

STATE CONSTITUTIONS AND THE RIGHT TO GENDER AUTONOMY

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Trans scholars have long theorized a fundamental right to gender autonomy under the Constitution: the right to self-determine one's gender and to express that gender free from state interference. Such a right to gender autonomy could be a powerful tool in challenging the diverse forms of trans-restrictive legislation and regulation across the United States. Moreover, pursuit of such a right would align the interests of the trans and nonbinary community with numerous others, including the intersex community, gender-nonconforming cisgender people, and even gender traditionalists who may fear government intervention.

And yet prospects for achieving recognition of such a right to gender autonomy under the Federal Constitution currently seem bleak. As illustrated by *Dobbs v. Jackson Women's Health Organization*, the Supreme Court is currently retrenching federal substantive due process protections. And the case of *United States v. Skrmetti* signals that the Court may be generally unreceptive to the constitutional claims of trans litigants for the foreseeable future. In this environment, it seems unlikely that even the lower federal courts will feel free to recognize a novel federal substantive due process right protective of transgender rights.

This Essay thus takes up the question of how such a right to gender autonomy might be moved from "off the wall" to "on the wall"—and suggests that state constitutions hold promise as a pathway forward. Just as gay rights advocates once used state constitutions to move sexual autonomy and marriage rights into the mainstream of constitutional law, state constitutions again today could play an important role in the legitimation and recognition of rights of gender autonomy.

There are numerous state constitutions that have more expansive protections for privacy, liberty, and dignity than the Federal Constitution. Moreover, many states have adjacent constitutional rights—such as constitutional protections for the fundamental rights of youth, or protections for medical decision-making—that could bolster a claimed right to gender autonomy in particular contexts. The Essay concludes by looking at a case study—the state of Montana—where advocates have already achieved some success in persuading the courts to recognize gender-autonomy-related rights and where state constitutional precedent holds promise for the full recognition of a right to gender autonomy.

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INTRODUCTION

On June 30, 1986, in the case of *Bowers v. Hardwick*,¹ the Supreme Court described the idea of a constitutionally protected right to same-sex intimacy as “at best, facetious.”² Like *Dobbs v. Jackson Women’s Health Organization*,³ this holding signaled not only the rejection of the specific claim—but also a broader methodological turn away from a robust federal substantive due process⁴ jurisprudence.⁵ As Professor Daniel Conkle put it at the time, *Bowers*, by eliminating the jurisprudential foundations for then-existing substantive due process law, “has . . . killed the doctrine of substantive due process.”⁶

And yet less than two decades later in 2003, the Supreme Court held in *Lawrence v. Texas*⁷ that private same-sex intimacy was indeed constitutionally protected, observing that “*Bowers* was not correct when it was decided . . . and now is overruled.”⁸ In 2015, the Supreme Court went even further, holding in *Obergefell v. Hodges*⁹ that the substantive due process right to marry extended to same-sex couples, and that bans on same-sex marriage were unconstitutional.¹⁰ And in 2017, the Supreme Court in *Pavan v. Smith*¹¹ held that *Obergefell* required

1. 478 U.S. 186 (1986).

2. *Id.* at 194.

3. 142 S. Ct. 2228 (2022).

4. An important note about terminology: I use the term “substantive due process” throughout this Essay interchangeably with “liberty,” “privacy,” and other constitutional terminology commonly used to designate similar concepts. In the state constitutional context, the textual provisions that gender autonomy claims are raised under may not be limited to due process clauses (as is the case under the Federal Constitution), and may include privacy, dignity, happiness, or autonomy provisions. See *infra* Parts II–III.

5. *Bowers*, 478 U.S. at 190–93 (defining the right at issue narrowly as the right to “homosexual sodomy” and looking to history as the defining metric for whether it was protected); see also *Dobbs*, 142 S. Ct. at 2247–54 (adopting a very similar methodological approach to *Bowers* and overruling *Roe v. Wade*).

6. See Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 216 (1987).

7. 539 U.S. 558 (2003).

8. *Id.* at 578.

9. 576 U.S. 644 (2015).

10. *Id.* at 675–76.

11. 582 U.S. 563 (2017).

states to afford same-sex couples all of the “rights, benefits, and responsibilities” that came with marriage—including the benefit of the “marital presumption.”¹²

How did the federal substantive due process rights of the lesbian/gay/bisexual (L/G/B)¹³ community go from moribund to robust in just three decades? It is widely acknowledged that state constitutional law played a key role.¹⁴ In the immediate aftermath of *Bowers*—and into the 2000s—impact litigators turned to the states, raising state constitutional substantive due process claims.¹⁵ These incremental victories—although also accompanied by loss—helped to move claims, such as the right to same-sex intimacy and the right to marry, from “off the wall” to “on the wall”—and ultimately to becoming federal law.¹⁶ While state constitutional decisions were far from the exclusive factor to play a role in this radical transformation of L/G/B constitutional law, they were almost certainly a necessary component.¹⁷

Echoing the call of Professor Quinn Yeargain, this Essay suggests that such a state constitutional strategy is worth pursuing again today, this time in pursuit of the due process (*i.e.*, liberty) rights of the trans

12. *Id.* at 566 (quoting *Obergefell*, 576 U.S. at 670).

13. I deliberately separate out the lesbian/gay/bisexual (L/G/B) communities from the transgender (T) community herein, insofar as cases such as *Lawrence v. Texas* and *Obergefell v. Hodges* were litigated with a primary focus on the L/G/B community. Obviously, these decisions also benefitted members of the transgender community, some of whom are also themselves L/G/B, and many of whom faced legal insecurity with respect to their marriages prior to *Obergefell*. See, e.g., *In re Estate of Gardiner*, 42 P.3d 120, 136 (Kan. 2002). The point, however, is that we now have a well-developed substantive due process with respect to the liberty rights of same-sex couples, but much less so with respect to equivalent rights of the transgender community.

14. See, e.g., Mary L. Bonauto, *Equality and the Impossible—State Constitutions and Marriage*, 68 RUTGERS U. L. REV. 1481, 1482–83 (2016); Quinn Yeargain, *Litigating Trans Rights in the States*, 85 OHIO ST. L.J. 355, 377–91 (2024); Leonore F. Carpenter & Ellie Margolis, *One Sequin at a Time: Lessons on State Constitutions and Incremental Change from the Campaign for Marriage Equality*, 75 N.Y.U. ANN. SURVEY AM. L. 255, 307–08 (2020).

15. See, e.g., Bonauto, *supra* note 14, at 1491–95; Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1249–50 (2010).

16. See sources cited *supra* notes 14–15; see also Jack M. Balkin, *Idolatry and Faith: The Jurisprudence of Sanford Levinson*, 38 TULSA L. REV. 553, 567 (2003) (describing the idea of legal ideas being “off the wall” or “on the wall” and how they can move from the former to the latter).

17. See sources cited *supra* notes 14–15.

and nonbinary¹⁸ community.¹⁹ Just as *Bowers* once foreclosed the further development of novel substantive due process rights in the federal courts, *Dobbs* has, at least for now, done so again.²⁰ And *United States v. Skrametti*²¹ signals that the current Supreme Court is unlikely to be receptive *in general* to the constitutional claims of transgender litigants.²² Thus, just as the LGBTQ rights movement turned to state constitutions in the wake of *Bowers*, state constitutions may also hold promise as a path forward today.²³

The question remains: Why substantive due process? Equality rights have long dominated the landscape of constitutional litigation on behalf of transgender rights.²⁴ This Essay does not argue for the abandonment of such equality claims, which remain critical to transgender rights across a range of important contexts. But this Essay does suggest that devoting resources to building claims sounding in liberty, privacy, and autonomy

18. Not all nonbinary people identify as transgender. *See, e.g., Transgender and Non-Binary People FAQ*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/transgender-and-non-binary-faq> [<https://perma.cc/2RK8-5UGW>] (last visited Oct. 1, 2025). I mean for my arguments throughout this Essay about the development of a right to gender autonomy to extend to both the transgender and the nonbinary communities, although at times I use “transgender” and/or “trans” alone in the interest of linguistic ease.

19. *See* Yeagain, *supra* note 14, at 356 (arguing that “state constitutional litigation . . . is a necessary, complementary part of any nationwide trans legal strategy”); *see also* Pelecanos, *States as Laboratories: Colorado Constitution (Reactants) + Independent State Constitutionalism (Catalyst) = Constitutional LGBTQ+ Protections (Products)*, 101 DENV. L. REV. 319, 347 (2024) (arguing that under the jurisprudence surrounding the Colorado Constitution, the right to gender identity self-determination should be recognized as a fundamental right).

20. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2247–54 (2022). *See generally* *Dep’t of State v. Muñoz*, 144 S. Ct. 1812 (2024) (chipping away at the existing right to marry).

