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BY: NICK WOLFRAM*

ABSTRACT

In 1910, the Supreme Court recognized in Weems v. United States *that a constitution "must be capable of wider application than the mischief which gave it birth." This principle led to the creation of the Court's two-pronged "evolving standards of decency," test: (1) evidence of an objective indicia of a national consensus, and (2) the reviewing court's own independent judgment. To this day the Court has yet to apply this test outside of the Eighth Amendment context. But can the "evolving standards of decency," test identify and protect other fundamental rights? This Article explores how the Court could apply the "evolving standards of decency" test to determine fundamental rights under the Fourteenth Amendment's Due Process Clause and provide more robust constitutional protections for LGBTQ+ rights. Specifically, it applies the test to* Lawrence v. Texas *and* Obergefell v. Hodges *to show how it would distinguish and affirm the respective protections found in those cases. This new application would not change the Court's current "history and tradition" test for fundamental rights, but rather it reimagines how to view history and tradition when we seek to determine which rights are fundamental in contemporary society. As the Court continues to restrict substantive due process rights—and explicitly put the rights discussed in* Lawrence *and* Obergefell *at risk—the "evolving standards of decency," test offers advocates a new approach to protect marginalized communities within this narrow framework.*

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INTRODUCTION

In 2022, someone leaked the draft opinion of *Dobbs v. Jackson Women's Health Organization*,[1] which would overturn *Roe v. Wade*[2] and *Planned Parenthood v. Casey*[3] to declare that there is no constitutional right for one to terminate their pregnancy.[4] While the immediate threat was beyond troubling, Justice Alito's reasoning in the draft raised concerns about whether the Court would strike down other substantive due process cases in the future.[5] Unless specifically enumerated in the Bill of Rights, it reasoned that the only rights protected by the Due Process Clause are those which are fundamental rights "deeply rooted in our nation's history and tradition" and implicit in our ordered scheme of liberty,[6] a test pulled from *Washington v. Glucksberg*.[7] Many scholars have determined that the fundamental rights protected by the *Roe*-*Casey* line of substantive due process cases, including LGBTQ+ rights, more than likely cannot survive the scrutiny of this narrow "history and tradition" test.

The published *Dobbs* opinion came out about a month later, and it largely did not change the draft's reasoning.[8] While the opinion attempted to stymie fears by stating no other substantive due process protections were at risk, Justice Thomas's concurrence raised many concerns.[9] He advised the Court to revisit a slew of its substantive due process decisions,[10] including two that protected integral LGBTQ+ rights: *Lawrence v. Texas*[11] and *Obergefell v. Hodges*.[12] The majority did not seem to agree that all substantive due process cases are "demonstrably erroneous," as Justice Thomas does, but the fact remains that the Court overturned *Casey* and *Roe* because the rights that they protected did not meet the test outlined in *Glucksberg*.[13]

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1. Robert Barnes & Mike DeBonis, *Supreme Court is Ready to Strike Down Roe v. Wade, Leaked Draft Shows*, WASH. POST (May 3, 2022), https://www.washingtonpost.com/politics/2022/05/02/roe-v-wade-supreme-court-draft-politico/ [hereinafter "Barnes & DeBonis"].

2. 410 U.S. 113 (1973).

3. 505 U.S. 833 (1992).

4. Barnes & DeBonis, *supra* note 1.

5. Politico Staff, *Read Justice Alito's Initial Draft Abortion Opinion Which Would Overturn* Roe v. Wade, POLITICO (May 2, 2022), https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504 (containing the full ninety-eight page draft opinion (Draft Opinion)).

6. *Id.* at 11.

7. 521 U.S. 702 (1997).

8. 142 S. Ct. 2228 (2022).

9. *Id.* at 2280–81.

10. *Id.* at 2301 (Thomas, J., concurring).

11. 539 U.S. 558 (2003).

12. 576 U.S. 644 (2015).

13. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

Since existing literature has failed to offer novel arguments to address the Court's narrowing interpretation of substantive due process rights, advocates can fill this gap by applying a longstanding tenet of constitutional interpretation: the "evolving standards of decency" test derived from Eighth Amendment jurisprudence. This Article will show how this approach could modernize strategies to define, argue for, and protect future fundamental rights—all while still working within the confines of the *Glucksberg* test.

Part I provides the historical backdrop to this Article. It details the development of fundamental rights analysis since the Founding and how LGBTQ+ rights activists organized against this institutionalized homophobia. Part II discusses how the leading LGBTQ+ fundamental rights cases—*Lawrence* and *Obergefell*—reached the high court. This journey exposed the ideological tensions that ultimately shaped Justice Kennedy's opinions which purported to create constitutional protections for this community. Part III dives into the flawed reasoning behind these seminal cases and the harmful effects that still haunt us. Once we understand why these cases are vulnerable, Part IV describes the current *Glucksberg* test in order to contextualize the various responses from scholars and why they are insufficient. Before the article's conclusion, Part V explains and applies the "emerging standards of decency" test to illustrate exactly how it would find fundamental rights in *Lawrence* and *Obergefell*, and protect them. This demonstration will also address any concerns others may have about adopting this test as another advocacy tool. Although the Court has not applied the "evolving standards of decency" test outside the context of the Eighth Amendment, this test deserves serious consideration because of how it produces creative solutions to troubling developments.

I. THE EVOLUTION OF FUNDAMENTAL RIGHTS JURISPRUDENCE

A. The History of Fundamental Rights

The concept that liberty rights are implicit in civil society predates the Constitution.[14] In the Federalist Papers, Alexander Hamilton argued that the Bill of Rights was not needed since inherent liberty rights were already well understood to be possessed by each individual.[15] He believed that enumerating particular rights would work to limit these already-held liberties.[16]

14. Nancy C. Marcus, *Yes, Alito, There is a Right to Privacy: Why the Leaked Dobbs Opinion is Doctrinally Unsound,* 13 CONLAWNOW 101, 104–05 (2022).

15. See THE FEDERALIST NO. 86 (Alexander Hamilton) ("I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous . . . For why declare that things shall not be done which there is no power to do?").

16. *Id.*

Perhaps in response to Hamilton's concerns about the limiting effect of enumerating particular rights, the Ninth Amendment states "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[17]

The Supreme Court was not quick to recognize these unenumerated rights, and even once it had, the Court was not set on how it would do so.[18] Indeed, the Court originally developed the process for determining which rights are fundamental through the incorporation of constitutional rights against the states.[19] Following the Civil War and the ratification of the Fourteenth Amendment, the Court in the *Slaughter-House Cases* maintained its position that the Bill of Rights only applied to the federal government.[20]

17. U.S. CONST. amend. IX. This concept lasted well beyond the founding, as evidenced by future Supreme Court Justice Louis Brandeis' 1890 law review article discussing the constitutional right to privacy. *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

18. The first instance of a federal court undertaking this task was likely in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823). There, a federal district court in Pennsylvania was tasked with determining whether an individual's constitutional rights were violated when their vessel was seized and converted by the defendant. *Id.* at 548–49. The court explained its inquiry was limited to "what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are ***fundamental***; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole." *Id.* at 551–52 (emphasis added).

19. *See* McDonald v. City of Chicago, Ill., 561 U.S. 742, 754–60 (2010) (discussing, in the context of the Second Amendment, the development of fundamental rights jurisprudence). "Incorporation" describes the process of determining which constitutional rights limit the governments of the states. *See Id.*

20. 83 U.S. 36, 37–38 (1872). There, two dissenting Justices seemed to agree with the idea that the Fourteenth Amendment protected some inherent, unenumerated economic rights. *Id.* at 96–98 (Field, J., dissenting), 113–14 (Bradley, J., dissenting). This gave rise to the Lochner Era, where "economic substantive due process " was used to invalidate legislative economic restrictions. Stephen M. Feldman, *Unenumerated Rights in Different Democratic Regimes*, 9 J. OF CONST. L. 47, 47 (2006). This concept was rooted in the idea that the Lockean concept of "property" was included in the Due Process Clause—which states "no state shall . . . deprive any person of life, liberty, or property, without Due Process of law," U.S. CONST. amend. XIV, § 1—to protect certain inalienable economic rights unenumerated elsewhere in the Constitution, such as the right to contract. *See* Feldman, *supra* note 21, at 52–53. However, over the next several decades, economic substantive due process was progressively de-clawed, culminating in the Court's decision in *United States v. Carolene Products*, where it held that economic restrictions need only meet rational basis review. 304 U.S. 144 (1938). There, the challenged law was the "Filled Milk Act," which prohibited "the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream." *Id.* at 146. Among several significant aspects of this case, it marked the Court's explanation that the Due Process Clause of the Fifth Amendment limits the federal government in the same way the Due Process Clause of the Fourteenth Amendment limits state governments. *Id.* at 148.

However, at the end of the nineteenth and into the twentieth centuries, the Court began to reconsider its position case-by-case. The Court recognized that some rights may be imposed against the states through the Due Process Clause of the Fourteenth Amendment, also known as the theory of incorporation.[21]

The Court "used different formulations in describing the boundaries of Due Process" during this time.[22] In *Snyder v. Massachusetts*, the Court stated these rights included those "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[23] The Court in *Palko v. Connecticut* held that these rights included only those that are "the very essence of a scheme of ordered liberty," and "principle[s of liberty and] justice so rooted in the traditions and conscience of our people as to be ranked fundamental."[24] Additionally, in *Duncan v. Louisiana*, the Court asked, "when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection."[25]

Two competing theories on how to determine which rights were fundamental—and therefore how and whether the Court could incorporate those rights—emerged as these cases progressed.[26] Justice Frankfurter championed the theory of "selective incorporation."[27] He asserted that the Due Process Clause of the Fourteenth Amendment guaranteed certain fundamental rights of the Bill of Rights against the states.[28] Whereas Justice Black campaigned for the theory of "mechanical" or "total incorporation," which posited that the Fourteenth Amendment incorporated all of the first eight amendments of the Bill of Rights against the states, but only those eight

21. *See* Hurtado v. California, 110 U.S. 516 (1884) (holding Due Process does not require grand jury indictment); Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897) (holding that Due Process prohibits states from taking of private property for public use without just compensation).

22. *McDonald*, 561 U.S. at 760.

23. 291 U.S. 97, 105 (1934).

24. *Id.* at 325.

25. 391 U.S. 145, 149 n.14 (1968).

26. *See McDonald*, 561 U.S. at 760–63 (2010) (discussing the evolution of incorporation theory on the Court).

