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TRANSGENDER RIGHTS AFTER *OBERGEFELL*

David B. Cruz*

Transgender Rights After Obergefell examines the potential of the Supreme Court's decision in *Obergefell v. Hodges* to help reduce obstacles to transgender persons living authentic lives by supporting their constitutional rights. Most immediately, by eliminating the mixed-sex requirement for civil marriage, *Obergefell* makes people's gender irrelevant to their right to marry, eliminating a site where U.S. courts have too often disregarded transgender individuals' gender identity and lived sex. In addition, though, *Obergefell* offers key support for the propositions that the Constitution protects peoples' ability to define and express their gender identities, to shape their own destinies, and that courts can hold the Constitution to protect this gender autonomy without having to reason within the narrowly specified, historically cabined parameters for substantive due process rights that the Court had earlier articulated in *Washington v. Glucksberg*.

When the Supreme Court held that states must provide marriage and marriage recognition to same-sex couples in *Obergefell v. Hodges*¹ this past June 26, the second anniversary to the day of its decision in *United States v. Windsor*² and the twelfth anniversary to the day of *Lawrence v. Texas*,³ I was moved to tears. I was not in the courtroom but at the Association of American Law School's mid-year workshop on Next Generation Issues of Sex, Gender and the Law. I had been teaching law students about constitutional claims to marriage equality since my first year as a law professor 1996-97, been publishing about marriage rights for same-sex couples since 2000, engaged in extensive public education about California's pernicious anti-marriage equality Propositions 22 and 28, married my long-time partner in the window it was legal in California in 2008, and been present at oral argument for the Court's major LGB rights cases *Romer v. Evans*⁴ in 1996, *Lawrence v. Texas* in 2003, *Hollingsworth v. Perry*⁵ and *U.S. v. Windsor* in 2013, and *Obergefell v. Hodges* in 2015.

After such great engagement with the issue, it was profoundly gratifying to have our nation's highest court join our first state high court to require equal access to marriage rights, Vermont, in recognizing "our common humanity."⁶ I believe that lesbian, gay, and bisexual (or "lesbigay") people will benefit from the *Obergefell* ruling, in ways great and small, direct and indirect. But it is not only lesbigay persons who will probably benefit from the decision. The

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¹ 135 S. Ct. 2584, 2599 (2015).

² See 133 S. Ct. 2675 (2013).

³ See 539 U.S. 558 (2003).

⁴ 517 U.S. 620 (1996).

⁵ 133 S. Ct. 2652 (2013).

⁶ *Obergefell*, 135 S. Ct. at 2599 (quoting *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 322 (2003)).

contribution I was solicited to make to the “After *Obergefell*” symposium explores what the decision could mean for the rights of transgender persons⁷ of whatever sexual orientation.

This matters, and not just as a matter of abstract academic inquiry. As the recent, derivative, but true hashtag says, TransLivesMatter. Yes, all lives matter (duh), but transgender persons too often face dismaying life circumstances worse than those Americans face on average. Good data are hard to come by, although the Williams Institute at UCLA School of Law is working to produce the most rigorous, comprehensive study ever. In the meantime, the best available information comes from *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*.⁸ The survey used convenience sampling to reach 7500 respondents. It

found that transgender and other gender non-conforming people as a group “face injustice at every turn: in childhood homes, in school systems that promise to shelter and educate, in harsh and exclusionary workplaces, at the grocery store, the hotel front desk, in doctors’ offices and emergency rooms, before judges and at the hands of landlords, police officers, health care workers and other service providers.” The respondents to this survey “lived in extreme poverty,” “nearly four times more likely to have a household income of less than \$10,000 [per] year compared to the” population average. They “experienced unemployment at twice the rate of the general population at the time of the survey, with rates for [trans and gender-nonconforming] people of color up to four times the national unemployment rate.” “Ninety percent . . . of those surveyed reported experiencing harassment, mistreatment or discrimination on the job or took actions like hiding who they are to avoid it.” “Forty-seven percent . . . said they had experienced an adverse job outcome, such as being fired, not hired[,] or denied a promotion because of being transgender or gender non-conforming.”⁹

This is not too surprising. There is much prejudice against and limited understanding of transgender persons. Perhaps the profile of transgender

⁷ I follow others such as Lambda Legal’s Transgender Rights Project National Director Dru Levasseur in using *transgender* “to describe people whose gender identity (one’s inner sense of being male, female, or a non-binary gender) differs from the assignment of gender at birth.” M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 944 n.1 (2015).

