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Transgender Rights: Shifting Strategies in a Changing Nation

ALEX BINSFELD

Abstract

Transgender rights have only come to the forefront of public consciousness and US jurisprudence in the past couple of decades. During this time, the transgender rights movement has made large strides and was rapidly working toward the enshrinement of federal non-discrimination protections for the transgender community. However, recent political changes in the US have led to a federal effort to undo the decades of progress that transgender activists have made in advocating for the recognition of their rights.¹ As a result of this changing political climate, the strategies used by transgender rights advocates must change if the movement is going to be effective during this new era. In section I of this paper outlines this further while section II outlines past success in litigation. Section III focuses on the shifting climate. Section IV highlights the role of different literature in conceptualizing strategies for Transgender rights. Finally, section V details the move away from the Courts.

Introduction

Transgender rights have only come to the forefront of public consciousness and US jurisprudence in the past couple of decades. During this time, the transgender rights movement has made large strides and was rapidly working toward the enshrinement of federal non-discrimination protections for the transgender community. However, recent political changes in the US have led to a federal effort to undo the decades of progress that transgender activists have made in advocating for the

1. This struggle began in the US at the 1959 Cooper Donuts Riot in Los Angeles, where trans and queer people fought police officers in the streets after years of systematic police harassment. *Milestones in the American Transgender Movement*, N.Y. TIMES (Aug. 28, 2015), <https://www.nytimes.com/interactive/2015/05/15/opinion/editorial-transgender-timeline.html>.

recognition of their rights.² As a result of this changing political climate, the strategies used by transgender rights advocates must change if the movement is going to be effective during this new era.

I. The Current Problem

While judges are allegedly neutral arbiters, many factors—including a judge's political leanings—shape the way that they rule on a variety of issues.³ Donald Trump appointed two justices to the Supreme Court of the United States during the first half of his presidency: Neil Gorsuch and Brett Kavanaugh.⁴ Both justices are notoriously conservative and their addition to the Supreme Court has cemented a conservative majority.⁵ This will deeply impact how cases are decided by the Supreme Court in the future. Assuming that the judges will vote on issues in a manner influenced by their political beliefs, there is more likely to be a contraction—rather than an expansion—of the rights of marginalized people when there is a conservative majority.

Thus, if the Supreme Court hears cases involving transgender rights in the future, the Court is likely to rule against the transgender party. The effects of such a decision cannot be understated. If the Supreme Court finds that transgender people are not protected from discrimination under Title VII or Title IX or rule that certain discriminatory acts against transgender people do not violate Equal Protection, all lower courts in the United States will be bound by this precedent. Everyday citizens will view such a decision as legalizing discrimination against transgender people nationwide, not realizing that many state nondiscrimination provisions

2. This struggle began in the US at the 1959 Cooper Donuts Riot in Los Angeles, where trans and queer people fought police officers in the streets after years of systematic police harassment. *Milestones in the American Transgender Movement*, N.Y. TIMES (Aug. 28, 2015), <https://www.nytimes.com/interactive/2015/05/15/opinion/editorial-transgender-timeline.html>.

3. Howard Gilman, *What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 465-96 (2001); See generally Michael A. Bailey & Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 AM. POL. SCI. REV. 369, 384 (2008).

4. Ariane de Vogue & Dan Berman, *Neil Gorsuch confirmed to the Supreme Court*, CNN (Apr. 7, 2017), <https://www.cnn.com/2017/04/07/politics/neil-gorsuch-senate-vote/index.html>; Clare Foran & Stephen Collinson, *Brett Kavanaugh sworn in as Supreme Court justice*, CNN (Oct. 6, 2018), <https://www.cnn.com/2018/10/06/politics/kavanaugh-final-confirmation-vote/index.html>.

5. Ariane de Vogue & Dan Berman, *Neil Gorsuch confirmed to the Supreme Court*, CNN (Apr. 7, 2017), <https://www.cnn.com/2017/04/07/politics/neil-gorsuch-senate-vote/index.html>; Clare Foran & Stephen Collinson, *Brett Kavanaugh sworn in as Supreme Court justice*, CNN (Oct. 6, 2018), <https://www.cnn.com/2018/10/06/politics/kavanaugh-final-confirmation-vote/index.html>; Adam Liptak & Alicia Parlapiano, *Conservatives in Charge, the Supreme Court Moved Right*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/interactive/2018/06/28/us/politics/supreme-court-2017-term-moved-right.html>.

protect transgender people and that there are other causes of action for protecting the rights of transgender people. Transgender people may also be unaware of their rights and may be discouraged from asserting their rights by a perceived or actual lessening of legal protections. There will be a large spike in discrimination against transgender people in employment, education, housing, and health care. This will lead to higher rates of unemployment and homelessness, while resulting in lower rates of education in the trans community. This will also cause transgender people to be denied potentially lifesaving medical care more frequently than they are currently being denied, leading to a high rate of preventable death in our community.

Furthermore, such a culture of discrimination will be emotionally and psychologically taxing. The 2011 survey *Injustice at Every Turn* found that 41% of transgender people “reported attempting suicide compared to 1.6% of the general population, with unemployment, bullying in school, low household income and sexual and physical assault associated with even higher rates.”⁶ Increased discrimination will lead to an inflation of this already high number. After the *New York Times* reported that the Trump administration was considering a memo that would define sex as binary and exclude trans people from nondiscrimination protections, Trans Lifeline—a suicide and crisis hotline run by trans people for trans people—received four times its average volume of calls.⁷ The results of a Supreme Court decision denying the rights of transgender people would be devastating to this already marginalized community. The results would also be long lasting. If such a decision were made, it is unlikely that it would be overturned for decades. *Bowers v. Hardwick* is the 1986 case in which the Supreme Court held that a state statute outlawing sodomy was constitutional.⁸ *Bowers v. Hardwick* was not overruled until 2003, when the Supreme Court held that antisodomy laws violate the Substantive Due Process rights of citizens, in *Lawrence v. Texas*.⁹ This reversal by the Supreme Court took 17 years to occur, and might not have happened as soon as it did but for the hard work of queer rights activists in shifting the national perspective on the LGB community. Were a decision to be made

6. Jaime M. Grant, Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman & Mara Keisling, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, WASH: NAT’L CTR. FOR TRANSGENDER EQUALITY & NAT’L GAY & LESBIAN TASK FORCE, 72 (2011), https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.

7. Brittney McNamara, *Calls to the Trans Lifeline Quadrupled After Trump’s Gender Memo*, TEEN VOGUE (Oct. 24, 2018), <https://www.teenvogue.com/story/calls-to-the-trans-lifeline-quadrupled-after-trumps-gender-memo?fbclid=IwAR2EuCc9KojRiJ-8mlfBcpRcb1pvqW3mRMnMQfwYDOIKhZ1x4On1mjfzOsE>.

8. *Bowers v. Hardwick*, 478 U.S. 186, 189-190 (1986).

9. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

that limits the rights of transgender people, a reversal would likely take that much time or more, considering the lesser public support of transgender people than gay, lesbian, and bisexual people.¹⁰

The rights of transgender people might be impacted by this newly conservative court, even if the court does not rule on transgender rights. When a shift in power like the move to a conservative majority in the Supreme Court occurs, there is often an attempt to undo the most recent progress that other political party has made.¹¹ While transgender rights cases have not been heard by the Supreme Court, cases on queer rights have been heard recently, and may be undone. Cases heard by the Supreme Court that are now in danger of reversal are *Lawrence v. Texas*, *Romer v. Evans* (ruling that legislation that prevents the creation of nondiscrimination laws that protect homosexuals violates Equal Protection), and *Obergefell v. Hodges* (ruling that homosexual couples have a fundamental right to marry under the Substantive Due Process and Equal Protection clauses).¹² As *Obergefell* is the most recent, there may be a higher likelihood that it will be overturned.¹³ If these cases are overturned, legal arguments that may have been used to forward transgender rights on Equal Protection and Substantive Due Process grounds will be invalidated, as many arguments that are used to forward trans rights are the same arguments used to support queer rights. Thus, if any cases on queer rights are brought to the Supreme Court, the rights of queer people may be overturned, which will also prevent transgender people from drawing on similar arguments to gain legal protections.

