

# TRANSGENDER DISENFRANCHISEMENT

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## ABSTRACT

*Transgender and gender variant people are excluded from formal democratic participation at the polls through a variety of legal mechanisms. Such barriers include purportedly neutral voter identification laws, which may prevent transgender people from voting given the obstacles to achieving accurate identification documents in many states, and felon disenfranchisement laws, which exclude the disproportionate number of trans people ensnared in the carceral system.*

*But, as this Article explains, transgender people are also deterred from public space and participation more broadly through laws and customs specifically policing gender identity. Such laws include so-called bathroom bills that prevent people from accessing facilities in government buildings, drag bans that prohibit the expression of any sort of public gender nonconformity, laws that erase queer people from public school curriculum, and laws that sanction employment discrimination against trans people, ensuring that transgender lives remain in the shadows.*

*As these examples suggest, voter disenfranchisement of transgender people is part of a broader political and economic disenfranchisement that seeks to erase trans people from public life and ensure that they are economically subordinate. Only by appreciating voter disenfranchisement as part of the systemic erasure of gender variance can the voter disenfranchisement laws be understood—and challenged—in their most comprehensive light. Put differently, in much the same way that racist voting regulations were just a part of the economic and political subjugation of Jim Crow, formal voting exclusion of transgender people is part of a calculated effort to segregate and erase queerness from the public square.*

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*The extent of this political and economic disenfranchisement is brought into even sharper relief given that trans lives are literally on the ballot. In capitols around the country and in recent ballot initiatives, voters and their representatives are debating trans existence in contexts ranging from medical care to athletic participation to bathroom access, with trans lives used as a political cudgel. To comprehensively capture the harms of transgender estrangement, scholars and activists must also underscore that trans people are being foreclosed from discussion of their own lives.*

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## INTRODUCTION

Voter disenfranchisement of minoritized communities is among the most significant threats to democracy, democratic legitimacy, and the ability to enact substantive policy changes benefiting those communities.<sup>1</sup> Political exclusion of Black people, Native people, women, and immigrants is long lasting and pernicious, and extends well beyond formal barriers to voting.<sup>2</sup> Not surprisingly given that systems of oppression are often retooled, political disenfranchisement of transgender people is also a significant, albeit understudied, phenomenon.<sup>3</sup>

This Article describes the barriers that trans people face with respect to voting, yes, but also *political* and *economic* participation more broadly. The Article also suggests a way to think about or conceptualize these impediments not just in the registers of equality,<sup>4</sup> identity, fundamental

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1. Selwyn Carter, *African-American Voting Rights: An Historical Struggle*, 44 EMORY L.J. 859 (1995) (documenting ongoing voter suppression of Black people notwithstanding the passage of the Voting Rights Act and the need for continued vigilance with respect to voting rights); Yalda Nia, Comment, *Voting Justice: Why the Attack on Voting Rights Is Best Understood as a “Justice” Issue*, 57 U.S.F. L. REV. 343, 365–66 (2023) (explaining how the right to vote is “preservative of all other rights” and, in the context of transgender rights, how when voting is repressed, the substantive policy content of people’s voices is also not brought to fruition).

2. E.g., Nazune Menka, *Native Nation Resistance to the Machinations of Settler Colonial Democracy*, 59 HARV. C.R.-C.L. L. REV. 141 (2024) (noting the historical disenfranchisement of native communities, but also underscoring how refusal to participate may be a form of resistance to settler colonial logics and practices); Chinyere Ezie, *Not Your Mule? Disrupting the Political Powerlessness of Black Women Voters*, 92 U. COLO. L. REV. 659 (2021) (observing how notwithstanding Black women’s political engagement, their relative political power remains subordinate).

3. Several important articles have foregrounded the different ways transgender people are excluded from exercising their formal voting rights. Among others cited *passim*, see, for example, Nicole R. Gabriel, Note, *Resurrecting the Nineteenth Amendment: Why Strict Voter ID Laws Unconstitutionally Discriminate Against Transgender Voters*, 56 IDAHO L. REV. 155 (2020); Holl Chaisson, Note, *The Impermissibility of Sex as a Voter Qualification*, 110 VA. L. REV. 985 (2024); Michael Milov-Cordoba & Ali Stack, *Transgender and Gender-Nonconforming Voting Rights After Bostock*, 24 U. PA. J.L. & SOC. CHANGE 323 (2021); Adam P. Romero, *The Nineteenth Amendment and Gender Identity Discrimination*, LITIG., Spring 2020, at 48.

4. Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405, 1424 (2023) (discussing transgender rights victories under a constitutional equality frame).

rights,<sup>5</sup> and animus<sup>6</sup>—as important and accurate as those frames are—but in terms of the erosion of democracy and economic alienation, which have not yet featured sufficiently prominently in discussions about anti-trans laws.

