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The Right to Transgender Identity

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I INTRODUCTION

Over the last few years, the rights of transgender people[1] have taken center stage in American politics, receiving considerable media coverage. For example, as of July 2023, 561 bills targeting transgender people had been proposed in the US, 79 of which have already passed – a marked increase from 157 anti-trans bills in all of 2022, 26 of which passed (Trans Legislation Tracker 2023). If enacted and allowed to go into effect (many have been enjoined), these laws will and do affect transgender peoples' lives in many ways, including restricting (or banning) gender-affirming medical care, limiting access to public facilities (like bathrooms and changing rooms), and barring people from changing their gender markers on various official documents.

The explosion of anti-transgender legislation is reflective of the contemporary political climate. While only 0.5 percent of the US adult population is transgender, the issue of transgender peoples' rights has garnered significant political attention, especially in the lead-up to the 2024 election (Herman, Flores, & O'Neill 2022). The issue seems to especially resonate with Republican voters, 79 percent of whom claim that acceptance of transgender people has gone "too far" (Chinni 2023) – compared to 30 percent in 2020 (Kirzinger et al. 2020). And we know that conservatives' changing attitudes towards transgender people are being driven by increased media attention – rather than interaction with the transgender community – since 77 percent of Republican voters report not knowing a transgender person (Data for Progress 2023).

Given the explosion of anti-transgender legislation, normative and legal questions surrounding transgender peoples' rights to identity are especially pressing. Do

[1] In this chapter we'll be using the term "transgender" very broadly to refer to any person whose gender identity does not correspond to the sex assigned at birth. This includes people who identify as transgender men, transgender women, transmasculine, transfeminine, nonbinary, agender, genderqueer, genderfluid, etc. However, not all transmasculine, transfeminine, nonbinary, agender, genderqueer, and genderfluid people identify themselves as "transgender" (for more on these labels see American Psychological Association 2023).

transgender people have the right to gender identities (in the way we think people have rights to their religious identities)? Before proceeding, it's worth distinguishing between two different ways one could defend a right to transgender identity. On the one hand, one could put forth an *a priori* argument for there being a right to gender identity which applies to transgender people. We want to stress that this isn't the type of argument we'll be presenting in this chapter (moreover, we think this demand often ends up being something of a red herring in the transgender case, given that it's also difficult to provide abstract arguments for rights to other sorts of identities like religion and race). Rather, we'll be considering the right to transgender identity as the right for transgender people to fully participate in society. The right to transgender identity, then, consists in the right for transgender people to not be excluded from normal social and political practices *because* they are transgender.

In American constitutional law, the mechanism courts use to evaluate the reach of vital rights is cashed out in so-called tiers of scrutiny. That is, how closely courts *scrutinize* the government's justification for a particular action or law. Spread across three formal tiers (with a patchwork of sliding-scale, special context alternatives), the basic rule is: The more important the right at issue, the higher a standard the government must meet to justify any intrusion on the right. If the government wants to pass a law forbidding a newspaper from publishing something, it needs a really good reason. If it wants to pass a law prohibiting murder, the way it does so just needs to make sense.

In this chapter, we will argue that transgender discrimination cases ought to receive the highest tier, so-called *strict scrutiny*. To receive strict scrutiny in judicial review, the law must either involve a fundamental right (e.g., speech) or target a *suspect class*, where suspect classes are groups that – due to historical discrimination and political disenfranchisement – are likely targets of discrimination (e.g., racial or religious minorities). In cases where strict scrutiny applies, the burden of proof falls on the government to demonstrate that the law targeting the suspect class achieves a "compelling state interest" and will be narrowly applied to achieve this interest. In Part III, we'll lay out the traditionally understood criteria for suspect classification. Applying the methodologies of experimental jurisprudence, we'll argue that transgender people clearly meet the criteria. Such a conclusion would have significant ramifications for the current wave of transgender legislation, in that the government would then need to establish for each law that it meets the high standard for compelling state interest demanded by strict scrutiny interpretation. It would also streamline the litigation to enjoin those laws. Thus, we stress that the (currently unsettled) issue of what level of judicial scrutiny applies to transgender discrimination cases has potentially far-reaching legal consequences.

