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LIBERTY BOUND: *OBERGEFELL*'S ECLIPSE OF POWER TO LIMIT SEXUAL AUTONOMY

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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, 2015, 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] and it has already been hailed as ushering in a new birth of freedom in the Court's substantive due process jurisprudence.[5] I choose to make a far less

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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). *see also id.* 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.").

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").

sanguine observation. While *Obergefell* strongly and unequivocally protects same-sex marriage rights, it recognizes the right to autonomy in sexual intimacy as fundamental but without elaboration.[6] With a potential change in the ideological composition of the Supreme Court on the horizon, it is important to be clear that Justice Kennedy's statement in *Lawrence v. Texas*[7] adopting the analysis of Justice Steven's dissenting opinion in *Bowers v. Hardwick*[8] combined with Kennedy's reference in *Obergefell* to sexual intimacy as a fundamental liberty protect the fundamental right of adult sexual autonomy from erosion.

I.

Justice Scalia's observation that Kennedy seems to employ a form of rational basis review in *Lawrence*, not strict scrutiny, to protect the right to sexual activity has some salience.[9] However, Kennedy's *Obergefell* decision refers to sexual intimacy as a "fundamental right."[10] Close to thirty years after *Bowers* applied rational basis review to Georgia's law criminalizing anal and oral sex[11] and twelve years after Scalia contended that *Lawrence*'s application of rational basis review[12] left the central legal conclusion

6. 135 S. Ct. at 2606 (referencing a "intimacy" and "marriage" as "other fundamental rights" for which it would inconsistent with the approach the Court has used to define the liberty interest "in a most circumscribed manner, with central reference to specific historical practices").

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

8. After the U.S. Supreme Court ruled against him, Michael Hardwick encouraged Americans to see the Court's now overruled 5-4 decision in Bowers v. Hardwick Bowers as narrowly construing the sexual autonomy rights of all persons, LGBT or not. However, the Bowers majority opinion successfully diverted attention from how the ruling potentially proscribed the sexual autonomy rights of heterosexuals. *See* Bowers, 478 U.S. at 188 n.2 (1986) (accepting the district court's determination that the heterosexual couple 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"). The Court's myopic description of the issue in Bowers as the constitutionality of a Georgia anti-sodomy statute only "as applied to consensual homosexual sodomy" ignored the law's explicit restriction on both heterosexual and homosexual anal and oral sex. *Id.*

9. Lawrence, 539 U.S. at 586, (Scalia, J., dissenting) (describing Lawrence majority opinion as failing to apply strict scrutiny by stating "nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a 'fundamental right'").

10. Obergefell v. Hodges, 135 S. Ct. at 2602 (explicitly employing the term "fundamental right" in the phrase "it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy").

11. Bowers, 478 U.S. at 196 (finding Georgia anti-sodomy statute satisfied the rational basis standard of review).

12. Lawrence, 539 U.S. at 586 (Scalia, J., dissenting). *See, e.g.*, Donald H.J. Hermann,

of *Bowers* "strangely untouched,"[13] this should relegate to a debate of only academic consequence the argument that *Lawrence v. Texas* fails to protect sexual autonomy as a fundamental right.[14]

While *Obergefell* facilitates revisiting the issue of what standard of review applies to laws infringing on the fundamental right to sexual autonomy, the doctrinal clarity the case provides with respect to laws prohibiting same-sex marriage potentially introduces a doctrinal paradox: that laws that infringe the fundamental right of same-sex couples to marry would trigger strict scrutiny analysis but laws that infringe on the fundamental right of consenting adults to make decisions with regards to sexual intimacy might not warrant that same high level of judicial scrutiny. Does infringement of the fundamental right to sexual autonomy merely trigger Justice Kennedy's idiosyncratic "animus test"[15] or are laws criminalizing adult consensual sexual decisions subject to the more robust and more predictably rights-protective strict scrutiny standard?

II.

The Eleventh Circuit Court of Appeals declared strict scrutiny to be the proper standard for protecting the freedom to sexual autonomy infringed by the Georgia law under review in *Bowers*,[16] doing so long before Justice Kennedy's first explicit reference to sexual

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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.").

13. Lawrence, 539 U.S. at 586 (Scalia, J., dissenting).

14. *Id.* at 598 (Scalia, J., dissenting) (describing the Court majority in Lawrence as "not hav[ing] the boldness to reverse" "Bowers' conclusion that homosexual sodomy is not a 'fundamental right'" and noting that Kennedy only used the terms "fundamental propositions" and "fundamental decisions," not the term fundamental right).

15. *See, e.g.*, 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").

16. The Eleventh Circuit used the following language:

> 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.

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

autonomy as a fundamental right. Now that Kennedy has definitively recognized the fundamental nature of sexual autonomy in *Obergefell*, Scalia's view that Kennedy's *Lawrence* analysis sets rational basis as the standard for reviewing laws that criminalize adult sexual intimacies is untenable.