21. No. 23-477 (U.S. June 18, 2025).

22. *See generally id.* (using contorted and unpersuasive reasoning to avoid having to apply heightened scrutiny to a statute targeting the transgender community). *See also* Tyler Rose Clemons, *The Right to Seek Joy*, HARV. C.R.-C.L. L. REV. (forthcoming Dec. 2025) (manuscript at 5 n.17) (on file with author) (observing that even in the lower courts, the only substantive due process argument raised in *Skrametti* was an argument for *parents’* liberty rights to control their trans children, not for trans youth themselves to have autonomous control over their own lives). Note that *Skrametti* leaves open many arguments for transgender constitutional rights, including in the equality domain. *See, e.g.,* Katie Eyer, *The Limits of Anti-Classification Doctrine in U.S. v. Skrametti*, REGUL. REV. (July 14, 2025), <https://www.theregreview.org/2025/07/14/eyer-the-limits-of-anti-classification-doctrine-in-u-s-v-skrametti/> [<https://perma.cc/L6QP-8SRN>]. However, the Court’s willingness to reject even doctrinally clear-cut constitutional arguments for transgender equality in *Skrametti* does not bode well for the future of such arguments, at least in the near future. *Id.*

23. *See* Yeagain, *supra* note 14, at 356.

24. *See generally* Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405 (2023) [hereinafter Eyer, *Transgender Constitutional Law*] (surveying the constitutional law landscape with respect to transgender rights).

(*i.e.*, substantive due process) may be equally important to developing a comprehensive and sustainable jurisprudence of constitutional rights for the transgender community.

In particular, a fundamental right to gender autonomy—long theorized by trans and allied scholars—holds intriguing potential as a long-term pathway to trans liberation.²⁵ A denial of gender autonomy arguably best describes the harm that is experienced when governments endeavor to stamp out or erase trans existence.²⁶ Moreover, such a right would extend equally to all corners of the diverse trans community—including those who are nonbinary, gender-fluid, or gender-nonconforming, those who are youth, and those who do not seek medical care.²⁷ Finally, the recognition of such a right would generate commonality of interests between the trans community and numerous other constituencies—from the intersex community to reproductive justice advocates to cisgender women seeking to defend the formal equality gains of the 1970s.²⁸

Importantly, the work to pursue a right to gender autonomy in state courts under state constitutions has already begun.²⁹ Montana, in particular, has recently become a burgeoning arena of state constitutional litigation on behalf of transgender rights, including claims that sound in gender autonomy.³⁰ Moreover, such claims have begun to see some success, with recent district court opinions coming remarkably close to

25. For an early exploration of the possibility of such a right, see generally Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy and Heteronormativity*, 10 TUL. J.L. & SEXUALITY 123 (2001). Such a right has sometimes also been described as the right to “gender self-determination.” See, *e.g.*, Julie A. Greenberg & Marybeth Herald, *You Can’t Take It with You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819, 883–84 (2005).

26. Cf. Alexander L. Chen, *Queerocide* 1 (Aug. 14, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5392485 (coining the term “queerocide” “to describe the phenomenon of a state-based campaign to eradicate the visible cultural markers of queerness in a polity”).

27. See *infra* Part I.

28. See *infra* Part I.

29. Internationally, there is also already an existing movement to develop the international human rights concept of gender self-determination. See, *e.g.*, Florence Ashley, *Gender Self-Determination as a Medical Right*, 196 CANADIAN MED. ASSOC. J. E833, E833 (2024).

30. See *infra* Part III. Although mostly long forgotten, early cases from the 1970s also once came close to recognizing a right to gender autonomy. See, *e.g.*, *City of Chicago v. Wilson*, 389 N.E.2d 522, 524 (Ill. 1978); *Doe v. McConn*, 489 F. Supp. 76, 79–81 (S.D. Tex. 1980). See generally Kate Redburn, *Before Equal Protection: The Fall of Cross-Dressing Bans and the Transgender Legal Movement, 1963–86*, 40 L. & HIST. REV. 679 (2022) (discussing this early litigation in depth). See also Eyer, *Transgender Constitutional Law*, *supra* note 24, at 1445–48 (discussing more recent victories in the lower federal courts pre-*Dobbs*).

declaring a right to gender autonomy.³¹ Medical autonomy claims, which are related to, but distinct from gender autonomy claims, have experienced even more spectacular success, resulting in a favorable Montana Supreme Court opinion upholding a preliminary injunction against Montana's ban on gender-affirming care for transgender minors.³²

The remainder of this Essay proceeds in three parts. Part I explains the concept behind a right to gender autonomy and explains why developing a right to gender autonomy could be important to the future of transgender rights. Part II describes what a state-level campaign for gender autonomy might look like and what considerations are likely to inform the choice of states in which to pursue litigation. Part III describes the legal landscape and ongoing work in developing a right to gender autonomy in one particular state: Montana.

I. THE RIGHT TO GENDER AUTONOMY AND ITS IMPORTANCE

What is the right to gender autonomy? As described by scholar and attorney Jillian Weiss, the right to gender autonomy is “the right of self-determination of one’s gender, free from state control, and the right to self-identify as that gender, free from state contradiction.”³³ Such a right is founded on the recognition that gender self-identification is—for the vast majority of us—innate and personally important.³⁴ Moreover, the need to align one’s gender expression with one’s gender identity is—for cisgender and transgender people alike—a basic human impulse that can lead to profound distress when frustrated.³⁵ A substantive due process

31. See *Edwards v. State*, No. DV-23-1026, at 18–21 (Mont. Dist. Ct. Feb. 18, 2025) (order on cross motions for summary judgment), https://statecourtreport.org/sites/default/files/2025-03/missoula_county_district_court-order.pdf [<https://perma.cc/E3WE-AP9S>]; *Perkins v. Montana*, No. DV-25-282, at 2–3 (Mont. Dist. Ct. Apr. 2, 2025) (temporary restraining order and order setting preliminary injunction hearing), <https://assets.aclu.org/live/uploads/2025/04/0402-Temporary-Restraining-Order-and-Setting-PI-Hearing.pdf> [<https://perma.cc/8NBL-PKCE>].

32. See *Cross ex rel. Cross v. State*, 2024 MT 303, ¶¶ 21–34, 560 P.3d 637, 646–49.

33. Jillian T. Weiss, *Protecting Transgender Students: Application of Title IX to Gender Identity or Expression and the Constitutional Right to Gender Autonomy*, 28 WIS. J.L. GENDER & SOC’Y 331, 345 (2013); see also David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997, 1034 (2002) (calling for a “free exercise of gender, or . . . ‘gender autonomy,’” as an “aspect of the constitutional disestablishment of gender”). See generally Clemons, *supra* note 22 (arguing for “the right to seek joy,” which includes the right to gender autonomy or self-determination); Weiss, *supra* note 25 (early theorizing of the right to gender autonomy).

34. See, e.g., Erin E. Buzuvis, “As Who They Really Are”: *Expanding Opportunities for Transgender Athletes to Participate in Youth and Scholastic Sports*, 34 L. & INEQ. 341, 352–53 (2016).

35. See, e.g., Clemons, *supra* note 22 (manuscript at 64–65).

right to gender autonomy would thus require the state to offer a heightened justification when it seeks to interfere with the highly personal and important arena of gender self-identification and expression.³⁶

So described, it should not be hard to see how a right to gender autonomy fits with the broader array of substantive due process rights that have been recognized by both the federal and state courts in the modern era. Perhaps the most predominant through-line of modern substantive due process law—although one that has not always consistently been validated—is the idea that constitutional law ought to recognize protections against government interference for our most deeply important areas of personal autonomy.³⁷ And for almost all of us (transgender and cisgender alike), gender identity and expression are indeed both deeply personal and important.³⁸ Thus, state efforts to interfere with an individual's gender identity or expression ought to demand a higher level of scrutiny than *de minimis* rational basis review.³⁹

For some cisgender readers, the claim that gender identity and expression are deeply personal or important—and thus warranting constitutional protection—may feel implausible or counterintuitive. But this is only because most cisgender people have not experienced governmental punishment, disrespect, or coercive regulation of their own

36. I leave to the side herein what level of justification might be required. While it is often assumed that substantive due process recognizes only two possibilities—strict scrutiny or *de minimis* rational basis review—even the U.S. Supreme Court's modern precedents have shown more nuance and variation. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 68–73 (2000); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Even courts' recognition that interference with gender autonomy requires more than *de minimis* rationality review would be a victory for the recognition of gender autonomy arguments. Cf. Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1321 (2018) (discussing variation in the way the courts apply the rational basis standard and describing meaningful forms of rational basis review).

37. See, e.g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972); *Lawrence*, 539 U.S. at 567; *Obergefell v. Hodges*, 576 U.S. 644, 665–66 (2015); cf. *Roe v. Wade*, 410 U.S. 113, 152–53 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion), *overruled by*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). From the state courts, see, for example, *Armstrong v. State*, 1999 MT 261, ¶ 39, 989 P.2d 364, 376 (recognizing a right to reproductive autonomy as a part of the state's rights to privacy and autonomy); *Hodes & Nauser, MDS, P.A. v. Stanek*, 551 P.3d 62, 71–73 (Kan. 2024) (same); *In re Terrazas*, 288 Cal. Rptr. 3d 801, 805 (Ct. App. 2022) (recognizing that in California, the right to personal autonomy includes rights of incompetent persons to have their medical care reflect their own values and wishes); *City of Chicago v. Wilson*, 389 N.E.2d 522, 524 (Ill. 1978) (recognizing that the fundamental values of privacy and autonomy protected the right to determine one's appearance in the context of anti-cross dressing law).

