Queer Rights After *Dobbs v. Jackson Women's Health Organization*

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I. INTRODUCTION

On June 24, 2022, Justice Samuel Alito announced his majority opinion in *Dobbs v. Jackson Women's Health Organization*[1] that overturned both *Roe v. Wade*[2] and *Planned Parenthood v. Casey*.[3] In so doing, *Dobbs* destabilized nearly five decades of fundamental rights jurisprudence.[4] The decision was not a surprise due to an unprecedented leaked draft of the opinion that began circulating in the press on May 2, 2022.[5] The leaked draft ignited a firestorm of commentary warning that the end of *Roe* would inevitably lead to the evisceration of queer rights.[6] This brand of commentary only accelerated after the final opinion was announced, as pundits pointed to ominous statements in Justice Thomas's concurrence regarding substantive due process.[7] In reality, however, warnings about the re-criminalization of queer sex and the demise of marriage equality[8] had been whispered

1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

2. Roe v. Wade, 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.

3. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

4. Amy Howe, *Supreme Court Overturns Constitutional Right to Abortion*, SCOTUSBLOG (June 24, 2022, 3:11 PM), https://www.scotusblog.com/2022/06/supreme-court-overturns-constitutional-right-to-abortion/ [https://perma.cc/6E8F-9XH3].

5. *Read Justice Alito's Initial Draft Abortion Opinion Which Would Overturn* Roe v. Wade, POLITICO (May 2, 2022, 9:20 PM), https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504 [https://perma.cc/SWX5-NM8E]. It was also arguably not a surprise given that *Roe* had been limited by *Casey*, which, in turn, had also been limited. *See* Mary Ziegler, *The Supreme Court Just Took a Case That Could Kill* Roe v. Wade*—or Let It Die Slowly*, WASH. POST (May 18, 2021, 2:32 PM), https://www.washingtonpost.com/politics/2021/05/18/supreme-court-just-took-case-that-could-kill-roe-v-wade-or-let-it-die-slowly/ [https://perma.cc/VHU9-S7UJ].

6. *See, e.g.*, Charlie Savage, *Draft Opinion Overturning Roe Raises a Question: Are More Precedents Next?*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/05/05/us/14th-amendment-roe-wade.html?searchResultPosition=6 [https://perma.cc/3B2K-TM93].

7. *See, e.g.*, Madeleine Carlisle & Julia Zorthian, *Clarence Thomas Signals Same- Sex Marriage and Contraception Rights at Risk After Overturning* Roe v. Wade, TIME (June 24, 2022, 2:45 PM), https://time.com/6191044/clarence-thomas-same-sex-marriage-contraception-abortion/ [https://perma.cc/7YWE-ULWP].

8. This Article uses the term queer rights instead of LGBTQ rights because the commentary specifically targeted two major U.S. Supreme Court cases that deal specifically with sexual orientation in the context of state sodomy laws, *Lawrence v. Texas*, 539 U.S.

throughout the *Dobbs* litigation in the form of bold, but vague statements made by the respondents, the Solicitor General, and various amici.[9] In each case, the parties implored the Court to view *Dobbs* as much more than a case about safe and legal access to abortion.[10]

This Article argues that it is far too soon to concede that *Lawrence v. Texas* and *Obergefell v. Hodges* are destined for the dustbin of history. Queer rights and abortion rights not only advance equality and have significant liberatory value, but they also are functionally different rights that rest on distinct legal foundations. Although both sets of rights may be essential to a progressive platform for inclusive political and social change, it is important not to conflate the equality-promoting impact of a right with the nature or legal basis for the right itself. These functional and legal differences are important not only for understanding the methods of subordination that lead to their denial, but also for crafting forward-looking legal and political arguments to support their preservation.

It is true that the summary dismissal of a fundamental right to reproductive autonomy in *Dobbs* inevitably exposes a series of judicially recognized rights of the past half-century to increased scrutiny.[11] However, the constitutional viability of *Lawrence*[12] and *Obergefell*[13] remains separate and independent from the privacy and fundamental rights methodology

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558, 562 (2003), and marriage prohibitions, *Obergefell v. Hodges*, 576 U.S. 644, 652 (2015). These cases do not expressly consider gender identity.

9. Brief for United States as Amici Curiae Supporting Respondents at 25–26, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) ("To reverse course and accept those limits today would not merely overturn *Roe* and *Casey*, but would also threaten the Court's precedents holding that the Due Process Clause protects other rights, including the rights to same-sex intimacy and marriage.").

10. *See, e.g.*, Brief of Amicus Curiae Am. Bar Ass'n in Support of Respondents at 20, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) (stating that *Roe* was the "foundation" for *Obergefell* and *Lawrence*).

11. The majority in *Dobbs* distinguishes a string of fundamental rights cases from abortion including the right to marriage, contraception, familial cohabitation, to educate one's children and to be free from involuntary sterilization. *Dobbs*, 142 S. Ct. at 2257 (citations omitted). However, Justice Thomas's concurrence specifically mentions contraception, queer sex, and marriage equality as substantive due process jurisprudence that should be revisited as examples of flawed legal reasoning and misplaced reliance on substantive due process under the Fourteenth Amendment. *Id.* at 2301 (Thomas, J., concurring) ("For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.").

12. *Lawrence*, 539 U.S. 558.

13. *Obergefell*, 576 U.S. 644.

advanced by *Roe*,[14] refined by *Casey,* and subsequently abandoned by *Dobbs*.[15] These landmark queer rights cases should easily survive any legal challenge based on the standard for due process liberty analysis, stare decisis, and rational-basis review articulated by the majority in *Dobbs.* The threats to these precedents are rooted in political forces, not a faithful application of the standards articulated in *Dobbs*.

To be clear, the overruling of *Roe* and *Casey* will have a profound human and legal impact on the lives of women and pregnant people for decades.[16] In this way, the *Dobbs* decision carries the weight of two separate elements. The first is the deeply personal impact this decision will have on individual women and pregnant people accessing abortion and reproductive health care, including the long-term effect of this loss of bodily autonomy on future opportunities.[17] The specter of forced pregnancy and the criminalization of women and pregnant people also promises to further accelerate the growing divide between the blue and red states.

The second element is the threat of a tectonic jurisprudential shift in our national understanding of individual liberty and fundamental rights. The Court's approach to liberty interests and stare decisis in *Dobbs* challenges the modern understanding of what our constitution protects.[18] Justice Alito's categorization of *Roe* alongside infamous cases, such as *Plessy v. Ferguson* and *Lochner v. New York*,[19] creates an environment where *Roe*-based jurisprudence could be seen as constitutional folly, rather than the realization of liberty that our Founders could not imagine, but nonetheless intended.[20] Both cases have contributed to the legal scaffolding for the modern liberty infrastructure that also embraced rights to queer sex and

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14. Roe v. Wade, 410 U.S. 113, 153 (1973), *overruled by Dobbs*, 142 S. Ct. 2228; *see also* Robin Maril, *The End of Roe will Lead to Baseless Attacks on Gay Rights*, L.A. TIMES, (June 26, 2022, 3:02 AM), https://www.latimes.com/opinion/story/2022-06-26/roe-supreme-court-obergefell-gay-rights [https://perma.cc/4XJZ-AUB3].

15. *See Dobbs*, 142 S. Ct. at 2241–43 (dismantling the "viability" standard).

16. Pam Belluck, *They Had Miscarriages, and New Abortion Laws Obstructed Treatment*, N.Y. TIMES (July 17, 2022), https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html [https://perma.cc/7ZMB-MZXR].

17. Brief of Amici Curiae Economists in Support of Respondents at 13, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

18. *See* Bruce Fein, *Does Dobbs Mark the Beginning of the End of Natural Rights?*, HILL (July 5, 2022, 2:30 PM), https://thehill.com/opinion/judiciary/3546342-does-dobbs-mark-the-beginning-of-the-end-of-natural-rights/ [https://perma.cc/MQ29-D6BU] ("[A]fter *Dobbs*, ideas of natural rights that were so prominent in the assumptions of the nation's founders have been expelled from constitutional law.").

19. Lochner v. New York, 198 U.S. 45 (1905).

20. *See* Devin Watkins, *Defending Substantive Due Process on Originalist Grounds*, FEDERALIST SOC'Y: FEDSOC BLOG (Jan. 22, 2019), https://fedsoc.org/commentary/fedsoc-blog/defending-substantive-due-process-on-originalist-grounds [https://perma.cc/84D9-FXKS].

marriage equality as expressions of constitutionally protected liberty interests.[21] Potential threats to other constitutionally protected liberty interests rights, including queer rights, are a symptom of a politically targeted, conservative narrowing of constitutional values concerning individual freedom and liberty.

While acknowledging the extreme personal loss to millions of Americans, this Article accepts the *Dobbs* decision as precedent and engages the second element: what does *Dobbs* mean for our understanding of individual liberty, specifically with respect to queer rights? This inquiry proceeds in four parts. The first part discusses the intertwined evolution of queer identity and legal status based on the liberty and equality principles enunciated by the Court from *Bowers v. Hardwick*[22] through *Obergefell v. Hodges*.[23] This section establishes that the rights of queer people to engage in sex free from criminalization and to marry were never based on a privacy analysis, but instead on interlocking liberty and equality interests. The second part explores further the distinction between queer rights and abortion access both with respect to the nature of the rights and their constitutional foundations. It argues that these functional and legal differences are significant and should result in divergent legal futures. The third part examines the majority opinion in *Dobb*s and shows how both *Lawrence* and *Obergefell* should survive review on the merits, as well as under stare decisis.[24] The fourth part offers a clear-eyed caveat. It acknowledges that the current political climate and make-up of the Court may nonetheless threaten the longevity of constitutionally recognized queer rights. It asserts that if these precedents fall, it would be the result of an exercise of political will rather than a reasoned and intellectually honest application of *Dobbs*. A brief conclusion discusses future legal avenues for ensuring protections for queer people and their families under *Dobbs*.

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21. *See infra* text accompanying notes 273–85 (acknowledging that *Lawrence* mentions *Roe*). *See also infra* text accompanying notes 286–89 (explaining that *Obergefell* does not cite *Roe*).

22. Bowers v. Hardwick, 478 U.S. 186, 191–92 (1986) (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

23. Obergefell v. Hodges, 576 U.S. 644, 633, 664 (2015).

24. *See infra* text accompanying notes 325–400 (applying the majority opinion in *Dobbs* to queer rights).

II. QUEER IDENTITY AND LEGAL STATUS

In a span of just under three decades, the U.S. Supreme Court transformed the legal status of queer people from outlaws in *Bowers v. Hardwick,*[25] to outcasts in *Lawrence v. Texas*,[26] to equals under the law in *Obergefell v. Hodges*.[27] Although it is indisputable that the privacy lens adopted by *Roe*[28] and *Griswold*[29] contributed to the modern understanding of the role of government in personal sexual decisions,[30] the legal evolution of the queer identity extends beyond considerations of privacy.[31] As early as 1986, Justice Stevens recognized that queer peoples' constitutional liberty and equality interests were distinct from privacy guarantees in his dissent in *Bowers*.[32] This turn toward liberty and equality predated the Court's 1992 decision in *Casey* that broadly limited the continued viability of an unenumerated constitutional right to privacy as a vehicle to secure personal freedom.[33] Justice Kennedy concretized this shift in the context of queer identity and rights in his majority opinions in *Romer v. Evans*,[34] *Lawrence v. Texas*,[35] and *Obergefell v. Hodges*[36] where he chose to frame queer rights in terms of the outward guarantees of liberty and equality rather than the more insular right to privacy.[37]

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25. *See Bowers*, 478 U.S. at 191.
26. *See Lawrence*, 539 U.S. at 578.
27. *Obergefell*, 576 U.S. at 681.
28. *See* Roe v. Wade, 410 U.S. 113, 153 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
29. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).
30. *See* Deborah J. Anthony, *Caught in the Middle: Transsexual Marriage and the Disconnect between Sex and Legal Sex*, 21 TEX. J. WOMEN & L. 153, 184–85 (2012) (discussing the modern understanding of the privacy doctrine as it has been developed through precedent and expounded in the recent case of *Lawrence*).
31. *See generally* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1436–60 (1992) (discussing the limitations on the privacy principle).
32. *See* Bowers v. Hardwick, 478 U.S. 186, 214–20 (1986) (Stevens, J., dissenting), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).
33. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.
34. Romer v. Evans, 517 U.S. 620, 634 (1996) ("[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."). Scholars have noted the significance of the amicus brief filed by the Human Rights Campaign that detailed the historical discrimination and disadvantage in informing Justice Kennedy's majority opinion. Brief of the Hum. Rts. Campaign Fund et al. as Amici Curiae in Support of Respondents at 12, *Evans*, 517 U.S. 620 (No. 94-1039).
35. Lawrence v. Texas, 539 U.S. 558, 579 (2003).
36. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).
37. *See infra* text accompanying notes 213–221 (explaining Justice Kennedy's interlocking analysis).

The Court's choice to adopt a constitutional liberty and equality lens in queer rights cases is consistent with the evolution of queer identity in the latter half of the twentieth century when queer people stepped out of the shadows and increasingly asserted their rights to dignity and equal rights in all aspects of public life.[38] As Justice Kennedy articulated in *Lawrence*, "[f]reedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[39] The interlocking nature of the liberty and equality interests articulated in *Obergefell* serves as the foundation for contemporary queer legal rights and reflects the core lived experience of queer people.[40] This interlocking lens is distinct from the foundational privacy interest articulated in *Roe*, as well as the standalone liberty interest described in *Casey*.[41] This section charts the evolution of queer rights from *Bowers* to marriage equality as the legal embodiment of the lived queer experience.

A. Outlaws to Outcasts: Bowers v. Hardwick *and* Lawrence v. Texas

Bowers and *Lawrence* challenged the ability of the state to criminalize same-sex sexuality through criminal sodomy laws.[42] Over the course of sixteen years, the U.S. Supreme Court reversed its view about the constitutionally protected rights implicated in sodomy bans, moving from a privacy frame in *Bowers*, that upheld the criminalization of sodomy,[43] to one centered on liberty interests in *Lawrence*, that struck down the Texas Homosexual Sodomy Law.[44] Some commentators have suggested that *Dobbs* could breathe new life into the criminal sodomy laws that

38. *See generally* LINDA HIRSHMAN, VICTORY: THE TRIUMPHANT GAY REVOLUTION (2012).

39. *Lawrence*, 539 U.S. at 562.

40. *See generally* Brief of Amici Curiae Fam. Equal. Council et al. in Support of Petitioners, Addressing the Merits and Supporting Reversal at 3–4, *Obergefell*, 576 U.S. 644 (No. 14-556).

41. *See* Stephen Gilles, Dobbs*,* Obergefell*, and "The Critical Moral Question Posed by Abortion,"* SCOTUSBLOG (July 06, 2022, 08:56 PM), https://www.scotusblog.com/2022/07/dobbs-obergefell-and-the-critical-moral-question-posed-by-abortion/ [https://perma.cc/LQZ3-8WYG].

42. Bowers v. Hardwick, 478 U.S. 186, 188 (1986), *overruled by Lawrence*, 539 U.S. 558.

43. *Id.* at 196.

44. *Lawrence*, 539 U.S. at 578. As explained by the majority in *Lawrence*, the Texas Homosexual Conduct Law only "criminalize[d] sexual intimacy by same-sex couples, but not identical behavior by different-sex couples." *Id.* at 564.

remain on the books in twelve states,[45] and the Texas Attorney General has even stated that he would enforce the Texas law if the Court were to revisit *Lawrence*.[46] Given the renewed interest in criminalizing same-sex sexuality, it is important to review how these laws were used to harm and subjugate queer people despite the fact that they were rarely enforced.[47] Moreover, it is essential to understand that the rationale for *Lawrence* is distinct from the privacy issues outlined in *Roe*.

1. The Harmful Impact of Sodomy Laws

When Michael Hardwick challenged the Georgia sodomy law[48] that led to his 1982 arrest, queer advocates had reason to be hopeful. Although anti-sodomy statutes were rooted in the English common law offense of "crimes against nature," historically these statutes were primarily used in the context of nonconsensual sexual offenses and applied equally to men and women.[49] In fact, Hardwick's initial charge was dismissed when the judge determined that enforcement should be limited to nonconsensual activity.[50] Even though these laws were rarely enforced,[51] the criminalization of queer people remained a reason to deny queer people equal dignity and

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45. *See* Timothy Bella, *Texas AG Says He'd Defend Sodomy Law if Supreme Court Revisits Ruling*, WASH. POST (June 29, 2022), https://www.washingtonpost.com/politics/2022/06/29/texas-sodomy-supreme-court-lawrence-paxton-lgbtq/ [https://perma.cc/F2ED-ADAS].

46. *Id.*; *see also* Tom Dart, *Texas Clings to Unconstitutional, Homophobic Laws— and It's Not Alone*, GUARDIAN (June 1, 2019, 2:00 AM), https://www.theguardian.com/world/2019/jun/01/texas-homophobic-laws-lgbt-unconstitutional [https://perma.cc/UV7U-RX7U].

47. *See generally* Sonia K. Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of* Lawrence, 14 WM. & MARY BILL OF RTS. J. 1429, 1463 (2006) (noting that Texas rarely enforced its antisodomy law).

48. Georgia Code Ann. § 16-6-2 provides, in pertinent part, as follows:

> (a)(1) A person commits the offense of sodomy when he . . . performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.
>
> . . . .
>
> (b)(1) [A] person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . . .

GA. CODE ANN. § 16-6-2 (West 1984).

49. Richard Weinmeyer, *The Decriminalization of Sodomy in the United States*, 16 AM. MED. ASS'N J. ETHICS 916, 916 (2014) (quoting Brief of the Cato Inst. as Amicus Curiae in Support of Respondents at 9, 11, *Lawrence*, 539 U.S. 558 (No. 02-102)).

50. *See* Elizabeth Sheyn, *The Shot Heard Around the LGBT World:* Bowers v. Hardwick *as a Mobilizing Force for the National Gay and Lesbian Task Force*, 4 J. RACE, GENDER & ETHNICITY 2, 3 (2009) (citing Hardwick v. Bowers, 760 F.2d 1202, 1204 (1985), *rev'd*, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558).

