

# Framing Trans Rights

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## ABSTRACT

In the wake of marriage equality, opponents of LGBT rights refocused their attention, making transgender rights their main target. To persuade voters to maintain gender identity antidiscrimination protections, LGBT rights campaigns presented trans identity in a specific, but limited, way. These campaigns emphasized gender-conforming transgender individuals—those who adhere to male and female stereotypes—and thereby implicitly reinforced the gender binary. Although LGBT advocates have largely succeeded in their efforts to preserve LGBT rights, their messaging may undermine the movement’s broader litigation strategy and subject nonbinary members of the transgender community to greater discrimination and persecution.

The trans rights framing choices thus raise questions about how the LGBT movement’s advocacy decisions blur the lines between success and failure, advancement and retrenchment. To explain this tension, this Article details the history of marriage equality campaign strategies, drawing on primary source campaign materials to identify how and why LGBT rights groups applied those frames to trans rights, as well as the consequences of those framing choices. This Article then analyzes the motivations behind social movements’ framing decisions more broadly to argue for an alternative approach to trans rights advocacy.

Framing trans rights is a significant issue that extends far beyond whether a specific city or state maintains or eliminates its gender identity protections. Although framing in an electoral campaign may seem far removed from the work of courts, legislatures, and administrative agencies, this Article demonstrates how porous the boundaries are, such that the frames of the former have a substantial impact on the latter. Drawing on the scholarly literature on acoustic separation, popular constitutionalism, and slippery slopes, this Article explains why LGBT state and local ballot measure contests cannot be separated from the movement’s broader strategies. It therefore demonstrates that electoral frames are integral to legal advocacy writ large.

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### INTRODUCTION

A funny thing happened on the way to the altar. As gays and lesbians gained visibility, acceptance, and approval, backlash to gay and lesbian legal victories increasingly took the form of opposition to

transgender rights. Beginning in 2012—the year the marriage equality movement first won at the ballot box—LGBT rights opponents across the country successfully led campaigns to repeal antidiscrimination protections for gays and lesbians by convincing voters that gender identity provisions would grant sexual predators access to women’s restrooms.<sup>1</sup> From municipal ordinances with limited reach to state laws that became national controversies, these campaigns exploited the anxieties of a public less familiar with transgender individuals than their gay and lesbian allies to attain anti-LGBT legislative goals.<sup>2</sup> In the past year, ballot box efforts have narrowed in focus to rescind only transgender protections.<sup>3</sup> In short, transgender rights recently became both a means for

1. See, e.g., Zack Ford, *LGBT Fight Could Return to Anchorage, Making It Another Houston*, THINKPROGRESS (Dec. 11, 2015, 1:17 PM), <https://thinkprogress.org/lgbt-fight-could-return-to-anchorage-making-it-another-houston-28e198a21e3a> [<https://perma.cc/9BUQ-JWL9>].

This Article uses the acronym “LGBT” to refer to the contemporary rights movement, even though most LGBT rights groups expanded to “LGBTQ” in the mid-2010s, because nonbinary interests often receive little, if any, representation within national organizations. Indeed, as this Article explains, their legal agendas do not reflect and may in fact hinder nonbinary interests. Although the term “queer” is expansive in its meaning and can apply to anyone who does not identify as heterosexual, its addition to LGBT demonstrates nonbinary inclusion. While many communities have embraced a broader membership and vision of rights—such as by including intersex and asexual individuals—the legal movement has remained more limited. See, e.g., NAT’L LGBTQ TASK FORCE, 2016 ANNUAL REPORT (2016), <https://www.thetaskforce.org/wp-content/uploads/2014/09/TF-annual-Report-2015-2016.pdf> [<https://perma.cc/P6EK-J73A>]; *About the ACLU Lesbian Gay Bisexual Transgender & HIV Project*, ACLU, <https://www.aclu.org/other/about-aclu-lesbian-gay-bisexual-transgender-hiv-project> [<https://perma.cc/7VZD-5AGM>]; *Explore: Transgender*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/explore/topic/transgender> [<https://perma.cc/8RAC-DE8C>]; *Transgender*, LAMBDA LEGAL, <https://www.lambdalegal.org/issues/transgender-rights> [<https://perma.cc/3JHD-RHVZ>]; *Transgender Law*, NCLR, <http://www.nclrights.org/our-work/transgender-law> [<https://perma.cc/J6R4-4YGB>]; Trudy Ring, *Expanding the Acronym: GLAAD Adds the Q to LGBT*, ADVOCATE (Oct. 26, 2016, 6:41 AM), <https://www.advocate.com/media/2016/10/26/expanding-acronym-glaad-adds-q-lgbt> [<https://perma.cc/H6M2-73UW>].

2. Michael Lipka, *Americans Are Divided over Which Public Bathrooms Transgender People Should Use*, PEW RES. CTR.: FACTTANK (Oct. 3, 2016), <http://www.pewresearch.org/fact-tank/2016/10/03/americans-are-divided-over-which-public-bathrooms-transgender-people-should-use> [<https://perma.cc/5JCX-RBGM>] (noting that although 87 percent of American adults report knowing someone who is gay, only 30 percent report knowing someone who is transgender).

3. See, e.g., H.B. 2, 2016 Leg., 2d Extra Sess. (N.C. 2016) (requiring every multiple occupancy bathroom or changing room in schools “to be designated for and used only by students based on their biological sex”); *Alabama City Passes Transgender Bathroom Law*, L.A. TIMES, Apr. 29, 2016, at A7; Ashley Fantz, *Anti-Trans Bathroom Ordinance Repealed in Oxford, Alabama*, CNN (May 5, 2016, 1:42 PM), <http://www.cnn.com/2016/05/05/us/oxford-transgender-bathroom-repeal> [<https://perma.cc/T3GU-X7MD>]; Mitch Smith, *South Dakota Governor Vetoes Restriction on Transgender Bathroom Access*, N.Y. TIMES (Mar. 1, 2016), <https://www.nytimes.com/2016/03/02/us/governor-vetoes-transgender-bathroom-restrictions-south-dakota.html> [<https://perma.cc/5JCX-RBGM>].

limiting gay and lesbian rights and a separate source of contention, creating a new focal point for the nation's culture wars.<sup>4</sup>

As in the struggle for marriage equality, ballot measures have emerged as a key battleground for transgender rights. Marriage debates prompted thirty-five states to hold ballot measures on the legal status of same-sex couples' unions, with some citizens returning to the polls over multiple years to vote on the issue.<sup>5</sup> Transgender rights measures, although fewer in number, have been no less contentious. Through ballots cast by their fellow citizens, transgender individuals' previously recognized rights have been repealed.

Trans rights framing has evolved as a political, social, and cultural undertaking with distinct legal consequences.<sup>6</sup> LGBT rights groups have consistently struggled to frame transgender identity, rights, and antidiscrimination principles in ways that resonate broadly.<sup>7</sup> In ballot measure contests and associated litigation, advocacy groups have thus far presented trans identity in a way that reinforces traditional gender roles, which may ultimately marginalize vulnerable members of the trans community and, in doing so, infringe upon the LGBT movement's fundamental principles.<sup>8</sup> Given these stakes, how trans rights are framed is a critical decision—with lasting effects that extend far beyond whether a specific city or state maintains or eliminates its gender identity protections.

perma.cc/WY2B-NTSL]; *2018 Ballot Propositions*, MUNICIPALITY OF ANCHORAGE, <https://www.muni.org/Departments/Assembly/Clerk/Elections/Pages/2018Ballot-Propositions.aspx> [https://perma.cc/W26E-N3TP] (proposing “regulating access to facilities such as locker rooms and bathrooms on the basis of sex at birth, rather than gender identity”); Stephanie Ebbert, *Voters Overwhelmingly Support Question 3 on Transgender Rights*, BOS. GLOBE (Nov. 7, 2018, 7:08 AM), <https://www.bostonglobe.com/metro/2018/11/06/question-asks-voters-weigh-transgender-rights-public-places/JgXjOlfcnJgQnHlf87Q0hJ/story.html> [https://perma.cc/M45P-8SLU]; *Revised Ballot Language for Initiative No. 183 (I-183)*, MONT. SEC'Y OF ST. (2018), <http://sosmt.gov/Portals/142/Elections/archives/2010s/2018/I-183.pdf> [https://perma.cc/SB5D-5AYP] (proposing requirements that all state and local entities “designate ‘protected facilities’ in government buildings . . . for use by members of only one sex”).

4. Marie-Amélie George, *The LGBT Disconnect: Politics and Perils of Legal Movement Formation*, 2018 WIS. L. REV. 503, 515–18.

5. *Id.* at 514–15.

6. Much of the work of social movements is creating frames, which shape the conversation for constituents, opponents, and bystanders. Through frames, movements identify the problem, articulate the solution, and mobilize their members. Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611, 613, 615–17 (2000); Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 892 (2013).

7. George, *supra* note 4, at 517–26.

8. Transgender people are individuals whose gender identity does not align with their assigned gender at birth. This includes those who live as male and female and conform to those gender norms, as well as nonbinary individuals, whose gender does not fit the traditional categories of male or female. Nonbinary people may combine elements of both genders, reject gender, or identify as a third gender category. Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 906 (2019).

Trans rights framing impacts how other jurisdictions address gender identity antidiscrimination laws, influences the future direction of the LGBT legal movement, affects the status of gender nonconforming people, and raises questions about social movement framing more broadly.<sup>9</sup>

Through original primary source research, including a review of over one hundred television and radio commercials, many of which are only available in archives, as well as movement strategy documents and other primary sources, this Article provides a deep and extensive analysis of modern LGBT ballot measure campaigns. It also provides the first comprehensive examination of antitransgender ballot measures and the LGBT movement's strategy around them. This Article reveals that the marriage equality's ultra-assimilationist strategy, whereby advocates presented gays and lesbians as like heterosexuals in all but the gender of their sexual partner, has had a particularly pernicious impact on transgender rights.<sup>10</sup>

In the first wave of anti-LGBT rights measures, which targeted both sexual orientation and gender identity antidiscrimination protections, LGBT advocacy groups followed marriage equality's extremely assimilationist approach, first by minimizing, and then by avoiding, the mention of transgender individuals. Transgender erasure was both a campaign tactic and a function of the fraught place of transgender rights within the LGBT coalition, which has been contested since the movement's inception.<sup>11</sup> With ballot measures now seeking to repeal only the gender identity provisions of antidiscrimination laws, campaigns have had to feature transgender people in their literature and advertisements, but the groups have done so in a specific—and extremely limited—way.

Much as they once did for gay and lesbian rights, LGBT rights groups have tended to adopt the most assimilationist posture possible, in that the transgender individuals they feature in campaign materials

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9. See, e.g., COLIN CROUCH, *POST-DEMOCRACY* 15–19 (2004). Although scholars like Professor Crouch question whether political campaigns may provide an effective mechanism for larger structural change, this Article suggests ways in which electoral struggles can serve movement goals.

10. Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1177 n.23 (2012) (discussing scholarship on marriage equality strategy and assimilationism). Assimilationism argues that a minority group is like the majority except for a legally irrelevant trait, and therefore deserves the same rights; these arguments may be exclusionary. See, e.g., Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2688–89 (2008) (“[T]he legitimacy and respectability that law confers on marital couples reinforces the illegitimacy and deviance of those whose sexual, intimate, and affective commitments, if not merely contacts, lie in nonmarital contexts.”); see also Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 627–29, 646–49 (2013) (discussing the negative doctrinal effects of the marriage equality movement's assimilationist strategy).

11. George, *supra* note 4, at 555–60, 564–74.

are all-but-fully transitioned, conventionally attractive men and women.<sup>12</sup> Indeed, trans people featured in these campaigns are often more gender normative than many cisgender men and women, with attire and grooming that accentuates their gender.<sup>13</sup> They are also often presented in traditional gender roles, with trans women appearing at the home and trans men at work. These presentations, although authentic to the individuals the campaigns are featuring, reify the very gender norms second-wave feminists began questioning and challenging decades ago.<sup>14</sup>

The LGBT campaigns' imagery overtly reinforces a binary view of gender, despite the wide range of transgender peoples' presentations and experiences. More than one-third of the transgender community does not identify as either male or female, or presents elements of both genders.<sup>15</sup> Given that approximately 0.6 percent of Americans are transgender, an estimated 0.21 percent of the population is nonbinary.<sup>16</sup> When applied to current population statistics, that means there are almost 700,000 nonbinary Americans—about the same number of people as live in Washington, D.C.<sup>17</sup> Additionally, many gays and lesbians are gender nonconforming, and the number of gender nonconforming youth is growing. Thus, the

12. See Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136, 153–54 (2015).

13. Cisgender refers to individuals whose gender identity conforms to their assigned sex. *Cisgender*, MERRIAM-WEBSTER DICTIONARY (2019), <https://www.merriam-webster.com/dictionary/cisgender> [<https://perma.cc/VHF8-DKML>].

14. The feminist movement excluded both lesbians and transsexuals in the 1970s, but as Subpart III.A *infra* explains, employment and education antidiscrimination protections for members of the LGBT community are rooted in the work of second-wave feminist theory on sexual stereotyping. See JANICE G. RAYMOND, *THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE* 104 (1979); MARC STEIN, *RETHINKING THE GAY AND LESBIAN MOVEMENT* 91–92 (Heather Ann Thompson ed., 2012).

15. SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY* 45 (2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF> [<https://perma.cc/YV3FCPBH>] [hereinafter U.S. TRANSGENDER SURVEY]; see GLAAD, *ACCELERATING ACCEPTANCE 2017*, at 4 (2017), [http://www.glaad.org/files/aa/2017\\_GLAAD\\_Accelerating\\_Acceptance.pdf](http://www.glaad.org/files/aa/2017_GLAAD_Accelerating_Acceptance.pdf) [<https://perma.cc/33U8-6LXH>]; see also BIANCA D.M. WILSON ET AL., UCLA CTR. FOR HEALTH POL'Y RES. & THE WILLIAMS INST., *CHARACTERISTICS AND MENTAL HEALTH OF GENDER NONCONFORMING ADOLESCENTS IN CALIFORNIA 2* (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/CHIS-Transgender-Teens-FINAL.pdf> [<https://perma.cc/9WF3-TLVA>] (*finding 27 percent of youth ages 12 to 17 in California are gender nonconforming*).

16. ANDREW R. FLORES ET AL., THE WILLIAMS INST., *HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES?* 3 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf> [<https://perma.cc/X37T-CGXA>]; U.S. TRANSGENDER SURVEY, *supra* note 15, at 45 (identifying 35 percent as non-binary).

17. The U.S. population was 327,167,434 as of July 1, 2018. See *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US#> [<https://perma.cc/8L2W-84CX>]; *Washington D.C. Population*, WORLD POPULATION REV., <http://worldpopulationreview.com/us-cities/washington-dc-population> [<https://perma.cc/HZ3H-QE6A>].

population dependent upon a legal regime with a comprehensive vision of gender will continue to expand.<sup>18</sup> Furthermore, ballot measure strategies reinforce a social and legal structure that assumes individuals fall into one of two sexes, a commitment that forms barriers to protecting the civil rights of many members of the LGBT community.<sup>19</sup>

LGBT rights groups have likely adopted their current approach to trans rights because they believe doing so is the most effective way to win the ballot measure contests—and they very well may be correct.<sup>20</sup> The campaigns are in a difficult position: they are asked to defend the rights of an unpopular group at the ballot box, often with little time to prepare, and are facing adversaries who distort and misstate both law and facts to the public.<sup>21</sup> Campaign organizers likely fear that gender nonconformity would be more than voters could process in a short election cycle, and thus may cost all trans individuals their rights.<sup>22</sup> Additionally, the loss could embolden the opposition to launch repeal measures elsewhere.

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18. Compare G. Nicole Rider et al., *Health and Care Utilization of Transgender and Gender Nonconforming Youth: A Population-Based Study*, 141 *PEDIATRICS* 1, 3–4 (2017) (finding that 2.7 percent of Minnesota students identified as transgender and nonconforming), with JODY L. HERMAN ET AL., *AGE OF INDIVIDUALS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES* 3 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/TransAgeReport.pdf> [<https://perma.cc/5BXA-Y87C>] (identifying 0.7 percent of youth as transgender). See also ARLENE STEIN, *UNBOUND: TRANSGENDER MEN AND THE REMAKING OF IDENTITY* 168–74, 266–70 (2018) (discussing examples of individuals who identify as bigender, agender, or lesbian and the interest of younger people in expanding gender).

19. For a detailed discussion of nonbinary gender identities rights, see generally Clarke, *supra* note 8.

20. For most of the movement's history, advocates have adopted an extremely assimilationist posture as the shortest path to equality. See George, *supra* note 4, at 567–74.

21. See, e.g., Jay Michaelson, *North Carolina's Anti-LGBT Law Is Based on a Total Lie*, *DAILY BEAST* (Apr. 13, 2017, 4:23 PM), <https://www.thedailybeast.com/north-carolinas-anti-lgbt-law-is-based-on-a-total-lie> [<https://perma.cc/YVF9-SX25>]; Evelyn Schlatter & Robert Steinback, *10 Anti-Gay Myths Debunked*, *INTELLIGENCE REP.* (Feb. 27, 2011), <https://www.splcenter.org/fighting-hate/intelligence-report/2011/10-anti-gay-myths-debunked> [<https://perma.cc/7E4A-8FNM>]; see also Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 *AM. J. POL. SCI.* 245, 253–54 (1997) (noting that civil liberties rarely fare well at the ballot box).

22. For example, LGBT rights advocates noted they had insufficient time for public education prior to the ballot measure campaigns. See Dominic Holden, *After Winning Marriage, the LGBT Movement Faces an Unexpectedly Tough Battle in Houston*, *BUZZFEED NEWS* (Nov. 2, 2015, 7:26 PM), [https://www.buzzfeed.com/dominicholden/why-is-the-lgbt-movement-struggling-to-uphold-a-simple-law-i?utm\\_term=.xpm1BDgz5#.gsEDMBzQx](https://www.buzzfeed.com/dominicholden/why-is-the-lgbt-movement-struggling-to-uphold-a-simple-law-i?utm_term=.xpm1BDgz5#.gsEDMBzQx) [<https://perma.cc/SK3Y-PM69>] (noting how time pressures prevented public education strategies in LGBT rights ballot measures). Freedom for All Americans has responded to this in part by creating a “national, centralized public education campaign to build public support for transgender-inclusive nondiscrimination protections.” *Transgender Freedom Project*, *FREEDOM FOR ALL AM. EDUC. FUND* (2018), <https://www.freedomforallamericans.org/about/our-programs/transgender-freedom-project> [<https://perma.cc/BFE8-ETLL>].

Social movements often adopt assimilationist strategies, which can be an effective and efficient means of attaining many goals. From the NAACP, which purged its branches of Communists, to the National Organization for Women (NOW), which infamously characterized lesbians as a “lavender menace,” the history of American legal movements is replete with examples of organizations attempting to cast out their more radical members in a bid for respectability.<sup>23</sup> In doing so, groups attempt to render themselves more acceptable to the mainstream and forge a closer analogy to the norm on which their legal arguments depend.<sup>24</sup> Through assimilationism, advocates secure the immediate rights at issue, but arguments and solutions may become “one-dimensional and abstract, reducing the meaning of . . . discrimination to the lowest common denominator.”<sup>25</sup>

Assimilationism, of course, is not an either-or approach, but rather a matter of degree. The strategy appeals to Aristotelian conceptions of justice, by which two similarly-situated individuals should be treated alike.<sup>26</sup> This vision of equality, which is embedded in antidiscrimination doctrine and popular thought, necessarily requires identifying a norm and making arguments as to how it compares to the rights-seeker.<sup>27</sup> How assimilationist those claims are can range; in the marriage equality context, LGBT rights groups emphasized that gays and lesbians hewed closely to the middle-class norm, but a version at the other end of the spectrum would base rights on status as citizens or as people.<sup>28</sup> Put generally, assimilationism simply seeks to make the rights-seekers relatable, and the question for advocates is how much the majority needs to recognize itself in the minority group.

This Article critiques the LGBT movement’s assimilationist arguments because of the *traits* the campaigns have chosen for comparison, not for having selected a comparator. It does not seek to abandon assimilationist strategies wholesale in favor of radical social restructuring. Rather it aims to reform current approaches to mitigate their harmful effects. This Article’s use of the terms “assimilation” and “assimilationist” are thus qualified to emphasize the normative implications of the strategy, rather than the approach itself.

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23. See RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 220 (2007); Stephanie Gilmore & Elizabeth Kaminski, *A Part and Apart: Lesbian and Straight Feminist Activists Negotiate Identity in a Second-Wave Organization*, 16 J. HIST. SEXUALITY 95, 102–03 (2007).

24. SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* 3–4 (2011) (discussing tactics of the second-wave feminist movement).

25. *Id.* at 226.

26. See Anton-Hermann Chroust & David L. Osborn, *Aristotle’s Conception of Justice*, 17 NOTRE DAME L. REV. 129, 141 (1942).

27. See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 744–46 (2011).

28. See *infra* Subpart II.C.



Although the far end of the assimilationist spectrum may seem like the inevitable strategy for trans rights given the LGBT movement's success thus far, debates over whether and when to pursue assimilationist arguments have long divided the LGBT movement.<sup>29</sup> For much of the twentieth century, social self-sorting and political advocacy alternated between excluding gender nonconformists and embracing them as brethren.<sup>30</sup> Debates over assimilationist strategies have also resulted in what Professor Kenji Yoshino refers to as an “epistemic contract of bisexual erasure.”<sup>31</sup> Notably, the LGBT movement has not always achieved success through appeals to integration, with the AIDS movement securing legal change via direct-action demonstrations, civil disobedience, and militant rhetoric.<sup>32</sup> The history of the LGBT rights movement is one of appeals to similarity and recognition of difference, both within and without.<sup>33</sup>

As part of its contribution to LGBT rights and movement strategy, this Article engages with scholarly research that has shown how, contrary to popular belief, winning and losing are not on opposite sides of the proverbial coin. As Professor Douglas NeJaime has persuasively

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29. See, e.g., *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* (Michael Warner ed., 1993) (collecting varying essays debating this issue); see also MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 59–61, 79–80 (1st ed. 2000) (arguing that the normalization of the LGBTQ community is problematic).

30. George, *supra* note 4, at 526–27, 531–35, 557–58.

31. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 *STAN. L. REV.* 353, 362–63 (2000) (explaining the “epistemic contract” as heterosexuals’ and homosexuals’ shared investment in bisexuality’s erasure, which derives from bisexuals’ destabilization of sexual orientation as an immutable trait and sex as a mode of social organization). For additional scholarship on the exclusion of bisexuals from the LGBT movement, see Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 *SAN DIEGO L. REV.* 415, 455 (2012); Elizabeth M. Glazer, *Sexual Reorientation*, 100 *GEO. L.J.* 997, 1018–19 (2012).

32. See, e.g., DEBORAH B. GOULD, *MOVING POLITICS: EMOTION AND ACT UP’S FIGHT AGAINST AIDS* 121–75 (2009); Jim Hubbard, *UNITED IN ANGER: A HISTORY OF ACT UP* (2012). Other rights movements have also adopted non-assimilationist approaches, including the Black Power movement and second-wave feminism, attaining important social and legal victories. See, e.g., Katharine K. Baker & Michelle Oberman, *Women’s Sexual Agency and the Law of Rape in the 21st Century*, in 69 *STUDIES IN LAW, POLITICS, AND SOCIETY, SPECIAL ISSUE: FEMINIST LEGAL THEORY* 63, 73–76 (Maxine Eichner & Clare Huntington eds., 2016); Peniel E. Joseph, *Historians and the Black Power Movement*, *OAH MAG. HIST.*, July 2008, at 8.

33. Marriage equality is no exception to this. Advocates debated whether to even pursue marriage rights, with some rejecting the goal as a false bid for respectability, as opposed to a recognition of equality. Compare Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, 6 *OUTLOOK NAT’L LESBIAN & GAY Q.* (Fall 1989), at 14–15 (contending that marriage rights will force lesbians and gays to assimilate to mainstream culture and de-emphasize differences), with Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, 6 *OUTLOOK NAT’L LESBIAN & GAY Q.* (Fall 1989), at 12–13 (arguing that marriage equality will help minimize discrimination against gays and lesbians and undermine the oppressive undertones of marriage).

demonstrated, litigation losses sometimes constitute victories, in that they can galvanize social movements.<sup>34</sup> On the other hand, scholars like Professor Michael Klarman have argued ballot box wins can sometimes be harmful, in that they may inspire resistance or countermobilization from opponents, as well as lead movement members to view the battle as over.<sup>35</sup>

This Article emphasizes how victories of one subgroup can impede the rights-based advocacy work of another. It challenges why social movements deploy conservative frames that exclude marginalized community members and demonstrates how these frames lay a precarious foundation for trans rights campaign decisions. This analysis reinforces that advocacy movements need to focus on *how* they secure rights as much as *whether* they succeed in doing so, and that the space between complete assimilationism and radical reform may provide important opportunities for inclusive legal change.

Political positioning in an electoral campaign may have seemingly little impact on legal movements, especially as compared to the decisions of courts, legislatures, and administrative agencies, but this Article demonstrates how porous the boundaries are, such that the frames of the former not only affect political campaigns, but also have a substantial impact across legal forums. The campaigns underlying the law have expressive value beyond what legislation itself prescribes—they create a cultural environment that shapes what values the law embodies, as well as individual preferences.<sup>36</sup> At the same time, by drawing on the scholarly literature on acoustic separation, popular constitutionalism, and slippery slopes, this Article identifies why state and local ballot measure contests cannot be separated from the LGBT movement's broader strategies.<sup>37</sup>

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34. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 941 (2011).

35. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 364–84 (2004); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 356–415 (2d ed. rev., 2008). For a review of the critiques of law as a tool of social change, see Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1654–57.

36. See RICHARD H. McADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS 139–42, 166 (2015); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000).

37. Acoustic separation is the concept that some aspects of the law are directed at officials, to guide their application of the law, while others are aimed at citizens, to direct their behavior. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630–31 (1984). Popular constitutionalism refers to citizens' role in the interpretation and enforcement of constitutional law. For discussions of popular constitutionalism and examples of the phenomenon, see Lani Guinier & Gerald Torres, *Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959 (2004); and Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

Forums other than courts have been, and continue to be, crucial sites for the LGBT movement.<sup>38</sup>

This Article proceeds in four Parts. Part I provides background on LGBT rights framing in ballot measures by detailing the evolution of marriage equality campaign strategies. In that context, LGBT rights groups altered their approach from defending marriage rights as a matter of equal access to government benefits (the equality/civil rights frame) to focusing on gays' and lesbians' loving family relationships (the emotive/assimilationist frame). This Part provides a descriptive account of framing changes in ballot measures, mapping them onto shifts in electoral results and public opinion. Although this Article does not purport to establish that narrative shifts resulted in success at the ballot box, it suggests the two were correlated. The marriage equality movement invested heavily in developing the frames to shape public opinion in favor of marriage rights, indicating advocates believed the frames would have a causal impact.<sup>39</sup>

Part II details how LGBT rights groups applied the lessons from the marriage equality movement to transgender rights framing. Like the marriage campaigns, transgender rights advocacy has shifted from a civil rights-based model to one that relies upon emotional and assimilationist appeals.<sup>40</sup> As part of this evolution, gender conforming transgender individuals have become the face of the campaigns. As with Part I, this analysis does not prove causation, but the correlation is striking.

Part III explains why the campaigns' tactics are problematic. First, the campaigns' emphasis on binary trans individuals promotes a limited view of sex and gender that may undermine the movement's broader litigation goals. Second, it ignores the many gender nonconforming individuals within the LGBT community. In doing so, LGBT rights advocates risk reinforcing social and legal impediments to the rights of the very individuals they are trying to serve.

Part IV places trans rights framing within the broader context of social movement advocacy, identifying it as a positional compromise that social movement advocates often undertake. This Part challenges the common arguments that drive positional compromises and suggests they are particularly problematic in this context. It concludes with suggestions

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38. See Marie-Amélie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 YALE L. & POL'Y REV. 83 (2017) (analyzing administrative advocacy); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87 (2014) (discussing legislative efforts). *But see* Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667 (2014) (providing an empirical analysis of how litigation set the LGBT movement's agenda).

39. See *infra* Part I.

40. The same groups were involved in the marriage and antidiscrimination ballot measure campaigns. See *infra* Part II.

for reframing transgender ballot measures to present a more comprehensive view of gender identity.<sup>41</sup> These new approaches are not simply a pivot towards featuring nonbinary individuals, nor are they a radical departure from the current approach. Rather, they critically engage with the broader stakes of gender identity protections and the concerns giving rise to their opposition.