27. *Id.* at 763; *see also* Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L. REV. 253, 308–09 (1982) (discussing the development of selective incorporation); Adamson v. People of State of Cal., 332 U.S. 46, 64–65 (1947) (Frankfurter, J., concurring), overruled by Malloy v. Hogan, 378 U.S. 1 (1964).

28. *Adamson*, 332 U.S. at 64–65; Israel, *supra* note 28, at 253.

amendments.[29] In time, the Court adopted Justice Frankfurter's selective incorporation.[30]

Implicit in the concept of selective incorporation was the idea that these fundamental rights also included rights not explicitly enumerated in the first eight amendments.[31] The several concurrences in *Griswold v. Connecticut* grappled with how these unenumerated rights indeed are—or ought to be—protected.[32] In subsequent cases, the Court relied on the Due Process Clause of the Fourteenth Amendment as the vehicle for their protection.[33] The Court eventually crafted a fairly robust substantive due process jurisprudence.[34] In 1997, it declared these cases had developed a definite framework for lower courts to follow when determining whether a non-enumerated right is fundamental under the Due Process Clause.[35]

None of these debates happened in a vacuum. Even though selective incorporation won the day, the Justices' arguments about incorporation and the determination of fundamental rights provided the roadmap for courts, activists, and the public to argue for the protection of new fundamental rights. Later a generation of LGBTQ+ activists and allies would use public opinion to force the Court to find those rights. In some ways they succeeded, and in others they failed.

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29. *Adamson*, 332 U.S. at 71–72, 82; *see also McDonald*, 561 U.S. at 762–63.

30. *See, e.g.,* Gideon v. Wainwright, 372 U.S. 335, 341 (1963); Malloy v. Hogan, 378 U.S., 5–6 (1964); Pointer v. Tex., 380 U.S. 400, 403–404 (1965); Wash. v. Tex., 388 U.S. 14, 18 (1967); *Duncan*, 391 U.S. at 147–148; Benton v. Md., 395 U.S. 784, 794 (1969).

31. *See* Poe v. Ullman, 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting) ("[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."); Griswold v. Connecticut, 381 U.S. 479, 487–488 (1965) (Goldberg, J., concurring) ("I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights."); Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that Virginia's anti-miscegenation statute deprived individuals of the fundamental right of marriage in violation of the Due Process Clause).

32. *Griswold*, 381 U.S. at 484 (Douglas, J., plurality opinion) (arguing that the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," which protect other unenumerated rights); *id*. at 486–88 (Goldberg, J., concurring) (suggesting the Due Process Clause protects more than just the rights enumerated in the first eight amendments, and that this was the framers' intention as evidenced by the Ninth Amendment)

33. *See*, *e.g.,* Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 502–03 (1977); Reno v. Flores, 507 U.S. 292, 301–02 (1993).

34. This line of cases includes, *inter alia*, *Griswold*, 381 U.S. at 487–88; *Roe*, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); *Carey*, 431 U.S. 678 (1977); *Casey*, 505 U.S. 883 (1992).

35. *Glucksberg*, 521 U.S at 720–21.

B. The Fight For LGBTQ+ Constitutional Protections

The American legal history of LGBTQ+ rights is long, winding, and leaves much room for progress. In the context of Supreme Court jurisprudence, the concepts of private liberties and human dignity offered the base protections for LGBTQ+ rights.[36] To be sure, this is no innovation, particularly in the realm of liberal democracy.[37] In his *Treatises of Government*—a text many view as the blueprint for the American founders—John Locke explained that the state has a duty to protect "a life fit for the dignity of man," which necessarily includes certain inalienable rights: life, liberty, and property.[38] The term "dignity," however, does not appear in the U.S. Constitution, and the Court did not recognize it as inherent to any constitutional protections until after World War II.[39] So how did LGBTQ+ rights develop in America and culminate in constitutional protections premised on these humanistic ideas? The persistent efforts of LGBTQ+ rights activists and advocates drove this evolution.

Before 2003, constitutional jurisprudence was openly anti-LGBTQ+. In 1972, the Court in *Baker v. Nelson* dismissed an appeal of a state supreme court's holding that marriage could only be between a man and a woman for "want of a substantial federal question."[40] The Court, in other words, said that "the idea that people of the same sex might have a constitutional right to get married . . . was too absurd even to consider."[41] Then over a decade later, the Court in 1986 upheld Georgia's anti-sodomy statute in *Bowers v. Hardwick*: it concluded that the right to consensual sexual relations between two individuals of the same gender identity had "no support in the text of the Constitution."[42]

The Court did not suddenly determine that LGBTQ+ individuals deserve a life of dignity overnight. It had many opportunities to reconsider its discriminatory decisions, including in *Baker* and *Bowers*.[43] Instead, the

36. *See* Steve Sanders*, Dignity and Social Meaning: Obergefell, Windsor, and Lawrence As Constitutional Dialogue*, 87 FORDHAM L. REV. 2069, 2070 (2019).

37. Indeed, the use of private liberties and human dignity as justifications for jurisprudence has developed over the last 2500 years. *See* AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 15–16 (2015).

38. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 111 (1690).

39. Sanders, *supra* note 36, at 2076.

40. 409 U.S. 810, 810 (1972).

41. Molly Ball, *How Gay Marriage Became a Constitutional Right*, THE ATLANTIC (July 1, 2015), https://www.theatlantic.com/politics/archive/2015/07/gay-marriage-supreme-court-politics-activism/397052/ [https://perma.cc/KWS8-J7U7].

42. 478 U.S. 186, 196–95 (1986).

43. *Getting Rid of Sodomy Laws: History and Strategy That Led to the* Lawrence *Decision*, ACLU, https://www.aclu.org/other/getting-rid-sodomy-laws-history-and-strategy-led-lawrence-

deliberate efforts of activists and allies changed how the public viewed the LGBTQ+ community and, in turn, altered the Court's course.[44] The decades following *Bowers* marked a "sea change" in public opinion in favor of LGBTQ+ rights.[45] Under increasing pressure, the Court could no longer reconcile anti-LGBTQ+ laws with the public's new attitude.[46] As one journalist summed this period up shortly after the *Obergefell* decision, "[w]hat changed . . . wasn't the constitution—it was the country. And what changed the country was a movement."[47]

III. THE SEMINAL CASES: LAWRENCE AND OBERGEFELL

The current state of constitutional protections for LGBTQ+ rights evolved from a long line of cases that discuss various protections. However, this Article spotlights two seminal Supreme Court cases that the LGBTQ+ movement used to persuade the Court to decide in its favor: *Lawrence*, which would provide constitutional protections for sex between two individuals of the same gender identity, and *Obergefell*, which would do the same for marriage between individuals of the same gender identity. Importantly, Justice Kennedy—who by most accounts was a moderate at best—wrote both majority opinions as well as the key cases that would provide the foundation for them.[48]

A. The Road to *Lawrence*

Even when *Bowers* was still good law, many state appellate courts struck down anti-sodomy statutes under state constitutional provisions by the turn of the century.[49] In 1996, the Supreme Court joined this trend in *Romer v. Evans* when it used the Equal Protection Clause to strike down a state constitutional amendment in Colorado that prohibited anti-LGBTQ+ discrimination laws.[50] If the overturning of *Bowers* was not already in the tea

decision (last visited Nov. 2, 2022) (detailing challenges to anti-sodomy laws across the country in the decades preceding *Lawrence*); Littleton v. Prange, 531 U.S. 872 (2000) (denying review of decisions holding transgender marriages were void under a same-sex marriage ban); Gardner v. Gardner, 537 U.S. 825 (2002) (denying review of the same).

44. Sanders, *supra* note 36, at 2081; Ball *supra* note 41.

45. Shankar Vedantam, *Shift in Gay Marriage Support Mirrors a Changing America*, NPR (Mar. 25, 2013, 3:14 AM), https://www.npr.org/2013/03/25/174989702/shift-in-gay-marriage-support-mirrors-a-changing-america [https://perma.cc/5USV-4BS3.

46. *See* Sanders, *supra* note 36, at 2083 ("[B]y the early 2000s public attitudes were moving steadily in a direction that was increasingly difficult to reconcile with the purpose of sodomy laws: to express moral disapproval of gays and lesbians by making their sexual activity a crime.").

47. Ball, *supra* note 41.

48. David S. Cohen, *Silence of the Liberals: When Supreme Court Justices Fail to Speak Up for LGBT Rights*, 53 U. RICH L. REV 1085, 1091 (2019).

49. ARTHUR S. LEONARD & PATRICIA A. CAIN, SEXUALITY LAW 134 (3rd ed. 2019).

50. 517 U.S. 620, 623 (1996).

leaves, Justice Scalia made it clear in his dissent that these two cases could not co-exist. He wrote that "[i]n holding that homosexuality cannot be singled out for unfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago . . . and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias."[51] In other words, Justice Scalia pointed out the obvious inconsistency: the Court upheld a state law criminalizing sex between two individuals of the same gender identity, but then held that another state violated the Equal Protection Clause by denying gay and lesbian individuals protection against discrimination.

The Court in 2003 resolved this dissidence when it granted certiorari to review a criminal conviction under a state anti-sodomy statute. A police officer, called to the location for an unrelated disturbance, discovered petitioners John Geddes Lawrence and Tyron Garner engaging in a sexual act in Lawrence's residence.[52] The two were arrested, charged, and convicted under a Texas statute that outlawed "deviate sexual intercourse."[53] The statute specifically outlawed "sodomy" as a deviant act, but the state interpreted it as only applying to acts between members of the same sex.[54]

Lawrence and Garner argued that the statute was unconstitutional on both Due Process and Equal Protection grounds.[55] The petitioners posited that, under the Due Process Clause, the Texas statute violated liberty and privacy rights that the Court had previously upheld in past substantive due process cases such as *Griswold v. Connecticut* and *Planned Parenthood v. Casey*.[56] They also argued that, under the Equal Protection Clause, the Texas statute functioned identically to the resolution struck down in *Romer* in that it "singl[ed] out a certain class of citizens for disfavored legal status."[57] Therefore, the petitioners argued that, just as in *Romer*, the law could not pass rational basis scrutiny.[58] Texas, hoping to rely on *Bowers* as a good

51. *Id.* at 636 (Scalia, J., dissenting).

52. *Lawrence*, 539 U.S. at 562 (2003).

53. *Id.* at 563.

54. *Id.* The statute (Tex. Penal Code Ann. § 21.06(a) (2003).) itself defined "deviate sexual intercourse" as "any contact between any part of the genitals of one person and the mouth or anus of another person; or the penetration of the genitals or the anus of another person with an object."

