

W(H)ITHER *GLUCKSBERG*?

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ABSTRACT

This article is a tale of two significant United States Supreme Court decisions interpreting and applying the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In Washington v. Glucksberg, the Court held that an asserted right to physician-assisted suicide is not a fundamental liberty interest protected by the clause because it is not a right deeply rooted in this nation's history and tradition. More recently, in Obergefell v. Hodges, the Court held that state laws prohibiting same-sex marriage violated the Due Process Clause. In so holding, the Obergefell Court departed from Glucksberg's history-and-tradition analysis and instead applied an evolving, generational approach in deciding the substantive due process issue before it. Dissenting in Obergefell, Chief Justice John G. Roberts, Jr. argued that the majority had effectively overruled Glucksberg. A different view was expressed in a 2017 speech by then-Judge and now-Justice Brett M. Kavanaugh in which he argued that Glucksberg stands today as an important precedent insuring that the Court operates as a court of law and not as an institution of social policy. This article examines these differing views and several post-Obergefell decisions shedding helpful but not dispositive light on this important aspect of substantive due process jurisprudence and doctrine. As concluded herein, and contrary to declarations and predictions of its demise, Glucksberg was not overruled, effectively or otherwise, by Obergefell.

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INTRODUCTION

This article is a tale of two significant United States Supreme Court decisions interpreting and applying the Due Process Clause of the Fourteenth Amendment to the United States Constitution.¹ *Washington v. Glucksberg*² held that an asserted right to physician-assisted suicide is not a fundamental liberty interest protected by the clause, because that claimed right is not deeply rooted in the nation's history and tradition. *Obergefell v. Hodges*³ held that state laws prohibiting marriage between persons of the same sex violated the clause. In so holding, the Court, noting *Glucksberg*'s history-and-tradition analysis, concluded that while that approach may have been appropriate in the context of physician-assisted suicide, it was not consistent with the Court's approach in other fundamental rights decisions.⁴ Both cases were decided by 5-4 votes, with Justice Anthony M. Kennedy casting the deciding vote in both rulings.

What remains of *Glucksberg* in the wake of *Obergefell*? Did *Obergefell* overrule *Glucksberg*, as Chief Justice John G. Roberts, Jr.,

1. See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”).

2. 521 U.S. 702 (1997), discussed *infra* Part II.

3. 135 S. Ct. 2584 (2015), discussed *infra* Part IV.

4. See *id.* at 2602.

argued in his *Obergefell* dissent?⁵ Or, as then-Judge and now Justice Brett M. Kavanaugh observed in a post-*Obergefell* speech, does *Glucksberg* stand “to this day as an important precedent, limiting the Court’s role in the realm of social policy and helping to ensure that the Court operates more as a court of law and less as an institution of social policy[?]”⁶ These important questions have not been definitively answered by the Court but have been considered in post-*Obergefell* lower court rulings, shedding helpful light on this aspect of the Court’s substantive due process jurisprudence. Gleaned from those cases is a provisional answer to this article’s w(h)ither *Glucksberg* query: *Glucksberg*’s methodology has survived, as evidenced by courts’ and judges’ post-*Obergefell* use of the *Glucksberg* two-step analysis.⁷

The article unfolds as follows. Part I’s prefatory and chronological backdrop discusses the tradition referent and employment of legal traditionalist methodology in the Court’s substantive due process decisions. Part II examines *Glucksberg*, and Part III turns to post-*Glucksberg* Court decisions first rejecting and subsequently applying *Glucksberg*’s history-and-tradition approach. *Obergefell* is the focus of Part IV. Part V, assessing the argument that *Obergefell* laid waste to and has definitely replaced the *Glucksberg* methodology, surveys recent post-*Obergefell* lower court decisions which continue to apply *Glucksberg* in turning away substantive due process challenges to certain governmental actions.

I. TRADITION, TRADITIONALISM, AND THE DUE PROCESS CLAUSE

Tradition, understood here as “our name for [a] repository of accustomed practices,”⁸ has long been a factor considered by the Court and individual Justices in decisions addressing the constitutionality of due process claims.⁹ The “central traditionalist idea is that one should be very careful about rejecting judgments made by people who were acting reflectively and in good faith, especially when those judgments

5. See *infra* notes 179 and 184 and accompanying text.

6. Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist* 16 (2017 Walter Berns Constitution Day Lecture), <http://www.aei.org/wp-content/uploads/2017/08/from-the-bench.pdf>.

7. See *infra* Part V.

8. David J. Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1036 (1991).

9. See generally Ronald J. Krotoszynski, Jr., *Dumbo’s Feather: An Examination and Critique of the Supreme Court’s Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923 (2006) (discussing tradition’s role in Supreme Court decisions).

have been reaffirmed or at least accepted over time.”¹⁰ Some jurists view tradition as a limiting principle; that is, an objective criterion preventing the substitution of judicial preferences for those of legislators.¹¹ For those who subscribe to the view that the Due Process Clause “is generally tradition-protecting”¹² and “suitably backward-looking,”¹³ established and customary positions and practices are of interest when the constitutionality of those positions and practices are challenged.

A. *Early Cases*

An early exemplar of the Court’s reference to and focus on tradition is found in *Dred Scott v. Sandford*,¹⁴ the “birthplace of the controversial idea of substantive due process.”¹⁵ In concluding that enslaved Africans and their descendants were not and could not be citizens of the United States, Chief Justice Roger Taney looked to “the legislation and histories of the times, and the language used in the Declaration of Independence” as well as “the public history of every European nation.”¹⁶ Taney stated that the opinion that blacks were “beings of an inferior order, and altogether unfit to associate with the white race . . . and . . . had no rights which the white man was bound to respect” was “fixed and universal in the civilized portion of the white race [and was] regarded as an axiom in morals as well as in politics.”¹⁷

In its 1908 decision in *Muller v. Oregon*,¹⁸ the Court opined that constitutional questions “are not settled by even a consensus of present public opinion,” and that where there is a debatable issue of fact “a

10. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891 (1996).

11. See Katharine T. Bartlett, *Tradition as Past and Present in Substantive Due Process Analysis*, 62 DUKE L.J. 535, 540 (2012).

12. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 67 (1996).

13. Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1897 (2004).

14. 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

15. Cass R. Sunstein, *The Dred Scott Case*, 1 GREEN BAG 2D 39, 40 (1997); see also AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 119 (2012) (the phrase substantive due process comes from judges “and the underlying concept has been deployed by judges in some of the most notorious Court opinions in American history, including the proslavery 1857 ruling in *Dred Scott v. Sandford*”).

16. *Dred Scott*, 60 U.S. at 407. Chief Justice Taney stated that while the words “all men are created equal” in the Declaration of Independence “would seem to embrace the whole human family . . . it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration.” *Id.* at 410.

17. *Id.* at 407.

18. 208 U.S. 412 (1908).

widespread and long continued belief concerning it is worthy of consideration.”¹⁹ *Twining v. New Jersey*,²⁰ holding that the Fourteenth Amendment did not make the privilege against self-incrimination applicable against the states, stated that what constitutes “due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.”²¹ In *Twining*, the Court concluded that the privilege was not established in English law “during the time when the meaning of due process was in a formative state and before it was incorporated in American constitutional law.”²²

Tradition was also referenced in *Snyder v. Massachusetts*,²³ where the Court held that a defendant did not have a due process right to be present at a jury’s view of a crime scene. The state was “free to regulate the procedures of its courts in accordance with its own conception of policy and fairness unless in doing so it offends some principle of justice *so rooted in the traditions and conscience of our people as to be ranked as fundamental*.”²⁴ A few years later, in *Palko v. Connecticut*,²⁵ the Court held that the privilege against double jeopardy²⁶ did not apply to the states via the Fourteenth Amendment’s Due Process Clause. Justice Cardozo’s opinion for the Court concluded that due process protects only those rights making up “the very essence of a scheme of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.”²⁷

Due process challenges to state regulation of education and parental control of children also faced unsuccessful tradition-based defenses. In *Meyer v. Nebraska*,²⁸ the Court struck down a Nebraska statute prohibiting the teaching of a foreign language to students who had not yet passed the eighth grade. Acknowledging that it had not precisely defined “liberty,” the Court determined that that term

19. *Id.* at 420–21.

20. 211 U.S. 78 (1908), *overruled in part* by *Malloy v. Hogan*, 378 U.S. 1 (1964).

21. *Id.* at 100.

22. *Id.* at 107.

23. 291 U.S. 97 (1934).

24. *Id.* at 105 (emphasis added).