With a Supreme Court that will no longer support the rights of transgender people, the strategy of trans and queer activists must shift from

10. Evan Greer, *Powerful gay rights groups excluded trans people for decades — leaving them vulnerable to Trump's attack*, WASH. POST (Oct. 29, 2018), <https://www.washingtonpost.com/outlook/2018/10/29/trumps-attack-trans-people-should-be-wake-up-call-mainstream-gay-rights-movement/>.

11. See generally David Smith, *The anti-Obama: Trump's drive to destroy his predecessor's legacy*, GUARDIAN (May 11, 2018), <https://www.theguardian.com/us-news/2018/may/11/donald-trump-barack-obama-legacy>; See also Juliet Eilperin & Darla Cameron, *How Trump is rolling back Obama's legacy*, WASH. POST (Mar. 24, 2017), https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/?utm_term=.d0f4c5166990.

12. *Lawrence v. Texas*, 539 U.S. at 564 (2003); *Romer v. Evans*, 517 U.S. 620, 626-627 (1996); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

13. Mark Joseph Stern, *Marriage Equality May Soon Be in Peril*, SLATE (July 5, 2017), <https://slate.com/news-and-politics/2017/07/how-the-supreme-court-could-overturn-obergefell-v-hodges.html>; Liam Stack & Elizabeth Dias, *Why the Supreme Court Opening Could Affect Gay Marriage as Well as Abortion*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/us/politics/gay-marriage-supreme-court.html>; Eugene Scott, *In Kavanaugh's non-answer on same-sex marriage, many heard a troubling response*, WASH. POST (Sept. 7, 2018), <https://www.washingtonpost.com/politics/2018/09/07/kavanaugh-non-answer-same-sex-marriage-many-heard-troubling-answer/>.

one that primarily focuses on impact litigation to one that employs different methods. This is especially true because appointments to the Supreme Court are lifetime appointments: this conservative majority—and the effects of its decisions—have the potential to stand for decades.¹⁴

II. Previous Success in Litigation

The transgender rights movement has had success using impact litigation in the past decades. Activists began by bringing cases in state courts. They then advanced to creating persuasive authority in federal district courts, where they had overwhelming success.¹⁵ When cases were appealed, activists largely prevailed in courts of appeal. Trans rights cases that have been heard in courts of appeal primarily consist of Title VII, Title IX, Equal Protection, Equal Credit Opportunity Act, and Gender Motivated Violence Act claims. However, success in District Courts has also included claims based on the Fair Housing Act and Section 1557 of the Affordable Care Act.¹⁶

Activists have had many recent successes in obtaining courts of appeal rulings that protect transgender people. Title VII claims in courts of appeals have mostly succeeded in the 6th circuit; cases include *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* (2018), *Barnes v. City of Cincinnati* (2005), and *Smith v. City of Salem* (2004).¹⁷ In the most recent case, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, the Court held that termination of an employee on the basis of their transgender status violates Title VII.¹⁸ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* is currently awaiting review by the Supreme Court.

14. See generally Mark Joseph Stern, *Marriage Equality May Soon Be in Peril*, SLATE (July 5, 2017), <https://slate.com/news-and-politics/2017/07/how-the-supreme-court-could-overturn-obergefell-v-hodges.html> and Liam Stack & Elizabeth Dias, *Why the Supreme Court Opening Could Affect Gay Marriage as Well as Abortion*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/us/politics/gay-marriage-supreme-court.html>, and Eugene Scott, *In Kavanaugh's non-answer on same-sex marriage, many heard a troubling response*, WASH. POST (Sept. 7, 2018), <https://www.washingtonpost.com/politics/2018/09/07/kavanaughs-non-answer-same-sex-marriage-many-heard-troubling-answer/> and Peter Baker, *A Conservative Court Push Decades in the Making, With Effects for Decades to Come*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/politics/supreme-court-conservatives-trump.html>.

15. See *infra* appendix for a list of district court cases in which transgender rights activists have prevailed.

16. *Id.*

17. See generally *EEOC v. R.G.*, 884 F.3d 560 (6th Cir. 2018) and *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (demoting an employee based on her “gender transition” violates Title VII because it is discrimination on the basis of sex) and *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (suspending an employee based on her “gender transition” violates Title VII because it is discrimination on the basis of sex).

18. *EEOC v. R.G.*, 884 F.3d at 574-575.

Though most Title VII cases that protect transgender people have been decided by the 6th circuit Court of Appeals, jurisprudence in Title VII claims can be applied to Title IX claims and jurisprudence in Title IX claims can be applied to Title VII claims.¹⁹ Both the 6th and 7th circuit Courts of Appeal have held that transgender students are protected from discrimination under Title IX in *Whitaker v. Kenosha Unified School District* (7th circ. 2017) and *Dodds v. U.S. Dept. of Education* (6th circ. 2016).²⁰

The 6th, 7th, and 11th Circuits have ruled that transgender people are protected under the Equal Protection clause of the Fourteenth Amendment. In 2017, the 7th circuit held that discrimination against a transgender student is discrimination on the basis of sex that violates Equal Protection.²¹ In 2011, the 11th circuit held that the termination of an employee based on transgender status, “gender transition,” and “bathroom concerns” constitutes a violation of Equal Protection, in *Glenn v. Brumby*.²² In 2016, the 6th circuit held in *Dodds v. U.S. Department of Education* that discrimination against transgender students violates Equal Protection.²³

Additional claims that succeeded in protecting transgender people in the federal courts of appeals are based on the federal Gender Motivated Violence Act and the Equal Credit Opportunity Act. In *Schwenk v. Hartford*, the 9th circuit held that the Gender Motivated Violence Act protects transgender people who have been targeted because they are transgender.²⁴ In *Rosa v. Park West Bank & Trust Co.*, the 1st circuit court of appeals held that refusing to serve transgender customers violates the Equal Credit Opportunity Act, because it is discrimination based on sex.²⁵

These decades of effort and success in litigation culminated when the first transgender rights case reached the Supreme Court in *G. G. v. Gloucester County School Board*. G.G., a sixteen-year-old transgender boy, was barred from the boys’ bathroom at his school after parents of his classmates heard that he was using the boys’ bathroom.²⁶ At their urging, the Gloucester County School Board created a new transgender bathroom policy that excludes transgender students from the bathrooms that coincide

19. *Preston v. Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206-207 (4th Cir. 1994).

20. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, 858 F.3d 1034, 1048-1049 (7th Cir. 2017) (discrimination against transgender students is sex discrimination under Title IX); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (discrimination against transgender students likely constitutes sex discrimination under Title IX).

21. *Whitaker*, 858 F.3d at 1048-1049.

22. *Glenn v. Brumby*, 663 F.3d 1312, 1316-1317 (11th Cir. 2011).

23. *Dodds*, 845 F.3d at 221.

24. *Schwenk v. Hartford*, 204 F.3d 1187, 1205(9th Cir. 2000).

25. *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215-216 (1st Cir. 2000).

26. *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016).

with their gender identities.²⁷ G.G. alleged that this policy discriminates against him on the basis of sex in violation of Title IX and Equal Protection.²⁸ Armed with a guidance from the Department of Education that interpreted Title IX to require that transgender students be able to use the bathroom consistent with their gender identity—guidance which merited *Auer* and *Chevron* deference²⁹—and with decades of precedent supporting his claim, G.G. was prepared when Gloucester County School Board petitioned for a writ of certiorari after the 4th circuit Court of Appeals ruled in G.G.’s favor.

