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## You Must Present a Valid Form of (Gender) Identification: The Due Process and First Amendment Implications of Tennessee's Birth Certificate Law

Brooke Lowell

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**YOU MUST PRESENT A VALID FORM OF  
(GENDER) IDENTIFICATION: THE DUE PROCESS AND  
FIRST AMENDMENT IMPLICATIONS OF TENNESSEE’S  
BIRTH CERTIFICATE LAW**

Brooke Lowell\*

INTRODUCTION

This Note analyzes Tennessee’s prohibition against transgender people changing their gender markers on their birth certificates under both Fourteenth Amendment Substantive Due Process and the First Amendment. Part I discusses the relevant terms related to transgender rights, the importance of birth certificates, and the relevant laws at play.<sup>1</sup> Part II focuses on the Substantive Due Process argument. It lays out the foundational cases and then applies them to analyze whether gender identity is a fundamental right.<sup>2</sup> Part III explores the First Amendment analysis, focusing on gender as speech.<sup>3</sup> It also discusses how government speech affects the analysis. The Note concludes by discussing the merits of both the Substantive Due Process and First Amendment arguments.

I. TERMINOLOGY AND BACKGROUND

*A. Transgender Rights*

“Transgender” is a term that describes people whose gender identity is different from the gender they were assigned at birth.<sup>4</sup> “Gender identity” is a person’s internal or personal sense of their own gender and “gender expression” is how a person presents their gender.<sup>5</sup> “Gender dysphoria” is the medical diagnosis of people who experience emotional distress because their birth sex does not match their gender identity.<sup>6</sup>

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\* JD Candidate, William & Mary Law School, 2020. BA, Simmons College, 2017. I would like to thank my mom, for her love and encouragement and my best friend Sam, for always keeping me grounded. I am also eternally grateful to the *William & Mary Bill of Rights Journal* editorial board for their support and thoughtful edits.

<sup>1</sup> See discussion *infra* Part I.

<sup>2</sup> See discussion *infra* Part II.

<sup>3</sup> See discussion *infra* Part III.

<sup>4</sup> *Understanding Transgender People: The Basics*, NAT’L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), <https://transequality.org/issues/resources/understanding-transgender-people-the-basics> [<https://perma.cc/68UL-62Y4>].

<sup>5</sup> *Id.*

<sup>6</sup> *Frequently Asked Questions About Transgender People*, NAT’L CTR. FOR TRANSGENDER

Not all transgender individuals experience dysphoria.<sup>7</sup> Transgender individuals encounter a plethora of discrimination ranging from employment, housing, voting, immigration, travel, and police/prisons.<sup>8</sup> A large amount of this discrimination emerges from transgender individuals' appearances not aligning with a strict gender binary that is pushed on society. Transgender individuals often do not adhere to this binary and may switch between "feminine" and "masculine" dress.<sup>9</sup> In reality, gender exists on a spectrum.<sup>10</sup>

Because transgender individuals were born with sex organs that do not match how they identify, their state documents do not usually match their gender expression or identity.<sup>11</sup> This Note does not attempt to also address non-binary individuals, who do not identify within the strict gender binary at all because that would require a new gender marker.<sup>12</sup> Due to the fact that their gender marker on their identification may not match how they outwardly identify, transgender people usually have to endure the process of changing their gender markers on state documents. This Note focuses on the gender marker amendment process for birth certificates in Tennessee.

### *B. The Importance of Birth Certificates*

In order to understand how the amendment process adversely affects the transgender community, it is important to recognize how vital birth certificates are to day-to-day life. This Section highlights a few out of the countless ways mismatched gender markers affect transgender individuals' lives.

A person's birth certificate is used "in determining eligibility for employment, obtaining other documents (e.g., driver's licenses, Social Security cards, passports, and other state identification documents), establishing school records, proving age, and enrolling in government programs."<sup>13</sup> Due to the variety of situations in which

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EQUAL. (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people> [<https://perma.cc/C3JR-YLL5>] [hereinafter *FAQs*].

<sup>7</sup> *Id.*

<sup>8</sup> *Issues*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues> [<https://perma.cc/D66H-6UQY>] (last visited Apr. 14, 2020).

<sup>9</sup> Katherine J. Wu, *Between the (Gender) Lines: The Science of Transgender Identity*, SCI. IN THE NEWS (Oct. 25, 2016), <http://sitn.hms.harvard.edu/flash/2016/gender-lines-science-transgender-identity/> [<https://perma.cc/3W9H-9GJ4>].

<sup>10</sup> Ravishly, *Neuroscience Proves What We've Known All Along: Gender Exists on a Spectrum*, HUFFPOST (Mar. 22, 2015), [https://www.huffingtonpost.com/ravishly/neuroscience-proves-what-\\_b\\_6494820.html](https://www.huffingtonpost.com/ravishly/neuroscience-proves-what-_b_6494820.html) [<https://perma.cc/3P5H-HTXB>]; see Wu, *supra* note 9 ("Like many other facets of identity, it can operate on a broad range of levels and operate outside of many definitions.").

<sup>11</sup> *FAQs*, *supra* note 6.

<sup>12</sup> Andy Newman, *Male, Female or 'X': The Push for a Third Choice on Official Forms*, N.Y. TIMES (Sept. 27, 2018), <https://nyti.ms/2N2aZFz>.

<sup>13</sup> Lisa A. Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure*

a birth certificate is needed, having an inaccurate one has serious implications.<sup>14</sup> A birth certificate may be a factor considered in whether or not an individual's gender identity is recognized.<sup>15</sup> Furthermore, having a birth certificate that does not match one's identity can "out" the person as transgender.<sup>16</sup> This can lead to discrimination and violence, especially in sex-segregated facilities such as bathrooms.<sup>17</sup>

This can also lead to discrimination in practical situations, such as a transgender individual trying to find employment.<sup>18</sup> During the hiring process, an employer may notice that the applicant's identity and gender marker do not match and subsequently discriminate against that applicant.<sup>19</sup> Employees in the United States are required to fill out an I-9 form before beginning employment.<sup>20</sup> If an employee does not have a passport or Social Security card, that person is required to show their birth certificate instead.<sup>21</sup> But even if one does have access to their Social Security card, it is given in conjunction with an identification card with a gender marker that stems from one's birth certificate.<sup>22</sup>

Transgender individuals also encounter discrimination and hardship whenever they need to have their ID checked.<sup>23</sup> Again, the gender marker on one's ID card stems from the birth certificate,<sup>24</sup> meaning that if the gender on the birth certificate does not match, all subsequent identification does not match.<sup>25</sup> According to the 2015 U.S. Transgender Survey, "25% of people were verbally harassed, 16% were denied services or benefits, 9% were asked to leave a location or establishment, and 2% were assaulted or attacked" when their gender marker did not match the gender they were presenting.<sup>26</sup> Inaccurate gender markers can also discourage travel out of fear of discrimination while going through airport security.<sup>27</sup> The National Center for

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*Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 391 (2013).

<sup>14</sup> *See id.*

<sup>15</sup> *Id.* at 392.

<sup>16</sup> *See id.*

<sup>17</sup> *See id.*; Timothy Zick, *Restroom Use, Civil Rights, and Free Speech "Opportunism,"* 78 OHIO ST. L.J. 963, 966 (2017).

<sup>18</sup> Mottet, *supra* note 13, at 392.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 393.

<sup>21</sup> *Proof of U.S. Citizenship and Identification When Applying for a Job*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/us-citizenship/proof-us-citizenship-and-identification-when-applying-job> [<https://perma.cc/FJ4W-RFW8>] (last updated July 10, 2018).

<sup>22</sup> Mottet, *supra* note 13, at 392, 394.

<sup>23</sup> *See id.* at 395.

<sup>24</sup> *Id.* at 392 ("Birth certificates establish the initial gender designation for other governmental identity documents, such as driver's licenses, passports and Social Security records.")

<sup>25</sup> *See id.*

<sup>26</sup> S. E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY* 82 (2016).

<sup>27</sup> *Id.* at 212–13.

Transgender Equality explains that “[t]he gender information included in [one’s] reservation is used to eliminate false matches with the same or similar names—not to evaluate a person’s gender,” but this does not stop Transportation Security Administration (TSA) agents from discriminating.<sup>28</sup> There are documented instances of agents questioning one’s marker.<sup>29</sup> In fact, in 2016, the TSA enacted a policy that codified discrimination against transgender individuals.<sup>30</sup> The rule implemented body-scan technology that requires agents to select either a pink or blue button based on how an individual presents themselves.<sup>31</sup> “The machine’s software scans male and female bodies differently and will trigger an alert over any anomaly.”<sup>32</sup> An anomaly would be, for example, a transgender woman who still has male genitalia.<sup>33</sup> This results in pat-downs and inspections of one’s genital area.<sup>34</sup> Additionally, TSA policy dictates that an individual be patted down by an agent that is the same gender as them, ignoring the fact someone may not be comfortable being patted down by someone that is the same gender they present, as they likely still have the opposite sex’s genitalia.<sup>35</sup>

One’s right to vote is also infringed. The Williams Institute at the UCLA School of Law found that transgender individuals in eight states in particular may be stopped from voting.<sup>36</sup> Poll workers may turn away individuals if their identification does not match how they present themselves.<sup>37</sup>

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<sup>28</sup> *Know Your Rights: Airport Security*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/know-your-rights/airport-security> [<https://perma.cc/WN3J-4GSD>] (last visited Apr. 14, 2020) [hereinafter *Airport Security*].

<sup>29</sup> See Katelyn Burns, *Traveling While Trans: Airport Security Sees Your Genitals as Cause for Alarm*, REWIRE.NEWS (May 5, 2017, 9:59 AM), <https://rewire.news/article/2017/05/05/traveling-trans-airport-security-sees-genitals-cause-alarm/> [<https://perma.cc/F8SU-SDPP>].

<sup>30</sup> See *New TSA Policy Codifies Discrimination Against Transgender People*, NAT’L LGBTQ TASK FORCE (Mar. 4, 2016), <http://www.thetaskforce.org/new-tsa-policy-codifies-discrimination-against-transgender-people/> [<https://perma.cc/XWV4-63SL>] [hereinafter *New TSA Policy*].