Normatively, appreciating the anti-democratic nature of these laws is key to understanding how they work holistically to push trans people from participating in public life and from seeking economic stability.<sup>7</sup> It is also of critical doctrinal importance given that members of the Supreme Court recently expressed disbelief that transgender people had been subject to *de jure* discrimination and politically powerless, factors in Equal Protection suspect classification analysis.<sup>8</sup> Finally, understanding the democratic exclusion of transgender people has the potential to expand the political coalition fighting for trans laws to include all working people and democracy advocates, broadening the tent beyond the queer community itself. But before going further—the most important thing I can contribute is to, at the outset, reaffirm the sanctity, beauty, realness, and magnificence of trans lives which, as I’ll outline, are tragically under attack from many corners.<sup>9</sup>

## I. BARRIERS TO VOTING

Several states have formal barriers preventing transgender people from exercising their right to vote. For example, thirty-six states have laws requiring or requesting voters to show some form of identification when a voter arrives at the polls to cast a vote in person.<sup>10</sup> Twelve of these states have what are referred to as absolutist or strict photo identification policies meaning that an individual cannot cast a regular ballot without a photo

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5. *Id.* at 1445–54 (analyzing fundamental rights litigation for transgender people).

6. *E.g.*, Scott Skinner-Thompson, *Trans Animus*, 65 B.C. L. REV. 965 (2024) (explaining how many laws suppressing transgender people are motivated by unconstitutional animus in violation of equal protection).

7. *Cf.* Paula A. Monopoli, *Gender, Voting Rights, and the Nineteenth Amendment*, 20 GEO. J.L. & PUB. POL’Y 91, 94 (2022) (arguing that a holistic interpretation of the Nineteenth Amendment would open the door to taking “into account the different ways women’s subordination manifests itself in society generally, and in voting practices in particular”).

8. *United States v. Skrmetti*, No. 23-477, slip op. at 5 (U.S. June 18, 2025) (Barrett, J., concurring), [https://www.supremecourt.gov/opinions/24pdf/23-477\\_2cp3.pdf](https://www.supremecourt.gov/opinions/24pdf/23-477_2cp3.pdf) [<https://perma.cc/RTV4-U2ZV>] (arguing that political powerlessness has historically been equated with laws burdening voting rights).

9. Chase Strangio, *The Magnificence and Fragility of Trans Bodies*, MEDIUM (Oct. 4, 2016), <https://chase-strangio.medium.com/the-tragic-deaths-and-magnificent-lives-of-trans-people-1b9e11d503c9> [<https://perma.cc/2J6G-79ZF>] (“By forcing the beauty of trans people out of our public consciousness, mechanisms of death and violence have taken hold in such predictable and tragic ways.”).

10. *Voter Identification Requirements for In-Person Voting*, MOVEMENT ADVANCEMENT PROJECT (Aug. 3, 2025), [https://www.lgbtmap.org/democracy-maps/in\\_person\\_voting](https://www.lgbtmap.org/democracy-maps/in_person_voting) [<https://perma.cc/PJZ2-JNZP>].

identification.<sup>11</sup> Proven alternatives to strict voter verification with ID exist—indeed, fourteen states and Washington, D.C. verify voters through matching signatures or through biographical verification, such as asking voters to give their names, addresses, and/or birth dates.<sup>12</sup>

Voter ID laws are a barrier to voting for many,<sup>13</sup> but one that is particularly acute for transgender people who may face a variety of obstacles to obtaining an accurate identification document.<sup>14</sup>

Many states make it difficult or impossible to obtain government-issued identification documentation with accurate gender markers. For example, four states do not permit people to correct the gender marker on their driver’s licenses, while ten require proof of surgery, a court order, or an amended birth certificate to do so.<sup>15</sup> As to amending the gender marker on a birth certificate, eight states do not permit it at all and eleven require proof of surgery.<sup>16</sup> Most jurisdictions also restrict the available gender markers to one of the two traditional binary options, M/Male or F/Female.<sup>17</sup> Consequently, a person living in a jurisdiction with a strict voter identification law that is not able to obtain an ID with an accurate gender marker because of legal, economic, or medical barriers may be deterred<sup>18</sup> or forbidden from voting.<sup>19</sup> Put plainly, “laws requiring identification

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11. *Id.*

12. *Voter Verification Without ID Documents*, NCSL (Feb. 28, 2024), <https://www.ncsl.org/elections-and-campaigns/voter-verification-without-id-documents> [<https://perma.cc/BG3S-NXPR>].

13. Kathleen M. Stoughton, Note, *A New Approach to Voter ID Challenges: Section 2 of the Voting Rights Act*, 81 GEO. WASH. L. REV. 292, 298–300 (2013) (discussing how many people, including minoritized communities, are disenfranchised by voter ID laws because of the lack of readily available government-issued photo identifications).

