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Privacy and "Fundamental Rights" in the United States: Should *Some Americans* Be Concerned?

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Abstract: *This paper considers some of the most important cases and legislative enactments in the progression and development of individual rights based on various understandings of privacy in our constitutional system. As a conclusion, we issue a warning regarding the future of these rights, which may once again face judicial reinterpretation, and, as a result, be lost or significantly diminished.*

Keywords: right to privacy, comstock act, full faith, credit, defense of marriage act, respect for marriage act

INTRODUCTION

Since the 1960s, American society, the United States Congress, and the United States Supreme Court have been engaged in debating, defining and explicating on the concept of privacy in a wide variety of circumstances. This engagement has been based largely on interpretating the Fifth and Fourteenth Amendments, the Due Process and Equal Protection Clauses of the U.S. Constitution – sometimes through legislative action and sometimes through judicial creation or reevaluation of precedents – and sometimes through a careful analysis of the Constitutional texts themselves—in some cases through what were termed the "penumbras or emanations" of the Bill of Rights.

Until recently, although subject to certain "ebbs and flows," these exercises have generally led to an expansion of privacy rights which have included the rights of individuals to marry the persons of their choice, the right to use contraceptives, the right to engage in private sexual conduct with a person of the same-sex, and the right of a woman to an abortion. All of these rights were controversial in their day, and some even until now.

Much of that expansion is now subject to doubt stemming from the Supreme Court's opinion in *Dobbs v. Jackson Women's Health Organization* (2022), which removed the right to an abortion from constitutionally protected status, ironically resulting in the passage of the *Respect for Marriage Act* (RFRA), and which, at the same time, opened these same rights to further reevaluation.

This paper considers some of the most important cases and legislative enactments in the progression and development of individual rights based on various understandings of privacy in our constitutional system. As a conclusion, we issue a warning regarding the future of these rights, which may once again face judicial reinterpretation, and, as a result, be lost or significantly diminished.

Griswold Revisited

The genesis of the discussion regarding privacy and the expansion of individual rights may be traced to the case of *Griswold v. Connecticut* (1965). *Griswold* was a landmark 7-2 decision of the U.S. Supreme Court in which the Court ruled that the Constitution of the United States protects the liberty of married couples to use contraceptives without government involvement or restriction (Hunter, Shannon, & Lozada, 2022b).

Griswold involved the application of the so-called "*Little Comstock Act*" enacted by the State of Connecticut that prohibited any person from using "any drug, medicinal article or instrument for the purpose of preventing conception." Violators could 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." Daugherty writes (2025) that:

> "The Comstock Act is named for Anthony Comstock, a prominent anti-vice crusader who became the U.S. Postal Inspector during the Ulysses S. Grant administration. From the 1870s into the early 20th century, the dry goods salesman-turned-self-appointed-censor sought to restrict what Americans could read, see—and share by mail."
>
> "Comstock's namesake law, enacted by Congress in 1873, expanded the scope of 'obscene, lewd or lascivious' materials banned from mailing to include information on birth control and abortion and contraceptives and drugs that could be used to terminate a pregnancy. Congress repealed the ban on birth control materials in 1971, but let the rest stand."

During the 1940s, two cases challenged the constitutionality of the Comstock Act (see Beckford, 2024). In *Tileston v. Ullman* (1943), a mother and her doctor challenged the law on the grounds that a ban on contraception could, in certain situations, threaten the lives and well-being of patients. The U.S. Supreme Court dismissed the appeal on the grounds that the plaintiff doctor lacked standing to sue on behalf of his patients. Yale School of Medicine gynecologist C. Lee Buxton and his patients brought a second challenge to the law in *Poe v. Ullman* (1961). The Supreme Court again dismissed the appeal, on the grounds that the case was not *ripe*: the plaintiffs had not been charged or threatened with prosecution. Thus, there was no actual controversy for the Court to resolve.

Arguably, *Griswold* was primarily based on the dissenting opinion of Justice John Marshall Harlan II in *Poe.* Justice Harlan argued that the Supreme Court should have heard *Poe* rather than dismissing it on ripeness grounds, indicating his support for a broad interpretation of the due process clause. On the basis of this interpretation, Justice Harlan concluded that the Connecticut statute violated the Constitution. Justice Harlan wrote:

> "(T)he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms in the United States; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."