55. Kristin Andreasen, *Lawrence v. Texas: One Small Step for Gay Rights; One Giant Leap for Liberty*, 14 J. CONTEMP. LEGAL ISSUES 73, 74 (2004).

56. Brief for Petitioner at 10, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (discussing *Griswold*, 381 U.S. 479 (1965); *Casey*, 505 U.S. 883 (1992)).

57. *Id.* at 32 (quoting *Romer*, 517 U.S. at 633).

58. *Id.* at 32–33.

precedent, offered morality as the sole justification for the law, believing that would withstand whatever level of scrutiny the Court chose to impose.[59]

In a 6-3 decision, the Court determined that the Texas law was unconstitutional.[60] Five justices joined the majority opinion in overturning *Bowers*.[61] Justice Kennedy's majority opinion chose substantive due process as the vehicle for protection of the underlying right at issue, and used a backdrop of privacy rights cases to invalidate *Bowers*.[62] He explained that the threshold for the privacy right at issue in *Griswold* was the "right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[63] On this basis, he explained that the *Bowers* Court inaccurately and incorrectly framed the right infringed upon by anti-sodomy statutes.[64] He specified that the *Bowers* Court erroneously declared the issue presented as "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 and have done so for a very long time."[65] Instead, cases such as *Griswold* show that legal proscriptions like anti-sodomy laws "have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home," and thus *Lawrence* "involves liberty of the person both in its spatial and in its more transcendent dimensions."[66]

Having re-framed the right at stake, Justice Kennedy then pointed at two other fatal flaws of *Bowers*: its incompatibility with the Court's post-*Bowers* decisions in *Planned Parenthood v. Casey* and *Romer*, and its inaccurate history of anti-sodomy laws.[67] First, *Bowers*'s history is inaccurate

59. Nathan R. Curtis, *Unraveling* Lawrence's *Concerns About Legislated Morality: The Constitutionality of Laws Criminalizing the Sale of Obscene Devices*, 2010 B.Y.U. L. REV. 1369, 1372 (2010); Brief for Respondent at 41, *Lawrence*, 539 U.S. 558 (2003) (No. 02-102).

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

61. *See id.* at 579 (O'Connor, J., concurring).

62. *Id*. at 565 ("We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers*.").

63. *Id.* (emphasis in original) (quoting *Eisenstadt*, 405 U.S. at 453).

64. *Id.* at 566.

65. *Id*. at 566–67 (quoting *Bowers*, 409 U.S. at 190).

66. *Id*. at 562-67.

67. *Id.* at 568–73. Justice Kennedy did not suggest that there was a national history of sexual relations between those of the same gender identity, nor did he introduce a historical discussion to get at the Court's test for fundamental rights. Rather, the opinion seemed only to undercut the central piece of the *Bower*'s reasoning as was necessary ultimately to overturn it. *Id*. at 568 ("We need not enter this debate in the attempt to reach a definitive historical judgment, but the following

because *Casey* "confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child-rearing, and education."[68] Second, *Romer* held that any statute born of animus towards a particular class is invalid under the Equal Protection Clause.[69] The Court invalidated the Texas statute under the Due Process Clause, but *Romer* was apposite in that "[e]quality 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."[70] The Court also explained that striking down the Texas law on equal protection grounds might leave some anti-sodomy laws in place that prohibit sodomy no matter the gender identity of the two individuals.[71]

All these arguments—reframing the issue, undercutting *Bowers*' historical discussion, and drawing on contradictory post-*Bowers* doctrine—were necessary to overturn *Bowers*. Therefore, the majority's reasoning seemed based on substantive due process, but, upon closer inspection, the opinion did not directly follow the main tenets of substantive due process precedent, which would expose vulnerabilities later.

B. The Road to *Obergefell*

In 2013, the Supreme Court issued two decisions concerning the right to marriage for members of the same gender identity prior to *Obergefell*. In *United States v. Windsor*—notably, another opinion penned by Justice Kennedy—the Court struck down a federal statute defining marriage as exclusively between a man and a woman as unconstitutional.[72] The *Windsor* Court, however, stopped short of declaring all such definitions of marriage unconstitutional.[73] Instead, it worked through different levels of federalist, equal protection, and substantive due process arguments, and concluded that the challenged federal provision would be struck down without invalidating

considerations counsel against adopting the definitive conclusions upon which Bowers placed such reliance. . . it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.").

68. *Id.* at 574–75 (citing *Casey*, 505 U.S. at 851).

69. *Id.*, at 574, (citing *Romer*, 517 U.S. at 634) ("We concluded that the provision was 'born of animosity toward the class of persons affected' and further that it had no rational relation to a legitimate governmental purpose.")

70. *Id.* at 575.

71. *Id.* Indeed, this conclusion was the result of Justice O'Connor's reasoning in her concurrence. She would have found the Texas statute unconstitutional but would not have overturned *Bowers* because that law prohibited sodomy for same-sex and different sex individuals alike. *Id.* at 581.

72. 570 U.S. 744, 752 (2013).

73. *Id.* at 775.

state statutes and constitutional provisions making the same classification.[74] The second case decided that day, *Hollingsworth v. Perry*, was a long-calculated challenge that aimed to strike down all same-sex marriage bans.[75] The Supreme Court dismissed the case for lack of standing without addressing the merits.[76]

In the wake of *Windsor* and *Perry*, challenges to state same-sex marriage bans cropped up in courts across the country, and the large majority ended in rulings favoring same-sex couples.[77] However, the glaring lack of clarity in *Windsor* further revealed exactly what the Court tried to sidestep in *Perry*: a case that would force the Court to take up the issue of same-sex marriage head-on.[78] Indeed, the Court itself indicated it would not review a same-sex marriage ban unless there was a circuit split.[79] The Sixth Circuit in 2014 provided that split when it upheld several such bans.[80] The next year, the Supreme Court granted certiorari to consider two issues argued in *Obergefell*: "whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex," and "whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right."[81]

In a 5-4 opinion, the *Obergefell* Court held that state bans of same-sex marriage violate both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[82] Justice Kennedy set the stage by first explaining that the substance of the Due Process Clause protects only fundamental rights.[83] He noted that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries," citing *Lawrence* as the authority.[84] While the foundation for this framework was built on constitutional protections only for heterosexual marriage, Justice Kennedy nevertheless

74. *Id.* at 764–74.

75. 570 U.S. 693 (2013); *see* Tom Watts, *From Windsor to Obergefell: The Struggle for Marriage Equality Continued*, 9 HARV. L. & POL'Y REV. 52, 54 (2015).

76. *Perry*, 570 U.S. 700–01.

77. CARLOS A. BALL, ET AL., CASES AND MATERIALS ON SEXUALITY, GENDER IDENTITY, AND THE LAW 493 (7th ed. 2022) ("Of the 66 federal and state rulings after Windsor, 61 favored same-sex couples."). The size of this wave of litigation should not be understated. As one legal scholar put it, "[t]he marriage equality cases may represent the first time in American legal history that a single constitutional question has been so rapidly and broadly litigated." Watts, *supra* note 75, at 53.

78. Watts, *supra* note 75, at 57.

79. *Id.* at 68.

80. *See* DeBoer v. Snyder, 772 F.3d 388, 421 (2014) (upholding several states' same-sex marriage bans).

81. *Obergefell*, 576 U.S. at 656.

82. *Id.* at 672–73.

83. *Id.* at 663–64.

84. *Id.* at 664.

concluded that same-sex couples have the right to marry.[85] He justified this conclusion with four prudential reasons as to why same-sex marriage is a protected right; but this substantive due process analysis conspicuously fell short in several key areas.[86]

III. HOW *LAWRENCE* AND *OBERGEFELL* PROVIDED WEAK CONSTITUTIONAL PROTECTIONS FOR LGBTQ+ RIGHTS AND THE EFFECTS OF THOSE FLAWS

Lawrence and *Obergefell* did provide members of the LGBTQ+ community with constitutional protection of invaluable rights. Unfortunately, neither of these seminal cases can still protect LGBTQ+ rights because of three important flaws in their reasoning and resulting harmful effects. This Part explains how the present Court could apply its new test to exploit these vulnerabilities and overturn *Lawrence* and *Obergefell*.

A. The Flaws

i. Blurring Due Process And Equal Protection

Both *Lawrence* and *Obergefell* include confusing discussions about how past cases found constitutional protections for fundamental rights using the Due Process and Equal Protection Clauses.[87] These two opinions clearly drew on substantive due process jurisprudence to argue that these rights should be protected *under* those cases, but not included *with* them.

Justice Kennedy began the *Lawrence* opinion by discussing the important liberty interest at stake, and how interceding substantive due process jurisprudence guided the Court to overrule *Bowers*.[88] He drew on, among others, *Griswold*, *Eisenstadt*, *Roe*, and *Carey v. Population Service International*[89] to hold that the Texas anti-sodomy law flew in the face of previously protected substantive due process liberty interests.[90] However, Justice Kennedy went on to explain that his decision in *Lawrence* was also guided by *Romer*—an Equal Protection Clause case.[91] He offered lofty language to explain the interplay and overlap of Due Process and Equal Protection

85. *Id.* at 665.

86. *Id.* at 665–70. These included that 1) "marriage is inherent in the concept of individual autonomy," *Id.* at 665; 2) that "a two-person union unlike any other in its importance to the committed individuals," *Id.* at 666; 3) "it safeguards children and families," *Id*. at 667; and 4) American "traditions make clear that marriage is a keystone of our social order." *Id.* at 669.

87. *Lawrence*, 539 U.S. at 575; *Obergefell*, 576 U.S. at 672.

88. *Lawrence*, 539 U.S. at 564–74.

89. *Griswold*, 381 U.S. 479 (1965); *Eisenstadt*, 405 U.S. 438 (1972); *Roe*, 410 U.S. 113 (1973); *Casey*, 505 U.S. 883 (1992); *Carey*, 431 U.S. 678 (1977).

90. *Id*. at 564–66.

91. *Id.* at 574–75.