38. See sources cited *supra* notes 34–35 and *infra* notes 40–41 and accompanying text.

39. See *supra* note 36 on the standard of review.

gender identity or expression. It should take only a modicum of imagination to envision, for example, how it might feel as a cisgender man to be required to wear a full face of makeup to a government job,⁴⁰ or how it might feel as a cisgender woman to be persistently referred to as “he/him” by a university professor.⁴¹ As such thought experiments demonstrate, gender autonomy is deeply personal and important for almost all of us—albeit for many of us, taken for granted.

Notably, while the right to gender autonomy described herein may be related to rights to medical autonomy and informational privacy, it is *not* the equivalent of, nor limited to, these other due process rights.⁴² Although the former right (of medical autonomy) may also be important to transgender people, and may also find support in state constitutions, it is narrower in its application and may leave out those who do not seek medical transition.⁴³ Nor is the right to informational privacy in one’s transgender status necessarily the equivalent of a more fulsome right to gender autonomy—though the two may at times both be relevant to

40. See *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1118 (9th Cir. 2006) (Kozinski, J., dissenting) (observing that his colleagues dismissed the female plaintiff’s subjective objections to wearing makeup but noting that “those of us not used to wearing makeup would find a requirement that we do so highly intrusive. Imagine, for example, a rule that all judges wear face powder, blush, mascara and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance. I suspect many of my colleagues would feel the same way.”).

41. See, e.g., *Meriwether v. Hartop*, 992 F.3d 492, 508–11 (6th Cir. 2021) (reinstating public university professor’s First Amendment claim of a right to misgender). But cf. Brian Soucek & Ryan Chen, *Misunderstanding Meriwether*, 92 FORDHAM L. REV. 57, 59 (2023) (explaining why, in light of the *Pickering* doctrine and the rules of civil procedure, *Meriwether* stands for far less than is commonly assumed).

42. For cases recognizing the medical autonomy rights of transgender plaintiffs, see, for example, *Cross ex rel. Cross v. State*, 2024 MT 303, ¶¶ 22–32, 560 P.3d 637, 646–49; *Roe ex rel. H.R. v. Cunico*, 745 F. Supp. 3d 842, 851–52 (D. Ariz. 2024); *Moe v. Yost*, 2025-Ohio-914, ¶¶ 43–76 (Ct. App.), *appeal allowed*, 2025-Ohio-2537, 263 N.E.3d 360. For those recognizing informational privacy rights, see, for example, *Powell v. Schriver*, 175 F.3d 107, 110–12 (2d Cir. 1999); *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018); *Grimes v. Cnty. of Cook*, 455 F. Supp. 3d 630, 638–39 (N.D. Ill. 2020); *Ray v. McCloud*, 507 F. Supp. 3d 925, 931–34 (S.D. Ohio 2020); *Doe v. Wash. State Dep’t of Corr.*, No. 21-CV-5059, 2021 WL 2453099, at *5–8 (E.D. Wash. May 17, 2021); *Love v. Johnson*, 146 F. Supp. 3d 848, 853–57 (E.D. Mich. 2015); *K.L. v. State*, No. 3AN-11-05413 CI, 2012 WL 2685183, at *3–6 (Alaska Super. Ct. Mar. 12, 2012); *In re M.T.*, 106 Cal. App. 5th 322, 337–41 (Ct. App. 2024).

43. Some cases have attempted to stretch a right to medical autonomy to reach circumstances where medical interventions are not desired, but required to access a state benefit, to mixed success. See, e.g., *Roe ex rel. H.R.*, 745 F. Supp. 3d at 851–52 (accepting such an argument); cf. *Morris v. Pompeo*, 706 F. Supp. 3d 1074, 1084–85, 1088–89 (D. Nev. 2020) (rejecting this type of an argument, though awarding relief on other grounds). It seems self-evident however, that a right to gender autonomy, if available, would be a better fit for such contexts.

challenging the same conduct.⁴⁴ Thus, while these related due process rights may well have important applications—and offer other avenues into due process protections for the transgender community—they would not offer the same broad benefits as a right to gender autonomy.

How could a right to gender autonomy be of use in constitutionally challenging the ongoing assault on transgender rights? In innumerable ways. Virtually all of the contemporary restrictions on trans autonomy and identity substantially burden a free right to self-identify and express one's gender—all that is required to trigger the requisite level of scrutiny where a due process right is at issue.⁴⁵ Thus, as I have previously written:

[T]here are numerous ways that government arguably burdens the gender autonomy of the transgender community today—through restrictive procedures for obtaining appropriate identity documentation, through outright discrimination based on gender identity or presentation, through restrictions on access to medical care and insurance, through prohibitions on gender-identity appropriate restroom access—indeed through all of the myriad ways that government has erected obstacles to the fair and equal treatment of the transgender community today.⁴⁶

A due process right to gender autonomy could potentially be used to challenge each of these many diverse contexts.

Moreover, recognizing a due process right to gender autonomy would buttress equal protection claims by making clear the patent impermissibility of certain claimed government interests, such as encouraging identification with birth sex.⁴⁷ It expresses clearly the fundamental problem with laws motivated by such interests—which is their underlying premise that identifying or expressing one's gender in a manner not aligned with sex assigned at birth is a harmful outcome to be avoided.⁴⁸ Moreover, it would prevent “leveling down” to solve equal protection problems—such as government prohibitions on gender-affirming care for both cisgender and

44. See cases cited *supra* note 42.

45. See Eyer, *Transgender Constitutional Law*, *supra* note 24, at 1447–48; see also, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (“When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”).

46. See Eyer, *Transgender Constitutional Law*, *supra* note 24, at 1447–48.

47. Cf. *Planned Parenthood of Mont. v. State*, 2024 MT 228, ¶ 22, 557 P.3d 440, 455 (“[O]nce the state ‘has entered an area that is covered by the zone of privacy . . . the state must be neutral.’” (quoting *Jeanette R. v. Ellery*, No. BDV-94-811, 1995 Mont. Dist. LEXIS 795, at *24)).

48. See *id.*

transgender minors—because in both instances, such prohibitions would interfere with gender autonomy.⁴⁹

But perhaps most importantly, there are substantial reasons to believe that a due process right to gender autonomy would best protect all of the diverse communities that fall under the umbrella of transgender rights.⁵⁰ As numerous scholars have pointed out, current transgender rights litigation has prioritized claims that will be of most benefit to a particular subset of the trans community: those who identify within the gender binary, have sought and have access to medical intervention, and who are relatively gender stereotypical.⁵¹ There may be good strategic reasons for this approach, as these are the claims that are most likely to be intelligible to judges.⁵² Nonetheless, there is a need to ensure that segments of the transgender community who do not match these limitations are not left behind—and a right to gender autonomy is the surest way to forestall this potential risk, since it respects *each* individual's right to identify and express their gender as they see fit.

Most notably, the large segment of the community who identify as nonbinary would arguably be best served by the autonomy model of a right to gender autonomy rather than an equality model of equal protection.⁵³ While it is certainly possible to fit many types of discrimination against nonbinary people into an equal protection model (and I am not suggesting forgoing such claims), gender autonomy simply is a more obvious fit for many of the pressing priorities of this part of

49. See, e.g., *Sessions v. Morales-Santana*, 582 U.S. 47, 72–75 (2017) (recognizing that leveling down is sometimes an acceptable means of rectifying an equal protection violation); see also Tracy A. Thomas, *Leveling Down Gender Equality*, 24 HARV. J.L. & GENDER 177, 178–79 (2019) (using the term “leveling down” to describe the Court’s actions in *Morales-Santana* and describing prior instances in which the Court has relied on this remedy).

50. Of course, such a right would not resolve the fundamental question of conflicting goals, insofar as some members of the trans and nonbinary community may seek the abolition of government-based sex recognition and sorting, whereas others may seek assimilation. See J.S. Welsh, *Assimilation, Expansion, and Ambivalence: Strategic Fault Lines in the Pro-Trans Legal Movement*, 110 CALIF. L. REV. 1447, 1448 (2022); see also William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1625–26 (1997) (describing the problem of intra-group disputes in goal-setting in civil rights litigation).

51. See, e.g., Marie Amélie George, *Expanding LGBT*, 73 FLA. L. REV. 243, 266–90 (2021); Welsh, *supra* note 50, at 1459–64; Kendra Albert, *You Should Be Ashamed of Yourself: Privacy Claims by Transgender Litigants and Navigating Transnormativity*, 59 HARV. C.R.-C.L. L. REV. 73, 92–100 (2024).