After *Poe* was decided in June of 1961, the Planned Parenthood League of Connecticut (PPLC) decided to mount a challenge to the law again. Estelle Griswold served on the PPLC as executive director from 1954 to 1965 (Yale Medical Magazine, 2006). Griswold and Dr. Buxton (a PPLC medical volunteer) had opened a birth control clinic in New Haven, Connecticut, "thus directly challeng[ing] the state law." The clinic opened on November 1, 1961, and that same day received its first ten patients and dozens of requests for appointments from married women who wanted birth control advice or who desired prescriptions for contraceptives. Less than two days later, New Haven police officers arrived at the clinic. Griswold explained in detail both the operations of the clinic and openly admitted breaking state law. A week later, detectives arrived with arrest warrants. Griswold and Buxton were arrested, tried in a one-day bench trial, found guilty, and fined $100 each for violating the law. The conviction was upheld by the Appellate Division of the Circuit Court, and by the Connecticut Supreme Court.

The case reached the United States Supreme Court on a writ of certiorari. In 1965, the Supreme Court held that the Connecticut statute was unconstitutional, The Court concluded that its effect was "to deny disadvantaged citizens ... access to medical assistance and up-to-date information in respect to proper methods of birth control" and that it violated the "right to marital privacy… " "protected from governmental intrusion."

While the Bill of Rights does not explicitly mention "privacy," Justice William O. Douglas wrote for the majority in *Griswold*: "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." Justice Douglas argued that the right of privacy exists in the Constitution within "a penumbra" (a partial shadow where light from a given source is not wholly excluded, as in an eclipse) "that is an emanation" (something which springs, flows or oozes from another source) from the Bill of Rights, that help give [the guarantees in the Bill of Rights] life and substance" (see Boggs, 2009). Justice Arthur Goldberg wrote a concurring opinion to clarify that the Ninth Amendment shows the framers' intention that fundamental rights are protected outside of those specifically listed in the first eight amendments, and that similarly, for purposes of what is incorporated by the 14th Amendment against the States, there are fundamental rights outside those specified in those amendments, Justice John Marshall Harlan II wrote a concurring opinion arguing that privacy is protected by the due process clause of the Fourteenth Amendment to the U.S. Constitution, while Justice Byron White argued that Connecticut's law failed the rational basis standard for its enforcement.

In dissent, Justice White wrote:

> "I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the woman, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but, in my view, its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court."

Justice William Rehnquist joined Justice White in dissent. Justice Rehnquist compared the majority's use of "substantive due process" to the Court's use of the now repudiated doctrine in the 1905 case *Lochner v. New York*.

3. Moving to an Expansion of Rights

After *Griswold*, attention would slowly turn to a budding issue: the rights of homosexuals. Two cases merit special consideration relating to the recognition of rights of homosexuals in light of the Court's analysis of privacy. In *Bowers v. Hardwick* (1986), the U.S. Supreme Court upheld, in a 5–4 ruling, the constitutionality of a Georgia sodomy law criminalizing oral and anal sex in private between consenting adults (in this case with respect to homosexual sodomy), although the law itself did not differentiate between homosexual and heterosexual sodomy. The majority opinion, written by Justice Byron White, stated that the U.S. Constitution did not confer "a

fundamental right to engage in homosexual sodomy." A concurring opinion by Chief Justice Warren E. Burger was especially pointed and cited the "ancient roots" of prohibitions against homosexual sex. The Chief Justice concluded: "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."

A dissenting opinion written by Justice Harry Blackmun (who would author the majority opinion in *Roe v. Wade*) squarely framed the issue as one revolving around the "right to privacy." Interestingly, Justice Blackmun's dissent accused the Court of an "overall refusal to consider the broad principles that have informed our treatment of privacy in specific cases." In response to invocations of religious taboos against homosexuality, Justice Blackmun wrote:

> "That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends, instead, on whether the State can advance some justification for its law beyond its conformity to religious doctrine."

