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Liberty Bound: *Obergefell*'s Eclipse of Autonomy in Sexual Intimacy

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LIBERTY BOUND: *OBERGEFELL*'S ECLIPSE OF AUTONOMY IN SEXUAL INTIMACY

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> *"[W]hat the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others."*[1]

On June 26, 2016, the U.S. Supreme Court issued its historic opinion in *Obergefell v. Hodges*,[2] holding that states cannot prohibit same-sex couples from marrying.[3] The decision's practical significance in the lives of Americans is immense.[4] *Obergefell*'s jurisprudential significance is far less clear. Whereas some have described *Obergefell* as a "new birth" in the Court's substantive due process analysis,[5] I make a far less sanguine observation. While it is clear after *Obergefell* that members of the LGBT community who wish to enter a same-sex marriage have a fundamental right to do so,

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1. Bowers v. Hardwick, 478 U.S. 186, 206 (1986) (Blackmun, J., dissenting), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

2. 135 S. Ct. 2584 (2015).

3. *Id.* at 2607–08 (also holding that states must recognize same-sex marriages licensed and performed in other states).

4. *See, e.g.*, Angela K. Perone, *Health Implications of the Supreme Court's* Obergefell vs. Hodges *Marriage Equality Decision*, 2 LGBT HEALTH 196 (2015), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4713052 (considering negative health effects of marriage bans and potential health insurance and tax issues stemming from the *Obergefell* decision); Brittany Blackburn Koch, *The Effect of* Obergefell v. Hodges *for Same-Sex Couples*, NAT'L L. REV. (July 17, 2015), http://www.natlawreview.com/article/effect-obergefell-v-hodges-same-sex-couples (addressing legal provisions and protections that will apply to same-sex couples after *Obergefell*, including joint tax filing, intestacy laws, and estate planning benefits); Emma Green, *How Will the U.S. Supreme Court's Same-Sex-Marriage Decision Affect Religious Liberty?*, ATLANTIC (June 26, 2015), http://www.theatlantic.com/politics/archive/2015/06/how-will-the-us-supreme-courts-same-sex-marriage-decision-affect-religious-liberty/396986 (discussing the uncertainty in "what will happen to the many, many religious organizations that don't support homosexuality, let alone gay marriage.").

5. *See e.g.*, Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 148 (2015) (describing *Obergefell* as "a game changer for substantive due process jurisprudence").

the right to autonomy in sexual intimacy with other consenting adults, whether heterosexual or LGBT, remains weakly protected after *Obergefell*. With a potential change in the ideological composition of the Supreme Court on the horizon, I assert it is important to examine how Justice Anthony Kennedy's language and reasoning in *Obergefell* "de-sexualize" marriage with the purpose and effect of preserving state power to regulate the sexual intimacies of LGBT *and* heterosexual adults.

Justice Kennedy's majority opinion in *Obergefell* reifies the fundamental right to marry as such an exceptional right that it cannot be denied to gay and lesbian persons. At the same time, Justice Kennedy declines, as he did over a decade ago in *Lawrence v. Texas*,[6] to recognize a fundamental right of consenting adults to sexual autonomy in private. A full three decades ago, the Court came within one vote of protecting adult private sexual autonomy as fundamental in *Bowers v. Hardwick*.[7] To me, this makes Justice Kennedy's *Obergefell* decision far less than a "new birth" in substantive due process analysis. The case continues Justice Kennedy's creation of a set of "skim milk" rights that do not receive the Court's highest level of doctrinal protection[8] and demonstrates the *Obergefell* Court majority has one key attribute in common with *Bowers* Court—it remains one vote shy of protecting sexual autonomy as a fundamental right.

Obergefell is exceedingly clear that marriage has long been a fundamental right, making the key holding in the case Justice Kennedy's conclusion that the already protected right to marry extends to LGBT persons. My purpose in this Foreword is to point out that *Obergefell* also has another, less obvious application in the realm of fundamental rights analysis. The case reinforces a striking

6. 539 U.S. 558 (2003).

7. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

8. Although elaboration is beyond the scope of this Foreword, I include a woman's right to terminate her pregnancy in this category of "skim milk" rights. In fact, the right to abortion has been transformed from a doctrinally typical fundamental right that was protected by the Court's strict scrutiny analysis like other fundamental rights to now being a unique type of fundamental right that warrants only protection under the Court's weaker "undue burden" analysis and, with Justice Kennedy's opinion in *Gonzales v. Carhart*, a weaker undue burden test that has similarities to the lower standard of review—rational basis. *See* Gonzales v. Carhart, 550 U.S. 124, 158 ("Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.").

double standard—the Court's willingness to recognize a fundamental right to marry but only a non-fundamental protected liberty interest in making decisions about how to conduct private, adult consensual sexual intimacy. Under the Court's precedent, application of only rational basis review (albeit it "rational basis with bite") to laws than infringe on sexual autonomy make it a capriciously protected interest, not a full-fledged fundamental right like marriage. To examine this, this Foreword highlights the Court's seeming "marriage bias," which is especially clear in Justice Kennedy's *Obergefell* decision—a willingness to limit government power to restrict marriage but an unwillingness to clearly delineate a set of sexual autonomy rights upon state government cannot trod.

Here, I present two lines of analysis. First, I revisit Justice Harry Blackmun's dissent in *Bowers* to illuminate how starkly its analysis of the right to autonomy in sexual intimacy differs from Justice Kennedy's view of the degree to which the due process clause protects adult sexual autonomy. Second, I point out the ways in which *Obergefell* clears a doctrinal path to a case that holds definitively that adult sexual autonomy rises to the level of a fundamental right. My conclusion is that Justice Kennedy's sex-less approach to analyzing the Court's substantive due process analysis in *Obergefell* severely overlooks the degree to which the decisional autonomy of individuals sits at the heart of the Court's jurisprudence in this realm and that the Court's continued hesitancy to recognize the right of consenting adults to engage in sexual practices of their own choosing is a remaining and erroneous vestige of the Court's overruled decision in *Bowers*.