III. The Shifting Climate

The 4th circuit ruled in favor of G.G. on April 19, 2016.³⁰ On Aug 29, 2016, the school board filed a writ of certiorari.³¹ While the parties in *G.G. v Gloucester County School Board* were waiting for the Supreme Court to hear the case, Donald Trump was elected president. On February 22, 2017—a mere 12 days before the case decided by the Supreme Court—the Department of Education, under Donald Trump appointee Secretary DeVos, pulled the Obama era Department of Education guidance which clarified that Title IX requires that transgender students be allowed to use restrooms consistent with their gender identity.³² The Supreme Court

27. *Id.* at 716.

28. *Id.* at 717.

29. In *Chevron*, the Court held that an agency’s regulation that interprets a statute is subject to deference. *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 862 (1984). In *Chevron*, the Environmental Protection Agency issued a regulation to clarify the Clean Air Act Amendments of 1977 that was challenged in court. *Id.* at 840-41. The Court held that if a term is ambiguous, an agency has the power to clarify that term within a statute, so that the agency may effectively implement the statute. *Id.* at 862. The Court determined that an agency’s definition of an unclear term should be upheld unless the interpretation is “arbitrary, capricious, or manifestly contrary to the Agency issued a regulation to clarify the Clean Air Act Amendments of 1977 that was challenged in court. *Id.* at 840-41. The Court held that if a term is ambiguous, an agency has the power to clarify that term within a statute, so that the agency may effectively implement the statute. *Id.* at 862. The Court determined that an agency’s definition of an unclear term should be upheld unless the interpretation is “arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 844. In *Auer*, the Court held that an agency’s amicus brief that interprets a statute is subject to deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). In *Auer*, the Court asked the Secretary of Labor to file an amicus brief interpreting the salary-basis test of the regulation at issue. *Id.* at 461. The Court held that the agency’s interpretation of its own regulation was “controlling unless plainly erroneous or inconsistent with the regulation.” *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

30. *Gloucester Cty. Sch. Bd.*, 822 F.3d at 725.

31. *Gloucester County School Board v. G.G.*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/gloucester-county-school-board-v-g-g/>.

32. Sandhya Somashekhar et al., *Trump administration rolls back protections for transgender students*, WASH. POST (Feb. 22, 2017), <https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4->

vacated the judgement and remanded “to the United States Court of Appeals for the Fourth Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.”³³ Even without a conservative majority, the Supreme Court refused to recognize the rights of transgender people. The Court did not have to vacate and remand—it could have protected G.G.’s rights based on the statute alone—but chose to remand. It is arguable that this decision was partially influenced by the shifting political climate: Trump empowered his Department of Education to rescind protections for a marginalized community and the Supreme Court refused to uphold transgender rights without the executive branch’s guidance. It is troubling that the Supreme Court would refuse to protect a marginalized group when the executive branch is unwilling to recognize their rights.

The Trump administration has also made tactical moves to prevent the success of *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* On October 24, 2018, as the Supreme Court decides whether to grant a writ of certiorari, the Department of Justice submitted a brief to the Supreme Court saying that Title VII does not protect transgender people from employment discrimination.³⁴ The Department of Justice maintained that Title VII’s prohibition of discrimination on the basis of sex does not prohibit discrimination on the basis of gender identity.³⁵ If the case is granted a writ of certiorari, this brief, coupled with the conservative makeup of the Supreme Court, may result in a decision that denies the humanity and innate rights of transgender people, encourages pervasive discrimination against a marginalized population, and stalls the progress of a rights movement decades in the making.

Even if the Supreme Court declines to hear *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, if impact litigation continues to be used, except in limited circumstances, it is likely that a case will come before the Supreme Court that results in precedent that negatively impacts transgender people. This could invalidate much of the beneficial precedent that currently exists in the circuit courts and will control for decades, causing unimaginable harm to generations of transgender people. The changing political climate has resulted in a situation where transgender rights are being abrogated at a time when they could have been enshrined. This climate has led to a necessary move away from the practice of using impact litigation to gain state recognition of trans rights. Instead, the Supreme

f913-11e6-bf01-d47f8cf9b643_story.html?utm_term=.edcdb53b16fe.

33. *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017).

34. Emily Birnbaum, *Justice Department says businesses can discriminate against transgender employees*, THE HILL (Oct. 24, 2018), <https://thehill.com/regulation/court-battles/413062-justice-department-says-businesses-can-discriminate-against-trans>.

35. *Id.*

Court must be avoided at all costs by queer and trans advocates alike. We must adopt a different set of strategies to survive and fight for liberation.

IV. Current Literature on Strategies

There is an abundance of literature regarding strategies of rights movements and effecting change within the United States. Paul Frymer's "Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-1985" explores how civil rights leaders changed their strategies over time. During the 1930s, the NAACP tried to get elected officials to act in support of civil rights.³⁶ When elected officials would not help, the NAACP turned to the courts, using impact litigation as a method for gaining state recognition of the rights of people of color.³⁷ This proved to be a much more effective strategy than the policy work that the NAACP had been doing until that point.³⁸ Much like the NAACP in the 1930s, transgender rights activists now must realize that the branch of government that we have invested our advocacy efforts into is no longer the branch at which we should be directing energy. We must recognize that the judicial branch is not our best option for gaining state recognition of our rights and must be flexible in our strategies, adjusting them when an avenue is futile.

As explained in Derrick A Bell's "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation," we cannot become stuck in following our previous strategies if doing so would harm the communities we are serving.³⁹ If advocates were to continue employing impact litigation as a primary tactic for transgender rights advocacy, they could risk bringing harm to the transgender community, instead of liberation. The transgender rights movement must change its strategies. Those in national organizations must listen to our communities, learning from the grassroots organizers and leaders, and responding to their ideas and concerns.⁴⁰ The most just liberation movements will come from the grassroots up, representing the needs of the community by ensuring that the community has a voice and control in all efforts.⁴¹

Though the Supreme Court is no longer a reliable avenue for ensuring state recognition of transgender rights, the lack of this forum for advocacy

36. Paul Frymer, *Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-85*, 97 AM. POL. SCI. REV. 483, 486 (2003).

37. *Id.*

38. *Id.*

39. See generally Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 489 (1976).

40. *Id.* at 483-86.

41. *Id.*

will not slow the movement. In fact, in the current environment, other branches of the US government are better suited to create more meaningful and long-lasting change than the courts. The legislative and executive branches are better equipped to recognize the rights of marginalized groups and ensure that those rights are upheld, because the courts are limited in what they can do and the efficacy of the change they can bring. In *The Hollow Hope*, Gerald Rosenberg explores the constraints on courts, the manner in which those constraints can be overcome, and the conditions—one of which must be met—for the courts to bring about significant social change. Rosenberg explains that courts are relatively constrained when creating large systemic changes. Additionally, he argues, it is a problem that we look to the courts for a legal solution to political and social problems.

