"Sex Changed by a Court's Decree": The History and Tradition of Gender Transitions in the United States

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In June 2025, the Supreme Court held in United States v. Skrmetti *that bans on gender-affirming care for minors do not violate the Equal Protection Clause. The Supreme Court's decision came after several years of laws targeting trans people's rights to transition and participate in public life. As courts decide the constitutionality of these laws, they often turn to questions of history and tradition. These appeals to history have become even more salient since* Dobbs v. Jackson Women's Health Organization, *where the Supreme Court argued that fundamental rights must be "deeply rooted in this nation's history and tradition" and "implicit in the concept of ordered liberty." Although anti-trans judges and litigants have adopted different, and sometimes contradictory, approaches to history in Equal Protection and Due Process cases, their arguments share a common theme. They claim that no trans people existed prior to the late twentieth century. Despite the importance of history to trans rights cases, few scholars have analyzed trans legal history in the 1800s or early 1900s.*

In this Article, I critique the uses of history in recent trans rights cases, and I argue that the right to transition gender is deeply rooted in United States history and tradition. Drawing upon original archival research, I demonstrate that trans people before the 1950s transitioned in many of the same ways that people do today: they changed their legally recognized sexes, they chose new names, they altered their bodies, they donned new wardrobes, and they transitioned their social and legal roles. Many trans people sought both legal and community acknowledgement of their transitions, and they participated in public life and exercised their civil rights. Trans people and even legal authorities defended these transitions as a right, and they connected the right to transition to both liberty and gender equality.

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I argue that critical trans legal history is essential to understanding trans people's constitutional rights. I reveal how this history illuminates that the right to transition is deeply rooted under the Due Process Clause. The legal history of gender transitions can help reconcile the uses of history in Due Process and Equal Protection jurisprudence. I demonstrate that this history also supports trans people's Equal Protection claims. I illustrate how trans people relied upon the right to transition gender to participate in political processes and public life. This history is particularly important now as both the Trump Administration and state legislatures attack trans people's right to exist and participate in civic life. Trans legal history matters—for constitutional rights arguments, for arguing against transphobic legislation, and for showing trans people that we have always been here.

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INTRODUCTION

In May 1888, Howard[1] Calder visited Reverend J.A. Frederick and asked to speak to him "on business."[2] Calder, a white individual in his late thirties or early forties,[3] informed Reverend Frederick that he was really a man.[4] He explained

1. At the time of his marriage, Calder was still using his deadname, Hanna. Registrum Matrimoniorum in Ecclesia Sanctae Mariae, *in* BALTIMORE ROMAN CATHOLIC PARISH MARRIAGES 7 (n.d.), *microformed on* FIND MY PAST, https://search.findmypast.com/record?id=S2/US/BALT/HD03/BOX06/AB180/0100&parentid=US/BALT/CATH/PR/MAR/0050977/B; *see also Deer Creek Elopement: Father Frederick's Story*, SUN, Feb. 20, 1889, at 4 (on file with ProQuest, Historical Newspapers: *The Baltimore Sun* (1837–1999), https://www.proquest.com/hnpbaltimoresun/docview/535115984/395E924C885F4A4APQ/1?accountid=11091&sourcetype=Newspapers) [hereinafter *Deer Creek Elopement*] (discussing this story). Within a few months he started going by the name Howard. *See Hanna and His Bride: They Are Rudely Torn from Each Other's Arms by Parental Decree*, SUN, Mar. 18, 1889, at 4 (on file with ProQuest, Historical Newspapers: *The Baltimore Sun* (1837–1999), https://www.proquest.com/hnpbaltimoresun/docview/535135989/74866AAB957B42ECPQ/2?accountid=11091&sourcetype=Newspapers) [hereinafter *Hanna and His Bride*]. He used both Howard and Hiram throughout the rest of his life. Although contemporary practice discourages deadnaming individuals, I provide it here for ease of following the primary sources and because he married under the name Hanna. For discussion of this story, see Whitney Broadaway, *Who Was Hiram Calder?*, ORANGE CNTY. REG'L HIST. CTR.: AROUND THE MUSEUM BLOG (Oct. 17, 2019), https://www.thehistorycenter.org/who-was-hiram-calder/ [https://perma.cc/ATF2-R3J6].

2. *Deer Creek Elopement*, *supra* note 1, at 4; *see also* Broadaway, *supra* note 1 (describing Calder's story). Thank you to Whitney Broadaway for discussing Calder with me and sharing sources. Thank you also to Christopher T. Smithson at the Historical Society of Harford County for talking to me about Calder. Although there are a handful of other records, such as marriage licenses, most of the existing sources on Calder and Beall are newspaper articles. Although newspaper articles quote the relevant parties, it is possible that these articles misquote people or make up details. I primarily relied on local newspapers, such as *The Baltimore Sun*, as they tend to be more accurate when reporting on trans people. *See* Emily Elizabeth Skidmore, Exceptional Queerness: Defining the Boundaries of Normative U.S. Citizenship, 1876–1936, at 5–6 (2011) (Ph.D. dissertation, University of Illinois at Urbana-Champaign) (on file with the University of Illinois Library) (discussing newspapers as sources for trans history); EMILY SKIDMORE, TRUE SEX: THE LIVES OF TRANS MEN AT THE TURN OF THE TWENTIETH CENTURY 7–9 (2017) (comparing local to national coverage of trans people by "track[ing] the ways in which the narratives produced around trans men changed as their stories circulated from local newspapers and courtrooms to national newspapers and sexological literature").

3. Calder is listed in the 1880 census as white and born in 1848. *See* Solomon S. Wetherill, Schedule 1.—Inhabitants in Jarrettsville Precinct 4th District, *in* [14] 10TH CENSUS MARYLAND: HARFORD HOWARD 41–477, at 30 (1880), *microformed on* FAM. SEARCH No. 005160772 (Bureau of the Census Micro-Film Lab'y), https://www.familysearch.org/ark:/61903/3:1:33S7-9YBK-FT6?view=index&personArk=%2Fark%3A%2F61903%2F1%3A1%3AMNQG-G1L&action=view&cc=1417683&lang=en&groupId=. In his marriage record, his age is listed as 37. *See* Marriage Record: Colder, E. Hanna and Beale, Cathn (Sep. 13, 1888) (on file with Md. State Archives, Court of Common Pleas Baltimore City (Marriage Index, Male) Cob-Comp 1886–1914), https://pve.msa.maryland.gov/pages/viewer.aspx?AQFBwoFrOBliaG4D45mRQBeEvZ0TfG%2fhpCvOiDvNqN8tSaf0XPsiXJzf+stPVvD%2f2svAo1wpeKjyxeXoLfUgGQ=%3d) (search for image 534) [hereinafter Marriage Record]. It is common for ages to vary between late-nineteenth-century records. Calder was probably around forty at the time of his marriage.

4. *See Deer Creek Elopement*, *supra* note 1, at 4.

that he wanted to marry a young woman named Kate Beall.[5] Calder had been one of Reverend Frederick's parishioners at St. Mary's Catholic Church in Harford County, Maryland, for a decade. During that time, Calder had presented as female, and Reverend Frederick had thought of his parishioner as an "eccentric old maid."[6] Although Reverend Frederick had known Calder as a woman, he not only believed Calder's assertion of gender, but he thought Calder made more sense as a man than a woman. Calder had "never really affected female ways."[7] He had always "kept his hair cut short and walked with a masculine step."[8] While Calder did explain that he had "consulted a surgeon," Reverend Frederick's understanding of Calder's gender did not seem to depend upon biology or a doctor's opinion.[9] Reverend Frederick perceived Calder as a man because of his gender performance and masculine behavior, not because of his anatomy.[10]

Reverend Frederick urged Calder to live openly as a man, and to exercise his rights as a man to marry a woman and wear male clothes.[11] While Calder wanted to present as male, he was worried about being "exposed to the ridicule of all who knew him."[12] Reverend Frederick argued that Calder should "throw off his female clothing, assume male attire, go boldly to Belair [the county seat of Harford County], secure the [marriage] permit in person, and thus face the world in his new condition of life."[13] Reverend Frederick saw publicity and community recognition—not secrecy—as the solution to Calder's gender trouble.[14] When Calder protested that his parents would be upset over him presenting as male, Reverend Frederick agreed to get the license for him. Reverend Frederick obtained a marriage license for him from the Court of Common Pleas in Baltimore.[15] According to newspapers, the Baltimore clerk believed Reverend

5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* It is not clear whether Calder was telling the truth and actually had consulted a surgeon.
10. Several gender theorists have pointed out that gender is a "doing" or a "performance," rather than a biological reality. *See* Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC'Y 125, 126 (1987) (explaining that individuals "'do' gender" within "social situations"); JUDITH BUTLER, UNDOING GENDER 1 (2004) ("[G]ender is a kind of a doing, an incessant activity performed . . . .").
11. *Deer Creek Elopement*, *supra* note 1, at 4.
12. *Id.*
13. *Id.*
14. *See id.* I borrow the phrase "gender trouble" from Judith Butler. Judith Butler uses "gender trouble" to convey the idea that there is no perfect or ideal performance of gender or heterosexuality and that the inability to perfectly perform gender causes anxiety. JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY *passim* (1999); *see also* Judith Butler, *Imitation and Gender Insubordination*, *in* INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES 20, 27–29 (Diana Fuss ed., 1991) ("[*G*]*ender is a kind of imitation for which there is no original;* in fact, it is a kind of imitation that produces the very notion of the original as an *effect* and consequence of the imitation itself."). *See generally* JUDITH BUTLER, WHO'S AFRAID OF GENDER? (2024) (discussing anxieties over gender and transness).
15. *Deer Creek Elopement*, *supra* note 1, at 4. Reverend Frederick also initially hesitated because Kate Beall was only seventeen. *Id.* He agreed to perform the marriage on Beall's eighteenth birthday. *Id.*

Frederick and assumed Calder to be a man.[16] Reverend Frederick even got a dispensation from the Diocese of Baltimore to perform Calder's interfaith wedding to his Protestant fiancée.[17] On September 5, 1888, Reverend Frederick officiated a marriage between E. Hanna[18] Calder and Catharine Beall.[19] Although Reverend Frederick knew that Calder had presented as female, he not only acknowledged Calder's masculine gender but also helped him exercise one of the key rights afforded to white men: marriage to a woman. Calder's marriage illustrates that religious leaders, such as Reverend Frederick, could be surprisingly supportive of their trans parishioners, even when the leader knew that the parishioner had transitioned gender.

Unfortunately, Beall[20] and Calder's marriage ceremony did not end their challenges, as both of their families objected to the union. For the first few months after their marriage, Beall and Calder continued to live with their respective parents, occasionally visiting each other.[21] Kate Beall's parents explained that they "tried to break up the intimacy" of their daughter with Calder.[22] Beall's mother claimed that Calder placed a "powerful enchantment over [Kate Beall]."[23] Once Beall's parents learned the couple had gotten married,[24] they accused Reverend Frederick of "marrying two women."[25] Unlike Reverend Frederick, Kate Beall's parents did not acknowledge or respect Howard Calder's gender transition but instead saw him as a dangerous woman. Kate Beall and Howard Calder finally eloped on February 12, 1889, a few months after their marriage, and left Harford County.[26] After learning of

16. *See Catharine Weds Hanna: The Two Girls Were Neighbors and Companions in a Maryland Village*, CINCINNATI ENQUIRER, Feb. 23, 1889, at 11 (on file with ProQuest, Historical Newspapers: *The Cincinnati Enquirer* (1872–1922), https://www.proquest.com/docview/883575507/fulltextPDF/2D5E43D6EE044082PQ/1?accountid=14496&sourcetype=Newspapers) [hereinafter *Catharine Weds Hanna*].

17. *See id.*; Registrum Matrimoniorum in Ecclesia Sanctae Mariae, *supra* note 1. A note on the register states that Reverend Frederick got a dispensation for the interfaith marriage. *Id.* Thank you to Whitney Broadaway for sending me this source. The Beall and Calder families were Presbyterian, but Howard had converted to Catholicism and, therefore, a special dispensation was required for Catholic priests to perform such weddings. *See Catharine Weds Hanna*, *supra* note 16, at 11. Howard Calder attributed his conversion to Catholicism to "reading religious works." *Hanna and His Bride*, *supra* note 1, at 4.

18. Calder's deadname. *See Hanna and His Bride*, *supra* note 1, at 4.

19. *See Catharine Weds Hanna*, *supra* note 16, at 11; Marriage Record, *supra* note 3.

20. I refer to Kate Beall by her maiden name both for clarity and because that is the name newspapers used. *See, e.g.*, *Deer Creek Elopement*, *supra* note 1, at 4.

21. *See Catharine Weds Hanna*, *supra* note 16, at 11.

22. *Deer Creek Elopement*, *supra* note 1, at 4.

23. *Id.*

24. It is unclear when Kate Beall's parents learned of the couple's marriage. The *Sun* suggested that they learned as early as November 1888, when Howard Calder informed them that he was married to their daughter. *See Deer Creek Elopement*, *supra* note 1, at 4.

25. *Id.*

26. *See Hanna and His Bride*, *supra* note 1, at 4; *Catharine Weds Hanna*, *supra* note 16, at 11. It is not entirely clear where they went. Calder said they went to various places including Lancaster, Pennsylvania and Baltimore, Maryland. *See Hanna and His Bride*, *supra* note 1, at 4. The detectives found them in Woodensburg, Baltimore County, about thirty miles from Beall's hometown of Federal Hill in Harford County, Maryland. *See id.*; *Catharine Weds Hanna*, *supra* note 16, at 11.

his daughter's elopement, Kate Beall's father asked a marshal to help him locate his daughter.[27] A few weeks later, detectives found the couple in Baltimore County, about thirty miles away, and brought Kate Beall back to her parents.[28] As predicted by Howard Calder, his parents also expressed disapproval of his marriage and gender choices.[29] Calder's father announced that Calder could never come home.[30] Although Howard Calder and Kate Beall might have convinced Reverend Frederick and the court clerk, they could not convince their parents to accept their marriage or Calder's gender transition. While legal and religious authority were an important part of trans people's gender transitions, family recognition and social acceptance were also crucial to enable trans individuals to present as their chosen gender and form families.

Although neither Calder's nor Beall's parents supported the union, Calder still insisted on both his masculinity and his rights as Beall's husband. When Kate Beall's parents tried to break up the couple in November 1888, a few months before they eloped, Calder showed Kate Beall's mother his marriage certificate.[31] He allegedly announced to her that he "was as good as any man," and declared that he was married to Kate Beall and "would not keep away from her."[32] Calder used his marriage certificate as a symbol of his legal and gendered rights, employing it to substantiate his claims of both masculinity and marriage. When Kate Beall's parents separated the couple in March 1889, Howard Calder refused to accept the split. He declared that he would "exercise [his] right to go after [Kate Beall]."[33] Calder did so, going before Judge Walters in Bel Air, Maryland, to seek a writ of habeas corpus to reunite him with his wife.[34] Calder argued he had certain legal rights as a man and a husband, rights that he expected priests and judges to support.

Ultimately Kate Beall, not any authorities or family members, decided whether to recognize Calder as a man and her husband. Judge Waters ruled that the decision was up to Kate Beall.[35] She could choose whether to return to Calder or stay with her parents.[36] After Kate Beall declared to the judge that she would live with

27. *Catharine Weds Hanna*, *supra* note 16, at 11.

28. *Hanna and His Bride*, *supra* note 1, at 4.

29. *See Deer Creek Elopement*, *supra* note 1, at 4.

30. *To Arrange a Settlement in the Calder–Beall Case*, SUN, Mar. 19, 1889, at 4 (on file with ProQuest, Historical Newspapers: *The Baltimore Sun* (1837–1999), https://www.proquest.com/hnpbaltimoresun/docview/535128239/A9BFB575C9A8469FPQ/43?accountid=11091&sourcetype=Newspapers). Calder also said he would not return home. *Hanna and His Bride*, *supra* note 1, at 4.

31. *Deer Creek Elopement*, *supra* note 1, at 4.

32. *Deer Creek Elopement*, *supra* note 1, at 4 (quoting Kate Beall's mother, who is paraphrasing what Howard Calder supposedly said).

33. *Hanna and His Bride*, *supra* note 1, at 4.

34. *A Woman in Trousers: She Asks the Court to Compel Her Wife to Live with Her*, WASH. POST, Apr. 11, 1889, at 1 (on file with ProQuest, Historical Newspapers: The *Washington Post* (1877–1922), https://www.proquest.com/hnpwashingtonpost/docview/138398378/6E6983DFCF104D7BPQ/1?accountid=11091&sourcetype=Newspapers).

35. *Id.*

36. *Id.*

Calder if he proved to be a man, Calder agreed to a medical examination.[37] Although the results of the examination were not publicized,[38] Calder and Beall separated after the proceeding, and the newspaper assumed that the medical examination determined Calder to be a woman.[39] Although Calder's attempts to win back his wife through a writ of habeas corpus failed, the judge does not appear to further punish Calder for his gender nonconformity. Beall's own choices, as well as the transphobic pressure from her family, ended up being the deciding factor in their relationship. Calder and Beall were separated, not because judges or police officers criminalized their relationship, but because Beall decided to go home.

Fortunately for Calder, his life as a man did not end. He remarried[40] and moved to Orlando, Florida.[41] Calder's next marriage was happier than his marriage to Beall, and it lasted until his wife's death several decades later.[42] Calder presented as male for many decades, even voting in Florida elections, and he was not outed in the newspaper until he revealed his gender on his deathbed in 1914.[43] Although Calder's gender transition was not without obstacles, he was able to present as a man for most of his adult life.

Howard Calder's transition and marriage demonstrates that some trans[44] people in the 1800s were able to transition publicly and legally, exercise gendered

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37. *Id.*

38. *Id.*

39. *Id.*

40. *See* Broadaway, *supra* note 1; Marriage Record: Calder, Howard E. and Kemp, Sarah A. (July 24, 1891) (on file with Md. State Archives, Court of Common Pleas Baltimore City (Marriage Index, Male) Burt-Camp 1886–1914, https://pve.msa.maryland.gov/pages/viewer.aspx?AQFBwoFrOBlia G4D45mRQMtjZ4vPNYYWmlssZnsERhMRpPcFPJMqRTnQ6YEsIyeUzz0cOTgLpNOBfjS5 QDRbWA=%3d) (search for image 913).

41. *See Calder 'Husband' of Two Women?: Baltimore Paper Tells of Early Wedding*, TAMPA TIMES, July 22, 1914, at 5 (on file with Anc., Newspapers, https://www.newspapers.com/newspage/325777423/) [hereinafter *Calder 'Husband' of Two Women?*].

42. *See* Broadaway, *supra* note 1. Although Calder changed his first name sometime in spring 1889, newspapers after his death connected Howard Calder to the Hanna Calder who had married in Baltimore. *See id.*; *Calder 'Husband' of Two Women?*, *supra* note 41, at 5.

43. *See Calder 'Husband' of Two Women?*, *supra* note 41, at 5; Broadaway, *supra* note 1.

44. I describe the people in this Article as trans, either because they transitioned from one gender presentation to another, or their gender differed from the one they were assigned at birth, or both. Some of the people I discuss in this Article would probably be considered intersex today, and some were deemed "hermaphrodite" in their own time period. *See Intersex Variations Glossary*, INTERACT, https://interactadvocates.org/intersex-definitions/ [https://perma.cc/Y7C8-U8LE] (last visited Oct. 13, 2025) ("*Intersex* is an umbrella term for unique variations in reproductive or sex anatomy. Variations may appear in a person's chromosomes, genitals, or internal organs like testes or ovaries."). I describe these individuals as trans, not to dismiss intersex history, but to convey that they did transition between genders. Furthermore, nineteenth-century Americans rarely made a clear distinction between being physically or psychologically gender nonconforming and often used terms like "epicene" or "hermaphrodite" to describe trans people. *See* Lizzie Ehrenhalt, *"Curious and Romantic Sensation": Sex, Fraud, and Celebrity in the Leon A. Belmont Case of 1880*, MINN. HIST., Spring 2021, at 214, 219 (describing an 1880s trans man referred to as a "hermaphrodite" by newspapers); JULIAN GILL-PETERSON, HISTORIES OF THE TRANSGENDER CHILD 16 (2018) (explaining that "many early twentieth-century trans people … drew on the language of intersex embodiment (then most often called 'hermaphroditism')"); JEN MANION, FEMALE HUSBANDS: A TRANS HISTORY 150–51 (2020) (providing

rights, and participate in public life. Calder's life also illustrates that trans people's ability to achieve these goals depended not just upon legal authorities but on whether religious leaders, kin, and community members supported them. Howard Calder capably navigated multiple kinds of authority: a religious official, a judge, and even a doctor. He asserted his rights specifically as a husband and a man, and he demanded that he be reunited with his wife.[45] Reverend Frederick believed Calder that he was a man, and he endorsed his right to marry a woman. While Calder had support from his priest, neither his nor Beall's parents supported the union. Ultimately, it was Beall and her parents—rather than a legal authority—who decided to separate the couple. Calder's life challenges the assumption that gender transitions are a new phenomenon,[46] and demonstrates how trans people used legal and community authorities to assist them in their transitions.

In this Article, I argue that not only were trans people conceivable from the 1800s to the 1950s but also that they frequently turned to the law to actualize their gender transitions.[47] Trans people changed their legally recognized sexes, obtained name changes, sought gender-affirming care and bodily modifications, donned new clothes, and adopted gendered familial and community roles.[48] As they did so, they sought both public and legal recognition for their gender, attempting to participate in social and community life. Trans people's ability to garner both legal and social support played an important role in their battles against public censure, discrimination, and even criminalization. Throughout the 1800s and early 1900s, legal authorities were often, but not always, willing to recognize trans people's genders and allow them to exercise gendered rights. Both trans people and their allies defended transitioning as an expression of liberty and gender equality.

Not only did trans people exist in the 1800s but they helped shape both legal doctrine and gender norms. While nineteenth-century Americans did not use the word "trans," they commonly referenced "changes of sex" or sex "transformations."[49]

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an example of a trans man who explained he was a "hermaphrodite" in 1836, and citing local newspaper articles).

45. *Hanna and His Bride*, *supra* note 1, at 4.

46. *See infra* Section I.A.

47. Although the word "sex" was more commonly used in the 1800s than "gender," I use "gender transitions" as a general term to refer to the way people modified their social, legal, and physical expressions of gender. *See, e.g.*, GILL-PETERSON, *supra* note 44, at 98 (explaining the development of the idea of gender as distinct from sex in the 1960s). Gender transition is a more commonly used term today than "sex transition." *See, e.g.*, *What Do I Need to Know About Transitioning*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/gender-identity/transgender/what-do-i-need-know-about-transitioning [https://perma.cc/D8TT-UJBM] (last visited Oct. 13, 2025) (explaining that transitioning can involve social, legal, internal, and medical changes, and using the term "gender transitions"). Gender transition also conveys that the transformation is not just about biological sex but can encompass other aspects of transitioning. *See id.*

48. *See infra* Part II.

49. *See A Wonderful Transformation: A Pennsylvania Woman of Twenty-Five Finds that She Is Not a Woman After All*, CINCINNATI ENQUIRER, Apr. 17, 1882, at 5 (on file with ProQuest, Historical Newspapers: *The Cincinnati Enquirer* (1872–1922), https://www.proquest.com/docview/890333976/fulltextPDF/4C79843E19B14441PQ/1?accountid=14496&sourcetype=Newspapers); *Change of Sex: Women as Men and Men as Women*, N.Y. DISPATCH, Feb. 11, 1883, at 1 (on file with Libr. of Cong.,

Newspapers reported on hundreds of people in the 1800s and early 1900s who transitioned between genders or "masqueraded" as men or women.[50] In 1883, the *New York Dispatch* wrote: "Ever since the world began to be peopled . . . men have masqueraded as women, and women as men."[51] As far back as the early 1820s,[52] trans people had become such a common part of American print culture that newspapers frequently reminded people that they were not exceptional nor even particularly unusual. The *Semi-Weekly Windham County Reformer* reported on the death of a trans man in 1901 by commenting: "This was not singular."[53] The *Semi-Weekly Windham County Reformer* reminded the reader of the many examples of people who had changed their sex in the last few decades.[54] Trans people not only filled the pages of

Chronicling America, https://www.loc.gov/resource/sn85026214/1883-02-11/ed-1/?sp=1&r=0.12%2C0.48%2C1.152%2C0.782%2C0&st=pdf); *A Change of Sex: L. Allen Scott Puts on Trousers After Wearing Petticoats for Twenty-Eight Years*, CHI. DAILY TRIB., Apr. 11, 1888, at 9 (on file with ProQuest, Historical Newspapers: *Chicago Daily Tribune* (1872–1922), https://www.proquest.com/hnpchicagotribune/docview/174189114/5D88FDC018294E87PQ/1?accountid=36339&sourcetype=Newspapers); *Sex Changed by a Court's Decree: Kate Tipton, Long Known as a Girl, Must Be Recognized as Carl G. Crawford*, ST. LOUIS POST-DISPATCH, July 10, 1904, at 5B (on file with ProQuest, Historical Newspapers: *St. Louis Post-Dispatch* (1879–1922), https://www.proquest.com/docview/577561317/fulltextPDF/DBFA431E1D3348CAPQ/1?accountid=14496&sourcetype=Newspapers). Although the language of "change of sex" seems to have been more common in the later 1800s, 1850s newspapers compared one teenager's gender transition "to the Roman fable of Iphis and Ianthe (a tale from Ovid's 'Metamorphoses')." Chris Baer, *This Was Then: A Story of Three Vineyard Men*, MV TIMES (Apr. 7, 2021), https://www.mvtimes.com/2021/04/07/story-three-vineyard-men/ [https://perma.cc/GH5U-CY6B].

50. *Strange Incident*, SUN, Mar. 24, 1849, at 1 (on file with ProQuest, Historical Newspapers: *The Baltimore Sun* (1837–1999), https://www.proquest.com/hnpbaltimoresun/docview/533215278/B7E9ADDFEE684BC7PQ/15?accountid=36339&sourcetype=Newspapers); *Women Who Passed as Men*, MARBLE HILL PRESS, July 2, 1902, at 2 (on file with NewspaperArchive, https://newspaperarchive.com/marble-hill-press-jul-02-1902-p-2/); *Women Who Wear Men's Clothes Men Who Wear Women's Clothes*, ST. LOUIS POST-DISPATCH, Mar. 10, 1907, at 59 (on file with Anc., Newspapers, https://www.newspapers.com/newspage/139329381/); *see also* Zagria, *Trans Men Listed in the Press in 1902*, GENDER VARIANCE WHO'S WHO (Aug. 3, 2020), https://zagria.blogspot.com/2020/08/trans-men-listed-in-press-in-1902.html [https://perma.cc/YVR4-YLKN] (describing the large number of newspapers in 1902 listing trans men); SKIDMORE, *supra* note 2, at 1–2, 7 (discussing a trans man who, in 1902, described all the other trans men he knew, and providing an overview of newspapers as sources for queer history). I conducted research in three main newspaper databases: Chronicling America Historic American Newspapers, ProQuest Historical Newspapers, and Newspapers.com. Using search terms like "male attire" and "female husband," I found over 500 people in the United States from the early 1800s through 1940s who transitioned gender, cross-dressed, were gender nonconforming, or otherwise challenged the gender binary. *See* SKIDMORE, *supra* note 2, at 8 (providing examples of useful search terms for trans history such as "as a man" and "masquerade"). While it is impossible to know the exact numbers of trans people in the United States in the 1800s, newspaper reports indicate that trans people were relatively common. *See id.* at 14.

51. *Change of Sex*, *supra* note 49, at 1.

52. *See* Rachel Hope Cleves, *"What, Another Female Husband?": The Prehistory of Same-Sex Marriage in America*, 101 J. AM. HIST. 1055, 1067 (2015) (discussing an 1820s newspaper about the frequency of trans men).

53. *Caroline Hall and Her Predecessors*, SEMI-WKLY. WINDHAM CNTY. REFORMER, Oct. 8, 1901 (on file with Digit. Transgender Archive, https://www.digitaltransgenderarchive.net/files/cv43nx17z).

54. *Id.* (Mrs. William Lindley, Ellis Glenn, Mary Anne Taylor, and Dr. James Barry).

newspapers, they also influenced legal doctrine in areas from mortgage law[55] to child custody doctrine.[56] One of the first cases ever tried in Minnesota, after it became a state,[57] involved a question of whether a trans man had the right to wear male clothes—he won.[58] In 1903, the Supreme Court even ruled on a habeas corpus case involving a trans defendant.[59] Not only did trans people exist in the 1800s, but they helped shape both legal doctrine and societal ideas of gender.

As anti-trans laws rip through the United States[60] and courts debate the constitutionality of anti-trans laws, it has become even more important for legal scholars and legal historians to focus on trans rights and trans history. Over the past few years, several circuit courts have considered questions about the constitutionality of laws restricting trans rights.[61] Although trans-rights cases have implicated many different aspects of constitutional law, many of these cases have centered on the Fourteenth Amendment's Due Process and Equal Protection Clauses.[62]

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55. *See generally* Leavitt v. Reynolds, 44 N.W. 567 (Iowa 1890) (involving a mortgage in an opera house executed to a trans man named Edgar Burnham). For a further discussion of Edgar Burnham, see *infra* notes 359–63, 492–93 and accompanying text.

56. *See generally* Merritt v. Swimley, 82 Va. 433 (1886) (a child custody case involving an intersex aunt named Lelia Payne who had a trans brother named Lawrence). For further discussion of the Paynes, see *infra* notes 329–33 and accompanying text.

57. *Admission of Minnesota into the Union 1858*, OFF. MINN. SEC'Y STATE, https://www.sos.mn.gov/about-minnesota/minnesota-government/admission-of-minnesota-into-the-union-1858/ [https://perma.cc/7YA9-BA9X] (last visited Oct. 22, 2025).

58. A.C. SMITH, A RANDOM HISTORICAL SKETCH OF MEEKER COUNTY, MINNESOTA: FROM ITS FIRST SETTLEMENT, TO JULY 4TH, 1876, at 105–06 (Litchfield, Minn., Belfoy & Joubert 1877) (discussing a case of a "woman, falsely personat[ing] a man" in the summer of 1858).

59. *See* Moss v. Glenn, 189 U.S. 506 (1903) (per curiam) (denying a habeas corpus claim by Ellis Glenn); SKIDMORE, *supra* note 2, at 94–98 (discussing Ellis Glenn and his gender).

60. As of September 5, 2025, 121 anti-trans laws were passed, and 981 bills were under consideration. *2025 Anti-Trans Bills Tracker*, TRANS LEGIS. TRACKER, https://translegislation.com/ [https://perma.cc/VFV9-RZ84] (last visited Sep. 5, 2025). For example, Arkansas passed a bill "to require the display of gender information on an Arkansas driver's license." H.B. 1796, 95th Gen. Assemb., Reg. Sess. (Ark. 2025).

61. *See generally* Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405, 1415–58 (2023) (providing an overview of trans constitutional law cases 2017–2021); Tyler Callagy, *Leave the Kids Alone: The Constitutional Battleground of Gender-Affirming Health Care Bans for Transgender Youth*, 55 SETON HALL L. REV. 601 (2024) (discussing recent court cases involving the constitutionality of bans on gender-affirming medical care for trans minors); Emily Kaufman, *On Liberty: From Due Process to Equal Protection*—Dobbs' *Impact on the Transgender Community*, 14 U. MIA. RACE & SOC. JUST. L. REV. 81 (2023) (discussing the role of Equal Protection and Due Process in recent trans rights court cases). For examples of cases, see Kadel v. Folwell, 100 F.4th 122, 133 (4th Cir. 2024) (holding that it violates the Equal Protection Clause for state health insurance to exclude coverage of gender-affirming care); K.C. v. Individual Members of Med. Licensing Bd., 121 F.4th 604, 612, 621 (7th Cir. 2024) (holding that bans on gender-affirming care for minors likely do not violate the Equal Protection Clause); Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1226, 1230 (11th Cir. 2023) (finding that an Alabama ban on gender-affirming care for minors likely did not violate either the Equal Protection Clause or the Due Process Clause), *reh'g denied*, 114 F.4th 1241 (11th Cir. 2024); Gore v. Lee, 107 F.4th 548, 557–58, 565 (6th Cir. 2024) (holding that prohibitions on changing the gender marker on birth certificates violate neither the Equal Protection Clause nor the Due Process Clause); Fowler v. Stitt, 104 F.4th 770, 784 (10th Cir. 2024) (holding that Oklahoma's policy of denying trans people accurate birth certificates violates their rights under the Equal Protection Clause).