I.

Two years after the U.S. Supreme Court ruled against the unsuccessful named plaintiff in the now-overruled 5-4 *Bowers* decision, Michael Hardwick declared that he "refuse[d] to be treated as a second-class citizen"[9] and that there is "no way the Supreme Court can say that I can't have sex with a consenting adult in the privacy of my own bedroom."[10] Hardwick went on to declare that the Court's ruling against him in *Bowers* evidenced a pressing need for

9. PETER IRONS, THE COURAGE OF THEIR CONVICTIONS: SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT 403 (1988).

10. *Id.* (emphasis omitted).

the "gay community to pull together, and also for the heterosexual community to pull together, against something that's affecting both of us."[11] Yet in the years since *Bowers*, the obviously key issue of how the case subjugated the rights of LGBT persons and denied them equal status as compared to heterosexuals has correctly received greater attention than the implications of *Bowers* for the sexual autonomy rights of all persons, LGBT and not. Thus, conceiving of *Bowers* as a case *only* about "gay rights" sharply misses Michael Hardwick's second point—the *Bowers* majority rejected the conclusion of the Court of Appeals decision on review that decided the case before it reached the U.S. Supreme Court. In contrast to the Supreme Court, that lower court had held that the due process clauses protected the fundamental right of consenting adults to autonomy in the details of their sexual intimacy.

Many American citizens would currently agree with Michael Hardwick's view that the U.S. Constitution prohibits the government from "saying" that he cannot have sex with a consenting adult in his own bedroom.[12] It is clear after *Lawrence* overruled *Bowers*, in a decision authored by Justice Kennedy, that certain sexual conduct cannot be criminalized. However, the limits of the government's power to regulate *how* consenting adults conduct their sexual intimacies have not been established. Plaintiff Hardwick was correct to point out that the lack of explicit protection of sexual autonomy rights against government intervention affects heterosexual and LGBT persons alike. Perhaps for the purpose of diverting heterosexual focus from how their opinion endorsed state power to proscribe particular types of sexual activity, the *Bowers* majority agreed with the lower court dismissal of the claim of the heterosexual couple, who had challenged the Georgia ban on oral and anal sex.[13] The Court then infamously proceeded to assess the constitutionality of the Georgia statute only "as applied to consensual homosexual sodomy,"[14] not to both heterosexual and homosexual anal and oral sex as the law itself did.

In an opinion written by Justice Byron White, the Court held

11. *Id.*

12. *See id.*

13. Bowers v. Hardwick, 478 U.S. 186, 188 n.2 (1986) (accepting the district court's determination that John and Mary Doe's challenge to the Georgia statute "did not have proper standing to maintain the action" and observing "[w]e express no opinion on the constitutionality of the Georgia statue as applied to other acts of sodomy").

14. *Id.*

that Michael Hardwick had no substantive due process right to be free of government intervention into his sexual intimacies with another consenting man. Its reasoning was starkly different from that of both the Eleventh Circuit Court of Appeals and the four *Bowers* dissenters—Justices Blackman, Brennan, Marshall, and Stevens. First, Justice White framed the issue in *Bowers* to be whether the due process clause conferred "a fundamental right on homosexuals to engage in sodomy"[15] and then rejected Hardwick's claim on the grounds that, far from such a right being deeply rooted in the this Nation's history and tradition, the conduct of sodomy had historically been deemed criminal.[16] On behalf of the *Bowers* majority, White explicitly declared that the claim of a fundamental right to engage in acts of consensual anal and oral sex to be, "at best, facetious"[17] and upheld that Georgia law under the presumptively deferential rational basis standard of review.[18] In so doing, the *Bowers* opinion applied an overly restrictive and incomplete version of substantive due process analysis that was wholly rejected by Justice Kennedy in *Obergefell*.[19] The *Bowers* version of substantive due process analysis led the majority to reject the conclusion of the Eleventh Circuit Court of Appeals—that the Due Process Clause protects a fundamental right to autonomy in adult consensual sexual intimacy and that laws infringing on that right should be reviewed under the stringent strict scrutiny level of judicial review.

So, in 1985, the Eleventh Circuit reached a conclusion in 1985 that eluded Justice Kennedy almost 20 years later, even as he wrote the *Lawrence* opinion overruling *Bowers*. In striking down a Texas law criminalizing same-sex adult consensual anal and oral sex, Justice Kennedy did not reach the Eleventh Circuit's conclusion that a fundamental right was at stake when the government bans consenting adults from engaging in anal and oral sex. The appellate court in *Bowers* did recognize the Due Process Clause as protecting the fundamental right that Justice Kennedy has never deemed protected. The Eleventh Circuit's conclusion that the Due Process Clause protected such a right was explicit:

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15. *Id.* at 190.

16. *Id.* at 193–94.

17. *Id.* at 194.

18. *Id.* at 196 (rejecting the argument that Georgia lacked a rational basis for the anti-sodomy statute by noting "we do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis").

19. *See infra* Part II.