<sup>31</sup> *Id.*

<sup>32</sup> Fredrick Kunkle, *Transgender Passengers Uneasy About TSA Shift on Pat-Downs*, WASH. POST (Mar. 25, 2017, 7:00 AM), [https://www.washingtonpost.com/news/tripping/wp/2017/03/25/transgender-passengers-uneasy-about-tsa-shift-on-pat-downs/?noredirect=on&utm\\_term=.c60494b7daab](https://www.washingtonpost.com/news/tripping/wp/2017/03/25/transgender-passengers-uneasy-about-tsa-shift-on-pat-downs/?noredirect=on&utm_term=.c60494b7daab) [<https://perma.cc/2YRE-TFAV>].

<sup>33</sup> See *id.* Hailey Melville, 25, a transgender student at Northwestern University’s graduate school of journalism “has asked the security officers [at the airport] to set the machine to the male setting and been refused because of her appearance. But when the machine operates on the female setting, it sets off an alarm that requires her to submit to a pat-down.” *Id.*

<sup>34</sup> *New TSA Policy*, *supra* note 30.

<sup>35</sup> *Airport Security*, *supra* note 28.

<sup>36</sup> JODY L. HERMAN & TAYLOR N.T. BROWN, THE WILLIAMS INST., THE POTENTIAL IMPACT OF VOTER IDENTIFICATION LAWS ON TRANSGENDER VOTERS IN THE 2018 GENERAL ELECTION 1 (2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Voter-ID-Laws-2018.pdf> [<https://perma.cc/H5AM-4WJR>] (identifying Alabama, Georgia, Indiana, Kansas, Mississippi, Tennessee, Virginia, and Wisconsin as the eight states in question).

<sup>37</sup> *Id.* at 3.

Other areas impacted by birth certificates are marriage recognition,<sup>38</sup> health insurance,<sup>39</sup> and discrimination in sex-segregated facilities.<sup>40</sup> It is particularly troubling in small communities. For example, if a transgender individual buys alcohol at a local convenience store and their ID does not match their gender *because* they were unable to change their birth certificate, the person checking the ID can easily inform the community.<sup>41</sup>

### C. Tennessee's Birth Certificate Law

Two states currently prohibit transgender individuals from changing their gender markers on their birth certificates—Tennessee and Ohio.<sup>42</sup> Tennessee's law is the most explicit and targeted: "The sex of an individual will not be changed on the original certificate of birth as a result of sex change surgery."<sup>43</sup> While the majority of the laws in the country allows a gender marker change *only if* you have shown proof of transitional surgery, Tennessee goes a step further and outright refuses to allow the change regardless.<sup>44</sup> While this Note focuses on Tennessee because of its explicit statutory provision, looking at the state of the law in Ohio also provides insight into the gender marker restriction.

Ohio is less targeted. It simply does not provide any guidance on updating gender markers.<sup>45</sup> The fact that there is no statutory scheme whatsoever means the Ohio Department of Health has the discretion to refuse to change gender markers, even when presented with a court order for gender change.<sup>46</sup> The complaint in the

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<sup>38</sup> Mottet, *supra* note 13, at 396.

<sup>39</sup> *Id.* at 397.

<sup>40</sup> *Id.* at 398.

<sup>41</sup> *See id.* at 395 (providing the example of police or security officers sharing information with a small community).

<sup>42</sup> *See ID Documents Center—Ohio*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents/state/ohio> [<https://perma.cc/ASY3-D2K8>] (last updated Nov. 2019) [hereinafter *Ohio*]. Kansas was included on this list until June 2019. *See* Dion Lefler & Jonathan Shorman, *Kansas to Allow Transgender People to Change Their Gender on Birth Certificates*, WICHITA EAGLE (June 24, 2019, 2:17 PM), <https://www.kansas.com/news/politics-government/article231903843.html> [<https://perma.cc/3WHM-MC2J>]; *ID Documents Center—Kansas*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents/state/kansas> [<https://perma.cc/F98P-2UQG>] (last updated Nov. 2019).

<sup>43</sup> TENN. CODE ANN. § 68-3-203(d) (2010).

<sup>44</sup> *Cf. id.*; *see also* K. B., *Never Quite the Woman that She Wanted to Be: How State Policies Transform Gender Marker Identification Into a Scarlet Letter*, 15 *DUKEMINIER AWARDS J.* 1, 6 (2016) ("Thirty-one of these states specifically require reassignment surgery as a prerequisite to amending birth certificates.").

<sup>45</sup> *Ohio*, *supra* note 42.

<sup>46</sup> *Id.* The ACLU has recently filed suit against Ohio. Complaint at 1–2, *Ray v. Himes*, No. 2:18-cv-00272-MHW-CMV (S.D. Ohio 2018).

ACLU's recent case against Ohio states the policy as follows: "While the state provides most people born in Ohio with accurate birth certificates—matching their gender identity—the state bars transgender people alone from obtaining accurate birth certificates matching their gender identity. . . . [T]his policy denies transgender people access to birth certificates they can use."<sup>47</sup>

These archaic laws open transgender people to discrimination, harassment, and violence.<sup>48</sup> In the past few years, however, states and territories have been changing their tune. Puerto Rico, for example, changed its gender marker law after a successful lawsuit.<sup>49</sup> Other states that progressed in the past two years are California, Montana, New Jersey, Oregon, and Washington.<sup>50</sup>

#### *D. The Story of Kayla Gore*

Rather than looking at this issue in the abstract, it is important to see how it actually affects transgender individuals. For example, Kayla Gore is an African-American female who lives in Memphis.<sup>51</sup> She is one of the plaintiffs in Lambda Legal's lawsuit that challenges Tennessee's birth certificate law.<sup>52</sup> Her birth certificate inaccurately indicates that her gender is male.<sup>53</sup> Gore stated: "[T]he state of Tennessee refuses to recognize my identity and forces me to carry incorrect identity documents. Tennessee's discriminatory policy complicates every aspect of transgender people's lives."<sup>54</sup> She believes she is put in harm's way by this policy, especially as a trans woman of color.<sup>55</sup> Gore has been able to change her gender marker on all other forms of identification.<sup>56</sup> Her birth certificate alone is what is putting her at risk of being outed or worse, physically harmed.<sup>57</sup> In short, Kayla Gore is negatively impacted by this antiquated law.

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<sup>47</sup> Complaint, *supra* note 46, at 2.

<sup>48</sup> *E.g., id.*

<sup>49</sup> See *Gonzalez v. Nevares*, 305 F. Supp. 3d 327, 335 (D.P.R. 2018).

<sup>50</sup> See, e.g., CAL. HEALTH & SAFETY CODE § 103426 (Deering 2019); MONT. ADMIN R. 37.8.311 (2020); N.J. STAT. ANN. § 26:8-40.12 (2019); OR. ADMIN R. 333-011-0272 (2018); WASH. ADMIN CODE § 246-490-075 (2018).

<sup>51</sup> Complaint for Declaratory and Injunctive Relief at 5, *Gore v. Lee*, No. 3:19-cv-00328 (M.D. Tenn. 2019).

<sup>52</sup> *Id.* at 1–2.

<sup>53</sup> *Id.* at 5.

<sup>54</sup> *Lambda Legal Sues Tennessee Over Anti-Transgender Birth Certificate Policy*, LAMBDA LEGAL (Apr. 23, 2019), [https://www.lambdalegal.org/news/tn\\_20190423\\_lambda-legal-sues-tennessee-birth-certificate-policy](https://www.lambdalegal.org/news/tn_20190423_lambda-legal-sues-tennessee-birth-certificate-policy) [<https://perma.cc/B8UT-9XXY>].

<sup>55</sup> *Id.*

<sup>56</sup> Complaint for Declaratory and Injunctive Relief, *supra* note 51, at 19.

<sup>57</sup> *Id.*

## II. SUBSTANTIVE DUE PROCESS

*A. The Substantive Due Process Framework*

*Washington v. Glucksberg* solidifies the fundamental rights test for analyzing Substantive Due Process claims.<sup>58</sup> First, fundamental rights are those that are “deeply rooted in this Nation’s history and tradition.”<sup>59</sup> This means that the right asserted must be rooted in tradition and implicit in the concept of “ordered liberty.”<sup>60</sup> The second factor that the Supreme Court established is a “careful description” of the asserted fundamental right.<sup>61</sup> There have been successful cases that categorize the asserted right both narrowly<sup>62</sup> or broadly.<sup>63</sup>

If the asserted right is found to be fundamental, strict scrutiny applies.<sup>64</sup> Strict scrutiny asks the following question: Is the law necessary for achieving a compelling government purpose?<sup>65</sup> If the right is not fundamental, meaning its characterization is not deeply rooted in history nor implicit in concepts of ordered liberty, the rational basis standard is applied.<sup>66</sup> For rational basis review, the law merely needs to be “reasonably rationally related” to achieving a legitimate government purpose.<sup>67</sup>

Applying this framework, the Court held in *Glucksberg* that aiding a suicide is not a fundamental right under the Due Process Clause.<sup>68</sup> A right to assisted suicide was found not deeply rooted in history.<sup>69</sup> On the contrary, the criminalization and prohibitions of the act were deeply rooted.<sup>70</sup> While this could have been characterized as a personal autonomy right, the Court found “[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal

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<sup>58</sup> See 521 U.S. 702 (1997).

<sup>59</sup> *Id.* at 702, 721 (quoting *Moore v. City of East Cleveland*, 431 U.S. 496, 503 (1977) (plurality opinion)).

<sup>60</sup> *Id.* at 721.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 702; see *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (characterizing the right as “adulterous natural father[s]”); *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (characterizing the right as “homosexual sodomy”).

<sup>63</sup> See *Lawrence v. Texas*, 539 U.S. 558, 560 (2003) (characterizing the right as “intimate sexual conduct”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (characterizing the right as “freedom to marry”).

<sup>64</sup> See *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4.

<sup>65</sup> See *Glucksberg*, 521 U.S. at 721 (indicating that the infringement must be “narrowly tailored to serve a compelling state interest” (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993))).

<sup>66</sup> See *id.* at 735.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 716.

<sup>70</sup> *Id.*



decisions are so protected.”<sup>71</sup> Because this right was not found to be deeply rooted in tradition or implicit in ordered liberty, it was not fundamental and was only subject to rational basis.<sup>72</sup> This is a low standard and, as such, the state’s assisted suicide ban was at least reasonably related to the promotion and protection of a number of Washington’s important and legitimate interests.<sup>73</sup> Another important takeaway from *Glucksberg* is the Court’s hesitancy to expand the concept of Substantive Due Process because it is an “unchartered area.”<sup>74</sup> The following cases explore privacy rights and how the Court has discussed further notions of personal liberty and autonomy.