51. Katyal, *supra* note 47.

the right to participate in public life.[52] From the standpoint of queer advocates who had just successfully fought for the declassification of homosexuality as a mental illness, sodomy statutes were the next barrier that had to fall.[53]

The 1973 declassification of homosexuality by the American Psychiatric Association (APA) coincided with the emergence of an out and proud gay liberation movement.[54] Activists tirelessly lobbied the APA to remove the diagnostic category of homosexuality from the Diagnostic Statistical Manual (DSM) where it was classified as a severe socio-pathic disorder.[55] The diagnosis had been used to deem queer people unfit for employment, parenting, and military service, just to name a few areas.[56] It also exposed queer people to harmful therapeutic interventions, including involuntary commitment in psychiatric hospitals, psychosurgery, shock treatment, and aversion therapy.[57]

Beginning in the 1970s, the winds shifted as the so-called "sexual revolution" changed the way that Americans spoke and thought about intimate conduct and personal freedom.[58] The 1973 declassification of homosexuality as a mental illness and the nascent gay liberation movement helped increase a growing sense of dignity and personhood for queer people in American society.[59] During this time, municipalities began enacting non-discrimination provisions that protected queer people and the visibility of queer people increased.[60] However, this progress also sparked a backlash among

52. *Lawrence*, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

53. *See generally* RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS 97 (Princeton Univ. Press 1987) (1981).

54. *See id.* at 88. Activists began protesting at psychiatric conventions as early as 1968. *Id.* at 92.

55. *Id.* at 39 (explaining the DSM).

56. *See* LILLIAN FADERMAN, THE GAY REVOLUTION: THE STORY OF STRUGGLE 3–50 (2015).

57. *See generally* MARTIN DUBERMAN, CURES: A GAY MAN'S ODYSSEY (1991).

58. DAVID ALLYN, MAKE LOVE, NOT WAR: THE SEXUAL REVOLUTION: AN UNFETTERED HISTORY, at ix–x (Routledge 2016) (2000).

59. *See The A.P.A. Ruling on Homosexuality: The Issue is Subtle, the Debate is Still On*, N.Y. TIMES, Dec. 23, 1973; ANNAMARIE JAGOSE, QUEER THEORY: AN INTRODUCTION 31 (1996).

60. In 1977, Miami Dade County in Florida became the first urban area to enact a non-discrimination ordinance. *See* Mireya Navarro, *2 Decades On, Miami Endorses Gay Rights*, N.Y. TIMES, Dec. 2, 1998, at A1.

conservative elements.[61] Some of the initial gains were rescinded and states began to adopt new laws specifically banning same-sex sex, while existing statutes like Georgia's[62] were enforced almost exclusively against gay men.[63] Increased, targeted criminalization stigmatized and alienated queer people from the law and prevented full participation in social, economic, and family life.[64] The existence of criminal sodomy laws were used to sanction employment discrimination and deprive queer parents of custody and parentage rights.[65] These laws functioned as a state-imposed demarcation of acceptable relationships and identities from criminality.

2. Bowers v. Hardwick

With this backdrop, it is easy to see why queer advocates, eager to remove the stigma of criminality, were interested in Hardwick's case.[66] The growing distance between the law's continued criminalization of queer sex and the increased acceptance of queer people in broader society bolstered Hardwick's legal challenge.[67] Emboldened by the pace of social change and represented by the American Civil Liberties Union (ACLU), Hardwick filed a federal suit challenging the constitutionality of the Georgia statute after his case was dismissed by the state trial court.[68] Hardwick

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61. For example, the anti-discrimination ordinance enacted in Miami Dade County was repealed by the voters by a margin of two to one the year after it was enacted. *Id.* The campaign to repeal the ordinance was led by the singer-turned-anti-gay activist Anita Bryant, who also led a movement to "Save Our Children." *Id.* Bryant claimed that the anti-discrimination ordinance was "an attempt to legitimize 'a perverse and dangerous' way of life." *Id.*

62. *See* Weinmeyer, *supra* note 49, at 917.

63. *See id.* at 918.

64. *See* Omar G. Encarnación, *Florida's 'Don't Say Gay' Bill is Part of the State's Long, Shameful History*, TIME (May 12, 2022, 3:51 PM), https://time.com/6176224/florida-dont-say-gay-history-lgbtq-rights/ [https://perma.cc/5UQE-PUSS].

65. *Why Sodomy Laws Matter*, ACLU, https://www.aclu.org/other/why-sodomy-laws-matter [https://perma.cc/UY76-UXSX]. As late as 1995, the Virginia Supreme Court used the existence of a little-enforced state sodomy law to deny a mother custody of her child. Bottoms v. Bottoms, 249 Va. 410, 419 (1995) ("Conduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth . . . .").

66. DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS 128–34 (2012) (noting that Lawrence and Garner were represented by the ACLU and Lambda).

67. Lawrence v. Texas, 539 US 558, 567–72 (2003) (critiquing the *Bowers* Court's reliance on history of sodomy laws to uphold Georgia law and the Court's failure to consider other advances including changes to the Model Penal Code); John Balzar, *The Times Poll; American Views of Gays: Disapproval, Sympathy*, L.A. TIMES (Dec. 20, 1985, 12:00 AM), https://www.latimes.com/archives/la-xpm-1985-12-20-mn-4928-story.html [https://perma.cc/N7ZQ-ZSVW].

68. Bowers v. Hardwick, 478 U.S. 186, 187 (1986), *overruled by Lawrence*, 539 U.S. 558; *see also* Art Harris, *The Unintended Battle of Michael Hardwick: After His*

argued that as a gay man who had sex with men, the statute threatened him with criminalization, which violated his fundamental privacy interests guaranteed by the Due Process Clause of the Fourteenth Amendment.[69] The United States District Court for the Northern District of Georgia dismissed the case,[70] but the Eleventh Circuit reversed and remanded for the state to prove the constitutionality of the statute.[71] The U.S. Supreme Court granted certiorari in 1985.[72] Its 1986 decision upholding the state law engaged in a chokingly narrow analysis of the statute and the rights at stake.[73] Despite the growing legal protection and cultural tolerance for queer people,[74] the *Bowers* Court dismissed Hardwick's constitutional claim as laughable, finding that the U.S. Constitution does not "confer[] a fundamental right upon homosexuals to engage in sodomy."[75]

The dissent, authored by Justices Blackmun and Stevens, signaled movement towards a more nuanced and complex connection between the right to engage in sex and the embodiment of queer identity.[76] Justice Blackmun employed a privacy-based analysis, and concluded that the majority had mischaracterized the nature of the rights at stake by limiting them to sodomy alone.[77] Justice Blackmun's classic privacy approach argued that Hardwick's right to engage in same-sex sex was consistent with other cases that have recognized such a right:

Georgia Sodomy Case, a Public Right-to-Privacy Crusade, WASH. POST (Aug. 21, 1986), https://www.washingtonpost.com/archive/lifestyle/1986/08/21/the-unintended-battle-of-michael-hardwick/73fb94db-2b0f-4bf8-8220-aa5070e996c6/ [https://perma.cc/YG2H-G8MM] (describing Hardwick's decision to participate in the litigation).

69. *See* Brief for Respondent, *Bowers*, 478 U.S. 186 (No. 85-140). Hardwick also argued that even without applying the fundamental rights framework, the state law was irrational and should be voided. *Id.* at *25–28.

70. Hardwick v. Bowers, 760 F.2d 1202, 1204 (11th Cir. 1985), *rev'd*, *Bowers*, 478 U.S. 186, *overruled by Lawrence*, 539 U.S. 558.

71. *See id.* at 1213.

72. Bowers v. Hardwick, 474 U.S. 943 (1985).

73. *See Bowers*, 478 U.S. at 196.

74. Wisconsin became the first state to prohibit private employment discrimination on the basis of sexual orientation in 1982. *See* William B. Turner, *The Gay Rights State: Wisconsin's Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 WIS. WOMEN'S L.J. 91, 93 (2007).

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

76. *See id.* at 205 (Blackmun, J., dissenting); *see also id.* at 217–18 (Stevens, J., dissenting).

77. *Bowers*, 478 U.S. at 204–06 (Blackmun, J., dissenting).

> [T]he Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. In construing the right to privacy, the Court has proceeded along two . . . lines. First it has recognized a privacy interest with reference to certain decisions that are property for the individual to make. Second it has recognized a privacy interest with reference to certain places without regard for the particular activities in which the individuals who occupy them are engaged. The case before us implicates both the decisional and spatial aspects of the right to privacy.[78]

This faithful privacy analysis echoed the Court precedent of the past two decades running from *Griswold* through *Roe*.[79] It is, in fact, the analysis that many scholars had predicted would be the holding of the Court.[80] Justice Blackmun's dissent cites *Roe* for support four times.[81]

Justice Stevens, however, rejected this privacy paradigm and instead focused on the liberty interests articulated in the earliest substantive due process cases and the contraception cases of the previous decade.[82] Justice Stevens explained that the emphasis on "the individual interest in privacy"[83] was misplaced because such claims were necessarily animated by "the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable."[84] Quoting from one of his prior opinions, Justice Stevens noted that "[t]hese cases do not deal with the individual's interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny."[85] Justice Stevens concluded that these "basic" or "fundamental" values are present in the nation's history and tradition.[86] Specifically, Justice Stevens argued that America's founding principles of freedom included the tradition of individual liberty that was free from intrusive state restrictions or interference.[87] Accordingly, Justice

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78. *Id.* at 203–04 (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)).

79. *See* Brief for Respondent, *Bowers*, 478 U.S. 186 (No. 85-140), 1986 WL 720442, at *11–12 (charting the evolution of privacy cases).

80. *See generally* Judith Wagner DeCew, *Constitutional Privacy, Judicial Interpretation, and* Bowers v. Hardwick, 15 SOC, THEORY & PRAC., 285 (1989) (providing a contemporary analysis of the status of privacy jurisprudence and predicting future application beyond *Bowers*).

81. *Bowers*, 478 U.S. at 199, 204–05, 210 (Blackmun, J., dissenting).

82. *See id.* at 216–18 (Stevens, J., dissenting).

83. *Id.* at 217 ("In consideration of claims of this kind, the Court has emphasized the individual interest in privacy, but its decisions have actually been animated by an even more fundamental concern.").

84. *Id.* (quoting Fitzgerald v. Porter Mem'l Hosp., 523 F.2d 716, 720 (1975)).

85. *Id.* (quoting *Fitzgerald*, 523 F.2d at 719).

86. *Id.* (quoting *Fitzgerald*, 523 F.2d at 719).

87. *See id.* (quoting *Fitzgerald*, 523 F.2d at 719–20).

Stevens clearly based his liberty analysis on a historical understanding of an American tradition that protects individual choice and definition of morality.[88]

Justice Stevens's dissent does not cite *Roe* for support, but instead relied on the contraceptive cases of *Griswold v. Connecticut*[89] and *Eisenstadt v. Baird*.[90] This reliance is unsurprising given that both cases provided a foundational starting point for extending the substantive due process liberty framework beyond the traditional interests protected in *Pierce v. Society of Sisters*[91] and *Meyers v. Nebraska*.[92] Although these cases are about contraception access, and in turn potential pregnancy and parentage, the *Griswold* and *Eisenstadt* analyses were more deeply tied to sex and intimacy than the abortion cases that dealt with pregnancy and potential parentage.[93] While *Griswold* constitutionalized access to contraception for married couples, the Court's decision was not focused so much on the status of marriage as much as on the nature of the relationship at the core of this status.[94] Although the Connecticut law[95] at issue in *Griswold* did not prohibit sex, it did impact the intimate decisions of spouses to engage in and consent to sexual activity when confronted with pregnancy.[96] Professor Harry H. Wellington's early analysis of *Griswold* in 1973 provided that "the state has undertaken to sponsor one institution that has at its core the love-sex relationship. That relationship demands liberty in the practice

88. *See id.* ("The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable." (quoting *Fitzgerald*, 523 F.2d at 719–20)).

89. *Id.* at 216, 218 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

90. *Id.* (citing Eisenstadt v. Baird, 405 U.S. 438 (1972)).

91. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (upholding the rights of parents and guardians to "direct the upbringing and education" of those under their care); *see also* DeCew, *supra* note 80, at 289 (citing *Pierce*).

92. Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("His right thus to teach and the right of parents to engage him so to instruct their children . . . are within the liberty of the [Fourteenth] Amendment.").

93. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 565 (2003) ("After *Griswold*, it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship."); *id.* ("[T]he Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons." (citing *Eisenstadt*, 405 U.S. 438)).

94. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

95. CONN. GEN. STAT. § 53–32 (repealed 1969).

96. *See Griswold*, 381 U.S. at 480 (quoting CONN. GEN. STAT. § 53–32 (repealed 1969)).

of the sexual act."[97] *Griswold* recognized that the social and legal status of marriage is independent from the love-sex relationship.[98] The Court's recognition of the liberty interest in the love-sex relationship at the core of marriage facilitated broader application of the liberty interest outside of socially and legally recognized relationships.[99]

After *Griswold*, the Court moved further towards severing this link between procreation, marital privacy, and sexual activity five years later with its decision in *Eisenstadt*.[100] Here, the Court's use of the Equal Protection Clause "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a [single or married] person as the decision whether to bear or beget a child," cemented the intertwined relationship between *Griswold*'s liberty interest and equality protections.[101] By affirming the right to access contraception outside of marriage, the Court solidified the liberty interest in this love-sex relationship as distinct from the right to parent or the right to marry.[102] Justice Stevens's reliance on these cases in his dissent in *Bowers* extended the liberty interest in the love-sex relationship as described by Wellington to same-sex couples.[103] It further reflected the growing social recognition of the validity of the love-sex relationship shared by same-sex couples.[104]

Justice Stevens's dissent in *Bowers* proved instrumental to the unfolding understanding of the liberty interest inherent in queer equality.[105] Indeed, just seventeen years later, it was adopted by the Court in *Lawrence* as the correct statement of what the holding should have been in *Bowers*.[106] In the intervening years, Justice Stevens's analysis provided the legal groundwork necessary to support the evolution of queer legal rights as demanded by

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97. Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 292 (1973).

98. *See id.* at 292–93.

99. *See id.* at 292.

100. *See* Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972).

101. *Id.* at 453.

102. *See id.* at 453–55.

103. Bowers v. Hardwick, 478 U.S. 186, 214, 216 (1986) (Stevens, J., dissenting), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

104. *See, e.g.*, Jim Whelan, *NY Les/Gay Lovers are "Family,"* OUT WEEK, July 24, 1989, at 16, 74 (providing contemporary commentary on the 1989 decision in *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989)). The court in *Braschi* held that for purposes of New York City's rent control policy, surviving same-sex partners should be considered "family." *Braschi*, 543 N.E.2d at 53–55. This case provides an important example of an ad hoc judicial movement towards recognizing LGBTQ functional families. *See id.* at 55.

105. *Bowers*, 478 U.S. at 214–20 (Stevens, J., dissenting).

106. *Lawrence*, 539 U.S. at 578 ("Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here. . . . Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

rapid social change.[107] Although Justice Scalia discounted the *Lawrence* decision in 2003 as being too close in time to *Bowers*, the highly compressed social progress regarding queer rights and acceptance made the recalibration timely.[108] Despite a second backlash against queer rights in the form of the Culture Wars of the 1990s and the retrenchment of family values within the Republican political agenda, queer people continued to assert their dignity and rightful place in public life.[109] Touchpoint issues, such as Ellen DeGeneres's coming out and the murder of Mathew Shepard, changed the conversation for millions of Americans.[110]

3. Lawrence v. Texas

In the intervening years between *Bowers* and *Lawrence*, both state and federal courts worked to refine an expansive, dignity-affirming understanding of individual liberty in the context of sexual intimacy and same-sex relationships as well as broader notions of equality for queer people.[111] State legislatures extended anti-discrimination protections based on sexual orientation and gender identity, and they began to grant recognition to same-sex relationships.[112] The U.S. Supreme Court decided two cases that

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107. *See Bowers*, 478 U.S. at 214–20 (Stevens, J., dissenting).

108. *Lawrence*, 539 U.S. at 586–87 (Scalia, J., dissenting) (deriding the "Court's surprising readiness to reconsider a decision rendered a mere 17 years ago"); *see also* ANDREW R. FLORES, WILLIAMS INST., NATIONAL TRENDS IN PUBLIC OPINION ON LGBT RIGHTS IN THE UNITED STATES 6, 15, 18 (2014).

109. Adam Nagourney, *'Cultural War' of 1992 Moves in From the Fringe*, N.Y. TIMES (Aug. 29, 2012), https://www.nytimes.com/2012/08/30/us/politics/from-the-fringe-in-1992-patrick-j-buchanans-words-now-seem-mainstream.html [https://perma.cc/F3Y2-YE8T] (describing the impact of Pat Buchannan's infamous speech at the 1992 Republican National Convention where he declared that a "cultural war" was ongoing and denounced the Democratic Party's support for abortion, feminism, and "homosexual rights").

110. *See* Lynn Neary, *How Ellen DeGeneres Helped Change the Conversation About Gays*, NPR (Mar. 25, 2013, 4:18 PM), https://www.npr.org/2013/03/25/175265720/how-ellen-degeneres-helped-change-the-conversation-about-gays [https://perma.cc/ZKG6-AUMH]; *see also infra* text accompanying notes 148, 149.

111. *See, e.g.*, High Tech Gays v. Def. Indus. Sec. Clearance Off., 668 F. Supp. 1361, 1369, 1372 (N.D. Cal. 1987) (finding that laws targeting gay men and lesbians must meet heightened scrutiny), *rev'd*, 895 F.2d 563, 571 (9th Cir. 1990) (finding rational-basis review was the appropriate standard).

112. *See, e.g.*, Carey Goldberg, *Gay Couples Are Welcoming Vermont Measure on Civil Union*, N.Y. TIMES (Mar. 18, 2000), https://www.nytimes.com/2000/03/18/us/gay-couples-are-welcoming-vermont-measure-on-civil-union.html?searchResultPosition=4 [https://perma.cc/C9HJ-SQAS].

affirmed the uniquely expressive nature of queer identity. In both *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*[113] and *Boy Scouts of America v. Dale*,[114] the Court found against queer plaintiffs who had been excluded on account of their sexual orientation, but it nonetheless recognized that queer people were political beings with distinct public identities.[115] Most notably, in *Romer v. Evans*, the Court struck down a state constitutional amendment that restricted the ability of municipalities to extend anti-discrimination protections to queer people on the grounds that it failed rational-basis review because animus towards gay men and lesbians was not a legitimate state interest.[116]

These opinions represented an important shift in how the Court viewed queer people, as it moved decisively away from the conduct-based construction of homosexuality adopted by the majority in *Bowers*.[117] Writing for the majority in *Bowers*, Justice White had asserted that "[n]o connection between marriage, family, or procreation on one hand and homosexual activity on the other has been demonstrated."[118] By 2003, however, the growing social and legal acceptance of queer people and their families exposed the fallacy of that assertion.

Accordingly, queer legal advocates were once again hopeful that the U.S. Supreme Court would prohibit criminal sodomy laws when John Geddes Lawrence, Jr. and Tyrone Garner challenged the Texas Homosexual Conduct Law in *Lawrence v. Texas*.[119] Represented by Lambda Legal, Lawrence and Garner had been charged under the Homosexual Sodomy Law in 1998 after police went to Lawrence's apartment to investigate what turned out to be a spurious 911 call and reportedly saw Lawrence and Garner having sex with each other.[120]

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113. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557 (1995).

114. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

115. *Id.* at 653 ("Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."); *Hurley*, 515 U.S. at 573 (reasoning that because "a speaker has the autonomy to choose the content of his own message," requiring parade organizers to include the Irish American Gay, Lesbian and Bisexual Group of Boston—a group that espoused a message the organizers disagreed with—in the city's St. Patrick's Day-Evacuation Parade, violated the First Amendment).

116. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632, 635 (1996) (explaining that Amendment 2 "seems inexplicable by anything but animus" towards gay and lesbian people and holding that because it "lack[ed] a rational relationship to legitimate state interests," it failed the rational-basis review under the Fourteenth Amendment).

117. Bowers v. Hardwick, 478 U.S. 186, 191 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

118. *Id.*

119. *Lawrence*, 539 U.S. 558.

120. *See* CARPENTER, *supra* note 66, at 72–79.

The Texas Homosexual Conduct Law made it a Class C misdemeanor if someone "engage[d] in deviate sexual intercourse with another individual of the same sex."[121] The Texas law had been enacted in 1973 when states started to target same-sex conduct.[122] Lawrence and Garner plead no contest to the charge.[123] They appealed the charges to the state's highest criminal court, and the Supreme Court granted certiorari in 2002.[124] The petitioners argued that the statute should be invalidated on equal protection grounds and substantive due process.[125] Their petition for writ of certiorari led with the equal protection argument, emphasizing the real harm imposed by these laws and citing *Romer v. Evans* for the proposition that the law would fail under any level of review.[126] The petition also argued substantive due process and liberty interests, specifically mentioning "the dimensions of privacy in the home and comparable settings,"[127] but it did not cite to *Roe*.[128]

Justice Kennedy's 2003 majority opinion in *Lawrence* held that the Texas Homosexual Conduct Law violated the concept of liberty guaranteed by the Fourteenth Amendment Due Process Clause.[129] Justice Kennedy rejected the narrow conduct-based approach adopted by the majority in *Bowers* and instead chose to follow the more expansive approach to liberty interests endorsed by Justice Stevens's dissent in *Bowers*.[130] Justice Kennedy concluded that *Bowers* failed to fully address the scope of the liberty interest at stake and the corresponding constitutional remedy demanded.[131] He specifically repudiated the way the majority in *Bowers* framed the question before the Court, namely "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal

121. *Lawrence*, 539 U.S. at 563 (quoting TEX. PENAL CODE ANN. § 21.06(a) (West 2003), *invalidated by Lawrence*, 539 U.S. 558).
122. *See id.* The statute had been adopted in 1973 when the state revised its criminal code to end its proscription on heterosexual anal and oral intercourse. *See id.* at 582.
123. *Id.*
124. *Id.* at 563–64.
125. *See id.* at 564.
126. Petition for Writ of Certiorari at 10–22, *Lawrence*, 539 U.S. 558 (No. 02-102).
127. *Id.* at 27.
128. *See id.* at vi–xi (table of cases cited).
129. *Lawrence*, 539 U.S. at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").
130. *Id.* ("Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here.").
131. *Id.* at 567.

and have done so for a very long time."[132] To the contrary, Justice Kennedy asserted the narrow framing in *Bowers* "discloses the Court's own failure to appreciate the extent of the liberty at stake."[133]

Justice Kennedy explained that state laws criminalizing consensual, noncommercial, adult sex broadly implicated liberty interests because such laws were seeking to control a personal relationship.[134] Justice Kennedy wrote:

> To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.[135]

In other words, Justice Kennedy's *Lawrence* majority opinion expressly acknowledged that the criminalization of identity-inducing conduct resulted in the criminalization of the identity itself. This criminalization of identity directly conflicted with previous liberty-based decisions protecting the right to self-definition, expression, and autonomy.[136]

It is instructive to note that the majority in *Lawrence* chose to adopt Justice Stevens's liberty-centered dissent over Justice Blackmun's privacy-based dissent.[137] Like Justice Stevens, the majority in *Lawrence* relied on

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132. *Id.* at 566–67 (quoting Bowers v. Hardwick, 478 U.S. 186, 190 (1986), *overruled by Lawrence*, 539 U.S. 558).

133. *Id.* at 567.

134. *See id.*

135. *Id.*

136. The majority opinion cites *Griswold* and *Eisenstadt* as foundational cases informing the decision. *Id.* at 564–65. Justice Kennedy relies on both *Casey* and *Romer* in support of recognition of gay and lesbian equality and dignity interests. *Id.* at 573–75.

137. *Id.* at 578. Justice Kennedy quotes Justice Stevens's conclusions:

> Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment.

Id. at 577–78 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

a broader liberty interest rather than a privacy interest relied on in *Roe*.[138] Detailing the broad substantive reach of liberty, the majority in *Lawrence* follows Justice Stevens's reliance on foundational substantive due process cases including *Pierce* and *Meyer*, as well as *Griswold* and *Eisenstadt*'s establishment of the liberty interest in the love-sex relationship.[139] *Lawrence* expands the conduct-induced constitutionally protected love-sex relationship between same-sex couples beyond the bounds of the bedroom and privacy interests to embrace identity.[140] As the majority notes "[f]reedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."[141] *Lawrence* thus acknowledges that in order to protect queer people's liberty interest in self-definition, there must be an equal right to engage in the love-sex relationship described by *Griswold* and extended in *Eisenstadt*.[142]

In recognizing a queer liberty interest in the right to pursue a consensual, private love-sex relationship without criminalization, Justice Kennedy equated the cost that same-sex couples faced with such an intrusion to that endured by the married Connecticut couples denied contraception access in *Griswold*, noting that "[a]fter *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship."[143] The *Lawrence* Court concluded that the intrusive Texas Homosexual Conduct Law reduced the understanding of queer existence to sodomy alone, thereby demeaning the broader scope of queer personhood and diminishing the liberty interests that protect it.[144]

In reaching this conclusion, Justice Kennedy was clear that the Texas law "furthers no legitimate state interest which can justify its intrusion

138. *See generally* Roe v. Wade, 410 U.S. 113 (1973) (holding the right to an abortion was under the right to privacy), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

139. *Lawrence*, 539 U.S. at 564.

140. *See id.* at 575.

141. *Id.* at 562.

142. *See id.* at 578 ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").

143. *Id.* at 565.

144. *See id.* at 578 ("The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").

into the personal and private life of the individual."[145] The Court rejected the appeals of the petitioners and some amici to invalidate the Texas law solely on equal protection grounds, noting that to do so would raise a question as to whether a more broadly drawn statute applying equally to different-sex couples would survive a constitutional challenge.[146] The Court explained:

> Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.[147]

B. Outcast to Equal: Obergefell v. Hodges

The years between *Lawrence* and *Obergefell* saw an acceleration in the legal and social acceptance of queer people, especially in the area of relationship recognition.[148] In addition, Congress passed the Mathew Shepard James Byrd Hate Crimes Act, the first federal statute to provide express protection for individuals on account of their sexual orientation or gender identity.[149] By the time the Court recognized marriage equality in *Obergefell* in 2015, nearly half of the states had LGBTQ non-discrimination protections in place.[150] Only thirteen states had prohibitions against same-sex marriage, largely due to successful court challenges.[151] If *Obergefell* were to be overturned, most states have marriage bans still on the books that could take effect immediately.[152]

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145. *Id.* at 578.
146. *Id.* at 574–75.
147. *Id.* at 575.
148. Justin McCarthy, *Same-Sex Marriage Support Inches Up to New High of 71%*, GALLUP (June 1, 2022), https://news.gallup.com/poll/393197/same-sex-marriage-support-inches-new-high.aspx [https://perma.cc/C84J-7ZTL].
149. 18 U.S.C. § 249.
150. German Lopez, *How Most States Allow Discrimination Against LGBTQ People*, VOX (Aug. 19, 2016, 2:25 PM), https://www.vox.com/2015/4/22/8465027/lgbt-nondiscrimination-laws [https://perma.cc/9Q6A-6SBT].
151. *See generally State-by-State History of Banning and Legalizing Gay Marriage*, BRITANNICA PROCON.ORG (Feb. 16, 2016), https://gaymarriage.procon.org/state-by-state-history-of-banning-and-legalizing-gay-marriage/ [https://perma.cc/EA7F-G9E3].
152. Elaine S. Povich, *Without Obergefell, Most States Would Have Same-Sex Marriage Bans*, PEW: STATELINE (July 7, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/07/without-obergefell-most-states-would-have-same-sex-marriage-bans [https://perma.cc/S5QW-KDZT] ("Thirty-five states ban same-sex

Justice Kennedy's majority opinion in *Obergefell* viewed the question of whether a same-sex couple had a fundamental right to marry through a broad lens, similar to that adopted in *Lawrence*.[153] In the context of marriage equality, Justice Kennedy continued to build on his interlocking theory of equal protection and fundamental rights that helped realize the contemporary queer subject.[154]

1. The Push for Marriage Equality

The same year the Court decided *Lawrence*, Massachusetts became the first state to mandate marriage equality.[155] In *Goodridge v. Department of Public Health*, the Massachusetts Supreme Court held that the failure to issue marriage licenses to same-sex couples violated the state constitution.[156] The Massachusetts Supreme Court based its decision solely on state constitutional law, but it also quoted *Lawrence* to support its broad reading of its state constitution: "[o]ur obligation is to define the liberty of all, not to mandate our own moral code."[157] Although other states soon followed suit, the period between *Lawrence* and *Obergefell* was marked by contentious ballot initiatives, conflicting court decisions, and a confusing patchwork of relationship recognition laws.[158]

Lawrence had established a uniform base level of legal tolerance for queer relationships.[159] In his dissent in *Lawrence*, Justice Scalia had declared that the decision made same-sex marriage an inevitability, concluding that the Court had dismantled "the structure of constitutional law that ha[d] permitted a distinction to be made between heterosexual and homosexual

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marriage in their constitutions, state law, or both, according to the National Conference of State Legislatures and *Stateline* research.").

153. *See* Obergefell v. Hodges, 576 U.S. 644, 665 (2015) (citing Lawrence v. Texas, 539 U.S. 558, 574 (2003)).

154. *See id.* at 672–74.

155. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969–70 (Mass. 2003).

156. *Id.* at 968.

157. *Id.* at 948 (quoting *Lawrence*, 539 U.S. at 571).

158. *See, e.g.*, Gizelle Lugo, *Same Sex Marriage Ballot Initiatives: Voters in Strong Backing for Equality*, GUARDIAN (Nov. 7, 2012, 1:44 PM), https://www.theguardian.com/world/2012/nov/07/same-sex-marriage-ballot-initiatives [https://perma.cc/WF8M-KBNN].

159. Obergefell v. Hodges, 576 U.S. 644, 667 (2015). Justice Kennedy described this tolerance induced limited-liberty, writing that "while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty." *Id.*

unions, insofar as formal recognition of marriage is concerned."[160] However, the path to marriage equality was far from clear or steady in the years immediately after *Lawrence*, when successes and setbacks occurred in quick succession even within the same state.[161] For example, California voters overturned a state supreme court decision mandating marriage equality in a ballot initiative known as Proposition 8.[162] Litigation was necessary to establish the continued validity of the marriages that had taken place during the seven-month interval when same-sex marriage was legal.[163]

The road to marriage equality was long and winding.[164] Gay liberation and the LGBTQ rights movement increased the visibility of queer people and their families.[165] The LGBTQ community's response to the HIV/AIDS epidemic further humanized queer people and moved committed same-sex relationships towards the mainstream.[166] Although there were a handful of marriage cases brought in the early days of the gay liberation movement in the 1970s,[167] marriage did not become a widely shared goal of the queer rights movement until the 1990s.[168] At that time, states began experimenting with different forms of relationship recognition, such as domestic partnerships that had begun in the marketplace as a way to secure health insurance benefits for same-sex partners.[169]

Health insurance benefits were only one example of the tangible benefits attached to marriage.[170] In the 1980s, the HIV/AIDS epidemic and the

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160. *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).

161. *The Journey to Marriage Equality in the United States*, HUM. RTS. CAMPAIGN, https://www.hrc.org/our-work/stories/the-journey-to-marriage-equality-in-the-united-states [https://perma.cc/KM7A-ZWP2].

162. Hollingsworth v. Perry, 570 U.S. 693, 701 (2013).

163. Strauss v. Horton, 207 P.3d 48, 122 (Cal. 2009).

164. *See The Journey to Marriage Equality in the United States*, *supra* note 161.

165. *See* JAGOSE, *supra* note at 59, at 42–43.

166. Samantha Vincenty, *How Princess Diana Changed the Way We Think About AIDS*, OPRAH DAILY (Nov. 27, 2020), https://www.oprahdaily.com/entertainment/tv-movies/a34550472/princess-diana-aids-charity-work/ [https://perma.cc/NH8S-538H].

167. *See, e.g.*, Eric Eckholm, *The Same-Sex Couple Who Got a Marriage License in 1971*, N.Y. TIMES (May 16, 2015), https://www.nytimes.com/2015/05/17/us/the-same-sex-couple-who-got-a-marriage-license-in-1971.html [https://perma.cc/V2CJ-PXFH].

168. For example, in 1989 a very public debate over marriage played out in the pages of OUT/LOOK Magazine in the form of two responsive articles written by well-known LGBTQ activists, Paula Ettelbrick and Tom Stoddard. Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation*?, 2 OUT/LOOK: NAT'L GAY & LESBIAN Q., no. 2, 1989, at 9, 14–17; Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, 2 OUT/LOOK: NAT'L GAY & LESBIAN Q., no. 2, 1989, at 9, 9–13.

169. *See, e.g.*, Act 383, ch. 572C, 1997 Haw. Sess. Laws 1211 (1997) (codified as amended at HAW. REV. STAT. ANN. § 572C (West 2022)).

170. Lina Guillen, *Marriage Rights and Benefits*, NOLO, https://www.nolo.com/legal-encyclopedia/marriage-rights-benefits-30190.html#:~:text=Government%20Benefits,Receiving%20public%20assistance%20benefits [https://perma.cc/93ZE-B4QF].

high-profile guardianship case of Karen Kowalski demonstrated the legal fragility of same-sex relations, leading queer advocates to argue for the legal recognition of same-sex relationships.[171] At the federal level, there were an estimated 1,138 rights and responsibilities in the U.S. Code that hinged on marital status, including social security benefits and numerous tax benefits.[172] On the state level, marriage secured important inheritance, real property, guardianship, and medical decision making rights.[173] Without legal recognition, a same-sex partner was considered a legal stranger and would have no rights upon the dissolution of the relationship or the illness or death of their partner.[174]

2. The Defense of Marriage Act (DOMA)

In the 1990s, marriage litigation in Hawaii resulted in a series of favorable rulings that were later blocked by legislative and constitutional amendments.[175] The Hawaii state legislature eventually enacted the category of Reciprocal Beneficiary Relationship that provided some of the benefits typically associated with marriage to same-sex couples who chose to register.[176] The Hawaii litigation prompted a backlash that led a number of states to prohibit same-sex marriage through legislation and ballot initiatives that amended their state constitutions.[177] It also prompted Congress to enact the Defense of Marriage Act (DOMA) in 1996.[178]

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171. GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 111–13 (2004) (discussing impact of HIV/AIDS epidemic).

172. In 2004, the U.S. General Accounting Office found 1,138 federal laws implicated by DOMA. U.S. GEN. ACCOUNTING OFF., GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004).

173. Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (finding marriage ban violated the Equal Rights Amendment to the Hawai'i State Constitution and, therefore, the state must establish a compelling state interest).

174. *See* Goodridge v. Dep't of Pub. Health, 789 N.E.2d 941, 957 (Mass. 2003) (citing Baker v. State, 744 A.2d 864, 889 (Vt. 1999)).

175. Michael D. Sant'Ambrogio & Sylvia A. Law, Baehr v. Lewin *and the Long Road to Marriage Equality*, 33 U. HAW. L. REV. 705, 711–12 (2011).

176. *See, e.g.*, HAW. REV. STAT. § 572C.

177. HAW. CONST. art. I, § 23 (1998) ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

178. The Defense of Marriage Act (DOMA), Pub. L. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (1996) and 28 U.S.C. 1738C (1996)).

DOMA was passed by overwhelming bipartisan majorities in both houses and signed into law by President Bill Clinton.[179] It provided that for all federal purposes marriage was between one man and one woman.[180] In addition, DOMA purported to grant states the power to refuse to recognize same-sex marriages performed in sister states.[181] Prior to DOMA, federal law had traditionally looked to state law to determine whether an individual was married.[182] Although it was seven years before Massachusetts recognized marriage equality, DOMA sent a powerful signal regarding the value of same-sex relationships.

Once states began to mandate marriage equality, DOMA created a level of complexity that further alienated queer couples and families from the law because their marriages were disregarded for federal purposes.[183] Of course, their marriages were also not recognized in the states with marriage bans or other lesser forms of relationship recognition.[184] This denial of legal recognition for same-sex couples enforced an artificial invisibility that was contrary to the lived reality of queer people, families, and the majority

179. Bill Clinton, Opinion, *It's Time to Overturn DOMA*, WASH. POST (Mar. 7, 2013), https://www.washingtonpost.com/opinions/bill-clinton-its-time-to-overturn-doma/2013/03/07/fc184408-8747-11e2-98a3-b3db6b9ac586_story.html [https://perma.cc/VLR3-YEYV] (explaining that DOMA was a mistake); Todd S. Purdum, *Gay Rights Groups Attack Clinton on Midnight Signing*, N.Y. TIMES (Sept. 22, 1996), https://www.nytimes.com/1996/09/22/us/gay-rights-groups-attack-clinton-on-midnight-signing.html [https://perma.cc/N6WT-V28D].

180. 1 U.S.C. § 7 (1996), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013) (adding the definition of "marriage" and "spouse" to Title 1 of the United States Code, also known as the Dictionary Act).

181. *See* 28 U.S.C. § 1738C (1996), *invalidated by* Obergefell v. Hodges, 576 U.S. 644 (2015). Section 2 of DOMA purported to authorize states to refuse to recognize same-sex marriages from sister states in order to stop the potential spread of same-sex marriage. *Id.*

182. S*ee, e.g.*, Boyer v. Comm'r, 732 F.2d 191, 194 (D.C. Cir. 1984) (holding that the law of the state of domicile controls).

