

## Marriage Equality and Obergefell's Generational (Not Glucksberg's Traditional) Due Process Clause

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*"Every age and generation must be as free to act for itself, in all cases, as the ages and generation which preceded it."*<sup>1</sup>

### INTRODUCTION

In its landmark decision in *Obergefell v. Hodges*<sup>2</sup> the United States Supreme Court, by a 5-4 vote, held that "the right to marry is a fundamental right inherent in the liberty of the person,"<sup>3</sup> and that state laws depriving same-sex couples of that right and liberty violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.<sup>4</sup>

Much will be written in the coming months and years about the Court's decision and the views expressed and positions taken in the majority and dissenting opinions. This essay focuses on one aspect of *Obergefell*: the majority's and dissents' differing interpretations and applications of the Due Process Clause. Justice Anthony M. Kennedy's opinion for the Court is an exemplar of *due process generationalism*. Under that methodology, the meaning and scope of the liberty protected by the Due Process Clause is discerned and defined, not by those who wrote and ratified the Fourteenth Amendment, but by "future generations . . . protecting the right of all persons to enjoy liberty as we learn its meaning."<sup>5</sup> Rejecting that approach, the dissenting Justices employed *due process traditionalism*, a methodology in which the Due Process Clause is interpreted in accordance with the nation's deeply rooted and long-standing traditions and history.<sup>6</sup> As discussed herein, *Obergefell*'s generational liberty protects a same-sex

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1. THOMAS PAINE, THE RIGHTS OF MAN (1791), reprinted in THE LIFE AND MAJOR WRITINGS OF THOMAS PAINE 243, 251 (Philip S. Foner ed., 1974).

2. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

3. *Id.* at 2604.

4. See U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

5. *Obergefell*, 135 S. Ct. at 2598.

6. For extended discussions of due process traditionalism, see Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH L. REV. 1543 (2008). See also Ronald Turner, *On Substantive Due Process and Discretionary Traditionalism*, 66 SMU L. REV. 841 (2013); Ronald Turner, *Same-Sex Marriage and Due Process Traditionalism*, 49 U. RICH L. REV. 579 (2015).

couple's right to marry; that right would not be recognized under a liberty principle grounded in and defined solely by reference to tradition.

### I. DUE PROCESS TRADITIONALISM

Tradition<sup>7</sup> and history have long been referenced in the Court's and individual Justices' interpretation and application of constitutional provisions.<sup>8</sup> Grounded in Burkean notions of and respect for tradition,<sup>9</sup> legal traditionalism

7. What counts as a, or the, pertinent tradition is itself an important and foundational question, for "judges must make controversial claims in order to ascertain what counts as 'American tradition.'" CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 141 (2007). As John Hart Ely remarked, "'tradition' can be invoked in support of almost any cause." JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 60 (1980). He stated:

There is obvious room to maneuver, along continua of both space and time, on the subject of which tradition to invoke. Whose traditions count? America's only? Why not the entire world's? . . . And what is the relevant time frame? All of history? Anteconstitutional history only? Prior to the ratification of the provision whose construction is in issue? . . . Is Henry David Thoreau an invocable part of American tradition? John Brown? John Calhoun? Jesus Christ? It's hard to see why not.

*Id.* at 60; *see also* ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 119 (1990) ("The judge who states that tradition and morality are his guides . . . leaves himself free to pick through them for those particular freedoms that he prefers. History and traditions are very capacious suitcases, and a judge may find a good deal pleasing to himself packed into them, if only because he has packed the bags himself.").

8. *See, e.g.*, *Moore v. City of E. Cleveland*, 431 U.S. 494, 504 (1977) (plurality opinion) ("The tradition of uncles, aunts, cousins, and especially grandparents sharing the household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."); *Roe v. Wade*, 410 U.S. 113, 130-41 (1973) (examining ancient attitudes, the origins of the Hippocratic Oath, common law, English statutory law, and state laws); *Loving v. Virginia*, 388 U.S. 1 (1967) (the state unsuccessfully argued that anti-miscegenation laws were not unconstitutional because "for over 100 years, since the Fourteenth Amendment was adopted, numerous states" prohibited interracial marriages "without any question being raised as to the authority of the state to exercise this power" (Brief and Appendix on Behalf of Appellee at 41, *Loving v. Virginia*, 381 U.S. 1 (1967) (No. 395))); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (marriage is "older than the Bill of Rights"); *id.* at 493 (Goldberg, J., concurring) (in deciding cases judges "must look to the 'traditions and (collective) conscience' of our people") (citation omitted); *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (due process cannot be reduced to a formula and is a "balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke."); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (due process liberty includes the right "to marry, establish a home and bring up children" and "the American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted."); *Muller v. Oregon*, 208 U.S. 412, 420-21 (1908) (constitutional questions "are not settled by even a consensus of present public opinion" where there is a debate over an issue of fact and "the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration."); *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896) (the question of the constitutionality of state-mandated racial segregation is to be answered by "reference to the established usages, customs and traditions of the people"); *Bradwell v. State*, 83 U.S. 130, 140 (1872) (Bradley, J., concurring) (agreeing with the Court's holding that Illinois constitutionally denied a married woman the right to practice law, Bradley stated that under the common law "only men were admitted to the bar, and the legislature had not made any change in this respect"); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857) (declaring that African slaves and their descendants were not citizens under the Constitution and relying on "the legislation and histories of the times" and "the public history of every European nation").