### 1. Contraception and Abortion

The Supreme Court first explored fundamental non-economic rights by examining “privacy rights.”<sup>75</sup> The Supreme Court has recognized a fundamental right to privacy through the penumbras and emanations of the Constitution,<sup>76</sup> i.e., a right to privacy can be implied from the other rights given by the Constitution.<sup>77</sup> In *Griswold v. Connecticut*, the Court held that a fundamental right to privacy existed in women using contraception.<sup>78</sup> In part, the Court came to this holding due to its decision in *Skinner v. Oklahoma*, where the Court struck down compulsory sterilization because of its effects on marriage and procreation.<sup>79</sup> In *Griswold*, the main focuses of the Court were on the autonomy to make one’s own decisions and bodily integrity.<sup>80</sup> This is a theme that will continue through the background of other privacy cases.

The fundamental right to privacy over one’s own body continued in *Roe v. Wade*.<sup>81</sup> In its holding, the Court relied on precedent,<sup>82</sup> the right of abortion’s similarity to children, marriage, and bodily integrity,<sup>83</sup> and tradition.<sup>84</sup> *Roe* is a prime

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<sup>71</sup> *Id.* at 727.

<sup>72</sup> *Id.* at 728 (“That being the case, our decisions lead us to conclude that the asserted ‘right’ to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington’s assisted-suicide ban be rationally related to legitimate government interests.”).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 720.

<sup>75</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“Various guarantees create zones of privacy.”).

<sup>76</sup> *Id.* at 484 (describing the penumbras as the First, Third, Fourth, Fifth, and Ninth Amendments).

<sup>77</sup> *Id.*

<sup>78</sup> See *id.* at 485–86.

<sup>79</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

<sup>80</sup> See *Griswold*, 381 U.S. at 484–85 (describing the right to privacy).

<sup>81</sup> 410 U.S. 113 (1973).

<sup>82</sup> See *id.* at 169 (Stewart, J., concurring).

<sup>83</sup> See *id.* at 152–53 (majority opinion).

<sup>84</sup> See *id.* at 129.

example of how differently rights can be framed. On one hand, the Court found there was tradition because of Roman and Greek laws.<sup>85</sup> On the other hand, at the time of the Fourteenth Amendment, abortion was outlawed.<sup>86</sup> Framing it as a right to privacy or right to personhood makes it easier to find support than if it were framed as recognizing the right to abortion.<sup>87</sup>

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court engaged more heavily with the language of bodily integrity and personal autonomy.<sup>88</sup> The Court, in upholding the right to abortion, stated that the private realm of family life “involv[ed] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment.”<sup>89</sup> The Court also created the undue burden standard, where the purpose or effect of a law may not place a substantial obstacle in the path of someone seeking pre-viability freedom.<sup>90</sup>

## 2. Family and Intimate Relationships

*Loving v. Virginia* struck down a state law banning interracial marriage.<sup>91</sup> This case was argued under both the Equal Protection and Substantive Due Process Clauses, which would eventually become an important standard.<sup>92</sup> The right there was framed broadly as a right to (heterosexual) marriage, not just a right to interracial marriage.<sup>93</sup> When the right was framed this way, marriage is “deeply rooted” in tradition and “implicit” in “concept[s] of ordered liberty.”<sup>94</sup>

*Michael H* exemplifies the difference between framing a right narrowly and broadly.<sup>95</sup> As Kenji Yoshino describes it, “[T]he Justices had a *battle royale* over how

<sup>85</sup> *Id.* at 130.

<sup>86</sup> *Id.* at 139–40.

<sup>87</sup> See Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 158 (2015) (describing this in the context of *Bowers v. Hardwick*, 478 U.S. 186 (1986) and *Lawrence v. Texas*, 539 U.S. 558 (2003)).

<sup>88</sup> See 505 U.S. 833, 857 (1992).

<sup>89</sup> *Id.* at 851.

<sup>90</sup> See *id.* at 874.

<sup>91</sup> 388 U.S. 1, 1 (1967).

<sup>92</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015) (“The Due Process Clause and the Equal Protection Clause are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet each may be instructive as to the meaning and reach of the other.”).

<sup>93</sup> See *Loving*, 388 U.S. at 12.

<sup>94</sup> See generally *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

<sup>95</sup> See *Michael H. v. Gerald D.*, 491 U.S. 110, 127–28 n.6 (1989) (“Why should the relevant category not be even more general—perhaps ‘family relationships’; or ‘personal relationships’; or even ‘emotional attachments in general’? Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”).

abstractly an alleged liberty interest could be defined.”<sup>96</sup> This case concerned a woman who was married to a man, Gerald, and conceived a child with a different man, Michael.<sup>97</sup> While the child was biologically Michael’s, the woman wanted her current husband to act as the child’s father.<sup>98</sup> Michael thereafter argued that he had a Substantive Due Process right to act as the child’s natural father.<sup>99</sup> A plurality of the Court held against Michael H. and framed the right as “the rights of the natural father adulterously conceived”<sup>100</sup> at the most specific level, instead of a right relating to “emotional attachments in general.”<sup>101</sup> The arguments against Justice Scalia’s framework stem from the idea it would be unlikely that any tradition would exist at this level of specificity.<sup>102</sup>

As a background of *Lawrence v. Texas*, it is essential to see how the intimacy right was defined before it overruled *Bowers v. Hardwick*.<sup>103</sup> *Bowers* and *Lawrence* both tackled the right of homosexual sodomy.<sup>104</sup> The Court in *Bowers* framed the right as just that: a right to homosexual sodomy, which of course was not deeply rooted in tradition.<sup>105</sup> When overruling this case, the *Lawrence* majority fought against that characterization of the right and went as far as to say “that statement, we now conclude, discloses the Court’s own failure to appreciate the extent of the liberty at stake.”<sup>106</sup> The Court in *Lawrence* instead framed the right more broadly as the right to engage in “the most private human conduct, sexual behavior, and in the most private of places, the home.”<sup>107</sup> This right, like the others relating to intimacy, can also be seen as supporting an even broader right to bodily integrity and autonomy.<sup>108</sup> While analyzing tradition, the Court did something new—showing evidence of support by looking at emerging global views.<sup>109</sup> Moreover, the majority found that laws against sodomy were general and did not target the gay population until the 1970s.<sup>110</sup> Interestingly, the State’s main interest in this case was morals.<sup>111</sup> While

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<sup>96</sup> Yoshino, *supra* note 87, at 154.

<sup>97</sup> *Michael H.*, 491 U.S. at 113–14.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 113.

<sup>100</sup> *Id.* at 127–28 n.6.

<sup>101</sup> *Id.*

<sup>102</sup> Yoshino, *supra* note 87, at 156.

<sup>103</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>104</sup> See *Lawrence*, 539 U.S. at 570; *Bowers*, 478 U.S. at 190.

<sup>105</sup> *Bowers*, 478 U.S. at 192 (“It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy.”).

<sup>106</sup> *Lawrence*, 539 U.S. at 567.

<sup>107</sup> *Id.*

<sup>108</sup> See *id.* at 562 (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”).

<sup>109</sup> *Id.* at 573.

<sup>110</sup> *Id.* at 570.

<sup>111</sup> See *id.* at 571.

the Court did not state a standard of review, it did find that morals are not legitimate interests even under rational basis review.<sup>112</sup> Justice Scalia, in his dissent, on the other hand, believed that interests should be able to be based on morality.<sup>113</sup>

### 3. Gay Rights and *Obergefell*

The most relevant Substantive Due Process case in recent history is *Obergefell v. Hodges*.<sup>114</sup> In this seminal case, the Supreme Court ruled in favor of gay marriage.<sup>115</sup> This case is important not just for its broad discussion of liberty interests, but also in that the majority moves away from the traditional history test.<sup>116</sup>

Similar to *Lawrence*, Justice Kennedy focused on notions of individual autonomy.<sup>117</sup> Comparing the case to *Lawrence*, he stated that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”<sup>118</sup> Yoshino, writing about *Obergefell*, likewise observed that marriage and intimacy as fundamental rights are “exemplary rather than exhaustive.”<sup>119</sup> Moreover, Kennedy took *Lawrence* and the rights of same-sex couples and extended them further when he wrote: “But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”<sup>120</sup> This broad notion of liberty can be imagined to extend to LGBTQ+ (Lesbian, Gay, Bisexual, Transgender, and Queer (or Questioning), Plus) rights in general, not just same-sex marriage.

Countering the tradition requirement and again echoing *Lawrence*, the majority in *Obergefell* held: “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 . . . did not presume to know the extent of freedom in all of its dimensions . . . .”<sup>121</sup> As a result of this discussion, Yoshino speculated that “[w]hile tradition remains important in this four-part analysis, it plays a much less rigid role than it [did in earlier cases].”<sup>122</sup> In addition to loosening the reigns on the role that tradition plays in the analysis, the *Obergefell* Court was also, similarly to *Lawrence*, looking to emerging ideas.<sup>123</sup> The Court noted that it was not until the end of the twentieth century that homosexuality was no longer thought of as an illness.<sup>124</sup> The Court continued for paragraphs about

<sup>112</sup> *Id.* at 583.

<sup>113</sup> *See id.* at 599 (Scalia, J., dissenting).

<sup>114</sup> 135 S. Ct. 2584 (2015).

<sup>115</sup> *See id.*

<sup>116</sup> Yoshino, *supra* note 87, at 164.

<sup>117</sup> *Obergefell*, 135 S. Ct. at 2621 (Roberts, J., dissenting).

<sup>118</sup> *Id.* at 2599 (majority opinion).

<sup>119</sup> Yoshino, *supra* note 87, at 166.

<sup>120</sup> *Obergefell*, 135 S. Ct. at 2600.

<sup>121</sup> *Id.* at 2598.

<sup>122</sup> Yoshino, *supra* note 87, at 164.

<sup>123</sup> *See Obergefell*, 135 S. Ct. at 2615 (Roberts, J., dissenting).