Experimental jurisprudence empirically investigates laypeople's intuitions (i.e., people without formal legal training) about legal concepts and applies these findings to jurisprudential debates. This can take multiple forms: One can either run experiments to collect this data or apply data others have collected in a novel way

(e.g., Tobia 2022, 45). In this chapter we'll be doing the latter – reviewing data researchers have collected on laypeople's attitudes towards transgender issues and applying these findings to the jurisprudential question at hand: whether transgender peoples' right to identity compels strict scrutiny, thereby codifying the "right to transgender identity." We will be considering attitudes from two different layperson groups: transgender people and the general public. Ultimately, we'll argue that whether or not a group constitutes a suspect class is – at least in large part – an empirical question in that the criteria for suspect classification are best met by appeal to available empirical data. In this way, we contend that our empirically grounded approach is able to shed novel light on the judicial scrutiny question.

To motivate our discussion of judicial scrutiny, consider the current political and legal landscape surrounding transgender legal rights in the United States. Does a right to transgender identity exist such that transgender people are unimpeded from normal social and political participation?

We can see the potential contours of such a right if we look at employment discrimination. In *Bostock* v. *Clayton County*, 590 U.S. 644 (2020), the Supreme Court ruled that workplace discrimination on the basis of sexuality and gender identity violates Title VII of the Civil Rights Act of 1964 (because such action constitutes discrimination "because of sex," which Title VII expressly prohibits). This substantive result suggests the outlines of a right to transgender identity, though the doctrinal scope of the decision is not so sweeping.

Assume the right to transgender identity exists in at least some minimal form for a moment – perhaps even as limited as the right to sell "filled milk"[2] or swing one's fist (which stops, as the truism goes, at someone else's face). We still must ask: How far does that right extend? For example, should states be allowed to deny transgender people access to bathrooms that align with their gender identity? Seventeen states plus the District of Columbia have prohibited discrimination based on gender identity in public accommodation, which includes bathrooms but also restaurants, hotels, libraries, gas stations, and so on (Trans Legislation Tracker 2023). However, Arizona, Illinois, Kansas, Kentucky, Massachusetts, Minnesota, Mississippi, Missouri, South Carolina, Tennessee, and Texas have all proposed bills that would require transgender people to use the public toilets that correspond to their sex assigned at birth (Trans Legislation Tracker 2023). In 2016, the US Department of Education prohibited public schools from discriminating against transgender students, which included access to bathrooms and changing rooms. However, the policy was rescinded by the Trump Administration in 2017 (Peters et al. 2017). As it currently stands, the public is strongly divided over the bathroom issue (Pew Research Center 2022).

Controversy surrounding access to public facilities has significant implications for transgender peoples' health and quality of life. For example, in 2016, 14 percent

[2] United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

of transgender Americans reported being verbally, physically, or sexually assaulted or harassed in a public restroom during the last 12 months and 59 percent reported having avoided using public restrooms for fear of harassment or assault (James et al. 2016). This physical and psychological threat extends to transgender children as well. A 2019 study found that 36 percent of transgender and nonbinary students that were restricted from restrooms and locker rooms that corresponded with their gender identities were sexually assaulted in the last year (Murchison et al. 2019). Thus, we proceed from the starting point that philosophical, legal, and empirical discussions of transgender identity can have serious and tangible effects for transgender people.

II WHAT LEVEL OF SCRUTINY?

Cases decided under the Constitution's Equal Protection Clause, at a basic level, put a citizen's right to be free of illegitimate (state) discrimination on a scale weighed against the government's interest in legitimately discriminating (if it exists).[3] As a kind of heuristic, the Supreme Court has stratified this analysis into "tiers" of scrutiny: The more pernicious the kind of discrimination, the more searching the scrutiny courts use. Thus, designating tiers of judicial scrutiny is a mechanism for protecting the interests of vulnerable social groups.

As a practical matter, then, the most important question during the life of many constitutional cases is "what level of scrutiny applies?" (Leitman 1994). Thus, put simply, scrutiny refers to how much of an interest the government must have before it can make decisions on the basis of a certain categorization – and how much tailoring such a law must have to meet that interest (e.g., if the government wants to regulate the content of drugs, it can do so pretty easily and without particularly careful tailoring; if the government wants to regulate religion, it must give a very good reason, and even then the law must be narrowly written to serve that interest).