25. 302 U.S. 319 (1937), *overruled in part* by *Benton v. Maryland*, 395 U.S. 784 (1969).

26. *See* U.S. CONST. amend. V (“No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . .”).

27. *Palko*, 302 U.S. at 325, 326.

28. 262 U.S. 390 (1923).

included, among other things, the right “to marry, establish a home and bring up children.”²⁹ It said: “The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.”³⁰ A subsequent decision, *Pierce v. Society of Sisters*,³¹ applied *Meyer* in ruling that an Oregon statute requiring public school attendance by children between the ages of eight and sixteen “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”³² Accordingly, a state could not “standardize its children by forcing them to accept instruction from public teachers only.”³³

B. The 1960s

In the 1960s, the Court began to address the constitutionality of state laws regulating certain reproductive choices and practices. In *Poe v. Ullman*,³⁴ the Court dismissed as not justiciable cases challenging a Connecticut statute making it a crime to use or give medical advice regarding the use of contraceptives. Justice John Marshall Harlan’s influential dissent set out a balancing approach to be employed in determining whether an asserted liberty interest was a fundamental right protected by the Due Process Clause:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon the postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the 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. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds

29. *Id.* at 399.

30. *Id.* at 400.

31. 268 U.S. 510 (1925).

32. *Id.* at 534–35.

33. *Id.* at 535.

34. 367 U.S. 497 (1961).

on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.³⁵

Interestingly, Justice Harlan also observed that laws regarding marriage and “forbidding adultery, fornication and homosexual practices . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.”³⁶

The Connecticut anti-use statute was again before the Court in *Griswold v. Connecticut*.³⁷ The Court, in an opinion by Justice Douglas, held that the law unconstitutionally intruded on the right to marital privacy located in the “penumbras . . . formed by emanations from those guarantees” in the Bill of Rights “that help give them life and substance.”³⁸ Marriage is “older than the Bill of Rights” and “is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.”³⁹ A concurring Justice Goldberg, emphasizing the Ninth Amendment,⁴⁰ observed that “judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the ‘traditions and collective conscience of our people’ to determine whether a principle is ‘so rooted there . . . as to be ranked as fundamental.’”⁴¹ Disagreeing with Justice Goldberg’s resort to tradition, a dissenting Justice Black, who found the Connecticut law “abhorrent, just viciously evil, but not unconstitutional,”⁴² stated that “the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted” in the people’s conscience.⁴³ It was not the Court’s duty “to keep the Constitution in tune with the times,”⁴⁴ he argued, for those who made the Constitution “knew the need for change and provided for it” in

35. *Id.* at 542 (Harlan, J., dissenting).

36. *Id.* at 546 (citation omitted).

37. 381 U.S. 479 (1965).

38. *Id.* at 484 (discussing marital privacy created and bound by the First, Third, Fourth, Fifth, and Ninth Amendments).

39. *Id.* at 486; *see also* *Eistenstadt v. Baird*, 405 U.S. 438, 454–55 (1972) (stating that unmarried couples’ right to use contraceptives is protected by the Equal Protection Clause).

40. *See* U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

41. *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (brackets omitted)).

42. ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 557 (2d ed. 1997).

43. *Griswold*, 381 U.S. at 519 (Black, J., dissenting).

44. *Id.* at 522.

Article V.⁴⁵ Justice Black said: “That method of change was good for our Fathers, and being somewhat old-fashioned I must add that it is good enough for me.”⁴⁶

Tradition and historical practices did not carry the day in the landmark *Loving v. Virginia* decision striking down state prohibition and criminalization of interracial marriages.⁴⁷ In its oral argument to the Court, Virginia noted that “for over 100 years, since the Fourteenth Amendment was adopted, numerous states—as late as 1956, the majority of the states—and now even 16 states” prohibited interracial marriage with no question raised as to the state’s authority to do so.⁴⁸ That history-based plea was unavailing, as the Court held that the law at issue violated the Equal Protection Clause and deprived individuals of the liberty guaranteed by the Due Process Clause. It held: “Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”⁴⁹

C. *The 1970s*

In *Roe v. Wade*,⁵⁰ the Court referenced history in invalidating a Texas criminal anti-abortion law. Justice Blackmun’s opinion for the Court examined “[a]ncient attitudes,” the origins of the Hippocratic Oath, the common law, English statutory law, and state laws.⁵¹ He wrote that “[a]t common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect.”⁵² A woman’s choice whether to terminate a pregnancy “was present in this country well into the 19th century,” Justice Blackmun wrote, and “[e]ven later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.”⁵³ Thus, he

45. *Id.*; see also U.S. CONST. art. V (setting forth procedures for the proposal and ratification of a constitutional amendment).

46. *Griswold*, 381 U.S. at 522 (Black, J., dissenting).

47. 388 U.S. 1, 12 (1967).

48. Oral Argument, *Loving v. Virginia* (No. 395), in 64 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 41 (Philip B. Kurland & Gerhard Casper, eds., 1975).

49. *Loving*, 388 U.S. at 12.

50. 410 U.S. 113 (1973).

51. *Id.* at 130–41.

52. *Id.* at 140.

53. *Id.* at 141.

concluded, the right to an abortion had not been traditionally proscribed.

Dissenting, then-Justice Rehnquist grounded his argument in a different account of history and tradition. He argued that a half-century of restrictions on abortion in a majority of states was “a strong indication . . . that the asserted right to an abortion is not ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”⁵⁴ Looking to 1868, the year of the adoption of the Fourteenth Amendment, he noted that at least thirty-six state or territorial laws limited abortion; that the laws of twenty-one states in effect in 1868 were still in effect at the time of the Court’s 1973 decision; and that the at-issue Texas law was first enacted in 1857 and essentially the same law struck down by the *Roe* Court.⁵⁵ Accordingly, in his view, prohibiting and criminalizing abortion was not unconstitutional because a number of states had prohibited the practice in the past.

Tradition and the history of the family was also an important aspect of the Court’s decision in *Moore v. City of East Cleveland*, a case involving a due process challenge to a city ordinance limiting the occupancy of a dwelling unit to members of a single nuclear family.⁵⁶ Justice Powell’s plurality opinion acknowledged that in substantive due process cases, “there is reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment”⁵⁷ Focusing on tradition and the family, he observed that that tradition included nuclear families as well as extended families of “uncles, aunts, cousins, and especially grandparents sharing a household.”⁵⁸ As those extended families were part of this nation’s traditions and were “equally deserving of constitutional protection,” the city could not constitutionally standardize adults and children “by forcing them to live in certain narrowly defined family patterns.”⁵⁹

54. *Id.* at 174 (Rehnquist, J., dissenting) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

55. *See id.* at 175–77.

56. 431 U.S. 494 (1977) (plurality opinion). Inez Moore lived in her East Cleveland home with her son and two grandsons. The grandsons were first cousins and not brothers; one child came to live with Moore and her son and his child after the death of the child’s mother. *See id.* at 496–97.

57. *Id.* at 502.

58. *Id.* at 504.

59. *Id.* at 505–06. Justice John Paul Stevens concurred in the judgment, arguing that the city had failed to explain the need for an ordinance that would have allowed the homeowner to live

Justice White, dissenting, criticized Justice Powell's approach as suggesting "a far too expansive charter What the deeply rooted traditions of the country are is arguable; which of them deserve the protection of the Due Process Clause is even more debatable."⁶⁰ In his view, the "Judiciary, including this Court[,] is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."⁶¹ Given that the Due Process Clause as presently constructed "represents a major judicial gloss on its terms, as well as on the anticipation of the Framers," Justice White argued that the Court "should be extremely reluctant to breathe still further substantive content into" the clause in striking down welfare-promoting legislative enactments adopted by a state or city.⁶² Doing so "unavoidably pre-empts" for the judiciary "another part of the governance of the country without express constitutional authority."⁶³

D. The 1980s and 1990s

In the 1980s, the Justices' references to history and tradition were key aspects of a methodology known as legal traditionalism, the interpretation of the Constitution "in accordance with the long-standing and evolving practices, experiences, and tradition of the nation."⁶⁴ A traditionalist "interpreter looks at what decentralized and representative bodies have done, over time, and treats their consensus as authoritative [U]nless the text and history of the Constitution are clear, judges should defer to the decisions of present-day representative institutions."⁶⁵ Consider the legal traditionalist

with her grandchildren if they were brothers but not if they were cousins. *See id.* at 520 (Stevens, J., concurring in the judgment). Absent any showing of the ordinance's substantial relation to the city's public health, safety, morals, or general welfare, the law could not deprive Moore of a fundamental right typically associated with the ownership of residential property: the right to decide who may reside at that property. *See id.*

60. *Id.* at 549 (White, J., dissenting).