<sup>124</sup> *Id.* at 2596 (majority opinion).

how these ideas have changed and acknowledged state laws and court cases that have been favorable to gay rights.<sup>125</sup>

All in all, the *Obergefell* Court discusses liberty rights with much more generality.<sup>126</sup> It also departed from the rigid tradition test.<sup>127</sup> It is important to note that this opinion is unique in its “double helix” approach of Substantive Due Process and Equal Protection because the Court relied on how the two work together.<sup>128</sup>

### *B. Applying the Fundamental Rights Test to Gender Identity*

#### 1. Identifying and Describing the Right

If a case on transgender gender markers were to come to the Supreme Court, there are two potential ways it would characterize the right based on precedent.<sup>129</sup> The first, if a majority of the Court were perhaps more in favor of the right, would characterize the right broadly.<sup>130</sup> The second, if the majority were more attuned to Scalia’s framework, would characterize the right narrowly.<sup>131</sup>

A broad right would likely be defined as the right to identify as one’s preferred gender, or even more broadly, a right to identity generally. A narrow right would make it clear there is no deeply rooted history for such a specific issue, i.e. the right of transgender individuals to change their gender markers on their birth certificates. Regardless of how the Court frames the right, it will be necessary to see how or if transgender individuals are deeply rooted in history and tradition.<sup>132</sup>

#### 2. Is the Right “Fundamental”?

Again, regardless of how the right is characterized, the Court would likely spend a large amount of time on whether the right is deeply rooted in history and tradition.<sup>133</sup> So, how long has the concept of “transgender” been around? Actually, for a very long time. While the term was not yet coined at this point in history, Native American

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<sup>125</sup> *Id.* at 2596–97.

<sup>126</sup> *See* Yoshino, *supra* note 87, at 166.

<sup>127</sup> *Id.* at 164.

<sup>128</sup> *Obergefell*, 135 S. Ct. at 2590 (“The Due Process Clause and the Equal Protection Clause are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet each may be instructive as to the meaning and reach of the other.”).

<sup>129</sup> *Compare* *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (defining a broad right to marry), *with* *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986) (defining a more narrow right to “intimate sexual conduct”).

<sup>130</sup> *See* *Lawrence*, 539 U.S. at 567.

<sup>131</sup> *See* *Bowers*, 478 U.S. at 195.

<sup>132</sup> *See, e.g., Lawrence*, 539 U.S. at 568–75 (discussing history and tradition in regards to homosexual individuals).

<sup>133</sup> *See, e.g., id.*

tribes prior to the 1800s did not recognize a strict gender binary as we have today.<sup>134</sup> In fact, “Native Americans have often held intersex, androgynous people, feminine males and masculine females in high respect.”<sup>135</sup> The term used to describe these individuals in modern times is “two-spirits,” but in the past, they were referred to as “berdache.”<sup>136</sup> In the twentieth century, however, “two-spirits” were often forced by European Christians to conform to more traditional gender roles.<sup>137</sup> The lesbian and gay movement in the 1960s allowed for the re-emergence of androgyny within Native American communities which continued into the 1990s.<sup>138</sup>

While Native American tribes continued to be an inspiration to movements advocating for same-sex marriage and challenging gender norms, the American Colonies stood in stark contrast.<sup>139</sup> Those who lived as a different gender in the seventeenth and eighteenth centuries were usually condemned, and those individuals were even arrested for such behavior.<sup>140</sup> One of the first recorded examples of a transgender individual during the colonial era was Thomas/Thomasine Hall.<sup>141</sup> What happened to Hall in Jamestown is described aptly in *Trans Bodies, Trans Selves*:

Perhaps because it took Hall at his or her word that he or she was bigendered (what we would call intersex today), the court ordered Hall in 1629 to wear both a man’s breeches and a woman’s apron and cap. In a sense, this unique ruling affirmed Hall’s dual nature and subverted traditional gender categories. But by fixing Hall’s gender and denying him or her the freedom to switch between male and female identities, the decision punished Hall and reinforced gender boundaries.<sup>142</sup>

In the nineteenth century, many individuals left the east coast and moved west to gain greater freedom.<sup>143</sup> Others moved to more industrialized cities, where they created

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<sup>134</sup> See Walter L. Williams, *The ‘Two-Spirit’ Peoples of Indigenous North Americans*, GUARDIAN (Oct. 11, 2010 7:28 AM), <https://www.theguardian.com/music/2010/oct/11/two-spirit-people-north-america> [<https://perma.cc/K2PR-BAAY>].

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* “Berdache” is defined as: “an American Indian who assumes the dress, social status, and role of the opposite sex.” *Berdache*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/berdache> [<https://perma.cc/X5QJ-FBME>] (last visited Apr. 14, 2020).

<sup>137</sup> Williams, *supra* note 134; see also Genny Beemyn, *US History, in TRANS BODIES, TRANS SELVES: A RESOURCE FOR THE TRANSGENDER COMMUNITY* 501–02 (Laura Erickson-Schroth ed., 2014).

<sup>138</sup> Williams, *supra* note 134.

<sup>139</sup> Beemyn, *supra* note 137, at 503.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 503–04.

<sup>142</sup> *Id.* at 504 (internal citations omitted).

<sup>143</sup> See *id.*

different gendered living communities.<sup>144</sup> This is where “drag” began, with the earliest known instance taking place in 1885.<sup>145</sup> By the 1930s, drag had spread rapidly and took place in almost every major city at the time.<sup>146</sup>

Although it is clear that individuals have been identifying opposite their gender for centuries, when the term “transgender” was recognized is important to the analysis.<sup>147</sup> In 1949, Dr. Caudwell was the first to use the term “transsexual” but believed that those individuals were mentally ill.<sup>148</sup> In the 50s and 60s, Dr. Benjamin was one of the first to distinguish between biological and psychological sex, and used the terms “transsexual” and “transvestite.”<sup>149</sup> Organizing efforts of the transgender community began in the 1950s and 60s as well, reaching its peak with the Stonewall Riots in New York City.<sup>150</sup> There were many similar riots before Stonewall, many of which were started by drag queens.<sup>151</sup>

In recent years, transgender rights have actually been upheld. In the November 2018 elections, Massachusetts passed the first statewide referendum protecting transgender rights.<sup>152</sup> This referendum shows that despite animosity toward transgender individuals, states are willing to pass laws protecting them. Currently, twenty-one states prohibit discrimination based on sexual orientation and gender identity in the employment context.<sup>153</sup> In addition, twenty states address hate crimes based on gender identity.<sup>154</sup>

In stark contrast, however, are the laws that still discriminate against LGBTQ+ people in general, including the transgender community.<sup>155</sup> Moreover, “‘Transgender’ Could Be Defined Out of Existence Under [the] Trump Administration.”<sup>156</sup>

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *See* *Lawrence v. Texas*, 539 U.S. 558, 570 (2003) (noting that the category “homosexual” didn’t exist in old sodomy laws and that laws didn’t target homosexuals until the 1970s).

<sup>148</sup> Beemyn, *supra* note 137, at 507.

<sup>149</sup> *Id.*

<sup>150</sup> *See id.* at 515.

<sup>151</sup> *Id.*

<sup>152</sup> Morgan Gstalter, *Massachusetts Passes First Statewide Referendum Protecting Transgender Rights*, HILL (Nov. 6, 2018, 10:42 PM), <https://thehill.com/homenews/state-watch/415402-massachusetts-passes-ballot-measure-preserving-transgender-rights> [<https://perma.cc/UYJ2-HWDW>].

<sup>153</sup> *State Maps of Laws and Policies: Employment*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/state-maps/employment> [<https://perma.cc/EX3W-FB8D>] (last visited Apr. 14, 2020).

<sup>154</sup> *State Maps of Laws and Policies: Hate Crimes*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/state-maps/hate-crimes> [<https://perma.cc/P3MF-QVYF>] (last visited Apr. 14, 2020).

<sup>155</sup> *The Discrimination Administration*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/the-discrimination-administration> [<https://perma.cc/8ADE-EQSF>] (last visited Apr. 14, 2020). *See generally* ACLU, *TRANSGENDER PEOPLE AND THE LAW: FREQUENTLY ASKED QUESTIONS* (2015) [hereinafter *TRANSGENDER PEOPLE AND THE LAW*].

<sup>156</sup> Erica L. Green et al., ‘*Transgender*’ *Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), <https://nyti.ms/2R9W1jB>.

Important to the *Lawrence* analysis is if or when transgender individuals started being criminalized and prosecuted. Transgender rights can sometimes be swept up into homosexual rights because one's identity changing may make them interested in the same sex. In such a case, it was not until the 1970s that states criminally prosecuted same-sex relations.<sup>157</sup> Beginning in the 1840s, states did criminalize "cross-dressing," but most of these laws have now been overturned.<sup>158</sup> On the contrary, federal and state laws are now in place to protect transgender individuals.<sup>159</sup>

More importantly is the emergence of new laws.<sup>160</sup> As shown in Part I, many state laws expressly allow transgender individuals to identify how they choose on their birth certificate.<sup>161</sup> There is, so to speak, "an emerging recognition" of transgender rights.<sup>162</sup> While the term "transgender" and its recognition may not be as deeply rooted as other rights, it can follow under the same analysis as *Lawrence*, where the Court focused on emerging views.<sup>163</sup>

In essence, the argument is a close one. If the Court were to stick to only a very strict understanding of "deeply rooted in history and tradition," the right would likely fail on this factor. However, if the Court analogized to *Lawrence* and focused on emerging ideas, it could pass muster.<sup>164</sup>

Constitutional law scholars, including Geoffrey Stone, believe that "many of the unenumerated fundamental rights that the Court has recognized clearly involved new applications of traditionally-recognized rights in light of evolving social understandings and values."<sup>165</sup> He offers *Skinner v. Oklahoma*,<sup>166</sup> *Griswold v. Connecticut*,<sup>167</sup> *Eisenstadt v. Baird*,<sup>168</sup> *Loving v. Virginia*,<sup>169</sup> and *Roe v. Wade*<sup>170</sup> as examples.<sup>171</sup> The Court, as Stone sees it, did not focus narrowly on these rights; "it asked whether the general understanding of the right was 'deeply rooted in the Nation's history and

<sup>157</sup> *Lawrence v. Texas*, 539 U.S. 558, 570 (2003).

<sup>158</sup> See *Arresting Dress: A Timeline of Anti-Cross-Dressing Laws in the United States*, PBS NEWS HOUR (May 31, 2015, 12:36 PM), <https://www.pbs.org/newshour/nation/arresting-dress-timeline-anti-cross-dressing-laws-u-s> [<https://perma.cc/CLP3-F435>].

<sup>159</sup> TRANSGENDER PEOPLE AND THE LAW, *supra* note 155, at 2 (noting that Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia all have such laws).

<sup>160</sup> See *Lawrence*, 539 U.S. at 572.

<sup>161</sup> See discussion, *supra* Section I.B.

<sup>162</sup> *Lawrence*, 539 U.S. at 572.

<sup>163</sup> *Id.*

<sup>164</sup> See *id.*

<sup>165</sup> GEOFFREY R. STONE, SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY 519 (2017).

<sup>166</sup> 316 U.S. 535 (1942).