There are three formal "tiers" that can answer the "what level of scrutiny" question: strict scrutiny, intermediate scrutiny, and so-called rational basis. In turn, they require progressively fewer compelling showings from the government before it can impose certain restrictions on rights. Strict scrutiny requires a compelling interest (e.g., national security, combating racial discrimination); intermediate scrutiny requires an important interest; and rational basis review requires a "legitimate" interest. Moreover, the relationship between the state's law and the objective differs: Strict scrutiny requires a narrowly tailored law, taking the least restrictive means to ensure the (compelling) interest; intermediate scrutiny requires a means that is only substantially related to the (important) interest; and rational basis review requires merely a rationally related

[3] We use the word "discriminating" here in both the pernicious and nonpernicious sense. For example, in some circumstances the government may legitimately discriminate between minors and adults. Or it might "discriminate" in favor of vendor proposals that would cost less taxpayer money, and against those that would cost more.

means to achieve the (legitimate) government interest. Practicing lawyers frequently shorthand the issue to say that strict scrutiny means plaintiff wins, rational basis means the government wins, and intermediate scrutiny means all bets are off.[4]

All of this grows out of what has been called "the most famous footnote in the [Supreme] Court's history" (Strauss 2010): footnote 4 of *United States* v. *Carolene Products*, 304 U.S. 144 (1938). The relevant part of that footnote reads (with in-line citations omitted):

> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious or national or racial minorities, or whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

As we discuss below, this basic idea – that some groups might, by reason of being "discrete and insular minorities," need some protections because the ordinary "political processes" will fail to protect them – develops into a multifactor test and gets widely applied. As far as doctrinal labels, if the government targets a "suspect class" its actions get strict scrutiny; if it targets a "quasi-suspect" class, intermediate scrutiny; and anything else gets rational basis. But the basic concept (if not also its multifactored progeny) presents a question well-suited for experimental jurisprudence: Can the ordinary political process be relied upon to protect particular minority groups, such that those groups' right to identity is sufficiently protected?

As Katie Eyer (2022) sets out in an article, this question is a live one for the transgender community. And the stakes are high – courts are answering the question "what level of scrutiny should laws targeting transgender people get?" at the same time as an unprecedented wave of such laws is sweeping the country.

Because of the nature of various constitutional interpretive canons,[5] courts have often avoided resolving the basic question: What level of scrutiny applies to laws

[4] Many have argued this should not be the case (*see*, *e.g.*, Jackson 2011).

But, by way of context, while the exact parameters of each test are beyond the scope of this chapter, this all falls out from the burdens the government faces: The showing required of the government under strict scrutiny is virtually impossible to make and requires the government to show there is literally no more narrow way to accomplish the same goal – and that the goal is a government interest of the highest priority; by the same token, rational basis only requires the government to show the law is rational – and that showing can even be a *post hoc* explanation (i.e., it doesn't even have to be the real reason the government passed the law).

[5] That is, courts avoid resolving weighty constitutional questions when a particular dispute can be resolved without those answers, saying that "is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments." *Karnoski v. Trump*, __ F3d __, __, Slip Op. at *41 (9th Cir 2019). And the nature of many of the laws at stake means that, even given the heavy thumb on the scale in favor of the government under lower levels of scrutiny, the laws still do not pass muster. Thus, courts say, when a law is "unsupported by any legitimate state purpose," the court "need not" figure out "the level of scrutiny applicable." *Denegal v. Farrell*, No. 1:15-cv-01251-DAD-MJS (PC), 2016 U.S. Dist. LEXIS 88937, at *18–19 (E.D. Cal. July 7, 2016).

that make distinctions based on the fact that the people they govern are transgender? And given the incentives and structure of litigation, because of the Supreme Court's decision in *Bostock*, many plaintiffs have made the (rational) choice to argue that transgender status discrimination ought to be treated like traditional gender discrimination, and subject to intermediate scrutiny.[6] But all of that leaves the question unanswered: Is there something about the way society views transgender people that leaves them more out in the political wilderness than those who face traditional sex discrimination? If so, respecting their right to identity would then demand strict scrutiny. Transgender status discrimination would then end up looking more like racial discrimination or religious discrimination (both of which receive strict scrutiny) than sex discrimination.