Clauses: "[e]quality 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."[92] But then he backtracked to explain that *Lawrence* was *not* an Equal Protection Clause case.[93]

The dissent focused on this disconnect:

> Our opinions applying the doctrine known as "substantive due process " hold that the Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. We have held repeatedly, in cases the Court today does not overrule, that only fundamental rights qualify for this so-called "heightened scrutiny" protection—that is, rights which are "deeply rooted in this Nation's history and tradition." All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest.[94]

As the dissent saw it, if this was a substantive due process case, the majority did not treat it as one. The dissenting Justices instead believed that what the majority should have done was apply rational basis scrutiny, which, it contended, any reasonable moral legislation such as this would withstand.[95]

Obergefell followed a similar pattern. Just as he had in *Lawrence*, Justice Kennedy then explained that even though *Obergefell* was not an equal protection case, he asserted that the Equal Protection and Due Process Clauses were closely tied together.[96] For example, he explained that in *Obergefell*—like in *Loving v. Virginia*[97] and *Zablocki v. Redhail*[98]— "the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage."[99] Justice Kennedy imported this logic from *Lawrence* to recognize that the Equal Protection Clause bars the state from demeaning the

92. *Id*. at 575.

93. *Id.* ("[W]e conclude the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.").

94. *Id.* at 593 (2003) (Scalia, J. dissenting).

95. *Id.* at 601 (citations and internal quotations omitted).

96. *See Lawrence*, 539 U.S. at 575 (discussing the interplay between the Due Process and Equal Protection clauses); *Obergefell,* 576 U.S. at 672 ("The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles.").

97. 388 U.S. 1 (1967) (invalidating an anti-miscegenation statute).

98. 434 U.S. 374 (1978) (invalidating a law that barred fathers behind on child support payments from marrying).

99. *Obergefell*, 576 U.S. at 674.

existence or controlling the destiny of LGBTQ+ individuals by criminalizing their private sexual conduct.[100] Based on this precedent, Justice Kennedy concluded 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*.[101]

However, Justice Kennedy then had to face the glaring fact that the Equal Protection Clause grounded the previous marriage discrimination cases .[102] So, he again linked Due Process Clause liberty interests to the protections afforded by the Equal Protection Clause:

> The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by Equal Protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other.[103]

Justice Kennedy's language only further muddied the waters and made it even more unclear what grounds he was basing the constitutional protections on in each case.[104] In turn, it is difficult to conceptualize two things: first, which clauses support each opinion; second, how this language should or could be interpreted and applied by later courts to uphold these protections; and relatedly how or if a court could extend them to protect other rights for the LGBTQ+ community.[105]

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100. *Id.* at 674–75. ("In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. Although *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.") (internal citations omitted).

101. *Id.* (emphasis added).

102. *Id.* at 672–73.

103. *Id.* at 672.

104. Cohen, *supra* note 48, at 1108; Eric Berger, *Lawrence's Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765, 778 (2013); Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare not Speak Its Name*, 117 HARV. L. REV. 1893, 1902–07 (2004).

105. Berger, *supra* note 104, at 775 ("[T]hough the [*Lawrence*] Court expressly rejected *Bowers*'s selected level of generality, it provided minimal guidance on precisely how the question

The dissenters derided Justice Kennedy's equal protection analysis as "not serious[]" and "difficult to follow."[106] The Chief Justice lamented the majority's lack of explanation as to why the Equal Protection Clause invalidated the classification at issue.[107] He found it fairly obvious that the legitimate state interest of "preserving the traditional institution of marriage" was more than enough to meet the burden placed upon the laws by the Equal Protection Clause.[108]

ii. Implied, But Never Stated Fundamental Rights

While both cases were predicated on substantive due process grounds, neither of them plainly stated that they recognized constitutionally protected fundamental rights.[109]

Justice Kennedy began in *Lawrence* by drawing on substantive due process jurisprudence to frame past fundamental rights based on personal liberty and dignity.[110] Then-recent cases, especially *Planned Parenthood v. Casey*,[111] helped give doctrinal backing to these protections, but the *Lawrence* decision used them in an ambiguous way.[112] Quoting Justice Steven's dissent in *Bowers*, the opinion recognized that cases like *Casey*, *Griswold*, *Eisenstadt*, and *Carey* stood for the proposition that "individual decisions . . . 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."[113] In *Lawrence*, Justice Kennedy stated that "[t]he Nation's laws and traditions in the past half-century [were] most relevant" in evaluating anti-sodomy laws, then reviewed the history of states' anti-sodomy laws following *Bowers* and their enforcement of

should be framed and why a broader framing was appropriate."); Cohen, *supra* note 49, at 1109 ("[T]here was once again no clarity [in *Obergefell*] about . . . how to analyze constitutional issues around sexual orientation when only a liberty claim or only an equality claim is presented to the Court.").

106. *Obergefell*, 576 U.S. at 707 (Roberts, C.J., dissenting).

107. *Id.*

108. *Id*.

109. *See* Tribe, *Fundamental Right*, *supra* note 104, at 1898–99 (discussing Justice Kennedy's lack of definitive fundamental rights language); Cohen, *supra* note 49, at 1108 (discussing the same).

110. Cohen, *supra* note 48, at 1107.

111. In his discussion of *Bowers*, Kennedy quotes one line from *Casey* that is particularly ironic: "Liberty finds no refuge in a jurisprudence of doubt." *Lawrence*, 539 U.S. at 577 (citing *Casey*, 505 U.S. at 844).

112. Berger, *supra* note 121, at 777; Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1272 (2007) ("The majority decision [in *Lawrence*] deploys artful ambiguity as to whether the liberty interest is fundamental or not . . ."); Cohen, supra note 48, at 1107–08.

113. *Lawrence*, 539 U.S. at 578 (quoting *Bowers*, 409 U.S. at 216).

those laws—or the lack of either.[114] However, unlike the cases he cited, Justice Kennedy never went so far as to recognize the right at issue—consensual sexual relations between two adult individuals of the same gender identity—as fundamental. So while there is constant mention of the fundamental privacy rights enumerated in a long line of substantive due process cases, the opinion does not add *Lawrence* to that list.

The same was true in *Obergefell*. Justice Kennedy clearly predicated the decision on fundamental rights, but never stated that marriage between two members of the same gender identity itself is a fundamental right.[115] While the opinion used the term "fundamental right" throughout and thoroughly explained why marriage is considered fundamental under the Court's methodology and precedent, Justice Kennedy never explicitly enumerated *same-sex* marriage as a fundamental right. The opinion spent the first part discussing marriage as a fundamental right, and how Due Process jurisprudence directed the Court to extend its protections beyond just heterosexual marriages.[116] He similarly explained in *Obergefell* that, when determining whether a right is fundamental, "[h]istory and tradition guide and discipline the inquiry but do not set its outer boundaries."[117] Similarly to *Lawrence*, the *Obergefell* opinion drew on several Supreme Court cases that previously discussed marriage between heterosexual couples as a fundamental right.[118] This offered a pathway to either say that same-sex marriage falls within the scope of this well-recognized right, or is a framework to explain why marriage between members of the same gender identity is also a distinct fundamental right.[119] His argument instead applied the substantive due process doctrine to a concept of human dignity and focused on four prudential reasons as to why same-sex couples should also be able to exercise the right to marry—again echoing the approach in *Lawrence*.[120] All of the prudential reasons, while important, fall conspicuously short of enumerating *same-sex* marriage itself as fundamental.

The *Obergefell* dissenters again underscored and expanded on these gaps in the majority opinion. As Chief Justice Roberts explained, the majority rooted its opinion in Supreme Court jurisprudence protecting the fundamental "right to marry."[121] However, those cases did not state that the right

114. *Id.* at 559–60.

115. Cohen, *supra* note 48, at 1108.

116. *Obergefell,* 576 U.S. at 659–72.

117. *Id.* at 645.

118. *Id.* at 664 ("[T]he Court has long held the right to marry is protected by the Constitution.").

119. *Id*.

120. *Id.* at 665–70 (supporting individual autonomy, externally recognizing commitment, protecting children, and preserving the family as "a keystone of our social order.").

121. *Obergefell,* 576 U.S. at 699 (Roberts, C.J., dissenting).

to marry may not be abridged, but rather held that those cases' proffered justifications did not suffice.[122] The Chief Justice went so far as to say the majority inappropriately relied on these cases because the state bans at issue merely defined marriage and did not place a burden upon one's right to marriage.[123] He further explained that reliance on *Lawrence* was also misplaced because same-sex couples do not seek a right to privacy, but rather public recognition of their union.[124] In turn, he suggested that the protection of same-sex marriage has no true grounds based on substantive due process.

iii. No Apparent Level of Scrutiny

Finally, and perhaps most detrimentally, neither opinion ascribed the level of scrutiny necessary to analyze either cases' respective rights under the Equal Protection or Due Process Clauses.[125] In *Lawrence*, Justice Kennedy only mentioned the Court's traditional scrutiny methodology at the very end of the opinion: "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[126] The lack of "legitimate state interest" sounds like rational basis review—the lowest level of constitutional scrutiny—but Kennedy never clarifies this statement.

The lack of scrutiny analysis in *Obergefell* is even more apparent. Indeed, Justice Kennedy only stated that "[t]here is no lawful basis for a State to refuse to recognize a lawful same-sex marriage"[127] In this way, both cases seem to follow Justice Kennedy's opinion in *Romer* based on an Equal Protection Clause framework: if legislators passed a law exclusively to disadvantage a particular group based on animus towards that group, then it can never survive rational basis review.[128] But again *Obergefell* did not state that rational basis review was the appropriate level of scrutiny, and instead wrote that the law at issue in *Romer* could not meet rational basis review.[129] Some may find that concluding a law cannot even meet the lowest, most forgiving

122. *Id.*

123. *Id*. at 700.

124. *Id.* at 702.

125. Cohen, *supra* note 48, at 1109.

126. *Lawrence*, 539 U.S. at 578.

127. *Obergefell,* 576 U.S. at 681; oddly the opinion refers to *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44. In which the Hawaiian supreme Court applied strict scrutiny under its state constitution. *Id*., at 662.

128. *Id.* at 634–35

129. *Id.* at 631–32 (internal citations omitted) ("We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. Amendment 2 fails, indeed defies, even this conventional inquiry.").

standard of scrutiny as persuasive.[130] However, nowhere in *Lawrence* or *Obergefell* does the Court explain that their respective restrictions in anti-sodomy laws and same-sex marriage bans offer any legitimate government interests.