14. Angela Sukurs, Feature, *How Strict Voter Registration Laws Will Affect Transgender Voters*, 20 LOY. PUB. INT. L. REP. 1, 5–6 (2014).

15. *Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT (Aug. 3, 2025), [https://www.lgbtmap.org/equality-maps/identity\\_documents](https://www.lgbtmap.org/equality-maps/identity_documents) [<https://perma.cc/AQ2C-A6MS>]. The Trump Administration also instituted a new policy in 2025 requiring that U.S. Passports only be issued corresponding to someone’s so-called “biological sex” and restricting the options to male and female. U.S. Dep’t of State, *Sex Markers in Passports*, TRAVEL.STATE.GOV (Feb. 11, 2025), <https://travel.state.gov/content/travel/en/passports/passport-help/sex-marker.html> [<https://perma.cc/2X4V-VLTZ>].

16. *Identity Document Laws and Policies*, *supra* note 15.

17. *Id.*

18. Ari Ezra Waldman, *Gender Data in the Automated Administrative State*, 123 COLUM. L. REV. 2249, 2313 (2023) (explaining how “strict voter identification laws transform the voting booth into gender dysphoric triggers” and that because “the state uses sex and gender data to determine identity and maintain security, many gender-diverse populations are forced to the margins of society as they avoid the risk of harm”).

19. Chaisson, *supra* note 3, at 1000; Gabriel, *supra* note 3, at 156–58; James Casey Edwards, Comment, *Justifying the Margins: Granting Suspect Classification to Trans\* Individuals in the U.S. Judicial System*, 55 UIC L. REV. 403, 423–24 (2022); Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress’s Power to Enforce It*, 108 GEO. L.J. (19TH AMEND. SPECIAL ED.) 27, 69–70 (2020); see also Lil Kalish, *Republican Policies Are Making It Harder for Trans People to Vote—And Do Everyday Life*, HUFFPOST (Sept. 22, 2024, 8:00

documents containing a gender marker in order to vote and those requiring that voters pay significant economic sums and/or undergo surgery to change a gender marker on their ID abridge the right to vote.”<sup>20</sup>

Similarly, several jurisdictions have erected barriers to obtaining identification documents with an accurate name. For example, states may require that the name change be published in a newspaper, potentially subjecting the individual to harassment and deterring them from legally changing their name.<sup>21</sup> About half of the states also impose additional obstacles to name changes for those with criminal records.<sup>22</sup> Of course, if one is unable to obtain an identification with their correct name on it, they may be forbidden from voting.<sup>23</sup>

In the same vein, all but two states and the District of Columbia forbid currently incarcerated people from voting,<sup>24</sup> with about half of all states preventing people with certain criminal convictions from voting even once released<sup>25</sup>—legal regimes sometimes referred to as “felon disenfranchisement.” These restrictions are deeply problematic for all those ensnared in the carceral system in that such laws presume that incarcerated individuals have no stake in or nothing to say about public policy. And such laws disproportionately exclude transgender people given their overincarceration. As Richard Saenz has explained, “[s]tudies have shown that one out of six (or 16 percent) of transgender people have been incarcerated at some time during their lives—a rate that skyrockets to 47 percent among Black transgender people.”<sup>26</sup> With new laws sweeping the nation seeking to penalize many aspects of transgender identity (discussed

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AM), [https://www.huffpost.com/entry/republican-policies-making-it-harder-trans-people-to-vote\\_n\\_66edd5bbe4b07bdc7bac8b43](https://www.huffpost.com/entry/republican-policies-making-it-harder-trans-people-to-vote_n_66edd5bbe4b07bdc7bac8b43) [<https://perma.cc/ARH6-SKQJ>].

20. Milov-Cordoba & Stack, *supra* note 3, at 343.

21. *Identity Document Laws and Policies*, *supra* note 15.

22. *Id.*

23. Emmy Maluf, Note, *Voting While Trans: How Voter ID Laws Unconstitutionally Compel the Speech of Trans Voters*, 122 MICH. L. REV. 927, 940–42 (2024); Ellen Bertels, *Strengthening the Trans Franchise*, 30 TUL. J.L. & SEXUALITY 21, 35 (2021); Ava Ayers, *Voting as Exclusion*, 90 FORDHAM L. REV. 373, 385–86 (2021).

24. NICOLE D. PORTER, THE SENTENCING PROJECT ET AL., OUT OF STEP: U.S. POLICY ON VOTING RIGHTS IN GLOBAL PERSPECTIVE 8 (Davin Rosborough et al., eds., 2024), <https://assets.aclu.org/live/uploads/2024/06/Out-of-Step-U.S.-Policy-on-Voting-Rights-in-Global-Perspective.pdf> [<https://perma.cc/WKM3-VXYD>].

