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On Pride’s Eve, the State of Transgender Equality

Issue is front and center politically, and it could emerge as the next big LGBT case at the Supreme Court

BY ARTHUR S. LEONARD

With the debate over transgender equality having recently moved to center stage across the US — raising the distinct possibility that the community’s opponents have overplayed their hand politically — it’s worth noting the anniversary of a major nationwide victory for transgender rights that has been widely overlooked.

Celebrations last June 26 over the Supreme Court’s ruling in Obergefell v. Hodges largely focused on the fact that same-sex couples are entitled to marry under the US Constitution’s 14th Amendment.

What few mentioned amidst the outpouring of joy was that the decision implicitly overruled some terrible state court rulings from around the country holding that marriages involving transgender people were invalid under existing state bans on same-sex marriage. By removing gender requirements for marriage, the Supreme Court was not only opening up marriage nationwide for same-sex couples, but also making it possible for transgender people to marry the partners they love regardless of their sex, sexual orientation, or gender identity. That advance canceled out any argument that a married person who was transitioning was no longer validly married or should be required to divorce their spouse. It also eliminated the catch-22 possibility that a transgender person who wished to divorce their spouse would be prevented from doing so because a state construed their marriage as not legally valid in the first place.

Noting the one-year mark since Obergefell and its positive impact on transgender equality is a good jumping off point for considering the overall status of the transgender community under US law. As of today, 17 states expressly prohibit discrimination based on gender identity in employment, housing, and public accommodations — California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, as well as the District of Columbia and Puerto Rico.

Five years after enacting a law prohibiting gender identity discrimination in employment and housing, the Legislature in Massachusetts has now passed a bill adding public accommodations protections, and Republican Governor Charlie Baker, initially an opponent of such a measure, has pledged to sign it.

Most of these nondiscrimination laws have specific exemptions for religious institutions — which in themselves are not unusual — but some of the states also have so-called religious freedom statutes that might be interpreted to provide exemptions for businesses whose owners have religious objections to treating LGBT people on the same basis as the general public. Though the Supreme Court’s narrow ruling in the 2014 Hobby Lobby case — granting the closely-held retail company’s employee health plan a religiously-based exemption from the contraception coverage requirement of the federal Affordable Care Act — gave opponents of LGBT rights encouragement, the general issue is hardly settled and, in fact, vigorously debated.

Three states prohibit sexual orientation discrimination by statute but not yet gender identity discrimination: New York, New Hampshire, and Wisconsin. Here in New York, however, the State Division of Human Rights earlier this year published a regulation stating that it interprets the New York Human Rights Law ban on sex discrimination to include discrimination because of gender identity, and the ban on disability discrimination to cover gender dysphoria, thereby providing protections to individuals who have not yet completed their gender transition.

That interpretation — encouraged by Governor Andrew Cuomo — has not yet been tested in the courts, but it is consistent with some unfolding developments in federal law as well as some prior rulings by New York trial courts.

In addition, many states have now included specific protections on the basis of gender identity under their hate crimes statutes, and hundreds of localities around the nation have acted to ban gender identity discrimination.

Unfortunately, over the past several years, backlash against such municipal protections has led some state legislatures to override those protections, prompting LGBT advocacy groups to file suit against such limitations.

At the federal level, two statutes, the Matthew Shepard – James Byrd, Jr., Hate Crime Prevention Act and the Violence against Women Act, provide for enhanced penalties for violent crimes motivated by the victim’s gender identity, but only when there is some connection to interstate activity — such as using weapons transported across state lines or kidnapping a victim and transporting them on an interstate highway. Congress’ oversight of interstate commerce is the basis for its jurisdiction in criminal cases.

Congress, however, has not yet approved the Equality Act, introduced last year to amend all federal civil rights statutes to list gender identity and sexual orientation as prohibited grounds of discrimination. Enacting that legislation would be groundbreaking — providing nationwide protection in employment, housing, public accommodations, credit, educational institutions, and all programs receiving federal financial assistance or operated by federal contractors, and would also cover state government employment and federal employment.

The Equality Act enjoys wide co-sponsorship among Democratic members of both houses, but has only a handful of Republican co-sponsors, and the GOP leader-
ship in both houses has denied committee hearings or votes on the bill, so it cannot be passed unless there is a significant change in the political balance of Congress or in the views of the Republican Party. Democrats have a good chance of retaking the Senate in November, but a change in House control is unlikely unless the Trump presidential bid descends into a quagmire.