183. Sharon Scales Rostosky et al., *Marriage Amendments and Psychological Distress in Lesbian, Gay, and Bisexual (LGB) Adults*, 56 J. COUNSELING PSYCH. 56, 56–57, 62–63 (2009) (noting a significant increase in psychological distress among the LGB population living in states with marriage bans). Researchers found that in addition to the legal impact of the bans, the public debate regarding LGBTQ people leading up to them was particularly damaging. *Id.* at 57 ("Marriage-amendment campaigns, as with other campaigns aimed at limiting the rights of LGB citizens, are accompanied by inflammatory anti-LGB rhetoric disseminated in the print, electronic, and broadcast media that reinforces stigma, prejudice, and discrimination." (citing CHIP BERLET & PAM CHAMBERLAIN, POL. RSCH. ASSOCS., RUNNING AGAINST SODOM AND OSAMA: THE CHRISTIAN RIGHT, VALUES VOTERS AND THE CULTURE WARS IN 2006 (2006))).

184. *See id.* at 57–58.

of Americans.[185] Despite the prevalence of marriage bans, an estimated 2.4 million children nationwide were being raised in queer families.[186]

DOMA and state-level marriage bans became increasingly out-of-step with the growing legal and social acceptance of queer relationships and families.[187] In 2013, a same-sex widow, Edie Windsor, challenged DOMA on the grounds that it was unconstitutional in violation of the equal protection guarantees of the Fifth Amendment.[188] Windsor had been denied the benefit of the marital deduction for federal estate tax purposes when her wife died on account of DOMA and received a tax bill of $363,000.[189] The Obama Administration refused to defend DOMA, conceding that it was unconstitutional, but congressional interests intervened to defend their statute.[190]

Justice Kennedy authored the majority opinion in *United States v. Windsor* that invalidated the provision of DOMA that refused to recognize same-sex marriages for federal purposes.[191] Focusing on the legal disabilities

185. GARY J. GATES & ABIGAIL M. COOKE, WILLIAM INST., UNITED STATES CENSUS SNAPSHOT: 2010 (2010).

186. Gary J. Gates, *Marriage and Family: LGBT Individuals and Same-Sex Couples*, 25 FUTURE CHILD., no. 2, 2015, at 67, 72 ("As many as 2 million and 3.7 million children under age 18 may have an LGBTQ parent, it's likely that only about 200,000 are being raised by a same-sex couple." (citing GARY J. GATES, WILLIAM INST., LGBT PARENTING IN THE UNITED STATES 2–3 (2013))).

187. KARLYN BOWMAN, ANDREW RUGG, & JENNIFER MARSICO, AM. ENTER. INST., POLLS ON ATTITUDES ON HOMOSEXUALITY AND GAY MARRIAGE 4 (2013). The article describes the results of polling conducted between 1973 and 2010 by the National Opinion Research Center at the University of Chicago. *Id.* In 1996, only twenty-seven percent of Americans thought that same-sex marriages should be legal. *Id.* at 32. By 2013, fifty-three percent of Americans were in favor of marriage equality. *Id.*

188. Eliza Gray, *Edith Windsor, The Unlikely Activist*, TIME (Dec. 11, 2013), http://poy.time.com/2013/12/11/runner-up-edith-windsor-the-unlikely-activist/ [perma.cc/TD5P-7RRA] (noting that Edith has been "transformed into an icon of the gay rights movement").

189. Andrew M. Harris, *Widow's $363,000 Tax Bill Led to Obama Shift on Marriage Act*, BLOOMBERG L. (Feb. 27, 2011, 9:01 PM), http://www.bloomberg.com/news/2011-02-28/a-363-000-tax-bill-to-widow-led-to-obama-shift-in-defense-of-marriage-act.html [perma.cc/3MCN-BWC9] ("[Thea's] death triggered a $363,053 federal tax bill from which her widow would have been exempt had she been married to a man . . . .").

190. Jake Tapper, Sunlen Miller & Devin Dwyer, *Obama Administration Drops Legal Defense of 'Marriage Act,'* ABC NEWS (Feb. 23, 2011, 9:37 AM), https://abcnews.go.com/Politics/obama-administration-drops-legal-defense-marriage-act/story?id=12981242 [perma.cc/22MM-9N7K]; Jake Sherman, *House GOP Moves to Defend DOMA*, POLITICO (Mar. 9, 2011, 6:34 PM), https://www.politico.com/story/2011/03/house-gop-moves-to-defend-doma-050987 [https://perma.cc/W4WH-UQFC].

191. United States v. Windsor, 570 U.S. 744, 769 (2013) (holding that Section 3 of DOMA violated the Due Process and Equal Protection Clauses of the Fifth Amendment).

that DOMA imposed on married same-sex couples, Justice Kennedy explained that DOMA "demean[ed] the couple, whose moral and sexual choices the Constitution protects."[192] He concluded:

> The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.[193]

As a result of the Court's holding, legally-married same-sex couples were considered married for federal purposes and, therefore, eligible to receive federal spousal benefits.[194] However, *Windsor* did not reach the constitutionality of the other section of DOMA that purported to allow states to refuse to recognize same-sex marriages performed in sister states nor did it address the choice of law question of what law applies to determine whether a couple is considered married.[195] Accordingly, even after *Windsor*, queer couples and their families continued to face a patchwork of state-based relationship recognition schemes.[196] For example, if a couple were married in a state with marriage equality, but moved to a state with a marriage ban, the federal government would consider them married for some purposes like federal income tax, but unmarried for others, like Social Security benefits.[197] In some ways, *Windsor* further exacerbated geographic and socio-economic disparities facing vulnerable queer people, including

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192. *Id.* at 772.

193. *Id.* at 775.

194. Press Release, Off. Pub. Affs. U.S. Dep't Just., One Year After Supreme Court's Historic Windsor Decision, Attorney General Holder Issues Report Outlining Obama Administration's Work to Extend Federal Benefits to Same-Sex Married Couples (June 20, 2014), https://www.justice.gov/opa/pr/one-year-after-supreme-court-s-historic-windsor-decision-attorney-general-holder-issues [perma.cc/Z9V8-EJFT].

195. 28 U.S.C. § 1783C (1996), *invalidated by* Obergefell v. Hodges, 576 U.S. 644 (2015). Section 2 of DOMA purported to authorize states to refuse to recognize same-sex marriages from sister states in order to stop the potential spread of same-sex marriage. *Id.*

196. Samantha Schmid, Comment, *Income Tax Treatment of Same-Sex Couples:* Windsor *vs State Marriage Bans*, 98 MARQ. L. REV. 1805, 1825–26, 1830 (2015).

197. Press Release, Hum. Rts. Campaign, Under Obama, Windsor Implementation Constitutes the Largest Conferral of LGBT Rights in History (June 20, 2014), https://www.hrc.org/press-releases/under-obama-windsor-implementation-constitutes-the-largest-conferral-of-rig [perma.cc/87PB-8TPC] (noting Obama administration adopted a "state-of-celebration" rule that it would recognize same-sex marriage wherever permitted by relevant statutory provisions, provided the marriage was valid in the state of celebration). Any remaining uncertainty was resolved in 2015 when *Obergefell v. Hodges* mandated nationwide marriage equality and also invalidated Section 2 of DOMA. *See Obergefell*, 576 U.S. 644.

communities of color and parents living in predominantly red states.[198] Two years later, Justice Kennedy acknowledged the detrimental weight of this constantly shifting marriage status on couples and their families in his majority decision in *Obergefell v. Hodges*.[199]

3. Obergefell v. Hodges

Announced on the two-year anniversary of *Windsor* and the twelfth anniversary of *Lawrence*, the 2015 U.S. Supreme Court decision in *Obergefell v. Hodges* mandated marriage equality nationwide.[200] Writing for the majority, Justice Kennedy once again articulated the interlocking nature of liberty and equality interests in the context of queer relationships and families.[201] Citing *Loving v. Virginia*, the majority opinion affirmed that marriage is a fundamental right guaranteed under the Due Process Clause of the Fourteenth Amendment and that the denial of that right to same-sex couples violated the Equal Protection Clause of the Fourteenth Amendment.[202] Justice Kennedy concluded:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.[203]

Justice Kennedy's majority opinion specifically recognized that same-sex couples had a fundamental liberty interest in the right to marry, explaining that it was inherent in the concept of individual autonomy.[204] Rooted in the characterization of individual expression and self-definition as articulated

198. *See* Sabrina Tavernise, *Parenting by Gays More Common in the South, Census Shows*, N.Y. TIMES (Jan. 18, 2011), https://www.nytimes.com/2011/01/19/us/19gays.html [https://perma.cc/98ML-UPLE].
199. *See Obergefell*, 576 U.S. at 668 ("Marriage also affords the permanency and stability important to children's best interests.").
200. *Id.* at 680–81.
201. *Id.* at 672.
202. *Id.* at 664–65, 672–73 (Loving v. Virginia, 388 U.S. 1, 12 (1967)).
203. *Id.* at 681.
204. *Id.* at 675.

in *Griswold* and *Eisenstadt*, the Court described the fundamental right for same-sex couples to marry as one of certain "personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs."[205] Justice Kennedy also writes that this liberty interest intersects with protections under the Equal Protection Clause, drawing a connection to the dynamic reflected in *Loving v. Virginia*.[206] The denial of the fundamental right to marriage to same-sex couples, Kennedy concluded, was in essence "unequal" drawing from the long history of subordination, disapproval, and continuing harm of discrimination on gays and lesbians.[207]

Obergefell was actually four separate consolidated cases from four different states involving fourteen same-sex couples and two men whose same-sex partners had died.[208] The petitioners all claimed that state officials had either denied them the right to marry or refused to recognize their marriages that were lawfully performed in another state in violation of the Due Process and the Equal Protection Clauses of the Fourteenth Amendment.[209] The petitioner in the lead case, Jim Obergefell, was a same-sex widower who lived in Ohio where there was a marriage ban.[210] Shortly before his partner's death from amyotrophic lateral sclerosis, they had traveled by a medical transport plane to Maryland where they were legally married on the tarmac.[211] When Ohio refused to include the designation of "married" on his husband's death certificate, Obergefell sued to have his marriage recognized.[212]

Justice Kennedy's majority opinion in *Obergefell* provides a comprehensive survey of the contemporary Fourteenth Amendment framework of the interlocking Due Process and Equal Protection Clauses.[213] Justice Kennedy argued that the independent, but intersecting nature of substantive due process and equal protection, as refined in *Loving* and *Lawrence*, are "not always coextensive, yet in some instances each may be instructive as to

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205. *Id.* at 645.
206. *See id.* at 675.
207. *Id.* at 647.
208. *Id.* at 653–54 (noting the cases originated from Kentucky, Michigan, Ohio, and Tennessee).
209. *Id.* at 655.
210. *Id.* at 658.
211. Michael S. Rosenwald, *How Jim Obergefell Became the Face of the Supreme Court Gay Marriage Case*, WASH. POST (Apr. 6, 2015), https://www.washingtonpost.com/local/how-jim-obergefell-became-the-face-of-the-supreme-court-gay-marriage-case/2015/04/06/3740433c-d958-11e4-b3f2-607bd612aeac_story.html [perma.cc/PTG6-DP65].
212. *Id.*
213. *See generally* Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147 (2015) (discussing the two traditional Fourteenth Amendment frameworks as applied by Justice Kennedy in *Obergefell*).

the meaning and reach of the other."[214] He concluded that application of an equal protection analysis that includes a discussion of the harm and damage caused by the deprivation of a right can expose that right as fundamental and subject to the Due Process Clause analysis.[215] When this dynamic occurs, Justice Kennedy explained that the equal protection analysis "furthers our understanding of what freedom is and must become."[216]

Justice Kennedy relied on *Loving v. Virginia* as an example of how the "synergy" between the Due Process and Equal Protection Clauses of the Fourteenth Amendment strengthens the independent protections.[217] *Loving* held that the Virginia criminal anti-miscegenation law violated both the Equal Protection and the Due Process Clauses.[218] Justice Kennedy wrote that "[t]he reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions."[219] In addition, Justice Kennedy traced the evolution of marriage and the status of women from the erosion of coverture to the dissolution of invidious sex-based classifications for marriage in the 1970s and 1980s.[220] Justice Kennedy wrote that "the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[221] Under this logic, the fact that legal status of married women in 1990 would be unrecognizable to a family law court in 1890 should not necessitate the deprivation of current rights, but rather an acknowledgement of past wrongs.[222]

Both the example of anti-miscegenation laws and coverture have direct relevance to the legal construction of queer identity, which is similarly dynamic and, of course, intersects across race and gender, as well as other vectors.[223] The anti-sodomy laws and marriage bans contributed to the

214. *Obergefell*, 576 U.S. at 672.
215. *See id.* at 672–73.
216. *Id.* at 672.
217. *See id.* at 672–73.
218. Loving v. Virginia, 388 U.S. 1, 12 (1967).
219. *Obergefell*, 576 U.S. at 673.
220. *Id.* at 673–74.
221. *Id.* at 673.
222. *Id.* at 659–60.
223. *See* R.A. Lenhardt, *Beyond Analogy:* Perez v. Sharp*, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CALIF. L. REV. 839, 878–88 (2008) (discussing the relationship between antimiscegenation laws and same-sex marriage bans, specifically how these two laws impact gender and sex identity roles).

stigmatization and disparate treatment of queer people and have had significant impact on their lived experience.[224] It is important to remember that the fundamental guarantee of liberty and the rights identified in *Obergefell* are not new.[225] The Court does not create new fundamental rights, but rather recognizes existing rights with the help of new interpretations that are informed by new information.[226] In the case of queer people, this new information relates to the recognition that queer people form relationships and families that are worthy of respect and entitled to dignity.[227]

In his dissent, Chief Justice Roberts dismissed this interlocking rights analysis, characterizing it as a judicial sleight of hand to bolster two interdependent claims that are insufficient on their own in order to warrant constitutional protection.[228] However, Justice Kennedy goes to great pains in the majority opinion to articulate how both Equal Protection and Due Process commands exist independently in the claims presented.[229] Justice Kennedy's equal protection analysis is informed by the demeaning impact or harm of the marriage bans, which in turn illustrates why a substantive due process analysis is necessary.[230] The initial equality inquiry does not create the right itself because a demeaning impact cannot make a denial of a right or policy unconstitutional, but instead exposes why the denial was unconstitutional in the first place.[231] It should go without saying that there is something especially disturbing when state-sponsored discrimination restricts access to a fundamental right.[232]

The dizzying and discriminatory impact of the state marriage bans that existed in 2015 provided just such an instance where equal access to a fundamental right was denied due to prejudice and bias.[233] The patchwork recognition schemes for same-sex couples exposed the precarious nature of the legal status of queer couples and placed the legal fragility of queer

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224. *See* Rostosky et al., *supra* note 183.
225. *See Obergefell*, 576 U.S. at 665–69.
226. *See id.* at 671–72.
227. *Id.* at 666–68.
228. *See id.* at 706–07 (Roberts, C.J. dissenting). Chief Justice Roberts' dissent dismisses the majority's treatment of the equal protection claim alongside the due process claim. *Id.* ("Absent from [the majority's discussion of the Equal Protection and due process claim], however, is anything resembling our usual framework for deciding equal protection cases.").
229. *Id.* at 672, 675 (majority opinion).
230. *Obergefell*, 576 U.S. at 672–73, 675.
231. *See id.* at 663–72.
232. *See* Loving v. Virginia, 388 U.S. 1, 11–12 (1967).
233. University of Virginia School of Law, *"After* Windsor*," A UVA Law Talk on LGBT Rights Following* United States v. Windsor, YOUTUBE (Feb. 26, 2014), https://www.youtube.com/watch?v=rg6XRg6q9V0 [https://perma.cc/4PG9-3LYL] (providing a contemporary analysis of the status of individual rights of same-sex couples and families in 2014).

relationships that expired at state lines in stark relief.[234] *Obergefell* recognized that although an individual's statutory legal rights may begin and end at state lines, their Constitutional rights to equality, liberty, and dignity were portable and would travel with them regardless of where they were in the United States.[235] Justice Kennedy concluded,

> It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: Same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.[236]

In *Obergefell*, Justice Kennedy also revisited his majority opinion in *Lawrence*, specifically exploring how the nature of the harm of discriminatory laws, especially on vulnerable people, can inform a constitutional inquiry.[237] *Lawrence* underscored the "demeaning" aspects of the Texas Homosexual Conduct Law.[238] Justice Kennedy also referenced the demeaning nature of DOMA in *Windsor* and the marriage bans in *Obergefell*.[239] The construction of whether a law or policy is "demeaning" directly triggers equal protection concerns.[240] In the majority opinion in *Obergefell*, Kennedy wrote that,

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234. *See* Steve Sanders, *Next on the Agenda for Marriage Equality Litigators . . .*, SCOTUSBLOG (June 26, 2013, 5:40 PM), https://www.scotusblog.com/2013/06/next-on-the-agenda-for-marriage-equality-litigators/ [perma.cc/CWA2-2B23]. Sanders, addressing the problematic patchwork left unsolved by *Windsor*, stated that "[j]ust like Section 3 of DOMA, these conflicting state regimes 'place same-sex couples in an unstable position of being in a second-tier marriage.'" *Id.* (quoting United States v. Windsor, 570 U.S. 744, 772 (2013)). Sanders argues that although "[t]he Court acknowledges that the 'incidents, benefits, and obligations of marriage . . . may vary . . . from one state to the next,'" it does not explain that "the very *status* of marriage [can] vary from state to state." *Id.* (quoting *Windsor*, 570 U.S. at 768).

235. *See* Obergefell, 576 U.S. at 674–76.

236. *Id.* at 675.

237. *See id.* at 674–75.

238. Lawrence v. Texas, 539 U. S. 558, 575–76 (2003).

239. *See Windsor*, 570 U.S. at 772; *see also Obergefell*, 576 U.S. at 675.

240. *See Obergefell*, 576 U.S. at 672–73.

> [a]lthough *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control their destiny by making their private sexual conduct a crime."[241]

Accordingly, the interlocking analysis of due process and equal protection serve as a powerful foundation for today's right to self-definition necessary for the realization of queer identity.[242] The interlocking nature of these rights in the context of both marriage and queer sexuality is strengthening and mutually enforcing, not diminishing.[243]

III. QUEER RIGHTS AND ABORTION ACCESS DISTINGUISHED

Both queer rights and abortion access have undeniable liberatory value, and they are both essential parts of a progressive platform for inclusive social and political change. The recognition of a constitutional right to access a safe, legal abortion for the past fifty years has facilitated greater economic, social, and educational equality for women.[244] Similarly, the rights recognized in *Lawrence* and *Obergefell* have moved queer people towards broader equality and promoted equal access to opportunity.[245]

This section acknowledges that although queer rights and abortion access have both led to significant equality gains, they are fundamentally distinct rights, both with respect to their nature and legal foundation. It is important to examine these differences and to avoid conflating the equality-promoting impact of a right with the nature or legal basis of the right itself. These functional and legal differences are important not only for understanding

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241. *Id.* at 675 (quoting *Lawrence*, 539 U.S. at 578).

242. *See id.* at 672.

243. *See id.* at 672–73.

