*

With federalism offering limited protection and the courts potentially disinclined to preserve LGBTQ rights, it makes sense to think out of the box and consider other institutions that might be responsive to the appeals of LGBTQ advocates, such as the market, the media, and civil society organizations. The LGBTQ rights movement has a strong track record in this regard, such as when it convinced businesses to adopt domestic partnership and nondiscrimination policies long before state governments would even entertain the idea.⁵¹³ These non-governmental institutions may not be

⁵⁰⁷ Alex Gangitano, *Musk Calls for “Wave of Judicial Impeachments,”* THE HILL (Feb. 12, 2025, at 13:10 ET), <https://thehill.com/homenews/administration/5140939-elon-musk-calls-judges-impeached/> [https://perma.cc/CQ2S-QGNF].

⁵⁰⁸ Charlie Savage & Minh Kim, *Vance Says “Judges Aren’t Allowed to Control” Trump’s “Legitimate Power,”* N.Y. TIMES (Feb. 9, 2025), <https://www.nytimes.com/2025/02/09/us/politics/vance-trump-federal-courts-executive-order.html> [https://perma.cc/C5GB-PEWA].

⁵⁰⁹ Pilkington, *supra* note 499.

⁵¹⁰ U.S. CONST. art. V.

⁵¹¹ See Michael Stokes Paulsen, *How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention*, 34 HARV. J.L. & PUB. POL’Y 837, 838–40 (2011).

⁵¹² U.S. CONST. art. V.

⁵¹³ Knauer, *supra* note 29, at 43–44 (discussing development of “domestic partnership” policies).

competent to provide the level of protection or reform that LGBTQ advocates need right now, but their actions can potentially help resist the current wave of anti-LGBTQ measures and safeguard sectors of society where LGBTQ people are still welcomed and not vilified. Unfortunately, all of these institutions are under increasing pressure to roll back protections for, and even any mention of, LGBTQ lives and identities.

As noted in Section II above, the business world began beating a swift retreat from its support of LGBTQ rights even before the announcements of Trump's DEI restrictions.⁵¹⁴ Major business players are backing out of longstanding LGBTQ sponsorship agreements and no longer participating in equity surveys designed to gauge support for LGBTQ employees and issues.⁵¹⁵ This shift has been particularly stark in the case of social media companies, which have largely decided to obey Trump's executive orders in advance.⁵¹⁶ Not only have they cancelled all their DEI initiatives, but Google erased Pride Month from its popular calendar app, along with Black History Month and other cultural events.⁵¹⁷

The Trump administration has taken direct aim at what MAGA loyalists refer to as the "legacy" media. In what would appear to be a violation of the First Amendment, the Trump administration has banned the Associated Press ("AP") reporters from presidential briefings and Air Force One because the AP style guide does not adopt Trump's new name for the Gulf of Mexico—the Gulf of America.⁵¹⁸ The administration has also removed legacy media from their offices at the Pentagon in favor of right-wing alternative media outlets and it will now control the composition of the White House Press Corps.⁵¹⁹ The U.S. Attorney for the District of Columbia has opened Operation Whirlwind, which is designed to protect federal workers by investigating and stopping "the storm of threats against officials at all levels," many of which came from sitting Democrats in Congress and journalists.⁵²⁰

⁵¹⁴ Gibson, *supra* note 332.

⁵¹⁵ See, e.g., Michael Schaffer, *Trump's Anti-DEI Edicts Just Scared a Big Sponsor Away from a Major Pride Event*, POLITICO (Feb. 14, 2025 at 10:00 ET), <https://www.politico.com/news/magazine/2025/02/14/booz-allen-worldpride-sponsor-00204059> [<https://perma.cc/SU34-J4RL>]; Neelakandan, *supra* note 333.

⁵¹⁶ SNYDER, *supra* note 10, at 17 (discussing the practice of obeying in advance).

⁵¹⁷ Nico Grant, *Google Calendar Deletes Women's History Month and Other Cultural Events*, N.Y. TIMES (Feb. 12, 2025), <https://www.nytimes.com/2025/02/12/technology/google-black-history-womens-history.html> [<https://perma.cc/TM9E-4H27>].