## I. THE MARRIAGE MOVEMENT

Marriage equality ballot measure strategies prefigured trans rights campaigns, both temporally and by providing an uncertain blueprint for contemporary ballot measures. As this Part explains, after a long string of defeats at the ballot box, the marriage equality marketing strategy shifted from a rights-based emphasis to an emotive model that stressed love, commitment, and family. The revised formulation was a winning one, but its insistence that same-sex couples deserved rights because they were exactly like their opposite-sex counterparts was also exclusionary. Trans rights ballot measure campaigns have adopted these tactics from the marriage equality movement without remedying that problematic element.

### A. *Ballot Box Defeats*

For LGBT rights, the ballot box has been as significant a battlefield as the courthouse and the legislative chamber: members of the LGBT community have had their rights subjected to popular vote more than any other minority group in America.<sup>42</sup> Beginning in the 1970s, religious conservatives began sponsoring antigay and lesbian ballot measures around the country.<sup>43</sup> The overwhelming success of these initiatives made ballot box contests the “most powerful *bête noire* of the LGBT rights movement.”<sup>44</sup> Through the early 2000s, approximately seventy percent of these ballot measures passed, leaving LGBT individuals with even fewer rights after Election Day.<sup>45</sup>

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41. This Article presents these as options, rather than recommendations, on the premise that those whose rights are at stake should be the decisionmakers.

42. See WILLIAMS INST., *Voters' Initiatives to Repeal or Prevent Laws Prohibiting Employment Discrimination Against LGBT People, 1974–Present*, in BRAD SEARS ET AL., DOCUMENTING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT ch. 15, at 1 (2009), [http://williamsinstitute.law.ucla.edu/wp-content/uploads/13\\_BallotInitiatives.pdf](http://williamsinstitute.law.ucla.edu/wp-content/uploads/13_BallotInitiatives.pdf) [<https://perma.cc/HB8F-GWD9>]. Twenty-six states permit citizens to introduce new laws or repeal enacted legislation through ballot measures, which may take the form of statutes or constitutional amendments. *Initiative and Referendum States*, NAT'L COUNCIL ST. LEGISLATURES (2019), <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> [<https://perma.cc/V9WU-9VLU>].

43. See AMY L. STONE, *GAY RIGHTS AT THE BALLOT BOX* 11 (2012).

44. Nan D. Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 UCLA L. REV. 1662, 1662 (2017).

45. STONE, *supra* note 43, at 4; Gamble, *supra* note 21, at 253 tbl.1, 257–58;

Voters have gone to the polls on a variety of LGBT rights-related issues, but none generated more attention than marriage equality, where the citizens of thirty-six different states were asked to cast ballots—sometimes more than once—on whether same-sex couples should be allowed to marry.<sup>46</sup> As a result, the larger campaign for marriage equality formed around ballot box frames; the marriage equality movement de-emphasized litigation and instead focused on developing effective messaging through electoral politics, which it later implemented in the judicial arena.<sup>47</sup> Conservatives forced direct democracy on LGBT rights advocates by repeatedly filing ballot measures, but the marriage movement recognized that it would not succeed in court unless it shifted public opinion, and therefore turned its attention to developing successful public messaging.<sup>48</sup>

Although the ballot box became the central forum for debating marriage equality, it was a court case that precipitated the movement. The issue of whether gays and lesbians should be allowed to marry entered the public eye in 1993, after a Hawaii Supreme Court ruling created a real possibility that same-sex couples would be able to marry in the Aloha State.<sup>49</sup> In that decision, the court held that the state needed to demonstrate a compelling interest to deny same-sex couples marriage licenses, a high bar that the state was unlikely to meet.<sup>50</sup> After additional legal developments and associated public outcry, the legislature put a proposed constitutional amendment on the November 1998 statewide election ballot, which asked voters whether “the legislature shall have the power to reserve marriage to opposite-sex couples.”<sup>51</sup> Since the legislature had already passed a bill banning same-sex marriage, voters were

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Donald P. Haider-Markel & Kenneth J. Meier, *Legislative Victory, Electoral Uncertainty: Explaining Outcomes in the Battles Over Lesbian and Gay Civil Rights*, 20 REV. POL'Y RES. 671, 676 (2003).

46. Hunter, *supra* note 44, at 1673, 1680.

47. See *id.* at 1666; Scott Barclay & Anna-Maria Marshall, *Supporting a Cause, Developing a Movement, and Consolidating a Practice: Cause Lawyers and Sexual Orientation Litigation in Vermont*, in *THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE* 171, 187–90 (Austin Sarat & Stuart Scheingold eds., 2005).

48. See Michael Adams et al., *Winning Marriage: What We Need to Do 3* (June 21, 2005) (unpublished manuscript), [http://s3-us-west-2.amazonaws.com/ftm-assets/ftm/archive/files/images/Final\\_Marriage\\_Concept\\_Paper-revised\\_\(1\).pdf](http://s3-us-west-2.amazonaws.com/ftm-assets/ftm/archive/files/images/Final_Marriage_Concept_Paper-revised_(1).pdf) [<https://perma.cc/MU5Y-9WS8>] (“Only with widespread public acceptance will the Supreme Court and/or Congress be ready to take marriage nationwide.”).

49. *Baehr v. Lewin*, 852 P.2d 44, 63–67 (Haw. 1993).

50. See *id.* at 68. Indeed, three years later, a Hawaii trial court held that limiting marriage licenses to opposite-sex couples violated the state’s Equal Protection clause. *Baehr v. Muike*, No. 91–1394, 1996 WL 694235, at \*22 (Haw. Cir. Ct. Dec. 3, 1996), *rev’d on other grounds*, 92 Haw. 634, 994 P.2d 566 (1999).

51. STATE OF HAW., OFFICIAL BALLOT, GENERAL ELECTION 2 (1998) (on file with author); Kathleen E. Hull, *The Political Limits of the Rights Frame: The Case of Same-Sex Marriage in Hawaii*, 44 SOC. PERSP. 207, 214 (2001).

effectively deciding whether to implement that legislation through the country's first statewide same-sex marriage ballot measure.<sup>52</sup>

Although Hawaii's LGBT rights advocates had not previously combatted a marriage equality ban at the ballot box, the campaign to defend marriage rights had historical precedents from which to craft their strategy. Based on previous, successful ballot efforts defending other gay and lesbian rights issues, Hawaii's LGBT rights organizations decided not to affirmatively champion same-sex marriage and instead framed the measure as an assault on civil rights.<sup>53</sup> The group's very name, Protect Our Constitution, reflected its strategy, which stayed silent on gay and lesbian rights generally. Rather, the organization highlighted how stripping the rights of one minority group could lead to the oppression of others.<sup>54</sup> Protect Our Constitution's television ads compared the amendment to the internment of Japanese Americans during the Second World War and argued that African Americans' civil rights "wouldn't exist now" if they had been put to a vote.<sup>55</sup> In its advertising, the group told voters that they did not need to approve of same-sex marriage to oppose the amendment and its discriminatory impact.<sup>56</sup> Protect Our Constitution thus asked voters to cast their ballots *against* discrimination, rather than *for* same-sex couples.

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52. H.B. 2312, 17th Leg., Reg. Sess. (Haw. 1994). The first time same-sex marriage was put to a statewide popular vote was in 1998. STONE, *supra* note 43, at 33. Previous initiatives to limit gay and lesbian rights included a ban on same-sex marriage as part of a larger set of restrictions. See WILLIAMS INST., *supra* note 42, at 19, 23, 34. Notably, Hawaii was not the only state to implement a constitutional ban on same-sex marriage in 1998. That year, in response to a pending lawsuit by a gay couple, the Alaska legislature enacted a statute limiting marriage to one man and one woman. STONE, *supra* note 43, at 33. An Alaska state court ruled that the law violated same-sex couples' rights under the state constitution, but the appeal was still pending when Election Day rolled around. MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 66–67 (2013). As a result, voters were asked whether to amend the constitution to read: "[t]o be valid or recognized in this State, a marriage may exist only between one man and one woman." *Ballot Measure 2*, ST. OF ALASKA (1998), <http://www.elections.alaska.gov/doc/oep/1998/98ba2.htm> [<https://perma.cc/A8WR-JM22>]. The opposition campaign called itself "Alaskans for Civil Rights" and criticized the amendment as an invasion of privacy, an attack on civil rights, and an unnecessary "issue of the moment" that would "clutter up the constitution." KLARMAN, *supra*, at 67. As in Hawaii, citizens in Alaska overwhelmingly approved the constitutional provision. *Id.*; WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 41–42 (2002).

53. See STONE, *supra* note 43, at 70–72.

54. See Hull, *supra* note 51, at 214–15.

55. See Videotape: Japanese (Protect Our Constitution 1998) (on file with the Julian P. Kanter Political Commercial Archive, University of Oklahoma (hereinafter Kanter archive)); Videotape: Dr. Rodney Powell (Protect Our Constitution 1998) (on file with Kanter archive).

56. See Videotape: Walter Tagawa (Protect Our Constitution 1998) (on file with Kanter archive).

In response, the amendment's proponents challenged Protect Our Constitution's frame and put forward their own.<sup>57</sup> They crafted commercials featuring Hawaiians telling their fellow citizens that opposing same-sex marriage did not make them bigots and was not equivalent to "sending people to concentration camps."<sup>58</sup> The only question for voters, according to the ads, was whether to keep marriage the same as it had always been.<sup>59</sup> The organizations also argued that the amendment was necessary to preserve traditions, protect families and children, and prevent courts from making the decision for the state.<sup>60</sup> Hawaiians voted 69 percent to 31 percent to amend their constitution, thereby implementing the statute limiting marriage to opposite-sex couples.<sup>61</sup>

The Hawaii debate drew a great deal of attention and shaped the narrative of ballot measure campaigns, which took off in 2004. Before the 2004 elections, same-sex marriage had only made it onto the ballot of six states; that number more than doubled in 2004.<sup>62</sup> Spurring the string of measures was the Massachusetts Supreme Judicial Court's ruling in *Goodridge v. Department of Public Health*.<sup>63</sup> In *Goodridge*, the court reasoned that civil unions relegated gays and lesbians to "second-class" status, and thus same-sex couples had a right to marry under the state's constitution.<sup>64</sup> Gavin Newsom, then-mayor of San Francisco, also increased the stakes for same-sex marriage opponents by announcing he would begin issuing licenses to same-sex couples.<sup>65</sup> By the time a California court issued an injunction, the media had reported on more than four thousand gay and lesbian couples who had traveled to San Francisco's City Hall to celebrate their marriages.<sup>66</sup> Elected officials across the coun-

57. See, e.g., Videotape: The Right to Marry (Alliance for Traditional Marriage Hawaii 1998) (on file with Kanter archive) (arguing marriage rights are not absolute since unions are already limited based on factors such as consanguinity).

58. Videotape: If You Watch TV (Pro-Family Hawaii 1998) (on file with Kanter archive).

59. *Id.*; Videotape: Let's Get One Thing Straight (Pro-Family Hawaii 1998) (on file with Kanter archive).

60. See Videotape: Jimmy Takushi (Save Traditional Marriage 1998) (on file with Kanter archive); Videotape: Law on the Books (Save Traditional Marriage 1998) (on file with Kanter archive); Videotape: The Right to Marry (Alliance for Traditional Marriage Hawaii 1998) (on file with Kanter archive); Videotape: Fisherman (Pro-Family Hawaii 1998) (on file with Kanter archive); Videotape: Targeted by Activists (Save Traditional Marriage 1998) (on file with Kanter archive).

61. KLARMAN, *supra* note 52, at 66.

62. See Bayliss J. Camp, *Mobilizing the Base and Embarrassing the Opposition: Defense of Marriage Referenda and Cross-Cutting Electoral Cleavages*, 51 SOC. PERSP. 713, 719 tbl.11 (2008).

63. 798 N.E.2d 941, 948 (Mass. 2003); see KLARMAN, *supra* note 52, at 105–06 (describing *Goodridge*'s effect on ballot measures).

64. 789 N.E.2d at 948; see also *In re Opinions of the Justices to the Senate*, 802 N.E. 2d 565, 570 (Mass. 2004).

65. See STONE, *supra* note 43, at 34.

66. See *id.*

try also issued licenses to same-sex couples, although courts shut down their efforts almost immediately.<sup>67</sup> The marriage movement's seeming success fueled a wave of activity from opponents. Within three years of *Goodridge*, voters in twenty-three states had approved constitutional amendments banning same-sex marriage, most by substantial margins. Of those, seventeen were "super-DOMAs," meaning the amendment prohibited the state from recognizing both same-sex marriage and domestic partnerships.<sup>68</sup>

This onslaught of constitutional initiatives made it difficult for the LGBT rights movement to disseminate their messages, let alone evaluate whether their frames were effective.<sup>69</sup> With thirteen states voting on constitutional measures in 2004, national organizations decided to focus their limited funds on the states where LGBT rights groups were most likely to succeed.<sup>70</sup>

Oregon, for instance, was one of the few campaigns that received funding from national groups in the 2004 election cycle, in large part because it had a long history of voting on gay and lesbian rights measures at the ballot box.<sup>71</sup> Between 1988 and 1996, the Oregon Citizens Alliance (OCA) sponsored more than thirty anti-gay and lesbian referenda and initiatives.<sup>72</sup> As a result of these electoral battles, Oregon's LGBT community was well-organized and familiar with ballot measure campaigns, which made it more likely that advocates would be able to spread their message to voters.<sup>73</sup>

Like the Hawaii campaign before it, Oregon organizations opposing prohibitions on same-sex marriage used an equality/civil rights frame. They did shift their strategy slightly; instead of making general arguments about inequality and oppression, groups like No on Constitutional Amendment 36 and Basic Rights Oregon emphasized the specific rights that gays and lesbians would forfeit if their neighbors voted in favor of the amendment.<sup>74</sup> They emphasized that, without access to marriage, couples could lose the ability to make medical decisions for one another,

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67. See Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 L. & Soc'y REV. 151, 163–64 (2009).

68. Camp, *supra* note 62, at 719 tbl.1; see also ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* 181–82 (2005).

69. See STONE, *supra* note 43, at 133. The gay and lesbian rights movement expanded to include transgender rights in the late 1990s and early 2000s. George, *supra* note 4, at 545–48.

70. Camp, *supra* note 62, at 719 tbl.1; see also STONE, *supra* note 43, at 133–34.

71. See STONE, *supra* note 43, at 133–34.

72. One of the three state-level measures passed; voters approved twenty-seven of the twenty-eight local ones. WILLIAMS INST., *supra* note 42, at 17–21, 46–50.

73. See STONE, *supra* note 43, at 134.

74. Compare sources cited *supra* notes 55–56, with sources cited *infra* note 75.



visit one another in the hospital, and collect pension benefits.<sup>75</sup> Even if citizens were “not sure about gay marriage,” the organizations urged voters to cast their ballots against the amendment because the ban would “hurt Oregon families” and unequal treatment did not “belong in the constitution.”<sup>76</sup> The campaign tried to make the vote about pragmatic consequences, rather than principle.

The ban’s proponents, however, challenged the notion that limiting marriage to opposite-sex couples would harm gays and lesbians. For instance, one campaign ad in favor of the amendment featured a gay couple, who explained that there was no need to redefine marriage, as gays and lesbians could contract into many of the benefits of marriage, like medical decision-making, as they had done.<sup>77</sup> Any claim to the contrary, the couple maintained, was “a dishonest argument.”<sup>78</sup> The Defense of Marriage Coalition rotated this ad among a panoply of others that emphasized the need to preserve respect, honor, and celebrate traditional families, as well as protect Oregon’s independence from “activist judges.”<sup>79</sup> Oregon voters approved the constitutional ban 57 percent to 43 percent.<sup>80</sup> Although Oregon’s vote was closer than many others in 2004, the state where national LGBT rights groups had concentrated so many resources still balked at the idea of marriage equality. By the end

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75. See *Basic Rights Oregon, Surgery, AdRespect (2004)*, <http://www.adrespect.org/common/adlibrary/adlibrarydetails.cfm?QID=2797&ClientID=11064> [<https://perma.cc/78MT-QUHK>]; *Basic Rights Oregon, Worry, AdRespect (2004)*, <http://www.adrespect.org/common/adlibrary/adlibrarydetails.cfm?QID=1966&ClientID=11064> [<https://perma.cc/A7ZF-WSGZ>]; *Basic Rights Oregon, Simple, AdRespect (2004)*, <http://www.adrespect.org/common/adlibrary/adlibrarydetails.cfm?QID=2030&ClientID=11064> [<https://perma.cc/QZ7U-3DUH>]; Videotape: Judge Tanzer (No on Constitutional Amendment 36, 2004) (on file with Kanter archive).

76. Videotape: Goes Too Far (No on Constitutional Amendment 36, 2004) (on file with Kanter archive).

77. See Defense of Marriage Coalition, *Gay Male Couple*, ADRESPECT (2004), <http://www.adrespect.org/common/adlibrary/adlibrarydetails.cfm?QID=2022&clientID=11064&ThisPage=Adlibrary> [<https://perma.cc/QDP9-A762>].

78. *Id.*

79. Defense of Marriage Coalition, *Latinos*, ADRESPECT (2004), <http://www.adrespect.org/common/adlibrary/adlibrarydetails.cfm?QID=2025&clientID=11064&ThisPage=Adlibrary> [<https://perma.cc/5F8V-76R7>]; Defense of Marriage Coalition, *Old Woman*, ADRESPECT (2004), <http://www.adrespect.org/common/adlibrary/adlibrarydetails.cfm?QID=2027&clientID=11064&ThisPage=Adlibrary> [<https://perma.cc/9QXX-XQQ4>]; Defense of Marriage Coalition, *Nuclear Family*, ADRESPECT (2004), <http://www.adrespect.org/common/adlibrary/adlibrarydetails.cfm?QID=2026&clientID=11064&ThisPage=Adlibrary> [<https://perma.cc/MG57-2ZS7>]; Defense of Marriage Coalition, *Judges*, ADRESPECT (2004), <http://www.adrespect.org/common/adlibrary/adlibrarydetails.cfm?QID=2023&clientID=11064&ThisPage=Adlibrary> [<https://perma.cc/JM35-3WN6>].

80. Camp, *supra* note 62, at 719 tbl.1.

of election night in 2004, more than a third of the country's states had instituted bans on same-sex marriage.<sup>81</sup>

LGBT rights advocates had spent six years defending marriage rights, but by the end of 2004, nineteen states had constitutional or statutory bans on same-sex marriage and a Republican president opposed to LGBT rights had been re-elected to the White House.<sup>82</sup> The civil rights frame, which had succeeded in antidiscrimination contests, had not convinced the electorate to vote in favor of marriage equality.

### B. *Strategic Turning Points*

Following this wave of electoral defeats, LGBT rights groups decided to reevaluate their approach. They committed themselves to making the legal movement's primary goal "[c]hanging the way the public thinks," rather than focusing on the law itself.<sup>83</sup> Movement leaders therefore pivoted to different frames, which reshaped the marriage movement and set the stage for today's transgender rights framing.<sup>84</sup>

Despite having defended more than a dozen ballot measures, leaders recognized they lacked information on how to change people's opinions about same-sex marriage.<sup>85</sup> In 2003, the ACLU commissioned opinion research from a media relations firm, which advised advocates to change their "frame from gays to marriage" by stressing commitment and highlighting emotional messaging, rather than rights.<sup>86</sup> Not everyone in the movement supported this strategy or believed in its efficacy. At the National Gay and Lesbian Task Force (NGLTF) Midwest Power Summit training, held in the spring of 2006, attendees reviewed two different ads from the 2004 campaigns.<sup>87</sup> One, from Texas, featured two African American women who spoke about their love for one another, while the other, from Missouri, asserted that the marriage ban put unequal treatment

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81. *Id.* Pundits also attributed George W. Bush's reelection to Ohio's marriage ballot measure, claiming it drove conservative voters to the polls, further augmenting LGBT rights advocates' sense of loss. See Daniel A. Smith et al., *Same-Sex Marriage Ballot Measures and the 2004 Presidential Election*, 38 ST. & LOC. GOV'T REV. 78, 78–79 (2006). Political scientists have disputed this claim. See MORRIS P. FIORINA ET AL., *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* 145–57 (2d ed. 2006); Smith et al., *supra*, at 87–88.

82. Camp, *supra* note 62, at 719 tbl.1.

83. Adams et al., *supra* note 48, at 3.

84. See Hunter, *supra* note 44, at 1687–88; see also NATHANIEL FRANK, *AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA* 208 (2017); MARC SOLOMON, *WINNING MARRIAGE: THE INSIDE STORY OF HOW SAME-SEX COUPLES TOOK ON POLITICIANS AND PUNDITS—AND WON* 95–96 (2014); Matt Coles, *The Plan to Win Marriage, in LOVE UNITES US: WINNING THE FREEDOM TO MARRY IN AMERICA* 100, 103–04 (Kevin M. Cathcart & Leslie J. Gabel-Brett eds., 2016).

85. See ADAMS ET AL., *supra* note 48, at 7.

86. Hunter, *supra* note 44, at 1685–86.

87. STONE, *supra* note 43, at 144.

into the state's constitution.<sup>88</sup> Neither those running the session nor the workshop participants could decide which of the two messages would resonate more with voters.<sup>89</sup>

It was not until the 2008 Proposition 8 campaigns in California that a new frame emerged. Between the 2004 and 2008 presidential election years, as leaders debated how to reframe their arguments, ten additional states enacted constitutional bans on same-sex marriage and six state supreme courts ruled against gay litigants seeking marital rights.<sup>90</sup> Although marriage equality advocates weathered substantial losses in this period, they also experienced some gains: six states created domestic partner registries,<sup>91</sup> two additional states recognized marriage equality,<sup>92</sup> and public opinion polls registered steady yearly increases in support for both same-sex marriage and domestic partnerships.<sup>93</sup>

Then, in 2008, Proposition 8 asked California voters to add a constitutional ban on same-sex marriage to the state's constitution.<sup>94</sup> For LGBT rights advocates, more was at stake compared to prior ballots: since the California Supreme Court had declared that same-sex couples had a constitutional right to marry earlier that year, defeating Proposition 8 meant maintaining the positive right to marry in the state, as opposed to merely preserving a constitution free of marriage-specific language.<sup>95</sup>

88. *Id.*

89. *See id.*

90. Camp, *supra* note 62, at 719 tbl.1; Initiative and Referendum Institute, *Same-Sex Marriage: Will Voters Break the Firewall?*, BALLOTWATCH (Sept. 2012), <http://www.iandinstitute.org/docs/BW%202012-1%20Marriage1.pdf> [<https://perma.cc/N5GJ-5QZC>]; *see, e.g.*, *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007) (upholding a Maryland law limiting marriage to a man and a woman because it survived rational basis review); *Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006) (instructing the legislature to take action to ensure equal treatment of homosexual couples, but not requiring that the definition of marriage be altered if elected officials could create an alternative); *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006) (upholding a New York law limiting marriage to opposite-sex couples); *Andersen v. King County*, 138 P.3d 963, 990 (Wash. 2006) (en banc) (holding that Washington established a rational basis for the Defense of Marriage Act "to codify the common law, to promote procreation, and to encourage stable families"); *Li v. State*, 110 P.3d 91, 102 (Or. 2005) (en banc) (holding that marriage is limited to opposite-sex couples under the Oregon constitution).

91. CAL. FAM. CODE § 2971 (2001); CONN. GEN. STAT. § 46b-38f (2009); HAW. REV. STAT. § 572-1.7 (1998); 22 ME. REV. STAT. § 2710 (2003); N.J. STAT. § 37:1-30 (2006); WASH. STAT. § 26.60.100 (2012); *Lewis*, 908 A.2d at 224.

92. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008) (holding that well-established equal protection principles necessitate an extension of the right to marriage to gay and lesbian couples); *In re Marriage Cases*, 183 P.3d 384, 426-27 (Cal. 2008) (striking down limitation on marriage as a violation of same-sex couples' fundamental privacy and liberty rights).

93. *Keck, supra* note 67, at 165-67, 169-70.

94. CAL. SEC'Y OF STATE, VOTER INFORMATION GUIDE 54 (2008).

95. *Stone, supra* note 43, at 138. Proposition 8 was not the first time California citizens had been asked to vote on same-sex marriage. In 2000, 61 percent of California voters had approved a statutory ballot measure reserving marriage to opposite-sex

As a result, the campaigns spent a combined total of approximately \$85 million, making California the site of the most expensive ballot measure in U.S. history.<sup>96</sup> Polls showed Proposition 8 losing by a wide margin into the fall, but 52percent of voters cast their ballots in favor of the constitutional amendment on Election Day.<sup>97</sup>

For marriage equality advocates, the Proposition 8 loss cemented that appeals to equality, rights, and fairness simply did not resonate with voters. In January 2008, the Gay and Lesbian Alliance Against Defamation (now GLAAD) and Movement Advancement Project published a guide for advocates entitled *Talking to the Moveable Middle About Marriage*.<sup>98</sup> The document highlighted a need to change the messaging around marriage, shifting the focus from rights and equality to messages of relationships and commitment, because moderate voters “don’t think of marriage as a legal institution.”<sup>99</sup> For those casting their ballots, marriage was about “relationship *validation* [rather] than legal protections.”<sup>100</sup> To the extent advocates discussed the harms of marriage inequality, they should limit their discussion to those that impeded partners’ ability to take care of one another, such as limitations on hospital visitation or sick leave.<sup>101</sup>

Despite this research, No on 8, the main campaign to retain marriage equality, ran ads emphasizing discrimination and the harm of inscribing inequality into the constitution.<sup>102</sup> These commercials tested well with undecided voters, thereby casting doubt on whether a new frame was really necessary.<sup>103</sup> The group’s commercials analogized the

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couples. However, the California Supreme Court struck down the statute in the spring of 2008. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010); *In re Marriage*, 183 P.3d at 453 (“[T]he language of section 300 limiting the designation of marriage to a union ‘between a man and a woman’ is unconstitutional and must be stricken . . .”).

96. KLARMAN, *supra* note 52, at 122.

97. Initiative and Referendum Inst., *supra* note 90.

98. Gay & Lesbian Alliance Against Defamation (GLAAD) & the Movement Advancement Project (MAP), *Talking to the Moveable Middle About Marriage: Guidelines for Talking to the Moveable Middle About LGBT Issues* (2008) (on file with author). In 2013, GLAAD changed its name from “Gay and Lesbian Alliance Against Defamation” to “GLAAD” to signify transgender inclusion. Rich Ferraro, *GLAAD Affirms Commitment to Trans People, LGBT Community and Allies on Melissa Harris-Perry Show*, GLAAD (Mar. 24, 2013), <https://www.glaad.org/blog/glaad-affirms-commitment-trans-people-lgbt-community-and-allies-melissa-harris-perry-show> [<https://perma.cc/KPJ3-D5HZ>].

99. GLAAD & MAP, *supra* note 98, at 7.

100. *Id.* (emphasis in original).

101. *See id.* at 10–11.

102. *See* Ben Ehrenreich, *Anatomy of a Failed Campaign*, ADVOCATE (Nov. 19, 2008, 12:00 AM), <https://www.advocate.com/news/2008/11/19/anatomy-failed-campaign> [<https://perma.cc/PUZ2-NRSY>]; Videotape: Senator Feinstein (No on Prop 8, 2008) (on file with Kanter archive).

103. *See* Ehrenreich, *supra* note 102.

constitutional amendment to institutionalized racism, including Jim Crow and Japanese internment, much like the campaign in Hawaii had done.<sup>104</sup> No on 8 also aired a humorous parody of the then-ubiquitous “Mac versus PC” commercials, where “No on Prop 8” took the place of the hip Mac and “Yes on 8” became the uptight, out-of-touch PC. In the ad, Yes on 8, dressed in a suit and clad with a gladiator helmet and shield, explained he was protecting an opposite-sex couple from gay and lesbian marriages. In response, and as Yes on 8 made increasingly absurd arguments, the couple expressed their support for marriage equality, noting that “same-sex marriages have been legal here for months and nothing’s happened.”<sup>105</sup>

Alongside No on 8, a coalition of marriage equality groups that organized under the name “Let California Ring” tested a different strategy in Santa Barbara County.<sup>106</sup> Let California Ring was by design a public education effort about same-sex marriage, rather than a lobbying group against Proposition 8; it began organizing two years before Californians considered the constitutional amendment.<sup>107</sup> The group adopted a “soft-sell” approach, asking its audience how they would feel if they could not marry the person they loved.<sup>108</sup> The ad the group developed, which featured a bride facing physical obstacle after obstacle in her quest to meet her groom at the end of the wedding aisle, seemed to resonate with voters.<sup>109</sup> On Election Day, Santa Barbara was the only county in Southern California to vote down Proposition 8.<sup>110</sup>

What the Proposition 8 defeat demonstrated to marriage equality advocates around the country was the value of appealing to emotion, rather than making rights-based arguments.<sup>111</sup> It therefore set the stage for the new frames that first the marriage equality movement, and later the transgender rights campaigns, adopted.