Celebration of *Brown*, and cases like it, cause Americans to believe that they are relieved of the obligation to confront systematic racial biases that permeate society, as they see legal victories as presenting a complete solution to complex and pervasive societal issues, causing underlying societal problems to remain unchallenged. Additionally, when a victory is won in the courts, activists often see this as the end of the battle, when one of the greatest issues facing the court is implementation of its rulings after the fact. Successful litigation causes the movement to lose steam while all litigation requires a significant amount of manpower and resources from the movement. Furthermore, litigation mobilizes opponents in a way that legislation does not, as legislation is seen as the outcome of deliberation by a majority of our representatives, who accurately represent our interests, while litigation is often seen as the manifestation of the will of a solitary—or a few—activist judges, unaccountable to the opinions of the people.⁴²

42. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 10-36 (1991). Rosenberg recognizes three major constraints on the court. The first constraint is the fact that constitutional rights are limited; the set of rights enshrined in the constitution are mostly negative rights and don't encompass many areas, including the right to education, health, or housing. In order for a right derivative from the constitution to be found—for this constraint to be overcome—activists must build precedent supporting the conclusion that such a right exists. The second constraint is lack of independence from other legal branches. As judges are politically appointed and because Congress can invalidate court rulings by passing legislation, the adjudication process is highly political and leads to the involvement of both the executive and legislative branches. This constraint may be overcome if the judicial branch partners with one of the other branches when making a decision. The final constraint is the fact that courts do not have implementation power. This may be overcome with support—or lack of opposition—of policymakers and citizens. After these constraints are overcome, one of four conditions must be met for a judicial decision to be effective. The first condition is incentives to induce compliance. An example of this is if courts gave schools additional funding if they integrated. The second condition is costs for noncompliance. This occurred when the courts threatened to withhold funding if states did not comply with the drinking age of 21. The third condition is if the judicial reform allows markets to implement the decision. Such a market

Thus, courts may not have been the best avenue for bringing about social change in the long term anyway, so our inability to use the Supreme Court as the primary avenue to attempt such change might not be a great loss.

Michael McCann critiques Rosenberg's *The Hollow Hope* in his piece, *Reform Litigation on Trial*. McCann explains that the legislative and executive branches also have trouble creating effective social change—that the courts are not the only constrained branch.⁴³ None of the branches can unilaterally create change, as “[o]ur system of mixed and shared powers usually requires cooperation, or at least consent, from all branches for policy changes” to have a significant impact.⁴⁴ Thus, those engaged in the struggle for state recognition of transgender rights should not look to one branch alone as the method of gaining that recognition; all branches of the government—and aspects of society—should be used to advocate for transgender rights in different ways.

McCann's piece also makes clear the limited ways in which the courts may still be used to advocate for state recognition of transgender rights. While advocates can no longer use the Supreme Court as a primary means of effecting social change, court decisions may still be helpful in transgender rights efforts, as court decisions may be effective, outside of inspiring strict compliance with their rulings. As McCann explains, the law shapes how people think—it can inspire people to understand that they have rights, that certain actions are discriminatory, that hegemonic power structures are not impervious, and can impact the language that people use to understand their experience.⁴⁵ Litigation is also a way to get free publicity for a cause and can be used as a bargaining chip when one's rights have been abrogated.⁴⁶ Thus, the fact that the Supreme Court is less promising of an avenue for the transgender rights movement does not prevent activists from using the courts entirely, especially as a threat to ensure that peoples' rights are not abrogated or to encourage settlement when they are. However, it must be noted that the positive effects of litigation that McCann describes can be created through other means, which do not pose the same risks that litigation does. The way litigation can influence marginalized groups to think and discuss their experiences can be

implementation of the decision arose when private clinics were created after *Roe v. Wade* decriminalized abortions. The fourth and final condition is if courts making the decision give cover to politicians and other people integral to the implementation of the decision to act. After a court decides that funding to a program must be increased, administrators can request additional funding, while shifting the blame for increased costs to courts.

43. Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 727 (1992).

44. *Id.*

45. *Id.* at 736.

46. *Id.* at 736-40.

achieved through organizing, as well as community education and empowerment initiatives. Free publicity can be garnered through organizing, direct action, and policy advocacy. Finally, publicity itself is a bargaining chip; activists can threaten to bring a story to the press if a violation of one's rights is not remedied. Therefore, activists who plan use courts to achieve various results might consider using other branches instead, which significantly reduces the risk of Supreme Court review, but are not necessarily prohibited from using courts altogether, as long as the Supreme Court itself is avoided.

However, because the branches work together in a system of checks and balances, activists must be cautious of the impact the Supreme Court may have on gains in state recognition of transgender rights, even if they are made through other branches. Activists must be careful and thoughtful when introducing legislation, as Congress's power to create social change is limited by the court's power of statutory interpretation.⁴⁷ The Supreme Court is the highest arbiter of statutory interpretation and has the power to make nationally binding decisions on the meaning of legislation. As explored in Matthew R. Christiansen and William N. Eskridge's article, "Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011," when the Supreme Court interprets statutes, Congress may disagree with their interpretation and pass a new law to override the ruling and clarify the intent of the statute.⁴⁸ When the court interprets a statute to be more conservative than Congress intended—and Congress does not override this interpretation through legislation—the results can be an abrogation of the rights of vulnerable populations that the statute at issue was created to protect. Thus, if advocates were to succeed in getting Congress to pass legislation to protect transgender people, the courts could limit the protections granted, through statutory interpretation. The courts often move much quicker than Congress, so if the Supreme Court were to make such an interpretation, it would likely take quite some time for Congress to override that interpretation, if it is able to override at all. Partisanship and more pressing legislative agendas could prevent Congress from passing override legislation, allowing the newly conservative Supreme Court to chip away at any statutorily enshrined rights. Thus, any policy work intended to further transgender rights must take into account the fact that the Supreme Court will likely be willing to scrutinize legislation and argue that the statute protects less people than it was intended to. All future

47. Positive legislation may also inspire reactionary legislation or executive action.

48. Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1317 (2014). While one might not imagine that the Supreme Court would deviate from legislative intent with any frequency, there were 68 overrides in the 1970s, 75 in the 1980s, and 104 in the 1990s. *Id.* at 1356.

policy work must include strategies to prevent such negative interpretation by the Supreme Court and should include strategies to facilitate legislative override. Advocates attempting to advance state recognition of transgender rights must be prepared for the Supreme Court to be an adversary to those efforts, regardless of the branch of government that advocates use to create change.

Finally, while it is likely not possible to create favorable policy through federal agencies at this time, just as federal legislation may not be possible while Republicans control the Senate, transgender rights advocates must lay the proper groundwork to do so in the future, in a country where the Supreme Court will be an adversary to transgender rights.⁴⁹ Federal agencies under Trump are trying to define transgender people out of existence and remove all legal protections against discrimination against transgender people.⁵⁰ As previously mentioned, the Department of Justice has already announced that transgender people are not protected against employment discrimination, and has enacted countless other rollbacks against the community.⁵¹ However, there is a possibility for favorable policy changes to occur, if someone other than Trump is elected to the presidency in 2020. Regardless, more transgender rights organizations must become involved with federal agencies as soon as possible. Neil Komesar and Wendy Wagner's "The Administrative Process From The Bottom Up: Reflections On The Role, If Any, For Judicial Review," discusses the necessity of organizing to be repeat players in agency decision making to have an impact on the process.⁵² Transgender rights advocates should become more involved in challenging agency decisions so that they might be more likely to influence outcomes, like the conservative minoritarian groups.⁵³ Activists may have better outcomes pursuing change through state agencies, just as they may through state legislatures, at this time. Just as with federal bodies, advocate involvement with state bodies should occur immediately, to begin creating change or to build a foundation to create such change.

49. It is important to note that state legislation is viable at this time.

50. Somashekhar et al., *supra* note 32.

51. Birnbaum, *supra* note 34.

52. Neil Komesar & Wendy Wagner, *Essay: The Administrative Process from the Bottom Up: Reflections on the Role, If Any, for Judicial Review*, 69 ADMIN. L. REV. 891, 917-19 (2017).

53. "Minoritarian groups" is used to describe industry and corporate interest groups in this work. Transgender rights advocates did such work in the Protect Tans Health campaign. *Protect Trans Health*, MEDIUM, <https://medium.com/protect-trans-health>.

V. The Move Away from Using Courts

Now that the transgender rights movement should avoid bringing cases to the Supreme Court of the United States, strategies other than impact litigation must be explored. There are many examples from trans and queer rights advocacy history that can inform future strategies.

a. Community Wellbeing and Defense

In times of increased discrimination, the wellbeing of marginalized communities is especially at risk. If federal anti-discrimination legislation were to no longer protect transgender people, there will be an increase in anti-trans discrimination in the areas of housing, health care, education, and employment. This will result in increased trans homelessness and increased inability to work in legal professions, which will lead to increased imprisonment of transgender people. The mental health of the population will decline, while health care discrimination rates increase, which will result in harms to the community including inability to work, medical complications from going to unlicensed physicians, and heightened rates of self-harm and death by suicide.