61. *Id.* at 544.

62. *Id.*

63. *Id.*

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

65. *Id.* at 1136. Traditionalism is distinct from and should not be confused with another interpretive methodology, originalism, a family of constitutional theories unified by the fixation thesis ("the original meaning of constitutional text was fixed at the time each provision was framed, ratified, and made public"), and the constraint principle ("constitutional practice should be constrained by this fixed original meaning"). Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1265–66 (2019). Originalism's focus on fixed meaning thus differs from evolutionary

approach and application in three significant substantive due process cases.

In *Bowers v. Hardwick*,⁶⁶ a five-Justice majority held that a Georgia anti-sodomy law as applied to two men did not violate the Due Process Clause. Justice White's majority opinion asked the following question: "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."⁶⁷ Answering "no," Justice White looked to and relied on the "ancient roots" of prohibitions of "homosexual sodomy"; common law criminalization of sodomy; laws prohibiting sodomy in the thirteen original states ratifying the Bill of Rights in 1791; criminal sodomy laws in effect in 32 of the 37 states when the Fourteenth Amendment was ratified in 1868; the proscription of sodomy in all fifty states prior to 1961, the year in which Illinois decriminalized consensual and private sexual conduct between adults; and the fact that at the time of the Court's 1986 decision, twenty-four states and the District of Columbia criminalized sodomy performed in private and between consenting adults.⁶⁸ Justice White concluded that "[a]gainst this background, 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."⁶⁹ Rejecting this traditionalist approach and conclusion, Justice John Paul Stevens argued that the Court's prior rulings made clear that the fact that a state traditionally viewed a specific practice as immoral was not sufficient grounds for forbidding the practice; "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."⁷⁰

Subsequently, the Court in *Michael H. v. Gerald D.*⁷¹ held that a California law presuming that a child born to a married woman was a

traditionalism "which draws its normative authority" from historical practice. John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CALIF. L. REV. 1211, 1241 (1998).

66. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

67. *Id.* at 190.

68. *Id.* at 192-94.

69. *Id.* at 194 (quotation marks omitted). Chief Justice Warren E. Burger, concurring, stated that the condemnation of homosexual conduct was "firmly rooted in Judeo-Christian moral and ethical standards." *Id.* at 196 (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." *Id.* at 197.

70. *Id.* at 216 (Stevens, J., dissenting); *see also id.* at 216 n.9 (citing Loving v. Virginia, 388 U.S. 1 (1967)) (noting that "miscegenation was once treated as a crime similar to sodomy").

71. 491 U.S. 110 (1989).

child of the marriage did not violate the due process rights of the child's biological father, who was not married to the mother and sought parental and visitation rights. Writing for a plurality of the Court, Justice Antonin Scalia declared that the purpose of the Due Process Clause "is to prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones."⁷² He asked whether the relationship between the biological father and the child "had been treated as a protected family unit under the historic practices of our society, or whether on any basis it has been accorded special protection" and thought "it impossible to find that it has."⁷³ In Justice Scalia's view, the pertinent tradition recognizing the common law presumption of legitimacy was found in a 1569 book written by Bracton, in Blackstone's and Kent's respective commentaries, and in a 1957 American Law Reports annotation on the presumption of the legitimacy of children conceived and born in wedlock.⁷⁴

As Michael H. asserted the right to a judicial declaration that he was the natural father of the child and sought to obtain parental prerogatives, Justice Scalia instructed that the father had to establish, "not that our society has traditionally allowed a natural father in his circumstances to establish paternity, but that it has traditionally accorded such a father parental rights, or at least has not traditionally denied them."⁷⁵ For Scalia, it was "ultimately irrelevant" that then-extant law in a number of states appeared to allow the natural father a theoretical power to rebut the marital presumption.⁷⁶ Not aware of a single case awarding substantive parental rights to the natural father conceived in and born into a marital unit embracing the child, Justice Scalia concluded: "This is not the stuff of which fundamental rights qualifying as liberty interests are made."⁷⁷

72. *Id.* at 122 n.2.

73. *Id.* at 124.

74. *See id.* at 124–26 and sources cited. Responding to Justice Scalia's identification of the pertinent tradition, Justice Brennan argued that accord on that point would require agreement with regard to when "a tradition becomes firm enough to be relevant to our definition of liberty and the moment at which it becomes too obsolete to be relevant any longer." *Id.* at 138 (Brennan, J., dissenting). Further, Justice Brennan argued that "it would be comforting to believe that a search for 'tradition' involves nothing more idiosyncratic or complicated than poring through dusty volumes on American history"; he "would not stop . . . at Bracton, or Blackstone, or Kent, or even the American Law Reports . . ." *Id.* at 137.

75. *Id.* at 126.

76. *Id.* at 127.

77. *Id.*

In a footnote joined only by Chief Justice Rehnquist, Justice Scalia set out a methodology governing the identification of the pertinent tradition in 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.”⁷⁸ Citing *Bowers v. Hardwick*,⁷⁹ he argued that this methodology was not novel, and that consulting the most specific tradition was necessary to avoid the “imprecise guidance” of general traditions that would allow judges to dictate and not discern society’s views.⁸⁰ Justice Sandra Day O’Connor, joined by Justice Kennedy, declined to adopt this approach, arguing that it “sketch[ed] 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.”⁸¹ Citing *Loving v. Virginia*⁸² and other Court decisions, Justice O’Connor argued that in those cases the Court characterized rights-protecting traditions “at levels of generality that might not be the most specific level available.”⁸³ Citing Justice Harlan’s *Poe v. Ullman* dissent,⁸⁴ she did not “foreclose the unanticipated by the prior imposition of a single mode of historical analysis.”⁸⁵

The Due Process Clause, as interpreted by the Court in *Bowers* and *Michael H.*, was grounded in not only decades-old but centuries-old views and positions applied to twentieth-century claims of individual rights. Given the traditionalist methodology employed in those decisions, modern-day challenges to certain governmental restrictions on individuals’ actions and conduct would fall and fail in the face of Court-determined history and tradition.

The Court took an anti-traditionalist turn, however, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁸⁶ Reaffirming the central holding of *Roe v. Wade*,⁸⁷ the Justices again discussed whether and how tradition should be considered and used in deciding substantive due process cases. A joint opinion for a plurality of the

78. *Id.* at 127 n.6 (opinion of Scalia, J.).

79. 478 U.S. 186 (1986), discussed *supra* note 66 and accompanying text.

80. *Michael H.*, 491 U.S. at 127 n.6 (opinion of Scalia, J.).

81. *Id.* at 132 (O’Connor, J., concurring in part).

82. *See supra* note 47 and accompanying text.

83. *Michael H.*, 491 U.S. at 132 (O’Connor, J., concurring in part) (quotation marks and citations omitted).

84. *Id.*; *see supra* note 35 and accompanying text.

85. *Michael H.*, 491 U.S. at 132 (O’Connor, J., concurring in part).

86. 505 U.S. 833 (1992).

87. 410 U.S. 113 (1973).

Court, authored by Justices O'Connor, Kennedy, and Souter, responded to Justice Scalia's *Michael H.* call for referring to the most specific level at which a tradition protecting or denying protection to a claimed right can be identified.⁸⁸ In their view, it is "tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified But such a view would be inconsistent with our law."⁸⁹ Citing the Ninth Amendment, the joint opinion stated: "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."⁹⁰

Grounding its analysis in Justice Harlan's *Poe* dissent,⁹¹ the joint opinion remarked that the "inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule."⁹² Prior Court decisions protecting individuals' "personal decisions relating to marriage, procreation, contraception, family relationships, children rearing, and education"⁹³ involved "the most intimate and personal choices a person

88. See *supra* note 71 and accompanying text.

89. *Casey*, 505 U.S. at 847 (joint opinion) (citing *Michael H.*, 491 U.S. at 127–28 n.6 (opinion of Scalia, J.)).

90. *Casey*, 505 U.S. at 848; see also *id.* at 923 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (stating that liberty should not be determined on the basis of state practices existing at the time of the adoption of the Fourteenth Amendment).