⁵¹⁸ Matt Sedensky, *Judge Rejects Immediately Restoring AP's Access to White House but Urges Government to Reconsider*, ASSOCIATED PRESS (Feb. 24, 2025, at 20:26 ET), <https://apnews.com/article/ap-lawsuit-trump-gulf-mexico-america-6b6f-ba488e7e420e5fcd28c44a755922> [<https://perma.cc/Z6GS-NJZQ>].

⁵¹⁹ David Bauder, *The Trump Administration Is Throwing More Pentagon Reporters Out of Their Workspaces*, ASSOCIATED PRESS (Feb. 7, 2025, at 23:18 ET), <https://apnews.com/article/pentagon-reporters-ejected-press-room-trump-administration-359d22d77ee22cb0f256170f8f67178c> [<https://perma.cc/WBD3-5FGZ>].

⁵²⁰ Spencer S. Hsu, *D.C. U.S. Attorney Probing Democrats Over Alleged Threats, Documents Show*, WASH. POST (Feb. 20, 2025), <https://www.washingtonpost.com/dc-md-va/2025/02/19/trump-justice-operation-whirlwind-democrats/> [<https://perma.cc/5RXA-8ZTE>].

A number of media outlets have recently settled lawsuits that claimed they engaged in deceptive advertising or defamation while reporting.⁵²¹ The success of these claims could lead to more lawsuits and have a chilling effect on news reporting.⁵²² After CBS settled a lawsuit with Donald Trump in July 2025, the network announced the cancellation of its marquee late-night show due to financial reasons, but many speculated that the cancellation was politically motivated.⁵²³ In September 2025, ABC was pressured by the Trump administration to cancel its late-night show after the host, Jimmy Kimmel, made an insensitive comment about the assassination of a conservative activist.⁵²⁴ ABC suspended the show for a week, but did not cancel it.⁵²⁵

The institutions of civil society—advocacy groups, academia, community groups, unions—are reeling from Trump’s initial anti-DEI actions and the freezing of government funds. Academia, in particular, has been targeted by the Trump administration. It stands to lose billions of dollars in research funds and may be subject to a new tax on endowment funds.⁵²⁶ Many institutions are dismantling their DEI initiatives on their own accord.⁵²⁷ Advocacy organizations are scrambling to find their footing in this new world.⁵²⁸ The freeze on foreign aid and federal funding more generally has left many charities holding the bag.⁵²⁹ Vance has attacked religious organizations that work with immigrants and refugees.⁵³⁰ Major national LGBTQ and progressive advocacy

⁵²¹ David Enrich, *Trump’s New Line of Attack Against the Media Gains Momentum*, N.Y. TIMES (Feb. 7, 2025), <https://www.nytimes.com/2025/02/07/business/media/trump-media-lawsuits.html> [https://perma.cc/VZ3C-JSB5].

⁵²² *Id.*

⁵²³ David Bauder et al., *Stephen Colbert’s “Late Show” Is Canceled by CBS and Will End in May 2026*, ASSOCIATED PRESS (July 18, 2025, at 11:04 ET), <https://apnews.com/article/stephen-colbert-late-show-cbs-end-8bad9f16f076df62c0ffc50e9c8adbab> [https://perma.cc/4Z4S-ZMQ4].

⁵²⁴ Kailyn Rhone, *What to Know About the Suspension, and the Return, of Jimmy Kimmel’s Show*, N.Y. TIMES (Sep. 25, 2025), <https://www.nytimes.com/2025/09/20/business/jimmy-kimmel-show-abc-kirk-fcc.html> [https://perma.cc/NW9B-5HYF].

⁵²⁵ *Id.*

⁵²⁶ Susan Svrluga & Danielle Douglas-Gabriel, *Trump Threatened College Research, Culture and Funding. Confusion Reigns*, WASH. POST (Feb. 8, 2025), <https://www.washingtonpost.com/education/2025/02/08/trump-orders-impact-colleges-funding-research-culture/> [https://perma.cc/L3RE-KYG2].

⁵²⁷ See, e.g., Snyder, *supra* note 331.

⁵²⁸ Lisa Lerer et al., *Venting at Democrats and Fearing Trump, Liberal Donors Pull Back Cash*, N.Y. TIMES (Feb. 16, 2025), <https://www.nytimes.com/2025/02/16/us/politics/donors-democrats-trump.html> [https://perma.cc/DLH4-4CEU].