⁸ Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (National Center for Transgender Equality and National Gay and Lesbian Task Force 2011), available at http://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.

⁹ David B. Cruz, *Acknowledging the Gender in Anti-Transgender Discrimination*, 32 LAW & INEQ. 257, 267 (2014) (quoting Grant et al., *supra* note 8 (internal citations omitted)).

celebrities such as Chaz Bono,¹⁰ Laverne Cox,¹¹ Janet Mock,¹² and Caitlyn Jenner¹³ and the popularity of the Emmy-winning show *Transparent* may be changing that. Although at least 200 cities and counties nationally have banned gender identity discrimination,¹⁴ approximately 32 states lack statewide laws expressly doing so, and more than 60% of people in the U.S. live in jurisdictions where they are not covered by such protections.¹⁵ And difficulties obtaining identity documents such as driver's licenses and Social Security cards can make it especially challenging for transgender persons to secure employment, receive equal treatment in a range of public accommodations, and avoid police harassment.¹⁶

So, if *Obergefell* could make life better for transgender persons, that would be significant. And its immediate effect does precisely that. One of the key sites where state judiciaries have disrespected transgender persons and disregarded their gender identity/lived sex has been marriage. I will return to this, but a number of cases involving rights dependent on civil marriage have denied that transgender persons were members of their post-transition sex. When states limited marriage to different-sex couples, that could be a problem. Now, after *Obergefell*, the validity of marriages including at least one transgender person does not depend on what legal sex they are deemed to be. There are thus already fewer occasions for judicial nullification of transgender persons' gender.

¹⁰ See, e.g., Shari Rudavsky, *Transgender Hoosiers Transition to New Lives*, INDY STAR (Sept. 14, 2015), <http://www.indystar.com/story/news/2015/09/14/transgender-hoosiers-transition-new-lives/72214784/> (recounting transgender youth's thinking after seeing documentary on Chaz Bono "OK, I'm not the only one.").

¹¹ See, e.g., Lisa Sorg, *Actress Laverne Cox: 'State of Emergency' for Too Many Transgender People*, NEWS & OBSERVER, (Sept. 25, 2015), <http://www.newsobserver.com/news/local/community/durham-news/article36601533.html> (describing aspects of life and accomplishments of Cox).

¹² See, e.g., Angelique Dakkak, *New York Times Best-Selling Author Janet Mock Discusses Transgender Identity*, STANFORD DAILY, (Apr. 21, 2014), <http://www.stanforddaily.com/2014/04/21/new-york-times-best-selling-author-janet-mock-discusses-transgender-identity/> (discussing her best-selling memoir and her "sense of responsibility to become an advocate for change as a member of the transgender community").

¹³ For one of far too many news stories about Caitlin Jenner, formerly known as Bruce Jenner, see Jennifer Lydon, *The Impact of the Caitlyn Jenner Cover Story on Trans Women Like Me*, PHILADELPHIA CITY PAPER, (June 12, 2015), <http://citypaper.net/blogs/the-impact-of-the-caitly-jenner-cover-story-on-trans-women-like-me/> ("The benefit of all the hype surrounding Jenner and that magazine cover can be summed up in a word—awareness. Those who never gave our struggle a thought are now involved in open discussions about what it means to be your authentic self.").

¹⁴ *Transgender People and the Law*, AM. CIVIL LIBERTIES UNION, question 1, <https://www.aclu.org/know-your-rights/transgender-people-and-law> (last visited Dec. 16, 2015).

¹⁵ See *Workplace Discrimination Laws and Policies*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/Workplace-Discrimination-Policies-Laws-and-Legislation> (last visited Dec. 16, 2015) ("Under the patchwork of state and local employment law that prohibits employment discrimination based on gender identity and sexual orientation more than three of every five citizens live in jurisdictions that do not provide such protections. . .").

¹⁶ See, e.g., Grant, et al., *supra* note 8.