Justice Blackmun's views turned out to be prophetic. Seventeen years, in *Lawrence v. Texas* (2003), the Supreme Court ruled that U.S. state laws criminalizing sodomy between consenting adults were unconstitutional in an opinion authored by Justice Kennedy. The *Lawrence* Court reaffirmed the existence of a constitutional "right to privacy" even though it was not explicitly enumerated in the Constitution. The Court based its ruling on the notions of personal autonomy to define one's own relationships and of American traditions of non-interference with any or all forms of private sexual activities between consenting adults. Justice Kennedy stated that there was "an integral part of human freedom" for consenting adults to choose to privately engage in sexual activity. Justice Kennedy wrote:

> "The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."

Interestingly, Justice Thomas wrote in a separate, two-paragraph dissent that the sodomy law the Court struck down was "uncommonly silly," a phrase drawn from the dissenting opinion of

Justice Potter Stewart's in *Griswold v. Connecticut*. Justice Thomas added that if he were a member of the Texas Legislature, he would vote to repeal the law. The Justice wrote that "punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources." However, Justice Thomas nevertheless voted to uphold the constitutionality of the Texas sodomy law because he could find "no general right of privacy" in the Constitution.

4. Same-sex Marriage and Privacy

Another important issue would come to the forefront in American life—gay or "same-sex" marriage. Would this putative "right" be recognized as being constitutionally protected? The issue of legal recognition of same-sex marriage had attracted little attention until the 1980s. Gay activist Jack Baker brought suit against the state of Minnesota in 1970 after being denied a marriage license to marry another man. In *Baker v. Nelson* (1971), the Minnesota Supreme Court ruled that a statute limiting marriage to opposite-sex couples did not violate the Minnesota Constitution. Baker later cleverly changed his legal name to "Pat Lynn McConnell" and "married" his male partner in 1971, but the marriage was not legally recognized.

Ironically, "the AIDS epidemic... brought questions of inheritance and death benefits to many people's minds (Gutis, 1989). In 1989, New York's highest court ruled that two homosexual men qualified as a *family* for the purposes of New York City's rent-control regulations (Gutis, 1989). In September 1989, the State Bar Association of California urged recognition of marriages between homosexuals.

Then, in 1996, in *Baehr v. Miike* (1996), the Supreme Court of Hawaii ruled that preventing same-sex couples from obtaining marriage licenses was an impermissible form of discrimination based on sex. The Hawaii Supreme Court found that the Hawaii State Constitution required the state to demonstrate that its "opposite-sex" marriage definition satisfied the legal standard known as *strict scrutiny*. This ruling immediately prompted concern among opponents of same-sex marriage, who feared that if same-sex marriage became legal in Hawaii, other states would recognize or be compelled to recognize those marriages as valid under the *Full Faith and Credit Clause* of the United States Constitution, which requires all courts to honor the judgments, legislative actions, and records from other courts, including out-of-state courts (Sachs, 2009; McKusick, 2024).

A Congressional Response

A 1996 Report of the House Judiciary Committee called for the passage of the *Defense of Marriage Act* (DOMA) that had been introduced in Congress by Rep. Bob Barr and Senator Don Nickles as a response to *Baehr.* The Report noted "a redefinition of marriage in Hawaii to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits."

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What was the Defense of Marriage Act (DOMA)?

DOMA was a federal law enacted in the 104th United States Congress and signed into law by President Bill Clinton on September 21, 1996. The law was intended to define and protect the "institution of marriage" as the union of one man and one woman. Section 2 of DOMA allowed individual states to deny recognition to same-sex marriages that were performed and recognized under the laws of another state.

In a later case, *United States v. Windsor* (2013), Justice Kennedy would write:

> "The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . . H. R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.' The House concluded that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage."

DOMA barred the federal government from treating same-sex couples who were married under *state law* as married couples under *federal law* (Clarkson-Freeman, 2005; Pelts, 2014). Section 3 codified non-recognition of same-sex marriages for all federal purposes, including insurance benefits for government employees, social security survivors' benefits, immigration, bankruptcy, and the filing of joint tax returns. It also excluded same-sex spouses from the scope of laws protecting families of federal officers, from laws evaluating financial aid eligibility, and from federal ethics laws applicable to opposite-sex spouses (Dunn, 2015).