104. Videotape: History (No on Prop 8, 2008) (on file with Kanter archive).

105. Videotape: Why Society is Dumb (No on Prop 8, 2008) (on file with Kanter archive).

106. See *Messaging, Messengers, and Public Support*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/Messaging-Messengers-and-Public-Support> [<https://perma.cc/H2N9-Z5SH>].

107. See STONE, *supra* note 43, at 147; *Let California Ring: A Case Study*, LIGHTBOX COLLABORATIVE, <http://www.lightboxcollaborative.com/let-california-ring> [<https://perma.cc/SBY8-3R99>].

108. See *Freedom to Marry—The Early Years*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/Freedom-to-Marry-The-Early-Years> [<https://perma.cc/V5XT-XV22>].

109. See Let California Ring, *Garden Wedding*, YOUTUBE (Oct. 10, 2007), [https://www.youtube.com/watch?v=GG7ddWLF\\_Fk](https://www.youtube.com/watch?v=GG7ddWLF_Fk) [<https://perma.cc/VSC4-QFES>].

110. *Gay Marriage Ban: A Tale of Two Votes*, L.A. TIMES (Sept. 16, 2014, 4:31 AM), <https://www.latimes.com/local/la-2008election-prop8prop22-htmlstory.html> [<https://perma.cc/KEJ2-UDX6>].

111. See *Freedom to Marry—The Early Years*, *supra* note 108.

### C. *Consequential Victories*

Although small, the Santa Barbara County experiment was extremely consequential because it led the marriage equality movement to reframe its messaging in the years that followed.<sup>112</sup> The new framing, like its predecessor, was assimilationist in two distinct ways. First, it sought to have LGBT individuals join a mainstream institution. Second, it did so by highlighting middle-class families who did not challenge any normative assumptions about gender or sexuality. What distinguished the new frame was *how* it made these assimilationist arguments. Although scholars have critiqued the marriage equality movement for both assimilationist elements, the latter is the one that has had harmful consequences for transgender rights, as campaigns to preserve gender identity protections have adopted that aspect of the marriage equality movement's approach.<sup>113</sup>

In the years after Proposition 8, Freedom to Marry, a national organization dedicated to securing marriage equality and a partner in the Let California Ring campaign, led the framing shift. Freedom to Marry served as the hub for a network that disseminated new framing strategies by linking research, opinion testing, campaign organizers, litigators, lobbyists, and media.<sup>114</sup> The director of research and marketing, Thalia Zepatos, reviewed the movement's data, which organizations had finally shared with one another. Through a confidential portal called the Marriage Research Consortium, Freedom to Marry confirmed the findings of earlier researchers—essentially, rights-based language did not resonate with the “moveable middle.”<sup>115</sup> Relying on eighty-five data sets from state campaigns, the group's researchers explained why: voters often knew LGBT individuals, and wanted the law to be fair to LGBT people, but they did not understand why marriage was necessary when domestic partnerships provided the same legal rights.<sup>116</sup> Marriage, for these undecided voters, was about love and commitment, not benefits.<sup>117</sup> This research

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112. *See id.*

113. *See, e.g.,* Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 238 (2006) (arguing that “tolerance” of same-sex relationship “private adult activity” is not the same as accepting LGBT political identity); Godsoe, *supra* note 12, at 153–54 (noting that the *Obergefell* opinion further increased pressure on the LGBT community to “conform” and therefore marginalized anyone who refused to “act straight”).

114. *See Messaging, Messengers, and Public Support, supra* note 106.

115. FRANK, *supra* note 84, at 278; Thalia Zepatos & Lanae Erickson Hatalsky, *The Marriage Movement's Secret Weapon: Radical Cooperation*, HUFFINGTON POST (June 26, 2015), [http://www.huffingtonpost.com/thalia-zepatos/the-marriage-movements-se\\_b\\_7665696.html](http://www.huffingtonpost.com/thalia-zepatos/the-marriage-movements-se_b_7665696.html) [<https://perma.cc/DF2A-BDNT>].

116. *See sources cited supra* note 115.

117. *See Messaging, Messengers, and Public Support, supra* note 106.

expanded advocates' understanding of the emotional dynamics behind voters' decisions so they could effectively address those concerns.<sup>118</sup>

Based on these results, Freedom to Marry created public education videos for more than thirty partners that stressed love, commitment, and family, not legal benefits.<sup>119</sup> The videos conveyed the new themes through a "journey story," in which those who had once been opposed to same-sex marriage explained how they came to support it.<sup>120</sup> These commercials emphasized that gays and lesbians expressed the same type of love and commitment in their relationships as heterosexual couples and that marriage was important to their families.<sup>121</sup> Journey stories encouraged viewers to realize that changing their minds about same-sex marriage did not undermine their values or require them to alter their other political or social opinions.

New messaging strategies, courtroom victories, and legislative enactments collectively contributed to a growing shift in public perception.<sup>122</sup> In 2011, for the first time, public opinion polls showed a majority support for same-sex marriage.<sup>123</sup> Freedom to Marry was nevertheless circumspect in which ballot measures it supported, since it maintained donor support by imposing strict guidelines to signal that the organization would not waste anyone's money.<sup>124</sup> Those requirements included lead time to lay the groundwork for a campaign, levels of local organization and fundraising, and polling thresholds.<sup>125</sup> Since Maine, Minnesota, and Washington met the benchmarks, Freedom to Marry sent staff and

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118. See Molly Ball, *The Marriage Plot: Inside This Year's Epic Campaign for Gay Equality*, ATLANTIC (Dec. 11, 2012), <https://www.theatlantic.com/politics/archive/2012/12/the-marriage-plot-inside-this-years-epic-campaign-for-gay-equality/265865> [<https://perma.cc/BLA5-U37C>].

119. See ALISON L. GASH, *BELOW THE RADAR: HOW SILENCE CAN SAVE CIVIL RIGHTS* 78 (2015); Nathaniel Frank, *How Gay Marriage Finally Won at the Polls*, SLATE (Nov. 7, 2012, 2:00 AM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2012/11/gay\\_marriage\\_in\\_maryland\\_and\\_maine\\_the\\_inside\\_strategy.html](http://www.slate.com/articles/news_and_politics/politics/2012/11/gay_marriage_in_maryland_and_maine_the_inside_strategy.html) [<https://perma.cc/JU6H-HL4Z>]. The organization also included drafts and transcripts, so its partners could edit materials to fit their local context and target specific subpopulations. It additionally provided its partners with graphics and tool kits. FREEDOM TO MARRY, *MOVING MARRIAGE FORWARD: BUILDING MAJORITY SUPPORT FOR MARRIAGE* (2011), [https://freemarry.3cdn.net/1809cf9c79a249a415\\_ztm6blgzo.pdf](https://freemarry.3cdn.net/1809cf9c79a249a415_ztm6blgzo.pdf) [<https://perma.cc/H423-ZFC5>]; Zepatos & Hatalsky, *supra* note 115.

120. *Messaging, Messengers, and Public Support*, *supra* note 106.

121. *See id.*

122. Though direct causation is impossible to pinpoint, these legal developments correlated with shifts in public opinion.

123. Frank Newport, *For the First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP NEWS (May 20, 2011), <https://news.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx> [<https://perma.cc/3XC4-GMD4>].

124. *See* Ball, *supra* note 118.

125. *See id.*

funding to those states. Maryland did not, so the organization limited itself to sharing information.<sup>126</sup>

In 2012, the breakthrough came for LGBT rights advocates when they secured marriage equality at the ballot box for the first time. That election cycle, all four states with ballot measures on the subject either instituted marriage equality by popular vote or defeated a state ban on same-sex marriage, with the complete sweep surprising everyone, including advocates.<sup>127</sup>

The Maine referendum was particularly momentous for the marriage equality movement since, three years earlier, voters had vetoed the legislature's same-sex marriage law.<sup>128</sup> In 2009, Equality Maine primarily argued that the ballot measure was discriminatory, unfair, and violated the state's principle of equality.<sup>129</sup> In 2012, the campaign for same-sex marriage took a different approach based on Freedom to Marry's research findings on messaging. The organization—named Mainers United for Marriage, which reflected its new emphasis—aired commercials featuring parents and grandparents who had enjoyed long and loving marriages, and who wanted their gay and lesbian children and grandchildren to be able to experience the same privilege.<sup>130</sup> As one set of parents explained from their spacious and light-filled home, they did not dream of a civil union when they were young—they wanted to get married, and the two were not equivalent.<sup>131</sup> The ads emphasized love, family, and devotion, with one describing marriage as “a commitment that comes

126. *See id.*

127. *See* Hunter, *supra* note 44, at 1697; Sunnive Brydum, *Win Claimed in Washington: Voters Affirm Marriage Equality*, *ADVOCATE* (Nov. 7, 2012, 4:00 PM), <https://www.advocate.com/politics/marriage-equality/2012/11/07/win-claimed-washington-voters-affirm-marriage-equality> [<https://perma.cc/C2ML-HMSJ>].

128. *See* Judy Harrison, *Mainers Approve Gay Marriage Referendum*, *BANGOR DAILY NEWS* (Nov. 6, 2012, 8:29 PM), <https://bangordailynews.com/2012/11/06/politics/both-sides-of-gay-marriage-question-optimistic-as-polls-close> [<https://perma.cc/Q3P6-HTDC>].

129. *See* Equality Maine, *Clear*, *YouTube* (Oct. 30, 2009), <https://www.youtube.com/watch?v=vPS-fMX0gsg> [<https://perma.cc/SU8F-XJPT>]; Equality Maine, *Stand*, *YouTube* (Oct. 29, 2009), <https://www.youtube.com/watch?v=ID8qo20pSiU> [<https://perma.cc/84RU-YC7E>]; Equality Maine, *Together*, *YouTube* (Aug. 19, 2009), <https://www.youtube.com/watch?v=74kiByvu8R4> [<https://perma.cc/6HBP-K9CM>].

130. *See* Mainers United for Marriage, *Cathy and Phil Curtis*, *YouTube* (Oct. 9, 2012), <https://www.youtube.com/watch?v=TL48VDCsG-4> [<https://perma.cc/BQ7S-HRVD>]; Mainers United for Marriage, *Gardner Family of Machias*, *YouTube* (Oct. 25, 2012), <https://www.youtube.com/watch?v=2dTdP-XLZzk> [<https://perma.cc/FQ2E-VYJZ>]; Mainers United for Marriage, *Pat and Dan Lawson of Monroe*, *YouTube* (Oct. 19, 2012), <https://www.youtube.com/watch?v=FdUCLgixanQ> [<https://perma.cc/UT7G-2T9Y>]; Mainers United for Marriage, *Will and Arlene Brewster*, *YouTube* (Nov. 2, 2012), <https://www.youtube.com/watch?v=rizfhtN6UVc> [<https://perma.cc/W7T4-P9LU>].

131. *See* Mainers United for Marriage, *Cathy and Phil Curtis*, *supra* note 130.



from your heart.”<sup>132</sup> These commercials featured white, seemingly middle-class family members making the argument for gender-conforming gays and lesbians, who only appeared in photographs.

Mainers United for Marriage also deployed the framing research in other ways, such as using canvassers to help voters through their own journey stories. In a previous campaign, Equality Maine employed canvassers to identify supporters for get-out-the-vote efforts.<sup>133</sup> In 2012, the organization adopted a model of “conversion canvassing” that engaged and addressed the concerns of undecided voters.<sup>134</sup> Staff members and volunteers had conversations with undecided voters on the phone or at their doorsteps, “with the goal of guiding them through their discomfort to a place of support.”<sup>135</sup> Amy Mello, the group’s field director, tracked the success rates canvassers reported, using them to tweak messaging strategy so the conversations would be as effective as possible.<sup>136</sup>

The new research also provided Mainers United for Marriage a more effective way of responding to the opposition’s arguments. In the 2012 campaign, Protect Marriage Maine used the same strategy it had three years earlier, arguing that schools would teach children about same-sex marriage if voters approved the measure. The group recycled an ad from 2009 that warned parents to “keep homosexual education out of Maine schools.”<sup>137</sup> That commercial starred the same parents that had been featured in one of the California Proposition 8 proponents’ most effective ads.<sup>138</sup> Unlike its prior responses, Mainers United for Marriage did not attack the commercial as baseless and false, but instead emphasized that parents imparted their values to their children—not schools.<sup>139</sup> The group’s response ad, which hit television stations within

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132. See, e.g., Mainers United for Marriage, *Pat and Dan Lawson of Monroe*, *supra* note 130.

133. Hunter, *supra* note 44, at 1697.

134. *Id.*; SOLOMON, *supra* note 84, at 241–45.

135. SOLOMON, *supra* note 84, at 235.

136. See *id.*

137. Stand for Marriage Maine, *Everything to Do with Schools*, YouTube (Sept. 22, 2009), <https://www.youtube.com/watch?v=FijVUubUIV3s> [<https://perma.cc/4LBS-QXWE>].

138. See ProtectMarriage.com, *It’s Already Happened*, YouTube (Oct. 7, 2008), <https://www.youtube.com/watch?v=0PgjcgqFYp4> [<https://perma.cc/DB5Q-JZ26>]. Within a week of the ad’s airing, poll numbers showed Proposition 8 in the lead by four percentage points, whereas before it had been trailing by fourteen to seventeen percentage points. Ehrenreich, *supra* note 102; see also CARLOS A. BALL, SAME-SEX MARRIAGE AND CHILDREN: A TALE OF HISTORY, SOCIAL SCIENCE, AND LAW 112 (2014); DAVID FLEISCHER, THE PROP 8 REPORT: WHAT DEFEAT IN CALIFORNIA CAN TEACH US ABOUT WINNING FUTURE BALLOT MEASURES ON SAME-SEX MARRIAGE 32–35 (2010). The Prop 8 spot was so successful that variations on it appeared in every state with a marriage ballot measure after Prop 8. See Michael Shepherd, *Truth Test: Schools Would Teach Gay Marriage? No*, PORTLAND PRESS-HERALD, Oct. 31, 2012.

139. See SOLOMON, *supra* note 84, at 251.

twenty-four hours of the opposition's commercial first airing, featured a teacher and her husband who explained that "no law is going to change the core values we teach our kids here at home."<sup>140</sup> The polls showed no immediate change in public opinion after the opponents' ad aired, with 56 percent of voters still supporting marriage equality.<sup>141</sup>

Advocates' focus on research, messaging, and changing public opinion paid off in the 2012 ballot measures, which were an unmitigated success for LGBT rights groups.<sup>142</sup> There was a dramatic shift in tone, focus, and rhetoric from the earliest campaigns, which focused on equality, civil rights, and fairness, to the last ones, which emphasized love, commitment, and family. The narrative shift—from a discourse emphasizing minority rights, which demanded that the community live up to its claims of equality, to emotive pleas invoking a desire to assimilate—produced electoral results.<sup>143</sup> However, these victories were not costless, and these contemporary ballot measure campaigns are framing transgender rights in ways that do not mitigate these harms.<sup>144</sup>

## II. FRAMING TRANSGENDER IDENTITY

In the wake of marriage equality, LGBT rights opponents focused their energies on overturning sexual orientation and gender identity anti-discrimination provisions at the state and local levels. As this Part explains, these organizations rallied voters by arguing that the laws' transgender rights protections provided men access to women's bathrooms and locker rooms, among other sex-segregated facilities. In doing so, they drew on a long history of bathrooms serving as a flashpoint for civil rights contests, from Jim Crow to the Equal Rights Amendment (ERA) to Don't Ask, Don't Tell.<sup>145</sup> LGBT rights advocates initially struggled to respond

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140. *Id.*; Mainers United for Marriage, *Rob and Mary of Fairfield*, YouTube (Oct. 30, 2012), <https://www.youtube.com/watch?v=PXSUYKgoOSg> [<https://perma.cc/4SA6-CYCQ>].

141. SOLOMON, *supra* note 84, at 252.

142. In 2012, Maine and Maryland became the first two states to institute same-sex marriage by popular vote. That same year, Minnesota citizens rejected a constitutional amendment to ban same-sex marriage. *Ballot Measures Have Historical Results on Same-Sex Marriage and Legal Marijuana*, PBS (Nov. 7, 2012, 1:28 AM), [https://www.pbs.org/newshour/politics/politics-july-dec12-ballotmeasures\\_11-07](https://www.pbs.org/newshour/politics/politics-july-dec12-ballotmeasures_11-07) [<https://perma.cc/TY63-Q46B>].

143. See Franke, *supra* note 113, at 240–46; Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 33–34 (2010).

144. See *infra* Part III.

145. See Elizabeth Abel, *Bathroom Doors and Drinking Fountains: Jim Crow's Racial Symbolic*, 25 CRITICAL INQUIRY 435, 441–42 (1999); Terry S. Kogan, *Public Restrooms and the Distorting of Transgender Identity*, 95 N.C. L. REV. 1205, 1228–29 (2017); Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 215–16 (2000); Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 HARV. L. & POL'Y REV. 201, 227–28 (2012); Maria L. La Ganga, *From Jim Crow to Transgender Ban: The Bathroom as Battleground for Civil*

to these claims, but they became more successful once they applied the lessons of the marriage equality campaigns. Their new strategy shifted away from a language of benefits to one that instead emphasized the ways in which transgender men and women are like their cisgender counterparts. However, these campaign messages simultaneously highlighted the gender normativity of trans individuals, thereby implicitly reinforcing a divide between male and female.

### A. *Developing the Bathroom Argument*

The message that gender identity protections create peril in bathrooms has not always convinced voters. For a more than a decade, citizens approved antidiscrimination laws that contained both sexual orientation and gender identity protections, even as the laws' opponents claimed the statutes would grant men access to women's facilities, raising the specter of indecent exposure and sexual abuse.<sup>146</sup> However, campaigns utilizing this bathroom argument were often waged in liberal enclaves, thereby making it less likely that their message would resonate with voters.<sup>147</sup>

One of the first referendum efforts that centered on bathroom claims took place in the D.C. suburb of Montgomery County, Maryland.<sup>148</sup> In 2007, a group called Maryland Citizens for Responsible Government mobilized when the county added gender identity to its nondiscrimination law.<sup>149</sup> The organization, which had formed three years earlier to

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*Rights*, GUARDIAN (Mar. 30, 2016, 7:00 PM), <https://www.theguardian.com/world/2016/mar/30/transgender-ban-bathrooms-north-carolina-civil-rights> [<https://perma.cc/4X-TL-P5F2>]. Restroom segregation is both a social and legal practice, with regulations at the federal, state, and local levels that require gender-segregated facilities. See 29 C.F.R. § 1910.141(c)(1)(i); Irus Braverman, *Loo Law: The Public Washroom as a Hyper-Regulated Place*, 20 HASTINGS WOMEN'S L.J. 45, 58–61 (2009); Elizabeth Nolan Brown, *The Biggest Obstacle to Gender Neutral Bathrooms? Building Codes*, REASON MAG. (Apr. 11, 2014, 1:30 PM), <http://reason.com/archives/2014/04/11/gender-neutral-bathrooms-building-codes> [<https://perma.cc/SKJ8-29WP>]. But see New York City, N.Y., Local Law No. 79 Int. No. 871-A (2016). Title IX provides that schools may segregate toilet, shower, and locker rooms, so long as it offers comparable facilities for students of both sexes. 34 C.F.R. § 106.33.

146. See George, *supra* note 4, at 514–15.

147. See *id.*

148. In an earlier ballot measure battle in Ypsilanti, Michigan, opponents of the town's LGBT antidiscrimination ordinance argued the law would permit transgender men to enter women's restrooms. The group printed flyers featuring the image of a transgender man with the line: "Will you vote YES to protect your daughter . . . your granddaughter . . . from being forced to use the girl's bathroom with men like this?" Most of the group's literature, however, focused on child protection and preserving marriage for opposite-sex couples. Ypsilanti Citizens Voting YES for Equal Rights Not Special Rights, Flyer (2002) (on file with Bentley Historical Library, University of Michigan, Ypsilanti Campaign for Equality Records, Collection No. 07129, Box 1).

149. See Amanda Erickson, *Transgender Protections Trigger Backlash, Referendum*, CHI. TRIB. (Aug. 3, 2008), <https://www.chicagotribune.com/news/ct-xpm-2008-08-03-0808020416-story.html> [<https://perma.cc/E6PS-B7S5>]. These events transpired only a few weeks after the House of Representatives voted against a

prevent local schools from teaching that same-sex sexual attraction was an innate characteristic, warned fellow citizens in fliers, radio ads, and on its website, “NotMyShower.com,” that young girls would find themselves undressing next to men in locker rooms.<sup>150</sup> As a result of public outcry, the city council eliminated public accommodations protections from the bill, thereby limiting the law’s reach to employment, housing, credit, and mortgage loans.<sup>151</sup> The group nevertheless launched a referendum, since it claimed that the remaining provisions were vague and would “leave the door wide open” for men to assault women in “private areas.”<sup>152</sup> However, the referendum petition did not receive enough signatures to qualify for the ballot.<sup>153</sup>

In the years following the failed Montgomery County referendum effort, LGBT rights opponents increasingly deployed bathroom arguments and their attendant fears of sexual predators. A commercial that aired in contests between 2008 and 2011 demonstrates the extent to which the bathroom claims focused on the danger that gender identity protections posed to women and children. In the ad, a bearded man, whose identity was obscured by a baseball hat and glasses, followed a young, blond girl into a women’s restroom.<sup>154</sup> Viewers were meant to identify the man as cisgender; the commercial was not making a statement about transgender individuals so much as the unintended consequences of affording them legal protections. Opponents of LGBT rights deployed the commercial to oppose antidiscrimination laws across the country, airing it in cities from Gainesville, Florida, to Kalamazoo, Michigan, to warn viewers that their government had made the man’s actions legal and only their vote could remedy the situation.<sup>155</sup> These campaigns thus suggested that antidiscrimination laws emboldened predatory opportunists.

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gender identity-inclusive version of the federal Employment Non-Discrimination Act. George, *supra* note 4, at 554.

150. Erickson, *supra* note 149; Marc Fisher, *Montgomery Wisely Keeps Anti-Discrimination Law for Transgender People out of Public Restrooms*, WASH. POST (Nov. 11, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/10/AR2007111001526.html> [<https://perma.cc/VB8C-5PVD>].

151. Dana L. Fleming, *Massachusetts Passes Transgender Rights Bill*, MASS. BAR LAW. J. 1, 15 (2012), <http://www.massbar.org/publications/lawyers-journal/2012/january/massachusetts-passes-transgender-rights-bill> [<https://perma.cc/RK25-UJN2>].

152. Erickson, *supra* note 149.

153. *Doe v. Montgomery Cty. Bd. of Elections*, 962 A.2d 342, 362–63 (Md. 2008).

154. GainesvilleCitizen, *Citizens for Good Public Policy - Commercial*, YOUTUBE (June 17, 2008), <https://www.youtube.com/watch?v=ExGBIXKRrYs> [<https://perma.cc/9KZK-HVQX>].

155. See Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 142 (2010); *Bathroom Bill*, MASS. FAM. INST. (Jan. 4, 2011), <http://www.mafamily.org/state-legislation/bathroom-bill/173> [<https://perma.cc/V3JJ-QKKU>]; autumn59, *Kalamazoo Citizens Voting No to Special Rights Discrimination (Anti-Transgender)*, YOUTUBE (Mar. 23, 2016) (commercial originally aired in 2009), <https://www.youtube.com/watch?v=V4-UfizW1pc> [<https://perma.cc/>].

In response to claims about the harms that antidiscrimination laws posed, LGBT rights groups focused citizens' attention on fairness, equality, and the economic benefits of diversity, much like marriage equality campaigns did at the time. Kalamazoo's group informed viewers the law "was the right thing to do" because "black white, straight or gay, everyone deserves to be treated equally."<sup>156</sup> In Gainesville, the pro-LGBT group emphasized a similar message, starting with its name, Equality is Gainesville's Business. The organization's ads stressed that individuals could lose their jobs or be denied an apartment simply because of their sexual orientation or gender identity, which was simply "wrong."<sup>157</sup> Given that, at the time, 433 of Fortune 500 companies included sexual orientation in their antidiscrimination policies, and another 153 included gender identity, the head of the campaign argued that diversity, and the law, was "good for business."<sup>158</sup> The commercials in both cities featured a range of citizens who supported LGBT rights, most of whom were not identifiably gay, lesbian, or transgender. Much like the early marriage equality campaigns, these commercials stressed civil rights, fairness, and equality, although they succeeded where their marriage counterparts did not.

Thus, while bathroom arguments were central to ballot measure contests over LGBT antidiscrimination laws, these arguments did not lead citizens to systematically overturn the sexual orientation and gender identity provisions. For a minority group that had its rights put to popular vote so many times and lost almost universally until the late 1990s, it is striking that their fellow citizens consistently cast their ballots in favor

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TZ64-8V3J]; Zack Ford, *Focus on the Family Doesn't Want Transgender People to Use Bathrooms in Delaware*, THINKPROGRESS (June 6, 2013, 1:35 PM), <https://thinkprogress.org/focus-on-the-family-doesnt-want-transgender-people-to-use-bathrooms-in-delaware-756740dda184> [https://perma.cc/P9FZ-DU7T]; Zack Ford, *Tennessee Group Recycles Anti-Trans Bathroom Meme Commercial*, THINKPROGRESS (Apr. 1, 2011, 9:20 PM), <https://thinkprogress.org/tennessee-group-recycles-anti-trans-bathroom-meme-commercial-7bbc0422d64d> [https://perma.cc/6FWK-EKMQ]; NoBathroom-Bill, *NoBathroomBill.com Ad #1*, YOUTUBE (Mar. 17, 2009), <https://www.youtube.com/watch?v=GWDA4IGyY-s> [https://perma.cc/DUZ7-5JQS]; *Our Partners*, MASS. FAM. INST. (2017), <http://www.mafamily.org/our-partners> [https://perma.cc/8LVF-Y22T].

156. OneKalamazoo, *One Kalamazoo Ad - "People on the Street,"* YOUTUBE (Oct. 29, 2009), <https://www.youtube.com/watch?v=VK-BgSjtV1w> [https://perma.cc/5YT6-HBA5]; see also OneKalamazoo, *One Kalamazoo Ad - "Neighbors,"* YOUTUBE (Oct. 13, 2009), <https://www.youtube.com/watch?v=nly0Vao0b9I> [https://perma.cc/8J23-JGE6].

157. Equality is Gainesville's Business, *Young Voters*, YOUTUBE (Mar. 23, 2009), <https://www.youtube.com/watch?v=4hmsg4xR6qg>; Equality is Gainesville's Business, *Joanne*, YOUTUBE (Mar. 4, 2009), <https://www.youtube.com/watch?v=WrrwIW1vUYE>; No on Charter Amendment One, *Commercial*, YOUTUBE (Mar. 4, 2009), <https://www.youtube.com/watch?v=GHZ612KW6ec>.

158. Associated Press, *Florida Conservatives Fight for Repeal of Transgender Restroom Rule*, FOX NEWS (Jan. 10, 2009), <http://www.foxnews.com/story/2009/01/10/florida-conservatives-fight-for-repeal-transgender-restroom-rule.html> [https://perma.cc/7BLQ-CF3M].

of LGBT antidiscrimination laws between 1998 and 2011. However, the electoral landscape changed dramatically in 2012.

### B. *Targeting Transgender Rights*

Beginning in 2012, as marriage equality increasingly became the law of the land, opposition to LGBT antidiscrimination laws took a different tone.<sup>159</sup> Ballot measure campaigns repeated one main refrain: gender identity protections would allow sexual predators access to bathrooms and other sex-segregated facilities. However, these arguments became more explicitly antitransgender.<sup>160</sup> The bathroom rhetoric elided the difference between sexual predators and gender dysphoria, casting transgender individuals as disordered, deviant, and socially dangerous.<sup>161</sup> To counter these arguments, LGBT rights advocates' campaigns did not focus on transgender rights or dispelling the myths their opponents circulated. Rather, LGBT rights groups overwhelmingly treated gender identity as an elephant that they could ignore, as they had in previous measures. This tactic proved disastrous, as equality advocates lost time and time again at the ballot box—much as the marriage equality movement had when they focused on civil rights and fairness.