But courts are not the only venues in which transgender persons have been deemed still to be members of their natively assigned sex. States have varying requirements for establishing one's gender on identity documents,¹⁷ which can be critical to trans persons' safety and security. A routine traffic stop can escalate to an existential crisis for someone who presents as one sex but is saddled with a driver's license showing her as her pre-transition assigned gender, for example.¹⁸ Hence transgender persons' autonomy to determine their own sex and have the state respect that is crucial.

The opening line of *Obergefell* seems to offer hope of that to transgender persons: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."¹⁹ Define and express their identity, safely live authentic lives, these are the fundamental goals of transgender persons—really, of all persons. The devil is in the details when it comes to Justice Kennedy's qualifications of this promised liberty—a person is constitutionally protected in defining and expressing one's identity only within some realm whose boundaries are set by law. Aside from, maybe, possible fraud concerns, though, it is difficult to see why a transgender person's seeking to live in accord with his gender identity should be understood to cross a line into unlawfulness. Since the Court was addressing a constitutional right that limits otherwise sovereign governmental authority, it cannot be that this qualification meant that whatever laws a state chooses to enact suffice to defeat people's freedom to define and express their identity. Thus, the pregnant negative ("unlawful") of "within a lawful realm" must have some independent content; harm to others is one plausible contender. Indeed, when addressing the Court's use of substantive due process and the role or lack thereof of history in its analysis later in the opinion, *Obergefell* approvingly cites²⁰ more than 20 pages of Justice Souter's concurrence in the judgment in *Washington v. Glucksberg*.²¹ There, Souter wrote: "The State thus argues that recognition of the substantive due process right at issue here would jeopardize the lives of others outside the class defined by the doctors' claim, creating risks of irresponsible suicides and euthanasia, whose dangers are concededly within the State's authority to address."²² At least Justice Souter thought then that harm to others rather than just a naked moral judgment of the state was a reason to reject holding terminally ill individuals to

¹⁷ See, e.g., Olga Tomchin, Comment, *Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans People*, 101 CALIF. L. REV. 813, 835-37 (2013) (discussing varying rules among states and other jurisdictions).

¹⁸ See, e.g., Leslie Feinberg, TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO RUPAUL 61-62 (1996) (providing first-person account of such concerns).

¹⁹ *Obergefell*, 135 S. Ct. at 2593.

²⁰ *Id.* at 2602.

²¹ 521 U.S. 702, 752-89 (1997).

²² *Id.* at 755.

have a fundamental right under the Due Process Clause to enlist the aid of a willing physician in their determinations of the specifics of their deaths.

The second qualification is that the referenced liberty protected by the Due Process Clauses might be read to extend only to “certain specific rights,” rather than all possible rights to define and express one’s identity. Which rights those might be is not immediately clear. On the other hand, this sentence could also be read to suggest that whatever those certain rights are, they are sufficient for persons to define and express their identities. In that case, given the grave difficulties transgender persons can face in navigating daily life when they do not have governmental acceptance of and corresponding documents reflecting their gender identity, some kind of rights to determine one’s sex in accordance with one’s embraced gender identity could be necessary to define and express one’s identity, and thus fall within the liberty promised to all by the Constitution.

For the *Obergefell* majority, the same-sex couples and surviving partners who brought the suits before the Court were seeking to make a “profound commitment” in the form of marriage, to which, because of “their immutable nature,” joining with another person of the same sex was “their only real path.”²³ Medicine, psychiatry, psychology—all show that, to date anyway, at least for the vast majority of people, our gender identities are part of our immutable nature. Our gender identities are set very early in life and not changeable;²⁴ this is a large part of why medical professionals who are experienced working with transgender persons now tend to refer to “gender confirmation surgery” rather than the older “sex reassignment surgery.” For many, gender identity is the primary determinant of sex, and one’s gender identity stays the same while one’s body is brought into greater conformity with that identity.²⁵ If courts could accept that a person does make a profound commitment to oneself when she lives in accord with her gender identity, and that securing government recognition of that commitment to oneself is the only real path to an authentic life that minimizes the risk transgender persons face in a transphobic world, then this invocation of people’s “immutable nature” also could support the identity claims of transgender persons.

Practical concerns in our federal union also figured in the *Obergefell* decision, and analogous concerns for transgender persons similar support their claims to constitutional identity rights. The Court characterized as a “substantial burden” the fact that, since states had different rules about whether same-sex couples were allowed to marry or to have their marriages recognized, one plaintiff couple’s “lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines.”²⁶ The Court acknowledged, as it had in the past, that “[b]eing married in one State but

²³ *Obergefell*, 135 S. Ct. at 2594.

