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How State Courts Apply *Lawrence v. Texas* in Civil Contexts: A Mixed-Methods Content Analysis of Two Decades of Cases

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This Article presents empirical analyses of civil state court decisions applying the U.S. Supreme Court's landmark decision in Lawrence v. Texas. After tracing key historical and legal developments leading up to the Lawrence decision's decriminalization of sodomy on substantive

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due process grounds in 2003, the Article utilizes both quantitative and qualitative content analyses of ninety-one civil cases citing *Lawrence* over the nearly two decades since it was decided. Results indicate that judicial decisions tended not to rely on *Lawrence* significantly in the context of most business and employment law cases. Courts that applied on *Lawrence* in family law disputes—especially those involving same-sex couples, often construed the case narrowly at first, but broadened their interpretations after *Obergefell v. Hodges* brought marriage equality to the United States. The largest category of cases in the study were those raising LGBTQ+ civil rights claims. Statistically significant geographic differences were found relating to how courts used *Lawrence* in those cases, with judges in northeastern and Pacific coastal states having applied the precedent broadly, while judges in southern and midwestern states tending to have applied the case more narrowly. The implications of findings are explored generally and within the specific context of the constriction of substantive due process rights in the wake *Dobbs v. Jackson Women’s Health Organization*.

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I. INTRODUCTION

In June 2003, the U.S. Supreme Court issued its landmark decision in *Lawrence v. Texas*.¹ Writing on behalf of himself and four other members of the Court, Justice Anthony Kennedy invalidated all of the remaining sodomy laws in the United States as applied to acts between consenting adults in private, reasoning that these laws impinged on liberty interests protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.² Justice Sandra Day O'Connor concurred in the result, but would have decided the case on equal protection grounds.³

Shortly after the release of the decision in *Lawrence*, scholars began to critique the reasoning in the majority opinion.⁴ Some questioned whether *Lawrence* represented genuine or illusory progress for LGBTQ+ rights,⁵ largely because the language the Supreme Court used in *Lawrence*

1. 539 U.S. 558, 578–79 (2003).

2. *Id.* at 564–79; see also *infra* at Part II.E. For an exploration of the Supreme Court's "chaotic" liberty jurisprudence and a proposal to stabilize it, see Deana Pollard Sacks, *Elements of Liberty*, 61 SMU L. REV. 1557, 1558 (2008).

3. *Lawrence*, 539 U.S. at 579–85 (O'Connor, J., concurring in the result).

4. E.g., Henry F. Fradella, *Lawrence v. Texas: Genuine or Illusory Progress for Gay Rights in America*, 39 CRIM. L. BULL. 597 (2003); Bernard E. Harcourt, *Foreword: "You are Entering a Gay and Lesbian Free Zone": On the Radical Dissents of Justice Scalia and Other (Post-) Queers [Raising Questions About Lawrence, Sex Wars, and the Criminal Law]*, 94 J. CRIM. L. & CRIMINOLOGY 503 (2004).

5. At that time, some of us writing about *Lawrence* used the term "gay rights." See, e.g., Fradella, *supra* note 4, at 597. At that time, it was not uncommon to use the word "gay" as "an umbrella term for people who identify as lesbian, gay, or bisexual." Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CTR. FOR AM. PROGRESS (July 19, 2011), <https://www.americanprogress.org/article/a-history-of-the-employment-non-discrimination-act/> [<https://perma.cc/HWE9-GVQW>], at n.1. In recognition of how such usage contributes to the erasure of other nonnormative sexual orientations and gender identities, the preferred umbrella term today is "LGBTQ+," the letters of which refer to lesbian, gay, bisexual, transgender, and queer people. The plus sign (+) acknowledges there are sexual and gender identities beyond those in the five-letter version of the acronym, including intersex, questioning, and asexual persons.

presented a substantive due process conundrum for the advancement of equality.⁶

On one hand, the Court in *Lawrence* used sweeping rhetoric to situate privacy and autonomy rights within substantive due process vis-à-vis the Fourteenth Amendment's protection of liberty:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.⁷

The majority opinion went so far as to reject the notion that the constitution permits criminal law to be used to enforce morality “absent injury to a person or abuse of an institution the law protects.”⁸ In doing so, the Court arguably embraced the “harm principle” which, consistent with its roots in utilitarian philosophy,⁹ maintains that criminal law should only prohibit acts or omissions which cause harm to others.¹⁰ Indeed, the seeming repudiation of legal moralism coupled with the broad scope of appeals to “personal dignity and autonomy” led Justice Antonin Scalia to

6. Fradella, *supra* note 4, at 602–03; Harcourt, *supra* note 4, at 511–12 (“[T]he result in *Lawrence* is not unambiguously pro-gay . . .”).

7. Fradella, *supra* note 4, at 602 (quoting *Lawrence*, 539 U.S. at 562).

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

9. See, e.g., JOHN STUART MILL, ON LIBERTY 80, 139 (David Bromwich & George Kateb eds., 2003) (1859).

10. Fradella, *supra* note 4, at 602–03; see also, e.g., Sonu Bedi, *Repudiating Morals Legislation: Rendering the Constitutional Right to Privacy Obsolete*, 53 CLEV. ST. L. REV. 447, 454–55 (2005) (interpreting *Lawrence* as a rejection of morals legislation); Harcourt, *supra* note 4, at 503–04 (“The Court’s ruling is the *coup de grâce* to legal moralism administered after a prolonged, brutish, tedious, and debilitating struggle against liberal legalism in its various criminal law representations.”); J. Kelly Strader, *Lawrence’s Criminal Law*, 16 BERKELEY J. CRIM. L. 41, 43 (2011) (arguing *Lawrence* embraced the harm principle over legal moralism); Eric Tennen, *Is the Constitution in Harm’s Way? Substantive Due Process and Criminal Law*, 8 BOALT J. CRIM. L. 3, 4–5 (2004) (arguing that *Lawrence* represents a culmination of precedents that incorporated the harm principle into contemporary criminal law jurisprudence). But see Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1313 (2004) (“*Lawrence* does not hold that the Constitution incorporates the harm principle. In fact, *Lawrence* is more of an equal protection case than a substantive due process case. Justice Kennedy’s opinion does not talk about the rights of persons generally as against the state. Rather, the opinion constantly refers to the rights of ‘homosexual persons’ and the right of gays to make ‘choices central to personal dignity and autonomy.’” (internal citations omitted)).

argue in his dissent that the case represented “the end of all morals legislation.”¹¹

On the other hand, despite the numerous passages in *Lawrence* referencing liberty, autonomy, and human dignity, the Court did not declare any specific right to be “fundamental,” which, in turn, would have subjected laws intruding into the personal and private sex lives of consenting adults to strict scrutiny.¹² Nor did the Court recognize LGBTQ+ people to be either a suspect or quasi-suspect class for equal protection purposes.¹³ Rather, the Court seemingly applied the rational basis test—the lowest standard of review—which, in turn, could result in defeats for those seeking LGBTQ+ civil rights in post-*Lawrence* litigation.¹⁴ The decision also heralded the very real possibility of serious backlash against LGBTQ+ people and their quest for equality because the logic of the decision rested, in part, on changing public views regarding sexual orientation, both domestically and abroad.¹⁵

11. *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting). Law professor Cass Sunstein argued that despite the sweeping language in *Lawrence*, it is actually a narrow opinion. Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 48–49. Sunstein maintained that rather than announcing a broad constitutional right, rooted in autonomy, which protects consensual sex that does not harm others, *Lawrence* is limited to recognizing that, on the whole, social values have changed such that society no longer views acts of oral or anal sex—even between members of the same biological sex—as warranting criminal punishment. *Id.*

12. Fradella, *supra* note 4, at 603. Some scholars insisted that *Lawrence* recognized something akin to a fundamental right without using that nomenclature. *E.g.*, Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (arguing that *Lawrence* recognized a right that should be treated as fundamental—one that implicates the interaction of liberty, human dignity, and equality). Others apparently viewed the lack of a fundamental right declaration as a positive shift in the jurisprudence of constitutional rights. Law professor Randy Barnett, for instance, maintained that *Lawrence*’s silence on any fundamental right represented a potential rejection of the outdated fundamental rights framework in favor of one that embraced the more comprehensive notion that governmental interference with “liberty” is presumptively unconstitutional. Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21, 35–36.

13. Fradella, *supra* note 4, at 606.

14. *Id.*; Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality*, 65 OHIO ST. L.J. 1341, 1342 (2004) (“*Lawrence* thereby moves sexual minorities into an interstitial place in constitutional law—from the status of formal outlaws but shy of the status of formal recognition; a traditionally subordinated social group now to be tolerated, but not necessarily accepted.”).

15. Fradella, *supra* note 4, at 606; Harcourt, *supra* note 4, at 511. For an illuminating discussion of backlash against *Lawrence* and other key judicial decisions criticized as taking sides in the so-called “culture war,” see Francisco Valdes, *Culture by Law: Backlash as Jurisprudence*, 50 VILL. L. REV. 1135, 1170 (2005).

Some of these apprehensions about the logic of the *Lawrence* decision appear to be well-founded. *Lawrence*'s reliance on liberty as the basis for a majority opinion unquestionably represented a major departure in a substantive due process case decided after the New Deal.¹⁶ Indeed, some scholars hailed the focus on liberty as a watershed moment for the expansion of privacy rights in a libertarian tradition.¹⁷ Other scholars, however, argued that the Court signaled it did not mean for *Lawrence* to be a broad libertarian decision, but rather deliberately intended for it to be narrow.¹⁸ *Lawrence*'s exclusion of sex acts between minors, public sexual conduct, acts of prostitution, marriage between persons of the same biological sex, and sex between persons "who might be injured or coerced or who are situated in relationships where consent might not easily be refused,"¹⁹ caused some commentators to criticize *Lawrence* as an inherently conservative opinion that offers only freedom from criminal prosecution to "respectable" LGBTQ+ people—assimilationists who embrace traditional values like romance, monogamy, and geographical privacy.²⁰

16. See, e.g., Barnett, *supra* note 12, at 33–37; Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1104 (2004) (hailing *Lawrence* "as marking the emergence of a new approach to substantive due process analysis, one that has been simmering in the concurring opinions of Justices Souter, Stevens, and Kennedy for the last decade [but now enjoys] a majority for extending meaningful constitutional protection to liberty interests without denominating them as fundamental rights").

17. See, e.g., Barnett, *supra* note 12, at 21 ("[W]e have in *Lawrence* nothing short of a constitutional revolution, with implications reaching far beyond the 'personal liberty' at issue [in the case]."); Hunter, *supra* note 16, at 1109 ("[T]he logic of *Lawrence* will reverberate in future substantive due process cases touching on marriage and morality."); Sonia K. Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 WM. & MARY BILL RTS. J. 1429, 1435 (2006) (asserting that *Lawrence* presents "a vision of sexual self-determination . . . that represents the intersectional convergence of three separate prisms: spatial privacy, expressive liberty, and deliberative autonomy").

18. See, e.g., Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140, 1141, 1162–69 (2004) (arguing that *Lawrence* is most properly understood not as broad libertarian decision, but one "within a conservative tradition favoring incremental change over sudden and wholesale ruptures with the past").

19. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

20. See, e.g., Elizabeth J. Baia, Note, *Akin to Madmen: A Queer Critique of the Gay Rights Cases*, 104 VA. L. REV. 1021, 1062 (2018); Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1401 (2004) ("[T]he liberty principle upon which the opinion rests is less expansive, rather geographized, and, in the end, domesticated. It is not the synonym of a robust liberal concept of freedom."); cf. Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 145 (2014) ("[*Lawrence*] is oddly, almost obsessively, focused on the role of sex in reinforcing emotional bonds. In seeking to demonstrate that sex (and the right to engage in it) is not always about sexual pleasure, the *Lawrence* Court seemed to forget that it can ever be about sexual pleasure."); Teemu Ruskola, *Gay Rights Versus Queer Theory: What is Left of Sodomy After Lawrence v. Texas?*, 23 SOC. TEXT 235, 239 (2005) ("In the end, the crucial rhetorical

The decisions of some lower federal courts grappling with applying *Lawrence* shortly after it was decided suggest that the latter group of scholars correctly predicted that the case would be narrowly construed. Consider the oft-cited example of the Eleventh Circuit's decision upholding Florida's ban on same-sex couples adopting children.²¹ The court rejected the notion that *Lawrence* recognized any fundamental right to private sexual intimacy and refused to infer any new fundamental rights from *Lawrence* because its "language and reasoning are inconsistent with standard fundamental rights analysis."²² The court also went on to reject an equal protection challenge to Florida's adoption law under the rational basis test because the case did not involve either a fundamental right or a suspect or quasi-suspect class that would trigger heightened levels of scrutiny.²³

The narrow interpretation of *Lawrence* in the Eleventh Circuit's decision upholding Florida's adoption law is not unique.²⁴ As Justin Reinheimer and others pointed out, for several years, *Lawrence* "had remarkably little impact on subsequent lesbian and gay rights litigation."²⁵ Marriage equality serves as an example. Courts in at least nine U.S. jurisdictions upheld states' refusal to recognize the rights of same-sex couples from marrying without so much as finding "that *Lawrence* suggest[ed], let alone require[d], a different outcome."²⁶ Several of these

limitation of *Lawrence* is precisely its inability, or refusal, to imagine (legitimate) homosexual sex that does not take place in a relationship and does not connote intimacy."); Mark Strasser, *Monogamy, Licentiousness, Desuetude and Mere Tolerance: The Multiple Misinterpretations of Lawrence v. Texas*, 15 S. CAL. REV. L. & WOMEN'S STUD. 95, 98 (2005) ("Much of the Court's focus in *Lawrence* was on same-sex relationships rather than on same-sex relations.").

21. *Lofton v. Sec'y of Dep't of Child. and Fam. Servs.*, 358 F.3d 804, 815–16 (11th Cir. 2004).

22. *Id.* at 816.

23. *Id.* at 818.

24. *E.g.*, *Seegmiller v. LaVerkin City*, 528 F.3d 762, 764, 771 (10th Cir. 2008) (upholding the discipline of a police officer for having an affair, reasoning that *Lawrence* did not recognize any fundamental right to engage in private, consensual sexual conduct and, therefore, the case does not protect "all important, intimate, and personal decisions").

25. Justin Reinheimer, Note, *What Lawrence Should Have Said: Reconstructing an Equality Approach*, 96 CAL. L. REV. 505, 505 (2008); see also Jonathan M. Black, *Sexual Privacy After Lawrence v. Texas*, 10 GEO. J. GENDER & L. 297, 330 (2009) (noting that *Lawrence*'s impact "has been limited"); Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1237 (2007) (stating that lower courts had construed the scope of the right to sexual liberty announced in *Lawrence* "quite narrowly"); Tobin Sparling, *A Path Unfollowed: The Disregard of Dignity Precedent in Justice Kennedy's Gay Rights Decisions*, 26 TUL. J. L. & SEXUALITY 53, 82 (2017) ("[N]otwithstanding the significance of the outcomes in *Romer* and *Lawrence*, these opinions have had only a marginal effect on subsequent jurisprudence in the lower courts.").

26. Reinheimer, *supra* note 25, at 520 (internal citations omitted).

courts ruled in such a manner for the very reasons some commentators predicted shortly after *Lawrence* was decided—namely the lack of any recognition of a fundamental right in the case and its failure to establish a framework for any heightened standard of review for the evaluation of constitutional challenges to laws burdening LGBTQ+ people.²⁷ Of course, *Lawrence* eventually played a role in advancing marriage equality in the United States, as evidenced by the U.S. Supreme Court’s reliance on *Lawrence* in both *United States v. Windsor*, which invalidated the federal Defense of Marriage Act (DOMA),²⁸ and *Obergefell v. Hodges*, which made marriage equality the law of the land.²⁹

Still, one can hardly argue that the decriminalization of sodomy and the legal recognition of same-sex marriages somehow transformed LGBTQ+ people’s lives such that they enjoy full equality and social acceptance.³⁰ Gays and lesbians experience violent victimization at a rate twice that of heterosexuals, while bisexuals experience such victimization at a rate more than 6.5 times that experienced by heterosexuals.³¹ Additionally, the rate of violent victimization against transgender people is 2.5 that of cisgender people.³² And even in the absence of criminal

27. *Id.* (“In rejecting claims for same-sex marriage, courts have held that *Lawrence* did not recognize a fundamental right and that *Lawrence* did not itself apply or require any type of heightened review that would be appropriate in a marriage context.” (internal citations omitted)).

28. *United States v. Windsor*, 570 U.S. 744, 772, 775 (2013) (invalidating DOMA as an unconstitutional deprivation of the liberty protected by the Fifth Amendment, relying, in part, on *Lawrence*).

29. *Obergefell v. Hodges*, 576 U.S. 644, 661–62 (2015) (recognizing that the legal question of marriage equality arose “[a]gainst the background” of *Lawrence* and *Romer v. Evans*, 517 U.S. 620, 635 (1996), which “invalidated an amendment to Colorado’s Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation”); see also, e.g., Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 163 (2015) (claiming that the “*Obergefell* majority unmistakably echoed the *Lawrence* passage in its discussion of tradition”); *id.* at 173 (noting that *Obergefell*’s analyses drew on *Lawrence*’s situation of the issue “as a substantive due process case inflected with equality concerns”); Steve Sanders, *Dignity and Social Meaning: Obergefell, Windsor, and Lawrence as Constitutional Dialogue*, 87 FORDHAM L. REV. 2069, 2106 (2019) (arguing that *Obergefell* and *Windsor* drew on the principle announced in *Lawrence* that gays and lesbians are entitled to “personal dignity and autonomy”).

30. See SHARITA GRUBERG ET AL., CTR. AM. PROGRESS, THE STATE OF THE LGBTQ COMMUNITY IN 2020: A NATIONAL PUBLIC OPINION STUDY (2020), <https://americanprogress.org/wp-content/uploads/2020/10/LGBTQpoll-report.pdf> [<https://perma.cc/KL8B-AK42>]; Paula M. Neira & An N. Lee, *Under Attack: Transgender Health in 2020*, 24 J. HEALTH CARE L. & POL’Y 109, 122 (2021) (detailing the obstacles LGBTQ+ people face in the face of discriminatory laws and policies).

31. JENNIFER L. TRUMAN & RACHEL E. MORGAN, BUREAU OF JUST. STATISTICS, VIOLENT VICTIMIZATION BY SEXUAL ORIENTATION AND GENDER IDENTITY, 2017–2020, at 1–2, 3 tbl.1 (2022), <https://bjs.ojp.gov/content/pub/pdf/vvsogi1720.pdf> [<https://perma.cc/F7VC-SGC3>].

32. *Id.* at 1–2, 3 tbl.1.

victimization, LGBTQ+ people routinely face adversities that negatively impact their “financial, mental, and physical well-being” because they experience “discrimination in their personal lives, in the workplace and the public sphere, and in their access to critical health care.”³³

Additionally, although *Lawrence* “marked a dramatic milestone in efforts to limit state power to control homosexuality,”³⁴ there can also be little doubt that there has been strong backlash in the wake of judicial rulings recognizing select constitutional protections for LGBTQ+ people. Empirical research suggests that although there have been documented decreases in public support for LGBTQ+ civil rights in the wake of key court cases expanding such rights, the effects have been largely short-lived.³⁵ But post-*Lawrence* apprehensions about backlash were not necessarily rooted in negative public opinions to the decision.³⁶ Rather, those concerns were (and largely continue to be) about legal backlash—changes in law and policy as a result of counter-mobilization by powerful elites who expend money and political capital to stymie LGBTQ+ equality by enacting legislation and harnessing the judicial role.³⁷ Such legal backlash unquestionably transpired as evidenced not only by inaction—such as the failure of Congress to adopt any federal antidiscrimination protections for LGBTQ+ people,³⁸ but also by

33. Gruberg *et al.*, *supra* note 30, at 1; see also, e.g., Alex Reed, *Beyond Bostock: Employment Protections for LGBTQ Workers Not Covered by Title VII*, 23 N.Y.U. J. LEGIS. & PUB. POL’Y 537 (2021) (highlighting that fewer than half the states prohibit discrimination on the basis of sexual orientation and gender identity and explaining how that impacts workers not covered by Title VII and the decision *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020)); Kyle C. Velte, *The Precarity of Justice Kennedy’s Queer Canon*, 13 CONLAWNOW 75, 89–90 (2022) (explaining how religious exemptions to antidiscrimination law protecting LGBTQ+ people remaining an open question).

34. Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1554 (2004).

35. See, e.g., Benjamin G. Bishin *et al.*, *Opinion Backlash and Public Attitudes: Are Political Advances in Gay Rights Counterproductive?*, 60 AM. J. POL. SCI. 625, 626 (2016); Andrew R. Flores & Scott Barclay, *Backlash, Consensus, Legitimacy, or Polarization: The Effect of Same-Sex Marriage Policy on Mass Attitudes*, 69 POL. RES. Q. 43, 46 (2016).

36. Scholars who study backlash refer to this as “mass opinion backlash.” Benjamin G. Bishin *et al.*, *Elite Mobilization: A Theory Explaining Opposition to Gay Rights*, 54 LAW & SOC’Y REV. 233, 234 (2020).

37. *Id.* at 233 (defining elite-led mobilization as “a reaction by elites seeking to prevent gays and lesbians from achieving full incorporation in the polity”); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 389 (2007) (“Legal scholars . . . use the term ‘backlash’ to focus on questions of judicial role and judicial authority.” (internal citations omitted)).

38. For a discussion of failed attempts to enact federal laws targeting anti-LGBTQ+ discrimination, see Jeremy W. Brinster, Note, *Taking Congruence and Proportionality Seriously*, 95 N.Y.U. L. REV. 580 (2020).

discriminatory actions. Examples of the latter include, but are not limited to, legislation³⁹ and judicial decisions⁴⁰ sanctioning religious exemptions from antidiscrimination laws; state high courts refusing to honor the full scope of *Obergefell*'s mandate by extending to same-sex spouses the same public employee spousal benefits offered to opposite-sex spouses;⁴¹ states with laws allowing officials to refuse to officiate marriages for any couples of whose unions they disapprove;⁴² the on-again, off-again ban on transgender people serving in the military;⁴³ laws limiting transgender people from accessing bathrooms or playing sports consistent with their identities;⁴⁴ laws outlawing gender-affirming treatment for trans youth;⁴⁵

39. At the time of this writing, two states have laws permitting private businesses to deny services to same-sex couples who seek to marry; seven states permit medical professionals to refuse to serve LGBTQ+ patients; and twelve states enacted legislation permitting "state-licensed child welfare agencies to refuse to place and provide services to children and families, including LGBTQ people and same-sex couples, if doing so conflicts with their religious beliefs." *Religious Exemption Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/religious_exemption_laws [<https://perma.cc/4A5A-NT95>] [hereinafter MAP] (last updated Aug. 23, 2022).

40. *E.g.*, *Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't*, No. 3:19-CV-851-JRW, 2020 WL 4745771 (W.D. Ky. Aug. 14, 2020) (holding that the governmental interest in protecting LGBTQ+ people from discrimination was not compelling as applied to a photographer who refused to photograph same-sex weddings due to her purported religious beliefs because "in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids"); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 914 (Ariz. 2019) (holding that a nondiscrimination ordinance could not be constitutionally applied to printers who refused to create custom wedding invitations for same-sex couples).

41. *Pidgeon v. Turner*, 538 S.W.3d 73, 86 (Tex.), *cert. denied*, 138 S. Ct. 505 (2017) ("*Obergefell* may have recognized a 'fundamental right' to same-sex marriage and may 'require States to license and recognize same-sex marriages,' but, [the plaintiffs seeking an injunction against providing equal benefits should be able to litigate that *Obergefell*] did not recognize a fundamental right 'to spousal employee benefits' or 'require States to give taxpayer subsidies to same-sex couples.'"). For more details about *Pidgeon*, see *infra* notes 563–573 and accompanying text.

42. Mississippi and North Carolina both have such laws. MAP, *supra* note 39.

43. See Rose Gilroy et al., *Transgender Rights and Issues*, 22 GEO. J. GENDER & L. 417, 426–32 (2021) (documenting the long-standing ban, its reversal during the Obama administration, its reinstatement during the Trump administration, and the relifting of the ban during the first month of the Biden administration); Victoria Manuel, *Trump's Transgender Military Ban: Policy, Law, and Litigation*, 29 TUL. J. L. & SEXUALITY 75 (2020) (advocating for passage of the USA Equality Act to address anti-LGBTQ+ laws and policies, including the military ban in effect when the article was published).

44. Gilroy et al., *supra* note 43, at 466 (discussing so-called "bathroom bills"); *Bans on Transgender Youth Participation in Sport*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/sports_participation_bans (last updated Aug. 17, 2022) (reporting that eighteen states ban trans youth from participating in school sports).

45. Gilroy et al., *supra* note 43, at 435–49; Alexa Sussmane, *The Far-Right Push to Outlaw Gender-Affirming Treatment for Minors*, 30 TUL. J. L. & SEXUALITY 91 (2021) (documenting such laws and discussing their implications for the health, safety, and welfare of

and “don’t say gay” laws of questionable First Amendment validity which censor the ability to speak about LGBTQ+ people or issues in schools.⁴⁶

The anti-LGBTQ+ legal backlash continued unabated after *Obergefell* and even increased after the U.S. Supreme Court’s decision in *Bostock v. Clayton County*,⁴⁷ which ruled the employment discrimination protections on the basis of sex contained in Title VII of the Civil Rights Act of 1964⁴⁸ extended to sexual orientation and gender identity.⁴⁹ Consider that state legislatures proposed a record number of bills targeting the LGBTQ+ community—more than 325 just in the first three months of 2022, eclipsing the 268 introduced throughout all of 2021.⁵⁰ If enacted, these efforts not only enshrine anti-LGBTQ+ sentiments into law—which, in turn, has the reifying effect of legitimizing anti-LGBTQ+ prejudice,⁵¹ but also promote stigma with potentially deadly consequences.

transgender and gender nonconforming teenagers). Some states have gone so far as to include penalties for parents seeking to provide for their children’s gender-affirming health care. Kerith J. Conron et al., *Williams Inst. Prohibiting Gender-Affirming Medical Care for Youth* (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Mar-2022.pdf> [<https://perma.cc/KTF2-95JB>].

46. *LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/curricular_laws [<https://perma.cc/K82Q-C7G7>] (reporting that five states require parental notification and the ability to opt-out of any curricula inclusive of LGBTQ+ issues, and six states that outright censor discussions of LGBTQ+ people in schools) (last updated Aug. 23, 2022).

47. 140 S. Ct. 1731 (2020).

48. Pub. L. 88-352, Title VII, § 703, 78 Stat. 255 (1964) (codified as amended at 42 U.S.C. § 2000e-2 (2021)).

49. For a discussion of the limited reach of the *Bostock* decision, see Reed, *supra* note 33, *passim*.

50. Kelsey Butler, *Anti-LGBTQ Proposals Are Flooding U.S. State Legislatures at a Record Pace*, BLOOMBERG (Apr. 8, 2022, 5:00 AM), <https://www.bloomberg.com/news/articles/2022-04-08/mapping-the-anti-lgbtq-proposals-flooding-u-s-state-legislatures> [<https://perma.cc/65QN-EJ4A>]. This phenomenon is not limited to state legislatures. Municipalities are also targeting LGBTQ+ rights. See, e.g., *Not in Our Town*, THE ADVOCATE, Mar.-Apr. 2022, at 9 (reporting that Chambersburg became the first local government in Pennsylvania to repeal a nondiscrimination ordinance that had been inclusive of LGBTQ+ people).

51. Stacey L. Sobel, *The Backlash Boomerang: Using Reverse Animus and Hostility to Limit LGBTQ Equality*, 22 U. PA. J. CONST. L. 1155, 1178–79 (2020) (noting that backlash efforts that harness law and policy to subordinate LGBTQ+ people “operate explicitly or implicitly to maintain social, economic, and political dominance by one group over another” and there create or reinforce “existing social hierarchies that tell outgroup members that they are inferior”); cf. Henry F. Fradella, *Legal, Moral, and Social Reasons for Decriminalizing Sodomy*, 18 J. CONTEMP. CRIM. JUST. 279, 292–93 (2002) (summarizing arguments that sodomy laws “create criminals,” reinforce hostility toward LGBTQ+ persons by labeling them as criminals, and perpetuate legal and moral stigma against LGBTQ+ people); Michele Goodwin & Erwin Chemerinsky, *The Transgender Military Ban: Preservation of Discrimination Through Transformation*, 114 Nw. U. L. REV. 751, 757 (2019) (stating that ban on transgender people serving in the military “reifies a

Data has shown that restrictive legislation has consequences on the mental and physical health of the queer and trans community, especially youth. A 2021 study shows that LGBTQ+ teens in states with homophobic and transphobic policies were more likely to attempt suicide than those in states with inclusive policies. In March, the CDC released data that one in five LGBTQ+ youth seriously considered attempting suicide in the [twelve] months before the survey. Advocates fear legislation like “Don’t Say Gay” will only exacerbate these consequences for queer and trans youth.⁵²

As if the uptick in discriminatory legislation were not worrisome enough threats to the promises of equality, liberty, and dignity for LGBTQ+ people, a key foundation of their civil rights were gutted by the U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*.⁵³ *Dobbs* overruled both *Roe v. Wade*⁵⁴ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁵⁵ Although abortion decisions, both *Roe* and *Casey* were substantive due process cases that rested upon the right to privacy.⁵⁶ As explored in Part II, despite the *Lawrence* decision’s emphasis on liberty more than privacy, the line of privacy cases, including *Roe* and *Casey*, were nonetheless important precedents underpinning the holding and rationale in *Lawrence*.⁵⁷ In the

social construction of LGBTQ persons being mentally ill or diseased”); Nancy J. Knauer, *Historical Contingency and the Limits of Identity: Implications for Law and Policy*, 28 S. CAL. INTERDISC. L.J. 387, 416 (2019) (arguing that religious exemptions “insulate religious objectors from the increased legal and social acceptance of LGBTQ[+] individuals and their families” and “signal that there is something different about LGBTQ[+] rights from other type of civil rights that merits caution”).

52. Alexandra Martinez, *Hate Crimes Are Rising as Anti-LGBTQ+ Legislation Passes and Misinformation Thrives*, PRISM (Apr. 20, 2022), <https://prismreports.org/2022/04/20/hate-crimes-rise-anti-lgbtq-legislation/> [<https://perma.cc/J8AL-CJTF>]; see also Sherry Everett Jones et al., *Mental Health, Suicidality, and Connectedness Among High School Students During the COVID-19 Pandemic—Adolescent Behaviors and Experiences Survey, United States, January–June 2021*, 72 MORBIDITY & MORTALITY WKLY. REP. 16 (Apr. Supp. 2022), <http://dx.doi.org/10.15585/mmwr.su7103a3>.

53. 142 S. Ct. 2228, 2242 (2022).

54. 410 U.S. 113, 153 (1973) (holding that the right to privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy,” at least prior to fetal viability), *overruled by Dobbs*, 142 S. Ct. at 2242.

55. 505 U.S. 833, 876 (1992) (reaffirming *Roe*’s central holding while rejecting its trimester framework in favor of one that disallows undue burdens on the decision to terminate a pregnancy), *overruled by Dobbs*, 142 S. Ct. at 2242.

56. *Roe*, 410 U.S. at 153; *Casey*, 505 U.S. at 883, 896.

57. See *infra* notes 149–171 and accompanying text.

wake of *Dobbs*, what will happen to *Lawrence*—and LGBTQ+ civil rights more generally—remain open, important questions.⁵⁸

As previously mentioned, several commentators—nearly all of whom wrote before *Obergefell* was decided—asserted that the *Lawrence* decision had limited jurisprudential impact.⁵⁹ Although such claims were supported by analysis of select cases, they were not empirically established via systematic methods. For instance, in the summer of 2010, law professor J. Kelly Strader, who specializes in criminal law and LGBTQ+ rights, supported that very observation by noting that a “quick Westlaw or Lexis search will identify dozens of judicial decisions declining to follow, declining to extend, or distinguishing *Lawrence*, but only a handful of decisions affirmatively relying on *Lawrence*.”⁶⁰ Strader drew that conclusion six to seven years after *Lawrence* was decided. As of this writing, *Lawrence* has been the law of the land for roughly two decades. What has its impact been over this longer period of time? Put differently, what has been the reach of *Lawrence* beyond its immediate role decriminalizing certain sexual acts performed in private between consenting adults and its longer-term impact on marriage equality? The present study is the first of a two-part series that seeks to answer that question through a systematic content analysis of how state courts have interpreted and applied *Lawrence*.⁶¹

58. Even before, the *Dobbs* decision was handed down, commentators warned that the fall of *Roe* and *Casey* could endanger LGBTQ+ civil rights. See, e.g., Jeannie Suk Gersen, *If Roe v. Wade Is Overturned, What's Next?*, NEW YORKER (Apr. 17, 2022), <https://www.newyorker.com/magazine/2022/04/25/if-ro-v-wade-is-overturned-whats-next> [<https://perma.cc/X67S-2BQC>] (“Overturning *Roe* would almost certainly fuel the broader fight to get fundamental moral issues out of the realm of federal constitutional rights and under the control of the states.”). After a draft majority opinion in *Dobbs* was leaked and published online, scholars chimed in that these warnings were not alarmist, but rather realistic assessments of the threats to *Lawrence*, *Windsor*, and *Obergefell*. See, e.g., Kate Sosin & Orion Rummeler, *What Happens If Roe v. Wade Is Overturned? LGBTQ+ Legal Experts Are Worried about Civil Rights*, THE 19TH (May 6, 2022), <https://19thnews.org/2022/05/lgbtq-civil-rights-ro-v-supreme-court/> [<https://perma.cc/HC48-N3WV>]; Lauren Vella, *How Roe v. Wade's Reversal Could Affect the LGBT Community*, THE HILL (May 8, 2022, 8:00 AM), <https://thehill.com/news/state-watch/3479755-how-ro-v-wades-reversal-could-effect-the-lgbt-community/> [<https://perma.cc/6MF6-Q9HU>].