Congress had passed DOMA with veto-proof majorities in both houses (including the vote of the Delaware Senator Joe Biden), and President Bill Clinton, under immense pressure from both sides of the issue and in the midst of a re-election campaign, signed the bill into law late at night behind closed doors. No signing ceremony was held for DOMA, and no photographs were taken of President Clinton signing the law. The White House released a statement in which President Clinton said: "the enactment of this legislation should not, despite the fierce and at times divisive rhetoric surrounding it, be understood to provide an excuse for discrimination, violence or intimidation against any person on the basis of sexual orientation" (Geidner, 2011). President Clinton later expressed his "deep regret" on the matter.

DOMA specifically stated that:

> "The word 'spouse' refers only to a person of the opposite sex who is a husband or a wife'… '[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.'"

In constitutional terms, DOMA made it clear that DOMA was a "carve out" of the *Full Faith and Credit Clause* of the United States Constitution and did not require states to respect or recognize the marriages of same-sex couples performed by authorities in other states (see Singer, 2005). From the outset, DOMA was subject to numerous lawsuits and repeal efforts. Two cases merit special attention.

Courts Intervene

The case of *Baker v. Nelson* (1972) is important in understanding how the issue of same-sex marriage eventually reached the United States Supreme Court (Shirey, 2025). When Jack Baker and Michael McConnell became the first same-sex couple in the United States to apply for a marriage license in 1970, Hennepin (Minnesota) County clerk Gerald R. Nelson rejected their application. They then sued Nelson, claiming a constitutional right to marry. The plaintiffs argued that since same-sex marriage was not *explicitly illegal* under Minnesota law, they must be issued a marriage license. In January of 1971, the District Court denied their motion without comment. Baker and McConnell appealed the decision of the District Court to the Minnesota Supreme Court, claiming a constitutional right to marry. On October 15, 1971, the Minnesota Supreme Court unanimously rejected the couple's appeal. The court's opinion denied their claims for a constitutional right to marry based on their analysis of the First, Eighth, Ninth, and Fourteenth Amendments.

Baker and McConnell then appealed to the U.S. Supreme Court, asking the Court to rule on the issue of same-sex marriage for the first time. On October 10, 1972, the Supreme Court dismissed the case "for want of a substantial federal question" and upheld the state's decision.

More than forty years later in *United States v. Windsor* (2013), two women, residents of the State of New York, were married in a lawful ceremony in Ontario, Canada in 2007 (see Young & Blondell, 2012/2013). Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to her spouse Edith Windsor. Windsor claimed the estate tax exemption for a surviving spouse. However, the *Defense of Marriage Act* specifically excluded a same-sex partner from the definition of "spouse," as that term is used in federal statutes, including for estate tax purposes. Windsor paid the taxes but filed a lawsuit in order to challenge the constitutionality of this exclusionary provision.

The United States District Court and the Second Circuit Court of Appeals ruled that this portion of the statute was unconstitutional and ordered the United States to pay Windsor a refund. In *Windsor*, the U.S. Supreme Court declared Section 3 of DOMA unconstitutional under the Due Process Clause, thereby requiring the federal government to recognize validly performed same-sex marriages conducted in the states (Archibald, 2013). However, as Dunn (2015) has noted, the Supreme Court took no position on a state's authority to forbid same-sex marriages. The resolution of that issue would wait for another day in *Obergefell v. Hodges* (2015).

Obergefell v. Hodges (2015)

In the period between January 2012 and February 2014, various plaintiffs in Michigan, Ohio, Kentucky, and Tennessee filed federal District Court cases asking that their "marriages" should be recognized and that state bans on same-sex marriage should be overturned.

