Dobbs, Justice Thomas, and Same-Sex Marriage: Understanding the Original Intent of the Framers

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On June 24, 2022, in Dobbs v. Jackson Women's Health Organization*, the U.S. Supreme Court held that the U.S. Constitution does not confer a right to abortion. The Court overturned* Roe v. Wade *and held that the authority to regulate the right to an abortion and abortion access must be returned to the people and their elected representatives—effectively permitting the states to outlaw abortion. The decision caused huge celebration among those who opposed the right to have an abortion and left those who supported the right shocked and outraged. The decision to overturn the fifty-year-precedent received national media coverage, and so did Justice Clarence Thomas's concurring opinion in which he called upon the Court to "reconsider" the constitutional right of same-sex couples to marry established only seven years prior in* Obergefell v. Hodges*. This Article responds to Thomas's call to reconsider* Obergefell *and challenges the arguments Thomas made in his* Obergefell *dissent.*

Introduction

Legal scholars have long disagreed over the best method of constitutional interpretation.[1] Most traditional originalists believe that the interpretation of the U.S. Constitution should be based on the original public meaning of the language as used by the Framers and it should not be based

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[1] *See* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 241 (2009) ("For the last several decades, the primary divide in American constitutional theory has been between those theorists who label themselves as 'originalists' and those who do not.").

on evolving societal values, morals, and principles.[2] Other common methods include the following: textualism, which involves interpretation based on the plain meaning of the text, as opposed to the public meaning; judicial precedent, which demands a court to weigh and respect prior judicial decisions; pragmatism, which allows a court to weigh the probable practical consequences of an interpretation; structuralism, which draws inferences from the design of the Constitution; and moral reasoning, which urges a court to consider the moral concepts that underline the text, such as the concepts of equal protection and due process under the law.[3] The debate over which approach is most appropriate becomes especially relevant when judges rule based on the Fourteenth Amendment.

In its landmark 1973 decision, the U.S. Supreme Court in *Roe v. Wade*[4] held that a pregnant person had a constitutional right to have an abortion under the Fourteenth Amendment.[5] The Court also created a trimester framework, under which the states could not impose restrictions on abortion during the first trimester.[6] However, a state had an significant interest to impose more restrictions after the first and second trimesters.[7] The Court revisited *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[8] in 1992, holding that a pregnant person still had a constitutional right under the Fourteenth Amendment to have an abortion.[9] However, the *Casey* Court also replaced the trimester framework with a new "undue burden" standard, which effectively allowed states to impose more abortion restrictions while still prohibiting a complete abortion ban.[10] More recently in 2022, the Court in *Dobbs v. Jackson Women's Health Organization*[11] overturned *Roe* and

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[2] Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENTARY 71, 73 (2016) (explaining that originalists believe "that constitutional interpretation should begin with ascertaining the original public meaning of the text"). *See also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989) (explaining that originalism "requires immersing oneself in the political and intellectual atmosphere of the time"); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997) (explaining that consulting "the writings of some men who happened to be delegates to the Constitutional Convention" is necessary because their writings "display how the text of the Constitution was originally understood.").

[3] *See generally* CONG. RSCH. SERV., R45129, MODES OF CONSTITUTIONAL INTERPRETATION (2018) (discussing the types of constitutional interpretation methods).

[4] 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[5] *Id.* at 153.

[6] *Id.* at 164–65.

[7] *Id.*

[8] 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[9] *Id.* at 879.

[10] *Id*. at 878.

[11] 142 S. Ct. 2228 (2022).

Casey by eliminating the constitutional right to have an abortion under the Fourteenth Amendment.[12] Since the *Dobbs* decision, states may outlaw abortions.[13]

Roe and *Casey* belong to a group of substantive due process cases, in which the Court has found that the Due Process Clause of the Fourteenth Amendment confers rights grounded in a right to privacy.[14] Other cases that belong to that group are *Griswold v. Connecticut*,[15] *Lawrence v. Texas*,[16] and *Obergefell v. Hodges*.[17] Justice Clarence Thomas wrote a concurring opinion in *Dobbs*, arguing that the Due Process Clause does not confer any substantive rights and calling upon the Court to reconsider all of these cases.[18] This Article responds to Justice Thomas's call to reconsider *Obergefell*, in which he also dissented, arguing that the Constitution does not confer a right to same-sex marriage and that such a right goes against the principles upon which America was built.[19] Justice Thomas further argued that the Framers would not have recognized such a right and that the Court's decision went against the liberty the Framers sought to protect.[20] This Article challenges these assertions.

This Article proceeds in four parts. Section I discusses the legal history of abortion in the United States. This part examines how competing interests of pro-abortion and anti-abortion movements resulted in *Griswold*, *Roe*, *Casey*, and ultimately *Dobbs*. Section I also provides the reasoning of these majority, concurring, and dissenting opinions and the role substantive due process played in each conclusion. Section I concludes with Justice Thomas's concurring opinion in *Dobbs*, in which he urged the Court to reconsider *Obergefell*. Section II discusses the gay rights movement leading up to *Bowers*, *Romer*, *Lawrence*, *Windsor*, and *Obergefell*. It similarly analyzes every majority, dissenting, and concurring opinion. Section II also examines the role of substantive due process in these decisions leading to

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[12] *Id.* at 2279.

[13] *See id.* at 2284 (declaring that Mississippi's Gestational Age Act was constitutional).

[14] *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that a right to abortion is founded within the right to privacy as a personal liberty); *Casey*, 505 U.S. at 846 (holding that the right to abortion derived from the Due Process Clause of the Fourteenth Amendment).

[15] 381 U.S. 479 (1965).

[16] 539 U.S. 558 (2003).

[17] 576 U.S. 644 (2015).

[18] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring).

[19] *See* Obergefell v. Hodges, 576 U.S. 644, 726–29 (2015) (Thomas, J., concurring) (arguing that the "founding-era understanding of liberty" encompasses rights that were held outside of the government and that the right to marriage was a right held inside the government due to its entitlements to governmental benefits).

[20] *See id.* at 732.

Obergefell. It concludes with Thomas's *Obergefell* arguments as to why the right to same-sex marriage was not protected by the Fourteenth Amendment. Section III explores these arguments. It examines historical documents at the time the Fourteenth Amendment's drafting and floor debates. In order to examine the Reconstruction Framers' goals, thoughts, and visions, Section III analyzes the Fourteenth Amendment in three subparts: the Equal Protection Clause, the Due Process Clause, and the Privileges and Immunities Clause. Finally, Section IV challenges the arguments Thomas made in his *Obergefell* dissent, demonstrating that his assertion that the Reconstruction Framers of the Fourteenth Amendment would have objected to the central holding of *Obergefell* does not have a historical basis. This Article concludes that *Obergefell* is an example of the constitutional principles upon which the Framers built America by answering the question of whether *Dobbs* and *Obergefell* were correctly decided.

I. Abortion Rights and *Dobbs*

Until the mid-nineteenth century, early English common law, under which America functioned, did not prohibit pre-quickening abortions.[21] Quickening describes the person's perception of the movements of the fetus inside the womb.[22] In 1821, Connecticut became the first state in America to pass post-quickening abortion restrictions.[23] Connecticut enacted a law making it illegal to induce an abortion with medication:

> Every person who shall, willfully and maliciously, administer to, or cause to be administered to, or taken by, any person or persons, any deadly poison, or other noxious and destructive substance, with an intention him, her, or them, thereby to murder, or thereby to cause or procure the miscarriage of any woman, then being quick with child, and shall be therefore duly convicted, shall suffer imprisonment, in newgate prison, during his natural life, or for such other term as the court having cognizance of the offense shall determine.[24]

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[21] Zoila Acevado, *Abortion in Early America*, 4 WOMEN & HEALTH 159, 161 (1979) ("Before 1803, Great Britain did not treat abortion as a crime as long as the abortion was induced prior to 'quickening.' The overhaul of British criminal law in 1803 resulted in the first English statute classifying all abortions as crimes."); JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 3–4 (1978) ("After quickening, the expulsion and destruction of a fetus without due cause was considered a crime, because the fetus itself has manifested some semblance of a separate existence: the ability to move. The crime was qualitatively different from the destruction of a human being, however, and punished less harshly."). *See also* Roe v. Wade, 410 U.S. 113, 132–38 (1973) (discussing pre-quickening pregnancies and the time of animation).

[22] CHRISTOPHER KACZOR, THE EDGE OF LIFE: HUMAN DIGNITY AND CONTEMPORARY BIOETHICS 26 (2005).

[23] MELODY ROSE, ABORTION: A DOCUMENTARY AND REFERENCE GUIDE 5 (2008).

[24] An Act Concerning Crimes and Punishments § 14, 1821 CONN. REV. PUB. LAWS tit. 22, §§ 14, 16 (codified at CONN. REV. STAT. tit. 22, §§ 14 at 152 (1821)).

Many of the essential features of this statute later appeared in abortion statutes passed by other states.[25] In 1829, New York passed a law, making pre-quickening abortions a misdemeanor and post-quickening abortions a felony.[26] By the early 1900s, most states had passed some restrictions on abortion.[27] Since abortions were illegal, women who wanted to get an abortion resorted to the black market, which had few safety regulations in place.[28] In 1930, some estimates suggest that illegal abortions resulted in the death of 2,700 women, which was one out of every five recorded maternal deaths.[29] The number of illegal abortions in the 1950s and 1960s ranged between two hundred thousand and 1.2 million per year.[30]

In addition to abortion regulations, some states had regulations on contraceptives. In 1958, Connecticut passed a statute, under which "[a]ny person who uses any drug, medical article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."[31] In 1961, Estelle Griswold, who was the executive director of the Planned Parenthood League of Connecticut, and Charles Buxton, who was the medical director, challenged the contraception statute by opening a birth control clinic in New Haven, Connecticut.[32] They were subsequently found guilty and fined for violating the contraception statute.[33] Their convictions were upheld by both appellate courts in Connecticut prior to the U.S. Supreme Court's review.[34]

The *Griswold* opinion was handed down on June 7, 1965 with the majority opinion authored by Justice William Douglas and joined by Chief Justice Earl Warren and Justices Campbell Clark, William Brennan, and

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[25] MOHR, *supra* note 21, at 21.

[26] N.Y. REV. STAT., pt. IV, ch. 1, tit. 2, art. 1, § 9 (1828) (creating a manslaughter offense for an attempted abortion performed after quickening).

[27] *See* JEFFREY D. SCHULTZ & LAURA VAN ASSENDELFT, ENCYCLOPEDIA OF WOMEN IN AMERICAN POLITICS 4 (1999) (explaining that after a 1989 case, a majority of states required "teen-aged girls to inform at least one of their parents, and in many cases to obtain their consent, before they [could] receive an abortion" and that other states imposed waiting periods with required substantial travel time in order to leave the state to receive an out-of-state abortion).

[28] ENCYCLOPEDIA OF SEX AND SEXUALITY: UNDERSTANDING BIOLOGY, PSYCHOLOGY, AND CULTURE 584 (Heather L. Armstrong ed., 2021).

[29] Rachel Benson Gold, *Lessons from Before* Roe*: Will Past be Prologue?*, 6 GUTTMACHER POL'Y REV. 8, 8 (2003).

[30] ENCYCLOPEDIA OF RACE, ETHNICITY, AND SOCIETY 6 (Richard T. Schaefer ed., 2008).

[31] *See* Griswold v. Connecticut, 381 U.S. 479, 480 (1965) (quoting CONN. GEN. STAT. 53–32 (1958)).

[32] State v. Griswold, 200 A.2d 479, 480 (Conn. 1964).

[33] *Id.*

[34] Griswold v. Connecticut, 381 U.S. 381 U.S. 479, 480 (1965).

Arthur Goldberg.[35] The Connecticut law operated "directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."[36] Douglas pointed out that the "association of people is not mentioned in the Constitution nor in the Bill of Rights," yet other rights, such as "[t]he right to educate a child in a school of the parents' choice" and "the right to study any particular subject or any foreign language," are also not mentioned in the Constitution.[37] Nevertheless, these rights are protected by the First Amendment,[38] because "the First Amendment has a penumbra where privacy is protected from the governmental intrusion."[39] Similarly, "the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[40] Douglas concluded:

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.[41]

Goldberg filed a concurrence, which was joined by Warren and Brennan.[42] Goldberg "agree[d] with the Court that Connecticut's birth-control law unconstitutionally intrude[d] upon the right of marital privacy . . . [and] 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."[43] He insisted that the concept of liberty "is not so restricted and that it embraces the right of marital privacy[,] though that right is not mentioned explicitly in the Constitution[,] is supported both by numerous decisions of this Court . .