9. The English writer and politician Edmund Burke cautioned that current generations should not ignore the past,

posits that the Constitution should be interpreted “in accordance with the long-standing and evolving practices, experiences, and traditions of the nation,”<sup>10</sup> and considers authoritative and binding the words of the document “as they have been understood by the people over the course of our constitutional history, from enactment through the present.”<sup>11</sup>

Due process traditionalism has been applied by the Court in substantive due process cases challenging government prohibitions of certain conduct by individuals. Consider *Bowers v. Hardwick*<sup>12</sup> wherein the Court rejected a substantive due process challenge to a Georgia law criminalizing so-called “homosexual sodomy.” Justice Byron Raymond White’s opinion for a five-Justice Court majority<sup>13</sup> framed the issue for resolution as follows: “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of many States that still make such conduct illegal and have done so for a very long time.”<sup>14</sup> Answering that question in the negative, Justice White noted that sodomy proscriptions “have ancient roots” and that sodomy was a common-law offense prohibited by the original thirteen states at the time of the 1791 ratification of the Bill of Rights;<sup>15</sup> that “all but 5 of the 37 States in the Union had criminal sodomy laws” in 1868, the year of the adoption of the Fourteenth Amendment;<sup>16</sup> and that “until 1961, all 50 States outlawed sodomy, and today 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and

lest the temporary possessors and life-renters in it, unmindful of what they have received from their ancestors, or of what is due to their posterity, should act as if they were the entire masters; that they should not think it amongst their rights to cut off the entail, or commit waste on the inheritance, by destroying at their pleasure the whole original fabric of society.

EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 192 (Conor Cruise O’Brien ed., Penguin Books 1969) (1790).

Burke believed that there was an unbroken chain linking ancestors to the living and “a partnership . . . between those who are living, those who are dead, and those who are to be born.” EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 85 (J.G.A. Pocock ed., Hackett Publ’g Co. 1987) (1790). Interestingly, David Bromwich posits that in this passage Burke “offered his vision of a society rooted in trust,” and that Burke “believed that the advent of democracy would destroy the very idea of a human partnership spread out over generations.” DAVID BROMWICH, THE INTELLECTUAL LIFE OF EDMUND BURKE: FROM THE SUBLIME AND BEAUTIFUL TO AMERICAN INDEPENDENCE 4–5 (2014).

It should be noted that Burke did not “develop an account of judicial review. English courts lacked (and lack) the power to strike down legislation, and hence it could not possibly have occurred to Burke to explore the nature and limits of that power.” CASS R. SUNSTEIN, CONSTITUTIONAL PERSONAE 84 (2015).

10. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1133 (1998).

11. *Id.* at 1133–36.

12. See *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

13. Following his retirement from the Court, Justice Lewis F. Powell, Jr., one of the five Justices comprising the *Bowers* majority, stated that he “probably made a mistake” when he voted to uphold the Georgia law. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 530 (1994).

14. *Bowers*, 478 U.S. at 190.

15. *Id.* at 192.

16. *Id.* at 193.

between consenting adults.”<sup>17</sup> “Against this background,” he concluded, “to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”<sup>18</sup>

The dissenting Justices in *Bowers* rejected the Court’s traditional-fore-constitutional holding. Justice Harry A. Blackmun criticized the view that “either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court’s scrutiny.”<sup>19</sup> He quoted Oliver Wendell Holmes: “[I]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”<sup>20</sup> In his separate dissent, Justice John Paul Stevens argued that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”<sup>21</sup> He called for recognition of a different tradition: one “of respect for the dignity of individual choice in matters of conscience . . . .”<sup>22</sup>

A subsequent decision, *Washington v. Glucksberg*,<sup>23</sup> involved a challenge to a Washington state law prohibiting assisted suicide. Writing for the Court, Chief Justice William H. Rehnquist began his analysis with an examination of this country’s history, legal traditions, and practices. “In almost every State—indeed, in almost every Western democracy—it is a crime to assist a suicide.”<sup>24</sup> He set out various indicators of what he deemed to be the pertinent tradition: Anglo-American common law tradition punished or disapproved of suicide and assisted suicide for more than 700 years; the American colonies adopted that common-law approach, as did early state legislatures and courts; a New York law enacted in 1828 outlawed assisted suicide, and other states followed suit; in the twentieth century, the American Law Institute’s Model Penal Code prohibited aiding suicide; and states “are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues.”<sup>25</sup> Chief Justice Rehnquist noted that “[a]ttitudes toward suicide itself have changed”<sup>26</sup> since Henry de Bracton’s 13<sup>th</sup>-century observation that “just as a man may commit felony by slaying another so may he do so by slaying himself.”<sup>27</sup> But

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17. *Id.*

18. *Id.* at 194; see also *id.* at 197 (Burger, C.J., concurring) (“To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”).

19. *Id.* at 210 (Blackmun, J., dissenting).

20. *Id.* at 199 (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

21. *Id.* at 216 (Stevens, J., dissenting).

22. *Id.* at 217.

23. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

24. *Id.* at 710.

25. *Id.* at 719.

26. *Id.*

27. *Id.* at 711 (brackets omitted) (quoting HENRY DE BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND 423 (Samuel E. Thorne trans., Harvard Univ. Press 1968) (c. 1235)).

that change did not render the asserted right fundamental, as “our laws have consistently condemned, and continue to prohibit, assisting suicide . . . Against this backdrop of history, tradition, and practice,” the Court turned to the challenge to the Washington law.<sup>28</sup>

Chief Justice Rehnquist then set out the elements of the Court’s traditionalist substantive due process inquiry and analysis:

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.<sup>29</sup>

Taking up the careful description step of the analysis, the Chief Justice framed the question before the Court as follows: “whether the ‘liberty’ specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.”<sup>30</sup> Turning to the tradition inquiry, he asked whether the asserted right was deeply rooted. No, he answered, for there was

a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.<sup>31</sup>

Chief Justice Rehnquist thus concluded that the history of the legal treatment of assisted suicide in the United States “has been and continues to be one of rejection of nearly all efforts to permit it.”<sup>32</sup> Accordingly, the claimed right was not fundamental, and the Court determined that the assisted-suicide ban was rationally related to legitimate governmental interests.<sup>33</sup>

28. *Id.* at 719.