The dissenters in both cases emphasized this failure to mention the proper level of scrutiny. Dissenting in *Lawrence*, Justice Scalia explained that heightened scrutiny is only appropriate when a fundamental right is identified or when a suspect class of individuals is affected.[131] Since neither applied, rational basis review was proper, under which legislation "safeguarding … public morality," is always sufficient.[132] Chief Justice Roberts said the same about the majority's opinion in *Obergefell*.[133]

B. The Effects

i. Bowers Lives On

As a result of the shortcomings in *Lawrence* and *Obergefell*, constitutional protections of LGBTQ+ rights have been, and will continue to be, weak. The cases' failure to repudiate all of *Bowers* produced negative side effects in the lower courts.[134] L. Joe Dunman, an attorney for several past marriage equality claims, has explained that while "*Lawrence v. Texas* should have been the end of *Bowers* and its progeny . . . its underlying premises still live on as controlling precedent in a majority of the circuit courts of appeals."[135] Specifically, federal appellate courts have applied rational basis review—the precedent level of review imported from *Bowers*—to uphold laws and practices discriminating against LGBTQ+ individuals.[136] Even after *Obergefell*, this practice has not changed because both *Obergefell* and

130. Indeed, rational basis review has been called a "lunacy test," so not meeting this mark is mildly reassuring. Joseph R. Gordon, *Same-Sex Relationships and State Constitutional Analysis*, 42 WILLAMETTE L. REV. 235, 247 (2007).

131. *Lawrence*, 539 U.S. at 594, 600 (Scalia J., dissenting).

132. *Id.* at 589.

133. *Obergefell,* 576 U.S. at 701 (Roberts, C.J., dissenting) ("Neither petitioners nor the majority cites a single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.").

134. L. Joe Dunman*, Blind Imitation: The Revolting Persistence of Bowers v. Hardwick*, 33 W. MICH. T.M. COOLEY L. REV. 67, 71 (2016).

135. *Id*. at 71.

136. *Id.* at 106. Dunman gives a case out of the Sixth Circuit, which struck down a city ordinance banning discrimination on the basis of sexual orientation. *Id.* at 78. Looking to *Bowers*, the court held that, because sexual orientation is behavior-based rather than status-based, gay individuals do not even "comprise an identifiable class," and therefore applied rational basis review. *Id.* at 77–78 (quoting Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995), *cert. granted*, *judgment vacated*, 518 U.S. 1001 (1996)). While that case was vacated and remanded in light of *Romer*, its outcome did not change on remand. *Id.* at 82–83.

Lawrence failed to announce a more demanding level of scrutiny for laws discriminating against LGBTQ+ individuals.[137]

ii. Undermining Protections Through State Antidiscrimination Laws

Since *Obergefell* and *Lawrence* failed to address gaps found in cases decided before them and neglected shortcomings that cases after might exploit, many subsequent cases have used the First Amendment and its exceptions to undermine state antidiscrimination laws.[138] These cases soon filled the gaps in the protections advanced by *Lawrence* and *Obergefell* but to the opposite effect. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Court held that parade organizers could preclude an LGBTQ+ group from running a float in their parade.[139] The group brought their claim under a Massachusetts public accommodations statute that prohibited discrimination based on sexual orientation.[140] The claim eventually reached the Massachusetts Supreme Court, which affirmed in favor of the group.[141] However, the Supreme Court reversed on First Amendment grounds.[142] The Court concluded in an opinion written by Justice Souter that the parade was expressive, so compelling the organizers to allow the group to walk in the parade would violate the organizers' First Amendment free speech rights.[143]

Then, in *Masterpiece Cake Shop v. Colorado Civil Rights Commission*, a case in which a Christian employee refused to design a cake for a gay couple's wedding, the Court held that personal religious beliefs trumped a Colorado antidiscrimination law.[144] Justice Kennedy wrote the opinion and narrowly held that the facts of that case—the specific request of the gay patrons and how the Colorado administrative body handled the antidiscrimination claim—led to the Court's holding.[145] Indeed, the Justice explained

> The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.[146]

137. *Id.* at 108–109.
138. Cohen, *supra* note 48, at 1089.
139. 515 U.S. 557, 581 (1995).
140. *Id.* at 564.
141. *Id.*
142. *Id.* at 581.
143. *Id.* at 568–70.
144. 138 S. Ct. 1719, 1724 (2018).
145. *Id.* at 1729–31.
146. *Id.* at 1732.

Nevertheless, that qualification did not limit the Supreme Court's following decisions that elevated First Amendment protections for free speech or freedom of religion over protections for LGBTQ+ patrons against discrimination. The Court in *Lawrence* and *Obergefell* failed to identify what fundamental rights they protected, if any, and thus permitted other constitutional rights to supplant them when they conflicted.[147] Therefore, the Court created these vulnerabilities, and has since done little to stop the erosion of these rights, which is largely why we are where we are today.

iii. Substantive Due Process at Risk

Finally, the present Court may choose to overturn both *Lawrence* and *Obergefell* simply because they are substantive due process cases. The Supreme Court overturned *Roe* and *Casey* in *Dobbs* when it held that there is no fundamental right to terminate one's pregnancy because of the previous reasoning based on substantive due process.[148] Therefore, *Dobbs* presents an immediate, potential danger to the rights protected in *Lawrence* and *Obergefell* because they too follow this line of reasoning.[149] The *Dobbs* majority opinion did go to great lengths to distinguish *Roe* and *Casey* from other substantive due process cases, including *Lawrence* and *Obergefell*.[150] Indeed, it explicitly stated that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion."[151] However, we cannot forget Justice Thomas's chilling concurrence, which placed both *Lawrence* and *Obergefell* on a short list of substantive due process cases to revisit and demarcated *all* substantive due process cases as "demonstrably erroneous."[152]

Further, despite the majority's insistence that *Dobbs* put *Lawrence* and *Obergefell* at no greater risk than before, the opinion's overall reasoning still threatens both cases. The *Dobbs* majority specifically chose the test for fundamental rights as used in *Washington v. Glucksberg* to conclude that one's right to an abortion is not fundamental and thereby not protected by the Due Process Clause.[153] It is easy to see that applying this test—whether the right is "deeply rooted in this nation's history," and "implicit in the concept of

147. For example, what if the parade organizers tried to bar a black rights group from marching?

148. *Dobbs*, 142 S. Ct. at 2243.

149. *Id*. at 2257.

150. *Id.* 2261 ("The exercise of the rights at issue in . . . *Lawrence*[] and *Obergefell* does not destroy a 'potential life,' but an abortion has that effect.").

151. *Id.* at 2281 (internal quotations omitted).

152. *Id.* at 2301 (citation and internal quotations omitted) (Thomas, J. concurring).

153. *Id.* at 2300.

ordered liberty,"[154]—to the rights in *Lawrenc*e and *Obergefell* puts both at risk.[155] But the true implications are worth exploring more.

IV. THE CURRENT TEST AND SCHOLARLY REACTIONS

A. The Glucksberg Test for Fundamental Rights

The current test for fundamental rights in *Dobbs* grew from *Washington v. Glucksberg*. In that case, the Supreme Court held that terminally ill individuals do not have a fundamental liberty interest in terminating their own lives by physician-assisted suicide.[156] Thus, the Court rejected the respondents' argument that one's right to terminate their own life was a fundamental right under the Due Process Clause of the Fourteenth Amendment.[157] To reach this conclusion, the Court explained that, "in addition to the specific freedoms protected by the Bill of Rights," the "liberty" discussed in the Due Process Clause of the Fifth and Fourteenth Amendments has substance to it, protecting other unenumerated rights.[158] However, rights are fundamental and therefore gain such protections only if they pass the Court's "established method of substantive-due-process analysis," which has two primary features:

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty," such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.[159]

The respondents' proffered right was neither deeply rooted in American history nor carefully described, so it was not fundamental; therefore, it was only subject to rational basis scrutiny.[160] Under this analysis, the Court upheld Washington's statute outlawing physician-assisted suicide.[161]

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154. *Glucksberg*, 521 U.S. at 721 (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).

155. *See* Kenji Yoshino, *Is the Right to Same-Sex Marriage Next?*, N.Y. TIMES (June 30, 2022), https://www.nytimes.com/2022/06/30/opinion/same-sex-marriage-supreme-court.html.

156. *Glucksberg*, 521 U.S at 709.

157. *Id.* at 720–21.

158. *Id.* at 719–20.

159. *Id.* at 720–21 (citations and internal quotations omitted).

160. *Id.* at 728.

161. *Id.* at 735.

While some may feel that *Lawrence* and *Obergefell* are still safe because they replaced or added to the fundamental rights test applied in *Glucksberg*,[162] I would argue that *Dobbs* showed that this hypothesis is not true—or at least no longer is for now.[163] The history of fundamental rights under that substantive due process analysis found in *Dobbs* largely forecloses any argument that *Lawrence* and *Obergefell* marked a change in fundamental right jurisprudence.

It is important to remember that the *Dobbs* Court specifically revived and used *Glucksberg* as the definitive test for fundamental rights under the Due Process Clause to overturn *Roe* and *Casey* partially because they were substantive due process cases.[164] Moreover, the aggressive tone in the majority opinion and the strict *Glucksberg* analysis, in combination with Thomas's concurrence, rightfully led many to believe that the rights protected in *Lawrence* and *Obergefell* are at risk because many agree that they very likely do not meet this standard.

The *Dobbs* opinion zeros in on the larger deficiencies of *Lawrence* and *Obergefell*, and thus could easily allow the Court to find that they do not meet this new standard for fundamental rights. As shown above, Justice Kennedy did not rewrite fundamental right jurisprudence, and instead he merely shifted the inquiry in determining which rights are fundamental.[165] But, scholars can still take lessons from *Dobbs*, *Obergefell* and *Lawrence* to explore new opportunities to fight for and preserve LGBTQ+ rights.

B. Perspectives On How To Move Forward

In the years since *Obergefell* and *Lawrence*, scholars have proposed their own analyses and beliefs regarding constitutional protections for LGBTQ+ rights. Several thought the cases developed constitutional protections for LGBTQ+ rights well on their terms. Others offered their own takes on how courts ought to, or should have, gone about providing constitutional protections for LGBTQ+ rights.

Some have interpreted *Lawrence* and *Obergefell* as reimagining substantive due process jurisprudence.[166] Professor Eric Berger believes that *Lawrence* could be read as abandoning the tiers of scrutiny altogether, at

162. Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015); Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges*,* 129 HARV. L. REV. 147, 179 (2015); Alexis M. Piazza, *The Right To Education After Obergefell*, 43 HARBINGER 62, 67–68 (2019) (arguing that "*Obergefell* plainly rejects both of *Glucksberg*'s two steps.").

163. Marcus, *supra* note 14, at 108–09.

164. *See Dobbs*, 142 S. Ct. at 2242 (2022) (applying the *Glucksberg* test to determine fundamental rights).