> The Georgia sodomy statue implicates a *fundamental right* of Michael Hardwick. The activity he hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation. . . . We therefore remand this case for trial, at which time the State must prove in order to prevail that it has a compelling interest in regulating this behavior and that this statute is the most narrowly drawn means of safeguarding that interest.[20]

Similarly, the dissenting justices in *Bowers* also explicitly interpreted the due process clause to protect "the *fundamental interest* of all individuals" to have control over "the nature of their intimate associations with others."[21]

In addition to reaching the conclusion that the Constitution protects a fundamental right to sexual intimacy, the dissenters in *Bowers* also included an explanation of why protecting such a right does not infringe on religious liberties. In fact, it terms that seem prescient today, Justice Blackmun explained, with a degree of specificity wholly absent from Justice Kennedy's opinion in *Obergefell*, why religious objections could not justify a state law criminalizing anal and oral sex. Justice Kennedy's opinion in *Obergefell* choose to emphasize the idea that religious objection to same-sex marriage may be "decent and honorable" and held "in good faith by reasonable and sincere people" and failed to include an explanation of *why* such an objection is insufficient to justify state laws codifying religious views. After assuring religious objectors to same-sex marriage that his opinion does not "disparaged" them, Justice Kennedy offers only one cryptic sentence stating that the reason religious beliefs cannot be codified is because putting the "imprimatur of the State" behind such beliefs would "demean" and "stigmatize" those individuals whose liberty would be denied under such laws.[22]

Contributing to the present skim milk protection of sexual

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20. Hardwick v. Bowers, 760 F.2d 1202, 1212–13 (1985) (emphasis added).

21. *Bowers*, 478 U.S. at 206 (Blackmun, J., dissenting) (emphasis added) (stating in characterizing the majority opinion that "what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others").

22. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) ("But when that since, personal opposition becomes enacted by law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.").

autonomy, Justice Kennedy's language in *Obergefell* regarding religious rights leaves the door open to state governments using religious beliefs as grounds for interfering with the sexual intimacies of consenting adults. Had Justice Kennedy been willing to be as clear as the *Bowers* dissenters that religious rights are not implicated by the private decision that other consenting adults makes regarding their sexual intimacies with one another, there would be clear Supreme Court precedent requiring state governments to have a compelling reason for regulating adult consensual sex. As matters stand and under Justice Kennedy's *Lawrence* and *Obergefell* approached, it remains conceivable that some state laws regulating sexual intimacy need only be justified by the government having a legitimate, not compelling, reason for such regulation. The fact that a significant portion of the citizenry has a religious objection to particular sexual acts might actually be a legitimate reason (since it is a low standard under the Court's jurisprudence). If Justice Kennedy had wished to offer a sharp and clear rebuke of basing generally applicable secular laws on Judeo-Christian values, not only could he have been as explicit as the dissenters in *Bowers* in articulating a fundamental right to sexual intimacy, he could have been explicit in his reasons for concluding that state governments lack the power to prohibit same-sex marriage based on religious objections by their citizens.

Since Justice Kennedy was presumably applying strict scrutiny in *Obergefell*,[23] even his conclusion that government adoption of religious beliefs would demean and stigmatize LGBT persons leaves the matter of whether government adoption of religious beliefs to regulate sexual intimacies could even satisfy rational basis review.[24]

To avoid the current lack of clarity and, as a doctrinal matter, lack of protection of a fundamental right to sexual intimacy, Justice Kennedy could well have included in *Obergefell* a preemptive response to the onslaught of religion-based anti-LGBT-civil rights

23. Justice Kennedy was not explicit about the standard of review being applied in the case nor did the opinion include specific application of means-ends analysis in its determination that state laws banning same-sex marriage failed strict scrutiny. In fact, the only time Justice Kennedy explicitly mentions "strict scrutiny" is in his discussion of a Hawaii Supreme Court case considering the judicial standard under the Hawaii Constitution. *Id.* at 2596–97.

24. In *Lawrence*, citing *Planned Parenthood v. Casey*, Justice Kennedy does observe that "morality" is insufficient in and of itself to justify government imposing of a criminal law banning sodomy. Lawrence v. Texas, 539 U.S. 558, 582 (2003). While it could be inferred, it is far from clear from this statement that adopting a state law imposing civil, not criminal, penalties for adults engaging in particular types of sexual intimacy would fail rational basis review.

state laws that have followed the *Obergefell* decision.[25] He could have done so by stating explicitly in the decision that state governments must have non-religious justifications for laws banning same-sex marriage and that secular recognition of same-sex marriage does not infringe on religious rights. Instead, Justice Kennedy's *Obergefell* assurances to religious objectors to same-sex marriage—in fact, he soft-pedaled on articulating the legal reasons it is unconstitutional for states to ban same-sex marriage based on religious views, and offering no citation to legal precedent—were diametrically different from the direct statements of the dissenting justices in *Bowers* who were explicit in declaring that the government must advance a non-religious justification for laws regulating sexual intimacy.[26] Writing for those justices, Blackmun wrote:

> The assertion that "traditional Judeo Christian values proscribe" the conduct involved cannot provide an adequate justification for § 1-6-2 [the Georgia sodomy law]. 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. . . . A state can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus. "The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).[27]

Although Justice Blackmun's *Bowers* dissent and Justice Kennedy's *Obergefell* majority opinion both cite the *West Virginia*

25. *See* An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations, H.B. 2, 2016 Leg., Second Extra Sess. (N.C. 2016) (enacted), http://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v4.pdf; An Act to Create the "Protecting Freedom of Conscience from Government Discrimination Act," 2016 Leg., Reg. Sess. (Miss. 2016) (enacted), http://billstatus.ls.state.ms.us/documents/2016/pdf/HB/1500-1599/HB1523SG.pdf; Religious Freedom Restoration Act, S.B. 101, 119th Gen. Assemb., Reg. Sess. (Ind. 2015) (enacted), https://iga.in.gov/legislative/2015/bills/senate/101#document-92bab197.

26. *Bowers*, 478 U.S. at 211 (Blackmun, J., dissenting).

27. *Id.* at 211–12 (internal citations omitted).