After all of the District Courts within the Sixth Circuit had ruled in favor of the plaintiffs, these rulings were appealed to the Sixth Circuit Court of Appeals. In November 2014, following a series of rulings from Fourth, Seventh, Ninth, and Tenth Circuits that state-level bans on same-sex marriage were unconstitutional, the Sixth Circuit nevertheless ruled that it was bound by *Baker v. Nelson* and found such bans to be constitutional. This created a classic "split between circuits" and led to a Supreme Court review. Lacovara (2008) notes that that the Supreme Court is more likely to grant review of a case to resolve a circuit split than for any other reason. Interestingly, while the Supreme Court maintains discretion over whether it should or should not grant review of a case, the *Rules of the Supreme Court of the United States* specifically state that while the existence of a circuit split is one of the factors the Court considers when deciding whether to grant review, the existence of a "circuit split" is "the single most important generalizable factor" that determines whether the Supreme Court will grant review of a case (see also Stephenson, 2013).

On June 26, 2015, the United States Supreme Court would decide *Obergefell v. Hodges* (2015). The Supreme Court, in a 5-4 opinion authored by Associate Justice Anthony Kennedy, held that same-sex marriage was a fundamental right protected by both the Due Process Clause and the Equal Protection Clause of the Constitution (Pollvogt, 2015). The ruling required all states to perform and to recognize the marriages of same-sex couples, leaving Section 2 of DOMA as superseded and unenforceable. At that point the only remaining part of the legislation which remained valid was Section 1 relating to its title. In his majority opinion, Justice Kennedy examined the nature of "fundamental rights" guaranteed by the Constitution, the potential of harm done to individuals by delaying the implementation of such rights while the democratic process plays out (one of the arguments made by opponents of the ruling was that this issue was more suitable for decision by the people through the "democratic process"), and the evolving understanding of discrimination and inequality that had developed greatly since the Sixth Circuit Court of Appeals had decided *Baker v. Nelson* (1972). Murray (2018) noted:

> "*Obergefell* builds the case for equal access to marriage on the premise that marriage is the most profound, dignified, and fundamental institution that

> individuals may enter. By comparison, alternatives to marriage, which I collectively term 'nonmarriage,' are less profound, less dignified, and less valuable."

On December 13, 2022, DOMA itself was repealed by the passage of the *Respect for Marriage Act* (RFMA) which was signed into law by President Joe Biden, who had previously voted in favor of DOMA as a United States Senator. What led to the passage of RFRA? Ironically, RFMA may be seen as reactive rather than proactive.

Dobbs v. Jackson Women's Health Organization

In June of 2022, the United States Supreme Court decided *Dobbs v. Jackson Women's Health Organization* (see Hunter, Shannon & Lozada, 2022a). *Dobbs* concerned the constitutionality of a 2018 Mississippi state law that banned most abortions after the 15 weeks of pregnancy. Jackson Women's Health Organization was Mississippi's only abortion clinic at the time. It had sued Thomas E. Dobbs, a state health officer with the Mississippi State Department of Health, in March 2018. Lower courts had enjoined enforcement of the law. The injunctions were based on *Planned Parenthood v. Casey* (1992), which had prevented states from banning abortion before fetal viability—generally within the first 24 weeks. *Casey* was decided on the basis that a woman's choice for an abortion during that 24 week period was protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution (Wharton, Frietsche, & Kolbert, 2006).

On June 24, 2022, the United States Supreme Court issued a 6-3 decision that reversed the lower court rulings. However, a majority of five justices joined the opinion overturning both *Roe* and *Casey*. Recalling Justice Black's dissenting opinion in *Griswold*, the majority held that abortion is neither a constitutional right enumerated or mentioned in the Constitution, neither was it a fundamental right implied by the concept of ordered liberty as described by Justice Benjamin Cardozo in *Palko v. Connecticut* (1937), nor was "deeply rooted in the nation's history," citing *Washington v. Glucksberg* (1997). While Chief Justice John Roberts joined in the part of the judgment upholding the validity of the Mississippi law, the Chief Justice did not join in the majority the opinion overturning *Roe* and *Casey.* In striking down *Roe* and *Casey*, *Dobbs* effectively returned the decision relating to abortion back to the states.