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[35] *Id.*

[36] *Id.* at 482.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 483.

[40] *Griswold*, 381 U.S. at 484.

[41] *Griswold*, 381 U.S. at 485–86 (citation omitted).

[42] *Id.* at 486 (Goldberg, J., concurring).

[43] *Id.*

. and by the language and history of the Ninth Amendment."[44] Goldberg noted that "[t]he language and history of the Ninth Amendment reveal[s] that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."[45] Thus, Goldberg concluded "that the right of privacy in the marital relation is fundamental and basic—a personal right 'retained by the people'" under the Ninth Amendment, meaning that the state could not "constitutionally abridge this fundamental right which is protected by the Fourteenth Amendment."[46]

Justice John Marshall Harlan II and Justice Byron White also concurred in the judgment.[47] Harlan wrote:

> [W]hat I find implicit in the Court's opinion is that the "incorporation" doctrine may be used to restrict the reach of the Fourteenth Amendment Due Process. For me this is just as unacceptable constitutional doctrine as is the use of the "incorporation" approach to impose upon the States all the requirements of the Bill of Rights . . . In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty."[48]

Meanwhile, White concluded in his concurrence that "nothing in this record justif[ied] the sweeping scope of [the Connecticut] statute,"[49] because "as applied to married couples [it] deprive[d] them of 'liberty' without due process of law, as that concept is used in the Fourteenth Amendment."[50]

Justice Hugo Black filed a dissent, which was joined by Justice Potter Stewart.[51] Black argued that there is no "constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals."[52] Instead, the "government has a right to invade [people's privacy] unless prohibited by some specific constitutional provision."[53] As such, Black argued, "neither the Due Process Clause nor the Ninth Amendment, nor both together, could under any circumstances be a

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[44] *Id.* at 486–87.

[45] *Id.* at 488.

[46] *Id.* at 499.

[47] *Griswold*, 381 U.S. at 499, 502 (Harlan, J., concurring & White, J., concurring).

[48] *Id.* at 500.

[49] *Id.* at 507 (White, J., concurring).

[50] *Id.* at 502.

[51] *Id.* at 507 (Black, J., dissenting).

[52] *Id.* at 508.

[53] *Griswold*, 381 U.S. at 499, 510 (Black, J., dissenting).

proper basis for invalidating the Connecticut law."[54] Finally, Stewart also filed his own dissent, which Black joined, arguing there was no "general right of privacy" in the Bill of Rights, Constitution, or any Supreme Court precedent.[55]

Three months after *Griswold* was decided, the American College of Obstetricians and Gynecologists issued a terminology bulletin to clarify that conception began at the implantation of a fertilized ovum.[56] Thus, birth control methods became classified as contraceptives instead of abortifacients.[57] However, because abortion continued to be heavily regulated, many women who wanted to have an abortion continued to have abortions illegally.[58] In 1965, seventeen percent of all deaths related to childbirth and pregnancy resulted from an illegal abortion.[59] At around this time, pro-abortion and anti-abortion organizations started to mobilize, like with the creation of the National Right to Life Committee, an umbrella organization for anti-abortion groups, in 1968.[60] In 1969, the National Association for the Repeal of Abortion Laws was formed as a response to the growing anti-abortion movement.[61] Pro-abortion activists started searching for the right case to challenge abortion restrictions.[62]

Sarah Weddington and Linda Coffee were two lawyers who wanted to challenge abortion laws in Texas.[63] In 1970, the lawyers filed a lawsuit in the U.S. District Court for the Northern District of Texas on behalf of their client

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[54] *Id.* at 511.

[55] *Id.* at 530 (Stewart, J., dissenting).

[56] *Cf. When Human Life Begins*, AM. COLLEGE PEDIATRICIANS (Mar. 2017), https://acpeds.org/position-statements/when-human-life-begins [https://perma.cc/5XG7-XQYC] ("Although the American College of Obstetrics and Gynecology in 1965 attempted to redefine 'conception' to mean implantation rather than fertilization, medical dictionaries and even English language dictionaries both before and after 1965 define 'conception' as synonymous with fertilization.")

[57] STACIE RUTH & CARRIE BETH STOELTING, UNITED THE USA: DISCOVER THE ABCS OF PATRIOTISM 96 (2013).

[58] *See* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 41 (1992) ("By the late 1960s as many as 1,200,000 women were undergoing illegal abortions each year: more than one criminal abortion a minute.").

[59] ENCYCLOPEDIA OF RACE, ETHNICITY, AND SOCIETY 6 (Richard T. Schaefer ed., 2008).

[60] DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 94 (2016).

[61] *1969–2019: The Fight for Our Lives*, NARAL PRO-CHOICE AM., https://www.prochoiceamerica.org/timeline/ [https://perma.cc/H4N5-BQWV].

[62] *Roe v. Wade: Behind the Case that Established the Legal Right to Abortion*, PLANNED PARENTHOOD ACTION FUND, https://www.plannedparenthoodaction.org/issues/abortion/roe-v-wade/roe-v-wade-behind-case-established-legal-right-abortion [https://perma.cc/8HCC-Q4EL] (discussing the search for a plaintiff to challenge Texas abortion laws in 1970).

[63] *Id.*

under the legal pseudonym "Jane Roe."[64] The lawyers also filed another lawsuit on behalf of a married couple.[65] The defendant in both cases was Henry Wade, who represented the State of Texas as the Dallas County District Attorney before the Texas Northern District Court in the summer of 1970.[66] The district court held that the Texas abortion statutes "must be declared unconstitutional because they deprive[d] single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children."[67] The U.S. Supreme Court subsequently granted certiorari on appeal.[68]

Only eight years after *Griswold* was decided, the United States Supreme Court revisited the right to privacy in *Roe* on January 22, 1973 with Justice Blackman writing for the majority and joined by Chief Justice Burger and Justices Douglas, Brennan, Stewart, Marshall, and Powell.[69] Blackmun wrote that "[t]he Constitution does not explicitly mention any right of privacy," although the Court has recognized "a guarantee of certain areas or zones of privacy" found in the First Amendment, the Fourth Amendment, the Fifth Amendment, Ninth Amendment, and the penumbras of the Bill of Rights.[70] Jurisprudence related to privacy confirmed that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy."[71] Blackmun clarified that the right of privacy found "in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[72] Blackmun also acknowledged that "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life," such that "[a]t some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision."[73] Blackmun laid out a trimester

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[64] Roe v. Wade, 314 F. Supp. 1217, 1219 n.1 (N.D. Tex., 1970), *aff'd in part, rev'd in part*, 410 U.S. 113 (1973).

[65] *Id.*

[66] *Id.*

[67] *Id.* at 1221.

[68] *See* Roe v. Wade, 410 U.S. 113 (1973).

[69] *Id.*

[70] *Id.* at 152.

[71] *Id.* (citation omitted).

[72] *Id.* at 153.

[73] *Id.* at 154.

framework, under which abortion restrictions would be evaluated.[74] He concluded that the Texas abortion statutes were unconstitutional.[75]

Justice Stewart wrote the only concurrence, declaring that "the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment. It is evident that the Texas abortion statute infringes that right directly."[76] Justice Rehnquist filed a dissent, arguing that the majority's "weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one."[77] He wrote that the majority's decision "to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one . . . partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment."[78]

In a similar case decided on the same day as *Roe*, the Court addressed similar criminal abortion statutes in Georgia in *Doe v. Bolton*.[79] Chief Justice Burger wrote a concurrence in *Doe*, in which he "agree[d] that, under the Fourteenth Amendment to the Constitution, the abortion statutes of Georgia and Texas impermissibly limit the performance of abortions necessary to protect the health of pregnant women, using the term health in its broadest medical context."[80] However, Burger was also "somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion."[81] While the Court struck down the Georgia requirement to have a judgment of a physician performing an abortion be confirmed by two other physicians, Burger was "inclined to allow a State to require the certification of two physicians to support an abortion."[82]

Justice Douglas also wrote a concurrence, in which he acknowledged "that childbirth may deprive a woman of her preferred lifestyle and force

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[74] *See Roe*, 410 U.S. at 164-65 ("(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.").

[75] *Id.* at 166.

[76] *Id.* at 170 (Stewart, J., concurring).

[77] *Id.* at 173 (Rehnquist, J., dissenting).

[78] *Id.* at 174.

[79] Doe v. Bolton, 410 U.S. 179 (1973).

[80] *Id.* at 207–08 (Burger, C.J., concurring).

[81] *Id.* at 208.

[82] *Id.*

upon her a radically different and undesired future."[83] Despite this, "[t]he State has interests to protect."[84] Nevertheless, Douglas argued that "where fundamental personal rights and liberties are involved, the corrective legislation must be 'narrowly drawn to prevent the supposed evil.'"[85] Thus, Douglas concluded that "[t]he present statute [in Georgia] has struck the balance between the woman's and the State's interests wholly in favor of the latter."[86] On the other hand, Justice White's dissent, which was joined by Justice Rehnquist,[87] asserted that "nothing in the language or history of the Constitution" underpinned the majority's opinion.[88] He argued that "[t]he Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes."[89]

After *Roe*, the anti-abortion activists started developing new strategies to convey their message, such as large graphic photographs of aborted fetuses being used more often to invoke emotion and sympathy for the unborn human being.[90] Anti-abortion activists further drew their focus from the pregnant woman to the fetus, trying to make the fetus a sympathetic victim.[91] By the late 1970s, evangelical Christians joined the anti-abortion movement.[92] In 1976, during the Republican National Convention, the party discussed anti-abortion legislation, making the already political abortion debate even more political.[93] Republicans like Ronald Reagan won office after Republican Party officially ran on an anti-abortion platform.[94] In 1979, the U.S. Supreme Court held that a state statute "cannot constitutionally permit judicial disregard of the abortion decision of a minor who has been determined to be

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[83] *Id.* at 214 (Douglas, J., concurring).

[84] *Id.*

[85] *Doe*, 410 U.S. at 216 (quoting Cantwell v. Connecticut, 310 U. S. 296, 307 (1940)).

[86] *Id.* at 217.

[87] *Id.* at 221 (White, J., dissenting).

[88] *Id.*

[89] *Id.* at 221–22.

[90] WILLIAMS, *supra* note 60, at 133–42.

[91] JOHANNA SCHOEN, ABORTION AFTER ROE 72–75 (2015); *see* ANDREW R. LEWIS, THE RIGHTS TURN IN CONSERVATIVE CHRISTIAN POLITICS: HOW ABORTION TRANSFORMED THE CULTURE WARS 39 (2017) ("Opposition to abortion increasingly came to be framed in individualist, right-to-life terms.").

[92] LEWIS, *supra* note 91, at 39.

[93] PRUDENCE FLOWERS, THE RIGHT-TO-LIFE MOVEMENT, THE REAGAN ADMINISTRATION, AND THE POLITICS OF ABORTION 26 (2018); Deepa Shivaram, *Abortion Wasn't Always the Politically Charged Issue It Is Today*, NAT'L PUB. RADIO (May 4, 2022, 4:46 PM), https://www.npr.org/2022/05/04/1096719971/abortion-wasn-t-always-the-politically-charged-issue-it-is-today [https://perma.cc/UEP6-BM2P].