52. See, e.g., Eyer, *Transgender Constitutional Law*, *supra* note 24, at 1471–74.

53. See *infra* note 54 and accompanying text.

the community—such as access to third-gender or agender recognition on government documents or within government institutions.⁵⁴

Additionally, transgender youth, who have often seen their liberty rights subordinated—even in trans rights litigation—to the rights of their parents, have much to gain from a gender autonomy argument.⁵⁵ In the absence of a meaningful doctrine of gender autonomy, the primary due process arguments raised today—both in favor and in opposition to trans rights—are parental rights arguments.⁵⁶ But as Professor Anne Dailey and Laura Rosenbury have put it, “the current regime of expansive parental rights harms transgender children lacking parental support.”⁵⁷ Every child—whether or not they have trans-supportive parents,⁵⁸ whether or not they are in state care,⁵⁹ or whether or not they are under a judicial custody order⁶⁰—should have the right to be who they are and identify and express their own gender.

Finally, a right to gender autonomy inherently pulls away from the medicalized models that have been used in contemporary litigation to recognize that medicalization is not a prerequisite for liberty.⁶¹ If each of us is entitled to gender autonomy—free gender identification and expression—then we are all equally entitled to opt for or against medical interventions to further that identification and expression.⁶² Given that there are members of the diverse trans community who do not opt for medical interventions—or who cannot afford such interventions—this would bolster arguments that states may not use particular medical

54. See Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 902–03 (2019) (discussing gender marker and restroom strategies for nonbinary inclusion).

55. See, e.g., Dara E. Purvis, *Gender-Affirming Care and Children’s Liberty*, 15 CONLAWNOW 155, 164–68 (2024); Clemons, *supra* note 22 (manuscript at 67–71).

56. See sources cited *supra* note 55.

57. Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 137 (2021); see also Purvis, *supra* note 55, at 165 (making a similar point).

58. See, e.g., Purvis, *supra* note 55, at 171 (noting this problem).

59. See, e.g., *Brian L. v. Admin. for Child.’s Servs.*, 51 A.D.3d 488, 500 (N.Y. App. Div. 2008) (reversing judicial order requiring state to arrange for gender-affirming surgery for youth in foster care).

60. See, e.g., *Paul E. v. Courtney F.*, 439 P.3d 1169, 1172–73 (Ariz. 2019) (describing history of custody orders placing limitations on the ability of a child to “gender explore”).

61. Cf. Albert, *supra* note 51, at 93–95 (describing medicalization in contemporary transgender rights litigation).

62. On why gender autonomy entails a right to seek medical treatment, see, for example, Clemons, *supra* note 22 (manuscript at 63–67). On why autonomy interests might include a right for trans folks not to seek medical interventions, see, for example, *Roe ex rel. H.R. v. Cunico*, 745 F. Supp. 3d 842, 851–52 (D. Ariz. 2024).

interventions (such as genital surgery or even a medical diagnosis) as gatekeepers to important rights or services.⁶³

There are thus strong reasons to pursue a due process right to gender autonomy that are internal to the transgender community itself. But a right to gender autonomy would not be limited to trans folks—it is relevant to us all. All of us, from those who embrace a profoundly traditional gender identity and expression to those whose gender identity or expression is radically inconsistent with traditional norms, have an interest in gender autonomy. It allows each of us to be who we are, and to identify and express our gender as we see fit, free from government intervention or restraint. Seeking a right to gender autonomy thus would align the interests of the trans community with those of many others.

This alignment, moreover, is not merely hypothetical, as there are in fact other communities whose gender autonomy is *currently* under threat from the government. The intersex community—which is often subject to invasive medical interventions in infancy and has now seen such interventions sanctioned officially for the first time under numerous states’ laws—is the most obvious.⁶⁴ But there are others as well—from gender nonconforming (cisgender) boys who are harassed and disparaged in public school,⁶⁵ to girls forced to wear skirts to their charter school,⁶⁶ to cisgender youth seeking to challenge absolute state bans on gender-integrated sports⁶⁷—who would benefit from such a right. And while government-imposed risks to traditional expressions of sex and gender may feel more remote, even those who aspire to traditionalism could find protections as well—perhaps from some future anti-traditionalist regime—from a constitutional right to gender autonomy.⁶⁸

63. See SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 93 (2016) (summarizing data on those who sought various types of medical care, as well as obstacles to such care).

64. Almost all of the bans on gender-affirming care for trans youth include explicit exemptions for the practice of non-consensual medical interventions on intersex children of any age—effectively amounting to state endorsement of it. See, e.g., Ido Katri & Maayan Sudai, *Intersex, Trans, and the Irrationality of Gender-Affirming Care Bans*, 134 YALE L.J. 1521, 1553–55 (2025).

65. David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135, 170–71 (2009).

66. *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 112, 128 (4th Cir. 2022).

67. See, e.g., Deborah L. Brake, *Title IX’s Trans Panic*, 29 WM. & MARY J. RACE, GENDER & SOC. JUST. 41, 47 (2022) (observing that many of the current trans sports bans also ban cisgender boys from participation even where such participation was previously allowed).

68. Cf. Meagan Day, *The Norwegian Route out of Tradwife Hell*, JACOBIN (Apr. 1, 2025), <https://jacobin.com/2025/04/norway-trad-pappaperm-paternity-leave> [<https://perma.cc/B3JS-YHBV>] (describing how Norwegian childcare policies—which afford substantial paid paternity leave that may only be used by fathers during a time when the mother is not at home—have reordered traditional patterns of child-rearing in Norway).

Thus, there are strong reasons for the transgender rights movement—and the intersex rights movement, women’s rights movement, and more—to pursue a substantive due process right to gender autonomy. The following Part takes up how developing such a nationwide right might be possible: through strategic use of litigation in state courts, under state constitutions.

II. USING STATE CONSTITUTIONS TO MOVE “GENDER AUTONOMY” TO “ON THE WALL”

The success of the movement for marriage equality did not happen by accident, or by virtue of a single well-planned case. As various insiders have recounted, the success of the movement—and in particular its initial key victories—was the result of a carefully planned litigation campaign under state constitutions, in the state courts.⁶⁹ Ultimately, these victories helped move the idea of a right to marry for same-sex couples from “off the wall” to “on the wall”—and eventually to being the law of the land.⁷⁰ This Part, drawing in significant part from the insights of the marriage movement, takes up the question of what strategic considerations may go into building a right to gender autonomy under state constitutions—while also acknowledging that some such work has already begun.

The first important question for advocates to consider is whether a right to gender autonomy ought to be *exclusively* pursued in state courts, under state constitutions, at this time. The marriage movement’s limitation of initial litigation to state courts, under state constitutions, was a key part of its strategy in the 1990s and early 2000s—and one that the movement went to great lengths to enforce, for example by actively discouraging federal litigation filings.⁷¹ It is widely acknowledged that this strategy was important, as it insulated the nascent development of a favorable body of law from review by the U.S. Supreme Court that then seemed sure to reject such claims.⁷²

Arguably, such an approach also makes sense today for the building of a right to gender autonomy. It seems extraordinarily unlikely that the

69. See, e.g., Bonauto, *supra* note 14, at 1482–83; Carpenter & Margolis, *supra* note 14, at 307–08; Yeagain, *supra* note 14, at 377–91.

70. See *Obergefell v. Hodges*, 576 U.S. 644, 675–76 (2015).

71. See Bonauto, *supra* note 14, at 1493–95; see also Press Release, ACLU, LGBT Organizations Point Out that Lawsuits Could Set Back Progress on Marriage for Same-Sex Couples (May 27, 2009, at 00:00 CT), <https://www.aclu.org/press-releases/lgbt-organizations-point-out-lawsuits-could-set-back-progress-marriage-same-sex> [https://perma.cc/PB4D-96SR] (as late as 2009, discouraging filings in federal court because of the likelihood that the Supreme Court was not yet ready to rule in favor of marriage equality).

72. See, e.g., Carpenter & Margolis, *supra* note 14, at 308–09.

current Supreme Court would recognize a new right to gender autonomy—or even that any federal court of appeals would do so given the current legal landscape.⁷³ Restricting advocacy of this argument to state courts under state constitutions would allow room to develop a favorable body of precedent, without the potentially adverse effects of a negative federal ruling.⁷⁴ While hopefully such arguments would eventually return to federal court (in the form of renewed claims under the *Federal* Constitution), this would only happen after the development of a body of favorable state constitutional law—and presumably also after shifts in the composition of the Supreme Court.

Other key questions for movement actors may relate to the choice of jurisdictions in which to pursue such a right. While not all litigants will have the luxury of picking and choosing locales in which to file, national organizations could consider a variety of factors such as:

What state constitutional provisions exist that might specifically support a right to gender autonomy? In addition to state due process of law or due course of law provisions, many state constitutions also have specific protections for privacy, liberty, happiness, and/or dignity, which could also be used to support a right to gender autonomy. The existence of these provisions—as well as the specifics of their text and legislative history—may all be important criteria in considering whether a state might recognize a right to gender autonomy.⁷⁵

What other provisions in the state constitution may buttress claimed rights to gender autonomy? More than half of the states have state-level equal rights amendments (ERAs) specifically protecting sex equality—something that might buttress a claimed

73. See generally, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (eliminating the forty-nine-year-old right to abortion and adopting a narrow historical approach to substantive due process under which recognition of new rights is extremely unlikely); *Dep't of State v. Muñoz*, 144 S. Ct. 1812 (2024) (refusing to apply the existing substantive due process “right to marry” and finding that narrowly recharacterized right did not exist).