91. See *supra* note 35 and accompanying text.

92. *Casey*, 505 U.S. at 849 (joint opinion). In his 2006 book, then-Judge and now-Justice Neil Gorsuch commented on the difficulties of the "reasoned judgment" test:

Are judges any more competent at the task (or deserving of any more deference) than legislators? How does substantive due process doctrine differ from outright judicial choice, or what is sometimes derisively labeled "legislation from the bench"? How many moral philosophers actually agree, after all, about what metaphysical imperatives such as "autonomy" entail? One might even ask whether it is bold enough to hold that the procedurally oriented language of the due process guarantee contains the enumerated substantive rights of the Bill of Rights; does going any further—holding that the clause is also the repository of other substantive rights not expressly enumerated in the text of the Constitution or its amendments, and thus entirely dependent for their legitimacy solely on the "reasoned judgment" of five judges—stretch the clause beyond recognition?

NEIL M. GORSUCH, *THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA* 77 (2006).

93. *Casey*, 505 U.S. at 851.

may make in a lifetime, choices central to personal dignity and autonomy,” and

are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define 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 compulsion of the State.⁹⁴

This tradition—the reasoned judgment of courts considering this conception of liberty—is antithetical to the traditionalist methodologies of *Bowers* and *Michael H.*

Reiterating the historical analysis of the abortion rights issue set out in his *Roe* dissent,⁹⁵ Chief Justice Rehnquist argued that “it 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.”⁹⁶ And Justice Scalia rejected the joint opinion’s reasoned judgment approach and conception of liberty as protecting intimate and personal choices central to an individual’s dignity and autonomy. Citing *Bowers v. Hardwick*,⁹⁷ he argued that the same judgment could be applied to same-sex sexual intimacies, polygamy, adult incest, and suicide, “all of which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable. It is not reasoned judgment that supports the Court’s decision; only personal predilection.”⁹⁸ The “American people love democracy and the American people are not fools,” Justice Scalia opined, and as long they and the Court thought that the Justices were doing “essentially lawyers’ work” the “public pretty much left us alone.”⁹⁹ But if the Court’s adjudication process is primarily one of making value judgments and ignoring a “long and clear tradition clarifying an ambiguous text,” “then a free and intelligent people’s attitude towards us can be expected to be (*ought* to be) quite different.”¹⁰⁰

94. *Id.*

95. *See id.* at 952 (Rehnquist, C.J., concurring in the judgment and dissenting in part); *supra* note 54 and accompanying text.

96. *Id.* at 952–53.

97. 478 U.S. 186 (1986), discussed *supra* note 66 and accompanying text.

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

99. *Id.* at 1000.

100. *Id.* at 1000–01.

II. REJECTING *POE*: *WASHINGTON V. GLUCKSBERG*

As just discussed, *Casey* embraced Justice Harlan's *Poe* balancing approach and called for the Court's reasoned judgment in its interpretation and application of the Due Process Clause. Five years later, a majority of the Court employed a different historical and formulaic substantive due process analysis in *Washington v. Glucksberg*.¹⁰¹

The *Glucksberg* Court addressed the question of whether a Washington state statute prohibiting a person from knowingly causing or aiding another person to attempt suicide¹⁰² violated a mentally competent, terminally ill adult's right to commit suicide with the assistance of a physician. Applying what is now known as the "*Glucksberg* Two-Step,"¹⁰³ the Court, in an opinion by Chief Justice Rehnquist (joined by Justices O'Connor, Scalia, Kennedy, and Thomas) considered two primary features of what the Chief Justice called the Court's "established" substantive due process methodology.¹⁰⁴ First, the Due Process Clause "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 his liberty nor justice would exist if they were sacrificed."¹⁰⁵ Second, the Court requires a "careful description of the asserted fundamental liberty interest."¹⁰⁶ An asserted right satisfying both prongs of the test is deemed a fundamental right triggering strict scrutiny judicial review; a claimed right not meeting the test is subject to deferential rational-basis review.

Considering first the "careful description" prong of the *Glucksberg* analysis, Rehnquist noted that those challenging the Washington law asserted a "liberty to choose how to die," a right to "control of one's final days," "the right to choose a humane, dignified death," and "the liberty to shape death."¹⁰⁷ Rejecting those descriptions of the claimed

101. 521 U.S. 702 (1997).

102. See WASH. REV. CODE § 9A.36.060(1).

103. See Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1488 (2008).

104. *Glucksberg*, 512 U.S. at 703.

105. *Id.* at 721 (quotation marks and citation omitted); see also *Bowers v. Hardwick*, 478 U.S. 186, 192, 194 (1986) (concluding that an asserted "fundamental right of homosexuals to engage in acts of consensual sodomy" was "facetious" as it was not "deeply rooted in this Nation's history and tradition" and was not "implicit in the concept or ordered liberty"), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

106. *Glucksberg*, 521 U.S. at 721 (quotation marks omitted).

107. *Id.* at 722.

liberty interest, he instead framed the question as “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.”¹⁰⁸

Turning to the *Bowers*-like history-and-tradition prong of the *Glucksberg* test, Rehnquist concluded that (his framing of) the at-issue right did not have “any place in our Nation’s traditions.”¹⁰⁹ He noted that “for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisted suicide”;¹¹⁰ the American colonies and early states prohibited assisted suicide as did most states when the Fourteenth Amendment was ratified in 1868;¹¹¹ and in recent years states had reexamined and generally reaffirmed assisted suicide proscriptions.¹¹² Given this “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,” the Chief Justice concluded that invalidating the Washington statute would “reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.”¹¹³ Accordingly, the claimed right was not deeply rooted in the nation’s history and tradition and was therefore “not a fundamental liberty interest protected by the Due Process Clause.”¹¹⁴

Rehnquist then concluded that the Washington statute survived rational-basis review because it was reasonably related to the following state interests: preserving human life; protecting the medical profession’s integrity and ethics; protecting the poor, the elderly, and the disabled from abuse and neglect; and avoiding the risk that permitting assisted suicide could be a pathway to both voluntary and involuntary euthanasia.¹¹⁵ The Court therefore held that Washington’s physician-assisted suicide ban did not violate the Fourteenth Amendment on its face or as applied to competent and terminally ill

108. *Id.* at 723. Formulating a different inquiry, a concurring Justice David H. Souter, relying on Justice Harlan’s *Poe* dissent, framed the pertinent question as whether the challenged law “sets up one of those ‘arbitrary impositions’ or ‘purposeless restraints’ at odds with the Due Process Clause of the Fourteenth Amendment.” *Id.* at 752 (Souter, J., concurring in the judgment) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

109. *Id.* at 723 (majority opinion).

110. *Id.* at 711.

111. *See id.* at 714–15.

112. *See id.* at 716.

113. *Id.* at 723.

114. *Id.* at 728.

115. *See id.* at 728–35.

adults seeking death-hastening medications prescribed by their doctors.¹¹⁶

The history-and tradition methodology employed in *Glucksberg* is fundamentally different from *Casey*'s balancing/reasoned judgment analysis. The approach is so different that scholars plausibly argued at that time that *Glucksberg* repudiated *Casey*'s methodology and assumed the mantle of the controlling authority in subsequent substantive due process cases.¹¹⁷

III. LAWRENCE'S MOVE AWAY FROM, AND MCDONALD'S RETURN TO, *GLUCKSBERG*

A. *Lawrence v. Texas*

The view that due process traditionalist analysis governed the Court's interpretation and application of the Due Process Clause in substantive due process cases was not followed in *Lawrence v. Texas*.¹¹⁸ There, the Court held that a Texas statute criminalizing certain intimate sexual conduct engaged in by two persons of the same sex violated the Due Process Clause. Writing for the *Lawrence* Court and opening his opinion with his conception of "liberty,"¹¹⁹ Justice Kennedy did not ask the question posed by the Court in *Bowers v. Hardwick*: "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."¹²⁰ He instead asked whether individuals "were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."¹²¹

116. *See id.* at 735.

117. *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1557–60 (2000) (noting that *Glucksberg* effectively renders the *Casey* framework unpersuasive).

118. 539 U.S. 558 (2003).

119. *See id.* at 562. Kennedy wrote:

Liberty protects the person from unwarranted government intrusions 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 in its more transcendent dimensions.

120. 478 U.S. 186, 190 (1986), *overruled by Lawrence*, 539 U.S. 558; *see also supra* note 67 and accompanying text.