These were the conditions under which Sylvia Rivera and Marsha P. Johnson, mothers of the transgender rights movement in the United States, began their advocacy. The pair created Street Transvestite Action Revolutionaries (STAR) after fighting police in the Stonewall Riots.⁵⁴ When STAR was formed in 1970, it was the first transgender rights organization in the United States.⁵⁵ Rivera and Johnson created the organization to support the most marginalized people in the community, housing homeless people and helping “anybody that needed help at that time.”⁵⁶ Initially, they occupied an abandoned house on the Lower East Side of Manhattan and set up a home for transgender youth living on the streets.⁵⁷ Eventually, they “secretly turned hotel rooms into temporary communal living spaces, sometimes for 50 or more people.”⁵⁸ Survival was STAR’s central mission; survival, “as both an attempt to provide for basic

54. Megan E. Davidson, *Transgender Cultural Activism in the United States: Sexed Bodies, Gender Identities, Contentious Politics, and Social Change* 82 (May 2, 2007) (unpublished Ph.D. dissertation, Binghamton University), PQDT 304721423.

55. *Id.*

56. Interview with Sylvia Rivera by Leslie Feinberg, Founding Member, Gay Liberation Front (n.d.), *infra* note 75.

57. Davidson, *supra* note 54, at 84.

58. Ehn Nothing, *Queens Against Society*, in *STREET TRANSVESTITE ACTION REVOLUTIONARIES: SURVIVAL REVOLT, AND QUEER ANTAGONIST STRUGGLE* 3, 8 (Untorelli Press n.d.).

needs of living and as a tension toward self-defense and offensive struggle against a society that threatened them.”⁵⁹ A primary concern of STAR was providing trans and gender nonconforming people with food, shelter, safety, and money.⁶⁰ They supported trans and queer people in jails when no other organizations would.⁶¹

The transgender community is explicitly under attack by the federal government, making more urgent the always present need to engage in community defense and to invest in community wellbeing. Transgender rights advocates must create and support networks that engage in this work. The Trans Lifeline (a transgender run suicide and crisis hotline), Rad Remedy (a directory network for transgender competent medical providers), Transgender Law Center and National Center for Lesbian Rights’ helplines (legal advice hotlines that suggest transgender friendly attorneys), TGIJP and Black and Pinks’ prison mail projects (trans and queer led information and pen pal services for trans people inside prisons and jails), free name and gender ID clinics, and transgender focused shelters are all especially necessary right now.

There are many services that should be created to support transgender people. Pro bono networks for the representation of transgender people in prisons and jails should be established to meet the needs of a chronically underserved population. Transgender cultural competency training for attorneys engaged in pro bono work and the creation of transgender focused nonprofits in underserved areas are also vital. These services and services like them ensure that transgender people stay alive, thriving, and fighting for liberation. The wellbeing and continued existence of transgender people is itself a monumental act of resistance in a society insistent on eliminating and erasing this group. Thus, people must be encouraged to focus their efforts on supporting such groups and projects; volunteering opportunities should be provided and people must be willing to lend their personpower in these volunteering roles.

b. Organizing

Organizing is one of the most important tactics that can be a substantial foundation to create change in an adverse political climate. There are many facets to organizing, from building coalitions and information networks, educating the community about their rights, moving people in power to support the cause, educating the public, and organizing

59. *Id.* at 9.

60. *Id.* at 8.

61. Sylvia Rivera, Y’all Better Quiet Down (1973), in *STREET TRANSGESTITE ACTION REVOLUTIONARIES: SURVIVAL REVOLT, AND QUEER ANTAGONIST STRUGGLE* 30, 30 (Untorelli Press n.d.).

direct action resistance.

i. Education

Education—of both the public and the transgender community—has been a necessary strategy to employ in the United States and European transgender rights movements. While transgender and gender nonconforming people have always existed, the community has been erased from Western history. A notable example of such an occurrence is when the contents of Magnus Hirschfeld’s—a Jewish queer rights activist who began his advocacy in 1896—Institut für Sexualwissenschaft (Institute of Sexology) were burned by Nazis on May 6, 1933, destroying “medical records, which contained detailed notes about the nuances of the complicated procedures [necessary for gender affirming medical care], alongside untold volumes of thoughts, stories, and studies on” transgender people.⁶² Much of the early transgender rights movement involved educating cisgender and transgender people on the transgender experience.

Christine Jorgensen is often referred to as the first transgender celebrity in the United States. She was an ex-GI married to a woman when she came to terms with the fact that she was transgender.⁶³ Christine made headlines in the United States in 1952, when she came out as transgender after she underwent gender affirming surgeries in Sweden.⁶⁴ She made headlines again when she was denied a marriage license in 1959, because the gender on her birth certificate was listed as male.⁶⁵ Her public visibility contributed to a shift in understanding about the rigidity of gender in the United States. The publicity that she had, as well as her autobiography, contributed to early public education on transgender issues in the United States.⁶⁶

Virginia Prince was one of the first community educators in the transgender rights movement in the United States. Her earliest known writing, titled “Homosexuality, Transvestism and Transsexualism: Reflections on Their Etiology and Difference” was published in 1957.⁶⁷ She began publishing *Transvestia* magazine, a magazine by and for

62. Lucy Diavolo, *LGBTQ Institute in Germany Was Burned Down by Nazis*, TEEN VOGUE (Sept. 20, 2017), <https://www.teenvogue.com/story/lgbtq-institute-in-germany-was-burned-down-by-nazis>.

63. N John T. McQuiston, *Christine Jorgensen, 62, Is Dead; Was First to Have a Sex Change*, N.Y. TIMES, May, 4 1989, at D22.

64. *Id.*

65. *Id.*

66. *Id.*

67. C. V. Prince, *Homosexuality, Transvestism and Transsexualism*, 11 AM. J. PSYCHOTHERAPY 80 (1957).

transgender and gender nonconforming people, in 1960.⁶⁸ In 1961, she was prosecuted for distributing obscene materials through the mail.⁶⁹ She was given probation and the court forbade her from wearing women's clothing.⁷⁰ Her lawyer requested permission for her to dress in women's clothing for educational presentations.⁷¹ In 1968, Virginia Prince began "living full-time as a woman."⁷² *Transvestia* continued to run until the 1979 and Prince published other educational works, such as *The Transvestite and His Wife* in 1967 and *How To Be a Woman Though Male* in 1971.⁷³

Public education has been a necessary aspect in gaining public acceptance for the transgender community. Activists attempting to counter attacks on the transgender community can emphasize education—both to create cisgender understanding of transgender people and also to support transgender people who may not have the ideological framework to describe their experience and who feel othered by society. Education helps transgender and gender nonconforming people feel less alone by providing people words to describe what they are feeling, while rooting them in a historical context. The education done by activists thus far has had a large effect on providing people the knowledge to allow them to be who they are. According to a 2017 GLAAD study, 12% of people ages 18-34 identify as transgender or gender nonconforming, compared to 6% of people ages 35-51, and 3% of people ages 52 and older.⁷⁴ The visibility of transness has made people feel more comfortable identifying as transgender. Education can also be used to inform people of their rights. This is especially important when the federal government is rolling back peoples' rights; there tends to be confusion over what rights remain. Know your rights education campaigns by transgender rights activists will be vital in the coming years. Furthermore, education on transgender issues and experience can build public sentiment in favor of transgender rights, over time, making it difficult for the government to sustain policies that are hostile to transgender people. Education is also often a pillar in ballot campaigns, to ensure that the people vote to recognize the rights of marginalized communities. We must ensure that transgender, intersex, and queer

68. *They called themselves "transvestites" and "crossdressers" then*, in VIRGINIA PRINCE: PIONEER OF TRANSGENDERING 7 (Richard Ekins & Dave King eds., The Haworth Medical Press 2006).