²⁴ Levasseur, *supra* note 7, at 984.

²⁵ *Id.*

²⁶ *Obergefell*, 135 S. Ct. at 2595.

having that valid marriage denied in another is [a] ‘most perplexing and distressing complication[,]’” and that “[l]eaving the current state of affairs in place would maintain and promote instability and uncertainty.”²⁷

This kind of instability and uncertainty plagues transgender persons today, when the Supreme Court has yet to hold that there are any sufficient federal criteria for transgender persons to “count” as members of their lived sex. Even genital reconstruction surgery, one of the most expensive and intrusive forms of medical care some transgender persons endure as part of transitioning to living in accord with their gender identity, has proven no guarantee that their identities won’t be denied. Consider, for example, the first of the modern reported opinions in the U.S. to reject a trans person’s lived sex, *Littleton v. Prange*, decided by an intermediate Texas appellate court in 1999.²⁸ Transgender woman Christie Lee Littleton was identified as male at birth in Texas in 1952, and underwent years of counseling, hormones, and surgeries finishing in 1979.²⁹ In 1989 she married a man whose gender appears unquestioned.³⁰ After her husband Mark Littleton died in 1996, she sued the surgeon for medical malpractice.³¹ When he learned during discovery that Christie used to be known as Lee Cavazos, Jr., a male, he argued that she was not a woman, that she therefore could not be a surviving spouse since Texas did not recognize marriages of same-sex couples, and that under Texas tort law she therefore could not sue for wrongful death.³² Even though Christie had secured a court order amending her Texas birth certificate to reflect her lived sex, the trial court agreed with the doctor that Christie was male, the amendment was an error, and her marriage was void, and so it granted him summary judgment, and a majority of the appeals court affirmed.³³

To similar effect three years later, the Supreme Court of Kansas refused to recognize the sex of transgender woman J’Noel Gardiner in *In re Estate of Gardiner*.³⁴ Not only had J’Noel undergone genital reconstruction surgery, she had—again by court order—amended her Wisconsin birth certificate to reflect that she was a woman.³⁵ Yet the Kansas Supreme Court refused to credit that and ruled J’Noel to be a man for purposes of Kansas marriage law, and thus not Marshall Gardiner’s widow and therefore not entitled to inherit when he died intestate.³⁶ Because of this ruling, J’Noel appeared to have been legally treated as female when she was in Wisconsin, as male when in Kansas, and who knows

²⁷ *Id.* at 2607 (internal citation omitted).

²⁸ 9 S.W.3d 223, 230-31 (Tex. App. 1999).

²⁹ *Id.* at 224-25.

³⁰ *Id.* at 225.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 225, 231.

³⁴ 42 P.3d 120, 142 (Kan. 2002).

³⁵ *Id.* at 122-23.

³⁶ *Id.* at 137.

how in other states. The *Obergefell* Court viewed this kind of perilous uncertainty as an important reason to hold the due process right to marry as extending to same-sex couples, and that prospect in the trans context could well move courts to hold that the Due Process Clause's protection of individual autonomy protects transgender persons from this kind of variable sex as they move across what is, after all, one country.

And autonomy plays an important role in the *Obergefell* opinion. Justice Kennedy began the Court's due process analysis by noting that "[t]he fundamental liberties protected by [this] Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs."³⁷ One's choice to live according to one's gender identity, which encompasses one's profound beliefs about one's personal identity, is deeply personal and so might be considered an "intimate choice"³⁸ even if it doesn't immediately seem relational in the way that was involved in *Griswold v. Connecticut*³⁹ and *Eisenstadt v. Baird*,⁴⁰ which were decisions about contraception and partnered sexual conduct.⁴¹

In explicating why the recognized fundamental constitutional right to marry substantively protected by the Due Process Clause extends not only to different-sex couples but also to same-sex couples, the *Obergefell* Court looked at its precedents and sought to identify and "respect the basic *reasons* why the right to marry has been long protected."⁴² The majority was convinced that "the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."⁴³ And the first of those principles was that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."⁴⁴ "Choices about marriage," the Court expounded, "shape an individual's *destiny*."⁴⁵ In *Lawrence v. Texas*, the Court characterized *Roe v. Wade*⁴⁶ as having "recognized the right of a woman to make certain fundamental decisions affecting her destiny"⁴⁷ and insisted that under the Due Process Clause "[t]he State cannot demean [gay persons'] existence or control their *destiny* by making their private sexual conduct a crime."⁴⁸ In *Planned Parenthood v.*

³⁷ *Obergefell*, 135 S. Ct. at 2589.