121. *Lawrence*, 539 U.S. at 564 (*Bowers*'s framing of the Court's inquiry "discloses the Court's

Deeming it necessary to reconsider *Bowers*'s holding and making no mention of *Glucksberg*—in which he joined the majority opinion in full¹²²—Justice Kennedy disagreed with *Bowers*'s conclusion that anti-sodomy laws have ““ancient roots.””¹²³ Finding “no longstanding history in this country of laws directed at homosexual conduct as a distinct matter,” he held that “early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally.”¹²⁴

Justice Kennedy then employed a desuetude analysis¹²⁵ and found significant the absence of a record of enforcement of anti-sodomy laws against consenting adults privately engaging in such conduct. As the infrequency of prosecutions “ma[de] it difficult to say that society approved of a rigorous and systematic punishment” of the conduct, the longstanding criminalization of homosexual sodomy relied upon in *Bowers* “[wa]s as consistent with a general condemnation of nonprocreative sex as it [wa]s with an established tradition of prosecuting acts because of their homosexual character.”¹²⁶ Moreover, state-law criminalization of same-sex intimate conduct did not occur until the 1970s, with nine states prohibiting same-sex sexual relations and five of those states later abolishing the proscription.¹²⁷ Justice Kennedy concluded that “the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.”¹²⁸

Having questioned the accuracy of *Bowers*'s historical account, Justice Kennedy turned to *Bowers*'s traditionalist analysis. He did not look back, as did the *Bowers* Court, to colonial times, 1791, 1868, or

failure to appreciate the extent of the liberty at stake” and “demeans the claim that 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”); see also *Bowers*, 478 U.S. at 567.

122. See Kenji Yoshino, Comment, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 153–54 (2015) (noting that the Court ought to have proclaimed that *Bowers* was wrongly decided and did so in *Glucksberg*).

123. *Lawrence*, 539 U.S. at 567 (quoting *Bowers*, 478 U.S. at 192).

124. *Id.* at 568.

125. On desuetude, see CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 109 (1999) (“Citizens may not be prosecuted under laws that that were enforced long ago, are regularly violated in practice, and are invoked only on a sporadic and highly selective basis”); Cass R. Sunstein, *What Did Lawrence Hold?: Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 27–28 (2003).

126. *Lawrence*, 539 U.S. at 570.

127. See *id.* at 570–71.

128. *Id.* at 571.

other time periods. In his view, the appropriate temporal period was “our laws and traditions of the past half century,” and he found therein “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”¹²⁹ He believed that “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”¹³⁰ Justice Kennedy opined that the aforementioned emerging awareness was evidenced by, among other things, the American Law Institute’s Model Penal Code, a 1981 European Court of Human Rights decision holding that laws prohibiting same-sex sexual intimacy violated the European Convention on Human Rights,¹³¹ and the post-*Bowers* reduction in the number of anti-sodomy state laws from twenty-five to thirteen, with four states specifically forbidding homosexual sodomy.¹³²

For the foregoing and other reasons, Justice Kennedy concluded, “*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.”¹³³ In so concluding, he noted that the case before the Court did not involve minors or persons injured, coerced, or in relationships in which consent could not be easily refused, or prostitution or public conduct.¹³⁴ Nor did the case involve the question “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”¹³⁵ As the Texas statute furthered no legitimate state interest justifying intrusion into the individual’s person and private life, the Court invalidated the law.

Justice Kennedy closed his opinion with the following observation:

Had those who drew and ratified the Due Process Clause of the Fifth Amendment or the 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 only serve

129. *Id.* at 572.

130. *Id.* (quotation marks, brackets, and citation omitted).

131. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) para. 52 (1981).

132. *Lawrence*, 539 U.S. at 573; see also *id.* at 572–73 (referring to the British Parliament committee’s 1963 Wolfenden Report recommending the repeal of laws punishing homosexual conduct and the enactment of the recommendations’ substance in 1967).

133. *Id.* at 578.

134. *Id.*

135. *Id.*

to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.¹³⁶

In overruling *Bowers*, Justice Kennedy did not mention *Glucksberg*, which was an interesting omission given that *Glucksberg* employed the same history-and-tradition methodology used in the interred *Bowers*. Furthermore, *Lawrence* did employ its own backward-looking approach, focusing on the half century preceding the Court's decision in which the Court found an "emerging awareness" that constitutionally protected liberty includes adults' decisions about their private sexual lives.¹³⁷ What was constitutionally permissible in 1986—the criminalization of private same-sex sexual intimacies—was constitutionally impermissible in 2003.

A vigorous dissent by Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, argued that liberty was constrained by the Texas law and by "laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery."¹³⁸ That restraint of liberty was not problematic, he argued, as the state may deprive persons of liberty through the due process of law.¹³⁹ Justice Scalia stated that the Court's substantive due process doctrine prohibits state infringement of fundamental liberty interests unless that interest is narrowly tailored to serve a compelling governmental interest. Under *Glucksberg*, "only fundamental rights qualify for this so-called 'heightened scrutiny' protection—that is, rights which are 'deeply rooted in this Nation's history and tradition.'"¹⁴⁰ Adhering to *Bowers*' history-and-tradition analysis, Justice Scalia rejected Justice Kennedy's emerging awareness approach and focus on the half-century preceding the *Lawrence* decision. An "'emerging awareness' does not establish a 'fundamental right,'" he argued, and "is by definition not deeply rooted in this Nation's history and traditions . . . Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior."¹⁴¹

136. *Id.*

137. *See supra* note 129 129and accompanying text.

138. *Id.* at 592 (Scalia, J., dissenting) (referencing the more than sixty working hour per week restriction at issue in *Lochner v. New York*, 198 U.S. 45 (1905)).

139. *See id.*

140. *Id.* at 593 (citation omitted) (quoting *Washington v. Glucksberg*, 478 U.S. 702, 721 (1997)).

141. *Id.* at 598 (brackets omitted).

Justice Scalia also responded to Justice Kennedy's statement that *Lawrence* did not involve the question whether any relationship entered into by homosexual persons had to be formally recognized by government:¹⁴²

Do not believe it . . . Today'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 . . . This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.¹⁴³

B. *McDonald v. City of Chicago*

So, did *Glucksberg* survive *Lawrence*? In *McDonald v. City of Chicago*, the Court held that the Second Amendment right to keep and bear arms, recognized in *District of Columbia v. Heller*,¹⁴⁴ is fully applicable to the states by virtue of the Due Process Clause.¹⁴⁵ Justice Alito's majority opinion, joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas,¹⁴⁶ quoted *Glucksberg* and answered in the affirmative the question whether the right to keep and bear arms was "deeply rooted in this Nation's history and tradition."¹⁴⁷ Alito wrote that "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day,"¹⁴⁸ and *Heller* makes it clear that this is a historical and traditional right.¹⁴⁹

Justice Alito traced the origins of the claimed right from the 1689 English Bill of Rights to Blackstone's 1765 assertion that "the right to keep and bear arms was 'one of the fundamental rights of Englishmen'" to the American colonies.¹⁵⁰ The right "was considered no less fundamental by those who drafted and ratified the Bill of Rights," with

142. See *supra* note 135 and accompanying text.

143. *Lawrence*, 539 U.S. at 604–05 (Scalia, J., dissenting).

144. 554 U.S. 570 (2008).

145. *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (ruling that *Heller* "unmistakably" suggests that the right to bear arms is binding on the states via the Due Process Clause of the Fourteenth Amendment).

146. *Id.* at 748.

147. *McDonald*, 561 U.S. at 767 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (internal quotations omitted).

148. *Id.* at 768 (footnote omitted).

149. See *id.*

150. *Id.*

nine states adopting state constitutional provisions protecting the individual right to keep and bear arms between 1789 and 1820, joining four other states that adopted Second Amendment analogues prior to ratification of the Bill of Rights.¹⁵¹ Justice Alito's opinion continued into the 1850s, past the Civil War and the Freedmen's Bureau Act of 1866 and the Civil Rights Act of 1866, and to the proposed and ratified Fourteenth Amendment.¹⁵² In 1868, the year of the adoption of the Fourteenth Amendment, "22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms," as did state constitutions adopted during Reconstruction by former states of the Confederacy.¹⁵³ "In sum," Justice Alito concluded, "it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."¹⁵⁴ Per *Glucksberg*, he examined what he determined to be the relevant and deeply rooted tradition and history in answering the due process question presented in *McDonald*.

In the almost twenty-five years beginning with *Bowers* and ending with *McDonald*, the Court (1) employed a traditionalist methodology in rejecting a substantive due process challenge to the criminalization of same-sex sexual conduct (*Bowers*); (2) declared that the outer limits of the substantive sphere of liberty were not marked by the Bill of Rights or by state practices at the time of the 1868 ratification of the Fourteenth Amendment (*Casey*); (3) looked to and relied on state practices when the Fourteenth Amendment was ratified as part of a *Bowers*-like history-and-tradition approach in rejecting a substantive due process challenge to a prohibition of physician-assisted suicide (*Glucksberg*); (4) overruled *Bowers* in another case involving the constitutionality of state criminalization of same-sex sexual intimacies (*Lawrence*); and (5) cited *Glucksberg* and employed the history-and-tradition methodology in holding that the Second Amendment right to keep and bear arms for purposes of self-defense was incorporated against the states by the Fourteenth Amendment (*McDonald*).