74. While state courts interpreting their own constitution need not follow federal law, an adverse federal opinion certainly could limit or reverse momentum (especially in those states that typically “lockstep” their constitutions) and would pose a much higher obstacle to overcome in any hoped return to federal court.

75. See, e.g., Tiffany C. Li, *State Constitutional Rights to Privacy*, GA. L. REV. (forthcoming 2025) (manuscript at 7–12, 18–21), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5146734 (describing and cataloguing state constitutional privacy provisions); Yeagain, *supra* note 14, at 400–07 (discussing possible state constitution-based privacy and personal autonomy arguments in the context of transgender rights); see also Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1859 (2023) (arguing that state constitutions in general have “a distinctive commitment to self-determination”).

right to gender autonomy.⁷⁶ In addition, two states, New York and Nevada, have specific constitutional equality protections for gender identity.⁷⁷ Some states also have protections for healthcare rights or autonomy, which might buttress arguments for a gender autonomy right.⁷⁸ And many state constitutions have other unique provisions that could potentially buttress a claimed right to gender autonomy in particular contexts, including, for example, protections of fundamental rights for youth.⁷⁹

What state constitutional case law exists and how might it support litigation efforts? Just like in the context of federal constitutional law, state constitutional jurisprudence is often more important to predicting results than the bare language of a state constitution. States that have recognized expansive privacy or liberty rights in their case law seem the most likely to recognize a right to gender autonomy.⁸⁰ Moreover, states that have recognized transgender equal protection rights—or recognized sexual orientation as a suspect or quasi-suspect class under their state constitutions—might be especially likely to be receptive to arguments for gender autonomy.⁸¹

What is the state’s general approach to state constitutional interpretation? Those states that do not “lockstep” their approach to constitutional interpretation, and especially those that have well-developed independent state constitutional jurisprudence may be especially open to the recognition of a novel substantive due process right.⁸²

How has the state supreme court engaged with transgender rights issues (or LGBTQ rights issues) more generally? One of

76. See Ting Ting Cheng, *State Equal Rights Amendments Can Protect Reproductive Rights Post-Dobbs*, BRENNAN CTR. FOR JUST. (Feb. 29, 2024), <https://statecourtreport.org/our-work/analysis-opinion/state-equal-rights-amendments-can-protect-reproductive-rights-post-dobbs> [<https://perma.cc/7BUJ-R9JG>] (noting that as of 2024, “28 state constitutions contain[ed] explicit sex equality protections, referred to as state ERAs”).

77. NEV. CONST. art. I, § 24; N.Y. CONST. art. I, § 11.

78. See, e.g., OHIO CONST. art. I, § 21; WYO. CONST. art. I, § 38.

79. See, e.g., MONT. CONST. art. II, § 15.

80. See Yeargain, *supra* note 14, at 403–04.

81. See, e.g., *New Hampshire v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553, 570–72 (Minn. Ct. App. 2020) (applying intermediate scrutiny to equal protection claim by transgender plaintiff arising under the Minnesota State Constitution).

82. See Carpenter & Margolis, *supra* note 14, at 313.

the key factors that marriage litigators looked to in selecting initial states was how the state supreme court had responded to other issues relating to the L/G/B community.⁸³ While there may not always be evidence of how the state supreme court has addressed transgender-rights issues specifically, some state supreme courts have addressed trans issues, and where they have not, LGBTQ issues more generally might provide some insights on whether the court is likely to be receptive to the claims of trans litigants.

How trans-friendly is the state government generally? As Professor Yeargain has observed, there may be jurisdictions in which there are plausible constitutional challenges to be brought against local actors, even where state legislators and the governor may be favorable to transgender rights.⁸⁴ Such jurisdictions could provide opportunities to bring challenges in jurisdictions that could be especially receptive to such arguments, and in which the risk of a backlash or constitutional amendment (discussed below) would be especially low.⁸⁵

How much would a favorable state constitutional ruling benefit state residents? In selecting states in which to litigate, it would also make sense to consider how much a state constitutional ruling would benefit state residents. This will generally cut in the opposite direction from how trans-friendly the state government is generally, since most states where a ruling would be highly beneficial to trans residents are those where there are a large number of state-level anti-trans laws.⁸⁶ Nonetheless, the practical benefit to trans residents is clearly a factor that should be relevant in selecting states in which to litigate.

How robust are LGBTQ community institutions, community organizing, and public education? As marriage advocates recognized, community infrastructure and community organizing and education (*i.e.*, how robust the social movement is in a given area) can be important to achieving successful outcomes in the

83. See Bonauto, *supra* note 14, at 1499–1500.

84. See Yeargain, *supra* note 14, at 411.

85. *Id.*

86. For a collection of the state anti-trans laws that have been enacted or proposed over the last several years, see *2025 Anti-Trans Bills Tracker*, TRANS LEGIS. TRACKER, <https://translegislation.com> [<https://perma.cc/NX7L-GNWL>] (last visited Oct. 3, 2025), and its archives.

courts.⁸⁷ This reflects the fact that a key part of what can help move ideas from “off the wall” to “on the wall” are social movement-driven efforts to shift broader public perceptions, given that judges themselves are steeped in the community discourse of which they are a part.

How easy is the state constitution to amend? Unlike the Federal Constitution, many (but not all) state constitutions are easy to amend.⁸⁸ For example, in some states, the state constitution can be amended through a simple majority vote on a ballot initiative or through a majority vote in the state legislature.⁸⁹ As marriage litigators quickly learned, bringing state constitutional litigation in easy-to-amend jurisdictions can be risky, as backlash can lead to the overruling of judicial decisions through state constitutional amendment.⁹⁰

Is the judiciary elected or appointed? Especially in states where the politics generally do not favor transgender rights, judges who are appointed may be more likely to issue a novel or broad ruling in favor of transgender rights.⁹¹ Moreover, in some states, elections have led to reversal of judicial decisions on contested constitutional issues, so this could be another risk of an elected judiciary.⁹²

Litigation in pursuit of a right to gender autonomy would also need to consider those *issues* that are most likely to prevail. As observed in Part I, virtually every contemporary infringement of transgender rights could be litigated under a gender autonomy argument. But this does not mean that initial cases *should* challenge all forms of gender oppression. As Professor Yeargain has observed, polling varies widely in public

87. See, e.g., Bonauto, *supra* note 14, at 1495–99.

88. See John Dinan, *Constitutional Amendment Processes in the 50 States*, STATE CT. REP. (July 24, 2023), <https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states> [https://perma.cc/FBE5-VZEC].

89. *Id.*

90. See, e.g., Carpenter & Margolis, *supra* note 14, at 311–12.

91. See Yeargain, *supra* note 14, at 412. For the methods of judicial selection across the states, see *Judicial Selection in the States*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_the_states [https://perma.cc/Y62E-JNSD] (last visited Oct. 3, 2025).

92. See, e.g., Mac Brower, *After the North Carolina Supreme Court Reversed Itself, Elected Officials and Experts React*, DEMOCRACY DKT. (May 5, 2023), <https://www.democracydocket.com/analysis/after-the-north-carolina-supreme-court-reversed-itself-elected-officials-and-experts-react/> [https://perma.cc/Q9DW-KCN7].

support for various forms of transgender rights.⁹³ Realism requires the recognition that courts are more likely to recognize a new legal right in a context that is otherwise viewed as sympathetic. Especially as the states escalate to new levels of criminalization of both trans folks and their allies, this may provide opportunities to challenge laws that most directly and patently interfere with rights of gender autonomy in ways that are likely to be legible to state judges and the public.⁹⁴

Finally, it is important to stress that litigation was never the only strategy of the marriage movement—nor should litigation be the only strategy here. In many of the states where there was successful marriage litigation, there were also substantial community organizing campaigns to raise awareness and build public support.⁹⁵ Even before, and overlapping with filing litigation, the LGBTQ rights movement used the enactment of domestic partnership laws and policies to help grow recognition of same-sex relationships.⁹⁶ Legislative strategies to achieve marriage rights also bolstered litigation ones.⁹⁷ Not all of these strategies will be directly applicable to building a right to gender autonomy—but the basic premise surely is. A movement to build toward the embrace of an idea—here, the idea that gender autonomy is an important part of our fundamental liberties—takes multifaceted strategies, not litigation alone.