69. Univ. of Vict., *Virginia Prince*, TRANSGENDER ARCHIVES, <https://www.uvic.ca/transgenderarchives/collections/virgina-prince/index.php>.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. GLAAD, *Accelerating Acceptance* (2017), http://www.glaad.org/files/aa/2017_GLAAD_Accelerating_Acceptance.pdf.

histories and sexual education are taught in schools and that trans, intersex, and queer histories and experiences are widely disseminated and given a spotlight in larger society.

ii. Coalition and Network Building

Transgender rights advocates must begin building connection with sympathetic congresspeople and state legislators now, so that we may try to make changes in federal legislation. It is also imperative that transgender rights advocates build coalitions to further both state and federal policy advocacy and create information networks, so that coalition members and other advocates may be notified when good and bad legislation is introduced, when agency regulations are being considered, and when litigation is underway that might reach the Supreme Court.

Advocates must create nationwide coalitions of national, state, and local organizations interested in furthering transgender rights. It is imperative that transgender led organizations lead the advocacy of the coalition, however, queer organizations must participate and support transgender rights advocacy.

Queer organizations should engage in the efforts to preserve and gain state recognition of transgender rights, and all efforts should be made to ensure that such organizations recognize the struggle for transgender rights to be a central priority in their activism. Queer organizations can contribute most by undertaking the most personpower intensive and expensive projects to further transgender rights that are proposed by trans leadership through coalitions and networks. For decades, transgender rights advocates have fought for the liberation of all LGBTQPIA2 people. For decades, the queer rights movement has not fought for transgender people.⁷⁵ The gay rights

75. Beginning in the 1950s, the Mattachine Society and the Daughters of Bilitis—early gay rights organizations—discouraged visible gender nonconformity in order to try to gain acceptance by mainstream society; effectively excluding transgender people. Greer, *supra* note 10. In 1971, Gay Activists Alliance purposefully excluded transgender people from proposed anti-discrimination legislation in New York City, believing that such legislation would be easier to pass without transgender people; it still did not pass until 1986. *Id.* In 1973, Sylvia Rivera gave her famous speech “Y’all Batter Quiet Down,” at the Liberation Day Rally in New York, in which she spoke of the daily injustices faced by transgender people and decried the white gay middle class treatment of transgender people, amid a torrent of boos and insults from her gay audience. *Id.* Sylvia Rivera and Marsha P Johnson were banned from future gay pride events as a result and organizers told Marsha P Johnson that they gave the movement a “bad name.” *Id.* In 1993, the National Gay and Lesbian March on Washington’s organizing committee chose to keep “transgender” out of the official name for the march. *Id.* In 2007, the Human Rights Campaign elected to keep transgender people out of the Employment and Non Discrimination Act, despite promising transgender activists that they would be included. *Id.* In 2018, anti-trans activists were allowed to lead the London Pride march. Patrick Greenfield, *Pride Organisers say sorry after anti-trans group leads march*, GUARDIAN (July 8 2018), <https://www.theguardian.com/world>

movement has explicitly decided to distance itself from transgender people, due to a perceived ease of assimilating into mainstream culture if transgender people are not included. These decisions by the gay rights movement—the framing of gayness as a matter of interpersonal relationships (love), instead of gender nonconformance (being), as well as the choice to exclude transgender people from legal protections at every turn—made the transgender community as vulnerable as it is today. As a result, LGB people have experienced an expansion of their rights and public acceptance that is far larger than the expansion of rights that transgender people have experienced.

Now, the rights of transgender people are under attack and transgender people are not explicitly included in many legal protections. In response, gay rights organizations should make transgender rights a priority in their work, and should be willing to take on the most expensive and personpower intensive tasks, due to their far larger budgets, and the moral obligation that they have to assist the transgender people that they have left behind.⁷⁶ Queer organizations should make the rights of transgender, gender nonconforming people, and intersex people a central focus of their work, and must take direction from leaders in those communities to ensure that their needs are properly met. By furthering the state recognition of transgender rights, queer groups will also continue to normalize and reinforce protection of LGB rights. When opponents to LGBTQPIA2 rights attack transgender rights, they attempt to invalidate arguments that also protect queer people and create narratives that alienate and create animosity to both trans and queer people. When our communities stand united, we can succeed in ensuring that the rights of all LGBTQPIA2 people, especially those who are currently most vulnerable, are protected.

Similarly, there must be cross-issue solidarity. Trans groups should assist a variety of movements, and groups leading those movements should assist transgender rights efforts as well. Transgender rights advocates can support harm reduction efforts, criminal justice reform, efforts to decriminalize sex work, disability rights efforts, health care reform, et cetera. Likewise, people in those movements should support the

2018/jul/08/london-pride-organisers-say-sorry-after-anti-trans-group-leads-march.

76. In 2018, HRC reported \$52,330,087 in total assets and in 2017 Lambda Legal reported \$21,665,093 in total assets. Human Rights Campaign, Inc. and Human Rights Campaign Foundation, *Combined Financial Statements 3* (2019), https://assets2.hrc.org/files/assets/resources/HRC-HRCF-Combined-2019-FS.pdf?_ga=2.227067801.526044233.1569007732-646996058.1569007732. Lambda Legal, *Financial Statements 3* (2017), https://www.lambdalegal.org/sites/default/files/audited_financial_statement_2017_2017-a.pdf. Meanwhile, in 2017, National Center for Transgender Equality reported \$2,656,521 in total income. National Center for Transgender Equality, *Annual Report 2017: Forward Together* 13 (2017), <https://transequality.org/sites/default/files/docs/resources/annual%20report%202017%20final.pdf>.

transgender rights movement. Solidarity across issues increases advocates' likelihood of success in their efforts; advocates who counter oppression and support the people are strongest when they work together. Thus, advocates should prioritize cross-issue solidarity.

A united front is possible. Large coalitions are easier to maintain now than ever, as a result of technology, allowing trans and queer organizations to work toward the common goal of achieving state recognition of transgender rights, while maintaining trans leadership. Many organizations can be actively involved in a coalition by using information networks for the purpose of advocacy. The most effective method for ensuring that all people in the network stay informed of developments is through the use of regular conference calling, but there are many other options available.⁷⁷ Advocates should focus on creating and expanding already existing networks. More advocates should be looped into networks, so that people are made aware of areas where the movement needs support, so that available personpower might be directed at these areas and that advocacy may be targeted and on message.

The Supreme Court should generally be avoided. However, some cases may be manufactured for impact litigation or be brought against states, cities, companies, or other bodies that have supportive policies by conservatives as an attempt to abrogate trans rights. Information networks should inform coalition members of such developments. Parties who represent transgender people in such litigation that may reach the Supreme Court and create anti-trans precedent, despite the moratorium on bringing cases to the Supreme Court, must be encouraged to cease litigation before the case is able to go to the Supreme Court, even if the result is negative precedent in a Court of Appeals.

iii. Direct Action

Visible protest has always been a method used by the transgender rights movement. The movement was started by transgender women of color fighting police officers with whatever they had at hand—utensils, coffee mugs, bricks—in response to years of pervasive harassment and abuse. This was true at Cooper's Do-nuts in 1959, Compton's Cafeteria in 1966, and Stonewall in 1969.⁷⁸ The first transgender rights organization,

77. It is common practice for hosts of an information call to initiate a national policy call with dozens or hundreds of people on the line, all muted, with only the designated speaker unmuted. Email updates of recent events are also an effective way of keeping advocates updated, however, the lack of information on whether one actually takes the time to read the material can cause such a method to be ineffective and be a waste of personpower to curate. Webinars and facebook secret groups are also effective means of keeping people informed of issues.