29. *Id.* at 720–21 (citing *Jackman v. Rosenbaum Co.*, 260 U.S. 22 (1922)).

30. *Id.* at 723 (footnote omitted). Those challenging the statute posed a different question: whether the liberty interest protected by the Fourteenth Amendment extended to the “‘liberty of competent, terminally ill adults to make end-of-life decisions free of undue governmental interference.’” *Id.* at 724 (quoting Brief for Respondents at 10, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (No. 96-110)); see also *id.* at 790 (Breyer, J., concurring) (rejecting the Court’s formulation of the asserted liberty interest and proposing a “right to die with dignity” approach).

31. *Id.* at 723; see also *id.* at 736 (O’Connor, J., concurring) (“[O]ur Nation’s history, legal traditions, and practices do not support the existence” of a protected right to suicide); *id.* at 740 (Stevens, J., concurring) (“History and tradition provide ample support for refusing to recognize an open-ended constitutional right to commit suicide.”).

32. *Id.* at 728.

33. See *id.* at 728–35 (stating “the asserted legal ‘right’ to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause” and “the law at issue is at least reasonably related to [legitimate governmental interests]”); see also *Vacco v. Quill*, 521 U.S. 793, 808–09 (1997) (holding that a New York law prohibiting assisted suicide did not violate the Equal Protection Clause).

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In *Glucksberg* and *Bowers* the Court looked to tradition and history, not just for potentially relevant information concerning past views and practices, but for supposedly discoverable and dispositive answers to the modern legal questions presented in those cases. Due process traditionalism looks back to centuries-old common law traditions, to colonial times, to 1791 when the Bill of Rights was ratified, to the 1868 ratification of the Fourteenth Amendment, and to past and current state laws addressing and prohibiting certain activity and conduct. Under this approach, the operative tradition(s) governing the resolution of a constitutional question are old(er), and established laws and practices supporting the continuation of the legal status quo.

Where tradition-as-authority governs constitutional interpretation, the question whether a challenged practice or prohibition is “good” or “bad” or positive or malevolent is not at issue.<sup>34</sup> Challenged laws and practices are left in place, including the discriminatory and noxious state mandate before the Court in *Bowers*. Consequently, individuals regulated and even denigrated by certain traditional and state-sanctioned practices and beliefs are unable to obtain judicial relief from jurists who believe that a claimed right not deeply rooted in tradition and history is not protected by the Constitution.

## II. DUE PROCESS GENERATIONALISM

Due process traditionalism was not the favored interpretative approach in substantive due process cases decided before and after *Glucksberg*. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>35</sup> a joint opinion authored by Justices Sandra Day O’Connor, Anthony Kennedy, and David H. Souter reaffirmed the central holding of *Roe v. Wade*.<sup>36</sup> The trio observed that it was “tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against governmental interference by other rules of law when the Fourteenth Amendment was ratified.”<sup>37</sup> They resisted that temptation: “Neither the Bill of Rights nor the specific practices of the States at the time of the adoption of the Fourteenth Amendment marks the outer limit of the substantive sphere of liberty which the Fourteenth Amendment protects.”<sup>38</sup> Liberty involves “the most intimate matters and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy”<sup>39</sup> and includes “the right to define

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34. As Judge Richard A. Posner recently noted:

Tradition per se has no positive or negative significance. There are good traditions, bad traditions pilloried in such famous literary stories as Franz Kafka’s “In the Penal Colony” and Shirley Jackson’s “The Lottery,” bad traditions that are historical realities such as cannibalism, foot-binding, and suttee, and traditions that from a public-policy standpoint are neither good nor bad (such as trick-or-treating on Halloween).

*Baskin v. Bogan*, 766 F.3d 648, 666 (7th Cir. 2014).

35. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

36. *See Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding that “the right of personal privacy includes the abortion decision”).

37. *Casey*, 505 U.S. at 847.

38. *Id.* at 848.

39. *Id.* at 851.

one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State."<sup>40</sup>

Having rejected the liberty-limiting traditionalist position, the joint opinion proclaimed that the Constitution is an aspirational document belonging to each generation of Americans:

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.<sup>41</sup>

Chief Justice Rehnquist's four-Justice and traditionalist dissent, calling for the overruling of *Roe*, argued that "the historical traditions of the American people" did not "support the view that the right to terminate one's pregnancy is 'fundamental.'"<sup>42</sup> And in a separate dissent Justice Antonin Scalia, approvingly citing *Bowers v. Hardwick*,<sup>43</sup> stated that abortion, "homosexual sodomy, polygamy, adult incest, and suicide . . . can constitutionally be proscribed because it is our unquestionable tradition that they are proscribable."<sup>44</sup>

Now consider the Court's post-*Glucksberg* analysis in the historic *Lawrence v. Texas* decision.<sup>45</sup> There, the Court, by a 5-4 vote, struck down a Texas statute criminalizing "'deviate sexual intercourse with another individual of the same sex.'"<sup>46</sup> Justice Kennedy, a member of the *Glucksberg* majority, authored a majority opinion that made no reference to *Glucksberg*. He opened the opinion with this conception of constitutionally protected liberty:

Liberty protects the person from unwarranted government intrusion into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimension.<sup>47</sup>

Framing the issue before the Court, Justice Kennedy asked "whether the petitioners were free as adults to engage in the private conduct in the exercise of

40. *Id.*

41. *Id.* at 901.