Of course, none of this is any guarantee that even a successful campaign to secure rulings from a number of states that their state constitution protects a right to gender autonomy will lead to more systemic change. Indeed, if the marriage movement demonstrated anything, it is that the road of state constitutional law can be messy and long, and can contain many detours.⁹⁸ Even victories under state constitutions can, at times, trigger a backlash—and can even lead to state

93. Yeargain, *supra* note 14, at 408–09; *see also Americans Have Grown More Supportive of Restrictions for Trans People in Recent Years*, PEW RSCH. CTR. (Feb. 26, 2025), <https://www.pewresearch.org/short-reads/2025/02/26/americans-have-grown-more-supportive-of-restrictions-for-trans-people-in-recent-years/> [https://perma.cc/A7PL-HKHW] (providing survey findings regarding public views on various trans-related laws and policies).

94. *See, e.g.*, Tess Vrbín, *Committee Awaits Amendments to Proposed Liability for Social Transitioning of Transgender Minors*, ARK. ADVOC. (Mar. 19, 2025, at 00:05 CT), <https://arkansasadvocate.com/2025/03/19/committee-awaits-amendments-to-proposed-liability-for-social-transitioning-of-transgender-minors/>; Erin Reed, *Fla. DMV: ‘Misrepresenting’ Gender on Drivers Licenses Is Fraud*, WASH. BLADE (Jan. 30, 2024), <https://www.washingtonblade.com/2024/01/30/fla-dmv-misrepresenting-gender-on-drivers-licenses-is-fraud/> [https://perma.cc/8PHP-PJRN].

95. *See, e.g.*, Bonauto, *supra* note 14, at 1496–97.

96. *See, e.g.*, Cummings & NeJaime, *supra* note 15, at 1251–58.

97. *See, e.g.*, *Winning Legislative Campaigns*, FREEDOM TO MARRY, <https://www.freedomtomarry.org/pages/Winning-Legislative-Campaigns> [https://perma.cc/4VPN-ABQZ] (last visited Oct. 3, 2025).

98. *See, e.g.*, Yeargain, *supra* note 14, at 383–86.

constitutions themselves becoming the site for discriminatory measures.⁹⁹ Because state constitutions are, unlike the Federal Constitution, truly “living” documents often subject to amendment, they are an arena of both promise and potential peril.¹⁰⁰

But a right to gender autonomy currently is not even within those constitutional ideas that are “on the wall”—which are within the bounds of the plausible, as opposed to the frivolous.¹⁰¹ State constitutions are the most promising strategy to change that—even though they are, as Professor Yeagain has observed, not a “skeleton key.”¹⁰²

III. A CASE STUDY: MONTANA

While it is impossible in this symposium Essay to fully canvas the state constitutional landscape with respect to a possible right to gender autonomy, this Part takes up a single case study: Montana. Montana is worth profiling for numerous reasons, among them that litigators there have *already* begun making progress towards the recognition of a right to gender autonomy under the state constitution. Moreover, Montana demonstrates that even states with a deeply trans-hostile state government—where a constitutional right to gender autonomy may matter greatly—may have other aspects of their constitutional and social backdrop that make securing a claimed right to gender autonomy plausible.

Montana has, in many ways, been on the front lines of state-level efforts to restrict transgender rights. Over the last five years it has, among other things, enacted laws to: (a) ban gender-affirming care for transgender minors;¹⁰³ (b) prohibit schools from penalizing students who misgender and deadname their peers;¹⁰⁴ (c) adopt an omnibus definition of sex as “biological and genetic indication[s]” and declaring that “[i]n human beings, there are exactly two sexes, male and female”;¹⁰⁵ (d) ban trans girls and women from participating in gender identity-appropriate

99. *Id.*

100. *Id.*

101. *See generally* Balkin, *supra* note 16, at 567 (describing the boundaries of what are considered to be frivolous and nonfrivolous legal arguments as “off the wall” and “on the wall,” and observing that those boundaries can be shifted by both the “practice of legal argument” and the “practice of politics”).

102. Yeagain, *supra* note 14, at 375.

103. Youth Health Protection Act, S.B. 99, 68th Leg., Reg. Sess. (Mont. 2023) (enacted).

104. H.B. 361, 68th Leg., Reg. Sess. (Mont. 2023) (enacted).

105. S.B. 458, 68th Leg., Reg. Sess. (Mont. 2023) (enacted).

sports;¹⁰⁶ (e) limit drag shows;¹⁰⁷ and (f) require schools to obtain parental consent for staff to use gender-identity appropriate pronouns (while also specifying that, even where such consent is given, “a person may not be compelled to use pronouns that do not align with the child’s sex”).¹⁰⁸

In the current legislative session, pending and adopted bills have gone even further. A recently enacted bill requires all public buildings, public schools, correctional institutions, and domestic violence shelters to segregate their facilities by sex (defined by genetics and reproductive capacity).¹⁰⁹ Another extended the statute of limitations for tort claims related to gender-affirming care to twenty-five years post-minority.¹¹⁰ Others (which failed to pass) would have made it a felony offense for any person to “procure[]” or “provide[]” gender-affirming care for a minor under sixteen,¹¹¹ and required judges to weigh adversely in custody disputes a parents’ support of a child’s gender transition, while prohibiting affording adverse weight to a parent’s opposition to a child’s trans status.¹¹²

But Montana is also a state with a rich tradition of protecting privacy and dignity rights under its state constitution, across an array of arenas from same-sex intimacy to abortion rights to prison conditions.¹¹³ It is also the home a diverse LGBTQ community that includes transgender, Native Two-Spirit, and intersex individuals.¹¹⁴ It has an ACLU chapter that has been actively involved in transgender rights work and a public interest law firm, Upper Seven Law, that has also brought successful transgender rights litigation under the state constitution.¹¹⁵ Moreover, Montana’s state legislature has two out trans legislators who are actively

106. Save Women’s Sports Act, H.B. 112, 67th Leg., Reg. Sess. (Mont. 2021) (enacted).

107. H.B. 359, 68th Leg., Reg. Sess. (Mont. 2023) (enacted).

108. S.B. 518, 68th Leg., Reg. Sess. (Mont. 2023) (enacted).

109. H.B. 121, 69th Leg., Reg. Sess. (Mont. 2025) (enacted).

110. H.B. 682, 69th Leg., Reg. Sess. (Mont. 2025) (enacted).

111. S.B. 164, 69th Leg., Reg. Sess. (Mont. 2025).

112. H.B. 730, 69th Leg., Reg. Sess. (Mont. 2025).

113. See, e.g., *Gryczan v. State*, 942 P.2d 112, 125–26 (Mont. 1997) (same-sex intimacy); *Armstrong v. State*, 1999 MT 261, ¶ 75, 989 P.2d 364, 384 (abortion rights); *Walker v. State*, 2003 MT 134, ¶ 84, 68 P.3d 872, 885 (prison conditions).

114. See Nicole Chavez, *Why Montana’s Two-Spirit People Are Challenging a State Law That Defines Sex as Binary*, CNN (Dec. 4, 2023, at 09:08 ET), <https://www.cnn.com/2023/12/04/us/montana-two-spirit-lawsuit-sex-binary-reaj/index.html>; Complaint at 4–10, *Edward v. Montana*, No. DV 32-2023-1026-CR (Mont. Dist. Ct. Oct. 11, 2023), <https://static1.squarespace.com/static/66981514ef4c031fc2b086d0/t/672cfd9b0224f5197cafc9de/1753481372416/2023-10-11+-+Dkt.+1+-+Compl.+and+Ex.+FINAL.pdf> [<https://perma.cc/2CRU-Q9L8>].

115. See *Court Cases*, ACLU OF MONT., <https://www.aclumontana.org/en/cases> [<https://perma.cc/4QU6-JGJC>] (last visited Oct. 3, 2025); *Our Work*, UPPER SEVEN L., <https://www.uppersevenlaw.com/our-work/> [<https://perma.cc/Q8CD-9SZY>] (last visited Oct. 3, 2025).

speaking up, and whose work is showing initial signs of shifting the state discourse.¹¹⁶ Even Montana's Republican governor has made national news for having a nonbinary child who urged him (unsuccessfully) to veto state legislation attacking the transgender community.¹¹⁷

In addition, initial signs are that the Montana courts are willing to take seriously state constitutional claims brought on behalf of transgender litigants—including, potentially, those that sound in gender autonomy.¹¹⁸ While most courts have not specifically discussed a right to gender autonomy, two trial court opinions—discussed more extensively later in this Essay—have already come close to recognizing such a right under the state constitution.¹¹⁹ Moreover, numerous cases—in both the district courts and the Montana Supreme Court itself, show that the Montana courts are generally willing to fairly evaluate claims brought by transgender litigants.¹²⁰ Indeed, just last year, the Montana Supreme Court affirmed a preliminary injunction against Montana's ban on

116. See, e.g., Erin Reed, *Powerful Speeches from Trans Dems Flip 29 Republicans, Anti-Trans Bills Die in Montana*, ERIN IN THE MORNING (Mar. 6, 2025), <https://www.erininthemorning.com/p/powerful-speeches-from-trans-dems> [https://perma.cc/7B79-QV3D].

117. Ray Sanchez, *Montana Governor's Nonbinary Son Urges Him to Reject Anti-Transgender Bills*, CNN (Apr. 28, 2023, at 22:26 ET), <https://www.cnn.com/2023/04/28/us/montana-governor-son-transgender-bills>.