The majority decision in *Dobbs* was written by Justice Samuel Alito and joined by Justices Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—some of whom had termed *Roe* and *Casey* as "super precedents" entitled to stare decisis in their confirmation hearings before the United States Senate (see Wright, 2019). In the introductory statement, Justice Alito summarized a historical view of abortion rights, saying: "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision." Alito wrote: "abortion couldn't be constitutionally protected. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy." Justice Alito continued:

> "*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division."

While seeking to limit the ruling to the issue of abortion, Justice Alito, writing for the Court's majority, stated that fears of some that the same arguments that resulted in overturning *Roe* might also touch upon "matters such as intimate sexual relations, contraception, and marriage" were "unfounded."

However, in a concurring opinion, Senior Associate Justice Clarence Thomas argued that the Court should go further in future cases, reconsidering past decisions that granted rights based on "substantive due process," such as *Griswold v. Connecticut* (the right to contraception), *Obergefell v. Hodges* (the right to same-sex marriage), and *Lawrence v. Texas* (the right to engage in private sexual acts) (see also Carbonaro, 2022).

The Justice Thomas View

Why did Justice Thomas' statement cause such controversy and alarm? As Hunter, Shannon, and Lozada (2022b) stated: "To Paraphrase: "What's Griswold Have to do With It?": Perhaps Holding the Key to a Decision by the United States Supreme Court."

Justice Thomas' comments were seen as a rejoinder of Justice Hugo Black's dissenting opinion from the Court's holding in *Griswold*, in which Justice Black claimed that that holding could only be defended on the basis of "the same natural law due process philosophy found in *Lochner v. New York*" (1905), a controversial and now discredited opinion, in which the Supreme Court had *struck down* a state law that limited the number of hours bakers could work in a day or a week on the grounds that it deprived them of "liberty of contract as well as of person" and violated the Fourteenth Amendment's Due Process Clause because it violated the "natural rights" of the individual (see Waimberg, 2015). Bernick (2017) notes that the "'natural law substantive due process philosophy' held that the individual rights protected by the Constitution could never be comprehensively listed, being as numerous as the peaceful activities that individuals can think to pursue, and that *legislative power was therefore inherently limited*—mere legislative will was insufficient to justify 'meddlesome interferences with the rights of the individual'" (see also Bernstein, 2005).

Justices Black and Douglas had often clashed on this issue. According to Justice Black, the Fourteenth Amendment was designed to protect the rights *specifically listed or enumerated* in Bill of Rights and which had been "incorporated" (held applicable) against the states (Hunter & Lozada, 2010)—and nothing more. Black had dissented from the Court's expansive ruling in *Griswold* in which the Court had noted:

> "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as

> the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate a pregnancy."

In Justice Douglas' view, the legitimate scope of government power is bounded by rights that precede government—termed as "natural rights" (see McCarthy, 2018). These "natural rights" are referred to in the Ninth Amendment and prohibit government actors, including judges and legislators, from "deny[ing] or disparag[ing]" those rights *because* they are unenumerated. In this context, judges have the right to expound upon these rights in creating new case law and precedents. McGinnis and Rappaport (2009) underscore these views and state that:

> "First, the Constitution as a matter of judicial power incorporates a minimal notion of precedent. Second, the Constitution treats precedent as a matter of federal common law that it is revisable by congressional statute. Thus, the courts in the first instance and Congress ultimately have significant discretion over what precedent rules should be adopted."

Critics, often identified as "originalists," sharply criticized *Griswold* and subsequent Supreme Court decisions that identified and protected various *unenumerated "fundamental" rights* on similar grounds (see McGinnis & Rappaport, 2009; Baude, 2017). According to this originalist view, both *Griswold* (1965) and *Lochner* (1905)—and *Roe v. Wade*, *Lawrence v. Texas* (2003)—had all been wrongly decided. Originalists argued that the proper recourse available to those who felt burdened by such statutes would be to petition the legislature that imposed them in the first place and not to the vagaries of a "natural law—substantive due process" analysis. Justice White had made a similar point in *Roe,* arguing that the issue of the legality of abortion *"for the most part, should be left with the people and the political processes the people have devised to govern their affairs."*

Recall that while Justice Alito had written explicitly in *Dobbs* that fears were unfounded that the same arguments that overturned *Roe* might also touch upon "matters such as intimate sexual relations, contraception, and marriage," there is, however, ample evidence from the text of *Dobbs v. Jackson's Women Health Organization* (2022) that the fear may *not* be unfounded (Hunter, Shannon, & Lozada, 2022a).