42. *Id.* at 952 (Rehnquist, C.J., dissenting); *see also id.* at 952-53 ("[I]t can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history supported the classification of the right to abortion as 'fundamental' under the Due Process Clause of the Fourteenth Amendment.").

43. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

44. *Casey*, 505 U.S. at 984 (Scalia, J., concurring in part and dissenting in part).

45. *Lawrence v. Texas*, 539 U.S. 558 (2003).

46. *Id.* at 563 (quoting TEX. PENAL CODE ANN. § 21.06 (West 2003)).

47. *Id.* at 562.

their liberty under the Due Process Clause.”<sup>48</sup> He noted that in *Bowers v. Hardwick* the Court asked whether there was a fundamental right to engage in homosexual sodomy.<sup>49</sup> That formulation of the issue “discloses the Court’s own failure to appreciate the extent of the liberty at stake” and “demeans the claim the individual put forward, just as it would demean a married couple were it to be said that marriage is simply about the right to have sexual intercourse.”<sup>50</sup>

Justice Kennedy rejected the history and tradition relied on in *Bowers* as doubtful and “overstated.”<sup>51</sup> In his view, anti-sodomy laws did not have “ancient roots,” there was no “longstanding history in this country of laws directed at homosexual conduct as a distinct matter,” and “early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally.”<sup>52</sup> Also significant was the absence of a record of enforcement of anti-sodomy laws against consenting adults engaging in private sexual activities. Applying a desuetude analysis,<sup>53</sup> Justice Kennedy reasoned that infrequent prosecutions made “it difficult to say that society approved of a rigorous and systematic punishment” of such activity.<sup>54</sup> He noted, in addition, that same-sex sexual intimacies were not targeted prior to the latter third of the twentieth century; that state laws criminalizing such activity did not occur before the 1970s; and that only nine states prohibited the conduct at the time of the Court’s 2003 decision.<sup>55</sup>

Having questioned the bases for and the accuracy of the *Bowers* Court’s analysis, Justice Kennedy made clear his view that “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”<sup>56</sup> He agreed with the following passage in Justice Stevens’ *Bowers* dissent: “[T]he fact that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting that practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”<sup>57</sup>

As can be seen, Justice Kennedy did not look back to and stop at the colonial era, 1791, and 1868. He focused instead on “our laws and traditions in the past half century” and found therein evidence of “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their lives in matters pertaining to sex.”<sup>58</sup> In his view, the holding in *Bowers* was rendered even more doubtful by the Court’s subsequent decision in *Casey*, wherein the Court “confirmed that our laws and traditions afford constitutional

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48. *Id.* at 564.

49. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

50. *Lawrence*, 539 U.S. at 567 (emphasis added).

51. *Id.* at 571.

52. *Id.* at 567–68.

53. Desuetude doctrine “forbids the use of old laws lacking current public support, to require more in the way of accountability and deliberation.” CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 27 (1999).

54. *Lawrence*, 539 U.S. at 569–70.

55. *See id.* at 570.

56. *Id.* at 572 (citation omitted).

57. *Id.* at 577–78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

58. *Id.* at 571–72; *see also id.* at 572–73 (discussing indicators of the “emerging awareness”).



protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."<sup>59</sup> Accordingly, "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."<sup>60</sup> Concluding, that the Texas law at issue was unconstitutional, the Court's opinion made clear that the case did not involve the question "whether the government must give formal recognition to any relationship that homosexual persons seek to enter."<sup>61</sup>

Further, and importantly, the penultimate paragraph of Justice Kennedy's opinion set out a generational approach to an understanding of the Due Process Clause:

Had those who drew and ratified the Due Process Clause of the Fifth or Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>62</sup>

The twenty-first century question raised in the challenge to the Texas "deviate sexual intercourse" statute was not answered by reference to and reliance on the laws of 1791 and 1868 or the 1960s. Traditional views do not and should not bind later generations, Justice Kennedy declared, as the "components of liberty" are not limited to the vision and understanding of those who framed and ratified the Due Process Clause. Due process generationalism, and not a traditional-therefore-constitutional approach, governed the Court's analysis as it invalidated Texas's criminalization of private and consensual sexual intimacies engaged in by persons of the same sex.

Justice Scalia's vigorous dissent, joined by Chief Justice Rehnquist and Justice Clarence Thomas, noted "the Court's surprising readiness to reconsider a decision rendered a mere 17 years ago in *Bowers v. Hardwick*."<sup>63</sup> Citing *Glucksberg*, he opined "that the Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest."<sup>64</sup> Fundamental rights—"that is, rights which are deeply rooted in this Nation's history and tradition"<sup>65</sup>—qualify for this insulation from state infringement. Justice Scalia argued that *Bowers* correctly held that a

59. *Id.* at 574. Justice Kennedy also noted that in *Romer v. Evans*, 517 U.S. 620 (1996), the Court upheld an Equal Protection Clause challenge to an amendment to the Colorado Constitution that prohibited legislative, executive, or judicial actions at the state or local government level designed to prohibit discrimination against homosexuals.

60. *Lawrence*, 539 U.S. at 578.

61. *Id.* at 578. Nor did the case involve minors, persons unable to give consent to sexual conduct, or prostitution or public conduct. *See id.*

62. *Id.* at 578-79. "In other words, persons in every generation can seek to realize the Constitution's promise of liberty." JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS* 59 (2015).