The ballot measure that marked a sea change in anti-LGBT rights campaigns' strategies took place in Anchorage, Alaska in 2012. The Alaska Family Council aired a series of ads featuring cross-dressing cartoon men, made up in garish eyeshadow and lipstick, who claimed the right to use the women's locker room at a gym and applied for a job at a day care.<sup>162</sup> The commercials warned that, under the proposed law, business owners would be fined or face jail time if they refused to “open the women's locker room to anyone who claims a female identity,” thereby identifying gender identity as a legal loophole rather than an authentic characteristic.<sup>163</sup> The ads similarly attempted to eliminate the difference between transgender identity and cross-dressing by informing viewers that daycare owners could not refuse to hire “a transvestite who wants to work with toddlers.”<sup>164</sup> As presented in these commercials, gender identity antidiscrimination provisions protected sexual predators, pedophiles,

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159. The change in campaign messaging is not the only explanation for the electoral shifts. Other factors, such as backlash to President Obama's re-election, retrenchment in response to marriage equality victories, and the location of the ballot measures themselves, all may have contributed to changes at the polls. However, it is notable that the campaigns also significantly changed their rhetoric.

160. See George, *supra* note 4, at 519–26.

161. See *id.*

162. AKFamilyAction, *Steve's Gym*, YouTube (Mar. 23, 2012), <https://www.youtube.com/watch?v=o8yoAaVgJVo> [<https://perma.cc/C75G-MLZ3>]; AKFamilyAction, *DaycareHD.mp4*, YouTube (Mar. 23, 2012), <https://www.youtube.com/watch?v=Qx-qYqY7vwt4> [<https://perma.cc/Z6Q3-N7GZ>].

163. AKFamilyAction, *Steve's Gym*, *supra* note 162.

164. AKFamilyAction, *DaycareHD.mp4*, *supra* note 162.

and fetishists, all while casting doubt on the notion that transgender existed as a real identity category.

The pro-LGBT rights coalition, One Anchorage, did little to refute the incendiary claims, instead pressing a positive message of inclusivity and equality—as its predecessor campaigns had done. For most of the election cycle, One Anchorage’s main commercials featured diverse groups of Anchorage residents who supported the ordinance as necessary to promote civil rights.<sup>165</sup> The ad’s message was that “everyone in Anchorage deserves the same legal protections” and the law was necessary because “gay and transgender workers can be fired simply because of who they are.”<sup>166</sup> The individuals in the commercial might have been gay, lesbian, or transgender, but they could just as easily have been heterosexual and cisgender allies. Nothing about the advertisement pointed to the people’s sexuality or gender identity. The upbeat music and happy families playing in the snow, having dinner, and enjoying life in Anchorage marked a stark contrast to the ominous tone of the opposition’s claims.

One Anchorage only addressed the opposition’s antitransgender claims five days before the vote. The organization disseminated a somber commercial featuring transgender activist Drew Phoenix, then-Executive Director of Identity, Inc., a leading Anchorage LGBT rights organization.<sup>167</sup> Speaking directly to the camera, Phoenix explained to viewers that he was born female, but that he had lived “fully as a man for many years,” and that it was “offensive when people like me are portrayed as a cartoon or worse yet, as someone to be feared.”<sup>168</sup> Phoenix also provided an affirmative case for the law: “Discrimination is dehumanizing. No one should be fired just because of who they are. I’m a real person. And like all people, I should have real legal protections.”<sup>169</sup> This message, which highlighted the personal impact of the law, aligned with shifts in the marriage equality campaigns that were happening at the same time.

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165. Yes on Proposition 5 – One Anchorage, *Stronger Community* (Mar. 12, 2012) (on file with author); see also Michelle Theriault Boots, *Debate Over Proposition 5 Intensifies with TV, Radio Ads*, ANCHORAGE DAILY NEWS (Mar. 20, 2012), <https://www.adn.com/alaska-news/article/debate-over-proposition-5-intensifies-tv-radio-ads/2012/03/21> [<https://perma.cc/WY5P-8ZD2>].

166. Yes on Proposition 5, *Stronger Community*, *supra* note 165.

167. Yes on Proposition 5 – One Anchorage, Real Faces – Drew (Mar. 28, 2012) (transcript on file with author); see also Lisa Keen, *Ads Loom over Anchorage Vote Tuesday*, KEEN NEWS SERV. (Mar. 29, 2012), <https://www.keennewsservice.com/2012/03/29/ads-loom-over-anchorage-vote-tuesday> [<https://perma.cc/6QAS-RBQM>] (describing Yes on 5’s response to Protect Your Rights). Phoenix appeared in One Anchorage’s earlier commercial. However, since Phoenix is a gender conforming man, it is not clear that any viewers would have identified him as transgender until this ad. Yes on Proposition 5, *Stronger Community*, *supra* note 165.

168. Yes on Proposition 5, Real Faces – Drew, *supra* note 167.

169. *Id.*

Anchorage citizens voted down the antidiscrimination protections, 58 percent to 42 percent.<sup>170</sup> Whether the Anchorage vote would have come out differently had One Anchorage presented Phoenix's arguments earlier in the campaign is impossible to say. Despite the limitations of One Anchorage's tactical decisions, the group stands out for being one of the only LGBT rights campaigns to foreground a transgender community member.<sup>171</sup>

In the following election cycles, organizations all but ignored gender identity, making the campaigns about everything but the transgender individuals whose lives would be affected. Instead, the groups continued to highlight rights and equality, even as the marriage equality movement shifted towards more emotional messages. For example, in a 2014 contest over an antidiscrimination law in Fayetteville, Arkansas, Keep Fayetteville Fair kept its message in line with its name: it focused on fairness.<sup>172</sup> The campaign's argument in favor of the antidiscrimination law was that no one should be discriminated against because of race, sex, religion, or sexual orientation.<sup>173</sup> As a result, "[a]ll folks who work hard, pay their taxes, serve in our military, and contribute to our community deserve to be treated fairly under the law, including our gay and transgender neighbors."<sup>174</sup> Like One Anchorage's first commercial, Keep Fayetteville Fair argued that LGBT individuals were the same as every other member of the community, and as such deserved the same rights.<sup>175</sup>

Given the decisive strategic shift within the marriage equality movement, the antidiscrimination campaigns' continued focus on rights and equality is noteworthy. One potential reason Keep Fayetteville Fair may have adopted a civil rights-based message, ignored its opponents' arguments about transgender deviance, and refused to feature transgender individuals in its campaign, was that Keep Fayetteville Fair's main funder

170. Ford, *supra* note 1.

171. See *infra* notes 179–180 and accompanying text.

172. See Dan Durning, *The Defeat of Fayetteville's Ordinance Prohibiting Anti-LGBT Discrimination: Was It Fair to Have Polling Places in Churches?*, ECLECTIC (AT BEST) (Mar. 5, 2015), <http://www.eclecticatbest.com/2015/03/the-defeat-of-fayettevilles-ordinance.html> [<https://perma.cc/VC6W-SJ2U>].

173. See Matthew Petty, *Against Repeal of Chapter 119: "Let's Keep Fayetteville Fair,"* NW. ARK. DEMOCRAT GAZETTE (Nov. 30, 2014), <https://www.nwonline.com/news/2014/nov/30/against-repeal-of-chapter-119-let-s-kee> [<https://perma.cc/RLE2-7F8Y>].

174. *Id.*

175. Notably, although the campaigns each spent approximately \$33,000, Keep Fayetteville Fair disseminated its message through telephone calls and flyers, rather than television or radio media. REPEAL 119, BALLOT QUESTION COMMITTEE FINANCIAL REPORT (Ark. 2015) (on file with author); KEEP FAYETTEVILLE FAIR, BALLOT QUESTION COMMITTEE FINANCIAL REPORT (Ark. 2015) (on file with author) [hereinafter Keep Fayetteville Fair 2015 Filing]; KEEP FAYETTEVILLE FAIR, BALLOT QUESTION COMMITTEE FINANCIAL REPORT (Ark. 2014) (on file with author) [hereinafter Keep Fayetteville Fair 2014 Filing].



was the Human Rights Campaign (HRC). HRC contributed hundreds of thousands of dollars in staff salaries, staff time, email and web development, fundraising, and legal fees to Keep Fayetteville Fair.<sup>176</sup> However, HRC had a long history of transgender exclusion from its organization; only one year earlier, it was embroiled in controversy after one of the organization's staffers asked a transgender activist to stop waving a trans flag at a marriage equality rally on the Supreme Court steps.<sup>177</sup> Indeed, local activists clashed with HRC over the national group's decision to marginalize transgender individuals in the ballot measure campaign.<sup>178</sup> The next year, when the city voted on a second LGBT ballot initiative, HRC declined to be involved and the local group got its way; it featured transgender individuals.<sup>179</sup> The second time around, Fayetteville upheld the LGBT rights ordinance, although that outcome was likely linked to a variety of factors, including revisions to the law itself.<sup>180</sup>

One of the main reasons HRC had historically opposed transgender inclusion was strategic, in that the organization's leaders were concerned that transgender individuals' transgression of gender norms would be too much for elected officials and the general public to accept and therefore would subvert its goals with respect to gay and lesbian rights.<sup>181</sup> HRC's position reflected the views of other gay and lesbian rights advocates, who considered extremely assimilationist arguments and appeals to the mainstream as the most effective way of attaining rights.<sup>182</sup> The fear that

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176. See Keep Fayetteville Fair 2015 Filing, *supra* note 175; Keep Fayetteville Fair 2014 Filing, *supra* note 175.

177. See George, *supra* note 4, at 542–48; Sunnivie Brydum, *HRC and Coalition Apologize for Silencing Undocumented, Trans Activists at Supreme Court Rally*, ADVOCATE (Apr. 1, 2013), <https://www.advocate.com/politics/marriage-equality/2013/04/01/hrc-and-coalition-apologize-silencing-undocumented-trans> [<https://perma.cc/W5SR-UA3D>].

178. See Dominic Holden, *Why America's Top LGBT Group Is Losing an Argument over Bathrooms*, BUZZFEED NEWS (Dec. 22, 2015, 10:55 AM), [https://www.buzzfeed.com/dominicholden/hrc-bathroom-strategy?utm\\_term=.oqWbvrMjn#.xw-jvMoa1G](https://www.buzzfeed.com/dominicholden/hrc-bathroom-strategy?utm_term=.oqWbvrMjn#.xw-jvMoa1G) [<https://perma.cc/5KK8-59XN>].

179. See *id.*

180. The revised Civil Rights Ordinance mirrored the Arkansas Civil Rights Act and Fair Housing Act to reduce confusion about what conduct the law prohibited. See Meleah Perez, *Special Election to Decide Fate of Ordinance*, ARK. TRAVELER (Aug. 26, 2015), [http://www.uatrav.com/news/article\\_f963926e-4a89-11e5-b4cf-fb9a60acb30b.html](http://www.uatrav.com/news/article_f963926e-4a89-11e5-b4cf-fb9a60acb30b.html) [<https://perma.cc/LYQ9-769T>].

181. See, e.g., Chai R. Feldblum, *Gay People, Trans People, Women: Is It All About Gender?*, 17 N.Y.L. SCH. J. HUM. RTS. 623, 627–28, 630 (2000); Memorandum from Martha Fitzwater, HRC Fund Board of Directors, to Kay Longcope, Texas Triangle Publisher (July 21, 1995) (on file with Carl A. Kroch Library, Cornell University, Human Rights Campaign Records, Collection No. 7712, Box 116, Folder 11).

182. See Shannon Price Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion*, in TRANSSEXUAL RIGHTS 153 (Paisley Currah et al. eds., 2006); Chrissy Cada, *Issue of Transgender Rights Divides Many Gay Activists, Transgender Activists Seek a Greater Voice*, BOS. GLOBE, Apr. 23, 2000, at A8.

transgender visibility would hinder advocacy efforts helps explain why HRC-led campaigns did not feature transgender individuals, although other campaigns also did the same.<sup>183</sup>

The most extreme example of transgender exclusion was in Houston in 2015, when the pro-LGBT rights coalition, Houston Unites, did not even mention gender identity protections in its campaign commercials.<sup>184</sup> By the time Houston's citizens voted down their city's antidiscrimination law, Houston Unites had raised almost \$4 million, outspending its opponents three to one, and everyone from presidential candidates to Hollywood celebrities had weighed in on the law.<sup>185</sup>

The Houston ballot measure was a gauge of how powerful anti-transgender bathroom rhetoric had become, as LGBT rights groups had not expected to lose in the country's fourth-largest city.<sup>186</sup> Houston's voters had returned a lesbian mayor to office in three consecutive elections, and the ordinance protected residents based on fifteen characteristics, including national origin, sex, marital status, military status, and disability.<sup>187</sup> Data showed the bill would be used primarily to address discrimination against racial minorities, but controversy arose during legislative debates because it included a provision allowing individuals to

183. HRC also led the 2015 campaign in Springfield, Missouri, and maintained the same strategy, avoiding addressing gender identity and transgender rights even as its opponents argued the law's gender identity provisions gave men access to women's facilities. Instead, HRC promoted the law as good for business and emphasized that LGBT individuals were valued community members. See Stephen Herzog, *Ad Features Business Leaders in Support of Gay Rights Law*, SPRINGFIELD NEWS-LEADER (Mar. 4, 2015), <http://www.news-leader.com/story/news/local/ozarks/2015/03/04/ad-features-business-leaders-support-gay-rights-law/24399003> [<https://perma.cc/5KK8-59XN>]; Holden, *supra* note 178.

184. See Houston Unites, YOUTUBE, <https://www.youtube.com/channel/UCVQ-iNhpXsfL4eB28hHZgDQ/featured> [<https://perma.cc/Q4G4-RTE8>] (last visited Oct. 31, 2019) (presenting eight videos in favor of the anti-discrimination law, none of which reference gender identity as a protected characteristic).

185. Russell Berman, *How Bathroom Fears Conquered Transgender Rights in Houston*, ATLANTIC (Nov. 3, 2015), <https://www.theatlantic.com/politics/archive/2015/11/how-bathroom-fears-conquered-transgender-rights-in-houston/414016> [<https://perma.cc/CF68-4ZAJ>]; Holden, *supra* note 178; Holden, *supra* note 22. HRC invested heavily in the measure, sending thirty-four staffers to work on the campaign full time and donating \$600,000. Holden, *supra* note 22.

186. See Berman, *supra* note 185. Sixty-one percent voted to repeal the antidiscrimination law. Justin Wm. Moyer, *Why Houston's Gay Rights Ordinance Failed: Fear of Men in Women's Bathrooms*, WASH. POST (Nov. 4, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/11/03/why-houstons-gay-rights-ordinance-failed-bathrooms> [<https://perma.cc/9KAU-SG9G>]; Alexa Ura, *Bathroom Fears Flush Houston Discrimination Ordinance*, TEX. TRIB. (Nov. 3, 2015, 7:00 PM), <https://www.texas-tribune.org/2015/11/03/houston-anti-discrimination-ordinance-early-voting> [<https://perma.cc/7EVG-HJND>].

187. Hannah Smothers, *Houston's Equal Rights Ordinance, Explained*, TEX. MONTHLY (Jan. 21, 2015), <http://www.texasmonthly.com/the-daily-post/houstons-equal-rights-ordinance-explained> [<https://perma.cc/9XKL-DYK7>].

use the restroom or locker room of their gender identity.<sup>188</sup> Although the approved version did not ultimately contain the facilities element, its initial presence spurred conservative politician Mike Huckabee to lead an opposition campaign against the ordinance.<sup>189</sup> Once again, opponents made the bathroom argument their central rallying cry,<sup>190</sup> and it proved decisive for the campaign, as fears surrounding sex-segregated facilities led many undecided voters to cast their ballots against the antidiscrimination measure.<sup>191</sup>

Like prior campaigns, Houston Unites' strategy de-emphasized LGBT individuals in favor of the other groups who would benefit from the law. The first commercial it developed featured religious leaders who explained they supported the law so that community members would be treated equally, "no matter their race, age, gender, sexual orientation, or military status."<sup>192</sup> Gender identity did not appear on this list. The campaign created only one commercial featuring a specific experience of discrimination, in which a man named Noel Freedman explained he had been discriminated against after serving in the Air Force because of his veteran status.<sup>193</sup> Houston Unites campaign manager Richard Carlbom later described this ad as "very effective" because it might allow viewers to personally relate to the story, as they might identify with Freedman.<sup>194</sup> The last commercial the group developed and aired before the vote showed pastors, families, veterans, and men and women of all races who supported the law. The ad noted that the law would protect individuals

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188. See *id.*; City of Houston, Tex., Ordinance No. 2014-530 (2014), [https://www.houstontx.gov/equal\\_rights\\_ordinance.pdf](https://www.houstontx.gov/equal_rights_ordinance.pdf) [<https://perma.cc/2H5L-YBRR>]; Dominic Holden, *This Ad Claims Men Will Follow Girls into Restroom Stalls If Houston Upholds Nondiscrimination Law*, BUZZFEED NEWS (Oct. 19, 2015, 7:49 PM), [https://www.buzzfeed.com/dominicholden/this-ad-claims-men-will-follow-girls-into-restroom-stalls-if?utm\\_term=.sy835kRo6#.pmkAkdBDP](https://www.buzzfeed.com/dominicholden/this-ad-claims-men-will-follow-girls-into-restroom-stalls-if?utm_term=.sy835kRo6#.pmkAkdBDP) [<https://perma.cc/CP2Q-RCTK>].

189. See Steve Harrison, *Opponents' Focus on Bathrooms Changed the Debate over LGBT Rights*, CHARLOTTE OBSERVER (Mar. 31, 2016, 2:00 AM), <https://www.charlotteobserver.com/news/politics-government/article69097577.html> [<https://perma.cc/P6GD-89JP>]; Smothers, *supra* note 187.

190. See CAMPAIGN FOR HOUSTON, VOTE NO HOUSTON'S PROPOSITION #1 MAILER (2015), <http://www.campaignforhouston.com/wp-content/uploads/2015/10/CAMPAIGN-FOR-HOUSTON-Sample-Ballot-for-Early-Voting.pdf> [<https://perma.cc/2RW8-7Y87>]; Campaign for Houston, *Campaign for Houston - TV Spot 1*, YOUTUBE (Oct. 13, 2015), <https://www.youtube.com/watch?v=D7thOvSvC4E> [<https://perma.cc/GLY4-DQPT>].

191. See Holden, *supra* note 178.

192. *Faith Leaders Take a Stand for Hero in Campaign's First TV Ad*, HOUSTON UNITES (Sept. 24, 2015), <http://houstonunites.org/adfaith> [<https://perma.cc/5WN5-7X4M>].

193. See *New Yes on Prop 1 TV Ad Highlights Discrimination Faced by Houston Veteran*, HOUSTON UNITES (Oct. 15, 2015), <http://houstonunites.org/new-yes-on-prop-1-tv-ad-highlights-discrimination-faced-by-houston-veteran> [<https://perma.cc/UH87-FYSY>].

194. Holden, *supra* note 22.

based on race, age, family status, and military status.<sup>195</sup> It did not mention either sexual orientation or gender identity.<sup>196</sup>

Houston Unites did not prepare any television commercials that exclusively addressed the bathroom issue. Rather, they incorporated counterarguments within another, pro-family ad.<sup>197</sup> In part, this approach was the product of Houston Unites underestimating the bathroom argument's impact.<sup>198</sup> Terri Burke, the executive director of the ACLU of Texas, indicated that the benefit of addressing the bathroom argument did not justify its steep financial cost; when a reporter asked whether the campaign should increase the focus of its advertising on the bathroom argument, she answered: "You think we are going to spend \$300,000 a week to keep talking about bathrooms?"<sup>199</sup> The commercial Houston Unites developed, which the group released almost halfway into the campaign, featured a panoply of women as they played, baked, and made crafts with their children, all while explaining that the antidiscrimination law was an essential means of protecting them and their families from discrimination.<sup>200</sup> They assured the audience that the law would not put women or children at risk or "allow sexual predators to enter women's restrooms."<sup>201</sup> The vision of domesticity, which matched the assurance from the women that, "as wives, mothers, grandmothers, nothing's more important than keeping our children safe," imbued the statement with moral authority.<sup>202</sup> However, it did not address the underlying anxieties about what it meant for transgender individuals to use facilities consistent with their gender identity.

The Houston campaign epitomized how detrimental the groups' strategy had become, and like other ballot measures during this period, LGBT individuals lost their protections after voters went to the polls.

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195. See *Breaking: Latest Ad Buy of the YES on Prop 1 Campaign is Live, Highlighting the Diversity of Houstonians Protected Under HERO*, HOUSTON UNITES (Oct. 26, 2015), <http://houstonunites.org/neighborsad> [<https://perma.cc/4QHL-S6AB>].

196. See *id.*

197. It also posted a web video featuring retired police officer Ed Gonzalez, who told viewers that, as a "father of four girls," he's "always in protection mode." Gonzalez followed the Springfield radio spot script, assuring voters that other Texas cities with similar laws had not seen an increase in public safety incidents and that the law would continue to prevent men from going into women's restrooms to harm or harass anyone. *Houston Unites Launches Web Ad Featuring Houston Police Officer Backing Proposition 1*, HOUSTON UNITES (Oct. 12, 2015), <http://houstonunites.org/houston-unites-launches-web-ad-featuring-houston-police-officer-backing-proposition-1> [<https://perma.cc/RV2K-MPVR>]; see sources cited *supra* note 4.

198. See Holden, *supra* note 22.

199. *Id.*

200. See *Houston Moms Voice Staunch Support for Proposition 1 in Latest Video Ad, Defying Opposition Claims*, HOUSTON UNITES (Sept. 29, 2015), <http://houstonunites.org/moms> [<https://perma.cc/3ZZE-N7BW>].

201. *Id.*

202. *Id.*

Opponents' arguments about bathrooms convinced citizens around the country that gender identity protections posed a significant danger, and equality advocates' arguments about civil rights—much like the marriage equality campaign years before—were insufficient to stem those fears. The national organizations involved in the local campaigns were not just aware of, but integrated in, the marriage equality movement, and therefore knew what strategic changes it had made to resonate with voters. However, they did not apply those lessons to transgender rights campaigns until 2018, and when they finally did so, they did not address the exclusionary aspects of the tactics.

Between 2012 and 2015, the LGBT rights campaigns increasingly ignored transgender rights. The Anchorage group featured a transgender individual, but only in the waning days of the campaign. In Arkansas, the Fayetteville organization kept transgender individuals out of the lime-light, instead hammering the themes of inclusion and fairness. By the Houston measure, the campaign was not even mentioning gender identity protections. The campaigns progressed towards transgender erasure because of the same strategic concerns that led the marriage equality movement to adopt the most assimilationist posture possible. The next stage of the ballot measure campaigns, in which trans rights became the sole issue for voters, finally pushed LGBT rights organizations to feature transgender individuals. However, following their previous strategies, they applied an extremely assimilationist approach, limiting trans representation to gender-conforming individuals.

### C. *New Measures, New Strategies*

With transgender rights as the only target, LGBT rights advocates have changed their messaging, as they can no longer ignore trans individuals. This past year, in 2018, the ballot measures narrowed in scope to only seek repeal of the gender identity provisions of antidiscrimination laws. To quell voters' anxieties about gender identity, nonconformity, and deviance, LGBT rights campaigns incorporated the marriage equality movement's personalized discourse and emphasis on sameness.<sup>203</sup> In doing so, the campaigns have featured binary transgender individuals, who reinforce gender norms,<sup>204</sup> while staying silent on the many gender nonconforming people whose rights may be all the more difficult to vindicate as a result of their social and political erasure.<sup>205</sup>

In the spring of 2018, Anchorage, Alaska, became the first site of a specifically antitransgender initiative.<sup>206</sup> LGBT rights campaign

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203. See Hunter, *supra* note 44, at 1670.

204. As Subpart IV.C explains, the campaigns have other options.

205. Erasure is a forced invisibility. Cf. Yoshino, *supra* note 31, at 388.

206. See Devin Kelly, *With Nearly All Ballots Counted, "Bathroom Bill" Rejected by Anchorage Voters*, ANCHORAGE DAILY NEWS (Apr. 6, 2018), <https://www.adn.com/alaska-news/anchorage/2018/04/06/>

organizers were well acquainted with the arguments and rhetoric their opponents would use, as four years earlier the new bathroom strategy had debuted in their city.<sup>207</sup> Voters rejected the proposed sexual orientation and gender identity nondiscrimination measure in 2012, but the Anchorage Assembly passed a local ordinance in 2015 providing these protections to LGBT residents.<sup>208</sup> Unlike the previously rejected version, the Assembly's ordinance included a definition of gender identity, namely that it was "sincerely held, core to a person's gender-related self-identity, and not . . . asserted for an improper purpose."<sup>209</sup> Despite this limitation, the Alaska Family Council, which had led the anti-LGBT rights effort only a few years before, gathered enough signatures to put a repeal of the gender identity element of the ordinance on the spring ballot.<sup>210</sup>

Anchorage's pro-LGBT rights campaign, Fair Anchorage, enlisted the help of national LGBT rights groups that had been involved in both earlier antidiscrimination ballot measures and the marriage equality movement. HRC and the ACLU both devoted significant staff time and other resources to helping Fair Anchorage prepare, launch, and develop its campaign, which invariably shaped the strategies the Anchorage group deployed.<sup>211</sup>

Much like the marriage equality movement had less than a decade earlier, Fair Anchorage focused on messaging and changing public opinion. The group raised over \$800,000 for the campaign, which it spent on polling and surveys before developing its radio, print, digital, and television advertisements.<sup>212</sup> Like many LGBT-related ballot measures in

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with-nearly-all-ballots-counted-bathroom-bill-rejected-by-anchorage-voters [https://perma.cc/8LUA-RZPQ].

207. See George, *supra* note 4, at 519–26.

208. Anchorage, Alaska, Ordinance 2015–96(S–1) (Sept. 29, 2015).

209. *Id.* Individuals could establish their gender identity by "evidence of medical history, care or treatment of gender identity, consistent and uniform assertion of the gender identity, or other evidence." *Id.* § 2.

210. See Devin Kelly, *God, Gender Identity and Public Restrooms at Play in Anchorage's Proposition 1 Debate*, ANCHORAGE DAILY NEWS (Mar. 3, 2018), https://www.adn.com/alaska-news/anchorage/2018/03/03/god-gender-identity-and-public-restrooms-at-play-in-anchorage-proposition-1-debate [https://perma.cc/SR5T-W4FT]. The Alaska Family Action is a public policy subsidiary of the Alaska Family Council. Jim Minnery, who led the anti-LGBT campaigns, is the executive director of both organizations. *Who We Are*, ALASKA FAM. COUNCIL, https://www.akfamily.org/who-we-are [https://perma.cc/HD6D-HAFH]; *Jim Minnery*, ALASKA FAM. COUNCIL, https://www.akfamily.org/team/jim-minnery [https://perma.cc/HD6D-HAFH].

211. These organizations, as well as the National LGBTQ Task Force and Lambda Legal Defense & Education Fund, also donated money to the campaign. FAIR ANCHORAGE, YEAR START REPORT, Mar. 4, 2018 (on file with Alaska Public Offices Commission); FAIR ANCHORAGE, THIRTY DAY REPORT, Mar. 25, 2018 (on file with Alaska Public Offices Commission); FAIR ANCHORAGE, SEVEN DAY START REPORT, Apr. 12, 2018 (on file with Alaska Public Offices Commission); FAIR ANCHORAGE, TWENTY-FOUR HOUR REPORT, Mar. 27, 2018 (on file with Alaska Public Offices Commission).

212. See sources cited *supra* note 211.

other cities, the campaign against Proposition 1 became one of the most expensive in Anchorage's history.<sup>213</sup>

Two important factors distinguished the 2018 campaign from the city's previous ballot measure: first, transgender individuals led Fair Anchorage, and, second, they were a visible part of the campaign from the beginning. In addition to having a transgender woman as a campaign co-chair, transgender women also led the organization's community organizing. Given how the organizations previously framed these campaigns, it was remarkable that transgender individuals appeared front and center. Having transgender individuals assert their gender identity and claim the right to be recognized accordingly was a significant step in promoting justice for transgender individuals, many of whom suffer these dignitary harms daily.<sup>214</sup>

At the same time, all of these trans leaders were gender conforming, which may have affected how they addressed their opponents' bathroom arguments. The campaign co-chair, Denise Sudbeck, had shoulder-length blond hair and was often pictured in skirts.<sup>215</sup> Lillian Lennon and Andrea Zekis, the field organizers, likewise sported haircuts and clothing that emphasized their femininity.<sup>216</sup> In discussing bathrooms, they emphasized how disconcerting it would be for cisgender individuals if trans people were required to use the restroom of their assigned gender at birth. Lennon, for example, told the Anchorage Daily News that she "wouldn't feel comfortable in the men's restroom" and that few men "would feel comfortable either, because [she] live[d] and present[ed] as a woman."<sup>217</sup> Lennon's self-presentation reinforced her point that her presence in a men's space would likely be discomfiting for cisgender men.