Board of Education v. Barnette[28] case, Justice Blackmun interprets *Barnette* as precedent requiring the Court to protect conduct inconsistent with religious values[29] whereas Justice Kennedy cites the opinion for the more general proposition that individuals may assert a fundamental right irrespective of the fact that a democratic debate about laws impacting the rights is ongoing.[30]

The divergent approaches of Justices Blackmun and Kennedy are clearest at the end of their respective opinions and demonstrate why Justice Kennedy offers far less than a new birth in substantive due process than Blackmun embraced over thirty years ago. Justice Kennedy takes the time in *Obergefell* to highlight that the decision's holding will not infringe upon the First Amendment rights of those who object to same-sex marriage on religious grounds[31] yet fails to explicitly explain how the Court will balance such rights with the right of same-sex couples to marry should a conflict arise between them. Blackmun's dissent in *Bowers* is demonstrative of the type of analysis Justice Kennedy omits. The *Bowers* dissent explicitly rejects the notion that how others conduct their intimate relationships can interfere with rights of religious persons when Blackmun observes:

This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.[32]

So, after even after *Obergefell*, no fundamental right to choose for oneself how to conduct intimate sexual relationships has been deemed protected by a majority of the Court nor has a majority opinion been clear as to whether religious values are a permissible basis for infringing on liberty in this realm of personal decision making. Although Justice Kennedy had the chance to protect sexual autonomy as a fundamental right, he stopped short of such a holding in *Lawrence*. A point emphasized by Justice Scalia's infamously scathing dissent in *Lawrence*. Scalia rightly notes that *Lawrence* left "strangely untouched" the *Bowers*' majority view that state anti-

28. 319 U.S. 624 (1943).

29. *Id.* at 214.

30. Obergefell v. Hodges, 135 S. Ct. 2584, 2605–06 (2015).

31. *Id.* at 2607 ("[R]eligions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by diving precepts, same-sex marriage should not be condoned.").

32. *Bowers*, 478 U.S. at 213 (Blackmun, J., dissenting) (citations omitted).

sodomy laws do not infringe upon a fundamental right. Scalia points out that *Lawrence* applied "an unheard-of form of rational-basis review":

> Though there is discussion [in *Lawrence*] of "fundamental propositions" and "fundamental decisions," nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process Clause; nor does it subject the Texas [sodomy] law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a fundamental right." . . . Instead, the Court simply describes petitioners' conduct as "an exercise of their liberty". . . .[33]

Justice Scalia was correct in his observation that Justice Kennedy remained closer doctrinally to the *Bowers* majority opinion than the soaring rhetoric of *Lawrence* suggests. *Lawrence* did not recognize a fundamental right of privacy in private, adult consensual sexual intimacy.[34] Any doubt as to the narrowness of the Court's ruling in *Lawrence* was removed by the constrained language Justice Kennedy used to describe the holding now thirteen years later in *Obergefell*. *Obergefell* confirms that Justice Scalia's characterization of *Lawrence* was correct—*Obergefell* never describes or cites *Lawrence* for the proposition that the due process clause confers *a fundamental right* of adult consensual sexual intimacy for either LGBT or heterosexual persons nor does it suggest that laws regulating sexual intimacy should be subject to strict scrutiny.

II.

As explained in detail above, *Obergefell*'s strong embrace of same-sex marriage as a fundamental right protected under substantive due process[35] makes its skimpy characterization of the interest protected in *Lawrence* as the "*mere* freedom from laws

33. Lawrence v. Texas, 539 U.S.558, 586, (Scalia, J., dissenting) (emphasis in original).

34. Donald H.J. Hermann, *Pulling the Fig Leaf off the Right of Privacy: Sex and the Constitution*, 54 DEPAUL L. REV. 909, 941 (2005) ("Thus, the majority found no need to determine whether sexual intimacy, including sexual activity between unmarried persons or persons of the same sex, involved a fundamental right since the statute did not survive rational basis review, obviating the need to apply a strict scrutiny analysis.")

35. *Obergefell*, 135 S. Ct. at 2598 ("Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause."); *id.* at 2602 ("The right to marry is fundamental as a matter of history and tradition . . .); *see also id.* ("The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived too, from that Amendment's guarantee of the equal protection of laws.").

making same-sex intimacy a criminal offense"[36] seem quite deliberate. In other words, it is no accident that *Obergefell* leaves how strongly the Court's substantive due process jurisprudence protects individuals from generally applicable laws that infringe on sexual autonomy an open question.[37] Whereas the right of homosexual and heterosexual persons' right to marry is clearly a fundamental one[38] and triggers the Court's most rigorous level of scrutiny, *Obergefell* cements the status of the liberty of adults to choose how they conduct consensual sexual intimacy as non-fundamental and thus subject to a deferential standard of rational basis review that only becomes discerning if the government purpose meets Justice Kennedy's idiosyncratic "animus test."[39] Justice Kennedy's use of broad language in describing the various aspects of marital privacy of the same time he uses very staid and technical terms to describe the interest in sexual privacy supports the inference that *Obergefell* is intentionally leaving government substantially more leeway to regulate sex than marriage.

The fact that, as Michael Hardwick observed in 1988, heterosexual persons as well as LGBT persons have only minimally more protection of liberty in the realm of consensual adult sexual intimacy is worth highlighting today. *Obergefell* solidifies as precedent an approach to substantive due process analysis that is free from the constraint of relying solely on "history and tradition" and rejects the requirement advocated by Justice Scalia of using the "most specific level" at which a tradition of either affording protecting or denying protection to an asserted right can be identified.[40] Yet it also solidifies Justice Kennedy's unwillingness to recognize the fundamental right the dissents in *Bowers* recognized. The result is that the Court's landmark decision protecting the right of same-sex couples to marry focuses exclusively on the fundamental nature of the decision to marry without changing the doctrinal

36. *Id.* at 2589 (emphasis added).

37. This is also true of the Court's equal protection jurisprudence in *Obergefell*. *Obergefell* does not explicitly address or offer doctrinal analysis applicable to government discrimination based on sexual orientation outside the context of marriage nor does the decision include equal protection analysis application to government discrimination based on sexual identity such as transgender status.

38. *Obergefell*, 135 S. Ct. at 2602.