78. Opinion, *Milestones in the American Transgender Movement*, N.Y. TIMES,

STAR, immediately became involved in direct action protest. Sylvia Rivera recounts: “[t]here was a mass demonstration that started in East Harlem in the fall of 1970. The protest was against police repression and we decided to join the demonstration with our STAR banner. That was one of [the] first times the STAR banner was shown in public, where STAR was present as a group.”⁷⁹ Sylvia Rivera revived STAR and their direct action activities in the 1990s after “the murder of a trans woman in New York City, Amanda Milan; the refusal of the Empire State Pride Association (ESPA) to include gender identity and expression in the state Employment Non-Discrimination Act; and what Rivera saw as a need for greater trans protest to the current conditions for trans people in the United States.”⁸⁰ On the renewed need for STAR, Rivera stated: “The mainstream gay community who have obtained their rights have left us off of all of their bills. People do not have to hire transgender women or men because there are no laws protecting us . . . that’s one of the reasons why at the beginning of this year I decided to resurrect STAR. . . If we continue to be invisible, people are not going to listen to us. And if we ourselves don’t stand up for ourselves, nobody else will do that for us.”⁸¹

Transgender rights advocates must continue the tradition of protest that has always been a part of the transgender rights movement. Public dissent empowers the people, brings trans issues to the attention of the public, and moves those who can be moved by the suffering and resistance of transgender folks.

c. Policy Work

Nancy Pelosi has promised to make the Equality Act—a bill that would explicitly add the LGBT community to the Civil Rights act, prohibiting discrimination—a priority, now that the Democratic Party won the House of Representatives in 2018.⁸² While such a bill cannot be successful while Republicans control the Senate, it will signal Democratic willingness to pursue such a course when they secure a majority in both houses in the future. Supporting a leftward shift in Congress will help legislation like the Equality Act pass in the future.

Legislation should be introduced in both state and federal contexts to

<https://www.nytimes.com/interactive/2015/05/15/opinion/editorial-transgender-timeline.html>
(updated Aug. 28, 2015).

79. Feinberg, *supra* note 56.

80. Davidson, *supra* note 54, at 84.

81. *Id.*

82. Chris Johnson, *Pelosi to make Equality Act a top priority if Dems retake House*, WASH. BLADE (Oct. 17, 2018), <https://www.washingtonblade.com/2018/10/17/pelosi-to-make-equality-act-a-top-priority-if-dems-retake-house/>.

ensure that the rights of transgender and gender nonconforming people are protected. However, legislation introduced is likely to be challenged in a Supreme Court that is adverse to transgender rights. There are various methods by which advocates can attempt to craft legislation impervious to attack by the Supreme Court, which are strongest if used together. Advocates can draft legislation with incredibly clear language regarding who is protected and what the protections encompass; if there is less ambiguity, there is less that a hostile court or agency can interpret. Advocates can also build allyship networks within Congress to attempt to ensure that Congress will override any decision by the Supreme Court contrary to the purpose of the statute. Furthermore, advocates and their accomplices can organize to support people in congressional elections who would support such an override.⁸³ Finally, just as conservative interest groups adopted strategies of public interest lawyers, as discussed in Ann Southworth's "Conservative Lawyers and the Contest Over the Meaning of 'Public Interest Law,'" transgender rights lawyers may be able to take some strategies from conservatives to affect their ends.⁸⁴ Conservatives have historically used neutral language to enact policies that actually target specific groups, such as voter identification laws, which use facially neutral language to suppress the votes of people of color. Various rights movements can use the tactic of neutral language aiming at specific results, to advantage marginalized groups instead of disadvantage them. For example, solitary confinement in prisons and jails disproportionately harms marginalized groups, including transgender people. Advocating for legislation that will improve transgender peoples' lives dramatically even without explicitly and specifically protecting the group is one way advocates can reduce the harm levied against transgender people at this time. Due to resource scarcity and the urgent need to directly address the current abrogation of transgender rights, this tactic may be especially effective if implemented by allies, coalition partners, and smaller transgender rights organizations instead of the primary national transgender rights organizations.

State legislatures are the arena in which transgender rights advocates may make the largest difference during this time. There is much work that can be done in states with both relatively liberal or conservative legislatures. Activists who live or operate in states that have yet to pass nondiscrimination protections for trans and queer people should introduce such legislation if it has a chance of passing and should create an

83. Due to limited budgets and personpower, this may not be as effective or likely, unless allies with deep pockets become involved in this initiative.

84. Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of "Public Interest Law"*, 52 UCLA L. REV. 1223 (2005).

environment in which such a bill would have a possibility of passing by emphasizing public education and network and coalition building, if the bill would likely not pass now. Similarly, legislation banning conversion therapy, requiring single user restrooms to be designated all gender, recognizing more than two genders, giving transgender people an affirmative right to use restrooms and other facilities consistent with their genders, mandating that transgender people be able to choose which gendered jails and prisons to be housed in, and requiring schools to teach trans and queer history, as well as trans, queer, and intersex inclusive sex education should be prioritized. Legislation should also be introduced to ensure that state health insurance includes gender affirming care. Solitary confinement in prisons, jails, and other forms of detention—which, as previously mentioned, adversely and disproportionately impacts transgender people—must be abolished. Legislation must be passed that requires greater oversight, monitoring, and accountability of police officers, to lessen the pervasive harassment and physical and sexual abuse that they use to terrorize the transgender community. Neutral language bills—ones that do not mention the word transgender—may be more likely to succeed, as they might garner more partisan support and support from other advocates whose interests are also met by such legislation. Legislation that reforms incarceration and policing may be effectively language neutral. Legislation passed by transgender rights advocates will extend protections to states that can no longer count on federal protections. All laws created by advocates will provide precedent and model language, which makes it easier for other states, and eventually the federal government, to adopt similar legislation in the future.

Finally, as previously mentioned, transgender rights advocates must position themselves as repeat players challenging federal agency interpretations to be able to shape agency policy in the future.⁸⁵ Vehemently opposing bad regulations now will also help build public record of arguments that can be used to support transgender rights in the future, and public comment campaigns can help energize supporters into engaging more with the movement.

d. Limited Litigation

Though the Supreme Court must be avoided, there are still limited circumstances under which transgender rights advocates may successfully litigate. Causes of action not rooted in federal law or with neutral language can still be used in state courts, as long as litigation ceases well before it reaches the Supreme Court. Torts like public disclosure of private fact

85. When a more transgender friendly president is in power.

might be used to protect transgender employees from having their transgender status or deadnames revealed in the workplace. The Americans with Disabilities Act can be used to require that transgender people receive accommodations for their depression, anxiety, or posttraumatic stress disorder in the workplace. These accommodations should require protection from misgendering and provide the right to use the bathroom consistent with their genders, so as to avoid aggravating the symptoms of their disabilities. Furthermore, state nondiscrimination provisions that explicitly protect on the basis of gender identity can be used to support litigation with less fear that the Supreme Court can reverse a granting of protection. Additionally, activists should file amici briefs in cases where the outcome would benefit transgender people, including cases on policing practices, incarceration, and immigration. Queer organizations should file cases that will benefit the transgender community, in such a manner, whenever possible. Thus, advocates can develop creative solutions to the problem that the Supreme Court poses.

VII. Conclusion

Though the Supreme Court likely will be an adversary to transgender rights for decades, this cannot slow the transgender rights movement. Advocates must use a variety of methods to ensure that the rights of transgender people are not abrogated, from community preservation tactics; to organizing, including education, coalition and network building, and direct action; policy advocacy; and limited litigation. Though conditions have changed, advocates will adapt and persevere. As the public witnesses the executive branch and the Supreme Court's attack on transgender people, public sentiment may shift to support transgender people, which could allow advocates to achieve protections that would not have been available in previous years. The success of the transgender rights movement depends on how quickly and effectively advocates mobilize, the networks and coalitions they build, and the tactics that they use.