25. *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CTR. FOR JUST. (Oct. 16, 2024), <https://www.brennancenter.org/sites/default/files/2024-10/2024.10.16-bc-criminal-disenfranchisement-laws-map.pdf> [<https://perma.cc/E7MK-6YLV>].

26. Richard Saenz, *A Crisis Behind Bars: Legal Issues Impacting Transgender People in Prisons*, ABA: CRIM. JUST. MAG. (Jan. 22, 2024), [https://www.americanbar.org/groups/criminal\\_justice/resources/magazine/2024-winter/crisis-behind-bars-legal-issues-impacting-transgender-people-prisons/](https://www.americanbar.org/groups/criminal_justice/resources/magazine/2024-winter/crisis-behind-bars-legal-issues-impacting-transgender-people-prisons/) [<https://perma.cc/URR6-JHFX>]; see also JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 163 (2011), [https://www.thetaskforce.org/app/uploads/2019/07/ntds\\_full.pdf](https://www.thetaskforce.org/app/uploads/2019/07/ntds_full.pdf) [<https://perma.cc/QXJ5-GLM7>].

more fully in the following Part), the rates of transgender incarceration and, in turn, voter disenfranchisement can only be expected to increase.<sup>27</sup>

All told with respect to the 2024 Presidential Election, according to a report by the Williams Institute, roughly 210,800 out of the estimated 825,100 voting-eligible transgender people would face barriers to voting due to voter ID laws, meaning that as many as one in four transgender people were at risk of being disenfranchised.<sup>28</sup> And even when trans people with sufficient social capital and resources are able to overcome the significant barriers to voting,<sup>29</sup> the process itself serves to legitimate voting as an exclusionary process, as Ava Ayers has aptly described.<sup>30</sup> That is, the voting process separates those who the state views as worthy and legitimate from those it does not, communicating messages of exclusion.<sup>31</sup>

## II. BARRIERS TO POLITICAL PARTICIPATION

Beyond voting, trans people encounter broader political disenfranchisement and legal estrangement.<sup>32</sup> In recent years, a whole host of laws designed to push trans people from the public square have been enacted in many U.S. jurisdictions. There are no less than a dozen such kinds of laws that I've cataloged elsewhere.<sup>33</sup> Such laws include so-called

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27. See *infra* Part II. Notwithstanding these formal barriers to voting, there is some evidence that transgender people's voter engagement exceeds national averages, though of course that level of engagement might be higher still if the voting barriers discussed here were removed. See, e.g., ADVOCES FOR TRANS EQUAL. EDUC. FUND, CIVIC ENGAGEMENT IN THE 2022 U.S. TRANSGENDER SURVEY 3–5 (2024), [https://transequality.org/sites/default/files/2024-08/USTS\\_2022CivicEngagementReport\\_Final.pdf](https://transequality.org/sites/default/files/2024-08/USTS_2022CivicEngagementReport_Final.pdf) [<https://perma.cc/2TVQ-EFFP>] (in a survey of 84,170 transgender adults, observing that 82% were registered for the 2020 presidential election compared to 73% of the total U.S. population, but also documenting that lack of accurate identification and fear of harassment by election officials prevented the registration rate for transgender people from being even higher); see also James Factora, *Trans People Vote More than Cis People, Despite Bureaucratic Obstacles*, THEM (Aug. 13, 2024), <https://www.them.us/story/trans-voter-turnout-election-study> [<https://perma.cc/A6FP-6YZW>] (analyzing the Advocates for Transgender Equality report).

28. JODY L. HERMAN, NATHAN CISNEROS, LINDSAY MAHOWALD & WILL TENTINDO, WILLIAMS INST., UCLA SCH. OF L., THE POTENTIAL IMPACT OF VOTER IDENTIFICATION LAWS ON TRANSGENDER VOTERS IN THE 2024 GENERAL ELECTION 2 (2024), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Voter-ID-Sep-2024.pdf> [<https://perma.cc/8J92-6BMP>].

29. Cf. Scott Skinner-Thompson, *Identity by Committee*, 57 HARV. C.R.-C.L. L. REV. 657, 684 (2022) (documenting, in the context of public schools, how bureaucratic barriers to living one's gender have distributional consequences among gender-diverse populations with economically and racially privileged groups more able to traverse the barriers).

30. Ayers, *supra* note 23, at 389.

31. *Id.*

32. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2067 (2017) (explaining that the concept of "legal estrangement" clarifies that "at both an interactional and structural level, current regimes can operate to effectively banish whole communities from the body politic").