39. *See* Russell K. Robinson, Unequal Protection, 68 STAN. L. REV. 151, 169–70 (describing Justice Kennedy's use of rational basis to strike down laws in *Romer v. Evans* and *Lawrence v. Texas* as applying an "animus test").

40. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989).

treatment the Court will apply to government intrusion into the sexual intimacy within and outside of marriage—*Obergefell* applies a jurisprudentially liberal substantive due process methodology but affirms the decidedly illiberal approach to protecting decisions in regards to sexual intimacy.

The Court's interpretation of the Due Process Clause of the Fourteenth Amendment as protecting substantive, not merely procedural, rights has long been controversial.[41] Various justices and legal scholars have declared it illegitimate for the Court to use substantive due process analysis to determine whether a previously unprotected liberty interest warrants protection as a fundamental right. The result of such analysis has been that, despite the absence of textual provisions enumerating such rights,[42] the Supreme Court has construed the word "liberty" in the Due Process Clause to protect rights not textually spelled out in the Constitution's text—"unenumerated" rights like the right of unmarried fathers to the custody of their children,[43] the right of whites to marry nonwhites and vice versa,[44] and the right to terminate one's pregnancy.[45]

The primary critique of substantive due process as a doctrine is that it gives constitutionally unwarranted and unchecked power to the Supreme Court. When the critique is grounded in the theory that the Constitution should be interpreted using an "originalist" methodology, it explicitly declares that only rights that were deemed fundamental when the framers adopted the Constitution should be deemed fundamental today. Hence, critics and proponents of substantive due process analysis typically divide along originalist versus non-originalist lines. Staunch originalists regularly declare all of the Court's doctrinally well-settled substantive due process case law to be inconsistent with the abiding principle of originalism—that the only legitimate way for the meaning of the Constitution to change is through its amendment. Non-originalists, on the other hand, embrace substantive due process analysis as one of the

41. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 31–32, 110–26, 180 (1990) (condemning substantive due process as a violation of the principle of majoritarian self-government).

42. In contrast, enumerated rights like the right of free speech and the right to bear arms are substantively protected by constitutional amendments—the First and Second Amendments, respectively.

43. Stanley v. Illinois, 405 U.S. 645, 658 (1972).

44. Loving v. Virginia, 388 U.S. 1, 12 (1967).

45. Roe v. Wade, 410 U.S. 113, 155 (1973).

important mechanisms by which the Constitution "evolves" to remain pertinent and effective in fulling the document's purpose of protecting the rights of "discrete and insular minorities" from the excesses of majority rule. The upshot is that under the originalist-type approach to due process-based fundamental rights analysis, protecting rights as fundamental under due process analysis is improper.

Having clearly rejected the view that the meaning of the Constitution cannot be changed by interpretation, a majority of the Court has recognized and employed substantive due process for essentially a half century dating back to Court's recognition of the fundamental right of married couples to use contraceptives recognized in *Griswold v. Connecticut*.[46] Chief Justice Rehnquist described substantive due process analysis in *Washington v. Glucksberg*[47] as follows:

> Our established method of substantive due process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive due process cases a "careful description" of the asserted fundamental liberty interest.[48]

Often those justices who are wary or openly critical of substantive due process analysis suggest methods of implementing this legal standard such that it will rarely if ever result in a right being protected as fundamental. Justice Scalia's approach to assessing whether a fundament right was at stake in the case *Michael H. v. Gerald D.*[49] is notable in this respect. After describing the substantive due process inquiry as the Court determining whether an interest has been treated as protected "under the historic practices of our [American] society"[50] or "whether on any other basis it has been

46. 381 U.S. 479 (1965).
47. 521 U.S. 702 (1997).
48. *Id.* at 720–21 (citations omitted).
49. 491 U.S. 110 (1989).
50. *Id.* at 124.

accorded special protection,"[51] Scalia advocated a rule for level of specificity with which a liberty interest should be defined that would require justices to consider "the most specific"[52] conception of the liberty interest.

As applied in *Michael H.*, Justice Scalia's rule meant the Court considered the history of protecting the "rights of a man who wishes to establish his paternity of a child born to the wife of another man."[53] This approach was criticized by the dissenting justices, who contended that a proper application of substantive due process analysis would ask instead "whether parenthood is an interest that historically has received our attention and protection."[54] They were critical of Justice Scalia's plurality opinion for only asking "whether the specific variety of parenthood under consideration—a natural father's relationship with a child whose mother is married to another man—has enjoyed such protection."[55] The dissenting justices explained that Scalia's methodology, if adopted, would change the outcome in virtually all of the Court's decisions protecting fundamental rights:

> If we had looked to tradition with such specificity in past cases, many a decision would have reached a different result. Surely the use of contraceptives by unmarried couples, or even by married couples, the freedom from corporal punishment in schools, the freedom from an arbitrary transfer from a prison to a psychiatric institution, and even the right to raise one's natural but illegitimate children were not "interest[s] traditionally protected by our society" at the time of their consideration by this Court. If we had asked, therefore, in *Eisenstadt*, *Griswold*, *Ingraham*, *Vitek*, or *Stanley* itself whether the specific interest under consideration had been traditionally protected, the answer would have been a resounding "no."[56]

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51. *Id.*

52. *Id.* at 127 n.6.

53. *Id.* at 113.

54. *Id.* at 139 (Brennan, J., dissenting).

55. *Id.*

56. *Id.* at 140–41 (citing Eisenstadt v. Baird, 405 U.S. 438 (1972) (use of contraceptives by unmarried couples), Griswold v. Connecticut, 381 U.S. 479 (1965) (use of contraceptives by married couples), Vitek v. Jones, 455 U.S. 480 (1980) (freedom from an arbitrary transfer from a prison to a psychiatric institution), Ingraham v. White, 430 U.S. 651 (1977) (freedom from corporal punishment in schools), and Stanley v. Illinois, 405 U.S. 645 (1972) (right to raise one's natural but illegitimate children)).