³⁸ *Id.* at 2590 (citing *Griswold v. Conn.*, 405 U.S. 438 (1972) & *Eisenstadt v. Baird*, 381 U.S. 479 (1965)).

³⁹ 405 U.S. 438.

⁴⁰ 381 U.S. 479.

⁴¹ I have, however, argued in the Harvard Civil Rights-Civil Liberties Law Review that legal sex is relational. See generally David B. Cruz, *Sexual Judgments: Full Faith and Credit and the Relational Character of Legal Sex*, 46 Harv. C.R.-C.L. L. Rev. 51 (2011).

⁴² *Obergefell*, 135 S. Ct. at 2589.

⁴³ *Id.* at 2599.

⁴⁴ *Id.*

⁴⁵ *Id.* (emphasis added).

⁴⁶ 410 U.S. 113 (1973).

⁴⁷ 539 U.S. at 565.

⁴⁸ *Id.* at 578 (emphasis added).

Casey,⁴⁹ the controlling joint opinion reaffirmed what it deemed the essential holding of *Roe v. Wade* in part because of the constitutional commitment to individual autonomy and the Court's conviction that "[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society"⁵⁰ and that a woman has "urgent claims . . . to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty . . ." ⁵¹ And Justice Blackmun's partial concurrence in *Casey* put an even sharper point on it, interpreting the Court's right of privacy precedents as "embody[ing] the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government."⁵²

So too, choices about whether to live an authentic life consistent with one's gender identity can powerfully shape one's destiny, and may implicate ultimate control over one's body. The Supreme Court has recognized that people's sex can bear on their destiny, even as our society has discarded numerous legal distinctions between men and women. The Court has in *Frontiero v. Richardson*⁵³ and other cases rejected the vision of gender offered by Justice Bradley in his concurring opinion in *Bradwell v. Illinois*,⁵⁴ where he wrote in 1873 that

the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.⁵⁵

To be sure, the plaintiffs and majority Justices in *Obergefell* had the advantage of working from a right to marry that was already repeatedly recognized as fundamental in Supreme Court precedents. The Court has not yet rendered holdings about people's rights to identity documents consistent with fundamental aspects of individual identity, so the row may be a bit harder to hoe to extend constitutional protection to transgender persons. Yet we should not lose sight that the Court in *Obergefell* insisted on analyzing the recognized right—the right to marry—at a higher level of generality than the dissents

⁴⁹ 505 U.S. 833 (1992).

⁵⁰ *Id.* at 852.

⁵¹ *Id.* at 869.

⁵² *Id.* at 927 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁵³ 411 U.S. 677 (1973).

⁵⁴ 83 U.S. 130, 139-42 (1873) (Bradley, J., concurring).

⁵⁵ *Id.* at 141.

preferred. Perhaps most tendentiously, Chief Justice Roberts characterized the plaintiffs as claiming “a right to make a State change its definition of marriage.”⁵⁶ The other dissenters joined Justice Alito’s opinion, which more conventionally if still narrowly defines the right he takes to be at issue as a “right to same-sex marriage.”⁵⁷ Much as the Court resisted that lower-level framing and reasoned about the Constitution’s protection of liberty at a higher level of generality, courts could do the same when thinking about transgender persons’ justice claims, appealing to rights of autonomy and shaping one’s own destiny.

Obergefell was entirely right to insist, and lower courts addressing the constitutional rights of transgender persons should not hesitate to embrace, that

[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, “has not been reduced to any formula.” Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.⁵⁸

Like marriage equality opponents,⁵⁹ those opposing gender autonomy claims may invoke *Washington v. Glucksberg*.⁶⁰ There, Chief Justice Rehnquist secured four other votes for his majority opinion that tried to curtail dramatically substantive due process. Attempting to impose more order on the doctrine than the case law fairly supported, he wrote:

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” Second, we have required in substantive-due-process cases a “careful description” of the asserted fundamental liberty interest. Our Nation’s history, legal traditions, and practices thus provide the crucial

⁵⁶ *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting).