III SUSPECT CLASSIFICATION

The *Carolene Products* formulation, over time, has generally come to be expressed as four criteria that, if met in some imprecise way, trigger strict scrutiny or at least intermediate scrutiny (making the subject group a "suspect class" or "quasi-suspect class" respectively). Consider their expression in Justice Brennan's plurality opinion in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). Those factors are:

1. Those in the group have historically faced discrimination, prejudice, stigma, and the like.
2. The characteristic that binds the group is immutable – or at least, is the kind of thing society should not be demanding people change, like religion – or otherwise highly visible.
3. The group is typically powerless to protect itself through the ordinary political process.
4. The characteristic does not prevent members of the group from contributing to society.

(See, e.g., Hutchinson 2014; Bernhardt 2016).

Each factor is not individually dispositive. And indeed, the most significant equal protection case of the Roberts Court era – *Obergefell* v. *Hodges*[7] – does not even use the phrase "suspect class." Nor, at least without searching that decision closely, can scholars find the factors at play.[8] In some ways, that approach squares more closely

[6] That argument likely goes a little further. Because, through *Bostock*, what the intermediate scrutiny argument is really saying is that because transgender status discrimination is a kind of "gender-based government action," this would require use of the "exceedingly persuasive justification" version of intermediate scrutiny. *United States v. Virginia*, 518 U.S. 515, 531 (1996).

[7] 576 U.S. 644 (2015).

[8] Bernhardt (2016), at p. 11, makes a compelling argument that these factors *are* at work in *Obergefell*, despite not appearing by name (noting "[w]hatever *Obergefell* lacked in the explicit naming conventions that some commentators may prefer, it more than made up for in substance and practical application").

with the broad statement of principles in *Carolene Products* itself than the multifactorial bean-counting of its progeny.[9] And some have suggested that *Obergefell* and the decisions leading up to it ultimately toss out the four factors entirely for an approach that basically just asks "do members of the group face unjust animus?" (see Araiza 2017). For convenience, we structure our discussion in the four-factor framework, understanding that the multifactorial approach may well be on the outs.

A *Historical Discrimination and Prejudice*

The first factor in traditional suspect class analysis is the question of whether the class has historically faced discrimination and prejudice.

Amongst the public, there seems to be a general recognition of past and present discrimination against transgender people. For example, the Pew Research Center (2022) found that 78 percent of Americans think discrimination against transgender people exists – 57 percent saying that there is "a great deal/fair amount" of discrimination and a further 21 percent saying there exists "some" discrimination. Pew also found that only 14 percent of Americans think that society is "extremely/very" accepting of transgender people (35 percent thought that society was "somewhat accepting" of transgender people) while a plurality (44 percent) felt that society was "little/not at all" accepting of transgender people. Thus, there is a fairly widespread recognition among the American public that transgender people experience considerable social prejudice.

Furthermore, the public favorably views anti-discrimination protections for transgender people. For example, the University of Illinois found that 65 percent of Americans think that transgender people should "receive protections provided by anti-discrimination laws" (University of Illinois Springfield Survey Research Office 2015) and a CNN poll reported that 75 percent of Americans support "laws that guarantee equal protection for transgender people in jobs, housing and public accommodations" (Agiesta 2016). However, as we noted in Part I, the public remains divided on certain policy areas, including bathroom and public facility access.

[9] Araiza (2017) put it, the Supreme Court's 1985 decision in *City of Cleburne v. Cleburne Living Center*, 473 US 432 (1985) "mark[ed] the last time the Supreme Court performed a serious analysis of whether a group should be denominated a suspect class."

This appears very striking when compared to the Second Circuit Court of Appeals' decision in *Windsor*, which carefully applies each factor (*Windsor v. United States*, 699 F.3d 169, 181–185 (2d Cir. 2012) ("Analysis of these four factors supports our conclusion that homosexuals compose a class that is subject to heightened scrutiny. We further conclude that the class is quasi-suspect (rather than suspect) based on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect"), to the Supreme Court's decision that does not even name the test. *United States v. Windsor*, 570 U.S. 744 (2013); *see also, id.* at 764 (Scalia, J., dissenting) ("if this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality").