63. *Lawrence*, 539 U.S. at 587 (Scalia, J., dissenting).

64. *Id.* at 593.

65. *Id.*

right to engage in homosexual sodomy was not so deeply rooted, as “our Nation has a longstanding history of laws prohibiting *sodomy in general*— regardless of whether it was performed by same-sex or opposite-sex couples.”<sup>66</sup> (This reference to “sodomy in general” is a departure from Justice Scalia’s earlier stated position that a relevant tradition must be identified at its most specific level so as to avoid the “imprecise guidance” provided by “general traditions.”)<sup>67</sup>

In addition, Justice Scalia argued that the “emerging awareness” identified by the Court “is by definition not ‘deeply rooted in this Nation’s history and tradition[s],’ as we have said ‘fundamental right’ status requires. Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior.”<sup>68</sup> Nor did he believe Justice Kennedy’s assurance that the Court’s ruling did not involve or decide the issue of whether government must formally recognize any relationship homosexual persons sought to enter.<sup>69</sup> In his view, the Court’s opinion “dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”<sup>70</sup> As for Justice Kennedy’s due process generationalism, Justice Scalia agreed that later generations can see that laws believed at one time to be necessary and proper can at later times oppress individuals.<sup>71</sup> “[W]hen that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.”<sup>72</sup>

In repudiating *Bowers*’ due process traditionalism, *Lawrence* did not even cite *Glucksberg*, an interesting omission given *Bowers*’ and *Glucksberg*’s shared views regarding the interpretation and application of the Due Process Clause.<sup>73</sup> Did *Glucksberg* survive *Lawrence*?<sup>74</sup> The Court’s 2003 decision made no such

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66. *Id.* at 596.

67. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1986) (plurality opinion). In that case Justice Scalia, joined by Chief Justice Rehnquist, set forth a specific methodology governing the identification of the pertinent and applicable tradition in substantive due process cases. “We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” *Id.* Identifying the most specific tradition is necessary, in his view, because “general traditions provide such imprecise guidance . . . [and] permit judges to dictate rather than discern the society’s views.” *Id.*

Interestingly, Justice O’Connor did not agree with Justice Scalia’s approach. In a concurring opinion joined by Justice Kennedy she argued that Scalia’s method “sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause . . . that may be somewhat inconsistent with our past decisions in this area.” *Id.* at 132 (O’Connor, J., concurring in part). Noting that the Court had previously characterized right-protecting traditions at “levels of generality that might not be ‘the most specific level available,’” she declined to “foreclose the unanticipated by the prior imposition of a single mode of historical analysis.” *Id.*

68. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting).

69. *See id.* at 578.

70. *Id.* at 604 (Scalia, J., dissenting).

71. *See id.* at 603.

72. *Id.* at 603–04.

73. *See generally* Brian Hawkins, Note, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409, 410 (2006).

74. *See* Yale Kamisar, *Foreword: Can Glucksberg Survive Lawrence? Another Look at the End of Life and Personal Autonomy*, 106 MICH. L. REV. 1453 (2008) (discussing *Lawrence*’s more expansive take on

proclamation. Was *Glucksberg* limiting post-*Lawrence* to the specific issue decided by the Court's 1997 ruling, the claimed right to commit suicide with another person's assistance? The answer to that question at the time of the *Lawrence* decision was by no means clear. What can be said with assurance is that *Lawrence's* due process generationalism, applied in the context of a challenge to a law discriminating on the basis of sexual orientation, invalidated the tradition-based and discriminatory status quo.

In its 2013 *United States v. Windsor*<sup>75</sup> decision the Court, in yet another 5-4 ruling, held that the federal government violated the Fifth Amendment's Due Process Clause<sup>76</sup> when it denied an estate tax refund to Edith Windsor, the surviving spouse of a same-sex marriage sanctioned by the state of New York.<sup>77</sup> That marriage was not recognized by the federal Defense of Marriage Act (DOMA). DOMA defined "marriage" as "a legal union between one man and one woman as husband and wife" and "spouse" as "a person of the opposite sex who is a husband or a wife."<sup>78</sup>

Justice Kennedy's opinion for the Court (joined by Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor, and Elena Kagan) noted that as a matter of history and tradition, the regulation of domestic relations "has long been regarded as a virtually exclusive province of the States."<sup>79</sup> Defining marriage "is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to 'the [p]rotection of offspring, property interests, and the enforcement of marital responsibilities."<sup>80</sup> From the beginning, this nation's legal governance of the domestic relationship between husband, wife, and child has been a state, not a federal, matter.

DOMA "departs from this history and tradition of reliance on state law to define marriage," Justice Kennedy stated, and "use[d] the state defined class for the opposite purpose—to impose restrictions and disabilities."<sup>81</sup> DOMA sought "to injure the very class New York seeks to protect,"<sup>82</sup> and the statute's "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages."<sup>83</sup> The statute thus interfered "with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power."<sup>84</sup> Because of

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substantive due process and whether *Glucksberg* can be reconciled with this take).

75. See *United States v. Windsor*, 133 S. Ct. 2675 (2013).

76. See U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

77. See *Windsor*, 133 S. Ct. at 2682 ("The State of New York recognizes the marriage of New York residents Edith Windsor and Thea Spyer who wed in Ontario.").

78. 1 U.S.C. § 7 (2012), *invalidated by United States v. Windsor*, 133 S. Ct. 2675 (2013).

79. See 133 S. Ct. at 2691 (internal quotation marks omitted) (citation omitted).

80. *Id.* (alteration in original) (citation omitted).