<sup>167</sup> 381 U.S. 479 (1965).

<sup>168</sup> 405 U.S. 438 (1972).

<sup>169</sup> 388 U.S. 1 (1967).

<sup>170</sup> 410 U.S. 113 (1973).

<sup>171</sup> See STONE, *supra* note 165, at 519.



tradition,' and then determined whether a particular restriction violated evolving and contemporary understandings of that . . . right."<sup>172</sup>

The next step of determining whether a right is fundamental is whether it is "implicit in ordered liberty."<sup>173</sup> Implicit in ordered liberty essentially means whether a well-ordered society could function without the right.<sup>174</sup> Here, if individuals never had identification that matched their gender expression, this would not contribute to an ordered society. It is easy to imagine a society that doesn't recognize transgender rights because many people don't.<sup>175</sup>

### 3. Is the Right Supported by Precedent?

The Supreme Court's lack of opinions on transgender individuals does not stop this analysis. An individual changing their gender marker is an expression of identity. Values of personal autonomy and identity *are* supported by precedent, which is consistently an important piece of the Supreme Court's analysis when it comes to fundamental rights.<sup>176</sup> One of the most persuasive precedents here is *Lawrence*. The Court there stated: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."<sup>177</sup> *Casey* echoes a similar stance on identity:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, 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.<sup>178</sup>

The stark difference between the precedent cases and the case at hand is the fact that gender identity is not always private and in the home. However, the cases on marriage, which is a public, governmental act, mitigate this dichotomy. Perhaps the way to reconcile the rights to autonomy in the private realm with the fact that gender identity is a public expression is to also focus on the right to marriage. Moreover, how one is allowed to identify can affect those intimate relationships.

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<sup>172</sup> *Id.*

<sup>173</sup> *See* *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

<sup>174</sup> *See id.*; *see also id.* at 743 n.10 (Stevens, J., concurring).

<sup>175</sup> *See* ROBERT P. JONES ET AL., PUB. RELIGION RESEARCH INST., AMERICA'S GROWING SUPPORT FOR TRANSGENDER RIGHTS 7 (2018).

<sup>176</sup> *See* *Lawrence v. Texas*, 539 U.S. 558, 562 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 851 (1992).

<sup>177</sup> *See Lawrence*, 539 U.S. at 562.

<sup>178</sup> *Casey*, 505 U.S. at 851.

*Lawrence* and *Casey* are analogous to the issue at hand because of their focus on the right to define one's own existence,<sup>179</sup> and other precedents still support this idea. For instance, *Skinner* and *Loving*, relating to procreation and marriage, recognize a right to choose.<sup>180</sup>

*Lawrence* and *Casey* were the strongest precedent until the Court ruled on *Obergefell* in 2015.<sup>181</sup> Justice Kennedy's expansion of the liberty right in that case looks strong for transgender rights.<sup>182</sup> Moreover, *Lawrence* and *Obergefell* are helpful support of the expansion of fundamental rights. Yoshino discusses that these two cases together represent "antidisubordination liberty."<sup>183</sup> This means that going forward, the Supreme Court will likely analyze "the impact of granting or denying such liberties to historically subordinated groups."<sup>184</sup> As transgender individuals are clearly subordinated, the future jurisprudence may look more favorable after *Obergefell*. The strongest language in *Obergefell* that supports the issue at hand is similar to the broad liberty language in *Lawrence*: "But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."<sup>185</sup> The freedom does not stop at *Lawrence* or at *Obergefell*, and this language supports a progressive movement towards more LGBTQ+ rights. In addition, *Obergefell* also focused on emerging ideas and stepped away from strictly interpreting tradition.<sup>186</sup>

There is, however, some language in recent gay rights litigation in the Supreme Court that cuts against *Obergefell* being favorable to this argument.<sup>187</sup> While always sympathetic to gay rights, Justice Kennedy never identifies a level of scrutiny for them in *Obergefell*.<sup>188</sup> Moreover, the analysis has never gone far enough to see if discrimination against gay individuals invokes a compelling state interest under an intermediate or strict scrutiny regime.

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<sup>179</sup> See K. B., *supra* note 44, at 15.

<sup>180</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

<sup>181</sup> *Obergefell v. Hodges*, 135 S. Ct. 2586 (2015).

<sup>182</sup> Cf. Yoshino, *supra* note 87, at 147–48, 174 ("Where *Loving* emphasized equality over liberty, *Obergefell* made liberty the figure and equality the ground." (footnote omitted)).

<sup>183</sup> *Id.* at 174.

<sup>184</sup> *Id.*

<sup>185</sup> *Obergefell*, 135 S. Ct. at 2600.

<sup>186</sup> See *id.* at 2595 (discussing how marriage has evolved over time).

<sup>187</sup> See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) ("Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth."). Despite this language, Justice Kennedy's majority opinion still ruled against the gay couple. *Id.*

<sup>188</sup> *Obergefell*, 135 S. Ct. at 2623 (Roberts, J., dissenting) ("Yet the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions.").

Regardless of whether gay rights are deeply rooted, it seems apparent that the precedence supports an expansion of LGBTQ+ rights. The Supreme Court has increasingly favored personal freedoms and autonomy relating to sexual orientation.<sup>189</sup> While gender identity and sexual orientation are not one and the same, they are often related. Therefore, the Supreme Court's recognition of gay marriage in *Obergefell v. Hodges* also helps to provide support.<sup>190</sup>

### C. Deciding Which Level of Scrutiny to Apply

If the right is deemed to be one that is fundamental, strict scrutiny would apply.<sup>191</sup> Tennessee has not stated any specific interests, but governmental interests are pretty similar across the board. State governments' alleged interests in rules about gender markers are generally: "(1) accurate records and government efficiency, (2) prevent[ing] fraud, and (3) national security."<sup>192</sup> Is the law of denying gender marker changes necessary to achieve a compelling government purpose? While it would be hard to say that the government's interests are not compelling, there are some gaps. In terms of accuracy of documents, the government's purpose is undercut by the fact that identification would be *more* accurate if state records conform to how the individual identifies.<sup>193</sup> The fear of fraud—i.e., that people may pretend to transition—is no longer relevant. The most common example of fraud was same-sex marriage, which was legalized by *Obergefell*.<sup>194</sup> Lastly, national security is clearly a compelling interest, although that argument also has flaws.<sup>195</sup> These rationales will be discussed more under the First Amendment analysis.<sup>196</sup>

Assuming these purposes are compelling, are the laws narrowly tailored? For the first two interests, the answer is no. A blanket ban on changing gender markers is too strict, and there are other types of laws that are more closely related. For instance, some states require reassignment surgery, a note from a therapist or physician, or a court order before changing a gender marker.<sup>197</sup> Therefore, Tennessee would not pass strict scrutiny.

Even if the right is only subject to rational basis review, there is an argument that these laws still would not pass muster. The government's interest remains the same but

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<sup>189</sup> See, e.g., *id.* at 2597, 2599.

<sup>190</sup> See *id.* at 2608.

<sup>191</sup> See *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

<sup>192</sup> K. B., *supra* note 44, at 21.

<sup>193</sup> *Id.* at 21–22.

<sup>194</sup> See *id.* at 22.

<sup>195</sup> See discussion *infra* Part III.

<sup>196</sup> See discussion *infra* Part III.

<sup>197</sup> See, e.g., ALA. CODE §§ 22-9A-19, 22-9A-21 (2016) (providing for the amendment of one's birth certificate upon receipt of a certified copy of an order of a court of competent jurisdiction indicating said individual's sex "has been changed by surgical procedure"); MASS. GEN. LAWS ANN. ch. 46, § 13-E (2015) (providing for the amendment of one's birth record with a notarized certificate from a physician).

now only needs to be rationally related to the purpose. While normally this is an easy standard to meet, there is an argument to be made that the correct analysis is rational basis with bite (animus).<sup>198</sup> However, articles that have argued Tennessee would not pass rational basis due to animus<sup>199</sup> miss the mark. Rational basis with bite only applies in the context of Equal Protection cases.<sup>200</sup> The concurrence in *Lawrence* actually developed an Equal Protection argument in addition to a Substantive Due Process one, ultimately finding animus.<sup>201</sup> Because animus is not applicable to Substantive Due Process, if the right is not fundamental, then rational basis is the correct standard, and the law likely would pass review. In reality, the Court probably would not state which level of scrutiny it is applying like when it failed to do in *Lawrence* and *Obergefell*.<sup>202</sup>

### III. THE FIRST AMENDMENT

“Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>203</sup> The First Amendment’s application is clear in many cases. Although speech is most clearly protected, expression of one’s gender identity may also fall under this protection.

#### A. Background Cases and Tests

*United States v. O’Brien* is the seminal case illustrating that even symbolic conduct can fall under First Amendment protection.<sup>204</sup> In that case, O’Brien burned his draft card in a symbolic opposition to the Vietnam War.<sup>205</sup> He was subsequently convicted under a law that specifically criminalized the destruction of draft cards.<sup>206</sup> While the Supreme Court upheld the law as constitutional, this case provided a framework for future symbolic speech cases, and the Court at least recognized that symbolic conduct *can* be regulated.<sup>207</sup>

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<sup>198</sup> See *United States Dep’t. of Agric. v. Moreno*, 413 U.S. 528 (1973). See generally Raphael Holoszyc-Pimentel, *Reconciling Rational Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2072 n.4 (2015).

<sup>199</sup> See K. B., *supra* note 44, at 24.

<sup>200</sup> See *Lawrence v. Texas*, 539 U.S. 558, 580 (O’Connor, J., concurring).

<sup>201</sup> *Id.* at 579–85.

<sup>202</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence*, 539 U.S. 558.

<sup>203</sup> U.S. CONST. amend. I.

<sup>204</sup> 391 U.S. 367, 382 (1968).

<sup>205</sup> *Id.* at 369.

<sup>206</sup> *Id.* at 370.

<sup>207</sup> See *id.* at 377.