The difference between the majority's and the dissenting justices' approach to defining the liberty interest was virtually determinative of the outcome in upholding the anti-sodomy law at issue in *Bowers*. Narrowly defining the liberty interest, the outcome dictated if Justice Scalia's specificity rule were required, it had exactly the outcome described by Justice Brennan in his *Michael H.* dissent. The *Bowers* majority literally posed the question as "whether the Federal Constitution confers a fundamental right upon homosexual couples to engage in sodomy," asked itself whether that specific has been traditionally protected under American law, and answered its own question with a resounding, "no." In stark contrast, Justice Blackmun's dissent in Bowers did not frame the liberty interest asserted by Michael Hardwick at the Scalia-preferred "most specific level" at which there was a relevant tradition of denying protection of the rights.

Instead, Justice Blackmun, joined by Justice Brennan, Justice Marshall, and Justice Stevens, defined the interest at stake in *Bowers* more broadly as "the right of an individual to conduct intimate relationships in the intimacy of his or her own home"[57] or "the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity."[58] These four justices on the losing side of the 5-4 split in the seminal case viewed the Georgia law that led to Michael Hardwick's arrest for having consensual sex in his own bedroom as unconstitutional violation of the Due Process Clause.

Interestingly, even in the midst of a seemingly deliberate limiting of sexual autonomy to a non-fundamental liberty interest, Justice Kennedy demonstrated an equally deliberate eagerness to reject Scalia's view of the proper method of analyzing questions arising under the Due Process Clause.[59] This approach by Justice Kennedy's *Obergefell* is consistent with his refusal to join Justice Scalia's now infamous footnote 6.[60] Justice Kennedy's explicit rejection of the footnote 6 methodology signaled an opposition to Scalia's rights-restrictive methodology that began in Justice

57. Bowers v. Hardwick, 478 U.S. 186, 208 (1986) (Blackmun, J., dissenting), *overruled by* Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472 (2003).

58. *Id.* at 199.

59. *See Michael H.*, 491 U.S. at 132 (O'Connor, J., dissenting).

60. Justice Kennedy joined "in all but footnote 6" of the Michael H. opinion. *Id.* Footnote 6 was where Justice Scalia set forth his view that interests should only be framed at the level most unlikely to result in it being protected as a fundamental right. *Id.* at 127 n.6.

Kennedy's *Lawrence* opinion and is equally explicit in his *Obergefell* substantive due process analysis.

In 2003, Justice Kennedy authored an opinion that relied upon the Due Process Clause to strike down a criminal law that made it a crime for an individual to have oral or anal sex with "another individual of the same sex."[61] First, in *Lawrence*, Justice Kennedy's majority opinion rejected and overruled the *Bowers* majority opinion essentially on the reasoning that the *Bowers* Court was incorrect in how it *framed* the liberty interest impacted by the law. Second, Justice Kennedy engaged in detailed historical analysis of anti-sodomy laws that led his to the conclusion that the *question of whether there is a history and tradition* of prohibiting private homosexual sex between consenting adults was "more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate."[62] Third, Justice Kennedy, using the reasoned judgment approach that the Court adopted in its prior substantive due process analysis,[63] assessed the Court's prior substantive due process precedent and "authorities pointing in an opposite direction"[64] of laws outlawing same-sex (and/or opposite sex) anal and oral sex support the conclusion that the Texas law violated the Due Process Clause.[65]

Justice Kennedy rejected the *Bowers* majority's very narrow articulation of the liberty interest as stake by saying that framing the legal question as whether the constitution "confers a fundamental right upon homosexuals to engage in sodomy"[66] constituted a "failure" of the Court to appreciate "the extent of the liberty at stake."[67] Using terms he echoed in his more recent *Obergefell* opinion, Justice Kennedy asserted that the way the *Bowers* Court characterized the liberty interest "demeans" the claims of the LGBT plaintiffs who had filed the *Lawrence* lawsuit.[68] Justice Kennedy's

61. Lawrence v. Texas, 539 U.S. 558, 563 (2003) (citing TEX. PENAL CODE ANN. § 21.06(a) (West 2003)).

62. *Id.* at 471 (O'Connor, J., concurring) (concluding that the Texas law banning same-sex oral and anal sex violated the equal protection clause and seemingly rejecting the majority's conclusion that the law violated the Due Process Clause).

63. *See*, Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833 (1992); Moore v. City of East Cleveland, 431 U.S. 494 (1977).

64. *Lawrence*, 539 U.S. at 572.

65. *Id.* at 578.

66. *Id.* at 566 (quoting Bowers v. Hardwick, 478 U.S. 186, 190 (1986)).

67. *Id.* at 567.

68. *Id.* For an excellent analysis of Justice Kennedy's willingness to overturn laws that he

articulation of the right at issue in *Lawrence* was far from clear. In fact, at times, Justice Kennedy's *Lawrence* reasoning seemed to sound more in equal protection analysis than in the Due Process Clause. This lack of clarity is most acute in trying to find any portion of the *Lawrence* opinion that declares states lack the power to prohibit sexual acts. Read carefully, it could actually be inferred from Justice Kennedy's analysis that he holds the view that the Due Process Clause permits state regulation of *heterosexual* sexual behavior so long as the government does not criminalize what Justice Kennedy seems to deem the quintessence of homosexual sexual conduct—being able to engage in oral and anal sex.

I contend there is one passage in particular where Justice Kennedy seemed to go to great lengths to avoid the conclusion that came quite easily to the dissenters in *Bowers*. In this passage, he included soaring language that seems, at first blush, to suggest he believes all persons have a right to privacy from government intrusion into their sexual behavior in private places. Specifically, Justice Kennedy wrote:

> The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private places, the home.