59. Black, *supra* note 25, at 330; Buchanan, *supra* note 25, at 1237; Reinheimer, *supra* note 25, at 505. Sparling made the same assertion even after the marriage equality cases in the mid-2010s, perhaps because the observation contained a caveat about *Lawrence*’s limited impact on “jurisprudence in the lower courts,” which would exempt *Windsor* and *Obergefell* from the generalization since they were U.S. Supreme Court decisions. Sparling, *supra* note 25, at 82 (emphasis added).

60. J. Kelly Strader, *Resurrecting Lawrence v. Texas as a Basis for Challenging Criminal Prosecutions*, 25 CRIM. JUST. 30, 31 (2010).

61. For an in-depth discussion about how systematic content analysis is particularly well suited for the study of legal cases, see Mark A. Hall & Ronald F. Wright, *Systematic Content*

This Article presents the results of those analyses for all decisions in civil cases that cited *Lawrence* since it was decided. The research focuses on state courts because *Dobbs* potentially heralds a significant retreat from federal constitutional protections for liberty and privacy rights. Understanding how state courts view these rights may help to provide insights that might inform future LGBTQ+ civil rights efforts—something that has taken on new urgency since *Dobbs* gutted key cases that had cemented privacy, autonomy, and liberty rights for half a century.

Part II contains a brief history of sodomy laws in Section A. Section B discusses how the regulation of sodomy changed in the post-World War II era. Section C provides an overview of the jurisprudential bases of the right to privacy. Section D summarizes how *Bowers v. Hardwick*, the 1986 U.S. Supreme Court case that upheld the constitutionality of sodomy laws, undercut this long line of privacy rights cases.⁶² Section E examines select implications of *Lawrence v. Texas*’s overturning of *Hardwick*.⁶³ Section F discusses the research questions addressed by the present study.

Part III contains details of the current study’s research methodology. Part IV presents the results of the study and Part V evaluates the study’s key findings and their implications before offering some concluding thoughts.

II. THE PATH TO LAWRENCE

A. Sodomy Laws in Historical Context⁶⁴

Most historians agree that “no Western legal or moral tradition—civil or ecclesiastical, European, English, or Anglo-American—has ever attempted to penalize or stigmatize a ‘homosexual person’ apart from the commission of external acts.”⁶⁵ Thus, nonnormative sexual orientation, per se, has not been condemned throughout history. Rather, only particular sexual acts in which members of the same biological sex might

Analysis of Judicial Opinions, 96 CALIF. L. REV. 63, 66 (2008). For an example of this method being used to conduct a study of legal cases, see, e.g., Erin Lutes, James A. Purdon, & Henry F. Fradella, *When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases*, 46 AM. J. CRIM. L. 77 (2019).

62. *Bowers v. Hardwick*, 478 U.S. 186, 192–93 (1986).

63. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

64. Portions of this section are adapted from my prior writings on sodomy laws. Fradella, *supra* note 51, at 280–82; Henry F. Fradella & Kenneth Grundy, *The Criminal Regulation of Sex: The Limits of Morality and Consent*, in *SEX, SEXUALITY, LAW, AND (IN)JUSTICE*, *supra* note 5, at 183, 186–87.

65. John Boswell, *On the History of Social Attitudes Toward Homosexuality from Ancient Greece to the Present*, in *GAYS AND THE MILITARY: THE UNITED STATES VERSUS JOSEPH STEFFAN* 40–48, 40 (Marc Wolinsky & Kenneth Sherrill eds., 1993).

engage—which are usually taken to include both oral and anal intercourse and subsumed under the general term “sodomy”—have been proscribed for centuries.

Sodomy laws have existed since biblical times. Even the term “sodomy” comes from the Bible, in the story of the destruction of Sodom.⁶⁶ Judaic law specifically prohibited sodomy.⁶⁷ There is scholarly literature which suggests that the biblical condemnation of same-sex relations may not be aimed at condemning same-sex relations.⁶⁸ But, even if we accept the text as a condemnation of homosexuality, it is clear that sodomy has not always been considered a crime. For example, sodomy played a large part in ancient Greek and Roman culture since both societies not only condoned acts of sodomy, but encouraged them under certain circumstances.⁶⁹ Under the tradition of *paiderastia* “ordained in law by Solon the lawgiver himself,” male citizens before marrying “had the obligation to take as a lover and pupil a younger male and train him in the arts of war and citizenship.”⁷⁰

With the spread of Christianity in Europe, Western Civilization came to be revolted by homosexuality and punished sodomy as an ecclesiastical offense.⁷¹ Sodomy was made a crime against the state, punishable by death, in the sixteenth century by Henry VIII.⁷² The English law, which used the term “buggery,” was interpreted as prohibiting bestiality (i.e., any sex act in which either a man or women engaged with an animal), anal sex between men and women, and anal sex between men.⁷³ Thus, the early English prohibition on buggery did not extend to

66. *Genesis* 19:1–29.

67. See Arthur E. Brooks, *Note, Doe and Dronenburg: Sodomy Statutes Are Constitutional*, 26 WM. & MARY L. REV. 645, 648 (1985) (citing *Leviticus* 18:22).

68. JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE & HOMOSEXUALITY* (1980); Robert K. Gnuse, *Seven Gay Texts: Biblical Passages Used to Condemn Homosexuality*, 45 BIBLICAL THEOLOGY BULL. 68, 68 (2015).

69. HAVELOCK ELLIS, *THE PSYCHOLOGY OF SEX: A MANUAL FOR STUDENTS* 2798 (1933) (“True love for the Greeks was nearly always homosexual.”); BYRNE R.S. FONT, *HOMOPHOBIA: A HISTORY* 17–28 (2000).

70. Byrne, *supra* note 69, at 19. Byrne cautioned that *paiderastia* not be confused with pedophilia because the former, sanctioned practice involved males who had reached puberty. *Id.*

71. RICHARD DAVENPORT-HINES, *SEX, DEATH AND PUNISHMENT: ATTITUDES TO SEX AND SEXUALITY IN BRITAIN SINCE THE RENAISSANCE* 59 (1990); Brooks, *supra* note 67, at 648.

72. Brooks, *supra* note 67, at 649 (citing 25 Henry VIII, ch. 6 (1533)). Queen Mary repealed the law, but Elizabeth I reinstated it. *Id.* (citing 1 Mary, ch. 1 (1553); 5 Eliz., ch. 17 (1562)); see also William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880–1946*, 82 IOWA L. REV. 1007, 1012 (1997).

73. Eskridge, *supra* note 72, at 1012 (citing *Stafford’s Case*, 77 Eng. Rep. 1318 (1607); *King v. Wiseman*, 92 Eng. Rep. 774 (K.B. 1718)); see also *Lawrence v. Texas*, 539 U.S. 558, 568 (2003).

acts of oral sex.⁷⁴ That changed, however, in 1885, when the mass suppression of sexuality of all types during the Victorian Era led Parliament to make it a crime, punishable by up to two years imprisonment, to be a party “to procur[ing] the commission by any male person of, any act of gross indecency with another male person,” whether in public or private.⁷⁵

The Puritans brought sodomy laws with them to the colonies, but expanded their reach to include other sex acts, including those attendant to “men lying with men” and “women lying with women.”⁷⁶ The original thirteen states maintained laws against buggery (primarily in the south and mid-Atlantic regions) or sodomy (primarily in New England), although violations were not punishable by death in some jurisdictions.⁷⁷ Statutory provisions did not elaborate on the specific acts prohibited, “for this remained the ‘unmentionable’ sin against nature.”⁷⁸ Some laws even used terminology such as “the infamous crime against nature” or the “abominable and detestable crime against nature,”⁷⁹ borrowing from the phrase coined by noted English jurist William Blackstone.⁸⁰

As the United States grew, sodomy laws spread, largely as a function of “the natural law philosophy valorizing procreative sex within marriage.”⁸¹ The meaning of sodomy laws, however, varied over time.⁸² Some states maintained the English approach of having laws that differentiated sodomy (which continued to be understood as targeting bestiality and anal sex), from oral sex (which was punishable under statutes punishing gross indecency, lewd and lascivious conduct, or oral copulation).⁸³ Other states amended their sodomy statutes to include oral

74. Eskridge, *supra* note 72, at 1012 (citing *Rex v. Jacobs*, 168 Eng. Rep. 830 (1817) (holding that even forcible oral sex committed by an adult man upon a seven-year-old boy “did not constitute the offence of sodomy”)).

75. *Id.* at 1026 (citing 48 & 49 Vict. 69, cl. 11 (1885) (Eng.)).

76. Eskridge, *supra* note 72, at 1013 (citing J. HAMMOND TRUMBULL, *THE TRUE-BLUE LAWS OF CONNECTICUT AND NEW HAVEN* 201 (1879)).

77. *Id.*

78. *Id.*

79. See, e.g., JONATHAN NED KATZ, *GAY/LESBIAN ALMANAC* 121–22 (1983); James Hampton, *Homosexuality: An Aggravating Factor*, 28 TUL. J. L. & SEXUALITY 25, 28 n.19 (2019).

80. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *125. Blackstone did not define the term “crime against nature” or delineate its limits.

81. Eskridge, *supra* note 72, at 1015.

82. *Id.* at 1013–15.

83. *Id.* at 1027 (citing, *inter alia*, 1903 Mich. Pub. Acts 198 (gross indecency between males); 1939 Mich. Pub. Acts 148 (gross indecency between females); MASS. GEN. LAWS ch. 436, § 1 (1887) (lewd and lascivious acts); 1915 CAL. STAT. 586, *repealed and replaced by* 1921 CAL. STAT. 848 (containing a similar provision criminalizing oral copulation)).

sex, many of which followed Pennsylvania's lead in detailing the prohibited conduct.⁸⁴ Still other states incorporated oral sex into their prohibitions against sodomy via judicial decisions that reasoned such sexual activity shared with anal sex both the inability to result in procreation and the "unnatural use . . . of body parts designed for breathing and excretion."⁸⁵

Renowned legal scholar, William Eskridge, Jr., explained that sodomy statutes were "the only formal regulations of same-sex intimacy in the United States before the 1880s."⁸⁶ Yet, the laws were almost never invoked for such purposes, at least not against consenting adults.⁸⁷ That quickly changed as the United States grew more urbanized, largely in response to two factors: (1) what the growing middle class viewed as the increasing perversions of city life—especially widespread prostitution;⁸⁸ and (2) a new medical vocabulary of degeneration (i.e., de-evolution or "evolutionary reversion") to refer to people with nonnormative sexual orientations and gender identities, many of whom flocked to growing urban areas where they could avoid the watchful eyes of family and close-knit community members in small towns.⁸⁹ Moral crusaders sounded the

84. *Id.* at 1027–28 (citing Act of June 11, 1879, § 1, 1879 Pa. Laws 156).

85. *Id.* at 1028 (citing, *inter alia*, *Honselman v. People*, 48 N.E. 304 (Ill. 1897)).

86. *Id.* at 1015 ("As far as I can tell, there is no reported case in the United States before 1880 where a sodomy conviction was upheld against a man apparently engaged in consensual intercourse with another man, or a woman engaged in intercourse with another woman.").

87. *Id.*; see also Ellen Ann Anderson, *The Stages of Sodomy Reform*, 23 T. MARSHALL L. REV. 283, 288 (1998) ("Although on the books, these laws were virtually never enforced against consenting adults in private, and virtually never within a marital relationship. Nonetheless, they served as the cornerstone for criminalizing homosexuality and legitimating discrimination against lesbian, gay, and bisexual people."). Eskridge reported that according to 1880 census data, only sixty-three people in the whole country were incarcerated for sodomy, the majority of whom "were males of color in the South." Eskridge, *supra* note 72, at 1015. Of the White prisoners, a third were from abroad. *Id.* Thus, Eskridge concluded that, "To the extent crime-against-nature laws were mechanisms of social control, their objects were people of color and foreign-born individuals, both 'alien' to a nervous white Anglo-Saxon America." *Id.*

88. Eskridge, *supra* note 72, at 1017–28. Eskridge summarized several authoritative sources that explained how, as middle class women became more active in public life, they sought to help women engaged in sex work for whom they had sympathy. *Id.* at 1019. But men, who grew uncomfortable with their wives' participation in politics, business, and the arts, usurped women's more helpful efforts by mobilizing governmental authority (which, of course, they controlled) to prosecute those engaged in prostitution, which included not only women, but also gay and gender-nonconforming men. *Id.*

89. Eskridge cited numerous authorities to explain that the medical establishment at the time labeled those who fell in the latter group, as well as those who sought their services, using terms such as "sexual inverts," "sexual perverts," and "sexual degenerates." *Id.* at 1017, 1020–23 (citing, *inter alia*, RICHARD VON KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS, WITH SPECIAL REFERENCE TO ANTIPATHIC SEXUAL INSTINCT: A MEDICO-FORENSIC STUDY* 581–85 (F.J. Rebman ed., Physicians & Surgeons Book Co. 1931) (1899); Havelock Ellis, *The Study of Sexual Inversion*,

alarm that “‘the degenerate classes,’ those ‘persons of low grade and development, physically and mentally, with a defective understanding of their true relations to the social system in which they live’ [spread] vice, crime, and disease.”⁹⁰ As a result of the ensuing moral panic, vice squads emerged to step up vigorous enforcement of laws criminalizing prostitution and sodomy.⁹¹

Law enforcement zeal to arrest and prosecute morals offenses contributed to what Eskridge termed an “inexorable legal revolution” in the construction and application of sodomy laws.⁹² Police and prosecutors used moral offenses to target persons with nonnormative sexual orientations and gender identities, including those criminalizing sodomy, lewd and lascivious conduct, indecent exposure, solicitation, public sexual indecency, obscenity, and even new crimes like appearing in public dressed in a manner incongruous with prevailing gender norms.⁹³ Moreover, public order offenses, like disorderly conduct, loitering, and vagrancy were vigorously used not only to support general anti-prostitution efforts, but also in ways that targeted “male degeneracy” in ways that “created a multiplicity of elastic offenses that any kind of sexual nonconformist could be charged with violating.”⁹⁴

Targeted enforcement of morals offenses against LGBTQ+ people increased significantly in the early- to mid-twentieth century, partly as a function of the rise of psychiatry.⁹⁵ In the United States, society—including the legal establishment—largely misinterpreted Sigmund Freud’s theory of psychosexual development⁹⁶ as evidence that

12 MED.-LEGAL J. 148 (1894–1895); G. Frank Lydston, Clinical Lecture: *Sexual Perversion, Satyriasis and Nymphomania*, 61 MED. & SURGICAL REP. 253, 254 (1889)).

90. *Id.* at 1024 (quoting G. FRANK LYDSTON, *THE DISEASES OF SOCIETY (THE VICE AND CRIME PROBLEM)* 37 (1905)). Notably, this moralist panic was imbued with racism. *Id.* (explaining the “sexual perversions” were associated with “prehistoric ‘troglodytes,’ barnyard animals, prostitutes, and people of color” (internal citations omitted)).

91. *Id.* at 1025–26.

92. *Id.* at 1026.

93. *Id.* at 1032–38, 1040, 1067–70. In fact, obscenity laws were expanded to prohibit possession of “any indecent or lewd book, picture or other thing whatever of an immoral or scandalous nature.” *Id.* at 1070 (quoting Chicago, Ill., Charter and Ordinances ch. XXXVIII, art. I, § 6 (1856)).

94. Eskridge, *supra* note 72, at 1039.

95. *Id.* at 1054–59.

96. Freudian theory offered one of the first fully-developed theories of sexual orientation. *Id.* at 1058. Contrary to the social construction of same-sex attraction as evidence of psychopathology, Freud did not see “the inverted” as either “degenerates” (in the neurological, evolutionary, or popular-use sense) or as a symptom of mental illness. Rather, he viewed all humans an innately bisexual who, as a function of normal development, mature into socially appropriate unisexual orientations. SIGMUND FREUD, *THREE ESSAYS ON SEXUALITY* 9–11 (A.A.

“homosexuals” posed significant social threats, especially to minors.⁹⁷ The social construction of gay men, in particular, as child molesters and sexual psychopaths led to “draconian sanctions against same-sex intimacy.”⁹⁸ As the myth of gay predators became woven into the fabric of society and its collective conscience, the need for social control of nonnormative sexual orientations and gender identities grew exponentially.⁹⁹ It should be unsurprising, then, that all U.S. jurisdictions had adopted sodomy laws in their criminal codes by the middle of the twentieth century.¹⁰⁰ On their face, these laws were neutral, such that they applied to people of all sexes, sexual orientations, and gender identities. Enforcement of these laws, however, disproportionately targeted consensual acts between members of the same sex.¹⁰¹ Indeed, there is little

Brill trans., Global Grey e-book ed. 2021) (1905), <https://www.globalgreybooks.com/ebooks1/sigmund-freud/three-essays-on-the-theory-of-sexuality/three-essays-on-the-theory-of-sexuality.pdf> [<https://perma.cc/8BCT-QKNH>]. But for those who early childhood development did not result in successful resolution of the either the Oedipal complex (for males) or Electra complex (for females) due to environmental factors (like parenting styles) or biological factors (natural variation in hormone levels), *Id.* at 10–12, Freud viewed same-sex attraction as nature outcome. *Id.* at 49–55.

97. Eskridge, *supra* note 72, at 1058 (explaining that key figures in U.S. psychiatry at the time “emphasized features of Freud’s theories that suited them, such as the functional (curable) rather than hereditary (incurable) causes of perversion, and deemphasized other features, such as Freud’s relatively pro-sex hedonism”).

98. *Id.* at 1059 (citing Estelle B. Freedman, “Uncontrolled Desires”: *The Response to the Sexual Psychopath, 1920–1960*, J. AM. HIST., June 1987, at 83).

99. *Id.* at 1068–69.

100. *Bowers v. Hardwick*, 478 U.S. 186, 193–94 (1986) (“[U]ntil 1961, all [fifty] States outlawed sodomy, and today, [twenty-four] States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.”). For a comprehensive listing of sodomy laws throughout U.S. history, see WILLIAM N. ESKRIDGE, DISHONORABLE PASSIONS 388–407 (2008).

101. Eskridge, *supra* note 72, at 1080–83; Marie-Amélie George, *The Harmless Psychopath: Legal Debates Promoting the Decriminalization of Sodomy in the United States*, 24 J. HIST. SEXUALITY 225, 236 (2015). Police raids of “spaces for same-sex socializing and cruising . . . [including] music halls, cafes and restaurants, private flats, public parks, streets, public toilets, the local YMCA lobby, theatres, public baths, and subways” become commonplace, starting in 1910. Eskridge, *supra* note 72, at 1080. Such police practices continued, largely unabated, through the post-Stonewall era, even as organizations aimed at LGBTQ+ civil rights grew exponentially and legal reforms to decriminalize sodomy accelerated. Matt Baume, *51 Years After Stonewall, Police Raided Two Gay Bars Aiding Protestors*, THEM (June 5, 2020), <https://www.them.us/story/police-raided-two-gay-bars-aiding-george-floyd-protestors> [<https://perma.cc/34PR-RDGL>] (detailing how police raided gay bars in Des Moines and Raleigh because people in them were providing medical care to people injured in protests against the policing killing of George Floyd); Jacob Ogles, *30 Infamous Police Raids of Gay Bars and Bathhouses*, THE ADVOCATE (Mar. 1, 2017), <https://www.advocate.com/politics/2017/3/01/30-infamous-police-raids-gay-bars-and-bathhouses#media-gallery-media-29> [<https://perma.cc/3EGW-68HN>] (documenting a series of police raids between 1903 and 2016).

question that despite their wording, sodomy laws “in fact apply only to homosexual sodomy.”¹⁰²

B. The Competing Values During the Era of Kinsey and McCarthy

During the late 1940s and early 1950s, pioneering research by Alfred Kinsey and his colleagues began to dispel many of the then-common misconceptions about human sexual behavior, including sexual activity between people of the same sex.¹⁰³ Kinsey’s groundbreaking, albeit controversial work, stirred “new popular interest in the status of our sex law”¹⁰⁴ that presented “a rare opportunity for re-examining a portion of the criminal law in the light of a factual study of the relevant social behavior.”¹⁰⁵ The supreme courts of Utah and Hawai’i both questioned the legitimacy of sodomy laws in light of the Kinsey studies, although neither court voided their state laws criminalizing such acts.¹⁰⁶ Several state commissions similarly expressed concerns about laws criminalizing certain consensual sex acts.¹⁰⁷ This led to a handful of states decreasing the penalties for sodomy,¹⁰⁸ removing consensual sodomy from the scope

102. RICHARD A. POSNER, *SEX AND REASON* 291 (1994).

103. See ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 392, 895 (1948) (reporting that 37% of males had at least one sexual encounter with another male); ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953) (reporting that 13% of females at least one sexual encounter with another female).

104. Note, *Post-Kinsey: Voluntary Sex Relations as Criminal Offenses*, 17 U. CHI. L. REV. 162, 163 (1949–50). In arguing for the decriminalization of several consensual sex offenses, the editors of the *University of Chicago Law Review* noted that the Kinsey report indicated a “substantial proportion”—perhaps as high as 95%—of men between sixteen and sixty was “engaging in illicit sex conduct at any given time.” *Id.* at 169–70.

105. *Id.* at 162; see also George, *supra* note 101, at 227 (explaining the shift from “the widespread implementation of sexual psychopath statutes to the decriminalization of sodomy . . . emerged out of debates around sexual psychopath laws and Alfred Kinsey’s reports on male and female sexual behavior, which questioned many of the assumptions underlying both sexual psychopath statutes and criminal code provisions on consensual sodomy”).

106. *State v. Cooper*, 201 P.2d 764, 767 (Utah 1949) (“Congenital homosexuals, and to a certain extent, psychopathic homosexuals, may be wholly irresponsible for their homosexual acts. They are motivated by biological and physiological factors which may be beyond their power to combat or control. And while such persons cannot be left to prey upon society, and particularly upon young children, the wisdom of declaring their conduct to be criminal may be seriously questioned . . .”); *Territory v. Bell*, 43 Haw. 23 (1958) (“There is much criticism of making a crime out of homosexual or other unnatural sexual relations, this criticism being particularly widespread in England at this time, but the remedy, if any, is a matter for the legislature.”).

107. Marie-Amélie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 YALE L. & POL’Y REV. 83, 106 (2017) (“Commissions in Illinois, Pennsylvania, Michigan, New Jersey, New York, and Virginia all questioned whether—in light of Kinsey’s findings—criminal laws could effectively be enforced.”).

108. California abolished its twenty-year maximum sentence and replaced it with an indeterminate sentence as judicially imposed. 1952 Cal. Laws ch. 24, p. 382. Nevada reduced the

of sexual psychopath laws,¹⁰⁹ or removing “sexual perverts” from the ambit of sterilization laws.¹¹⁰

Importantly, the American Law Institute (ALI) omitted sodomy from its highly influential Model Penal Code,¹¹¹ noting the “absence of harm to the secular interests of society occasioned by atypical sexuality between consenting adults.”¹¹² The ALI recognized that its decision to omit “deviate sexual intercourse” occurring in private between consenting adults represented a “fundamental departure from prior law.”¹¹³ As a function of Illinois reorganizing its criminal laws by adopting nearly all of Model Penal Code in 1961, it became the first state to decriminalize sodomy.¹¹⁴ Idaho enacted a similar statutory overhaul, “but when the legislature discovered it had repealed the sodomy law, it repealed the entire reform package instead.”¹¹⁵

Some states, however, *increased* their penalties for sodomy at that time, largely in response to the renewed moral panic over “homosexuality” that was attendant to Cold War politics, which viewed all types of nonconformity as threats to national security.¹¹⁶ Conservative

minimum penalty from five years, see NEV. REV. LAWS § 6459 (1911), to one year, although the maximum penalty remained a potential life sentence. 1951 NEV. LAWS ch. 318, p. 524–25 (codified at NEV. REV. STAT. § 2010.190 (1951); compare *Ex parte Benites*, 140 P. 436, 436 (Nev. 1914) (citing then-applicable statute and upholding conviction for its violation), with *Hogan v. State*, 441 P.2d 620, 621 (Nev. 1968) (same). New York, for example, reduced sodomy between consenting adults from being a felony, see N.Y. PENAL LAW § 690 (1909), to a misdemeanor. See 1950 N.Y. LAWS ch. 525, § 151, p. 1271, 1278–79; see also *People v. Randall*, 203 N.Y.S.2d 372, 373 (1960) (noting the change to the state’s sodomy statute), *aff’d*, 9 N.Y.2d 413, 174 N.E.2d 507 (1961).

109. George, *supra* note 107, at 106–07 (citing 1955 Ill. LAWS 1144, 1144–46).

110. 1909 CAL. STATS., ch. 720, § 1, pp. 1093–94, *replaced by* 1913 CAL. STATS. ch. 363, § 1, pp. 775–76, *partially repealed and replaced by* 1951 CAL. STATS. ch. 552, § 1, pp. 1706–07 (removing sexual “perversion” as a basis for sterilization).

111. For insights into the Model Penal Code’s impact, see Herbert L. Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594 (1963); Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319 (2007).

112. MODEL PENAL CODE § 213.2 cmt. at 369 (AM. L. INST., Proposed Official Draft 1962).

113. *Id.* For an in-depth discussion of the Code’s treatment of morals offenses, including sodomy, see Louis B. Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 674 (1963) (noting that the Kinsey studies contributed to the views expressed in the comments on tentative drafts of the Model Penal Code).

114. Act of July 28, 1961, § 35-1, 1961 Ill. LAWS 1983, 2044 (codified at 983 ILL. COMP. STAT. 5/11-2 (1962) (repealed 1984); see also George, *supra* note 107, at 109.

115. *Getting Rid of Sodomy Laws: History and Strategy that Led to the Lawrence Decision*, ACLU, <https://www.aclu.org/other/getting-rid-sodomy-laws-history-and-strategy-led-lawrence-decision> [https://perma.cc/A56D-TTUZ] (last visited Aug. 31, 2022).

116. For instance, Congress enacted a sodomy law governing the District of Columbia that included oral sex and provided for a penalty of up to ten years in prison. Pub. L. No. 615-428, 62 Stat. 346, 347 (1948). Both Arizona and Wyoming increased their penalties for violating their

politicians, especially Joseph McCarthy, crusaded against communism and homosexuality.¹¹⁷ Not only did this cause some states to increase criminal punishments for select moral offenses, but also resulted in the “Lavender Scare”—the widespread persecution of LGBTQ+ people in governmental jobs.¹¹⁸ Perhaps as a result of the antigay sentiments of the era, no states other than Illinois repealed their sodomy laws between 1950 and 1969 as applied to private acts between consenting adults, despite Kinsey’s research and advocacy.¹¹⁹ Most jurisdictions—including the federal government—refocused enforcement efforts in ways that targeted gay men, in particular.¹²⁰ Such anti-LGBTQ+ animus was not limited to how police and prosecutors enforced consensual sex crimes. Indeed, it might best be exemplified by how legislatures changed sodomy laws themselves. Consider that in response to the work of Kinsey, Wilhelm Reich, Masters and Johnson, and other sex researchers, society became more open to sexuality in general during the sexual revolution of 1960s

sodomy laws. ARIZ. CODE ANN. § 43–406 (1939), *revised by* 1951 Laws Ariz. ch. 134, § 1 (codified at ARIZ. REV. STAT. § 13–651 (1955) (changing the name of the crime from sodomy to the “infamous crime against nature” and increasing the punishment from a term of incarceration from one to five years to a term of five to twenty years); Laws Wyo. 1890, ch. 73, p. 127 (five-year penalty), *amended by* 1955 Wyo. Laws ch. 209, p. 230 (codified at WYO. COMP. STAT. § 9–520) (1957)) (increasing penalty to a maximum term of imprisonment of ten years).

117. George, *supra* note 101, at 230 (explaining that governmental “investigations into security risks and disloyalty targeted homosexuals in particular, based on the belief that homosexuals lacked emotional stability and were susceptible to blackmail”); *see also* JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970*, at 40–41 (2d ed. 1998); *see generally* DAVID M. OSHINSKY, *A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY* (1983) (examining McCarthy’s life and the impact of his politics).

118. *See* DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (2004) (exploring McCarthy’s pivotal role in the long-lasting search for and purge of homosexuality from the ranks of U.S. government).

119. In fact, despite law reform commissions in many states successfully pushing for adoption of the Model Penal Code, opposition to the decriminalization of sodomy from law enforcement and religious organizations caused most state legislatures to refuse to exclude criminal prohibits against sodomy as a function of not wanting to be seen as tolerating, if not endorsing, homosexuality. William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 662 (1999). As a result, “[n]o other state decriminalized consensual sodomy until Connecticut did so in its 1969 criminal code revision.” *Id.* at 663.

120. George, *supra* note 101, at 231 (“The widespread depiction of homosexuals as national security risks and moral pervers gave police forces around the country a license to harass homosexual men and women, leading to brutal crackdowns throughout the 1950s”); James Gleason, *LGBT History: The Lavender Scare*, NAT’L LGBT CHAMBER OF COM. (Oct. 3, 2017), <https://www.nglcc.org/blog/lgbt-history-the-lavender-scare> [<https://perma.cc/F3SN-HTBL>] (reporting that when the United States Park Police created a program of enforcement aimed at the elimination of “sex perversion” in 1947, at least 500 five hundred people were arrested and seventy-six were charged).

and 1970s.¹²¹ As a result, a number of states altered their statutes so that acts of sodomy between opposite-sex partners (i.e., “heterosexual sodomy”) would be beyond the reach of the criminal law, but acts between members of same-sex remained criminalized.¹²² A constitutional attack on one such sodomy law during the 1980s led to one of the most shameful U.S. Supreme Court decisions of the twentieth century: *Bowers v. Hardwick*.¹²³

C. *The Right to Privacy Leading Up to Bowers v. Hardwick*

Bowers v. Hardwick held that the right to privacy did not protect consensual sexual acts of sodomy between members of the same sex.¹²⁴ The 1986 decision was not the first, however, to reject a constitutional

121. Jeffrey Escoffier, *The Sexual Revolution, 1960–1980*, THE GLBTQ ENCYCLOPEDIA PROJECT ARCHIVES 2 (Claude Summers ed., 2004), http://www.glbtqarchive.com/ssh/sexual_revolution_S.pdf [<https://perma.cc/6XV4-GCBQ>]; see generally DAVID ALLYN, MAKE LOVE, NOT WAR—THE SEXUAL REVOLUTION: AN UNFETTERED HISTORY (2016) (exploring the full scope of the sexual revolution).

122. See, e.g., ARK. STAT. ANN. § 41-1813 (1975), *invalidated by* *Jegley v. Picado*, 80 S.W.3d 332, 350, 353–54 (2002) (finding the law violated the state constitutional guarantees of privacy and equal protection); KAN. STAT. ANN. § 21-3505 (1969); KY. REV. STAT. ANN. § 510.100 (1974), *invalidated by* *Commonwealth v. Wasson*, 842 S.W.2d 487, 496, 501–02 (1992) (finding the law violated the state constitutional guarantees of privacy and equal protection); MO. ANN. STAT. § 566.090(3) (1977); TEX. PENAL CODE ANN. § 21.06 (1973). In the mid-1980s, the Court of Criminal Appeals of Oklahoma limited its facially neutral law to criminalizing sodomy only between members of the same sex. *Post v. State*, 717 P.2d 1151, 1152 (Okla. 1986) (holding OKLA. STAT. § 21-886 could not constitutionally reach “private, consensual and non-commercial heterosexual acts between adults”).