The test that *O'Brien* established is further discussed in *Texas v. Johnson*.<sup>208</sup> The first part is to determine if the activity is an expressive act under the *Spence* test.<sup>209</sup> To analyze this point, one should ask: (1) is there an intent to convey a particularized message?<sup>210</sup> and (2) is the likelihood great that, in context, the message will be understood by an audience?<sup>211</sup> If both questions are answered in the affirmative, the *O'Brien* analysis is then applicable.<sup>212</sup> This analysis further dictates that regulations implicating an expressive act are valid only if: (1) it is within the constitutional power of government to affect;<sup>213</sup> and (2) the government interest is unrelated to the suppression of free speech, i.e., it is content-neutral.<sup>214</sup> If neither or only one are true, apply strict scrutiny;<sup>215</sup> if both are true, apply intermediate scrutiny.<sup>216</sup>

In *Texas v. Johnson*, Johnson publicly burned an American flag as a means of political protest.<sup>217</sup> He was then convicted of desecrating a flag in violation of Texas law.<sup>218</sup> In applying *Spence*, the Court found this was clearly expressive conduct.<sup>219</sup> The Court referred to Johnson's burning of the flag as "conduct sufficiently imbued with elements of communication."<sup>220</sup> Because the *O'Brien* test only applies if the suppression of speech is content-neutral, it did not apply to Johnson's case.<sup>221</sup> The regulation was not incidental to the suppression of free speech because it specifically forbids the desecration of venerated objects.<sup>222</sup> This differs from *O'Brien* because an individual could burn the flag in an appropriate way, but not in an insulting way.<sup>223</sup> The state interest of national unity was not a compelling state interest, and, therefore, did not pass strict scrutiny.<sup>224</sup>

Finally, *Clark v. Community of Creative Non-Violence* analyzed a time, place, and manner restriction.<sup>225</sup> The Court found that protestors sleeping in Lafayette Park

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<sup>208</sup> 491 U.S. 397 (1989).

<sup>209</sup> *Id.* at 410 (citing *Spence v. Washington*, 418 U.S. 405 (1974) (holding that the same interest asserted by Texas here was insufficient to support a criminal conviction under a flag-misuse statute for the taping of a peace sign to an American flag)).

<sup>210</sup> *Id.* at 404 (citing *Spence*, 418 U.S. at 410–11).

<sup>211</sup> *Id.* (citing *Spence*, 418 U.S. at 410–11).

<sup>212</sup> *Id.* at 407.

<sup>213</sup> *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

<sup>214</sup> *Id.*

<sup>215</sup> *Johnson*, 491 U.S. at 412, 420.

<sup>216</sup> *See O'Brien*, 391 U.S. at 377.

<sup>217</sup> *Johnson*, 491 U.S. at 399.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 406.

<sup>220</sup> *Id.* (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)).

<sup>221</sup> *Id.* at 407.

<sup>222</sup> *Id.*

<sup>223</sup> *See id.* at 410 ("If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law.").

<sup>224</sup> *Id.* at 420.

<sup>225</sup> *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

were practicing speech, but that the government bar on overnight sleeping was unrelated to the suppression of that speech.<sup>226</sup> Moreover, the Court focused on available alternative means of communicating their message.<sup>227</sup>

## *B. Applying the Symbolic Conduct Framework to Gender Identity*

### *1. Spence Test*

The most challenging aspect of this analysis is the argument that gender identity and expression is an expressive act and therefore eligible to be symbolic conduct under *Spence*.<sup>228</sup> At first glance, one may think how an individual chooses to identify is completely unrelated to intentional speech. Jeffrey Kosbie challenges this, and, for many reasons, argues that gender identity clearly meets the expressive act requirement.<sup>229</sup> For one, he uses *Doe v. Yunits*, a case from the Superior Court of Massachusetts, which held that a transgender girl's clothing choice was protected speech and, as such, that she must be allowed to present herself as a girl,<sup>230</sup> to illustrate how gender identity should be protected as speech.<sup>231</sup>

Furthermore, Kosbie tackles whether gender identity is communicative under *Spence v. Washington*.<sup>232</sup> Again, this case can be articulated as describing protected conduct as “sufficiently imbued with elements of communication.”<sup>233</sup> Kosbie and others argue “that the central concern of speech-conduct tests is protecting conduct when it is communicative.”<sup>234</sup> While looking at speech this way, it is essential to key in on the social context of the communication.<sup>235</sup> This social context is what really turns gender expression and identity into speech.<sup>236</sup> Professor Timothy Zick focused his First Amendment argument on bathroom bills,<sup>237</sup> and Kosbie similarly uses the example of bathroom use to convey his point.<sup>238</sup> The following excerpt illustrates how gender expression applies to using the restroom:

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<sup>226</sup> *Id.* at 288, 299.

<sup>227</sup> *Id.* at 288, 293.

<sup>228</sup> *Spence v. Washington*, 418 U.S. 405 (1974).

<sup>229</sup> Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. WOMEN & L. 187, 187 (2012).

<sup>230</sup> *Doe ex rel. Doe v. Yunits*, No.001060A, 2000 WL 33162199, at \*4, \*8 (Mass. Super. Ct. Oct. 11, 2000).

<sup>231</sup> *See* Kosbie, *supra* note 229, at 202.

<sup>232</sup> 418 U.S. 405 (1974); Kosbie, *supra* note 229, at 203–10.

<sup>233</sup> *Spence*, 418 U.S. at 409.

<sup>234</sup> Kosbie, *supra* note 229, at 204. *See generally* John Greenman, *On Communication*, 106 MICH. L. REV. 1337 (2008).

<sup>235</sup> *See* Kosbie, *supra* note 229, at 204.

<sup>236</sup> *See id.* at 205.

<sup>237</sup> *See* Zick, *supra* note 17, at 963.

<sup>238</sup> Kosbie, *supra* note 229, at 206.

Everyone communicates a message of gender identity by using a single-sex restroom. . . . Social norms ascribe gender meaning to restroom choice. Even if a cisgender woman used the men's restroom because the line was shorter, others might think she was a man or be confused by her restroom choice. Similarly, if a transgender woman uses the women's restroom, others will likely either think she is a woman, or challenge her restroom choice because they think she appears too masculine. When a trans woman uses the women's restroom, she communicates her femininity even if she passes, and especially if she does: if no one questions her, then she has successfully communicated that she is a woman. But even if she is challenged, her restroom choice communicates a message of gender identity.<sup>239</sup>

The same can be said for birth certificates. If an individual is allowed to change their gender marker to reflect their gender identity, they are either successfully communicating their gender identity or they will be questioned for not looking how one perceives males or females should look. When a trans woman changes her gender marker to female, "she challenges the assumption that femininity only belongs to cisgender women."<sup>240</sup> Ideas around sex-segregated bathrooms and identification with gender are deeply rooted in the gender binary.<sup>241</sup> We assume that things of this nature will automatically conform with the gender binary.<sup>242</sup> Therefore, when transgender people make a choice associated with their gender identity, they are communicating opposition to the gender binary.<sup>243</sup>

Kosbie illustrates an example that further shows how social context matters. He writes, "If restrooms are unisex, then restroom choice cannot communicate a gender message."<sup>244</sup> Similarly, one can imagine this same logic being applied to birth certificates or even identification in general. If all pieces of identification had gender-neutral markers, choosing a certain gender would not be communicating a message.

The biggest counter-argument to this interpretation of *Spence* is the Supreme Court's clear two-part test in its decision, particularly that the speaker must intend to communicate a message.<sup>245</sup> Kosbie argues, in the alternative, that the communication should be protected even if it does not have specific intent.<sup>246</sup> Despite the well-known two-pronged approach, other courts have noted that the explicit test from *Spence* actually only requires "activity [that] was sufficiently imbued with elements

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<sup>239</sup> *Id.* (internal citations omitted).

<sup>240</sup> *Id.*

<sup>241</sup> *See id.* at 206–07.

<sup>242</sup> *See id.* at 207.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 207–08.

of communication.”<sup>247</sup> To bolster this argument, recent cases have not even cited *Spence* when referring to expressive conduct.<sup>248</sup> Other scholars similarly argue that if the conduct is communicative, intent should not matter.<sup>249</sup> First Amendment scholar Professor Greenman uses the example of a nude dancer.<sup>250</sup> The nude dancer’s mental state “does not make the dancing more or less communicative.”<sup>251</sup> Therefore, one may communicate an idea that they do not currently think or feel.<sup>252</sup>

The bottom line is this: “Whether or not individual transgender people subjectively intend to express a message, the audience easily understands the message”<sup>253</sup> because gender in itself is communicative.

Others argue against the second prong of *Spence*—that the message is not understood.<sup>254</sup> The school district in *Doe v. Yunits* tried to make this very argument but the Massachusetts court rejected it, explaining that “[o]ther students did not need to understand what it meant to be transgender in order to understand the overall message [of defiance].”<sup>255</sup>

Timothy Zick adopts much of Kosbie’s argument but expands it, focusing completely on bathroom bills.<sup>256</sup> Zick similarly begins his analysis with *Spence*.<sup>257</sup> Instead of trying to counter that case, Zick explains that the Court, in several cases, just assumes coverage.<sup>258</sup> He notes “burning a draft card as part of a political protest, burning the flag in a similar context, and sleeping outdoors as part of a protest of laws affecting the homeless . . .” as examples where the Court assumed speech.<sup>259</sup> Zick, like Kosbie, hones in on the particular context of the choice.<sup>260</sup> Zick similarly gives *Yunits* as an example and then goes on to discuss Kosbie and agrees that “communication of and respecting gender is deeply embedded in our social norms concerning masculinity and femininity.”<sup>261</sup> Zick ends his argument for this part of his article by concluding that the speech coverage argument is strong for gender identity.<sup>262</sup>

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<sup>247</sup> *Id.* at 208 (quoting *Troster v. Pa. State Dep’t of Corr.*, 65 F. 3d 1086, 1090 (3d Cir. 1995)).

<sup>248</sup> *Id.* (including *Rumsfeld v. Forum for Acad. & Inst. Rights*, 547 U.S. 47, 49 (2006)).

<sup>249</sup> *Id.*

<sup>250</sup> Greenman, *supra* note 234, at 1343.

<sup>251</sup> Kosbie, *supra* note 229, at 208 (citing Greenman, *supra* note 234, at 1343).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 209.

<sup>254</sup> *Id.* (citing *Doe ex rel. Doe v. Yunits*, No.001060A, 2000 WL 33162199, at \*4 (Mass. Super. Ct. Oct. 11, 2000)).

<sup>255</sup> *Id.* (citing *Yunits*, 2000 WL 33162199, at \*4).

<sup>256</sup> See Zick, *supra* note 17, at 977–79.

<sup>257</sup> *Id.* at 976.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 297–98 (1984); *United States v. O’Brien*, 391 U.S. 367, 376 (1968)).

<sup>260</sup> *Id.* at 977.

<sup>261</sup> *Id.*

<sup>262</sup> See *id.* at 979.