81. *Id.* at 2692.

82. *Id.* at 2693.

83. *Id.*

84. *Id.*; see also KENJI YOSHINO, SPEAK NOW: MARRIAGE EQUALITY ON TRIAL: THE STORY OF HOLLINGSWORTH V. PERRY 263 (2015) (noting that Justice Kennedy's *Windsor* opinion "made almost a dozen references to the 'dignity' of gay individuals" and is "a case about the dignity of gay people, which would mean that all states would have to provide marriage equality to respect that dignity").

DOMA, the state-sanctioned marriage of a same-sex couple was treated as a “second-tier marriage,” and tens of thousands of children raised by same-sex couples were humiliated and financially harmed.<sup>85</sup> Justice Kennedy concluded that the law’s purpose and effect demeaned persons in lawful same-sex marriages and therefore violated the Fifth Amendment’s due process and equal protection principles.<sup>86</sup> In so holding, Justice Kennedy emphasized that “[t]his opinion and its holding are confined to those lawful marriages.”<sup>87</sup>

Invoking *Glucksberg*, a dissenting Justice Scalia argued that Justice Kennedy’s opinion did not contend that same-sex marriage is deeply rooted in this nation’s tradition and history. Such a claim “would of course be quite absurd” as would “the further suggestion (also necessary, under our substantive-due-process precedents) that a world in which DOMA exists is bereft of ‘ordered liberty.’”<sup>88</sup> Pointing to Justice Kennedy’s statement that the Court’s opinion and holding were confined to same-sex marriages sanctioned by state law, Justice Scalia said that he had “heard such bald, unreasoned disclaimers before” in *Lawrence*.<sup>89</sup> He continued:

It takes real cheek for today’s majority to assure us . . . that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here – when what has preceded that assurance is a lecture on how superior the majority’s moral judgment in favor of same-sex marriage is to the Congress’s hateful moral judgment against it. I promise you this: The only thing that will “confine” the Court’s holding is its sense of what it can get away with.<sup>90</sup>

Justice Alito, dissenting separately, grounded his argument in *Glucksberg*. Arguing that the right to same-sex marriage is not deeply rooted in this nation’s history and tradition, he stated that same-sex marriages had not been permitted by a state prior to a 2003 decision by the Massachusetts Supreme Judicial Court,<sup>91</sup> and that in 2000, the Netherlands was the first country to allow such marriages.<sup>92</sup> In his view, Windsor and the United States seek “from unelected judges” “not the protection of a deeply rooted right but the recognition of a very new right” which should come from legislatures elected by the people.<sup>93</sup> Positing two competing views of marriage – (1) “traditional” or “conjugal” marriage and (2) “consent-based” marriage<sup>94</sup> – Justice Alito said that the Constitution does not codify either view (though he suspected that “it would have been hard at the

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85. *Windsor*, 133 S. Ct. at 2694–95.

86. *See id.* at 2695.

87. *Id.* at 2696.

88. *Id.* at 2707 (Scalia, J., dissenting) (citation omitted).

89. *Id.* at 2709 (internal quotation marks omitted); *see also* *Lawrence v. Texas*, 539 U.S. 558, 604 (2003).

90. *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting).

91. *See Goodridge v. Dep’t. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

92. *See Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting).

93. *Id.*

94. For Justice Alito, “traditional” or “conjugal” marriage “sees marriage as an intrinsically opposite-sex institution” that was “created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing.” *Id.* at 2718. “Consent-based” marriage “primarily defines marriage as the solemnization of mutual commitment – marked by strong emotional attachment and sexual attraction – between two persons.” *Id.*

time of the adoption of the Constitution or the Fifth Amendment to find Americans who did not take the traditional view for granted").<sup>95</sup> Given this constitutional silence, he "would not presume to enshrine either vision of marriage in our constitutional jurisprudence."<sup>96</sup>

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On display in the Court's pre- and post-*Glucksberg* decisions in *Casey*, *Lawrence*, and *Windsor* are debates over generational and traditional interpretations, and applications of the Due Process Clause. The *Casey* joint opinion declared that the promise of liberty is generational and aspirational, and is not limited to or by traditional views and practices. *Lawrence* overruled and interred the Court's traditionalist decision in *Bowers*. In doing so, Justice Kennedy's opinion for the Court called for a generational approach to the Due Process Clause that does not hermetically seal and insulate from constitutional challenge tradition-based and discriminatory legal commands. On that view, certain laws must give way when later generations conclude, and the Court determines, that what was once constitutionally acceptable is now constitutionally unacceptable. Tradition *qua* tradition was not a justificatory ground for discrimination<sup>97</sup> and did not foreclose the invocation of generational due process principles by those challenging the criminalization of same-sex sexual intimacies.

Nor was *Glucksberg* traditionalism applied by a majority of the Court in *Windsor*. There, the Court relied on the history and tradition of states' definition of marriage and states' regulation of domestic relations as support for its holding that DOMA violated the Fifth Amendment. In referencing and employing tradition in this way, the Court did not contend, as did Justices Scalia and Alito, that same-sex marriage is not deeply rooted in this nation's history and tradition, for the issue of the due process fundamentality of the right to marry a person of the same sex was not before the Court. The Court considered that issue in *Obergefell*.

### III.OBERGEFELL

In *Obergefell v. Hodges*<sup>98</sup> the Supreme Court, by a 5-4 vote, held that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment same-sex couples may not be deprived of that right and that liberty."<sup>99</sup> In striking down state anti-same-sex-marriage laws, the Court defined

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95. *Id.*

96. *Id.* at 2719.