123. 478 U.S. 186 (1986). I previously referred to *Bowers v. Hardwick* as “the *Plessy v. Fergusson* of our time.” Fradella, *supra* note 4, at 606 (citing *Plessy v. Fergusson*, 163 U.S. 537, 551–52 (1896) (permitting segregation under the racist “separate but equal” doctrine)); see also Kris Franklin, *Homophobia and the “Matthew Shepard Effect” in Lawrence v. Texas*, 48 N.Y.L. SCH. L. REV. 657, 691 (2004) (equating the homophobia in *Bowers* to the racism that “undergird[ed] segregation” before *Brown v. Board of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483 (1954), overturned *Plessy*). For other critiques of the homophobia in *Bowers* and the flawed reasoning in the decision, see Mary C. Dunlap, *Gay Men and Lesbians Down by Law in the 1990’s USA: The Continuing Toll of Bowers v. Hardwick*, 24 GOLDEN GATE U.L. REV. 1, 10 (1994) (“The inescapable conclusion is that the result in *Hardwick* is about homophobia, and, given that cause of the result, playing with the facts will not change the outcome; only a frontal address of the homophobia will do so.”); Janet E. Halley, *Reasoning About Sodomy: Acts and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1770 (1993) (describing the decision as an “exercise of homophobic power”); Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 36 (2005) (“The *Bowers* decision is highly flawed and harmful to justice claims because it rests on explicitly homophobic language, construes liberty in an extremely narrow fashion, contains gross misstatements of history, and permits states to satisfy rational basis review by simply asserting that their laws advance some undefined, ambiguous conception of “morality.”).

124. *Bowers*, 478 U.S. at 191–96.

challenge to sodomy laws. In 1926, for example, the Wisconsin Supreme Court upheld a sodomy conviction of a woman for allegedly engaging in the act with a man in her home. After determining that the police were lawfully in the woman's apartment, the court dispensed with her challenge to the law saying that "uphold[ing] defendant's contention would seriously embarrass the enforcement of law, and license the defendant and her kind to continue their abominable practices under the protection of the law."¹²⁵ In 1944, an Arizona man specifically challenged his sodomy conviction for engaging in oral sex with another man on the grounds that "the privacy of his home" had been invaded.¹²⁶ The Arizona Supreme Court simply ignored his argument when upholding his conviction.¹²⁷ Unlike in these early cases, the outcome in *Bowers v. Hardwick* was surprising in light of a series of U.S. Supreme Court cases concerning the right to privacy. The remainder of this section traces the jurisprudence of this constitutional right as a backdrop to *Bowers*.

1. Early Origins of the Right to Privacy

The right to privacy is not specifically enumerated in the U.S. Constitution; in fact, the word "privacy" appears nowhere throughout the document.¹²⁸ Commentors often cite an influential *Harvard Law Review* article that Samuel D. Warren and Louis D. Brandeis authored in 1890 in which they advocated for recognition of a right to privacy that encompasses the "right to be let alone," largely in response to the press availing themselves of then-new technologies that allowed tabloid

125. *Edwards v. State*, 208 N.W. 876, 877 (Wis. 1926).

126. *Faber v. State*, 521 P.2d 671, 673 (Ariz. 1944).

127. Courts in other states, including California, Iowa, Minnesota, and Oregon, also upheld sodomy convictions without regard for the privacy implications of doing so. *See, e.g.*, *State v. Edwards*, 412 P.2d 526, 527, 528 (Or. 1966) (upholding sodomy conviction after a neighbor reported the defendant, a person assigned the male gender at birth, who used the name Joyce and dressed in women's clothing, living with a man whom Joyce married in a civil ceremony); *People v. Manicap*, 260 P.2d 137, 137 (Cal. 1953) (upholding convictions of women seen entering a motel room and subsequently seen by police because they had "pushed the blind aside" to see them in bed together); *State v. Nelson*, 271 N.W. 114, 115 (Minn. 1937) (upholding convictions based on a "confession" contained in letters that a postal inspector had opened); *People v. Funtas*, 182 P. 785, 785 (Cal. 1919) (upholding conviction obtained after a mother "caused to be bored two auger-holes in a wall" of her son's bedroom, allowing her to witness the act); *State v. Gage*, 116 N.W. 596, 596–97 (Iowa 1908) (upholding conviction of man who witnesses, peering through a keyhole, observed engaging in oral sex while in a locked water closet on a train).

128. *See generally* U.S. CONST., *passim*.

journalists to capture and publish salacious photos.¹²⁹ Others have suggested that judicial recognition of the right to privacy in the United States has roots that predate the article by Warren and Brandeis.¹³⁰ For instance, in *Union Pacific Railway Co. v. Botsford*, the Court upheld a determination that courts cannot compel surgical examinations in personal injury actions of those claiming injuries.¹³¹ Although the Court did not specifically reference privacy, per se, it clearly was concerned with bodily autonomy as illustrated by its statement that “[t]he right to one’s person may be said to be a right of complete immunity; to be let alone.”¹³² Indeed, the Court invoked the very same language from a leading torts treatise by Judge Thomas M. Cooley that Warren and Brandeis had quoted in their article the year before *Botsford* was decided.¹³³

Professor Eugene McCarthy argued that *Boyd v. United States* was one of the first U.S. Supreme Court decisions to “tackle[] the right to privacy from a constitutional perspective.”¹³⁴ That case invalidated a statutory provision allowing for court orders, akin to subpoenas *duces tecum*, compelling the production of customs invoices that the government could use to build criminal cases.¹³⁵ In so holding, the Court wrote:

[I]nvasions on the part of the government and its employees of the sanctity of a man’s home and privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty[,] and private property. . . .¹³⁶

129. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS, OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (2d ed. 1888)).

130. Eugene McCarthy, *In Defense of Griswold v. Connecticut: Privacy, Originalism, and the Iceberg Theory of Omission*, 54 WILLAMETTE L. REV. 335, 339 (2018) (citing *Boyd v. United States*, 116 U.S. 616 (1886)).

131. 141 U.S. 250, 251 (1891). The majority in *Roe v. Wade* cited *Botsford* as “perhaps” its earliest privacy rights case. 410 U.S. 113, 152 (1973).

132. *Botsford*, 141 U.S. at 251 (quoting *Cooley*, *supra* note 129, at 29).

133. *Id.*; see also *Cooley*, *supra* note 129, at 29.

134. McCarthy, *supra* note 130, at 339 (citing *Boyd*, 116 U.S. 616).

135. *Boyd*, 116 U.S. at 636–38. Of course, *Boyd*’s view regarding the compelled production of evidence has been repudiated. See, e.g., *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 301 (1967). Still, *Boyd*’s recognition of privacy rights stemming from both the Fourth and Fifth Amendments illustrates the notion of rights via constitutional “penumbras” long predates the Court’s explicit use of such an approach in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

136. McCarthy, *supra* note 130, at 339 (quoting *Boyd*, 116 U.S. at 630).

Brandeis was confirmed as an associate Justice on the U.S. Supreme Court in 1916.¹³⁷ During his tenure, he participated in two cases that turned out to be key precedents in subsequent privacy cases despite the fact that the word “privacy” is not used in either case. In *Meyer v. Nebraska*, the Court reversed the conviction of a school teacher who had provided foreign language instruction in violation of a state law prohibiting the teaching of foreign languages to grammar school students.¹³⁸ In invalidating the law on due process grounds, the Court said that the Fourteenth Amendment’s protection of liberty,

denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹³⁹

Applying such reasoning, the Court found that the restriction on foreign language instruction interfered with the protected liberty interests of teachers’ rights to instruct and parents’ rights to direct the upbringing and education of their children.¹⁴⁰ Two years later in *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, the Court applied the same logic when it unanimously invalidated an Oregon law that mandated children attend public schools, rather than private or parochial schools.¹⁴¹

Thirty-eight years after the publication of his highly influential article with Warren, Brandeis again used the phrase “the right to be left alone” in his dissent from an opinion in *Olmstead v. United States*, which upheld the warrantless use of telephone wiretaps.¹⁴² His approach ultimately prevailed years after his death,¹⁴³ perhaps due, in part, to Brandeis’ efforts to persuade other Justices to recognize the right to privacy as a way of protecting “personal liberty rights against government intrusion.”¹⁴⁴

137. *Louis D. Brandeis, 1916–1939*, SUP. CT. HIST. SOC’Y, <https://supremecourthistory.org/associate-justices/louis-d-brandeis-1916-1939/> [https://perma.cc/EGS6-9WJ2].

138. 262 U.S. 390, 396–97, 403 (1923).

139. *Id.* at 399.

140. *Id.* at 400.

141. 268 U.S. 510, 530, 534–35 (1925).

142. See *Olmstead v. United States*, 277 U.S. 438, 466, 478 (1928) (Brandeis, J., dissenting), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967); *Id.* at 466.

143. See *Katz*, 389 U.S. at 350.

144. McCarthy, *supra* note 130, at 341 (citing *Katz*, 389 U.S. at 350).

Professor McCarthy noted that Brandeis' efforts to get the Court to recognize a right to privacy even extended to him selecting and vetting William O. Douglas, another privacy rights proponent, as his successor on the Court.¹⁴⁵ Douglas assumed the mantle, using his dissents in several key cases to inform his fellow Justices about privacy rights.¹⁴⁶ A modified version of the Brandeis/Douglas approach to the right to privacy eventually won the day in the landmark 1965 case of *Griswold v. Connecticut*.¹⁴⁷

2. *Griswold v. Connecticut*

Griswold invalidated a Connecticut statute that prohibited the use of contraceptives, even by married couples.¹⁴⁸ Unlike in his previous dissents in which Douglas moored the right to privacy in the Fourteenth Amendment's protection of liberty, in *Griswold*, Douglas grounded the

145. *Id.* at 341–43 (citing Richard A. Posner, *The Anti-Hero*, NEW REPUBLIC, Feb. 24, 2003, at 27 (book review)).

146. *Id.* at 343–44 (citing *Poe v. Ullman*, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting from a dismissal of a declaratory judgment action brought by married couples who challenged a law preventing them from accessing contraceptives on the basis that they lacked standing and, in doing so, emphasizing that such laws were “an invasion of the privacy that is implicit in a free society”); *On Lee v. United States*, 343 U.S. 747, 762–63 (1952) (Douglas, J., dissenting from upholding the warrantless use of a wire by an undercover agent); *Beauharnais v. Illinois*, 343 U.S. 250, 285 (1952) (Douglas, J., dissenting from upholding a racist pamphlet as libelous on First Amendment grounds and, in doing so, equating the freedom of speech to the right to privacy as “equally sacred”); *Pub. Utils. Comm’n v. Pollak*, 343 U.S. 451, 467–69 (1952) (Douglas, J., dissenting from an opinion upholding a private bus company’s ability to broadcast a radio station for compensation on the ground that passengers were a “captive audience” whose rights to privacy were infringed by being forced to listen to the radio station’s message)).

147. 381 U.S. 479, 481–86 (1965). It should be noted that prior to *Griswold*, the Court issued at least three two decisions that broadly interpreted the liberty interests protected by substantive due process. First, in *Skinner v. Oklahoma*, 316 U.S. 535, 541–43 (1942), the Court invalidated a law that compelled the sterilization of people convicted of three felony offenses from a select list. Although technically decided on equal protection grounds (due to the nature of the included and excluded felony offenses), *Skinner* used language implicating substantive due process. *Id.* at 541. By referencing marriage and procreation as “basic civil rights” and by classifying infringements of these rights as deprivations of “basic liberty,” the Court recognized unenumerated rights that were directly at issue in subsequent right to privacy cases. *Id.* Then, in both *Kent v. Dulles*, 357 U.S. 116, 125, 130 (1958), and *Aptheker v. Secretary of State*, 378 U.S. 500, 505, 517 (1964), the Court invalidated restrictions on the right to travel. Like the right to privacy, the right to travel is not specified in the U.S. Constitution. These cases, therefore, illustrate the Court’s willingness to protect unenumerated rights that implicate personal liberty. “In the light of *Skinner*, *Kent*, and *Aptheker*, *Griswold* was, in effect, a decision waiting to happen.” G. Sidney Buchanan, *The Right of Privacy: Past, Present, and Future*, 16 OHIO N.U. L. REV. 403, 418 (1989) (emphasis added).

148. *Griswold*, 381 U.S. at 485–86.

right to privacy in the penumbral emanations of specific, enumerated constitutional rights:

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

* * *

We have had many controversies over these penumbral rights of “privacy and repose.” These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.¹⁴⁹

Douglas’ majority opinion went on to conclude that the anticontraception law at issue in the case violated the right to privacy in ways that could intrude into the “sacred precincts of marital bedrooms.”¹⁵⁰ As the next

149. *Id.* at 484–85 (internal citations omitted).

150. *Id.* at 485. *Griswold* sparked a backlash among conservatives to which some commentators trace the contemporary movement for originalism. McCarthy, *supra* note 130, at 348 (citing SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* 57 (1999)). Originalism is a doctrine which posits words should be interpreted in accordance with their commonly understood meanings at the time they were written. Put differently, those who subscribe to originalism adhere to a “canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect.” ORIGINALISM, BLACK’S LAW DICTIONARY (11th ed. 2019). Because the Constitution neither specifically guarantees a right to privacy nor prohibits any ban on access to contraceptives, originalists—including the two dissenters in *Griswold*, Justices Hugo Black and Potter Stewart—maintain that the challenge to the anticontraceptive law at issue in *Griswold* “does not raise a constitutional issue and is not a matter upon which the Court is authorized to make a determination.” McCarthy, *supra* note 134, at 349–50 (citing *Griswold*, 318 U.S. at 507–27)).

There are originalists, however, who defend *Griswold* and its logic. McCarthy, for instance, argued that the right to privacy was “foremost . . . among self-evident liberties” that the public understood at the time the framers were striving to form a free society. *Id.* at 360 (quoting JOHN W. JOHNSON, *GRISWOLD V. CONNECTICUT: BIRTH CONTROL AND THE CONSTITUTIONAL RIGHT OF PRIVACY* 192 (2005)). Thus, he concluded that the “*Griswold* opinion—and its articulation of the constitutional right to privacy—adheres meticulously to the tenets of judicial originalism and

section of the Article illustrates, *Griswold* was the first in an important line of cases the Court decided in the eight-year period between 1965 and 1973 that either explicitly turned on the right to privacy or its related guarantee of liberty under the Fourteenth Amendment.

3. *Loving, Stanley, Eisenstadt, and Roe*

Two years after *Griswold*, the Court issued the landmark decision of *Loving v. Virginia*, which invalidated the nation's then-remaining miscegenation laws on both substantive due process and equal protection grounds.¹⁵¹ The Court did not use the word "privacy" in its unanimous decision, but it nonetheless captured dimensions of the right to privacy when it held that laws banning interracial marriage "deprive all the State's citizens of liberty without due process of law" because "the freedom to marry or not marry . . . resides with the individual and cannot be infringed by the State."¹⁵²

Two years after *Loving*, the Court decided *Stanley v. Georgia*.¹⁵³ The case overturned a law that had criminalized the "private possession of obscene material."¹⁵⁴ The Court reasoned that, although there are important governmental interests at stake in regulating the creation, distribution, and sale of materials that may be obscene and, therefore, not subject to First Amendment protections, the same is not true regarding the possession of such materials in the privacy of one's own home.¹⁵⁵ Importantly, the case was not strictly decided on privacy grounds, as it

accurately captures the original public meaning of the Constitution." *Id.* at 359; see also Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1162 (1987) (explaining that the Ninth Amendment was included in the Bill of Rights to allay the concerns of many of the Founders were opposed to enumerating specific rights for fear that doing so "would inaccurately imply that the rights themselves were limited to those enumerated"). But see Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 259-65 (1983) (arguing that the Ninth Amendment was intended to protect rights contained in state law (i.e., state constitutions, statutes, and common law) and, therefore, cannot appropriately form an independent federal basis for invalidating state laws).

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

152. *Id.* As law professor Sydney Buchanan noted, the *Loving* opinion did not directly link its holding to the right to privacy or even cite the *Griswold* decision, which was then just two years old. Buchanan, *supra* note 147, at 454. But the Court subsequently made that link explicit in *Zablocki v. Redhail*, in which the Court cited *Griswold* in support of its statement that "the right to marry is part of the fundamental 'right to privacy.'" 434 U.S. 374, 384 (1978) (invalidating a law that required people paying child support to getting married without first obtaining permission from a judicial officer)).

153. 394 U.S. 557, 568 (1969).

154. *Id.* at 559.

155. *Id.* at 565.

presented concerns under the First and Fourth Amendments, as well.¹⁵⁶ With regard to the former, the Court emphasized that “[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”¹⁵⁷ Still, despite the confluence of different constitutional rights, the location of defendant’s possession of obscene movies “in the *privacy* of [his] own home” contributed an “added dimension” to the case.¹⁵⁸

Three years later, the Court extended *Griswold*’s central holding to unmarried couples in *Eisenstadt v. Baird*.¹⁵⁹ Although the Court stated in *Eisenstadt* that the right to privacy includes the individual’s interest in making certain decisions that fundamentally affect his or her person “free from unwarranted governmental intrusion,”¹⁶⁰ the Justices did not rely on due process for their decision; rather, *Eisenstadt* was decided on equal protection grounds.¹⁶¹

One year after its decision in *Eisenstadt*, the Court extended the right to privacy to “include[] the abortion decision” in *Roe v. Wade*.¹⁶² Relying on a “line of decisions” recognizing a constitutional right to personal privacy—including *Botsford*, *Boyd*, *Meyer*, *Pierce*, *Griswold*, *Loving*, *Stanley*, and *Eisenstadt*¹⁶³—*Roe* invalidated laws prohibiting abortions during the first trimester of pregnancy.¹⁶⁴ By contrast, the Court reasoned that the State’s interest in the protection of “the potentiality of human life” during the third trimester of pregnancy (i.e., after a fetus is viable),¹⁶⁵ permits the regulation and even proscription of abortions “except when it is necessary to preserve the life or health of the mother.”¹⁶⁶ The Court subsequently abandoned the trimester framework in *Planned Parenthood*

156. *Id.* at 572.

157. *Id.*

158. *Id.* at 564 (emphasis added).

159. 405 U.S. 438, 453 (1972).

160. *Id.*

161. *Id.* at 453 (“[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).

162. 410 U.S. 113, 154 (1972), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

163. *Id.* at 152–53; *see generally supra* notes 131–162 and accompanying text.

164. *Roe*, 410 U.S. at 162–65.

165. *Id.* at 162.

166. *Id.* at 164.

of *Southeastern Pennsylvania v. Casey*,¹⁶⁷ but nonetheless reaffirmed *Roe*'s core holding that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."¹⁶⁸ Although the Supreme Court overruled *Roe* and *Casey* in *Dobbs v. Jackson Women's Health Organization*,¹⁶⁹ those cases were "good law" at the time the Court reviewed and upheld the constitutionality of Georgia's sodomy law in *Bowers v. Hardwick*.¹⁷⁰

D. Sodomy Laws and Bowers v. Hardwick's Retreat from the Right to Privacy

In 1986, the U.S. Supreme Court strikingly departed from the line of privacy cases previously discussed when it notoriously upheld the constitutionality of sodomy laws in *Bowers v. Hardwick*.¹⁷¹ The factual background of the case suggests that homophobia played a significant role in the Justices' reasoning.¹⁷²

1. Background Facts

To say the *Bowers v. Hardwick* decision is skimpy on the salient facts of the case would be quite the understatement. The Court simply stated that "[i]n August 1982, respondent Hardwick . . . was charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of respondent's home."¹⁷³ But as Leslie Huff explained, the "little-known facts" of the case are important.¹⁷⁴ Relying on Peter Iron's interview with Michael Hardwick,¹⁷⁵ Huff reported that a police officer known for targeting LGBTQ+ people cited Hardwick for having an open can of beer by the doorway to the gay

167. 505 U.S. 833, 874–76 (1992), overruled by *Dobbs*, 142 S. Ct. at 2228, 2242 (2022).

168. *Id.* at 879.

169. 142 S. Ct. at 2242.

170. 478 U.S. 186, 196 (1986).

171. *Id.*

172. See *supra* note 123 and accompanying text; see also Amy D. Ronner, *Homophobia: In the Closet and in the Coffin*, 21 LAW & INEQ. 65, 102–03 (2003) ("While the Georgia statute itself was gender-neutral, proscribing both homosexual and heterosexual sodomy, the *Bowers* Court read it as singling out only homosexual conduct. What the *Bowers* Court did was engraft criminalized conduct onto what it perceived as a homogenous group—homosexuals. In so doing, it personified sexual orientation as a menace to a wholesome society.").

173. *Bowers*, 478 U.S. at 187–88.

174. Leslye M. Huff, *Deconstructing Sodomy*, 5 AM. U. J. GENDER & L. 553, 561 (1997).

175. Peter Irons, *Interview with Michael Hardwick*, in LESBIANS, GAY MEN AND THE LAW 1265, 125–31 (William B. Rubenstein ed., 1993).

bar where he worked as a bartender.¹⁷⁶ The officer wrote conflicting information on the ticket. In one area, he underlined a hearing date on a Wednesday, but in smaller print on another part of the citation, he wrote a date corresponding to one day earlier, which fell on a Tuesday.¹⁷⁷ Thinking he did not need to be in court until Wednesday, Hardwick inadvertently missed his hearing on Tuesday, prompting the citing officer to obtain an arrest warrant for Hardwick.¹⁷⁸ Hardwick subsequently went to court to show the conflicting dates on the ticket and paid the fine due.¹⁷⁹

A few weeks later, the officer showed up at Hardwick's home at approximately 8:30am.¹⁸⁰ Because it was a hot morning during August, Hardwick had left his front door open for ventilation. The officer availed himself of that fact to enter the home, found Hardwick in his bedroom engaging in oral sex with his partner, and arrested them both.¹⁸¹ The American Civil Liberties Union (ACLU) contacted Hardwick and convinced him to challenge the constitutionality of the Georgia's sodomy law, especially since the arrest took place in the privacy of his home.¹⁸²

Prosecutors refused to move forward with the case in an attempt to prevent the ACLU from challenging the state's sodomy law.¹⁸³ Hardwick then filed a declaratory judgment action in federal district court in which he claimed he lived in fear of prosecution under the sodomy statute which, he argued, violated his rights to privacy, due process, and freedoms of expression and association.¹⁸⁴ The district court dismissed his complaint "for failure to state a claim, relying on *Doe v. Commonwealth's Attorney for the City of Richmond*," a 1975 federal district court case in which a three-judge panel upheld the constitutionality of Virginia's sodomy law and was summarily affirmed by the Supreme Court.¹⁸⁵ The U.S. Court of Appeals for the Eleventh Circuit reversed the district court, concluding that Georgia's sodomy law violated the rights to privacy and intimate

176. Huff, *supra* note 174, at 561 (citing Irons, *supra* note 175).

177. *Id.* (citing Irons, *supra* note 175, at 127).

178. *Id.* (citing Irons, *supra* note 175, at 127).

179. *Id.* at 562 (citing Irons, *supra* note 175, at 127).

180. *Id.* (citing Irons, *supra* note 175, at 127).

181. *Id.* (citing Irons, *supra* note 175, at 127).

182. *Id.* at 563 (citing Irons, *supra* note 175, at 128).

183. *Id.* at 564 (citing Irons, *supra* note 175, at 1289).

184. Brief of Petitioner Michael J. Bowers at *3, *Bowers v. Hardwick*, No. 85-140, 1985 WL 667939 (U.S. Dec. 17, 1985).

185. *Bowers v. Hardwick*, 478 U.S. 186, 188 (1986) (citing *Doe v. Commonwealth's Att'y*, 403 F. Supp. 1199 (E.D. Va. 1975), *summarily aff'd*, 425 U.S. 901 (1976)).

association.¹⁸⁶ The State of Georgia then petitioned for certiorari and the U.S. Supreme Court granted review.¹⁸⁷

2. The *Bowers* Decision

The *Bowers* decision began by explaining that the issue presented in the case was not covered by the Court's privacy line of cases.¹⁸⁸ The Court distinguished cases like *Pierce*, *Meyer*, *Griswold*, *Loving*, and *Roe* as being limited to privacy rights as they impact child rearing, education, family relationships, marriage, and procreation.¹⁸⁹ Reasoning that "homosexual sodomy" did not concern any of these issues, the *Bowers* Court concluded such conduct lies outside the realm of the constitutional right to privacy those cases collectively represented.¹⁹⁰

Having removed the case from the protections of the right to privacy, the majority in *Bowers* then cast the issue in the case as whether there was a "fundamental right to engage in homosexual sodomy."¹⁹¹ The Court answered that question in the negative, reasoning that fundamental rights are those either "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed'"¹⁹² or those which are "deeply rooted in this Nation's history and tradition."¹⁹³ The Court concluded that neither formulation supported answering the question in the affirmative, especially since "proscriptions against that conduct have ancient roots."¹⁹⁴

The dissenting Justices criticized the majority opinion in *Bowers* for having framed the issue much too narrowly:

186. *Id.* (citing *Hardwick v. Bowers*, 760 F.2d 1202, 1212–13 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986)). The Eleventh Circuit distinguished *Hardwick*'s challenge from the one brought by the *Doe* plaintiffs by noting that they "had neither been arrested nor threatened with prosecution," unlike Michael *Hardwick*. *Hardwick v. Bowers*, 760 F.2d at 1207.

187. *Bowers v. Hardwick*, 474 U.S. 943 (1985) (granting certiorari). Some commentators were surprised by this "unexpected grant." Yao Apasu-Gbetsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 521 (1986). The editors of the University of Miami Law Review went on to say that "[i]t is our hope that what at first came as an unexpected surprise to our editorial board will result in an opinion offering greater insight into the proper scope of the right to privacy and its possible continued expansion into other areas of individual freedoms." *Id.* at 523. Their hopes were not realized.

188. *Bowers*, 478 U.S. at 190.

189. *Id.* (internal citations omitted)

190. *Id.* at 190, 191–92.

191. *Id.* at 191.

192. *Id.* at 191–92 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

193. *Id.* at 192 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

194. *Id.*

This case is no more about “a fundamental right to engage in homosexual sodomy[.]” . . . than *Stanley v. Georgia* . . . was about a fundamental right to watch obscene movies, or *Katz v. United States* . . . was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about “the most comprehensive of rights and the right most valued by civilized men,” namely, “the right to be let alone.”¹⁹⁵

The dissent persuasively argued that the majority had failed to consider how sodomy laws infringe important privacy rights.¹⁹⁶ Many scholars were similarly critical of the Court’s bizarrely narrow framing of the issue in the case.¹⁹⁷ Had the Court examined the issue through a broader right to privacy lens, it easily could have situated the case within the protections of *Griswold* and its progeny to conclude that consenting adults have a right “to engage in non-procreative sexual relations, even outside the traditional setting of marriage.”¹⁹⁸

Scholars also criticized *Bowers* for resorting to a fundamental rights analysis that depends on what is deeply rooted in history and tradition.¹⁹⁹

195. *Id.* at 199 (Blackmun, Brennan, Marshall, and Stevens, J.J., dissenting) (internal citations omitted).

196. *Id.* at 206 (“[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.”).

197. *E.g.*, Richard D. Mohr, *Mr. Justice Douglas at Sodom: Gays and Privacy*, 18 COLUM. HUM. RTS. L. REV. 43, 44 (1986–1987) (arguing “why privacy should be viewed as a fundamental, substantive and quite general constitutional right, why gay sex falls under that right, and why it is important that this should be so recognized by the courts”); Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 651–52 (1987) (“[T]he majority went out of its way to reformulate the issue presented by the case in order to rebuke homosexual—an only homosexual—‘sodomy.’ The Georgia statutes covers oral or anal intercourse committed by any two people—homosexual or heterosexual, unmarried or married The Supreme Court, however, characterized the case as one concerning ‘the fundamental rights of homosexuals,’ and specifically postponed the issue of the statute’s application to ‘other acts of sodomy.’ It reframed *Hardwick*, converting it from a ‘sexual privacy’ case to a ‘gay rights’ case.”).

198. Fradella, *supra* note 51, at 282–83 (quoting B.J. Williamson, *The Constitutional Privacy Doctrine after Bowers v. Hardwick: Rethinking the Second Death of Substantive Due Process*, 62 S. CAL. L. REV. 1297, 1310 (1989)); see also Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 236 (1987) (calling *Bowers v. Hardwick* “a deviant judicial decision . . . because it is blatantly inconsistent with the Court’s own precedents” and “perverse, because the constitutional claim rejected in *Bowers* was not merely of the same strength as the claim the Court accepted in *Roe*; it was substantially stronger.”); David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 860–61 (1986) (“The interest of autonomy in intimate homosexual relations is at least as strong as the reproductive autonomy in abortion decisions.”); cf. Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1079 (1988) (“If the Court understood *Hardwick*’s sexual act as similar to other activities protected under the ‘constitutional right of privacy,’ his challenge should have succeeded.”).

199. *E.g.*, Richards, *supra* note 198, at 850–51 (“The gravamen of Justice White’s argument is an appeal to history It is difficult to regard this appeal to history as anything but

After all, *Loving* invalidated miscegenation laws despite the fact that such laws existed in many states for much of the nation's history.²⁰⁰ *Griswold* and *Roe* similarly found behaviors to be within the scope of the right to privacy despite the fact that neither contraceptives nor abortion were rights deeply rooted in history and tradition.²⁰¹ The editors of the *Harvard Law Review* deconstructed this inconsistency as follows:

[R]elying on history involves a value choice in that the Court selects which history it will base its decision on. The Court could have decided to rely on recent history: for example, a majority of states no longer outlaw sodomy, and homosexual leaders now occupy prominent positions in local, state, and federal elective office. The historic persecution of homosexuals should not have been used to deter the current societal trend of recognizing that individuals have a fundamental right to define their own sexual identities. Such reliance on past discrimination to justify future discrimination harkens back to the days when historical tradition was used to justify long-since condemned laws supporting slavery and the so-called separate but equal treatment of blacks.²⁰²

This criticism is well-taken because it illustrates how in the two decades preceding *Bowers*, “the mere longevity of a statute, even when the law fits into a legal pattern or ‘tradition,’ has never before been deemed a bar to judicial intervention.”²⁰³ On the other hand, the criticism does not go far enough because it does not directly debunk the flawed presentation of history in *Bowers*' majority opinion.²⁰⁴ As previously discussed, the alleged historical condemnation of sodomy—especially in the form of oral sex—is factually inaccurate.²⁰⁵ It reflects one point in history while

disingenuous, since the Court's previous work in the area of constitutional privacy disavows such an anachronistic and indeed ahistorical interpretation of history.”).

200. Stoddard, *supra* note 197, at 654.

201. Fradella, *supra* note 51, at 283; Stoddard, *supra* note 197, at 654.

202. Note, *Right to Privacy and Consensual Sodomy*: *Bowers v. Hardwick*, 100 HARV. L. REV. 210, 218–19 (1986).

203. Stoddard, *supra* note 197, at 655. In subsequent cases, the Court conceded that “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (quoting *Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

204. In *Lawrence*, the Court acknowledged that in the wake of *Bowers*, scholars had written extensively about the “fundamental criticisms of the historical premises relied upon by the majority and concurring opinions” in *Bowers* as they related to assertions about the history of sodomy proscriptions. *Lawrence*, 539 U.S. at 567–68 (citations omitted).

205. Eskridge, *supra* note 72, at 1107 (“In truth, sodomy laws were rarely enforced before 1880, and almost never applied to sex between consenting adults, same-sex or otherwise; were understood as a regime for normalizing procreative sex, a goal now considered unconstitutional; and were authoritatively applied to oral sex (Michael Hardwick's crime) in not a single state before 1879.”); see also *supra* notes 65–123 and accompanying text.

ignoring others. Consider philosopher Richard Mohr's criticism of the selective use of history in *Bowers*:

Judges have no special insight to [history]; their job neither allows them time nor invokes the talents required for honing historical skills to a degree that might permit impartial findings—not even professional historians usually achieve that. Even for experts, [history] is controversial and as ideologically laden as any of the humanities and social sciences. Judges are as likely as any amateurs to pick and choose its variety in ways that fit their pre-conceived ends. Justice Burger's concurrence in *Bowers* provides a stellar case of this vice. He claims that "homosexual conduct [has] been subject to state intervention throughout the history of Western Civilization" and that to protect gay sex "would be to cast aside millennia of moral teaching." He cites but one historian and makes no mention of John Boswell's work on the history of gay people. Boswell thoroughly criticizes Burger's one source and shows that far from a uniform condemnation of gay sex "throughout the history of Western Civilization," over the largest stretch of that civilization—6th century B.C. to the 12th century A.D.—there were a large variety and considerable flux in the moral, social, legal and religious evaluation of gays and gay acts.²⁰⁶

3. The Aftermath

The decision in *Bowers* prompted an avalanche of criticism.²⁰⁷ Scholars referred to its "venomous mean-spiritedness,"²⁰⁸ called it "hateful and bigoted,"²⁰⁹ described it as a "study of aggression" that serves as "a classic example of discrimination against a disfavored minority,"²¹⁰ and derided it as "rag[ing] irrationally against [homosexuality]" using rhetoric that "discursively makes and marks" sexual differences that

206. Mohr, *supra* note 197, at 67.

207. *E.g.*, James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 270 (1993) ("In *Bowers*, however, the Court practically reduces the due process inquiry to a backward-looking question concerning historical practices . . ."); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 432 (2011) ("The analytic problems of the *Bowers* majority opinion appear almost willful."); Andrea Sachs, *The Worst Supreme Court Decisions Since 1960*, TIME (Oct. 6, 2015, 11:36 AM), <https://time.com/4056051/worst-supreme-court-decisions/> [<https://perma.cc/6QLY-C26L>] (quoting law professor Jamal Greene criticizing *Bowers* as saying "narrow-minded, cynical and offensive" and quoting law professor Kathryn Abrams as saying "it doesn't get much worse than this"); Stoddard, *supra* note 197, at 656 ("*Bowers v. Hardwick* is, fundamentally, lawmaking by personal predilection . . . a cavalier decision, without reference to either standard or principle and in blatant disregard of well-settled procedural rules.")