## 2. *O'Brien* Test

After deciding that gender identity is a form of speech and has fulfilled the *Spence* test, the next step in the analysis is the *O'Brien* test.<sup>263</sup> The regulation is valid if it is within the constitutional power of the government and if the government interest is unrelated to the suppression of free speech.<sup>264</sup> However, it is essential to decide whether Tennessee's law is content-neutral or content-based. If it is content-based, the analysis is over and strict scrutiny is applied.<sup>265</sup> If it is content-neutral, the regulation has to further a substantial governmental interest.<sup>266</sup>

Tennessee's law reads as follows: "The sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery."<sup>267</sup> Contrasted with Ohio's laws, which provides no guidance on any gender marker changes, Tennessee's appears to be a content-based ban.<sup>268</sup> The law targets transgender individuals by specifically disallowing them to change their gender marker even after a sex-change surgery.<sup>269</sup> Moreover, individuals in Tennessee are allowed to change their gender markers for *other* reasons.<sup>270</sup> If a mistake was made when a child was born, gender markers can be changed through a notarized affidavit.<sup>271</sup> Because the Tennessee Office of Vital Records allows that change, yet specifically forbids individuals who have had sex changes from changing their gender markers,<sup>272</sup> Tennessee's law is content-based, like in *Texas v. Johnson*.<sup>273</sup> The Court held in *Johnson* that "[t]he restriction on Johnson's political expression is content based, since the Texas statute is not aimed at protecting the physical integrity of the flag in all circumstances, but is designed to protect it from intentional and knowing abuse that causes serious offense to others."<sup>274</sup> Similarly, Tennessee's law is content-based because it is not applicable to the changing of gender markers in all circumstances.

While the government could argue that it is content-neutral since it treats everyone who has reassignment surgery the same, the stronger argument is that gender marker changes are not protected by the First Amendment because they are not expression. The government could argue that gender identity does not meet the *Spence* test of

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<sup>263</sup> *O'Brien*, 391 U.S. at 377.

<sup>264</sup> *Id.*

<sup>265</sup> *See id.*

<sup>266</sup> *Id.*

<sup>267</sup> TENN. CODE ANN. § 68-3-203(d) (2010).

<sup>268</sup> *See Ohio*, *supra* note 42.

<sup>269</sup> TENN. CODE ANN. § 68-3-203(d).

<sup>270</sup> *How Do I Get My Certificate Corrected?*, TENN. DEP'T OF HEALTH, <https://www.tn.gov/health/health-program-areas/vital-records/corrected-certificate.html> [<https://perma.cc/NF2C-A4T3>] (last visited Apr. 14, 2020).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Texas v. Johnson*, 491 U.S. 397, 398 (1989).

<sup>274</sup> *Id.*

expressive conduct.<sup>275</sup> Despite the possibility that the Court would view gender identity as uncovered, it is still worthwhile to see if this law could survive a strict scrutiny analysis.

Strict scrutiny in the free speech context is not easy to overcome. The law must be narrowly tailored to serve a compelling governmental interest.<sup>276</sup> In *Texas v. Johnson*, for instance, the Court held Texas’s law to “the most exacting scrutiny” precisely because the law was regulating content.<sup>277</sup> The Court was not persuaded by the State’s compelling interest in national unity.<sup>278</sup> The Court stated that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>279</sup>

Governmental interests for gender marker change refusals are often “(1) accurate records and government efficiency, (2) prevent[ing] fraud, and (3) national security.”<sup>280</sup> The fraud interest is not compelling. This concern mainly arose in the context of same-sex marriage before it was legalized by *Obergefell*.<sup>281</sup> Even before same-sex marriage was legal, “[t]here [were] no reported cases of same-sex couples made up of two non-transgender people where one person changes the gender marker on a driver’s license for the purpose of receiving a marriage license.”<sup>282</sup> There is simply no real evidence of fraud in the context of birth certificates and transgender individuals.<sup>283</sup>

With regard to national security interests, some states believe that people should not be able to change their gender markers because they will disguise their gender to commit crimes.<sup>284</sup> Yet, transgender advocates have noted, “[T]he last thing a person who is trying to blend in and escape notice should do is dress in the opposite gender.”<sup>285</sup> Moreover, there is evidence that gender marker changes do nothing to compromise national security interests.<sup>286</sup> For example, the State Department doesn’t require individuals to get surgery to change their gender marker.<sup>287</sup> If the federal government was truly concerned with national security, it would have a law similar to Tennessee’s.

In terms of the accuracy of government records, the concern is that someone will “switch back.”<sup>288</sup> However, this is easily countered by the fact that even if someone did

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<sup>275</sup> See *Spence v. Washington*, 418 U.S. 405, 409–10 (1974).

<sup>276</sup> See *Johnson*, 491 U.S. at 401.

<sup>277</sup> *Id.* at 412.

<sup>278</sup> *Id.* at 413–15.

<sup>279</sup> *Id.* at 414.

<sup>280</sup> K. B., *supra* note 44, at 21, 25; see also discussion *supra* Section II.C.

<sup>281</sup> See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>282</sup> Mottet, *supra* note 13, at 414.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 415.

<sup>288</sup> *Id.* at 416.

switch back, their birth certificate would still be accurate while they identified as a different gender.<sup>289</sup> The individual could simply change their gender marker again.<sup>290</sup> Additionally, it is not as likely as some think that transgender individuals will later change back. Lisa Mottet explains that “a return to previous gender happens extremely rarely and is generally a result of discrimination and rejection from family, friends, and colleagues.”<sup>291</sup> If the concern genuinely is accuracy, then letting people change their gender markers to match their identity actually upholds this interest.

At the very least, national security is likely compelling. Assuming that it is, the real issue with this law is its tailoring. A law is not narrowly tailored if it isn't helping the interests set forth.<sup>292</sup> The interests listed above are actually enhanced by allowing transgender people to change their gender markers.<sup>293</sup> When transgender individuals cannot change their gender markers to the gender they identify as, the marker on their identification does not match their expression.<sup>294</sup> This makes people think that the identification is fraudulent, when in fact the person was simply not allowed to change it.<sup>295</sup> Therefore, Tennessee's law is clearly not narrowly tailored, as it does not solve the problems that are generally associated with changing gender markers, such as fear of fraud.

The clearest problem with Tennessee's law is its lack of tailoring. The Court, however, has allowed the government much deference when it comes to expressive activity.<sup>296</sup> Before the First Amendment analysis is complete, this Note examines how the doctrine of government speech affects the First Amendment protection.

### *C. Do Birth Certificates Speak on Behalf of the Government?*

The concept of “government speech” is governed by two Supreme Court cases: *Pleasant Grove City v. Summum*<sup>297</sup> and *Walker v. Sons of Confederate Veterans*.<sup>298</sup>

First, in *Summum*, the Supreme Court held that allowing placement of permanent monuments in a public place was a form of government speech.<sup>299</sup> The implication of falling under government speech is that the speech is no longer subject to the First Amendment's Free Speech Clause.<sup>300</sup> The Court's holding was essentially that a

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<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *See, e.g.,* *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

<sup>293</sup> Mottet, *supra* note 13, at 415.

<sup>294</sup> *Id.*

<sup>295</sup> *See id.*

<sup>296</sup> *See, e.g.,* *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984).

<sup>297</sup> 555 U.S. 460 (2009).

<sup>298</sup> 135 S. Ct. 2239 (2015).

<sup>299</sup> *Summum*, 555 U.S. at 472.

<sup>300</sup> *Id.* at 469 (“[G]overnment speech is not restricted by the Free Speech Clause.”).

monument in a public park, even if privately donated, still reflected the city's viewpoints.<sup>301</sup> One quote sums up the difficulty in determining whether something is government speech: "There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech . . . ."<sup>302</sup>

*Walker*, decided six years later,<sup>303</sup> is more applicable to the discussion at hand. The Court held in that case that specialty license plates were government speech and therefore not private expression protected by the First Amendment.<sup>304</sup> The expression on the license plate that was determined to be government speech was a plate for the Sons of Confederate Veterans featuring the Confederate flag.<sup>305</sup> The Court decided that license plates are government speech by deriving a three-pronged test from *Summum*.<sup>306</sup> Clay Calvert articulates the test as follows: "(1) the history of the program, medium, or venue in or on which messages occur; (2) who a reasonable observer of the speech would consider is speaking; and (3) who effectively controls the selection of the messages."<sup>307</sup>

Applying this test to the facts of *Walker*, the majority held that license plates "long have communicated messages from the States," and, therefore, the first prong tilted toward government speech.<sup>308</sup> License plates have been used since the early 1900s to promote tourism and state slogans.<sup>309</sup> They often even contain the state's emblem.<sup>310</sup>

For the second prong of the test, the Court held this also leaned toward government speech because people perceive Texas's plates as conveying a message on the state's behalf.<sup>311</sup> The majority continued to speculate that "a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message."<sup>312</sup> The Court compared license plates to government IDs, thereby implying that IDs are government speech.<sup>313</sup> "[T]he governmental nature of the plate is clear from their faces," the majority held, since "[t]he State places the

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<sup>301</sup> *Id.* at 470.

<sup>302</sup> *Id.*

<sup>303</sup> *Walker*, 135 S. Ct. 2239.

<sup>304</sup> *Id.* at 2248, 2253.

<sup>305</sup> *Id.* at 2253.

<sup>306</sup> Clay Calvert, *The Government Speech Doctrine in Walker's Wake: Early Rifts and Reverberations on Free Speech, Viewpoint Discrimination, and Offensive Expression*, 25 WM. & MARY BILL RTS. J. 1239, 1249 (2017).

<sup>307</sup> *Id.* (citing *Walker*, 135 S. Ct. at 2249).

<sup>308</sup> *Walker*, 135 S. Ct. at 2248.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> Calvert, *supra* note 306, at 1249.

<sup>312</sup> *Walker*, 135 S. Ct. at 2249. *But see* Calvert, *supra* note 306, at 1249 ("[W]ithout referencing any evidence or research to indicate as such, it is a mere guess by the majority about why people display specialty plates.").

<sup>313</sup> *See Walker*, 135 S. Ct. at 2249.

name ‘TEXAS’ in large letters at the top of every plate.’<sup>314</sup> In addition, the Court gave weight to the state requiring vehicle owners to display license plates and that they are issued by the State.<sup>315</sup>

The Court held the third prong also shows that the state effectively controls selection of the messages in question.<sup>316</sup> Texas has direct control because the Texas Department of Motor Vehicles “approve[s] every specialty plate design proposal before the design can appear on a Texas plate.”<sup>317</sup> Therefore, all three factors showed that license plates are government speech.