62. *See* cases cited *supra* note 61.

Disputes about the constitutionality of anti-trans laws have become even more significant with the current Administration, as President Trump has issued numerous executive orders restricting trans rights.[63] The Supreme Court has recently agreed to hear cases considering whether bans on trans girls' participation in girls' sports violate the Equal Protection Clause or Title IX.[64] As both the Supreme Court and lower courts consider the constitutionality of anti-trans laws, they are increasingly turning to questions of history and tradition.[65] I dispute the claim that gender transitions are new and illustrate how trans history can contribute to constitutional debates over the right to transition gender under both the Due Process and Equal Protection Clauses.

In this Article, I challenge the Supreme Court's recent holding in *United States v. Skrmetti* that bans on medical gender-affirming care for minors are not a form of anti-trans discrimination and thus do not violate the Equal Protection Clause.[66] The Supreme Court reasoned that bans on minors' access to gender-affirming care did not classify based on transgender status but instead only classified based on medical use and age. By framing these anti-trans laws as just about puberty blockers or hormones, the Supreme Court dismissed the importance of gender affirming care to trans people's liberty and equality. The Court also ignored the connection between bans on gender-affirming care and anti-trans discrimination. As legal scholars like Nicole Scott and Noa Ben-Asher have pointed out, recent anti-trans laws are rooted in animus[67] and in a belief that "transgender children and adults are *not* desirable social outcomes."[68] By banning trans medical care for minors, these legislatures are restricting trans people's rights and showing their animus towards trans people. Laws banning gender-affirming care are part of a large collection of laws seeking to limit trans people's ability to engage in public and social life.[69]

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63. *See, e.g.*, Exec. Order No. 14,168, 90 Fed. Reg. 8615, 8615 (Jan. 20, 2025) (defining sex as immutable and determined at conception); Exec. Order No. 14,201, 90 Fed. Reg. 9279, 9279 (Feb. 5, 2025) (prohibiting trans women from playing in women's sports); Exec. Order No. 14,183, 90 Fed. Reg. 8757, 8757–58 (Jan. 27, 2025) (restricting trans people's ability to openly serve in the U.S. military).

64. *See* Press Release, ACLU, Supreme Court Will Hear Challenges to Bans on Athletic Participation by Transgender Students (July 3, 2025, at 9:50 ET), https://www.aclu.org/press-releases/supreme-court-will-hear-challenges-to-bans-on-athletic-participation-by-transgender-students [https://perma.cc/55HR-BQVP]; Hecox v. Little, 104 F.4th 1061 (9th Cir. 2024), *cert. granted*, 145 S. Ct. 2871 (2025); B.P.J. *ex rel.* Jackson v. W. Va. State Bd. of Educ., 98 F.4th 542 (4th Cir. 2024), *cert. granted*, 146 S. Ct. 57 (2025).

65. *See infra* Part I.

66. 605 U.S. 495, 510 (2025).

67. Nicole Scott, *Trans Rights Are Human Rights: Protecting Trans Minors' Right to Gender-Affirming Care*, 14 DREXEL L. REV. 685, 731–35 (2022); Noa Ben-Asher, *Transforming Legal Sex*, 102 N.C. L. REV. 335, 391 (2024).

68. Ben-Asher, *supra* note 67, at 392.

69. *See* Ryan Thoreson, *Trump Administration Moves to Reject Transgender Identity, Rights*, HUM. RTS. WATCH (Jan. 23, 2025, at 05:00 ET), https://www.hrw.org/news/2025/01/23/trump-administration-moves-reject-transgender-identity-rights [https://perma.cc/C9X8-G288] (noting the Trump Administration's "intention to erase transgender people from public life and strip them of basic protections"); Orion Rummler & Kate Sosin, *All the Ways Trump Wants to Exclude Trans People from Public Life*, 19TH (Mar. 5, 2025, at 12:28 ET), https://19thnews.org/2025/03/trump-anti-trans-executive-orders/ [https://perma.cc/E24U-GYMX].

The ability and the right to transition are important to trans people's ability to express their genders, exercise legal rights, enjoy liberty, participate in their communities, and engage in public and civic life.[70] For example, several states require trans people to have certain kinds of surgery or medical procedures to change their identity documents.[71] Without such documents, trans people struggle to do basic civic actions like vote or travel.[72] By protecting trans rights under Equal Protection, courts would follow the long line of Equal Protection precedent that centers on protecting equal access to public spaces and civic life.[73] Instead, the Supreme Court disregarded the link between medical transitions, equality, and freedom from discrimination.

The history of gender transitions can help illuminate *why* gender transitions are so significant to trans people and so connected to ideas of equality. Trans people hoped that a court decree, a name change, or a marriage certificate could protect from the interference of family members like Kate Beall's parents, harassment from police, or even incarceration.[74] For example, Howard Calder saw his gender transition as central to his ability to marry, to be seen in the community as a man, and to form a family with his wife.[75] Even for non-originalists, this history can help demonstrate why transitioning was so important in the past and why it continues to be important in the present. In this Article, I argue that the legal history of gender transitions can help support trans rights under the Equal Protection Clause, as this history illustrates why transitions were so essential both to protect trans people from discrimination and to allow them to participate equally in public life.

While the majority decision in *Skrmetti* did not rely on historical analysis, several Justices reasoned in their concurrences that a group had to experience a

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70. *See* Press Release, ACLU, *supra* note 64.

71. *See Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/identity_document_laws [https://perma.cc/55E2-LSTR] (last visited Oct. 14, 2025) (identifying ten states and two territories as states that "require[] proof of surgery").

72. *See* Erica Aries, *I Am Who I Am and I Deserve an ID to Match*, ACLU (Feb. 17, 2021), https://www.aclu.org/news/lgbtq-rights/i-am-who-i-am-and-i-deserve-an-id-to-match [https://perma.cc/X578-K3K3] ("Having an inaccurate gender marker has cost me a job, housing opportunities, and basic respect."); *Voting While Trans: Preparing for Voter ID Laws*, ADVOCS. FOR TRANS EQUAL., https://transequality.org/resources/voting-while-trans-preparing-voter-id-laws [https://perma.cc/MPZ9-H2MQ] (last visited Oct. 14, 2025) ("Strict new identification requirements in many states may make it more difficult for transgender voters to get their votes counted in the upcoming election."); Emmy Maluf, Note, *Voting While Trans: How Voter ID Laws Unconstitutionally Compel the Speech of Trans Voters*, 122 MICH. L. REV. 927, 932 (2024) (discussing the impact of voter ID laws on the trans community, and arguing that "requiring trans voters to present ID constitutes compelled speech").

73. *See* United States v. Virginia, 518 U.S. 515, 531–32 (1996) (access to educational opportunities); Watson v. City of Memphis, 373 U.S. 526, 539 (1963) (access to public parks and other municipal recreational facilities); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467 (1982) (access to educational opportunities); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (access to educational opportunities).

74. Beall's parents sent detectives after the couple, but Calder does not appear to have been arrested. *See Catharine Weds Hanna*, *supra* note 16, at 11. However, other trans people were sometimes arrested by the police. *See infra* Section II.D.

75. *See supra* notes 1–45 and accompanying text.

history of discrimination to be considered a quasi-suspect class, and they explained that trans people did not experience such a history of discrimination.[76] These concurrences also illustrate that some Supreme Court Justices see the histories of sexism and the histories of transphobia as distinct, as they reason that trans people did not have analogous discriminatory histories to those of women (or people of color).[77] *Skrmetti* did not ultimately turn on this question of history. The majority opinion held that the bans on gender-affirming care did not discriminate based on transgender status or sex, and thus the Court did not reach the question of whether trans people are a quasi-suspect class.[78] However, the concurrences in *Skrmetti* suggest that future trans-rights, Equal Protection cases will have to make claims about a history of discrimination, if they are going to convince the Court that trans people should be considered a quasi-suspect class.[79]

In addition to supporting trans rights under the Equal Protection Clause, the history of gender transitions is essential to defending trans rights claims under the Due Process Clause. Questions about history and tradition have become especially salient after *Dobbs v. Jackson Women's Health Organization*, which overturned *Roe v. Wade* and held that the Constitution does not protect a right to abortion.[80] In *Dobbs*, Justice Alito both relied upon and revised the *Glucksberg* test,[81] which holds that for an unenumerated right to be protected under Due Process it must be "deeply rooted in this Nation's history and tradition"[82] and "implicit in the concept of ordered liberty."[83] Unlike other originalist decisions, *Dobbs* did not consider whether the Fourteenth Amendment was originally intended to protect abortion nor whether its original public meaning would have been understood to refer to abortion.[84] Instead, Justice Alito reduced the question

76. *See* United States v. Skrmetti, 605 U.S. 495, 554 (2025) (Barrett, J., concurring); *see also id.* at 575 (Alito, J., concurring). A full history of anti-trans discrimination is beyond the scope of this article. For a response to Justice Barrett's arguments, see Brianne Felsher, Shay Olmstead & Kate Redburn, *To Protect Transgender Rights in the Future, We Must Look to the Past*, L.A. TIMES (Feb. 7, 2025, at 03:00 PT), https://www.latimes.com/opinion/story/2025-02-07/transgender-rights-supreme-court-skrmetti (arguing that there is a history of anti-trans discrimination).

77. *See Skrmetti*, 605 U.S. at 554 (Barrett, J., concurring); *see also id.* at 576 (Alito, J., concurring).

78. *Id.* at 517.

79. Justice Barrett stated, "In future cases, however, I would not recognize a new suspect class absent a demonstrated history of *de jure* discrimination." *Id.* at 557 (Barrett, J., concurring). She explained that the question was "largely academic" since she believed that trans people were not a "discrete and insular minority." *Id.* However, her comments suggest that, if trans rights activists want to convince Justice Barrett that trans people should be considered a quasi-suspect classification, they will need to show that trans people experienced a history of discrimination.

80. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

81. *Id.* Reva Siegel argues that *Glucksberg* "defines liberties protected by the Due Process Clause far more expansively than does Justice Alito's opinion." Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1182 n.213 (2023). Indeed, *Glucksberg* even considers abortion to be within history and tradition. *Id.*

82. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Moore v. E. Cleveland, 431 U.S. 494, 503 (1977)).

83. *Id.* The concept of "implicit in the concept of ordered liberty" can be traced to *Palko v. Connecticut*. 302 U.S. 319, 325 (1937).

84. *See* Siegel, *supra* note 81, at 1170.

of "history and tradition" to simply a question of counting the number of states that banned abortion in the 1860s.[85] Although *Dobbs* does not mention trans or gender-nonconforming people directly,[86] courts have already relied on *Dobbs* to deny trans people rights.[87] Legal scholars have warned that *Dobbs* may have far-reaching implications for LGBTQ rights[88] and could threaten even existing precedent like *Obergefell v. Hodges*[89] and *Lawrence v. Texas*.[90] The Supreme Court has yet to rule on questions of trans rights under the Due Process Clause. When it does so, the Court will likely consider the history and tradition of gender transitions. This Article supplies that history, arguing that the right to transition *is* deeply rooted in U.S. history and tradition.

As many legal scholars have explained, the Supreme Court's definitions of "deeply rooted" rights are often contradictory and incoherent.[91] Indeed, the Court has never settled on a definition of "deeply rooted."[92] By arguing that the right to transition is deeply rooted, I do not mean that all Americans in the 1860s would have supported a right to gender transition or that there were no laws limiting such a right. I also do not mean to suggest that constitutional rights jurisprudence in the twenty-first century should simply adopt the mores and beliefs of people in the 1860s. Instead, this right is deeply rooted because it is fundamental to how many Americans have long thought about equality and "ordered liberty." Judges

85. *See Dobbs*, 597 U.S. at 250. *Dobbs* even included an appendix listing state statutes banning abortion in 1868. 597 U.S. at 302 app. A. Reva Siegel criticizes Justice Alito's decision for simply "counting laws [that banned abortion] stripped from context." Siegel, *supra* note 81, at 1192; *see also* Reginald Oh, *The Anti-Constitutionality of the Deeply Rooted Test in* Dobbs v. Jackson, 72 CLEV. ST. L. REV. 83, 97 (2023) (similarly critiquing *Dobbs* for reducing the deeply rooted test to just counting state laws).

86. *See* Jordan Thomas, *Challenging the Inconceivability Fallacy: Post-*Dobbs *Abortion Rhetoric, Transgender Visibility, and What the United States Can Learn from Latin America's "Green Wave*," 42 YALE L. & POL'Y REV. 699, 708 (2024) (noting that *Dobbs* does not mention trans people, and criticizing the dissent in *Dobbs* for their trans exclusive language).

87. *See* L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 475 (6th Cir. 2023), *aff'd in part sub nom.*, United States v. Skrmetti, 605 U.S. 495 (2025); Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1224 (11th Cir. 2023).

88. *See generally* Dane Brody Chanove, *A Tough Roe to Hoe: How the Reversal of* Roe v. Wade *Threatens to Destabilize the LGBTQ+ Legal Landscape Today*, 13 U.C. IRVINE L. REV. 1041 (2023); Marc Spindelman, *Trans Sex Equality Rights After* Dobbs, 172 U. PA. L. REV. ONLINE 1 (2023); Dov Fox & Mary Ziegler, *The Lost History of "History and Tradition*," 98 S. CAL. L. REV. 1 (2024); Kaufman, *supra* note 61.

89. 576 U.S. 644, 675 (2015) (holding that bans on same-sex marriage violate the Due Process and Equal Protection Clauses).

90. 539 U.S. 558, 578 (2003) (holding that laws criminalizing same-sex sodomy violated the Due Process Clause). For discussions of the potential impact of *Dobbs* on *Lawrence* and *Obergefell*, see Oh, *supra* note 85, at 94; Fox & Ziegler, *supra* note 88, at 54–56; Kaufman, *supra* note 61, at 88. *But see* Spindelman, *supra* note 88, at 5–6 (arguing that *Dobbs* does not necessarily have to limit LGBTQ rights since the majority opinion explains that abortion is different from other kinds of rights).

91. *See* Serena Mayeri, *The Critical Role of History After* Dobbs, 2 J. AM. CONST. HIST. 173, 190–91 (2024) ("Radical inconsistencies in the Court's application of history-and-tradition abound."); Oh, *supra* note 85, at 90–92 (discussing different versions of the history-and-tradition test).

92. *See* Thomas P. Crocker, *What Is Deeply Rooted in the Constitution*?, 50 BYU L. REV. 265, 271–72 (2025).

and legal scholars have defined "ordered liberty" in different ways.[93] Many judges have considered "ordered liberty" to include rights that are fundamental to people's "identity, destiny, or way of life." Some judges and legal scholars have argued that trans rights are intrinsic to "ordered liberty," although they have rarely referenced trans history to support their claims. For example, in *Karnoski v. Trump*, the U.S. District Court for the Western District of Washington cited *Obergefell v. Hodges* to hold that there is a fundamental right to "make decisions concerning bodily integrity and self-definition central to an individual's identity."[94] This right encompasses "the ability to define and express [one's] gender identity."[95] Building upon these arguments, I defend the right to gender transition by making three main arguments about trans legal history. First, I argue that many trans people were able to transition in many of the same ways that people do today. They changed their legally recognized sexes.[96] They chose new names.[97] They altered their bodies.[98] They donned new wardrobes.[99] They presented themselves to their community as their gender.[100] Second, I explain how trans people historically had the ability to exercise civil rights, conduct legal actions, and participate in the community, demonstrating their deep-rooted right to transition. Third, I explain that legal officials, trans people, and other commentators often defended people's gender transitions, and they saw these rights as central to equality and liberty. Trans people's participation in their communities was inherently *legal*, as they exercised their civil rights and engaged in civic life.

Although judges use history in both Equal Protection and Due Process cases, these uses of history are often contradictory. In Due Process cases, originalist judges argue that if a right, such as abortion, did not exist in the past, it is not a fundamental right.[101] In Equal Protection cases, judges often rely on a history of discrimination to hold that a group is a quasi-suspect class. Several legal scholars have pointed out the possible tension between the two clauses, describing how the Due Process Clause "looks backward" while the Equal Protection Clause is "forward-looking."[102] In Equal Protection cases, courts often seek to depart from

93. *See* Oh, *supra* note 85, at 89 & nn.34–35.

94. Karnoski v. Trump, No. C17-1297, 2017 WL 6311305, at *8 (W.D. Wash. Dec. 11, 2017) (citing *Obergefell*, 576 U.S. at 651); *see also* Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984) (explaining that due process "safeguards the ability independently to define one's identity that is central to any concept of liberty"). Many legal scholars have also argued for a right to "gender autonomy." *See* Jillian T. Weiss, *Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for* Lawrence v. Texas, 5 J. RACE, GENDER & ETHNICITY 2, 37 (2010); Scott, *supra* note 67, at 737; Julie A. Greenberg & Marybeth Herald, *You Can't Take It with You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV 819, 877–79 (2005).

95. *Karnoski*, 2017 WL 6311305, at *8.

96. *See infra* Section II.A.

97. *See infra* Section II.B.

98. *See infra* Section II.C.

99. *See infra* Section II.D.

100. *See infra* Section II.E.

101. *See* Oh, *supra* note 85, at 96–97.

102. Katherine Watson, *When Substantive Due Process Meets Equal Protection: Reconciling* Obergefell *and* Glucksberg, 21 LEWIS & CLARK L. REV. 245, 262 (2017); *see* Cass R. Sunstein, *Sexual*

the past, invoking past discrimination as "negative precedent."[103] They seek to make the future different, and presumably better, than the past. For example, in *Frontiero v. Richardson*, the Court explained that women were a quasi-suspect class because of a history of invidious discrimination, a discrimination that the Court described as "firmly rooted" in history.[104] By contrast, in Due Process cases, the Supreme Court suggests that the present should look similarly to the past or, at least, that courts in the present should protect similar rights to those historically protected. In *Dobbs*, the Court concluded that abortion rights were not protected in the present, because these rights had been denied in the 1860s.[105] The history of discriminatory laws was used to *grant* women rights in *Frontiero*, but was used to *deny* women (and other people who can get pregnant) rights in *Dobbs*.[106] These tensions in the Court's treatment of the Equal Protection and Due Process Clauses pose challenges for both advocates and legal historians. The same legal history that can be used to support marginalized people's rights under one clause can be used to deny them rights under another clause.

I argue that this history of the right to gender transitions illustrates a possible way to reconcile the tensions between the uses of history in Equal Protection and Due Process Clauses. In *Obergefell*, Justice Kennedy reasoned that the "Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles."[107] Justice Kennedy focused on the possibility of the Equal Protection Clause for "vindicating precepts of liberty and equality."[108] I argue that the legal history of trans rights further highlights the interconnections between the Equal Protection and the Due Process Clauses. Both trans people and legal commentators viewed gender equality, liberty, and gender autonomy as connected. Trans legal history illuminates how, like other marginalized people, trans people could simultaneously experience de jure discrimination, while also defending their rights and trying to exercise autonomy over their lives.[109] Trans people need their rights to transition to be protected

Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. CHI. L. REV. 1161, 1163 (1988).

103. *See* Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19, 54–55 (2022); Deborah A. Widiss, Note, *Re-Viewing History: The Use of the Past as Negative Precedent in* United States v. Virginia, 108 YALE L.J. 237, 252 (1998).

104. 411 U.S. 677, 684 (1973).

105. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 248 (2022); *see also* Oh, *supra* note 85, at 109.

106. *See* Oh, *supra* note 85, at 109.

107. Obergefell v. Hodges, 576 U.S. 644, 672 (2015). Legal scholars disagree on what exactly Kennedy meant by intertwining these clauses. *Compare* Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 174 (2015) (proposing that *Obergefell* introduces a principle of "antisubordination liberty" to substantive due process), *with* Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015) (arguing that *Obergefell* goes further than an "antisubordination principle" and creates a doctrine of "equal dignity" within constitutional interpretation).

108. *Obergefell*, 576 U.S. at 674.

109. *See generally* Siegel, *supra* note 103 (explaining the history of women advancing arguments about suffrage, liberty, and equality); Dylan C. Penningroth, *Everyday Use: A History of Civil Rights in Black Churches*, 107 J. AM. HIST. 871 (2021) (discussing the history of Black people exercising civil

precisely because they experienced and continue to experience discrimination. For example, Howard Calder sought support from a judge and his reverend, partly to protect himself from the transphobia he faced from Kate Beall's parents.[110] When trans people could not access accurate documentation or support from a legal authority, they could be vulnerable to police harassment or even arrest. For example, Beall's parents sent detectives to separate Kate Beall and Howard Calder.[111] Trans people also defended themselves from prejudice by invoking their right to dress and act as they chose, linking this right to notions of liberty. By restricting trans people's right to transition, legislators and courts are also limiting trans people's ability to protect themselves from discrimination and enjoy equal protection under the law.

Despite (or because of) the contradictions and confusions of these uses of history, legal scholars and legal historians cannot ignore the past in making constitutional arguments. Legal historians and law scholars have engaged in a fervent debate over the merits of addressing originalism on its own terms. They ask whether "progressive originalism"[112] will have any impact upon the Court, or whether the Court can just shift the terms of the debate.[113] While I share many legal scholars' skepticism of originalism, I argue that trans legal history remains essential to constitutional analysis. Whether or not legal scholars or historians want the Court to use originalism, the Court will continue to do so. Furthermore, courts are actively seeking out histories of trans lives and critiquing trans activists for failing to provide it to them.[114] Legal historian Serena Mayeri contends, "*Dobbs* should not lead us to reject history's relevance to constitutional law . . . [c]laims about and understandings of the past are an inescapable part of any theory of constitutional interpretation, and they are critical to our understanding of our political community today."[115] While Mayeri focuses on reproductive

rights); DYLAN C. PENNINGROTH, BEFORE THE MOVEMENT: THE HIDDEN HISTORY OF BLACK CIVIL RIGHTS (2023) (discussing how Black people navigated law and legal institutions).

110. *See Deer Creek Elopement*, *supra* note 1, at 4.

111. *See Catharine Weds Hanna*, *supra* note 16, at 11.

112. Progressive originalism refers to the use of originalism to advance progressive aims, such as queer rights or gun control. *See* Almas Khan, *Progressive Originalism and the New Canon Wars*, 36 AM. LITERARY HIST. 809, 809–10 (2024).

113. For critiques of progressive originalism, see generally Michael L. Smith, *The False Promise of Progressive Originalism*, 56 N.M. L. REV. (forthcoming 2026); Dale E. Ho, *Dodging a Bullet:* McDonald v. City of Chicago *and the Limits of Progressive Originalism*, 19 WM. & MARY BILL RTS. J. 369 (2010); Khan, *supra* note 112. These disputes over the use of progressive originalism have rarely focused on trans history, as even proponents of trans rights tend to assume that there is no history of a right to gender transitions. *See infra* Part I (providing an overview of the use of trans history); Ezra Ishmael Young, Transgender Originalism 4 (Mar. 31, 2022) (unpublished manuscript) (on file with SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3967605 (arguing for a pro-trans originalism).

114. *See infra* Section I.A.

115. Mayeri, *supra* note 91, at 174 (citation omitted). Many legal scholars have contested the Court's use of abortion history in *Dobbs*, in some cases supplying their own interpretation of the history and tradition of abortion. *See generally* Reva B. Siegel & Mary Ziegler, *Abortion's New Criminalization—A History-and-Tradition Right to Health-Care Access After* Dobbs, 111 VA. L. REV. 413 (2025); Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and*

rights, her arguments are relevant to trans rights as well. If legal historians and pro-trans scholars do not engage in this historical fight, we will already have lost before we have even started. Even worse, we lose an opportunity to signal to both trans and cis people that trans people *do* have a history and tradition in the United States. Non-originalists can also use trans legal history: to demonstrate the significance of transitioning, to find inspiration for activism, to provide hope for better futures, or to challenge the idea that the gender binary is inevitable. Many U.S. courts have based their constitutional assertions on a claim that there is simultaneously no history of anti-trans discrimination and no history of a right to gender transition. This Article illustrates that both claims are wrong.

In this Article, I make the conscious choice to tell a specific story of the past, one that highlights the voices and beliefs of marginalized people, especially trans people. Since the mid-1980s, scholars have largely agreed that our histories of fundamental rights should include not just the histories of statutes or judges' opinions but also how marginalized people thought about and used the law.[116] Scholars like Reva Siegel and Jack Balkin urge historians and legal scholars to construct an expansive "constitutional memory," one that includes the arguments and ideas of marginalized people.[117] Although legal scholars have done important work placing women and people of color at the center of their constitutional histories,[118] they have not reconstructed the histories of trans people. In this Article, I make the conscious choice to tell a specific story of the past—one that highlights the voices and beliefs of marginalized people, especially trans people. The historical evidence illustrates that trans people have a long history of seeing their transitions as central to their enjoyment of liberty, their exercise of rights, their resistance to prejudice, and their ability to participate in their communities. This Article emphasizes the importance of trans people and their lives to constitutional doctrine.

Outside of the Abortion Context, 43 COLUM. J. GENDER & L. 67 (2022); Aaron Tang, *The Supreme Court Flunks Abortion History*, L.A. TIMES (May 5, 2022, at 03:00 PT), https://www.latimes.com/opinion/story/2022-05-05/abortion-draft-opinion-14th-amendment-american-history-quickening.

116. *See* Siegel, *supra* note 103, at 46–47, 52 (arguing that suffragists' arguments and writings should be part of constitutional analysis); Mayeri, *supra* note 91, at 196 (arguing that "the experiences and ideas of the excluded and disenfranchised, such as formerly enslaved and freedpeople" should inform judges' and legal scholars' understanding of the Fourteenth Amendment); Hendrik Hartog, *The Constitution of Aspiration and "The Rights that Belong to Us All*," 74 J. AM. HIST. 1013, 1014 (1987) (discussing the importance of the rights consciousness of marginalized people to constitutional interpretation).

117. *See* JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 8 (2024) (arguing "we should embrace an expansive conception of collective constitutional memory"); Siegel, *supra* note 103, at 31–32.

118. *See generally* Siegel, *supra* note 103 (women suffragists); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019) (prison abolitionists); PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES (1997) (enslaved families); Reva B. Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It*, 134 YALE L.J. 1068 (2025) (resistance to Comstockery). For a discussion of different legal scholars' uses of history to make reproductive justice constitutional arguments, see Serena Mayeri, *Reproductive Injustice, Feminist Resistance, and the Uses of History in Constitutional Interpretation*, 33 WM. & MARY BILL RTS. J. 519, 519–21 (2024).

In this Article, I focus on the period before the 1950s, and especially emphasize nineteenth-century trans legal history, for three main reasons. First, the originalist Supreme Court Justices tend to focus on nineteenth-century history, especially the year 1868, when the Fourteenth Amendment was ratified.[119] Second, trans legal historians have focused primarily on the second half of the twentieth century.[120] This Article is the first scholarly work to fully examine the legal history of gender transitions in the United States before the 1950s, and one of few works to consider nineteenth-century trans legal history at all.[121] Third, the 1950s marked a turning point in trans legal history. While trans people certainly faced

119. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 248 (2022) ("By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening.").

120. For examples of scholarship that focuses on post-1950s trans legal history, see generally Kate Redburn, *Before Equal Protection: The Fall of Cross-Dressing Bans and the Transgender Legal Movement, 1963–86*, 40 L. & HIST. REV. 679 (2022) (discussing cross-dressing regulation in municipalities and several states); 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) (examining the "legal, medical, and common-sense logics" of sex designations on birth certificates between 1965 and 2006 in New York City); Katrina Cordray Rose, Forgotten Paths: American Transgender Legal History, 1955–2009 (May 2018) (Ph.D. thesis, University of Iowa) (on file with Iowa Research Online) (analyzing transition-recognition legislation at the state level starting in 1955); Shay R. Olmstead, "Refuse to Run Away": Transsexual Workers Fight for Civil Rights, 1969–1992 (May 2024) (Ph.D. dissertation, University of Massachusetts Amherst) (on file with author) (discussing cases brought by transsexual workers against their employer from 1969 to 1995); Sonia K. Katyal & Ilona M. Turner, *Transparenthood*, 117 MICH. L. REV. 1593 (2019) (analyzing custody and visitation cases "involving a transgender or gender variant parent since the 1970s").

121. I have only been able to find a handful of articles and one book that discuss trans legal history before the 1960s. This scholarship tends to emphasize the importance of doctors or of criminal law and rarely focuses on how trans people used or conceptualized law. *See* CLARE SEARS, ARRESTING DRESS: CROSS-DRESSING, LAW, AND FASCINATION IN NINETEENTH-CENTURY SAN FRANCISCO 2 (2015); Maayan Sudai, '*A Woman and Now a Man*': *The Legitimation of Sex-Assignment Surgery in the United States (1849–1886)*, 52 SOC. STUD. SCI. 79, 79 (2022) [hereinafter Sudai, '*A Woman and Now a Man*']; Maayan Sudai, *The Medico-Legalization of Sex in the Nineteenth-Century United States*, 41 L. & HIST. REV. 1, 3 (2023) [hereinafter Sudai, *The Medico-Legalization of Sex*]; Maayan Sudai, *Sex Ambiguity in Early Modern Common Law (1629–1787)*, 47 L. & SOC. INQUIRY 478, 480 (2022) [hereinafter Sudai, *Sex Ambiguity*]; Saru Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 12 CARDOZO J.L. & GENDER 213, 240 (2005); Katrina C. Rose, *A History of Gender Variance in Pre-20th Century Anglo-American Law*, 14 TEX. J. WOMEN & L. 77, 92, 101, 104 (2004); James Casey Edwards, *Justifying the Margins: Granting Suspect Classification to Trans** Individuals in the U.S. Judicial System, 55 UIC L. REV. 403, 413–14, 417, 428 (2022). Ezra Young discusses the history of trans people's participation in constitutional law, but he does not focus on the history of transitioning. *See generally* Young, *supra* note 113. There are a couple of newspaper and popular articles that discuss specific trans people who changed their names or gender markers. *See, e.g.*, Vince Brooks, *The Mystic Chords of Memory: The Payne Family of Frederick County*, LIBR. VA.: THE UNCOMMONWEALTH (Oct. 28, 2015), https://uncommonwealth.virginiamemory.com/blog/2015/10/28/the-mystic-chords-of-memory [https://perma.cc/Q7EH-UD46]; Baer, *supra* note 49; Michael Waters, *Barbara Ann Richards Designed—and Then Demanded—the Life She Deserved*, SLATE (Mar. 20, 2022, at 19:00 ET), https://slate.com/human-interest/2022/03/barbara-ann-richards-trans-history-california [https://perma.cc/Y8EK-NKFB]. For recent histories of trans people in the nineteenth century, see generally MANION, *supra* note 44; SKIDMORE, *supra* note 2; C. RILEY SNORTON, BLACK ON BOTH SIDES: A RACIAL HISTORY OF TRANS IDENTITY (2017); Jesse Bayker, Before Transsexuality: Transgender Lives and Practices in Nineteenth-Century America (May 2019) (Ph.D. dissertation, Rutgers University) (on file with Rutgers University Community Repository).

discrimination and policing before World War II, most anti-trans laws were at the municipal level.[122] As Margot Canaday has pointed out, the federal government started policing queer and trans people more after World War I and even more aggressively after World War II.[123] This increase in federal anti-queer and anti-trans policing reflected multiple factors, including anxieties over the Cold War,[124] desires to enshrine heterosexuality after the upheaval of World War II,[125] and an increase in federal bureaucracy.[126] Before the 1950s, trans people primarily navigated local and county legal institutions, rather than state or federal ones. At the same time, many of the aspects of their transitions, such as name changes or the adoption of new clothes, look surprisingly similar to gender transitions in the twenty-first century.

This Article illustrates that gender transitions *are* deeply rooted in U.S. history and tradition. I argue that there was a recursive relationship between trans people's uses of law and their participation in society. Trans people relied upon the law to enable them to transition and engage in social and public life. At the same time, social and community support played an important role in their ability to transition. I use the history of gender transitions to support trans rights under the Equal Protection and Due Process Clauses. I demonstrate that the right to transition is not only "implicit in the concept of ordered liberty" but also essential to trans people's equal participation in society. My goal for this Article is to challenge inaccurate uses of history in anti-trans cases and to provide useful material for lawyers advancing pro-trans arguments.