165. Tribe, *Equal Dignity*, supra note 162, at 16–17.

166. Berger, *supra* note 104, at 800; Tribe, *Fundamental Right*, *supra* note 104, at 1902–04.

least in cases such as this.[167] It could be read at the same time as holding that the anti-sodomy laws were irrational, as Justice Kennedy did in *Romer*, though this time under the Due Process Clause.[168] However, under this change in doctrine, he notes it is difficult to interpret how this applies to future cases.[169]

Others believed the cases rewrote the Court's evaluation of which rights were fundamental under the Due Process Clause by incorporating equality principles. Professor Laurence Tribe explained that Justice Kennedy's "blend of Equal Protection and substantive due process themes [in *Lawrence*] was neither unprecedented nor accidental."[170] In this iteration, the Court's recognition of the importance of guarantees of liberty towards the ends of "[e]quality of treatment"[171] for LGBTQ+ individuals "was an obviously important doctrinal innovation."[172] Legal scholar Kenji Yoshino wrote in the wake of *Obergefell* that by emphasizing "the intertwined nature of liberty and equality . . . [the case] became a game changer for substantive due process jurisprudence."[173] Specifically, he reasoned that *Obergefell* was the next step in the Court's struggle to determine which rights are fundamental under the Due Process Clauses of the Fifth and Fourteenth Amendments.[174] "After *Obergefell*," he posited in 2015, "it will be much harder to invoke *Glucksberg* as binding precedent."[175] But now the Court seems to have unfortunately and definitively established *Glucksberg* as *the* test for which rights are fundamental.[176]

Outside of substantive due process methodology, Professor Holning Lau suggests that *Obergefell* took a positive step away from focusing on invidious intent and toward focusing on discriminatory impact—principles more integral to Equal Protection analysis.[177] In a practical sense, Lau explains that analyses are underproductive when they "focus solely on facial classifications and invidious intentions," because these methods allow lawmakers to "easily conceal their discriminatory intentions and write facially

167. Berger, *supra* note 105, at 781–82.

168. *Id.*

169. *Id.* at 782.

170. Tribe, *Fundamental Right*, *supra* note 104, at 1902.

171. *Lawrence*, 539 U.S. at 575 (2003).

172. Tribe, *Fundamental Right*, *supra* note 104, at 1934.

173. Yoshino, *New Birth of Freedom*, *supra* note 162, at 148 (2015).

174. *Id.* at 162–66.

175. *Id.* at 162.

176. *See Dobbs*, 142 S. Ct. at 2242.

177. Holning Lau, *From* Loving *to* Obergefell: *Elevating the Significance of Discriminatory Effects*, 25 VA. J. SOC. POL'Y & L. 317, 326 (2018).

neutral laws that bear extremely harmful discriminatory effects."[178] While *Loving* placed great weight on the white supremacist intent behind the anti-miscegenation law at issue, *Obergefell* "embodi[ed] the normative principle that discriminatory effects are troubling, regardless of whether the discriminatory effects are accompanied by invidious intent or facially discriminatory classification schemes."[179] Thus, it was emblematic of the Court taking a different approach in evaluating equality principles more generally.

Other scholars believe the ambiguous holdings would have been better off finding a path to explicitly applying heightened scrutiny. Professor David Cohen sees Kennedy's authorship as an integral problem.[180] He traces LGBTQ+ rights jurisprudence back to 1985 when the Supreme Court refused to hear the case of a woman who was fired from her school district because she was a lesbian.[181] In the denial for review, Justice Brennan did what no Justice has dared to do since: explain why LGBTQ+ individuals, or particular groups within the LGBTQ+ community, make up a suspect class that warrants heightened scrutiny.[182] Brennan's dissent provided a framework for applying heightened scrutiny under the Equal Protection Clause to laws discriminating against LGBTQ+ individuals in the future, such as the anti-sodomy and same-sex marriage bans in *Lawrence* and *Obergefell*.[183] While this would have extended more solid protection of LGBTQ+ rights both in application (in that more discriminatory laws would be struck down) and in doctrinal validity (as rooting its protection in the well-established tiers of scrutiny methodology), no liberal justice has even written as much in a concurrence or dissent since Justice Brennan nearly four decades ago.[184] It is difficult to see how that approach would gain traction now.

And yet, some scholars have imagined constitutional protections for LGBTQ+ rights outside of the Fourteenth Amendment. Some argue that discriminatory laws, such as anti-sodomy laws, violate LGBTQ+ individuals' First Amendment rights.[185] Legal scholar Sheldon Bernard Lyke

178. Lau, *supra* note 177, at 326.

179. *Id.* at 327.

180. Cohen, *supra* note 48, at 1089–90.

181. *Id*. at 1087; Rowland v. Mad River Loc. Sch. Dist., Montgomery Cnty., Ohio, 470 U.S. 1009 (1985)

182. Cohen, *supra* note 48, at 1087 (citing *Rowland*, 470 U.S. at 1014–17).

183. *Id*. at 1089.

184. *Id*. at 1091.

185. David Cole & William N Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 321–322 (1994) (arguing that "the government's restrictions on gays in the military directly implicate First Amendment values, and should be subject to strict scrutiny under current First Amendment case law."); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 829–32 (discussing the First Amendment implications of coming-out speech).

examined *Lawrence* as a vehicle to extend protections for LGBTQ+ individuals and intimacy through an Eighth Amendment substantive proportionality analysis.[186]

I believe a solution lies in the Court reimagining its test for fundamental rights, even if the success of alternatives seems unlikely. It would be difficult to argue that *Lawrence* and *Obergefell* created a new Due Process methodology because, as made clear in *Dobbs*, the present Court applies the *Glucksberg* test in determining which rights are fundamental under the Due Process Clause.[187] Also, it is unlikely that the present Court would do what all liberal justices have failed to do over the last nearly four decades and declare LGBTQ+ individuals a suspect class under the Equal Protection Clause. Therefore, a feasible solution may require working *within* the framework outlined in *Dobbs*.

V. HOW THE "EVOLVING STANDARDS OF DECENCY" TEST INTERSECTS WITH THE "HISTORY AND TRADITION TEST

As previously mentioned, Justice Kennedy declared in *Lawrence* that, when evaluating intimate relations between those of the same gender identity, "[t]he Nation's laws and traditions in the past half-century [were] most relevant."[188] The Court selected key events within that timeframe to justify its holding. First, laws have consistently changed in the direction of decriminalizing sexual acts between LGBTQ+ individuals.[189] Second, states who did not repeal or strike down anti-sodomy statutes scarcely enforced them, if ever.[190] Third, civilized nations elsewhere in the Western world had strongly come down against laws in the preceding decades like the Georgia law at issue.[191] Under that analysis, the Court found "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters about sex."[192]

This historical account did not resemble a traditional analysis of fundamental rights under the test set out in *Glucksberg*. Rather, it more closely resembled an analysis of the "evolving standards of decency" test under the Eighth Amendment's cruel and unusual punishment clause. I suggest that we reimagine the *Glucksberg* test's evaluation of our nation's history and

186. *See generally* Sheldon Bernard Lyke, *Lawrence as an Eighth Amendment Case: Sodomy and the Evolving Standards of Decency*, 15 WM. & MARY J. WOMEN & L. 633 (2009) (analyzing *Lawrence* under an Eighth Amendment lens).

187. *Dobbs*, 142 S. Ct. at 2300 (2022).

188. *Lawrence*, 539 U.S. at 571.

189. *Id.* at 572–573.

190. *Id.* at 573.

191. *Id.* at 573–574.

192. *Id.* at 572.

tradition with this tenet of Eighth Amendment jurisprudence in mind. The Court should likewise consider the "evolving standards of decency" test when applying other Constitutional principles, namely the Fourteenth Amendment, to cases in an ever-changing society. By looking at where the test for evaluating "evolving standards of decency" test came from and what its analysis looks like, we can apply the test to the rights protected in *Lawrence* and *Obergefell* respectively.

A. The Two-Prong "Evolving Standards of Decency" Test

The Eighth Amendment states "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[193] While the Amendment's scope and meaning have long been left ambiguous and scarcely defined,[194] "[t]here is little doubt that the original drafters of the Eighth Amendment's prohibition against cruel and unusual punishments were primarily concerned with the use of tortures and other barbarous methods of punishment."[195] Originally, the Court determined which methods of punishment were cruel and unusual by comparing them to methods that were determinately inhumane from the country's English past.[196]

Eventually, modes of punishment deemed cruel and unusual in the late eighteenth century were no longer useful points of reference. The Court dealt with this revelation in the 1910 case *Weems v. United States*.[197] There, it struck down, on Eighth Amendment grounds, a punishment of "twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor," for the crime of falsifying records.[198] The Court examined past interpretations and applications of the Amendment to reach this conclusion.[199] This historical account did not lead the Court to a precise formulation of the Eighth Amendment, but it did lend to the idea that the interpretation and application of the Amendment cannot be static.[200] Rather, the Court

193. U.S. CONST. amend. VIII.

194. *See* John D. Bressler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 WM. & MARY BILL RTS. J. 989, 990 (2019) ("The meaning of the U.S. Constitution's Eighth Amendment has long been treated as an enigma.").

195. Jeffrey D. Bukowski, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases Is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419, 421–22 (1995). Bukowski notes that this was the center of discussions surrounding the drafting and adoption of the amendment. *See id.* at 422 n.17; *see also* Raff Donelson, *Who Are the Punishers?*, 86 UMKC L. REV. 259, 274–77 (2017).

196. *See* Bukowski, *supra* note 198, at 422–23 (examining the early use of the Eighth Amendment).

197. 217 U.S. 349 (1910).

198. *Weems*, 217 U.S. at 366.

199. *See id.* at 367–71 (examining past cruel and unusual punishment cases).

200. *Id.* at 373–74.

explained that a Constitution must apply to a much wider set of circumstances than those that gave rise to its principles:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.[201]

The Court built on these principles over the following decades. In *Trop v. Dulles*, the Court drew on *Weems*'s discussion of a constitution's necessarily immortal attributes to proclaim that "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[202]

It was not clear how this standard would manifest in future Eighth Amendment cases. For example, in 1972, the Court declared that imposing the death penalty on those convicted of non-deadly offenses was cruel and unusual under the Eighth Amendment.[203] Each Justice in the majority wrote their own concurrence, and several reached their conclusions by drawing on the principle of evolving standards of decency.[204] The Court in 1976 again recognized that the Amendment's interpretation must be "flexible and dynamic," but this time held that the death penalty was not unconstitutional in all instances.[205]

Finally, in several cases across the early 2000s (which I will collectively refer to as "the Eighth Amendment cases"), the Court developed a two-part test to determine whether a punishment was at odds with the evolving standards of decency.[206] First, the Court looks for objective indicia of a national

201. *Id.* at 374 (no citation in original).