Interestingly, Justice Kennedy was in the majority in the non-traditionalist *Casey* and *Lawrence* decisions, yet also in the traditionalist *Glucksberg* and *McDonald* rulings. Given those votes,

151. *Id.* at 768–69.

152. *See id.* at 770–77.

153. *Id.* at 777.

154. *Id.* at 778.

how Justice Kennedy would treat and what he would say about *Glucksberg* in the Court's marriage equality decision were important matters of legal and public interest.

IV. OBERGEFELL

In its landmark decision in *Obergefell v. Hodges*,¹⁵⁵ the Supreme Court held that state laws banning marriage between persons of the same sex violated the Fourteenth Amendment's Due Process Clause.¹⁵⁶ In so holding, Justice Kennedy's opinion for a five-Justice majority (joined by Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor, and Elena Kagan) departed from *Glucksberg*'s history-and-tradition approach.

Recall that the first *Glucksberg* prong determines the issue of the fundamentality of an asserted liberty interest by reference to the nation's deeply rooted history and traditions.¹⁵⁷ Not using that approach, Justice Kennedy, quoting Justice Harlan's *Poe v. Ullman* dissent, observed that the "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.'"¹⁵⁸ "History and tradition guide and discipline this inquiry but do not set its outer boundaries," Justice Kennedy continued, and respecting and learning from history does not mean that "the past alone . . . rule[s] the present."¹⁵⁹ In a passage similar to one he wrote in *Lawrence*,¹⁶⁰ Justice Kennedy wrote:

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 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.¹⁶¹

155. 135 S. Ct. 2584 (2015).

156. The Court also held that laws prohibiting same-sex couples' right to marry "abridge central precepts of equality" and violate the Equal Protection Clause. *Id.* at 2604.

157. *See supra* note 105 and accompanying text.

158. *Obergefell*, 135 S. Ct. at 2598 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

159. *Id.*

160. *See supra* note 136 and accompanying text.

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

This due process approach entrusting to future generations the task of determining the meaning of “liberty” in their own times is the antithesis of “liberty” defined and cabined by *Glucksberg*’s formulaic history-and-tradition approach.

Justice Kennedy then addressed the respondents’ argument that *Glucksberg*’s “careful description” prong required framing the petitioners’ claim as one seeking not the right to marry, but “a new and nonexistent ‘right to same-sex marriage.’”¹⁶² He conceded that *Glucksberg* had called for a circumscribed definition of liberty in the context of the right to physician-assisted suicide asserted in that case. While that approach “may have been appropriate”¹⁶³ in analyzing that issue, “it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.”¹⁶⁴ *Loving v. Virginia*¹⁶⁵ concerned marriage, not interracial marriage; *Turner v. Safley*¹⁶⁶ marriage, not inmates’ right to marry; and *Zablocki v. Redhail*¹⁶⁷ marriage, not a father with unpaid child support’s right to marry. In each of those cases, the Court considered the “right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.”¹⁶⁸

Moreover, Justice Kennedy made clear his view that the past did not control the Court’s 2015 consideration and resolution of the same-sex marriage issue. “If rights were defined by those who exercised them in the past,” he wrote, “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.”¹⁶⁹ While the right to marry is fundamental as a matter of history and tradition, “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.”¹⁷⁰ Kennedy believed that in this era, at this time, the right to marry was a fundamental right, and states that

162. *Id.* at 2602 (quoting Brief for Respondents at 8, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556)).

163. *Id.*

164. *Id.*

165. 388 U.S. 1 (1967).

166. 482 U.S. 78 (1987).

167. 434 U.S. 374 (1978).

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

169. *Id.*

170. *Id.*

deprive same-sex couples of that liberty violate the Due Process Clause.¹⁷¹

Dissenting Chief Justice Roberts, joined by Justices Scalia and Thomas, remarked that “for millennia and across civilizations[,]” marriage referred to the union of a man and a woman, and that at the time of the nation’s founding marriage was understood as a voluntary compact between husband and wife.¹⁷² The Framers entrusted to the states the subject of husband-wife domestic relations, every state defined marriage “in the traditional, biological way,” and nineteenth-century dictionaries and early Court opinions defined marriage as the union of a man and a woman.¹⁷³

Emphasizing the “need for restraint in administering the strong medicine of substantive due process,” Chief Justice Roberts cited two Court decisions as exemplars of the Court exceeding its judicial role. First, in *Dred Scott v. Sandford*,¹⁷⁴ the Court acted on its conceptions of liberty and property in invalidating the Missouri Compromise. And *Lochner v. New York*¹⁷⁵ struck down a New York law establishing maximum hours for bakery employees because the Court saw “no reasonable foundation for holding this to be necessary or appropriate as a health law.”¹⁷⁶ The Chief Justice stated that *Dred Scott*’s holding and approach¹⁷⁷ “was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox,” only to reappear in *Lochner* before the Court eventually recognized its error of “converting personal preferences into constitutional mandates” and discarded the doctrine.¹⁷⁸

Moreover, Chief Justice Roberts complained that *Obergefell* effectively overruled *Glucksberg*, “the leading modern case setting the bounds of substantive due process.”¹⁷⁹ In so doing, he argued, the Court employed the discredited *Lochner* methodology in an opinion

171. *See id.* at 2604.

172. *See id.* at 2612 (Roberts, C.J., dissenting).

173. *Id.* at 2614.

174. 60 U.S. (19 How.) 393 (1857).

175. 198 U.S. 45 (1905).

176. *Id.* at 58.

177. In the view of one writer, Chief Justice Roberts suggested “that the majority in *Obergefell* was imposing its own view of liberty on the American people” just as Chief Justice Roger Taney’s *Dred Scott* opinion “imposed his view of slavery. He implied that *Obergefell* was just as egregious.” JOAN BISKUPIC, *THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS* 300 (2019).

178. *Obergefell*, 135 S. Ct. at 2617, 2618 (Roberts, C.J., dissenting).

179. *Id.* at 2621.

“rest[ing] on nothing more than the majority’s own conviction that same-sex couples should be allowed to marry because they want to, and that it would disparage their choices and diminish their personhood to deny them this right.”¹⁸⁰ Equating that conclusion with the “naked policy preferences adopted in *Lochner*,” the Chief Justice wrote that the majority’s approach “is dangerous for the rule of law The Court today not only overlooks our country’s entire history and tradition but actively repudiates it, preferring to live in the heady days of the here and now.”¹⁸¹ In his view, an immodest and unrestrained Court was insufficiently sensitive to the fact that judges are unelected and unaccountable, and are not “attuned to the lessons of history” and what it means when judges exceed their appropriate bounds.¹⁸² Like judges, a pretentious “present generation” has supposed that they “are the ones chosen to burst the bonds” of “thousands of years” of the traditional institution of marriage.¹⁸³

V. *GLUCKSBERG*, POST-*OBERGEFELL*

As previously noted, Chief Justice Roberts argued that *Obergefell* effectively overruled *Glucksberg*, “the leading modern case setting the bounds of substantive due process.”¹⁸⁴ Noting the Chief Justice’s observation on this point, Professor Kenji Yoshino has argued that “[a]fter *Obergefell*, it will be much harder to invoke *Glucksberg* as binding precedent” and that *Obergefell* “seems to have laid waste to the entire *Glucksberg* edifice.”¹⁸⁵ Agreeing with Professor Yoshino, Professor Laurence Tribe has written that *Obergefell* “has definitively replaced” the *Glucksberg* test “with the more holistic inquiry of Justice Harlan’s justly famous 1961 dissent in *Poe v. Ullman*”¹⁸⁶ However, as previously noted, in 2017 then-Judge and now-Justice Kavanaugh expressed a different view regarding *Glucksberg*’s post-*Obergefell*

180. *Id.* (quotation marks and citations omitted).

181. *Id.* at 2621, 2622–23.

182. *Id.* at 2626.

183. *Id.* In a separate dissent, Justice Alito, quoting *Glucksberg*, argued that to “prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that ‘liberty’ under the Due Process Clause should be understood to protect only those rights that are ‘deeply rooted in this Nation’s history and tradition.’” *Id.* at 2640 (Alito, J., dissenting).

184. *Id.* at 2621 (Roberts, C.J., dissenting).