244. *See, e.g.*, Brief of Amici Curiae Economists in Support of Respondents, *supra* note 17, at 13 (citing Kelly Jones, *At a Crossroads: The Impact of Abortion Access on Future Economic Outcomes* 14–16 (Am. Univ., Dep't of Econ., Working Paper No. 2021-02, 2021)); *see also* Asha Banerjee, *Abortion Rights are Economic Rights: Overturning* Roe v. Wade *Would be an Economic Catastrophe for Millions of Women*, ECON. POL'Y INST.: WORKING ECON. BLOG (May 18, 2022, 9:26 AM), https://www.epi.org/blog/abortion-rights/ [perma.cc/9Y3E-836R].

245. *See* CHRISTY MALLORY & BRAD SEARS, THE ECONOMIC IMPACT OF MARRIAGE EQUALITY FIVE YEARS AFTER *OBERGEFELL V. HODGES*, WILLIAMS INST. (2020); Angela K. Perone, *Health Implications of the Supreme Court's Obergefell vs. Hodges Marriage Equality Decision*, 2 LGBT HEALTH 196, 197–98 (2015). Perone finds that "[w]hile discrimination against LGBT persons will continue to negatively affect LGBT health, the *Obergefell* decision, however, moves LGBT persons one step closer to better health by affirming marriage equality and thus the dignity of LGBT couples to have equal rights as their opposite-sexed peers in this legal arena." Perone, *supra*, at 197.

the methods of subordination that lead to their denial, but also for crafting forward-looking legal and political arguments to support their preservation.

As explained below, queer rights are constitutive of contemporary queer identity and are based on liberty and equality principles. The nature of queer rights demands the liberty to participate in public life with equal dignity and recognition.[246] Abortion rights represent a similar exercise of personal autonomy that is integral to individual personhood, but they have been based on privacy considerations and liberty interests presumably within a healthcare context.[247] Although abortion access may be a necessary prerequisite to full participation in public life, abortion rights have been framed against significant countervailing interests, such as fetal life, the integrity of the medical profession, and maternal well-being.[248] Currently, queer rights are not burdened by such countervailing interests, but Part V warns that certain political dynamics could attempt to manufacture competing interests to serve makeweight when evaluating queer rights.

A. The Nature of the Rights

The queer rights discussed in Part II are broad spectrum liberty interests. The right to be free from criminalization and the right to marry may protect seemingly narrow points of conduct, but this conduct is essential to forming the constellation that makes up a queer identity. They guarantee queer freedom and the ability to live with equal dignity. The act of engaging in queer sex or being able to marry a same-sex partner is the expression of a shared identity. These acts are identity-inducing conduct. The former, done in private, is the essential act of self-definition as a queer person. The latter is freedom to participate fully in the community and in public life more generally as this person—not in spite of it. As explained below, Justice Kennedy's interlocking approach to Fourteenth Amendment protections for queer people reflects this broad complexity in the nature of queer rights and their relationship to queer identity.[249]

246. *See Obergefell*, 576 U.S. at 669–70.

247. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

248. *See infra* text accompanying notes 402–04 (discussing Justice Alito's description of legitimate state interests in *Dobbs*).

249. *See Obergefell*, 576 U.S. at 672.

The privacy principles that animated *Roe* were never a source of recognition for queer equality.[250] Justice Brandeis famously explained that the essence of privacy is the right "to be let alone."[251] Privacy may preserve dignity, but it does not affirmatively recognize it.[252] Although privacy is a component of engaging in sexual conduct, identifying as gay, lesbian, bisexual or queer requires the opposite. As the U.S. Supreme Court has held, an unapologetically out individual is uniquely expressive and sends a very public message.[253] The interlocking rights of equality and liberty protect something beyond this promise of government non-intrusion. Liberty and equality offer the promise to be *let in*—the right to participate and to be seen.[254] The self-definition articulated in *Lawrence* and recognized by *Obergefell* is unattainable in a vacuum of privacy.[255] Definition demands exposure, comparison, and understanding. Queerness is defined against the relief of broader society. As Martha Shelley shouted in the earliest days of gay liberation in her influential essay *Gay Is Good*, "[W]hen I am among gays or in bed with another woman, I am a person, not a lesbian. When I am observable to the straight world, I become gay. You are my litmus paper."[256]

The nature of abortion rights is inherently narrower and more discrete. Abortion access is not identity-inducing, although the impact may be life-defining.[257] People who have an abortion are not defined as a class socially or legally.[258] One's abortion history is not linked to a shared identity outside of pregnancy. The narrowness of this right does not diminish its importance or its validity. It is more closely related to other fundamental rights involving

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250. *See* Roe v. Wade, 410 U.S. 113, 153–54 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.

251. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("The right to be let alone—the most comprehensive of rights and the right most valued by civilized men."), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).

252. *See id.*

253. Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000) ("Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.").

254. *See Olmstead*, 576 U.S. at 478–79.

255. *See* Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

256. MARTHA SHELLEY, CROSSING THE DMZ 4 (1974).

257. *See* Katha Pollitt, *How the Right to Legal Abortion Changed the Arc of All Women's Lives*, NEW YORKER (May 24, 2019), https://www.newyorker.com/news/essay/how-abortion-changed-the-arc-of-womens-lives [https://perma.cc/8ZW9-LPPN].

258. *See* Laura Kurtzman, *Five Years After Abortion, Nearly All Women Say It Was the Right Decision, Study Finds*, UCSF (Jan. 13, 2020), https://www.ucsf.edu/news/2020/01/416421/five-years-after-abortion-nearly-all-women-say-it-was-right-decision-study [https://perma.cc/MRR7-N6M8].

healthcare, including the right to decline medical intervention.[259] In this regard, abortion rights have been characterized as private decisions that should be made in consultation with a medical professional.[260] It is critical healthcare and can be lifesaving when a pregnancy cannot be carried safely to term.[261] Abortions that are not medically indicated may still be life affirming for the mother.[262] Access to abortion recognizes the personhood of women and pregnant people and the value in future choices that they will make as a result of not carrying an unwanted child to term.[263] The ability to seek and obtain this medical procedure reflects societal trust in their judgment and investment in their broader contributions beyond pregnancy.[264]

The inherently private nature of abortion is analogous to that of queer sex. It is possible to make a strong case that access to abortion is an essential exercise of bodily autonomy that is a necessary condition for personhood. Arguably, it was difficult to comprehend the importance of abortion rights during a time of constitutionally protected abortion access.[265] Justice

259. *See* Shea Flanagan, Note, *Decisions in the Dark: Why "Pregnancy Exclusion" Statutes are Unconstitutional and Unethical*, 114 NW. U. L. REV. 969, 1000 (2020); Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred . . . than the right of every individual to the possession and control of his own person . . . ."); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269 (1990) ("Every [adult] . . . has a right to determine what shall be done with his own body . . . ." (quoting Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 129 (N.Y. 1914), *overruled by* Bing v. Thunig, 2 N.Y.2d 656 (1957))); *see also* Winston v. Lee, 470 U.S. 753, 766–67 (1985) (forced surgery); Rochin v. California, 342 U.S. 165 (1952) (forced stomach pumping); Washington v. Harper, 494 U.S. 210 (1990) (forced administration of antipsychotic drugs).

260. *Facts Are Important: Abortion is Healthcare*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare [https://perma.cc/X9WR-9ATH].

261. *Fact Check-Termination of Pregnancy can be Necessary to Save a Woman's Life, Experts Say*, REUTERS (Dec. 27, 2021, 8:39 AM), https://www.reuters.com/article/factcheck-abortion-false/fact-check-termination-of-pregnancy-can-be-necessary-to-save-a-womans-life-experts-say-idUSL1N2TC0VD [https://perma.cc/KR62-P33M].

262. *See* Kurtzman, *supra* note 258.

263. Emily M. Johnston, *Research Shows Access to Legal Abortion Improves Women's Lives*, URBAN INST. (May 27, 2022), https://www.urban.org/urban-wire/research-shows-access-legal-abortion-improves-womens-lives [https://perma.cc/WRX9-KKBQ].

264. *See* David M. Smolin, *Cultural and Technological Obstacles to the Mainstreaming of Abortion*, 13 ST. LOUIS U. PUB. L. REV. 261, 275–77 (1993).

265. *See* Anne Branigin & Samantha Chery, *Women of Color Will Be Most Impacted by the End of* Roe*, Experts Say*, WASH. POST (June 24, 2022, 8:04 PM), https://www.washingtonpost.com/nation/2022/06/24/women-of-color-end-of-roe/ [https://perma.cc/TMQ7-BSD3].

Alito dismissed out of hand the "intangible reliance" interests on continued access to safe and legal abortion in *Dobbs*.[266] Unfortunately, the connection between abortion access and personhood will no doubt be brought into starker relief as the abortion bans sweeping the country result in forced pregnancies.[267]

Despite these similarities between queer rights and abortion access, the issue of abortion has always been mediated by significant third-party considerations, most notably the regard for the "potentiality of life."[268] The question of how to balance these sometimes divergent interests has been the crux of the abortion debate across time.[269] As explained below, *Roe* and *Casey* attempted to resolve the debate with bright line rules regarding "viability."[270] The regard for potential life or "fetal life," as expressed in *Roe* and *Casey* has been successfully recharacterized by "pro-life" groups.[271] Instead of discussing potential life or fetal life, anti-abortion statutes now use terms such as "unborn human being" and refer to the state's interest in protecting an "unborn child."[272] Additional competing interests that have been identified in the abortion context include maternal health and the integrity of the medical profession, but both are arguably secondary to the question of how to balance, what *Roe* referred to as the "potentiality of life."[273]

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266. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2276–77 (2022) ("When a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and intangible form of reliance endorsed by the *Casey* plurality is another matter.").

267. *See* Jennifer Rubin, *The Math is Clear: Forced-Birth Laws Will Kill More Women*, WASH. POST (July 27, 2022, 10:00 AM), https://www.washingtonpost.com/opinions/2022/07/27/science-is-clear-abortion-ban-forced-birth-laws-will-kill-more-women/ [http://perma.cc/HLN5-TCWK].

268. Roe v. Wade, 410 U.S. 113, 162 (1973), *overruled by Dobbs*, 142 S. Ct. 2228; *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 886 (1992) ("potential life"), *overruled by Dobbs*, 142 S. Ct. 2228.

269. *See Dobbs*, 142 S. Ct. at 2259–60 (discussing "quickening" as dividing line in early abortion laws). In *Dobbs*, Justice Alito states "abortion was illegal at common law at least after quickening." *Id.*

270. *Casey*, 505 U.S. at 860 ("Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided; which is to say that no change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.").

271. The plurality in *Casey* characterized *Roe*'s "central holding" as follows: "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *Id.*; *see also Roe*, 410 U.S. at 163–64 ("If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.").

272. *See, e.g.*, MISS. CODE ANN. § 41-41-191 (2018).

273. *Roe*, 410 U.S. at 162.

Comparable third-party considerations have been largely absent from the debate over queer rights. Over the years, attempts to show that queer rights pose a risk to children, traditional morality, and religious persons have not proved persuasive.[274] The identified interests are several steps removed from the decision to engage in queer sex or enter into a same-sex marriage and advocates have not been able to demonstrate how queer rights tangibly interfere with these interests.[275] Social science data shows no harm to children.[276] Questions of morality have evolved significantly with respect to queer rights over the last fifty years.[277] Religious objections are typically based on a very specific belief system and such objectors are entitled to the same quantum of exemptions that would apply to religious-based objections over interracial marriage.[278]

B. The Constitutional Foundation of the Rights

The way that queer rights and abortion rights have been characterized and understood is reflected, and indeed reinforced, by the way that they have been supported under the law. As a result, the constitutional foundations for queer rights and abortion rights are distinct, albeit related. These disparate legal foundations underscore why the immediate fear that *Lawrence* and *Obergefell* will be overturned in the wake of *Dobbs* is misplaced.

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274. Lawrence v. Texas, 539 U.S. 558, 571 (2003) (rejecting traditional morality as a rational for homosexual sodomy laws); United States v. Windsor, 570 U.S. 744, 814 (2013) (Alito, J., dissenting) (noting that the government interests supporting DOMA had argued in their Brief "that the institution of marriage was created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing"); Obergefell v. Hodges, 576 U.S. 644, 711 (2015) (Roberts, C.J., dissenting) (expressing concern for religious objectors, stating "[h]ard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage").

275. *See "All We Want Is Equality" Religious Exemptions and Discrimination Against LGBT People in the United States*, HUM. RTS. WATCH (Feb. 19, 2018), https://www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt-people [https://perma.cc/JAN6-4D34].

276. *See id.*

277. Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 823–25 (2014).

278. *See "All We Want Is Equality" Religious Exemptions and Discrimination Against LGBT People in the United States*, *supra* note 275; *see also* Franklin, *supra* note 277, at 835–37.

Queer rights are reflective of well-developed substantive due process liberty interests as articulated in foundational cases like *Meyers*,[279] *Pierce*,[280] and more recently *Moore v. City of East Cleveland*.[281] *Lawrence* prohibits the government from criminalizing queer relationships, whereas *Obergefell* requires the government to respect queer relationships and afford them equal dignity.[282] Although *Lawrence*'s focus on queer sex would lend itself to a traditional privacy-based analysis, Justice Kennedy's majority opinion is based on liberty and autonomy principles.[283] The opinion only discusses *Roe* briefly when setting out "the state of the law with respect to some of the most relevant cases when the Court considered *Bowers v. Hardwick*."[284] Informed by an equal protection case, *Romer v. Evans*, the majority in *Lawrence* struck down the Texas Homosexual Conduct Law, holding that it did not further a legitimate state interest.[285]

As discussed above, in *Obergefell*, Justice Kennedy's majority opinion further elaborated on the intertwined nature of liberty and equality interests and held that same-sex couples have a fundamental right to marry.[286] The majority opinion did not discuss or cite *Roe* or *Casey*.[287] Instead, Justice Kennedy's opinion focused on case law defining the fundamental right to marry and engaged in a detailed historical inquiry.[288] He explored the "synergy" between liberty and equal protection, concluding that "the right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws."[289]

The Court in *Roe* recognized a fundamental right to abortion as an outgrowth of a broader right to privacy developed out of an expansive aspirational approach to substantive due process.[290] After *Roe*, the Court

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279. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

280. Pierce v. Soc'y of Sisters, 268 U.S. 510, 518–19 (1925).

281. Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977). For a discussion of the broader impact of functional family recognition under due process protections, see Frederick E. Dashiell, Case Note, *The Right to Family Life:* Moore v. City of East Cleveland, 6 BLACK L.J. 288, 291 (1979).

282. Lawrence v. Texas, 539 U.S. 558, 578 (2003); Obergefell v. Hodges, 576 U.S. 644, 672 (2015).

283. *Lawrence*, 539 U.S. at 566.

284. *Id.*

285. *Id.* at 578 ("The Texas Statute furthers no legitimate state interest which can justify the intrusion into the personal and private of the individual.").

286. *Obergefell*, 576 U.S. at 672.

287. *Id.*

288. *Id.* at 666–67 (citing *Griswold*, 381 U.S. 479, 486 (1965), for its definition of marriage, but not its privacy-based reasoning).

289. *Id.* at 672.

290. Roe v. Wade, 410 U.S. 113, 157–58 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

moved away from privacy and penumbras.[291] In *Casey*, the plurality did not independently reach the question of whether the U.S. Constitution guaranteed a right to abortion access, but instead preserved the essential holding of *Roe* on the basis of stare decisis.[292] *Casey* and later cases applied a discrete liberty interest analysis to abortion rights similar to that referenced in other healthcare cases, such as *Cruzan v. Missouri.*[293] These liberty underpinnings are focused on the impact of the conduct, rather than the exercise of the right itself.[294]

The contextualization of abortion within a healthcare framework further distinguishes abortion access from the right to engage in queer sex or same-sex marriage. As a medical procedure, the state has an interest in regulating abortion to ensure the safety of the patient and the ethical conduct of the physicians.[295] This state interest is independent of any future interest in the preservation of potential life and instead pertains to regulation of facilities and services.[296] Abortion access involves not only the well-being of the individual patient, but also medical professionals and facilities.[297] This necessary medicalization of the right thereby invites government intervention in a way that queer rights—both sex and marriage —do not.

Finally, the personal decision to have an abortion necessarily involves the consideration of potential life and associated state interests.[298] This unavoidable fact sets abortion rights apart from queer rights. Balancing these competing interests has posed a quagmire for the courts since *Roe*, and the *Dobbs* decision only further muddies the water.[299] Queer rights, however, are singularly individual. They require no third-party involvement and the state damages expressed in opposition are merely vague, intangible interests of a very specific and religiously based view of morality. *Romer*

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291. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

292. *Id.*

293. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

294. *See Casey*, 505 U.S. at 874 (discussing "undue burden").

295. *See* Jorge E. Galva, Christopher Atchison & Samuel Levey, *Public Health Strategy and the Police Powers of the State*, 120 PUB. HEALTH REPS. 20, 21–23 (2005).

296. *See infra* text accompanying notes 386–96 (discussing reliance interests in *Dobbs*).

297. *See infra* text accompanying notes 386–96.

298. *See A History of Key Abortion Rulings of the U.S. Supreme Court*, PEW RSCH. CTR. (Jan. 16, 2013), https://www.pewresearch.org/religion/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/ [https://perma.cc/HK5N-FU72].

299. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257 (2022).

clearly held that just interests, even when based on "profound and deep convictions," did not constitute a legitimate state interest for laws that result in discrimination.[300]

IV. THE APPLICATION OF *DOBBS* TO QUEER RIGHTS

In the months immediately following the *Dobbs* decision, commentators from a wide range of perspectives have criticized and dismantled Justice Alito's reasoning. These critiques argue, *inter alia*, that *Dobbs* fails to follow precedent, misrepresents history,[301] adopts highly specific religious tenets,[302] exercises the bare political will of the Court,[303] and disrespects women and pregnant people, especially those who are marginalized and people of color.[304] This public process of critique is important and meaningful work, and no doubt there is much more to be said about the Court's endorsement of forced pregnancy and disregard for the lived experience of tens of millions of Americans.[305] However, this Article employs a more pragmatic approach to *Dobbs*. Instead of cataloguing the many ways that *Dobbs* was wrongly decided, this section accepts *Dobbs* as binding precedent and engages the central question of what *Dobbs* will mean going forward, specifically with respect to queer rights.

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300. Lawrence v. Texas, 539 U.S. 558, 571, 571 (2003).

301. *See, e.g.*, Jill Elaine Hasday, Opinion, *On* Roe*, Alito Cites a Judge Who Treated Women as Witches and Property*, WASH. POST (May 9, 2022, 5:00 PM), https://www.washingtonpost.com/opinions/2022/05/09/alito-roe-sir-matthew-hale-misogynist/ [https://perma.cc/7MZZ-TFJD] ("Alito has misrepresented the actual historical record.").