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213. Kelly, *supra* note 206; *see also supra* note 96 and accompanying text.

214. *See, e.g.*, U.S. TRANSGENDER SURVEY, *supra* note 15, at 49–51, 150–52.

215. *See Fair Anchorage Announces Campaign Leadership Staff*, FAIR ANCHORAGE (2019), <http://www.fairanchorage.org/blog-posts/fair-anchorage-announces-campaign-leadership-staff> [<https://perma.cc/686H-UKF7>]; *Denise Sudbeck*, FAIR ANCHORAGE (2019); <http://www.fairanchorage.org/voices/denise-sudbeck> [<https://perma.cc/XF46-SUHP>].

216. Lennon and Zekis served as the Field Organizer and Community Organizer, respectively. Julie Compton, *Alaskans Vote "No" on Anti-Transgender "Bathroom Bill"*, NBC NEWS (Apr. 7, 2018), <https://www.nbcnews.com/feature/nbc-out/alaskans-vote-no-transgender-bathroom-bill-n863471> [<https://perma.cc/8XEK-AS3R>]; *Fair Anchorage Announces Campaign Leadership Staff*, *supra* note 215; Rebecca Palsha, *A Signature Pledging Not to Sign Another Petition: Anchorage's "Bathroom" Initiative Generates Controversy*, KTUU (July 18, 2017), <https://www.ktuu.com/content/news/A-signature-pledging-not-to-sign-another-petition-435265783.html> [<https://perma.cc/LB33-KX2Q>]; Devin Kelly, Photograph of Andrea Zekis, in Kevin D. McGee, *Point-Counterpoint: Protect Transgender People from Bigotry*, ANCHORAGE DAILY NEWS (Feb. 8, 2018), <https://www.adn.com/opinions/2018/02/08/point-counterpoint-protect-transgender-people-from-bigotry-vote-no-on-proposition-1> [<https://perma.cc/CD2B-EPHZ>].

217. Kelly, *supra* note 210.

The organization's statements did not extend to the fraught experiences of gender nonconforming individuals in gendered spaces.

Because of her appearance and personal experiences, Lennon was able to engage with voters who were anxious about sharing bathrooms with trans individuals, thereby guiding them through the types of journeys that marriage equality advocates had identified as so crucial. Starting in August 2017, Lennon and other campaign volunteers spent every weekend knocking on voters' doors.<sup>218</sup> When voters expressed concerns about restrooms, Lennon explained that Proposition 1 would force her to use the men's restroom and shared her fears about what would unfold in such situations.<sup>219</sup> Those conversations at voters' doorsteps was the first time many citizens had encountered a transgender person, which may have also helped shape their views in favor of transgender rights.<sup>220</sup>

Fair Anchorage took another page from the marriage equality playbook when it presented parents to explain why the law's defeat was important to their families. The campaign's first television commercial introduced Anchorage residents to David Lockard, the father of a transgender teenager.<sup>221</sup> Lockard began by telling viewers that, "like most parents, I care deeply about my family," and that he wanted his transgender son Col to be safe.<sup>222</sup> The commercial also featured Col, who expressed his fears of bullying, harassment, and being "forced to use the girls' restroom at school."<sup>223</sup> Like the other transgender individuals featured in the campaign, Col was gender conforming, thereby implicitly reinforcing the campaign's strategic point that transgender men are men and transgender women are women, even though many are not.<sup>224</sup>

The advocates of the repeal measure, Yes on Prop 1, used the same strategy that opponents of transgender rights had relied upon in other measures: they emphasized that the law allowed men to enter women's spaces. One commercial featured a woman named Kate, who described feeling violated upon encountering a biological man in a women's one-piece swimsuit in the female locker room at a health club pool.<sup>225</sup> In

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218. See Compton, *supra* note 216.

219. See *id.*

220. See *id.* Interpersonal contact can reduce bias against minority populations, including transgender individuals. See, e.g., Aaron T. Norton & Gregory M. Herek, *Heterosexuals' Attitudes Toward Transgender People: Findings from a National Probability Sample of U.S. Adults*, 68 *SEX ROLES* 738 (2013); Tanya L. Tompkins et al., *Reducing Stigma Toward the Transgender Community: An Evaluation of a Humanizing and Perspective-Taking Intervention*, 2 *PSYCHOL. SEXUAL ORIENTATION & GENDER DIVERSITY* 34, 36 (2015).

221. *First No on Prop 1 Television Ad Hits the Air in Anchorage!*, FAIR ANCHORAGE (2008), <http://www.fairanchorage.org/blog-posts/first-television-ad-hits-air> [<https://perma.cc/7VWN-X4KA>].

222. *Id.*

223. *Id.*

224. U.S. TRANSGENDER SURVEY, *supra* note 15, at 45.

225. *Ask Me First: Kate*, YES ON 1 (2018), <https://yesprop1.com/videos> [<https://>



another ad, the organization highlighted a dispute over a transgender woman seeking to access an Anchorage homeless shelter for women.<sup>226</sup> Yes on Prop 1 characterized the events as “[a] man claiming to be a woman” trying to “enter a shelter for abused women . . . to sleep and shower with the women” and “using Anchorage law to force his way in.”<sup>227</sup> In each of these two commercials, Yes on 1 thus framed gender identity protections as a loophole through which sexual predators gained access to victims.

Yes on Prop 1’s backers, through their advertisements and statements to the press, also questioned whether transgender individuals in fact existed. They insisted that it was not possible for a man to identify as a woman, and vice versa.<sup>228</sup> Their position was “rooted in fundamental religious beliefs about the differences between men and women.”<sup>229</sup> For that reason, an individual who was assigned a male gender at birth might “claim” to be a woman, but could not be one.

Anchorage voters ultimately rejected Yes on Prop 1’s arguments, with 53 percent opposing the repeal initiative.<sup>230</sup> Citizens also re-elected the mayor that had signed the ordinance into law.<sup>231</sup> The shift from 2012 was significant, as six years earlier 58 percent had voted down the sexual orientation and gender identity protections.<sup>232</sup> There were several factors

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perma.cc/T2W2-ZRYX]. She claimed the man cast a predatory gaze over the women in the space and management could not intervene because of the non-discrimination law. *Id.* The woman in the ad was Kate Ives, from Minnesota, who first recounted her experience to the Minnesota Legislature. Yes on 1 argued Ives’ experience was representative of Anchorage residents’ experiences, but that those individuals were afraid of harassment should they speak up. Devin Kelly, *Groups Trade Barbs Over Campaign Advertising on Anchorage Transgender Proposition*, ANCHORAGE DAILY NEWS (Mar. 23, 2018), <https://www.adn.com/alaska-news/anchorage/2018/03/23/groups-trade-barbs-over-campaign-advertising-on-anchorage-transgender-proposition> [<https://perma.cc/ZE2D-PUQL>].

226. Devin Kelly, *Discrimination Complaint Against Downtown Anchorage Women’s Shelter Opens up Political Front*, ANCHORAGE DAILY NEWS (Mar. 14, 2018), <https://www.adn.com/alaska-news/anchorage/2018/03/14/discrimination-complaint-against-downtown-anchorage-womens-shelter-opens-up-political-front> [<https://perma.cc/996Z-22F6>]. Samantha Coyle, a transgender woman, filed a discrimination claim against Hope Center, arguing they had refused her entry because of her transgender status; Hope Center stated they denied Cole on the first occasion because she was intoxicated and on the second because she came at the wrong time of day, and that it had served transgender women in the past. Kelly, *supra* note 225.

227. Kelly, *supra* note 225.

228. Kelly, *supra* note 210.

229. *Id.*

230. Emanuella Grinberg, *Voters in Alaskan City Reject a “Bathroom Bill” at the Ballot Box*, CNN (Apr. 9, 2018, 12:35 PM), <https://www.cnn.com/2018/04/08/politics/anchorage-alaska-results-proposition-1/index.html> [<https://perma.cc/G7JC-RUEG>]; Kelly, *supra* note 206.

231. Grinberg, *supra* note 230.

232. Michelle Theriault Boots, *Voters Reject Sexual Orientation Initiative*, ANCHORAGE DAILY NEWS (Apr. 3, 2012), <https://www.adn.com/alaska-news/article/>

that likely contributed to the different outcome, including the change in strategy, as well as the LGBT rights advocates' expenditure of more than twice as much on the measure the second time around.<sup>233</sup> Additionally, citizens had likely become more familiar with trans rights issues during the intervening years.<sup>234</sup> Finally, there were almost 5 percent more participants voting in the 2018 election, which was conducted by mail-in ballots over the course of a three-week period, rather than using in-person polls.<sup>235</sup>

As the first jurisdiction to uphold transgender rights on a standalone referendum, the Anchorage strategy indicated that the particularly assimilationist, binary model of transgender representation was one to emulate, and other campaigns did in fact follow Fair Anchorage's lead.<sup>236</sup> In Montana, the LGBT rights groups that opposed Initiative 183 (I-183), adopted a strategy much like Fair Anchorage's. The Montana Family Foundation proposed I-183 after HB 609, entitled the "Montana Locker Room Privacy Act," failed in the House Judiciary Committee.<sup>237</sup> Supporters of the bill had argued to the committee

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voters-reject-sexual-orientation-initiative/2012/04/04 [https://perma.cc/RSF8-C2TX].

233. Compare *id.* (explaining that LGBT rights advocates raised \$350,000 in 2012), with Kelly, *supra* note 206 (explaining that LGBT rights advocates raised over \$800,000 in 2019).

234. See Mark Mellman, *Changing Views of Transgender Rights*, THE HILL (June 11, 2019, 7:30 PM), <https://thehill.com/opinion/civil-rights/448047-mellman-changing-views-of-transgender-rights> [https://perma.cc/6SNH-FHV2]; see also Samantha Schmidt, *Americans' Views Flipped on Gay Rights. How Did Minds Change so Quickly?*, WASH. POST (June 7, 2019), [https://www.washingtonpost.com/local/social-issues/americans-views-flipped-on-gay-rights-how-did-minds-change-so-quickly/2019/06/07/ae256016-8720-11e9-98c1-e945ae5db8fb\\_story.html](https://www.washingtonpost.com/local/social-issues/americans-views-flipped-on-gay-rights-how-did-minds-change-so-quickly/2019/06/07/ae256016-8720-11e9-98c1-e945ae5db8fb_story.html) [https://perma.cc/56T9-F8NT] (identifying familiarity as a key factor in changing opinions on gay and lesbian rights).

235. Compare Grinberg, *supra* note 230 (stating nearly 77,000 ballots were cast in 2018), with Christopher Brocklebank, *Anti-Discrimination Bill Results in Anchorage Called into Question Over Allegations of Voter Fraud*, PINK NEWS (Apr. 9, 2012), <https://www.pinknews.co.uk/2012/04/09/anti-discrimination-bill-results-in-anchorage-called-into-question-over-allegations-of-voter-fraud> [https://perma.cc/TF9A-D6FQ] (stating 50,000 ballots were cast in 2012); see also MJ Okma, *Transgender Rights Targeted by Multiple Ballot Measures Across the United States*, GLAAD (Feb. 12, 2018), <https://www.glaad.org/blog/transgender-rights-targeted-multiple-ballot-measures-across-united-states> [https://perma.cc/2Z8F-35W2] (explaining the vote by mail timeline for the 2018 election). Anchorage changed to Vote by Mail elections in 2016. *Frequently Asked Questions*, Municipality of Anchorage (July 23, 2019), <https://www.muni.org/Departments/Assembly/Clerk/Elections/Pages/Frequentlyaskedquestions.aspx#S7Q1> [https://perma.cc/PPM6-E8NX].

236. See Stephanie Ebbert, *Transgender Rights Will Be Tested in Mass. Referendum*, BOS. GLOBE, Apr. 18, 2018, at A1.

237. See Complaint for Declaratory & Injunctive Relief at 2-3, *Hobaugh v. Montana*, No. CDV-17-0673 (Mont. Cty. Ct. Oct. 17, 2017), [https://www.aclumontana.org/sites/default/files/field\\_documents/2017-10-17\\_complaint\\_for\\_declaratory\\_inj\\_relief\\_w\\_exhibits.pdf](https://www.aclumontana.org/sites/default/files/field_documents/2017-10-17_complaint_for_declaratory_inj_relief_w_exhibits.pdf) [https://perma.cc/U6MD-ZXZQ]; Holly K. Michels, *Montana Transgender Bathroom Bill Killed in Committee; Ballot Initiative Vowed*, MISSOULIAN (Mar.

that the law was necessary to protect women and children. Opponents, however, emphasized the discrimination transgender individuals faced and the burden that the law would impose on local communities to police public spaces. In voting down the bill, lawmakers cited the high rates of suicide and attempted suicide among transgender individuals, as well as the potentially devastating effects on the state's economy, given businesses' and consumers' responses to House Bill (H.B.) 2 in North Carolina.<sup>238</sup> I-183, which was almost identical to the bill Montana legislators debated, required individuals to use the restroom of their assigned sex at birth and provided a private right of action against government agencies that failed to enforce the law.<sup>239</sup>

Proponents of I-183 failed to gather sufficient signatures to place the initiative on the ballot, but while their efforts were underway, the ACLU filed a lawsuit to enjoin the measure. In their filings, the group relied upon the gender binary to underscore its arguments against the proposed law.<sup>240</sup> The plaintiffs in the suit were eight transgender individuals, all of whom identified as either male or female.<sup>241</sup> The litigators detailed the ways in which the plaintiffs had become members of the opposite sex, from their self-presentations to identity documents, and highlighted the medical treatments involved—such as hormone treatments and surgical interventions—that made it impossible for them to present as members of their originally designated genders.<sup>242</sup> For example, in describing plaintiff Micah Hartung, the ACLU explained that he “underwent surgery to reduce his breasts, sculpt his stomach, and remove his uterus” among “numerous additional gender-affirming procedures.”<sup>243</sup> The end result was that “I-183 would require Micah, a bearded man, to use the high school restroom or locker room designated for women” when he attended local sporting events.<sup>244</sup> In describing the plaintiffs, the pleading emphasized how they used the space associated with their gender identity without incident, and that returning to the facilities of their assigned gender at birth would be impossible because

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27, 2017), [https://missoulian.com/news/government-and-politics/montana-transgender-bathroom-bill-killed-in-committee-ballot-initiative-vowed/article\\_5120d968-6767-5f85-8e19-04da0beba58d.html](https://missoulian.com/news/government-and-politics/montana-transgender-bathroom-bill-killed-in-committee-ballot-initiative-vowed/article_5120d968-6767-5f85-8e19-04da0beba58d.html) [<https://perma.cc/Q5DF-D2DJ>].

238. H.B. 2, 2016 Leg., 2d Extra Sess. (N.C. 2016) (imposing limitations on bathroom access based on assigned gender at birth); Michels, *supra* note 237.

239. HB 609, 65th Leg., Reg. Sess. (Mont. 2017), <https://leg.mt.gov/bills/2017/billpdf/HB0609.pdf> [<https://perma.cc/QX2Q-BDZQ>]; *Revised Ballot Language for Initiative No. 183 (I-183)*, MONT. SEC'Y OF STATE (2018), <https://sosmt.gov/Portals/142/Elections/archives/2010s/2018/I-183.pdf?dt=1523476029241> [<https://perma.cc/QK78-W9LU>].

240. *See* Complaint, *supra* note 237.

241. *Id.* at 4–5.

242. *See id.* at 9–17.

243. *Id.* at 12.

244. *Id.*

of how they appeared to others. In other words, the plaintiffs' gender normativity undermined the law.

Across the country, another antitransgender measure made it onto the ballot in Massachusetts, and like their counterparts in Anchorage and Montana, LGBT rights advocates emphasized binary transgender identities to support their arguments. The controversy over transgender rights in the Bay State began in 2011, when the legislature added gender identity protections to employment, housing, public education, and credit antidiscrimination laws, as well as the hate crimes law, all of which already included sexual orientation.<sup>245</sup> Advocates had introduced a version of the law every year since 2007, deciding to focus on expanding rights to include transgender individuals after securing marriage equality in the state in 2003.<sup>246</sup> A major impediment to the law was opposition from the Massachusetts Family Institute, which branded it as the "Bathroom Bill" and warned citizens that "[a] majority of Mass. Legislators support a bill to make it legal for men to enter WOMEN'S BATHROOMS."<sup>247</sup> To counter these objections, the Massachusetts legislature did not extend gender identity protections to public accommodations.<sup>248</sup> Five years later, however, in the wake of national controversy over North Carolina's H.B. 2, the legislature expanded gender identity protections to public accommodations and guaranteed access to sex-segregated facilities based on gender identity.<sup>249</sup> The law also directed the Attorney General's office to issue regulations on prosecuting individuals "whose assertion of a gender identity is for an improper purpose," which was meant to address concerns about fraudulent access to sex-segregated places.<sup>250</sup> Opponents considered this insufficient and gathered the necessary signatures to place the law's repeal on the November 2018 ballot.

Freedom for All Massachusetts, the pro-LGBT rights group, adopted what was now a tested strategy. Its campaign videos featured what appeared to be fully transitioned transgender men and women,

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245. H.R. 3810, 2011 Leg., 187th. Sess. (Mass. 2011).

246. See *Goodridge v. Dep't of Pub. Health*, 798 N.Ed.2d 941, 969–70 (Mass. 2003); Megan Woolhouse, *Patrick Backs Bill to Protect Rights of Transgendered*, BOS. GLOBE, Mar. 5, 2008, at B4; *Some Massachusetts Trans Rights History*, MASS. TRANSGENDER POL. COALITION (Sept. 6, 2016), <http://www.masstpc.org/media-center/trans-rights-history> [https://perma.cc/FVX6-6KQG].

247. Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 142 (2010); *NoBathroomBill*, *NoBathroomBill.com Ad #1*, *supra* note 155; *Bathroom Bill*, MASS. FAM. INST. (Jan. 4, 2011), <http://www.mafamily.org/state-legislation/bathroom-bill/173> [https://perma.cc/6ZE9-V4CA].

248. Mass. H.R. 3810.

249. See *An Act Relative to Transgender Anti-Discrimination*, S.2407, 2016 Mass. Acts ch. 134, §§ 2–3; Michael Gordon et al., *Understanding HB2: North Carolina's Newest Law Solidifies State's Role in Defining Discrimination*, CHARLOTTE OBSERVER (Mar. 26, 2016, 11:00 AM), <https://www.charlotteobserver.com/news/politics-government/article68401147.html> [https://perma.cc/528X-YHL7].

250. *An Act Relative to Transgender Anti-Discrimination*, *supra* note 249, § 4(b).

presenting them in ways that emphasized their gender normativity. The group's first digital ad, which it released six months before the election, featured Kasey Suffredini, the campaign co-chair, who appeared in a suit and tie as he counseled clients and drafted documents.<sup>251</sup> The same ad presented Nicole Talbot, a teenage girl, who was shown straightening her hair and strapping on high heels before she descended down a catwalk.<sup>252</sup> Other transgender men and women likewise reinforced gender expectations: a transgender woman named Chastity wore large earrings and a necklace, while a bearded transgender man named Mason Dunn appeared in a suit and tie.<sup>253</sup> Later commercials also accentuated gender stereotypes to present a consistent message about transgender identity as one of gender conformity. Nicole Talbot, again wearing cocktail dresses, high heels, and sparkling jewelry, took on the stereotypical female role of homemaker as she pulled cookies out of her kitchen oven.<sup>254</sup>

All these ads were authentic representations of these individuals, but the campaign's decision to feature binary transgender men and women, as well as present them in ways that reinforced gender stereotypes, was a specific framing choice. Transgender men and women, even gender conforming ones, challenge the notion that a person's physical body necessarily coheres with their gender performance. As a result, all transgender individuals subvert the gender binary in some way. However, the frames served to minimize transgender individuals' gender incoherence so as to allow viewers uncomfortable with transgender identity to avoid confronting this fact.

The campaign also deployed parents of transgender youth to present their arguments, like the marriage equality movement and Anchorage group had done before. Mothers and fathers of transgender children informed viewers that the law had a "critical, immense impact" on not just transgender individuals, but "the people who love those transgender people."<sup>255</sup> The parents sought to communicate with other parents, emphasizing the shared need for children to "come home . . . every night safe and secure and not being bullied or discriminated, harassed against"<sup>256</sup>

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251. See Press Release, Freedom Mass., Coalition to Protect Transgender Non-discrimination Law Officially Launches Campaign (May 3, 2018), <https://www.freedommassachusetts.org/coalition-to-protect-transgender-nondiscrimination-law-officially-launches-campaign> [<https://perma.cc/65D6-EY8H>].

252. Freedom Mass., *This November, Massachusetts Will Vote YES for Fairness*, YouTube (May 3, 2018), <https://www.youtube.com/watch?v=WByc2UjZYjg> [<https://perma.cc/4JGW-QZK7>]; see also Human Rights Campaign, #YesOn3: Nicole, YouTube (Sept. 13, 2018), <https://www.youtube.com/watch?v=HTNc20usaXw> [<https://perma.cc/YAU4-6AYF>] (featuring Nicole on catwalk).

253. Freedom Mass., *This November*, *supra* note 252.

254. Human Rights Campaign, #YesOn3: Nicole, *supra* note 252.

255. Freedom Mass., *This November*, *supra* note 252.

256. Human Rights Campaign, #YesOn3: Jacob, YouTube (Sept. 13, 2018), <https://www.youtube.com/watch?v=ij9HGa1u7rQ> [<https://perma.cc/2NRJ-PLYB>].

and asking “would you want your child’s rights to be restricted?”<sup>257</sup> These appeals did not necessarily ask viewers to approve of transgender identity, but rather understand why the protections were necessary. Viewers could presumably relate to the fears and anxieties of the cisgender parents, who loved their children and wanted the best for them.

With gender conforming individuals at the heart of the LGBT rights campaigns, advocates implicitly asked voters what it meant to be male or female. Andrew Beckwith, the President of the Massachusetts Family Institute, argued the antidiscrimination law could not be implemented because it did not distinguish between those who had had gender confirmation surgery and those who had not, thereby equating gender with biology.<sup>258</sup> Particularly problematic for him was that “many people now consider gender to be fluid,” thereby increasing the ambiguity between the sexes.<sup>259</sup> Thus, ballot measure campaigns asked voters where to draw the boundary between the two sexes—at biology or self-presentation. Those who did fit within the two categories were simply not part of the conversation.

The binary presentation worked—Massachusetts voters, like those in Anchorage, retained the gender identity protections.<sup>260</sup> 2018 thus marked a turning point for trans rights, where citizens upheld gender identity protections at the ballot box after a half decade of defeats.<sup>261</sup> The shift in strategy accompanying these victories was one that changed the focus from general claims of inclusivity to emotive pleas from transgender individuals. The 2018 measures were remarkable for featuring transgender individuals for the first time, but the only trans identity they presented was a binary one.

### III. THE CAMPAIGN’S HARMS

LGBT rights groups have thus far deployed a particular vision of transgender identity, one that reinforces the gender binary by identifying transgender individuals as like all other men and women. However, the binary frame erases subpopulations of the trans community who do not conform to either gender. One of the central roles of social movements is to frame claims in ways that will mobilize their constituents and the public more broadly.<sup>262</sup> Generally, rights organizations present argu-

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257. Freedom Mass., *This November*, *supra* note 252.

258. *Id.*

259. Ebbert, *supra* note 236.

260. Stephanie Ebbert, *Transgender Rights Effort Passes Easily*, BOS. GLOBE, Nov. 7, 2018, at B1.

261. George, *supra* note 4, at 514–15 tbl. 1.

262. Steven A. Boutcher, *Mobilizing in the Shadow of the Law: Lesbian and Gay Rights in the Aftermath of Bowers v. Hardwick*, in 31 RES. SOC. MOVEMENTS, CONFLICTS, & CHANGE 175, 188 (Patrick G. Coy ed., 2011); STEVEN M. BUECHLER, UNDERSTANDING SOCIAL MOVEMENTS: THEORIES FROM THE CLASSICAL ERA TO THE PRESENT 146 (2011).

ments that they believe will resonate with their audiences, deploying tested themes across legal forums.<sup>263</sup> However, as this Part explores, the campaigns' strategy may undermine work in other areas of LGBT rights and may ultimately limit the rights of many within the LGBT community.

### A. *Strategic and Doctrinal Inconsistency*

Although LGBT rights advocates have adopted assimilationist arguments in many aspects of their work, they have not applied that approach universally. Indeed, the ballot measure campaigns' emphasis on gender normativity appears inconsistent with prior efforts to overturn discriminatory laws and practices, particularly gender-based differences in employment and education.

Since the mid-1970s, when the Supreme Court began applying heightened scrutiny to sex-based classifications, assumptions about gender norms have become increasingly suspect and differences based on sex more difficult to sustain.<sup>264</sup> As the Court explained when it held Virginia must open the doors of the Virginia Military Institute to women, "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."<sup>265</sup> Likewise, sex-based stereotyping is an impermissible form of discrimination under Title VII, a doctrinal development that protects individuals who do not conform to expectations of how men and woman should act.<sup>266</sup>

The sex stereotyping principle—and its attendant notion that individuals should not have to conform to gender norms—has been crucial for LGBT sex discrimination lawsuits under Title VII.<sup>267</sup> For many years,

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263. See *Boutcher*, *supra* note 262, at 188. For example, the marriage equality movement integrated its themes of commitment and love in its litigation briefs. See *Hunter*, *supra* note 44, at 1716.

264. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (women-only admissions to nursing school); *Orr v. Orr*, 440 U.S. 268 (1979) (only husbands required to pay alimony); *Craig v. Boren*, 429 U.S. 190 (1976) (women could buy beer at younger age); *Stanton v. Stanton*, 421 U.S. 7 (1975) (lower age of majority for women); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (benefits that went to widows but not widowers); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (military benefits allocated based on sex).

265. *United States v. Virginia*, 518 U.S. 515, 550 (1996).

266. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (holding gender stereotyping actionable for an employee in a sex-discrimination employment case). For a discussion of how courts have interpreted *Price Waterhouse*, see Zachary R. Herz, Note, *Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 *YALE L.J.* 396 (2014) and Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 *U. PA. L. REV.* 757 (2013).

267. See Luke A. Boso, *Acting Gay, Acting Straight: Sexual Orientation Stereotyping*, 83 *TENN. L. REV.* 575, 600 (2016); Mary Anne Case, *Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 *STAN. L. REV.* 1333, 1345–54 (2014); Brian Soucek, *Perceived Homosexuals: Looking Gay Enough*

courts rejected these types of claims from gay and lesbian plaintiffs, reasoning that Title VII did not protect against discrimination based on sexual orientation.<sup>268</sup> Judges recognized that gender- and sexual orientation-based stereotypes could overlap, making it difficult to distinguish between legally prohibited sex stereotyping discrimination and legally permissible sexual orientation discrimination.<sup>269</sup> They nevertheless insisted the two had to be distinct as “every case of sexual orientation discrimination cannot translate into a triable case of gender stereotyping discrimination, which would contradict Congress’s decision not to make sexual orientation discrimination cognizable under Title VII.”<sup>270</sup>

Despite these concerns, some courts upheld claims where they could isolate the elements of gender-based, as opposed to sexual orientation-based, discrimination.<sup>271</sup> In *Prowel v. Wise Business Forms*, for example, the Third Circuit determined that a machine operator’s high-pitched voice and effeminate demeanor, including his dress, grooming, and manner of walking, all served to bolster his claim that he failed to conform to his employer’s vision of “how a man should look, speak, and act.”<sup>272</sup> As courts attempted to distinguish between sex and sexual orientation discrimination, the blurred line between the two became increasingly apparent, to the point that some determined that a distinction did not exist except as a matter of judicial construct.<sup>273</sup>

In the past two years, the Seventh and Second Circuits have held that discrimination on the basis of sexual orientation constitutes sex discrimination as a matter of law, thereby demonstrating the importance of anti-sex stereotyping to LGBT rights advocacy.<sup>274</sup> In addition to the untenable confusion that resulted from judicial efforts to extricate gender

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for Title VII, 63 AM. U.L. REV. 715, 748–49 (2014).

268. See, e.g., *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Fredette v. BVP Mgmt. Assoc.*, 112 F.3d 1503, 1510 (11th Cir. 1997); *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989).

269. See *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1065 n.5 (7th Cir. 2003); *Higgins*, 194 F.3d at 261.

270. *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009). The Second Circuit put it a bit more bluntly: “[A] gender stereotyping claim should not be used to ‘bootstrap protection for sexual orientation into Title VII.’” *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (quoting *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000)).