The public perception of anti-transgender discrimination also largely coheres with the available data on transgender peoples' experiences. Throughout the rest of the chapter, we'll discuss findings from the 2015 US Transgender Discrimination Survey (USTS), which was the largest survey of transgender and gender nonconforming people to date, with 27,715 respondents from all 50 US states, US territories, and US military bases (James et al. 2016). The 2015 USTS is still generally considered the research gold standard for information on transgender peoples' experiences.[10]

According to the 2015 USTS, the majority of transgender people (55 percent) had experienced intimate partner violence, 47 percent had been sexually assaulted, and 10 percent had experienced some type of family member violence. These patterns of discrimination extend beyond the home as well. Regarding employment, the 2015 USTS found that 30 percent of respondents who were employed during the last year reported being fired, denied a promotion, or "experiencing some other form of mistreatment in the workplace due to their gender identity or expression, such as being verbally harassed or physically or sexually assaulted at work." Seventy-seven percent reported taking "steps to avoid mistreatment in the workplace, such as hiding or delaying their gender transition or quitting their job" (USTS 2015). These troubles at work also contribute to the high rates of poverty and homelessness experienced by the transgender population. For example, 29 percent of transgender people were living in poverty (compared to the US national average of 9.1 percent, Kilduff 2022). The Executive Summary of the 2015 USTS cites unemployment as the likely contributing factor to the high rates of poverty reported within the transgender community, noting that the 15 percent unemployment rate of transgender people was three times higher than the national average (James et al. 2016).

Finally, we note that the *Carolene Products* formulation makes reference to discrimination both present and *historical*. However, the first iteration of the USTS (then called the "National Transgender Discrimination Survey") was conducted in 2008. Almost no survey data on transgender peoples' experiences or public opinion towards transgender people exist prior to the late 2000s.

Nonetheless, there is plenty of evidence of historical discrimination, which explains the patterns of contemporary discrimination that we see in the Pew and USTS data. For example, the *Diagnostic and Statistical Manual of Mental Disorder* listed "Transsexualism" (in the DSM-3) and "Gender Identity Disorder" (in the DSM-4) as mental disorders, diagnoses which were used to justify medical discrimination and mistreatment of transgender people (American Psychiatric Association 1987, 1994; Davy 2015). We also see evidence of historical discrimination in law enforcement. During the 1940s, 50s, and 60s police weaponized "mascarading

[10] The last USTS was conducted in 2015 and data collection for the next USTS is (at the time we are writing this) currently underway. However, as the explosion of anti-transgender legislation indicates, if anything, the American legal and cultural landscape has gotten more hostile to transgender people since 2015. This means we should expect even higher rates of anti-transgender discrimination being reported in the next USTS.

laws" to target cross-dressing LGBT people, including transgender people (Eskridge 2002). This sort of policing became known as the three item rule because LGBT people would be required to prove they were wearing at least three items of clothing associated with their assigned sex when stopped by the police or else be arrested. Thus, throughout the twentieth century in the US we see transgender identity being pathologized and policed, which amply evidences that the contemporary discrimination has considerable historical precedent, thus satisfying the historical discrimination and prejudice criterion for suspect classification.

B *Immutability*

The second factor is nominally "immutability." But a strict or literal sense of immutability is quite clearly *not* what courts mean here. Rather, as commentators have long observed, immutability captures a sense of whether people *should* need to change a particular characteristic. Or, as an often-cited concurrence put it:

> "immutability" may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically. (*Watkins* v. *U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1988) (Norris, J., concurring))

Once framed that way, the value of experimental jurisprudence methodology is clear here: The question is simply "what kinds of things does society recognize as so core to a person's autonomy that they should not be required to change them to receive protection from the state?" This means that some quality of a person is immutable in the relevant sense if it would be unreasonable for the state to demand it be altered (even if the person *physically* could make that change).