In Part I of this Article, I analyze the tensions and contradictions in how lawyers, judges, and legal scholars have used appeals to history in recent trans-rights litigation, especially cases involving the right to gender transitions under the Fourteenth Amendment. I discuss specific claims made by both anti- and pro-trans practitioners and judges in trans rights cases. Anti-trans lawyers make false claims about history, but even pro-trans lawyers rarely emphasize the actual legal history of trans people. This Article will thus help thwart historical distortions by conservative judges and Justices, and, at the same time, serve as a litigation tool for pro-trans lawyers who rarely emphasize the legal history of trans people. I also illustrate tensions between uses of history in the Due Process and Equal Protection Clauses. In Part II, I argue that the right to gender transitions is deeply rooted in U.S. history and tradition. I explain the history of legal transition before

122. *See, e.g.*, MARGOT CANADAY, THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA 24 n.19 (2009). Many anti-trans laws were cross-dressing laws, which were primarily passed by cities rather than states. *See, e.g.*, Jesse Bayker, *Historical Cross-Dressing Laws Map*, RUTGERS, https://rutgers.maps.arcgis.com/apps/instant/sidebar/index.html?appid=0d662b6809e34eddb552c6fbebac9ca0 (last visited Oct. 31, 2025).

123. CANADAY, *supra* note 122, at 14, 57, 138.

124. *See* DAVID K. JOHNSON, THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT 3 (2004).

125. *See* CANADAY, *supra* note 122, at 14, 57, 138.

126. *See* STEPHEN VIDER, THE QUEERNESS OF HOME: GENDER, SEXUALITY, AND THE POLITICS OF DOMESTICITY AFTER WORLD WAR II, at 15 (2021).

the 1950s, describing how people altered their legal genders, obtained name changes, modified their bodies, changed their clothing, and adopted a new social and community role. I argue that trans people claimed that they had a *right* to transition, and that many legal commentators defended this right. I also highlight how trans people sought social and legal acknowledgement of their genders, exercised civil rights, and participated in their communities. In Part III, I discuss the implications of this history for contemporary trans rights cases, and I consider how trans rights activists and lawyers could use trans legal history. I argue for the importance of critical approaches to trans legal history. I demonstrate how this history illuminates that the right to transition *is* deeply rooted under the Due Process Clause. I also illustrate how the legal history of gender transitions can help reconcile the uses of history under Due Process and Equal Protection claims. I argue that trans people relied on their right to transition to enable them to participate in public and social life with dignity and respect.

I. USES OF HISTORY IN GENDER TRANSITION CASES

In this Part, I demonstrate the importance of history to the constitutional law of trans rights, especially the right to gender transitions. I argue that, whether or not they support trans rights, lawyers and judges have not grappled with the actual history of trans rights, trans discrimination, and transitioning. In order to uphold the constitutionality of anti-trans laws, judges have adopted different and sometimes contradictory approaches to history in Equal Protection and Due Process cases. However, their arguments share a common theme. They believe, erroneously, that no trans people existed prior to the mid-twentieth century. Anti-trans litigants and lawyers have also mobilized claims about history and tradition to persuade judges that the right to transition is not protected by the Constitution. In contrast, pro-trans litigants have made general claims about trans history and occasionally gestured towards a history of anti-trans discrimination, but they have rarely discussed the actual history of trans rights. Judges sometimes reference trans history to protect trans rights, but their uses of history tend to be vague and general, possibly due to a dearth of writing on trans legal history. Recent trans rights cases demonstrate both the importance of history, and the need for more accurate and thorough trans legal history.[127]

127. In researching this Part, I conducted an in-depth survey of uses of history in recent cases involving trans rights, focusing on cases involving the Fourteenth Amendment's "Due Process" and "Equal Protection" clause. Since this Article especially highlights the importance of *Dobbs*, I searched on Westlaw for all cases citing *Dobbs* that contained the key word "transgender." This resulted in twenty-eight relevant cases. I also found two additional cases by searching "gender identity." Second, I searched the ACLU and Lambda Legal websites for any additional cases involving trans rights issues. I also read through several briefs of trans rights cases on the ACLU website. I searched for any cases that were extensively cited by other cases, or that were cited in law review articles on transgender law. My goal is not to provide an exhaustive account of all the recent cases that have used history. Instead, I highlight patterns of how litigants, lawyers, and judges have invoked history to make claims about trans rights, especially the right to gender transition. In total, I examined over fifty cases.

A. USES OF HISTORY TO OPPOSE THE RIGHT TO GENDER TRANSITIONS

In this Section, I analyze uses of history that judges, lawyers, and legal scholars have leveraged to oppose trans rights. I demonstrate that they dismiss the histories of trans people, describing transitioning as new and threatening. They also claim that trans rights are *not* deeply rooted in U.S. history and tradition. At the same time, many judges claim that there is no history of anti-trans discrimination. While not all people who hold these beliefs about history would describe their beliefs or themselves as anti-trans, I choose to use that label to describe them all. By describing court decisions or legal arguments that oppose trans rights as anti-trans or as perpetuating trans discrimination, I make the legal argument that attacks on trans people's transitions *are* forms of anti-trans discrimination and *do* harm trans people's lives. Whether consciously or not, these judges and lawyers are (mis)using history to hurt trans people and limit their rights.

1. Uses of History for Due Process Claims

One of the most prevailing beliefs among anti-trans activists, lawyers, and judges is that trans people are a new threat to longstanding ideas about binary sex. In a concurrence in *State v. Loe*, a Supreme Court of Texas opinion holding that a ban on gender-affirming care for minors did not violate the Texas Constitution,[128] Judge Blacklock explained, "[T]he Traditional Vision . . . holds that a boy is a boy, a girl is a girl, and neither feelings and desires nor drugs and surgery can change this immutable genetic truth, which binds us all."[129] He argued, "Until very recently in human history, the Traditional Vision was the only vision."[130] Judges like Blacklock deny that concepts of transness or gender identity even existed until recent history.

Anti-trans litigants and judges claim not only that transness is a new idea but also that it is a dangerously growing ideology. The brief for the respondents in *United States v. Skrmetti* starts by complaining: "In recent years, the number of minors receiving gender-dysphoria diagnoses ha[s] exploded. States have also seen a corresponding surge in unproven and risky medical interventions for these underage patients."[131] Some judges have accepted these fears about an increase in trans people, especially trans children. In *Skrmetti*, the Supreme Court stated, "In recent years, the number of minors requesting sex transition treatments has increased."[132] Opponents of trans rights fixate on this idea of transness as an alarming new trend and present doctors and trans activists as duping innocent children.[133]

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128. 692 S.W.3d 215, 231 (Tex. 2024). This case focused on whether the gender-affirming care ban violated the Texas State Constitution's Due Course of Law Clause. *Id.* at 227 (citing TEX. CONST. art. I, § 19). However, the Court uses reasoning very similar to federal constitutional law analysis, and it cites federal constitutional cases pertaining to trans medical care. *Id.* at 229, 231.

129. *Id.* at 239 (Blacklock, J., concurring).

130. *Id.* at 240 (Blacklock, J., concurring).

131. Respondents' Brief in Opposition at i, L.W. *ex rel.* Williams v. Skrmetti, 605 U.S. 495 (2024) (Nos. 23-466, 23-477).

132. *Skrmetti*, 605 U.S. at 504 (2025).

133. Michael S. Broder, *Anti-LGBTQ Laws Claiming to Protect Children Actually Harm Them, University Experts Say*, S.F. STATE U. (June 12, 2023), https://news.sfsu.edu/news/anti-lgbtq-laws-claiming-protect-children-actually-harm-them-university-experts-say [https://perma.cc/A3SC-3J3W]

In anti-trans decisions, judges have suggested that substantive due process requires not only those rights be "deeply rooted in our nation's history and tradition," but that the technologies used to fulfill those rights be likewise rooted. In doing so, they either ignore trans history or they refuse to see that history as relevant to the case. In right to transition cases, judges and litigants strategically vary the "level of generality" of the right, allowing them to argue that the right is not part of U.S. "history and tradition."[134] In cases involving access to gender-affirming medical care, anti-trans litigants frame the right as either a right to specific medical treatment or a right of parents to provide children with specific treatments. In their brief in *L.W. ex rel. Williams v. Skrmetti*, the defendants-appellants pejoratively framed the relevant right as a right of parents "to subject their children to such risky treatments."[135] Many judges have adopted such strategic framings in their decisions. In *Eknes-Tucker v. Governor of Alabama*, the Eleventh Circuit agreed that there was a general right for parents to have "care, custody, and control of [one's] children,"[136] but they concluded that the right did not encompass "the right to give one's children puberty blockers and cross-sex hormone treatment."[137] In *L.W. ex rel. Williams*, the Sixth Circuit reframed the right for children to access gender-affirming care as a "right to specific treatments."[138] These courts reduced trans people's rights to a demand for a specific pill or surgery, rather than a general right to gender transitions or bodily autonomy. By narrowing the relative right, judges ignore the connections between medical gender transitions and trans people's liberty and equality.[139]

Once the right is narrowly defined as a right to specific medical care, it is easy for judges to argue that the relevant right is new and thus not deeply rooted in history. In *State v. Loe*, the Texas Supreme Court described gender-affirming care for minors as "novel treatments for a novel condition."[140] The court framed not only hormone replacement therapy and puberty blockers but the whole idea of gender dysphoria, as "novel." In *L.W. ex rel. Williams*, the Sixth Circuit's opinion

("[P]oliticians and pundits are employing the same strategies to target LGBTQ rights that they've used for decades: inciting 'moral panics' and framing the issue as one of protecting children.").

134. *See* Poe v. Drummond, 697 F. Supp. 3d 1238, 1255 (N.D. Okla. 2023) (explaining that "an asserted implied right must be narrowly and precisely expressed"); Reva B. Siegel, *The Levels-of-Generality Game: "History and Tradition" in the Roberts Court*, 47 HARV. J.L. & PUB. POL'Y 563, 566 (2024) ("Changing the level of generality at which judges characterize the past can be outcome-determinative . . . ."); *see also* Callagy, *supra* note 61, at 612 ("The success of the due process claims hinges on how broadly or narrowly courts are willing to define the fundamental right . . . .").

135. Brief of Defendants-Appellants at 23, L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023) (No. 23-5600).

136. 80 F.4th 1205, 1221 (11th Cir. 2023) (alteration in original) (quoting Troxel v. Granville, 530 U.S. 57, 66 (2000)).

137. *Id.*

138. *Williams*, 83 F.4th at 476. I focus on the Sixth Circuit decision as the Supreme Court did not grant certiorari on the Due Process Claim because the United State's brief only raised the Equal Protection claim. *See* Petition for a Writ of Certiorari at I, United States v. Skrmetti, 605 U.S. 495 (2025) (No. 23-477).

139. *See infra* Section II.C (discussing the connection between medical transitions and trans people's liberty and ability to participate in public life).

140. 692 S.W.3d 215, 232 (Tex. 2024).

started with a history of hormones and gender-affirming surgery since the 1960s.[141] The court highlighted that "gender-affirming care was not available for minors until just before the millennium."[142] Even when judges gesture towards a broader trans history, they argue that the right to gender-affirming care itself is not deeply rooted. In *Eknes-Tucker*, the Eleventh Circuit acknowledged that "there are records of transgender or otherwise gender nonconforming individuals from various points in history."[143] However, the court dismissed the relevance of this history because puberty blockers and hormones were not invented until "well into the twentieth century."[144] Although the courts could conclude that medicine has simply advanced in the last twenty years, they instead see these medicines as untested and dangerous.[145] They also disregard the broader history of trans people accessing gender-affirming care.[146]

In cases involving trans people's right to identity documentation, judges have similarly framed the right as new and not deeply rooted. In a recent decision on gender marker changes in birth certificates, the Sixth Circuit held, "The right to a birth certificate conforming to one's gender identity is not 'deeply rooted' in our history and 'implicit in the concept of ordered liberty.'"[147] The court reasoned, "[I]t is only recently that the States have modified their laws to permit sex designations to conform to gender identity."[148] Rather than framing the right as informational privacy[149] or the right to define one's gender identity,[150] the Sixth Circuit framed it specifically as a right to a specific kind of birth certificate.[151] Birth certificates were not common until the 1930s for anyone.[152] By framing the relevant right so narrowly, courts make it almost impossible to defend trans rights.[153] If the question is simply what kinds of documentation or medical technology existed in the 1860s, the Due Process Clause would cover very few rights. As the District Court of Idaho pointed out in *Poe ex rel. Poe v. Labrador*, such

141. *Williams*, 83 F.4th at 466–68.

142. *Id.* at 467.

143. Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1220 (11th Cir. 2023).

144. *Id.* at 1221.

145. *See, e.g.*, *id.* at 1218.

146. *See infra* Section II.C.

147. Gore v. Lee, 107 F.4th 548, 562 (6th Cir. 2024).

148. *Id.*

149. *See* Arroyo Gonzalez v. Rossello Nevares, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (holding that bans on changing gender on birth certificates violated the right to "informational privacy").

150. *See* Karnoski v. Trump, No. C17-1297, 2017 WL 6311305, at *8 (W.D. Wash. Dec. 11, 2017) (holding that the Due Process Clause protected such a right); Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984) (explaining that due process "safeguards the ability independently to define one's identity that is central to any concept of liberty"); Greenberg & Herald, *supra* note 94, at 881. Many legal scholars have also argued for a right to "gender autonomy." *See* Weiss, *supra* note 94, at 2; Scott, *supra* note 67, at 737.

151. *Gore*, 107 F.4th at 562.

152. *See* SUSAN J. PEARSON, THE BIRTH CERTIFICATE: AN AMERICAN HISTORY 5 (2021). While the Sixth Circuit acknowledged the recent history of birth certificates, they use that historical fact to bolster their argument that a right to changing gender on one's birth certificate is not protected by the Due Process Clause. *See Gore*, 107 F.4th at 562.

153. *See* Poe *ex rel.* Poe v. Labrador, 709 F. Supp. 3d 1169, 1198 (D. Idaho 2023) (criticizing courts for framing the right to gender-affirming care as "the right to seek a specific medical treatment").

reasoning would suggest that the Fourteenth Amendment does not protect the right to any modern medicine, from insulin to vaccines.[154] These court decisions focus on the mechanism being used—such as puberty blockers or changes in birth certificates—rather than the right to gender transition.

2. Uses of History for Equal Protection Claims

Judges also misunderstand and misuse trans history in Equal Protection cases, reasoning that there is no history of anti-trans discrimination in the United States. In *Skrmetti*, several of the Justices claimed in their concurrences that there is no history of de jure anti-trans discrimination in the United States. In his concurrence, Justice Samuel Alito reasoned that "the plaintiffs and their many *amici* have not been able to show a history of widespread and conspicuous discrimination [against trans people] that is similar to that experienced by racial minorities or women."[155] Justice Barrett held that, for a group to be considered a quasi-suspect class, the historical discrimination they experience must have been de jure, not just de facto.[156] She explained that the litigants only pointed to a history of de facto anti-trans discrimination, rather than de jure. These concurrences suggest not only an ignorance of trans history but a potential conflict between the Equal Protection Clause and the Due Process Clause.

3. Conflict Between the Equal Protection and Due Process Clauses

In *Dobbs*, the Supreme Court denied people rights due to the *presence* of sexist and racist anti-abortion laws from the 1860s.[157] In *Skrmetti*, the concurrences threaten to deny people rights due to a *lack* of anti-trans laws in the 1860s. *Skrmetti* illustrates how judges can rely upon inaccurate trans history to deny trans people rights and dismiss histories of transphobia.

Although judges have traditionally used history as a "negative precedent" in Equal Protection cases,[158] some litigants and judges have gestured to history as a potential *positive* precedent in trans-rights Equal Protection cases.[159] In *Dobbs*, the Supreme Court briefly rejected sex-equality-based defenses of abortion,[160] explaining that regulations of procedures that "only one sex can undergo" do not

154. *Id.*

155. United States v. Skrmetti, 605 U.S. 495, 575 (2025) (Alito, J., concurring).

156. *Id.* at 557 (Barrett, J., concurring).

157. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 251 (2022); *see also* Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 HOU. L. REV. 901, 906 (2023) (criticizing the Supreme Court for ignoring how abortion laws were shaped by sexism and racism); Khiara M. Bridges, *Foreward: Race in the Roberts Court*, 136 HARV. L. REV. 23, 35–37 (2022) (pointing out the sexism and racism behind abortion laws, and criticizing the Supreme Court for ignoring that people who could get pregnant did not enjoy full citizenship in the 1860s).

158. *See* Siegel, *supra* note 103, at 54–55; Widiss, *supra* note 103, at 252.

159. *See* Katie Eyer, *Transgender Equality: An Inflection Point for Equal Protection?*, 93 U. CIN. L. REV. 948, 960 (2025). Drawing on the past as positive precedent involves using the past "as a source of revered authority that can guide us in debating who we are and what we are to do, and so give voice to our identity, our ideals, and our future." Siegel, *supra* note 103, at 57.

160. *Dobbs*, 597 U.S. at 236.

implicate the Equal Protection Clause so long as they are not motivated by "invidious discrimination."[161] In *Skrmetti*, the state-defendants extended that argument to trans people, arguing that bans on gender-affirming care are just about recognizing biology. They invoked history, reasoning that "[t]he recognition of biological sex is not sex stereotyping, at least by the standards of 1868."[162] The defendants invited the judges to use history as a *positive* precedent, suggesting that judges *adopt* the views of gender from the 1860s for an Equal Protection claim.[163] This is contrary to typical Equal Protection reasoning, where judges attempt to correct and rectify the negative views of the past instead of following them.[164] Although the Supreme Court did not adopt this historical reasoning in *Skrmetti*,[165] some judges have accepted arguments that differentiation based upon physical and biological sex has a long and uncontested history in the United States.[166] In *Hecox v. Little*, the appellants also invoked the original meaning of equal protection: "What matters is what the public in 1868 would have understood by equal protection of the laws."[167] Like the defendants in *Skrmetti*, the appellants claimed that this public would not have understood equal protection to refer to gender identity or to protect trans rights. While the Ninth Circuit rejected the appellants' argument,[168] it is unclear whether the Supreme Court will be more receptive to this use of originalism in Equal Protection jurisprudence.[169] These judges and litigants simplified the long history of disputes over how to define and determine sex, presenting bodies as the historic signifier of gender. They also described transphobia as merely a recognition of "neutral biological differences between men and women"[170] rather than a form of bigotry.[171] Instead of seeing

161. *Id.* (citing Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974)). Reva Siegel, Serena Mayeri, and Melissa Murray point out that abortion restrictions *are* connected to histories of sexism, as well as racism and classism. Siegel, Mayeri & Murray, *supra* note 115, at 91–93; *see also* Bridges, *supra* note 157, at 50 (presenting a similar argument).

162. Brief of Defendants-Appellants, *supra* note 135, at 20; *see also* Brief of the State Defendants-Appellants at 2, Corbitt v. Sec'y of the Ala. L. Enf't Agency, 115 F.4th 1335 (11th Cir. 2024) (No. 21-10486) (arguing that Alabama has always defined sex based upon genitals).

163. *See* Brief of Defendants-Appellants, *supra* note 135, at 20; *see also* Siegel, *supra* note 103, at 54, 57 (defining the use of positive precedent).

164. *See* Siegel, *supra* note 103, at 54–55; Widiss, *supra* note 103, at 252.

165. The Supreme Court *did* say that bans on gender-affirming care were not sex discrimination, but they relied on *Geduldig*, not 1860s history, as precedent. United States v. Skrmetti, 605 U.S. 495, 518 (2025).

166. *See, e.g.*, State v. Loe, 692 S.W.3d 215, 239–40 (Tex. 2024) (Blacklock, J., concurring) (arguing that "until very recently," no one would have contested "the immutable genetic truth" that "a boy is a boy, a girl is a girl").

167. Intervenors-Appellants' Petition for Rehearing En Banc at 15, Hecox v. Little, 104 F.4th 1061 (9th. Cir. 2024) (Nos. 20-35813, 20-35815).

168. *Hecox*, 104 F.4th at 1076 n.9.

169. *But see* Eyer, *supra* note 159, at 960.

170. Shannon Price Minter, *"Déjà Vu All over Again": The Recourse to Biology by Opponents of Transgender Equality*, 95 N.C. L. REV. 1161, 1164 (2017); *see Hecox*, 104 F.4th at 1078 ("The Act's specific classification of 'biological sex' has . . . been carefully drawn to target transgender women and girls.").

171. *See Transphobia*, TRANSACTUAL, https://transactual.org.uk/transphobia/[https://perma.cc/N8AW-MPZJ] (last visited Oct. 28, 2025) (describing one manifestation of transphobia as "[u]sing biological essentialism to try and delegitimize trans people").

equal protection as an antidote to historic discrimination, they suggest that the Equal Protection Clause should enshrine historical ideas of sex.

In their anti-trans rulings, judges often criticize plaintiffs or pro-trans judges for not addressing questions of history and tradition. In *Eknes-Tucker*, the Eleventh Circuit noted,

> [T]he district court's order does not feature any discussion of the history of the use of puberty blockers or cross-sex hormone treatment or otherwise explain how that history informs the meaning of the Fourteenth Amendment at the time it was ratified—July 9, 1868.[172]

In both *Poe v. Drummond* and *L.W. ex rel. Williams v. Skrmetti*, two cases dealing with minors' right to gender-affirming care, the judges similarly criticize plaintiffs for not arguing "that the original fixed meaning of the due process or equal protection guarantees covers these claims."[173] Trans law scholar Katie Eyer points out that this criticism is strange because judges usually do not use originalism for deciding Equal Protection cases.[174] The courts' reasoning suggests that history might become important in Equal Protection cases more broadly, likely in ways that are harmful for not only trans people but other marginalized people.[175] Although pro-trans activists and litigants have shied away from discussing history, judges have repeatedly expressed a desire for litigants to explain and defend this history in trans rights cases.

The idea that trans rights are not deeply rooted in the nation's history and tradition forms a kind of common sense, an idea about U.S. history that seems so obvious that it requires no support.[176] Neither judges nor litigants provide much support for their conclusions about the recency of trans history. Instead, they accept it as simply a given that trans people did not exist in the past and that trans rights are thus not protected by the Due Process Clause or the Equal Protection Clause. In the next Section, I examine how pro-trans judges and lawyers have countered some of these historical claims, while also adopting some of the same false beliefs about trans history.

B. USES OF HISTORY TO SUPPORT THE RIGHT TO GENDER TRANSITIONS

Despite the importance of history to constitutional arguments, pro-trans litigants and lawyers have not mounted a thorough historical defense of trans rights.

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172. Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1221 (11th Cir. 2023).

173. L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 471 (6th Cir. 2023). The language is almost identical in *Poe*. Poe v. Drummond, 697 F. Supp. 3d 1238, 1248 (N.D. Okla. 2023) ("That is, Plaintiffs do not argue that the original fixed meaning of either the due process guarantee or the equal protection guarantee covers their claims.").

174. Eyer, *supra* note 159, at 960.

175. *See id.* at 961. The Supreme Court did not adopt an originalist approach to Equal Protection in *United States v. Skrmetti*, but it is possible they could in future cases. *See id.*

176. Reva Siegel argues that legal scholars, judges, and the general public create a kind of "constitutional memory" of what the past was and what the past means for constitutional analysis. *See* Siegel, *supra* note 103, at 46–47.

They often reference only recent trans history or deflect from the question of history. A few judges have acknowledged the history of both transphobia and trans people in the United States. While several trans historians have discussed the histories of trans lives before the 1950s,[177] these histories are often missing from legal arguments. Pro-trans activists, lawyers, and legal scholars have yet to articulate fully an affirmative history of trans rights.

While pro-trans lawyers and scholars sometimes acknowledge trans history, their references are often vague or inconclusive. For example, the historians' brief in *United States v. Skrmetti* briefly discussed that the "desire to transition from one sex to another" has a long history,[178] and it provided examples across different times and places.[179] However, the brief provided no discussion of the *legal* history of medical gender transitions before the early twentieth century. An entire section of the brief focused on post-1950s trans history.[180] At oral argument in *Skrmetti*, the lawyers also only provided vague answers to questions about anti-trans sex discrimination. Then-Solicitor General Prelogar, on the pro-trans side, agreed with Justice Barrett that there was no history of de jure anti-trans discrimination.[181] ACLU lawyer Chase Strangio tried to correct the narrative by providing examples of cross-dressing bans and laws regarding military service.[182] Nonetheless, the lawyers seemed ill-prepared to address the argument that trans people had a history of de jure anti-trans discrimination and thus should be considered a quasi-suspect class.[183] Strangio and then-Solicitor General Prelogar might have struggled to find many historical accounts of nineteenth-century trans legal history, as there are not that many in existence. The legal argumentation in *Skrmetti* illustrates the need for significant and well-researched nineteenth-century trans legal history, history that can be used by lawyers to make pro-trans arguments.[184]

Pro-trans litigants often deflect the question of trans history, instead shifting the debate to other fundamental rights. Advocates have invoked several fundamental rights in trans rights cases, from privacy[185] to the right to refuse unwanted

177. *See generally* GILL-PETERSON, *supra* note 44; SKIDMORE, *supra* note 2; MANION, *supra* note 44; SEARS, *supra* note 121; Bayker, *supra* note 121.

178. Brief of *Amici Curiae* American Historical Association et al. in Support of Petitioner and Respondents in Support of Petitioner at 7, United States v. Skrmetti, 605 U.S. 495 (2025) (No. 23-477).

179. *Id.* at 5–7.

180. *See, e.g.*, *id.* at 12–16.

181. Transcript of Oral Argument at 59–60, United States v. Skrmetti, 605 U.S. 495 (2025) (No. 23-477).

182. *Id.* at 110.

183. *See supra* Section I.A.2 and notes 177–178 and accompanying text for a discussion of the importance of de jure discrimination to Equal Protection.

184. My point is not to criticize the lawyers or historians who fought for trans rights in these cases. Instead, I am intending to illustrate trends within trans argumentation, and to illustrate the problems of the lack of trans legal history.

185. *See, e.g.*, Brief of Plaintiffs-Appellees at 40–41, Corbitt v. Sec'y of the Ala. L. Enf't Agency, 115 F.4th 1335 (11th Cir. 2024) (No. 21-10486). The court ultimately rejected this argument. *Corbitt*, 115 F.4th at 1350.

medical treatment.[186] However, in cases involving access to medical gender-affirming care, they have tended to focus on the right of parents to make decisions about their children's medical care. For example, in *L.W. ex rel. Williams v. Skrmetti*, the plaintiffs argued that these bans infringed parents' fundamental right to "make decisions concerning the medical care of their children."[187] While there may be strategic reasons to invoke such parental autonomy claims, this framing distances the case from a broader discussion of trans people's right to transition. In a memorandum for *Moe v. Yost*,[188] a case challenging Ohio's ban on gender-affirming care for minors, the defendants claimed that gender transitioning was not deeply rooted because "young children transitioning from one to another gender is a recent phenomenon."[189] The plaintiffs replied, "The issue is not whether any particular medical intervention is deeply rooted in the nation's history and tradition, but rather whether parents have the right to make decisions concerning the care of their children . . . ."[190] The plaintiffs moved the question away from trans history and instead argued the question was about the history of parental rights. In making this move, the plaintiffs left unchallenged the defendants' claim that minors' transitions are a "recent phenomenon." Rather than arguing that gender transitions themselves are deeply rooted in U.S. history, plaintiffs have focused on other rights, such as the right to medical care.

Occasionally, judges have acknowledged a broader history of trans people and trans rights. In her dissent in *Gore v. Lee*, Judge Helene N. White challenged the majority's perspective of history, explaining, "[B]eing transgender is not new, nor are attempts to induce gender conformity through law or otherwise."[191] The Ninth Circuit agreed in *Hecox v. Little*, a case involving trans women's participation in sports, stating, "Moreover, there is evidence that transgender people have existed since ancient times."[192] Rather than arguing that the Framers of the Fourteenth Amendment would not have understood trans people, the Ninth Circuit retorted, "[T]he ratifiers of the Fourteenth Amendment would certainly not have understood the Act's definition of 'biological sex'" since that definition relied upon modern concepts like "endogenously produced testosterone levels."[193] The Ninth Circuit elevates the level of generality by presenting definitions of biological sex, rather than trans people, as a recent invention. These two opinions suggest that judges *can* use history to support trans rights and refute

186. Complaint for Declaratory Judgment and Injunctive Relief at 39, Love v. Johnson, 146 F. Supp. 3d 848 (E.D. Mich. 2015) (No. 15-11834).

187. Brief of Plaintiffs-Appellees at 49–50, L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023) (No. 23-5600) (quoting Kanuszewski v. Mich. Dep't of Health & Hum. Servs., 927 F.3d 396, 418 (6th Cir. 2019)).

188. Moe v. Yost, No. 24CVH03-2481, 2024 WL 1657858 (Ohio C.P. Franklin Cnty. Apr. 16, 2024).

189. Memorandum Contra Plaintiffs' Motion for Temporary Restraining Order at 26, *Moe*, 2024 WL 1659004 (No. 24CVH03-2481).

190. Reply in Support of Plaintiffs' Motion for Temporary Restraining Order at 12, *Moe*, 2024 WL 1659004 (No. 24CVH03-2481).

191. Gore v. Lee, 107 F.4th 548, 585 (6th Cir. 2024) (White, J., dissenting).

192. Hecox v. Little, 104 F.4th 1061, 1076 n.9 (9th Cir. 2023).

193. *Id.*

inaccurate ideas of gender. Although the Ninth Circuit seemed satisfied with rather vague references to trans history in "ancient times,"[194] a more specific history of gender transitions in the United States could strengthen these arguments.

In addition to acknowledging the history of trans people, some judges mobilized histories of discrimination to protect trans rights under Equal Protection, rather than to deny trans people their rights. In *Skrmetti*, Justice Sotomayor discussed the history of de jure anti-trans discrimination, including the history of cross-dressing laws.[195] In *Board of Education of the Highland Local School District v. U.S. Department of Education*, a case contesting a discriminatory bathroom policy, the Southern District of Ohio reasoned, "[T]here is not much doubt that transgender people have historically been subject to discrimination including in education, employment, housing, and access to healthcare."[196] Several courts have referenced this history of discrimination to conclude that trans people constitute a quasi-suspect class.[197] In *Hecox v. Little*, the Ninth Circuit rejected appellants' argument that "because transgender people were marginalized in 1868, they should be afforded no constitutional protections on the basis of their transgender status."[198] Rather than ignoring the histories of anti-trans discrimination or viewing 1868 views of gender as dispositive, these judges cite history to protect trans rights in the present.

As judges turn increasingly to history and tradition, pro-trans activists and lawyers must be able to cite history to demonstrate that trans rights are protected by Due Process and Equal Protection. Although judges and lawyers have occasionally referenced trans history to make pro-trans arguments, the lack of trans legal historical scholarship makes their task difficult. This Article contributes to both trans scholarship and trans rights advocacy by advancing a legal history of gender transitions in the nineteenth century. In Part II, I argue that transitioning *is* deeply rooted in U.S. history and tradition, and I describe how trans people transitioned before the 1950s.

II. THE HISTORY AND TRADITION OF GENDER TRANSITIONS IN THE U.S. BEFORE THE 1950S

In this Part, I examine how trans people transitioned in five main ways in the 1800s and early 1900s: sex changes, name changes, bodily changes, clothing changes, and changes in their social and familial roles. Many trans people turned to legal institutions for support for their gender transitions, arguing that they had

194. *Id.*

195. United States v. Skrmetti, 605 U.S. 495, 601–02 (2025) (Sotomayor, J., dissenting).

196. 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016). Other courts have similarly explained that trans people have faced a long history of discrimination. *See* Flack v. Wis. Dep't of Health Servs., 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018); Ray v. McCloud, 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020); Adkins v. City of New York, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015).

197. *See* cases cited *supra* note 196.

198. *Hecox*, 104 F.4th at 1076 n.9. *Hecox* was an Equal Protection and not a Due Process case. However, a similar retort could be used to protect trans rights under Due Process. Why should trans people, or any group, be discriminated against in the present because they were in the past?

a right to make choices about their bodies and genders. Their gender transitions were not just about their identity. They also shaped the way trans people interacted with legal systems, participated in public life, and exercised their civil rights. In the 1800s through the 1950s, judges granted trans people court-ordered gender marker changes, state legislatures allowed trans people to change their names, and parents recognized their children's new genders. I argue that the right to gender transitions *is* deeply rooted in U.S. history and tradition.