33. Skinner-Thompson, *supra* note 6.

bathroom bills that forbid people from using bathrooms consistent with their gender identity, bans on gender affirming care for minors, laws that kidnap children from gender-affirming parents, laws that restrict gender affirming care for adults, laws that prohibit accurate identification documents, laws that prohibit accurate pronouns in school, laws that dictate and prescribe students' genders, laws that erase queer people from school curricula, laws that out trans students to their parents, laws that ban trans female athletes, laws that ban drag performances, and laws that segregate trans people within the carceral system.<sup>34</sup> In addition, there are examples of queer people being excluded from jury service—a critical form of public participation—on the basis of their identity, with prevailing law approving that exclusion.<sup>35</sup>

Taken together, these laws send a powerful message that trans people do not belong in public, in society, in life; while also erecting substantial practical barriers to that participation. For instance, barring government employees—including elected officials<sup>36</sup>—as well as the public more generally from gender-affirming bathroom access in government buildings operates as a significant impediment to influencing the halls of democratic power, invades their privacy,<sup>37</sup> and subjects them to harassment.<sup>38</sup> Requiring and/or approving of the misgendering of trans people, including trans students, outs them and publicly shames.<sup>39</sup> Queer people are told they don't exist and never have existed when they are literally erased from the history books.<sup>40</sup> Drag bans seek to diminish the ability of queer people to express themselves in public,<sup>41</sup> while also attacking a critical subaltern counterpublic where queer identity has historically been nurtured.<sup>42</sup> Law enforcement profiles transgender women as sex workers or for other petty offenses, subsequently questioning and harassing them, a phenomena that

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34. *Id.* In addition to these state laws, the second Trump Administration has instituted an expansive array of policies designed to exclude transgender people from public life and deny their existence. Scott Skinner-Thompson, *Donald Trump's Executive Orders Aim to Create Jim Crow for Trans People*, SLATE (Feb. 3, 2025, 11:00 AM), <https://slate.com/news-and-politics/2025/02/donald-trump-anti-trans-executive-orders-jim-crow.html> [https://perma.cc/ZD39-VG4K].

35. Chan Tov McNamara, Note, *Striking Out Animus: A Framework to Remedy Batson's Blind Spots*, 29 CORNELL J.L. & PUB. POL'Y 945, 947–48 (2020).

36. Annie Karni, *Johnson Says He Will Bar Transgender Women from Capitol Bathrooms*, N.Y. TIMES (Nov. 20, 2024), <https://www.nytimes.com/2024/11/20/us/politics/mike-johnson-transgender-women-ban-capitol-bathrooms.html> [https://perma.cc/6YNA-UYSG].

37. Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159, 192 (2015).

38. James Esseks, *Anti-Trans Bathroom Bills Have Nothing to Do with Privacy and Everything to Do with Fear and Hatred*, ACLU (Apr. 19, 2016), <https://www.aclu.org/news/lgbtq-rights/anti-trans-bathroom-bills-have-nothing-do-privacy-and-everything> [https://perma.cc/YHG3-K688].

39. Skinner-Thompson, *supra* note 6, at 998; Scott Skinner-Thompson, *The First Queer Right*, 116 MICH. L. REV. 881, 903 (2018).

40. Dara E. Purvis, *Transgender Students and the First Amendment*, 104 B.U. L. REV. 435, 461 (2024).

41. Note, *Drag Queens, The First Amendment, and Expressive Harms*, 137 HARV. L. REV. 1469, 1477 (2024).

42. See MICHAEL WARNER, *PUBLICS AND COUNTERPUBLICS* 57 (2002).

has been dubbed “walking while trans.”<sup>43</sup> Laws that portray trans people as part of some sort of social contagion, nefarious gender ideology, or a threat to cis women borrow from well-worn playbooks used against the gay rights movement,<sup>44</sup> and seek to demonize trans people as an evil threat that must be punished and contained.

As these examples suggest, voter disenfranchisement of transgender people is part of a broader *political* disenfranchisement that seeks to erase trans people from public life. Only by appreciating voter disenfranchisement as part of the systemic erasure of gender variance can the voter disenfranchisement laws be understood—and legally challenged—in their most comprehensive light.<sup>45</sup> Put differently, in much the same way that racist voting regulations were just a part of Jim Crow, formal voting exclusion of transgender people is part of a calculated effort to segregate and erase queerness from the public square.<sup>46</sup> Indeed, without drawing false equivalencies, what is happening across the country represents the most widespread exclusion of people from all spheres of public life since Jim Crow.

### III. BARRIERS TO ECONOMIC PARTICIPATION

In addition to being estranged from civic spheres, trans people are also excluded from economic participation and security through discriminatory practices sanctioned by a neoliberal economic/legal system that fails to provide a meaningful social safety net.

Fueled in part by the barriers to political participation discussed above, “[e]mployment discrimination against trans people is frequently open and unapologetic.”<sup>47</sup> For instance, the lack of access to accurate identification documents can out trans people to potential employers,<sup>48</sup> exposing them to

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43. Leonore F. Carpenter & R. Barrett Marshall, *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 WM. & MARY J. WOMEN & L. 5, 13–14 (2017).

44. Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1478 (2017) (discussing Anita Bryant and the so-called “Save Our Children” movement that falsely portrayed gay teachers as sexual predators out to recruit and groom children).

45. *Cf. Rogers v. Lodge*, 458 U.S. 613, 624 (1982) (in voting rights challenge to racially discriminatory at-large voting scheme, noting the importance of evidence regarding the broader context that Black people had “less opportunity to participate in the political processes and to elect candidates of their choice”).

46. Ruqaiyah Yearby, Editorial, *The Return of Jim Crow: Government Discrimination Against Women, LGBTQIA+ Individuals, and Racial/Ethnic Minority Individuals*, 114 AM. J. PUB. HEALTH 1331 (2024).

47. Chinyere Ezie, *Dismantling the Discrimination-to-Incarceration Pipeline for Trans People of Color*, 19 U. ST. THOMAS L.J. 276, 285 (2023).

48. Skinner-Thompson, *supra* note 37, at 160.

covert adverse actions<sup>49</sup> notwithstanding the Supreme Court's recent determination that federal law prohibits employment discrimination on the basis of someone's gender identity.<sup>50</sup> Sex work, which trans people may turn to given lack of other employment opportunities, is also criminalized.<sup>51</sup>

Similarly, several states permit discrimination by public accommodations against transgender people.<sup>52</sup> And even in states that prohibit such discrimination, the Supreme Court recently created a large exception to the extent that the public accommodations' expressive freedoms may be impacted by the anti-discrimination edict.<sup>53</sup> Trans people also face higher rates of housing discrimination and insecurity (including in homeless shelters), as well as barriers to healthcare.<sup>54</sup> The exclusion from participation in so many sectors of economic life contributes to high rates of poverty, homelessness, and incarceration for transgender people, particularly trans people of color.<sup>55</sup>

These harms are by themselves of course sufficient to normatively justify legal protections for transgender lives. And the extent of the subjugation is why several critical trans scholars and activists have questioned the vitality of identity politics and promise of legal recognition of trans identities and, instead, rightly encouraged those who care about trans lives (and others!) to focus on redistributive ways of supporting each other that are less reliant on the state.<sup>56</sup>

But the economic marginalization also has the effect of pushing transgender lives into the shadows, preventing them from influencing the

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49. Ezie, *supra* note 47, at 285–86.

50. *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020) (holding that Title VII's prohibitions on sex discrimination in employment extends to discrimination against transgender people).

51. *Carpenter & Marshall*, *supra* note 43, at 14 n.40 (“Many transgender women are left with little choice but to participate in street economies, since they tend to experience extremely high rates of homelessness, family rejection, and discrimination in employment.”).

52. Grace Vedock, Note, *Public Accommodations Parlance*, 123 MICH. L. REV. 79, 93 (2024) (“States provide a patchwork of protections. Only about half of LGBTQ+ Americans live in states with public accommodations laws that protect them. The remainder of queer Americans—approximately ten million people—live in states with no such protections, meaning they are not guaranteed access to places of public accommodation. All told, of the forty-five states with public accommodations statutes, twenty-two do not protect against discrimination based on sexual orientation or gender identity.” (footnotes omitted)).

53. *See* 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

54. Ezie, *supra* note 47, at 288–89; *see also* DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 82–83 (rev. & expanded ed. Duke Univ. Press 2015) (ebook) (discussing the role of gender classification systems in limiting access to health care for transgender people).

55. SANDY E. JAMES, JODY L. HERMAN, LAURA E. DURSO & RODRIGO HENG-LEHTINEN, NAT'L CTR. FOR TRANSGENDER EQUAL., *EARLY INSIGHTS: A REPORT OF THE 2022 U.S. TRANSGENDER SURVEY* 21 (2024) (documenting that roughly one-third of transgender people were experiencing poverty, 18 percent were unemployed, and nearly one-third had experienced homelessness in their lifetime).

56. *See generally* ERIC A. STANLEY, *ATMOSPHERES OF VIOLENCE: STRUCTURING ANTAGONISM AND THE TRANS/QUEER UNGOVERNABLE* (2021).

social tableau through their presence in the economic milieu. What I've described elsewhere when discussing the harms of surveillance toward marginalized identities is also applicable to the economic marginalization described herein. This kind of widespread alienation

imposes group harms, pushing and erasing entire segments of society from the hegemonic public sphere, contributing to homogeneity of identities in public. This in turn creates societal-level harms to democracy, including conformity of ideas within the dominant public sphere, with marginalized groups effectively segregated from that space—ultimately contributing to political polarization by reinforcing echo chambers rather than increasing heterogeneous interactions.<sup>57</sup>

#### IV. TRANS LIVES ON THE BALLOT

The extent of this disenfranchisement is brought into even sharper relief given that trans lives are literally on the ballot.<sup>58</sup> In statehouses around the country and in ballot initiatives,<sup>59</sup> voters and their representatives are debating trans existence in contexts ranging from medical care to athletic participation, with trans lives being used as a political cudgel.<sup>60</sup>

For example, many politicians like Florida Governor Ron DeSantis,<sup>61</sup> then South Dakota Governor Kristi Noem,<sup>62</sup> and others openly campaign and legislate on transphobic platforms putting trans identities front and center. This was evident in the 2024 Presidential Election, as well, with then former President Donald Trump attacking Vice President Kamala Harris for

57. Scott Skinner-Thompson, *Agonistic Privacy & Equitable Democracy*, 131 YALE L.J.F. 454, 455 (2021) (footnotes omitted).