271. EEOC v. Boh Bros. Constr. Co., 731 F.3d 444, 457 (5th Cir. 2013); *Prowel*, 579 F.3d at 292.

272. 579 F.3d at 291–92.

273. See *Videckis v. Pepperdine Univ.*, 150 F. Supp.3d 1151, 1159 (C.D. Cal. 2015); *Centola v. Potter*, 183 F. Supp. 2d 403, 408 (D. Mass. 2002).

274. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017); see also *Baldwin v. Foxx*, EEOC Doc. 0120133080, 2015 WL 4397641, at \*5 (EEOC July 15, 2015) (“Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.”).



nonconformity from sexual orientation discrimination cases, these courts determined that sexual orientation discrimination was necessarily a subset of sex discrimination because it always required a specific form of gender stereotyping, namely that “real” men should date women, and women men.<sup>275</sup> Given the Supreme Court’s rulings from *Romer v. Evans* onwards, which emphasized the equality of gays and lesbians, these courts reasoned they could not countenance such a heterosexual imperative.<sup>276</sup> In light of the circuit split, the Supreme Court recently heard several cases on this issue.<sup>277</sup>

A similar process unfolded in the case of transgender employment discrimination, in that courts initially rejected claims that gender identity discrimination fell within Title VII’s ambit, but many ultimately reconsidered this position because of sex stereotyping arguments. Early cases denied that transgender individuals could recover under Title VII, reasoning that “Congress had a narrow view of sex in mind when it passed the Civil Rights Act.”<sup>278</sup> After *Price Waterhouse v. Hopkins*, transgender individuals framed the discrimination they faced as a failure to conform to stereotypes of how men and women should behave.<sup>279</sup> In *Smith v. City of Salem*, for example, after the plaintiff transitioned to living as a woman full-time, her coworkers complained that her conduct and mannerisms were not masculine enough.<sup>280</sup> The Sixth Circuit, in ruling that the plaintiff had a cognizable claim under Title VII, concluded that a person’s status as a transgender individual was not fatal to a sex stereotyping claim, since a victim could still suffer discrimination based on gender nonconformity.<sup>281</sup>

Judicial doctrine evolved in trans employment antidiscrimination cases, much like in the gay and lesbian context. Almost a decade and a half after *Smith*, the Sixth Circuit held that gender identity discrimination

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275. See *Zarda*, 883 F.3d at 121; *Hively*, 853 F.3d at 346.

276. See Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 434–39 (2017) (tracing the evolution of gay and lesbian rights jurisprudence at the Supreme Court).

277. The Supreme Court heard oral arguments in *Bostock v. Clayton County, GA.* and *Altitude Express v. Zarda* on October 8, 2019. *October Term 2019*, SUPREME COURT OF THE UNITED STATES (Sept. 11, 2019), [https://www.supremecourt.gov/oral\\_arguments/argument\\_calendars/MonthlyArgumentCalOctober2019.pdf](https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalOctober2019.pdf) [<https://perma.cc/9F8M-6658>].

278. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661–63 (9th Cir. 1977).

279. 490 U.S. 228 (1989). Transgender plaintiffs were increasingly successful, but not all courts held that they could bring lawsuits under Title VII. See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) (concluding “discrimination against a transsexual based on the person’s status as a transsexual is not discrimination because of sex under Title VII”).

280. 378 F.3d 566, 572 (6th Cir. 2004).

281. See *id.* at 575.

and sex discrimination were one and the same.<sup>282</sup> Like the courts that had determined there was no way to distinguish between sexual orientation and gender nonconformity discrimination, in *EEOC v. R.G. & G.R. Harris Funeral Homes*, the court ruled that “an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align,” because “[t]here is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity.”<sup>283</sup> The Supreme Court is likewise scheduled to rule on this issue during the 2019 term.<sup>284</sup>

As a result of changing perspectives on gender nonconformity, Title VII jurisprudence expanded over several decades to make it possible for gay, lesbian, and transgender litigants to bring claims for employment discrimination. Initially, these lawsuits were limited to instances in which individuals were discriminated against based on their defiance of gender expectations, rather than their sexual orientation or gender identity, but that has changed in recent years.<sup>285</sup> The EEOC now maintains that sexual

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282. See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 576–77 (6th Cir. 2018).

283. *Id.*

284. See *R.G. & G.R. Harris Funeral Homes v. EEOC*, 139 S. Ct. 1599 (2019) (Mem.) (granting cert on the question: “Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender [and] (2) sex stereotyping under *Price Waterhouse*”).

285. Compare *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (dismissing sexual harassment claim when harassment was based on an employee’s homosexuality); *Fredette v. BVP Mgmt. Assoc.*, 112 F.3d 1503, 1510 (11th Cir. 1997) (holding sexual harassment of male employee by homosexual male supervisor was actionable under Title VII); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143–44 (4th Cir. 1996) (allowing same-sex sexual harassment claim by heterosexual employee against homosexual supervisor and coworker to proceed when claim was based on employee’s sex and not sexual orientation); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989) (dismissing racial discrimination claim after finding employee clearly believed the treatment was based on his homosexuality); *Ulane v. E. Airlines*, 742 F.2d 1081, 1086 (7th Cir. 1984) (holding discrimination against transsexuals is not actionable under Title VII); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (holding sex discrimination under Title VII does not encompass transgender discrimination); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661–63 (9th Cir. 1977) (holding Title VII does not prohibit the discharge of an employee for initiating “sex transformation” process because transgender discrimination is not prohibited under Title VII); *with Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018) (holding that sexual orientation discrimination is a subset of sex discrimination prohibited by Title VII); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 576–77 (6th Cir. 2018) (holding that discrimination against transgender persons implicates Title VII’s proscriptions against sex stereotyping); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351–52 (7th Cir. 2017) (holding that sex discrimination includes discrimination on the basis of sexual orientation under Title VII); *Baldwin v. Foxx*, EEOC Doc. 0120133080, 2015 WL 4397641, at \*10 (EEOC July 15, 2015) (same).

orientation and gender identity discrimination constitutes sex discrimination under Title VII, and several circuits do as well, thereby opening new avenues of relief.<sup>286</sup> LGBT rights groups are still working to expand protections for gay, lesbian, and transgender individuals across all jurisdictions, but the evolution of Title VII jurisprudence has been one of their notable achievements.

Although LGBT rights groups attained success in Title VII lawsuits by focusing on gender nonconformity, the doctrine has evolved only so far. Particularly because of Title VII jurisprudence on dress codes, nonbinary individuals may fall outside of Title VII protections.<sup>287</sup> Employers are free to impose sex-differentiated grooming codes, so long as the burdens of complying with the requirements fall equally upon all employees.<sup>288</sup> As a result, “[g]arden-variety gender benders”—a shorthand that employment discrimination scholar Dean Kimberly Yuracko uses for “those who object to some but not all of the conventions associated with their biological sex”—remain subject to gender-based workplace requirements.<sup>289</sup> Courts have upheld appearance regulations ranging from prohibitions on male earrings, to specifications on the hair lengths and styles for all employees, to requirements that females wear makeup and feminine clothing.<sup>290</sup> What justifies these grooming standards are “commonly accepted social norms,” as a result of which courts expect employees to conform to conventional gender roles.<sup>291</sup>

Transgender litigants have received employment protections in circumstances where garden-variety gender benders have not because of judicial concern for protecting immutable characteristics.<sup>292</sup> Courts understand sex-based grooming standards as invasive, demeaning, and debilitating for transgender individuals because of the immutable nature of their gender identities, whereas they characterize the same requirements as a trivial matter of personal preference for run-of-the-mill gender nonconformists. In *Pecenka v. Fareway Stores, Inc.*, the Iowa Supreme Court ratified an employer’s termination of a male employee for wearing

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286. See, e.g., *Zarda*, 883 F.3d at 112; *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 576–77; *Hively*, 853 F.3d at 351–52; *Baldwin*, 2015 WL 4397641, at \*10.

287. See Amy McCrea, Note, *Under the Transgender Umbrella: Improving ENDA’s Protections*, 15 GEO. J. GENDER & L. 543, 553 (2014).

288. See *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006).

289. KIMBERLY A. YURACKO, GENDER NONCONFORMITY AND THE LAW 6 (2016).

290. See *Jespersen*, 444 F.3d at 1107 (hairstyles); *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1214–15 (8th Cir. 1985) (feminine makeup and clothing); *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800, 805 (Iowa 2003) (male earrings).

291. *Carroll v. Talman Fed. Sav. & Loan Ass’n of Chicago*, 604 F.2d 1028, 1032 (7th Cir. 1979); see also YURACKO, *supra* note 289, at 60 (explaining that the narrow unequal burdens test “explains why courts have been unwilling to strike down short-hair and no-beard requirements for men despite the seemingly disproportionate burdens they imposed: such requirements were viewed by courts as simply enforcing conventionally gendered professional norms”).

292. YURACKO, *supra* note 289, at 98.

an ear stud, remarking “[w]earing an ear stud is not an immutable characteristic.”<sup>293</sup> Likewise, in *Jespersen v. Harrah’s Operating Co.*, the Ninth Circuit disregarded the undisputed evidence that the plaintiff considered wearing makeup “offensive” and having to do so made her feel “very degraded and very demeaned,” concluding that “[g]rooming standards that appropriately differentiate between the genders are not facially discriminatory.”<sup>294</sup> Courts thus permit sex-based grooming standards for garden variety gender-benders, even though the same policies would constitute impermissible discrimination when applied to transgender individuals, because they perceive the former as a question of personal preference and the latter as one of immutable identity.<sup>295</sup>

By limiting this subset of gender nonconformity-based employment discrimination arguments to transgender claimants, courts are entrenching a particular—and narrow—understanding of sex, gender, and gender identity into the law.<sup>296</sup> Courts and LGBT rights campaigns are in a dialogical relationship, where each simultaneously informs and influences the other. It is possible that courts will reconcile the dress code and anti-stereotyping cases by determining that *Jespersen* was wrongly decided or by finding ways to cabin the decision.<sup>297</sup> The antidiscrimination ballot measure campaigns, which reduce transgender identity to a male and female essence, are not currently helping courts move in this direction, although they could by modifying their frames in the ways that Subpart IV.C proposes.

Pressing courts to recognize sex-stereotyping and false assumptions tied to gender norms has been central to the LGBT movement’s efforts to secure antidiscrimination protections for gay, lesbian, and transgender individuals. However, ballot measure campaign strategies that reinforce gender ideologies and claim a natural division between the sexes undermine this advocacy.

## B. *Factual Erasure*

In addition to its effect on judicial doctrine, the ballot measure strategies may have a pernicious social effect: factual erasure. By focusing attention on binary trans individuals, ballot measure campaigns fail to address the social anxieties underlying bathroom access on both sides, which extend to other parts of the law. The campaigns nevertheless

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293. 672 N.W.2d 800, 805 (Iowa 2003).

294. *Jespersen*, 444 F.3d at 1108–10.

295. See YURACKO, *supra* note 289, at 98–99.

296. See *id.* at 105.

297. The Sixth Circuit described *Jespersen* as a decision the Circuit “should not” follow because of its irreconcilability with other Title VII precedent. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 573 (2018).

claim to be conducted on behalf of gender nonconforming and nonbinary transgender people alike.<sup>298</sup>

### 1. Sex-Segregation's Harmful Effects on Transgender Individuals

Although public restrooms and other sex-segregated spaces may have an inflated place in public discourse given their status as a rallying cry for conservatives, they are a crucial issue for transgender and gender nonconforming individuals.<sup>299</sup> Public, sex-segregated facilities are a source of anticipatory fear and stress, given individuals' experiences of verbal harassment, denied access, and physical assault.<sup>300</sup> In a survey of Washington, D.C. gender nonconforming individuals, 70 percent reported experiencing problems accessing or using public restrooms.<sup>301</sup> Professor Ellen Riggle, a professor of political science and gender and women's studies at the University of Kentucky and a gender nonconforming lesbian, described the range of reactions she typically received when she endured the "risky and anxiety provoking" experience of visiting a public restroom.<sup>302</sup> These responses included women exiting, screaming, verbally accosting her, and tracking down security to assess her gender.<sup>303</sup> As a result of the stress associated with bathroom use, many transgender individuals absent themselves from work, school, social events, and other forms of public life.<sup>304</sup>

Bathrooms are particularly fraught for gender nonconforming individuals, who have greater difficulty being accepted in sex-segregated spaces than gender conforming individuals and who are also more likely to experience harassment when they attempt to access public restrooms.<sup>305</sup> Many gender nonconforming individuals develop different strategies to help "pass" in restrooms, including feminizing their walk or talking to others as they enter so those present will hear their feminine

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298. See, e.g., *Fair Anchorage Announces Campaign Leadership Staff*, *supra* note 215.

299. See SHEILA L. CAVANAGH, *QUEERING BATHROOMS: GENDER, SEXUALITY, AND THE HYGIENIC IMAGINATION* 53–78 (2010) (analyzing the disciplinary force of public restrooms for transgender and gender nonconforming individuals).

300. See Ellen D.B. Riggle, *Experiences of a Gender Non-Conforming Lesbian in the "Ladies' (Rest)Room,"* 22 J. LESBIAN STUD. 482, 484 (2018).

301. See Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People's Lives*, 19 J. PUB. MGMT. & SOC. POL'Y 65, 71 (2013).

302. Riggle, *supra* note 300, at 486.

303. *Id.* at 487–89.

304. See Herman, *supra* note 301, at 77.

305. See *id.*; Charles R. White & Dusty D. Jenkins, *College Students' Acceptance of Trans Women and Trans Men in Gendered Spaces: The Role of Physical Appearance*, 29 J. GAY & LESBIAN SOC. SERVS. 41, 56, 58 (2017). The same does not necessarily hold true for transgender youth. GAY, LESBIAN & STRAIGHT EDUCATOR NETWORK, *THE 2017 NATIONAL SCHOOL CLIMATE SURVEY* 96 (2017).

voices.<sup>306</sup> Surveys of cisgender individuals reinforce these reports: in sex-segregated spaces, transgender women with more feminine physical features are more likely to be accepted than those who appear more masculine.<sup>307</sup> Sex-segregated spaces are therefore less perilous for the gender conforming transgender individuals featured in the ballot campaigns than for those who do not read as male or female.<sup>308</sup>

The campaigns' emphasis on gender conforming trans individuals reinforces an existing division within the transgender population, whereby those who are gender nonconforming are more likely to suffer stigma, discrimination, and violence than binary trans people.<sup>309</sup> Non-binary youth also suffer higher rates of anxiety, depression, and low self-esteem than their binary transgender counterparts.<sup>310</sup> Those health outcomes may be linked to reports of how some parents struggle when raising a gender nonconforming child, with some responding by refusing to help them obtain treatment, physically abusing them, or turning them out of the family home, although parents have reacted similarly to their binary transgender children.<sup>311</sup> By featuring binary trans individuals, the campaigns thus present a particular kind of transgender body as safe for public consumption, rather than highlighting the condition of transgender identity as the object of social bias.<sup>312</sup> For a population that

306. See Herman, *supra* note 301, at 76–77.

307. See White & Jenkins, *supra* note 305, at 56, 58.

308. It is more difficult for trans women to pass as cisgender women, both because their physicality and their increasing visibility in popular culture. Additionally, access to the technologies required to pass depends on income, which is correlated to race and ethnicity. These reasons compound the discrimination that transgender women of color, who are disproportionately the target of hate crimes, endure. See STEIN, *supra* note 18, at 207.

309. See Jack Harrison et al., *A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey*, 2 LGBTQ POL'Y J. HARV. KENNEDY SCH. 13, 23 (2011–2012) (noting that “gender variant respondents . . . are suffering significant impacts of anti-transgender bias and in some cases are at higher risk for discrimination and violence than their transgender counterparts in the study”); Lisa R. Miller & Eric Anthony Grollman, *The Social Costs of Gender Nonconformity for Transgender Adults: Implications for Discrimination and Health*, 30 Soc. F. 809, 826 (2015) (concluding that “gender nonconformity may heighten trans people’s exposure to discrimination and health-harming behaviors”).

310. Nat Thorne et al., *A Comparison of Mental Health Symptomatology and Levels of Social Support in Young Treatment Seeking Transgender Individuals Who Identify as Binary and Non-Binary*, 20 INT’L J. TRANSGENDERISM 241, 246 (2019).

311. U.S. TRANSGENDER SURVEY, *supra* note 15, at 65; Jesse Singal, *When Children Say They’re Trans*, ATLANTIC (July/August 2018), <https://www.theatlantic.com/magazine/archive/2018/07/when-a-child-says-shes-trans/561749> [<https://perma.cc/J35Z-5JNT>].

312. Cf. SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 86, 92 (2009) (discussing how only a certain type of disabled body was “entirely safe to display”).

already suffers disproportionately high rates of discrimination and violence, exacerbating a trans hierarchy is particularly harmful.<sup>313</sup>

Transgender individuals are not the only ones whose self-presentation is policed in restrooms to ensure it meets societal expectations of how women should appear. In the wake of H.B. 2, news media increasingly reported on bystanders forcibly removing cisgender women sporting short hairstyles and t-shirts from restrooms after mistaking them for men.<sup>314</sup> For example, Aimee Toms, a twenty-two-year-old, was taken aback when she was harassed in a Walmart restroom for her pixie-style haircut.<sup>315</sup> Media reports made much of the fact that Toms had adopted the popular fashion choice after donating her locks to a children's wig-making charity, with Toms' altruism standing in sharp contrast to those who perpetrated the harm.<sup>316</sup> Regardless of the motivations for an individual's appearance, what Toms' and others' experiences showed was that gender policing extends widely, reaching those who fail to conform to gender norms for any reason.

Trans rights debates have fueled vigilant policing of bathroom access, which has recently become more confrontational and aggressive.<sup>317</sup> However, the campaigns are not addressing the root cause: society's investment in the gender binary and discomfort with those who do not conform to expectations about how men and women should appear.<sup>318</sup> These emotions—which may range from discomfort to hostility to violence—do not stem from a sole source, but rather an array of reactions, from embarrassment, offense, repulsion, and disgust, to fears of

313. Over half of transgender people report experiencing sexual violence, a rate that is double (one in three girls) or triple (one in six boys) the commonly reported rates of sexual abuse. FORGE, *TRANSGENER RATES OF VIOLENCE 2* (2012), <http://forge-forward.org/wp-content/docs/FAQ-10-2012-rates-of-violence.pdf> [<https://perma.cc/Z6HJ-2KFB>].

314. See Rachel Vorona Cote, *Police Refuse to Believe Lesbian Is a Woman, Force Her out of Bathroom*, JEZEBEL (Apr. 28, 2016, 11:00 PM), <https://jezebel.com/police-refuse-to-believe-lesbian-is-a-woman-force-her-1773733431> [<https://perma.cc/KJH5-QN9E>]; Matt DeRienzo, *Woman Mistaken for Transgender Harassed in Walmart Bathroom*, NEWS TIMES (May 16, 2016, 3:50 PM), <https://www.newstimes.com/local/article/Woman-mistaken-for-transgender-harassed-in-7471666.php> [<https://perma.cc/R62V-FQU6>]; Eric Nicholson, *Self-Appointed Bathroom Cop Catches Dallas Woman Using Women's Restroom*, DALLAS OBSERVER (Apr. 29, 2016, 12:21 PM), <https://www.dallasobserver.com/news/self-appointed-bathroom-cop-catches-dallas-woman-using-womens-restroom-8259104> [<https://perma.cc/J5JF-DWQH>]; see also Matthew Tharrett, *Lesbian Teen Kicked Out of McDonald's for Using Women's Bathroom, Failing to "Prove" Gender*, NEW NOW NEXT (Apr. 7, 2016), <http://www.newnownext.com/lesbian-teen-kicked-out-of-mcdonalds-for-using-wrong-bathroom-failing-to-prove-gender/04/2016> [<https://perma.cc/EVP3-LZXV>].

315. See DeRienzo, *supra* note 314.

316. *Id.*

317. See Riggle, *supra* note 300, at 491.

318. See Norton & Herek, *supra* note 220, at 750.

dissimulation and fraud.<sup>319</sup> What the responses to perceived gender transgression imply is that gender conformity is superior, and gender nonconformity is an illness requiring quarantine.<sup>320</sup> Many of these sentiments may be dispelled by familiarizing people with transgender identity and addressing why transgender identity is not some convenient excuse for illicit conduct. If anything, making gender-conforming trans men and women the face of the campaigns may reinforce the biases that render bathroom access so fraught for many other transgender individuals.

## 2. Reinforcing Institutionalized Sex-Segregated Spaces

The campaigns' promotion of gender-conforming trans individuals in advertisements is consistent with a broader legal structure of trans rights, in that it is built around those who transition from one sex to the other, rather than individuals who live in the interstitial space between. The privileging of binary transgender rights is in part a historical consequence of how transgender identity evolved, with laws related to gender identity developing to address the needs of transsexuals, an identity category defined by surgically transitioning from one gender to another.<sup>321</sup> In the mid-1980s, the more expansive identity category of transgender emerged, encompassing those who lived in a gender other than the one assigned at birth, whether or not they received transition-related health care, as well as those who identified as nonbinary.<sup>322</sup>

Trans individuals' legal rights are often determined according to a medical model that assumes individuals will transition from one gender to another.<sup>323</sup> In the 1970s, states began allowing individuals to modify the gender listed on their government documents, such as birth certificates and driver's licenses, after undergoing gender confirmation surgery.<sup>324</sup>

319. Cf. SCHWEIK, *supra* note 312, at 35, 38, 87, 91, 94, 102, 109 (discussing how “unsightly beggar ordinances” drew on these many discourses); Tobin Siebers, *What Can Disability Studies Learn from the Culture Wars?*, 55 CULTURAL CRITIQUE 182, 186 (2003) (arguing that the “political unconscious . . . enforces a mutual identification between forms of appearance . . . and ideal images of the body politic” that “accounts for the visceral and defensive response to any body found to disturb society’s established image of itself”).

320. SCHWEIK, *supra* note 312, at 93–94.

321. See George, *supra* note 4, at 529–31.

322. See *id.* at 536–38.

323. See Sonia K. Katyal, *The Numerus Clausus of Sex*, 84 U. CHI. L. REV. 389, 410 (2017). The medical model itself is limited and does not adequately protect those who fall under its ambit. Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & C.R. L. REV. 651, 664–65 (2009).

324. See JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSEXUALITY IN THE UNITED STATES* 242–53 (2002); Paisley Currah & Lisa Jean Moore, “*We Won’t Know Who You Are*”: *Contesting Sex Designations in New York City Birth Certificates*, 24 HYPATIA 113 (2009); Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 767–69 (2008); Press Release, Transgender Equality, Breaking News: New York State Modernizes Requirements for Birth Certificate Gender Markers (June 5, 2014), <https://transgenderequality.wordpress.com/2014/06/05/>



Transgender rights advocates have spent four decades lobbying states to eliminate the surgical requirement, such that many now only require proof of clinical treatment to amend the documents.<sup>325</sup> Such a reform can be extremely consequential; for example, under bathroom laws like H.B. 2, the sex designation on a birth certificate determines which facility a transgender person must use.<sup>326</sup>

However, the binary model is neither absolute nor inescapable. Some institutions have been willing to accept and recognize nonbinary statuses, indicating it is possible to successfully advocate for nonbinary rights. In the past two years, numerous cities and at least eighteen states and Washington D.C. have started providing a gender-neutral designation on IDs., and other states are currently considering similar measures.<sup>327</sup>

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breaking-news-new-york-state-modernizes-requirements-for-birth-certificate-gender-markers/#more-2722 [https://perma.cc/UR8U-K5VZ].

325. See MOVEMENT ADVANCEMENT PROJECT, IDENTITY DOCUMENT LAW AND POLICIES: DRIVER'S LICENSE (2018), <http://www.lgbtmap.org/img/maps/citations-id-drivers-license.pdf> [https://perma.cc/7XAD-PXBS]; MOVEMENT ADVANCEMENT PROJECT, IDENTITY DOCUMENT LAW AND POLICIES: BIRTH CERTIFICATE (2018), <http://www.lgbtmap.org/img/maps/citations-id-birth-certificate.pdf> [https://perma.cc/LSD7-YPE9].

326. See Carcaño v. McCrory, 203 F. Supp. 3d 615, 627 (M.D.N.C. 2016); Jonathan L. Koenig, Note, *Distributive Consequences of the Medical Model*, 46 HARV. C.R.-C.L. L. REV. 619, 634–35 (2011); Spade, *supra* note 324, at 771.

327. As of September 2019, the following states offer nonbinary gender designations on IDs: Arkansas, California, Colorado, Illinois, Indiana, Hawaii, Maine, Maryland, Minnesota, Nevada, New Hampshire, New Jersey, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Washington. See Nonbinary Identification Cards Amendment Act of 2018, D.C. Act 22–466, 65 D.C. Reg. 11402 (Nov. 27, 2018); N.J. REV. STAT. § 26:8–40.12 (2013); H.B. 1165, 30th Leg., Reg. Sess. (Haw. 2019); S.B. 196, 2019 Leg., Reg. Sess. (Md. 2019); H.B. 669, 2019 Leg., Reg. Sess. (N.H. 2019); S.B. 179, 2017 Leg., Reg. Sess. (Cal. 2017); Sex Designation, COLO. CODE REGS. § 2014–32 (2018); WASH. ADMIN. CODE § 246–490–075 (2018); N.Y.C. ADMIN. CODE § 17–1671 (Oct. 9, 2018); Letter from Hayley Gorenberg, Deputy Legal Director, Lambda Legal, to Lauri Kunze, ODOT Administrative Rules Coordinator (May 12, 2017), [https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/lambda\\_legal\\_comments\\_regarding\\_oar\\_735-062-0013\\_submitted\\_5\\_12\\_17.pdf](https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/lambda_legal_comments_regarding_oar_735-062-0013_submitted_5_12_17.pdf) [https://perma.cc/VX2T-53PT]; Press Release, Dep't of the Sec'y of State, Maine BMV to Offer Non-binary Gender Designation on Driver's Licenses, ID Cards (June 11, 2018), <https://www.maine.gov/sos/news/2018/genderdesignationdlid.html> [https://perma.cc/5XQX-GH2T]; Press Release, Nevada Dep't of Motor Vehicles, Nevada Implements Gender-Neutral IDs (Apr. 22, 2019), <https://dmvnv.com/news/19001-gender-x-available.htm> [https://perma.cc/3JM2-8KXS]; Press Release, Vermont Dep't of Motor Vehicles, New License/ID Will Allow Third Gender Option Starting this Summer (June 4, 2019), <https://dmv.vermont.gov/press-release/new-license-id-will-allow-third-gender-option-starting-this-summer> [https://perma.cc/X6MF-AMZX]; Teresa Boeckel, "X" Will Become an Option for Gender on Pa. Driver's Licenses, YORK DAILY REC. (July 31, 2019), <https://www.ydr.com/story/news/2019/07/31/pa-to-offer-gender-neutral-drivers-licenses/1877995001> [https://perma.cc/SKD6-QMX3]; Kellie Hwang, *Indiana Becomes the 6th State to Offer a New Gender Option on Driver's Licenses*, INDY STAR (Mar. 12, 2019, 10:00 AM), <https://www.indystar.com/story/news/2019/03/12/indiana-drivers-licenses-now-have-x-gender-option/3138447002>

Although the State Department limits passport gender designations to male and female, a federal court in Colorado ruled the agency must offer a nonbinary gender identity option.<sup>328</sup> Major U.S. airlines have also begun offering passengers an “unspecified” and “undisclosed” gender option, in addition to male and female.<sup>329</sup> And, as Professor Jessica Clarke recently detailed, there are numerous additional ways in which the law can recognize, accommodate, protect, and promote nonbinary rights.<sup>330</sup>

Despite these important shifts, the sexual binary predominates, and biology is often determinative in accessing binary sex-segregated spaces, which remain prevalent. Transgender individuals often confront the question of which sex-specific restroom, store dressing room, and fitness club locker room to use. For transgender youth, these quandaries are also present throughout their education, as schools divide sports teams, other extracurricular activities, and residence halls according to sex. School admissions themselves may be limited by gender, although many prominent women’s colleges, including all Seven Sisters, admit transgender women.<sup>331</sup>

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[<https://perma.cc/2L7H-DC8E>]; Talia Kirkland, *Pennsylvania to Become Latest State Offering Gender-Neutral IDs*, FOX NEWS (Aug. 14, 2019), <https://www.foxnews.com/us/pennsylvania-gender-neutral-id-cards> [<https://perma.cc/7S9D-C7BC>]; Nico Lang & Kate Sosin, *Utah Among Growing Number of States Issuing Gender-Neutral IDs*, NBC NEWS (Mar. 18, 2019, 12:37 PM), <https://www.nbcnews.com/feature/nbc-out/utah-among-growing-number-states-issuing-gender-neutral-ids-n984326> [<https://perma.cc/54B3-A4M8>]; Steve LeBlanc, *Massachusetts Senate OKs Bill to Allow Gender “X” Option*, ASSOCIATED PRESS (June 28, 2018), <https://www.apnews.com/d950dc3eb3a5436c888c3bf71b30cc9b> [<https://perma.cc/L9AQ-8KLN>]; Paul Walsh, *Minnesota Now Offers “X” for Gender Option on Driver’s Licenses*, STAR TRIB. (Oct. 3, 2018, 8:34 AM), <http://www.startribune.com/minnesota-now-offers-x-for-gender-option-on-driver-s-licenses/494909961> [<https://perma.cc/94B8-T3UC>]; Mary Emily O’Hara, *Oregon Becomes First State to Add Third Gender to Driver’s Licenses*, NBC (June 15, 2017, 5:57 PM), <https://www.nbcnews.com/feature/nbc-out/oregon-becomes-first-state-add-third-gender-driver-s-licenses-n772891> [<https://perma.cc/63ZC-9XSK>]; Jake Wittich, *Illinois Approves Nonbinary State ID Documents, but Gender-Neutral Option Might Not be Available for Years*, CHI. SUN-TIMES (Aug. 25, 2019, 11:09 PM), <https://chicago.suntimes.com/2019/8/25/20832644/pritzker-approves-non-binary-state-id-cards-drivers-licenses> [<https://perma.cc/48MY-34DY>]; WJAR Staff, *RI Will Offer Third Gender Option for Licenses, Birth Certificates*, NEWS CHANNEL 9 (Aug. 9, 2019), <https://newschannel9.com/news/nation-world/ri-will-offer-third-gender-option-for-licenses-birth-certificates> [<https://perma.cc/C6HK-KYTC>]; Curtis M. Wong, *Arkansas Has Been Offering a Nonbinary Gender Option on State IDs for Years*, HUFFINGTON POST (Oct. 17, 2018, 6:50 PM), [https://www.huffingtonpost.com/entry/arkansas-gender-neutral-state-id-option\\_us\\_5bc79f75e4b0d38b5874a669](https://www.huffingtonpost.com/entry/arkansas-gender-neutral-state-id-option_us_5bc79f75e4b0d38b5874a669) [<https://perma.cc/SGG5-536A>].