What does it mean for a right to be deeply rooted? Since the Supreme Court has provided inconsistent definitions of "deeply rooted,"[199] I provide three main explanations for what the term means. First, one way of approaching the "deeply rooted" question is to ask: *were* people able to transition in the 1800s? Were there laws banning transitions, and were these laws enforced? The Supreme Court asked a similar question in *Lawrence v. Texas*, where the Court asked whether sodomy laws were enforced.[200] As the dissent pointed out, *Lawrence v. Texas* did not rely upon the *Glucksberg* test.[201] However, I argue that one way of conceptualizing a right is to ask whether people were allowed to exercise that right and whether legal authorities permitted them to do so. Trans people *did* exercise a right to transition, and courts and other legal authorities often acknowledged their transitions. In the 1800s, many aspects of gender transition were not explicitly prohibited by any statute or judicial decision.[202] State laws targeting medical gender-affirming care are of very recent invention, with the first such law passed only in 2021 in Arkansas.[203] As a result, many trans people *did* transition, often without an appellate judge or legislator explicitly saying whether they could. The mechanisms for their transition were sometimes different than they are today, but the goals were often the same. For example, trans men may have shaved to induce a beard, rather than using testosterone.[204] In other instances, they relied upon surprisingly familiar strategies for transitioning: court-ordered name or gender marker changes,[205] announcements

199. Crocker, *supra* note 92, at 268.

200. 539 U.S. 558, 569 (2003); *see also* Aaron Tang, *Lessons from* Lawrence*: How "History" Gave Us* Dobbs*—And How History Can Help Overrule It*, 133 YALE L.J.F. 65, 67 (2023) (discussing how both sodomy bans and abortion bans were rarely enforced and the possible implications for the Due Process Clause). Aaron Tang argues that a similar reasoning could have been used in *Dobbs*: people were able to access abortions, and abortion bans were inconsistently enforced. *Id.* at 85–87.

201. *Lawrence*, 539 U.S. at 593–94 (Scalia, J., dissenting).

202. *See infra* Section II.B (discussing common law name changes); Section II.C (discussing the lack of laws banning gender-affirming medical care). One exception is cross-dressing, which was criminalized. *See* Bayker, *supra* note 121, at 64; Bayker, *supra* note 122; SEARS, *supra* note 121, at 3.

203. *See* Melanie Paulick, *Arkansas Becomes First State to Pass Law Banning Transgender Youth from Receiving Gender-Affirming Treatment*, JURIST NEWS (Apr. 7, 2021, at 12:29 ET), https://www.jurist.org/news/2021/04/arkansas-becomes-first-state-to-pass-law-banning-transgender-youth-from-receiving-gender-affirming-treatment/# [https://perma.cc/3W29-FBKG].

204. *See* Bayker, *supra* note 121, at 160. Testosterone is much more effective than shaving at inducing beard growth, but the intended result is still similar.

205. *See Sex Changed by a Court's Decree*, *supra* note 49, at 5B. In 2025, name and gender marker changes usually happen through courts. *See Identity Document Guidance for Transgender, Nonbinary,*

in newspapers,[206] or chest binding.[207] Trans people's gender transitions required negotiations with lower-level officials: the chancery court judge who granted a trans person a name change,[208] the immigration officials who helped a trans woman get a passport,[209] the local judge who refused to prosecute a person for cross-dressing,[210] or the priest who agreed to officiate a trans man's wedding.[211] Legal historians generally agree that local law was particularly important in the 1800s, especially before the Civil War.[212] While legal authorities did not always respect or approve of trans people's transitions, a surprisingly large number of them did. I demonstrate that it is state bans on gender-affirming care, rather than the right to gender-affirming care, that are new.

Second, I argue that transitions were an essential part of "ordered liberty,"[213] as they allowed people to exercise their civil rights, protect themselves from discrimination, and participate in their communities and public life. Trans people used law both for everyday activities and for important life events: to convey property, marry, execute a mortgage in an opera house, or act as a complainant against a fraudulent car salesman.[214] When trans people sold property or obtained a mortgage, they did more than just buy and sell goods. They exercised their civil rights, demonstrating that they had rights that both legal authorities and their neighbors should and could protect.[215] Legal historian Dylan C. Penningroth

Gender-Nonconforming, and Intersex People, LAMBDA LEGAL, https://lambdalegal.org/tgnc-checklist-under-trump/ [https://perma.cc/CY39-Z4A7] (last visited Oct. 24, 2025).

206. *See* WENDY L. ROUSE, PUBLIC FACES, SECRET LIVES: A QUEER HISTORY OF THE WOMEN'S SUFFRAGE MOVEMENT 75 (2022) (describing a trans man who published his name change in a newspaper). Many states still require trans people to publish their intended name changes in newspapers. *See Identity Document Laws and Policies*, *supra* note 71 (select "Name Change").

207. *See, e.g.*, *Woman Who Posed as a Man Tells Her Story at Hospital; Case Interesting Physicians*, CINCINNATI ENQUIRER, Jan. 10, 1916, at 12 (on file with ProQuest, Historical Newspapers: *The Cincinnati Enquirer* (1872–1922), https://www.proquest.com/newspapers/woman-who-posed-as-man-tells-her-story-at/docview/869197659/se-2) (describing a trans man who wore a device to flatten his chest).

208. *See* Petition of Lawrence Register Payne, *Ex parte* Lydia Rebecca Payne, No. 1884-012 (Va. Ch. Frederick Cnty. 1884), Dkt. No. 568.5 (on file with Libr. of Va., Chancery Records Index, https://www.lva.virginia.gov/chancery/case_detail.asp?CFN=069-1884-012).

209. *See generally* Louise Lawrence, Autobiography, 1948–1957 (on file with Ind. Univ., Louise Lawrence Collection, Box 1, Series JA, Folder 2).

210. *See* KERRY SEGRAVE, "MASQUERADING IN MALE ATTIRE": WOMEN PASSING AS MEN IN AMERICA, 1844–1920, at 32 (2018).

211. *See Deer Creek Elopement*, *supra* note 1, at 4; Broadaway, *supra* note 1.

212. *See* LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH 57–58, 61 (2009) (discussing the importance of local law and courts in the antebellum period); Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271, 278 (2004) (discussing prevalence of local and state legislation in Kentucky and Pennsylvania before the Civil War); Penningroth, *supra* note 109, at 881–82 (2021) (describing the significance of county courts to nineteenth century civil rights). Margot Canaday argues that there was little federal policing of queerness before World War I. CANADAY, *supra* note 122, at 24 n.19.

213. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 298 (2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). The concept of "implicit in the concept of ordered liberty" originates before *Glucksberg* to *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

214. *See infra* Section II.B.

215. *See* Penningroth, *supra* note 109, at 872 (describing civil rights as "certain rights that a court could protect" including "matters of contract, property, and standing"); *see also* PENNINGROTH, *supra* note 109, at xxii ("I mean that when white people did recognize Black people's property or contracts, it

explains that, in the mid-nineteenth century, civil rights meant "the rights of property, contract, and the right to sue and testify in a court—to 'go to Law.'"[216] These rights shaped the ways in which private individuals interacted with each other and made agreements.[217] White trans men also obtained access to gendered and racialized rights, such as voting.[218] Some trans people also relied upon legal actions, such as a court-ordered sex change or a marriage, to signify their new gender presentation and identity to their community.[219] Trans people's gender transitions allowed them not just to exercise civil rights but to participate in their community and engage in public life.[220] Historians of sexuality have often assumed that trans people relied upon anonymity or secrecy for their transitions, like moving to a new town where no one knew them or their assigned gender at birth.[221] However, many trans people stayed in the same communities before and after their transition, maintained relationships with their birth families, and even convinced legal authorities that their gender had changed.[222] Trans people's participation in their communities was inherently *legal*, as they exercised their civil rights and engaged in civic life. Gender transitions were an important part of liberty since these transitions assisted trans people in enjoying other rights and privileges.

Third, I demonstrate that trans Americans articulated a liberty-based right to transition, made choices about their genders, and participated within public and family life as their chosen gender.[223] I also explain that many non-trans people, including many judges and lawyers, defended trans people's right to transition. While they did not necessarily describe the right as "transitioning," they supported people's rights to dress how they chose or live with whom they wanted. Some commentators linked gender nonconformity to women's equality, arguing that it was a "women's rights" issue for people to be allowed to dress how they chose.[224]

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was not out of a sense of fairness or paternalist obligation . . . . White people recognized Black rights because life's ordinary business could not go on . . . .").

216. *See* Penningroth, *supra* note 109, at 872.

217. *See id*.

218. See *infra* Section II.E for discussion of gendered and racialized rights.

219. *See, e.g.*, *supra* notes 1–45 and accompanying text.

220. *Cf.* KATE MASUR, AN EXAMPLE FOR ALL THE LAND: EMANCIPATION AND THE STRUGGLE OVER EQUALITY IN WASHINGTON, D.C. 5 (2010) (discussing impact of belonging to certain social groups on ability to enjoy rights and participate in one's community); PENNINGROTH, *supra* note 109, at xxii (discussing importance of associational privilege and civil rights to lives of Black Americans before the 1950s); BARBARA YOUNG WELKE, LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES 6 (2010) (discussing the importance of community belonging). Both Masur and Penningroth point out that the privileges they discuss were not themselves rights nor were they actually protected by a court. MASUR, *supra*, at 7; PENNINGROTH, *supra* note 109, at xv. However, these privileges were essential to a person's ability to participate in public life, and they were often deemed more important than rights. MASUR, *supra*, at 5; PENNINGROTH, *supra* note 109, at xxii.

221. *See* Bayker, *supra* note 121, at 20; SKIDMORE, *supra* note 2, at 142–43; MANION, *supra* note 44, at 21, 258.

222. *See infra* Section II.E.

223. *Cf.* Penningroth, *supra* note 109, at 876 (explaining that Black Americans still actively participated in the legal process and went to the courthouse in the 1800s even though they were denied full citizenship or political rights).

224. *See infra* Section II.D.

Trans people's ability to exercise their right to transition was highly contingent upon both their racial and class privilege and their ability to get support from family members and authority figures. Nonetheless, trans legal history suggests that trans people were not only conceivable in the mid-1800s but that many Americans saw gender autonomy as "implicit in the concept of ordered liberty."[225]

I argue that this history of the right to gender transitions illustrates a possible way to reconcile the tensions between the uses of history in Equal Protection and Due Process cases. In *Obergefell v. Hodges*, Justice Kennedy reasoned that "[t]he Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles."[226] Justice Kennedy focused on the possibility of the Equal Protection Clause for "vindicating precepts of liberty and equality."[227] I argue that the legal history of trans rights further highlights the interconnections between the Equal Protection and Due Process Clauses. Both trans people and legal commentators viewed gender equality, liberty, and gender autonomy as connected. Trans legal history illuminates how, like other marginalized people, trans people could simultaneously experience de jure discrimination while also defending their rights and trying to exercise autonomy over their lives.[228] Trans people needed their rights to transition protected precisely because they experienced and continue to experience discrimination. When trans people could not access accurate documentation or support from a legal authority, they could be vulnerable to arrest.[229] Trans people also defended themselves from prejudice by invoking their right to dress and act as they chose, linking this right to notions of liberty. By restricting trans people's right to transition, legislators and courts are also limiting trans people's ability to protect themselves from discrimination and enjoy equal protection under the law.

Like the legal history of other marginalized people, much of the legal history of trans people resides outside of Supreme Court decisions or databases like Westlaw.[230] In order to research the 1800s, I had to look beyond appellate courts,

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225. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 298 (2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

226. Obergefell v. Hodges, 576 U.S. 644, 672 (2015). For additional discussion, see *supra* note 107.

227. *Obergefell*, 576 U.S. at 674.

228. *See generally* Siegel, *supra* note 103 (explaining the history of women advancing arguments about suffrage, liberty, and equality); Penningroth, *supra* note 109 (discussing the history of Black people exercising civil rights); PENNINGROTH, *supra* note 109 (discussing how Black people navigated law and legal institutions).

229. *See infra* Section II.A.

230. *See generally* Myisha Shuntez Eatmon, Public Wrongs, Private Rights: African Americans, Private Law, and White Violence During Jim Crow (Sep. 2020) (Ph.D. dissertation, Northwestern University) (ProQuest) (tracing the history of Black people using tort law); YVONNE PITTS, FAMILY, LAW, AND INHERITANCE IN AMERICA: A SOCIAL AND LEGAL HISTORY OF NINETEENTH-CENTURY KENTUCKY (2013) (focusing on local courts in Kentucky to analyze the history of inheritance law); EDWARDS, *supra* note 212 (discussing the importance of county courts to adjudicating claims of people of color and women in the antebellum South); Stephen Robertson, *What's Law Got to Do with It? Legal Records and Sexual Histories*, 14 J. HIST. SEXUALITY 161 (2005) (advocating that legal histories of sexuality take a broad approach to studying law and legality, including examining lower courts); SEARS, *supra* note 121 (providing an example of a trans legal history that uses both newspaper articles and municipal legal sources as sources).

which only decided a few cases involving trans people in that period.[231] My research relies on lower court records, newspaper records, censuses, city directories, marriage licenses, and draft records. In a couple of cases, I was able to use trans people's autobiographies. Although some newspaper articles contain sensationalist coverage of trans people and their lives, many newspapers serve as important ways of conveying legal information and informing people about legal issues.[232] Occasionally, medical journals or scientific writings provide useful details on trans lives. I found over 500 examples of trans people in the 1800s through early 1900s and thousands of newspaper articles covering these stories.[233] By combining a variety of sources, I consider both how trans people used the law in this period and how legal institutions and everyday Americans conceptualized transness. In order to both advance trans rights and understand trans histories, scholars must understand the interconnection between trans people's uses of law and their participation in their communities.

A. CHANGES OF SEX

One of the most important components of a gender transition is changing one's socially and legally designated sex. It is customary now to use "sex change" to refer to a surgical procedure.[234] However, nineteenth-century Americans often used "change of sex" to describe the process of changing gender presentation or legally recognized sex or to discuss someone who seemed to change almost magically from one biological sex to another.[235] In this Section, I focus on trans people's attempts to announce to either legal institutions or their communities that they had changed their sex. These sex changes could include publicly proclaiming one's sex in an affidavit, getting a priest or doctor to affirm one's sex, informing one's family of one's transition, or even obtaining a court order announcing one had changed sex.

I use the word "sex," rather than gender, for three reasons. First, sex was more commonly used than gender in the 1800s.[236] Second, these transitions were often seen as changing not just a person's gender expression but even their biology. Third, I distinguish "sex change," as the transformation in a person's perceived legal

231. *See, e.g.*, Moss v. Glenn, 189 U.S. 506 (1903) (per curiam) (a habeas corpus case involving a trans man); Merritt v. Swimley, 82 Va. 433 (1886) (a child custody case involving an intersex aunt, Leila Payne, who had a trans brother named Lawrence Register Payne). For further discussion of the Paynes, see *infra* notes 329–33.

232. *See* Skidmore, *supra* note 2, 153, 173 (discussing newspapers as sources for trans history). When I have been able to compare newspaper coverage of court cases to the court transcripts, the newspapers are usually very accurate.

233. *See supra* note 50 for a discussion of how the information was collected.

234. Although such a use is falling out of favor, as trans people tend to prefer terms like "gender-affirming surgery." *See* PAISLEY CURRAH, SEX IS AS SEX DOES: GOVERNING TRANSGENDER IDENTITY 7 (2022) (describing "sex changes" as an "old-fashioned term for gender affirmation surgery").

235. *See* sources cited *supra* note 49.

236. *See* Rhoda Kesler Unger, *Toward a Redefinition of Sex and Gender*, 34 AM. PSYCH. 1085, 1085 (1979) (discussing that "[p]sychologists have tended to use the term ["sex"] interchangeably as both an independent and a dependent variable" (citing RHODA KESLER UNGER & FLORENCE L. DENMARK, WOMAN: DEPENDENT OR INDEPENDENT VARIABLE? (1975)).

or biological sex, from the more general category of gender transitions.[237] By the 1880s and 1890s, newspapers published article after article with headlines like *A Wonderful Transformation: A Pennsylvania Woman of Twenty-Five Finds that She Is Not a Woman After All*,[238] *A Change of Sex: L. Allen Scott Puts on Trousers After Wearing Petticoats for Twenty-Eight Years*, [239] or *Sex Transformed: Freak of Nature Most Marvelous*.[240] These newspaper articles represented a belief that a person's sex could change, sometimes without any clear explanation.[241] Although the fluidity and ambiguity around sex could lead to anxiety and even criminalization for trans people, it could also create space for trans people to define their own genders and seek legal acknowledgement of their sex changes.

Our modern system of identification—passports, driver's licenses, identification cards, and birth certificates—is primarily a creation of the early 1900s.[242] Before the early twentieth century, most white Americans did not have any clear documentation that indicated their legal sex.[243] Enslaved Black people did have to carry identification documents when they were away from their enslaver's home.[244] These documents varied, but they generally indicated their sex and name.[245] White Americans did not have any such documentation until after World War I. Neither birth certificates[246] nor driver's licenses became widespread until the 1930s.[247]

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237. *See* CURRAH, *supra* note 234, at 7 (describing the legal category of sex and the variable rules used to change one's sex classification).

238. *A Wonderful Transformation*, *supra* note 49, at 5.

239. *A Change of Sex*, *supra* note 49, at 9.

240. *Sex Transformed: A Freak of Nature Most Marvelous*, CINCINNATI ENQUIRER, Aug. 18, 1890, at 2 (on file with ProQuest, Historical Newspapers: *The Cincinnati Enquirer* (1872–1922), https://www.proquest.com/docview/881952755/fulltextPDF/5CB0189B977242BFPQ/1?accountid=14496&sourcetype=Newspapers).

241. *See, e.g.*, *id.* ("The mother, Mrs. Reynolds, and physicians have examined Delbert, or Belle, as the individual now calls herself, and states that the transformation has really taken place, and all within the last eighteen months.").

242. For a discussion of the birth of modern identification, see generally PEARSON, *supra* note 152 (discussing the history of birth certificates); Cassius Adair, *Licensing Citizenship: Anti-Blackness, Identification Documents, and Transgender Studies*, 71 AM. Q. 569 (2019) (discussing how administration of identification documents historically marginalized Black and trans people); CRAIG ROBERTSON, THE PASSPORT IN AMERICA (2010) (discussing development of modern passports). For discussions of the impact of identification laws on trans people in the twenty-first century, see Heath Fogg Davis, *Sex-Classification Policies as Transgender Discrimination: An Intersectional Critique*, 12 PERSPS. ON POL. 45, 54 (2014); HEATH FOGG DAVIS, BEYOND TRANS: DOES GENDER MATTER? 13 (2017); CURRAH, *supra* note 234, at 7–9.

243. *See* Bayker, *supra* note 121, at 6, 28; *see also Explore the Newly Discovered Papers*, U. PITTSBURGH: FREE AT LAST? SLAVERY IN PITTSBURGH IN THE 18TH AND 19TH CENTURIES, http://exhibit.library.pitt.edu/freeatlast/papers_listing.html [https://perma.cc/6K59-JXPF] (last visited Oct. 28, 2025) ("Freedom papers and certificates of freedom were documents declaring the free status of Blacks. These papers were important because 'free people of color' lived with the constant fear of being kidnapped and sold into slavery.").

244. *See* Bayker, *supra* note 121, at 32.

245. *Id.*

246. *See* PEARSON, *supra* note 152, at 5.

247. *See* FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., YEAR OF FIRST STATE DRIVER LICENSE LAW AND FIRST DRIVER EXAMINATION (1997), https://www.fhwa.dot.gov/ohim/summary95/dl230.pdf

Passports did not become common until after World War I.[248] Before World War I, identity documentation was primarily focused on controlling marginalized people of color, rather than recording everyone's name or sex.[249] Although trans people before the 1930s did not typically have passports or driver's licenses to change, they still sought to change their socially and legally recognized sexes. Not only did these sex changes affirm their sense of self, but they allowed trans people to exercise gendered rights and provided some protection from criminalization.[250]

Throughout the nineteenth and early twentieth century, a variety of different authority figures—from lawyers to town elders to doctors—attempted to define and codify sex. In the colonial period, American and British authorities determined the sex of intersex or trans people by relying upon both medical examinations and witness testimony.[251] Although doctors attempted to claim greater authority over sex determinations in the antebellum period, they struggled to define people of so-called "doubtful sex."[252] In Francis Wharton and Moreton Stillé's 1873 treatise, *Medical Jurisprudence*, the authors asked, "[H]ow far is it possible to discriminate the true sex of a living person?" [253] Wharton and Stillé acknowledged that "in some cases [it] is indeed impossible."[254] Sometimes legal authorities also struggled to define whether a person was male or female. In 1868, Rosa Smith was arrested in Buffalo as a vagrant for wearing male clothes.[255] Smith was ultimately acquitted.[256] The *Buffalo Courier Express* explained, "An attempt was made to prove that she was a woman of bad repute, but this could not be done, and then again it could not be shown that he was a woman at all."[257] Even the newspaper article did not seem sure about Smith's gender, alternating between he and she pronouns. Contemporary judges might claim that, in 1868, everyone knew men from women, but the reality was quite different. Both doctors and judges confronted people they could not separate into narrow male or female categories.

[https://perma.cc/J2XS-38RA]. In 1930, twenty-four states had driver's license laws. South Dakota, the last state to pass such a law, did not require driver's licenses until 1954. *Id.*

248. *See* Bayker, *supra* note 121, at 28.

249. *See* Adair, *supra* note 242, at 571.

250. *See* Bayker, *supra* note 121, at 191.

251. *See* Sudai, *The Medico-Legalization of Sex*, *supra* note 121, at 757; Kathleen Brown, "*Changed . . . into the Fashion of Man": The Politics of Sexual Difference in a Seventeenth-Century Anglo-American Settlement*, 6 J. HIST. SEXUALITY 171, 181, 186 (1995); Sudai, *Sex Ambiguity*, *supra* note 121, at 486–87.

252. Sudai, *The Medico-Legalization of Sex*, *supra* note 121, at 749–50 (discussing the origins of medical jurisprudence in the U.S., and referencing medical jurisprudence book chapters titled "Doubtful Sex").

253. 2 WHARTON & STILLÉ, MEDICAL JURISPRUDENCE 152 (Samuel Ashhurst et al. eds., 3d ed., Phila., Kay & Brother 1873).

254. *Id.*

255. *The Sequel*, BUFFALO COURIER EXPRESS, Jan. 27, 1868, at 4 (on file with Anc., Newspapers, https://www.newspapers.com/image/343751032); *A Female Bounty Jumper*, ROCKLAND CNTY. MESSENGER, Feb. 20, 1868, at 1 (on file with Hudson River Valley Hist. Newspapers, *Rockland County Messenger*, https://news.hrvh.org/veridian/?a=d&d=rocklandmessenger18680220.2.11&srpos=1&dliv=none&e=——-en-20–1–txt-txIN-%22male+attire%22+——).

256. *The Sequel*, *supra* note 255, at 4.

257. *Id.*

In the late nineteenth century through mid-twentieth century, doctors continued to search for ever more complicated ways to define sex. In the 1870s, doctors and scientists began to articulate a theory of inversion, which referred to people who had a "total reversal of [their] sex role."[258] Sexologists[259] explained that some people acted, behaved, loved, and even sounded like a different sex than the one they were assigned at birth.[260] For example, Havelock Ellis, one of the most prominent sexologists,[261] described how "female inverts"[262] exhibited traits like a "masculine straightforwardness and sense of honor," a "taste and tolerance for cigars," and a "capacity for athletics."[263] Although Havelock Ellis's description was pejorative, it still reflected his belief that people could exhibit both masculine and feminine characteristics. At the turn of the twentieth century, the discovery of new signifiers of sex, such as hormones and chromosomes, further complicated efforts to define biological sex.[264] Many doctors started to believe in the idea of "universal bisexuality," that all people had biological aspects of both men and women.[265] Historian Jules Gill-Peterson argued that, "[b]y 1950, sex was in crisis" as doctors struggled to define the confusion of binary sex.[266] Despite the claims of opponents of trans rights, at no point in U.S. history were biological or legal sex stable, binary categories.

Trans people did not simply accept medical or legal professionals' efforts to define their sex. In *Autobiography of an Androgyne*, published in 1919, a white[267] trans person named Jennie June wrote, "Medico-legally, sex should be determined by the psychical constitution rather than by the physical form."[268] June advanced her own legal definition of sex, one that depended on how a person thought about their own sex. Some trans people proclaimed these ideas about their sex in their court battles. Lucy Hicks Anderson, a Black trans woman, announced during her trial for perjury: "I defy any doctor in the world to prove that I am not a woman. I have lived, dressed, acted just what I am, a woman."[269]

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258. George Chauncey, Jr., *From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualization of Female Deviance*, 58/59 SALMAGUNDI 114, 119 (1983).

259. Sexology is the term for the quasi-scientific study of sex that emerged in the late 1800s. *See id.* at 115 & n.3.

260. *Id.* at 119–20.

261. *See* Kate Aaron, *The Queer Life of Havelock Ellis*, MEDIUM (Sep. 17, 2015), https://medium.com/gay-old-times/the-queer-life-of-havelock-ellis-2a345c75f94b [https://perma.cc/T9SU-7C9N].

262. A term for people assigned female at birth who were attracted to women and acted masculine. *See* Chauncey, *supra* note 258, at 124. We would now probably consider them trans men or lesbians.

263. Chauncey, *supra* note 258, at 120–21 (quoting 2 HAVELOCK ELLIS, STUDIES IN THE PSYCHOLOGY OF SEX: SEXUAL INVERSION 250 (3d ed. 1915)).

264. *See* Ben-Asher, *supra* note 67, at 344–45.

265. *See* JOANNE MEYEROWITZ, HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES 22–23, 29 (2004).

266. GILL-PETERSON, *supra* note 44, at 97.

267. Channing Gerald Joseph, *A New Approach to Solving a Century-Old Queer-History Mystery*, OUTHISTORY (Oct. 10, 2022), https://outhistory.org/exhibits/show/inprogress/whojj/channew [https://perma.cc/6PCQ-S7DL] (explaining that June was most likely white).

268. EARL LIND ("RALPH WERTHER" – "JENNIE JUNE"), AUTOBIOGRAPHY OF AN ANDROGYNE 22 (Alfred W. Herzog ed., 1919).

269. Shari Rose, *Lucy Hicks Anderson: Black Transgender Pioneer of the 1940s*, BLURRED BYLINES (Feb. 21, 2022), https://blurredbylines.com/articles/lucy-hicks-anderson-black-transgender-woman/

Many trans and intersex people proposed their own interpretations of biology, and they rejected the attempts of doctors or judges to decide their sex for them.

Trans people's right to legally transition their sex depended upon both their status and their capacity to garner help from various authorities: doctors, pastors, parents, and legal officials. In 1901, a white[270] Maine barber[271] named Arthur Carver announced that he was a man, though he had been assigned female at birth.[272] He signed an affidavit averring, "I do hereby publicly declare that I have been masquerading, and for more than 10 years against my wishes. . . . My real name is Arthur Leslie Carver; I am a man, and since September this year (1901) have dressed and have been known as such."[273] Carver's parents and pastor both signed his witness statement.[274] He married a woman named Jennie Seavey a year later.[275] Although Seavey's parents were hesitant to let her marry Carver,[276] they did not prevent the marriage. Like Howard Calder, Carver appears to have received support for his gender transition from his priest. Unlike Howard Calder, Carver's parents *did* support his marriage, and he was able to stay with his wife.

Some trans people not only publicized their sex changes; they received formal court decrees allowing them to change their sex and exercise gendered rights. In 1901, Carl Crawford, a white[277] trans man, petitioned the Grundy County Court

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[https://perma.cc/PE7R-RM4D] (discussing Lucy's story); *see also Lucy Hicks Says: "I Will Die a Woman,"* OXNARD PRESS-COURIER, Nov. 24, 1945, at 2 (on file with Newspaper Archive, https://newspaperarchive.com/oxnard-press-courier-nov-24-1945-p-2/).

270. Carver's race is listed as white in the 1910 census. *See* R.M. Pierce, Thirteenth Census of the United States: 1910—Population, *in* [20] 13TH CENSUS MAINE: KNOX 1–187, at 123 (1910), *microformed on* FAM. SEARCH No. 004971655 (Bureau of the Census Micro-Film Lab'y), https://www.familysearch.org/ark:/61903/3:1:33SQ-GRV5-NX7?view=index&personArk=%2Fark%3A%2F61903%2F1%3A1%3AMR3H-791&action=view&cc=1727033&lang=en&groupId=.

271. *See Known as a Woman for 30 Years: Arthur L. Carver, North Haven, Me, Barber, Ends Strange Masquerade*, BOS. DAILY GLOBE, Dec. 19, 1901, at 3 (on file with ProQuest, Historical Newspapers: *Boston Daily Globe* (1872–1922), https://www.proquest.com/docview/499574267/6C675D5977FA43CCPQ/2?accountid=14496&sourcetype=Newspapers). Although barbers were traditionally male roles, Carver worked as a barber even before his formal gender transition. *See id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *See Woman Becomes a Husband: Arthur Carver Puts Off Feminine Garb and Takes a Wife*, AUSTIN STATESMAN, Dec. 21, 1902, at 15 (on file with Portal to Tex. Hist., https://texashistory.unt.edu/ark:/67531/metapth1454556/m1/); Record of a Marriage: Arthur L. Carver & Jennie K. Seavey, *in* INDEX TO VITAL RECORDS 1892 THROUGH 1907 (1907), *microformed on* FAM. SEARCH No. 004543988 (Genealogical Soc'y, Salt Lake City, Utah), https://www.familysearch.org/ark:/61903/3:1:9398-Q1F4-G?view=index&personArk=%2Fark%3A%2F61903%2F1%3A1%3AVZ3J-NVD&action=view&cc=1803978&lang=en&groupId=; *see also* Jesse Bayker, *'Some Very Queer Couples': Gender Migrants and Intimacy in Nineteenth-Century America*, 35 GENDER & HIST. 103, 119 (2023) (discussing this story).

276. *See Woman Becomes a Husband*, *supra* note 275, at 15.

277. Crawford's race is listed as white on the census. *See* E.C. Geiger, Thirteenth Census of the United States: 1910—Population, *in* [8] 13TH CENSUS FLORIDA: DUVAL 1–187, at 075 (1910), *microformed on* FAM. SEARCH No. 004970340 (Bureau of the Census Micro-Film Lab'y), https://www.familysearch.org/ark:/61903/3:1:33SQ-GRVX-VS1?view=index&personArk=%2Fark%3A%2F61903%2F1%3A1%3AMVV1-L9M&action=view&cc=1727033&lang=en&groupId=.

in Tennessee to have his sex changed from female to male.[278] Crawford explained that he had been wearing male attire for a while but was worried about being prosecuted for his clothing.[279] He asked the Court to change his sex to male and his name from Kate Tipton to Carl Crawford.[280] In support of his petition, Crawford obtained a sworn statement from both his mother and his physician.[281] The Court approved Crawford's petition, basing its analysis of Crawford's "true sex" upon the testimony of his mother and physician, as well as by an assessment of Crawford's "masculine . . . deportment and manners."[282] The court then "ordered, adjudged and decreed by the court that the sex of petitioner . . . be and is hereby declared to be masculine . . . and that petitioner be and is hereby clothed with all the rights and privileges of a male person and a male American citizen."[283] Since Crawford got support from his doctor,[284] he might also have had a body that did not conform to normative expectations of feminine anatomy. While most trans people did not obtain court-ordered decrees, at least one court was willing to grant a person a court-decreed sex change. Crawford's decree also resembles contemporary court-ordered changes in gender markers. Although he did not have any identity documents to be changed, he sought an acknowledgement that he was a man and could live in his community as a man.[285]

Carver and Crawford's stories illustrate the ways that trans people navigated competing forms of authority—religious, medical, familial, social, and legal—as they affirmed their sex. Rather than being anonymous or invisible, trans people like Crawford and Carver used visibility as a strategy. They averred to their communities that they *were* men and that the law should—and indeed did—recognize that they were men. For Crawford, this strategy also helped him avoid arrest or police harassment.[286] Familial and social support, as much as medical authority, could be vital for trans people who wished to transition.