But, instead of declaring that the government lacks the authority to regulate particular sexual acts by consenting adults in the privacy of the home, Justice Kennedy actually implicitly distinguished between statutes regulating sexual acts generally—statutes Justice Kennedy might deem within the government's authority—and statutes prohibiting sexual acts that simultaneously "seek to control a personal relationship that, whether or not entitled to formal recognition in the law"—an obtuse phrase Justice Kennedy used to describe a same-sex sexual relationship.[69] Next, Justice Kennedy explained that same-sex sexual relationships are "within the liberty of persons to choose without being punished as criminals."[70] Justice

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deems to "demean" and "humiliate" LGBT persons but his failure to adopt analogous reasoning in reviewing laws that would fit the same standard if considered in the context of laws impacting persons of color and women, see Robinson, *supra* note 39, at 161–63.

69. *Lawrence*, 539 U.S. at 567.

70. *Id.*

Kennedy proceeded to "counsel against" as a "general rule" government attempts "to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[71]

Justice Kennedy's analysis is far removed from Blackmun's *Bowers* dissent and Michael Hardwick's view that that what happens in the bedrooms of consenting adults is none of the government's business. While Justice Kennedy's first caveat that States have an interest in prohibiting sexual behaviors that result in injury to the persons involved—seems reasonable and even expected, the second caveat—that States have some interest in regulating sexual acts if those acts *abuse an institution the law protects*—is a rather large opening for government regulation of sex acts. Justice Kennedy's final sentences on the matter do little to reassure those who may be concerned that his opinion leaves government the power to regulate sexual behavior. He observed that consenting adults retain dignity when they have sex in their homes but does not say those adults enjoy a fundamental right that would subject government regulation of their sex acts to strict scrutiny. Instead, Justice Kennedy said with a substantial lack of clarity as to whether he is using the term "relationship" to describe all adult consenting sexual relationships, adult oral and anal sexual acts, or, only same-sex sexual relationships:

> It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds over 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.[72]

Having so framed the liberty interest at stake in *Lawrence* and stating again that is was different from the framing used by the *Bowers* majority, Justice Kennedy adopted an expansive approach to substantive due process analysis, one that he reaffirms in *Obergefell*. He cited *Planned Parenthood of Southeastern Pennsylvania v.*

71. *Id.*
72. *Id.*

Casey[73] for the proposition that the majority may not use the power of the States to enforce its views, including its religious beliefs, by the operation of the criminal law.[74] Later, Justice Kennedy shifted the focus on his analysis from the Judeo-Christian historical authorities relied upon by the *Bowers* majority and presented what can be fairly considered a very progressive application of the traditional traditions and history component of substantive due process analysis. Justice Kennedy's consideration of recommendations of the British Parliament, the European Court of Human Rights, and the fact that all members of the Council of Europe had invalidated laws criminalizing, in Justice Kennedy anachronistic terms, "consensual homosexual conduct."[75]

The holding in *Lawrence* was further buttressed in Justice Kennedy's reasoning by the Court's decisions in *Casey* and *Romer v. Evans*,[76] both of which were decided in the years between *Bowers* and *Lawrence*. The former case was invoked by the *Lawrence* opinion for the proposition that the Due Process Clause protects the autonomy of persons to make "intimate and personal choices . . . , choices central to personal dignity and autonomy."[77] The latter case was examined for its value as precedent in how to review government action that is "born of animosity toward a class of persons affected"[78] and for reaching the conclusion that they type of animus-driven government action fails rational basis review.[79]

After rejecting the *Bowers* majority view that prosecuting sex between same-sex partners has "ancient roots," Justice Kennedy distinguished the history relied upon in *Bowers* as actually focused on a *general* condemnation of nonprocreative sex applicable to both homosexual and heterosexual individuals. Moreover, Justice Kennedy was explicit in observing that a "history and tradition" of prohibiting a liberty interest, even if identified, would not in and of itself foreclose the Court from concluding the interest was protected under substantive due process. The *Lawrence* analysis ended by declaring that Justice Stevens dissenting analysis in *Bowers* "should

73. 505 U.S. 833 (1992).

74. *Lawrence*, 539 U.S. at 571 ("Our obligation is to define the liberty of all, not to mandate our own moral code." (quoting *Casey*, 505 U.S. at 850)).

75. *Id.* at 573.

76. 517 U.S. 620 (1996).

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

78. *Id.* (quoting Romer v. Evans, 517 U.S. 620, 634 (1996)).

79. *Id.*

control" and overruling *Bowers*, noting that the view that a particular practice is immoral is not a sufficient reason for upholding a law and that intimates "choices" by unmarried as well as married persons "are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."[80]

Adding to the matters left hazy by Justice Kennedy's analysis in *Lawrence* is exactly how much of Justice Stevens dissenting opinion he considered to be controlling and, more specifically, whether he meant to incorporate the entirety of Justice Stevens dissent as controlling precedent binding on the Court due to his reference to it in *Lawrence*. Under a broad reading of *Lawrence*—the interpretation that Stevens entire opinion became part of the holding in *Lawrence*—it could be argued that the *Lawrence* decision actual did articulate a limit on government power to regulate sexual conduct because Stevens dissent observed that the due process clause analysis in cases like *Griswold*, *Eisenstadt,* and *Casey* were reasonably interpreted to mean all persons, LGBT or not, married or unmarried, had "the right to engage in nonreproductive sexual conduct that others may consider offensive or immoral."[81]

However, that reading of *Lawrence* is made difficult by the Court's ruling in *Obergefell*. Justice Kennedy's language in *Obergefell* only describes *Lawrence* as restricting state power to criminalize sexual behavior. It never uses Stevens' language of a "right" to engage in nonprocreative sex other may consider immoral. This is despite Justice Kennedy's very detailed articulation and quite clear articulation of a majority approach to substantive due process analysis that is decidedly rights-protective. Citing *Poe v. Ullman*[82] to assert that identifying which unenumerated liberties constitute fundamental rights, *Obergefell* says the analysis is not formulaic. Justice Kennedy described the Court's approach as the exercise of reasoned judgment that is guided "by many of the same considerations relevant to analysis of other constitutional provisions that set forth *broad* principles rather than specific requirements."[83]

The portion of *Obergefell* that ushers in the doctrinal authority to broadly protected unenumerated rights come next in the opinion

80. *Id.* at 578 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

81. *Bowers*, 478 U.S. at 218 (Stevens, J., dissenting).