328. See *Zzyym v. Kerry*, 220 F. Supp. 3d 1106, 1111, 1114 (D. Colo. 2016).

329. Hillary Leung, *Major U.S. Airlines Will Soon Offer Passengers Non-Binary Gender Options on Tickets*, TIME MAG. (Feb. 20, 2019), <https://time.com/5533248/us-airlines-non-binary-gender-options> [<https://perma.cc/8C23-3DUF>].

330. See Clarke, *supra* note 8, at 901–02.

331. See Shannon Weber, “Womanhood Does Not Reside in Documentation”: *Queer and Feminist Student Activism for Transgender Women’s Inclusion at Women’s*

Furthermore, when transgender individuals come into contact with law enforcement, officials often make decisions about their sex for them. Housing assignments in sex-segregated facilities like prisons and detention facilities are overwhelmingly based on whether a transgender individual has had genital surgery.<sup>332</sup> As a consequence of these administrative designations, transgender prisoners and detainees experience disproportionate rates of sexual assault while incarcerated.<sup>333</sup> In addition to prisons and immigration detention facilities, homeless shelters and youth shelters are also sex-segregated, a fact that particularly impacts the lives of trans individuals, who are significantly more likely to live in poverty than cisgender Americans.<sup>334</sup> One third of transgender Americans experience homelessness in their lifetime, but more than a quarter of those individuals will not seek assistance at a homeless shelter for fear of discrimination.<sup>335</sup>

Challenging social norms and expectations around gender is a prerequisite to changing the binary legal model, which, by requiring individuals to fall into one of two sexes, restricts the rights of gender nonconforming individuals. The current system limits access to sex-segregated facilities, which depends on a person's legal gender, although the existence of those spaces is also a product of the law itself. Prisons, jails, and immigration detention facilities are more obviously connected to the state because of officials' constant supervision, but locker rooms, restrooms, and dressing rooms are the products of zoning regulations that mandate the separation of men and women.<sup>336</sup> Additionally, patrons may call upon law enforcement to regulate access to those spaces, thereby involving the state in policing gender.<sup>337</sup> Law thus reinforces social divisions, both of which perpetuate the sexual binary in public spaces.

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*Colleges*, 20 J. LESBIAN STUD. 29, 32–33 (2016). Mount Holyoke has a particularly inclusive policy of admitting students who identify as anything other than cisgender men. *Admission of Transgender Students*, MOUNT HOLYOKE, <https://www.mtholyoke.edu/policies/admission-transgender-students> [<https://perma.cc/A2H2-U22T>] (“Mount Holyoke is a women’s college that is gender diverse: We welcome applications from female, transgender and nonbinary students.”).

332. See Janei Au, Comment, *A Remedy for Male-to-Female Transgender Inmates: Applying Disparate Impact to Prison Placement*, 24 AM. U. J. GENDER & SOC. POL’Y & L. 371, 375–76 (2016); *Does a Policy that Houses Transgender or Intersex Inmates Based Exclusively on External Genital Anatomy Violate Standard 115.42(c) & (e)?*, NAT’L PREA RESOURCE CTR. (Mar. 24, 2006), <https://www.prearesourcecenter.org/node/3927> [<https://perma.cc/8RT4-2YUL>].

333. See Julia C. Oparah, *Feminism and the (Trans)gender Entrapment of Gender Nonconforming Prisoners*, 18 UCLA WOMEN’S L.J. 239, 261–63 (2012).

334. See U.S. TRANSGENDER SURVEY, *supra* note 15, at 56.

335. *Id.* at 178, 180.

336. See, e.g., Complaint at 2–3, *Yale Univ. v. Connecticut St. Codes and Standards Committee*, HHB-CV-17–6038904-S (Conn. Super. Ct. June 23, 2017) (on file with author).

337. See, e.g., sources cited *supra* note 314.

However, LGBT rights groups have the opportunity to challenge this legal and social norm in ballot measure campaigns.

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By emphasizing in their campaigns that transgender men and women are just like their cisgender counterparts, LGBT rights groups are evading the difficult conversations around the many gender nonconforming members of their community. What the campaigns implicitly argue is that biology matters less than appearance, but this creates precarious situations for gender nonconforming individuals in sex-segregated spaces, who do not meet normative expectations of how men and women should look. Reinforcing the sexual binary has significant legal consequences, as it maintains sex-segregated public spaces that the law either creates or upholds. The campaigns seem to undermine decades of advocacy to remedy harmful sex-based stereotypes and alleviate employment and educational inequalities. Given the costs of presenting trans individuals in a binary way and the strategic inconsistencies these campaigns introduce, the ends of LGBT campaigns may not justify their means.

#### IV. FRAMING CHOICES

The frames that LGBT rights groups have adopted are limited in their ability to effectuate social change and may impede other legal advocacy efforts, but there are alternatives that campaigns may wish to consider. These other options run counter to conventional wisdom around social movement advocacy, whereby social movements adopt the most assimilationist narratives because they are politically expedient. This Part analyzes the considerations that have led the LGBT movement to its current framing choices, before presenting those other options.

##### A. *Problematic Compromises*

As this Article has shown, the current frame for transgender rights is a product of historical circumstance, but as this Subpart explains, it is also a matter of positional compromise. Social movements generally engage in positional compromise because they have different constituencies with diverse needs, goals, and expectations that produce positional conflicts.<sup>338</sup> As this Subpart demonstrates, social movement lawyers engage in various

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338. Although positional conflicts are technically limited to arguments on behalf of one client that contradict those advanced for another, lawyers also group within that category those situations in which a position potentially offends the interests of a second client. See John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457, 460 (1993); Peter Margulies, *Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the Legal Services Lawyer*, 67 FORDHAM L. REV. 2339, 2340 (1999). Ethical rules only prohibit lawyers from making inconsistent arguments in the same appellate court. See MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 24 (AM. BAR. ASS'N 2018) ("Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients."); Margulies, *supra*, at 2353.

strategies to deflect, diffuse, and obscure the positional conflicts of their constituents, pressing group members to reach an agreement.

When advocating for the positional compromise, these lawyers are not simply trying to convince their constituents that the compromise position is ultimately beneficial for everyone; they sincerely believe it as well.<sup>339</sup> However, examining four common arguments for positional compromise—(1) incrementalism, (2) ends-not-means, (3) forum type, and (4) slippery slope—reveals that the binary approach to transgender rights is a concession that the LGBT movement does not necessarily need to make.

One oft-repeated argument for positional compromise is that civil rights advances are incremental, such that modest legal or social changes are necessary first steps to broader and more radical reforms. According to this conception of legal change, reforms that benefit gender conforming transgender individuals lay the groundwork and provide a platform from which to advance the claims of gender nonconformists. This was the argument that then-Congressman Barney Frank and the Human Rights Campaign made in 2007, when they supported a version of the federal Employment Non-Discrimination Act (ENDA) that protected against discrimination based on sexual orientation, but not gender identity.<sup>340</sup>

Although legal transformation is indeed a process, social movements have also found that their efforts may stall after initial successes. Nowhere has this been truer than in the context of LGBT rights, where transgender individuals repeatedly heard that gay and lesbian rights advocates would “go back for” their rights after securing sexual orientation antidiscrimination protections, which lawmakers would be more willing to approve because gays and lesbians hewed to middle-class norms.<sup>341</sup>

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339. See generally Scott L. Cummings, *How Lawyers Manage Intragroup Dissent*, 89 CHI.-KENT L. REV. 547, 556–60 (2014).

340. Lou Chibbaro, *Activists Seek Reconciliation, Renewed Push for ENDA*, WASH. BLADE, Feb. 21, 2008; Lou Chibbaro, *ENDA Hits Snag Over Transgender Inclusion*, WASH. BLADE, Sept. 26, 2007; Leadership Conference on Civil & Human Rights, Letter to U.S. House of Representatives in Support of ENDA (Nov. 6, 2007), <http://www.civilrights.org/advocacy/letters/2007/enda-lccr-sign-on-letter.html?referrer=https://www.google.com> [<https://perma.cc/7PF2-LVZV>]; Eliza Gray, *Transitions*, NEW REPUBLIC, July 14, 2011, at 10, 17; Cynthia Laird, *Tense Meeting with HRC over ENDA*, BAY AREA REP. (Jan. 9, 2008), <https://www.ebar.com/news///238638> [<https://perma.cc/RPR5-BB2T>].

341. Monica Roberts, *Why the Transgender Community Hates HRC*, TRANSGRIOT (Oct. 8, 2007), <http://transgriot.blogspot.com/2007/10/why-transgender-community-hates-hrc.html> [<https://perma.cc/3MZA-XJ3T>]; see also Shannon Price Minter, *supra* note 182. Notably, one of the earliest LGBT antidiscrimination laws, which Minneapolis enacted in 1975, included both sexual orientation and gender identity protections. Emma Margolin, *How Minneapolis Became First U.S. City to Pass Trans Protections*, NBC NEWS (June 3, 2016, 9:28 AM), <https://www.nbcnews.com/feature/nbc-out/how-minneapolis-became-first-u-s-city-pass-trans-protections-n585291> [<https://perma.cc/9CXD-KXMF>].

After pressing sexual orientation-only bills, LGBT rights advocates learned that it was exceedingly difficult to convince legislators to add gender identity once they had already amended their antidiscrimination law to include sexual orientation.<sup>342</sup> Successful efforts sometimes took decades, even in progressive states like New York and Massachusetts.<sup>343</sup> As a result, organizations shifted to only supporting comprehensive bills, which elected officials approved.<sup>344</sup> What the experience lobbying for antidiscrimination laws demonstrates is that, although incremental change is a strategy social movements have deployed effectively, it is not the only possibility, and in fact may not be the most efficient option when pursuing law reform.

A second claim in favor of positional compromise is that, regardless of the arguments lawyers make, it is the result that matters, because the law will benefit all group members once enacted. Under this formulation, propounding a binary view of gender identity during the election cycle is a necessary evil that will largely be remedied when courts apply the law to protect gender nonconforming individuals. Such a perspective identifies a type of “acoustic separation” between the messages directed at citizens when voting, and those transmitted to officials when applying the law.<sup>345</sup>

However, as Professor Meir Dan-Cohen, who developed the concept of acoustic separation, noted, the public and officials “are not in fact locked into acoustically sealed chambers, and consequently each group may ‘hear’ the normative messages” transmitted to each group, although there are circumstances under which “certain normative messages are more likely to register with one of the two groups than with the other.”<sup>346</sup> Thus, the ballot box and courtroom are not separate from one another, if only because the arguments voters hear become the law’s “legislative history” and are consequently essential to a judge’s interpretation of an ambiguous statute.<sup>347</sup> Courts will “attempt to place [themselves] in the

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342. See Lisa Keen, *ENDA Vote Postponed*, BAY WINDOWS (Oct. 25, 2007), <http://www.baywindows.com/enda-vote-postponed-51714> [<https://perma.cc/8NW7-DHQF>].

343. There was often a long gap between when a group secured sexual orientation and gender identity protections. The District of Columbia, for example, enacted an antidiscrimination law including sexual orientation in 1997. Human Rights Act of 1977, D.C. Code § 2–1401.01. It added gender identity protections to it in 2005. Human Rights Clarification Amendment Act of 2005, sec. 2(a), § 2–1401.01, 53 D.C. Reg. 14, 14 (Jan. 6, 2006); Katrina C. Rose, *Where the Rubber Left the Road: The Use and Misuse of History in the Quest for the Federal Employment Non-Discrimination Act*, 18 TEMP. POL. & CIV. RTS. L. REV. 397, 410 (2009).

344. See Keen, *supra* note 342.

345. The theory of acoustic separation is that laws contain two separate parts: a conduct rule indicating how the public should act, and a decision rule for how a judge should enforce a violation of the law. Dan-Cohen, *supra* note 37, at 630.

346. *Id.* at 631, 634.

347. *Kwikset Corp. v. Super. Ct.*, 246 P.3d 877, 884 (Cal. 2011); *Ecumenical Ministries of Or. v. Or. State Lottery Comm’n*, 817 P.2d 106, 110–11 (Or. 1994).

position of the voters at the time the initiative was placed on the ballot” and “interpret the initiative using the tools available to the citizens” at the time of the vote.<sup>348</sup> To do so, judges will consider “contemporaneous sources,” such as statements in the voter’s pamphlet, media reports on the initiative, and the materials the campaigns distributed to voters.<sup>349</sup> When it does so, the court may be hard-pressed to find that the voters believed the law applied beyond binary transgender individuals.

A third and related argument for compromise is that different forums require specific types of framing, such that more nuanced positions must be reserved for litigation and administrative advocacy. For example, media-based advocacy requires a specific approach, as groups that package their issues specifically for journalists are more likely to reap the benefit of having their particular frames reflected on the printed page.<sup>350</sup> Media coverage provides a social movement with legitimacy as it makes the public familiar with the movement’s frame.<sup>351</sup> Ballot measures, which depend on media attention, are thus more limited by the length and style of newspaper articles, television ads, tweets, and other social media posts than other forms of advocacy.

This third argument is appealing, and yet also inaccurate. Advocates do not necessarily present more complicated arguments in forums that welcome considered debate, and therefore may never present the nuanced points before legal decisionmakers. Like ballot measure campaigns, transgender rights litigation has primarily advanced a binary conception of gender identity.<sup>352</sup> The collapse of ballot measure and litigation strategy is not new; as Professor Nan Hunter has demonstrated, electoral politics shaped the litigation strategy for marriage equality, with lawyers employing the arguments in their briefs that “tested best with voters.”<sup>353</sup> These lawyers’ conservative approach reflects the systemic constraints in which they operate, as courts are not typically the vanguard

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348. *Alaskans for Common Language, Inc. v. Kritz*, 170 P.3d 183, 193 (Alaska 2007); see also *Zaner v. City of Brighton*, 899 P.2d 263, 268–69 (Colo. App. 1994).

349. Courts have either relied on these types of sources in the past or identified them as acceptable tools for interpretation. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 930 (N.D. Cal. 2010); *Alaskans for Common Language*, 170 P.3d at 193–94; *Oregon Telecomms. Ass’n v. Or. Dept. of Transp.*, 144 P.3d 935, 938 (Or. 2006); *State v. Allison*, 923 P.2d 1224, 1230 (Or. Ct. App. 1996) (en banc).

350. See Deana A. Rohlinger, *Framing the Abortion Debate: Organizational Resources, Media Strategies, and Movement-Countermovement Dynamics*, 43 Soc. Q. 479, 481, 483 (2002); Barry L. Tadlock, *Issue Framing and Transgender Politics: An Examination of Interest Group Websites and Media Coverage*, in *TRANSGENER RIGHTS AND POLITICS: GROUPS, ISSUE FRAMING, AND POLICY ADOPTION 27* (Jami K. Taylor & Donald P. Haider-Markel eds., 2014).

351. See Rohlinger, *supra* note 350, at 484; Tadlock, *supra* note 350, at 27.

352. See *supra* notes 221–224, 251–254 and accompanying text; George, *supra* note 4, at 581–82.

353. Hunter, *supra* note 44, at 1662.

of social change.<sup>354</sup> For that reason, litigators may prefer to put forward centrist arguments that appeal to judges in the same way as voters.

The similarity of frames in different legal forums is also a product of the interrelationship between law and society, which results in courts often ratifying the public's interpretation of what the law is or should be. Citizens are not "mere subjects of law."<sup>355</sup> Rather, as scholars of popular constitutionalism have shown, their activities "create and shape legal norms in routine social and political interactions."<sup>356</sup> Thus, although mobilization around the ERA did not lead to the amendment's ratification, courts integrated proponents' arguments about sex equality into law, thereby creating a "de facto" ERA.<sup>357</sup> The close connection between frames in extra-legal spaces and legal forums comes from the fact that laws are "but a small part of the normative universe" and "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning."<sup>358</sup> For that reason, although advocates may be able to offer more nuanced arguments to legal decisionmakers, those adjudicators have already been influenced by the cultural systems in which they operate. The frames that judges, legislators, and administrators encounter outside their professional environment are likely to continue to resonate, and therefore moving towards other arguments may not be as persuasive.<sup>359</sup>

A fourth reason that social movements adopt compromise positions is to avoid or diffuse slippery slope counterarguments. Concerns about slippery slopes are partly legal, in that the first step down the slope will create precedent for the second. For example, in *Romer v. Evans*, Justice Scalia anticipated that the Court's holding that states could not enact laws "disfavoring homosexual conduct" would provide the foundation to invalidate consensual sodomy laws.<sup>360</sup> His prediction materialized in *Lawrence v. Texas*,<sup>361</sup> and he similarly foreshadowed the Court's decision on same-sex marriage in that dissent.<sup>362</sup> Slippery slope concerns are also social, as "the expressive power of law changes people's political behavior as well as their other behavior, by leading them to accept

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354. See ANDERSEN, *supra* note 68, at 12–14; Heather K. Gerken, Windsor's *Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 603–04 (2015).

355. Kramer, *supra* note 37, at 972.

356. *Id.*

357. Siegel, *supra* note 37, at 1333.

358. Robert M. Cover, *The Supreme Court 1982 Term Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

359. Courts may of course shape the strategic terms of the debate, as well as move matters in one direction or another. See Kramer, *supra* note 37, at 971.

360. *Romer v. Evans*, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting).

361. 539 U.S. 558, 564 (2003).

362. See *id.* at 601–02 (2003) (Scalia, J., dissenting).



proposals that they would have rejected before.”<sup>363</sup> The concern underlying slippery slope arguments is thus that each decision shifts legal and social norms, creating a new context for the next decision rather than crafting an exception to the status quo.<sup>364</sup> Accordingly, court decisions both create legal precedent as well as help shift Americans’ normative commitments.

Positional compromises are appealing because a modest proposal is less likely to instill fear that permitting the current claim will necessarily lead to the successive, objectionable issue.<sup>365</sup> Positional compromise that makes reform appear less radical, and thus less challenging to existent social norms, may therefore give slippery slope arguments less traction. Additionally, the thin line between the first step and the next—the fear that drives slippery slope argues—may in fact be useful for advocates, as they create judicial and social openings for reform.

The problem with ceding ground to slippery slope arguments is twofold. First, it permits opponents of LGBT rights to identify what claims are and are not permissible. Secondly, the bases for LGBT-related slippery slope arguments center on disgust, with repulsion serving as the primary means of distinguishing what falls on either side of the line.<sup>366</sup> It is no coincidence that Justice Scalia connected the decriminalization of same-sex sodomy and marriage equality with bestiality and incest.<sup>367</sup> As Professor William Ian Miller explains, disgust allows individuals to “define and locate the boundary separating our group from their group, purity from pollution, the violable from the inviolable.”<sup>368</sup> Disgust, however, is an unreliable emotion on which to base rights, given that it is “shaped by social norms” and works in “fantasy-laden ways.”<sup>369</sup> There may be rational reasons for line-drawing, but disgust is not one of them.

Positional compromise may be necessary in some situations, but not all, and the benefits are not always as social movement actors claim. In fact, gender identity protections have fared best when they are part of the initial legislative package, instead of pursued as incremental gains.

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363. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1036 (2003) (emphasis omitted).

364. See Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CALIF. L. REV. 1469, 1515 (1999).

365. See Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1551–54 (2005) (describing slippery slope arguments).

366. See *id.* at 1607. See generally MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW (2010) (analyzing the politics of disgust surrounding homosexuality); William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011 (2015) (describing how anti-gay disgust shaped law).

367. See *Lawrence*, 539 U.S. at 590; *Romer*, 517 U.S. at 651.

368. WILLIAM IAN MILLER, THE ANATOMY OF DISGUST 194–95 (1997).

369. Nussbaum, *supra* note 366, at 16.

Courtrooms are not hermetically sealed from the arguments that voters hear during the election cycle, and the frames that advocates are using during ballot measure contests are later repeated in litigation. For that reason, LGBT rights groups may want to consider different frames, to ensure that positional compromise does not become positional forfeit for nonbinary individuals.

### B. *Costs of Winning*

When making positional compromises to secure victories in the first instance, the LGBT movement—like any social movement—must consider the cost associated with winning using a particular strategy. Each legal battle is not simply a matter of winning or losing, but rather success and failure are two ends of a continuum. Just as advocates can leverage losses into wins, so too can victories slip into defeats, particularly since, as this Subpart describes, legal victories are often incomplete and impose unexpected costs on the group's members.<sup>370</sup> LGBT rights advocates can lose by winning in a number of ways, which they must factor into their strategic calculations. Limited legal victories do not make winning counterproductive, but failing to account for these costs means the LGBT movement has not attained the gains it claims to have secured, particularly for nonbinary individuals.

One typical way in which winning is limited is that the victory is partial, in that the movement does not obtain all of the rights it sought or certain group members are excluded from the gain. The federal Employment Non-Discrimination Act, for example, was originally a comprehensive “gay rights bill” that sought to extend federal antidiscrimination protections to employment, education, housing, and public accommodations.<sup>371</sup> In the 1990s, gay rights lobbyists winnowed its scope to its employment provisions to make the bill more viable; in 2007, after gay and lesbian rights groups had expanded to LGBT, they added gender identity provisions. The House of Representatives passed a sexual orientation-only version of the law in 2007, but the Senate did not take it up that year.<sup>372</sup>

As part of the debate over ENDA, LGBT rights groups debated jettisoning gender identity protections to improve the law's chances.

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370. Professor Catherine Albiston has developed a useful typology of the positive, negative, and neutral consequences of litigation strategies for social movements that apply equally well to other types of legal work. See Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 66–67 (2011).

371. H.R. 14752, 93d Cong. (1974); Elias Vitulli, *A Defining Moment in Civil Rights History? The Employment Non-Discrimination Act, Trans-Inclusion, and Homonormativity*, 7 SEXUALITY RES. & SOC. POL'Y 155, 159 (2010).

372. See Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 177–80* (John D'Emilio et al. eds., 2000); George, *supra* note 4, at 554–55.

The discussion centered on whether a partial gain was preferable to the status quo in which no one in the movement had federal protections.<sup>373</sup> Although in that situation, advocates explicitly considered excluding group members, exclusion is often incidental. As a number of scholars noted during the marriage equality campaign, gays and lesbians who did not conform to middle-class norms were implicitly excluded from the marriage equality movement, which had a homogenizing and normalizing influence.<sup>374</sup> At the same time, by devoting so many resources to the marriage equality campaign, those individuals who wanted LGBT rights organizations to focus on other issues were shunted to the movement's periphery.<sup>375</sup>

In the transgender rights context, the campaigns are securing gender identity antidiscrimination protections, and in that sense their victory appears to be complete. However, because their strategies exclude nonbinary individuals, the broader payoff may be less significant than advocates anticipate. The campaigns may ultimately consider this a necessary tradeoff, but they need to make an informed calculation that considers all of the benefits, limitations, and options, and define winning accordingly.

A second typical way a legal victory may be limited is that the win might negatively impact other doctrinal areas, as laws are part of an interlocking network that reshape one another. In 2003, LGBT rights advocates around the country celebrated when the Supreme Court ruled that the criminalization of consensual sodomy unconstitutionally discriminated against gays and lesbians.<sup>376</sup> That opinion honored the relationships of same-sex couples and eliminated an important source of discrimination against gays and lesbians. However, it also contained dicta that circumscribed the rights of those who engage in nonnormative sexual practices, from nonmarital sex to practitioners of bondage, dominance, and sadomasochism (BDSM).<sup>377</sup> The *Lawrence* majority opinion's statement that states should not set boundaries on relationships "absent

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373. See George, *supra* note 4, at 548–57.

374. See, e.g., Franke, *supra* note 113, at 245; Levit, *supra* note 143, at 23–24.

375. These included topics such as AIDS and the problems facing LGBT youth. See Neo huu, Comment, *Obergefell v. Hodges: Kinship Formation, Interest Convergence, and the Future of LGBTQ Rights*, 64 UCLA L. REV. 184, 213 (2017); Cara Buckley, *Gay Couples Choosing to Say "I Don't"*, N.Y. TIMES (Oct. 25, 2013), <https://www.nytimes.com/2013/10/27/style/gay-couples-choosing-to-say-i-dont.htm> [<https://perma.cc/4KVE-U26T>].

376. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003); DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS* 259–61, 269–72 (2012).

377. See Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 137, 159 (2014); Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573, 583–85 (2016).

injury to a person” has resulted in courts upholding the criminal convictions of individuals involved in consensual BDSM activities.<sup>378</sup>

*Lawrence’s* impact on other areas of criminal law stems in part from its veneration of familial relationships, thereby creating a “domesticated liberty” interest that does not extend beyond traditional morality.<sup>379</sup> That outlook, in turn, stemmed from litigators’ strategy, which focused “less on sexual acts and more on relationships and families on the theory that that was a more appealing way to talk about these things.”<sup>380</sup> The lawyers took that approach as far they could, even stressing that John Lawrence and Tyron Garner were arrested for engaging in a physical act like any other loving couple, despite the fact that the men were mere acquaintances.<sup>381</sup>

Advocates’ approach in *Lawrence* was a response to the Supreme Court’s 1986 decision upholding consensual sodomy laws, which created a precedent that they had to “litigate around.”<sup>382</sup> Lawyers consequently shifted their tactics from highlighting sodomy laws’ assault on privacy to emphasizing how the penal code provisions constituted identity-based discrimination. When arguing *Lawrence*, litigators focused on overturning precedent, not how the Court would choose to do so.<sup>383</sup> That decision produced a consequential legal victory that paved the way for additional gay rights advances, but its doctrinal carryovers are ones that advocacy groups continue to address.

Similarly for transgender rights, the doctrinal effects of gender identity anti-discrimination protections secured through a binary model does not necessarily extend to gender nonconforming individuals’ rights in other areas of law.<sup>384</sup> Trans individuals have different legal goals, which include having the right to decide one’s own sex or gender, as well as securing many sex and gender options.<sup>385</sup> The difference between the two sets of rights formulations is significant; protecting trans individuals insofar as they conform to gender roles is not the same as recognizing gender neutrality or a third gender.