97. See *Baskin v. Bogan* 766 F.3d 648, 666 (7th Cir. 2014) ("Tradition per se . . . cannot be a lawful ground for discrimination—regardless of the age of the tradition.").

98. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

99. *Id.* at 2604. The Court discussed four principles demonstrating the fundamentality of marriage between persons of the same sex. First, "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." *Id.* at 2599. Second, "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals." *Id.* at 2589. Third, "the right to marry . . . safeguards children and families

and comprehended liberty in generational and contemporary terms and pointedly rejected *Glucksberg's* traditionalist approach to and narrow interpretation of the Due Process Clause.

Justice Kennedy's opinion for a five-Justice Court majority<sup>100</sup> concentrated on the history and "transcendent importance of marriage," an institution "essential to our most profound hopes and aspirations."<sup>101</sup> "The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life."<sup>102</sup> Both continuous and changing, the history of marriage—"even as confined to opposite-sex relations—has evolved over time."<sup>103</sup> From marriages arranged by parents, to contracts between a man and a woman, to and beyond the law of coverture, "developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential."<sup>104</sup> These developments have strengthened and not weakened marriage, Justice Kennedy opined, as "new dimensions of freedom became apparent to new generations."<sup>105</sup>

Turning to the lives and rights of gays and lesbians, Justice Kennedy noted that prior to the mid-20<sup>th</sup> century same-sex intimacy was deemed immoral and often criminalized, and that for much of the 20<sup>th</sup> century homosexuality was treated as an illness.<sup>106</sup> Political and cultural developments in the late 20<sup>th</sup> century challenged those views—views reflected in laws that overtly discriminated on the basis of sexual orientation—and "same-sex couples began to lead more open and public lives and to establish families."<sup>107</sup> The issue of gay rights was discussed throughout a nation showing a greater tolerance towards gays and lesbians.<sup>108</sup>

The issue of and debate over the constitutional rights of gays and lesbians ultimately reached the courts. Justice Kennedy noted the Supreme Court's rulings in this area: *Bowers v. Hardwick*,<sup>109</sup> *Romer v. Evans*,<sup>110</sup> *Lawrence v. Texas*,<sup>111</sup>

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and thus draws meaning from related rights of childrearing, procreation, and education." *Id.* at 2600. Fourth, "marriage is a keystone of our social order" and states "have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order." *Id.* at 2601.

100. Justice Kennedy was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. *Id.* at 2591.

101. *Id.* at 2594.

102. *Id.*

103. *Id.* at 2595.

104. *Id.*

105. *Id.* at 2596.

106. *See id.* ("Same-sex intimacy remained a crime in many States . . . [and] homosexuality was treated as an illness.").

107. *Id.*

108. *See id.* ("This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance.").

109. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

110. *Romer v. Evans*, 517 U.S. 620 (1996) (striking down an amendment to the Colorado constitution forbidding the enactment of measures outlawing sexual orientation discrimination by that state's branches and political subdivisions).

111. *Lawrence v. Texas*, 539 U.S. 558 (2003).

and *United States v. Windsor*.<sup>112</sup> The legality of same-sex marriage prohibitions was also addressed by the Hawaii Supreme Court in a 1993 decision holding that that state's law restricting marriage to opposite-sex couples was a sex-based classification subject to strict scrutiny judicial review under the Hawaii Constitution.<sup>113</sup> Ten years later, in *Goodridge v. Department of Public Health*,<sup>114</sup> the Massachusetts Supreme Judicial Court, guided by *Lawrence*, held that same-sex couples' right to marry was protected by that state's constitution.

Justice Kennedy instructed that the identification and protection of fundamental rights "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 an analysis of other constitutional provisions that set forth broad principles rather than specific requirements."<sup>115</sup> In his view, two of those considerations, history and tradition, are relevant but not determinative. "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."<sup>116</sup> He again called for a generational interpretation of the Due Process Clause:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.<sup>117</sup>

While the "limitation of marriage to opposite-sex couples may long have seemed natural and just," said the Justice, "its inconsistency with the central meaning of the fundamental right to marry is now manifest" and it must be recognized that same-sex marriage bans "impose stigma and injury of the kind prohibited by our basic charter."<sup>118</sup>

Relying on *Glucksberg*, the state-defendants argued that the Court was being asked to recognize, not the right to marry, but "a new and nonexistent 'right to same-sex marriage.'"<sup>119</sup> Justice Kennedy agreed that *Glucksberg* insisted that the definition of due process liberty must be circumscribed "with central reference to specific historical practices."<sup>120</sup> In a significant move, however, he limited the *Glucksberg* analysis to the right asserted in that case: the right to physician-assisted suicide. While the *Glucksberg* approach was appropriate in that context,

112. *United States v. Windsor*, 133 S. Ct. 2675 (2013)

113. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23.

114. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

115. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

116. *Id.*

117. *Id.*

118. *Id.* at 2602.

119. *Id.* (citation omitted).