302. *See, e.g.*, Linda Greenhouse, Opinion, *Religious Doctrine, Not the Constitution, Drove the* Dobbs *Decision*, N.Y. TIMES (July 22, 2022), https://www.nytimes.com/2022/07/22/opinion/abortion-religion-supreme-court.html [https://perma.cc/P886-DFG6] ("[I]t was the court's unacknowledged embrace of religious doctrine that has turned American women into desperate refugees fleeing their home states in pursuit of reproductive health care.").

303. *See, e.g.*, Cristian Farias, "*Power, Not Reason": The Fall of* Roe *and the Rise of Republican Orthodoxy at the Supreme Court*, VANITY FAIR (June 24, 2022), https://www.vanityfair.com/news/2022/06/fall-of-roe-rise-of-republican-orthodoxy-at-supreme-court [https://perma.cc/V7EZ-P2BV] (describing *Dobbs* as "a result that was born not of careful decision-making and analytic rigor, but of power").

304. *See, e.g.*, Christine M. Slaughter & Chelsea N. Jones, *How Black Women Will Be Especially Affected by the Loss of* Roe, WASH. POST: MONKEY CAGE (June 25, 2022, 7:00 AM), https://www.washingtonpost.com/politics/2022/06/25/dobbs-roe-black-racism-disparate-maternal-health/ [https://perma.cc/MM66-J83M] ("[*Dobbs*] will disproportionally hurt the reproductive health of African American women for generations.").

305. Youyou Zhou & Li Zhou, *Who Overturning* Roe *Hurts Most, Explained in 7 Charts*, VOX (July 1, 2022, 9:50 AM), https://www.vox.com/2022/7/1/23180626/roe-dobbs-charts-impact-abortion-women-rights [https://perma.cc/ZJH9-G3RC] ("About 33.7 million women, or about half of reproductive-age women (defined as those between 15 and 44, in this analysis) in the US, live in states where there are poised to be new restrictions.").

After first examining the reasoning of *Dobbs*, this section sets forth the reasons why *Lawrence* and *Obergefell* should survive both on the merits and under stare decisis. As the prior section made clear, *Lawrence* and *Obergefell* provide a stable constitutional infrastructure for queer rights, and in turn have bolstered equality and the accompanying sense of dignity and personhood for queer people. The rights recognized in those cases are both functionally and legally distinct from the right to abortion. As explained in Part V, political considerations may ultimately lead the Court to revisit *Lawrence* and *Obergefell*. However, we should be clear, if the Court chooses to overturn queer rights recognized in these cases, it would have nothing to do with the rule of law and everything to do with the politics of exclusion and subordination.

A. Dobbs v. Jackson Women's Health Organization

In March 2018, the Mississippi state legislature passed the Gestational Age Act (the Mississippi law) that prohibited all abortions after fifteen weeks except "in a medical emergency or in the case of a severe fetal abnormality."[306] The Mississippi law contains no exception for rape or incest.[307] On the day the Mississippi law was enacted, the Jackson Women's Health Organization (the Clinic), the only clinic providing abortion care in the entire state of Mississippi, challenged the law as a violation of the constitutional right to abortion established in *Roe v. Wade* and affirmed in *Casey v. Planned Parenthood*.[308] The U.S. District Court for Southern Mississippi granted summary judgment and permanently enjoined the law from taking effect.[309] The Fifth Circuit ruled in favor of the Clinic and

306. MISS. CODE ANN. § 41-41-191(4)(a) (2018). At the time it was enacted, the Mississippi Gestation Age Act was the nation's most restrictive abortion law. *See* Jenny Gathright, *Mississippi Governor Signs Nation's Toughest Abortion Ban Into Law*, NPR (Mar. 19, 2018, 6:44 PM), https://www.npr.org/sections/thetwo-way/2018/03/19/595045249/mississippi-governor-signs-nations-toughest-abortion-ban-into-law [https://perma.cc/7TNQ-SZLU].

307. *See* MISS. CODE ANN. § 41-41-191 (2018).

308. *See* Richard Fausset, *Mississippi Bans Abortions After 15 Weeks; Opponents Swiftly Sue*, N.Y. TIMES (Mar. 20, 2018), https://www.nytimes.com/2018/03/19/us/mississippi-abortion-ban.html [https://perma.cc/X6H7-D55V].

309. Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536, 545 (S.D. Miss. 2018), *aff'd sub nom*. Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019), *rev'd*, 142 S. Ct. 2228 (2022).

affirmed the lower court's ruling.[310] The state of Mississippi appealed to the Supreme Court in June 2020.[311] Interestingly, Mississippi did not argue in its petition for certiorari that *Roe* and *Casey* should be overruled.[312] Instead, it focused on whether there could be a blanket exception to pre-viability restrictions on abortion and whether abortion providers had standing to challenge the Mississippi law.[313] The Court granted certiorari in May 2021.[314]

In the three years since passage of the Mississippi law, the make-up of the Court had changed significantly to include conservative Justices Kavanaugh and Barrett in the place of Justices Kennedy and Ginsburg.[315] Throughout oral arguments, the state argued that the viability standard set out in *Roe* and affirmed by *Casey* was not constitutionally mandated, damaged democracy, and failed to allow the state to adequately consider the protection of fetal life or what the petitioner referred to as an "unborn child."[316] Arguing that there is no constitutional right to abortion, Mississippi concluded that rational-basis review was all that was required and that the Mississippi law clearly furthered legitimate state interests.[317] The Clinic, represented by the Center for Reproductive Rights, argued that the Mississippi law could not stand without overruling *Roe* and *Casey*.[318] Justice Alito took the petitioner's bait.[319] In a majority opinion joined by Justices Thomas, Gorsuch, Kavanaugh, and Barrett, Justice Alito succinctly concluded, "*Roe* and *Casey* must be overruled."[320] Justice Alito held that the absence of an

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310. Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 269 (5th Cir. 2019), *rev'd*, 142 S. Ct. 2228 (2022).

311. Petition for Writ of Certiorari, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

312. *See id.* at 14, 15.

313. *See id.* at i. The Petition raised three questions: (1) whether all pre-viability abortion restrictions were unconstitutional, (2) what standard of review should apply to pre-viability restrictions, and (3) whether abortion providers had third-party standing. *Id*. When the Court granted certiorari, it only certified the first question. *Id.*

314. *See* Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021).

315. Justice Gorsuch had earlier filled the vacancy that resulted from Justice Scalia's death in 2016. *See* Nina Totenberg, *Senate Confirms Gorsuch to Supreme Court*, NPR (Apr. 7, 2017, 5:00 AM), https://www.npr.org/2017/04/07/522902281/senate-confirms-gorsuch-to-supreme-court [https://perma.cc/JDH8-XSFB].

316. Transcript of Oral Argument at 4–5, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

317. *Id.* at 5, 8.

318. *See id.* at 63.

319. *See Dobbs*, 142 S. Ct. at 2242 ("[T]he State's primary argument is that [the Court] should reconsider and overrule *Roe* and *Casey* and once again allow each State to regulate abortion as its citizens wish. . . . We hold that Roe and Casey must be overruled.").

320. *Id.* Chief Justice Roberts concurred in judgment, but he would have left the question of whether *Roe* and *Casey* should be overruled to another day. *Id.* at 2313 (Roberts, C.J., concurring).

analysis of the viability standard within *Casey* was a fundamental flaw that stare decisis did not save.[321]

Justice Alito's majority opinion repeatedly offered assurances that the Court's holding should not "cast doubt on precedents that do not concern abortion."[322] Still, commentators have expressed concern over the *Dobbs*' endorsement of a restrictive approach to substantive due process and seeming disregard for stare decisis.[323] As noted earlier, arguments in the pleadings of the respondents, the Solicitor General, and various amici suggested that overruling *Roe* and *Casey* would place *Lawrence* and *Obergefell* in jeopardy.[324] The following section explains that, at least in terms of legal doctrine, this concern is misplaced.

B. Queer Rights Survive a Dobbs *Analysis*

As explained in Parts II and III, the queer rights recognized in *Lawrence* and *Obergefell* are distinct from the right to abortion enunciated in *Roe* both with respect to their nature and legal underpinnings. *Lawrence* and *Obergefell* are not based on the privacy line of cases exemplified by *Roe* and a penchant for penumbras; *Obergefell* relies, at least in part, on a substantive due process analysis[325] whereas *Lawrence* primarily rests on a rational-basis review informed by a liberty balancing analysis.[326] *Dobbs* adopted the substantive due process standard enunciated in *Washington v. Glucksberg* that was not applied by Justice Kennedy in either *Lawrence* or *Obergefell*.[327] Accordingly, it is important to examine the queer rights

321. *Id.* at 2243 (majority opinion) ("*Stare decisis*, the doctrine on which *Casey*'s controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority.").

322. *Id.* at 2277–78.

323. *See, e.g.*, David Litt, *A Court Without Precedent*, ATLANTIC (July 24, 2022), https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-stare-decisis-roe-v-wade/670576/ [https://perma.cc/MQ2T-XHPM].

324. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondents at 25–26, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) ("To reverse course and accept those limits today would not merely overturn *Roe* and *Casey*, but would also threaten the Court's precedents holding that the Due Process Clause protects other rights . . . .").

325. *See supra* text accompanying notes 213–27 (discussing *Obergefell*'s liberty analysis).

326. *See supra* text accompanying notes 145–47 (discussing *Lawrence*'s rational-basis review).

327. In *Obergefell*, Justice Kennedy expressly rejects the application of *Glucksberg* to the marriage bans because of their equal protection considerations. Obergefell v.

recognized in those cases under the *Dobbs* liberty rubric that ask whether a right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[328]

The following section makes three points. First, the queer rights affirmed in *Lawrence* and *Obergefell* should satisfy the *Glucksberg* standard of historical fidelity.[329] Second, both *Lawrence* and *Obergefell* should also easily meet the stare decisis command as set forth in *Dobbs* given the extensive tangible reliance interests of those decisions.[330] Third, in any event, criminal sodomy laws and marriage bans should decisively fail a rational-basis review because animus is not a legitimate state interest and there are no countervailing legitimate state interests, such as the desire to protect potential life.[331]

1. The Glucksberg *Standard of "Ordered Liberty"*

Dobbs tackled head on the question that *Casey* avoided: Is there a constitutional right to abortion?[332] Justice Alito relied on the standard for recognizing unenumerated fundamental rights under the Due Process Clause of the Fourteenth Amendment that was articulated in *Washington v. Glucksberg*.[333] Under this standard, an unenumerated fundamental right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[334] Applying this standard, Justice Alito unsurprisingly concluded that "[t]he right to abortion does not fall within this category."[335] He explained,

> Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of "liberty." *Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and

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Hodges, 576 U.S. 644, 671 (2015) (saying that the Court must ask "if there was a sufficient justification for excluding the relevant class from the right").

328. *Dobbs*, 142 S. Ct. at 2242 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

329. *See Glucksberg*, 521 U.S. at 710.

330. *See Dobbs*, 142 S. Ct. at 2244, 2265.

331. Justice Alito also identifies the interest in preserving maternal health and protecting the integrity of the medical profession. *Id.* at 2284.

332. *See id.* at 2242.

333. *Glucksberg*, 521 U.S. at 720–21.

334. *Id.* (first quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977); and then quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969)).

335. *Dobbs*, 142 S. Ct. at 2242.

> marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being."[336]

In *Lawrence*, Justice Kennedy did not expressly apply a fundamental rights analysis, although he did engage in a long discussion of liberty interests in a historical context before concluding that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[337] In *Obergefell*, Justice Kennedy specifically said that the *Glucksberg* standard is not the appropriate standard where there is both a broadly recognized right, such as marriage, and a bar to access the right for certain classes.[338] In such a case, Justice Kennedy reasoned that a backwards glance of our history and tradition would only affirm the discriminatory harm.[339] Instead, Justice Kennedy cited Justice Harlan's influential dissent in *Poe v. Ullman* for the proposition that substantive due process analysis "has not been reduced to any formula."[340] He then applied his interlocking liberty and equality analysis described in Part II above.

The *Dobbs* reliance on *Glucksberg* represents the latest attempt to cabin in the contentious area of substantive due process and enforce the appearance of certainty and judicial restraint.[341] For rights that are not explicitly included in the first eight amendments, substantive due process recognizes that there are additional unenumerated rights that nonetheless are fundamental to who we are as a people.[342] Although the proponents of *Glucksberg*'s historical methodology commend its "disciplined" approach, the *Glucksberg* test is as deceptively malleable as is the history that it faithfully mines.[343] It purports to provide a formulaic and almost mathematical approach to deciphering

336. *Id.* (quoting MISS. CODE ANN. § 41-41-191(4)(b) (2018)).
337. Lawrence v. Texas, 539 U. S. 558, 578 (2003).
338. *See* Obergefell v. Hodges, 576 U.S. 674, 671 (2015) (holding that the Court must ask "if there was a sufficient justification for excluding the relevant class from the right").
339. *See id.* ("If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.").
340. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) ("No formula could serve as a substitute, in this area, for judgment and restraint."); *see also* Washington v. Glucksberg, 521 U.S. 702, 765–66 (1997) (Souter, J., dissenting).
341. *See, e.g.*, Yoshino, *supra* note 213, at 152.
342. *Glucksberg*, 521 U.S. at 720.
343. *See* Yoshino, *supra* note 213, at 149.

the mysteries of our 230-year-old Constitution.[344] Of course, when Justices input subjectively narrow data points into the equation, the result will be a predictably narrow answer.

Over the years, individual Justices have taken different approaches to the vexing question of how best to discern and delimit these unenumerated rights while not overstepping the institutional bounds of their judicial role.[345] The expansive penumbral reasoning that was employed in *Griswold* and set the stage for *Roe* had been largely discarded before *Dobbs* with the turn to textualism exemplified by Justice Scalia's approach to unenumerated rights in his plurality opinion in *Michael H. v. Gerald D.*[346] Justice Harlan's dissent in *Poe v. Ullman* is often seen as an alternative to the more restrained history-bound approach of *Glucksberg* or Justice Scalia's footnote four in *Michael H.*,[347] but the two approaches share many similarities, such as judicial restraint and attention to historical trends.[348] In *Dobbs*, Justice Alito clings to the *Glucksberg* standard, warning that a less rigorous standard would invite the haphazard distribution of rights by the Court.[349]

Given Justice Alito's adoption of the *Glucksberg* standard, a significant portion of the *Dobbs* decision is rooted in a historical analysis of the regulation of abortion throughout common law history going back to a thirteenth century treatise by Henry de Bracton.[350] Upon this selective review of history, Justice Alito reaches the "inescapable conclusion . . . that a right to abortion is not deeply rooted in the Nation's history or traditions," finding that abortion was criminalized throughout history.[351] He further finds that laws restricting or regulating abortion access do not violate the concept of ordered liberty,[352] which defines the boundaries of competing interests.[353] Justice Alito concludes that the reliance of *Roe* and abortion rights advocates on broader autonomy precedents, including marriage and parenting rights, is misplaced because those contexts do not regard the state's interest in fetal life.[354]

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344. *See Glucksberg*, 521 U.S. at 720–21.
345. *Id.* at 721.
346. Michael H. v. Gerald D., 491 U.S. 110, 121 (1989).
347. *See* Anthony C. Cicia, Note, *A Wolf in Sheep's Clothing?: A Critical Analysis of Justice Harlan's Substantive Due Process Formulation,* 64 FORDHAM L. REV. 2241, 2248–49 (1996).
348. *See id.* at 2246, 2254.
349. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248–49 (2022).
350. *Id.* at 2249–54 (noting that English cases dating all the way back to the thirteenth century corroborate the treatises' statements that abortion was a crime).
351. *Id.* at 2253–54.
352. *Id.* at 2257.
353. *Id.*
354. *Id.* ("*Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed 'potential life.'").

> What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the life of an "unborn human being." None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way.[355]

In the wake of the *Dobbs* decision, some commentators have been quick to dismiss the viability of *Lawrence* and *Obergefell* under the *Glucksberg* standard.[356] However, this concession is premature and shortsighted. Both *Lawrence* and *Obergefell* foreground careful and detailed historical analyses. *Lawrence* does not involve an unenumerated fundamental right, but rather rational-basis review.[357] *Obergefell* simply mentions *Poe* for the proposition that substantive due process analysis "has not been reduced to any formula"[358] and then Justice Kennedy offers an interlocking liberty-equality analysis that attends to the equality concerns implicated in the marriage bans.[359] In *Obergefell*, Justice Kennedy did not reject *Glucksberg* out right and adopt a full-throated endorsement of *Poe*, as Justice Souter did in his concurrence in *Glucksberg*, but rather crafted an analysis that encompassed both liberty interests and equal protection guarantees.[360]

In both cases, Justice Kennedy provided a detailed roadmap for an analysis of queer rights based on history and tradition that challenges common misconceptions and provides an inclusive understanding of our past.[361] In *Lawrence*, for example, Justice Kennedy corrected the historical error committed by the Court in *Bowers*, where the Court asserted—without discussion—that targeted, anti-gay sodomy laws had "ancient roots."[362]

Justice Alito explains that "the people of the various States may evaluate those interests differently." *Id.*

355. *Id.* at 2258.

356. Kate Sosin & Candice Norwood, *What Will Happen If Obergefell is Overturned? Queer Legal Experts Are Scrambling*, 19TH NEWS (July 11, 2022, 5:00 AM), https://19thnews.org/2022/07/obergefell-legal-experts-lgbtq-marriage-protection/ [https://perma.cc/7P7W-P9P4].

357. *See* Lawrence v. Texas, 539 U. S. 558, 578 (2003).

358. Obergefell v. Hodges, 576 U.S. 644, 671 (2015) (quoting Poe v. Ullman, 367 U.S. 479, 542 (1961)).

359. *Id.* at 673–75.

360. *Id.*

361. *See generally Lawrence*, 539 U. S. 558; *Obergefell*, 576 U.S. 644.