⁵²⁹ Missy Ryan & Dan Keating, *Funding Freeze Thrusts Foreign Aid Groups into Crisis*, WASH. POST (Feb. 1, 2025), <https://www.washingtonpost.com/national-security/2025/02/01/foreign-aid-freeze-state-department-usaid/> [https://perma.cc/GXV4-352H].

⁵³⁰ Michelle Boorstein, *Attacks on Catholics, Lutherans Suggest New Trump Approach on Religion*, WASH. POST (Feb. 8, 2025), <https://www.washingtonpost.com/nation/2025/02/08/catholic-lutheran-vance-flynn-musk-trump/> [https://perma.cc/2MEG-UYP8].

organizations have laid off significant percentages of their staff as they try to adjust to the new climate.⁵³¹

Many organizations have appealed to the courts, which will slow the progress of the actions of the Trump administration, allowing time for new, and perhaps uncomfortable, alliances to form.⁵³² The magnitude of the situation requires broad coalitions that are united in opposition to authoritarianism and not divided by differing policy priorities, identity politics, or old grudges—all of which can be sorted out once our democratic institutions and norms are back on an even keel. These coalitions can be powerful forces to organize opposition to the MAGA movement. By pooling knowledge and resources, they can work through the courts and with blue states to stop some of Trump's initiatives. They can revitalize efforts at the local level to take back school boards and city councils and secure our elections. They can fight misinformation with outreach and help channel collective outrage. LGBTQ organizations should play a vital role in these coalitions, and LGBTQ rights should be at the forefront of their shared agenda.

Ultimately, institutions and organizations are composed of people who make choices. It has been inspiring to see career civil servants at all levels of the federal government fight to regain their jobs after wrongful termination or choose to resign rather than violate their ethical obligations.⁵³³ Individual Americans will continue to stand up for their vision of democracy, and when they do, it is imperative that their vision includes LGBTQ rights. For LGBTQ people and their allies, it is time to connect the dots and make the case (once again) for their basic humanity. The future of LGBTQ rights, as well as the future of our democracy, rests with the People.

CONCLUSION

Whether we are standing in the twilight of American democracy or just going through a rough patch remains to be seen, but one thing is certain: It is time to say the quiet part out loud. A virulent anti-LGBTQ narrative has been embraced and strategically deployed by an ascendent populist movement with

⁵³¹ Molly Sprayregen, *Major LGBTQ+ Organizations Initiate Mass Layoffs in the Wake of Right-Wing Hate*, LGBTQ NATION (Feb. 11, 2025, at 14:00 ET), <https://www.lgbtqnation.com/2025/02/major-lgbtq-organizations-initiate-mass-layoffs-in-the-wake-of-right-wing-hate/> [<https://perma.cc/7CVU-6V67>] (stating that HRC laid off 20% of workforce and GLSEN laid off 60% of workforce).

⁵³² See, e.g., Daniel Wiessner, *Trump's Plan to Reclassify, Fire Federal Workers Challenged by Unions*, REUTERS (Jan. 29, 2025, at 21:50 ET), <https://www.reuters.com/world/us/trumps-plan-ease-firing-federal-workers-challenged-by-union-2025-01-29/> [<https://perma.cc/B6ZQ-ZHW9>].

⁵³³ Eileen Sullivan, *Federal Workers' "Emotional Roller Coaster": Fired, Rehired, Fired Again*, N.Y. TIMES (July 15, 2025), <https://www.nytimes.com/2025/07/15/us/politics/fired-federal-workers-trump.html> [<https://perma.cc/VQ4Q-6PTG>]; Walter Olson, *Officials Resign En Masse at Justice Department After Political Intervention in Adams Case*, CATO (Feb. 14, 2025, at 14:14 ET), <https://www.cato.org/blog/officials-resign-en-masse-justice-department-after-political-intervention-adams-case> [<https://perma.cc/CWJ5-DJM6>].

overtly fascist tendencies—the MAGA movement.⁵³⁴ The demonization of LGBTQ people helped propel Donald Trump to a second term in the White House and has defined much of his early policymaking.⁵³⁵ In our current age of democratic decline and unprecedented presidential power,⁵³⁶ the Politics of Eradication is potentially unbound, which is an extremely dangerous turn of events.