82. 367 U.S. 497 (1961).

83. Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).

when Justice Kennedy cites *Lawrence* for the proposition that substantive due process analysis uses history and tradition as a "guide" but that history and tradition does not bound, does not set the outer limits, of what the Court protects as a fundamental rights under the Due Process Clause.[84] Justice Kennedy eloquently observes that the framers of the Bill of Rights and the Fourteenth Amendment could not have articulated or even conceived all modern fundamental rights.

> The nature of injustice is that we may not always see it in our own times. The generation 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 persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and received legal stricture, a claim to liberty must be addressed.

Justice Kennedy also articulated what seems to be a two-route approach to framing the issue in substantive due process analysis. On the one hand, Justice Kennedy recognized an approach that "may" be appropriate for the assertion of a right like "physician-assisted suicide," and, on the other hand, a far less circumscribed manner of describing the right at issue in cases involving fundamental rights like the right to marry.[85] To explicate this point, Justice Kennedy observed that *Loving v. Virginia*[86] did not frame the right at stake to be whether there was a long tradition and history in our nation of protecting a fundamental "right to interracial marriage;" that *Turner v. Safley*[87] did not ask whether there has been protection of a fundamental "right of inmates to marry;" and that *Zablocki v. Redhail*[88] did not ask about the historical protection of a fundamental "right of fathers with unpaid child support duties to marry."[89] Instead, *Obergefell* quite explicitly states that substantive due process analysis, at least in the context of fundamental rights such as

84. *Id.* ("History and tradition guide and discipline this inquiry but do not set its outer boundaries.").

85. *See* Yoshino, *supra* note 5, at 168 (discussing how Justice Kennedy's distinction may be between negative and positive rights).

86. 388 U.S. 1 (1967).

87. 482 U.S. 78 (1987).

88. 434 U.S. 374 (1978).

89. *Obergefell*, 135 S. Ct. at 2602.

the right to marry, requires inquiring about rights in a "comprehensive sense" and asking, in particular, whether there is a sufficient justification for the government to exclude particular classes of persons from enjoying the right.

Obergefell is clearly evidence that Justice Kennedy rejects Justice Scalia's narrow approach that all interests that plaintiffs assert should be deemed fundamental. Justice Kennedy explains the futility and incorrectness of a myopic approach to determining what fundamental rights are protected under the Due Process Clause, observing that, "[i]f rights were defined by who exercised them in the past, then receive practices could serves as their own continued justification and new groups could not invoke rights once denied."[90] Yet Justice Kennedy's broad embrace of broadened substantive due process insights in *Obergefell* stops short of a fundamental right of consenting adults to sexual autonomy. While the decision repeatedly refers to marriage as a fundamental right,[91] each reference to *Lawrence* in *Obergefell* describes the case as protecting a liberty interest that does not rise to the level of a strongly protected fundamental right—just a protection from the state laws that "mak[e] same-sex intimacy a crime,"[92] a confirmation of "a dimension of freedom that allows individuals to engage in intimate association without criminal liability." *Obergefell*'s most extended discussion of sexual intimacy only confirmed that same-sex couples and opposite-sex couples enjoyed the same level of protection under the Due Process Clause but never described the sexual autonomy rights as *fundamental* and thus protected on par with the right to marriage.

CONCLUSION

Three decades after the Court's 5-4 decision in *Bowers v. Hardwick* upheld the state of Georgia's ban on anal and oral sex between opposite-sex and same-sex couples and over a decade after the Court overruled *Bowers*, the landmark decision protecting same-sex marriage rights, *Obergefell v. Hodges,* solidifies the Court's

90. *Id.*

91. *Id.* ("[T]he Court has reiterated that the right to marry is fundamental under the Due Process Clause"); *id.* at 2599–2603 (articulating four principles and tradition that demonstrate the reasons why "marriage is fundamental under the Constitution"); *id.* at 2599 (describing *Loving* as holding that "the right to marry is of fundamental importance for all individuals").

92. *Id.* at 2596 (describing *Lawrence* as "holding that laws making same-sex intimacy a crime 'demea[n] the lives of homosexual persons'"); *id.* at 2607 ("The Court, in this decision, holds that same-sex couples may exercise the fundamental right to marry in all States.").

failure to protect sexual autonomy rights as fundamental. *Obergefell* reinforces the Court's ruling in *Lawrence v. Texas* as leaving states the potential power to regulate sexual behavior between consenting adults in private, including married and unmarried couples engaging in sexual acts in their own bedroom. In short, it is clear in the Court's protection of the fundamental right of LGBT persons to marry, the Supreme Court remains unwilling to protect the fundamental right of all consenting adults, whether heterosexual or LGTB, to autonomy in decisions regarding sexual intimacy even though that position was only one vote short of becoming the law in *Bowers* back in 1986. By failing to explicitly characterize adult private sexual intimacy as a fundamental right today, a time period during which fewer and fewer persons of any sexual orientation are financial able or are opting to marry,[93] *Obergefell* cements doctrinal uncertainty as to the standard of review lower courts should apply in a realm that impacts an increasing number of adults to a greater degree than the *Obergefell*'s vigorous protection of the right to marry. Many Americans would be surprised to know that the Court has not set clear boundaries on the government's power behind their closed bedroom doors.

93. And fewer Americans have the inclination and financial resources to enter into marriage. *See* Melissa Murray, *Recovering the Right to Not Marry*, CALIF. L. REV. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652478; Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87 (2014).