185. Yoshino, *supra* note 122, at 162, 166.

186. Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 16 (2015); see also Alexis M. Piazza, *The Right to Education After Obergefell*, 43 HARBINGER 62 (Apr. 2, 2019) (noting although *Obergefell* did not expressly overrule *Glucksberg*, “there is little doubt that [*Glucksberg*] rests on fragile ground”).

status, remarking that to the then-present day *Glucksberg* is an important precedent ensuring that the Court operates as a court of law and not as an institution of social policy.¹⁸⁷

Those views raise an important question: did *Glucksberg* survive *Obergefell*? In *Obergefell*, Justice Kennedy reasoned that while *Glucksberg* may have been appropriate in the physician-assisted suicide context in which it was applied, it was inconsistent with the approach taken by the Court in substantive due process cases involving marriage and intimacy.¹⁸⁸ Under that view, *Obergefell* did not expressly overrule *Glucksberg*, leaving the Court's 1997 decision in the physician-assisted-suicide jurisprudential and precedential silo. But aspects of the *Obergefell* majority opinion could be read and understood as rejecting *Glucksberg*'s formulaic fundamental rights analysis. For instance, Justice Kennedy declared that history and tradition guide, but do not set, the outer boundaries of the Court's substantive due process methodology and recognized—indeed endorsed—the need for and propriety of generational determinations of the meaning of “liberty.”

Whether and to what extent *Glucksberg* lives post-*Obergefell* is an open question awaiting future Court analysis and resolution. In the meantime, one can look to post-*Obergefell* lower court decisions for guidance. For instance, the Fourth Circuit in *Reyna v. Hott*¹⁸⁹ considered plaintiffs' argument that their asserted substantive due process right to family unity precluded Immigration and Customs Enforcement from transferring parents from a facility near their children to one farther away. While the plaintiffs relied on *Obergefell* as support for their position, the court did not agree. Finding no precedent recognizing the asserted right and citing *Glucksberg*, the court concluded that it “was hardly free to create a new substantive due process right”¹⁹⁰ The court thus declined to recognize the claimed right in the absence of objective criteria for assessing the strength of family ties, as the enforcement of such a right would rest upon the subjective judgments of judges, “just the circumstance about which the Supreme Court advised utmost caution in *Glucksberg*.”¹⁹¹

187. See *supra* note 6 and accompanying text.

188. See *supra* notes 165–167 and accompanying text.

189. 921 F.3d 204 (4th Cir. 2019).

190. *Id.* at 211.

191. *Id.*

Another Fourth Circuit decision, *D.B. v. Cardall*,¹⁹² held that the federal Office of Refugee Settlement’s refusal to release a child to his mother’s custody because it deemed her incapable of providing for the child’s physical and mental well-being did not violate the mother’s substantive due process rights. Acknowledging *Obergefell*’s statement that the identification of rights implicating substantive due process “has not been reduced to any formula,”¹⁹³ the court opined that, at a minimum, rights “deeply rooted in this Nation’s history and tradition” are included.¹⁹⁴ The denial of the mother’s custody request based on the determination that she was incapable of caring for the child did not deprive her of a deeply rooted right and fundamental liberty interest.¹⁹⁵

In *Parrino v. Price*,¹⁹⁶ the Sixth Circuit rejected a pharmacist’s substantive due process claim against the federal government. The pharmacist pled guilty to the crime of introducing misbranded drugs into interstate commerce and was excluded from participation in federal health programs for at least five years.¹⁹⁷ The pharmacist alleged that the exclusion deprived him of a protected liberty interest in his good name and reputation protected by the Fifth Amendment’s Due Process Clause.¹⁹⁸ Relying on *Glucksberg*, the Sixth Circuit stated that substantive due process “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.”¹⁹⁹ The pharmacist had no fundamental right to participate in the programs.²⁰⁰ The Sixth Circuit also rejected a substantive due process claim in another case which involved claims that individuals’ inclusion on a government list designating them for enhanced security screening before they were allowed to board flights infringed their fundamental rights to travel and harmed their reputations.²⁰¹ Again citing

192. 826 F.3d 721 (4th Cir. 2016).

193. *Id.* at 740 (quoting *Obergefell*, 135 S. Ct. at 2598).

194. *Id.* (quoting *Glucksberg*, 521 U.S. at 721).

195. *Id.* at 741; *see also* Dawson v. Bd. of Cty. Comm’rs. of Jefferson Cty., 732 F. App’x 624 (10th Cir. 2018) (asserting plaintiff’s right to be free from pretrial detention after paying a required bond and waiting to be fit with a GPS monitor was not deeply rooted in the nation’s history and tradition and was therefore not a fundamental liberty interest).

196. 869 F.3d 392 (6th Cir. 2017).

197. *Id.* at 395.

198. *Id.* at 396; *see also* U.S. CONST. amend. V (1791) (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

199. *Parrino*, 869 F.3d at 397 (quoting *Glucksberg*, 521 F.3d at 720–21).

200. *Id.*

201. *Beydoun v. Sessions*, 871 F.3d 459 (6th Cir. 2017).

Glucksberg and quoting the Court’s deeply rooted in history and tradition language, the court held that the plaintiffs had failed to adequately allege a violation of their fundamental rights.²⁰²

In another post-*Obergefell* case, *Aka v. United States Tax Court*,²⁰³ the District of Columbia Circuit held that a decision to disbar the plaintiff without evidence that he had committed a crime did not violate the Fifth Amendment’s Due Process Clause. Approvingly citing *Glucksberg*, the court opined, “substantive due process protects ‘fundamental’ liberties that are ‘deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty.’ . . . Under this banner, the Supreme Court has protected certain interests related to sexuality, marriage, and family life,”²⁰⁴ including a same-sex couple’s right to marry.²⁰⁵ The court found it “impossible to wrench from these cases a substantive due process right to bar membership or against unduly harsh disbarment.”²⁰⁶ Thus, *Glucksberg* survived *Obergefell*.

A recent district court decision citing *Obergefell*, *Duffner v. City of St. Peters*,²⁰⁷ nonetheless relied on *Glucksberg* in concluding that plaintiffs challenging an ordinance requiring residents to plant and maintain turf grass on their private property failed to identify a fundamental right restricted by the ordinance.²⁰⁸ And in *Struniak v. Lynch*,²⁰⁹ the Eastern District of Virginia observed that *Obergefell*’s methodology is “properly understood as a rejection of the strict requirements of *Glucksberg* and an embrace of Justice Harlan’s common law approach to implied fundamental liberty interests.”²¹⁰ Determining that *Obergefell* did not expressly overrule *Glucksberg*, the court applied both decisions in analyzing the plaintiff’s argument that

202. *Id.* at 466–67.

203. 854 F.3d 30 (D.C. Cir. 2017).

204. *Id.* at 34 (quoting *Glucksberg*, 521 U.S. at 720–21).

205. *Id.* at 35 (citing *Obergefell*, 135 S. Ct. at 2599).

206. *Id.*; see also *Van Orden v. Stringer*, 937 F.3d 1162 (8th Cir. 2019) (citing *Glucksberg* and holding that plaintiffs’ contention that they were entitled to changes in the way state officials conducted annual reviews of civilly-committed persons was not deeply rooted in the nation’s history and tradition or implicit in the concept of ordered liberty); *Waldman v. Conway*, 871 F.3d 1283 (11th Cir. 2017) (noting prisoner did not have a protected liberty interest in not being classified as a sex offender; per *Glucksberg*, the claimed right to refuse registration was not deeply rooted); *Morrissey v. United States*, 871 F.3d 1260 (11th Cir. 2017) (citing *Glucksberg* and concluding that history and tradition did not provide a firm footing for a taxpayer’s claimed deduction for the costs of in vitro fertilization procedures, a “decidedly modern phenomena”).

207. *Duffner v. City of St. Peters*, No. 4:16-CV-01971, 2018 WL 1519378 at *4 (E.D. Mo. Mar. 28, 2018), *aff’d*, 930 F.3d 973 (8th Cir. 2019).

208. *Id.*

209. 159 F. Supp. 3d 643 (E.D. Va. 2016).