[94] FLOWERS, *supra* note 93, at 239.

mature and fully competent to assess the implications of the choice she has made."[95]

Furthermore, in 1965 Congress added the Medicaid program through Title XIX to the Social Security Act, which provided federal assistance to the states that chose to reimburse certain costs of medical treatment for people in need.[96] Once a state decided to participate, the state had to comply with the requirements of Title XIX.[97] Congress subsequently passed the Hyde Amendment, which denied public funding for certain medically necessary abortions.[98] The funding restrictions were challenged in federal courts, eventually leading to the U.S. Supreme Court.[99] In 1980, the Court held "that a State that participates in the Medicaid program is not obligated under Title XIX to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment" and that those "funding restrictions of the Hyde Amendment violate neither the Fifth Amendment nor the Establishment Clause of the First Amendment."[100]

Anti-abortion activists slowly but steadily continued to advocate for incremental legal change by making access to abortion more difficult at the state level.[101] In 1988 and 1989, Pennsylvania passed several restrictions on abortion.[102] Five abortion clinics, one physician representing himself, and a class of physicians who provided abortion services sought declaratory and injunctive relief against those laws in federal court.[103] While the district court held that all provisions of the laws were unconstitutional, the Court of Appeals for the Third Circuit affirmed in part and reversed in part.[104]

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[95] Bellotti v. Baird, 443 U.S. 622, 650 (1979).

[96] Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended in scattered section of 42 U.S.C.).

[97] *See* 42 U.S.C. § 302.

[98] *See* Harris v. McRae, 448 U.S. 297, 300–01 (1980) (identifying the statutory and constitutional questions presented to the Supreme Court in the Hyde Amendment).

[99] *See id.* at 303.

[100] *Id.* at 326.

[101] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[102] *Id.* ("The Act requires that a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed. For a minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option if the minor does not wish to or cannot obtain a parent's consent. Another provision of the Act requires that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion. The Act exempts compliance with these three requirements in the event of a 'medical emergency.'").

[103] Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 687 (3d Cir. 1991).

[104] *Id.* at 687, 719.

By the time the U.S. Supreme Court reviewed the Pennsylvania statutes in *Planned Parenthood of Southeastern Pennsylvania v. Casey* in 1992, the Court was divided over several issues, including the challenged statutes and their constitutionality individually.[105] Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter jointly authored the plurality opinion, concluding that an examination of *Roe* and subsequent cases required the Court to lay out some guiding principles.[106] First, "[t]o protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, [the Court] employ[ed] the undue burden analysis."[107] Second, *Roe*'s rigid trimester framework was rejected because"[a]s with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion."[108] The Court reaffirmed *Roe*'s undue burden analysis and central holding, including the holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[109]

Justice Harry Blackmun, writing separately, argued that "[a]pplication of the strict scrutiny standard results in the invalidation of all the challenged provisions."[110] On the other hand, Chief Justice Rehnquist, who was joined in dissent by Justices Byron White, Antonin Scalia, and Clarence Thomas, declared that "*Roe* was wrongly decided, and that it can and should be overruled consistently with [the Court's] traditional approach to *stare decisis* in constitutional cases. "[111] He believed that "[t]he Court in *Roe* reached too far when it analogized the right to abort a fetus to the rights involved in [previous cases]."[112]

Justice Scalia, who was joined in a separate dissent by Rehnquist, White, and Thomas, wrote that "[t]he States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so."[113] Like Blackmun, Scalia argued that "[t]he ultimately standardless nature of the 'undue burden' inquiry is a reflection of the underlying fact that the

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[105] *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 843–44 (1992) (plurality opinion).

[106] *Id.* at 877.

[107] *Id.* at 878.

[108] *Id.*

[109] *Id.* (quoting Roe v. Wade, 410 U.S. 113, 164-65 (1973)).

[110] *Id.* at 934 (Blackmun, J. concurring).

[111] *Casey*, 505 U.S. at 944 (Rehnquist, C.J., dissenting).

[112] *Id.* at 953 (citing to the following cases as controlling authorities under stare decisis: Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923), Virginia v. Loving, 388 U.S. 1 (1967); and Griswold v. Connecticut, 381 U.S. 479 (1965)).

[113] *Id.* at 979 (Scalia, J., dissenting).

concept has no principled or coherent legal basis."[114] Instead, if Scalia applied a rational basis test, he insisted that he would have upheld the Pennsylvania statute entirely.[115]

After *Casey*, anti-abortion organizations continued to mobilize and advocate for more abortion restrictions. In 2003, Congress passed the Partial-Birth Abortion Ban Act, which punished physicians who performed a partial-birth abortion, which is defined as an abortion of a living fetus that has any portion of its body outside of the mother during delivery.[116] In 2007, the U.S. Supreme Court upheld the law.[117] The Guttmacher Institute found that state legislatures passed eighty laws restricting abortion in the first six months of 2011, which was "more than double the previous record of 34 abortion restrictions enacted in 2005, and more than triple the 23 enacted in 2010."[118] Since then, states continued to pass abortion restrictions, especially focusing on targeted regulation of abortion providers, imposing burdensome requirements on facilities that perform abortions.[119] Some of these regulations required a specific width of corridors in abortion facilities or required providers to obtain admitting privileges at a nearby hospital when that hospital would not be willing to grant such privileges.[120] In 2016, the U.S. Supreme Court struct down some of these restrictions because they violated the Fourteenth Amendment by imposing an undue burden on abortion access.[121]

After President Donald Trump took office, three new justices—Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—replaced three justices appointed by Democrats, and anti-abortion activists saw this as a chance to revisit *Roe* and *Casey*.[122] On March 13, 2018, the Mississippi Legislature passed House Bill 1510, under which an abortion could not be performed in

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[114] *Id.* at 987.

[115] *Id.* at 981.

[116] Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108–105, 117 Stat. 1201, (codified at 18 U.S.C. § 1531).

[117] Gonzales v. Carhart, 550 U.S. 124, 168 (2007).

[118] *Laws Affecting Reproductive Health and Rights: State Trends at Midyear, 2011*, GUTTMACHER INST., (July 1, 2011) https://www.guttmacher.org/laws-affecting-reproductive-health-and-rights-state-trends-midyear-2011# [https://perma.cc/2M4Y-3M5V].

[119] Elizabeth Chiarello, *Policing Pleasure: A Sociolegal Framework for Understanding the Social Control of Desire*, 73 STUD. L., POL. & SOC'Y 109, 122 (2017)).

[120] *Id.*; *see also Targeted Regulation of Abortion Providers*, GUTTMACHER INST., (Aug. 31, 2023), https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers [https://perma.cc/W8CC-N7HC] ("Efforts to use clinic regulation to limit access to abortion, rather than to make its provision safer resurfaced in the 1990s and have gained steam since 2010.").

[121] Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 627 (2016).

[122] *See* James J. Zumpano Jr., *Abortion in the United States: A Cry for Human Dignity*, 15 INTERCULTURAL HUM. RTS. L. REV. 285, 383–85 (2020).

most cases until a provider first determined and documented a fetus's probable gestational age.[123] The law read:

> Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform, induce, or attempt to perform or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.[124]

On March 19, 2018, Jackson Women's Health Organization and one of its providers challenged the law in the U.S. District Court for the Southern District of Mississippi because the clinic performed surgical abortions after fifteen weeks.[125] Seven months later, the federal district court ruled for the clinic, permanently enjoining the law "because it is a facially unconstitutional ban on abortions prior to viability."[126]

Mississippi subsequently appealed the decision to the Fifth Circuit, which affirmed the district court's decision.[127] The Fifth Circuit held:

> In an unbroken line dating to *Roe v. Wade*, the Supreme Court's abortion cases have established (and affirmed, and re-affirmed) a woman's right to choose an abortion before viability. States may *regulate* abortion procedures prior to viability so long as they do not impose an undue burden on the woman's right, but they may not ban abortions. The law at issue is a ban. Thus, we affirm the district court's invalidation of the law, as well as its discovery rulings and its award of permanent injunctive relief.[128]

On February 13, 2019, the Mississippi State Senate passed Senate Bill 2116, which forbade most abortions when a fetus's heartbeat could be detected.[129] The District Court for the Southern District of Mississippi issued an injunction against the enforcement of the new abortion law.[130] In February 2020, the Fifth Circuit again affirmed the lower court's decision.[131] Finally, the U.S. Supreme Court granted certiorari in *Dobbs v. Jackson Women's Health Organization*.[132]

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[123] MISS. CODE ANN. § 41-41-191 (2018).

[124] *Id.*

[125] Complaint at 5, Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536, 545 (S.D. Miss. 2018) (No. 3:18-cv-00171).

[126] *Currier*, 349 F. Supp. 3d at 545.

[127] Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 269 (5th Cir. 2019).

[128] *Id.*

[129] 2019 MISS. LAWS 349 (codified at MISS. CODE ANN. § 41-41-34.1 (2021).

[130] Jackson Women's Health Org. v. Dobbs, 379 F. Supp. 3d 549, 553 (S.D. Miss. 2019).

[131] Jackson Women's Health Org. v. Dobbs, 951 F.3d 246, 248 (5th Cir. 2020).

[132] Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619, 2619–20 (2021).

Dobbs was decided in 2022, with the majority opinion authored by Justice Samuel Alito and joined by Justices Thomas, Gorsuch, Kavanaugh, and Barrett.[133] The Court declared the following:

> *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law.[134]

Thus, Alito called for the time "to heed the Constitution and return the issue of abortion to the people's elected representatives."[135]

Justice Alito provided a three-step analysis of "whether the Constitution, properly understood, confers a right to obtain an abortion."[136] First, Alito explained that "[t]he Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text."[137] Yet, Alito determined that the right to an abortion was clearly not encapsulated in the Fourteenth Amendment.[138] Second, Alito concluded that the right was also "not deeply rooted" in American history or traditions.[139] Third, Alito declared that there was no judicial precedent for the right, either.[140] Alito wrote that "[t]here are occasions when past decisions should be overruled" and that "this is one of them"[141] based on five factors: "the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[142]

Justice Kavanaugh concurred, noting the following:

> The interests on both sides of the abortion issue are extraordinarily weighty. . . . The issue before this Court, however, is not the policy or

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[133] Dobbs v. Jackson Women's Health Org.,142 S. Ct. 2228, 2239 (2022).

[134] *Id.* at 2242.

[135] *Id.* at 2243.

[136] *Id.* at 2244.

[137] *Id.* at 2245.

[138] *Id.* at 2248.

[139] *Dobbs*, 141 S. Ct. at 2253.

[140] *Id.* at 2257.

[141] *Id.* at 2261.

[142] *Id.* at 2265.

> morality of abortion. The issue before this Court is what the Constitution says about abortion. The Constitution does not take sides on the issue of abortion. The text of the Constitution does not refer to or encompass abortion. . . . But a right to abortion is not deeply rooted in American history and tradition, as the Court today thoroughly explains.[143]

Demanding the *Dobbs* Court to be scrupulously neutral, Kavanaugh accused the *Roe* Court of taking sides by unilaterally legalizing abortion up to the point of viability.[144] Kavanaugh lauded the majority, claiming that it returned the judiciary to a "position of neutrality" and restored democratic autonomy to the people by letting them address the issue of abortion.[145] Chief Justice Roberts also concurred in the judgment, agreeing that the *Roe* and *Casey*'s viability line should be discarded under stare decisis and judicial restraint.[146] Roberts explained that "[i]f it is not necessary to decide more to dispose of a case, then it is necessary not to decide more."[147]

Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan joined in a single dissent, recognizing that "because, as the Court has often stated, protecting fetal life is rational, States will feel free to enact all manner of restrictions."[148] They believed that the Court was not impartially applying the law, as Kavanaugh purported.[149] They argued that "early law" supported the right to abortion, such as the common law tradition of legal pre-quickening abortions.[150]

> Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read out foundational character as viewed at the time of ratification . . . it consigns women to second-class citizenship."[151]

They condemned the majority for "discard[ing] a known, workable, and predictable standard in favor of something novel and probably far more complicated."[152] As such, the dissent concluded that "the majority throws

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[143] *Id.* at 2304 (Kavanaugh, J., concurring).

[144] *Id.* at 2305.

[145] *Dobbs*, 141 S. Ct. at 2305.

[146] *Id.* at 2310 (Roberts, C.J., concurring).

[147] *Id.*

[148] *Id.* at 2317 (Breyer, Sotomayor & Kagan, JJ., dissenting).

[149] *Id.* at 2320.

[150] *Id.* at 2324.

[151] *Dobbs*, 141 S. Ct. at 2325 (Breyer, Sotomayor & Kagan, JJ., dissenting).