118. See *infra* notes 119–121 and accompanying text.

119. See sources cited *infra* notes 131–132 and accompanying text.

120. See sources cited *infra* notes 131–132 and accompanying text; *Cross ex rel. Cross v. State*, 2024 MT 303, ¶¶ 13–57, 560 P.3d 637, 644–54; *Barrett v. State*, 2024 MT 86, ¶¶ 15–51, 547 P.3d 630, 640–49; *ACLU of Mont. Found., Inc. v. Fox ex rel. State*, No. OP 17-0449, 2017 WL 9532878, at *2–3 (Mont. Sep. 19, 2017); *Marquez v. State*, No. DV 21-873, at 4–19 (Mont. Dist. Ct. June 26, 2023) (order granting summary judgment, enforcing preliminary injunction, and finding defendants in contempt), <https://assets.aclu.org/live/uploads/2021/07/2023-06-26-Order.pdf> [https://perma.cc/K4V8-4AKE]; *Kalarchik v. State*, No. ADV 2024-261, at 5–14 (Mont. Dist. Ct. Dec. 16, 2024) (order granting preliminary injunction), <https://assets.aclu.org/live/uploads/2024/05/061-Order-Granting-Plaintiffs-Motion-for-Preliminary-Injunction.pdf> [https://perma.cc/UC8Z-7EXY]; *Reagor v. State*, No. DV-23-1245, at 3–12 (Mont. Dist. Ct. June 25, 2024) (opinion and order granting summary judgment on count I), https://www.aclumontana.org/app/uploads/2024/06/25_opinion_order_granting_plaintiffs_motion_for_summary_judgment_on_count_i.pdf [https://perma.cc/6H66-EXBP]; *Berndt v. Mont. Dep't of Just.*, No. DV-24-637, at 13–24 (Mont. Dist. Ct. Feb. 6, 2025) (opinion and order denying motion to dismiss), https://www.aclumontana.org/sites/default/files/field_documents/32_opinion_and_order_denying_defendants_motion_to_dismiss.pdf [https://perma.cc/49TK-SC3Y]; see also *van Garderen v. State*, No. DV-23-541, at 19–47 (Mont. Dist. Ct. Sept. 27, 2023) (district court opinion later affirmed in *Cross*, 560 P.3d at 644–54, ruling for the plaintiffs on additional rationales), <https://assets.aclu.org/live/uploads/2023/07/131-Order-Granting-Plaintiffs-Motion-for-Preliminary-Injunction-1.pdf> [https://perma.cc/5MXD-4E9C]; *Cross ex rel. Cross v. State*, No. DV-23-541, at 16–58 (Mont. Dist. Ct. May 13, 2025) (ruling for plaintiffs on cross-motions for summary judgment on remand from Montana Supreme Court's decision in *Cross*), <https://assets.aclu.org/live/uploads/2023/07/279-Order-re-Cross-Motions-for-Summary-Judgment.pdf> [https://perma.cc/33NZ-FW5N].

gender-affirming care for minors under the privacy provisions of the state constitution (albeit on a medical privacy rationale, rather than a gender autonomy one).¹²¹

What might be the source of a claimed right to gender autonomy in the Montana state constitution? The most obvious would be Montana's expansive and textual right to privacy, which provides: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."¹²² Prior Montana Supreme Court decisions have recognized that this provision was drafted purposefully to be "broad and undefined,"¹²³ and was intended to encompass philosophical notions of "personal autonomy."¹²⁴ As one delegate put it at the Montana constitutional convention, "the right to be let alone" is "the most important right of them all."¹²⁵ As such, the Montana Supreme Court has repeatedly reiterated that "Montana adheres to one of the most stringent protections of its citizens' right to privacy in the United States—exceeding even that provided by the federal constitution."¹²⁶ The Court has already applied this broad privacy right across a host of contexts, including reproductive autonomy, access to gender-affirming care for trans minors, and private consensual same-sex intimacy.¹²⁷

Moreover, the recognition of a right to gender autonomy seems to fit very comfortably within the scope of the Montana Constitution's right to privacy as it has been recognized by the Montana Supreme Court. As the Court has observed, among the important purposes of that right was "to protect citizens . . . from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private."¹²⁸ It is simultaneously "as narrow as is necessary to protect against a specific unlawful infringement of individual dignity and personal autonomy . . . and as broad as are the State's ever innovative attempts to dictate in matters of conscience, to define individual values, and to condemn those [who are] politically

121. *Cross ex rel. Cross*, 2024 MT 303, ¶¶ 21–37.

122. MONT. CONST. art. II, § 10.

123. *Armstrong v. State*, 1999 MT 261, ¶ 36, 989 P.2d 364, 374.

124. *Id.* ¶¶ 30–31.

125. *Montana Constitutional Convention Proceedings, 1971–1972*, 5 MONT. CONST. COLLECTION 1217, 1681 (1972).

126. *Armstrong*, 1999 MT 261, ¶ 34; see also *Planned Parenthood of Mont. v. Knudsen ex rel. State*, 2024 MT 227, ¶ 21, 557 P.3d 471, 481 (quoting *Armstrong* for this same point); *Planned Parenthood of Mont. v. State*, 2024 MT 228, ¶ 21, 557 P.3d 440, 454 (same); *State v. Burns*, 830 P.2d 1318, 1320 (Mont. 1992) (making a similar observation).

127. See, e.g., *Gryczan v. State*, 942 P.2d 112, 121–23 (Mont. 1997); *Armstrong*, 1999 MT 261, ¶¶ 39–48; *Cross ex rel. Cross v. State*, 2024 MT 303, ¶¶ 21–37, 560 P.3d 637, 646–50.

128. *Armstrong*, 1999 MT 261, ¶ 35.

unpopular.”¹²⁹ One’s own gender self-identification and gender expression—among the most deeply personal and important aspects of identity, and one clearly under threat in contemporary state legislation in Montana—would seem to fit easily within this understanding of the Montana right to privacy.

Indeed, two recent Montana District Court opinions—while not using the explicit language of “gender autonomy”—seem to come close to effectively endorsing a right to gender autonomy under Montana’s privacy provision.¹³⁰ Most notably, in considering a challenge to Montana’s Senate Bill 458—an omnibus provision defining sex as narrowly defined by genetics and reproductive capacity—a Montana District Court described the Montana right to privacy, and its implications, as follows:

Such a [privacy] right is implicated when the State interferes with one’s ability to make decisions regarding an individual’s body and psyche. The right of privacy is also intended to protect against “information gathering and protect citizens from illegal private action and from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private.” Regulations that interfere with an individual’s ability to self-define and make personal choices concerning their identity infringes on the right to privacy.

In this case, SB 458 takes away Plaintiffs’ ability to define or identify themselves, and requires them to identify by the State’s definitions. This intrusion is particularly burdensome to intersex Plaintiffs, as the definitions under SB 458, do not accurately define their biological sex Given that SB 458 regulates Montanans’ ability to make personal and intimate decisions concerning their bodies and psyche, SB 458 infringes upon Plaintiffs right to privacy, triggering strict scrutiny.¹³¹

In another recent ruling on a temporary restraining order to halt the implementation of Montana House Bill 121, which bars trans individuals from gender-identity-appropriate restrooms, shelters, and other facilities, another district judge similarly opined:

129. *Id.* ¶ 38.

130. *See infra* notes 131–132 and accompanying text.

131. *Edwards v. State*, No. DV 23-1026, at 20–21 (Mont. Dist. Ct. Feb. 18, 2025) (citations omitted) (order on cross motions for summary judgment), https://statecourtreport.org/sites/default/files/2025-03/missoula_county_district_court-order.pdf [<https://perma.cc/E3WE-AP9S>].

Plaintiffs have shown at least serious questions going to the merits of their claim that the Act violates their constitutional right to privacy as follows. *See* Mont. Const. art. II, § 10. Decisions about how to express a person's gender identity are personal and private, as is information about a person's transgender or intersex status, anatomy, genetics, and medical history. The Act infringes on these personal and private decisions and information.¹³²

Montana's textual privacy right thus could provide a strong basis for a claimed right to gender autonomy. But it is important to recognize that while the Montana privacy right is the most obvious place that a right to gender autonomy might be sited, there are numerous other provisions in the Montana Constitution that also support such a right. Indeed, the Montana Supreme Court once wrote of the right to procreative autonomy, in words that could be close to verbatim invoked in support of a right to gender autonomy, that:

[W]e have directed our focus in this opinion to the right of individual privacy found at Article II, Section 10. It bears noting however, that Montana's Constitution, and especially the Declaration of Rights, is not simply a cook book of disconnected and discrete rules written with the vitality of an automobile insurance policy. Rather, our Constitution, and in particular its Declaration of Rights, encompasses a cohesive set of principles, carefully drafted and committed to an abstract ideal of just government. It is a compact of overlapping and redundant rights and guarantees. Thus, the rights of personal and procreative autonomy at issue here also find protection in more than just Article II, Section 10. Without attempting to exhaustively plumb the depths of the Constitution in this regard, several provisions of the Declaration of Rights deserve mention.