Dobbs and Its Connection to RFRA

It may be argued that in response to the Court's decision in *Dobbs*, the *Respect for Marriage Act* (RFMA) was enacted by the 117th United States Congress in 2022 and signed into law by then President Joe Biden. RFMA was designed to protect the "rights" that Justice Thomas had argued should be reconsidered. RFMA specifically ensured that the right to same-sex and interracial marriages would remain part of federal statutory law even if the Supreme Court ruled at some future date that they were not constitutionally guaranteed as had been done in *Dobbs*.

Several attempts had been made to codify the specific right of same-sex partners to marry in the past but had failed to be enacted in law. In July 2022, RFMA was reintroduced into Congress, with revisions including protections for interracial marriages. The Act passed the House in a bipartisan vote on July 19, 2022. Senator Tammy Baldwin of Wisconsin, a principle sponsor of the legislation in the United States Senate, announced on November 14, 2022, that a bipartisan deal had been struck which would permit the legislation to reach the 60 votes necessary to break the filibuster mounted by opponents of same-sex marriage.

A cloture motion passed 62–37 in the Senate on November 16. On November 29, the Senate passed RFMA by a 61–36 vote. A large majority of Senate votes against the legislation originated from Southern Republican Senators. On December 8, the House agreed to the Senate amendment by a 258–169 vote, with one member voting *present*. Surprisingly, thirty-nine Republicans voted in favor of the Act on final passage. President Biden signed the bill into law on December 13, 2022. By 2022, public opinion polls indicated that a strong majority of Americans were in in favor of same-sex marriage, while interracial marriage enjoyed nearly universal support (McCarthy 2023).

In specifically repealing DOMA, RFMA replaced the section of DOMA with a statement that the *Full Faith and Credit Clause* of the Constitution requires interstate recognition of same-sex marriages. Clarkson-Freeman (2005, p. 1) argued that "that the passage of this piece of legislation [DOMA] was a misuse of Article IV, Section 2 of the United States Constitution, 'Full Faith and Credit.' The Defense of Marriage Act represents an extraordinary act of Congress, as they have rarely passed legislation under this mandate and have never passed legislation that curtails full faith and credit."

RFMA requires the federal government and all states and territories (with the exception of federally-recognized Native American nations, which are free to determine their own policy on performance and recognition of marriage) to recognize the validity of both same-sex and interracial civil marriages in the United States. RFMA officially codified parts of *Obergefell v. Hodges* (2015)*, United States v. Windsor* (2013), and the 1967 ruling in *Loving v. Virginia*. *Loving* (1967) had struck down Virginia's anti-miscegenation law in 1967, holding that racial discrimination in marriage violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Prior to the Supreme Court's 1967 ruling in *Loving*, anti-miscegenation laws were still in force in sixteen states, all prohibiting interracial marriage (Wallenstein, 2006). Recall that in *Windsor*, the Supreme Court had ruled that the federal government cannot define the terms "marriage" and "spouse" in a way that excludes married same-sex couples from the benefits and protections that married opposite-sex couples receive. The Court thus struck down Section 3 of the Defense of Marriage Act (DOMA) under the Due Process Clause of the Fifth Amendment.

RFMA Discussed

While the legal issue may have been resolved (at least temporarily), RFMA continued to divide many American on religious grounds represented by groups who remained morally opposed to

same-sex marriage (see Laycock, Berg, Esbeck, & Wilson, 2024). In order to assuage some of the concerns raised by these Americans, a series of amendments to the bill were introduced in the United States Senate which became part of the final bill in order to provide *religious liberty protections* Koppelman, 2024). Under the RFMA, nonprofit religious organizations were not required to "provide services, accommodations, advantages, facilities, goods or privileges for the solemnization or celebration of a marriage."