208. Valdes, *supra* note 14, 1391.

209. Sachs, *supra* note 207 (quoting law professor Ashutosh Bhagwat).

210. Janet Self, *Bowers v. Hardwick: A Study of Aggression*, 10 HUM. RTS. Q. 395, 395 (1988).

“make[] homophobia possible.”²¹¹ Findlaw included *Bowers* on its list of the thirteen “most terrible, horrible, no good, very bad Supreme Court decisions” of all time.²¹² Even the Supreme Court eventually acknowledged that the “criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions.”²¹³

Between 1961 and when *Bowers* was decided in 1986, about half of U.S. states decriminalized sodomy either through legislative repeal or through state court judicial action.²¹⁴ Beyond generating scathing critiques from scholars and commentators alike, *Bowers* triggered another, arguably more important response by mobilizing activists for LGBTQ+ rights.²¹⁵ As a result of their efforts, combined with advocacy that led some courts to invalidate their states’ sodomy laws on state constitutional grounds,²¹⁶ twelve more states decriminalized sodomy between 1986 and 2003.²¹⁷ Thus, at the time *Lawrence v. Texas* was decided, thirteen states still criminalized sodomy.²¹⁸ Those laws fell with the Supreme Court’s decision in *Lawrence*.²¹⁹

211. Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1828 (1993).

212. Casey C. Sullivan, *13 Worst Supreme Court Decisions of All Time*, FINDLAW (Oct. 14, 2015 12:51 PM), <https://www.findlaw.com/legalblogs/supreme-court/13-worst-supreme-court-decisions-of-all-time/> [<https://perma.cc/B8ZE-X9QD>].

213. *Lawrence v. Texas*, 539 U.S. 558, 560 (2003).

214. *Bowers v. Hardwick*, 478 U.S. 186, 193–94 (1986) (citing Yao Apasu-Gbotsu et al., *supra* note 187, at 524, n.9).

215. See, e.g., Melinda D. Kane, *Social Movement Policy Success: Decriminalizing State Sodomy Laws, 1969–1998*, 8 MOBILIZATION: AN INT’L Q. 313 (2003); Mitchell Lloyd Pearl, Note, *Chipping Away at Bowers v. Hardwick: Making the Best of an Unfortunate Decision*, 63 N.Y.U. L. REV. 154, 155 (1988) (citing *Antisodomy Laws Targeted for Repeal After High Court Ruling*, WASH. POST, Feb. 4, 1987, at A16)).

216. See Fradella, *supra* note 51, at 285–86 tbl.1 (citing, *inter alia*, *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998) (invalidating the very law that *Bowers* had upheld); *Commonwealth v. Wasson*, 842 S.W.2d 487, 491–92 (Ky. 1992)).

217. Fradella, *supra* note 4, at 600; see also *Lawrence*, 539 U.S. at 573.

218. Fradella, *supra* note 4, at 600 (“This is fairly remarkable since, in the wake of the European Convention on Human Rights calling for the decriminalization of sodomy, many other countries in the free world—even former Soviet republics—had invalidated their sodomy laws in the last decade. Even staunchly religious Ireland had done so!”); see also *Lawrence*, 539 U.S. at 573 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981), at ¶ 52).

219. 539 U.S. at 578–79.

E. Lawrence v. Texas Overturns Bowers and Ushers In a New Age of Liberty

Lawrence concerned two men who had been convicted of violating Texas' sodomy law after police entered John Lawrence's apartment and allegedly found him having sex with Tyron Garner.²²⁰ Police showed up and entered the apartment in response to a complaint of a weapons disturbance.²²¹ It turns out there was no such disturbance. The story was fabricated by someone trying to harass Garner, perhaps out of a combination of jealousy and racism.²²² How the case unfolded is subject to debate, but there is credible evidence which suggests that the two men pled "no contest" to violating Texas' "homosexual conduct" law²²³ and, through their attorneys, arranged to pay a fine just high enough to allow for an appeal in the hopes of the case being used to challenge the constitutionality of the statute.²²⁴ The Court of Appeals of Texas affirmed their convictions over due process and equal protection challenges under the state and federal constitutions.²²⁵ The Supreme Court reversed and, in doing so, invalidated the thirteen remaining sodomy laws in the United States.²²⁶

In the majority opinion, five Justices used sweeping language that evidenced strong support for LGBTQ+ rights. After a brief review of the landmark privacy cases summarized in Part II, Section C of this Article,²²⁷ the *Lawrence* majority acknowledged that the framing of the issue in *Bowers* was mistaken in that it failed "to appreciate the extent of the liberty [interest] at stake."²²⁸ *Lawrence* correctly recognized that sodomy laws do more than criminalize particular sex acts. They "have more far-

220. *Id.* at 562–63.

221. *Id.* at 562.

222. See Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1479 (2004). Carpenter's article deconstructs the facts of the case by offering a convincing analysis as to why police accounts of what transpired are not credible. *Id.* at 1475–1508.

223. TEX. PENAL CODE ANN. § 21.06(a) (West 2003).

224. Carpenter, *supra* note 222, at 1518–19.

225. *Lawrence v. State*, 41 S.W.3d 349 (Tex. App. 2001), *rev'd*, 539 U.S. 558 (2003), *dismissed on remand*, No. 14-99-00109-CR, 2003 WL 22453791, at *1 (Tex. App. Oct. 30, 2003) (reversing the original judgments of the trial court, ordering the complaints be dismissed, and entering judgments of acquittal).

226. *Lawrence*, 539 U.S. at 574–75 (explaining that the Texas statute could be invalidated on equal protection grounds, but because such an approach would not reach more neutral sodomy laws—ones that are not just targeted at sexual activity between people of the same-sex, the Court opted to decide the case on due process grounds to protect "the substantive guarantee of liberty" infringed by all sodomy statutes).

227. See *supra* notes 131–169 and accompanying text.

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

reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home,” and, in doing so, such laws “seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals.”²²⁹ The Court went on to state that “*Bowers* was not correct when it was decided” and, therefore, should be overruled.²³⁰

F. The Present Study: The Need to Evaluate the Impact of Lawrence as the U.S. Supreme Court Cuts Back on Privacy Rights by Overturning Roe v. Wade

Since it was decided, scholars have written eloquent analyses of how *Lawrence* impacts laws criminalizing assisted suicide, incest, prostitution, bigamy,²³¹ as well as its effect on other laws, regulations, or policies that impinge on sexual privacy and intimate association rights.²³² Commentators have similarly examined *Lawrence*’s impact on select LGBTQ+ rights under the Equal Protection Clause in the wake of *Lawrence*.²³³ But, as far as I can tell, no one has undertaken a systematic examination of *Lawrence*’s broad impact over the nearly two decades since it was decided. The present research seeks to fill that void. This Article systematically examines the impact of *Lawrence v. Texas* in civil disputes adjudicated in state courts. Next year, the *Tulane Journal of Law and Sexuality* will publish the second part of the study which examines

229. *Id.*

230. *Id.* at 578. In overruling *Bowers*, the Court acknowledged that respect for precedent via “[t]he doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command.” *Id.* at 577 (citing *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

231. See, e.g., Jonathan E. Amgott, *Post-Windsor Prospects for Morals Legislation: The Case of Polygamous Immigrants*, 26 STAN. L. & POL’Y REV. 513 (2015); Diana Hassel, *Sex and Death: Lawrence’s Liberty and Physician-Assisted Suicide*, 9 U. PA. J. CONST. L. 1003 (2007).

232. See, e.g., J. Richard Broughton, *The Criminalization of Consensual Adult Sex After Lawrence*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 125, 132 (2014); H. Hunter Bruton, *The Questionable Constitutionality of Curtailing Cuckolding: Alienation-of-Affection and Criminal-Conversation Torts*, 65 DUKE L.J. 755 (2016); Richard Glover, *Can’t Buy A Thrill: Substantive Due Process, Equal Protection, and Criminalizing Sex Toys*, 100 J. CRIM. L. & CRIMINOLOGY 555 (2010); LiJia Gong & Rachel Shapiro, *Sexual Privacy After Lawrence v. Texas*, 13 GEO. J. GENDER & L. 487 (2012); Matthew W. Green, Jr., *Lawrence: An Unlikely Catalyst for Massive Disruption in the Sphere of Government Employee Privacy and Intimate Association Claims*, 29 BERKELEY J. EMP. & LAB. L. 311 (2008); Y. Carson Zhou, *The Incest Horrible: Delimiting the Lawrence v. Texas Right to Sexual Autonomy*, 23 MICH. J. GENDER & L. 187 (2016); cf. Sara L. Dunski, *Make Way for the New Kid on the Block: The Possible Zoning Implications of Lawrence v. Texas*, 2005 U. ILL. L. REV. 847 (2005).

233. E.g., J. Kelly Strader & Lindsey Hay, *Lewd Stings: Extending Lawrence v. Texas to Discriminatory Enforcement*, 56 AM. CRIM. L. REV. 465, 465 (2019).

criminal and quasi-criminal (e.g., collateral attacks on criminal convictions) cases.²³⁴

Specifically, this portion of the study examining civil cases seeks to answer the following research questions:

- In which types of civil cases do courts grapple with applying *Lawrence*? Are they limited primarily to cases presenting questions about privacy or LGBTQ+ rights, or do the cases present other types of questions?
- In what ways do courts accept litigants' attempts to broadly construe *Lawrence* in ways that embrace or expand privacy and liberty protections? Conversely, under what circumstances do courts reject such attempts by narrowly construing *Lawrence* in ways that limit privacy and liberty protections?
- What extra-legal factors, if any, are related to how judges construe *Lawrence*? Are there geographical differences across the country? Are there differences by the sex, race, or political party of the judge?

Part III summarizes the research methods used to answer these research questions.

III. METHODS

A. *Data Collection*

This study examines the total population of published and unpublished judicial decisions adjudicating civil claims in U.S. state courts that cited *Lawrence v. Texas* between its release date in June of 2003 until December 31, 2021.²³⁵ These cases were obtained using Westlaw by selecting the KeyCite “citing references” feature for *Lawrence* and then limiting the results to state court decisions.²³⁶ That

234. The results are divided into two different papers because if both civil and criminal cases were reported in a single paper, it would be too long (at more than 100,000 words) for publication in most journals. See Henry F. Fradella, *Liberty and Privacy after the (Partial) Decriminalization of Sodomy: A Content Analysis of How State Courts Applied Lawrence v. Texas in Criminal and Quasi-Criminal Cases Over Two Decades*, 33 TUL. J. L. & SEXUALITY ____ (forthcoming 2024) (on file with author).

235. The cut-off date was selected because data coding and analysis began during the spring of 2022 and continued through the summer of that year.

236. Because search results were limited to cases from U.S. state courts, this study does not analyze cases from tribal courts, U.S. commonwealths (Puerto Rico and the Northern Marianas Islands), and U.S. territories (Guam, American Samoa, U.S. Virgin Islands).

process yielded a total of 441 cases. Of these, 177 (40.1%) involved civil lawsuits, all of which were read and coded by two researchers.²³⁷

Fifteen cases were then eliminated because they were duplicates of other cases, either because the case was decided at multiple levels of the court system's hierarchy, or because opinions were withdrawn or superseded.²³⁸ After the removal of these duplicates, 162 civil cases remained.

B. Data Coding and Analyses

Each of the 162 cases was analyzed using content analysis, a systematic set of procedures “for making replicable and valid inferences from data to their context.”²³⁹ Quantitative content analysis involves an *a priori* design in which the manifest content of source material (here, judicial opinions) are coded for the presence or absence of predefined variables—or even the degrees to which those variables are manifest—and then those data are analyzed.²⁴⁰ The approach is particularly useful for measuring the frequency and extent to which key variables are related.²⁴¹ This approach also offers the benefits of allowing for

237. To ensure the reliability of the author's coding, a Ph.D. student employed as the author's research assistant also coded all of the cases. The author reiterates his appreciation to Gerald Eastwood for his excellent assistance in this time-consuming and often tedious process.

238. *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017); *Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426 (Ariz. Ct. App. 2018); *Blumenthal v. Brewer*, 24 N.E.3d 168 (Ill. App. Ct. 2014); *Jones v. Jones*, 307 P.3d 598 (Utah Ct. App. 2013); *Elane Photography, LLC v. Willock*, 284 P.3d 428 (N.M. Ct. App. 2012); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006); *Hernandez v. Robles*, 805 N.Y.S.2d 354 (Sup. Ct. App. Div. 2005); *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005); *Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006), *rev'd*, 932 A.2d 571 (2007), *opinion extended after remand*, (Md. Cir. Ct. 2008); *Hernandez v. Robles*, 794 N.Y.S.2d 579 (Sup. Ct. 2005); *In re Coordination Proceeding, Special Title Rule 1550(c)*, No. 4365, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005), *aff'd in part, rev'd in part sub nom. In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Ct. App. 2006), *superseded by* 149 P.3d 737 (Cal. 2006), *rev'd*, 183 P.3d 384 (2008); *Howard v. Child Welfare Agency Rev. Bd.*, No. CV 1999-9881, 2004 WL 3154530 (Ark. Cir. Ct. Dec. 29, 2004), *aff'd sub nom. Dep't of Hum. Servs. & Child Welfare Agency Rev. Bd. v. Howard*, 238 S.W.3d 1 (2006); *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004), *rev'd sub nom. Andersen v. King Cnty.*, 138 P.3d 963 (Wash. 2006); *Andersen v. King Cnty.*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004), *rev'd*, 138 P.3d 963 (Wash. 2006); *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Ct. Nov. 5, 2003).

239. KLAUS KRIPPENDORFF, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* 18 (2nd ed. 1980).

240. KIMBERLY A. NEUENDORF, *THE CONTENT ANALYSIS GUIDEBOOK* 18 (2d ed. 2017).

241. *Id.* at 96–119 (discussing variable coding); *Id.* at 121–62 (discussing variable measurement).

hypothesis testing and easy replicability.²⁴² By contrast, ethnographic content analysis is qualitative and inductive; it is particularly appropriate when multiple cases are reviewed in an attempt to discover emergent patterns and differing emphases among and between the cases.²⁴³ The present study employs both of these types of content analysis to provide comprehensive and rich insights into how state courts have applied *Lawrence* in civil cases.

Exclusion of Irrelevant Cases

Of the 162 distinct state court civil cases, two researchers agreed that fifty should be excluded because, even though these cases cited *Lawrence*, they did so for reasons that had nothing to do with any of the research questions. Four cases cited *Lawrence* as an example of a criminal law that had been invalidated by the courts.²⁴⁴ Twenty-two cases cited *Lawrence* for general Fourteenth Amendment principles, such as applicable standards of review, even though other cases could have been cited instead.²⁴⁵ Seventeen cases merely quoted from *Lawrence* that

242. *Id.* at 19–20.

243. DAVID L. ALTHEIDE & CHRISTOPHER J. SCHNEIDER, *QUALITATIVE MEDIA ANALYSIS* 12–13 (2d ed. 2013).

244. *In re N.G.*, 115 N.E.3d 102, 121 (Ill. 2018) (citing a case that turned, in part, on *Lawrence*'s invalidation of sodomy laws); *Gillmor v. Summit Cnty.*, 246 P.3d 102, 111 (Utah 2010) (using sodomy laws as an example of an unconstitutional law that lingered on the books for many years before being invalidated in a case in which law caused harm to a particular plaintiff); *In re Care & Treatment of Williams*, 214 P.3d 1225 at *3 (Kan. Ct. App. 2009), *rev'd* 253 P.3d 327 (Kan. 2011) (“[S]odomy is no longer a crime between consenting adults.”); *Gilliam v. McGrady*, 673 S.E.2d 474, 480 (Va. Ct. App. 2009), *aff'd in part, rev'd in part*, 691 S.E.2d 797 (Va. 2010) (noting that the state's fornication law had previously been invalidated under *Lawrence*).

245. *E.g.*, *Jones v. Jones*, 359 P.3d 603, 609 n.5 (2015) (citing *Lawrence* to support the statement that when a due process right is fundamental, courts apply “strict scrutiny to the protection of such a right”); *see also* *Rowitz v. McClain*, 138 N.E.3d 1241, 1257 (Ohio 2019); *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 483 n.88 (Ky. 2011); *Neifert v. Dep't of Env't*, 910 A.2d 1100, 1112 (Md. 2006); *Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440, 460–61 n.93 (Wisc. 2005), *overruled by* *Mayo v. Wisconsin Injured Patients & Fams. Comp. Fund*, 914 N.W.2d 678 (Wis. 2018); *Wagner v. AGW Consultants*, 114 P.3d 1050, 1063 (N.M. 2005); *Montoy v. State*, 120 P.3d 306, 317–18 (Kan. 2005); *Woods v. Commonwealth*, 142 S.W.3d 24, 55 (Ky. 2004); *Nixon v. Commonwealth*, 839 A.2d 277, 286–87 (Pa. 2003); *Harrison v. Vanderkooi*, No. 330537, 2017 WL 2262889, at *8 (Mich. Ct. App. May 23, 2017), *rev'd in part sub nom.* *Johnson v. Vanderkooi*, 918 N.W.2d 785 (Mich. 2018); *People v. Novie*, 976 N.Y.S.2d 636, 646 n.2 (Sup. Ct. App. Term 2013); *People v. Castellanos*, No. H032865, 2009 WL 2438434, at *19 (Cal. Ct. App. Aug. 11, 2009); *State ex rel. Branson v. Fabian*, No. A09-0814, 2009 WL 2447531, at *2 (Minn. Ct. App. Aug. 11, 2009); *Cendant Corp. & Subsidiaries v. Dep't of Revenue*, 226 P.3d 1102, 1111 (Colo. App. 2009); *State Route 4 Bypass Auth. V. Superior Ct.*, 64 Cal. Rptr. 3d 286, 299 (Ct. App. 2007); *Buckner v. Fam. Servs. Of Cent. Fla., Inc.*, 876 So. 2d 1285, 1288 (Fla. Dist. Ct. App. 2004).

although *stare decisis* is important, it is not “an inexorable command”; these cases did not, however, rely on *Lawrence* in any way that is relevant to this study’s research questions.²⁴⁶ Seven cases cited *Lawrence* for “one-off” reasons that were not repeated in a significant number of other cases. Such citations include using *Lawrence* as an example of (1) a court rejecting the framing of an issue as being too narrow;²⁴⁷ (2) a rare case in which en banc reconsideration had been granted by a state appellate court;²⁴⁸ (3) substantive due process being used to invalidate a law;²⁴⁹ (4) a case in which a *pro se* prisoner cited *Lawrence* in support of a post-

In addition to mere mention of Fourteenth Amendment standards of review, this category also includes cases that simply reference—but do not apply—the fact that, at the time a case was decided, due process protected the right to privacy as it relates to marriage, procreation, contraception, family relationships, child rearing, and education. See *Gutraj v. Dep’t of Fin. & Pro. Regul.*, No. 4–12–1096, 2013 WL 5777170 at *5 (Ill. Ct. App. Oct. 24, 2013); *In re J.R.*, 171 S.W.3d 558, 570 n.5 (Tex. App. 2005); Proceeding for the Appointment of a Guardian for Leon, No. 2016–XXXX, 2016 WL 5724234 at *3 (N.Y. Sur. Ct. 2016); *In re Zhuo*, 53 Misc. 3d 1121, 1126–27 (N.Y. Sur. Ct. 2016); *In re V.R.*, No. NN 5616-04, 2004 WL 3029874 at *5 n.13 (N.Y. Fam. Ct. 2004); *In re Bobbjean P.*, No. 03626-03, 2004 WL 834480 at *4 (N.Y. Fam. Ct. 2004), *vacated in part*, 842 N.Y.S.2d 826 (App. Div. 2007).

246. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). Notably, *Lawrence* quoted from *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), which, in turn, quoted *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). See also *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509, 517 (Kan. 2019); *Ray v. Swager*, 903 N.W.2d 366, 393 (Mich. 2017) (Wilder, J., dissenting); *Quinn v. Quinn*, 137 A.3d 423, 438 (N.J. 2016) (Albin, J., dissenting); *Hernandez v. Banks*, 65 A.3d 59, 65 (D.C. 2013); *Miller v. Johnson*, 289 P.3d 1098, 1141–42 (Kan. 2012) (Beier, J., concurring in part and dissenting in part) *abrogated by* *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509 (Kan. 2019), *abrogated by* *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509 (Kan. 2019); *League of Women Voters Minn. V. Ritchie*, 819 N.W.2d 636, 684 (Minn. 2012) (Anderson, J., dissenting); *Home Paramount Pest Control Companies, Inc. v. Shaffer*, 718 S.E.2d 762, 766 (Va. 2011); *O’Neal v. St. John Hosp. & Med. Ctr.*, 791 N.W.2d 853, 868 (Mich. 2010) (Weaver, J., concurring); *Regents of Univ. of Mich. v. Titan Ins. Co.*, 791 N.W.2d 897, 908 (Mich. 2010) (Weaver, J., concurring) *overruled by* *Joseph v. Auto Club Ins. Ass’n*, 815 N.W.2d 412 (Mich. 2012), *overruled by* *Joseph v. Auto Club Ins. Ass’n*, 815 N.W.2d 412 (Mich. 2012); *Bezeau v. Palace Sports & Ent., Inc.*, 795 N.W.2d 797, 808 n.3 (Mich. 2010) (Weaver, J., concurring); *McCormick v. Carrier*, 795 N.W.2d 517, 535 (Mich. 2010); *Lansing Sch. Educ. Ass’n v. Lansing Bd. Of Educ.*, 792 N.W.2d 686, 696 (Mich. 2010); *Oberhand v. Dir., Div. of Tax’n*, 940 A.2d 1202, 1213 (N.J. 2008) (Albin, J., concurring); *Vitro v. Mihelcic*, 806 N.E.2d 632, 640 (Ill. 2004) (Fitzgerald, J., dissenting); *Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 1268 n.5 (Ohio 2003); *Ramirez v. Bank of America, N.A.*, 627 S.W.3d 486, 493 (Tex. App. 2021); *Harvey v. City of Newark*, No. CIV. A. 5023-VCS, 2010 WL 4240625, at *7 n.43 (Del. Ch. Oct. 20, 2010).

247. *Mays v. Governor of Mich.*, 954 N.W.2d 139, 168 n.1 (Mich. 2020) (McCormack, C.J., concurring).

248. *Texas Dep’t of Fam. & Prot. Servs. V. Grassroots Leadership, Inc.*, NO. 03-18-00261-CV, 2019 WL 6608700, *2 (Tex. App. Dec. 5, 2019) (Triana, J., dissenting);

249. *Palmer v. Atl. Coast Pipeline, LLC*, 801 S.E.2d 414, 420 (Va. 2017) (McCullough, J., concurring).

conviction petition without connection to the facts of the case;²⁵⁰ (5) how perceptions of legality change over time;²⁵¹ (6) asking a rhetorical question;²⁵² and (7) the fact that legislatures do not need to draft statutes with logical consistency in every application.²⁵³

In addition to the fifty cases excluded for their irrelevance, twenty relevant cases are not included in the study because, although they were technically civil cases, they were quasi-criminal in nature, dealing primarily with issues of criminal law or procedure and, therefore, are addressed in a different manuscript. These included habeas petitions and other collateral attacks on criminal convictions; declaratory judgment actions seeking to invalidate criminal laws; challenges to the constitutionality of sex offender registries, classification determinations, or the specific restrictions placed on sex offenders; or some combination of these types of claims.²⁵⁴

250. *State v. Tom*, No. 2 CA-CR 2016-0088-PR, 2016 WL 1601706, at *1–2 (Ariz. Ct. App. Apr. 20, 2016) (“[Petitioner] . . . has not developed on review any argument that *Lawrence* . . . appl[ies] to his case.”).

251. Nonhuman Rts. Project, Inc. *ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898, 917 (N.Y. Sup. Ct. 2015) (“As Justice Kennedy aptly observed in *Lawrence v. Texas*, albeit in a different context, ‘times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.’” (quoting 539 U.S. 558, 579 (2003))).

252. *Gunn v. Mariners Church, Inc.*, No. G032304, 2005 WL 1253953, at *11 (Cal. Ct. App. May 27, 2005) (“Pray tell, is Justice Scalia ‘known to be homophobic’ for having dissented in *Lawrence* . . . ? Try that at your next dinner party if you don’t want to tackle the question of whether the Catholic Church, or any other sector of traditional Judaism, Islam, or Christianity is ‘homophobic.’”).

253. *Carl J. Battaglia, M.D., P.A. v. Alexander*, 177 S.W.3d 893, 914 (Tex. 2005) (quoting Justice Scalia’s dissent in *Lawrence* that “people, unlike judges, need not carry things to their logical conclusion”).

254. *In re A.P.*, 246 A.3d 399, 401 (Vt. 2020) (upholding delinquency adjudication for “open and gross lewdness and lascivious behavior” for groping a high-school student in hallway when third-parties were not around to witness the act); *York v. Longlands Plantation*, 840 S.E.2d 544, 578 (S.C. 2020) (refusing to rule on constitutionality of fornication statute in workers compensation survivor benefits suit because the claimant was unable to show she had been dependent on the decedent for the “reasonable necessities of life” and, therefore, would not qualify as a dependent for death benefits); *Johnson v. Dep’t of Just.*, 341 P.3d 1075, 1084 (Cal. 2015) (upholding sex offender classification); *1568 Montgomery Highway, Inc. v. City of Hoover*, 45 So. 3d 319, 341 (Ala. 2010) (upholding criminal law banning sale of sexual devices); *Doe v. Sex Offender Registry Bd.*, 897 N.E.2d 992, 999 (Mass. 2008) (upholding sex offender classification); *In re M.D.*, 757 N.W.2d 559, 562 (N.D. 2008) (upholding sex offender classification); *Martin v. Zihler*, 607 S.E.2d 367, 370 (Va. 2005) (invalidating criminal law against fornication); *In re W.M.*, 851 A.2d 431, 450–51 (D.C. 2004) (upholding statutory scheme of sex offender registration and notification over a due process challenge); *Ex parte Fairchild-Porche*, 638 S.W.3d 770, 782 (Tex. App. 2021) (upholding constitutionality of revenge porn law); *Ex parte Dehnert*, 605 S.W.3d 885, 892 (Tex. App. 2020) (differentiating *Lawrence* as involving the privacy rights of two consenting adults” from those of minors “who might be injured or coerced”); *Ex parte Metzger*, 610 S.W.3d 86, 103–04 (Tex. App. 2020) (protecting people’s privacy from voyeurs); *McLaughlin v. Becerra*,

2. Quantitative Coding and Analyses

After the removal of the irrelevant and quasi-criminal cases, ninety-two relevant state court civil cases remained. All of them relied on *Lawrence* for a substantive reason—meaning that one party to the litigation sought to have a court apply *Lawrence* to the facts of the case at bar or, alternatively, that a court felt *Lawrence*'s holding or rationale provided some support, if not meaningful guidance, to deciding the particular case. Each of these judicial opinions was coded for all of the variables presented in Table 1.

Table 1: Study Variables

<i>Variable Name</i>	<i>Description</i>
Dependent Variable	
<i>Treatment</i>	Trichotomous variable: (1) neutral, (2) narrow/limiting, (3) broad/expansive
Independent Variables	
<i>Depth</i>	Dichotomous variable indicating the depth of treatment <i>Lawrence</i> received as being either (1) key to case, or (2) merely mentioned in passing
<i>Party</i>	Dummy categories were created to indicate whether the judge writing an opinion either ran for office as or was appointed by a (1) democrat, (2) republican, or (3) other (including nonpartisan elections)

No. B280529, 2018 WL 654556, at *1 (Cal. Ct. App. Feb. 1, 2018) (granting declaratory judgments that the plaintiff's proposed ballot measure, which sought to make same-sex sexual relations punishable by death, was unconstitutional and, therefore, did not need to be circulated); *Ex parte Bleimeyer*, No. 01-16-00838-CR, 2017 WL 586509, at *1 (Tex. App. Feb. 14, 2017) (upholding pretrial release conditions that required court notification if defendant became pregnant); *Keeney v. Fitch*, 458 S.W.3d 838, 839–41 (Mo. Ct. App. 2015) (granting declaratory judgment for removal from sex offender registry for petition convicted of sodomy); *Merryfield v. Sullivan*, No. 111204, 2015 WL 326652, at *1 (Kan. Ct. App. Jan. 16, 2015) (upholding restrictions on involuntarily committed sex offenders); *In re Commitment of Cleaveland*, No. 09-12-00428-CV, 2014 WL 4364263, at *7 (Tex. App. Sept. 4, 2014) (upholding sexually violent predator determination and commitment); *People v. Perez*, 961 N.Y.S.2d 51, 52 (Sup. Ct. App. Div. 2013) (upholding sex offender classification); *Guerra v. Lombardi*, 336 S.W.3d 167, 171 (Mo. Ct. App. 2011) (upholding sex offender classification); *Louisiana Electorate of Gays & Lesbians, Inc. v. Connick*, 902 So. 2d 1090, 1096 (La. Ct. App.), *writ denied*, 916 So. 2d 1062 (2005) (upholding sodomy law as applied to bestiality); *Hobbs v. Smith*, No. 05 CVS 267, 2006 WL 3103008, at *1 (N.C. Super. Ct. Aug. 25, 2006) (invalidating criminal law against fornication).

<i>Race</i>	Dummy categories were created to indicate the race and ethnicity of the judge writing an opinion: (1) Non-Hispanic White; (2) Asian/Pacific Islander; (3) African-American/Black; (4) Hispanic/Latino; and (5) Native American
<i>Region</i>	Dummy categories were created for the geographical region of the country based on U.S. Census regions: (1) Northeast, ²⁵⁵ (2) Midwest, ²⁵⁶ (3) South, ²⁵⁷ and (4) West ²⁵⁸
<i>Sex</i>	Dummy categories were created for the sex of the judge writing an opinion: (1) male or (2) female ²⁵⁹

a. Coding of Variables

The *treatment* variable was coded in one of three ways. Cases were coded as having a “narrow” or “limiting” treatment of *Lawrence* if a judicial opinion narrowly construed *Lawrence* such that it was either (1) unwilling to extend *Lawrence* to protect claims of liberty or privacy rights, (2) criticized or disregarded *Lawrence*, or (3) distinguished *Lawrence* to render it inapplicable to claims of liberty or privacy rights. Cases were coded as having “broad” treatment of *Lawrence* if a judicial opinion expansively interpreted *Lawrence* to protect liberty or privacy rights. Finally, cases coded as “neutral” either involved (1) a

255. The Northeast includes New England (CT, MA, ME, NH, RI, VT) and the Mid-Atlantic (NJ, NY, PA, and VT). *Census Regions and Divisions of the United States*, U.S. CENSUS BUREAU, https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf [<https://perma.cc/LT7J-EUE8>] [hereinafter *Census Regions*] (last visited June 13, 2022), at 1.

256. The Midwest includes the East North Central division (IL, IN, MI, OH, and WI) and the West North Central division (IA, KS, MN, MO, NE, ND, and SD). *Id.* at 1.

257. The South includes the South Atlantic division (DC, DE, FL, GA, MD, NC, SC, VA, and WV); the East South Central division (AL, MS, KY, TN), and the West South Central division (AR, LA, OK, and TX). *Id.* at 1.

258. The West include the Mountain division (AZ, CO, ID, MT, NV, NM, UT, and WY) and the Pacific division (AK, CA, HI, OR, and WA). *Id.* at 1.

259. I respectfully acknowledge that this coding scheme has the potential to erase nonbinary and intersex people. But as far as I could tell, none of the judges writing any of the opinions analyzed in the current study identified as either. The Victory Fund, an LGBTQ+ political advocacy organization, reports that it the first nonbinary person ever elected to judicial office in the United States did not occur until November of 2021 and that person did not author any of the opinions in the current study. See *Xander Orenstein Is First Non-Binary Person Elected to a Judicial Position in the United States*, LGBTQ+ Victory Fund (Nov. 2, 2021), <https://victoryfund.org/news/xander-orenstein-is-first-non-binary-person-elected-to-a-judicial-position-in-the-united-states/> [<https://perma.cc/NWR5-TH8J>]. Additionally, I could identify no news source reporting that an openly nonbinary person had been appointed to judicial office.

straightforward application of *Lawrence*'s specifically articulated exclusions from its central holding—such as alleged claims of sexual privacy involving minors, nonconsensual acts, commercial sex, or sex acts in public; or (2) those in which *Lawrence* was cited or briefly discussed, but not relied upon in any outcome-determinative manner.