[152] *Id.* at 2337.

longstanding precedent to the winds without showing that anything significant has changed to justify its radical reshaping of the law."[153]

Famously, Justice Thomas concurred "separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause."[154] Thomas warned that the "legal fiction" of substantive due process was dangerous, "[b]ecause the Due Process Clause does not secure *any* substantive rights, [and so] it does not secure a right to abortion."[155] First, Thomas reasserted that substantive due process places judges above and out of reach of the people by allowing the Court to divine "new rights in line with 'its own, extraconstitutional value preferences' and nullif[y] state laws that do not align with the judicially created guarantees."[156] Second, Thomas wrote that "substantive due process distorts other areas of constitutional law" because "once this Court identifies a 'fundamental' right for one class of individuals, it invokes the Equal Protection Clause to demand exacting scrutiny of statutes that deny the right to others."[157] Finally, Thomas argued that the use of substantive due process foreshadowed "disastrous ends,"[158] citing to *Dred Scott v. Sandford*,[159] in which "the Court invoked a species of substantive due process to announce that Congress was powerless to emancipate slaves brought into the federal territories."[160] Therefore, Thomas concluded that "in future cases, we should reconsider all of this Court's substantive due process precedents," and specifically listed the following decisions impacting sexual minorities: *Griswold v. Connecticut*; *Lawrence v. Texas*; and *Obergefell v. Hodges*. [161]

But what would that reconsideration entail according to Justice Thomas? Why would Thomas vote for overturning *Obergefell*, which is a decision that does not directly concern the right to abortion? Before delving into Thomas's dissent in *Obergefell*, it is helpful to go through a brief history of the gay rights movement and important legal decisions that led to *Obergefell*.

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[153] *Id.* at 2338.

[154] *Id.* at 2300 (Thomas, J., concurring).

[155] *Id.* at 2301.

[156] *Id.* at 2302 (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 794 (1986) (White, J., dissenting)).

[157] *Dobbs*, 141 S. Ct. at 2303 (Thomas, J., concurring).

[158] *Id*.

[159] 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[160] *Dobbs*, 141 S. Ct. at 2303 (Thomas, J., concurring).

[161] *Id.* at 2301.

II. Gay Rights and *Obergefell*

"From colonial days until the nineteenth century," people in America could have been prescribed capital punishment for sodomy.[162] The first sodomy laws were instruments to regulate sexual morality.[163] Individuals were prosecuted—even executed—for sodomy as far back as the colonial period.[164] Until 1962, every state could prosecute individuals for homosexual acts under sodomy laws.[165] Some of these laws were based, at least in part, on the judgment of the medical community, which in the early days saw homosexuality as abnormal.[166] In 1952, the American Psychiatric Association classified homosexuality as a mental disorder in the first edition of *Diagnostic and Statistical Manual of Mental Disorders*.[167]

The resistance to sodomy laws and negative public perception of homosexuals inspired the homophile movement in the 1950s, during which gay rights advocacy organizations, such as Mattachine Society in Los Angeles, formed.[168] To spread awareness of gay rights issues, the members of the Mattachine Society started publishing a magazine intended for a gay audience.[169] In 1954, a publisher sent these magazines to the United States Post Office to distribute to various parts of the country.[170] The postmaster returned the magazines as non-mailable under federal statute because they were "obscene, lewd, lascivious, and filthy."[171] The members of the magazine later sued the postmaster in a federal district court, which ruled for the Post Office.[172] The Ninth Circuit upheld the decision, holding that "[t]he articles mentioned are sufficient to label the magazine as a whole, obscene and filthy."[173] In 1958, the U.S. Supreme Court reversed.[174] On the other side

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[162] WILLIAM N. ESKRIDGE, DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003, at 16 (2008).

[163] *Id.* at 19.

[164] Lawrence v. Texas, 539 U.S. 558, 597 (2003) (Scalia, J., dissenting) (citing JONATHAN KATZ, GAY/LESBIAN ALMANAC 29, 58, 663 (1983)).

[165] DAVID CARTER, STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION 1 (2010); KEVIN HILLSTROM, GAY MARRIAGE (HOT TOPICS) 11 (2014).

[166] *See* HILLSTROM, *supra* note 165, at 13 (reporting that homosexuality was listed as a mental disorder).

[167] *Id.*

[168] MARC STEIN, RETHINKING THE GAY AND LESBIAN MOVEMENT 46, 54–55 (2012).

[169] HILLSTROM, *supra* note 165, at 14.

[170] One, Inc. v. Olesen, 241 F.2d 772, 773 (9th Cir. 1957).

[171] *Id.*

[172] *Id.* at 773–74.

[173] *Id.* at 778.

[174] One, Inc. v. Olesen, 355 U.S. 371, 371 (1958) (per curiam).

of the country, New York City was unknowingly setting the stage for the gay rights movement that would eventually spread across the nation.[175]

In the early 1960s, New York City Mayor Robert F. Wagner Jr. led a campaign to purge the city of gay bars in preparation for the 1964 World's Fair.[176] By 1966, homosexual men were routinely arrested for solicitation because of police entrapment practices.[177] At that time, there was one particular bar, the Stonewall Inn, that had a reputation for being "the gay bar in the city."[178] On June 28, 1969, police raided the Stonewall Inn.[179] The police attempted to detain several patrons; however, people resisted which eventually led to defiance and protests that continued for the next several days.[180] People were calling for "equality for homosexuals" and asking to "legalize gay bars" and "support gay power."[181] A year later, on June 28, 1970, the first pride march was held in New York City to commemorate the event.[182] This brief moment in history is referred to as "The Stonewall Riots of 1969," and many historians argue that it was the turning point in the gay rights movement.[183] Since then, every June, in commemoration of the Stonewall Riots, people across the world hold gay pride celebrations.[184]

In 1972, the U.S. Supreme Court was presented with a gay rights case, *Baker v. Nelson*.[185] In May 1970, James McConnell and John Baker applied for a marriage license in Minnesota, but their district clerk denied their request because they were a same-sex couple.[186] The district court denied the couple's request to force the clerk to grant a marriage license, so the couple appealed.[187] The Minnesota Supreme Court held that because the state's marriage statute did not expressly authorize same-sex marriages, same-sex

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[175] HILLSTROM, *supra* note 165, at 16.

[176] CARTER, *supra* note 165, at 36.

[177] *Id.* at 18.

[178] *Id.* at 74.

[179] *Id.* at 137.

[180] THE STONEWALL RIOTS: A DOCUMENTARY HISTORY 3-5 (Marc Stein ed., 2019).

[181] BETSY KUHN, GAY POWER!: THE STONEWALL RIOTS AND THE GAY RIGHTS MOVEMENT, 1969, at 75 (2011).

[182] ADAM NAGOURNEY, PRIDE: FIFTY YEARS OF PARADES AND PROTESTS FROM THE PHOTO ARCHIVES OF THE NEW YORK TIMES 15 (2019).

[183] *See, e.g.*, THE STONEWALL RIOTS: A DOCUMENTARY HISTORY, *supra* note 180, at 1 ("Whether they are understood as the starting point or turning point in the history of LGBTQ activism, the riots are justifiably viewed as a key moment in the mobilization of one of the most transformative social movements of the twentieth and twenty-first centuries."); CARTER, *supra* note 165, at 1 ("These riots are widely credited with being the motivating force in the transformation of the gay political movement.").

[184] KUHN, *supra* note 181, at 113.

[185] Baker v. Nelson, 409 U.S. 810 (1972).

[186] Baker v. Nelson, 191 N.W.2d 185, 185 (Minn. 1971).

[187] *Id.*

marriages were prohibited.[188] Further, the court held that the statute did not violate the First, Eighth, Ninth, or Fourteenth Amendments.[189] The court wrote that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."[190] The court further disregarded the argument raised in *Loving v. Virginia*, writing that "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."[191] Although the couple appealed to the U.S. Supreme Court, the Court dismissed the action for want of a substantial federal question.[192]

Following the Stonewall Riots, new gay rights organizations, such as the Gay Liberation Front and the National Gay Task Force, were formed.[193] In 1973, the American Psychiatric Association voted to declassify homosexuality as a mental disorder, which was another turning point in the gay rights movement because it helped to positively shape how the public saw homosexual people.[194] While homosexual people were certainly becoming more accepted by the public, many states still had laws criminalizing sex between two people of the same sex.[195] Until the early 1960s, all fifty states and the District of Columbia criminalized homosexual behavior through some sodomy statute.[196] By 1986, half of those states repealed their laws, but twenty-four states and the District of Columbia still continued to provide criminal penalties for sodomy.[197] One of these sodomy laws was challenged all the way to the U.S. Supreme Court.[198]

In 1982, Michael Hardwick was charged with violating a Georgia statute criminalizing sodomy between two people of the same sex.[199] Hardwick brought suit in the Federal District Court for the Northern District of Georgia, arguing that the Georgia sodomy law violated the U.S.

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[188] *Id.* at 186.

[189] *Id.* at 187.

[190] *Id.* at 186.

[191] *Id.* at 187.

[192] Baker v. Nelson, 409 U.S. 810 (1972) (mem.).

[193] RAYMOND A. SMITH & DONALD P. HAIDER-MARKEL, GAY AND LESBIAN AMERICANS AND POLITICAL PARTICIPATION: A REFERENCE HANDBOOK 76–77 (2002).

[194] HENRY L. MINTON, DEPARTING FROM DEVIANCE: A HISTORY OF HOMOSEXUAL RIGHTS AND EMANCIPATORY SCIENCE IN AMERICA 2–3 (2002).

[195] *See generally* Yao Apasu-Gbotsu et al., *Survey of the Law: Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521 (1986).

[196] *Id.* at 526.

[197] *Id.* at 524.

[198] *See* Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003) (reviewing a Georgia sodomy statute).

[199] Hardwick v. Bowers, 760 F.2d 1202, 1204 (11th Cir. 1985).

Constitution, but the district court dismissed the claim.[200] The Eleventh Circuit reversed and remanded, holding "that the Georgia sodomy statute implicate[d] a fundamental right" of same-sex couples.[201] The appellate court remanded the case so that the state could "prove in order to prevail that it ha[d] a compelling interest in regulating this behavior and that this statute [was] the most narrowly drawn means of safeguarding that interest."[202]

The U.S. Supreme Court's majority opinion in *Bowers v. Hardwick*, released on June 30, 1986, was authored by Justice White and joined by Chief Justice Burger and Justices Rehnquist, O'Connor, and Powell.[203] White wrote that the U.S. Constitution did not confer "a fundamental right upon homosexuals to engage in sodomy."[204] White declared that the rights announced in previous cases that dealt with child rearing and education, family relationships, procreation, marriage, contraception, and abortion bore no "resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case."[205] "[A]ny claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable."[206] White noted that there were "ancient roots" for statues against homosexual conduct and that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[207] White concluded that sodomy laws passed the rational-basis test and, in Georgia's case, "[t]he law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalided under the Due Process Clause, the courts will be very busy."[208]

Chief Justice Burger filed a concurrence, in which he separately "underscore[d] [his] view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy."[209] Burger asserted that "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[210]

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[200] *Id.*

[201] *Id.* at 1212.

[202] *Id.* at 1213.

[203] 478 U.S. 186, 187 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[204] *Id.* at 190–191.

[205] *Id.* at 204.

[206] *Id.* at 191.

[207] *Id.* at 194.

[208] *Id.* at 196.

[209] *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring).

[210] *Id.* at 197.

Powell also concurred, agreeing that there is no fundamental right to commit homosexual sodomy.[211] Powell argued that the Georgia sodomy statute, which "authorize[d] a court to imprison a person for up 20 years for a single private, consensual act of sodomy[,]. . . would create a serious Eighth Amendment issue."[212]

Justice Blackmun dissented and was joined by Justices Brennan, Marshall, and Stevens.[213] Blackmun proclaimed that "this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"[214] Blackmun thought that the case's claims should be analyzed under the constitutional right to privacy.[215] He noted that according to the language of the Georgia statute, the law applied to heterosexual and homosexual activity equally.[216] Thus, Blackmun argued that the petitioner's claim involved "an unconstitutional intrusion into his privacy and his right of intimate association[, which] does not depend in any way on his sexual orientation."[217] He contended that this case "implicate[d] both the decisional and the spatial aspects of the right to privacy."[218] Joined by Justices Brennan and Marshall, Justice Stevens also filed a dissent, arguing that states may not completely prohibit the conduct proscribed by the sodomy statute.[219] Stevens claimed there was no evidence justifying the "selective application of the generally applicable law" against only homosexuals, when the statute by its language applies to both heterosexuals and homosexuals.[220]

After *Bowers*, the gay rights movement took another hit during the HIV/AIDS epidemic in the 1980s.[221] AIDS was swiftly branded as "a gay plague," which negatively affected the public's view of homosexual people.[222] In 1985, the Gay & Lesbian Alliance Against Defamation (GLAAD) was founded as a response to *The New York Post*'s AIDS

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[211] *Id.*

[212] *Id.* 197–98.