58. In this way, transgender disenfranchisement replicates an irony that Elizabeth Katz has documented regarding women's political participation on the bench, with women at times holding offices they could not themselves vote for. Elizabeth D. Katz, "May It Please Her Honor": *The United States' First Woman Judges, 1870–1930*, 102 WASH. U. L. REV. 1729 (2025).

59. Skinner-Thompson, *supra* note 6, at 984–1007 (documenting anti-transgender legislation sweeping the nation).

60. Marie-Amélie George, *Framing Trans Rights*, 114 NW. U. L. REV. 555, 584 (2019) (explaining how at least as early as 2012, anti-transgender ballot initiatives have been introduced seeking to portray transgender people as sexual predators who would be given protection by gender identity anti-discrimination laws).

61. Brendan Farrington, *DeSantis Spread False Information While Pushing Trans Health Care Ban and Restrictions, a Judge Says*, ASSOCIATED PRESS (Dec. 22, 2023, 3:37 AM), <https://apnews.com/article/florida-desantis-transgender-law-trial-61639592d4c5e8512af3d3b078e40862> [<https://perma.cc/PQ4M-MQWQ>].

62. Morgan Matzen, *Gov. Kristi Noem Signs 'Fairness' Bill, Limiting Transgender Athletes' Access to Sports*, ARGUS LEADER (Feb. 4, 2022, 9:03 AM), <https://www.argusleader.com/story/news/2022/02/03/south-dakota-anti-transgender-athlete-fairness-bill-passed-gov-kristinoem/6654261001> [<https://perma.cc/UY57-UTNM>].

her support of transgender rights.<sup>63</sup> And as suggested in Part III, perhaps the most pressing issues facing trans people and many minoritized communities are poverty and wealth inequality<sup>64</sup>—issues that are salient in every election.

To comprehensively capture the harms of transgender political exclusion, scholars and activists must also underscore that trans people are being foreclosed from discussion of their own lives, building on the horrible practice of excluding Black people, Native Americans, women, and other minoritized groups from engaging in political action regarding their own fates.<sup>65</sup>

#### CONCLUSION: THE PARTICIPATORY TURN

This exclusion from public participation is at its core anti-democratic.<sup>66</sup> While it has many different patinas, any definition of a functioning democracy depends on meaningful participation of the people.<sup>67</sup> Such participation can occur in informal fora or formal representative ones. But whether it be deliberative democracy, agonistic pluralism, or even civic republicanism, popular participation is the linchpin of many theories of democracy.

Democratic theories may differ in terms of the emphasis they place on how and why participation matters, but they almost all agree that it does. For example, deliberative democracy often foregrounds the role of rational consensus as a critical goal of public participation.<sup>68</sup> As leading scholar of

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63. Susan Davis, *GOP Ads on Transgender Rights Are Dominating Airwaves in the Election's Closing Days*, NPR (Oct. 19, 2024, 5:00 AM), <https://www.npr.org/2024/10/19/g-s1-28932/donald-trump-transgender-ads-kamala-harris> [<https://perma.cc/RHE2-X6DE>].

64. STANLEY, *supra* note 56.

65. See, e.g., Henry L. Chambers, *Minor v. Happersett, Dobbs v. Jackson Women's Health Organization, and the Supreme Court's Refusal to Reconstruct America*, 102 WASH. U. L. REV. 1691 (2025) (arguing that the Reconstruction Amendments should have secured voting rights for women); Alexandra Fay, *Citizenship and Empire in Elk v. Wilkins*, 102 WASH. U. L. REV. 1839 (2025) (discussing the denial of citizenship, and voting rights, to Native Americans); Brandon J. Johnson, *History, Tradition, and the Franchise*, 102 WASH. U. L. REV. 1879 (2025) (arguing that historically-bound Fourteenth Amendment jurisprudence threatens election law and voting rights); Elizabeth D. Katz, *supra* note 58 (explaining how the denial of women's suffrage barred some women from holding office); Ellen D. Katz, *Minor v. Happersett and the Repudiation of Universal Suffrage*, 102 WASH. U. L. REV. 1909 (2025) (explaining how activists delinked the cause of women's suffrage from that of universal suffrage).