In the face of congressional intransigence, the Obama administration has moved aggressively to advance the ball, adopting executive orders last year that prohibit federal government agencies and private sector contractors doing business with them from discriminating in employment or provision of services because of gender identity or sexual orientation. These orders are enforced administratively within the executive agencies, not in federal courts.

Recent activity in Congress has placed the federal contractor protections into question. After House Republicans succeeded in getting a broad religious exemption to the contractor provisions approved in the annual defense authorization bill, an impasse has developed over Democratic efforts, led by out gay upstate Representative Sean Patrick Maloney, to incorporate Obama’s original contractor order into other appropriations bills. There are enough Republican votes in favor of such an amendment, but then not enough Republican votes to pass the amended bills given Democratic opposition to the underlying measures, which they see as providing insufficient funding or imposing unacceptable curbs on agencies’ actions. This curious skirmish has brought the legislative authorization process to a temporary halt, and looms as a potential crisis as the nation approaches a sharply contested congressional election cycle.

The hot issue of the day, however — one that could make it to the Supreme Court in the next term — is whether gender identity discrimination is already illegal, even when it is not mentioned as a prohibited ground of discrimination.

As Congress considered the 1964 Civil Rights Act, the primary aim was to end racial and religious discrimination in employment and public services. During the floor debate on the bill, a conservative House member from Virginia introduced an amendment to the Title VII employment protections to add a ban on sex discrimination — perhaps as a strategy to doom its chances. The term sex was not defined in the statute, and after Title VII went into effect in 1965, some early attempts to bring discrimination claims on behalf of gay and transgender people were rejected by both the Equal Employment Opportunity Commission (EEOC), which has enforcement oversight, and the federal courts.

In 1972, Congress enacted Title IX of the Education Amendments Act, which forbids sex discrimination by educational institutions that receive federal funding. In interpreting the
Federal appeals courts began extending protection to transgender plaintiffs on the theory that they suffered discrimination because they failed to conform to sex stereotypes.

term sex under that law, both the US Department of Education and courts generally looked to how it was treated under the Title VII employment provisions. Other federal statutes addressing sex discrimination — including the Fair Housing Act and the Equal Credit Opportunity Act — also received narrow interpretations of their sex discrimination provisions.

When Congress passed the Americans with Disabilities Act in 1990, some right-wing opponents of that bill warned it might be hijacked by sexual minorities claiming that homosexuality or transsexuality could be deemed disabilities. North Carolina’s notorious Republican Senator Jesse Helms won approval of an amendment specifically stating that homosexuality and “transsexualism” would not be considered disabilities under the statute.

Meanwhile, the interpretation of federal sex discrimination laws had already begun to change. In 1989, the Supreme Court, in Price Waterhouse v. Hopkins, a Title VII case, ruled that Ann Hopkins had suffered sex discrimination when she was denied a partnership at the accounting firm because some partners thought she was not adequately feminine in her appearance and conduct. One partner said she needed “a course in charm school,” and the head of her office told her she should wear make-up and jewelry and walk, talk, and dress more femininely if she wanted to be a partner. Signaling a broad interpretation of sex discrimination, the Supreme Court said that this kind of sexual stereotyping was evidence of a discriminatory motive under Title VII at odds with Congress’ intention to knock down all such barriers to women’s advancement in the workplace.

Since 1989, lower federal courts have used the Price Waterhouse decision to expand their interpretation of “sex” under Title VII and other federal sex discrimination provisions. By the turn of the century, some federal appeals courts began extending protection to transgender plaintiffs on the theory that they suffered discrimination because they failed to conform to sex stereotypes.

Federal circuit and district courts in many different parts of the country have now found gender identity protection in cases under the Violence against Women Act and the Equal Credit Opportunity Act, as well as Title VII. In an important breakthrough in 2011, the Atlanta-based US Court of Appeals for the 11th Circuit ruled that discrimination against Vandiver Elizabeth Glenn, a transgender state employee in Georgia, violated the 14th Amendment’s Equal Protection Clause. The same standard used for sex discrimination claims should be applied to gender identity claims, that court found.