The jurisdiction in which a case was decided is evident from a judicial decision and was coded, as applicable, using the corresponding region of the country as defined by the U.S. Census Bureau.²⁶⁰ The name of the judge or justice writing an opinion is clearly evident in most cases, but demographic information about those judicial officers are not. The race, sex, and political affiliation of judges were obtained by consulting the websites for the courts on which each state court judge or justice sits or sat,²⁶¹ as well as BallotPedia's database on state court judges.²⁶² On the rare occasion that the salient demographic information about a particular judge could not be gleaned from one of these two sources, Google searches were used to track down the information as needed. These methods are reliable ways of obtaining judges' or justices' biographies, including their sex, political party affiliation, and education. The same, however, cannot be said about the race and ethnicity of any judge. Sometimes that information is provided in judicial biographies. Other times, it needed to be obtained from news sources,²⁶³ and still other times, determinations about this demographic characteristic needed to be determined from people's names and photos.²⁶⁴

260. *Census Regions*, *supra* note 255, at 1.

261. For instance, the website for the Supreme Court of New Mexico contains a page listing the current justices with hyperlinks to pages presenting photos and biographies for each sitting justice. *Supreme Court, Current Supreme Court Justices*, N.M. CTS., <https://supremecourt.nmcourts.gov/supreme-court/supreme-court-justices/current-supreme-court-justices/> [<https://perma.cc/BV8W-X259>] (last visited June 13, 2022). That website also contains a similar database for former justices on the court. *Supreme Court, Former Supreme Court Justices*, N.M. CTS., <https://supremecourt.nmcourts.gov/supreme-court/supreme-court-justices/former-supreme-court-justices/> [<https://perma.cc/LU6D-266J>] (last visited June 13, 2022).

262. *Courts and Judges by State*, BALLOTEDIA, https://ballotpedia.org/Courts_and_judges_by_state [<https://perma.cc/C4GJ-YFAK>] (last visited June 13, 2022).

263. For instance, a Google search for California Supreme Court Associate Justice reveals her ethnic heritage. *Governor Newsom Swears in Justice Patricia Guerrero to California Supreme Court, the First Latina to Serve on State's Highest Court*, CAL. OFF. OF GOVERNOR, <https://www.gov.ca.gov/2022/03/28/governor-newsom-swears-in-justice-patricia-guerrero-to-california-supreme-court-the-first-latina-to-serve-on-states-highest-court/> [<https://perma.cc/E3UD-D2Z9>].

264. This is a limitation of the study. As other researchers have acknowledged, "'eyeballing' race is far from ideal, given there are considerable differences in skin tone between—and within—White, Latino, and Black communities." Danielle Slakoff & Pauline K. Brennan, *White, Black, and Latina Female Victims in U.S. News: A Multivariate and Intersectional Analysis of Story Differences*, RACE & JUST. 22 (2020) (advanced online publication available at

As for the *depth* variable, cases discussing *Lawrence* in ways not central to the holding were coded as “mentioned in passing.” By contrast, cases involving decisions in which *Lawrence* was central to the decision at issue were coded as “key to case.” This coding was verified against the depth indicator in Westlaw’s KeyCite feature. In KeyCite, one star indicates a case was mentioned, usually in a string citation; two stars means a case was discussed in a few sentences, but usually not more than a full paragraph; three stars indicates a case was substantively discussed for more than a paragraph, but less than a page; and four stars means a case was examined in depth, usually for more than a full page of printed text.²⁶⁵ All of the cases we coded as “key to case” were coded in KeyCite with two, three, or four stars.²⁶⁶ All of the cases we removed as irrelevant had one or two stars in KeyCite. Lastly, all of the cases coded as “mentioned in passing” had either two or three stars in KeyCite.²⁶⁷

Finally, when judicial candidates ran for office via partisan elections, I coded their political party affiliation as either “democrat” or “republican”. Nonpartisan candidates are coded as “other.” When judicial officers were appointed to the bench via political processes, I coded for the political affiliation of the appointing entity, typically a governor.

b. Analytic Strategy

The ethnographic content analyses, described more fully in the next section, are used to qualitatively address the first two research questions. The third research question, however, poses an empirical one regarding the relationship between extralegal factors and the use of *Lawrence*. I use bivariate analyses to determine whether there are significant differences between the treatment of *Lawrence* and the categorical independent

doi:10.1177/2153368720961837). To address this methodological concern, I followed the lead of Slakoff and Brennan in that whenever photographs were used to determine race, a second coder verified the coding. The two coders agreed each time, resulting in 100% inter-rater reliability for this variable.

265. *Guide to Law Review Research*, WESTLAW (2007), <http://lscontent.westlaw.com/images/banner/documentation/LawReviewResearchGuide.pdf> [https://perma.cc/5LSH-95AX].

266. The coding system in this study differs from KeyCite’s because it does not reply on the number of lines in a judicial opinion, but rather the centrality of *Lawrence* to the disposition of a subsequent case. *E.g.*, *Hobbs v. Smith*, No. 05 CVS 267, 2006 WL 3103008 (N.C. Super. Ct. Aug. 25, 2006) (declaring fornication statute unconstitutional under *Lawrence* in a single sentence).

267. In KeyCite, three stars simply indicates a paragraph or two of discussion. That does not automatically indicate, however, that the discussion of *Lawrence* was central to a case’s holding.

variables. Specifically, I used Pearson's chi-square tests to analyze if there are any significant differences between treatment of *Lawrence* and factors such as the geographic region in which the case was decided and judicial officers' demographic characteristics. The chi-square test of independence is used to examine if two categorical variables are truly independent of each other.²⁶⁸ Where applicable, the probabilities for statistically significant relationships are reported using Fisher Exact tests²⁶⁹ and the strength of such associations are reported using the Cramer's V statistic.²⁷⁰

3. Qualitative Coding and Analyses

Consistent with the research method as set forth by Altheide and Schneider, the qualitative portion of this research project focuses on narrative data in which both categorical and unique data were obtained from each case studied.²⁷¹ The content analysis was conducted in three phases, the completion of which allowed for the creation of a typology based on the patterns that emerged during the analyses of cases.

The first phase of the qualitative content analysis involved two researchers independently reviewing forty cases in an attempt to discern distinctive patterns in ways that courts were applying *Lawrence*. This allowed each of the researchers to develop a preliminary protocol containing categories against which other cases could be assessed.

268. See ALAN AGRESTI, AN INTRODUCTION TO CATEGORICAL DATA ANALYSIS 36–41 (3d ed. 2019); *Using Chi-Square Statistic in Research*, Stats. Sols., <https://www.statisticssolutions.com/using-chi-square-statistic-in-research/> [<https://perma.cc/9Q3Q-8WEK>].

269. The Fisher Exact test serves the same purpose as chi-squares, but is more appropriate with sample sizes less than 1,000 or when 20% of expected frequencies in cross-tabulation cells are less than or equal to five (which occurred in some chi-squares). See Matthias Döring, *Testing Independence: Chi-Squared vs Fisher's Exact Test*, DATA SCI. BLOG (Oct. 17, 2018), https://www.datascienceblog.net/post/statistical_test/contingency_table_tests/ [<https://perma.cc/C36Q-4WG8>]. Because this study analyzes fewer than 1,000 cases, both the chi-square and Fisher's Exact statistics are reported as confirmatory of each other.

270. *Nominal Variable Ass'n*, Stats. Sols., <https://www.statisticssolutions.com/free-resources/directory-of-statistical-analyses/nominal-variable-association/> [<https://perma.cc/9R2Y-C5J6>] (last visited Aug. 19, 2022).

Cramer's V results range from 0.00 to 1.00. Some authorities make three divisions for interpreting the strength of associations values. *Id.* (describing values less than 0.10 as weak, 0.10 to 0.30 as moderate, and 0.31 or higher as strong). Other sources refine interpretation across five levels with values less than 0.05 indicating a very weak relationship; values between 0.05 and 0.10 indicating weak associations; values between 0.10 and 0.15 representing moderate associations; values between 0.15 and 0.25 indicating strong associations; and values of 0.25 or higher indicating very strong relationships. Haldun Akoglu, *User's Guide to Correlation Coefficients*, 18 TURK. J. EMERGENCY MED. 91, 92 tbl.2 (2018).

271. ALTHEIDE & SCHNEIDER, *supra* note 243, at 23–73.

Importantly, this phase involves a collaborative, discursive process to identify categories that capture the richness of narrative descriptions without any predefined categories.²⁷² Then, after independently identifying emergent themes, two researchers compared their own assessments of the forty cases and then harmonized their conceptualizations so that cases presenting similar themes could be more reliably coded as falling within a particular category.

The second phase of the content analysis involved two researchers independently coding all ninety-one relevant civil cases. When a particular case fell within one of the themes developed as part of the preliminary data analysis protocol, it was added to the previously-identified category. By contrast, when a case presented a substantially different use of *Lawrence*, a new category was created, thereby allowing for the emergence of central themes that are explored in detail in the results section of this Article.

In the third phase, the cases within each of the categories that emerged in phase two were compared and contrasted. The goal of this phase was to make generalizations not only about the ways litigants sought to use *Lawrence*, but also about how courts ultimately ruled on such attempts.

During the first phase, the two coders reached 77.5% agreement, which exceeds the typical threshold of 75% agreement required in the social sciences.²⁷³ During the second phase of coding, our inter-rater reliability increased to 87.9%. Then, after the third phase, we met and talked through our different approaches to coding the eleven cases on which we did not independently code identically during phase two. Based on those discussions, we were able to reach consensus on the final coding of all the cases in the study.

IV. RESULTS

A. Quantitative Analyses

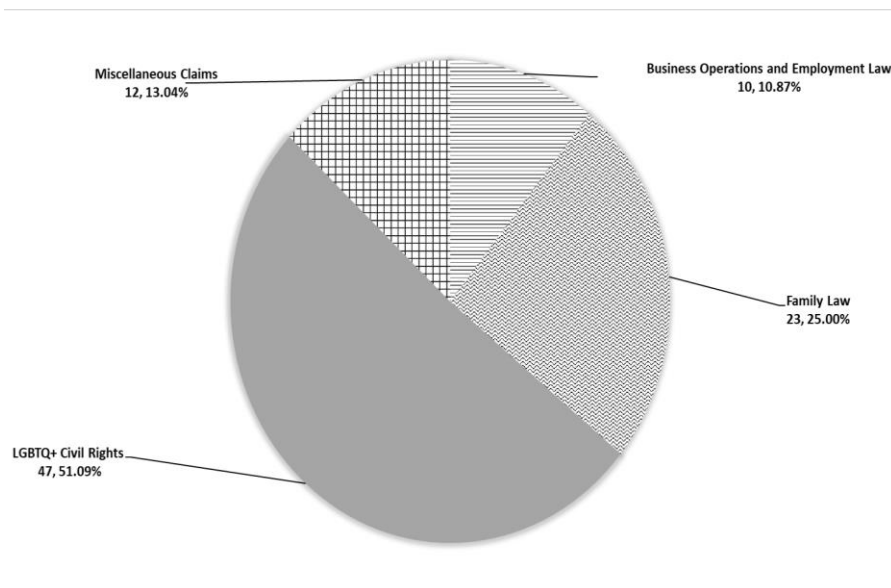
The cases fell into one of three primary themes that emerged during the qualitative analysis of the data. They include, in alphabetical order, (1) business operations and employment law; (2) family law claims not involving marriage equality; and (3) LGBTQ+ civil rights, including

272. *Id.* at 44–45.

273. See, e.g., *Inter-rater Reliability IRR: Definition, Calculation*, STATS. HOW TO (July 17, 2016), <https://www.statisticshowto.com/inter-rater-reliability/> [<https://perma.cc/RG46-XF5H>].

marriage equality. In addition to these three substantive categories, a miscellaneous category presents cases that used *Lawrence* in ways that differed from one of the other categories that emerged during data analysis. Figure 1 illustrates the number of cases in each category along with the corresponding percentage of the total cases in the study.

Figure 1: Category Frequencies



1. Depth of *Lawrence* Analysis

Table 2 presents a crosstabulation of the depth of analysis in each of the major case categories. Although these relationships were not statistically significant ($\chi^2_{(3, 92)} = 2.906$; $p > 0.05$), as Table 3 illustrates, the depth of treatment across all categories was significantly related to how courts construed the case.

Table 2: Crosstabulation of Depth by Category

Case Category	Depth of Analysis		
	<i>Mentioned in Passing</i>	<i>Key to Case</i>	<i>Total</i>
Business Operations and Employment Law	8 (8.7%)	2 (2.2%)	10 (10.9%)
Family Law	20 (21.7%)	3 (3.3%)	23 (25.0%)
LGBTQ Civil Rights	33 (35.9%)	14 (15.2%)	47 (51.1%)
Miscellaneous Civil Claims	8 (8.7%)	4 (4.3%)	12 (13.0%)
Total	69 (75.0%)	23 (25.0%)	92 (100%)

2. Treatment of *Lawrence*

Table 3 shows a crosstabulation of the treatment of *Lawrence* against all of the independent variables in the study.

Table 3: Crosstabulation of Treatment of *Lawrence* by Independent Variables

Category	Treatment of <i>Lawrence</i> n (%)				Chi-Square	Sig.	Cramer's V
Category of Case	<i>Neutral</i> 40 (43.5%)	<i>Narrow</i> 16 (17.4%)	<i>Broad</i> 36 (39.1%)	<i>Total</i> 92 (100.0%)	2.538 (6, 92)	p > 0.050	N/A
<i>Business & Employment Law</i>	6 (6.5%)	1 (1.1%)	3 (3.3%)	10 (10.9%)			
<i>Family Law</i>	10 (10.9%)	5 (5.4%)	8 (8.7%)	23 (25.0%)			
<i>LGBTQ Civil Rights</i>	20 (21.7%)	7 (7.6%)	20 (21.7%)	47 (51.1%)			
<i>Miscellaneous Civil Claims</i>	4 (4.3%)	3 (3.3%)	5 (5.4%)	12 (13.0%)			

Depth	Neutral	Narrow	Broad	Total	21.126 (2, 92)	Fisher's Exact p = 0.001	0.479
Mentioned in Passing	38 (41.3%)	6 (6.5%)	25 (27.2%)	69 (75.0%)			
Key to Case	2 (2.2%)	10 (10.9%)	11 (12.0%)	23 (25.0%)			
Region	Neutral	Narrow	Broad	Total	13.352 (6, 92)	Fisher's Exact P = 0.036	0.269
Northeast							
New England	3 (3.3%)	0 (0.0%)	5 (5.6%)	8 (8.9%)			
Mid- Atlantic	7 (7.8%)	3 (3.3%)	12 (13.3%)	22 (24.4%)			
Subtotal	10 (10.9%)	4 (4.3%)	18 (19.6%)	32 (34.8%)			
South							
South Atlantic	2 (2.2%)	5 (5.6%)	5 (5.6%)	12 (13.3%)			
East South Central	4 (4.1%)	1 (1.1%)	0 (0.0%)	5 (5.6%)			
West South Central	5 (5.6%)	3 (3.3%)	1 (1.1%)	9 (10.0%)			
Subtotal	11 (12.0%)	9 (9.8%)	6 (6.5%)	26 (28.3%)			
Midwest							
East North Central	4 (4.4%)	1 (1.1%)	1 (1.1%)	6 (6.7%)			
West North Central	3 (3.0%)	0 (0.0%)	2 (2.2%)	5 (5.6%)			
Subtotal	7 (7.6%)	1 (1.1%)	3 (3.3%)	11 (12.0%)			
West							
Mountain	5 (5.6%)	2 (2.2%)	4 (4.4%)	11 (12.2%)			
Pacific	7 (7.8%)	0 (0.0%)	5 (5.6%)	12 (13.3%)			
Subtotal	12 (13.0%)	2 (2.2%)	9 (9.8%)	23 (25.0%)			

Judge's Sex	<i>Neutral</i>	<i>Narrow</i>	<i>Broad</i>	<i>Total</i>			
<i>Male</i>	27 (29.3%)	12 (13.0%)	20 (21.7%)	59 (64.1%)	4.688 (4, 92)	p > 0.050	N/A
<i>Female</i>	13 (14.1%)	3 (3.3%)	15 (16.3%)	31 (33.7%)			
<i>Not Applicable (per curiam)</i>	0 (0.0%)	1 (1.1%)	1 (1.1%)	2 (2.2%)			
Judge's Race/Ethnicity	<i>Neutral</i>	<i>Narrow</i>	<i>Broad</i>	<i>Total</i>			
<i>White</i>	33 (35.9%)	13 (14.1%)	31 (33.7%)	77 (83.7%)	2.780 (4, 92)	p > 0.050	N/A
<i>Nonwhite</i>	7 (7.6%)	2 (2.2%)	4 (4.3%)	13 (14.1%)			
<i>Not Applicable or Unknown</i>	0 (0.0%)	1 (1.1%)	1 (1.1%)	2 (2.2%)			
Judge's Political Affiliation	<i>Neutral</i>	<i>Narrow</i>	<i>Broad</i>	<i>Total</i>			
<i>Nonpartisan</i>	22 (23.9%)	11 (12.0%)	25 (27.2%)	58 (63.0%)	6.963 (6, 92)	p > 0.050	N/A
<i>Democrat</i>	8 (8.7%)	1 (1.1%)	7 (7.6%)	16 (17.4%)			
<i>Republican</i>	10 (10.9%)	4 (4.3%)	3 (3.3%)	17 (18.5%)			
<i>Not Applicable or Unknown</i>	0 (0.0%)	0 (0.0%)	1 (1.1%)	1 (1.1%)			

A few salient findings stand out. First, when judges interpreted and applied *Lawrence* in ways that went beyond a neutral application of its central holding, they gave the precedent a broad construction more than twice as frequently than a narrow one.

Second, the differences in the depth of courts' analyses of *Lawrence* were strongly related to how the precedent was treated. Specifically, *Lawrence* was briefly discussed in nearly three-quarters of the civil cases in the study, most frequently as part of a neutral application of the precedent. When *Lawrence* was key to the outcome of a case, however, it was very rarely applied in a straightforward manner. Rather, judges needed to interpret *Lawrence* and they split nearly evenly between narrow and broad applications of the case.

Third, the geographical region in which cases were decided was moderately to strongly related to how courts applied *Lawrence*. Judges in the northeastern and western regions interpreted the precedent broadly by a margin of more than four to one over narrow constructions. Conversely, judges in the South gave *Lawrence* a more narrow reading by a margin of 1.5 to one. These regional differences were statistically significant.

Fourth, there were no significant differences in the way judges treated *Lawrence* based on their sex or racial/ethnic heritage.²⁷⁴ The same is true for their political affiliation.²⁷⁵

B. Qualitative Analyses

1. Business Operations and Employment ($n = 10$, 10.9%)

Judges cited *Lawrence* in eleven cases concerning business operations. Five subthemes emerged in these cases.

a. Business Liability

One of the business operations cases presented the question of whether an adult theater was being maintained by its owners as a public nuisance because patrons engaged in lewd conduct during movie screenings.²⁷⁶ The court easily dispensed with the defendant's argument that enforcement of the state's nuisance law violated theater patrons'

274. The race and ethnicity of two judges could not be determined. Of the remainder, seventy-six (83.5%) were White, two (2.2%) were Asian or Pacific Islanders, five (5.5%) were African-American or Black; and six (6.6%) were Hispanic. Given that people of color account for comparatively few of the judges represented in the study, it was necessary to collapse the categories as presented in Table 3 to avoid there being too few observations for meaningful statistical analyses.

275. The political affiliation of nearly two-thirds of the judges ($n = 59$, 64.8%) could not be determined because they had achieved judicial by winning nonpartisan elections or through other nonpartisan means. Of those who were elected in partisan races or appointed via a political process, judges were evenly split between Democratic and Republican party affiliations.

276. *Commonwealth v. Can-Port Amusement Corp.*, No. 2005-0295, 2005 WL 937312, at *1 (Mass. Super. Ct. Mar. 31, 2005).

privacy rights since the sexual activities at issue in the case had occurred in a theater open to the public, rather than anywhere private. Accordingly, a straightforward application of *Lawrence* placed the lewd conduct in the case outside of the scope of *Lawrence*'s protections.²⁷⁷ The court therefore ruled in favor of the state and against the theater.

Another business case involved whether the Board of Elders of a church had any civil liability for negligent supervision of a pastor. The pastor had been criminally convicted of using his position to sexually exploit parishioners over his defense that *Lawrence* protected his conduct.²⁷⁸ The Supreme Court of Iowa held that the civil defendants could be liable for negligent supervision, but the plaintiffs' claims were time-barred by the statute of limitations.²⁷⁹

b. Disclosure of Communications by Public Employees

Another case in this category concerned an effort to limit public disclosure of emails between public employees, some of which involved sexually-explicit content.²⁸⁰ Television and print media sought to obtain an unredacted report prepared by a private investigator that contained 570 email messages between a county clerk and one of that person's supervisees who claimed to have been constructively discharged and sexual harassed.²⁸¹ The Colorado Court of Appeals determined that some of these emails were not appropriate for release due to the privacy rights of the two county employees. The court cited *Lawrence* in passing for the proposition that "sexual behavior is the most private human conduct."²⁸² Notably, the bulk of the decision concerned the application of state's public record laws and precedents interpreting it. Ultimately the court concluded that more than 100 emails could be properly disclosed, but by broadly applying *Lawrence*, it shielded disclosure of the sexually-explicit ones, reasoning they were private and not subject to general release.²⁸³

277. *Id.* at *10.

278. *Bandstra v. Covenant Reformed Church*, 913 N.W.2d 19, 34-35 (Iowa 2018).

279. *Id.* at 46.

280. *In re Bd. of Cnty. Comm'rs of Cnty. of Arapahoe*, 95 P.3d 593, 596 (Colo. App. 2003), *as modified on denial of reh'g* (Oct. 23, 2003), *aff'd in part, rev'd in part sub nom.* *Denver Pub. Co. v. Bd. of Cnty. Comm'rs of Cnty. of Arapahoe*, 121 P.3d 190 (Colo. 2005).

281. *Id.* at 596.

282. *Id.* at 600-01.

283. *Id.* at 604.

c. Employee Discipline

In *Sylvester v. Director of the Arkansas Employment Security Department*, a state police officer appealed the denial of his application for unemployment benefits after he was terminated for having lied about a sexual relationship he had with a victim in one of the cases he had investigated.²⁸⁴ He argued that because the relationship was consensual, it was protected by *Lawrence*.²⁸⁵ But because his termination stemmed from lying about the affair—both violating policy and calling his credibility into question any time he took the witness stand in a case, the court found *Lawrence* inapplicable and upheld the denial of unemployment benefits.²⁸⁶

Unlike in cases like *Sylvester* in which dishonesty about a potentially constitutionally-protected relationship formed the basis for employee discipline, when the relationship itself triggers disciplinary action, courts recognize that employees might possess “a legally protected privacy interest in pursuing an intimate or sexual relationship,” just as the court stated in *Barbee v. Household Automotive Financial Corp.*²⁸⁷ Nonetheless, the court upheld the firing of a sales manager for dating one of his subordinates, reasoning that certain workplace romantic or sexual relationships present potential conflicts of interest, the likelihood of disparate treatment of employees due to favoritism, and possibility of claims sexual harassment.²⁸⁸

d. Wrongful Termination Claims

Several employment cases concerned claims by employees that they had been discriminated against on the basis of their sexual orientation. Those raising religious freedom issues are presented in Part IV.B.3.d²⁸⁹ But one such case is discussed here because it raised no First Amendment claim.

In *Tarrant County College District v. Sims*, the plaintiff alleged she had been terminated from her job because she was gay.²⁹⁰ The defense unsuccessfully moved to dismiss the case for lack of jurisdiction because

284. No. E05-46, 2006 WL 637097, at *1 (Ark. Ct. App. Mar. 15, 2006).

285. *Id.* at *2.

286. *Id.*

287. 6 Cal. Rptr. 3d 406, 411 (Ct. App. 2003).

288. *Id.* 411–12 (internal citations omitted).

289. See *infra* notes 391–548 and accompanying text.

290. *Tarrant Cnty. Coll. Dist. v. Sims*, 621 S.W.3d 323, 325 (Tex. App. 2021).

the state's antidiscrimination law did not reach sexual orientation.²⁹¹ The Texas Court of Appeals affirmed, finding that the statute in question could be used as the basis for a lawsuit for employment discrimination based on sexual orientation because it prohibited "sex discrimination based on a failure to conform to gender stereotypes," mirroring the U.S. Supreme Court's logic in *Bostock v. Clayton County*.²⁹² In a separate opinion, a judge took issue with the majority's reasoning and argued that, at the time the Texas legislature had adopted the law, the state not only prohibited same-sex marriage, but also criminalized "homosexual conduct."²⁹³ He acknowledged that *Lawrence* had invalidated the latter statute, but nonetheless asserted that, unlike the situation in *Bostock*, in which the U.S. Supreme Court "was able to draw on a plethora of federal statutes in support of its conclusion that Congress would (or should) have understood the phrase 'because of sex' to include 'sexual orientation' as a matter of federal law in 1964," the same was not true about the "statutory landscape" in Texas at the time the antidiscrimination statute was adopted.²⁹⁴ Rather than engaging in a constitutional analysis about the implications of *Lawrence*, *Obergefell*, and *Bostock* for the case, the judge argued that the plaintiff's case should be dismissed because the statutory language should have been interpreted within the plain meaning of the word "sex" at the time law was adopted: "Whether any of this is good or bad policy, then as now, is a question for the legislature, not the courts. What matters, for our purposes, is what the law says and what the legislature understood it to mean at the time."²⁹⁵

Unlike the allegation of sexual orientation discrimination underlying the wrongful termination claim in *Tarrant*, the plaintiff in *Robinson v. Salvation Army* filed a common law wrongful termination claim against her former employer in which she alleged that she had been fired for refusing to engage in sex with her manager.²⁹⁶ Despite the fact that the Supreme Court of Virginia had invalidated the state's fornication law in the 2005 case of *Martin v. Zihler*,²⁹⁷ the plaintiff in *Robinson* argued that

291. *Id.* at 326.

292. *Id.* at 327.

293. *Sims*, 621 S.W.3d at 333 (Schneck, J., concurring in part and dissenting in part).

294. *Id.*

295. *Id.* at 334; see also *Burns v. Ohio State Univ. Coll. of Veterinary Med.*, No. 13AP-633, 2014 WL 1317499 at *3-4 (Ohio Ct. App. Mar. 25, 2014) (refusing to interpret discrimination on the basis of sex as including sexual orientation while noting that the case did not present either due process or equal protection claims and, therefore, cases like *Lawrence* were inapposite).

296. 791 S.E.2d 577, 578 (Va. 2016).

297. 607 S.E.2d 367, 370 (Va. 2005).

because the fornication law remained “on the books,” it represented the state’s public policy; thus, she argued that terminating her employment-at-will for refusal to commit a violation of the law was actionable.²⁹⁸ Both a trial court and the Supreme Court of Virginia rejected her argument, reasoning that for her claim to be cognizable, her manager would have to had encouraged her to engage in conduct that fell outside the realm of *Lawrence* by engaging in “public fornication, prostitution, or other such crimes.”²⁹⁹ Absent such facts, the court held that demands for extramarital sex “can no longer provide the basis for a valid allegation of wrongful termination whether the employee accedes to the demands or is terminated for refusing the demands.” But this is quite a narrow interpretation of *Lawrence*. At-will employees who are subject to termination for refusing to engage in sexual activity with a supervisor could easily fall within *Lawrence*’s exclusion for those “who are situated in relationships where consent might not easily be refused.”³⁰⁰ Indeed, a lower court in Virginia cited that very sentence in *Lawrence* when ruling that a wrongful termination claim stemming from an alleged refusal to engage in acts of adultery, fornication, or sodomy did, in fact, violate the public policy of the state.³⁰¹ Curiously, that case was not cited in *Robinson v. Salvation Army*, despite the fact that it had been decided three years earlier.

e. Self-Autonomy in the Workplace

Finally, one case in this category presented a claim of self-autonomy. *American Legion Post #149 v. Washington State Dept. of Health* involved a challenge to both a statute and an ordinance banning smoking in “any place of employment.”³⁰² The plaintiffs alleged that they possessed a constitutionally cognizable privacy interest in smoking in private facilities. In rejecting that claim, the Supreme Court of Washington noted that the constitutional right to privacy protects “autonomous decision making (including issues relating to marriage, procreation, family relationships, child rearing, and education) and . . . confidentiality, or nondisclosure[,] of personal information.”³⁰³ Because no such privacy

298. *Robinson*, at 791 S.E.2d at 578–80.

299. *Id.* at 580.

300. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

301. *See, e.g., Bomar v. Chesapeake Bay Steakhouse, Inc.*, No. CL12–2415, 2013 WL 9564168, at *3 (Va. Cir. Ct. 2013).

302. *Am. Legion Post #149 v. Washington State Dep’t of Health*, 192 P.3d 306 (Wash. 2008).

303. *Id.* at 321.

interests were implicated by a smoking ban in a private club that had employees who would be exposed to second-hand smoke while working, the court applied the rational basis test and upheld the laws as being rationally related to the legitimate governmental interest of protecting public health.³⁰⁴

A dissenting justice would have invalidated the laws on due process grounds because the ban reached conduct in a private place.³⁰⁵ He quoted *Lawrence* when he wrote,

“[L]iberty protects the person from unwarranted government intrusions into a dwelling or other private places Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self” This self-autonomy includes what time you go to bed at night, how much to exercise, how much fat to eat, a choice to smoke, a choice to be around smokers as well as every other myriad private decision we make to pursue happiness in our lives (even when some choices are probably not as healthy as others). Yet these choices are the very essence of personal liberty and self-autonomy.³⁰⁶

The dissent went on to question the link between second-hand smoke and cancer, heart disease, and asthma.³⁰⁷ Unless such links could be established to the satisfaction of a trier-of-fact, the dissenting judge would have invalidated the anti-smoking laws as arbitrary exercises of governmental power that infringe constitutionally-protected liberty interests.

The science-denying claims in the dissenting justice’s opinion in the *American Legion Post* case notwithstanding, the logic of the dissent represents a high-watermark for a libertarian view of *Lawrence*. The majority opinion in *Dobbs* stressed that judicial review of liberty claims can lead to “freewheeling judicial policymaking” if its constitutional interpretation is not limited to “the teachings of history.”³⁰⁸ But Justice Sanders’ dissent in *American Legion Post* cited *Lawrence* positively, embracing an expansive interpretation of the case that goes so far as protecting liberty vis-à-vis autonomy by questioning legislative pronouncements regarding public health.

304. *Id.* at 324.

305. *Id.* at 335 (Sanders, J., dissenting).

306. *Id.* at 335–36 (emphasis added by Justice Sanders in his dissent, not in the *Lawrence* decision itself).

307. *Id.* at 336–38.

308. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2248 (2022).

2. Family Law (n = 23, 25.0%)

Putting aside marriage equality for same-sex couples because it arguably raises significant questions of civil rights, it is clear that *Lawrence* had significant impact on more traditional questions of family law. Sometimes, this impact was tangential—largely serving as an example of changing views about LGBTQ+ rights. Other times, *Lawrence* significantly influenced either the outcome or the rationale for the decisions. But even in such cases, *Lawrence* tended to mitigate homophobia and heterosexism, rather than serving as a basis for true LGBTQ+ equality in family law.

Of the twenty-three family law cases in the study, ten (43.5%) applied *Lawrence* neutrally, five (21.7%) construed the precedent narrowly, and the remaining eight (34.8%) cases gave *Lawrence* a broad reading. The three primary contexts of such applications are explored in the following subsections.

a. *Lawrence* as a Signpost

Under New Hampshire law, adultery qualifies as grounds for divorce.³⁰⁹ But case law had previously limited the definition of adultery in this context to “extramarital, sexual intercourse between persons of the opposite sex,” thereby excluding sexual activity between members of the same sex.³¹⁰ *Matter of Blaisdell* overruled the precedent which had established that holding.³¹¹ The *Blaisdell* court cited *Lawrence* in passing when noting that “the law and public opinion surrounding the rights of same-sex couples to engage in intimate association” had begun to change at least eighteen years earlier.³¹² But *Lawrence* was not a key precedent for the decision in *Blaisdell*. Rather, because New Hampshire embraced marriage equality for LGBTQ+ people by statute in 2009 and *Obergefell* extended that right nationwide in 2015, the court reasoned that “limiting the definition of adultery to sexual intercourse between two persons of the opposite sex would be inconsistent” with the way marriage had come to be understood.³¹³

309. N.H. REV. STAT. § 458:7 (2020).

310. *In re Blanchflower & Blanchflower*, 834 A.2d 1010, 1011–12 (N.H. 2003).