66. The first five paragraphs of this Part are reproduced from a prior piece I've written. See Skinner-Thompson, *supra* note 57, at 465–67.

67. Mike Ananny, *Presence of Absence: Exploring the Democratic Significance of Silence*, in DIGITAL TECHNOLOGY AND DEMOCRATIC THEORY 141, 154 (Lucy Bernholz, Hélène Landemore & Rob Reich eds., 2021) (“Although the term *participation* is central to much of democratic theory, it is still highly contingent and debatable in both form and aims. It means different things in different contexts, often presumes different democratic ideals, and carries with it different assumptions about what role individual and collective actions play in democratic institutions.”).

68. For a thorough and succinct overview of theories of deliberative democracy and their shortcomings, see EDWINA BARVOSA, *DELIBERATIVE DEMOCRACY NOW: LGBT EQUALITY AND THE EMERGENCE OF LARGE-SCALE DELIBERATIVE SYSTEMS* 1–16 (2018).

deliberative democracy Jürgen Habermas described, the effectiveness of civil society and deliberative democracy historically “stood or fell with the principle of universal access. A public sphere from which specific groups would be . . . excluded was less than merely incomplete; it was not a public sphere at all.”<sup>69</sup>

In contrast to deliberative democracy’s emphasis on consensus building, civic republicanism centers on what Philip Pettit describes as a “contestatory citizenry”—one that is “committed to interrogating all the elements of government and imposing itself in the determination of law and policy” to ensure that the government does not become totalitarian.<sup>70</sup> In other words, contestatory participation under a republican model underscores the role of participation aimed at the government itself (i.e., vertically).

Like civic republicanism, agonistic pluralism distinguishes itself from deliberative democracy by underscoring the value of contention over consensus.<sup>71</sup> But under an agonistic pluralist veneer, participation in the public square is critical because “the public space is where conflicting points of view are confronted without any possibility of a final reconciliation.”<sup>72</sup> Horizontal tension (among the people and corporatist, neoliberal powers) is acceptable—and indeed necessary—because the lack of reconciliation can underscore the hegemonic forces operating with the public square and can also help ensure continued vigilance in the face of many ultimately short-term political victories.<sup>73</sup> Or, as put by Chantal Mouffe, an agonistic approach to public discourse “consists in making visible what the dominant consensus tends to obscure and obliterate, in

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69. JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 85 (Thomas Burger trans., MIT Press 1989) (1962).

70. PHILIP PETTIT, *ON THE PEOPLE’S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY* 5 (2012).

71. CHANTAL MOUFFE, *AGONISTICS: THINKING THE WORLD POLITICALLY* 92 (2013) (“And what distinguishes the agonistic approach to the public space from other approaches? Its main characteristic is that it challenges the widespread view that, albeit in different ways, informs most visions of the public space. According to the accepted view, the public space is the terrain where one aims at creating consensus.”).

72. *Id.*

73. BONNIE HONIG, *POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS* 4–15, 205 (1993) (underscoring that while the “perpetuity of contest is not easy to celebrate,” it serves as a realist recognition that political contests “engender remainders and that, if those remainders are not engaged, they may return to haunt and destabilize” the contests that were mistakenly believed to be settled or closed, with the displacement of contestation as disempowering the most marginalized identities who stand to benefit from further contestation).

giving a voice to all those are silenced within the framework of the existing hegemony.”<sup>74</sup>

In short, Habermas emphasizes the purported role of rational decision making within the deliberative process; Pettit and Mouffe underscore the importance of contestation or agonism as a key characteristic of participatory deliberations. But a core tenet unifying all these theories is popular sovereignty through participation by the people, suggesting that unless we safeguard such participation, we risk undermining our democracy altogether.

As such, these attacks on trans folks are not just a matter of political and economic equality or identity (important as those frames are), but are fundamentally at odds with almost every theory of functional democracy. Not only is this angle critical for understanding the law’s totalizing effects,<sup>75</sup> but it has the potential to broaden the scope of those who prioritize transgender rights from those who care about transgender people per se to those who also care about democratic norms. It also has the potential to bolster claims that transgender people are entitled to heightened protection under the Equal Protection Clause.

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74. MOUFFE, *supra* note 71, at 93; *see also* CHANTAL MOUFFE, FOR A LEFT POPULISM 17 (2018) (explaining that “[o]ne of the fundamental symbolic pillars of the democratic ideal—the power of the people—has been undermined because post-politics eliminates the possibility of an agonistic struggle between different projects of society which is the very condition for the exercise of popular sovereignty”).

75. Skinner-Thompson, *supra* note 6, at 971 (underscoring “the need to consider law and policy holistically, not individually, when considering [the] civil rights implications” of the many different kinds of anti-transgender laws being instituted).