The scapegoating of unpopular groups and the urge to purge these groups from the body politic is, unfortunately, a reoccurring theme across human history.⁵³⁷ Eliminationist rhetoric frequently adopts the language of contagion to dehumanize the target population and justify the conclusion that the imagined toxin or vermin must be contained and eradicated.⁵³⁸ The Politics of Eradication translates these hateful views into practical policy solutions designed to address the manufactured danger. In the case of LGBTQ people, the MAGA movement has vilified the LGBTQ community by recycling long-discredited tropes that LGBTQ people are “groomers,” mentally unstable, and pose a threat to women, children, and national security.⁵³⁹ In his second term, Trump has elevated this far-right anti-LGBTQ rhetoric to the level of federal policy where it is now enshrined in executive orders,⁵⁴⁰ administrative memoranda,⁵⁴¹ and national security pronouncements.⁵⁴² Both the rhetoric and

⁵³⁴ See discussion *supra* Part I.B (discussing the rise of the MAGA movement).

⁵³⁵ See discussion *supra* Part II.C (examining Trump’s 2024 presidential campaign and early policymaking in his second administration).

⁵³⁶ See discussion *supra* Part I.A (exploring democratic decline and the consolidation of power).

⁵³⁷ See, e.g., ADAM JONES, *GENOCIDE: A COMPREHENSIVE INTRODUCTION* 3–13 (4th ed. 2024) (discussing genocide in prehistory, antiquity, and early modernity).

⁵³⁸ See DANIEL JONAH GOLDBACH, *WORSE THAN WAR: GENOCIDE, ELIMINATIONISM, AND THE ONGOING ONSLAUGHT ON HUMANITY* 14–21 (2009) (describing “eliminationism” beliefs and policies).

⁵³⁹ See discussion *supra* Part II.B.2 (discussing the MAGA characterization of LGBTQ people as a threat to children, women, and national security). The attempt to identify LGBTQ people as threats to national security took an especially dark turn in the federal government’s response to the killing of Renee Good, a queer mother of three, by a United States Immigration and Customs Enforcement officer in Minneapolis, Minnesota, on January 7, 2026. Alan Feuer, Glenn Thrush & Devlin Barrett, *F.B.I. Inquiry into ICE Shooting Is Examining Victim’s Possible Ties to Activist Groups*, N.Y. TIMES (Jan. 12, 2026), <https://www.nytimes.com/2026/01/12/us/politics/fbi-renee-good-ice-shooting.html> [https://perma.cc/4T35-6ANB]. Without waiting for the results of an investigation, administration officials characterized Good as a “domestic terrorist,” “professional agitator,” and “violent rioter” who was tied to an organized left-wing network. Melissa Gira Grant, Opinion, *Trump and ICE Want You to Think Renee Nicole Good Deserved It*, NEW REPUBLIC (Jan. 13, 2026), <https://newrepublic.com/article/205199/renee-good-shooting-misogyny> [https://perma.cc/A5AR-N9NP].

⁵⁴⁰ See discussion *supra* Part II.D (detailing the Presidential policies targeting gender identity and the LGBTQ community).

⁵⁴¹ See, e.g., U.S. OFF. OF PERS. MGMT., *UPDATED GUIDANCE REGARDING EXECUTIVE ORDER 14168, DEFENDING WOMEN FROM GENDER IDEOLOGY EXTREMISM AND RESTORING BIOLOGICAL TRUTH TO THE FEDERAL GOVERNMENT* 1 (July 10, 2025), <https://www.opm.gov/chcoc/transmittals/2025/Defending%20Women%20Guidance%20Memo%207-10-2025.pdf> [https://perma.cc/F6RG-PEQ2]; Memorandum from Pam Bondi, *supra* note 427, at 6.