Protections under the RFMA cover churches, mosques, synagogues, temples, nondenominational ministries, mission organizations, religious education institutions and faith-based social agencies, and include their respective employees. RFMA states that any refusal to provide marriage advantages or services, as listed in the act, "shall not create any civil claim or cause of action" against such a nonprofit (Boyd, 2022).

RFMA was supported by the Church of Jesus Christ of Latter-day Saints, the Episcopal Church, the Evangelical Lutheran Church in America, the Union for Reform Judaism, the United Church of Christ, the Unitarian-Universalist Association, and the Presbyterian Church (USA). However, the Act was opposed by the U.S. Conference of Catholic Bishops (which had also strongly opposed *Roe v. Wade*) and the Southern Baptist Convention.

Interestingly, Pew Research Center (2019) polling in 2004 indicated that Americans opposed same-sex marriage by a margin of 60% to 31% at that time. However, support for same-sex marriage had grown over the period 2004-2019. Based on polling in 2019, a majority of Americans (61%) supported same-sex marriage, while 31% opposed it.

The Rand Corporation (2024) indicated that researchers had reviewed nearly one hundred studies that examined the consequences of same-sex marriage on multiple measures of family formation and well-being. Rand found consistent results “indicating significant benefits to same-sex couples and no harm to different-sex unions.”

Benjamin R. Kearney, a UCLA professor of psychology, stated:

> “Some of those who opposed the granting of marriage rights to same-sex couples predicted that doing so would undermine the institution of marriage, resulting in fewer couples marrying, more couples divorcing, and an overall retreat from family formation…. Overall, the fears of opponents of same-sex marriage simply have not come to pass.”

Concluding Comments: Are these issues largely “settled”?

While Justice Alito had specifically written in *Dobbs* that fears were unfounded that the same arguments that overturned *Roe* might also touch upon "matters such as intimate sexual relations, contraception, and marriage," there is, however, ample evidence from the text of *Dobbs v. Jackson’s Women Health Organization* (2022) that the fear may *not* be unfounded (Hunter, Shannon, & Lozada, 2022a).

The question now is no longer an esoteric or abstract one. Returning to the views of Justice Clarence Thomas, was it also time to revisit the underlying theory of *Griswold v. Connecticut* that had expanded a whole range of personal freedoms that many Americans had come to rely on in the decades after *Griswold* relating to same-sex marriage, homosexual rights, and even access to drugs such as mifepristone, a drug which is typically used in combination with misoprostol to bring about a medical abortion during pregnancy (Zettler & Sarpatwari, 2022; Wexler, 2023; Kurtzleben, 2024)? Moniuszko (2025) reported that Health and Human Services Secretary Robert F. Kennedy Jr. has asked Food and Drug Administration Commissioner Marty Makary "to review the latest data on mifepristone," raising questions about the drug commonly referred to as the abortion pill.

Cohen, Donley, and Rebouche (2023) opine:

> "Judges and scholars, and most recently the Supreme Court, have long claimed that abortion law will become simpler if Roe is overturned, but that is woefully naïve. In reality, overturning Roe will create a novel world of complex, interjurisdictional legal conflicts over abortion. Some states will pass laws creating civil or criminal liability for out-of-state abortion travel while others will pass laws insulating their providers from out-of-state prosecutions. The federal government will also intervene, attempting to use federal laws to preempt state bans and possibly to use federal land to shelter abortion services. Ultimately, once the constitutional protection for previability abortion disappears, the impending battles over abortion access will transport the half-century war over Roe into a new arena, one that will make abortion jurisprudence more complex than ever before."

Might this involve the resurrection of the Comstock Act or a modern progeny? Siegel and Ziegler (2024-2025) state:

> "With the overturning of *Roe v. Wade*, the antiabortion movement has focused on a new strategy: transforming the Comstock Act, a postal obscenity statute enacted in 1873, into a categorical ban on abortion—a ban that Americans never enacted and, as the movement recognizes, would never embrace today. Claims on the Comstock Act have been asserted in ongoing challenges to the approval of the abortion pill mifepristone, in litigation before the Supreme Court, and in the 2024 campaign for the presidency" (see also Beckford, 2024).

Only time will tell!

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