202. Trop v. Dulles, 356 U.S. 86, 101 (1957).

203. Furman v. Georgia, 408 U.S. 238, 239–40 (per curiam) (1972).

204. *Id*. at 242 (1972) (Douglas, J., concurring); 269–70 (Brennan, J., concurring); 329 (Marshall, J., concurring).

205. Gregg v. Georgia, 428 U.S. 153, 171 (1976).

206. *See* Atkins v. Virginia, 536 U.S. 304 (2002) (striking down capital punishment for individuals with intellectual disabilities); Roper v. Simmons, 543 U.S. 551 (2005) (striking down

consensus.[207] As part of this step, "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[208] Second, the Court bears its own independent judgment.[209] That is, the Court will make its normative conclusions and determine whether there is "reason to disagree with the judgment reached by the citizenry and its legislators."[210]

i. Prong One: Objective Indicia Of National Consensus

The Supreme Court has generally found objective indicia of national consensus by looking at the state legislatures. In *Atkins v. Virginia*, the first case applying this contemporary framework, the Court held that the imposition of the death penalty on individuals with intellectual disabilities violates the Eighth Amendment's evolving standards of decency.[211] In the thirteen years since the Court upheld the same punishment in *Penry v. Lynaugh*, the number of states maintaining capital punishment but banning it for intellectually disabled individuals grew from two to eighteen.[212] Add that to the twelve states that barred the death penalty altogether, capital punishment was proscribed for this class of individuals in thirty of the fifty states.[213] The Court explained that even with this fairly solid majority, "[i]t is not so much

capital punishment for minors); Kennedy v. Louisiana, 554 U.S. 407 (2008) (striking down capital punishment for the crime of sexual assault of a minor); Graham v. Florida, 560 U.S. 48 (2010) (striking down life without parole (LWOP) sentences for minors). Importantly, the Court has only applied this Eighth Amendment test to capital and life without parole sentences to determine whether their imposition is prohibited relative to the underlying crime, *see Kennedy*, 554 U.S. 407 (holding that the Eighth Amendment prohibits death sentences in criminal cases that do not result in the death of a victim or the individual), or the defendant, *see Atkins*, 536 U.S. 304 (holding that a death sentence of an intellectually disabled individual violates the Eighth Amendment). The Court has used other tests for different types of Eighth Amendment claims. For example, the Court has held that the Eighth Amendment contains a "narrow proportionality principle that applies to noncapital sentences." Ewing v. California, 538 U.S. 11, 20 (2003) (citation and internal quotations omitted). Further, in challenges to a method of execution, the Court looks to whether there is an objectively intolerable risk of harm, and whether there is a feasible, readily implemented alternative. Baze v. Rees, 553 U.S. 35, 50, 52 (2008). For the purposes of this discussion, only the Court's application of the Eighth Amendment's evolving standards of decency is important. *But see* Bucklew v. Precythe, 139 S. Ct. 1112 (2019) (applying this method, Justice Gorsuch found that the Eighth Amendment did not support a state death row inmate's challenge to his state's method of execution, despite the fact that the method would cause him excruciating pain).

207. *Atkins*, 536 U.S. at 311–12; *Roper*, 543 U.S. 563–67.

208. *Atkins*, 536 U.S. at 312 (citation and internal quotations omitted).

209. *Id.* at 312 ("[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of [punishment] under the Eighth Amendment." (internal citation and quotations omitted)); *Roper*, 543 U.S. at 563.

210. *Atkins*, 536 U.S. at 313.

211. *Id.* at 306–07.

212. *Id.* at 315 (discussing its holding in Penry v. Lynaugh, 492 U.S. 302 (1989)); *id.* at 315–16.

213. *Id.*

the number of these States that is significant, but the consistency of the direction of change."[214] Indeed, no state had reinstated the power to conduct such punishment on these individuals.[215] And even then, the practice was very uncommon in the states that did still allow the punishment: only five such individuals had been executed between the Court's decision in *Penry* and its decision in *Atkins*.[216]

Three years later in *Roper v. Simmons*, the Court held that imposition of the death penalty on a defendant younger than eighteen years at the time they committed the crime is unconstitutional.[217] Again, the Court looked to the legislatures of the states, and specifically what they had done since the Court upheld such punishment just a decade and a half earlier in *Stanford v. Kentucky*.[218] The states reached the same majority as *Atkins*: "30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but . . . exclude juveniles from its reach."[219] While the change was less rapid in *Roper*—only five states abolished the practice in the interim compared to sixteen in *Atkins*—the Court found it more important that the direction of the change was consistent.[220] Also, the Court noted that, like in *Atkins*, only six of the twenty states that permit the punishment actually executed minors since the Court's previous decision on the point.[221]

In 2008, the Court again applied the Eighth Amendment's "evolving standards of decency" test in *Kennedy v. Louisiana* to strike down capital punishment for sexual assault of a minor.[222] The Court began its analysis of a national consensus by pointing out that the last execution for the crime at issue was in 1964.[223] Additionally, forty-four states did not impose capital punishment for the sexual assault of a minor—a more significant majority than both *Atkins* and *Roper*.[224] The difference here was the recent trend to adopt capital punishment for the crime: six states, including Louisiana, and the United States military made sexual assault of minors punishable by death

214. *Id.* at 316.
215. *Id.*
216. *Id.*
217. *Roper*, 543 U.S. at 568.
218. *Id*. at 564 (2005) (citing Stanford v. Kentucky, 492 U.S. 361 (1989)).
219. *Id.*
220. *Id.*
221. *Id.* at 564–65.
222. 554 U.S. 407, 413 (2008).
223. *Id.* at 422.
224. *Id.* at 423.

between 1995 and 2007.[225] However, the Court concluded this trend was not significant enough to undercut the national consensus of abolition.[226]

Finally, in 2010, the Court in *Graham v. Florida* found objective indicia of a national consensus against sentencing a minor to life without parole (LWOP).[227] The legislatures were more mixed than in previous cases: six states barred LWOP sentences for minors; seven states permitted LWOP sentences for minors only for homicide crimes; thirty-seven states and D.C. permitted LWOP for juveniles in some circumstances; and federal law permitted LWOP sentences for minors as young as thirteen years of age.[228] The Court, however, determined that the actual sentencing practices of these jurisdictions revealed a fairly clear national consensus, as only eleven of the thirty-seven states that permitted the punishment in fact imposed it.[229]

ii. Prong Two: Independent Judgement

In the second step, the Court only looks for glaring reasons to disagree with the consensus reached by the majority of states. The Court's own independent judgment across these cases generally boiled down to two principles: evaluation of whether penological ends were fulfilled by the respective punishments, and an analysis of how other European and Anglo-American countries treated the practices. The Court in *Atkins* questioned if the aims of a death sentence in the American penal system—retribution and deterrence––were served by imposing such sentences on persons with intellectual disabilities.[230] Specifically, the justices were concerned with the accuracy of the procedure in adjudicating such individuals.[231] There were similar concerns in *Roper* and *Graham* with capital and LWOP sentences of minors.[232] The Court reasoned in *Kennedy* that capital sentences for sexual assault of children carry "a special risk of wrongful execution" because of the victims

225. *Id.*

226. *Id.* at 432–33.

227. 560 U.S. 48, 52–53 (2010).

228. *Graham*, 560 U.S. at 62 (2010).

229. *Id.* at 63–64.

230. *Atkins*, 536 U.S. at 319–320.

231. *Id.* at 321. ("The risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty is enhanced, not only by the possibility of false confessions, but also by the lesser ability of [intellectually disabled] defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors." (citations and internal quotations omitted).

232. *Roper,* 543 U.S. at 553–54 ("[I]t is evident that neither of the two penological justifications for the death penalty—retribution and deterrence of capital crimes by prospective offenders—provides adequate justification for imposing that penalty on juveniles." (citation omitted)); *Graham*, 560 U.S. at 71–74 (explaining that none of the four penological goals are furthered by LWOP sentences for youths).

involved.[233] The *Kennedy* Court also explained that restricting death as a potential sentence for non-deadly offenses may incentivize defendants to spare the lives of their victims.[234]

The Court also looked to sources outside the legislature and its own normative reasoning to confirm its judgment. The *Atkins* Court explained that those in the psychological profession, individuals from several religious organizations, and countries in the western European community shared their conclusion that the execution of individuals with intellectual disabilities contravened modern standards of decency.[235] The *Roper* and *Graham* Courts drew even more explicitly from international sources, painting the United States as a true outlier in the international community in its punishment of minors.[236]

B. Application to the Rights in *Lawrence* and *Obergefell*

It is not clear why the Court limits the application of the Eighth Amendment's "evolving standards of decency" test. *Weems* is an Eighth Amendment case, but its analysis transcends this one amendment by discussing the requirements for *all* constitutional principles to be effective: specifically, the capacity for evolution. It seems, then, that there is an obvious opportunity to apply the "evolving standards of decency" test to analyze many other constitutional protections.

To that end, I will apply the "evolving standards of decency" test to the substantive due process analyses in *Lawrence* and *Obergefell* at the time they were decided. I can show not only what these holdings might have been if the Court applied the "evolving standards of decency" test in evaluating our nation's history and tradition, but I can also use those results to address two potential counterpoints to my proposal.

i. Applying the "Evolving Standards of Decency" test in Lawrence

In the *Lawrence* opinion, Justice Kennedy evaluated the trend of the nation's legislatures similarly to the Eighth Amendment cases.[237] Before 1961, all fifty states had anti-sodomy laws, but by 1986, this dropped to just twenty-four states and Washington D.C.[238] This number dwindled to just

233. *Kennedy*, 554 U.S. at 443.

234. *Id.* at 445–46.

235. *Atkins*, 536 U.S. at 316 n.21.

236. *Roper*, 543 U.S. at 576–77 (explaining that only seven countries, Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China, allow the execution of children); *Graham*, 560 U.S. at 81 ("the United States is the only Nation that imposes life without parole sentences on juvenile nonhomicide offenders.").

237. Interestingly, Justice Kennedy would go on to write the *Roper*, *Kennedy*, and *Graham* decisions over the next few years.