311. 261 A.3d 306, 309 (N.H. 2021).

312. *Id.* at 311.

313. *Id.* at 313 (citing, *inter alia*, N.H. REV. STAT. § 457:1-a (2010); *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015)); *see also* *Hogsett v. Neale*, 478 P.3d 713, 721 (Colo. 2021) (modifying the standards for determining whether parties mutually intended to enter a common law marriage to accommodate members of the same-sex); *cf. In re Guardianship of Dameris L.*, 956 N.Y.S.2d 848, 855 (Sur. Ct. 2012) (citing *Lawrence*’s use of international law as persuasive authority as a

Kinnett v. Kinnett is another case in which *Lawrence* played no meaningful role in the case outcome, but nonetheless was cited in passing to illustrate that changing times might require revisiting long-standing precedents. In *Kinnett*, the Louisiana Court of Appeals grappled with the scope of biological parents' constitutionally protected liberty interests in their relationships with their children.³¹⁴ The court reversed a trial court's determination that a putative father's avowal action was preempted.³¹⁵ A judge wrote a concurring opinion to express her concerns that the statute governing the time period for paternity acknowledgments was unconstitutional.³¹⁶ In so doing, she challenged the notion of presumptive paternity for men married to a woman at the time she gives birth. In her analysis of the liberty interests at stake for both biological fathers and their children, the judge questioned a line of cases that had relied on common law presumptions of paternity and, in doing so, cited *Lawrence* and *Obergefell* for the proposition that history and tradition do not necessarily limit the constitutional protection rights:

Rigid focus upon history and tradition is inconsistent with a rich body of United States Supreme Court jurisprudence . . . and fails to consider that both history and tradition are a side effect of the passage of time and evolving social mores Supreme Court jurisprudence addressing a plethora of asserted rights affirms that history and tradition are not the sole arbiters of whether liberty interests are entitled to protection under the constitution in the face of evolving science and societal norms. *See, e.g., Lawrence v. Texas*³¹⁷

The majority opinion in *Kennett* did not wrestle with the constitutional dimensions of the case. On appeal, the Louisiana Supreme Court reversed the appellate court's nonconstitutional ruling and remanded the action for consideration of the constitutional challenge.³¹⁸ On remand, the appellate court vacated the trial court's judgment that the statute was constitutional and remanded for a full evidentiary trial "with factual and/or expert testimony and evidence" to determine the constitutionality of the statute

guide for examining Article 12 of the United Nations Convention on the Rights of Persons with Disabilities, as persuasive authority for interpreting constitutional protections in guardianship proceedings); *In re Mark C.H.*, 906 N.Y.S.2d 419, 434 (Sur. Ct. 2010) (same).

314. 302 So. 3d 157 (La Ct. App. 2020), *rev'd in part*, 332 So. 3d 1149 (La. 2021).

315. *Id.* at 187.

316. *Id.* at 187–204 (Wicker, J., concurring).

317. *Id.* at 191–92 (internal citations omitted); *see also In re Tammy J.*, 270 P.3d 805, 813 (Alaska 2012) ("Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." (internal quotations and citations omitted)).

318. 332 So. 3d 1149, 1157 (La. 2021).

in question.³¹⁹ Notably, the court of appeals' decision on remand did not cite *Lawrence*, perhaps because the continued viability of these decisions was called into question by *Dobbs*, most especially by Justice Thomas' concurring opinion in which he stated the Court "should reconsider all of [its] substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."³²⁰

Under Alabama law in effect until 2022, alimony payments were supposed to be terminated upon "proof that the spouse receiving such alimony has remarried or that such spouse is living openly or cohabiting with a member of the opposite sex."³²¹ In *J.L.M. v. S.A.K.*, an ex-husband moved to terminate alimony payments to his ex-wife when she began living with a female partner.³²² He claimed that his alimony payments compelled him to "'abet' his former wife's criminal conduct by subsidizing her illicit relationship with his money" in violation of the public policy of the state.³²³ In support of his argument, he pointed to the state's ban on the recognition of same-sex marriages and the fact that the state's sodomy law (which was limited to acts involving members of the same-sex) remained on the books despite *Lawrence*. The court refused to modify the alimony award because the plain language of the statute applied only to cohabitation with a member of the opposite sex. Additionally, the court based its decision on the ex-wife's continued need for financial support and the fact that "[t]he former husband offered no evidence indicating that the former wife is using her alimony for anything other than the payment of her ordinary living expenses."³²⁴ *Lawrence*, therefore, played no meaningful role in the *J.L.M. v. S.A.K.* decision. In fact, the court seemed to pay little more than lip service to the precedent by acknowledging that the Supreme Court had invalidated "a similarly-worded Texas statute" in *Lawrence*, but then went on to say that, although the Alabama sodomy law could not be constitutionally applied to private sex acts between consenting adults, the state's sodomy law had "not been declared unconstitutional by any court."³²⁵ It took until 2022 for Alabama

319. *Kinnett v. Kinnett*, 345 So. 3d 1122, 1131 (La. App. July 7, 2022).

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

321. ALA. CODE § 30-2-55 (1975 & 2008 Supp.).

322. 18 So. 3d 384, 385–86 (Ala. Civ. App. 2008).

323. *Id.* at 389.

324. *Id.* at 390.

325. *Id.* at 388 n.4.

to amend its family law to make the termination of alimony upon romantic cohabitation apply neutrally to all sexes and sexual orientations.³²⁶

b. Adoption by a Gay Parent

Florida was the last U.S. state to prohibit adoption by gays and lesbians. Originally enacted in 1977, the relevant statutory provision provided, “[n]o person eligible to adopt under this statute may adopt if that person is a homosexual.”³²⁷ That law withstood several challenges over the years before two courts in different Florida counties invalidated it on equal protection grounds (among others).³²⁸ Both courts relied, in part, on *Lawrence*. One cited *Lawrence* to dispense with the state’s claim that the adoption ban was rationally related to the promotion of public morality.³²⁹ The other relied on *Lawrence* for the proposition that it was irrational to deny qualified parents the ability to adopt based on sexual orientation after the Supreme Court held in *Lawrence* that such status “may not be penalized.”³³⁰ Both courts gave *Lawrence* an expansive interpretation, using the case as a basis to protect the rights of LGBTQ+ people and their putative children.

c. *Lawrence* as (Mostly) Ineffective Sword or Shield in Family Law Disputes

In several cases, a spouse or former spouse attempted to use *Lawrence* to support their positions in family court actions. They were almost always unsuccessful.

Malecek v. Williams involved the constitutionality of two “common law causes of action—alienation of affection and criminal conversion—that permit litigants to sue the lovers of their unfaithful spouses.”³³¹ The court acknowledged these “aging” torts “were born out of misogyny and in modern times are often used as tools for enterprising divorce lawyers

326. ALA. CODE § 30-2-55 (2022) (as amended by 2022 Ala. Laws 430 (H.B. 54)).

327. FLA. STAT. ANN. § 63.042(3) (1973 & 2008 Supp.).

328. *In re Adoption of Doe*, 2008 WL 5006172, at *29 (Fla. Cir. Ct. Nov. 25, 2008) (Miami-Dade County); *In re Adoption of Doe*, 2008 WL 5070056, at *31 (Fla. Cir. Ct. Aug. 29, 2008) (Monroe County).

329. *Doe*, 2008 WL 5006172, at *29. The Supreme Court of Arkansas and a court in Missouri both applied the same logic when invalidating their state bans on LGBTQ+ people serving as foster parents. *Dep’t of Hum. Servs. & Child Welfare Agency Rev. Bd. v. Howard*, 238 S.W.3d 1, 10–11 (Ark. 2006); *Johnston v. Missouri Dep’t of Soc. Servs.*, No. 0516-CV09517, 2006 WL 6903173, at *5 (Mo. Cir. Ct. Feb. 17, 2006).

330. *Doe*, 2008 WL 5070056, at *31 n.34.

331. 804 S.E.2d 592, 594 (N.C. Ct. App. 2017).

seeking leverage over the other side.”³³² Yet, the court rejected the defendant’s challenge to these causes of action, reasoning that they deterred and compensated for personal injuries while fostering “the promise of monogamy that accompanies most marriage commitments.”³³³ In so holding, the court rejected the defendant’s argument that these torts infringed on the constitutionally protected liberty interest for consenting adults to engage in private sexual relations. The court noted *Lawrence* applies only to activity that did not inflict “injury to a person” or “abuse . . . an institution the law protects.”³³⁴ Because marriage is an “obvious choice” of the latter, the court held that the two torts at issue in the case served a legitimate—even a substantial—governmental interest in compensating aggrieved spouses for the injuries caused by marital infidelity.³³⁵

In *Vanderveer v. Vanderveer*, a woman challenged the award of primary child custody to her ex-husband.³³⁶ One of the reasons a family court judge ordered that change in custody was that she had begun living with a new boyfriend—conduct, she argued, was constitutionally protected under *Lawrence*.³³⁷ The court determined *Lawrence* was “factually inapposite” because it did not limit “the atmosphere in a parent’s home” that can be considered when determining the best interest of a child.³³⁸ Moreover, there were other reasons for the change in custody.³³⁹

In *Hawkins v. Grese*, an appellate court upheld the denial of custody to the former same-sex partner of the child’s biological mother after the two unmarried partners ended their ten-year relationship.³⁴⁰ Although the child considered both women to be his parents, the court ruled that “the term ‘parent’ contemplates a relationship to a child based upon either the contribution of genetic material through biological insemination or by

332. *Id.*

333. *Id.*

334. *Id.* at 595.

335. *Id.* at 595–96.

336. No. 0122-04-2, 2004 WL 2157930, at *1 (Va. Ct. App. Sept. 28, 2004).

337. *Id.* at *4.

338. *Id.* at *4, *5.

339. *Id.* at *4. *Vanderveer* involved opposite-sex partners. The same outcome occurred in a case involving same-sex partners. See, e.g., *Page v. Page*, No. 07CA0109, 2008 WL 2469176, at *6 (Ohio Ct. App. June 20, 2008) (differentiating *Lawrence*’s due process holding as applied to criminalizing sodomy from child custody determinations which are “subject to the state’s legitimate interest in insuring that the award and any subsequent modification of [child custody orders are] in the best interest of [the] children”).

340. 809 S.E.2d 441, 443, 452 (Va. Ct. App. 2018).

means of legal adoption.”³⁴¹ In upholding the constitutionality of that definition of parentage, the court cited *Lawrence* for the proposition that sexual orientation is not a suspect or quasi-suspect classification and, therefore, the rational basis test applied when determining the equal protection rights of LGBTQ+ people.³⁴² Applying that deferential standard, the court reasoned that limiting parenthood to biological or adoptive parents did not discriminate on the basis of sexual orientation. “If the couple is not married, the non-biological/non-adoptive partner is not a parent irrespective of gender or sexual orientation.”³⁴³

As the facts of *Hawkins v. Grese* make clear, that case did not involve biological or adoptive parents. When a couple with biological or adoptive children split-up, courts clearly take sexual orientation into consideration when making child custody decisions. More often than not, courts awarded primary custody to the straight parent over an LGBTQ+ one.³⁴⁴ Still, courts clearly have felt at least partially constrained by *Lawrence* to allow either joint custody or visitation with an LGBTQ+ parent. Consider the court’s reasoning in *A.O.V. v. J.R.V.*, a case involving cross-appeals in which a mother contested a trial court decision that did not grant her sole custody of her children and the father challenged the imposition of restrictions on his visits with his children on the basis of his sexuality.³⁴⁵ The court stated that although “[h]omosexuality by itself does not render a parent unfit,” it may nonetheless be a factor that affects what might be in a child’s best interest.³⁴⁶ After discussing two cases that manifested homophobic views about the presumed negative impact on children seeing a parent in a loving same-sex relationship, the court acknowledged that those cases had been “weakened to the extent that they relied on [the state’s] criminalization of certain sexual acts” that

341. *Id.* at 446.

342. *Id.* at 445.

343. *Id.* at 447.

344. *E.g.*, *L.A.M. v. B.M.*, 906 So. 2d 942, 947 (Ala. Civ. App. 2004) (upholding change in primary physical custody from mother to father after she came out, but noting additional reasons for the change).

345. No. 0219-06-4, 2007 WL 581871 at *1 (Va. Ct. App. Feb. 27, 2007).

346. *Id.* at *3–4 (citing *Doe v. Doe*, 284 S.E.2d 799, 805–06 (Va. 1981)); *see also* McGriff v. McGriff, 99 P.3d 111, 117 (Idaho 2004) (“But even before the *Lawrence* decision was handed down, it was established in a number of state courts across the nation that a homosexual parent may not be denied custody of a child unless there is sufficient evidence presented to show that the parent’s homosexuality is having a negative effect on the child and that the parent’s custody is not in the best interests of the child. Only when there is a nexus between harm to the child and a parent’s homosexuality, can that parent’s sexual orientation be a factor in determining custody of a child.”).

subsequently had been invalidated by *Lawrence*.³⁴⁷ Still, the court emphasized that when determining custody, judges need to consider both the extent to which children are exposed to parents' romantic relationships and whether those relationships have any "adverse impact" on children.³⁴⁸ The court concluded that because the father was a fit parent, joint custody was proper. But the court also upheld restrictions on the father when the children visited with him that prohibited him from living openly and honestly as a gay man. Specifically, the court upheld a prohibitions on the father "from allowing his companion to occupy the home overnight or engaging in displays of affection while the children visit."³⁴⁹

A similar outcome occurred in *Weichman v. Weichman* when an appellate court upheld an award of child custody to a father, rather than a mother who had left her husband because she was gay.³⁵⁰ But unlike the Virginia Court of Appeals' 2007 decision in *A.O.V. v. J.R.V.*, a New York City appellate court modified a custody order that had prohibited the noncustodial mother from exposing the child to any activities that violated the tenets of the child's Orthodox Jewish faith. The court found the order was overly broad and infringed on the mother's constitutionally protected liberty interest to "express oneself and live freely" since, as originally entered, the trial court's order could have prohibited her from having her child around a partner if she "became involved in a relationship with or married a woman."³⁵¹ The *Weichman* case was decided in 2021, six years after *Obergefell*'s mandate of nationwide marriage equality. Perhaps the fourteen year timespan between *A.O.V. v. J.R.V.* and *Weichman*, along with the attendant changes in the social acceptance of LGBTQ+ people during that time, account for the difference in the two courts' willingness to control how gay parents express themselves in front of their children during visitation.

347. *Id.* at *3–4.

348. *Id.* at *5.

349. *Id.* at *6; see also *McGriff*, 99 P.3d at 120–21 (upholding similar restrictions on a gay man while his children visited).

350. 158 N.Y.S.3d 154 (Sup. Ct. App. Div. 2021).

351. *Id.* at 157. Providing continuity of religious life for Orthodox Jews, especially those in the Hasidic community, was a key part of the court's rationale. That same concern manifest in other cases, as well. In *Weisberger v. Weisberger*, 60 N.Y.S.3d 265 (Sup. Ct. App. Div. 2017), the court denied a change in child custody from the biological mother to the biological father after the mother came-out as a lesbian. The court noted that children were close with their mother and that she had raised them in accordance with the tenets of their faith despite identifying as a lesbian, whereas the father had not regularly exercised his visitation rights or fulfilled his financial obligations to the children after the parties' separation. *Id.* at 274. The court emphasized that the children were to be given a Hasidic upbringing, but that did not require their mother to abandon her due process rights "to express [her]self and live freely." *Id.* at 275.

T.M.H. v. D.M.T. was the only case in which a court gave *Lawrence* an expansive reading that supported a family law claim in a manner that benefitted an LGBTQ+ litigant.³⁵² The case involved a lesbian couple who owned a home together and used funds in their joint bank account to have a child.³⁵³ They had ova withdrawn from one woman (the biological mother), had them fertilized, and then had them implanted into the other woman (the birth mother). The in vitro fertilization process resulted in a successful pregnancy that yielded a child whom they named using a hyphenation of both of their last names. The women eventually separated and the biological mother sought a declaration of parentage and shared responsibility for the custody and support of the child. A trial court denied her petition because a state law provided that “other than the commissioning couple or a father who has executed a preplanned adoption agreement,” people who donate ova or sperm relinquish all parental rights and obligations with respect to any resulting children.³⁵⁴ The trial court considered the biological mother to be an egg donor within the meaning of that statute. The Florida District Court of Appeal reversed the grant of summary judgment to the birth mother, reasoning that providing ova to one’s partner within the intent of coparenting any resultant children does not render someone a donor within the meaning of the statute because there was no intent to give one’s ova away.³⁵⁵ The court quoted from *Lawrence* to support its reasoning that that any contrary construction of the Florida statute would violate the biological mother’s “constitutional rights to equal protection and privacy under the United States and Florida Constitutions.”³⁵⁶ The birth mother appealed and the Florida Supreme Court upheld the parental rights of the biological mother.³⁵⁷ In doing so, however, the court took issue with the intermediate appellate court’s determination that the biological mother was not a donor within the meaning of the statute. Nonetheless, the Florida Supreme Court declared the statute unconstitutional on due process and equal protection

352. 79 So. 3d 787, 793 (Fla. Dist. Ct. App. 2011), *aff’d in part, disapproved in part*, 129 So. 3d 320 (Fla. 2013).

353. *Id.* at 788.

354. *Id.* at 790–91 (quoting FLA. STAT. ANN. § 742.14 (2016)).

355. *Id.* at 791–92.

356. *Id.* at 793 (“[C]onstitutional protections are provided to individuals making personal decisions relating to such matters as procreation and child-rearing because the Constitution demands respect for the autonomy of the person making these decisions and that ‘[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do’” (quoting *Lawrence v. Texas*, 539 U.S. 558, 574 (2003))).

357. 129 So. 3d 320, 328 (Fla. 2013).

grounds under both the federal and state constitutions without citing *Lawrence*.

3. LGBTQ+ Civil Rights (n = 47, 51.1%)

Given that *Lawrence* is largely considered to be a landmark victory for LGBTQ+ rights, it is unsurprising that the category concerning LGBTQ+ civil rights contains the largest number of cases citing *Lawrence* in the civil portion of this study. Eighteen (40.0%) cases neutrally applied *Lawrence*, seven (15.6%) construed the case narrowly, and twenty cases (44.4%) gave *Lawrence* a broad reading. Notably, nineteen of the twenty cases applying *Lawrence* expansively in LGBTQ+ civil rights cases were decided in the Northeast or West; none came out of the Midwest and only one was decided by a court in the South.

a. Marriage Equality

The law in a handful of jurisdictions recognized transgender people's rights to marry someone of the same sex assigned to the trans-person at birth long before marriage equality for same-sex couples, presuming, however, that the transgender person had undergone gender affirmation surgery prior to the date of the marriage.³⁵⁸ Other states were not so enlightened.³⁵⁹ But the sex of each person in a couple became a

358. See, e.g., Henry F. Fradella, Megan M. Parry & Lauren E. Fradella, *Marriage, Sexuality, and Gender in SEX, SEXUALITY, LAW, AND (IN)JUSTICE*, *supra* note 5, at 330–33; Mark Strasser, *Defining Sex: On Marriage, Family, and Good Public Policy*, 17 MICH. J. GENDER & L. 57, 81 (2010); see also *In re Est. of Araguz*, 443 S.W.3d 233, 235–36, 245 (Tex. App. 2014) (reversing a grant of summary judgment in favor of a decedent's mother because someone who underwent gender-affirmation surgery (what the court called a "sex change") would be eligible to marry a person of the opposite sex; thus, the validity of the decedent's marriage turned on genuine issues of material fact as to the sex of his former spouse); *M.T. v. J.T.*, 355 A.2d 204, 211 (N.J. Super. Ct. App. Div. 1976).

359. *Kantaras v. Kantaras*, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004) (rejecting marriage of transgender person on the grounds that the state barred same-sex marriage and a trans-male was of the same sex as his female partner because "the common meaning of male and female, as those terms are used statutorily, . . . refer to immutable traits determined at birth"); *In re Marriage License for Nash*, No. 2002–T–0149, 2003 WL 23097095 at *9 (Ohio Ct. App. 2003) (refusing to recognize out-of-state amended birth certificate of postoperative trans-man and prohibiting the issuance of a marriage license for him to marry a woman on public policy grounds); *In re Estate of Gardiner*, 42 P.3d 120, 136–37 (Kan. 2002) (holding that a transgender woman was not a woman within the meaning of the statutes recognizing marriage and, therefore, the marriage her and male husband was void against public policy); *Littleton v. Prange*, 9 S.W.3d 223, 230–31 (Tex. App. 1999), *superseded by statute as recognized in Araguz*, 443 S.W.3d at 240 (citing TEX. FAM. CODE ANN. § 2.005(b)(8) (West Supp. 2013)). For a thoughtful critique of the fundamental misunderstanding of both medical and psychological science reflected in these cases, see Lindsee

moot point when marriage equality became the law of the land because all LGBTQ+ people can now marry their partner of choice. But it took twelve years before *Lawrence* helped to usher in that state of affairs for the whole nation.

As discussed in the introduction to this Article, at first, judges frequently gave *Lawrence* a narrow reading when upholding statutory frameworks that limited marriage to people of opposite sexes.³⁶⁰ These courts often cited *Lawrence* for the proposition that the rational basis test applied to review of marriage laws.³⁶¹ Applying that deferential standard to equal protection challenges, these courts upheld laws barring marriage equality on the basis that “[a]ll men and all women are equally entitled to enter the institution of marriage.”³⁶² Of course, such a narrow framing of the issue fails to take into account the fact that lesbians and gays only had such rights to marry someone of the opposite sex, rather than the same-sex persons they loved. These courts similarly rejected due process challenges to laws that were not inclusive of marriage equality. Even though judges recognized that marriage is a fundamental right, they limited that right to “traditional marriage” between one man and one woman.³⁶³ Moreover, they justified this interpretation as having several

A. Acton, *Overturning In re Gardiner: Ending Transgender Discrimination in Kansas*, 48 FAM. L.Q. 563 (2014).

360. One case even refused to grant a property tax exemption to a same-sex couple, one of whom was a disabled veteran. The couple had been lawfully married in Canada and they also entered into a legally-sanctioned civil union in Vermont. Even though a tax exemption would have been available to married, opposite-sex couple, a New Jersey court, relying on its “defense of marriage” act, declined to recognize either out-of-state union, reasoning that the public policy exception to the usual application of comity under the Full Faith and Credit Clause of the U.S. Constitution did not require either the recognition of the marriage or the extension of equal rights commensurate with married persons. *Hennefeld v. Twp. of Montclair*, 22 N.J. Tax 166, 174–87 (2005).

361. *E.g.*, *State ex rel. Alabama Pol’y Inst.*, 200 So. 3d 495, 532–52 (Ala. 2015), *abrogated by Obergefell v. Hodges*, 576 U.S. 644 (2015).

362. *Id.* at 533; *see also Nat’l Pride at Work, Inc. v. Governor of Mich.*, 732 N.W.2d 139, 155 (Mich. Ct. App. 2007), *aff’d*, 748 N.W.2d 524 (2008) (sidestepping the majority opinion in *Lawrence*, but citing the concurring opinion to support the proposition that the state ban on marriage equality rationally served the legitimate state interest of “protecting and strengthening traditional marriages” and, therefore, public employers could lawfully be precluded from extending benefits to same-sex domestic partners).

363. *Id.* at 534; *see also State v. Naylor*, 466 S.W.3d 783, 814 (Tex. 2015) (Divine, J., dissenting); *Kern v. Taney*, 11 Pa. D. & C. 5th 558, 570 (C.P. Berks Cnty. 2010). *But see Czekala-Chatham v. State ex rel. Hood*, 212 So. 3d 787, 792 (Miss. 2015) (King, J., objecting to order for supplemental briefing). In that case, the Supreme Court of Mississippi ordered supplemental briefing on whether an action should be stayed pending resolution of *Obergefell* in a case in which a same-sex couple sought a divorce from an out-of-state marriage into which they could not have entered in that state. Justice Leslie D. King thought such briefing was unnecessary because, in his

rational bases, most frequently promoting procreation and child well-being within a traditional family unit.³⁶⁴

Other cases relied on *Lawrence*, in part, for justifying a revisiting of marriage law, as well as laws and policies affected by marital status, with an eye toward LGBTQ+ inclusion and equality.³⁶⁵ Cases recognizing

assessment, the ban on same-sex marriage was unconstitutional due, in part, to *Lawrence* and other cases that “found homosexuals deserving of protection against discrimination.” *Id.* at 792.

364. *Id.* at 543–44. For a broader, contextual discussion of the Alabama marriage cases, see Howard M. Wasserman, *Crazy in Alabama: Judicial Process and the Last Stand Against Marriage Equality in the Land of George Wallace*, 110 Nw. U.L. REV. ONLINE 1, 17 (2015).

For other cases refusing to recognize marriage equality using similar reasoning to that in the Alabama case (all of which were abrogated by *Obergefell*), see *Conaway v. Deane*, 932 A.2d 571, 633–34 (Md. 2007); *Andersen v. King Cnty.*, 138 P.3d 963, 985–90 (Wash. 2006); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 676–81 (Tex. App. 2010); *Samuels v. New York State Dep’t of Health*, 811 N.Y.S.2d 136, 144 (Sup. Ct. App. Div.), *aff’d sub nom.*, *Hernandez v. Robles*, 855 N.E.2d 1, 7–12 (2006); *Morrison v. Sadler*, 821 N.E.2d 15, 29 (Ind. Ct. App. 2005); *Standhardt v. Superior Ct. ex rel. Cnty. of Maricopa*, 77 P.3d 451, 456–65 (Ariz. Ct. App. 2003); *Seymour v. Holcomb*, 790 N.Y.S.2d 858, 863 (Sup. Ct. 2005), *aff’d*, 811 N.Y.S.2d 134 (Sup. Ct. App. Div. 2006), *aff’d sub nom. Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Shields v. Madigan*, 783 N.Y.S.2d 270, 276 (Sup. Ct. 2004), *aff’d*, 820 N.Y.S.2d 890 (Sup. Ct. App. Div. 2006); *cf. Lockyer v. City & Cnty. of San Francisco*, 95 P.3d 459, 503 (Cal. 2004) (holding that local officials exceeded the scope of their lawful authority when they issued gender-neutral marriage licenses to same-sex couples in contravention to a state law, the constitutionality of which was not properly before the court); *Donaldson v. State*, 292 P.3d 364, 365, 366–67 (Mont. 2012) (finding that an action for a declaratory judgment ordering the state legislature to enact a statutory scheme that honored same-sex couples rights to due process, equal protection, privacy, and dignity presented nonjusticiable claims that, if granted, would constitute an “inappropriate exercise of judicial power”). A dissenting justice in *Donaldson* argued that the court was “on the wrong side of history” and cited *Lawrence* to express his concerns that the laws of the state served to oppress LGBTQ+ people. *Id.* at 375 (Nelson, J., dissenting).

365. *E.g.*, *Mueller v. Tepler*, 95 A.3d 1011, 1023–24 n.18 (Conn. 2014) (holding that same-sex couples could maintain loss of consortium claims for tortious conduct that occurred prior to the time that the law permitted them to be married); *Alaska C.L. Union v. State*, 122 P.3d 781, 786 (Alaska 2005) (“The Marriage Amendment effectively precludes same-sex couples from marrying in Alaska, but it does not explicitly or implicitly prohibit public employers from offering to their employees’ same-sex domestic partners all benefits that they offer to their employees’ spouses.”); *Snetsinger v. Montana Univ. Sys.*, 104 P.3d 445, 452 (Mont. 2004) (invalidating state university system’s denial of benefits to same-sex partners on equal protection grounds when unmarried, opposite-sex partners could receive benefits simply by filing an affidavit); *Godfrey v. Spano*, 836 N.Y.S.2d 813, 813 (Sup. Ct. 2007) (citing *Lawrence* as an example of the expanding rights of LGBTQ+ people that led to their seeking marriage equality), *aff’d*, 871 N.Y.S.2d 296 (Sup. Ct. App. Div. 2008), *aff’d* 920 N.E.2d 328 (N.Y. 2009) (upholding county executive’s recognition of same-sex marriages legally performed in other jurisdictions); *Golden v. Paterson*, 877 N.Y.S.2d 822, 837 (Sup. Ct. 2008) (dismissing challenge to governor’s executive directive recognizing same-sex marriages legally performed in other jurisdictions). *But see* *Glossip v. Missouri Dep’t of Transp. & Highway Patrol Employees’ Ret. Sys.*, 411 S.W.3d 796, 806 (Mo. 2013) (upholding limitation on survivor benefits to spouses over an equal protection claim by the surviving same-sex partner of a deceased state trooper who died prior to the era of marriage equality on the grounds that the restriction was rationally related to the legitimate state interests of providing support to spouses who were economically dependent on a deceased state employee, as well as administrative

marriage equality or expanding the recognition of rights attendant to marriage were usually, although not exclusively handed down by courts in “blue” states, primarily in the Northeast and Pacific coastal areas.³⁶⁶ Some of these states declared sexual orientation to be a suspect or quasi-suspect classification before invalidating laws that had limited marriage to opposite-sex couples.³⁶⁷

Notably, the combination of *Lawrence* and *Obergefell* did not remedy all of the inequities of the times before marriage equality. Undoubtedly, some courts granted LGBTQ+ people access to legal remedies that depended on giving some quasi-retroactive effect to marriage equality when a failure to do so offended equal protection. But not all courts have been willing to do so. Compare what happened in a cases from Pennsylvania with one from Illinois.

In *In re Estate of Carter*, the surviving partner of a couple in a long-term, same-sex relationship argued that he and his late partner had entered into a common law marriage before Pennsylvania abolished them in 2005.³⁶⁸ An appellate court agreed, reasoning that because opposite-sex couples in the state could establish the existence of a common law marriage before the date they were legislatively eliminated, same-sex

efficiency and controlling costs); *Langan v. St. Vincent's Hosp. of N.Y.*, 802 N.Y.S.2d 476, 479–80 (Sup. Ct. App. Div. 2005) (upholding the exclusion of partners in same-sex civil unions from the class of persons with standing to bring wrongful death suits over federal and state constitutional equal protection challenges); *cf. Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623, 656 (Mass. 2006) (“[I]t is neither arbitrary nor capricious for the Legislature to decide as a matter of public policy to restrict the Massachusetts marriages of out-of-state residents . . .”).

366. See, e.g., *Lewis v. Harris*, 908 A.2d 196, 222 (N.J. 2006) (holding same-sex couples must be afforded the same rights and benefits enjoyed by married opposite-sex couples, although that need not be “marriage”); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961–68 (Mass. 2003) (holding denial of civil marriage license violated state constitutional guarantee of equal protection); *Garden State Equal. v. Dow*, No. CIV.A. MER-L-1729-11, 2012 WL 540608 at *6 (N.J. Super. Ct. Law Div. Feb. 21, 2012) (citing *Lawrence* in a decision allowing a marriage equality case to move forward on due process and equal protection challenges); *People v. Greenleaf*, 780 N.Y.S.2d 899, 905 (Just. Ct. 2004) (dismissing misdemeanor charges against Unitarian ministers who officiated marriages for same-sex couples on the grounds that the law preventing the issuance of marriage licenses to such couples was unconstitutional).

367. See, e.g., *Griego v. Oliver*, 316 P.3d 865, 881 (N.M. 2013) (recognizing sexual orientation as a “sensitive class” and applying intermediate scrutiny accordingly); *Varnum v. Brien*, 763 N.W.2d 862, 888 (Iowa 2009) (recognizing sexual orientation as a quasi-suspect classification and applying heightened scrutiny accordingly); *In re Marriage Cases*, 183 P.3d 384, 440–44 (Cal. 2008) (recognizing sexual orientation as a suspect classification for state equal protection clause purposes and applying strict scrutiny accordingly); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 432–76 (Conn. 2008) (recognizing sexual orientation as a quasi-suspect classification and applying heightened scrutiny accordingly).