Although many people were able to transition legally, some legal authorities rejected trans people's assertions of sex. Trans people of color particularly struggled to convince legal institutions to accept their gender. According to the *Saint Paul Globe*, a Black person[287] asked the mayor for "permission to wear male or female apparel, as [they] chose" explaining they were "as much man as woman."[288] An

278. *Sex Changed by a Court's Decree*, *supra* note 49, at 5B.
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *See* Special Dispatch to the Enquirer, *Tried: To Commit Suicide Because She Loved Another than Her Liege Lord*, CINCINNATI ENQUIRER, Oct. 24, 1903, at 1 (on file with ProQuest, Historical Newspapers: *The Cincinnati Enquirer* (1872–1922), https://www.proquest.com/docview/883795327/4128170067B746B7PQ/1?accountid=14496&sourcetype=Newspapers) (describing Crawford's story, including an attempted suicide, his court order, and his marriage after his order).
286. *See Sex Changed by a Court's Decree*, *supra* note 49, at 5B.
287. There is no name given for this person nor much identifying information at all.
288. *A Freak of Nature: The Mayor's Attention Called to a Curious Malformation*, SAINT PAUL DAILY GLOBE, July 27, 1886, at 3 (on file with Anc., Newspapers, https://newscomwc.newspapers.com/

examination determined that the person was "not a hermaphrodite, but was absolutely without sex."[289] According to the newspaper, the mayor decided the individual was a man "and gave him papers to that effect."[290] Like Carl Crawford and Arthur Carver, this gender-nonconforming individual sought legal acknowledgement for their gender. Unlike Crawford and Carver, this individual was not allowed to make their own choices about gender, and, instead, the mayor decided their sex for them. Around the same time, another Black person claimed to be a "hermaphrodite": a Black woman named Georgeanna Holly[291] living in Fort Smith, Arkansas, with her husband, a white man named James Chesser.[292] After the couple was arrested, a doctor examined Holly and proclaimed her a "natural man."[293] Holly and Chesser were sentenced to several years in prison for buggery, as a punishment for their allegedly same-sex marriage.[294] Holly and Chesser's punishment was probably especially severe because they were an interracial couple.[295] Judges also may have been less willing to acknowledge Black people's right to transition. These two accounts suggest that not all trans people were able to present successfully as their decided gender, especially if they were people of color. At the same time, these two stories demonstrate how trans people attempted to assign their own interpretations to their bodies and genders, even if those interpretations were ultimately rejected by legal authorities. They also illustrate that trans people of color valued legal recognitions of their sex, such as marriage certificates or mayoral declarations.

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image/81053437/); *see also* Sudai, *The Medico-Legalization of Sex*, *supra* note 121, at 763 (discussing this story in the context of the history of intersex people and biological sex).

289. *A Freak of Nature*, *supra* note 288, at 3. It is not entirely clear what the distinction the doctor was drawing between those "without sex" and a "hermaphrodite." Perhaps the doctor meant that people "without sex" had no genitals, whereas "hermaphrodites" had anatomies associated with both men and women.

290. *Id.*

291. Her name is sometimes spelled Georgeanna Holley. I spell it Holly for consistency.

292. *A White Man Duly Married to a Negro Man*, FORT SMITH ELEVATOR, July 13, 1888 (on file with Encyclopedia of Ark., https://encyclopediaofarkansas.net/media/chesser-and-holly-marriage-case-of-1888-21992/).

293. *Id.*

294. *See* State v. Harlow, No. 112.20 (Ark. Cir. Ct. Oct. 19, 1888), https://search.alexanderstreet.com/preview/work/bibliographic_entity%7Cbibliographic_details%7C5569294; *George Burton*, FORT SMITH ELEVATOR, Oct. 26, 1888 (on file with Encyclopedia of Ark., https://encyclopediaofarkansas.net/media/chesser-and-holly-marriage-case-of-1888-21994/); *see also* Rachel Trusty, *Chesser and Holly: A Case of Queer, Interracial Marriage in the Turn-of-the-Century Frontier*, ALEXANDER ST., https://search.alexanderstreet.com/qupa/browse/exhibit-page?ff%5B0%5D=exhibit_facet%3AChesser%20and%20Holly%3A%20A%20Case%20of%20Queer%2C%20Interracial%20Marriage%20in%20the%20Turn-of-the-Century%20Frontier (last visited Dec. 20, 2025) (collecting sources, and analyzing this case). Thank you to Rachel Trusty for discussing this case with me.

295. The *Fort Smith Elevator* describes the case as "all the more revolting" because it was an interracial marriage. *A White Man Duly Married to a Negro Man*, *supra* note 292. Although there is not explicit evidence that their sentence was harsher because they were an interracial couple, it seems likely. The newspaper articles suggest that public opinion towards them was worse because they were an interracial couple, which likely influenced legal decisions. Furthermore, most states, including Arkansas, had laws banning interracial marriage. *See* PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 21 (2009).

Legal or medical documentation of trans people's sex played an important role in allowing them to participate in their communities and avoid arrest or persecution. While nineteenth-century white Americans typically lacked documentation such as passports or IDs,[296] Black Americans *were* required to carry various forms of documentation.[297] In 1851, a police officer arrested a Black trans woman named Mary Ann Waters for an alleged crime.[298] Although Waters probably *was* free, she had no documentation to support her claim to freedom.[299] The officers assumed that she was wearing female clothes to aid in her escape and detained her for at least a week before ultimately releasing her when no enslaver emerged.[300] Historian Jesse Bayker explains that the ability to move freely without documentation was a privilege of whiteness.[301] For Black trans people, like Waters, lacking documentation could make them vulnerable to arrest and even enslavement.[302]

By the mid-twentieth century, as identity documents became more prevalent,[303] white trans people were sometimes also stopped for lack of documentation. Louise Lawrence, a trans woman, describes in her autobiography being stopped by a police officer, who asked her for identification.[304] She wrote, "Knowing full well that I didn't have anything that said I was female I merely drew my driver's license out of my wallet and showed it to him."[305] Lawrence, unable to provide any legal documentation of her sex, was detained.[306] The police contacted Lawrence's doctor, who explained that Lawrence had a reason for her female clothing.[307] Lawrence was scolded by the police and released.[308] Although Lawrence did not have a driver's license, her doctor's testimony helped support her transition and protect her from arrest. While white trans people also faced challenges when they did not have accurate identification documents, they were less vulnerable to arrest than trans people of color.[309] Both identity documents and support from authority figures played an important role in allowing trans people to travel and exist in public.

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296. *See* Bayker, *supra* note 121, at 28.

297. *See id*. at 32.

298. *See A Negro Masquerade*, AM. & COM. DAILY ADVERTISER, Sep. 24, 1851, at 3 (on file with Google News, https://news.google.com/newspapers?nid=8dmKnlANe1sC&dat=18510924&printsec=frontpage&hl=en); *see also* Bayker, *supra* note 121, at 32–33 (discussing this story).

299. *See* Bayker, *supra* note 121, at 33 & n.31.

300. *See id*. at 33-34.

301. *See id*. at 32.

302. *See id*.

303. Bayker, *supra* note 121, at 28.

304. Louise Lawrence, Autobiography 95 (n.d.) (on file with Ind. Univ., Louise Lawrence Collection, Box 1, Series 1A, Folder 2); *see also* Bayker, *supra* note 121, at 298–301 (discussing this story).

305. Lawrence, *supra* note 304, at 95.

306. *Id*.

307. *Id*. at 96.

308. *Id*.; Bayker, *supra* note 121, at 299–300.

309. *See* Adair, *supra* note 242, at 581–86 (discussing the racist history of identity documents, and highlighting the interaction between licensing and harassment).

These stories of sex transformations reveal that it *was* possible for trans people to publicly change their sex and even have their new sex be acknowledged by their community or family. Newspapers even used the language of sex change, presenting people as metamorphosizing from one sex to another. Trans people's ability to change their sex depended heavily on both their racial privilege and their ability to gain support from legal or medical authorities. When people were unable to transition their gender, they were vulnerable to police harassment and even incarceration. For many trans people, public and legally recognized gender transitions were important not just to affirm their sex but also to avoid arrest and participate in public life.

B. NAME CHANGES

Name changes have always been an important part of trans people's transitions in the United States. While some trans people simply moved to a new town and adopted a new name,[310] others turned to their legislatures or courts, seeking formal legal name changes. Some trans people publicly announced their new name to their communities. Using their new names, they managed to marry, obtain patents, convey and inherit property, act as complainants in court cases, and participate in public life. As legal scholar Cori Alonso-Yoder points out, the right to choose one's name is an important part of liberty and individual autonomy.[311] Many trans people acted upon this right in the 1800s and early 1900s.[312]

Although it has become common to refer to a person's "legal name," under United States law there is no single true "legal name."[313] In the 1800s, U.S. courts generally agreed with the common law right to a name change, holding that people did not need to go through courts or legislatures for name changes so long as they represented themselves to their community using their new name.[314] Although formal name changes were unnecessary, some trans people *did* turn to legislatures or courts for name changes. They likely reasoned that formal acknowledgement of their name change would help them avoid arrest, fit into their community, manage property, or sign contracts.

In the antebellum period, individuals who wished to obtain a legal name change could go through their state legislatures, which passed dozens of private

310. *See* SKIDMORE, *supra* note 2, at 3–4; Bayker, *supra* note 121, at 20.

311. *See* Cori Alonso-Yoder, *Making a Name for Themselves*, 74 RUTGERS U. L. REV. 911, 918 (2022). Alonso-Yoder explains that name changes were an important part of Black liberation. Many well-known Black activists like Harriet Tubman and Sojourner Truth chose their own names. *Id.* at 932.

312. *Id.* at 921.

313. Austin A. Baker & J. Remy Green, *There Is No Such Thing as a "Legal Name,"* 53 COLUM. HUM. RTS. L. REV. 129, 133 (2021); *see* Alonso-Yoder, *supra* note 311, at 921.

314. *See* 21 THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW 311 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1902) (summarizing this common law right). For cases recognizing this common law right, see Brayton v. Beall, 53 S.E. 641, 642 (S.C. 1906); Linton v. First Nat'l Bank of Kittanning, 10 F. 894, 897 (C.C.W.D. Pa. 1882); Graham v. Eiszner, 28 Ill. App. 269, 273 (1888); Smith v. U.S. Cas. Co., 90 N.E. 947, 950–51 (N.Y. 1910); Coplin v. Woodmen of the World, 62 So. 7, 9 (Miss. 1913). For additional information, see Alonso-Yoder, *supra* note 311, at 918–19 (explaining common law name changes).

acts to allow name changes.[315] At least two trans people obtained legislative name changes. In 1834, the legislature of Maine passed a special act such that "Sally Strout of Limington be allowed to take the name of Albion Peter Strout."[316] After the name change, Albion Strout used his new name to convey his share of a saw mill and a grist mill, declaring, "Know all men by these Presents, that I Albion P. Strout of Limington in the county of York, formerly known as Sally Strout, of said Limington, in consideration of three hundred and fifty dollars . . . do hereby promise, release, bargain, sell, and convey . . . all my right, title and interest in [the property]."[317] Strout had a vested interest in developing a legal tie to his new name and proclaiming that name to his community. He wanted to continue to convey property and do business even if he was now presenting as a man. His public name change allowed him to continue to exercise his civil rights and participate in public life.

About fifteen years after Strout successfully petitioned the Maine Legislature for a name change, another trans person obtained a legislative name change in a different state. In January 1850, Captain West requested that the Massachusetts Legislature change his child's name from Rebecca West to William Valentine West.[318] William West was only about fifteen at the time.[319] William West's younger sibling also transitioned and adopted the name Luther.[320] Unlike William, Luther does not appear to have obtained a legal name change.[321] Since newspaper reporting on the Wests is limited, it is hard to know how the West brothers or their father felt about this name change or why they decided to obtain it. The story of the West brothers demonstrates both that some state legislatures granted gender-affirming name changes and that some parents supported their children's gender transitions. It also illustrates that legislative name changes were one possible strategy, but that they were not a requirement to use a new name and gender identity. Even within the same family, one trans person might seek a legislative name change while the other one did not. William West's and Luther West's transitions illustrate that there is a history and tradition of trans *children* changing their names and even receiving parental and legal support for that name change.

After the Civil War, courts increasingly became the site for name change petitions for all individuals, including trans people.[322] In the early 1900s, a handful of

315. *See* Ireland, *supra* note 212, at 292.

316. Act of Mar. 7, 1834, ch. 486, 1834 Me. Laws 715, 716; *see also* Cassius Rideout (@queeroldweapon), TUMBLR, *Using Genealogy to Find Your Trans-Cestors*, https://queeroldweapon.tumblr.com/post/156354773739/using-genealogy-to-find-your-trans-cestors/amp [https://perma.cc/SCT2-K2ZZ] (last visited Feb. 20, 2025) (discussing Albion Strout, who was Rideout's many-times removed great uncle). Thank you to Cassius Rideout for discussing Strout with me. Unfortunately, the legislative record provides no additional information about the name change.

317. Deed No. 16 (Dec. 13, 1834) (on file with York Cnty. of Me., Registry of Deeds) (unintelligible text omitted).

318. *See* Act of Apr. 29, 1850, ch. 253, 1850 Mass. Acts 435, 439; Baer, *supra* note 49.

319. Baer, *supra* note 49.

320. *Id.*

321. *Id.* Thank you to Chris Baer for talking to me about the West brothers and sharing his sources.

322. For example, before 1847, people in New York could only change their name through a special legislative act. *See Records of Names Changes*, N.Y. STATE ARCHIVES, https://www.archives.nysed.gov/

other trans people also obtained court-ordered name changes: Horace Herriman in 1903 in New York[323] and two brothers named Gene and Noel Armstrong in 1931 in Indiana.[324] In 1929, a Taunton resident who had been assigned female at birth declared, "I'm a man. I shall be 21 soon and I want to live like a man."[325] The doctor explained he had "made a mistake" in proclaiming the child a girl at birth.[326] The trans person successfully petitioned to change his name to "David Swasey," correcting an apparent "error on his birth certificate."[327] All four of these people turned to the courts to assist in their gender transitions.

As trans people navigated name and gender changes, they deliberately and carefully invoked medical authority. Trans people's name changes were not pre-ordained by their body but, rather, determined by conscious choices they made. In March 1884, the Frederick County, Virginia, Chancery Court granted a name change to Lawrence Register Payne, a white[328] trans man. The court explained,

> [I]t appearing to the court from the testimony of medical experts that the applicant is of the male sex and that his present name on that account inappropriate[.] It is ordered on his motion this 8th day of March 1884 that his present name of Lydia Rebecca Payne be changed for that of Lawrence Register Payne—which shall henceforth be his lawful name.[329]

Payne's ability to get support from "medical experts," his doctor W.P. McGuire, helped him transition and obtain a name change.[330] However, Payne's transition was

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research/res_topics_gen_naturalization_name [https://perma.cc/2RVH-6SA2?type=standard] (last visited Oct. 29, 2025). From 1847 to 1875, they could change their names through either county courts or the legislature. *Id.* After 1875, they could only go through their courts. *Id.*

323. *See* ARCHIE E. BAXTER, N.Y. STATE ASSEMBLY, GENERAL INDEX TO THE LAWS OF THE STATE OF NEW YORK 1902–1907, at 481 (1908); *Woman Becomes a Man: Strange Case of Mistaken Sex in Syracuse*, BUFFALO COURIER EXPRESS, Nov. 18, 1901, at 2 (on file with Anc., Newspapers, https://www.newspapers.com/image/344205645/); *see also* Waters, *supra* note 121 (discussing Horace's story).

324. *See "Girls" Will be Boys, Hoosier Court Rules*, PHAROS-TRIB., Jan. 8, 1932, at 6 (on file with Anc., Newspapers, https://newscomwc.newspapers.com/image/4075462/); *see also* Waters, *supra* note 121 (discussing the Armstrong brothers).

325. Special Dispatch to the Globe, *Boy Lived for 20 Years as a Girl*, DAILY BOS. GLOBE, Dec. 8. 1929, at B1 (on file with ProQuest, Historical Newspapers: *Daily Boston Globe* (1928–1960), https://www.proquest.com/docview/849581509/5554BA847B034DF8PQ/1?accountid=14496&sourcetype=Newspapers); *see also* Baer, *supra* note 49 (chronicling this and similar name changes in Martha's Vineyard in the nineteenth and twentieth centuries).

326. Special Dispatch to the Globe, *supra* note 325, at B1.

327. *Id.* It is not clear from the newspaper record if Swasey was actually issued a new birth certificate or was just noting that his birth certificate had been inaccurate and was attempting to get his name changed by a court order.

328. *See* Edwin D. Baker, Schedule No. 1—Population, *in* [21] 12TH CENSUS OF POPULATION: VIRGINIA FREDERICK CO. GILES CO. 7–224 (1900), *microformed on* FAM. SEARCH No. 004117877 (Bureau of the Census Micro-Film Lab'y), https://www.familysearch.org/ark:/61903/3:1:S3HT-6S6S-1BC?view=index&personArk=%2Fark%3A%2F61903%2F1%3A1%3AMMNS-GYD&action=view&cc=1325221&lang=en&groupId=M9V5-387.

329. Petition of Lawrence Register Payne, *supra* note 208; *see also* Brooks, *supra* note 121 (discussing this case). Thank you to Vince Brooks for helpfully sharing information about the Payne siblings with me.

330. *See* Brooks, *supra* note 121.

not just an inevitable result of his intersex body. A couple years later, the same doctor examined Payne's sister, Lelia, and testified that "in her development the masculine gender largely predominated."[331] Lelia Payne continued to present as female, even after her brother-in-law publicly accused her of being a man, during a nasty custody battle.[332] As Jesse Bayker points out, "[a]though Lawrence Register Payne and Lelia Payne experienced similar anatomical ambiguities, their decisions about the possibility of gender change were starkly different."[333] Although doctors played an important role in transitions, trans and intersex people also made their own decisions about how to interpret their bodies and genders.

Trans women could also carefully make claims about their bodies to acquire name changes. In 1941, a trans woman requested that the Superior Court of Los Angeles allow her to change her name legally to Barbara Ann Richards.[334] Richards explained to the judge that "some physiological change was taking place."[335] She stated that she no longer needed to shave and that there were changes to her skin and face.[336] After Richards submitted a doctor's report of her transformation, the judge agreed that it was "permanent" and granted her the legal name change.[337] Although Richards presented her "metamorphosis" as natural and spontaneous, she later revealed that she had actually been taking hormonal treatment.[338] Shortly thereafter, Richards's spouse (who was assigned female at birth) also transitioned, went on hormones, and changed his name.[339] The two remarried under their new names,[340] and lived together until Barbara Richards's death.[341] Barbara Richards's gender transition reflects a shift towards the use of hormones as an important part of gender transitions. At the same time, Barbara

331. Deposition of Dr. W.P. McGuire at 1, Merritt v. Swimley (Va. Ch. Frederick Cnty. c. Feb. 1886) (on file with Libr. of Va., Local Government Records Collection); *see also* Brooks, *supra* note 121 (providing useful analysis of Dr. McGuire's testimony).

332. *See The Transformed Women: Recent Litigation over a Child Revives Interest in the Payne Sisters, Who Became Brothers*, CINCINNATI ENQUIRER, Sep. 5, 1885, at 2 (on file with ProQuest, Historical Newspapers: *The Cincinnati Enquirer* (1872–1922), https://www.proquest.com/docview/881860557/F0CF33D4626A489APQ/4?accountid=14496&sourcetype=Newspapers); Brooks, *supra* note 121; Bayker, *supra* note 121, at 206.

333. Bayker, *supra* note 121, at 206.

334. *See* Arthur Whitney, *Metamorphosis from Man to Woman Legally Recognized*, OAKLAND TRIB., Oct. 10, 1941, at B11 (on file with Anc., Newspapers, https://newscomwc.newspapers.com/image/147961819/); *Man Becomes Woman in Strange Physical Shift*, IMPERIAL VALLEY PRESS (El Centro, Calif.), Oct. 10, 1941, at 1 (Libr. of Cong., Chronicling America, https://www.loc.gov/resource/sn92070146/1941-10-10/ed-1/?q=man+becomes+woman+in+strange+physical+shift); Waters, *supra* note 121.

335. Whitney, *supra* note 334, at 11; *Man Becomes Woman in Strange Physical Shift*, *supra* note 334, at 1; Waters, *supra* note 121.

336. *See* Whitney, *supra* note 334, at 11; *Man Becomes Woman in Strange Physical Shift*, *supra* note 334, at 1; Waters, *supra* note 121.

337. *See* Whitney, *supra* note 334, at 11; *Man Becomes Woman in Strange Physical Shift*, *supra* note 334, at 1; MEYEROWITZ, *supra* note 265, at 40.

338. *See* Waters, *supra* note 121.

339. *See* MEYEROWITZ, *supra* note 265, at 40. It is not clear if Barbara Richard's husband got a court-ordered name change. He may have just informally changed his name.

340. *See* Waters, *supra* note 121.

341. *See id.*

Richards's name change reflects continuity in the actions and priorities of trans people across time. Like Lawrence Payne, Barbara Richards interpreted her body and gender in her own way, and she sought affirmation from legal and medical authorities for her assertion of gender.

It seems only a select group of trans people bothered with a formal name change. All the trans people I have found who obtained name changes were white, and almost all of them were trans men.[342] They were also generally well-off,[343] and many of them owned significant property or ran businesses. White people likely found it easier to convince a court or legislature that they were truly the gender they said they were and that they were not lying or trying to commit a crime or fraud. Well-off men might also have concluded that they had more to gain by attempting a formal name change, as this transformation would grant them the rights, privileges, and responsibilities of white men. For example, Albion Strout's public name change allowed him to maintain property rights to his sawmill, rights a woman in 1834 would have had more difficulty exercising.[344] Like trans people's sex changes, their name changes often relied on their ability to garner medical support for their genders. As demonstrated by Barbara Richards, trans people did not just passively seek out medical advice but also shaped their own narratives about their bodies and genders. Although not all trans people obtained formal name changes, these examples illustrate that some courts and legislatures were willing to recognize trans people's new name and gender expression.

Other trans people did not go through the courts or legislatures but simply declared to their family or community that they were using a new name. For example, Eugene De Forrest, a white actor and acting teacher, placed an announcement in the *Berkeley Advocate* in 1895: "To the Public: Some years since I assumed male attire by advice of the highest medical authority. Albert Eugene De Forest."[345] De Forrest also advertised acting classes as "Eugene De Forest."[346] Historian Wendy Rouse explained that De Forrest "socially transitioned very openly and publicly with apparently very little opposition."[347] Although De Forrest does not appear to have obtained court orders or legislative name changes, he represented himself to his community using his new name. At

342. In most cases, I was able to determine people's race through census data. In the case of Barbara Richards, I conjecture that she is white based on photographs of her, and newspapers almost always mentioned the race of people of color.

343. *See, e.g.*, Baer, *supra* note 49 ("[Luther West] founded the L.B. West & Co. firm and store in Taunton, selling stoves and crockery. . . . Luther soon earned enough money to be listed in the 1888 book 'Twenty Thousand Rich New Englanders.'").

344. For an analysis on women and the law of property in early America, see generally David H. Bromfield, *Women and the Law of Property in Early America*, 85 MICH. L. REV. 1109 (1987); MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA (1986).

345. ROUSE, *supra* note 206, at 75.

346. *Id.* I infer that Eugene De Forrest is white from photographs of him and from newspaper accounts not mentioning his race. *See Albert Eugene de Forest (DeForrest)*, FIND GRAVE, https://www.findagrave.com/memorial/240269215/albert_eugene-de_forest_(deforrest) [https://perma.cc/N4EE-XDU2] (last visited Dec. 20, 2025).

347. ROUSE, *supra* note 206, at 76.

the turn of the twentieth century, such public representation was the functional equivalent of a court- or legislative-ordered name change.[348]

Most court cases involving name changes revolved around whether people could *use* that name: to sue[349] or be sued,[350] mortgage property,[351] and make binding contracts.[352] In other words, they allowed people to exercise their "civil rights," the rights to use the courts and interact with the legal system.[353] Trans people were able to exercise their civil rights under their chosen names. Both Albion Strout[354] and William West[355] married under their male names. When the Prudential Insurance Company sued the Armstrong brothers for foreclosure of a mortgage, the complaint listed both their female and male names.[356] Rollin Kedzie Morgan, a trans doctor,[357] brought a complaint against fraudulent car dealers under the name of Rollin K. Morgan.[358] Similarly, Edgar Wales Burnham, a trans man who transitioned in the 1860s, seems to have never bothered to obtain a legal name change. Burnham's gender transition was not secret

348. *See* THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW, *supra* note 314, at 311; *see also* Brayton v. Beall, 53 S.E. 641, 642 (S.C. 1906) ("At common-law a [person] may lawfully change [their] name, or by general usage or habit acquire another name than that originally borne by [them], without the intervention of court or Legislature.").

349. *See* Linton v. First Nat'l Bank of Kittanning, 10 F. 894, 897 (C.C.W.D. Pa. 1882) (holding that, at common law, a person may change their name and sue under that new name).

350. *See id.* at 897; Miller v. George, 9 S.E. 659, 660 (S.C. 1889) (holding that a plaintiff could sue a defendant under a name by which the defendant was commonly known).

351. *See Brayton*, 53 S.E. at 642 (holding that mortgages executed under a name by which a person is commonly known is constructive notice).

352. *See* Graham v. Eiszner, 28 Ill. App. 269, 273 (1888) (holding that contracts entered under an assumed name are binding).

353. *See* Penningroth, *supra* note 109, at 872.

354. *See* An Introduction of Marriage Between Mr. Albion P. Strout and Mary Dorsett, *in* 2 LIMINGTON RECORDS 1810–1849, at 279 (Joshua H. Frost ed. 1849), *microformed on* FAM. SEARCH No. 007595738 (Genealogical Soc'y, Salt Lake City, Utah), https://www.familysearch.org/ark:/61903/3:1:3QS7-L9NW-HW5G?view=index&lang=en&groupId=M9LK-PJC.

355. *See* Marriages Registered in the Town of East-Bridgewater for the Year Eighteen Hundred and Seventy Three, *in* 254 MARRIAGES 403 (1873), *microformed on* FAM. SEARCH No. 004279597 (Bos., Ma. State Archives), https://www.familysearch.org/ark:/61903/3:1:S3HT-XS9Y-NM?view=index&lang=en&groupId=.

356. *See Suit Recalls Gender Change Court Action: Armstrong Brothers Named Defendants in Suit on Farm Loan*, ANDERSON HERALD, Mar. 6, 1932, at 8 (on file with Anc., Newspapers, https://newscomwc.newspapers.com/image/974220457/).

357. Special Dispatch to the Enquirer, *"Husband": Was Not of the Male Sex, Dr. Alice Bush Discovered After Four Years of Married Life*, CINCINNATI ENQUIRER, Nov. 15, 1909, at 1 (on file with ProQuest, Historical Newspapers: *The Cincinnati Enquirer* (18721922), https://www.proquest.com/docview/895360777/citation/EF020A8311D040E2PQ/3?sourcetype=Newspapers).

358. *Randall Held in $2,000 Bail: Surrenders Himself, Case Continued — Darker Still Missing*, EVENING EXPRESS (Portland, Me.), July 5, 1922, at 1 (on file with Anc., Newspapers, https://newscomwc.newspapers.com/image/851308167/). It is most likely the same Rollin K. Morgan, as it is the same town and notes that he was a doctor. *See Girl Posed As Boy: Strange Case in a Platonic Marriage Revealed by Operation*, SEDALIA DEMOCRAT, Nov. 16, 1909, at 11 (on file with Anc., Newspapers, https://www.newspapers.com/article/the-sedalia-democrat-dr-alice-bushmarr/28482470/) (discussing that Rollin was a medical student).

as several newspapers described the "former girl" who was "now a man."[359] Although many people knew Burnham used to have a different name and was assigned female at birth, he still managed to use his male name for many legal purposes: marrying twice,[360] handling[361] and inheriting property,[362] and even obtaining a patent for a music leaf turner.[363] Trans people's name changes were more than just an assertion of identity. They allowed trans people to exercise their civil rights, use the law, and participate in their communities.

When trans people did not have formal documentation of their name change, they often encountered difficulties when exercising their rights to travel or emigrate. When Frank Woodhull, a white trans man originally from Canada, was traveling to the United States from England in 1908, he was stopped for questioning at Ellis Island.[364] After the authorities claimed he was a woman, they changed his name on the paperwork to his deadname.[365] Despite this difficulty, Frank

359. *A Man-Woman*, LAST SENSATION, Jan. 25, 1868 (on file with Digit. Transgender Archive, https://www.digitaltransgenderarchive.net/files/g732d9110). Burnham had transitioned a few years previously, but newspapers dug up the story in 1868, and again in 1882. *See id.*; *A Remarkable Case*, GRAND FORK DAILY HERALD, Mar. 31, 1882 (on file with Digit. Transgender Archive, https://www.digitaltransgenderarchive.net/files/hh63sw15j). For further discussion of Burnham, see Zagria, *Edgar Wales Burnham (1841 –1918) Forgotten Musician*, A GENDER VARIANCE WHO'S WHO (Oct. 20, 2020), https://zagria.blogspot.com/2020/10/edgar-wales-burnham-1841-1918-musician.html [https://perma.cc/2RK5-T94L]; Jonathan H. White, *A Civil War Hermaphrodite*, 62 CIV. WAR HIST. 321, 321–28 (2016); U Swanson, *Edgar Wales Burnham*, WIKITREE (Sep. 27, 2023), https://www.wikitree.com/wiki/Burnham-3337#_note-12 [https://perma.cc/H83G-UQR8]. Thank you to Chance Stover, Burnham's step great-great-granddaughter, for discussing him with me.

360. Marriage Index Record: Burnham, Edgar W (Apr. 27, 1865) (on file with Wis. Hist. Soc'y, Pre-1907 Vital Records, https://wisconsinhistory.org/Records/Marriage/MR2320166). To see Burnham's marriage to Girta E. Everett, see *id.* (choose "See possible spouse matches"). I was unable to find Edgar and Theresa Burnham's marriage record, but an entry on the back of a birth record for Kathleen Burnham, Theresa Burnham's daughter, lists their marriage year as 1893. *See* Birth Record: Kathleen Ursula Burnham (1914) (on file with N.H. Bureau of Vital Recs.) (available at https://www.ancestrylibrary.com/search/collections/61833/records/300415103).

361. *See* Leavitt v. Reynolds, 44 N.W. 567, 567 (Iowa 1890). According to this case, which deals with questions of mortgage law, a mortgage was executed to E.W. Burnham for "Burnham's Opera-House" in 1885. Since Burnham's deadname also started with an "E," this could theoretically have been a reference to his female deadname. However, he was presenting as a man named Edgar Burnham in 1885, and it is unlikely that his community thought the initials referred to a female name.

362. Burnham's father left property in his will to "Edgar W. Burnham." Will of Milo L. Burnham, *in* 3 RECORD OF WILLS: SAN DIEGO 3 (n.d.), *microformed on* FAM. SEARCH No. 007600633 (S.D. Hist. Soc'y), https://www.familysearch.org/ark:/61903/3:1:3QS7-89J3-C8H?view=fullText&keywords=Burnham%2CEdgar%20W&lang=en&groupId=.

363. A patent was issued to "Edgar W. Burnham" for a Music-Leaf Turner. Music Leaf Turner, U.S. Patent No. 447,040, at [1] (filed June 12, 1890) (issued Feb. 24, 1891). For more details, see 54 Off. Gaz. Pat. Office 1027 (Feb. 24, 1891).

364. *See* Philip Sutton, *Why Your Family Name Was Not Changed at Ellis Island (and One that Was)*, N.Y. PUB. LIBR.: NYPL BLOG (July 2, 2013), https://www.nypl.org/blog/2013/07/02/name-changes-ellis-island [https://perma.cc/7ZY7-XABR].

365. *See id.* Deadnames are a modern term referring to the name given at birth. *See Deadname*, Merriam–Webster, https://www.merriam-webster.com/dictionary/deadname [https://perma.cc/6KBC-HFGH] (last visited Oct. 31, 2025); Chan Tov McNamarah, *Misgendering*, 109 CALIF. L. REV. 2227, 2254 (2021).