⁵⁷ *Id.* at 2640 (Alito, J., dissenting).

⁵⁸ *Id.* at 2598 (quoting in part *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

⁵⁹ *Obergefell*, 135 S. Ct. at 2602.

⁶⁰ *Glucksberg*, 521 U.S. 702. The Respondents in *Obergefell* used this *Glucksberg* proposition to bolster their argument. See Brief for Respondent at 8, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556).

“guideposts for responsible decisionmaking,” that direct and restrain our exposition of the Due Process Clause.⁶¹

One could readily envision arguments that, unlike marriage which had at least in some form received extensive legal protection in the U.S., gender self-determination was not so “deeply rooted” historically.

Yet Justice Kennedy, who provided one of the votes necessary for the *Glucksberg* opinion’s majority status, limited its sweep in writing for a more liberal majority in *Obergefell*. “*Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices,” he conceded.⁶² “Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide),” he equivocated, “it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.”⁶³ As illustrations of this approach,⁶⁴ the Court cited *Loving v. Virginia*,⁶⁵ *Turner v. Safley*,⁶⁶ and *Zablocki v. Redhail*.⁶⁷ But *Obergefell* also cited Justice Souter’s and Justice Breyer’s concurring opinions in *Glucksberg*. Specifically, Kennedy cited the first three parts of Souter’s opinion, in which Justice Souter tried carefully to assess the interests on each side; recounted the Court’s history of substantive due process adjudication; and embraced his understanding of the second Justice Harlan’s *Poe v. Ullman* dissent. Souter argued in *Glucksberg* that Harlan’s

approach calls for a court to assess the relative “weights” or dignities of the contending interests, and to this extent the judicial method is familiar to the common law. Common law method is subject, however, to two important constraints in the hands of a court engaged in substantive due process review. First, such a court is bound to confine the values that it recognizes to those truly deserving constitutional stature, either to those expressed in constitutional text, or those

⁶¹ *Glucksberg*, 521 U.S. at 720-21 (internal citations omitted).

⁶² *Obergefell*, 135 S. Ct. at 2602.

⁶³ *Id.* The hedged language (“may have been appropriate”), is reminiscent of some of the hedged language in the joint opinion Kennedy co-authored in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). See, e.g., *id.* at 857 (“*Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity . . .”). This could reflect either subsequent doubts on Justice Kennedy’s part that *Glucksberg*’s method was appropriate, or disagreement with one or more members of his *Obergefell* majority coalition about its propriety. Cf. *id.* at 871 (“We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.”).

⁶⁴ *Obergefell*, 135 S. Ct. at 2598.

⁶⁵ 388 U.S. 1 (1967).

⁶⁶ 482 U.S. 78 (1987).

⁶⁷ 434 U.S. 374 (1978).

exemplified by “the traditions from which [the Nation] developed,” or revealed by contrast with “the traditions from which it broke.”⁶⁸

Thus, Souter understood substantive due process adjudication to include a role for history—the identification of constitutional values—without embracing the restrictive, highly fact-specific gloss on the framing of rights that Rehnquist’s *Glucksberg* formulation had often been taken to dictate.

Obergefell also cited the entirety of Justice Breyer’s *Glucksberg* concurrence. That opinion specifically stated that Breyer did “not agree . . . with the Court’s formulation of [the] claimed ‘liberty’ interest.”⁶⁹ He “would not reject the respondents’ claim without considering a different formulation, for which our legal tradition may provide greater support. That formulation would use words roughly like a ‘right to die with dignity.’”⁷⁰ Thus, Breyer rejected—and so the *Obergefell* majority rejects (at least as a rule)—narrow, fact-bound framing of rights in ways that could defeat constitutional claims that at a somewhat higher level of abstraction do enjoy substantial support in our legal traditions.⁷¹ And this is important, as Laurence Tribe and numerous other scholars have understood.⁷² As the Court put it in *Obergefell*: “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.”⁷³

In a passage that seems to blend ontology and epistemology, what the grounds of constitutional liberty rights are and how we know which constitutional liberty rights exist, the *Obergefell* majority wrote that “[t]he right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.”⁷⁴ This language could be read to suggest that an improved understanding of liberty in our constitutional democracy might be a sufficient basis for substantive due process rights. It implies that history and tradition are sufficient in this case,

⁶⁸ 521 U.S. at 765 (Souter, J., concurring) (quoting in part *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)).