Courts have long answered – albeit largely implicitly[11] – that religion meets the immutability criteria. See, for example, *New Orleans* v. *Dukes*, 427 US 297, 303 (1976) ("race, religion, or alienage" all trigger strict scrutiny). Perhaps that is because religion is special. But there seems to be broad scholarly consensus that religion and gender are more alike than they are different (see, e.g., Clark 2015). That is, as one scholar put it: "[T]he great lesson of the transgender cases is that, where there is a will, there is a way to change one's sex, [and a]t least as far as immutability is concerned, religion and sex are more alike than different" (Kramer 2014). Basically, despite it being clear that gender and sex can (at least in some meaningful sense, like religion) be changed (thus, literally mutable), gender matches religion in being the kind of thing that we generally think people *ought* not be told they must change in order to, say, own land or vote. To make the case, we point to empirical data on the stability of transgender peoples' gender identities and the relationship between gender identity and mental and physical health.

[11] That is, courts treat the answer to this question as so obvious as to not even require analysis of the factors.

Regarding stability, a review of available studies on transition show that regret for transition is extremely rare (Bustos et al. 2022):

> A total of 27 studies, pooling 7928 transgender patients who underwent any type of GAS [gender assignment surgery … the] prevalence of regret after GAS was 1% (95% CI <1%–2%) … The prevalence of regret among patients undergoing transmasculine and transfeminine surgeries was <1% (CI<1%–<1%) and 1% (CI <1%–2%), respectively.

This coheres with the survey data on detransitioners (people who transition and then transition back to their assigned gender) as well. Turban et al. (2021) found that while 13.1 percent of participants surveyed for the 2015 USTS reported detransitioning, 82.5 percent of the detransitioners claimed their decision to detransition was influenced by "at least one external driving factor," such as family pressure or social stigma, with only 15.9 percent of those detransitioning reporting detransitioning because they were influenced by an "internal driving factor," such as deciding they weren't actually transgender. A similar pattern of gender identity stability has been observed in transgender children, with 95 percent of transgender children continuing to identify as transgender after five years (Olson et al. 2022).

Thus, the data reveals that transgender peoples' gender identities are stable and robust. Further, we argue that (quoting *Watkins* v. *U.S. Army*) gender identity is so "central to a person's identity," that penalizing a transgender person for authentically expressing their identity would be "abhorrent" and unnecessarily cruel. The empirical data on suicidality demonstrates this unnecessary cruelty. Forty percent of transgender people report having attempted suicide during their lifetimes, compared to the 4.6 percent of the US general population (USTS 2015). High suicide rates in the transgender community can be tied back to widespread legal and social discrimination. Turban et al. (2020) found that suicide rates were higher for transgender people who'd been previously exposed to some form of professional or religious conversation therapy during their lives, defined as "psychological interventions that attempt to change one's gender identity from transgender to cisgender" (note that conversion therapy for LGBT minors is still legal in twenty-one US states and four US territories). However, legal interventions can help: Providing access to gender-affirming healthcare (specifically gender-affirming surgeries) was found to reduce past-year suicidal ideation in adults by 44 percent (Almazan & Keuroghlian 2021) and in transgender youth social transition (e.g., changing names and pronouns) was found to reduce suicidal ideation by 29 percent and suicidal behavior by 56 percent (Russell et al. 2018).

We conclude, then, that denying transgender people the right to express their gender identities causes undue physical and psychological harm (as clearly demonstrated by the data on suicidality and transition) and it would be unreasonable for the state to insist on harming transgender people in this way as a precondition to participation in society. Thus, transgender identity is immutable in that asking transgender people to give up their gender identities would be an unreasonable ask on the part of the state.