Woodhull was allowed to continue on in his male clothing.[366] As identity documents became more prevalent, trans people also sometimes experienced difficulties with discrepancies on their passports. Louise Lawrence recalled in her autobiography her experience getting a passport in 1958 to go to Paris.[367] She explained, "I filled out the usual forms accurately with the obvious exception of my name."[368] After Lawrence was questioned, she "very straightforwardly told the agents the entire truth" and supplied them with "references."[369] Lawrence thought the process was "successful" and concluded "the use of another name is no crime except where the facts are withheld from the Department."[370] Although Lawrence experienced some frustration, she seems to have found the experience less stressful than she anticipated. Woodhull and Lawrence likely benefitted from being white since identity documents were (and are) frequently used to police people of color.[371] Woodhull and Lawrence would likely have experienced *more* difficulties today, now that state-issued identity documentation is more prevalent and required to access so many rights.[372]

Even before identity documents were widespread, trans people still sought out and often obtained formal name changes, first from state legislatures and then from courts. As trans people changed their names, they navigated both legal and medical authority, asserting their own interpretations of their bodies and identities. Trans people's name changes were an important part of their transitions, allowing them to present as their chosen gender and engage in civil rights. Using their new names, they were able to buy property, marry, travel, teach, and even be sued. Furthermore, many judges and legislatures *did* recognize trans people's right both to assume a legal name and use that chosen name for business and legal purposes.

C. GENDER-AFFIRMING CARE AND BODILY MODIFICATION

In this Section, I argue that trans Americans have a long history of accessing gender-affirming care. I define gender-affirming care broadly[373] to involve a range of bodily modifications that people undertake to affirm their gender and achieve their desired gender presentation.[374] These alterations could include

366. *See* Sutton, *supra* note 364; *Allowed to Proceed in Male Attire*, FOREST REPUBLICAN, Oct. 6, 1908, at 5 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/resource/sn84026497/1908-10-07/ed-1/?sp=5&st=pdf&r=0.029,-0.098,1.538,1.538,0).

367. *See* Lawrence, *supra* note 209.

368. *Id.*

369. *Id.*

370. *Id.*

371. *See* Bayker, *supra* note 121, at 32; Adair, *supra* note 242, at 581–86.

372. *See, e.g.*, Chris Sanders, Kristin Burnett, Steven Lam, Mehdia Hassan & Kelly Skinner, *"You Need ID to Get ID": A Scoping Review of Personal Identification as a Barrier to and Facilitator of the Social Determinants of Health in North America*, INT'L J. ENV'T RSCH. & PUB. HEALTH, June 2020, at 1, 1.

373. For an example of a narrow interpretation of gender-affirming care, see Brandt *ex rel.* Brandt v. Griffin, 147 F.4th 867, 891–92 (8th Cir. 2025).

374. *See Gender Incongruence and Transgender Health in the ICD*, WHO, https://www.who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-

hormones or surgeries, but they could also involve haircuts, voice alterations, binding breasts, changes to one's gait or posture, or shaving. Although gender-affirming care is most associated with trans people, cis people also engage in gender-affirming care: shaving body or facial hair, taking puberty blockers or testosterone, or getting breast enlargements or reductions.[375] Even before the 1950s, trans people adopted a range of bodily changes to pass as their gender, feel more comfortable in their body, or obtain social or legal recognition. Until very recently, few laws regulated trans people's access to gender-affirming care. Control over such care was largely left to doctors and trans people themselves. In fact, it is *bans* on gender-affirming care, not the care itself, that have "exploded"[376] in recent years.

Trans people commonly performed bodily modifications such as shaving, haircuts, or changes in gait or voice. When a trans man named John Whittman was outed after marrying a woman in 1906, a newspaper described: "What [Whittman] Did to Appear Like a Man."[377] What follows is a kind of "how-to" guide, explaining the various steps required to "appear" male. These steps included that Whittman had "[p]racticed walking with long step," "[u]sed a razor to induce a beard to come," "[k]ept [his] hair clipped close," and "[e]nunciated slowly to avoid talking in high tones."[378] Although the newspaper likely did not intend its article as advice, it is possible that other trans people could have taken inspiration from Whittman's account.[379] Shaving and haircuts were particularly common in nineteenth-century descriptions of trans men.[380] Many trans men, like Whittman, believed that shaving would "induce facial hair growth."[381] In the late 1800s, doctors and scientists

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the-icd [https://perma.cc/2RDE-32L8] (last visited Feb. 20, 2025) (defining gender-affirmative health care).

375. My definition of gender-affirming care owes to conversations with Eli Lawliet, a gender doula who works with trans people. *See* Eli Lawliet, *Meet the Gender Doula*, GENDER DOULA, https://www.thegenderdoula.com/meet-the-gender-doula [https://perma.cc/6JUY-3JWW] (last visited Oct. 31, 2025). Lawliet points out that it can be helpful to think of gender affirming care, not as something unique to trans people but as something that is central to everyone's pursuit of dignity, happiness, and bodily autonomy. *See* Personal Conversations with Eli Lawliet (ongoing). This framing makes it more clear that anti-gender transition laws are specifically intended to target *trans* people, who are not allowed to modify their bodies in ways permitted to cis people. For example, one recent study found that the vast majority of breast reduction surgeries on minors are performed on cis men, not trans teenagers. *See* Dannie Dai et al., *Prevalence of Gender-Affirming Surgical Procedures Among Minors and Adults in the US*, JAMA NETWORK OPEN, June 2024, at 2.

376. *Contra* Respondents' Brief in Opposition, *supra* note 131, at i ("In recent years, the number of minors receiving gender-dysphoria diagnoses ha[s] exploded.").

377. *Eventful Career of a Woman Who Became "Female Husband,"* SPOKANE PRESS, Feb. 9, 1906, at 4 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/resource/sn88085947/1906-02-09/ed-1/?sp=4&q=spokane+press).

378. *Id*.

379. While I do not have concrete evidence that other trans people were inspired by Whittman, there is evidence that trans people were influenced by other newspaper accounts of other trans people. For example, Howard Calder brought a news clipping about a "remarkable case of mistaken sex at Winchester, Va." to Reverend Frederick to explain his gender to the reverend. *Deer Creek Elopement*, *supra* note 1, at 4. It is possible that Whittman similarly inspired other trans people.

380. *See, e.g.*, *A Wonderful Transformation*, *supra* note 49, at 5.

381. Bayker, *supra* note 121, at 160. As Bayker points out, shaving does not actually increase facial hair. *Id*. For an example of a trans person getting a haircut as part of their transition, see J. Allen Gilbert,

associated facial hair with both masculinity and whiteness, and they often claimed that Black men lacked masculine characteristics such as beards.[382] Since beards were so associated with masculinity and whiteness, trans men might have seen facial hair as a way of affirming their gender.

Some trans women disliked their facial hair and tried to get rid of it. In *Autobiography of an Androgyne*, Jennie June described herself as "doomed to be a girl who must pass her earthly existence in a male body."[383] June lamented being a "young woman [with] a slight growth of hair on lip or cheeks!"[384] Ironically, trans women *also* used shaving as a strategy, hoping in this case to prevent the growth of beards and mustaches.[385] By the 1870s, doctors started using electrolysis to remove unwanted body hair, including beards on women.[386] It is possible that some trans women also used this procedure. Although people in the nineteenth and early twentieth centuries did not have hormone replacement therapy to control their body hair,[387] both trans and cis people still used methods like shaving and electricity to modify their bodies and affirm their genders.

Although sources rarely report explicitly on trans people's breasts, occasional references suggest that some trans people did bind or stuff their chests to hide or create breasts. Sarah Smiley, a Black person born to enslaved parents, recalled, "When my breasts began to grow I didn't want those bumps on me, and tied them down with wide rags."[388] In discussing the history of queer Black people, Candice Lyons says that Smiley's use of "rags" could be seen as an act of binding, though it could also be read as anxiety about sexual violence.[389] More straightforward is the case of Frances Frey, a white trans man outed in 1916, who wore a "straight jacket of coarse cloth" to hide "the contours of [his] chest," and used "artificial substitutes to carry

Homosexuality and Its Treatment, *in* GAY AMERICAN HISTORY: LESBIANS & GAY MEN IN THE U.S.A. 258, 276 (1992) (describing Alan Hart getting a haircut as part of his transition).

382. *See* MELISSA N. STEIN, MEASURING MANHOOD: RACE AND THE SCIENCE OF MASCULINITY, 1830–1934, at 131–34, 156 (2015).

383. EARL LIND ("RALPH WERTHER" – "JENNIE JUNE"), *supra* note 268, at 41.

384. *Id.*

385. *See, e.g.*, *Thrice in Jail, Man Passes as Woman: Sex of "May Miller" in the Tombs Disclosed when He Asks for a Razor*, N.Y. TIMES, Dec. 30, 1914, at 8 (on file with ProQuest, Historical Newspapers: *New York Times* (1857–1922), https://www.proquest.com/hnpnewyorktimes/docview/97636839/1088E4B7EEC4DF9PQ/1?accountid=36339&sourcetype=Newspapers) [hereinafter *Thrice in Jail*] (discussing how a trans woman, May Miller, was outed after requesting a razor to shave her beard).

386. *See* Rebecca Herzig, *Subjected to the Current: Batteries, Bodies, and the Early History of Electrification in the United States*, 41 J. SOC. HIST. 867, 867–68 (2008); *but see* Bayker, *supra* note 121, at 164 & n.76 (noting that "[e]lectrolysis . . . was prohibitively expensive for most women and not widely available" so trans women might also have used depilatories to remove their hair).

387. *See* ELIZABETH SIEGEL WATKINS, THE ESTROGEN ELIXIR: A HISTORY OF HORMONE REPLACEMENT THERAPY IN AMERICA 91–92 (2007).

388. Candice Lyons, Queering the Archive: Re-Examining Narratives of U.S. Chattel Slavery 66 (May 2022) (Ph.D. dissertation, University of Texas at Austin) (on file with Texas ScholarWorks, University of Texas Libraries) (citing Interview by Martin & Barker with Sarah Smiley in Humphrey, Ark., *in* 2 ARKANSAS NARRATIVES PART 6, at 172 (Federal Writers' Project ed. 1941)).

389. *See* Lyons, *supra* note 388, at 66.

out [his] role of a man."[390] Although the "artificial substitutes"[391] are not named, they might have referred to some kind of packer or dildo that was used to resemble a penis. Other trans men likely also bound or concealed their breasts. Some trans women also modified their chests. Georgia Black, a Black trans woman who presented as female for several decades in the first half of the twentieth century, used "foam rubber falsies" to create the appearance of larger breasts.[392] While none of these people had access to twenty-first century technologies, hormones, or top surgery, they still exercised autonomy over their bodies and chose how to present their gender.

Although gender-affirming surgeries were less common before the late twentieth century, doctors have been performing genital surgeries for centuries.[393] In the early 1800s, some doctors performed vaginal surgeries on women or girls whose vaginas were obstructed or closed to some degree.[394] Some of these surgeries were nonconsensual and invasive, performed without respect for the women's bodily autonomy.[395] However, some people did voluntarily seek out genital surgeries. In 1833, Dr. John Warren described a young woman who asked him to create a vagina for her.[396] There is no evidence that this woman was assigned male at birth, but she was still seeking medical care to form genitals that affirmed her sense of her gender.[397] In 1868, another woman asked Dr. Henry Avery to perform a medical examination upon her genitals to remove a "growth,"[398] which the doctor concluded was a testicle.[399] Like Warren's patient, this individual seems to have identified as a woman and been assigned female at birth. Many doctors criticized Avery for this medical procedure, arguing that he had castrated a *man* rather than removed a testicle from a woman.[400] Although it is not clear that either of these women transitioned genders, both seem to have made deliberate choices about their bodies and their gender, and they sought medical care to affirm those choices. Avery and Warren's patients both understood themselves as

390. *Woman Who Posed as a Man Tells Her Story at Hospital*, *supra* note 207, at 12. I inferred that Frances Frey was white since the newspapers do not mention his race. Newspapers almost always mentioned the race of trans people of color. *See, e.g.*, *A White Man Duly Married to a Negro Man*, *supra* note 292.

391. *Woman Who Posed as a Man Tells Her Story at Hospital*, *supra* note 207, at 12.

392. Willie Sabb, *My Mother Was a Man*, EBONY MAG., June 1953, at 75, 77 (on file with Dig. Transgender Archive, https://www.digitaltransgenderarchive.net/files/4x51hj44m). Black's daughter-in-law found these "falsies" when she helped her get dressed as an old woman. *Id.*

393. *See* Robert M. Goldwyn, *History of Attempts to Form a Vagina*, 59 PLASTIC & RECONSTRUCTIVE SURGERY 319, 324–25 (1977); Sudai, '*A Woman and Now a Man*,' *supra* note 121, at 81.

394. *See* Sudai, '*A Woman and Now a Man*,' *supra* note 121, at 81.

395. *See, e.g.*, *id.* at 80 (discussing a medical procedure performed on a three-year-old girl's genitals).

396. John C. Warren, *Non-Existence of Vagina, Remedied by an Operation*, 13 AM. J. MED. SCIS. 79, 79–80 (1833).

397. *See id.*; *see also* Sudai, '*A Woman and Now a Man*,' *supra* note 121, at 82 (discussing this case procedure and other similar surgeries).

398. Henry N. Avery, *A Genuine Hermaphrodite*, 6 MED. INVESTIGATOR 47, 47 (1868).

399. *Id.* at 47–48.

400. *See* Sudai, '*A Woman and Now a Man*,' *supra* note 121, at 91.

women and altered their bodies to fit that understanding. This is a form of gender-affirming care.

Trans people sought out gender-affirming surgeries and hormones as soon as they became available. Although these forms of medical care were only available to certain kinds of privileged trans people, typically white and wealthy,[401] they do indicate trans people's desire to alter their bodies in accordance with their gender. At the turn of the twentieth century, some trans people obtained surgical procedures like orchiectomies[402] or hysterectomies. Around 1898, a trans person named Jennie June got an orchiectomy.[403] Although Jennie June says her main reason was to prevent masturbation and ejaculation, she also explains, "Minor motives were that I would prefer to possess one less mark of the male, and that I thought the facial hair cells would cease to function and I thus be rid of my most detested and most troublesome badge of masculinity."[404] June's orchiectomy was an important part of her sense of self and her affirmation of her gender. In 1917, Alan Hart, a trans doctor, requested that a doctor perform a hysterectomy on him.[405] Hart declared, "[T]he result [of the hysterectomy was] that I left the hospital as a man."[406] Both Jennie June's and Alan Hart's medical procedures can be seen as forms of gender-affirming surgery, as both sought to modify their bodies surgically in accordance with their gender.

As soon as the technology existed for hormone replacement therapy and better bottom surgeries[407] in the early 1900s, many trans people eagerly sought out these procedures. In the 1910s and 1920s, the sexuality and gender researcher Magnus Hirschfeld started to perform gender-affirming surgeries in Germany.[408] In the 1920s and early 1930s, a few Americans traveled to Germany to obtain these surgeries.[409] By the late 1930s, people started to access hormone replacement therapy.[410] For example, the trans woman named Barbara Richards started hormones around 1939.[411] While hormone replacement therapy and better genital surgeries were certainly important technological advancements, they were not the first forms of gender-affirming care. Trans people had already been using a variety of mechanisms to affirm their bodies.

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401. *See* Olmstead, *supra* note 120, at 17; GILL-PETERSON, *supra* note 44, at 4, 31.

402. An orchiectomy refers to a removal of one or both testicles. *Orchiectomy*, CLEVELAND CLINIC (Jan. 24, 2024), https://my.clevelandclinic.org/health/procedures/orchiectomy [https://perma.cc/ZXT3-439G].

403. *See* EARL LIND ("RALPH WERTHER" – "JENNIE JUNE"), *supra* note 268, at 196; *see also* Bayker, *supra* note 121, at 258–86 (discussing this story); GILL-PETERSON, *supra* note 44, at 14 (same). Channing Joseph argues convincingly that Jennie June was also the author and journalist Mowry Saben. Joseph, *supra* note 267.

404. EARL LIND ("RALPH WERTHER" – "JENNIE JUNE"), *supra* note 268, at 196.

405. *See* GILL-PETERSON, *supra* note 44, at 60.

406. *Id.*

407. Bottom surgery and genital reconstructive surgery are used interchangeably. *See Genital Reconstructive Services/Bottom Surgery*, UCLA HEALTH, https://www.uclahealth.org/medical-services/gender-health/programs-services/genital-reconstructive-services-bottom-surgery [https://perma.cc/27KL-YZH9] (last visited Nov. 11, 2025).

408. MEYEROWITZ, *supra* note 265, at 18–19.

409. *Id.* at 30.

410. Bayker, *supra* note 121, at 305.

411. *Id.*

Unlike name or gender marker changes, gender-affirming surgery rarely required any kind of legal approval. Although antebellum surgeries generated significant controversy,[412] there is little evidence that they provoked legal regulatory responses. In the mid-twentieth century, American doctors worried that they would be arrested under mayhem laws for gender-affirming surgery.[413] Mayhem laws were old common law prohibitions on maiming any men who could become soldiers.[414] Lawyers, attorney generals, and law professors provided conflicting advice about the legality of gender-affirming surgery, but some lawyers concluded that "cutting off of the male genitalia would not be mayhem."[415] Trans historian Joanne Meyerowitz found no evidence that any doctors were prosecuted for gender-affirming surgery, whether under mayhem laws or any other laws.[416] Bans on gender-affirming surgery are far newer than the use of the surgery itself.

Nineteenth-century Americans, especially enslaved women and other marginalized people, struggled more to *avoid* unwanted genital surgeries then to obtain them. James Marion Sims, often heralded as the "Father of American Gynecology," performed experiments upon enslaved Black women's vaginas without their consent.[417] There is also a long history of non-consensual surgeries upon intersex individuals, surgeries that continue to this day.[418] There is less evidence for a history of laws *banning* surgeries on people's genitals.

Trans people's searches for gender-affirming care suggest that the desire to have a comfortable and gender-affirmed body is not a new one. Contemporary judges fixate upon the invention of specific kinds of gender-affirming care, such as puberty blockers[419] or hormone replacement therapy.[420] However, trans and intersex people sought gender-affirming care and bodily autonomy long before the invention of hormone replacement therapy and puberty blockers. While their gender affirmation might have involved different technologies than trans medical care today, they still shaped their body and appearance in accordance with their gender. The desire to have autonomy over one's body is deeply rooted in U.S. history and tradition.

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412. *See generally* Sudai, '*A Woman and Now a Man*,' *supra* note 121 (tracing the "controversy around sex-assignment surgery" from 1849 to 1886).

413. *See* MEYEROWITZ, *supra* note 265, at 121.

414. *Id.* at 120–21.

415. *Id.* at 121.

416. *Id.*

417. *See* DEIRDRE COOPER OWENS, MEDICAL BONDAGE: RACE, GENDER, AND THE ORIGINS OF AMERICAN GYNECOLOGY 108 (2017).

418. *See* GILL-PETERSON, *supra* note 44, at 17 (discussing the history of nonconsensual surgeries on intersex children); *see also* Jojo Macaluso, *Where Gender-Affirming Care for Youth is Banned, Intersex Surgery May Be Allowed*, NPR (Apr. 11, 2023, at 5:05 ET), https://www.npr.org/2023/04/11/1169194792/some-states-that-ban-gender-affirming-care-for-trans-youth-allow-intersex-surger [https://perma.cc/JF5W-SZUD] (discussing how bans on gender-affirming care still allow intersex surgeries). As Macaluso points out, the key difference between childhood intersex and gender-affirming surgeries is "consent": intersex children rarely agree to these surgeries. *Id.*

419. *See, e.g.*, United States v. Skrmetti, 605 U.S. 495, 504 (2025).

420. *Id.*

D. CLOTHING CHANGES

Gender-affirming clothes historically played an important part in gender transitions, often even more important than surgeries or name changes. Although cross-dressing was illegal in many places, trans people adamantly defended their right to wear the clothes they chose. Both trans people and their supporters explicitly framed clothing choices as a *right*, and they connected this right to issues of liberty and gender equality. While some trans people were arrested and criminalized for their clothes,[421] many legal authorities agreed that they had the right to wear what they wanted.

Unlike other aspects of transitioning, like name changes or gender-affirming surgery, cross-dressing *was* explicitly prohibited by statute. In the mid-nineteenth century, several cities passed ordinances prohibiting cross-dressing. The first city to develop a law banning appearing "in a dress not belonging to his or her sex" was St. Louis, in 1843.[422] Many other cities followed, including Chicago, Kansas City, and San Francisco.[423] Cross-dressing was classified as a misdemeanor, and punishment was typically a fine or sometimes imprisonment of up to six months.[424] Clare Sears and Jesse Bayker point out that these laws emerged at the same time as other laws regulating the public space, such as laws constraining the actions of disabled people, people of color, or sex workers.[425] Many trans people resisted cross-dressing laws and proclaimed that they would continue to dress as they chose. Jeanne Bonnet declared in court in San Francisco, "You may send me to jail as often as you please but you can never make me wear women's clothing again."[426] Bonnet was arrested over twenty times for wearing male clothes in the 1870s.[427] Although cross-dressing laws restricted and limited trans people's lives, they did not stop trans people from proclaiming their right and ability to make their own clothing choices.

Some trans people started their transitions at young ages, refusing to wear the clothes associated with their gender assigned at birth. In 1897, immigration authorities stopped a young man named Alejandro Velas and interrogated him about his gender.[428] Velas's lawyer explained,

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421. *See* SEARS, *supra* note 121, at 62 (noting that San Francisco police made over one hundred arrests for cross-dressing between the 1860s and 1900).

422. Bayker, *supra* note 122 (choose "St. Louis, Missouri (1843)"; then view "Text"). *But see* Bayker, *supra* note 121, at 64 (identifying Columbus, Ohio, as "the first city to prohibit public cross-dressing" in 1848).

423. Bayker, *supra* note 121, at 64–65.

424. *Id.* at 65.

425. *Id.* at 65 & n.122; SEARS, *supra* note 121, at 10.

426. SEARS, *supra* note 121, at 142.

427. *Id.*

428. *See* Special Dispatch to the Enquirer, *Abandoned: Her Home and Family*, CINCINNATI ENQUIRER, July 18, 1897, at 9 (on file with ProQuest, Historical Newspapers: *The Cincinnati Enquirer* (1872–1922), https://www.proquest.com/docview/888658225/fulltextPDF/3E42B18FF6F94DB4PQ/1?accountid=14496&sourcetype=Newspapers) [hereinafter *Abandoned*] (discussing the lawyer's testimony); Special Dispatch to the "Chronicle," *Dressed like a Man for Years: Masquerade Kept Up by a Rich English Girl*, S.F. CHRON., July 16, 1897, at 1 (on file with ProQuest, Historical Newspapers: *San*

> When an infant [Velas] manifested the desire, which subsequently grew into a mania, for boy's clothing. When only six years of age she [sic] declared to her mother that she was unhappy because she had been born a girl. Never would she wear dresses, which, if put upon her, she would tear into shreds. Seeing that they could do nothing with her, her parents brought her up as a boy.[429]

When asked about his gender, Velas proclaimed, "I'm a man."[430] Velas kept insisting upon his gender and finally declared, "It is my life's desire to be a man. That the Almighty made me a woman is no fault of mine."[431] Velas maintained that he wanted to be a man, and he refused to allow quirks of his biology to stand in his way. His parents eventually agreed to his demand to wear male clothes.[432] Some trans women also expressed a preference for female clothes from their youth. According to an 1889 history of Rhode Island, Nancy Brown, a Black individual, decided "at the age of fourteen years" that she "was determined not to be a sod kicker and wield the scythe and hoe stick."[433] Brown decided to wear female clothes and perform housework.[434] Like many other trans people, Brown and Velas began their transitions as children. These stories of childhood gender transitions illustrate that there is a long history of *children* socially transitioning their genders.

One of the rights of freedom, a right denied to enslaved people, was the right to choose one's clothing and gender expression. Historian Candice Lyons describes how enslavers would force enslaved cis women to wear pants as a form of punishment,[435] while other times they would punish assigned-female-at-birth enslaved people who chose to wear trousers.[436] Either way, they violently controlled what enslaved people could wear and how they could present their gender. After emancipation, some trans people gleefully embraced new clothing. The *Nashville Union and American* reported on Lizzie Montgomery, "Once he [sic] was a slave, and sometimes compelled to dress as a man; but when the year of jubilo [emancipation] came . . . [Montgomery] rushed madly into liberty and female clothes, and wildly proclaimed that his name was Lizzie."[437] This newspaper article gives

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Francisco Chronicle (1869–1922), https://www.proquest.com/docview/575920272/fulltextPDF/B1BC4DC20C674960PQ/1?accountid=14496&sourcetype=Newspapers).

429. *See Abandoned*, *supra* note 428, at 9; *see also Dressed like a Man for Years*, *supra* note 428, at 1 (quoting the same).

430. *She Wears Garb of Man: English Woman for Twelve Years Succeeds in Concealing Her Sex*, TWICE-A-WEEK PLAIN DEALER, Oct. 29, 1897, at 3 (on file with Libr. on Cong., Chronicling America, https://chroniclingamerica.loc.gov/lccn/sn88059319/1897-10-29/ed-1/seq-3/).

431. *Abandoned*, *supra* note 428, at 9.

432. *See Dressed like a Man for Years*, *supra* note 428, at 1.

433. J.R. COLE, HISTORY OF WASHINGTON AND KENT COUNTIES, RHODE ISLAND 42 (N.Y., W.W. Preston & Co. 1889); R. Adams, *Joshua (Nancy) Brown Formerly Hawkins*, WIKITREE (July 20, 2023), https://www.wikitree.com/wiki/Hawkins-9947 [https://perma.cc/3CG3-PYLS].

434. COLE, *supra* note 433, at 42.

435. Lyons, *supra* note 388, at 94.

436. *Id.* at 95.

437. *Some Weeks Ago*, NASH. UNION & AM., July 27, 1870, at 2 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/resource/sn85033699/1870-07-27/ed-1/?sp=2&st=image).

the impression of Lizzie Montgomery joyfully leaping into both freedom and femininity. Choices about clothing were an important part of freedom.

Enforcement of cross-dressing laws was inconsistent and contingent and depended on both the identity of the defendant and the opinions of the judge. Some judges refused to prosecute people for cross-dressing altogether. In 1888, when the police arrested Mary Gordon, a young Black person, in Kansas City for wearing male clothing, Recorder Davenport responded, "There can be no law which prevents women from dressing in male attire and appearing in public therein so long as they conduct themselves in an orderly manner."[438] When asked a bit later whether Davenport would extend the same right to men in female attire, he replied, with a laugh, "I'd rather not commit myself on it, but I see no reason why a man shouldn't wear pantalettes [a type of women's underwear] if he wants to."[439] Kansas City actually did have an 1860 law prohibiting masquerading as a different sex.[440] Davenport either did not know or did not care about this law. He refused to treat cross-dressing itself as criminal, so long as the people involved were not disorderly. Similarly, in 1918, a St. Louis judge refused to fine or punish a trans man for cross-dressing[441] even though the city did have a law banning the wearing of clothes that did "not belong to his or her sex."[442] These judges did not see cross-dressing as inherently disorderly or dangerous but as a legal and reasonable choice. Even when there were laws prohibiting certain kinds of gender nonconformity, some judges still refused to punish trans people for such behavior.

Other judges *did* enforce cross-dressing laws and criminalize people for wearing gender-nonconforming clothes. In February 1889, Lizzie Ryan obtained a letter from the same Recorder Davenport saying that she would probably not face arrest for wearing male attire.[443] Ryan had apparently learned of Davenport's decision and written to him to inquire whether she could wear male clothes "for self-protection."[444] The letter from Davenport proved both insufficient and incorrect, and Ryan was arrested in Hannibal, Missouri.[445] The Police Court fined her $10.[446] In Kansas City, cross-dressing might be legal. Two hundred miles away

438. SEGRAVE, *supra* note 210, at 32; *Privileges of the Sex*, *in* 12 THE LEGAL NEWS 8, 8 (James Kirby ed., Montreal, Gazette Printing Co. 1889).

439. *Kansas City's Sensation*, ST. LOUIS POST-DISPATCH, Sep. 17, 1888, at 7 (on file with State Hist. Soc'y Mo., https://shsmo.newspapers.com/image/138107471/?match=1&terms=kansas%20City%27s%20Sensation).

440. *See* Bayker, *supra* note 121, at 64.

441. *Judge Hogan Refuses to Fine Woman Who Posed as a Man*, ST. LOUIS POST-DISPATCH, Nov. 27, 1918, at 8 (on file with ProQuest, Historical Newspapers: *St. Louis Post-Dispatch* (1879–1922), https://www.proquest.com/docview/578199599/citation/F7829292EFF64331PQ/18).

442. ST. LOUIS, MO., ORDINANCES ch. 25, art. II, § 2 (1881). St. Louis was actually the first city to prohibit cross-dressing in 1843. *See* Bayker, *supra* note 122 (choose "St. Louis, Missouri (1843)").

443. *Masqueraded in Male Attire*, ST. LOUIS POST-DISPATCH, Feb. 18, 1889, at 2 (on file with State Hist. Soc'y Mo., https://shsmo.newspapers.com/image/138107813/).

444. *Id.*

445. *Id.*

446. *Id.* This would be equivalent to about $350 today, quite a lot of money. *Value of $10 from 1889 to 2025*, OFF. DATA: CPI INFLATION CALCULATOR, https://www.officialdata.org/us/inflation/1889?amount=10 [https://perma.cc/3QKQ-PH23] (last visited Oct. 31, 2025).

in western Missouri, the same action was criminalized, no matter what Davenport said. Trans people attempted to navigate the complicated landscape of anti-cross-dressing laws in the 1800s and early 1900s. Rather than being definitively legal or illegal, cross-dressing was a topic of public and legal debate in this period. As illustrated in Ryan's case, trans rights in the late nineteenth and early twentieth century depended on the particular city or even the particular judge.[447]

Since not all cities had cross-dressing ordinances, some trans people were arrested under laws regulating vagrancy or disorderly conduct. Unlike many other cities, such as San Francisco and Chicago, New York City never passed a law banning cross-dressing.[448] However, an 1845 New York state law banned people from "appearing disguised and armed" or "having [their] face painted, discolored, covered or concealed, or being otherwise disguised."[449] The legislature did not pass this law to criminalize cross-dressing or "masquerading as a man/woman," but the law could be used to target trans people and punish gender nonconformity. For example, a trans woman named May Miller was arrested by the police multiple times in New York from 1914 to 1916.[450] She was charged with masquerading as a woman, unlawfully possessing a drug, disorderly conduct, and other alleged crimes.[451] Vagrancy and disorderly conduct laws were an unwieldy and discriminatory tool. They could be used to punish gender nonconformity even in cities without bans on cross-dressing.

However, not all judges agreed that these vagrancy laws could or should be used to police gender nonconformity, and many trans people successfully argued that they had not actually broken any law. When Frances de Nyse was arrested in New York for wearing male clothes, his lawyer argued that he was not a vagrant. According to newspapers, his lawyer explained, "Read that statute yourself . . . and then say publicly that this case comes under any of these provisions. Donning female [sic][452] attire can not constitute vagrancy."[453] The lawyer carefully distinguished between disguise, which *was* prohibited by the law, and simply wearing

447. In the present day, federalism continues to play a big role in trans rights, as anti- and pro-trans laws vary greatly by state. *See Snapshot: LGBTQ Equality by State*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps [https://perma.cc/WK6R-NP2V] (last visited Oct. 31, 2025) (providing an overview of trans laws by state); *see also* Jami Taylor, Andrew Flores, Donald Haider-Markel, Daniel Lewis & Patrick Miller, *American Federalism: A Blessing and a Curse for Transgender Rights*, 54 PUBLIUS 511, 515–17 (2024) (discussing the benefits and drawbacks of federalism for trans rights); Nancy J. Knauer, *The LGBTQ Equality Gap and Federalism*, 70 AM. U. L. REV. 1, 49–56 (2020) (discussing the differences between states in terms of LGBTQ equality).

448. *See* Bayker, *supra* note 121, at 64. A map of cross-dressing laws lists over fifty examples of cities with anti-cross-dressing laws. Bayker, *supra* note 122. They are primarily concentrated in the Midwest, South, and West. *See id.* Bayker found no cross-dressing laws in cities such as New York City or Boston. *Id.*

449. Bayker, *supra* note 121, at 71.

450. *Thrice in Jail, Man Passes as Woman*, *supra* note 385, at 8; *Thrice Arrested as Girl Is Sent to Prison as Man*, EVENING REC., May 31, 1916, at 6 (on file with ProQuest, https://www.proquest.com/docview/2238047272/C16F5E070A7E47D0PQ/7?accountid=14496&sourcetype=Newspapers).