Appendix: Favorable District Court Decisions

Tovar v. Essentia Health, cv-16-100-DWF-LIB (D. Minn. Sept. 20, 2018) (holding that a health care plan that excluded health services related to gender dysphoria discriminated against transgender people in violation of the Health Care Rights Law (Section 1557 of the Affordable Care Act), which prohibits discrimination in health care).

Boyden v. Conlin, No. 17-cv-264-WMC, 2018 (W.D. Wis. September 18, 2018) (holding that a state employee health plan refusal to cover transition-related care constitutes sex discrimination in violation of Title VII, Section 1557 of the ACA, and the Equal Protection Clause).

EEOC v. A&E Tire, 1:17-cv-02362 (D. Colo. Sept. 5, 2018) (holding that an employer that denied an applicant a job because he was transgender likely violated Title VII of the Civil Rights Act of 1964).

Adams v. School Board of St. Johns County, 318 F.Supp.3d 1293 (M.D. Fla. Jul. 26, 2018) (holding that excluding transgender student from school restrooms consistent with his gender identity constituted sex discrimination under Title IX and the Equal Protection Clause).

Flack v. Wisconsin Department of Health Services, 18-cv-309, 2018 WL 3574875 (W.D. Wis. Jul. 25, 2018) (holding that Medicaid exclusion targeting transgender people constitutes sex discrimination under Affordable Care Act and Equal Protection Clause).

Doe v. Massachusetts Department of Correction, et al., No. CV 17-12255-RGS, 2018 WL 2994403 (D. Mass. June 14, 2018) (holding that “where a State creates a classification based on transgender status, the classification is tantamount to discrimination based on sex” under the Equal Protection Clause).

Grimm v. Gloucester County School Board, No. 4:15-cv-54 (E.D. Va. May 22, 2018) (holding that denying a transgender boy access to school restrooms matching his gender violated Title IX and the Equal Protection Clause of the U.S. Constitution)

Parker v. Strawser Construction, No. 2:17-cv-541, 2018 WL 1942374 (S.D. Ohio Apr. 25, 2018) (affirming that Title VII protects against anti-transgender discrimination).

Wittmer v. Phillips 66 Co., No. CV H-17-2188, 2018 WL 1626366 (S.D. Tex. Apr. 4, 2018) (holding that Title VII protects transgender workers against discrimination).

M.A.B. v. Board of Education of Talbot County, 286 F. Supp. 3d 704 (D. Md. March 12, 2018) (holding that prohibiting a transgender boy from boys’ locker room based on transgender status is a Title IX sex-discrimination claim as well as a gender-stereotyping claim).

F.V. v. Barron, 286 F. Supp. 3d 1131 (D. Idaho March 5, 2018) (finding the practice of denying transgender individuals’ applications to

change the sexes listed on their birth certificates violated Equal Protection Clause).

Karnoski v. Trump, C17-1297-MJP, 2017 WL 5668071 (W.D. Wash. Dec 11, 2017) (granting preliminary injunction against policy of excluding transgender individuals from serving openly in the military).

A.H. ex rel. Handling v. Minersville Area School District, No. 3:17-CV-391 2017 WL 5632662 (M.D. Pa. Nov. 22, 2017) (holding that excluding a transgender girl from girls' school restrooms states a sex discrimination claim under Title IX and the Equal Protection Clause of the Constitution).

Stone v. Trump, 280 F. Supp. 3d 747 (D. Md. Nov. 21, 2017) (discrimination against transgender people is gender-based discrimination under the Equal Protection Clause of the Constitution).

Prescott v. Rady Children's Hospital-San Diego, 265 F. Supp. 3d 1090 (S.D. Cal. Sept. 27, 2017) (holding that discrimination against transgender patients violates the Affordable Care Act).

E.E.O.C. v. Rent-a-Center East, Inc., 264 F. Supp. 3d 952 (C.D. Ill. Sept. 8, 2017) (holding that discrimination against transgender workers violates Title VII).

Brown v. Dept. of Health and Hum. Servs., No. 8:16DCV569, 2017 WL 2414567 (D. Neb. June 2, 2017) (holding that discrimination against transgender people constitutes sex discrimination that is subject to heightened scrutiny under the Equal Protection Clause of the Constitution).

Smith v. Avanti, 249 F. Supp. 3d 1149, 2017 WL 1284723 (D. Colo. Apr. 5, 2017) (holding Fair Housing Act prohibited discrimination against a transgender woman and partner).

Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267 (W.D. Pa. Feb. 27, 2017) (holding that excluding transgender students from restrooms consistent with their gender identity likely constitutes sex-based discrimination in violation of the Equal Protection Clause).

Mickens v. Gen. Elec. Co., No. 16-603, 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016) (holding termination of employee based on his transgender status violates Title VII).

Roberts v. Clark Cty. Sch. Dist., No. 2:15-cv-00388, 2016 WL 5843046 (D. Nev. Oct. 4, 2016) (holding that excluding transgender employee from restrooms consistent with his gender identity constitutes sex-based discrimination under Title VII).

Bd. of Ed. of Highland Local Sch. Dist. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850 (S.D. Ohio Sept. 26, 2016) (holding that excluding transgender student from restrooms consistent with her gender identity likely constituted sex-based discrimination under Title IX and the Equal Protection Clause).

Cruz v. Zucker, 195 F.Supp.3d 554 (S.D.N.Y. Jul. 5, 2016) (holding

that discrimination on the basis of gender identity is sex discrimination under Section 1557 of the Affordable Care Act).

Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509 (D. Conn. Mar. 18, 2016) (holding that discrimination based on transgender status of a job applicant constitutes sex-based discrimination under Title VII).

Doe v. State of Ariz., No. CV-15-02399-PHX-DGC, 2016 WL 1089743 (D. Ariz. Mar. 21, 2016) (holding discrimination against a transgender employee constitutes sex-based discrimination under Title VII)

Dawson v. H&H Elec., Inc., No. 4:14CV00583 SWW, 2015 WL 5437101 (E.D. Ark. Sept. 15, 2015) (holding that termination of an employee based on transgender status and gender transition constitutes discrimination based on sex under Title VII).

Norsworthy v. Beard, 87 F. Supp. 3d 1164 (N.D. Ca. Oct. 5, 2015) (granting preliminary injunction against prison officials and medical staff for denying necessary medical treatment for [incarcerated person's] gender dysphoria—finding likely Equal Protection Clause and Eighth Amendment violation).

U.S. v. S.E. Okla. State Univ., No. CIV-15-324-C, 2015 WL 4606079 (W.D. Okla. July 10, 2015) (holding that harassment, health insurance exclusion, and termination based on gender transition constituted sex stereotyping discrimination under Title VII).

Rumble v. Fairview Health Servs., No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (holding that discrimination against hospital patient based on his transgender status constitutes sex discrimination under Section 1557 of the Affordable Care Act).

Finkle v. Howard Cty., 12 F. Supp. 3d 780 (D. Md. 2014) (holding a claim of discrimination based gender identity constitutes sex discrimination under Title VII).

Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 F. Supp. 2d 653 (S.D. Tex. 2008) (holding that withdrawal of job offer based on transgender status constitutes sex discrimination under Title VII).

Mitchell v. Axcan Scandipharm, Inc., No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. 2006) (holding that claim of harassment targeting transgender employee constituted discrimination based on sex stereotypes under Title VII).

Tronetti v. Healthnet Lakeshore Hosp., No. 03-CV-0375E, 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003) (holding claim of discrimination based on gender transition constitutes sex discrimination under Title VII).

Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. Sept. 19, 2008) (holding that withdrawal of job offer based on applicant's gender transition constitutes sex-based discrimination under Title VII of the 1964 Civil Rights Act)."

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