C *Powerlessness*

As applied, the powerlessness criterion does not necessarily fit one's first intuition. A pure measure of political power does not necessarily tip this factor. Consider, for example, poverty: The "Supreme Court has held repeatedly that poverty, standing alone, is not a suspect classification" (*Harris* v. *McRae*, 448 U.S. 297, 323 1980).[12] So the question is whether the kind of powerlessness that matters is at play here. As we alluded to above, because of the historical background of the Equal Protection Clause (at least if one is playing in the doctrinal sandbox), it often makes sense to ask "is this like race?" That is, the question is whether the group at issue is powerless in a meaningfully similar way to the way people have been disempowered on the basis of race. And for transgender people, as explained below, the answer is yes. We argue that transgender people are powerless in a number of domains relevant for suspect classification, including political representation, housing access, and policing. In terms of political power, the Human Rights Campaign found that 49 percent of transgender adults (and 55 percent of transgender adults of color) "said they were unable to vote in at least one election in their life because of fear of experiencing discrimination at the polls" (Bibi 2020). LGBT people are also generally underrepresented in elected positions in the US. As of 2022, LGBTQ people make up 7.1 percent of the US population but only 0.2 percent of elected official positions. According to the Victory Institute's 2022 census of "out LGBTQ elected officials," 35,854 more LGBTQ people would need to be elected to achieve "equitable representation," including twenty-two more LGBTQ people in the House of Representatives. Though the Victory Institute didn't specifically publish the percentages of elected officials who are transgender, it did note that while the number of transgender elected officials is on the rise, transgender people are even more underrepresented in elected positions than their LGBQ counterparts (2022). Thus, while we've seen an explosion of laws *about* transgender people, transgender lawmakers are still extremely rare. Due to this pervasive underrepresentation, it's clear that transgender people lack power when it comes to advocating for their legal and political interests.

This powerlessness also extends to basic needs, such as access to housing and shelter. For example, at some point in their lives almost a third of transgender people had experienced homelessness (USTS 2015). Further, 26 percent of people that had experienced homelessness in the last year reported having avoided staying in shelters "because they feared being mistreated as a transgender person" and 70 percent who had stayed in shelters reported "some form of mistreatment, including being harassed, sexually or physically assaulted, or kicked out because of being transgender" (USTS 2015).

[12] But *see* James v. Valtierra, 402 U.S. 137, 145 (1971) ("an explicit classification on the basis of poverty … demands exacting judicial scrutiny") (Marshall, J., dissenting).

Transgender people also experience considerable powerlessness when it comes to law enforcement and policing. According to the 2015 USTS Executive Summary (James et al. 2016):

> In the past year, of respondents who interacted with police or law enforcement officers who thought or knew they were transgender, more than half (58%) experienced some form of mistreatment. This included being verbally harassed, repeatedly referred to as the wrong gender, physically assaulted, or sexually assaulted, including being forced by officers to engage in sexual activity to avoid arrest … Police frequently assumed that respondents – particularly transgender women of color – were sex workers.

Of course, there is a sense in which transgender people are gaining power nationwide. Over the last few years, a number of transgender research groups and advocacy organizations have emerged – for example, the National Center for Transgender Equality, the Transgender Law Center, and the Center for Applied Transgender Studies. However, as a *group*, transgender people lack political power, due to both the relatively small size of the community and (current and historical) discrimination and disenfranchisement. Indeed, this kind of power very much resembles the way that Black people have politically organized – and many of the legal organizations (mentioned above) supporting transgender rights are modeled on the NAACP. Thus, while transgender people continue to make important social, intellectual, and political contributions, the transgender community is powerless in the sense that's relevant to discussions of strict judicial scrutiny.

D *Social Contribution*

Taking the social contribution factor at face value,[13] what is at work here is simple enough: The question is whether there is something inherent in being transgender that makes a person mechanically (e.g., physically or mentally) incapable of contributing to society. In the *Windsor* decision later affirmed by the Supreme Court, (then-)Chief Judge Jacobs of the Second Circuit addressed this factor bluntly for sexual orientation discrimination (while also seeming to question the continued relevance of this factor):

> There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some respect. But homosexuality is not one of them. The aversion homosexuals

[13] The societal contribution factor gets far less attention in modern literature. Perhaps some of that is because of just how dated the analysis sounds:

> And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. (*Frontiero v. Richardson*, 411 U.S. 677, 686 (1973))

> experience has nothing to do with aptitude or performance. (*Windsor v. United States*, 699 F.3d 169, 182–83 (2d Cir. 2012))

More recent courts have taken a similarly brusk approach to answering this question for transgender people – see for example, *Grimm* v. *Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 612 (4th Cir. 2020); *Adkins* v. *City of N.Y.*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015). That is, modern cases basically treat this factor as a given, and do not have much of a test to apply.