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

Instead, Justice Kennedy stated these laws were of a relatively recent vintage.[363] He devoted five pages of his majority opinion to this historical analysis[364] critiquing the myopic reliance of the *Bowers* Court on an exclusionary and incomplete version of history that ignored, *inter alia*, the 1955 revisions to the Model Penal Code and the 1957 British Parliament removal of criminalization for same-sex conduct.[365] Justice Kennedy's historical analysis was not designed to find a fundamental right, but rather to correct the error committed by *Bowers*, thereby abrogating any claim that the opinion should be respected under stare decisis.[366]

In *Obergefell*, Justice Kennedy devoted a similarly significant portion of his decision in *Obergefell* to the history of marriage, including the dynamic and socially responsive expansion of marriage access and rights including in the context of interracial marriage and married women's economic rights.[367] Kennedy's inclusion of same-sex marriage and the recognition of queer rights fits squarely within this historical trajectory. Accordingly, Justice Kennedy provided a clear and historically faithful approach to a *Glucksberg* analysis for a Court willing to engage with it. Even beyond Justice Kennedy's clear treatment of history and tradition, meaningful research and historical preservation have taken place since 2003 regarding the history of same-sex relationships and the LGBTQ community more broadly.[368]

2. The Dobbs *Standard of Stare Decisis*

After finding that there is no constitutionally protected right to abortion, Justice Alito then turns to the question of stare decisis, which he reminds us is not an "inexorable command."[369] He reviews the purpose and value of stare decisis, including reliance on the law and the benefit of judicial restraint and even-handed decision making.[370] Stare decisis also provides

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363. *See id.* at 568.
364. *Id.* at 567–71.
365. *Id.* 572–73. Justice Kennedy noted that the rescission of state level laws between 1986 and 2003 alone exposed the "deficiencies" in *Bowers*' historical and tradition-based underpinnings. *Id.* at 573.
366. *See id.* at 567–77.
367. Obergefell v. Hodges, 576 U.S. 644, 660 (2015).
368. *See, e.g.*, GRETA LAFLEUR, THE NATURAL HISTORY OF SEXUALITY IN EARLY AMERICA 9–10 (2018); Jennie Rothenberg Gritz, *But Were They Gay? The Mystery of Same-Sex Love in the 19th Century*, ATLANTIC (Sept. 7, 2012), https://www.theatlantic.com/national/archive/2012/09/but-were-they-gay-the-mystery-of-same-sex-love-in-the-19th-century/262117/ [https://perma.cc/2ZVH-STJR]; *Anne Lister's Story*, WEINBERG COLL. ARTS & SCI.: THE ANNE LISTER SOC'Y, https://english.northwestern.edu/about/anne-lister-society/story.html [https://perma.cc/2TN8-NFCA].
369. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2278 (2022).
370. *Id.* at 2261–62.

a valuable sense of finality to litigants and the public,[371] but Justice Alito notes that the benefits of stare decisis are the weakest when interpreting the Constitution because of the potential damage to the democratic fabric of our Nation.[372]

In evaluating whether stare decisis preserves *Roe* and *Casey*, Justice Alito lays out a five-factor test that includes evaluating (1) the nature of the court error, (2) the quality of the reasoning of the decision, (3) the workability of the decision or standard, (4) the effect on other laws, and (5) the reliance of litigants and the public on the settled law.[373] With respect to each point, he concludes that the cases do not warrant application of the doctrine.[374] As explained below, if *Lawrence* and *Obergefell* were subjected to the same form of inquiry, there would be a different result. They should easily satisfy the *Dobbs* articulation of stare decisis, in large part due to the extensive and tangible reliance interests that the cases encouraged and invited.[375]

With respect to the nature of the court error, Justice Alito emphasizes that the decisions in *Roe* and *Casey* were not only "egregiously wrong," but also took the issue of abortion away from the people and damaged our democratic infrastructure.[376] In the case of the marriage bans, it is possible to say that *Obergefell* stopped democratic debate because there had been numerous ballot and legislative initiatives around the subject, but it is difficult to declare that the decision was egregiously wrong due to the absence of third-party harm.[377] Justice Alito's concern regarding the intrusion on a state's rights to make their own abortion laws is centered on the state's right to balance the fetal life against individual rights.[378] No such balancing exists in the context of queer rights. Thus, the constitutional error and democratic harm are minimal at best.

When it comes to the quality of the decision making, Justice Alito primarily faults the viability standard set forth in *Roe* and affirmed in *Casey*.[379] Earlier in the opinion, Justice Alito remarks that *Roe* had,

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371. *Id.* at 2262.
372. *Id.*
373. *Id.* at 2265.
374. *See id.* at 2265–78.
375. *Id.* at 2276.
376. *Id.* at 2265.
377. Justice Alito asserts that the Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe*. *Id.*
378. *Id.* at 2257.
379. *Id.* at 2270.

> concocted an elaborate set of rules, with different restrictions for each trimester of pregnancy, but it did not explain how this veritable code could be teased out of anything in the Constitution, the history of abortion laws, prior precedent, or any other cited source; and its most important rule (that States cannot protect fetal life prior to "viability") was never raised by any party and has never been plausibly explained.[380]

Lawrence and *Obergefell* present no similar concerns. There are no standards, thresholds, three-part tests, or multiple prongs to navigate. Both opinions simply struck down discriminatory laws.

In *Dobbs*, Justice Alito argues that *Casey*'s undue burden standard and the preservation of viability are unworkable, vague, and lead to inconsistent results.[381] The opposite is true for nationwide marriage equality and decriminalization of queer sex, both of which contributed to the elimination of geographic and economic disparities among vulnerable populations and provided the government workers tasked with enforcing the laws with a clear code.[382] Accordingly, *Lawrence* and *Obergefell* should easily satisfy Justice Alito's third prong of his stare decisis inquiry which states that an "important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner."[383]

The next prong of Justice Alito's stare decisis analysis inquires as to whether the decision has had an effect on other laws.[384] In the context of abortion, Justice Alito lists a number of ways that *Roe* and *Casey* "distorted" other doctrines, such as third-party standing.[385] There is no comparable concern in the context of queer rights. Again, *Lawrence* and *Obergefell* simply struck down discriminatory laws.

The final prong of *Dobbs*'s stare decisis analysis has the most relevance for queer rights. In *Dobbs*, Justice Alito finds that *Roe* and *Casey* had not given rise to any tangible reliance interests that the Court could assess because "getting an abortion is generally an 'unplanned activity.'"[386] He

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380. *Id.* at 2266.

381. *Id.* at 2275.

382. *See* Courtney Vinopal, *LGBTQ Activists on What Progress Looks Like 5 Years After Same-Sex Marriage Ruling*, PBS NEWS HOUR (June 29, 2020, 6:36 PM), https://www.pbs.org/newshour/nation/lgbtq-activists-on-what-progress-looks-like-5-years-after-same-sex-marriage-ruling [https://perma.cc/Y2HM-S7K6]; Jeffrey M. Jones, *In U.S., 10.2% of LGBT Adults Now Married to Same-Sex Spouse*, GALLUP (June 22, 2017), https://news.gallup.com/poll/212702/lgbt-adults-married-sex-spouse.aspx [https://perma.cc/W33E-FX7P].

383. *Dobbs*, 142 S. Ct. at 2272.

384. *Id.* at 2275.

385. *Id.* at 2275–76.

386. *Id.* at 2276 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992), *overruled by Dobbs*, 142 S. Ct. 2228).

also rejects the description of "a more intangible form of reliance" that had been described in the plurality in *Casey* and advanced by the respondents and various amici.[387] Instead, Justice Alito notes that prior Supreme Court cases "emphasize very concrete reliance interests, like those that develop in 'cases involving property and contract rights.'"[388] The end of criminality and marriage recognition fit neatly into such a reliance framework because they both directly implicate contractual and financial components where advanced planning is essential.[389]

For nearly a decade, married same-sex couples across the country have made financial decisions based on their marriage status.[390] Many have bought homes and had children.[391] In the wake of COVID-19 layoffs and resignations, some have made hard decisions regarding their own employment in reliance on the continued recognition of their marriage and the security that benefits like health insurance and social security offer.[392] Further, both *Lawrence* and *Obergefell* have contributed to a well-established social fabric with millions of families, children, and communities relying on non-criminalization and marriage recognition as a means to safeguard future stability.[393] Eliminating marriage equality would result in harmful and unnecessary financial and emotional costs not only to individual families,

387. The plurality in *Casey* had found that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Casey*, 505 U.S. at 856.

388. *Dobbs*, 142 S. Ct. at 2276 (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

389. *See id.*

390. *See* Lauren Bauer, Veronica Clevenstine, & Moriah Macklin, *Examining the Economic Status of Same-Gender Relationship Households*, BROOKINGS (Jan. 20, 2022), https://www.brookings.edu/blog/up-front/2022/01/20/examining-the-economic-status-of-same-gender-relationship-households/ [https://perma.cc/6GBE-4GRC]; *see also* Jacob Goldstein, *Is Marriage Rational?*, NPR (Feb. 3, 2011, 11:25 AM), https://www.npr.org/sections/money/2011/02/03/133462877/is-marriage-rational [https://perma.cc/9BA4-6T4J]. *See generally* M.E. Robinson, *Marriage as an Economic Institution*, 13 INT'L J. ETHICS 171 (1903).

391. *See* Wendy D. Manning & Krista K. Payne, *Measuring Marriage and Cohabitation: Assessing Same-Sex Relationship Status in the Current Population Survey*, 58 DEMOGRAPHY 811, 816–19 (2021).

392. *See* Thom File & Joey Marshall, *Household Pulse Survey Shows LGBT Adults More Likely to Report Living in Households with Food and Economic Insecurity Than Non-LGBT Respondents*, U.S. CENSUS (Aug. 11, 2021), https://www.census.gov/library/stories/2021/08/lgbt-community-harder-hit-by-economic-impact-of-pandemic.html [https://perma.cc/P2GV-BZZU].

393. *See* Allison Hope, *How LGBTQ Families Can Protect Themselves Now*, CNN HEALTH (July 10, 2022, 2:06 AM), https://www.cnn.com/2022/07/10/health/lgbtq-families-protection-wellness/index.html [https://perma.cc/8XMU-GDHV].

but to all of the systems that have come to rely on this uniform recognition.[394] Everything from businesses who cover spouses on employee based health plans, to federal agencies like Social Security and the IRS, to hospitals with uniform visitation forms would be faced with potential uncertainty and cost countless worker hours to resolve.[395]

3. Rational-Basis Review

In *Dobbs*, Justice Alito evaluates the Mississippi law under rational-basis review after he determines that there is no fundamental right to abortion access and that stare decisis will not preserve *Roe* and *Casey*.[396] Accordingly, even if the rights asserted in *Lawrence* and *Obergefell* did not rise to the level of a fundamental right or trigger stare decisis, it would still be necessary to evaluate both criminal homosexual sodomy laws and marriage bans under rational-basis review.[397] In such case, "[l]egislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."[398] However, the state would fail to satisfy its minimal fact-finding burden because both homosexual sodomy laws and marriage bans are the result of animus and discriminatory intent toward queer people, which *Romer v. Evans* has held are not a legitimate state interests.[399]

With respect to the Mississippi law, Justice Alito finds that the state easily meets the rational-basis standard.[400] Reasoning that the Mississippi law is entitled to a "strong presumption of validity" because it is a health and welfare law,[401] he cautions that the Court cannot substitute its judgment

394. *See* MALLORY & SEARS, *supra* note 245.

395. *See* Steve Moss, Supreme Court's Same-Sex Marriage Decision Affects Federal, State Taxation, HOLDEN MOSS (July 5, 2015), https://www.holdenmoss.com/blog/supreme-courts-same-sex-marriage-decision-affects-federal-state-taxation [https://perma.cc/39AE-BGB4].

396. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2282–83 (2022).

397. Recall that *Lawrence* invalidated the Texas Homosexual Conduct Law under a rational-basis standard, finding that the law did not serve a legitimate state purpose. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

398. FCC v. Beach Commc'ns, 508 U.S. 307, 315 (1993).

399. Romer v. Evans, 517 U.S. 620, 635 (1996) (holding that animus towards gay and lesbian people was insufficient to meet the state interest requirement in a rational-basis review under the Fourteenth Amendment).

400. *See Dobbs*, 142 S. Ct. at 2284 ("These legitimate interests justify Mississippi's Gestational Age Act.").

401. *Id.* ("A law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.'" (quoting Heller v. Doe, 509 U.S. 312, 319 (1993))).

for that of the legislature.[402] Justice Alito then lists a number of legitimate state interests that closely track the findings of the Mississippi legislature, including "respect for and preservation of prenatal life at all stages of development," "the elimination of particularly gruesome or barbaric medical procedures," and "the mitigation of fetal pain."[403]

In *Dobbs*, Justice Alito does not have occasion to provide examples of interests that would not constitute legitimate state interests because he finds that all of the interests asserted by the state are legitimate.[404] Accordingly, we are left to consult prior precedents, most notably *Romer v. Evans*, to ask when a state interest is illegitimate.[405] *Romer* explained decisively that animus directed toward an unpopular group is not a legitimate state interest.[406] *Romer* is directly applicable to both homosexual sodomy laws and marriage bans, which were the result of backlash against increased queer visibility.

In *Dobbs*, Justice Alito distinguishes the nature of abortion rights from other liberty interests on the ground that abortion necessarily involves countervailing interests—none of which are at play in the case of homosexual sodomy laws or marriage bans.[407] For example, in *Lawrence*, Justice Kennedy goes to great lengths to establish that there are no such countervailing interests at play in the case of homosexual sodomy laws.[408] He notes that the case does "not involve minors" or "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused" or "public conduct or prostitution."[409] Presumably, each of these instances could support legitimate state interests that would require further inquiry. To the contrary, Justice Kennedy finds that homosexual sodomy laws "demean" queer people and were enacted as part of a moral panic in the 1970s.[410] The same could be said of the marriage bans that only began to appear the 1990s.[411]

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402. *Id.* ("[W]hen [abortion] regulations are challenged under the Constitution, courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies.'" (quoting Ferguson v. Skrupa, 372 U.S. 726, 729–30 (1963))).
403. *Id.* at 2284 (citing Gonzales v. Carhart, 550 U.S. 124, 157–58 (2007)).
404. *See id.*
405. Romer v. Evans, 517 U.S. 620, 632 (1996).
406. *See id.*
407. *See Dobbs*, 142 S. Ct. at 2258.
408. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).
409. *Id.*
410. *See id*. at 570–75 ("It was not until the 1970's that any State singled out same-sex relations for criminal prosecution.").
411. *See supra* Section II.B.2 (discussing DOMA).

Finally, there is support within the *Dobbs* opinion itself for the conclusion that the laws invalidated in *Lawrence* and *Obergefell* would not satisfy rational-basis review. Justice Alito specifically includes "the prevention of discrimination on the basis of race, sex, or disability" on his list of recognized legitimate state interests.[412] Surely, if the prevention of discrimination is a legitimate state interest, then it should go without saying that the intent to discriminate is not a legitimate state interest. As the history in both *Lawrence* and *Obergefell* shows, the criminalization and exclusion of queer people is driven by discriminatory intent and a base desire to harm.

V. POLITICS AND THE COURT

As established throughout the prior parts of this Article, *Obergefell* and *Lawrence* share a stable Constitutional grounding that rests on a historically nuanced liberty interest analysis under the Due Process Clause of the Fourteenth Amendment.[413] There are also precedent-based arguments invalidating homosexual sodomy laws and marriage bans under the Equal Protection Clause of the Fourteenth Amendment.[414] These laws should not survive even a rational-basis review because they are borne of discriminatory animus towards queer people.[415] *Obergefell* and *Lawrence* have reasonably induced the type of tangible and widespread reliance that should preserve their holdings under the doctrine of stare decisis.[416]

The overruling of *Roe* and *Casey* has not changed these constitutionally sound legal arguments for the continued viability of *Lawrence* and *Obergefell*. The only things that have changed are the political makeup of the Court and the emergence of a newly emboldened conservative political movement.[417] Given the current political trends, it is prudent to consider the ways that queer rights could be imperiled before the Court despite the strength of their jurisprudential underpinnings. This section explains that if queer rights are overturned, it will most likely be due to extralegal factors—specifically the weight of political pressure on individual Justices resulting from external

412. *Dobbs*, 142 S. Ct. at 2284.
413. *See supra* text accompanying notes 356–67 (discussing *Lawrence* and *Obergefell*).
414. *See supra* text accompanying notes 356–67.
415. *See* Romer v. Evans, 517 U.S. 620, 634–35 (1996).
416. *See Dobbs*, 142 S. Ct. at 2276–78.
417. *See* Jeannine Suk Gersen, *The Supreme Court's Conservatives Have Asserted Their Power*, NEW YORKER (July 3, 2022), https://www.newyorker.com/magazine/2022/07/11/the-supreme-courts-conservatives-have-asserted-their-power [https://perma.cc/NJ9B-U3SE]; *see also* Robert Barnes, *With Sweep and Speed, Supreme Court's Conservatives Ignite a New Era*, WASH. POST (July 2, 2022, 2:31 PM), https://www.washingtonpost.com/politics/2022/07/02/supreme-court-conservative-majority/ [https://perma.cc/PP2Q-LK8Z].

partisan loyalties and agendas, as well as internal drivers stemming from personal ideology and belief.

A. History

Political pressure, both external and internal, has influenced the Justices and in turn the Court's decisions from the beginning. One look no further than Chief Justice Marshall's acquiescence in the foundational case of *Marbury v. Madison* for an example of an opinion heavily influenced by external factors outside of the legal and factual questions of the case.[418] In modern Supreme Court history, Justices have also incorporated extralegal reasonings, including socio-political factors, in deciding some of the most important cases of our day.[419]

The Civil Rights Cases of 1883 offer a wrenching example of the power of extralegal factors including sociopolitical pressure to drive a certain outcome.[420] In this case, eight of the nine Justices published an opinion overruling the Civil Rights Act of 1875, the cornerstone achievement of Reconstruction and the vision for moving formerly enslaved people towards more equal citizenhood.[421] Despite its blueprint for equality, the Civil Rights Act of 1875 had been a disappointment due to a lack of executive implementation and judicial underenforcement.[422] By the time the Civil Rights Act of 1875 was before the Court, many saw it as a failed law.[423] After the decision was published, a columnist for the *Cleveland*

418. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Michael W. McConnell, *The Story of* Marbury v. Madison*: Making Defeat Look Like Victory*, *in* CONSTITUTIONAL LAW STORIES 13 (Michael Dorf, ed., 2d ed. 2009).

419. The concept of the "Brandeis Brief" offered to bolster the then special counsel Louis Brandeis's state argument in *Muller v. Oregon* in 1908 has been used subsequently by modern iterations of the Court in discrimination cases outside of marriage and parenting cases including those involving education, like *Hazelwood School District v. United States*, 433 U.S. 299, 308–12 (1977), and twenty years earlier in the landmark desegregation case, *Brown v. Board of Education*, 347 U.S. 483, 493–94 (1954), jury service, *Castaneda v. Partida*, 430 U.S. 482, 495–96 (1977), and *Witherspoon v. Illinois*, 391 U.S. 510, 528 (1968).

420. *See generally The Civil Rights Cases*, 109 U.S. 3 (1883).

421. *Supreme Court Landmark Case Civil Rights Cases of 1883*, C-SPAN (Mar. 5, 2018), https://www.c-span.org/video/?440864-1/supreme-court-landmark-case-civil-rights-cases-1883 [https://perma.cc/BZ2U-M29J].