[213] *Id.* 199 (Blackmun, J., dissenting).

[214] *Id.* (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

[215] *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting).

[216] *Id.* at 200.

[217] *Id.* at 201.

[218] *Id.* at 204.

[219] *Id.* at 218 (Stevens, J., dissenting).

[220] *Id.* at 220.

[221] *See* RITA SANTOS, ACT UP!: THE WAR AGAINST HIV IN THE LGBTQ+ COMMUNITY: THE HISTORY OF THE LGBTQ+ RIGHTS MOVEMENT 9 (2019) (discussing how the AIDS epidemic unfolded).

[222] SUSAN M. CHAMBRÉ, FIGHTING FOR OUR LIVES: NEW YORK'S AIDS COMMUNITY AND THE POLITICS OF DISEASE 57 (2006).

coverage.[223] GLAAD organized protests against *The New York Post*, demanding a change in the negative portrayal of homosexuals in the Post's coverage of the AIDS epidemic.[224] Eventually, AIDS was reframed from being a "homosexual disease" to a disease that could affect anyone.[225]

Openly homosexual men also became more visible in American politics. In 1983, following allegations of inappropriate sexual behavior, the American public learned that Congressman Gerry Studds was homosexual.[226] In 1987, before getting elected to the U.S. House of Representatives, Barney Frank also came out to his family and the public.[227] The gay rights movement also had a small win in New York, where the New York Court of Appeals in 1989 held that the term "family" in the rent and eviction regulations includes heterosexual and homosexual couples.[228]

However, while gay rights organizations had scored some wins, they were also facing some challenges. In 1992, Colorado held a statewide referendum where voters approved an amendment to the state constitution preventing any city, town, or county in the state from taking any legislative, executive, or judicial action to recognize homosexuals as a protected class.[229] At that time, public opinion polls showed that, while Coloradans disfavored discrimination based on sexual orientation, they were against affirmative action based on sexual orientation.[230] In a lawsuit seeking to enjoin the amendment, the trial court issued a preliminary injunction, and the Colorado Supreme Court affirmed, holding that "[t]he state ha[d] failed to establish that Amendment 2 is necessary to serve any compelling governmental interest in a narrowly tailored way."[231]

The U.S. Supreme Court handed down its decision on May 20, 1996 with the majority opinion authored by Justice Kennedy and joined by Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer.[232] Kennedy wrote that the Equal Protection Clause "require[d the Court] to hold invalid a provision of

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[223] *GLAAD History and Highlights,* GLAAD, https://www.glaad.org/about/history [https://perma.cc/EQD3-N6AV].

[224] *Id.*

[225] NEWS AND SEXUALITY: MEDIA PORTRAITS OF DIVERSITY 103 (Laura Castañeda & Shannon Campbell eds., 2006).

[226] J. MICHAEL MARTINEZ, CONGRESSIONAL PATHFINDERS: "FIRST" MEMBERS OF CONGRESS AND HOW THEY SHAPED AMERICAN HISTORY 105 (2021).

[227] WE DO!: AMERICAN LEADERS WHO BELIEVE IN MARRIAGE EQUALITY 192 (Jennifer Baumgardner & Madeleine M. Kunin eds., 2013).

[228] Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 53–54 (N.Y. 1989).

[229] Evans v. Romer, 882 P.2d 1335, 1338 (Colo. 1994).

[230] MARIANA VALVERDE, LAW'S DREAM OF A COMMON KNOWLEDGE 125 (2003).

[231] *Evans*, 882 P.2d at 1339,1350.

[232] Romer v. Evans, 517 U.S. 620, 623 (1996).

Colorado's Constitution."[233] The amendment changed the legal status of homosexual people because it invalidated ordinances and other laws that gave extra protections to them.[234] Kennedy described the amendment as "withdraw[ing] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and . . . forbid[ding] reinstatement of these laws and policies."[235] He further wrote that the amendment barred "homosexuals from securing protection against the injuries that these public-accommodations laws address" and "nullifie[d] specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment."[236] Kennedy feared that the amendment raised an "inevitable inference" that an animosity toward homosexual people created the disadvantage imposed.[237] Holding that the amendment violated the Equal Protection Clause, Kennedy saw it as one not "directed to any identifiable legitimate purpose or discrete objective" and as classifying "homosexuals not to further a proper legislative end but to make them unequal to everyone else."[238]

In his dissent joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia argued that the majority's reasoning contradicted *Bowers*.[239] He claimed that "[s]ince the Constitution . . . says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions."[240] Additionally, Scalia thought that the amendment required a clear application a rational basis test.[241] Citing *Bowers*, Scalia wrote that "[i]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct."[242] Because Scalia could not find a constitutional principle or judicial precedent prohibiting the amendment, he concluded that the majority's opinion "ha[d] no foundation in American constitutional law."[243]

The topic of same-sex marriage slowly started being discussed in national politics in 1993, when the Hawai'i Supreme Court suggested that the

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[233] *Id.*

[234] *Id.* at 627.

[235] *Id.*

[236] *Id.* at 629.

[237] *Id.* at 634.

[238] *Romer*, 517 U.S. at 635.

[239] *Id.* at 636 (Scalia, J., dissenting).

[240] *Id.*

[241] *Id.* at 640.

[242] *Id.* at 641.

[243] *Id.* at 644, 653.

state's prohibition of same-sex marriage might be unconstitutional.[244] Several months after the Hawai'i case, the gay rights movement had a setback when the "Don't Ask, Don't Tell" policy took effect, prohibiting people who "demonstrate[d] a propensity or intent to engage in homosexual acts" from serving in the United States armed forces.[245] The law stated the presence of homosexuals "would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."[246] A few years later, Congress passed the Defense of Marriage Act (DOMA), which permitted states to deny recognition of same-sex marriages conducted by other states because the federal government defined "the word 'marriage' [to] mean[] only a legal union between one man and one woman as husband and wife, and the word 'spouse' [to] refer[] only to a person of the opposite sex who is a husband or a wife."[247]

While Congress slowed down the progress of the gay rights movement through legislation, Lambda Legal continued making steady strides at the state level.[248] When reviewing a summary judgment motion in 1996, the Seventh Circuit held that a reasonable fact finder could find that school officials violated a homosexual student's "Fourteenth Amendment right to equal protection by discriminating against him based on his gender or sexual orientation" when failing to protect him from bullying.[249] During that time, Lambda Legal also looked for the right case to overturn *Bowers*.[250]

In September 1998, two homosexual men were charged with violating the Texas anti-sodomy law.[251] Under that law, "[a] person commits an

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[244] *See* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) ("What we *have* held is that, on its face and as applied, HRS § 572-1 denies same-sex couples access to the martial status and its concomitant rights and benefits, thus implicating the equal protection clause of article I, section 5."); MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 56 (2013) (discussing how *Baehr* "provoked an enormous political backlash—both in Hawaii and on the mainland").

[245] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1671 (1993), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

[246] *Id.*

[247] Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996), *repealed by* Respect for Marriage Act, Pub. L. No. 117-228, § 3, 136 Stat. 2305, 2305 (2022).

[248] *See* Nabozny v. Podlesny, LAMBDA LEGAL, https://lambdalegal.org/case/nabozny-v-podlesny/ [https://perma.cc/4ZTU-3J6V] (detailing the organization's impact in the state case).

[249] Nabozny v. Podlesny, 92 F.3d 446, 460 (7th Cir. 1996).

[250] *See* KEVIN CATHCART, THE ARC OF HISTORY: FROM BOWERS TO LAWRENCE TO EQUALITY, https://legacy.lambdalegal.org/sites/default/files/publications/downloads/fs_the-arc-of-history_1.pdf [https://perma.cc/HX72-TWMS] (previewing *Lawrence* and Lambda Legal's representation).

[251] READINGS IN POLITICAL PHILOSOPHY: THEORY AND APPLICATIONS 622 (Diane Jeske & Richard Fumerton eds., 2011).

offense if he engages in deviate sexual intercourse with another individual of the same sex."[252] At the state trial court, the defendants argued that the statute violated the Equal Protection Clause of the Fourteenth Amendment, but their arguments did not prevail.[253] The appellate court considered their arguments under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, but ultimately rejected their arguments.[254]

On June 26, 2003, the U.S. Supreme Court delivered its opinion in *Lawrence v. Texas*.[255] In the majority opinion, which was joined by Justices Stevens, Souter, Ginsburg, and Breyer, Justice Kennedy recognized that the case's challenges involved the "liberty of the person both in its spatial and more transcendent dimensions."[256] He wrote that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[257] Kennedy challenged the idea that proscriptions against homosexual conduct had ancient roots because early legal literature did not discuss punishments for consenting adults who engaged in private acts.[258] Citing *Casey*, Kennedy explained that "our laws and tradition" constitutionally protected personal decisions of marriage, procreation, contraception, family relationships, child rearing, and education.[259] "When homosexual conduct is made criminal by the law of the State, that declaration is and of itself an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[260] Kennedy condemned states for attempting to demean or control homosexual people by criminalizing their private sexual conduct because "[t]heir right to liberty under the Due Process Clause gives them a full right to engage in their conduct without intervention of the government."[261] Thus, the Court overruled *Bowers*.[262]

Justice O'Connor concurred in the holding that the Texas statute was unconstitutional under the Fourteenth Amendment's Equal Protection

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[252] Lawrence v. State, 41 S.W.3d 349, 376 (Tex. App. 2001) (en banc) (Anderson, J., dissenting) (quoting TEX. PENAL CODE ANN. § 21.06).

[253] *Id.* at 350 (majority opinion).

[254] *Id.* at 362.

[255] 539 U.S. 558, 558 (2003).

[256] *Id.* at 562.

[257] *Id.* at 567.

[258] *Id.* at 570.

[259] *Id.* at 573–74.

[260] *Id.* at 575.

[261] *Lawrence*, 539 U.S. at 576.

[262] *Id.* at 578.

Clause, but she disagreed with overturning *Bowers*.[263] She explained that under the statute, "sodomy [was] a crime only if a person 'engage[d] in deviate sexual intercourse with another individual of the same sex,'" whereas "[s]odomy between opposite-sex partners . . . [was] not a crime in Texas."[264] Thus, Texas treated participants engaging in the same conduct differently by branding homosexual people as criminals.[265] O'Connor concluded that "Texas' sodomy law therefore result[ed] in discrimination against homosexuals as a class in an array of areas outside the criminal law."[266]

Joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia dissented, criticizing the majority's "surprising readiness to reconsider a decision rendered a mere 17 years ago in *Bowers v. Hardwick*."[267] Scalia argued the following:

> [T]he contention that there is no rational basis for the law here under attack . . . is so out of accord without jurisprudence—indeed, with the jurisprudence of *any* society we know—that it requires little discussion. The Texas statute undeniably [sought] to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable" . . . the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity."[268]

Scalia concluded that rational basis review was "readily satisfied here by the same rational basis that satisfied it in *Bowers*—society's belief that certain forms of sexual behavior are 'immoral and unacceptable.'"[269] Thomas also dissented, arguing that "as a member of this Court [he was] not empowered to help petitioners and others similarly situated" because a general right of privacy did not exist in the Bill of Rights or in any other part of the Constitution.[270]

Lawrence added much-needed fuel to the gay rights movement.[271] On November 18, 2003, the Supreme Judicial Court of Massachusetts held "that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."[272] The decision was "stayed for 180

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[263] *Id.* at 579 (O'Connor, J., concurring).

[264] *Id.* at 581.

[265] *Id.*

[266] *Id.* at 584.

[267] *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

[268] *Id.* at 599.

[269] *Id.* at 600.

[270] *Id.* at 605–06 (Thomas, J., dissenting).