⁵⁴² Nat’l Sec. Presidential Mem. No. 7 on Countering Domestic Terrorism and Organized Political Violence, 90 Fed. Reg. 47225 (Sep. 30, 2025), <https://www.govinfo.gov>.

the resulting policies should not be mistaken for the inevitable give-and-take of politics as usual. To the contrary, these attacks on LGBTQ people should set off alarm bells far and wide, as they already have in some corners of the international genocide prevention community.⁵⁴³

Scholars of genocide have identified warning signs that can serve as precursors to physical destruction, such as Professor Gregory Stanton's widely accepted ten (nonlinear) stages of genocide.⁵⁴⁴ When the current state of LGBTQ rights is viewed within this prevention framework, the result is quite sobering. The conditions facing LGBTQ people in the United States seem to tick a number of the boxes that experts say create a climate where eliminationist rhetoric and policies can turn into exterminationist action.⁵⁴⁵ This Article has documented conditions that arguably satisfy at least four of Stanton's stages, namely the classification and othering of LGBTQ people and the creation of an "us versus them" mentality (stage 1), discrimination against LGBTQ people (stage 3), the dehumanization of LGBTQ people through the

gov/content/pkg/FR-2025-09-30/pdf/2025-19141.pdf [https://perma.cc/M7NV-M9CT] (expanding definition of "domestic terrorism" to include "hostility towards those who hold traditional American views on family, religion, and morality"); *see also* Memorandum from Attorney General, Implementing National Security Presidential Memorandum-7: Countering Domestic Terrorism and Organized Political Violence (Dec. 4, 2025), <https://www.washingtonpost.com/documents/b610d753-733b-4eee-8a17-5035bc94cd6c.pdf> [https://perma.cc/3XQK-2GQD] (implementing NSPM-7 by expanding the official definition of "domestic terrorism" to include "hostility towards traditional views on family, religion, and morality").

⁵⁴³ In February 2025, the Lemkin Institute issued its first "Red Flag Alert" for genocide of transgender people in the United States in response to Trump's anti-trans executive orders, which was followed by a second alert in June 2025 after the U.S. Supreme Court decision *United States v. Skrametti*. *See Red Flag Alert for the Anti-Trans Agenda of the Trump Administration in the United States*, LEMKIN INST. FOR GENOCIDE PREVENTION & HUM. SEC. (Feb. 28, 2025), https://www.lemkininstitute.com/files/ugd/9bc553_d353ac-2c10f5404aa157bfbfa4fbd09f.pdf [https://perma.cc/U3AP-HQ5B]; *Red Flag Alert 2 for the Anti-Trans Agenda of the Trump Administration in the United States*, LEMKIN INST. FOR GENOCIDE PREVENTION & HUMAN SEC. (June 30, 2025), <https://www.lemkininstitute.com/red-flag-alerts/red-flag-alert-2-for-the-anti-trans-agenda-of-the-trump-administration-in-the-united-states> [https://perma.cc/XZX5-S9PE]; *see also* *United States v. Skrametti*, 145 S. Ct. 1816, 1837 (2025) (upholding state bans on hormone therapy and puberty blockers for transgender youth). The Institute issues "Red Flag Alerts" for regions or countries "when developments . . . exhibit several red flags for genocide . . . that have the potential to radicalize and/or bring together destructive historical trajectories and move a society further towards a mass atrocity event aimed at destroying one or more collective identities." *Red Flag Alerts for Genocide*, LEMKIN INST. FOR GENOCIDE PREVENTION & HUM. SEC., <https://www.lemkininstitute.com/red-flag-alerts> [https://perma.cc/8LR8-7FH9]. The first Alert read: "[T]he recent spate of executive orders, which are in line with a genocidal process against the transgender community that has been emerging in the United States for over a decade, are meant to pave the way for greater state repression against all individuals and other groups in the future." *Red Flag Alert for the Anti-Trans Agenda of the Trump Administration in the United States*, *supra*.

⁵⁴⁴ Gregory H. Stanton, *The Ten Stages of Genocide*, GENOCIDE WATCH, <https://www.genocidewatch.com/tenstages> [https://perma.cc/3PN9-NVAM].