238. *Lawrence*, 539 U.S. at 573 (2003).

thirteen states by the time of the *Lawrence* decision.[239] Even then, those thirteen states hardly enforced these laws, if at all.[240] Compared to the Eighth Amendment cases discussed above, this would most certainly have been enough to find an objective indicia of a national consensus. On a pure tally of states, those abolishing anti-sodomy laws made up a majority of thirty-seven states, greater than the thirty-state majorities in *Atkins* and *Roper*, and the mixed bag in *Kennedy*. Further, the direction of change was constant, as no states reinstated such laws following the *Bowers* decision.[241] In conclusion, the pattern reflected in *Lawrence* likely provides the objective indicia required across the Eighth Amendment cases.

Next, several other sources would have supported the agreement with the consensus. For example, "[i]n 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for criminal penalties for consensual sexual relations conducted in private."[242] In the years preceding the *Bowers* decision, the European Court of Human Rights struck down the anti-sodomy laws of Northern Ireland, holding that such laws violated the European Convention on Human Rights.[243] The United Nations Human Rights Committee did the same in 1994 when it struck down the last of Australia's anti-sodomy laws in *Toonen v. Australia*.[244] This trend was even true outside the Western European and Anglo-American realms, as South Africa's Constitutional Court struck down the country's prohibition of male-male sexual activity in 1998.[245]

Finally, and perhaps most importantly, Justice Kennedy's appeals to larger issues of human dignity would have fit nicely into the second prong, the Court's own independent judgment. For example, Justice Kennedy drew on several Supreme Court decisions in the preceding years, including *Griswold*, *Casey*, and *Romer*, to explain that laws like the one at issue in *Lawrence* deal with "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [that] are central to the liberty protected by the Fourteenth Amendment."[246] Justice

239. *Id.*

240. *Id.* To be sure, though, these laws were used in ways other than criminal punishments and convictions. For example, such laws were used to limit the ability of gay individuals to raise children by denying them custody and refusing them adoption. *Why Sodomy Laws Matter*, THE AM. C.L. UNION (June 26, 2003), https://www.aclu.org/other/why-sodomy-laws-matter.

241. *See Lawrence*, 539 U.S. at 573.

242. *Id.* at 572 (citation and internal quotations omitted).

243. *Id.* at 573 (citing Dudgeon v. United Kingdom [1981] 45 Eur. Ct. H.R.).

244. No. 488/1992, U.N. DOC. CCPR/C/50/D/488/1992 (Hum. Rts. Comm.) (Mar. 31, 1994) http://www.unhchr.ch/tbs/doc.nsf.

245. *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1998 (CC) (S. Afr.).

246. *Id*. at 574 (2003) (quoting *Casey*, 505 U.S. at 851).

Kennedy also explained the stigma of criminal convictions, which act as a scarlet letter on the defendant's record, even if they are never incarcerated.[247] By reinforcing these concepts with the Court's own jurisprudence, many Justices could have joined Kennedy with more confidence.

In conclusion, applying the "evolving standards of decency" test to the Due Process analysis in *Lawrence* would have protected intimate relations between those of the same gender identity as a fundamental right. There was at least as strong of an objective indicia of a national consensus amongst the states in abolishing anti-sodomy laws as there was across the Eighth Amendment cases. Further, the Court's own independent evaluation could have drawn on constitutional principles rooted in human dignity and autonomy, which are likely more compelling than the normative discussions of penological ends across the Eighth Amendment cases, to affirm the national consensus. Finally, there was no shortage of international sources to consider the United States as an outlier in the Western European and Anglo-American (and perhaps beyond) tradition of abolishing anti-sodomy laws.

ii. Applying Evolving Standards of Decency in Obergefell

The wide-spread abolishment of same-sex marriage bans in the years leading up to *Obergefell* could have provided even stronger indicia of a national consensus than in *Lawrence*. Congress passed the Defense of Marriage Act (DOMA) in 1996, a federal enactment defining marriage as only between a man and a woman.[248] A decade later, forty-five states had same-sex marriage bans, either by statute or state constitutional initiatives.[249] By 2013—the same year that the Court decided *Windsor*—this number reduced to thirty-five states with bans.[250] By 2014—just one year before the Court took up *Obergefell*—the majority of states had flipped: only fifteen states still had same-sex marriage bans.[251] This thirty-five state majority almost matched the thirty-seven majority count in the *Lawrence* analysis, but what is most important is the rapidity of change leading up to *Obergefell*. Indeed, this move from forty-five states with bans to thirty-five without them occurred in just eight years. And the direction of change was constant over

247. *See id.* at 575 ("The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions.").

248. *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 (last visited Nov. 30, 2022, 7:14 PM).

249. *Same-Sex Marriage, State by State*, PEW RSCH. CTR. (June 26, 2015), https://www.pewresearch.org/religion/2015/06/26/same-sex-marriage-state-by-state-1/.

250. *Id.*

251. *Id.*

those eight years, as no state enacted a ban at that time.[252] Simply put, this checks all the boxes of an objective indicia of a national consensus put forth by the Court across the Eighth Amendment cases: a strong majority of states rapidly coming to legal consensus in a constant direction of change.

Again, there were again some international sources to affirm the consensus of the legislatures, but certainly not as many as in the *Lawrence* analysis. The Netherlands became the first country to legalize same-sex marriage in 2001.[253] Pulling from the Court's usual European-and-Anglo-American country sample, same-sex marriage had been legalized in just eleven European countries and Canada by 2015.[254] These statistics, however, would have had a minimal impact on the inquiry because the *Kennedy* Court did not explicitly draw on international authorities when exercising its own independent judgment.[255]

Lastly, Justice Kennedy's appeal to deeper constitutional concerns of individual liberties, privacy, and autonomy concerning marriage would have been very persuasive rhetoric in guiding the Court's own independent judgment analysis. This is where Justice Kennedy's four specific reasons for the importance of marriage in America would have been crucial: 1) that "marriage is inherent in the concept of individual autonomy";[256] 2) that "a two-person union unlike any other in its importance to the committed individuals";[257] 3) that "it safeguards children and families";[258] and 4) that American "traditions make clear that marriage is a keystone of our social order."[259] All of these reasons would have likely moved the majority to join him.

In sum, the "evolving standards of decency" test as applied to the Due Process analysis in *Obergefell* would have protected marriages between those of the same gender identity as a fundamental right because it satisfied both prongs. Evidence of domestic and international trends towards

252. *Id.*

253. David Crary & Mike Corder, *The Dutch Went First in 2001; Who has Same-Sex Marriage Now?*, AP (Mar. 31, 2021), https://apnews.com/article/europe-africa-netherlands-job-cohen-western-europe-e08b053af367028737c9c41c492cc568.

254. Danny Hakim & Douglas Dalby, *Ireland Votes to Approve Gay Marriage, Putting Country in Vanguard*, N.Y. TIMES (May 23, 2015), https://www.nytimes.com/2015/05/24/world/europe/ireland-gay-marriage-referendum.html. Notably, England, Wales, and Scotland had all legalized same-sex marriage by 2014, but all of the United Kingdom did not do so until Northern Ireland legalized it in 2020. *See* Peter Coulter, *Same-Sex Marriage now Legal in Northern Ireland*, BBC NEWS (Jan. 13, 2020), https://www.bbc.com/news/uk-northern-ireland-51086276.

255. Indeed, some dissenters across Eighth Amendment cases felt international sources had no place in the Court's analysis. *Roper*, 543 U.S. at 622–23 (Scalia, J., dissenting).

256. *Obergefell,* 576 U.S. at 665.

257. *Id.* at 666.

258. *Id.* at 667.

259. *Id.* at 669.

acceptance was even stronger than in *Lawrence*, and Kennedy's persuasive arguments would have guided the Court's independent judgment.

iii. Addressing Objections to the Test

The "evolving standards of decency" test offers a strong approach to finding the rights in *Lawrence* and *Obergefell* as constitutionally protected fundamental rights even within the restrictive *Glucksberg* framework. However, I anticipate two potential objections.

One common objection may be that the first prong, requiring a national consensus, leaves the Court far behind the actual sentiment of the citizenry. Put differently, should LGBTQ+ individuals have to wait for the majority of states to agree they deserve basic rights before the Court can say these protections were protected by the Constitution all along? This is unfortunately a valid concern; however, the lead-up to *Lawrence* and *Obergefell* suggest this was already the case. Recall the words of journalist Molly Ball after the *Obergefell* decision: "[w]hat changed . . . wasn't the constitution—it was the country. And what changed the country was a movement."[260] In the absence of viable alternatives, perhaps this slow-moving approach will always be the case, but the "evolving standards of decency" test theory offers much stronger protection for rights within the Court's existing frameworks.

Another objection may focus on the second prong of this test, the Court's own independent judgment, to argue that it could leave open the possibility of objectionable conclusions. It could potentially be used to deny LGBTQ+ individuals rights and, of course, nine of the brightest legal minds in the world will be able to make nearly any argument compelling. Nevertheless, the weight of authority suggests this should not be a concern with the rights at issue. In objectively applying the Court's framework from the Eighth Amendment cases, the only reasonable outcome is upholding these protections. As for the Court's own independent judgment, it is important to note that this prong does not guide the analysis, and instead the Court has only used it to confirm the objective determination made by the country's legislatures. The second prong, in other words, is only used to find a glaring normative reason to disagree with the legislatures of the many states. For example, strict Christian justices could try to disagree with the consensus in *Obergefell*, but this would be limited to a religious view of the matter. So, while such an argument be made, it likely would hold no weight.

VI. CONCLUSION

We can address the weak constitutional protections for LGBTQ+ rights in current Supreme Court jurisprudence by extending a century-old

260. Ball, *supra* note 41.

constitutional principle. While the *Lawrence* and *Obergefell* decisions are certainly monumental, Justice Kennedy drafted both opinions with significant flaws that failed to address necessary topics—including which clause in the Fourteenth Amendment protects these rights, whether they are indeed fundamental, and what level of scrutiny courts should apply to protect them––and left the rights at issue vulnerable to other constitutional challenges. Rather than moving in a completely new direction, advocates should consider the "evolving standards of decency" test precisely because it works within and can survive the *Glucksberg* test. The "evolving standards of decency" test would not only clarify the status of the rights at issue in *Lawrence* and *Obergefell* but importantly it would solidify Fourteenth Amendment protections for them. Through a tenet of Eighth Amendment jurisprudence, we can extend the Fourteenth Amendment analysis of our nation's history and tradition to protect LGBTQ+ rights from further constitutional challenges, and perhaps even expand them.