[271] *See* CATHCART, *supra* note 250.

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

days to permit the Legislature time to enact legislation 'as it may deem appropriate in light of this opinion.'" On May 17, 2004, Massachusetts became the first state to allow same-sex couples to get married.[273] The ruling sparked national debate over same-sex marriage, and legislators who opposed same-sex marriage attempted to introduce proposals restricting marriage to people of the opposite sex.[274]

The gay rights movement became even more successful when Barack Obama took office.[275] On June 17, 2009, President Barack Obama issued a presidential memorandum, permitting same-sex partners of federal employees to receive benefits.[276] On October 28, 2009, Obama signed a law that added sexual orientation to existing federal hate crime laws.[277] On December 22, 2010, Obama signed another law repealing "Don't Ask, Don't Tell."[278] On February 23, 2011, Eric H. Holder, Jr., the Attorney General of the United States under the Obama administration, sent a letter to congressional leadership to inform them that "the President of the United States has made the determination that Section 3 of [DOMA] as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment."[279] This letter was sent to address the following ongoing case dealing with same-sex marriage.[280]

Before DOMA was enacted, Thea Spyer and Edith Windsor met in New York City in 1963 and got married in Canada in 2007.[281] Spyer passed away in February 2009, leaving her estate to Windsor.[282] However, Windsor paid $363,053 in estate taxes because under DOMA, she did not qualify for the marital exemption from the federal estate tax as a surviving spouse.[283] She subsequently filed a suit in the United States District Court for the Southern District of New York, where she argued that DOMA deprived her of equal

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[273] ALISON M. SMITH, CONG. RSCH. SERV., RL31994, SAME-SEX MARRIAGES: LEGAL ISSUES 8 (2009).

[274] ANDREW SULLIVAN, SAME-SEX MARRIAGE: PRO AND CON: A READER 87 (2009).

[275] *See generally* OBAMA ON OUR MINDS: THE IMPACT OF OBAMA ON THE PSYCHE OF AMERICA 187–88 (Lori A. Baker ed., 2016).

[276] Federal Benefits and Non-Discrimination, 74 Fed. Reg. 29,393 (June 17, 2009).

[277] Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2838 (2009) (codified at 18 U.S.C. § 249).

[278] Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

[279] Press Release, U.S. Dep't of Just., Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act [https://perma.cc/27FZ-PLQ7].

[280] *Id.*

[281] Windsor v. United States, 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012).

[282] *Id.*

[283] *Id.*

protection of the laws under the Fifth Amendment.[284] The district court ruled against the United States.[285] The Second Circuit affirmed the district court's judgment.[286]

Joined by Justices Ginsberg, Breyer, Sotomayor, and Kagan in 2013, Justice Kennedy in writing for the majority acknowledged that "DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations."[287] Kennedy underscored how DOMA rejected the "long-established precept" all married couples uniformly were entitled to the incidents, benefits, and obligations of marriage.[288] DOMA created situations where states that recognized same-sex marriages would be treating those couples as second-class marriages under federal law, which implicated Fifth Amendment issues.[289] By injuring the very class New York sought to protect, DOMA violated due process and equal protection principles.[290] Kennedy concluded "that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."[291]

Chief Justice Roberts dissented, arguing that the Court did not have jurisdiction to review the lower court's decision and Congress constitutionally passed DOMA.[292] Roberts cited "[i]nterests in uniformity and stability [that] amply justified Congress's decision to retain the definition of marriage [and] that, at that point, had been adopted by every State in our Nation, and every nation in the world."[293]

Justice Scalia also dissented and was joined by Justice Thomas, and in part by Chief Justice Roberts.[294] Scalia, like Roberts, argued that the Court had no power to decide this case, and that, even if it did, the Court could not constitutionally invalidate the "democratically adopted legislation."[295] Scalia rebuffed the majority opinion as "an assertion of judicial supremacy over the people's Representatives in Congress and the Executive."[296] Because the Constitution did not expressly acknowledge marriage, Scalia argued that the

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[284] *Id.* at 396.

[285] *Id.* at 406.

[286] Windsor v. United States, 699 F.3d 169, 188 (2d Cir. 2012).

[287] United States v. Windsor, 570 U.S. 744, 765 (2013).

[288] *Id.* at 768.

[289] *Id.* at 771.

[290] *Id.* at 769.

[291] *Id.* at 774.

[292] *Id.* at 775 (Roberts, C.J., dissenting).

[293] *Windsor*, 570 U.S. at 775 (Roberts, C.J., dissenting).

[294] *Id.* at 778 (Scalia, J., dissenting).

[295] *Id.* at 778.

[296] *Id.* at 799.

Constitution did not require or forbid states to authorize same-sex marriage, just like no-fault divorce, polygamy, or the consumption of alcohol.[297] Scalia proclaimed that "there are many perfectly valid—indeed, downright boring—justifying rationales for this legislation. Their existence ought to be the end of this case."[298]

Lastly, Justice Alito also filed a dissent, in which Justice Thomas joined in part.[299] Alito believed that DOMA did not violate any person's Fifth Amendment rights because "[t]he Constitution does not guarantee the right to enter into a same sex-marriage" and "no provision of the Constitution speaks to the issue."[300] Alito asserted that the right to same-sex marriage being deeply rooted in American history and tradition was beyond dispute.[301] He wrote that "[a]ssuming that Congress has the power under the Constitution to enact the laws affected by §3, Congress has the power to define the category of persons to whom those laws apply."[302]

By late 2014, lawsuits challenging prohibition of same-sex marriage laws had been brought in every state that still had laws denying marriage licenses to same-sex couples.[303] The split among the state and federal courts made the case ripe for the U.S. Supreme Court.[304] The petitioners in *Obergefell* were fourteen same-sex couples and two men whose same-sex partners were deceased, and the respondents were state officials who were tasked with enforcing state laws.[305] The cases came from Kentucky, Michigan, Ohio, and Tennessee, where marriage was defined as a union between one man and one woman.[306] The petitioners filed lawsuits in federal courts in their home states, and each federal district court ruled in their favor, although the Sixth Circuit later court reversed those decisions.[307]

The U.S. Supreme Court decided *Obergefell* in June of 2015, and Justice Kennedy authored the majority opinion, proclaiming that "the Court has long held the [fundamental] right to marry is protected by the

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[297] *Id.* at 795.

[298] *Id.*

[299] *Windsor*, 570 U.S at 802 (Alito, J., dissenting).

[300] *Id.* at 807.

[301] *Id.* at 808.

[302] *Id.* at 817–18.

[303] Christine L. Nemacheck, *The Path to* Obergefell*: Saying "I Do" to New Judicial Federalism?*, 54 WASH. U. J.L. & POL'Y 149, 164–65 (2017).

[304] *Id.* at 165 ("Once the United States Court of Appeals for the Sixth Circuit reversed lower federal district courts' decisions striking down state bans on same-sex marriage creating a split amongst the federal circuit courts, the Supreme Court was finally ready to confront the question of marriage equality under the Constitution.").

[305] Obergefell v. Hodges, 576 U.S. 644, 654–55 (2015).

[306] *Id.* at 653–54.

[307] *Id.* at 656.

Constitution" under the Due Process Clause.[308] Kennedy relied on four principles and traditions to reach this holding.[309] First, he derived the right of a personal choice to marry as inherent in individual autonomy, which was recognized through the invalidation of interracial marriage bans.[310] Then, he explained how this right to marry—unlike any other right—was unique to the committed individuals seeking a union, which was a central point in *Griswold*.[311] Next, Kennedy emphasized how the right to marry protected children and families in matters related to childrearing, procreation, and education.[312] Last, he pointed toward judicial precedent and American traditions to show that marriage is a keystone of social order.[313] Kennedy warned that by excluding same-sex couples from the benefits of marriage, states taught same-sex couples that they were "unequal in important respects," despite the right to marriage being a guaranteed liberty right owed equal protection under the law.[314] "[I]n interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[315] As such, Kennedy concluded states could not lawfully refuse to recognize same-sex marriages performed in other states on the basis of sexuality, because the liberty interest in the fundamental could not be burdened or abridged.[316]

First of four dissents, Chief Justice Roberts was joined by Justices Scalia and Thomas.[317] Roberts argued that judges have the constitutional authority to say "what the law is, not what it should be."[318] However, he likened the constitutional right of same-sex couples to marriage as one supported by only compelling policy arguments, but not legal or traditional arguments.[319] Roberts accused the due process rights in "right to marry" cases of having a limited reach in striking particular restrictions on access to marriage because the right to privacy did not extend to an affirmative right to redefine marriage.[320] Finally, Roberts concluded that there was no equal

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[308] *Id.* at 664.

[309] *Id.* at 665.

[310] *Id.*

[311] *Obergefell*, 576 U.S. at 665–66.

[312] *Id.* at 667.

[313] *Id.* at 669.

[314] *Id.* at 670.

[315] *Id.* at 673.

[316] *Id.* at 674, 675, 681.

[317] *Obergefell*, 576 U.S. at 686 (Roberts, C.J., dissenting).

[318] *Id.* at 686.

[319] *Id.*

[320] *Id.* at 700, 702.

protection violation in the case because states have a legitimate state interest to discriminate between same-sex and opposite-sex couples to "preserv[e] the traditional institution of marriage."[321]

Second, Justice Scalia also dissented and was joined by Justice Thomas.[322] Scalia condemned the majority for striking down a practice that is "not expressly prohibited" by the Fourteenth Amendment.[323] Scalia thought that the Obergefell opinion diminished the "Court's reputation for clear thinking and sober analysis."[324] Third, Justice Alito also filed a dissent joined by Justices Scalia and Thomas, based on the premise that the Constitution was silent on the right to same-sex marriage and that there were no deep root for same-sex marriage.[325] Alito also condemned the Court's alleged lack of restraint for policymaking, warning that "[a] lesson that some will take from today's decision is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means."[326]

Finally, Justice Thomas filed a dissent joined by Justice Scalia.[327] Thomas claimed that the majority's concept of liberty bore "no resemblance to any plausible meaning" under the Due Process Clause.[328] Thomas wrote:

> The Framers drew heavily upon Blackstone's formulation, adopting provisions in early State Constitutions that replicated Magna Carta's language, but were modified to refer specifically to "life, liberty, or property." State decisions interpreting these provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly construed the word "liberty" to refer only to freedom from physical restrain.[329]

To Thomas, "liberty" traditionally refers to the individual's freedom from governmental action, but it did not confer a right to a particular governmental entitlement.[330] Most traditional originalists, like Justice Thomas, believe that the Court should decide constitutional issues on the basis of the

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[321] *Id.* at 707.

[322] *Id.* at 713 (Scalia, J. dissenting).

[323] *Obergefell*, 576 U.S. at 716.

[324] *Id.* at 720.

[325] *Id.* at 736–38 (Alito J. dissenting).

[326] *Id.* at 742.

[327] *Id.* at 721 (Thomas, J., dissenting).

[328] *Id.* at 722.

[329] *Obergefell*, 576 U.S. at 724–25.

[330] *Id.* at 726.

Constitution's original meaning.[331] In his *Obergefell* dissent, Thomas also warned that the majority's meaning of liberty would have collateral damage.[332] Thus, Thomas argued:

> The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our Constitution to preserve that understanding of liberty. Yet, the majority invokes our Constitution in the name of a "liberty" that the Framers would not have recognized, to the detriment of the liberty they sought to protect.[333]

But is that true? What would the Reconstruction Framers of the Fourteenth Amendment have thought about *Obergefell*'s central holding? Is Justice Thomas correct to proclaim that the Framers would not have recognized the liberty that was the basis for *Obergefell*? Finding the answers to these questions requires delving into the history of the Reconstruction Framers and their drafting of the Fourteenth Amendment in the Constitution.

III. Drafting of the U.S. Constitution

On May 29, 1790, Rhode Island became the last of thirteen colonies to ratify the U.S. Constitution.[334] Under the Constitution, there are three branches of government: the legislative power, the executive power, and the judicial power.[335] Judicial power is "vested in one supreme Court" and it "extend[s] to all Cases, in Law and Equity, arising under this Constitution."[336]

Following the Civil War in 1865, the Thirteenth Amendment was ratified.[337] On April 9, 1866, Congress passed the Civil Rights Act, which sought to protect the rights of Black people:

> Be it enacted . . . That all persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color . . . shall have the same right . . . to full and

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[331] *See* Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas*?, 4 N.Y.U. J.L. & LIBERTY 494, 516 (2009) ("Justice Thomas is clearly an Originalist, a jurist who insists that the Court should decide constitutional issues on the basis of the Constitution's original meaning.").