451. *Id.*

452. Presumably the lawyer meant "male attire."

453. *Jennie Westbrook Released: Arraigned for Vagrancy*, CINCINNATI ENQUIRER, Feb. 26, 1882, at 12 (on file with ProQuest, Historical Newspapers: *The Cincinnati Enquirer* (1872–1922), https://www.proquest.com/docview/890291692/fulltextPDF/549C75EA127406CPQ/1?accountid=14496&sourcetype=Newspapers).

male clothes, which was not.[454] The judge agreed, and de Nyse was released.[455] In 1912, the Erie County Court similarly held that it was not vagrancy for a person who appeared to be male to be wearing "women's clothes" in public.[456] While some judges used vagrancy statutes to criminalize cross-dressing, others refused to read the statutes so broadly. They argued that just wearing male or female attire was not in and of itself vagrancy or "disorderly conduct."[457] These acquittals demonstrate trans and gender-nonconforming[458] people's ability to use the law to argue for their rights and avoid conviction. They also illustrate that some judges were unwilling to read vagrancy statutes to prohibit cross-dressing and instead stuck to a narrow interpretation of such laws.

Many trans people argued that they should have a right to dress and act as they choose. In 1880, a white man named Leon A. Belmont was accused of being a woman, and he was fined $50 in Minneapolis.[459] Nevertheless, he continued to wear male clothes and even married a woman.[460] Belmont was asked by a journalist, "I suppose you know . . . that it is against the law for a woman to wear men's clothing."[461] He replied,

> I know it . . . and yet Judge Cooley said I had a right to wear it . . . I want you to know that I have a right to be in this town; I have a right to wear what clothing I want to, and I am going to exercise that right.[462]

It is unclear whether the judge actually told Belmont that he had such a "right." However, Belmont articulated that he had the "right" to keep living as he wanted and where he wanted. In 1909, the *Afro-American*, a Baltimore Black-owned newspaper,[463] reported that James Allen was not a man but a woman.[464] According to the *Citizen*, James Allen, a young Black school teacher, proclaimed,

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454. *Id.*

455. *Id.*

456. People v. Luechini, 136 N.Y.S. 319, 320–21 (N.Y. Cnty. Ct. 1912).

457. *Id.* at 320.

458. The defendant in *People v. Luechini* might not have been trans, because he seems to have just been wearing female clothes as part of a performance. 136 N.Y.S. at 320. Regardless, he still provides another example of a person using the law to defend their gender nonconforming clothing.

459. Ehrenhalt, *supra* note 44, at 216–17, 222.

460. *Id.* at 223.

461. *Id.* at 214.

462. *Id.* at 214; *see also The Belmont Mystery*, MINNEAPOLIS TRIB., Nov. 12, 1880, at 6 (on file with Minn. Hist. Soc'y, Minnesota Digital Newspaper Hub, https://newspapers.mnhs.org/jsp/PsImageViewer.jsp?doc_id=7fe71607-29e4-48e3-947a-9665b6f6fc5c%2Fmnhi0005%2F1DFC5C58%2F80111201) (quoting the same).

463. *Baltimore Afro-American*, REP. FOR AM., https://www.reportforamerica.org/newsrooms/the-baltimore-afro-american/ [https://perma.cc/A4L3-WXUZ] (last visited Nov. 11, 2025).

464. *And Her Name Was Maud—Not James*, AFRO-AMERICAN, May 1, 1909, at 4 (on file with ProQuest, Historical Newspapers: *Baltimore Afro-American* (1893–2010), https://www.proquest.com/docview/530313918/fulltextPDF/2C19D93F8EF0440EPQ/1?accountid=14496&sourcetype=Newspapers).

"I see no reason as to why I should not be allowed to dress as I please."[465] Trans people like Allen and Belmont asserted that they had the right to "dress as they please" and that other people should not interfere with that right. They saw their clothes as vitally important, not just to their gender but to their ability to make their own choices. Allen and Belmont did not seem to be arguing that they should be permitted to wear male attire because they were men but, rather, because people should be allowed to wear what they want regardless of gender.

Some trans people explicitly sought legal or state permission for wearing the clothes they chose. Emily Paxton, a mixed-race person from Missouri, was permitted by the Governor to wear men's clothes, but only outside of cities larger than 10,000 people.[466] The Governor might have seen Paxton's attire as practical in rural areas, where Paxton worked in farming and horse training,[467] but disruptive in cities. In 1905, Maud Milbourne argued that they[468] should have the "privilege to wear female attire."[469] Milbourne explained, "While physically I am a man, yet spiritually and intellectually I am neither a man nor a woman, while I feel that in form and spirit I incline more to effeminacy."[470] Milbourne defended their clothing as an expression of their self, gender, and liberty. They explained that they intended to petition the legislature for permission to wear female clothes.[471] Trans people like Paxton and Milbourne sought legal approval for their clothing choices.

Judges and lawyers sometimes presented trans rights not just as an exercise of liberty but as part of "women's rights." In 1858, a judge decided whether Joseph Lobdell, a white trans man,[472] should be convicted for wearing male

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465. *Makes Her Way as Man: Maude Allen, Young Mulatto Posing for Eight Years as Boy, Graduates and Is Made Teacher*, CITIZEN, June 16, 1909, at 6 (on file with Libr. of Cong., Chronicling America, https://chroniclingamerica.loc.gov/lccn/sn87078082/1909-06-16/ed-1/seq-6/).

466. *Where Is This Law?*, DAILY HERALD, Aug. 18, 1893, at 1 (on file with Libr. of Cong., Chronicling America, https://chroniclingamerica.loc.gov/lccn/sn86089174/1893-08-18/ed-1/seq-1/); *There Is One Woman in Missouri*, BRIDGETON PIONEER, Aug. 15, 1889, at 4 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/resource/sn87068192/1889-08-15/ed-1/?sp=4&q=There+Is+One+Woman+in+Missouri+Bridgeton&st=pdf&r=-0.297,-0.006,1.593,1.593,0). Paxton appears to have had both Black and white ancestry. *Id.*

467. *There Is One Woman in Missouri*, *supra* note 466, at 4.

468. Milbourne probably did not use they/them pronouns. However, as they describe themself as neither man nor woman, I use those pronouns to convey that gender identity as best as possible. *Here Is the Human Limit: Ohio Man Who Wears Skirts and Has the Soul of a Female*, CINCINNATI ENQUIRER, Oct. 20, 1906, at 11 (on file with ProQuest, Historical Newspapers: *The Cincinnati Enquirer* (1872–1922), https://www.proquest.com/docview/895759915/fulltextPDF/92BD11CEDBB941D1PQ/1?accountid=14496&sourcetype=Newspapers).

469. *See* Special Correspondence to the Enquirer, *Insists He Has a Right to Wear Woman's Attire*, CINCINNATI ENQUIRER, Apr. 16, 1906, at D5 (on file with ProQuest, Historical Newspapers: *The Cincinnati Enquirer* (1872–1922), https://www.proquest.com/docview/895211927/fulltextPDF/B4E39D76360C4686PQ/1?accountid=14496&sourcetype=Newspapers).

470. *Id.*; *This Man Wants to Wear Regulation Clothes of Woman*, OAKLAND TRIB., May 30, 1905, at 9 (on file with Anc., Newspapers, https://newscomwc.newspapers.com/image-view/76917335/?match=1&terms=milbourne&pqsid=bxxYHcCeOvlix-x1o0bzDg%3A24639%3A2116013691).

471. *See Insists He Has a Right to Wear Woman's Attire*, *supra* note 469, at D5.

472. Lobdell is in the 1850 census under his deadname and listed as white. Bell, Schedule I: Free Inhabitants in Westerloo in the County of Albany, *in* POPULATION SCHEDULES OF THE SEVENTH CENSUS OF THE UNITED STATES: NEW YORK ALBANY COUNTY 150 (1850), *microformed on* FAM. SEARCH

clothes.[473] According to Lobdell's lawyer's account, the judge "ruled that the right of females to 'wear the pants' had been recognized from the time of Justinian."[474] Lobdell was released.[475] Lobdell's lawyer framed the case as one of "wom[e]n's rights,"[476] and explained that it was "among the first cases" tried in Minnesota after it became a state.[477] Although Lobdell might not have seen the case as about women's rights, as he was not a woman, it is notable that Lobdell's lawyer described this case as connected to gender equality.[478] Not only are trans rights "deeply rooted" in U.S. history but one of the first actions of the Minnesota legal system resulted in a judge refusing to punish a trans man for wearing women's clothes. This court case also illustrates how some judges saw cross-dressing as connected to women's rights.

Journalists also defended the right of people, especially people who were assigned female at birth, to wear the clothes they chose. In 1883, the *New York Dispatch* reasoned, "[N]or does there seem any good reason why a woman should not wear a man's dress, any more than that the law should regulate the length or width, or color of her skirts."[479] The *Dispatch* did not see any particular reason why what someone wore was the law's business. Other newspapers made similar arguments. In an astonishing opinion piece, the *New York Times* responded to an 1883 marriage between a trans man, named Frank Dubois, and a cis woman named Gertie Fuller. It asked, "Why, then, has not Mrs. Dubois [Gertie Fuller] the right to live with another woman who wears lawful trousers, and why should so much indignation be lavished upon Mrs. Dubois's female husband?"[480] These newspapers were not making entirely serious arguments, and they did not see these trans men as men. Nevertheless, they presented gender nonconformity and even queer marriages as lawful and moral. Queer people might have been strange but that does not mean they were breaking the law. It was neither illegal nor immoral to be odd.

In 1912, the *San Francisco Call* hosted a contest to answer the question: "Has Miss Sears the Right to Wear Trousers?"[481] Eleanora Sears, a tennis champion,

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No. 004196761 (Nat'l Archive Microfilm Publ'ns), https://www.familysearch.org/ark:/61903/3:1:S3HT-XXF7-PHL?view=index&personArk=%2Fark%3A%2F61903%2F1%3A1%3AMCTX-B8P&action=view&cc=1401638&lang=en&groupId=M9C8-1T1.

473. SMITH, *supra* note 58, at 105–06. Smith was one of Lobdell's lawyers. *Id.*; *see also* MANION, *supra* note 44, at 212–13, 216 (discussing this trial).

474. SMITH, *supra* note 58, at 106.

475. *Id.*

476. *Id.* at 132.

477. *Id.*

478. Lobdell's legal battles did not end, and much later, he was imprisoned in an asylum by his brother. *See* MANION, *supra* note 44, at 222. However, this early legal victory is still important.

479. *Change of Sex*, *supra* note 49, at 1.

480. *Female Husbands*, N.Y. TIMES, Nov. 4, 1883, at 8 (on file with ProQuest, Historical Newspapers: *New York Times* (1857–1922), https://www.proquest.com/hnpnewyorktimes/docview/94061840/9DE9F80C1A4B4865PQ/2?accountid=36339&sourcetype=Newspapers). For an analysis of this article, see MANION, *supra* note 44, at 235–36.

481. *Has Miss Sears the Right to Wear Trousers?*, S.F. CALL, Mar. 31, 1912, at 11 (on file with Anc., Newspapers, https://newscomwc.newspapers.com/image/80824859/).

had been asked by the Burlingame Mothers' club to refrain from wearing trousers while riding horseback.[482] Although some people wrote to the newspaper to condemn women wearing trousers,[483] many defended women's "right" to dress as they wanted and connected this right to feminism. One woman asked, "Is not this a free country?"[484] She concluded, "Wear your trousers, Miss Sears, California has given women 'equal rights.'"[485] Another letter stated, "I think Miss Sears has the right to do as she pleases."[486] Another person insisted, "When the world gives up the old, wornout idea that everything that a woman does out of the usual is necessarily immodest, then we California women will really have the full benefit of our justly deserved suffrage."[487] These newspaper commentators did not embrace a general right to transition, nor did they see Eleanora Sears as a man. Instead, they argued that people should have a right to do as they choose and that freedom of dress was an important part of feminism. Like many judges, they also refused to see cross-dressing as inherently disorderly or immoral. These letters suggest that many ordinary people, or at least middle-class women who read the newspaper, also supported cross-dressing and connected it to feminism and liberty.

Before World War II, judges and police applied a patchwork of inconsistent laws to regulate trans people and gender nonconformity. Although some judges eagerly enforced cross-dressing laws, others refused to punish people just for gender nonconforming attire. Trans people and their supporters marshalled different arguments to support their clothing choices. Sometimes they explained that they *were* men or women or neither or that their clothing helped affirm or support their sense of gender. Some trans people protested that they had not broken any law and that they were not actually vagrants. Sometimes they argued that they should have the right to "dress as they please." Some commentators explicitly connected cross-dressing to gender equality, claiming that women should be allowed to wear male clothes. While not all legal authorities saw the right to choose clothing as about gender transitions, many trans people linked their clothing choices to the liberty to present their gender as they chose. This history suggests that many nineteenth-century Americans *did* see gender transitions as part of "ordered liberty," and they used many different legal arguments to support their interpretation of the law.

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482. *See id.* (picturing "Miss Eleonora Sears . . . in the Riding Trousers That Have Caused All the Trouble").

483. *See* M.L.M., *Bible Authority Brought to Bear*, S.F. CALL, Apr. 21, 1912, at 39 (on file with Anc., Newspapers, https://newscomwc.newspapers.com/image/80847442/); B.H. Veeder, *Costumes of Men and Women Should Be Different*, S.F. CALL, Apr. 14, 1912, at 11 (on file with Anc., Newspapers, https://newscomwc.newspapers.com/image/80839593/).

484. Jennie E. Brown, *Trousers Less Shocking than Ball Gown*, S.F. CALL, Apr. 14, 1912, at 11 (on file with Anc., Newspapers, https://newscomwc.newspapers.com/image/80839593/).

485. *Id.*

486. E.B.W., *A Girl of Spirit and Fun*, S.F. CALL, May 19, 1912, at 35 (on file with Anc., Newspapers, https://newscomwc.newspapers.com/image/80875328/).

487. *Women Should Wear What She Pleases*, S.F. CALL, May 19, 1912, at 35 (on file with Anc., Newspapers, https://newscomwc.newspapers.com/image/80875328/).

E. TRANSITIONS IN SOCIAL AND FAMILIAL ROLES

Transitioning involved not just changes to one's body or identity but also adoption of a new place within one's social, legal, and familial world. Jesse Bayker explains, "The question 'how do you experience gender internally?' could be seen as a proxy for a more pressing social question: 'how do you want to interact with other members of your community?'"[488] As many legal historians have pointed out, a person's reputation and standing in their community were an essential part of nineteenth-century life.[489] Rather than leaving their families or communities, many trans people instead stayed in contact with their families.[490] They took on new gendered familial and social roles, becoming mothers or husbands or daughters or grandfathers. They also adopted gendered legal rights and responsibilities[491]: voting, registering for the draft, avoiding the draft, and even entering political office. Trans people sought respect and recognition from their communities for their genders, and sometimes they received such respect in return.

For many trans people, the adoption of gendered familial roles was an important part of their transitions. For example, when Edgar Burnham transitioned in the 1860s and married a woman, newspapers summarized his story by explaining, "The former girl is now a man, the former wife is now a husband, the former *mother* is now a *father*, the former young lady teacher of a young lady is now that young lady's husband."[492] Although Burnham was not a father or a mother,[493] these newspaper accounts viewed his gender transition as more complete if he had also become a father and a husband. Burnham's transition also demonstrates the recursive relationship between familial and gender role. Burnham's masculinity allowed him to marry, and his marriage enforced his masculinity. Some trans men, like Albion Strout, even got married in the same town they had lived in before their transitions.[494] Since gender and family were so interconnected, trans people's adoption of family roles played an important role in affirming and representing their gender. Some queer historians have pointed out that trans and queer

488. Bayker, *supra* note 275, at 105.

489. *See* MASUR, *supra* note 220, at 5.

490. *But see* Bayker, *supra* note 121, at 20 (discussing the importance of anonymity and mobility for trans people); SKIDMORE, *supra* note 2, at 142–43 (providing examples of trans people who moved towns to remain anonymous).

491. *See* LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 224–25 (1998) (discussing how citizenship involves gendered obligations as well as gendered privileges and rights); Elizabeth D. Katz, *Sex, Suffrage and State Constitutional Law: Women's Legal Right to Hold Public Office*, 33 YALE J.L. & FEMINISM 110, 165 (2022) (discussing women's efforts to hold public office).

492. *A Man-Woman*, *supra* note 359 (emphasis added).

493. Burnham did later become a step-father, marrying a woman named Theresa Ryan who had three children. *See* W.F. Hair, Schedule No. 1—Population, *in* [66] 12TH CENSUS OF POPULATION: ILLINOIS COOK CO. CHICAGO CITY 7–224 (1900), *microformed on* FAM. SEARCH No. 004113744 (Bureau of the Census Micro-Film Lab'y), https://www.familysearch.org/ark:/61903/3:1:S3HY-64KS-KPG?view=index&personArk=%2Fark%3A%2F61903%2F1%3A1%3AMS79-QKV&action=view&cc=1325221&lang=en&groupId=M9L1-97N.

494. *See* An Introduction of Marriage Between Mr. Albion P. Strout and Mary Dorsett, *supra* note 354, at 279.

people attempted to fit into community norms as a strategy to minimize persecution.[495] Rather than abandoning gendered expectations, such as the assumption that men were husbands, some trans people may have instead used these expectations to support their transitions.[496]

Many trans people's relatives acknowledged, at least to some extent, their loved one's transitions. In 1890, Mrs. Reynolds explained that she was certain that her child was male when she was born, but she accepted that her child was now a woman named Belle.[497] Reynolds explained, "[My child] convinced me beyond a shadow of a doubt. It is certainly the most marvelous thing that ever happened, but it is true, nevertheless. My boy has been changed into a girl."[498] At least according to this newspaper account, Reynolds respected her daughter's transition. Some parents eventually accepted their trans children, even if they initially resisted their transitions. Rollin Kedzie Morgan, a white resident of Vermont who was assigned female at birth, ran away from home at least twice as a teenager or young adult.[499] After both times, he begrudgingly returned home to live with his family, probably after resuming female attire.[500] Soon after, he left home again, this time marrying a woman in Oakland, California.[501] After his

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495. *See* SKIDMORE, *supra* note 2, at 55–57; RACHEL HOPE CLEVES, CHARITY AND SYLVIA: A SAME-SEX MARRIAGE IN EARLY AMERICA xi–xiv (2014).

496. *See, e.g.*, CLEVES, *supra* note 495, at xi ("One reason people viewed Charity and Sylvia's relationship as marital was that the women divided their domestic and public roles according to the familiar pattern of husband and wife.").

497. *See* Carol Acquaviva, *An Enigma for Olema: "Evolution or Hoax: Born a Boy but Swears She Is a Girl,"* MEDIUM (June 25, 2021), https://medium.com/anne-t-kent-california-room-community-newsletter/an-enigma-for-olema-evolution-or-hoax-born-a-boy-but-swears-she-is-a-girl-57c4ec090c4a [https://perma.cc/74X2-AGM4].

498. *Id.*

499. *See Masqueraded as a Boy: Young Woman Leaves Home to Secure Employment*, TIMES HERALD, Oct. 11, 1901, at 1 (on file with Anc., Newspapers, https://newscomwc.newspapers.com/image/84719861/); *Girl Runs Away as a Boy: Preacher's Daughter in Male Attire Hired as a Clerk*, LANCASTER EXAM'R, Oct. 16, 1901, at 3 (on file with Anc., Newspapers, https://newscomwc.newspapers.com/image/568739988/); *A Self Made Man: Worked in Brattleboro in Livery and as Farm Hand*, VT. PHOENIX, July 3, 1903, at 1 (on file with Anc., Newspapers, https://newscomwc.newspapers.com/image/547111017/); *Girl Wearing Male Attire*, ST. ALBANS DAILY MESSENGER, at 4 (on file with Anc., Newspapers, https://newscomwc.newspapers.com/image-view/444381643/?match=1&terms=%22myra%20morgan%22%20masquerade&pqsid=wUkXsPjYRZfyhyqCozUfRg%3A236848%3A1255560705). Myron Morgan is almost definitely the same person as Rollin K. Morgan. These newspaper articles discuss an individual named Myron Morgan (with the deadname Myra) who is the daughter of a physician named George (or sometimes Charles) Morgan. *See Masqueraded as a Boy*, *supra*, at 1; *A Self Made Man*, *supra*, at 1; *Girl Wearing Male Attire*, *supra*, at 4. *But see Girl Runs Away as a Boy*, *supra*, at 3 (identifying Morgan's father as a preacher, not a physician). The 1900 census lists a Lemyra Morgan (born 1881) living with the parents George (a physician) and Mary Morgan in Bennington, Vermont. A. Charles Niles, Schedule No.1—Population, *in* [2] 12TH CENSUS OF POPULATION: VERMONT BENNINGTON CO. 172 (1900), *microformed on* FAM. SEARCH No. 004120607 (Bureau of the Census Micro-Film Lab'y), https://www.familysearch.org/ark:/61903/3:1:S3HY-DHCQ-L7S?view=index&personArk=%2Fark%3A%2F61903%2F1%3A1%3AMMGT-PP3&action=view&cc=1325221&lang=en&groupId=M9L8-F1T.

500. *See A Self Made Man*, *supra* note 499, at 1. The newspaper claims that he resumed female clothes, *id.*, but that might be untrue.

501. *See "Husband," supra* note 357, at 1.

divorce in 1909,[502] he returned home. However, this time his parents seemed to acquiesce to him presenting as a male, and, by 1910, he was living with his parents while using the name Rollin.[503] Morgan presented as male for the rest of his life, marrying a woman for the second time in 1922.[504] He continued to stay in regular contact with his family, frequently visiting his parents and sisters.[505] Morgan's family, even if they were not initially supportive, seems to have decided remaining in contact with their son was more important than protesting his transition. Unlike Howard Calder's family, who refused to allow him to come home,[506] Morgan's parents did remain in contact with their trans son. People like Rollin Morgan and Belle Reynolds challenge the assumption that all trans people had to rely upon secrecy or passing and the assumption that parents never accepted their trans children.

In addition to transforming their familial role, many trans men also transitioned their legal obligations and performances of gender. For white trans men in particular, the adoption of a new gender role granted them new rights, rights that were not afforded to white women or people of color. In a history of legal adjudication of race, Ariela Gross asked, "Who was a white man? A civic being who voted, served on juries, and mustered in the militia."[507] White masculinity meant more than just anatomy; it also conferred certain rights and privileges. When the Grundy County court declared Carl Crawford as a man, they explained that his

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502. *See id.*

503. The 1910 census lists a Rollin K. Morgan (age 28) living with his parents George Morgan (a physician) and Mary Morgan in Bennington, Vermont. L. Halsea . . ., Thirteenth Census of the United States: 1910—Population, *in* [2] 13TH CENSUS: VERMONT BENNINGTON LAMOILLE 1–340, at 12B (1910), *microformed on* FAM. SEARCH No. 005157498 (Bureau of the Census Micro-Film Lab'y), https://www.familysearch.org/ark:/61903/3:1:33S7-9YB9-LQS?view=explore&action=view&cc=1727033&lang=en&groupId=TH-1951-25141-7780-20 (unintelligible text omitted).

504. *See* Marriage Record of Rollin K. Morgan & Emily J. Potter (July 15, 1922) (on file with Me. Genealogy, Maine Marriage Records (1892–1966, 1977–2009), https://www.mainegenealogy.net/marriage_record.asp?id=162948&groomfirstname=rollin&groomlastname=morgan&groomspelling=exact&groomtown=&groomstate=&bridefirstname=emily&bridelastname=potter&bridespelling=exact&bridetown=&bridestate=&day=&month=&year=1922&yearrange=0).

505. The *Republican Journal* describes Morgan visiting or being visited by his parents and sisters frequently, sometimes for prolonged periods of time. *Personal*, REPUBLICAN J., Aug. 10, 1916, at 1 (on file with Digit. Me. Repository, https://digitalmaine.com/cgi/viewcontent.cgi?article=1031&context=rj_1916) (describing Morgan visiting his sister); *October 26: Keep the Date in Mind*, REPUBLICAN J., Oct. 9, 1919, at 5 (on file with Digit. Me. Repository, https://digitalmaine.com/cgi/viewcontent.cgi?article=1041&context=rj_1919) (describing Morgan spending the winter with his parents, sisters, and brother-in-law); *Personal*, REPUBLICAN J., Apr. 21, 1921, at 1 (on file with Digit. Me. Repository, https://digitalmaine.com/cgi/viewcontent.cgi?article=1015&context=rj_1921) (describing Morgan's parents having spent the winter with him); *Personal*, REPUBLICAN J., Aug. 10, 1922, at 1 (on file with Digit. Me. Repository, https://digitalmaine.com/cgi/viewcontent.cgi?article=1031&context=rj_1922) (describing Morgan's sister, brother-in-law, and parents visiting Morgan shortly after he got married for the second time). Of course, a person can visit their family and still dislike them or fight over gender, but the frequency and duration of these visits suggest that they were at least somewhat close.

506. *See supra* note 29 and accompanying text.

507. ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA 53 (2008); *see also* Sudai, '*A Woman and Now a Man*,' *supra* note 121, at 84 (discussing how medical testimony on individuals' legal and biological sex implicated a range of rights like voting and marriage).

female gender assignment had "unintentionally . . . depriv[ed] [Crawford] of the legitimate rights of an American citizen."[508] The "American citizen" was assumed to be a white man, with the attendant "rights" and duties. Rather than arguing that all people should have certain rights, the court assumed that Crawford should have these rights because he was a man. Carl Crawford would later exercise these rights and responsibilities: marrying multiple times[509] and registering for the draft in World War I.[510] Several other white trans men registered to vote,[511] signed up for the draft,[512] and even ran for

508. *Sex Changed by a Court's Decree*, *supra* note 49, at 5B. See *supra* notes 278–85 and accompanying text for a discussion of Crawford.

509. Crawford married four times in his life: three times to women and once to a man. Two of these marriages to women occurred after the court-ordered gender change, in 1906 and 1919. *See* Board of Health, Record of Licenses and Marriages for the Month of December 1906, *in* 2 RECORD OF MARRIAGES DEC. 1899 TO JAN. 1908 (1908), *microformed on* FAM. SEARCH No. 004269103 (Genealogical Soc'y, Salt Lake City, Utah), https://www.familysearch.org/ark:/61903/3:1:3Q9M-C9TN-2933-G?i=363&lang=en (No. 482); Marriage License: Mr. Carl G. Crawford and Miss Annie M. Selleck, *in* 28 MARRIAGE RECORD: DUVAL COUNTY, FLORIDA 24 (1920), *microformed on* FAM. SEARCH No. 007621924 (Genealogical Soc'y, Salt Lake City, Utah), https://www.familysearch.org/ark:/61903/3:1:3QS7-L9KJ-9JXV?i=19&lang=en&cc=2397260; *see also* U Swanson, *Carl Goodwin (Tipton) Crawford (1872 - 1944)*, WIKITREE (Oct. 8, 2025), https://www.wikitree.com/wiki/Tipton-2759#_note-2 [https://perma.cc/4FUV-GGN3] (providing an overview of Crawford and his marriages).

510. *See* Registration Card No. 2457: Carl Goodwin Crawford, *in* WORLD WAR I SELECTIVE SERVICE SYSTEM DRAFT REGISTRATION CARDS 1917–1918: STATE OF FLORIDA CITY OF JACKSONVILLE LOCAL BOARD NO. 1, *microformed on* FAM. SEARCH No. 005150516 (Genealogical Soc'y, Salt Lake City, Utah), https://www.familysearch.org/ark:/61903/3:1:33SQ-GYYM-SC1R?view=index&personArk=%2Fark%3A%2F61903%2F1%3A1%3A7B6Z-L13Z&action=view&cc=1968530&lang=en&groupId=.

511. Rollin K. Morgan's voter registration is listed in the index to the Great Register of Alameda County for 1908. *See* Fourth Ward—Precinct No. 11, *in* 1 GREAT REGISTER: ALAMEDA COUNTY THIRD WARD NINTH PRECINCT CITY OF OAKLAND (1908), *microformed on* ANC. LIBR. (Custom Microfilm Sys., Inc.), https://www.ancestrylibrary.com/search/collections/61066/records/463869?tid=&pid=&queryId=95acbd51-5363-4bac-85dd-7dab451046bf&_phsrc=AQd1&_phstart=successSource. Walter Pope Spry, a white trans music teacher, also registered to vote a few years after he publicly transitioned in 1884. *See A Strange Metamorphosis: A Chicago Girl Turns Out to Be a Man*, DAILY MORNING ASTORIAN, Oct. 18, 1884, at 1 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/resource/sn96061150/1884-10-18/ed-1/?sp=1&r=0.704,0.61,0.592,0.293,0) (describing the "metamorphosis" of a man named Harry Spry); 7-1 RECORD & INDEX OF PERSONS REGISTERED & OF POLL LISTS OF VOTERS, 1888–1890, at 192 (1890), *microformed on* ANC. LIBR. (Off. of the Sec'y of State), https://www.ancestrylibrary.com/imageviewer/collections/5997/images/cvr_30-1787_00000202?rc=&queryId=576e8a8c-ed52-403e-b4c2-2bd021a5ed74&usePUB=true&_phsrc=Pih1&_phstart=successSource&pId=152004. Genealogist U. (Hannemann) Swanson concludes that Walter Spry is almost definitely the same person as the Harry/Hattie Spry mentioned in the newspaper article. Brian Stump & U Swanson, *Walter Pope Spry*, WIKITREE (Nov. 7, 2022), https://www.wikitree.com/wiki/Spry-738#_note-death [https://perma.cc/QA2K-B436] ("Records for 'Harriet'/Harry end in 1880, while records for Walter begin in 1889. The articles regarding his gender change were published in 1884. Both 'Harriet'/Harry and Walter were born in Chicago in 1868 to English parents . . . John and Ellen Spry.").

512. *E.g.*, Rollin Kedzie Morgan registered for the draft in World War I. Registration Card Serial No. 3828: Rollin Kedzie Morgan, *in* WORLD WAR I SELECTIVE SERVICE SYSTEM DRAFT REGISTRATION CARDS 1917–1918: STATE OF VERMONT COUNTY OF CHITTENDEN, *microformed on* FAM. SEARCH No. 005271324, https://www.familysearch.org/ark:/61903/3:1:33S7-81VQ-X37?view=index&personArk=%2Fark%3A%2F61903%2F1%3A1%3AK8WH-WT3&action=view&cc=1968530&lang=en&groupId=. Ben Schmidt, a Hungarian trans man, also registered for the World War I draft. *See Judge Hogan Refuses*, *supra* note 441, at 8 (Bertha is Ben's deadname); *Women Who Posed as Man and Wife Are Under Arrest: Widow and Her Cousin, Both of Hungarian Birth, 'Married' Six Weeks Ago at Clayton*, ST. LOUIS STAR, Nov. 26, 1918, at 3 (on file with Anc., Newspapers, https://newscomwc.newspapers.com/image-view/204569436/); Registration Card

political office.[513] Some trans men, like the acting teacher Eugene De Forrest, were directly involved in suffrage or other kinds of women's rights activism.[514] Other white trans men voted for various reasons, perhaps just because they could or because voting was connected to masculinity.[515] By registering to vote or participating in the draft, white trans men exercised both the privileges and responsibilities of white male citizenship.[516]

As many trans men embraced military service or the draft, some trans women deliberately avoided the draft. In 1940, Congress passed a "Selective Training and Service Act," which required all male citizens to register for the draft.[517] As trans historian Juniper Oxford points out, this act created problems for trans women, who had to decide whether to avoid the summons and risk arrest.[518] Some trans women, including Louise Lawrence[519] and Barbara Richards,[520] were rejected for the draft. Sadie Acosta, a Latina trans woman, initially evaded the draft, before being arrested in 1941.[521] After she was outed, she finally agreed to register for the draft, likely motivated by her reliance on welfare.[522] Acosta's ability to live and present as a woman was limited by her need to comply with certain governmental requirements, such as the draft, in order to make her living.[523] Lucy Hicks Anderson, a Black trans woman, was also charged with draft evasion in 1946, and the court found her guilty of perjury.[524] Since she was married to a veteran and collected his pension, she was convicted of fraud, sentenced to a year in

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Serial No. 1515: Ben Bert Schmidt (on file with Anc. Libr., U.S., World War I Draft Registration Cards, 1917–1918), https://www.ancestrylibrary.com/imageviewer/collections/6482/images/005151921_04350?rc=&queryId=6caccbbb-f96c-4404-95ad-130fea65bbe9&usePUB=true&_phsrc=Pih3&_phstart=successSource&pId=30824109).