In his 2003 *Lawrence* opinion, Kennedy is definitive in his rejection of the *Bowers* holding and reasoning when he declares *Bowers* incorrect in framing the legal question as whether the constitution "confers a fundamental right upon homosexuals to engage in sodomy."[17] However, instead of making it clear that a law banning anal and oral sex is subject to strict scrutiny analysis because it infringes on a fundamental right, Kennedy's ultimate analysis uses the terminology long-associated with the rational basis standard of review—whether the law serves a "legitimate" government purpose.[18] Because of this—Justice Kennedy seemingly using rational basis instead of strict scrutiny as the standard the Texas law had to meet, Justice Scalia characterized *Lawrence* as aligned with *Bowers* in deeming rational basis to be the proper test for justifying a state law infringing sexual autonomy.[19]

While rhetorically clever, there are two reasons—one that predates *Obergefell* and another made possible by it—that undermine the validity of future invocations of Scalia's reasoning to argue government efforts to regulate sexual intimacy among consenting adults need only satisfy rational basis review. First, in language Justice Scalia's dissent ignores, *Lawrence* explicitly incorporates, albeit without quotation, the analysis in Justice Stevens' *Bowers* dissent as controlling and integral to the *Lawrence* holding. Second, now that *Obergefell* has clearly embraced sexual autonomy as a fundamental right on par with marriage autonomy, Scalia's argument that Kennedy's use of the term "legitimate" instead of the word

17. Lawrence, 539 U.S. at 563, 566–67 (citing Tex. Penal Code Ann. § 21.06(a) (West 2003)). Justice Kennedy also engaged in a 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[d]." *Id.* at 571.

18. *Id.* at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.") (emphasis added).

19. Lawrence, 539 U.S. at 586, (Scalia, J., dissenting) (asserting that the "actual holding" in Lawrence is that the Texas law criminalizing same-sex sodomy "furthers no legitimate state interest" and thereby only applies "an unheard-of form of rational-basis review" not a heightened judicial scrutiny).

"compelling"—the standard applicable under strict scrutiny—has even less persuasive value than it may have had prior to *Obergefell*.

Lawrence explicitly incorporates Justice Stevens' definitive treatment of sexual autonomy as a fundamental right. While Justice Scalia is correct that the text of *Lawrence* does not use the term "fundamental right" nor the term "fundamental liberty interest,"[20] the dissent by Justice Stevens in *Bowers* that Kennedy declares to be part and parcel of his *Lawrence* opinion does assert clearly that the Due Process Clause protects "the right to engage in nonreproductive sexual conduct that others may consider offensive or immoral."[21] Even if it were plausible pre-*Obergefell*, the *Lawrence* majority opinion's inclusion of Justice Stevens's *Bowers* dissent means *Lawrence* can no longer be fairly read as condoning judicial treatment of the right to sexual autonomy as a second-class liberty. When *Lawrence* and *Obergefell* are read together, there is no plausible interpretation other than that the right to engage in nonreproductive sexual conduct that others may find offensive (how Stevens described the right he clearly deemed constitutionally protected) is enjoyed by all persons, irrespective of sexual orientation.

CONCLUSION

Three decades after *Bowers v. Hardwick*, the landmark *Obergefell v. Hodges* decision protecting same-sex marriage rights lifts the cloud on whether the Court's protection of sexual autonomy rights as fundamental requires the application of strict scrutiny. Even after *Obergefell*'s textual reference to sexual intimacy as a fundamental right, I expect that some jurists will seek to argue state regulation of sexual behavior between consenting adults in private is only subject to, at most, the toughened version of rational basis review applied in *Lawrence.* However, as much as *Obergefell*'s vigorous protection of the right to marry for same-sex couples is

20. *Id.* 593 ("Not once does it describe homosexual sodomy as a 'fundamental right' or a "fundamental liberty interest,' nor does it subject the Texas statute to strict scrutiny.").

21. Bowers, 478 U.S. at 218 (Stevens, J., dissenting) ("In all events, it is perfectly clear that the State of Georgia may not totally prohibit the conduct proscribed by § 16-6-2 of the Georgia Criminal Code."). *Cf.* 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").

front and center in the opinion, the case also makes it more difficult to contend adult sexual intimacy rights fail to warrant the heightened standard of strict scrutiny as protection. *Obergefell*'s role in providing greater clarity as to the limits on the government's power to regulate sexual intimacy behind closed bedroom doors means the decision is of broader personal significance to Americans of all sexual orientations than many would realize[22]—a point Michael Hardwick would likely have sought to emphasize.[23]

Kindly be informed that this is the last page of the Forward. The next Article begins on page 375.

22. Research shows fewer and fewer persons of any sexual orientation are financial able or are opting to marry. *Cf.* 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) (noting that fewer Americans have the inclination and financial resources to enter into marriage).

23. *Cf.* In criticizing the Court's decision in *Bowers*, Hardwick called for the "gay community to pull together, and also for the heterosexual community to pull together, against something that's affecting both of us." PETER IRONS, THE COURAGE OF THEIR CONVICTIONS: SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT 403 (1988).