[332] *Obergefell*, 576 U.S. at 732 (Thomas, J., dissenting).

[333] *Id.*

[334] CRAIG A. DOHERTY & KATHERINE M. DOHERTY, THE THIRTEEN COLONIES: RHODE ISLAND 104 (2005).

[335] *See* U.S. CONST. art. I, II & III.

[336] U.S. CONST. art III, §§ 1–2.

[337] ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 48 (2004).

> equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . .[338]

After the statute was passed, Congress went one step further and in 1866 the Fourteenth Amendment, which states the following:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[339]

The Fourteenth Amendment has three important clauses: the Equal Protection Clause, the Due Process Clause, and the Privileges and Immunities Clause, which each include a unique drafting history.

A. The Equal Protection Clause

The original language of the Fourteenth Amendment was much narrower. The earlier draft of the Fourteenth Amendment stated the following:

> Sec. 1. No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.
>
> Sec. 2. From and after the fourth day of July, in the year one thousand eight hundred and seventy-six, no discrimination shall be made by any state, nor by the United States, as to the enjoyment by classes of persons of the right of suffrage, because of race, color, or previous condition of servitude.
>
> Sec. 3. Until the fourth day of July, one thousand eight hundred and seventy-six, no class of persons, as to the right of any of whom to suffrage discrimination shall be made by any state, because of race, color, or previous condition of servitude, shall be included in the basis of representation.[340]

This proposed draft was rejected because it did not have equality or due process principles that would extend beyond slavery and race.[341] In 1866, the

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[338] Civil Rights Act of 1866, Pub. L. No. 39-26, 14 Stat. 27 (codified as amended at 42 U.S. §§ 1981–1982).

[339] U.S. CONST. amend. XIV, § 1.

[340] BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1865–1867, at 83–84 (1914).

[341] *See* Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIAMI L. REV. 648, 681–82 (2016) ("[Earlier versions of the Fourteenth Amendment limiting protections to race and race-based discrimination] were scraped in favor of a broader phrasing that included guarantees for the rights of *all persons*, regardless of race. . . . Largely, this is because the

Republican Party published a bulletin lauding the caste-abolition accomplishments, stating that Republicans "sought by legislation and by constitutional amendment to guarantee to every citizen of the republic the equality of civil rights before the law."[342] When the Fourteenth Amendment was introduced to the Senate on May 23, 1866, Senator Jacob Howard of Michigan was a member of the drafting committee, the Joint House-Senate Committee on Reconstruction.[343] "[H]e acted as the floor manager for the Amendment in the Senate,"[344] explaining that the words "race" and "color" were dropped from the Fourteenth Amendment for the following reason:

> The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.[345]

Instead of limiting their slavery-related concerns in the Fourteenth Amendment, Congress decided to go one step further.[346] Republican Representative Thomas Eliot of Massachusetts explained the following:

> If, under the Constitution as it now stands, Congress has not the power to prohibit State legislation discriminating against classes of citizens or depriving any persons of life, liberty, or property without due process of law, or denying to any persons within the State the equal protection of the laws, then, in my judgment, such power should be distinctly conferred.[347]

Furthermore, the idea that the Fourteenth Amendment should provide broader equality and due process principles also comes from the original drafter of the Fourteenth Amendment—Representative John Bingham of Ohio.[348] Representative Bingham supported Abraham Lincoln's presidency,

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original draft version of the Amendment was rejected by members of Congress on both the right and the left, since both parties wanted the Fourteenth Amendment to protect against a wider array of rights violations. Congress on both the right and the left 'wanted to prohibit all forms of caste' and members on the right 'wanted to protect the rights of white Unionists in the South.'").

[342] Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 35 (2011) (citing *Who Did It?*, PHILA. N. AM. & U.S. GAZETTE, Aug. 18, 1866, at 1).

[343] Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 313 (2007).

[344] *Id.*

[345] CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard).

[346] Calabresi & Begley, *supra* note 341, at 681.

[347] CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866) (statement of Rep. Elliot).

[348] GERARD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT 1–2 (2013).

and in the 1860s, Bingham served in the U.S. House of Representatives.[349] He advocated for the abolition of slavery, becoming "one of the strongest anti-slavery voices in the Republican Party."[350] The speeches that Bingham gave throughout his career furnish evidence that Bingham intended the Fourteenth Amendment to provide broader protections, as indicated by his 1851 speech, where he stated:

> When the vital principle of our government, the equality of the human race, shall be fully realized, when every fetter within our borders shall be broken, where the holy Temple of Freedom, the foundations of which our fathers laid amidst prayers, and sacrifices, and battles and tears, shall be complete, lifting its head-stone of beauty above the towers of watch and war, then conscious of duty performed, and a noble mission fulfilled, we may call to the down-trodden and oppressed of all lands—come.[351]

Bingham was an even bigger advocate for equality; in 1859, Bingham in another speech explained that "equality of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the produce of their toil, is the rock on which that Constitution rests—its sure foundation and defense."[352] A few years later in 1861, Bingham said the following:

> No matter upon what spot of the earth's surface they were born; no matter whether an Asiatic or African, a European or an American sun first burned upon them; . . . no matter whether strong or weak, this new Magna Charta to mankind declares the rights of all to life and liberty and property are equal before the law.[353]

It is evident that at the time the Fourteenth Amendment was being drafted, the prevailing theme was equality for the Reconstruction Congress. The Reconstruction Framers considered several drafts of the Fourteenth Amendment, and they carefully chose the language of the text.[354] They deliberately chose the word "equal."[355] Furthermore, the Reconstruction Framers could have limited the scope of the Amendment by adding the word

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[349] *Id.* at 2.

[350] *Id.*

[351] *Id.* at 185.

[352] CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859) (statement of Rep. Bingham).

[353] CONG. GLOBE, 37th Cong., 2d Sess. 1638 (1862) (statement of Rep. Bingham).

[354] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 256–57 (1988) ("Despite the many drafts, changes, and deletions, the Amendment's central principle remained constant: a national guarantee of equality before the law.").

[355] *Id.*

"slavery" at the end of the Equal Protection Clause, thus making the clause only applicable to slaves.[356]

Professor Steven Calabresi argues that the Reconstruction Framers of the Fourteenth Amendment wanted to ban systems of caste-based discrimination.[357] In his articles on originalism, Calabresi points out that at the time of the drafting, the Framers' desire to outlaw caste-based discrimination is why the Framers included the Equal Protection Clause.[358] He has explained that the animosity towards the caste system in the 1860s supports the idea of equality in terms of gender discrimination and same-sex marriage.[359]

Reconstruction Framers of the Fourteenth Amendment advocated for broader equality principles. The Framers could have restricted the language to, for example, women, foreigners, kids, the elderly, or ethnic minorities. But instead of restricting the language to slavery, they decided to go broader. The following discussion shows that the Framers intended for the judges to interpret the Fourteenth Amendment as they see fit with the evolving times.

B. The Due Process Clause

Like the Equal Protection Clause, the choice to include the Due Process Clause in the Fourteenth Amendment was a thoughtful one.[360] The Bill of Rights, which formerly applied to the federal government, contains the Fifth Amendment's Due Process Clause.[361] When the Reconstruction Framers of the Fourteenth Amendment included the second due process, they knew what powers the U.S. Supreme Court had and how it had dealt with the language of due process in the past because of the Court's judicial review powers under *Marbury v. Madison*—making their understanding of the Court's powers as it related to due process even greater than the Framers of the Fifth Amendment.[362] While deciding the law was always the presumptive duty of the courts, the *Marbury* decision strengthened the Court's power by firmly establishing the principle of judicial review in 1803.[363] From 1803 until the

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[356] MAGLIOCCA, *supra* note 348, at 1–2.

[357] *See generally* Calabresi & Begley, *supra* note 341, at 648; Calabresi & Rickert, *supra* note 342, at 19–20.

[358] Calabresi & Begley, *supra* note 341, at 653; Calabresi & Rickert, *supra* note 342, at 19–20.

[359] Calabresi & Begley, *supra* note 341, at 652; Calabresi & Rickert, *supra* note 342, at 6–8.

[360] FONER, *supra* note 354, at 256–57.

[361] U.S. CONST. amend. V.

[362] 5 U.S. (1 Cranch) 137 (1803) (holding that the Court's role is to interpret is constitutional).

[363] *See generally id.*

passage of the Fourteenth Amendment in 1866, the U.S. Supreme Court had ample opportunity to analyze what "due process" meant.[364]

For example, the Court identified the requirement of due process before a claim could be adjudicated in a 1827 case.[365] In that case, the Court considered a federal statute that required the following:

> [W]henever any vessel or boat from which any piratical aggression, search, restraint, depredation, or seizure, shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, after due process and trial, in any Court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought, and the same Court shall thereupon order a sale and distribution thereof accordingly, and at their discretion.[366]

In 1840, the Court also considered the requirement of due process when the government exercises authority that deprives a person of life, liberty, or property.[367] In 1852, the Court revisited due process in its holding that Congress violated the Due Process Clause by depriving property owners of using certain machines that had been purchased and paid for, without any limitation as to the time for which they were to be used.[368] In 1855, the Court also analyzed notice requirements and whether they conform with due process.[369] In the same year, the Court again decided whether a legal process pursuant a federal statute conformed with the Due Process Clause.[370] In 1857, the Court infamously considered due process in the Fifth Amendment when a person's life, liberty, or "property" were at stake in *Dred Scott v.*

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[364] *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 275–76 (1855) (addressing the meaning of "due process of law").

[365] The Palmyra, 25 U.S. (12 Wheat.) 1, 8 (1827).

[366] *Id.* (emphasis omitted).

[367] Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 587 (1840) ("It was said, that the authority exercised in this case, was in violation of that part of the fifth amendment which declares, 'that no person shall be deprived of life, liberty, or property, without due process of law.'").

[368] Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 553–54 (1852).

[369] *See* Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 408 (1855) ("We consider this foreign corporation, entering into contracts made and to be performed in Ohio, was under obligation to attend, by its duly authorized attorney, on the courts of that State, in suits founded on such contracts, whereof notice should be given by due process of law.").

[370] *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855) ("That the warrant now in question is legal process, is not denied. It was issued in conformity with an act of Congress. But is it 'due process of law?'").

Sandford.[371] Lastly, in 1860, the Court analyzed whether personal service conformed with the requirements of due process.[372]

These decisions all demonstrate how the concept of "due process" was challenged and openly considered multiple times by the U.S. Supreme Court and Congress. Did notice conform with due process? Was a defendant provided due process at trial? Did the federal statute deprive a person of due process of law? All these questions required the Court to analyze the meaning of due process. In these cases, the Court showcased its most important role—judicial review.[373] The Reconstruction Framers of the Fourteenth Amendment fully understood the role of the Court and what judicial review entails. They knew about these cases and how the Court sometimes struggled with the seemingly confusing concept of due process, causing federal statutes to be struck down as a violation of due process.

After the Civil War, the Reconstruction Framers could have drafted an amendment that specifically provided equality for slaves.[374] Similarly, the Framers could have excluded the Due Process Clause altogether, or craft more precise language. However, they understood that federal courts would have the responsibility to dictate the meaning of the constitutional text.[375] In 1818, the U.S. Supreme Court in *United States v. Bevans* eloquently explained the importance of constitutional interpretation by using the following common law approach:

> It is impossible to understand or explain the constitution without applying to it a common law construction. It uses terms drawn from that science, and in many cases would be unintelligible or insensible, but for the aid of its interpretation. The cases cited show, that the

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[371] *See* 60 U.S. (19 How.) 393, 450 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV ("And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.").