513. *See infra* notes 530–32 and accompanying text; Ehrenhalt, *supra* note 44, at 223 (discussing Leon Belmont, a white trans person, who ran for city physician in Minneapolis even after he had been outed).

514. *See* ROUSE, *supra* note 206, at 77.

515. *See* sources cited *supra* note 511; MANION, *supra* note 44, at 195. In the 1880s, Black people still participated in politics and voting, but white supremacists used a variety of methods to attempt to suppress the Black vote. *See* OMAR H. ALI, IN THE LION'S MOUTH: BLACK POPULISM IN THE NEW SOUTH, 1886–1900, at 146 (2010) (ebook). By the turn of the twentieth century, Southern states had largely disenfranchised Black voters. *See id.* I have not found any examples of Black trans men or other trans men of color who were registered to vote, although there certainly may have been some.

516. *See* KERBER, *supra* note 491, at 223–24 (discussing the draft as a male obligation of citizenship).

517. Selective Training and Service Act of 1940, ch. 720, 54 Stat. 885. Juniper Oxford notes that "[t]here are several notable cases of trans feminine Americans who served in the military during the Second World War . . . include[ing] Christine Jorgensen." Juniper Oxford, *Draft Dodger, Soldier's Wife: Trans Feminine Lives, Civic Duty, and World War II*, 12 GRADUATE HIST. REV. 73, 105 (2023).

518. Oxford, *supra* note 517, at 74–75.

519. Lawrence, *supra* note 304, at 84. Lawrence suggests in her autobiography that her rejection was related to her gender presentation. *See id.*

520. Waters, *supra* note 121.

521. Oxford, *supra* note 517, at 84 & nn.29–30.

522. *Id.* at 85–86. At the time, the United States had not entered World War II. *Id.* at 86. It does not seem that Acosta ever served in the military. *Id.* at 89–90.

523. *Id.* at 89.

524. *Id.* at 97.

jail, and ordered to pay a large fine.[525] Unlike Lawrence, Richards, or even Acosta, Lucy Hicks Anderson was severely punished for her gender nonconformity. Trans women's ability to successfully transition depended on both their race and class privilege. By forcing trans women of color to register for the draft or punishing them for noncompliance, the federal government punished them for rejecting masculine obligations. For both trans men and trans women, the draft and military service served as important signifiers of their genders and were an important part of their assertions of gender.

The story of Charles Phear, a white trans man from a tiny town in upstate New York, illustrates how many trans people were able to remain part of their communities and take on gendered roles. Charles Phear presented as a girl until sometime in the 1870s[526] when he supposedly underwent what one newspaper called a "wonderful metamorphosis"[527] and started appearing masculine. By 1880, Phear was presenting as male and going by the name Charles.[528] Despite Phear's transition, he stayed close to his family, returning to live with them in 1880 after he first transitioned.[529] Phear also occupied many reputable positions within his town. He served as a church deacon,[530] worked as a teacher,[531] and even held local elected office, being elected an assessor.[532] When he died, his obituary remembered him

525. *Id*. at 97–98.

526. *See* Schedule 1, *in* 7 POPULATION SCHEDULES OF THE NINTH CENSUS OF THE UNITED STATES: NEW YORK CHAUTAUQUA COUNTY 26 (1870), *microformed on* FAM. SEARCH No. 004274896 (Nat'l Archives Microfilm Publ'ns), https://www.familysearch.org/ark:/61903/3:1:S3HT-68GS-MZ7?view=index&personArk=%2Fark%3A%2F61903%2F1%3A1%3AM8XM-299&action=view&cc=1438024&lang=en&groupId= (listing Phear as female and white in the 1870 census under his deadname (Rosa) at line 20).

527. *The Story of a Wonderful Metamorphosis in Erie*, SMYRNA TIMES, Apr. 26, 1882, at 1 (on file with Libr. of Cong., Chronicling America, https://chroniclingamerica.loc.gov/lccn/sn84020422/1882-04-26/ed-1/seq-1/); *A Strange Case Recalled: By a Female Husband*, MAGNOLIA GAZETTE, Dec. 20, 1883, at 2 (on file with Anc., Newspapers, https://www.newspapers.com/image/630994271/). Although newspapers reported on this transition in the mid-1880s, Charles Phear was already in the census under his male name by 1880. *See* T.B. Little, Schedule 1—Inhabitants in Ripley, in the County of Chautauqua, State of New York, *in* [10] 10TH CENSUS: NEW YORK CHAUTAUQUA PART 2 CHEMUNG 1–601, at 26 (1880), *microformed on* FAM. SEARCH No. 005161454 (Bureau of Census Micro-Film Lab'y), https://www.familysearch.org/ark:/61903/3:1:33S7-9YBN-9F3H?view=index&personArk=%2Fark%3A%2F61903%2F1%3A1%3AMZZC-2G6&action=view&cc=1417683&lang=en&groupId= (line 20). National newspapers tend to call him by the more poetical name of Charles Fear, but genealogical sources and local newspapers generally refer to him as Charles Phear, which was probably the correct spelling of his last name.

528. Little, *supra* note 527, at 26.

529. *See id*.; *see also A Strange Case Recalled*, *supra* note 527, at 2 (discussing Charles's return).

530. *See* Ripley Baptist Church Membership (c. 1893) (on file with Ripley Town Historian). Thank you to Dr. John Hamels, the Ripley Town Historian, and Michelle Henry, the Chautauqua County Historian, for sending me sources on Charles Phear.

531. *See* Emma Rickenbrode, Pioneer Schools of Ripley (c. 1921) (on file with Ripley Town Historian) (read at the Ripley Literary Club); *Charles H. Phear*, WESTFIELD REPUBLICAN, Jan. 25, 1922, at 8 (on file with NYS Hist. Newspapers, https://www.nyshistoricnewspapers.org/?a=d&d=wre19220125-01.1.1&e=——-en-20–1–txt-txIN———).

532. *Ripley*, WESTFIELD REPUBLICAN, Feb. 17, 1892, at 4 (on file with NYS Hist. Newspapers, https://www.nyshistoricnewspapers.org/?a=d&d=wre18920217-01.1.1&e=——-en-20–1–txt-txIN———); BD. OF SUPERVISORS, CHAUTAUQUA CNTY., JOURNAL OF PROCEEDINGS OF THE CHAUTAUQUA COUNTY BOARD OF

as a "man of sterling character."[533] In Phear's tiny town, it seems likely that most people would have known that Charles Phear was assigned female at birth. Nonetheless, his neighbors repeatedly chose him for positions of trust within the town, and they did not seem to oppose his marriage to a woman.[534] Phear was able not only to continue to live within his community but to take specifically *male* roles: husband, deacon, assessor,[535] and son.

Trans people's legal transitions and community transitions were intertwined. Throughout Part II, I discussed different ways that people transitioned: sex changes, new names, gender-affirming medical care, and gender-affirming clothing. While these types of transitions were important in and of themselves, they were also essential to trans people's ability to participate in their communities with dignity and respect. For example, Charles Phear's community not only acknowledged his new name and new clothes but also afforded him a prominent place of respect. The right to transition allows trans people to equally engage in their communities, and community support enables trans people to transition. As anti-trans laws target both trans people's medical and legal transitions and their participation in public life, it is important to remember the long history linking those two aspects of trans rights.

When Francis Lewis died in 1823, newspapers reported,

> Died. In Tisbury, (Ms.) Mr. Francis Lewis, 93 – 32 of which years he dressed as a woman, and was supposed to be such. After that, he took his proper apparel as a man, and passed the remainder of his life in the marriage state, and has left numerous descendants. The family has always deserved and received the respect of those who knew it.[536]

The newspapers acknowledged Lewis had been assigned female at birth. Nonetheless, they saw him as worthy of respect as a man, a father, and a member of their community. Transitions were not just about identity or self-affirmation, though both are important. They were also about "receiv[ing] the respect" of one's community and family.[537] Many trans people, like Francis Lewis and Charles Phear, successfully transitioned into a new social and community role. This legal history illustrates that the ability to participate in public and family life

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SUPERVISORS 129 (Fredonia, N.Y., W. McKinstry & Son 1892); *The Roles of the Assessor*, N.Y. STATE: DEP'T OF TAX'N & FIN. (May 27, 2025), https://www.tax.ny.gov/pubs_and_bulls/orpts/assessjo.htm [https://perma.cc/4UAV-SZN8] ("The assessor is a local government official who estimates the value of real property within a city, town, or village's boundaries.").

533. *Charles H. Phear*, *supra* note 531, at 8.

534. *See* N.Y. STATE DEP'T OF HEALTH, NEW YORK STATE MARRIAGE INDEX 505 (1887) (certificate number 3374).

535. In the 1880s and 1890s, there were ongoing debates over whether women should be allowed to hold political office. *See* Katz, *supra* note 491, at 163. New York allowed female notaries and lawyers by the 1886 but did not generally grant women the right to hold public office. *See id.* at 165.

536. Baer, *supra* note 49.

537. *Id.* Trans people's communities do not have to be identical to straight people's to be valid or important. My point is not that these communities have to be normative but that transitions shape people's relationship to their communities.

is a necessary part of the right to transition, and an essential part of "ordered liberty."

III. IMPLICATIONS OF TRANS LEGAL HISTORY FOR THE RIGHT TO TRANSITION

In this Article, I aim to answer legal scholar Serena Mayeri's call to take a "critical approach to history"[538] after *Dobbs*. Rather than merely showing that trans people existed in the nineteenth century, I examine how trans people used legal institutions and advocated for their rights, as well as how state and local authorities responded. I challenge the inaccurate versions of history advanced in many court cases, and I demonstrate that the right to transition *is* deeply rooted in U.S. history and tradition. My goal is for this piece to be one of many scholarly works that interrogate the legal history of trans people. Trans history can demonstrate the historical significance of trans rights, illuminate possible pro-trans arguments, and challenge the idea that gender nonconformity is new.

Trans legal history is important both for originalist and non-originalist interpretations of the Constitution. If originalists *are* going to look to the history of rights, they can at least look to more accurate histories of trans people. While proponents of trans rights may not agree with originalism, they should still be able to use history to counter originalist claims. Nineteenth-century judges and legislators would have understood gender transitions differently than we do today, but that does not mean the idea of sex changes would have been foreign to them. In 1868, the same year that the Fourteenth Amendment was ratified, newspapers were reporting on the gender transitions of the musician Edgar Burnham.[539] Pro-trans lawyers and activists can and should assert not just that trans people existed in the mid-1800s but that they were a common and well-known part of everyday life.

Even for non-originalists, legal history remains central to constitutional arguments. Rather than avoiding or deflecting from the question of trans history,[540] lawyers and other trans rights activists should engage directly with trans history. They could counter conservative arguments that trans people are new and that no one transitioned before the late twentieth century.[541] Pro-trans activists can also use trans legal history to resist claims that gendered biological differences are neutral, that nineteenth-century Americans never acknowledged gender fluidity, or that gender-affirming care is a recent invention.[542] Appeals to history are not just the domain of transphobes or conservatives; pro-trans people can engage with history too.

The history of legal transitions also demonstrates that considerations of "history and tradition" should go beyond just the history of legislative statutes, legal treatises, or Supreme Court decisions. Although cases involving trans people did

538. Mayeri, *supra* note 91, at 195.
539. *See, e.g.*, *A Man-Woman*, *supra* note 359.
540. *See supra* Section I.B.
541. See *supra* Section I.A for a summary of these conservative arguments.
542. See *supra* Section I.A for a summary of these claims.

occasionally reach higher courts, county and municipal level authorities played a much more important role in this history. A cursory search on Westlaw or Lexis Nexis might give the impression that the law had little to say about trans people before the late twentieth century or that trans people had little to say about the law. This is far from the truth. Trans people actively used and engaged with law, and legal institutions actively engaged with trans people.

Trans legal history provides three main lessons for constitutional law. First, the right to gender transitions should be considered a fundamental right under the Due Process Clause because trans rights *are* deeply rooted in U.S. history and tradition. Second, trans legal history illustrates one way to reconcile courts' contradictory uses of history in the Equal Protection and Due Process contexts. Trans people valued these legal transitions precisely *because* they experienced de jure discrimination. Third, many anti-trans laws violate the Equal Protection Clause. Restrictions on gender transitions both deny trans people's ability to participate equally in public life and are themselves a form of anti-trans discrimination.[543] Despite the contradictions and tensions within judges' uses of history, neither pro-trans lawyers nor legal scholars should ignore or avoid trans legal history.

A. THE RIGHT TO GENDER TRANSITION IS DEEPLY ROOTED

In this Article, I argue that trans rights *are* deeply rooted in U.S. history and tradition. In the 1800s and early 1900s, trans people argued that they had a *right* to transition. Trans people saw their gender transitions as central both to their sense of self and to their liberty. Sadie Acosta said, in 1941 when a doctor proclaimed her a man, "So? But I would rather be a woman. So I am a woman."[544] Acosta proclaimed that *she*, not any doctor, decided her gender. Trans people fought for their right to dress or act as they pleased, and they asserted that *they*, not doctors or even judges, got to decide their sex. They also exercised their right to transition to enable them to participate in their communities, do legal actions, exercise their civil rights, and live the lives they chose. At the same time, many legal, religious, and medical authorities *did* recognize trans people's right to transition. They provided court decrees affirming their name and sex changes,[545] officiated their weddings,[546] refused to enforce cross-dressing statutes,[547] and signed affidavits and letters affirming their genders.[548]

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543. *Contra* United States v. Skrmetti, 605 U.S. 495, 519 (2025) (claiming that bans on puberty blockers and other forms of gender-affirming care are not anti-trans discrimination).

544. Oxford, *supra* note 517, at 84.

545. See *supra* notes 278–83 and accompanying text for a discussion of Carl Crawford's court decree authorizing his name and sex change.

546. See *supra* notes 2–19 and accompanying text for a discussion of Reverend Frederick officiating Howard Calder's wedding.

547. See *supra* notes 438–41 and accompanying text for a discussion of Recorder Davenport and Judge Hogan.

548. See *supra* note 274 and accompanying text for a discussion of Arthur Carver's reverend signing his affidavit affirming his gender. See *supra* notes 329–30 and accompanying text for a discussion of Lawrence Payne's doctor providing a note to allow him to marry and change his name.

Even by the *Dobbs* standard, trans rights are deeply rooted in U.S. history. In *Dobbs*, Justice Alito's history and tradition method involves just counting which states banned or did not ban a practice.[549] This is a rather narrow definition of history and tradition. As many historians have pointed out, laws on the books differ from law in practice.[550] Historically, this kind of simplistic state counting was used by white supremacists attempting to overturn *Brown v. Board of Education*.[551] However, even by Justice Alito's definition, transition is *still* deeply rooted. I have found no evidence of state laws banning gender-affirming medical care, gender marker or name changes, or even same-sex marriage in the 1860s. Although there were laws banning cross-dressing, they were primarily municipal and not universal. Other statutes, such as vagrancy or disorderly conduct statutes, could be used to criminalize transness.[552] However, many judges, especially before the early twentieth century, refused to interpret such statutes to prohibit cross-dressing.[553] Broad, sweeping transphobic laws are an invention of the last decade. As discussed throughout this Article, many trans people and their supporters *did* understand gender transitions to be a component of liberty in the late 1800s.

The history of gender transitions can also point to new arguments to support the right to transition in Due Process cases. Litigants have argued that trans rights cases implicate a number of fundamental rights, including the right to informational[554] or decisional privacy,[555] the right to refuse medical care,[556] and the right to "define and express" one's gender identity.[557] Pro-trans lawyers have also argued that bans on gender-affirming care for minors violate parents' rights, such as their rights to make medical choices for their children.[558] Late-nineteenth-century and early-twentieth-century trans people and their allies articulated additional defenses of trans rights. They argued that trans people had a liberty right to transition, that trans people had not committed any crimes or transgressions, and that trans rights were connected to gender equality.[559] Trans legal history also illustrates the importance of gender transitions to trans people's ability to participate in public life. Lawyers could argue that trans rights are "implicit in the

549. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 248, app. A (2022).

550. *See, e.g.*, Siegel, *supra* note 81, at 1191 n.240.

551. *See* Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s Method (and Originalism) in the Defense of Segregation*, 133 YALE. L.J.F. 99, 111 (2023).

552. See *supra* Section II.D. for a discussion of vagrancy and disorderly conduct law.

553. *See, e.g.*, People v. Luechini, 136 N.Y.S. 319, 320–21 (N.Y. Cnty. Ct. 1912).

554. *See* Corbitt v. Sec'y of the Ala. L. Enf't Agency, 115 F.4th 1335, 1351 (11th Cir. 2024) (rejecting plaintiffs' claim that restrictions on gender marker changes on driver's license violate their right to "informational privacy").

555. *See* Arroyo Gonzalez v. Rossello Nevares, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (holding that forcing trans people to disclose that they are trans violates their right to "decisional privacy" and "informational privacy).

556. *See Corbitt*, 115 F.4th at 1350–51 (rejecting plaintiffs' claim that requiring bottom surgery to change gender markers violates plaintiffs' "right to refuse medical care").

557. *See* Karnoski v. Trump, No. C17-1297, 2017 WL 6311305, at *8 (W.D. Wash. Dec. 11, 2017).

558. *See, e.g.*, Brief of Plaintiffs-Appellees, *supra* note 187, at 49–50.

559. *See supra* Section II.D.

concept of ordered liberty" because they allow trans people to participate in public life and exercise their civil rights.

Pro-trans lawyers, judges, and litigants do not need to shy away from trans history when making Due Process claims. They do not need to rely upon vague references to trans history[560] or discuss only the history of related rights like parental rights.[561] Instead, they can focus specifically on the history of the relevant right. Many of the rights that trans people seek today—to change names and gender markers, to obtain accurate documents, to wear what they want, to change their bodies how they want, to fit into their communities—were rights that trans people exercised long before the twenty-first century. When arguing for trans people's rights to gender-affirming care, pro-trans lawyers could reference the histories of orchiectomies or binding.[562] When arguing for a right to change one's identity documents, lawyers could discuss the history of trans name changes.[563] Furthermore, trans people also articulated a right to dress and act as they wanted, which they rooted in both liberty and equality.[564] The right to gender autonomy is not only a core part of liberty but it is an important part of U.S. history and tradition.

B. RECONCILING HISTORY IN EQUAL PROTECTION AND DUE PROCESS

As several legal scholars have pointed out, judges tend to use history in Equal Protection and Due Process cases differently. In Equal Protection cases, they look to the past as examples of discrimination to overcome, but in Due Process cases, they look to the past as a source of rights to protect.[565] These two uses of history can be contradictory. In this Article, I illuminate ways that the Equal Protection and Due Process Clauses are linked.[566] Trans people exercised their right to gender transitions not because they did not experience any discrimination but because they *did*. For example, Carl Crawford, a white trans man, sought a court decree authorizing his gender change when he worried he would be arrested for cross-dressing.[567] When trans people, especially trans people of color, were unable to change their documentation or other markers of gender identity, they could be subject to criminalization or incarceration. For example, Mary Ann Waters, a Black trans woman, was arrested in 1851 by the police on suspicion of having run away from slavery. She had no documentation to support her gender or her free status.[568] Trans legal history illustrates the importance of gender

560. *See supra* Section I.B for a critique.

561. *See, e.g.*, Reply in Support of Plaintiffs' Motion for Temporary Restraining Order, *supra* note 190, at 12.

562. *See supra* Section II.C.

563. *See supra* Section II.B.

564. *See supra* Section II.D.

565. *See* Watson, *supra* note 102, at 262; Sunstein, *supra* note 102, at 1163; Siegel, *supra* note 103, at 54–55; Widiss, *supra* note 103, at 252.

566. *Cf.* Obergefell v. Hodges, 576 U.S. 644, 672 (2015) (discussing the connections between the Equal Protection and Due Process Clauses).

567. *See Sex Changed by a Court's Decree*, *supra* note 49, at 5B.

568. *See supra* notes 298–300 and accompanying text.

transitions not just to trans people's autonomy but also to their ability to participate in their communities and withstand transphobia.

Although the uses of history in Equal Protection and Due Process cases are sometimes contradictory, opponents of trans rights often adopt one basic premise: trans people did not exist in the past. If they did not exist, they did not experience discrimination and they did not have any rights. In this Article, I illustrate that people in the 1860s knew trans people existed, and they were aware that sex could and did change.

C. IMPLICATIONS FOR EQUAL PROTECTION JURISPRUDENCE

Although the implications of the history of gender transitions for Due Process cases are the most obvious, I argue that such history can also support rights to gender transition claims under the Equal Protection Clause in two main ways.[569] First, the legal history of gender transitions can help counter arguments that the original meaning of the Equal Protection Clause did not encompass anti-trans discrimination. Second, the legal history of gender transitions illustrates that laws restricting puberty blockers or participation in sports *are* a form of anti-trans discrimination since these laws limit trans people's ability to participate in their communities and public life.

In this Article, I argue that many people in the 1800s and early 1900s saw anti-trans discrimination as connected to issues of gender equality and "the right[s] of females."[570] Some have suggested that the Court look to the past not just as a source of rights under the Due Process Clause but to provide definitions of sex and sex discrimination for Equal Protection cases.[571] They argue that no one in the 1860s would have thought of sex as encompassing trans people or gender identity, so anti-trans discrimination is not a form of sex discrimination.[572] These litigants urge that courts adopt an originalist approach to the Equal Protection Clause.[573] Some judges have questioned whether "the original fixed meaning of . . . equal protection" encompassed anti-trans discrimination.[574] This embrace of originalism in Equal Protection jurisprudence is both concerning for trans people's rights and might have dangerous implications for other marginalized individuals. It also is inaccurate from a historical standpoint. In the 1800s and early 1900s, both legal commentators and everyday Americans linked gender equality with the right to dress and act as one wanted.[575] As Wendy Rouse has pointed out,

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569. Another important use of trans legal history is to illustrate that trans people *did* experience a history of discrimination. Although that claim is beyond the scope of this Article, I have addressed it elsewhere. *See* Felsher, Olmstead, & Redburn, *supra* note 76.

570. *See, e.g.*, SMITH, *supra* note 58, at 105–06.

571. *See* Eyer, *supra* note 159, at 960; Brief of Defendants-Appellants, *supra* note 135, at 20; Intervenors-Appellants' Petition for Rehearing En Banc, *supra* note 167, at 15.

572. *See* Brief of Defendants-Appellants, *supra* note 162, at 20; Intervenors-Appellants' Petition for Rehearing En Banc, *supra* note 167, at 15; *see also* Section I.A.

573. As Katie Eyer points out, originalism usually does not play a role in Equal Protection claims. Eyer, *supra* note 159, at 960.

574. L.W. *ex rel*. Williams v. Skrmetti, 83 F.4th 460, 471 (6th Cir. 2023).

575. *See supra* Section II.D.

some trans people were directly involved in the fight for suffrage.[576] One of the very first cases ever decided in Minnesota affirmed a trans person's choice to wear male clothes using a framework of women's rights.[577] Late-nineteenth-century Americans were arguably *more* inclined to see anti-trans discrimination as a form of sex discrimination than twenty-first-century Americans, who often see the two as oppositional.[578]

I also argue that, contrary to the Court's reasoning in *Skrmetti*, bans on gender-affirming care *do* discriminate against trans people, as they restrict trans people's participation in social and public life. In his concurrence in *Skrmetti*, Justice Alito argued that "there is no evidence that transgender individuals, like racial minorities and women, have been excluded from participation in the political process."[579] Justice Alito's comment disregards actual histories of trans exclusion and discrimination. As discussed in Part II, many trans people of color faced intersecting forms of discrimination. For example, enslavers refused to allow enslaved people to choose their clothing,[580] and police arrested trans Black people under suspicion of having run away from slavery.[581] Justice Alito also misses that, when trans people were able to participate in politics, they employed the very right that the Supreme Court denied them in *Skrmetti*: the right to transition. While the Court in *Skrmetti* dismissed bans on gender-affirming care as just distinctions based on "medical uses,"[582] these bans implicate trans people's ability to participate in the political process. For example, several states require trans people to access medical gender-affirming care (often surgery) to change their birth certificate or driver's license.[583] A lack of accurate identity documents makes it more difficult for trans people to enjoy a range of rights, from employment opportunities to voting.[584] Courts deny trans people redress under Equal Protection because they claim trans people are involved in the political process, while simultaneously upholding laws that hinder trans people's involvement in that process.[585]

Supreme Court precedent suggests that exclusion from public life strikes at the core of the Equal Protection Clause. In many important race and gender equality

576. *See* ROUSE, *supra* note 206, at 77.

577. *See* SMITH, *supra* note 58, at 105-06.

578. *See* Brief for Respondents at 38, United States v. Skrmetti, 605 U.S. 495 (2025) (No. 23-477) (arguing that protecting trans people under Equal Protection would threaten cis women); Pamela Paul, *The Far Right and Far Left Agree on One Thing: Women Don't Count*, N.Y. TIMES (July 3, 2022), https://www.nytimes.com/2022/07/03/opinion/the-far-right-and-far-left-agree-on-one-thing-women-dont-count.html (arguing that trans people are trying to erase women and hurt their rights).

579. *Skrmetti*, 605 U.S. at 576 (Alito, J., concurring).

580. *See, e.g.*, Lyons, *supra* note 388, at 94.

581. *See supra* notes 298–300 and accompanying text.

582. *Skrmetti*, 605 U.S. at 515–16. The Supreme Court did not reach the question of whether anti-trans discrimination should receive heightened scrutiny because they claimed there was no anti-trans discrimination in the first place. *See id.* at 517.

583. *See Identity Document Laws and Policies*, *supra* note 71.

584. *See supra* note 72.

585. *See Skrmetti*, 605 U.S. at 576 (Alito, J., concurring); Gore v. Lee, 107 F.4th 548, 559 (6th Cir. 2024) (arguing that trans people are not lacking in "political power").

cases, the Supreme Court emphasized the importance of equal participation in education, public spaces, and other aspects of civic and social life. In *United States v. Virginia*, the Supreme Court made the connection between the Equal Protection Clause and public life explicit, stating,

> Since *Reed* [*v. Reed*, 404 U.S. 71 (1971)], the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.[586]

Important race discrimination cases, such as *Brown v. Board of Education*[587] and *Watson v. City of Memphis*,[588] also centered on people of color's access to key aspects of public life, such as public schools[589] or public parks.[590] Anti-trans laws aim to restrict trans people's participation in public life:[591] preventing trans people from accessing bathrooms,[592] hampering their ability to travel,[593] and excluding them from sports teams or military service.[594] These restrictions particularly hinder trans people of color, who face intersectional racist and transphobic violence.[595] The violence against trans people of color not only threatens their lives and well-being but makes it more difficult for them to safely engage in public life.

In Equal Protection cases, courts ask whether similarly situated people are being treated differently.[596] Anti-trans laws *do* treat trans people differently from cis people: they allow cis people to participate in public life and affirm their genders, while denying trans people the same right. The Supreme Court will soon

586. 518 U.S. 515, 532 (1996).

587. 347 U.S. 483 (1954).

588. 373 U.S. 526 (1963).

589. *Brown*, 347 U.S. at 493.

590. *Watson*, 373 U.S. at 528.

591. *See* Thoreson, *supra* note 69; Rummler & Sosin, *supra* note 69.

592. *See Bans on Transgender People Using Public Bathrooms and Facilities According to Their Gender Identity*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/nondiscrimination/bathroom_bans [https://perma.cc/4GE5-DGMJ] (last visited Nov. 5, 2025) (providing map of state bathroom bans).

593. Joseph Gedeon, *Rubio Instructs Staff to Freeze Passport Applications with "X" Sex Markers*, GUARDIAN (Jan. 23, 2025, at 12:52 ET), https://www.theguardian.com/us-news/2025/jan/23/trump-rubio-x-gender-passport [https://perma.cc/SG3A-2PDM].

594. *See* Exec. Order No. 14201, 90 Fed. Reg. 9279, 9279 (Feb. 5, 2025) (prohibiting trans women from playing in women's sports); Exec. Order No. 14183, 90 Fed. Reg. 8757, 8757–58 (Jan. 27, 2025) (restricting trans people's ability to openly serve in the U.S. military).

595. *See* Pamuela Halliwell, Jill Blumenthal, Rebecca Kennedy, Lauren Lahn & Laramie R. Smith, *Characterizing the Prevalence and Perpetrators of Documented Fatal Violence Against Black Transgender Women in the United States (2013–2021)*, 31 VIOLENCE AGAINST WOMEN 3756, 3758 (2025); T.J. Jourian, *What Are the Connections Between Transphobia, Racism and Sexual Violence?*, NAT'L SEXUAL VIOLENCE RSCH. CTR. (Mar. 8, 2023), https://www.nsvrc.org/blogs/saam/what-are-connections-between-transphobia-racism-and-sexual-violence [https://perma.cc/VC77-SFNP].

596. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

decide whether excluding trans people[597] from sports teams violates the Equal Protection Clause.[598] These sports exclusion laws clearly treat trans and cis people differently: cis people can play on the sports team that aligns with their gender, while trans people cannot. Cis people are allowed to participate in their schools and sports teams with an equal dignity that is denied to trans people.[599] The legal history of gender transitions highlights why such exclusions are so harmful. Trans people's transitions were not just about themselves but also about fitting into a wider community and social network. Trans people exercised various rights and privileges of membership in their communities, from voting to involvement in churches. This history demonstrates both that trans people *did* engage in community life and that their ability to transition was important to their ability to do so.

CONCLUSION

In *Black Majority*, Peter Wood wrote that, once he started looking for Black people in colonial history, "[i]nformation . . . could not only be found but could hardly be avoided."[600] Similarly, once I started looking for trans people, they appeared everywhere and anywhere. Newspapers told stories of women who turned out to be men, men who transitioned to becoming women, or people in-between genders. Doctors fretted about the ambiguity of gender, judges debated whether to police gender nonconformity, and trans people argued that they had the right to live their lives as they wanted. Not only did trans people exist before the 1950s but they participated actively in social and legal life. They demanded that their legal institutions recognize their transitions, and they fought for their right to live the lives they chose.

Trans legal history is full of people acknowledging, accepting, and respecting trans people: mothers who recognized their trans daughters, constituents who elected trans politicians, judges who refused to punish trans people for their clothing choices, and newspapers that wondered why gender nonconformity was anyone else's business. While some laws did target trans people's lives, many trans people and some legal officials resisted this infringement of liberty. Trans people argued that their clothing was not bothering anyone and people should just learn to tolerate it. Many newspapers agreed, asking "whose business was it" what

597. Some of these laws apply just to trans women. *See, e.g.*, IDAHO CODE § 33-6203(1)–(3) (2020) (specifying only that "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex," and defining that the biological sex of a student may only be determined by "the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels").

598. Press Release, ACLU, *supra* note 64; Hecox v. Little, 104 F.4th 1061 (9th Cir. 2024), *cert. granted*, 145 S. Ct. 2871 (2025) (No. 24-38); B.P.J. *ex rel.* Jackson v. W. Va. State Bd. of Educ., No. 23-1078, 2023 WL 2803113 (4th Cir. Feb. 22, 2023), *cert. granted*, No. 24-43, 2025 WL 1829164 (U.S. July 3, 2025).

599. Justice Kennedy emphasized the importance of dignity in *Obergefell v. Hodges*. 576 U.S. 644, 663 (2015); *see also* Tribe, *supra* note 107, at 23 (discussing the importance of equal dignity).

600. PETER H. WOOD, BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION xvii (1974).

someone wore or whom they married. Trans legal history suggests that gender transitions *were* a part of "ordered liberty" and *are* "deeply rooted in this Nation's history and tradition."

We live in a particularly dangerous time for trans rights. In *United States v. Skrmetti*, the Supreme Court denied trans people's rights and allowed states to restrict gender-affirming care for minors. The Supreme Court will soon decide another case involving trans rights, in this case determining whether bans on trans girls' participation in girls' sports violate the Equal Protection Clause or Title IX. Both states and the federal government have targeted trans people's right to exist in public life. As courts issue more and more decisions on trans rights, they often turn to inaccurate discussions of history and tradition. They claim that trans people are newfangled and dangerous. Trans history is literally being erased from government-run websites, as the Trump Administration tries to pretend that trans people were not involved in Stonewall or the suffrage movement. Legal historians, activists, lawyers, and judges should embrace trans history and use this history to defend trans people's rights. Trans legal history matters now more than ever: for constitutional rights arguments, for arguing against transphobic legislation, and for showing trans people that we have always been here.