A critical factor that has helped advance this broad interpretation of sex discrimination was President Barack Obama’s appointment, in his first term, of Chai Feldblum, then a law professor at Georgetown University, to be an EEOC commissioner. Feldblum, the first openly lesbian or gay person in that post, argued effectively that the agency should adopt a broad interpretation of “sex” and apply it to discrimination claims by federal employees. In three important rulings over the last few years, the EEOC held first that gender identity discrimination claims may be brought under Title VII, then that sexual orientation discrimination claims could also be brought under Title VII, and late last year that Title VII requires federal agencies to allow transgender employees to use workplace restrooms consistent with their gender identity.
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The EEOC was originally ruling on internal discrimination claims within the federal government, but the agency has now undertaken an affirmative litigation strategy, filing briefs in cases pending in federal court brought by private litigants against non-governmental employers. The EEOC has also filed its own gender identity and sexual orientation discrimination lawsuits in federal courts on behalf of individuals who filed charges against their employers with that agency.

Building on the EEOC rulings as well as the growing body of federal court rulings, the Justice Department, the Department of Education, and other federal agencies with civil rights enforcement responsibility have also begun to interpret their statutory sex discrimination laws more broadly.

The Department of Education and the Justice Department have become involved in several cases brought by transgender high school students under Title IX, seeking access to restrooms consistent with their gender identity. In one case, which drew national attention last year, the Education and Justice Departments represented a transgender high school student in Illinois who was denied appropriate bathroom access and negotiated a settlement with the school district affirming the student’s rights. That attracted a federal court lawsuit against the government by Alliance Defending Freedom, a right-wing litigation group representing some objecting parents and students. The lawsuit claims that Title IX does not apply to this situation and that their children’s “fundamental right of bodily privacy” was violated by the terms of the settlement. It also claims that the Education and Justice Departments violated administrative law in the way in which they adopted their new interpretations of Title IX.

This issue burst into national headlines when the North Carolina Legislature acted precipitously early this spring to block a new local nondiscrimination ordinance in Charlotte that, among other things, would have made clear the rights transgender people have in accessing public and workplace restrooms consistent with their gender identity. H.B. 2, enacted in late March, preempted local nondiscrimination laws across North Carolina and limited restroom access based on a person’s gender as listed on their birth certificate.

Defenders of H.B. 2 rely on the old canard about the dangers posed to women and children from heterosexual men pretending to be transgender in order to gain improper access to sex-segregated facilities — despite the lack of any evidence this has happened in the 17 states and hundreds of localities where transgender rights are protected. Opponents of public accommodations protections for transgender people are also parroting an argument from the new Illinois lawsuit — that allowing transgender people into restrooms consistent with their gender identity threatens the “right of bodily privacy” of other users to avoid exposing themselves to transgender people. Those making this argument essentially reject the proposition that a transgender woman is genuinely a woman and a transgender man is genuinely a man.

The state of Mississippi recently enacted a law that specifically authorizes people whose religious belief rejects transgender identity to refuse to treat transgender people consistent with their gender identity, including in places of business when it comes to things like restroom access.

North Carolina’s H.B. 2 and the Mississippi statute are now both the subject of multiple federal lawsuits disputing the “bodily privacy” argument and forcing courts to con-
The question at issue are also not ones that would automatically rally the four votes needed on the court to grant review, especially with the court shy one member — and the conservative bloc down one seat.

Conservatives have been critical of courts deferring to executive interpretations of congressional enactments, but with the death of Antonin Scalia it’s not clear that four justices would agree to take the case, much less that five would overturn the Fourth Circuit.

The alternative argument, based on a theory of “bodily privacy rights,” would require conservative justices to embrace a broadening of the right of privacy under the Due Process Clause, a principle they have fought hard against over many years. The Virginia case, then, may well not make it in front of the Supreme Court — which would be good news for the young transgender plaintiff.

That said, it is unlikely that the high court can duck the issue for too long. It seems a good bet that the next big LGBT rights case to go all the way to the Supreme Court will focus on whether gender identity discrimination is a form of “sex” discrimination forbidden by existing sex discrimination law as well as the 14th Amendment’s Equal Protection Clause.

This article is based on a talk New York Law School Professor Arthur S. Leonard gave at the Trans Pride Shabbat at Congregation Beit Simchat Torah on June 3.