⁵⁴⁵ *See* GOLDHAGEN, *supra* note 538, at 29 (asking "How do eliminationist beliefs, or even an eliminationist ideology get translated in eliminationist action?").

vocabulary of contagion (stage 4), and extreme polarization and the spread of anti-LGBTQ propaganda (stage 6).⁵⁴⁶

Of course, as a matter of international law, the crime of genocide cannot be committed against LGBTQ people. LGBTQ people are not considered a protected class under the Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”), which covers certain “acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group” and triggers an obligation to intervene on the part of the global community.⁵⁴⁷ Although there are historical reasons why the Genocide Convention adopted such limited language, the failure to recognize LGBTQ people as a people highlights a much broader issue that goes directly to the crux of present day LGBTQ precarity.⁵⁴⁸ Even before the MAGA movement set its sights on the LGBTQ community, LGBTQ identities remained stubbornly contested and politicized in a way that the identity politics of the LGBTQ rights movement had never been able to resolve.⁵⁴⁹ In other words, the Politics of Eradication threatens to destroy an identity that a significant segment of Americans never accepted as valid in the first place.⁵⁵⁰

The Politics of Eradication is driven by the desire to contain and, if possible, remove an offending group from the *res publica*. To achieve this result, traditional tools of policy formulation and implementation are perverted

⁵⁴⁶ Stanton’s ten stages of genocide are classification, symbolization, discrimination, dehumanization, organization, polarization, preparation, persecution, extermination, and denial. Stanton, *supra* note 544.

⁵⁴⁷ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; S. Exec. Doc. O, 81-1 (1949). Atrocities committed against the LGBTQ community could be considered “crimes against humanity” under international law. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. The United States has not ratified the Rome Statute and, therefore, is not bound by its provisions. Eve Sampson, *Why Some Countries Won’t Join the I.C.C.*, N.Y. TIMES (Nov. 21, 2024), <https://www.nytimes.com/2024/11/21/world/middleeast/us-icc-member-countries.html> [<https://perma.cc/Q8CD-UTWS>].

⁵⁴⁸ Initial definitions of genocide included “political” groups as a protected class. JONES, *supra* note 537, at 20. A vocal minority of countries, including the Soviet Union, objected to the inclusion of political groups and argued that “political groups lack the stability of other groups,” did not have “the same homogeneity,” and “are less well defined.” *Id.* The language including “political” groups was eventually dropped from the definition of genocide. *Id.* However, a number of countries include political groups in the definition of genocide for the purposes of their domestic law. *Id.* at 21.

⁵⁴⁹ Even at the high-water point for approval of same-sex marriage in 2022 and 2023, a significant portion of the United States continued to believe that “gay or lesbian relations” were morally wrong. *LGBTQ+ Rights*, GALLUP, <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> [<https://perma.cc/7KPG-PSUU>]. During 2022 and 2023, seventy-one percent of people polled reported that they thought same-sex marriage should be legal, but between twenty-five percent and thirty-three percent of those polled believed that “gay or lesbian relations” were morally wrong. *Id.* The percentage of people polled who supported same-sex marriage in 2022 and 2023 represented the highest level of support measured to date. *Id.*

⁵⁵⁰ Tessa E.S. Charlesworth & Eli J. Finkel, *Americans Are Turning Against Gay People*, N.Y. TIMES (Jan. 19, 2026), <https://www.nytimes.com/2026/01/19/opinion/heated-rivalry-gay-prejudice.html> [<https://perma.cc/6S6M-ZN6T>] (reporting that anti-gay bias has risen by ten points in just four years).

to produce policies that reflect patently anti-democratic and eliminationist values. Under normal circumstances, it is possible to counter these policies through appeal to our democratic institutions and norms. Even then, countering a Politics of Eradication involves more than simply undoing bad policy. It requires the disruption or displacement of deep-seated beliefs that fuel the demand for such policies in the first place.

The anti-LGBTQ policies of the second Trump administration have swiftly unraveled decades of hard-fought civil rights protections, along with the lives and families that have been built around them. In our age of democratic uncertainty, the task of countering these policies and the views that animate them will be much more difficult. It is imperative to identify which remaining institutional mechanisms and levers of power can help reverse this trajectory and then work tirelessly to preserve those avenues of safety. It is also more important than ever to assert the shared humanity of LGBTQ people. Everyone can and should find their voice and help in some way. The days of resting assured that something like *that* could not happen *here* are, sadly, over.⁵⁵¹

⁵⁵¹ See generally SINCLAIR LEWIS, *IT CAN'T HAPPEN HERE* (1935) (dystopian novel about the rise of fascism in the United States).