368. 159 A.3d 970, 972 (Pa. Super. Ct. 2017).

couples needed to be able to do the same for both due process and equal protections reasons.³⁶⁹

By contrast, the Supreme Court of Illinois seemed to misunderstand the implications of *Lawrence* and *Obergefell* for people in same-sex couples seeking legal remedies for which they would not have been eligible before marriage equality.³⁷⁰ In *Blumenthal v. Brewer*, a woman sought to maintain an action seeking common law remedies, including restitution and unjust enrichment, against her former same-sex partner. A trial court had dismissed her claims because a 1979 case had held that public policy in the state embodied in statutory prohibition against common-law marriage precluded “unmarried cohabitants from bringing claims against one another to enforce mutual property rights where the rights asserted are rooted in a marriage-like relationship between the parties.”³⁷¹ The state high court agreed and reaffirmed the nearly forty-year-old precedent over the claimant’s due process and equal protection challenges:

This court’s decision in *Hewitt* only disallows unmarried cohabitants who live in a marriage-like relationship from accessing, under the guise of an implied contract, the rights and protections specified in the Marriage and Dissolution Act. In other words, individuals can enter into an intimate relationship, but the relationship itself cannot form the basis to bring common-law claims [*Hewitt*] acknowledges the legislative intent to provide certain rights and benefits to those who participate in the institution of marriage.³⁷²

But unlike the opposite-sex couple in *Hewitt* who could have legally married, the same-sex couple in *Blumenthal v. Brewer* could not. Justice Mary Jane Theis recognized this and reasoned that *Lawrence* meant *Hewitt*’s holding was “not rationally related to a legitimate governmental interest.”³⁷³ Moreover, she agreed with the claimant that it was:

“particularly irrational” to expand *Hewitt* from its fact context of opposite-sex domestic partners who could have married, but chose not to do so, to the fact context here of same-sex domestic partners who . . . “did not choose not to marry[, but] were barred from it” by a law, like those declared unconstitutional in *Obergefell*.³⁷⁴

369. *Id.* at 977–78.

370. *Blumenthal v. Brewer*, 69 N.E.3d 834, 852 (Ill. 2016).

371. *Id.* at 839 (citing *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979)).

372. *Id.* at 859.

373. *Id.* at 868 (Theis, J., dissenting).

374. *Id.*

She, therefore, would have overruled Hewitt “as an outmoded and unfair rule for all domestic partners” or, alternatively would have sided with the claimant “that Hewitt’s rule, as applied to same-sex domestic partners . . . whose relationships ended before they were permitted to marry in Illinois, violates due process and equal protection.”

b. Intimate-Partner Violence Liability and Orders of Protection

For many years, the law in numerous states excluded same-sex victims of intimate-partner violence (IPV) from the scope of criminal laws targeting IPV and eligibility for a range of resources available to IPV victims in opposite-sex relationships, largely because those laws were enacted with spouses in mind.³⁷⁵ Some states excluded LGBTQ+ people from eligibility for orders of protection and from victims services.³⁷⁶ Prior to *Lawrence*, a handful of state legislatures amended their IPV laws to become inclusive of LGBTQ+ people’s relationships.³⁷⁷ Since *Lawrence*, several judicial decisions either invalidated exclusionary statutory schemes on equal protection grounds or interpreted ambiguous IPV laws broadly so that they applied to same-sex partners.³⁷⁸

375. Sheila M. Seelau & Eric P. Seelau, *Gender-Role Stereotypes and Perceptions of Heterosexual, Gay and Lesbian Domestic Violence*, 20 J. FAM. VIOLENCE 363, 363 (2005) (explaining that, at the time, only four states included people in same-sex relationships in their IPV laws).

376. See, e.g., ARIZ. REV. STAT. § 13-3601 (1998); DEL. CODE ANN. tit. 10, § 1041(2)(b) (1997); MONT. CODE ANN. § 45-5-206(2)(b) (1995); N.C. GEN. STAT. §§ 50B-1(b)(1), (2), (6) (1979 & 2015 Supp.). The North Carolina law remained discriminatory until declared unconstitutional in December of 2020—more than sixteen years after *Lawrence* and four and half years after *Obergefell*. M.E. v. T.J., 854 S.E.2d 74, 96–97, 100–08 (N.C. Ct. App. 2020), *aff’d as modified*, 869 S.E.2d 624, 638 (N.C. 2022). For a discussion of the impact of this state of affairs in North Carolina, see Phillip Sylvester, *Arming America’s Most Dangerous Abusers: How Domestic Violence Laws Have Failed the LGBTQIA Community*, 11 DREXEL L. REV. 783 (2019) (citing H.B. 118, 19th Leg. (Haw. 1997)).

South Carolina has the dubious distinction of having amended its IPV laws specifically to exclude same-sex couples during the time in which the marriage equality movement was gaining traction. Doe v. State, 808 S.E.2d 807, 812 (S.C. 2017) (explaining that in 1994, the legislature added “a male and female who are cohabiting or formerly have cohabited” in lieu of its former gender-neutral use of “persons” who are or formerly were cohabitating (citing Act No. 519, §§ 1–3, 1994 S.C. Acts 5926, 5926–27, 5929) (codified at S.C. CODE §§ 16-25-10, 20-4-20 (1995)). Utah did the same in 1989. Utah Laws 1989, ch. 32, § 1 (codified at UTAH CODE ANN. § 30-6-1 (1990)).

377. Sylvester, *supra* note 376, at 824 (citing H.B. 118, 19th Leg. (Haw. 1997) (codified at HAW. REV. STAT. § 586-4 (1998 & 2022 Supp.))); see also A.B. 93, Cal. Assembly, 1993–94 1st Ex. Sess. ch. 28, § 2 (codified at CAL. PENAL CODE § 273.5 (1994)).

378. Sylvester, *supra* note 376, at 799 (citing Ireland v. Davis, 957 S.W.2d 310, 312 (Ky. Ct. App. 1997)); Glater v. Fabianich, 625 N.E.2d 96, 99 (Ill. App. Ct. 1993)). For example, in *Ochoa v. State*, the Texas Court of Appeals interpreted the phrase “dating relationship” in its IPV statute to include same-sex partners over arguments from the defendant that the phrase was

c. Jury Selection

Batson v. Kentucky held that the use of peremptory challenges to excuse prospective jurors on the basis of their race violates the Fourteenth Amendment's guarantee of equal protection.³⁷⁹ The Supreme Court extended *Batson* to peremptory challenges made on the basis of a prospective juror's sex in *J.E.B. v. Alabama ex rel. T.B.*³⁸⁰ Since then, lower courts have issued decisions in which judges reasoned that *Batson* applied to select cognizable groups, such as Italians and Jews.³⁸¹ Some courts have refused to apply *Batson* to LGBTQ+ people,³⁸² whereas other courts have determined that "equal protection prohibits peremptory strikes based on sexual orientation."³⁸³

ambiguous and could not have been meant to apply to same-sex partners because, as the time it was adopted, the state criminalized sex acts between members of the same sex. 355 S.W.3d 48, 53 (Tex. App. 2010) (citing TEX. FAM. CODE § 71.0021 (2001)). The court reasoned that even though the state criminalized sex between members of the same sex when the IPV statute was enacted, "the Legislature could have reasonably determined that people in these relationships, whether legal at the time or not, needed special protection from an abuser." *Id.* at 54; *see also M.E. v. T.J.*, 854 S.E.2d at 96–97, 100–08 (relying heavily on *Lawrence* and *Obergefell* in invalidating North Carolina's discriminatory IPV statutory scheme on both due process and equal protection grounds on due process and equal protection grounds); *see generally* Tara R. Pfeifer, Comment, *Out of the Shadows: The Positive Impact of Lawrence v. Texas on Victims of Same-Sex Domestic Violence*, 109 PENN ST. L. REV. 1251 (2005).

379. 476 U.S. 79, 89 (1986); *see also* *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019) (reaffirming *Batson* in the wake of continued discrimination on the basis of race in criminal case jury selection).

380. 511 U.S. 127, 146 (1994).

381. Mark E. Wojcik, *Extending Batson to Peremptory Challenges of Jurors Based on Sexual Orientation and Gender Identity*, 40 N. ILL. U. L. REV. 1, 12 (2019).

382. *Id.* at 21 (discussing *Johnson v. Campbell*, 92 F.3d 951 (9th Cir. 1996)); *see also* *Goodman v. Lands End Homeowners Ass'n of Hilton Head, Inc.*, No. 91-2542, 1992 WL 91890, at *3 (4th Cir. May 6, 1992) (upholding ostensible strike on the basis of race when gender nonconformity was offered as the nonracially-discriminatory reason); *Carter v. Duncan*, No. C 02-0586SBA(PR), 2005 WL 2373572, at *12 (N.D. Cal. Sept. 27, 2005) (same); *cf.* *Commonwealth v. Smith*, 879 N.E.2d 87, 98 (Mass.), *cert. denied*, 555 U.S. 893 (2008) (upholding strike of prospective juror for having "some identification issues" for presenting in a gender-nonconforming manner without reaching the constitutional question for want of a sufficient factual record); *State v. Weatherall*, 848 S.E.2d 338, 345 (S.C. Ct. App. 2020) (referencing the trial court's determination that "sexual orientation was not a protected class and therefore not subject to a *Batson* analysis," but not reviewing that conclusion of law on the merits because the appellant had not established a *prima facie* case of discrimination).

383. Wojcik, *supra* note 381, at 21 (quoting *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 474 (9th Cir. 2014)); *see also* *People v. Garcia*, 92 Cal. Rptr. 2d 339, 348 (Cal. Ct. App. 2000); *cf.* *Morgan v. State*, 416 P.3d 212, 224 (Nev. 2018) (expanding *Batson* to sexual orientation, but determining that the petitioner had not established a *prima facie* case for discrimination because the prosecution had offered a convincing nondiscriminatory reason for its peremptory strike of a prospective juror who indicated his approval of media criticism of the police).

Numerous scholars, commentators, and the American Bar Association have argued that *Batson*'s logic should apply to sexual orientation.³⁸⁴ A handful of states have enacted legislation to that effect.³⁸⁵ Given the U.S. Supreme Court's decision in *Bostock* holding that Title VII's prohibition on the basis of sex includes sexual orientation and gender identity, it seems clear that *Batson* and *J.E.B.* should prohibit discrimination in jury selection on these bases since they are "inextricably bound up with sex."³⁸⁶ Indeed, the Supreme Judicial Court of Massachusetts relied on that logic when it held in *Commonwealth v. Carter* that sexual orientation is a protected class for jury selection purposes.³⁸⁷

d. Harassment, Discrimination, and the First Amendment

Many states have enacted anti-discrimination laws that protect LGBTQ+ people from discrimination in housing, public accommodations, employment, and public licensure.³⁸⁸ But these laws

384. See, e.g., Wojcik, *supra* note 381, *passim*; Lauren R. Deitrich, *Transgender and the Judiciary: An Argument to Extend Batson Challenges to Transgender Individuals*, 50 VAL. U. L. REV. 719 (2016); Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 HARV. J.L. & GENDER 407 (2014); see also ABA House of Delegates, Resolution 108D, *Am. Bar Ass'n* (Feb. 5, 2018), <https://www.americanbar.org/content/dam/aba/directories/policy/2018-midyear/2018-mm-108d.pdf> [<https://perma.cc/5S74-TUL5>]; cf. Esther J. Last, *Peremptory Challenges to Jurors Based on Sexual Orientation: Preempting Discrimination by Court Rule*, 48 IND. L. REV. 313, 314 (2014) (arguing that although extending *Batson/J.E.B.* to sexual orientation "would be an appropriate application of equal protection," the existing framework "is not workable" since, in the absence of self-disclosure, it requires proof of LGBTQ+ status in ways that may invade privacy).

385. E.g., CAL. GOV'T CODE §§ 11135(a) & 12926(r)(2) (2019) (jury provision and applicable definitions, respectively); COLO. REV. STAT. §§ 13-71-104(3)(a) & 2-4-401(13.5) (2019) (jury provision and applicable definitions, respectively); 775 ILL. COMP. STAT. 5/1-103(O-1) (2022) (antidiscrimination law that applies to a broad range of circumstances, not just jury selection); MINN. STAT. §§ 593.32 & § 363A.03(44) (2018) (jury provision and applicable definitions, respectively); OR. REV. STAT. § 10.030 & § 174.100(7) (2017) (jury provision and applicable definitions, respectively).

386. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742 (2020) ("[H]omosexuality and transgender status are inextricably bound up with sex.").

387. *Commonwealth v. Carter*, 172 N.E.3d 367, 380 (Mass. 2021).

388. See, e.g., N.Y. EXEC. LAW § 296 (2022 Supp.); WASH. REV. CODE § 49.60.040 (2006) (updating prior version to include sexual orientation protections); see also *Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/employment_non_discrimination_laws [<https://perma.cc/93MY-TEC4>] (last updated Aug. 23, 2022) (noting that thirty-one states and the District of Columbia offer discrimination protections to LGBTQ+ people on the basis of both sexual orientation and gender identity in housing, and twenty-eight states and the District of Columbia do the same in public accommodations); *Employment Nondiscrimination*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/employment_non_discrimination_laws [<https://perma.cc/93MY-TEC4>]

have increasingly come into conflict with the First Amendment when people or organizations claim that their religious beliefs prevent them from acting in nondiscriminatory ways.

Courts appear to be willing to allow LGBTQ+ people to maintain civil rights lawsuits claiming that they were subjected to unlawful harassment by state actors. For instance, when police threatened to arrest two men for having kissed each other in a restaurant, the Texas Court of Appeals noted that the state law against “homosexual conduct” not only failed to reach kissing, but also had been declared unconstitutional in *Lawrence*.³⁸⁹ It therefore permitted the couple’s declaratory judgment action, in which they alleged police violated their equal protection rights under the state constitution, to move forward.³⁹⁰ In contrast to state-sanctioned harassment, however, courts continue to struggle with how to adjudicate discrimination claims—especially when the acts giving rise to allegations of discrimination implicate the First Amendment.

i. Creativity, Compelled Speech, and Religious Beliefs

“May a wedding photographer be required to create photographs of same-sex weddings? May a freelance writer be required to write press releases for the Church of Scientology? May a calligrapher be required to create invitations for an event promoting a white supremacist organization or the Socialist Party?”³⁹¹ Law professor Eugene Volokh asked these questions and answered them by stating that there is no black letter law yet that governs the constitutionality of what he termed “compulsions to create speech.”³⁹² Since then, the waters have gotten muddier.

The remarkably narrow decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* ruled in favor of a baker who had refused to make a wedding cake for a same-sex couple.³⁹³ But the ruling was predicated on a rather unique set of circumstances in which a state commission investigating discrimination had expressed hostility toward

(last updated Aug. 23, 2022) (noting that thirty-three states and the District of Columbia offer employment discrimination protections to LGBTQ+ people on the basis of both sexual orientation and gender identity). *But see supra* note 39 and accompanying text (noting laws that facilitate anti-LGBTQ+ discrimination).

389. *De Leon v. City of El Paso*, 353 S.W.3d 285, 288 (Tex. App. 2011).

390. *Id.* at 290–91. The plaintiff sought a permanent injunction directing El Paso police to refrain from using the invalidated sodomy law “to threaten, harass, or arrest anyone.” *Id.* at 289. This was important because sovereign immunity would have applied to claims for damages, but not for claims of equitable relief. *Id.* at 290–91.

391. Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 382–83 (2018).

392. *Id.* at 382.

393. 138 S. Ct. 1719, 1732 (2018).

religion in ways that called into question the fairness and impartiality of its determination that the baker had illegally discriminated against the couple who sought the wedding cake.³⁹⁴ The Court did not reach the larger constitutional question; it merely stated that such conflicts “must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.”³⁹⁵

Prior to the *Masterpiece Cakeshop* decision, several state courts sided with “creatives”—those who use their skills to create customized or unique products—when they refused to do so on First Amendment grounds involving claims of free speech or the free exercise of religion. For instance, the Kentucky Court of Appeals ruled that a print shop did not violate a Lexington antidiscrimination ordinance when it refused to print t-shirts for an LGBTQ+ pride celebration.³⁹⁶ The court acknowledged that when certain conduct serves as the basis for a denial of service in places of public accommodation, intent to discriminate against some protected class of persons may be presumed.³⁹⁷ The court then cited Justice O’Connor’s concurring opinion in *Lawrence* as an example illustrating that point: “A shopkeeper’s refusal to serve a homosexual, not because the person is homosexual, but because the shopkeeper disapproves of homosexual intercourse or same-sex marriage, would be the legal equivalent of sexual orientation discrimination.”³⁹⁸ But the without citations to any authority, the court then stated:

[T]he “service” [the shop] offers is the promotion of *messages*. The “conduct” [the shop] chose not to promote was pure speech. There is no contention that [the shop] is a public forum in addition to a public accommodation. Nothing in the fairness ordinance prohibits [the shop], a private business, from engaging in viewpoint or message censorship. Thus, although the menu of services [the shop] provides to the public is accordingly limited, and censors certain points of view, it is the same limited

394. *Id.* at 1729.

395. *Id.* at 1732. Importantly, law professor Netta Barak-Corren, who surveyed 1,155 wedding vendors—including bakers, photographers, and florists—reported a 23% decrease in the “willingness of businesses to serve same-sex couples” after *Masterpiece Cakeshop*. Netta Barak-Corren, *A License to Discriminate? The Market Response to Masterpiece Cakeshop*, 56 HARV. C.R.-C.L. L. REV. 315, 319 (2021).

396. Lexington Fayette Urb. Cnty. Hum. Rts. Comm’n v. Hands on Originals, Inc., No. 2015-CA-000745-MR, 2017 WL 2211381, at *1 (Ky. Ct. App. May 12, 2017), *aff’d*, 592 S.W.3d 291 (Ky. 2019).

397. *Id.* at *6 (quoting *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993)).

398. *Id.* at *6 (citing *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O’Connor, J., concurring)).

menu [the shop] offers to every customer and is not, therefore, prohibited by the fairness ordinance.³⁹⁹

By contrast, other courts sided with LGBTQ+ people when they have been the victims of discrimination. Most of these cases turn on the U.S. Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, which held that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."⁴⁰⁰ Under *Smith*, neutral laws of general applicability are constitutional if they are rationally related to a legitimate governmental interest,⁴⁰¹ but those that burden a religious practice and are neutral or generally applicable must be narrowly tailored to advance a compelling government interest.⁴⁰² Courts applying *Smith* to laws barring discrimination in places of public accommodation have repeatedly upheld such laws as serving the legitimate, indeed compelling governmental interest in eliminating discrimination.⁴⁰³

In *Gifford v. McCarthy*, for example, the owners of a farm rented portions of it for a variety of events, including both religious and secular weddings.⁴⁰⁴ The venue was prepared to host a wedding reception for a woman until she used a feminine pronoun to refer to her fiancé. At that point, the owner indicated there was "a problem" because they did not host same-sex marriage at their venue due to their religious beliefs.⁴⁰⁵ The New York State Division of Human Rights subsequently determined that the venue had unlawfully discriminated on the basis of sexual orientation in violation of the state's nondiscrimination law.⁴⁰⁶ An appellate court upheld that determination, reasoning that the venue was a place of public accommodation and thus subject to the nondiscrimination law,⁴⁰⁷ and that

399. *Id.* at *7.

400. 494 U.S. 872, 879 (1990).

401. *Id.*

402. *Id.* at 883.

403. The lower court decision in *Craig v. Masterpiece Cakeshop, Inc.* serves as a good example. 370 P.3d 272, (Colo. App. 2015), *rev'd*, 138 S. Ct. 1719 (2018); *see also* *Elane Photography, LLC v. Willock*, 309 P.3d 53, 73–75 (N.M. 2013); *State v. Arlene's Flowers, Inc.*, No. 13-2-00871-5, 2015 WL 720213, *21–22 (Wash. Super. Ct. Feb. 18., 2015), *aff'd*, 389 P.3d 543 (Wash. 2017), *vacated and remanded*, 138 S. Ct. 2671 (2018), *aff'd on remand*, 441 P.3d 1203 (Wash. 2019), *cert. denied*, 141 S. Ct. 2884 (2021).

404. 23 N.Y.S.3d 422, 426 (Sup. Ct. App. Div. 2016).

405. *Id.*

406. *Id.* at 426–27 (citing N.Y. EXEC. LAW § 290 (McKinney 2011)).

407. *Id.* at 428.

the law was neutral, generally applicable, and did not target religious practices.⁴⁰⁸ The court therefore concluded that the venue operators were “free to adhere to and profess their religious beliefs that same-sex couples should not marry, but they must permit same-sex couples to marry on the premises if they choose to allow opposite-sex couples to do so.”⁴⁰⁹ The court also rejected a free speech challenge to the antidiscrimination law as applied to the facts of the case:

[The law] does not compel the [venue operators] to endorse, espouse or promote same-sex marriages, nor does it require them to recite or display any message at all. The[y] remain free to express whatever views they may have on the issue of same-sex marriage. The determination simply requires them to abide by the law and offer the same goods and services to same-sex couples that they offer to other couples. Despite the[ir] assertion that their direct participation in same-sex wedding ceremonies would “broadcast to all who pass by the Farm” their support for same-sex marriage, reasonable observers would not perceive the[ir] provision of a venue and services for a same-sex wedding ceremony as an endorsement of same-sex marriage [T]here is no real likelihood that the[y] would be perceived as endorsing the values or lifestyle of the individuals renting their facilities as opposed to merely complying with anti-discrimination laws. We thus conclude that the conduct allegedly compelled is not sufficiently expressive so as to trigger First Amendment protections.⁴¹⁰

Gifford v. McCarthy was decided before the U.S. Supreme Court’s decision in *Masterpiece Cakeshop*. But *Klein v. Oregon Bureau of Labor and Industries* was decided after the Court vacated a prior decision and remanded the case for reconsideration in light of *Masterpiece Cakeshop*.⁴¹¹ In reaffirming its prior ruling against a baker who had refused to make a cake for a same-sex couple, the Oregon Court of Appeals stated the following about how it interpreted its obligations after *Masterpiece Cakeshop*:

[W]e discern three principles to guide our review on remand. The first is that, in evaluating on direct review a litigant’s claim that an adjudication is premised, in whole or in part, on unconstitutional hostility to religious beliefs, a reviewing court must examine the entire record of the case,

408. *Id.* at 429–31. The court cited *Lawrence* in support of its rejection of the operators’ argument that they had not discriminated on the basis of sexual orientation, but rather made a decision based on their religious beliefs against marriage equality. *Id.* at 428.

409. *Id.* at 431.

410. *Id.* at 432.

411. 410 P.3d 1051 (Or. Ct. App. 2017), vacated, 139 S. Ct. 2713 (2019) (vacating for reconsideration in light of *Masterpiece Cakeshop*), *aff’d after remand*, 506 P.3d 1108, 1113–14 (Or. Ct. App.).

including each stage of the case. The second is that, where, as here, a governmental adjudicator is called upon to determine whether a person's conduct violates a generally applicable, neutral law, and that conduct was motivated by a religious belief, the adjudicator must walk a tightwire, acting scrupulously to ensure that the adjudication targets only the unlawful conduct, and is not, in any way, the product of the adjudicator's hostility toward the belief itself. Third, and finally, because even "subtle departures" from neutrality violate the First Amendment, even "subtle departures" require some form of corrective action from a reviewing court.⁴¹²

The court overturned the award of damages based on a finding that the prior administrative proceedings in the case had not been neutral toward religion as mandated by *Masterpiece Cakeshop*.⁴¹³ But it affirmed its prior holding that the bakers had violated Oregon's nondiscrimination law, which the court upheld as a "generally applicable law" under *Smith*.⁴¹⁴

ii. Noncreative Religious Exemptions from
Antidiscrimination Laws

A year after *Masterpiece Cakeshop*, the Supreme Court decided another case on narrow grounds that pitted First Amendment rights against nondiscrimination protections for LGBTQ+ people, but that case did not involve the creation of something unique or artistic. *Fulton v. City of Philadelphia* invalidated a city contract with foster care agencies that contained a provision mandating that prospective foster parents be considered regardless of sexual orientation.⁴¹⁵ Catholic Social Services (CSS) challenged that provision after a determination that it violated the contract by refusing the place children with same-sex couples due to the Catholic Church's opposition to marriage equality. Although the Court sided with CSS, the rationale for doing so again sidestepped the constitutional question about how to balance First Amendment liberties against statutory provisions that advance Fourteenth Amendment equal protection rights. The Court noted that the provision was not generally

412. *Klein*, 506 P.3d at 1124–25.

413. *Id.* 1122–28.

414. *Id.* at 1120–22. The court in *Klein* noted that the Oregon nondiscrimination statute did not permit the types of individual exceptions that the U.S. Supreme Court found constitutionally fatal in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1874–75 (2021); see *infra* note 417–420 and accompanying text. The Oregon Supreme Court declined review of the case in May of 2022. 509 P.3d 119 (Or. 2022).

415. 141 S. Ct. 1868, 1874–75 (2021).

applicable and neutral with respect to religion as required by *Smith*,⁴¹⁶ because exceptions to the nondiscrimination provision could be granted for “good cause” as determined by the commissioner of the Department of Human Services in the commissioner’s “sole discretion.”⁴¹⁷ Despite all of the city’s proffered interests in preventing discrimination in the certification of foster parents, none satisfied strict scrutiny because Philadelphia could not offer “a compelling reason why it has a particular interest in denying an exception to CSS while making them available to others.”⁴¹⁸

When laws apply more evenly than the one at issue in *Fulton*, courts have had to engage in careful balancing acts. In *Laquerre v. Maurice*, the plaintiff filed an action for defamation per se against the pastor of a church at which he had been formerly employed.⁴¹⁹ He alleged that the pastor told congregants that the plaintiff was gay and had used a church computer to view gay pornography.⁴²⁰ The pastor attempted to have the suit dismissed on the grounds that the courts lacked jurisdiction to adjudicate the claim because it would require the impermissible judicial inquiry “into ecclesiastical proceedings, discipline, and church doctrine.”⁴²¹ An appellate court in New York disagreed, reasoning that a defamation claim could be decided “solely upon the application of neutral principles of law, without reference to any religious principle.”⁴²² The court went on to rule in favor of the pastor, however, finding that social attitudes toward homosexuality had changed sufficiently since the time cases had first recognized that false allegations about one’s sexuality can constitute defamation per se, thereby obviating the need for proof of special damages.⁴²³ The court cited *Lawrence* and *Obergefell* in support of its reasoning that public policy dictated that false imputations of homosexuality can no longer constitute defamation per se.⁴²⁴ That same court subsequently refused to extend its holding in *Laquerre v. Maurice*

416. 494 U.S. 872, 884 (1990) (“A law is not generally applicable if it invites the government to consider the particular reasons for a person’s conduct by providing a mechanism for individualized exemptions.” (internal quotations, citations, and alterations omitted)).

417. *Fulton*, 141 S. Ct. at 1875.

418. *Id.* at 1882.

419. 138 N.Y.S.3d 123, 126 (Sup. Ct. App. Div. 2020).

420. *Id.*

421. *Id.*

422. *Id.* at 127 (quoting *Matter of Congregation Yetev Lev D’Satmar, Inc. v. Kahana*, 879 N.E.2d 1282, 1285 (N.Y. 2007)).

423. *Id.* at 129.

424. *Id.* at 130–31; see also *Yonaty v. Mincolla*, 945 N.Y.S.2d 774, 777 (Sup. Ct. App. Div. 2012).

to a case in which a model sued for defamation per se for the unauthorized use of her photo on an HIV educational ad.⁴²⁵ The court reasoned that, unlike the progress on social views of sexuality, infection with HIV still carried significant social stigma.⁴²⁶

When legal questions cannot be determined without regard to religious principles, the question of whether the First Amendment can shield an actor or entity from discrimination liability is far more complicated. Consider what transpired in *Woods v. Seattle's Union Gospel Mission* (SUGM),⁴²⁷ a case involving Washington's antidiscrimination law and its specific exemption of religious and nonprofit organizations from the definition of an "employer."⁴²⁸ The Supreme Court of Washington explained in *Woods* that this provision in the law "created a *statutory* right for employees to be free from discrimination in the workplace while allowing employers to retain their *constitutional* right, as constrained by state and federal case law, to choose workers who reflect the employers' beliefs when hiring ministers."⁴²⁹ The case arose from developments after a gay man volunteered for a legal clinic run by SUGM, an evangelical Christian organization that served Seattle's unsheltered population.⁴³⁰ When a staff position arose, he applied for it, but was denied the position because he was in a same-sex relationship with a man he hoped to marry.⁴³¹ He sued, claiming that the application of the statutory exemption for religious organizations, as applied to him, was unconstitutional "because the staff attorney job duties were 'wholly unrelated to SUGM's religious practices or activities.'"⁴³² He argued that the religious exemption from the state's nondiscrimination law violated a provision in the Washington State Constitution which states: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."⁴³³ Specifically, he argued the exemption burdened two of his constitutional

425. *Nolan v. State*, 69 N.Y.S.3d 277, 279, 285 (Sup. Ct. App. Div. 2018) (differentiating imputation of HIV infection as defamation per se from the *Yonaty* court's analysis of the imputation of sexuality or the same tort classification).

426. *Id.* at 284–85.

427. 481 P.3d 1060 (Wash. 2021), *cert. denied*, 142 S. Ct. 1094 (2022).

428. WASH. REV. CODE § 49.60.040(11) (2020).

429. *Woods*, 481 P.3d at 1062.

430. *Id.* at 1063.

431. *Id.*

432. *Id.*

433. *Id.* at 1065 (quoting WASH. CONST. art. I, § 12).

rights: his right to live his life in accordance with his sexual orientation (relying on *Lawrence*) and his right to marry (relying on *Obergefell*).⁴³⁴

Because *Woods* involved an as-applied constitutional challenge, it was unnecessary for the court to analyze the facial validity of the law. Although it may be considered dicta, the court stated that the exemption was facially valid because it served to prevent “state interference with religious freedoms.”⁴³⁵ The court then went on to analyze the plaintiff’s as-applied challenge to the exemption. It began doing so by noting that the First Amendment, vis-à-vis what has been termed the “ministerial exception,” prevents government from interfering with matters of “faith and doctrine,” including internal management decisions.⁴³⁶ The moniker given to that exception is misleading, as it does not only apply to those who are ordained or have formal titles as ministers; rather, it turns on “what the employee does.”⁴³⁷ For instance, the U.S. Supreme Court previously determined that the ministerial exception applied to lay teachers at religiously-affiliated schools because they “performed vital religious duties: guiding the faith lives of their students, providing instruction on subjects that included religion, praying and attending religious services with students, and preparing students for other religious activities.”⁴³⁸ Whether the organization in *Woods* had acted unconstitutionally turned on whether a person in a legal staff position would trigger the ministerial exception.⁴³⁹ Because such a determination had not been made by lower courts, the state high court remanded the case for a factual determination of whether a staff attorney, noting that some of the in the key indicators of that the ministerial exception would apply were present in the case, while others were not:

[A]ll [of the organization’s SUGM employees are expected to evangelize, but there is no evidence that staff attorneys had titles as ministers or training in religious matters comparable to *Hosanna-Tabor*’s teacher. And while staff attorneys are expected to share their faith with clients as opportunities arise, there is no evidence that they are expected to nurture their converts’

434. *Id.*

435. *Id.* at 1067.

436. *Id.* at 1068 (citing *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (holding that the ministerial exception barred Catholic school teachers’ claims that had alleged age and disability discrimination in employment)); see also *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190–92 (2012) (holding a teacher who had to undergo religious training to qualify the position at a religiously-affiliated school was a “minister” for the purposes of the ministerial exception).

437. *Id.* (quoting *Our Lady of Guadalupe*, 140 S. Ct. at 2064)).

438. *Id.* at 1069.

439. *Id.* at 1070.

development in the Christian faith similar to the job duties performed by the teachers in *Our Lady of Guadalupe* and *Hosanna-Tabor*. Further, neither SUGM nor [its legal clinic] is a church or religious entity principally responsible for the spiritual lives of its members. SUGM employees are expected to be active members of local churches; SUGM employment alone does not appear to be sufficient religious affiliation. Employees held to be ministers in *Our Lady of Guadalupe* and *Hosanna-Tabor* led faith groups and taught religious doctrine. The record indicates that these duties occur outside SUGM, in local churches for SUGM employees. Moreover, Woods sought employment with SUGM as a lawyer specifically, not as a religious minister or teacher, and there is no indication that religious training is necessary for the staff attorney position, unlike the teachers in *Hosanna-Tabor*.⁴⁴⁰

A concurring justice opined that staff attorneys at the SUGM legal clinic were not likely ministers because they “are not charged with the responsibility of elucidating or teaching the tenets of the faith. They are first and foremost charged with providing objective legal advice that may, in fact, conflict with the employing entity’s religious doctrine.”⁴⁴¹ She went on to state that religious organizations that employ attorneys “in order to provide civil legal aid cannot control the legal advice by requiring the attorney[s] to serve as minister[s] and attorney[s] at the same time.”⁴⁴² The U.S. Supreme Court denied certiorari in the case and it remains pending in the Washington state court system as of this writing.⁴⁴³

4. Miscellaneous Types of Claims ($n = 12$; 13.0%)

The remaining cases presented issues that were either unique or comparatively rare (i.e., only two or three such cases compared to the higher numbers in the enumerated categories). This final section in Part IV explores the commonalities among some of these cases.

440. *Id.* (internal citations omitted).

441. *Id.* at 1073 (Yu, J., concurring).