422. For a full discussion of the chronic underenforcement of the Civil Rights Act and contemporary reactions to the Civil Rights Cases of 1883, see Marianne L. Engelman Lado, *A Question of Justice: African-American Legal Perspectives on the 1883* Civil Rights Cases, 70 CHI.-KENT L. REV. 1123 (1995).

423. *Id.* at 1124–25.

Gazette wrote that "[t]he Civil Rights bill lingered unconsciously nearly nine years and died on the 15th of October, 1883, without a struggle."[424]

The Court's opinion did not directly address this ineffectuality or its roots.[425] Instead, eight out of nine Justices chose to employ an interpretation of the Fourteenth Amendment restricting its reach in a way that ran directly counter to the intent of its drafters; many of whom were still living.[426] There should have been no mystery that the drafters of the Amendment intended the language to be interpreted in an expansive way to root out invidious discrimination and alleviate the continued wounds of enslavement.[427] When the Court held otherwise, it not only undermined the scope of the Fourteenth Amendment, but it delivered the final death knell for progressive Reconstruction.[428] Justice Harlan wrote in lone dissent:

> The opinion in these cases proceeds, it seems to me, upon grounds entirely too narrow and artificial. . . . [t]he substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. "It is not the words of the law but the internal sense of it that makes the law: the letter of the law is the body; the sense and reason of the law is the soul." Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law.[429]

A more recent example would be the Supreme Court's begrudging approval of President Roosevelt's New Deal programs following the President's court packing scheme.[430] There is very little legal daylight between a series of the Warren Court's decisions overturning statutory elements of the New Deal including the National Industrial Recovery Act of 1935[431] and the 1937 decision in *West Coast Hotel Co. v. Parrish*.[432] Many scholars have posited that President Roosevelt's support for a court-reform bill that would lead to the addition of new Justices likely influenced the decision.[433] In a message accompanying the Administration's proposal, Roosevelt argued

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424. Xenia, *Numerous Notes—Politics—Civil Rights*, CLEV. GAZETTE, Oct. 27, 1883, at 2.
425. *See The Civil Rights Cases*, 109 U.S. at 16–17.
426. *See id.* at 23.
427. *See id.* at 10–11.
428. *See id.* at 57 (Harlan, J., dissenting).
429. *Id.* at 26.
430. *See* Ezra Klein, *What a Reckoning at the Supreme Court Could Look Like*, N.Y. TIMES (July 10, 2022), https://www.nytimes.com/2022/07/10/opinion/supreme-court-biden-reform.html [https://perma.cc/GW6P-63ZS].
431. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935).
432. *See* W. Coast Hotel, Co. v. Parrish, 300 U.S. 379 (1937).
433. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 166–67 (6th ed. 2020).

that new, younger Justices were needed on the Court.[434] Targeting the current Court, the message concluded that, "[a] lowered mental or physical vigor leads men to avoid an examination of complicated and changed conditions. Little by little, new facts become blurred through old glasses filled, as it were, for the needs of another generation."[435] The threat of an addition of a purposefully diluting faction of a new generation proved to be too much for the existing Justices.

Although these historic cases may seem worlds away from today's questions, they reflect a persistent, though often ignored reality. The U.S. Supreme Court is a human-made institution, and its Justices are far from divine. They are not isolated from the politics or ideology of the day, but rather they are the product of it. The individual political aspirations or affiliations of Supreme Court Justices are well documented.[436] The personal relationships of individual Justices with party leadership are similarly noncontroversial pieces of history. For example, Justice Abe Fortas had a direct phone line with President Johnson, whereas Justice William Douglas had presidential aspirations of his own.[437] Indeed, President Taft served as the tenth Chief Justice after serving as the twenty-seventh president.[438] Given the structural and political realities of the nomination and confirmation processes, it would be naive to understand any of the Justices or the Court as a truly apolitical agent devoted to the law.

B. Current Targeting Trends

Although the political nature of the Supreme Court is not new, many scholars and commentators have noted that today the role of politics is

434. *Judiciary: De Senectute*, TIME (Feb. 15, 1937), http://content.time.com/time/subscriber/article/0,33009,882676-1,00.html [https://perma.cc/99E6-TK42].

435. *Id.*

436. *See* Rachel Shelden, *The Supreme Court Used to be Openly Political. It Traded Partisanship for Power*, WASH. POST (Sept. 5, 2020, 11:04 AM), https://www.washingtonpost.com/outlook/supreme-court-politics-history/2020/09/25/b9fefcee-fe7f-11ea-9ceb-061d646d9c67_story.html [https://perma.cc/97RW-MGHL].

437. Joshua Zeitz, *The Supreme Court Has Never Been Apolitical*, POLITICO (Apr. 3, 2022, 7:01 AM), https://www.politico.com/news/magazine/2022/04/03/the-supreme-court-has-never-been-apolitical-00022482 [https://perma.cc/T38Q-3Y7A].

438. *See William Howard Taft's Truly Historic 'Double-Double*,*'* NAT'L CONST. CTR. (June 30, 2022), https://constitutioncenter.org/blog/william-howard-tafts-truly-historic-double-double [https://perma.cc/7X4N-WT5D].

different by both degree and nature.[439] Justice Coney Barrett's assertion that the Court is "not comprised of a bunch of partisan hacks"[440] may ring true, but it is comprised of lawyers who are politically supported, if not directly affiliated. Conservative groups invested around $30 million to support her confirmation in the fall of 2020.[441]

The newest Justices alongside Justice Thomas have ignored traditional procedural guardrails designed to promote at least an optic of fairness. Further, the Court has shown a new willingness to engage in politically tumultuous issues and radically overturn precedent seemingly with disregard for the impact on the social fabric. Although this term's blockbuster cases like *Dobbs* and *West Virginia v. EPA* will continue to dominate newspaper columns and history books, the Court's approach to procedural actions is similarly disturbing and reveals a growing lack of concern for the tradition, human impact, or legal standards that have historically restrained the Court. For example, in February 2022 the Court suspended a lower court's unanimous ruling that had held that the 2022 congressional election district map designed by the Alabama legislature was invalidated by the 1965 Voting Rights Act.[442] The map that the lower court had invalidated resulted in one Black representative and six White representatives in a state with over a quarter of the state's voters identifying as Black.[443] This Court's intervention was perceived by many as an extreme power grab, unjustified by the law or underlying process.[444] Chief Justice Roberts did not join Justices Thomas, Alito, Gorsuch, Kavanaugh, and Coney Barrett in the majority opinion.[445] Instead, he scolded his conservative allies, saying,

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439. *See* Paul Waldman & Greg Sargent, *Voters are Finally Seeing How Political the Supreme Court Really Is*, WASH. POST (May 18, 2022, 5:08 PM), https://www.washingtonpost.com/opinions/2022/05/18/public-realizing-supreme-court-political/ [https://perma.cc/5BTZ-PJKG].

440. Zeitz, *supra* note 437.

441. Jordan Fabian, *Trump-Allied Groups Pour $30 Million Into Barrett Confirmation*, BLOOMBERG (Oct. 22, 2020, 1:00 AM), https://www.bloomberg.com/news/articles/2020-10-22/trump-allied-groups-pour-30-million-into-barrett-confirmation/ [https://perma.cc/ZL8G-GLMU].

442. Merrill v. Milligan, 142 S. Ct. 879 (2022); *see also* Amy Howe, *In 5-4 Vote, Justices Reinstate Alabama Voting Map Despite Lower Court's Ruling that it Dilutes Black Votes*, SCOTUSBLOG (Feb. 7, 2022, 8:43 PM), https://www.scotusblog.com/2022/02/in-5-4-vote-justices-reinstate-alabama-voting-map-despite-lower-courts-ruling-that-it-dilutes-black-votes/ [https://perma.cc/JQB4-7LZU].

443. Reid J. Epstein, *Court Throws Out Alabama's New Congressional Map*, N.Y. TIMES (Jan. 24, 2022), https://www.nytimes.com/2022/01/24/us/politics/alabama-congressional-map-redistricting.html [https://perma.cc/82XB-HA3W].

444. *See, e.g.*, Andrew Chung & Lawrence Hurley, *U.S. Supreme Court's Alabama Ruling Signals New Threat to Voting Rights Law*, REUTERS (Feb. 8, 2022, 2:27 PM), https://www.reuters.com/world/us/us-supreme-courts-alabama-ruling-signals-new-threat-voting-rights-law-2022-02-08/ [https://perma.cc/9VNH-BNHZ].

445. *See Milligan*, 142 S. Ct. at 882 (Roberts, C.J., dissenting).

"The District Court properly applied existing law in an extensive opinion with no apparent errors for our correction."[446] A former George H.W. Bush appointee, Donald Ayer, observed that "[w]hat is new is the court's frequency and brashness in achieving these radical outcomes and its willingness to do so too often without an honest explanation and acknowledgement of what is actually going on."[447]

Faced with these political realities and the seemingly unrestrained willingness of a majority of the Supreme Court to revisit landmark precedents, advocates for queer rights and the retention of marriage equality have reason for concern. This is especially true after Justice Thomas's concurrence in *Dobbs* called on the Court to expansively reconsider the use of substantive due process.[448] Finally, despite Justice Alito's insistence that abortion is distinct from other rights because of the third-party interest of potential life, queer rights are not insulated from similar harm-based claims. Anti-queer attacks have consistently relied on divisive fearmongering and pseudo-moralistic talking points to leverage political power.[449] Beyond the anti-sodomy statutes of the 1970s, the hallmark of the 1980s and 1990s culture war included policies of deadly neglect during the early years of the AIDS epidemic, as well as explicit policies of exclusion like DOMA. These policies alienated queer and transgender people from accessing the law and living as full members of society.

The tenor of today's attacks has a similar, persistent undercurrent—the need for protection *from* queer and transgender people. Although it is tempting to characterize laws that prohibit inclusive educational policies or criminalize supportive parents as merely an Anita Bryant-style of retrograde

446. *Id.*

447. Donald Ayer, *The Supreme Court has Gone Off the Rails*, N.Y. TIMES (Oct. 4, 2021), https://www.nytimes.com/2021/10/04/opinion/supreme-court-conservatives.html [https://perma.cc/3E9H-J2CJ].

448. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2304 (2022) (Thomas, J., concurring).

449. *See* Patrick Joseph Buchanan, Culture War Speech: Address to the Republican National Convention (Aug. 17, 1992) (including "homosexual rights" and "the amoral idea that gay and lesbian couples should have the same standing in law as married men and women" as evidence of the nation's moral decline alongside access to abortion and restricting public funding to religious schools); Timothy Egan, *Oregon Measure Asks State to Repress Homosexuality*, N.Y. TIMES (Aug. 16, 1992), https://www.nytimes.com/1992/08/16/us/oregon-measure-asks-state-to-repress-homosexuality.html [https://perma.cc/PR2F-MSFG].

backlash,[450] they are different in substance and by degree. In 2021, state legislatures proposed more than 250 anti-LGBT bills and passed seventeen, including seven directly targeting transgender student athletes and one restricting coverage of transition-related care.[451] In 2022 alone, state legislatures introduced 320 anti-LGBT proposed bills.[452] Similarly, the resurgence of bills like Florida's "Don't Say Gay" law and the characterization of its opponents as sexual predators or "groomers" is chilling.[453] History is a harsh, but a clear-eyed teacher. Fear and division are effective tools for subordination and a retrenchment of the exclusionary and undemocratic values that it demands. Today's political climate, coupled with the success of restrictive state legislation demonizing queer and transgender people, has equipped opponents of queer rights with a legally specious, but politically attractive, claim that the Court must balance the rights of queer people with the need to protect society—and its children—from witnessing queer equality. These questions will fall on the desks of nine lawyers in Washington, D.C. Given the strength of the constitutional infrastructure of queer rights and the *Dobbs* approach to stare decisis, if the Court overturns them, the Constitution will have "had nothing to do with it."[454]

VI. CONCLUSION

The Supreme Court's decision rescinding the recognition of a Constitutional right to reproductive autonomy was as uniquely definitive as it was severe. The immediate blackletter meaning of Justice Alito's enthusiastic rejection of the fundamental right set out by *Roe* and *Casey* demands little interpretation. However, understanding the long-term jurisprudential and

450. Jillian Eugenios, *How 1970s Christian Crusader Anita Bryant Helped Spawn Florida's LGBTQ Culture War*, NBC NEWS (Apr. 14, 2022, 9:21 AM), https://www.nbcnews.com/nbc-out/out-news/1970s-christian-crusader-anita-bryant-helped-spawn-floridas-lgbtq-cult-rcna24215 [https://perma.cc/Z2L8-V9RG].

451. Wyatt Ronan, *2021 Officially Becomes Worst Year in Recent History for LGBTQ State Legislative Attacks as Unprecedented Number of States Enact Record-Shattering Number of Anti-LGBTQ Measures into Law*, HUM. RTS. CAMPAIGN (May 7, 2021), https://www.hrc.org/press-releases/2021-officially-becomes-worst-year-in-recent-history-for-lgbtq-state-legislative-attacks-as-unprecedented-number-of-states-enact-record-shattering-number-of-anti-lgbtq-measures-into-law [https://perma.cc/6EKW-PYYQ].

452. Delphine Luneau, *Human Rights Campaign Condemns South Carolina House Passage of Anti-Transgender Sports Ban*, HUM. RTS. CAMPAIGN (Apr. 6, 2022), https://www.hrc.org/press-releases/human-rights-campaign-condemns-south-carolina-house-passage-of-anti-transgender-sports-ban [https://perma.cc/UBD4-YXNH].

453. Jo Yurcaba, *After 'Don't Say Gay' Bill Passed, Anti-LGBTQ 'Grooming' Rhetoric Surged 400% Online*, NBC NEWS (Aug. 12, 2022, 7:13 AM), https://www.nbcnews.com/nbc-out/out-news/-dont-say-gay-bill-passed-lgbtq-online-hate-surged-400-rcna42617 [https://perma.cc/JGV8-RF6A].

454. Obergefell v. Hodges, 576 U.S. 644, 713 (2015) (Roberts, C.J., dissenting).

political impact of the decision will be an evolving process undoubtedly marked by unforeseen aftershocks and future implosions.

The legal and social uncertainty created by the Court's radical willingness to overturn previously recognized and long-established fundamental rights precedent has contributed to a political culture of increasing fear.[455] This individual vulnerability sparked increased political urgency and coordination.[456] According to exit polls, the *Dobbs* decision heavily influenced votes cast by members of both parties in the November 2022 midterms.[457] Reports show that personal disagreement with the decision acutely blunted a predicted "red wave" of Republican state and national leadership.[458] Further, within six months Congress passed the Respect for Marriage Act (RMA), overturning the Defense of Marriage Act and ensuring federal recognition of same-sex and interracial marriages.[459] The RMA also requires that states recognize these marriages regardless of state or local bans.[460] Politicians and advocates championing the RMA cited growing concern within the LGBTQ community over the impact of the *Dobbs* decision on marriage rights.[461]

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455. *See, e.g.*, Molly Jong-Fast, Roe *Rage: What Losing* Roe *Feels Like for Women*, ATLANTIC (June 27, 2022), https://newsletters.theatlantic.com/wait-what/62ba09f5da4cea0020eed379/dobbs-roe-overturned-motherhood-womens-rights/ [https://perma.cc/QT4M-PLPV].

456. *See* Richard Blumenthal (@SenBlumenthal), TWITTER (June 30, 2022, 5:40 AM), https://twitter.com/senblumenthal/status/1542488361339949058 [https://perma.cc/7PFR-42EQ] ("The Dobbs decision has evoked anger, outrage, & fear. Proud to stand with dedicated advocates in New London as we fight to protect reproductive freedoms & make sure CT remains a safe harbor for abortion care.").

457. *See* Sara Dorn, *2022 Exit Polls: Voters are Angry About the State of the Country —Here's What was on Their Mind as They Voted*, FORBES (Nov. 8, 2022, 6:27 PM), https://www.forbes.com/sites/saradorn/2022/11/08/2022-exit-polls-voters-are-angry-about-the-state-of-the-country-heres-what-was-on-their-mind-as-they-voted/?sh=4ac24882ec19 [https://perma.cc/79E9-6HBL].

458. S*ee* Alice Miranda Ollstein & Megan Messerly, *A Predicted 'Red Wave' Crashed into Wall of Abortion Rights Support on Tuesday*, POLITICO (Nov. 9, 2022, 4:04 PM), https://www.politico.com/news/2022/11/09/abortion-votes-2022-election-results-00065983 [https://perma.cc/9ZDQ-6GYC].

459. *See* Ximena Bustillo, Juma Sei & Deepa Shivaram, *Respect for Marriage Act Clears Congress with Bipartisan Support*, NPR (Dec. 8, 2022, 2:28 PM), https://www.npr.org/2022/11/29/1139676719/same-sex-marriages-bill-senate-vote [https://perma.cc/E7YD-JRF2].

460. *See* Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2306 (2022) (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

461. *See* Kaitlyn Radde, *What Does the Respect for Marriage Act Do? The Answer Will Vary by State.*, NPR (Dec. 8, 2022, 12:27 PM), https://www.npr.org/2022/12/08/1140808263/what-does-the-respect-for-marriage-act-do-the-answer-will-vary-by-state [https://perma.cc/EC24-63Q5] ("'I want to be really clear that there would be no reason to

The weight of this destabilizing uncertainty on individual, traditionally marginalized communities cannot be overstated. The American LGBTQ community in particular is continuing to make sense of rising rates of violence[462] and discrimination as it prepares for LGBTQ rights to be at the center of Supreme Court debate again in spring 2023.[463] However, a faithful application of the *Dobbs* standard to *Lawrence* or *Obergefell* should leave the rights recognized by these landmark cases undisturbed.

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reverse *Obergefell* and that it was correctly decided under existing precedents,' including the Equal Protection Clause of the Fourteenth Amendment, says Mary Bonauto, a senior attorney at GLBTQ Legal Advocates and Defenders who has argued landmark civil rights cases, including *Obergefell*. 'But if it were, there is now a backstop in place requiring states to respect these marriages' and guaranteeing them federal recognition.").

462. *See* Morning Edition, *How Political Rhetoric Factors into Violence Against the LGBTQ Community*, NPR (Nov. 22, 2022, 7:18 AM), https://www.npr.org/2022/11/22/1138555795/how-political-rhetoric-factors-into-violence-against-the-lgbtq-community [https://perma.cc/HN58-EWC9]; *see also* Robin Maril, *Op-Ed: Club Q Shooting in Colorado Springs Follows Six Brutal Years of Republican Anti-LGBTQ Rhetoric*, L.A. Times (Nov. 20, 2022, 1:29 PM), https://www.latimes.com/opinion/story/2022-11-20/colorado-springs-club-q-shooting-republican-anti-gay-politics [https://perma.cc/X49D-MEDN].

463. *See* 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021), *cert. granted in part*, 142 S. Ct. 1106 (2022).