A third way victories might impose externalities is by creating backlash, meaning opponents’ responses to legal gains may circumscribe

378. See *State v. Van*, 688 N.W.2d 600, 613-14 (Neb. 2004); *Commonwealth v. Appleby*, 402 N.E.2d 1051, 1060-61 (Mass. 1980); *People v. Davidson*, No. DO64880, 2015 WL 4751166, at \*8 (Cal. Ct. App. Aug. 12, 2015).

379. Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1400-01 (2004).

380. CARPENTER, *supra* note 376, at 194.

381. See *id.* at 45, 193-94.

382. See *Bowers v. Hardwick*, 478 U.S. 186, 190-92, 194-96 (1986); Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1617 (1993).

383. See CARPENTER, *supra* note 376, at 184-89, 192-97.

384. See *supra* Subparts III.B and IV.A.

385. See Clarke, *supra* note 8, at 921-22.

the wins' expected positive effects. As scholars like Professors Michael Klarman and Gerald Rosenberg have argued, legal victories inspire resistance and countermobilization, whether they originate with the judiciary, with the legislature, or at the ballot box.<sup>386</sup> Legal changes “impose substantive resolutions of policy issues that may be very different from those supported by most voters,” which allow the movement's opponents to mobilize in the wake of those decisions.<sup>387</sup> For that reason, segregationists responded to *Brown v. Board* with violence to protract the decision's implementation, while conservative extremists in the wake of *Roe v. Wade* organized to defeat the ERA, which they identified as further entrenching abortion rights.<sup>388</sup>

LGBT rights victories have also given rise to sustained opposition, particularly marriage equality. Conservative leaders issued calls to resist the Supreme Court even before the justices handed down the *Obergefell* opinion.<sup>389</sup> After the decision, state and county officials around the country began contesting the decision through delay, distraction, and defiance,<sup>390</sup> although resistance quickly became limited to private actors who refused to provide wedding-related goods and services to same-sex couples.<sup>391</sup> In 2018, the Supreme Court reinforced the importance

386. See KLARMAN *supra* note 52, at 165–69; KLARMAN, *supra* note 35, at 104, 391–92, 464–68; ROSENBERG, *supra* note 35, at 416–19.

387. KLARMAN, *supra* note 52, at 166.

388. KLARMAN, *supra* note 35, at 422; Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 766 (1991).

389. See Ryan T. Anderson, *The Roe of Marriage*, NAT'L REV. (Aug. 11, 2014, 4:00 AM), <https://www.nationalreview.com/nrd/articles/383581/roe-marriage> [<https://perma.cc/RWH9-2PSJ>]; Richard Wolf, *Same-Sex Marriage, Once Inconceivable, Now Appears Inevitable*, INDY STAR (Oct. 6, 2014, 11:13 AM), <https://www.indystar.com/story/news/nation/2014/10/06/same-sex-marriage-appears-inevitable/16803123> [<https://perma.cc/TC5Y-VWGT>].

390. See *Miller v. Davis*, 123 F. Supp. 3d 924, 929 (E.D. Ky. 2015); Ken Paxton, Attorney General of Texas, Opinion Letter on Rights of Government Officials Involved with Issuing Same-Sex Marriage Licenses and Conducting Wedding Ceremonies, Opinion No. KP-0025, June 28, 2015, at 2–4; Press Release, Thomas Enright, Executive Counsel of Governor Bobby Jindal, Memorandum on Religious Liberty Implications in Light of Same Sex Marriage Ruling, June 29, 2015, <http://media.graytvinc.com/documents/Memo+On+Religious+Liberty+Implications+In+Light+Of+SCOTUS+Ruling.pdf> [<https://perma.cc/Y9V7-ECC5>]; Steven J. Heyman, *A Struggle for Recognition: The Controversy Over Religious Liberty, Civil Rights, and Same-Sex Marriage*, 14 FIRST AMEND. L. REV. 1, 6–9 (2015); David A. Fahrenthold et al., *Opponents Divided on How—or Whether—to Resist Justices' Ruling*, WASH. POST (June 26, 2015), [https://www.washingtonpost.com/politics/opponents-divided-how-or-whether-to-resist-supreme-court-ruling/2015/06/26/3219f626-1c12-11e5-ab92-c75ae6ab94b5\\_story.html](https://www.washingtonpost.com/politics/opponents-divided-how-or-whether-to-resist-supreme-court-ruling/2015/06/26/3219f626-1c12-11e5-ab92-c75ae6ab94b5_story.html) [<https://perma.cc/D76B-PRXX>]; David Weigel et al., *Kim Davis Released from Jail, Ordered Not to Interfere with Same-Sex Marriage Licenses*, WASH. POST (Sept. 8, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/09/08/judge-orders-kentucky-clerk-kim-davis-released-from-jail> [<https://perma.cc/B24R-XT2S>].

391. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n*, 138 S. Ct. 1719, 1724–26 (2018); *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017); *In*

of respecting religious objectors' views in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, a case involving a devout Christian baker who refused to provide wedding cakes to same-sex couples.<sup>392</sup> The Court ruled the state's commission members, in hearing the baker's case, made statements during the hearing that demonstrated "a clear and impermissible hostility" towards the baker's sincerely held religious beliefs, thereby violating his First Amendment rights.<sup>393</sup>

Backlash to transgender rights will very likely follow the same path as marriage equality, with claims to religious freedom pitted against Equal Protection guarantees. Although many religious denominations welcome and affirm transgender individuals, some churches press their transgender members to embrace their biological sex and discourage any attempts to physically transition.<sup>394</sup> The Southern Baptist Convention, for example, roots its opposition to transgender identity in Bible verses that demonstrate "God's design was the creation of two distinct and complementary sexes, male and female" and that "[d]istinctions in masculine and feminine roles [were] ordained by God."<sup>395</sup> Although it is likely that religious objectors will not distinguish between binary and nonbinary transgender individuals, their emphasis on gender roles and the distinction between male and female may lead to some differentiation in their views on the types of transgender individuals. To what extent religious

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re Klein, Nos. 44–14, 45–14, 2015 WL 4868796 (Or. Bur. Lab. & Indus. July 2, 2015); *Bernstein v. Ocean Grove Camp Mtg. Ass'n*, OAL Dkt. No. CRT 6145–09, 2012 WL 169302 (N.J. Admin. Jan. 12, 2012); Grant Rodgers, *Grimes' Gortz Haus to Stop All Weddings in Wake of Discrimination Complaint*, DES MOINES REG. (Jan. 28, 2015, 5:53 PM), <https://www.desmoinesregister.com/story/news/investigations/2015/01/28/gortz-haus-owners-decide-stop-weddings/22492677> [<https://perma.cc/MNSP-A5YF>]; *N.Y. Farm Appeals \$13,000 Fine for Refusing Lesbian Couple's Wedding*, CHRISTIAN SCI. MONITOR (Nov. 23, 2015), <https://www.csmonitor.com/USA/Justice/2015/1123/N.Y.-farm-appeals-13-000-fine-for-refusing-lesbian-couple-s-wedding> [<https://perma.cc/9AY5-HSCM>].

392. 138 S. Ct. at 1731–32.

393. *Id.* at 1729. The Court noted the importance of balancing the baker's First Amendment rights against those of gay and lesbian citizens; decisions would need to avoid a situation where "all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect [are] allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages,' something that would impose a serious stigma on gay persons." *Id.* at 1728–29.

394. Aleksandra Sandstrom, *Religious Groups' Policies on Transgender Members Vary Widely*, PEW RES. CTR. (Dec. 2, 2015), <http://www.pewresearch.org/fact-tank/2015/12/02/religious-groups-policies-on-transgender-members-vary-widely> [<https://perma.cc/A4CQ-PTLC>]. Churches that do not accept transgender identity include the Assemblies of God, Church of Jesus-Christ of Latter-day Saints (the Mormon Church), Lutheran Church-Missouri Synod, Southern Baptist Convention, and Roman Catholic Church. *Id.*

395. SOUTHERN BAPTIST CONVENTION, RESOLUTION ON TRANSGENDER IDENTITY (2014), <http://www.sbc.net/resolutions/2250/on-transgender-identity> [<https://perma.cc/ZZ7Y-X63A>].

principles will circumscribe transgender rights is an issue that has not yet come to pass, although it is one LGBT rights groups will likely address in the near future.

Although legal victories may be circumscribed, incomplete, or have a negative impact on subpopulations within the group, this does not mean that social movements should be paralyzed. Rather, lawyers should consider how their gains in courts, legislatures, administrative agencies, and at the ballot box will play out when designing their strategies. Of course, advocates cannot anticipate every eventuality, and sometimes their only options will require accepting negative externalities. However, examining the potential costs of winning may lead advocacy groups to adopt different strategies and tactics in the first instance.

### C. *Reframing Trans Rights*

With serious potential costs to winning with a binary strategy, the LGBT movement should consider what a different strategy for transgender rights would produce. The approach campaigns should adopt depends on how the campaigns are defining victory, which may range from winning the popular vote to educating citizens and securing larger social change. The options presented here—featuring nonbinary individuals, as well as their family members and elected representatives; highlighting how the laws force all citizens to conform to gender stereotypes; and emphasizing gender identity’s immutability—allow campaigns’ victory to expand beyond securing a localized benefit. These suggestions are not significant departures from what campaigns have been utilizing, but they may be more likely to promote the social change required to effectuate meaningful legal reform.

One possibility would be to incorporate nonbinary individuals in both commercials and canvassing, particularly since personal contact has overwhelmingly produced support for LGBT rights measures.<sup>396</sup> Television ads, radio spots, and front door conversations provide a forum to share the experiences of nonbinary individuals who have suffered discrimination because of their gender identity, from harassment to abuse to accusations of fraud. Given that, in 2016, only 30 percent of Americans reported knowing a transgender person, and that nonbinary individuals make up a smaller subset of that category, campaigns may offer an opportunity for interpersonal contact that many voters would otherwise lack.<sup>397</sup>

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396. See Jay Barth et al., *Community Context, Personal Contact, and Support for an Anti-Gay Rights Referendum*, 62 POL. RES. Q. 355 (2009); David Broockman & Joshua Kalla, *Durably Reducing Transphobia: A Field Experiment on Door-to-Door Canvassing*, SCI. MAG., Apr. 8, 2016, at 220–24.

397. *Vast Majority of Americans Know Someone Who Is Gay, Fewer Know Someone Who Is Transgender*, PEW RES. CTR. (Sept. 28, 2016), <http://www.pewforum.org/2016/09/28/5-vast-majority-of-americans-know-someone-who-is-gay-fewer-know-someone-who-is-transgender> [<https://perma.cc/STQ9-YD5R>].

Organizations may be hesitant to feature nonbinary individuals, as advocates tend to be particularly conservative in selecting the face of campaigns.<sup>398</sup> However, this emotive framing mirrors the marriage equality movement's successful strategy, and as such may have potential to succeed.

This first option could be combined with a second that potentially tempers its destabilizing effect: adapting the appeals from family members that the campaigns already deploy. Transgender rights advocates have adopted the emotive appeals of the marriage equality movement, often relying upon the parents of transgender children to convey the arguments for antidiscrimination laws. Instead of gender-conforming transgender children, campaigns could instead highlight families with nonbinary transgender children. The current strategy implicitly asks viewers to identify with cisgender adults; the new framework would presumably be successful since its approach is the same, but it would teach viewers more about transgender identity. Ultimately, this frame could counter the fears provoked by the unknown.

These tactics continue to be assimilationist in important respects, in that they emphasize belonging and joining a mainstream institution, which both makes them likelier to succeed and exposes them to criticism.<sup>399</sup> However, assimilationist arguments are not either/or, but rather exist on a spectrum. Campaigns can make claims that are more assimilationist or less, and it is a question of where on the spectrum they place their appeals. At the low end is a call to common humanity, at the other is presenting individuals as like all others except for a specific, and presumably insignificant, trait. But there is a great deal of room for arguments that fall in the middle of those two extremes, such as emphasizing the needs and rights of nonbinary individuals within the context of the nuclear family. A subtle reorientation of the movement's current strategies may garner the benefits of the assimilationist approach, while reducing the harm perpetuated by binary constructions of gender.

In that same vein, the campaigns could also feature legislators and administrative officials from states that have enacted nonbinary gender markers on driver's licenses and birth certificates. When states and cities have promulgated these changes, officials have explained that nonbinary designations are more both accurate and promote the well-being of their citizens, who suffer harassment, stigma, and dysphoria when their documentation does not align with their gender identity.<sup>400</sup> Legislators

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398. See Godsoe, *supra* note 12, at 150; Paul Hendrickson, *The Ladies Before Rosa: Let Us Now Praise Unfamous Women*, 8 RHETORIC & PUB. AFF. 287, 288, 291 (2005).

399. The marriage equality campaign advertisements were also critiqued for their assimilationist imperative. See *generally supra* Subpart I.C.

400. See, e.g., Gorenberg, *supra* note 327, at 6–10; Press Release, Office of Governor Phil Murphy, Governor Murphy Signs Bills Expanding Rights and Protections



speaking on the subject would reinforce both the existence of nonbinary individuals and authenticity of their claims, thereby countering opposition arguments as to fraud, insignificance, and deviance.

Campaigns that adopt these approaches must be careful to keep nonbinary individuals at the forefront. Campaigns should not have family members and legislators speak on behalf of nonbinary individuals at the expense of supplanting nonbinary individuals themselves. Community members need the opportunity to meet the people whose rights are at issue, even if only through campaign materials. Indeed, familiarity has been successful: legislators and regulators voted to expand gender designation options after hearing directly from nonbinary individuals, who shared their struggles for social acceptance and the state's validation of their authentic lives.<sup>401</sup> Additionally, nonbinary people are the ones who can best communicate how the laws will impact their lives, using the emotive messaging that was so effective during the marriage equality campaigns. Thus, material featuring family members and legislatures must also incorporate nonbinary individuals.

To that end, campaigns could feature not just transgender individuals but the plethora of other citizens who do not conform to gender stereotypes. Another option is therefore to focus attention on how antitransgender rhetoric necessarily depends on reinforcing traditional gender norms and circumscribing the personal expression of all citizens. Emphasizing the experiences of “tomboy” girls, butch lesbians, and effeminate men who have been asked to leave restrooms would make it clear how the law extends beyond trans rights. Likewise, campaigns could discuss the prevalence of intersex individuals, which may be as high as 1.5 percent of the population, and their physiological inability to meet the gender binary.<sup>402</sup> Identifying the law's broader implications for voters would help them understand the issues at stake, render transgender

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for New Jersey's LGBTQ Community (July 3, 2018), [https://nj.gov/governor/news/news/562018/approved/20180703a\\_LGBTQ.shtml](https://nj.gov/governor/news/news/562018/approved/20180703a_LGBTQ.shtml) [<https://perma.cc/P9TT-EQ2H>]; CAL. SENATE JUDICIARY COMM., BILL ANALYSIS OF S.B. 179 (Apr. 25, 2017) [https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201720180SB179](https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB179) [<https://perma.cc/SLY8-ELUH>] (click on the “04/24/17- Senate Judiciary” link to download the file); N.Y.C. COUNCIL, COMMITTEE REPORT OF THE HUMAN SERVICES DIVISION, PROPOSED INT. No. 954-A (Sept. 6, 2018) (on file with author); *Oregon Becomes First State to Add Third Gender to Driver's Licenses*, WLTX19 (June 16, 2017 6:51 AM), <https://www.wltx.com/article/news/local/oregon-becomes-first-state-to-add-third-gender-to-drivers-licenses/283-449450725> [<https://perma.cc/WH6A-KF3T>]; Perry Stein, *Meet the First Person in the Country to Officially Receive a Gender-Neutral Driver's License*, WASH. POST (June 30, 2017), [https://www.washingtonpost.com/local/meet-the-first-person-in-the-country-to-officially-receive-a-gender-neutral-drivers-license/2017/06/30/bcb78afc-5d9a-11e7-9fc6-c7ef4bc58d13\\_story.html](https://www.washingtonpost.com/local/meet-the-first-person-in-the-country-to-officially-receive-a-gender-neutral-drivers-license/2017/06/30/bcb78afc-5d9a-11e7-9fc6-c7ef4bc58d13_story.html) [<https://perma.cc/WG2L-GAKU>].

401. See generally sources cited *supra* note 400.

402. See Alisa L. Rich et al., *The Increasing Prevalence in Intersex Variation from Toxicological Dysregulation in Fetal Reproductive Tissue Differentiation and Development by Endocrine-Disrupting Chemicals*, 10 ENVTL. HEALTH INSIGHTS 163, 163 (2016).

identity more familiar, and possibly produce a larger conversation on biological sex and gender norms.<sup>403</sup>

Tackling the law's wider implications would benefit the many different constituencies within the LGBT movement that have divergent visions for how the law should be with respect to gender identity-related differences.<sup>404</sup> For some, the ultimate aim may be to ensure the law respects individuals' gender-based self-identifications, as there are cases, statutes, and administrative regulations that recognize transgender individuals' gender identity as their legal sex, but no national trend or consensus,<sup>405</sup> and the Trump Administration has actively worked to rescind federal protections for transgender individuals.<sup>406</sup> For others, the movement's goals may be to eliminate any government classifications by sex or gender.<sup>407</sup> Under this formulation, rather than respecting individuals' gender self-identifications, advocates would press for the elimination of sex classifications, bifurcation of traits from their gendered associations, or concealment of gender where the characteristic is irrelevant.<sup>408</sup> Examples of each include eliminating sex on birth certificates, in much

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403. Cf. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749–50 (2011) (arguing in favor of liberty analysis because it creates a more inclusive “we,” and arguing that equality claims harmfully subdivide the population into groups).

404. See, e.g., Gabriel Arkles et al., *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579, 598, 607–10, 612–13 (2010) (describing how the implementation of various approaches to social change lawyering within a single movement can produce conflict). LGBT rights organizations also have varied mission statements, goals, and plans for attaining their aims. Compare *The Roadmap to Victory*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/Roadmap-to-Victory> [<https://perma.cc/HZ8R-RX-LK>] (presenting a state-focused strategy), with LAMBDA LEGAL, A VISION FOR THE FUTURE: 2019–2020 STRATEGIC PLAN (2019), <https://www.lambdalegal.org/about-us/strategic-plan> [<https://perma.cc/V97K-X3XR>] (outlining a strategy that targets both state and federal law).

405. Movement Advancement Project, *Mapping Transgender Equality in the United States*, TRANSGENDER LAW CENTER (Oct. 25, 2019), <https://transgenderlawcenter.org/equalitymap> [<https://perma.cc/QWT8-BMRC>].

406. See Letter from Sandra Battle, Acting Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. & T.E. Wheeler, II, Acting Assistant Att’y Gen. for Civil Rights, U.S. Dep’t of Justice, to Colleagues on Changes to Title IX Discrimination Protections (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [<https://perma.cc/MY8L-YV3K>]; see also Erica L. Green et al., *Trump Administration Eyes Defining Transgender out of Existence*, N.Y. TIMES, Oct. 21, 2018, at A1 (summarizing the Trump administration’s narrowing of “sex” under Title IX and its implications on the civil rights of transgender people). For a discussion of the many forms of sex and gender identification, see Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 747, 756, 759–60, 763–64, 769–70 (2015).

407. See, e.g., Olga Tomchin, Comment, *Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans\* People*, 101 CALIF. L. REV. 813, 818 (2013) (arguing that “only total elimination of ‘sex’ as a legal category” will eradicate the harms of “sex categorization and regulation” for transgender individuals).

408. Clarke, *supra* note 8, at 901.

the same way governments have stopped indicating race on the documents; providing equal parental leave, rather than limiting particular benefits to mothers; and enforcing gender-blind hiring.<sup>409</sup>

Despite their different goals, the various constituencies within the LGBT umbrella support individuals' gender self-expression. Therefore, highlighting the ways in which antitransgender rhetoric assumes conformity to gender norms promotes the long-term aims of the constituencies whose rights are at stake.

Fourth, campaigns could emphasize that gender identity is an immutable characteristic, which would alleviate concerns about dissimulation and fraud.<sup>410</sup> For the gay and lesbian rights movement, championing immutability prompted both social acceptance and legal rights gains; it supported status-based antidiscrimination claims under the Equal Protection Clause while simultaneously challenging opponents' long-standing arguments that gays and lesbians were undeserving of legal protections because same-sex sexuality was a chosen conduct rather than an innate characteristic.<sup>411</sup> Highlighting how gender identity is also stable, permanent, deeply rooted, constitutive of a person's identity, and difficult to change, and that what individuals are altering is their self-presentation to match their existent gender identity, may also have a similar effect for the transgender rights movement.

One challenge in emphasizing gender identity's immutability is that, although transgender adults have permanent and stable gender identities, there is an ongoing debate about whether the same is true for pre-adolescent children.<sup>412</sup> In longitudinal studies of pre-adolescent children treated in clinics for gender dysphoria, only 12 percent–27 percent of girls, and 6 percent–23 percent of boys, later identified as binary transgender adults.<sup>413</sup> The desistance of gender dysphoria among adolescents

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409. *See id.* at 941–42.

410. Immutability can be defined in several different ways, most notably as a characteristic a person cannot change as well as a trait that is so fundamental to identity that a person should not be asked to change. Equal Protection doctrine incorporates both definitions, as does this Article. *See* Jessica A. Clarke, *Against Immutability*, 125 *YALE L.J.* 2, 27 (2015).

411. Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 *ALA. L. REV.* 794, 844–46 (2017); *Religious Beliefs Underpin Opposition to Homosexuality*, PEW RES. CTR. (Nov. 18, 2003), <http://www.pewforum.org/2003/11/18/part-1-opinion-of-homosexuals> [<https://perma.cc/F4CZ-879D>] (finding forty-two percent of Americans think same-sex sexual attraction is a choice).

412. ELI COLEMAN ET AL., WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, *STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE* 10–11 (2012), [https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care\\_V7%20Full%20Book\\_English.pdf](https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf) [<https://perma.cc/R4K2-S593>]; Am. Psychol. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 *AM. PSYCHOLOGIST* 832, 841–42 (2015).

413. Jack Drescher & Jack Pula, *Ethical Issues Raised by the Treatment of*

has become a rallying cry for opponents of transgender rights, as well as one of the major arguments against providing gender-affirming care to gender dysphoric children.<sup>414</sup> However, as a growing number of clinicians and scholars have noted, the language of persistence and desistance assumes these children are either binary transgender or cisgender, rather than nonbinary.<sup>415</sup> As such, emphasizing the immutability of gender identity—whatever its form—may promote a better understanding of adolescents’ varied gender expression.

Additionally, tying social and legal advances to an empirical premise that scientists may later disprove is a fraught endeavor, and implies that transgender identity would be invalid without an outside expert’s approval.<sup>416</sup> Requiring the intervention of scientists is particularly vexing for LGBT rights groups, as transgender advocates have a complicated history with medical practitioners, who serve as gatekeepers to necessary treatments, like hormones and surgical interventions.<sup>417</sup> For some transgender advocates, mental health professionals’ oversight in transition-related decisions serves only to stigmatize those they claim to help,

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*Gender-Variant Prepubescent Children*, 44 HASTINGS CTR. REP., SPECIAL ISSUE: LGBT BIOETHICS: VISIBILITY, DISPARITIES, AND DIALOGUE S17 (2014). Most of the children in these studies whose gender dysphoria desisted later identified as gay or lesbian. *Id.* at S18; see also COLEMAN ET AL., *supra* note 412, at 172. For a discussion of the factors associated with gender dysphoria’s desistance and persistence in children, see Thomas D. Steensma et al., *Factors Associated with Desistance and Persistence of Childhood Gender Dysphoria: A Quantitative Follow-Up Study*, 52 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 582, 587–89 (2013).

414. See, e.g., Julian Vigo, *The Myth of the “Desistance Myth,”* WITHERSPOON INST.: PUB. DISCOURSE (July 2, 2018), <https://www.thepublicdiscourse.com/2018/07/21972> [<https://perma.cc/K3TX-SLDS>]; see also Tey Meadow, *The Loaded Language Shaping the Trans Conversation*, ATLANTIC (July 10, 2018), <https://www.theatlantic.com/family/archive/2018/07/desistance/564560> [<https://perma.cc/D4HV-54DU>] (finding the term “desistance” was adopted based on outdated science and that the existence of the phenomenon supports social, rather than medical, intervention for children).

415. Jon Brooks, *The Controversial Research on “Desistance” in Transgender Youth*, KQED (May 23, 2018), <https://www.kqed.org/futureofyou/441784/the-controversial-research-on-desistance-in-transgender-youth> [<https://perma.cc/28PZ-R2CC>]; Meadow, *supra* note 414.

416. See KENJI YOSHINO, COVERING 48 (2006) (arguing that under the immutability frame, technological advances in genetic manipulation and the discovery of a gay gene could limit the incidence of same-sex sexuality); see also Clifford Rosky, *Same-Sex Marriage Litigation and Children’s Right to Be Queer*, 22 GLQ 541, 547 (2016) (describing the immutability frame as “troubling” because it assumes gays and lesbians deserve civil rights only because it has been empirically established they “can’t help it”); Susan R. Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495, 1520–21 (2009) (characterizing reliance on scientific research to oppose anti-gay rhetoric is “unpalatable” because it ignores the “dangers of eugenics” and isolates gays and lesbians).

417. Jack Drescher, *Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual*, 39 ARCH. SEXUAL BEHAV. 427, 446 (2010).

while at the same time limiting access to care.<sup>418</sup> Others, however, argue that the psychiatric diagnosis ensures insurance coverage for costly transition-related surgery, and therefore provides essential benefits.<sup>419</sup> Some of these debates dissipated in 2012, when the American Psychiatric Association replaced the diagnostic term “Gender Identity Disorder” with “Gender Dysphoria,” and simultaneously separated the new category from Sexual Dysfunctions and Paraphilic Disorders.<sup>420</sup> For much of the past few years, transgender rights advocates have been working with mental health professionals to advocate for legal change, indicating that they may be able to effectively partner on this new frame.<sup>421</sup>

None of these suggestions is an extreme departure from the LGBT legal movement’s previous frames, and yet by highlighting nonbinary identity, their effects could be significant. In addition to protecting the rights of the most vulnerable members of the transgender community, such a strategic shift would support broader legal change by challenging gender norms, rather than essentializing them. These alternatives are therefore possibilities that LGBT rights advocates should weigh against the current frames to determine what is more likely to produce lasting, long-term change.

## CONCLUSION

An axiomatic truth for lawyers—if not people more generally—is that winning is better than losing. For that reason, a strategy that yields success is better than one that does not. However, organizations can make tactical decisions along the road to legal change that produce hollow victories or impose unexpected costs.

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418. *See id.* at 428, 446; Camille Beredjick, *DSM-V to Rename Gender Identity Disorder “Gender Dysphoria,”* ADVOCATE (July 23, 2012, 8:00 PM), <https://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria> [<https://perma.cc/FAJ6-LH7F>].

419. Drescher, *supra* note 417, at 446; Beredjick, *supra* note 418.

420. AM. PSYCHIATRIC ASS’N, GENDER DYSPHORIA 1 (2013), [https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA\\_DSM-5-Gender-Dysphoria.pdf](https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf) [<https://perma.cc/SZ9D-3D84>].

421. For example, professional medical associations have been filing amicus briefs on behalf of transgender individuals excluded from single-sex facilities that correspond to their gender identity. *See, e.g.*, Brief of the Am. Acad. of Pediatrics et al. as Amicus Curiae in Support of Appellees at 1–2, *Doe v. Boyertown Area Sch. Dist.*, No. 17–3113 (3d Cir. Jan. 23, 2018) (on file with author) (describing their interest in the case as providing the court with medical consensus and best practices on treatment protocols for transgender and gender nonconforming people); Brief of the Am. Acad. of Pediatrics et al. as Amicus Curiae Supporting Respondent at 1–2, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15–2056, 2017 WL 1057281 (4th Cir. May 15, 2017) (same). They have also filed briefs opposing the exclusion of transgender individuals from the armed forces. *See, e.g.*, Brief of the Am. Med. Ass’n as Amicus Curiae Supporting Appellees at 1–2, *Karnoski v. Trump*, No. 18–35347 (9th Cir. July 3, 2018) (on file with author).

LGBT rights groups have been succeeding at the ballot box and keeping transgender rights protections in place. However, because they have done so with frames that emphasize gender conformity and the gender binary, their gains may be less consequential than they seem. These frames are the result of a historical evolution of ballot measure strategy, whereby the marriage equality movement moved away from a call to rights and equality and towards emotive appeals, as well as more entrenched social movement strategies that tend towards conservative argumentation.

The barrier between public messaging and legal change is porous, and the frames that appeal to voters are not so different from arguments that resonate in courtrooms, legislatures, and administrative hearings. Frames are the central work of legal change, such that how transgender rights will take shape depends largely on the frames that LGBT rights groups adopt—or adapt—today.