210. *Id.* at 667.

a citizen has a constitutionally protected and judicially enforceable liberty interest in residing in the United States with his or her non-citizen spouse.²¹¹ Under *Glucksberg*, “the analysis is simple and straightforward . . . the nation’s history and traditions establish the power of Congress to restrict immigrant presence in the United States even when the immigrant is married to a United States citizen.”²¹² Under *Obergefell*, “the analysis is not much more difficult . . . the *Glucksberg* analysis remains relevant, and the long history of congressional regulation bears due consideration,” as does the absence of a “history of impermissible animus as the basis for the restriction at issue here.”²¹³ Accordingly, the court held, the plaintiff did not have a judicially protected or enforceable fundamental liberty interest.²¹⁴

An *Obergefellian* approach to a Fifth Amendment substantive due process suit was on display in the District of Oregon’s decision in *Juliana v. United States*.²¹⁵ The court considered whether environmental activists who were too young to vote had a fundamental liberty interest in a climate system capable of sustaining human life.²¹⁶ Noting *Glucksberg*’s history and tradition inquiry, the court nonetheless relied on *Obergefell*’s generational liberty approach²¹⁷ in concluding that “‘new’ fundamental rights are [not] out of bounds.”²¹⁸ Exercising its “reasoned judgment,” the court had “no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the ‘foundation of the family,’ a stable climate system is quite literally the foundation of society, without which there would be neither civilization nor progress.”²¹⁹ Thus, the court held,

where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet’s ecosystem, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution

211. *Id.*

212. *Id.* at 667–68 (citation omitted).

213. *Id.* at 668.

214. *Id.*

215. 217 F. Supp. 3d 1224 (D. Ore. 2016), *rev’d for lack of standing and remanded for dismissal*, 947 F.3d 1159 (9th Cir. 2020).

216. *Juliana*, 217 F. Supp. 3d at 1234.

217. *See supra* note 161 and accompanying text.

218. *Juliana*, 217 F. Supp. 3d at 1249.

219. *Id.* at 1250 (quotation marks omitted).

affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink. Plaintiffs have adequately alleged infringement of a fundamental right.²²⁰

Although reversed on appeal for lack of standing,²²¹ the court's decision is an interesting exemplar of the application of a generational liberty analysis going beyond the *Glucksberg* approach.

Consider an additional post-*Obergefell* decision by the Supreme Court of New Mexico involving the same issue of physician-assisted suicide taken up by the *Glucksberg* Court in 1997. In *Morris v. Brandenburg*,²²² the court considered a declaratory judgment action brought by physicians and a patient challenging the constitutionality of a New Mexico statute criminalizing assisted suicide.²²³ As framed by the court, the "question in this case is whether a mentally competent, terminally ill patient has a constitutional right to have a willing physician, consistent with accepted medical practices, prescribe a safe medication that the patient may self-administer for the purpose of peacefully ending the patient's life."²²⁴ "No," answered the court, holding that physician assistance in dying is not a fundamental or

220. *Id.* For additional post-*Obergefell* federal decisions court decisions discussing *Glucksberg*, see *Students & Parents for Privacy v. Sch. Dirs. of Township High Sch. Dist. 211*, 377 F. Supp. 3d 891 (N.D. Ill. 2019) (noting *Obergefell* but relying on *Glucksberg* in holding that students' claimed right not to be seen unclothed by the opposite sex was not a fundamental liberty interest protected by the Due Process Clause); *Gary B. v. Snyder*, 329 F. Supp. 3d 344, 363 (E.D. Mich. 2018) (holding that minor children's allegations that inadequate public schools denied them access to literacy because of their race did not violate the Due Process Clause; although noting *Obergefell's* "reasoned judgment" analysis, the court concluded that "in a case like this one, the holding of *Obergefell* does not counsel a departure from" the *Glucksberg* approach); *Ammarell v. United States*, No. 3:16-CV-00708, 2018 WL 2843441 (W.D.N.C. June 11, 2018) (noting North Carolina tort claims for alienation of affection and criminal conversation passed constitutional muster; *Glucksberg's* history-and-tradition analysis was not altered by *Lawrence v. Texas*, and the alleged sexual conduct abused the institution of marriage); *Robinson v. Gov't of the District of Columbia*, 234 F. Supp. 3d 14 (D.D.C. 2017) (claiming plaintiff's liberty interest in possessing an unsealed container of alcohol in public was not fundamental and protected; such possession is not deeply rooted in this nation's history and tradition and implicit in the concept of ordered liberty as required by *Glucksberg*); *Doe v. Rector & Visitors of George Mason Univ.*, 149 F. Supp. 3d 602, 632 (E.D. Va. 2016) (noting *Obergefell* but holding that under *Glucksberg* the plaintiff's asserted fundamental liberty interest in engaging in bondage, discipline, dominance, submission, sadism, and masochism is clearly not protected or judicially enforceable under the Due Process Clause: "[t]here is no basis to conclude that tying up a willing submissive sex partner and subjecting him or her to whipping, choking, or other forms of domination is deeply rooted in the nation's history and traditions or implicit in the concept of ordered liberty").

221. See *Juliana*, 947 F.3d at 1175.

222. 376 P.3d 836 (N.M. 2016).

223. *Id.*; see also N.M.S.A. 1978, § 30-2-4.

224. *Brandenburg*, 376 P.3d at 838.

important right under the Due Process Clause of the Fourteenth Amendment.²²⁵

Brandenberg undertook a detailed discussion of the *Glucksberg* formula, noting the United States Supreme Court's call for avoiding the transformation of liberties protected by the Due Process Clause on the basis of the Court's policy preferences.²²⁶ The New Mexico high court pointed to *Obergefell*'s concern that defining an asserted right by reference to historical practices was inconsistent with the Court's fundamentality analysis in its right to marry decisions.²²⁷ However, *Brandenberg* concluded, as *Obergefell* did not expressly overrule *Glucksberg*, the Court's 1997 decision controlled.²²⁸ Consequently, *Obergefell*'s concern with defining rights by looking to historical practices was not pertinent to the analysis of the physician-assisted suicide issue. Unlike the marriage cases grounded in a tradition of a fundamental right to marry, "we do not have such a tradition to fall back on regarding physician aid in dying."²²⁹

The aforementioned and admittedly small sample of post-*Obergefell* cases reveal that *Glucksberg* not only survived but is being employed by courts in rejecting substantive due process claims in areas outside the physician-assisted suicide setting addressed in the Court's 1997 decision. Apart from *Juliana*'s recognition of a fundamental liberty interest in a life-sustaining climate system, the lower federal court and New Mexico Supreme Court decisions acknowledged *Obergefell* but turned to and applied *Glucksberg* in declining to find a "new" (*i.e.*, non-historical and non-traditional) fundamental right judicially protected by and enforceable under the Due Process Clause.

Aware of the perils of prediction, it is my view that a majority of the currently constituted Court would reject the view that *Obergefell* overruled *Glucksberg* and that the latter decision's history-and-tradition methodology is no longer applicable to the resolution of substantive due process issues. Chief Justice Roberts and Justices Thomas and Alito have already made clear their adherence to the *Glucksbergian* traditionalist methodology in their opinions. And statements made by Justices Gorsuch and Kavanaugh prior to joining the Court—in which Gorsuch criticized "reasoned judgment"

225. *Id.* at 850.

226. *Id.* at 845.

227. *Id.* at 848; *see also supra* note 164 and accompanying text.

228. *Brandenberg*, 376 P.3d at 847.

229. *Id.* at 848.

interpretation of the Constitution,²³⁰ and Kavanaugh observed in a post-*Obergefell* speech that *Glucksberg* is an important precedent²³¹— suggests that the newest members of the Court regard *Glucksberg* as still viable and governing precedent. If correct, this prediction can have significant implications for future substantive due process cases claiming unconstitutional governmental deprivations of liberty, including, for example, the judicial methodology employed in deciding challenges to alleged state denials of reproductive choice.²³²

CONCLUSION

The arguments that *Obergefell* effectively overruled *Glucksberg*, “laid to waste the entire *Glucksberg* edifice,” and definitively replaced the history-and-tradition test with a holistic due process inquiry²³³ have not (yet) been borne out. At this juncture it appears, generally speaking, that *Obergefell*’s generational approach to the meaning of protected and protectable “liberty” interests in the same-sex marriage context has not created a methodological sea change in substantive due process jurisprudence. Whether and how the Court, sans Justice Kennedy, will ultimately decide the subject addressed in this essay is an important and intriguing question.²³⁴ But at this point the answer to the w(h)ither *Glucksberg* query is that *Glucksberg* lives.

230. See *supra* note 92.

231. See *supra* note 6 and accompanying text.

232. This obviously important issue merits further consideration beyond the scope of this essay.

233. See *supra* note 185 and accompanying text.

234. As is another critical question beyond the scope of this essay: whether *Obergefell* might be overruled. As posited by Professor Geoffrey Stone: “In light of the vehemence of the dissenting justices and their harsh condemnation of the legitimacy of the decision, it is certainly possible that at some point down the road a majority of justices holding similar views might jettison the precedent” GEOFFREY R. STONE, *SEX AND THE CONSTITUTION* 524 (2017).