⁶⁹ *Id.* at 790 (Breyer, J., concurring).

⁷⁰ *Id.*

⁷¹ Breyer, too, relied on Harlan’s *Poe* dissent. *See id.* Breyer understood the plaintiffs in *Glucksberg* to “argue that one can find a ‘right to die with dignity’ by examining the protection the law has provided for related, but not identical, interests relating to personal dignity, medical treatment, and freedom from state-inflicted pain.” *Id.* at 791.

⁷² *See, e.g.,* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. Chi. L. Rev. 1057, 1066, 1096-97 (1990) (addressing the disconnecting of claimed liberties from precedents that can flow from overly specific characterizations of the claim).

⁷³ *Obergefell*, 135 S. Ct. at 2602.

⁷⁴ *Id.*

but since they suffice, there would otherwise be no need to appeal to improved understandings.⁷⁵ The process of public education in which transgender persons and allies have been engaged thus may well already have been laying the groundwork for substantive due process protection of trans people and gender autonomy.

And substantive due process rights of gender autonomy may well be reinforced by equal protection principles. The Court in *Obergefell* saw the connection between liberty and equality in the marriage context.

Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.⁷⁶

So the Court here is focusing not on the purpose of the discrimination, but its effects—how it “works,” what it “serves to” do.

Similarly, against a long and ongoing history of disapproval of and violence against transgender persons, anti-trans discrimination likewise has the effect of disrespecting and subordinating transgender persons. It is hard to see anti-trans discrimination as genuinely and proportionately responding to some functional concern. Consider, for example, *Glenn v. Brumby*.⁷⁷ In one of very few reported decisions addressing gender identity or expression discrimination under the Equal Protection Clause, the U.S. Court of Appeals for the Eleventh Circuit ruled in favor of transgender woman Vandy Beth Glenn.⁷⁸ She was fired from her job as an editor in the Georgia legislature’s Office of Legislative Counsel, simply for transitioning—which clearly has no bearing on her language skills.⁷⁹ Even if a court weren’t persuaded of a malign intent behind such mistreatment, it nonetheless “disrespects and subordinates” Ms. Glenn and all transgender persons. Courts attuned to *Obergefell* will be less likely to give such conduct a pass than has sometimes been the case in the past.

We should realize that it is part of the problematic social context for transgender persons, but there has not been nearly as much deliberation—in judicial or other fora—about the dictates of justice with specific respect to trans

⁷⁵ It is of course also possible that the “improved understanding” language merely bolsters the conclusion the Court already reached in *Obergefell* on grounds of history and tradition—though at a minimum this shows the Court treating reflective understanding, political philosophy of a sort, as an important source for constitutional interpretation.

⁷⁶ *Obergefell*, 135 S. Ct. at 2604.

⁷⁷ *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

⁷⁸ *Id.* at 1321.

⁷⁹ *Id.* at 1313-14.

persons, as the Court noted there had been about marriage for same-sex couples.⁸⁰ Yet the Court's decision made clear that "when the rights of persons are violated, 'the Constitution requires redress by the courts,' notwithstanding the more general value of democratic decisionmaking. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity."⁸¹ *Obergefell* observed that one might have read *Bowers v. Hardwick*'s fundamental rights denial as deferring to democratic processes, but saw *Bowers* as making a bad call on that score:

[I]n effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. . . . Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.⁸²

All the more reason courts should be hesitant to deny constitutional protection to vulnerable populations like transgender persons. And with a little luck, and a lot of education and engagement, far fewer courts will do so after *Obergefell*.

⁸⁰ See *Obergefell*, 135 S. Ct. at 2605.

⁸¹ *Id.* at 2605 (quoting *Schuette v. BAMN*, 134 S. Ct. 1623, 1626 (2014)). *Obergefell* makes the same point at length, quoting the famous language in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943), quoted in *Obergefell*, 135 S. Ct. at 2606.

⁸² *Obergefell*, 135 S. Ct. at 2606.