Applying the factors from *Walker* to birth certificates, it is initially unclear whether birth certificates would count as government speech.<sup>318</sup> The history of birth certificates is dissimilar to that of license plates. Birth certificates are not used in the same way to promote the state and what it has to offer.<sup>319</sup> Birth certificates do not have state slogans or promote the state in any way. While birth certificates display the state of birth, they mainly contain information about the individual, including full name, age, sex, race, date and place of birth, parents’ information, and name and address of the physician.<sup>320</sup> Birth certificates are not used to communicate messages from the states; they are used to communicate information about the individual who was born.

Second, birth certificates are not as clearly identified with the State as license plates and government IDs.<sup>321</sup> While a state requires and issues birth certificates, it does not require them to be publicly displayed. Birth certificates are not clearly endorsing messages on behalf of the state. In fact, birth certificates are extremely neutral looking. Let’s compare a Tennessee license with a Tennessee birth certificate. The largest font on the license is the word “Tennessee” with its state nickname, “The Volunteer State” directly below.<sup>322</sup> The entire background of the license is Tennessee landmarks.<sup>323</sup> There are even some Tennessee licenses that have the state

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<sup>314</sup> *Id.* at 2248–49 (“Consequently, ‘persons who observe’ designs on IDS ‘routinely—and reasonably—interpret them as conveying some message on the [issuer’s] behalf.’” (alteration in original)).

<sup>315</sup> *Id.* at 2248.

<sup>316</sup> *Id.* at 2249.

<sup>317</sup> *Id.* (citing TEX. ADMIN. CODE §§ 217.45(i)(7)–(8), 217.52(b) (2015)).

<sup>318</sup> *See id.* at 2248–49.

<sup>319</sup> *See id.* at 2243, 2248 (noting that license plates include state animals, slogans, emblems, and specialty designs that promote state events).

<sup>320</sup> *Completing the Birth Certificate*, OKLA. ST. DEP’T OF HEALTH, [https://www.ok.gov/health/Birth\\_and\\_Death\\_Certificates/Birth\\_and\\_Death\\_Registration\\_\(ROVER\)/Birth\\_Registration\\_Training/Completing\\_the\\_Birth\\_Certificate.html](https://www.ok.gov/health/Birth_and_Death_Certificates/Birth_and_Death_Registration_(ROVER)/Birth_Registration_Training/Completing_the_Birth_Certificate.html) [<https://perma.cc/3RP6-P49X>] (last visited Apr. 14, 2020).

<sup>321</sup> *See Walker*, 135 S. Ct. at 2248–49.

<sup>322</sup> Dave Boucher, *FAQ: How Do I Restore My Driver’s License in Tennessee?*, NASHVILLE TENNESSEAN (July 6, 2018, 4:02 PM), <https://www.tennessean.com/story/news/2018/07/06/how-do-restore-my-drivers-license-tennessee/761716002/> [<https://perma.cc/7JYH-TJJ2>] (last visited Apr. 14, 2020).

<sup>323</sup> *Id.*

flag in the upper right-hand corner.<sup>324</sup> This license clearly conveys that it represents Tennessee. When looking at a birth certificate, however, it is less apparent. A birth certificate says “State of Tennessee” on the top but that is the only state feature.<sup>325</sup> The rest is just the required information that all birth certificates have.<sup>326</sup> The differences between birth certificates and licenses/license plates are striking, and the fact that the state issues birth certificates is likely not enough for them to be government speech.<sup>327</sup> License plates are even more different from birth certificates and are essentially enlarged versions of governmental IDs without personally identifying information. When someone sees a birth certificate, they likely consider the holder to be the one speaking, not the state.<sup>328</sup> Aside from the state name on the top, the rest of the information is identifying the birth certificate holder.

The last prong is also not as strong as it is in the case of license plates. While birth certificates are issued by the state, the state usually has “sole control” over license plates.<sup>329</sup> The state can reject designs, whereas birth certificates are uniform.<sup>330</sup> Birth certificates are not as heavily regulated as license plates or licenses. People have multiple copies of their birth certificate and it is relatively easy to get a copy.<sup>331</sup> However, if you lose your government identification, there is a more difficult process to go through.<sup>332</sup> This is true of license plates as well.<sup>333</sup>

In sum, while they may seem similar on their face, birth certificates are actually starkly different from license plates and state-issued identification. Birth certificates are not used in the same way to promote the state, it does not seem likely that people view birth certificates as connected to the state, and the state does not control the

<sup>324</sup> *TN Driver’s Licenses to Be Renewed Every 8 Years*, WRCBTV (Apr. 20, 2015, 9:24 AM), <http://www.wrcbtv.com/story/28845790/tn-drivers-licenses-to-be-renewed-every-8-years> [<https://perma.cc/9GD6-S33C>] (providing an image of a Tennessee driver’s license).

<sup>325</sup> *Birth Records*, TENN. SEC’Y OF STATE, <https://sos.tn.gov/products/tsla/birth-records> [<https://perma.cc/T9FY-QQJH>] (last visited Apr. 14, 2020) (providing an image of a Tennessee birth certificate).

<sup>326</sup> *Id.*

<sup>327</sup> *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248 (2015) (“[E]very Texas license plate is issued by the State.”).

<sup>328</sup> *But see Calvert*, *supra* note 306, at 1249 (citing *Walker*, 135 S. Ct. at 2249).

<sup>329</sup> *Walker*, 135 S. Ct. at 2249 (“Texas law provides that the State ‘has sole control over the design, typeface, [and] color . . . for all license plates.’”).

<sup>330</sup> *See id.* (“Texas asserts, and SCV concedes, that the State has rejected at least a dozen proposed designs.”).

<sup>331</sup> *See How Do I Get My Certificate?*, TENN. DEP’T OF HEALTH, <https://www.tn.gov/health/health-program-areas/vital-records/certificate.html> [<https://perma.cc/EDP8-AQVF>] (last visited Apr. 14, 2020).

<sup>332</sup> *See Replacing Lost Licenses*, TENN. DEP’T OF SAFETY & HOMELAND SEC., <https://www.tn.gov/safety/driver-services/classd/dlduplicate.html> [<https://perma.cc/VJ9Y-NEUR>] (last visited Apr. 14, 2020).

<sup>333</sup> *See How Do I Get a Tennessee License Plate for My Car?*, TENN. DEP’T OF REVENUE, <https://revenue.support.tn.gov/hc/en-us/articles/207560536-How-do-I-get-a-Tennessee-license-plate-for-my-car-> [<https://perma.cc/V2UQ-9LBJ>] (last visited Apr. 14, 2020).

message. All birth certificates have the same information. Overall, Tennessee's birth certificate law is likely not exempt from the First Amendment under the government speech doctrine.

If one accepts the argument that gender is expression and therefore protected by the First Amendment, as many scholars have,<sup>334</sup> Tennessee's content-based law that targets transgender individuals would not survive strict scrutiny because it is not narrowly tailored to further compelling governmental interests.<sup>335</sup>

#### CONCLUSION

Substantive Due Process and the First Amendment are two of the multiple arguments that can be made against Tennessee's law.<sup>336</sup> Which would be most successful? Despite the rich history of transgender individuals and the rights of personal autonomy associated with gender identity and expression, the Supreme Court has yet to decide a case on transgender rights.<sup>337</sup> While *Lawrence* and *Obergefell* are the strongest precedent for LGBTQ+ rights, they both leave much to be desired. The Court has yet to state that LGBTQ+ rights are fundamental or what level of scrutiny they would be subject to.

The First Amendment argument seems stronger.<sup>338</sup> Despite how the Court has interpreted the *Spence* test, there are strong arguments that gender expression is in and of itself speech. The Court's decision in *O'Brien* and lower court decisions support this.<sup>339</sup> A person is undeniably expressing an idea when one decides what to wear, how to style their hair, and which bathroom to use.<sup>340</sup> Tennessee's law then, restricts gender expression, but only in a way that targets transgender individuals. If a gender marker was made in error, that can be changed,<sup>341</sup> but transgender individuals cannot change their gender marker even after sex-reassignment surgery.<sup>342</sup>

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<sup>334</sup> See, e.g., CARLOS A. BALL, THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY 96 (2017) ("To punish LGBT people for self-identifying as such is to prevent them from participating in a construction of their own identities. This prohibition implicates the Free Speech Clause . . ."); Kosbie, *supra* note 229, at 205–06; Zick, *supra* note 17, at 976.

<sup>335</sup> See *Texas v. Johnson*, 491 U.S. 397, 401 (1989).

<sup>336</sup> Equal Protection being another strong argument.

<sup>337</sup> The Supreme Court heard oral arguments for a case involving a transgender employee's termination in October 2019. See *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019).

<sup>338</sup> See Zick, *supra* note 17, at 967 ("In recent years, a general concern has arisen that litigants are invoking the Free Speech Clause strategically in order to win cases they would likely lose under other rights provisions.").

<sup>339</sup> See *United States v. O'Brien*, 391 U.S. 367, 376, 382–86 (1968); *Doe ex rel. Doe v. Yunits*, No.001060A, 2000 WL 33162199, \*3 (Mass. Super. Ct. Oct. 11, 2000).

<sup>340</sup> Kosbie, *supra* note 229, at 205–06.

<sup>341</sup> *How Do I Get My Certificate Corrected?*, *supra* note 270.

<sup>342</sup> TENN. CODE ANN. § 68-3-203(d) (2010).

The arguments for strict scrutiny are the same as they are for Substantive Due Process—not allowing individuals to change their markers is actually counterproductive to the usual governmental interests. Although the doctrine of government speech could potentially preclude any arguments about birth certificates, they are different enough from license plates and state-issued identification.

The transgender community has suffered countless and continued discrimination. Denial of one's own gender identity is one of the most extreme examples. The implications of laws like Tennessee's are real and severe and affect transgender individuals' day-to-day lives.

I think what you're seeing is a profound recognition on the part of the American people that gays and lesbians and transgender persons are our brothers, our sisters, our children, our cousins, our friends, our co-workers, and that they've got to be treated like every other American. And I think that principle will win out.<sup>343</sup>

President Obama said this in 2011,<sup>344</sup> but despite his view that the principle of transgender recognition will win out, the fight is far from over. One way the transgender community can be truly recognized is to allow them to change their gender markers to match how they identify.

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<sup>343</sup> Sheryl Gay Stolberg, *Obama Moves Near 'Greater Equality' on Gay Marriage*, N.Y. TIMES (June 29, 2011), <https://nyti.ms/lvSNMG>.

<sup>344</sup> *Id.*