Whatever the test, the data bears out that "[b]eing transgender bears no … relation" to social contribution (*Grimm*, 972 F.3d at 612). At most, the discrimination that comes along with being transgender might *hinder* such participation. But there is nothing about being transgender (separate from external social marginalization) that interferes with meaningful social contribution. And indeed we certainly see transgender people contributing to society. Take Rachel Levine, who made history becoming the highest-ranking transgender person to ever serve in the federal government when she was appointed as Assistant Secretary for Health by President Biden. And in the entertainment industry, transgender actors and writers like Laverne Cox and Elliot Page are winning acclaim for their acting performances, portraying the rich and complex lives of transgender people.

However, we want to push the social contribution criterion one step farther and not merely claim that transgender people *can* contribute to society. Rather, transgender people – in virtue of being transgender – are actually able to contribute to society in unique ways. This isn't a position we'll be able to fully flesh out here, but before concluding we want to briefly sketch out the view, drawing from work in feminist social epistemology (sometimes called "standpoint epistemology," see, e.g., Harding 1993; Toole 2019; Wu 2022).

Standpoint views claim that an agent's epistemic standing is influenced by their social identities which can include:

> spatial location or social identity, habits of perceptual attention, what Ian Hacking calls "styles of reasoning" and also the individual's own interests – interests which are fluid and open to interpretation but have some objective elements in regard to the condition of the knower's material reality. (Alcoff 2007)

Thus, patterns of lived experiences associated with people's social identities can affect their epistemic standing to certain types of inquiry. To illustrate, consider sexual harassment allegations. It's known that men and women often react differently when called upon to assess the plausibility of sexual harassment allegations, with women assigning the allegations more default plausibility than men (Powell 1986). Cases of men intentionally and/or maliciously downplaying the prevalence of sexual harassment are frequently discussed. But in many cases both men and women seem to be doing their epistemic due diligence, assessing the plausibility of the sexual harassment allegations against the backdrop of their

past experiences. However, statistical discrepancies exist along social identity lines – specifically, women are more likely to have experienced sexual harassment than men (Kearl 2018), which gives them epistemic advantage in assessing sexual harassment accusations. Because men tend to have fewer experiences of sexual harassment, they assume the behavior just isn't very prevalent based on their past experience. Standpoint theorists claim that in many cases oppressed groups share a unique set of lived experiences, which can yield fruitful epistemic insights.

Transgender people are no exception. For example, transgender writers and public figures frequently emphasize that transgender people have a unique perspective on gender. Laverne Cox (2014) makes this point about transwomanhood:

> I think trans women, and trans people in general, show everyone that you can define what it means to be a man or woman on your own terms. A lot of what feminism is about is moving outside of roles and moving outside of expectations of who and what you're supposed to be to live a more authentic life.

Further, there's an idea in queer theory that heterosexual cisgender people (i.e., straight people who are not transgender) tend to underestimate the significance of gender in modern culture because their social identities are such that they need not reflect on gender (see e.g., Stone 1992; McKinnon 2015; Radi 2019). Conversely, transgender people are argued to be uniquely positioned to appreciate the way gender shapes social organization and interpersonal relationships because they've had to actively confront their own experiences of gender by virtue of being transgender (e.g., experiencing gender dysphoria/euphoria, undergoing social and medical transition). This can make transgender people especially sensitive to the manner in which gender affects how we present ourselves, how we relate to each other (e.g., who we befriend and associate with), and even how we talk, move, and hold our bodies.

Hence, it's not merely the case that being transgender doesn't impede positive contribution to society. We've suggested that being transgender might actually represent a unique, socially valuable epistemic standpoint. In this way, protecting transgender peoples' rights to identity isn't only in the interests of transgender people; such protection also advances the interests of the larger community.

IV CONCLUSION

We have argued that transgender people should, as a group, meet the classic criteria for strict scrutiny. And more to the point for this volume, this jurisprudential conclusion is buttressed through a careful examination of empirical literature. Thus, protecting transgender peoples' right to identity requires applying strict scrutiny to transgender discrimination cases.

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