132. *Perkins v. State*, No. DV 25-282, at 2–5 (Mont. Dist. Ct. Apr. 2, 2025) (citation omitted) (temporary restraining order and order setting preliminary injunction hearing), <https://assets.aclu.org/live/uploads/2025/04/0402-Temporary-Restraining-Order-and-Setting-PI-Hearing.pdf> [<https://perma.cc/EDP5-EWKK>]; *see also Perkins v. State*, No. DV 25-282, 2, 40–42 (Mont. Dist. Ct. May 16, 2025) (granting preliminary injunction in part on similar grounds, though emphasizing informational privacy), https://www.aclumontana.org/sites/default/files/field_documents/25-opinion_and_order_granting_plaintiffs_motion_for_preliminary_injunction.pdf [<https://perma.cc/77UF-D7HE>].

Respect for the dignity of each individual—a fundamental right, protected by Article II, Section 4 of the Montana Constitution—demands that people have for themselves the moral right and moral responsibility to confront the most fundamental questions about the meaning and value of their own lives and the intrinsic value of life in general, answering to their own consciences and convictions.¹³³ Equal protection, also protected by Article II, Section 4, requires that people have an equal right to form and to follow their own values in profoundly spiritual matters.¹³⁴ Article II, Section 3, guarantees each person the inalienable right to seek safety, health and happiness in all lawful ways—i.e., in the context of this case, the right to seek and obtain medical care from a chosen health care provider and to make personal judgments affecting one’s own health and bodily integrity without government interference.¹³⁵ As already noted, Article II, Sections 5 and 7, protect, respectively, the freedom to accept or reject any religious doctrine . . . and the right to express one’s opinion in all lawful ways and forums.¹³⁶ The right to due process of law, Article II, Section 17, protects those rights—including rights of personal and procreative autonomy—inherent in the historical concept of “ordered liberty.”¹³⁷ Finally, the right of individual privacy guaranteed

133. [Ed. Note: MONT. CONST. art. II, § 4 (“The dignity of the human being is inviolable.”).]

134. [Ed. Note: *Id.* (“No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.”). In the context of transgender rights, both sex (because anti-transgender discrimination is sex discrimination) and culture (because many of the Native peoples present in Montana do not ascribe to Western views about sex and gender) may be implicated. *See, e.g., Edwards*, No. DV 23-1026, at 30.]

135. [Ed. Note: MONT. CONST. art II, § 3 (“All persons are born free and have certain inalienable rights. They include . . . enjoying and defending their lives and liberties...and seeking their safety, health and happiness in all lawful ways.”).]

136. [Ed. Note: *Id.* § 5 (“The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”); *id.* § 7 (“No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty.”).]

137. [Ed. Note: *Id.* § 17 (“No person shall be deprived of life, liberty, or property without due process of law.”).]

by Article II, Section 10,¹³⁸ requires the government to leave us alone in all these most personal and private matters.¹³⁹

In the context of cases involving laws specifically targeting or affecting youth, moreover, these expansive rights remain largely undiminished. The Montana Constitution specifically provides that “[t]he rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.”¹⁴⁰ And the Montana Supreme Court has held that this means that “minors are afforded full recognition under the equal protection clause and enjoy all the fundamental rights of an adult,” subject only to a showing that the law at issue was “designed and [is] operating” to protect youth.¹⁴¹ Moreover, the Montana Supreme Court has rejected parental rights arguments as inapplicable to the question of whether this provision is satisfied—as the law must be “necessary to enhance a minor’s *own* protection.”¹⁴²

In short, there is ample support in Montana’s constitution—and in its constitutional jurisprudence—for a claimed right to gender autonomy. Montana has declared its own right to privacy “one of the most stringent” protections of privacy in the world.¹⁴³ It has repeatedly spoken of the protections afforded by those privacy rights as protecting individual self-determination, bodily autonomy, and other related rights which are implicated by a right to gender autonomy.¹⁴⁴ Finally, it has made clear that the Montana right to privacy is specifically intended, among other things, to prevent against the imposition of the moral or religious views of a majority on the minority in violation of their right “to be let alone.”¹⁴⁵

While there is thus much to suggest Montana as a promising site for gender autonomy arguments, it is worth observing that Montana might not be a state that would be chosen by a national organization proceeding

138. [Ed. Note: MONT. CONST. art. II, § 10 (“The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”).]

139. *Armstrong v. State*, 1999 MT 261, ¶¶ 71–72, 989 P.2d 364, 383 (citations omitted).

140. MONT. CONST. art., II, § 15.

141. *Planned Parenthood of Mont. v. State*, 2024 MT 178, ¶¶ 20–21, 554 P.3d 153, 164 (first quoting *In re S.L.M.*, 951 P.2d 1365, 1373 (Mont. 1997) and then quoting *In re C.H.*, 683 P.2d 931, 940 (Mont. 1984)).

142. *Id.* ¶ 48 (emphasis added).

143. See sources cited *supra* note 126.

144. See, e.g., *Armstrong*, 1999 MT 261, ¶¶ 29–45; *Planned Parenthood of Mont. v. State*, 2024 MT 178, ¶¶ 22–25; *Gryczan v. State*, 942 P.2d 112, 123 (Mont. 1997); *Weems v. State*, 2023 MT 82, ¶¶ 35–37, 529 P.3d 798, 809.

145. See, e.g., *Armstrong*, 1999 MT 261, ¶¶ 67–74.

strategically according to the criteria set out in Part II. Its constitution is relatively easy to amend, and its judges are elected.¹⁴⁶ Moreover, its political branches are clearly hostile to transgender rights, increasing the likelihood of a political backlash (and indeed, such a backlash appears to be under way at this time).¹⁴⁷ But it nonetheless appears possible that Montana may become the first state to recognize a right to gender autonomy under its state constitution. As this demonstrates, it is not always the maximally cautious planning—but sometimes also bold and creative action—that can lead to important change.

CONCLUSION

In the wake of *United States v. Skrametti*, the LGBTQ movement once again faces the prospect of the U.S. Supreme Court inhospitable to their constitutional claims.¹⁴⁸ Just as in the aftermath of *Bowers v. Hardwick*, a turn to state courts and state constitutions is one strategy that the movement is likely to increasingly embrace.¹⁴⁹ While such state constitutional strategies afford more piecemeal victories, and may be slow to achieve broader results, history has shown that they can ultimately pave the way to important national victories, even where the federal legal landscape looks bleak.

This Essay suggests that in that effort to rebuild, developing a state constitutional right to gender autonomy should be one important focus. Gender self-identification and presentation is deeply personal, core to human identity and human flourishing, and should be among the autonomy rights that require more than *de minimis* government justification to infringe.¹⁵⁰ Such a right would, moreover, protect all of the diverse corners of the LGBTQ community—and beyond. State constitutions afford an opportunity to move such a right from “off the wall” to “on the wall”—and in the process to potentially rehabilitate federal substantive due process doctrine writ large.¹⁵¹

146. MONT. CONST. art. XIV (titled “Constitutional Revision”); see *Judicial Selection in Montana*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_Montana [<https://perma.cc/92WK-PQUT>] (last visited Oct. 3, 2025).

147. See, e.g., Constance Van Kley, *The Montana Legislature’s Partisan Attack on Judicial Independence*, STATE CT. REP. (Apr. 9, 2025), <https://statecourtreport.org/our-work/analysis-opinion/montana-legislatures-partisan-attack-judicial-independence> [<https://perma.cc/59RW-SV2M>].

148. See generally *United States v. Skrametti*, No. 23-477 (U.S. June 18, 2025) (holding that a state law prohibiting gender-affirming care for transgender minors did not violate the Equal Protection Clause, or even trigger heightened scrutiny).

149. For the turn post-*Bowers*, see *supra* notes 15–17 and accompanying text.

150. For a compelling recent argument on this front, see generally Clemons, *supra* note 22.

151. Cf. Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution*: Lawrence v. Texas, 2002–2003 CATO SUP. CT. REV. 21, 21 (reading *Lawrence v. Texas* not only

Just as post-*Bowers* campaigns in the state courts took time, it is also important to recognize that a federal right to gender autonomy will not be developed overnight. It took seventeen years for *Bowers v. Hardwick* to be overruled in *Lawrence v. Texas*, and even longer for the Supreme Court to extend the right to marry to same-sex couples.¹⁵² The path forward of gender autonomy will also surely be slow and messy, with both victories and losses along the way. But the idea of a right to gender autonomy also can function as a beacon in dark times: of an imagined future in which freedom for all of the diverse corners of the LGBTQ community is possible.

as an important case for LGBTQ rights, but for the Supreme Court's approach to liberty under the Due Process Clause more generally).

152. See generally *Bowers v. Hardwick*, 478 U.S. 186 (1986) (characterizing arguments for a constitutional right to private same-sex intimacy as "at best, facetious"); *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning *Bowers* and holding that the Due Process Clause protects private consensual same-sex intimacy); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that denying the right to marry to same-sex couples is unconstitutional).