[372] *See* Nations v. Johnson, 65 U.S. (24 How.) 195, 203–04 (1860) ("Personal service was made upon the defendants in this case by due process of law in the court of original jurisdiction, and the question here is, whether a party duly served with notice in a subordinate court, after he has appeared and answered to the suit, and secured an erroneous judgment in his favor, may voluntarily absent himself from the jurisdiction of the appellate tribunal, so as to render it impossible to give him personal notice of an appeal, and still have a right to complain that notice was served by publication, pursuant to the law of the jurisdiction from which he has thus voluntarily withdrawn.").

[373] *See generally* Shruti Rana, *"Streamlining" the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action*, 2009 U. ILL. L. REV. 829, 837 (2009) (arguing why the power of judicial review is very important and how the Department of Justice undermines it in immigration appeals).

[374] *See* KENDRICK, *supra* note 340, at 83–84 (citing an example of an earlier draft of the Fourteenth Amendment that explicitly provided protections for slaves).

[375] *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing the power of judicial review).

> extent of the equity powers of the United States courts ought to be measured by the extent of these powers, in the general system of the common law.[376]

By incorporating the Due Process Clause into the Fourteenth Amendment, the Reconstruction Framers approved of future courts using the broad language in the Due Process Clause to expand constitutional protections as courts would see fit. Furthermore, the idea that the Framers wanted the Fourteenth Amendment to protect certain fundamental rights is also evident from the Privileges and Immunities Clause.

C. The Privilege and Immunities Clause

The Privileges and Immunities Clause of the Fourteenth Amendment states that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[377] As has been shown above, the Reconstruction Framers, including Representative John Bingham of Ohio, advocated for "federalizing a broad category of fundamental civil rights."[378] Bingham acknowledged that the idea of natural rights referred to some foundational freedoms that belonged to all, regardless of a person's rank or status.[379] During the Fourteenth Amendment's congressional floor debate, John Bingham explained why the Privileges and Immunities Clause was necessary in the following manner:

> The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrible conflict – that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, in the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction

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[376] United States v. Bevans, 16 U.S. (3 Wheat.) 336, 347 (1818).

[377] U.S. CONST. amend. XIV, § 1.

[378] Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 333 (2011).

[379] *See id.* at 346 ("Like most of his Republican colleagues, John Bingham accepted the concept of natural rights—the idea that some freedoms were so fundamental that they belonged to all persons regardless of their status in society.").

> whenever the same shall be abridged or denied by the unconstitutional acts of any State.[380]

Representative Bingham was not the only lawmaker who shared similar views on the idea of natural rights; Ohio Representative Samuel Shellabarger also believed in certain substantive rights that could not be denied by the state.[381] In the following statement, Republican Senator Jacob Howard of Michigan demonstrated that he also shared similar views, recognizing that fundamental rights cannot be fully defined and enumerated:

> Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution.[382]

Howard recognized that the natural rights expressed in the Privileges and Immunities Clause were not clear, but, as the following statement expresses, he did not see a problem with future courts interpreting the Clause:

> It would be a curious question to solve what are the privileges and immunities of citizens of each of the States in the several States. I do not propose to go at any length into that question at this time. . . . [However, it] was inserted in the Constitution for some good purpose. It has in view some results beneficial to the citizens of the several States, or it would not be found there; yet I am not aware that the Supreme Court have ever undertaken to define either the nature or extent of the privileges and immunities thus guarantied. Indeed, if my recollection serves me, that court, on a certain occasion not many years since, when this question seemed to present itself to them, very modestly declined to go into a definition of them, leaving questions arising under the clause to be discussed and adjudicated when they should happen practically to arise.[383]

Bingham and many other Republicans believed that all persons had natural rights, and that those rights included all natural rights in addition to

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[380] KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 150 (2014) (citing CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham)).

[381] *See* Lash, *supra* note 378, at 409 ("Like other radical Republicans, Shellabarger believed that the "fundamental rights" guaranteed to sojourning citizens under Article IV were the substantive rights of "national citizenship," which a state could no more deny its own citizens than it could deny them to visitors from other states.").

[382] CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

[383] CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

those rights conferred by the virtue of living in America.[384] Bingham believed that nobody should be excluded from these natural rights accorded by the Privileges and Immunities Clause.[385]

> When you come to weigh these words, "equal and exact justice to all men," go read, if you please, the words of the Constitution itself: "The citizens of each State (being *ipso facto* citizens of the United States) shall be entitled to all the privileges and immunities ofcitizens (supplying the ellipsis "of the United States") in the several States." This guarantee is of the privileges and immunities . . . applies to every citizen of every State of the Union; there is not a guarantee more sacred, and none more vital in that great instrument.[386]

Bingham expressed deep resistance to states withholding certain fundamental rights.[387]

> Why are gentlemen opposed to the enforcement of the bill of rights, as proposed? Because they aver it would interfere with the reserved rights of the States! Who ever before heard that any State had reserved to itself the right, under the Constitution of the United States, to withhold from any citizen of the United States within its limits, under any pretext whatever, any of the privileges of a citizen of the United States, or to impose upon him, no matter from what State he may have come, any burden contrary to that provision of the Constitution which declares that the citizen shall be entitled in the several States to all the immunities of a citizen of the United States?[388]

To Bingham, these natural rights belonged to all people, and they should be protected by the Fourteenth Amendment.[389]

> [T]his amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy.[390]

In his article on the history of the Privileges and Immunities Clause, Professor Kurt Lash explained that John Bingham fought for his version of the Fourteenth Amendment which provided protection for substantive

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[384] *See* Lash, *supra* note 378, at 397 ("As did most other Republicans, and as he had explained during the debates over the Civil Rights Act, Bingham believed that *all* persons had a natural right to equal protection of the law and due process in matters relating to life, liberty, and property.").

[385] CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866) (statement of Rep. Bingham).

[386] *Id.*

[387] CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (statement of Rep. Bingham).

[388] *Id.*

[389] CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham).

[390] *Id.*

rights.[391] "Having failed in his initial attempt to add language protecting substantive rights, Bingham ultimately succeeded in convincing his fellow committee members" to adopt the current language of the Fourteenth Amendment that includes the Privileges and Immunities Clause.[392]

These congressional speeches and debates show that lawmakers recognized the importance of fundamental rights and that such rights were intended to be contained in the Fourteenth Amendment. They also recognized that those rights could not be fully defined, thus authorizing courts to later enumerating those rights.

IV. Response to Justice Thomas

On June 24, 2022, the *Dobbs* Court adopted the idea that "[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment."[393] Undoing decades of precedent, the Court had every power to dismantle abortion rights constitutionally.[394] The Constitution gives the Court judicial power to decide the case that is in front of it—that is the way the American system of government works.[395] Those who disagree with the system or any decision by the Court can advocate for federal reform by changing the system or changing the law by passing a new constitutional amendment.[396]

In his concurring *Dobbs* opinion, Justice Thomas argued that "in future cases, we should reconsider all of this Court's substantive due process precedents, including . . . *Obergefell*."[397] In his dissenting *Obergefell* opinion, Thomas took the following stance, criticizing the *Obergefell* majority:

> The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well

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[391] Lash, *supra* note 378, at 396 (discussing the back-and-forth series of vote between Bingham's proposals and Indiana Congressman Robert Dale Owen's proposal, which excluded a substantive right of just compensation for government takings of private property).

[392] *Id.*

[393] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

[394] *See* U.S. CONST. art III, §§ 1–2 ("The judicial Power of the United shall be vested in one supreme Court . . . [and] shall extend to all Cases, in Law and Equity, arising under this Constitution.").

[395] *See id.*

[396] *Cf.* Jennifer Shutt, *A Year After Dobbs: Congress Takes a Back Seat on Federal Abortion Policy*, N.J. MONITOR (June 19, 2023, 3:15 PM), https://newjerseymonitor.com/2023/06/19/a-year-after-dobbs-congress-takes-a-back-seat-on-federal-abortion-policy/ [https://perma.cc/4HCT-WZDC] (arguing that state and lower federal courts are changing the spectrum of reproductive rights).

[397] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring).

> before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our Constitution to preserve that understanding of liberty. Yet, the majority invokes our Constitution in the name of a "liberty" that the Framers would not have recognized, to the detriment of the liberty they sought to protect."[398]

Thomas is within the judicial power of the U.S. Supreme Court to vote the way he voted in *Dobbs* and *Obergefell*; however, his reasons for dissenting in *Obergefell* are not immune from challenges, nor is his reasoning in his dissents or concurrences controlling authority for any court.

Justice Thomas joined Justice Scalia's *Obergefell* dissent, in which Scalia argued that "[w]hen the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so."[399] Although, this is a classic argument made by a traditional originalist, how strong is it? Was same-sex marriage a topic of conversation in 1868? How many homosexual couples in 1868 envisioned—let alone advocated for—same-sex marriage? In 1868, every state in America had sodomy laws that were used to prosecute homosexual people.[400] When two people of the same sex wanted to be intimate in 1868, they had to do so in private and even private conduct came with a huge risk. Being openly gay was never an option, let alone being in a relationship and building a future. Thus, Scalia and Thomas are correct to say that in 1868 marriage was limited to one man and one woman as a matter of textual law and social expectations. However, does that mean that "no one doubted the constitutionality" of limiting marriage in that way? Does that mean that the Reconstruction Framers, who envisioned broad equal protection and due process rights to be constantly informed by changing times and norms,[401] would not have recognized the liberty interest that the majority in *Obergefell* used to support its decision?

In 1868, the Framers were not against same-sex marriage, and they were not for same-sex marriage; they did not have an opinion of same-sex marriage because the concept did not exist at that time. Similarly, in 1868, "no one doubted the constitutionality" of laws restricting marriage to opposite-sex couples because the Fourteenth Amendment had just been adopted. The majority in *Obergefell* relied on the Fourteenth Amendment to

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[398] Obergefell v. Hodges, 576 U.S. 644, 721 (2015) (Thomas, J., dissenting).

[399] *Id.* at 715 (Scalia, J., dissenting).

[400] HILLSTROM, *supra* note 165, at 11.

[401] *Obergefell*, 576 U.S. at 664 ("The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all person to enjoy liberty as we learn its meaning.").

hold that same-sex couples had a fundamental right to marry.[402] "No one doubted the constitutionality" of laws restricting marriage to opposite-sex couples because no basis on which such laws could be challenged existed. Thomas may argue that *Obergefell* "is at odds . . . with the principles upon which our Nation was built,"[403] but the drafter of the Fourteenth Amendment himself wanted to protect, and convinced Congress to pass a constitutional amendment that protected, "by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State."[404] The principles upon which our Nation was built, at least when it pertains to the time the Fourteenth Amendment was drafted, are clearly outlined. Thus, the argument that the Reconstruction Framers would have objected to the *Obergefell*'s central holding does not have historical basis.

Furthermore, Justice Thomas argued that the *Obergefell* "majority invokes our Constitution in the name of a 'liberty' that the Framers would not have recognized."[405] In 1866, during a legislative session, Michigan's Republican Senator Jacob Howard explained that "privileges and immunities . . . cannot be fully defined in their entire extent and precise nature."[406] It is evident that at the time of the drafting of the Fourteenth Amendment, the Reconstruction Framers in many discussions carefully contemplated the idea that there were rights that they did not know about at that time and that some of those rights "cannot be fully defined in their extent and precise nature."[407] Yet, they still chose to adopt an amendment with the language empowering future generations to protect the full extent of those privileges and immunities.[408] The Framers also decided to adopt the language with their understanding of the Court's enormous judicial power as defined in the U.S. Constitution and iterated in *Marbury*.[409] Thus, *Obergefell*, as well as any other judicial decision, exemplifies the very constitutional principles upon which America was built.

Were *Dobbs* and *Obergefell* "correctly" decided? They were only correctly decided to the extent that the U.S. Supreme Court has the judicial power that "extend[s] to all Cases, in Law and Equity, arising under [the]

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[402] *Id*. at 672.

[403] *Id*. at 721 (Thomas, J., dissenting).

[404] CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham).

[405] *Obergefell*, 576 U.S. at 721 (Thomas, J., dissenting).

[406] CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

[407] *Id.*

[408] *Obergefell*, 576 U.S. at 664.

[409] *See supra* text accompanying notes 365–76.

Constitution."[410] However, while one must accept the decision as "correct" in that it is an assertion of judicial review, one is not required to accept the reasoning of any given concurrence or dissent provided for casting a particular vote.

[410] U.S. CONST. art III, §§ 1–2.