120. *Id.*

he argued, it was inconsistent with the approach the Court has taken in other cases discussing fundamental rights in general and marriage and intimacy in particular. *Loving v. Virginia*<sup>121</sup> did not ask whether there was a right to interracial marriage; *Turner v. Safley*<sup>122</sup> did not ask whether inmates had the right to marry; and *Zablocki v. Redhail*<sup>123</sup> did not “ask about a ‘right of fathers with unpaid child support duties to marry.’”<sup>124</sup> In those cases the Court “inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.”<sup>125</sup> If that approach was not followed and applied to the marriage equality issue and “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.”<sup>126</sup>

The four dissenting Justices rejected Justice Kennedy’s generationalist analysis. Chief Justice John G. Roberts, Jr., joined by Justices Scalia and Thomas, argued that in jettisoning *Glucksberg’s* careful approach to implied fundamental rights the Court effectively overruled “the leading modern case setting the bounds of substantive due process.”<sup>127</sup> The Chief Justice agreed with Justice Kennedy that proper reliance on history and tradition requires one to look beyond the particular law being challenged “so that every restriction on liberty does not supply its own constitutional justification.”<sup>128</sup> Even so, he continued, history and tradition impose meaningful limits on the judiciary and insure judicial restraint. “Expanding a right suddenly and dramatically is likely to require tearing it up from its roots.”<sup>129</sup> The majority “not only overlooks our country’s entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now.”<sup>130</sup> And, while agreeing again with Justice Kennedy that we may not always be able to see injustice “in our own times,”<sup>131</sup> Roberts remarked, “But to blind yourself to history is both prideful and unwise. ‘The past is never dead. It’s not even past.’”<sup>132</sup>

Justice Scalia’s separate dissent, joined by Justice Thomas, argued that the Court had no basis for invalidating the restriction of marriage to opposite-sex couples, a practice endorsed by “a long tradition of open, widespread, and unchallenged use dating back to the [Fourteenth] Amendment’s ratification” and not explicitly proscribed by that provision’s text.<sup>133</sup> Noting Justice Kennedy’s

121. *Loving v. Virginia*, 388 U.S. 1 (1967).

122. *Turner v. Safley*, 482 U.S. 78 (1987).

123. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

124. *Obergefell*, 135 S. Ct. at 2602.

125. *Id.* (citations omitted).

126. *Id.*

127. *Id.* at 2620–21 (Roberts, C.J., dissenting).

128. *Id.* at 2618.

129. *Id.*

130. *Id.* at 2623.

131. *See id.* at 2598.

132. *Id.* at 2623 (Roberts, C.J., dissenting) (quoting WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1951)).

133. *Id.* at 2628 (Scalia, J., dissenting). (“When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases.”).



observation that the generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment “did not presume to know the extent of freedom in all of its dimensions,”<sup>134</sup> Justice Scalia would have added the following language to that sentence: “and therefore they provided for a means by which the People could amend the Constitution,” or “therefore they left the creation of additional liberties, such as the freedom to marry someone of the same sex, to the People, through the never-ending process of legislation.”<sup>135</sup> Justice Scalia complained that the majority’s judge-empowering opinion left to future generations the task of “protecting the right of all persons to enjoy liberty as we learn its meaning. The ‘we,’ needless to say, is the nine of us.”<sup>136</sup>

Like his dissenting colleagues, Justice Alito argued that it is beyond dispute that a right to same-sex marriage is not a right deeply rooted in this nation’s history and tradition. The *Glucksberg* methodology sought to “prevent five unelected Justices from imposing their personal vision of liberty upon the American people.”<sup>137</sup> In his view, it did not matter to the majority “that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition.”<sup>138</sup> Five Justices recognized and “confer[red] constitutional protection upon that right simply because they believe that it is fundamental.”<sup>139</sup>

*Obergefell* is a clear defeat for the Court’s due process traditionalists. Declining to limit substantive due process protection only to rights with a traditional pedigree, Justice Kennedy, in his majority opinion, continued down the jurisprudential path marked by *Lawrence* and *Casey*. He described the institution of marriage as an evolving and not static institution. He noted the trajectory of societal and legal developments concerning the lives, lived experiences, and rights of gays and lesbians from earlier times of posited immorality and criminalization to the present day in which the nation exhibits greater tolerance towards gays and lesbians and in which same-sex couples are better able to live open and public lives. The history and tradition of marriage between one man and one woman, while relevant, did not dispositively answer the contemporary question of whether same-sex marriage bans violate the Due Process Clause. For the *Obergefell* Court, the answer to that question was not found in a traditional and reflexive understanding of marriage as only the union of opposite-sex couples. The answer was determined by a Court exercising reasoned judgment and by the Justices engaged in a generational and reflective interpretation of due process “liberty.”

## CONCLUSION

*Obergefell* is the latest iteration of the Justices’ debate over the analytical role

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134. See *id.* at 2598.

135. *Id.* at 2628 (Scalia, J., dissenting).

136. *Id.*

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

138. *Id.*

139. *Id.*; see also *id.* at 2643 (“If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate. Even enthusiastic supporters of same-sex marriage should worry about the scope of the power that today’s majority claims.”).

that tradition and history do and should play in the Court's substantive-due-process decision-making and jurisprudence. Both the majority and the dissenters made interpretive and methodological choices, choices available to them as no "particular approach to the Constitution" and to constitutional interpretation are mandated by the document.<sup>140</sup> Eschewing the use of *Glucksberg's* traditionalist methodology, the *Obergefell* majority proclaimed that in answering the question of the constitutionality of same-sex marriage bans, the past does not rule the present.<sup>141</sup> Accordingly, the right to marry a person of the same sex has now been declared to be a fundamental right that cannot be denied by legislative acts moored to deeply rooted history and tradition in which marriage is defined as the union of one man and one woman. *Obergefell* thus teaches that the meaning of the Due Process Clause's liberty interest and principle is to be given operative content by persons in every generation.

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140. SUNSTEIN, *supra* note 53, at 43; *see also id.* at xv ("[I]nterpreters are free to adopt many different approaches, while also remaining interpreters. The choice of approach is inescapably ours."); Cass R. Sunstein, *There is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193 (2015).

141. *See Obergefell*, 135 S. Ct. at 2598.