442. *Id.*; see also *Barrett v. Fontbonne Acad.*, No. NOCV2014-751, 2015 WL 9682042, at *2 (Mass. Super. Ct. Dec. 16, 2015) (granting summary judgment to a qualified food service employee who, after a Catholic school told him he had the job, was not ultimately hired after he completing hiring paperwork listing a same-sex spouse as his emergency contact). In *Barrett*, the court reasoned that the refusal to hire the plaintiff in a food service position could not be justified under the ministerial exception. *Id.* at *11.

443. *Seattle’s Union Gospel Mission v. Woods*, 142 S. Ct. 1094 (2022) (denying certiorari).

a. Bodily Autonomy

i. Abortion

When *Roe* and *Casey* were good law, courts were still called upon to balance the central holdings of these cases against abortion restrictions. *Planned Parenthood of the Heartland v. Reynolds* illustrates this point.⁴⁴⁴ In *Reynolds*, the Supreme Court of Iowa invalidated a statutory provision that imposed a mandatory seventy-two hour waiting period before a woman could have an abortion in the state.⁴⁴⁵ The court gave *Lawrence* an expansive reading as evidenced by its statement that *Lawrence* had involved the “*fundamental right* of consenting adults to engage in private, consensual conduct without government intervention.”⁴⁴⁶ The court went on to say the following:

Autonomy and dominion over one’s body go to the very heart of what it means to be free. At stake in this case is the right to shape, for oneself, without unwarranted governmental intrusion, one’s own identity, destiny, and place in the world. Nothing could be more fundamental to the notion of liberty. We therefore hold, under the Iowa Constitution, that implicit in the concept of ordered liberty is the ability to decide whether to continue or terminate a pregnancy.⁴⁴⁷

Having determined that the waiting period infringed upon a fundamental right, the court applied strict scrutiny and concluded that the waiting period did not further any compelling state interest because empirical data demonstrated that it did not cause “a measurable number of women” to change their minds and “continue a pregnancy they otherwise would have terminated without the mandatory delay.”⁴⁴⁸ Perhaps as a harbinger of *Dobbs*, the Iowa Supreme Court retreated from the holding in this case in 2022.⁴⁴⁹ Notably, only a dissenting opinion discussed *Lawrence*; the majority decision did not even cite the case.⁴⁵⁰

444. 915 N.W.2d 206 (Iowa 2018), *overruled by* Planned Parenthood of the Heartland, Inc. v. Reynolds, 975 N.W.2d 710 (Iowa 2022) (holding that the Iowa constitutional guarantees of due process and equal protection do not encompass the decision to have an abortion as a fundamental right).

445. *Id.* at 237.

446. *Id.* at 235 (citing *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (emphasis added)).

447. *Id.* at 237.

448. *Id.* at 243. The court also held that the waiting period violated women’s state constitutional guarantee of equal protection. *Id.* at 245–46.

449. *Reynolds*, 975 N.W.2d at 742.

450. *Reynolds*, 975 N.W.2d at 776–77, 794–95 (Appel, J., dissenting) (arguing that *Lawrence* “compels” the rejection of any “fundamental rights” analysis that relies on an “18th century mentality”). At least five U.S. Supreme Court Justices seemingly disagree with that interpretation of *Lawrence* as evidenced by their embrace of such a narrow “fundamental rights”

ii. Assisted Suicide

In *Morris v. Brandenburg*, the New Mexico Court of Appeals held that the state constitution conferred no due process rights to assisted suicide on individuals or their health care providers. The decision drew heavily from the U.S. Supreme Court's decision in *Washington v. Glucksberg*, which held that physician-assisted suicide implicates no liberty interests protected by the Fourteenth Amendment.⁴⁵¹ The court narrowly construed *Lawrence* as applying to "sexual relationships" and not to supporting "the position that 'death' or 'aid in dying' . . . have either been recognized as embedded principles within our democratic society or as a modern interpretation of certain fundamental interests that have been applied to some members of society but historically denied to others."⁴⁵²

The highest court in New York similarly neglected *Lawrence* when it held that neither due process nor equal protection implicate any right to assisted suicide.⁴⁵³ In a concurring opinion, Judge Jenny Rivera agreed with the majority that the New York State Constitution does not confer any "unrestricted state constitutional right to physician-prescribed medications that hasten death."⁴⁵⁴ But she went on to conclude that terminally-ill people nearing death possess both due process and equal protection rights "to physician-prescribed medication that allows the patient in the last painful stage of life to achieve a peaceful death as the end draws near."⁴⁵⁵ Judge Rivera cited *Lawrence* in support of her reasoning that people's "interests in autonomy and freedom are not less substantial when facing the choice of how to bear the suffering and physical pain of a terminal illness at the end of life" than they are when making decisions "about life's most private matters—e.g. sexuality, marriage, procreation, and child-rearing—all choices that reflect personal beliefs and desires."⁴⁵⁶

analysis using originalist jurisprudence in *Dobbs*. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2244–45 (2022) ("Constitutional analysis must begin with 'the language of the instrument' . . . , which offers a 'fixed standard' for ascertaining what our founding document means" (internal citations omitted)).

451. 356 P.3d 564 (2015-NMCA-100); 521 U.S. 702, 728, 735 (1997).

452. *Morris*, 356 P.3d at 578.

453. *Myers v. Schneiderman*, 85 N.E.3d 57, 62–63 (N.Y. 2017).

454. *Id.* at 66 (Rivera, J., concurring).

455. *Id.*

456. *Id.* at 70.

iii. Breaches of Bodily Integrity

A prison inmate prison system filed a civil action to enjoin the state force-feeding him. He argued that the Washington Department of Correction's policy to force the administration of food and fluids via a nasogastric tube violated rights to privacy and bodily autonomy.⁴⁵⁷ Although the Washington Supreme Court recognized these interests persisted in the correctional environment, it reasoned that the rights that normally would protect a competent person from refusing artificial nutrition and hydration were outweighed by four compelling state interests, including "the maintenance of security and orderly administration within the prison system," "the preservation of life," "the protection of innocent third parties," and "the maintenance of the ethical integrity of the medical profession."⁴⁵⁸

Justice Richard B. Sanders, the lone dissenter in the case, took issue with the majority's framing of the issues in the case:

The lead opinion incorrectly frames the privacy interest at stake as the right to suicide. This case is no more about the right to suicide than *Lawrence v. Texas* . . . was about the right to sodomy. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone"

Nowhere does [plaintiff] state a wish to commit suicide. His "only wish is for [his] personal decision not to eat to be respected and to be left in peace for [his] fast to take its course" In other words, he wishes "to be let alone"

Furthermore, the right of terminally ill patients to refuse food and water under the federal constitution does not answer the question of whether [plaintiff] may live free from the State's invasion of his body under our state constitution. Our guarantee of privacy is not found in the unstated "penumbra" of federal rights but is explicit in our state constitution: "[n]o person shall be disturbed in his private affairs . . . without authority of law."⁴⁵⁹

Justice Sanders went on to opine that the right to privacy under the state constitution could not be infringed "even for a compelling reason" absent "authority of law," primarily because privacy is "antimajoritarian" and, therefore, not subject to balancing against the will or interests of a majoritarian government.⁴⁶⁰ Notably, no other justice indicated agreed with his reasoning as evidenced by the fact that none joined his dissent.

457. *McNabb v. Dep't of Corr.*, 180 P.3d 1257, 1259 (Wash. 2008).

458. *Id.* at 1265 (emphasis in original).

459. *Id.* at 1268–69 (citing WASH. CONST. art. I, § 7; other internal citations omitted).

460. *Id.* at 1270.

Given Justice Sanders' expansive view of the primacy of the rights to privacy and bodily autonomy, one might wonder how he would have ruled on the constitutionality of vaccine mandates. Once vaccinations were available to ameliorate the COVID-19 pandemic, many public and private employers mandated them for all of their employees, just as the City of New York did for its teachers and public school employees and contractors.⁴⁶¹ Some of those employees turned to the courts to enjoin the mandate, arguing that it violated their "substantive due process rights by threatening their personal autonomy, bodily integrity and right to reject medical treatment."⁴⁶² Specifically, these employees argued that the line of privacy cases summarized in Part II.C–E, including *Lawrence*, changed the landscape of due process rights since the U.S. Supreme Court had upheld mandatory smallpox vaccinations in the landmark 1905 case of *Jacobson v. Commonwealth of Massachusetts*.⁴⁶³ The court dismissed this argument by saying that those cases were "not germane to the issues here" since they dealt primarily with issues of contraception, procreation, marriage, and intimate relations, whereas "the case before this Court addresses the sole issue of whether vaccination may be compelled as a condition of employment."⁴⁶⁴ The court went on to uphold the vaccinate mandate, reasoning that although due process implicated some limited liberty rights to pursue one's chosen field, it did not create a right to any "specific job" since employment in certain fields could be constitutionally subject to reasonable governmental regulations.⁴⁶⁵

b. Informational Privacy

In 2009, U.S. Circuit Judge Alex Kozinski rhetorically asked, "Is there a constitutional right to informational privacy?"⁴⁶⁶ He then noted that the U.S. Supreme Court had hinted there may be such a right in its 1977 decision in *Whalen v. Roe* when the Court alluded to "the individual interest in avoiding disclosure of personal matters," but subsequently had "never said another word about it."⁴⁶⁷ Since Kozinski offered that observation, the U.S. Supreme Court assumed that there is such a right,

461. New York City Mun. Lab. Comm. v. City of New York, 156 N.Y.S.3d 681, 684 (Sup. Ct. 2021).

462. *Id.* at 685.

463. *Id.* at 686 (citing 197 U.S. 11, 27–33 (1905)).

464. *Id.*

465. *Id.* at 687.

466. Nelson v. Nat'l Aeronautics & Space Admin., 568 F.3d 1028, 1052 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc).

467. *Id.* (quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)).

but it only did so for sake of argument because the Court found it unnecessary to reach the constitutional question to resolve the particular dispute.⁴⁶⁸ Still, nearly every circuit in the federal appellate system has determined that there is such a right.⁴⁶⁹ Most circuits require a balancing of interests that include weighing:

[T]he type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable interest militating toward access.⁴⁷⁰

Planned Parenthood of Indiana v. Carter illustrates an informational privacy claim within the context of health records.⁴⁷¹ Indiana law requires health care providers to report child sexual abuse.⁴⁷² The state sought access to minors' medical records at a reproductive services clinic as part of an investigation that the clinic had failed to report abuse pursuant to that law.⁴⁷³ The clinic sought a preliminary injunction barring the state from accessing the minors' health records on the grounds that, among other theories, they are constitutionally-protected, private medical records.⁴⁷⁴ An intermediate appellate court agreed.⁴⁷⁵ In their opinion, the majority relied heavily on a dissenting opinion from a Tenth Circuit case that interpreted a Kansas law, which stated "states cannot extinguish federal privacy rights simply by criminalizing certain behavior."⁴⁷⁶ The court concluded that "a minor consulting with a health care professional in an effort to seek treatment for a reproductive health condition related to sexual activity has a legitimate expectation of privacy as to that information."⁴⁷⁷ The court noted, however, that such a right to information

468. *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 151–52 (2011).

469. Helen L. Gilbert, *Minors' Constitutional Right to Informational Privacy*, 74 *U. Chi. L. Rev.* 1375, 1378 (2007).

470. Russell T. Gorkin, Comment, *The Constitutional Right to Informational Privacy: Nasa v. Nelson*, 6 *DUKE J. CONST. L. & PUB. POL'Y SIDEBAR* 1, 8 (2010) (quoting *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980)).

471. *Planned Parenthood of Ind. v. Carter*, 854 N.E.2d 853, 883 (Ind. Ct. App. 2006).

472. IND. CODE § 31-33-5-1 (1997).

473. *Carter*, 854 N.E.2d at 856.

474. *Id.* at 857.

475. *Id.* at 883.

476. *Id.* at 874–78 (quoting *Aid for Women v. Foulston*, 441 F.3d 1101, 1123 (10th Cir. 2006) (Herrera, J., dissenting)).

477. *Id.* at 878.

privacy is not unlimited, but rather must be balanced against the interest of the state in investigating claims of child abuse, patient neglect, medical fraud, and the like. Given the possibility of unauthorized disclosure of such private information during investigations and any potential subsequent judicial proceedings, the court decided that the state needed to use less intrusive means than unlimited access to patients' medical records to investigate such claims.⁴⁷⁸

Claims concerning informational privacy also commonly arise with regard to employment records as illustrated by cases pitting law enforcement officers' claims of informational privacy against public policies designed to keep policing activities transparent. A comparison of two cases illustrates the factors that might be decisive in such cases.

The New Jersey State Police (NJSP) began disciplinary proceedings against seven state troopers who were involved in a group sexual encounter with a woman.⁴⁷⁹ The event came to light after the woman sought treatment in a hospital following the incident. "She acknowledged that some of the activity was consensual; she equivocated whether all of it was consensual."⁴⁸⁰ After an investigation, prosecutors declined to seek charges from a grand jury—a move an appellate court subsequently commented upon after reviewing relevant discovery documents by saying that "much of the information provided by the alleged victim about the location and circumstances of the events was roundly discredited" which, in turn, raised "very substantial doubt that any fact-finder [would] find that some or all of the activities were without the consent of the woman."⁴⁸¹ Given this determination, the court sided with the troopers who sought to keep their names private during the pendency of the disciplinary proceedings against them. In coming to this conclusion, the court first cited a number of the foundational privacy cases discussed in Part II.C to support the premise that some matters "fall within a zone of privacy which bars inquiry by the government or an employer."⁴⁸² Still, the court recognized that public employers like the NJSP have a bona-fide interest in investigating certain aspects of troopers' personal lives, especially when sexual activities might impact their job performance.⁴⁸³ But something more than perceived immorality must support the

478. *Id.* at 883.

479. *In re Seven State Troopers*, No. A-2833-09T2, 2010 WL 668718, at *1 (N.J. Super. Ct. App. Div. Feb. 25, 2010).

480. *Id.*

481. *Id.* at *5.

482. *Id.* at *3.

483. *Id.*

investigation since moral disapproval, without more, “cannot form the basis of discipline when [sexual] activity occurs off-duty in a private place among consenting adults.”⁴⁸⁴ Thus, if evidence at the disciplinary hearing established that the events in question were consensual, “the factual predicate for the charges dissipates.”⁴⁸⁵ Yet, if their identities were publicly disclosed before such a determination, their reputations and family relationships could be irreparably damaged. Accordingly, the court ruled that the privacy interests of the individual troopers needed to prevail, at least until a fact-finder determined there was some basis for the charges “after a full evidentiary hearing.”⁴⁸⁶

Without the arguably unique facts present in *Seven State Troopers*, law enforcement personnel likely cannot shield their identities and information about alleged misconduct from the public by arguing a right to informational privacy under the Fourteenth Amendment. Consider what occurred in *Burton v. York County Sheriff’s Department*.⁴⁸⁷ In that case, a newspaper filed FOIA requests to obtain information about why four deputy sheriffs had been suspended without pay for “conduct unbecoming an officer” after a citizen tipped-off a reporter that the suspensions had been prompted by official misconduct, included “falsification of investigative reports, possession of stolen property, abuse of authority, and sexual activity in patrol cars.”⁴⁸⁸ The sheriff’s department asserted that the information was exempt from FOIA disclosure because it would engender a “unreasonable invasion of personal privacy.”⁴⁸⁹ After the newspaper sued, a trial court conducted an *in camera* review of the records and determined that the FOIA requests were valid and needed to be honored, with the exception of certain allegations against a deputy involving off-duty sexual activities.⁴⁹⁰ On appeal initiated by the sheriff’s department, the court largely affirmed the trial court’s determination:

In the present case, we find the manner in which the employees of the Sheriff’s Department prosecute their duties to be a large and vital public interest that outweighs their desire to remain out of the public eye. The newspaper, in fulfilling its obligation to report on and hold to account those in public service, had a legitimate need to access the records . . . requested.

484. *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558, 566 (2003)).

485. *Id.* at *5.

486. *Id.*

487. 594 S.E.2d 888 (S.C. Ct. App. 2004).

488. *Id.* at 891.

489. *Id.*

490. *Id.*

By raising ... constitutional [privacy] argument[s], the Sheriff's Department urges this Court to add another category of protection to the privacy rights the Supreme Court has found under the Fourteenth Amendment: the right of an individual's performance of his public duties to be free from public scrutiny. We find this would be ill-advised. Unless and until the Supreme Court rules otherwise, we will follow its precedent and not expand the "right of privacy" under the Fourteenth Amendment beyond those situations which the Court has ruled bear on the most intimate decisions affecting personal autonomy—namely reproductive rights, familial and marital relations.⁴⁹¹

As the description of the *Seven State Troopers* case indicates, the troopers' attempt to shield their identities was grounded in the fact that they engaged in sexual activities that a court determined were very likely protected by *Lawrence* and, therefore, could not be used to discipline the off-duty troopers. Private information about off-duty sexual behavior was similarly shielded in *Burton*, while other aspects of official misconduct—including allegations of sexual activity in patrol cars—was not. In *Cortez v. Johnston*, however, the claim of informational privacy was well beyond the scope of any protection that a plain reading of *Lawrence* offers.

In *Cortez*, a Texas judge filed a defamation lawsuit against his former attorney.⁴⁹² He sought to avoid disclosure of certain court records which had been filed in response to discovery requests. In his efforts to have the records sealed, he argued that *Lawrence* should protect those documents—a move the Texas Court of Appeals characterized as seeking "to place the documents within the outer fringes of *Lawrence* [by] suggesting that the landmark decision will logically and necessarily extend farther than its facts into information about other types of relationships."⁴⁹³ It is no surprise he tried hard to keep those records secret, as they included allegations "that he used cocaine, paid for sex, choked a woman who accused him of fathering her son, and sexually assaulted a little girl."⁴⁹⁴ Although the court did not disclose the nature of these allegations, it acknowledged that the records were "embarrassing and offensive."⁴⁹⁵ But because Cortez was a public figure, and because his own actions triggered the situation in which he found himself—namely

491. *Id.* at 895–96.

492. No. 06-13-00120-CV, 2014 WL 1513306, at *1 (Tex. App. Apr. 16, 2014).

493. *Id.* at *5.

494. *Files Detail Allegations That Dallas Judge Used Coke, Bought Sex, Raped Young Girl*, DALL. MORNING NEWS (Apr. 17, 2014, 12:01 AM), <https://www.dallasnews.com/news/investigations/2014/04/17/files-detail-allegations-that-dallas-judge-used-coke-bought-sex-raped-young-girl/> [<https://perma.cc/XM6J-YMGH>].

495. *Cortez*, 2014 WL 1513306, at *5.

that he “claimed to be defamed, filed suit, demanded proof, and then, when responsive evidence was filed, dismissed his suit and demanded that the evidence be sealed—the court ultimately refused his request to seal the records.”⁴⁹⁶

c. Substantive Due Process in the Civil Context

Finally, a party in a handful of civil cases asserted claims largely unrelated to *Lawrence*, but nonetheless relied on the case despite its ostensible inapplicability. One of these cases tangentially involved sexual privacy,⁴⁹⁷ while the others did not.

In *Doe v. Moe*, the plaintiff filed a personal injury case against a female sex partner because his penis was fractured when she changed positions during consensual sexual activity with him.⁴⁹⁸ A trial court granted summary judgment to the defendant on a theory that when such an injury occurred during constitutionally protected sexual activity, liability could not attach for mere civil negligence, but rather that recklessness needed to be proven.⁴⁹⁹ On appeal, the court cited the leading substantive due process cases, including *Lawrence*, in support of the proposition that contemporary jurisprudence shied away “from governmental regulation of consensual sexual conduct.”⁵⁰⁰ It affirmed the trial court’s determination, saying the following:

While it is inappropriate and unworkable to hold consenting adults to a standard of reasonable care in the conduct of private consensual sexual behavior, we conclude that it is appropriate that they be held to a standard that requires them not to engage in wanton or reckless conduct toward each other during such consensual sexual conduct. The words “wanton” and “reckless” are not merely rhetorical or vituperative expressions used instead of negligent or grossly negligent. They express a difference in the degree of risk and in the voluntary taking of risk so marked, as compared with negligence, as to amount substantially and in the eyes of the law to a difference in kind Since the essence of wanton or reckless conduct is intentional conduct which involves a high degree of likelihood that substantial harm will result to another . . . , we believe that a fact finder is capable of recognizing such extreme conduct, impartially and without prejudice, even in the context of consensual sexual behavior.⁵⁰¹

496. *Id.*

497. *Doe v. Moe*, 827 N.E.2d 240 (Mass. App. Ct. 2005).

498. *Id.* at 243.

499. *Id.*

500. *Id.* at 245 n.5.

501. *Id.* at 245 (internal quotations and citations omitted).

There were no sexual privacy issues in other cases that raised civil claims that did not fit well in the other categories of cases. In *City of Seattle v. Long*, a man who owned a truck and lived in it filed a lawsuit against the city for having towed the vehicle when it was illegally parked.⁵⁰² He argued that because he lived in the truck, the impoundment violated his substantive due process rights because it deprived him of shelter and exposed him to inclement weather.⁵⁰³ Specifically, he relied on *Lawrence* and *Foucha v. Louisiana* to argue that the state-created danger doctrine should provide him with relief from civil enforcement of the parking violation.⁵⁰⁴ That doctrine provides a narrow exception to the usual rule in 42 U.S.C. § 1983 actions that due process does not guarantee minimum levels of safety and security.⁵⁰⁵ But when “state action creates or exposes [people] to a danger which they would not have otherwise faced,” some courts allow plaintiffs to hold states liable.⁵⁰⁶ The court rejected the plaintiffs attempt to use *Lawrence* and *Foucha* in this manner, simply saying that neither case “addresses the state-created danger doctrine or suggests that [courts] should expand a narrow exception for liability to serve as a way to pursue relief in civil enforcement actions. As a result, we determine [plaintiff] cannot raise the state-created danger doctrine to seek relief from impoundment.”⁵⁰⁷

Perhaps no case in the study better captured judicial hostility to substantive due process than *Price v. New York City Board of Education*.⁵⁰⁸ In that case, parents of public school children filed a declaratory judgement action seeking to invalidate a ban on public school students possessing pagers and cell phones while in school without special permission. They argued that although the city could restrict the use of such equipment on school premises, the prohibition on the mere possession of cell phones violated due process.⁵⁰⁹ A Manhattan judge, Lewis Bart Stone, upheld the rules, finding there were rational bases for keeping cell phones out of public schools, including burdening teachers

502. *City of Seattle v. Long*, 467 P.3d 979, 991 (Wash. Ct. App. 2020), *aff’d in part, rev’d in part*, 493 P.3d 94 (Wash. 2021).

503. *Id.* at 991.

504. *Id.* at 992 (citing, *inter alia*, *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

505. *Id.* at 991 (citing *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989)).

506. *Id.* at 992 (quoting *Henry A. v. Willden*, 678 F.3d 991, 1002 (9th Cir. 2012)) (internal alterations omitted).

507. *Id.*

508. 837 N.Y.S.2d 507 (Sup. Ct. 2007).

509. *Id.* at 511.

with enforcement (rather than security personnel screening children upon entry to schools) and preventing children “whose self-control may not be perfectly formed” from being distracted by the temptation to use their phones.⁵¹⁰ When he addressed the plaintiffs’ constitutional arguments, he expressed the same type of hostility to the notion of substantive due process that conservative U.S. Supreme Court Justices Scalia and Thomas had previously expressed:⁵¹¹

There is nothing presently more controversial in the body politic of this country and State than attempts by competing advocates to enlist courts to address issues of sex which they are unable to resolve through the usual political process. Cases . . . which have grasped this judicial “third rail” include *Griswold v. Connecticut* . . . (contraceptives), *Roe v. Wade* . . . (abortion), *Lawrence v. Texas* . . . (sodomy), and [the N.Y. state case of] *Hernandez v. Robles* . . . (same sex marriage). The intense and *sui generis* nature of these controversies rarely commends the principles enunciated in such decisions as precedent to be expanded to unrelated matters.⁵¹²

With that preface, Stone (who had been a real estate lawyer before being a judge and who resigned from the bench while facing an ethics complaint)⁵¹³ boldly declared that the doctrine of substantive due process “no longer exists as a principle of [f]ederal constitutional law.”⁵¹⁴ He went on to differentiate a string of cases in which the federal courts, including the U.S. Supreme Court, had determined that parents possess a constitutionally protected liberty interest in raising their children. He dismissed the applicability of *Meyer v. Nebraska* and *Pierce v. Society of Sisters* as follows:

In *Meyer*, the party seeking to void State law was a parochial school teacher and in *Pierce*, the parties plaintiffs were schools. In neither case was a parent a party. Although the Court in both cases used language relating to the “liberty” of parents, the actual decisions in both cases turned on the business and commercial interests of the party seeking to void the State law . . . to

510. *Id.* at 519.

511. In *McDonald v. City of Chicago*, for instance, Justices Scalia and Thomas both expressed their doubts about substantive due process as a viable legal theory. 561 U.S. 742, 791 (2010) (Scalia, J., concurring); *id.* at 812 (Thomas, J., concurring in part and concurring in judgment). Justice Thomas would go on to repeat this mantra when, in his concurring opinion in *Dobbs*, he called for the Court to “reconsider all of [its] substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.” 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring).

512. *Price*, 837 N.Y.S.2d at 524 (internal citations omitted).

513. Kenneth Lovett, *Hevesi’s Judge Retiring Amid an Investigation into His Own Conduct on the Bench*, N.Y. DAILY NEWS (Dec. 6, 2012, 12:34 AM), <https://www.nydailynews.com/new-york/hevesi-judge-retiring-probe-article-1.1215307> [<https://perma.cc/6VNH-N6RZ>].

514. *Price*, 837 N.Y.S.2d at 525.

ply their trades without unreasonable state interference. Thus, although “parental liberty” was discussed, such issue was hardly central to the decisions which instead focused on the [F]ourteenth [A]mendment as a matter of “[s]ubstantive [d]ue [p]rocess” to enable the Court to void economic restrictions on business relationships.⁵¹⁵

Stone similarly differentiated *Ingraham v. Wright*⁵¹⁶ and *Moore v. City of East Cleveland*.⁵¹⁷ He reasoned that *Ingraham*, which upheld corporal punishment in schools, was an Eighth Amendment case.⁵¹⁸ But that analysis ignores the fact that the majority opinion in *Ingraham* specifically rejected the notion that the Eighth Amendment had applicability in the context of discipline in schools and, therefore, that the “pertinent constitutional question” in the case was “whether the imposition is consonant with the requirements of due process.”⁵¹⁹ The Court in *Ingraham* determined that although a constitutionally protected liberty interest was at stake, due process is satisfied so long as corporal punishment is imposed withing the common law limitations that the amount of force used is not excessive, is reasonably believed to be necessary for discipline, and not is maliciously inflicted.⁵²⁰ In short, Stone’s hostility toward due process protections of liberty interests either caused him to stop reading *Ingraham* halfway through the opinion or to view the entirety to the Court’s due process analysis as dicta despite it being the central holding of the case.

Stone similarly distinguished *Moore*, which invalidated an ordinance that operated to prevent certain relatives from living together. His articulated reason for doing so was that only four Justices in *Moore* relied on substantive due process (which, again, Stone viewed as now defunct), whereas the decisive factor in the case outcome depended on a fifth Justice’s view that the ordinance “unreasonably impinged on Ms. Moore’s property rights as to the uses she could put her house.”⁵²¹ This interpretation, which treats liberty and property interests as distinct, ignores the fact that the U.S. Supreme Court itself stated that “the dichotomy between personal liberties and property rights is a false

515. *Id.* at 526 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925)) (internal footnotes omitted). For a brief summary of these two foundational cases, see *supra* notes 138–142 and accompanying text.

516. *Ingraham v. Wright*, 430 U.S. 651, 671 (1977).

517. *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 504–05 (1977).

518. *Price*, 837 N.Y.S.2d at 526 (citing *Ingraham*, 430 U.S. at 671).

519. *Ingraham*, 430 U.S. at 671.

520. *Id.* at 677–78.

521. *Price*, 837 N.Y.S.2d at 526–27 (citing *Moore*, 431 U.S. at 504–05).

one.”⁵²² Although it is true that a plurality of four Justices in *Moore* relied on a liberty-based substantive due process analysis for invalidating the ordinance in question, the reason that the concurring opinion by Justice Stevens did not do so had nothing to do with his rejection of that theory. Indeed, Justice Stevens’ opinions in many cases make it clear that he embraced the notion of substantive due process protecting liberty interests.⁵²³ Rather, Justice Stevens felt it unnecessary to even address the constitutionality of the ordinance because it failed to meet the minimum standards under relevant precedent for valid zoning ordinances: “The city has failed totally to explain the need for a rule which would allow a homeowner to have two grandchildren live with her if they are brothers, but not if they are cousins.”⁵²⁴ Moreover, it is worth noting that despite Judge Stone’s eagerness to present property rights as something wholly different from due process rights, it is the Fourteenth Amendment’s Due Process Clause itself that provides constitutional protection of property from governmental interference.⁵²⁵

Stone then rebuffed the plaintiffs’ efforts to use *Troxel v. Granville* as a basis for their arguments.⁵²⁶ *Troxel* affirmed a state court determination that allowing anyone to petition for visitation rights by asserting such visits would be in the best interest of a child violated parents’ fundamental due process rights “to make decisions concerning the care, custody, and control” of their children.⁵²⁷ Stone said that although “the language of the case mentions the fundamental constitutional rights of parents to make decisions as to how they raise their children, *Troxel* does not indicate that the possession of a cell phone by a child in school may fall into this category of a fundamental constitutional right.”⁵²⁸ Again, this glib, conclusory statement does not engage in an analysis of parental rights, but rather misstates the issue of what rights

522. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). For discussions of how substantive due process protects property, see generally Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555 (1997); see also Erica Chee, Comment, *Property Rights: Substantive Due Process and the “Shocks the Conscience” Standard*, 31 U. HAW. L. REV. 577 (2009).

523. Justice Stevens “wholly approve[d]” of the shift from economic and property rights to a substantive due process jurisprudence. Douglas S. Broyles, *Have Justices Stevens and Kennedy Forged a New Doctrine of Substantive Due Process? An Examination of McDonald v. City of Chicago and United States v. Windsor*, 1 TEX. A&M L. REV. 129, 131, 133 (2013).

524. *Moore*, 431 U.S. at 520 (Stevens, J., concurring) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

525. U.S. CONST. amend XIV, § 1.

526. 530 U.S. 57 (2000).

527. *Id.* at 75.

528. *Price v. New York City Bd. of Educ.*, 837 N.Y.S.2d 507, 527 (Sup. Ct. 2007).

were claimed in the case. It was no more about a fundamental right to use cell phones in school than *Bowers* was about a fundamental right to engage in sodomy.

Finally, Stone conceded that the Third Circuit's decision in *Gruenke v. Seip* was relevant to the *Price* plaintiffs' claims.⁵²⁹ That Section 1983 case centered around the potential liability of a swimming coach who asked a member of the team to take a pregnancy test. A divided panel held that the student's mother had stated a viable claim for violation of her due process rights to manage the upbringing of her child, but because that right was not "clearly established," the coach was entitled to qualified immunity.⁵³⁰ From this holding, Stone concluded that "although there has been some judicial discussion of a 'fundamental parental right' or 'parental liberty to rear children'" *Gruenke* supported the proposition that "the parameters" of such rights were "hardly established."⁵³¹

Notably, the entirety of Stone's opinion devoted to dismissing the *Price* plaintiffs' use of authority was unnecessary. He could have recognized that due process rights were implicated in the case, but then articulated why the ban on cell phones withstood constitutional challenge. Certainly, such a policy is supported by several rational bases, just as Stone opined in the portion of his decision *before* he attempted to justify the death of substantive due process.⁵³² That is exactly what happened when the final judgment in the case was appealed—and without any unnecessary minimization of Fourteenth Amendment jurisprudence.⁵³³ Thus, much of the opinion in *Price* seems to have been less about an meaningful analysis of the relevant law than it was about presenting a judicial diatribe against substantive due process protection of liberty interests.

529. 225 F.3d 290 (3d Cir. 2000).

530. *Id.* at 307.

531. *Price*, 837 N.Y.S.2d at 528.

532. *Id.* at 519.

533. *Price v. New York City Bd. of Educ.*, 855 N.Y.S.2d 530, 542 (Sup. Ct. App. Div. 2008). The appellate court noted "that reasonable regulations that do not directly and substantially interfere with a fundamental right need not be strictly scrutinized." *Id.* (internal quotations and other citations omitted). The court went on to hold that the ban withstood rational basis review because the Chancellor had "reasonably determined that a ban on cell phone possession was necessary to maintain order in the schools"—a goal the court said was "unquestionably a legitimate one." *Id.*

V. CONCLUSION

One of the more surprising results of this study, at least to its author, was just how few state court decisions relied on *Lawrence*. Indeed, only 441 cases—both civil and criminal, published and unpublished alike—even cited *Lawrence* between the date it was decided and the end of 2021. By contrast, Westlaw’s KeyCite feature indicates that 1,124 state court cases cited *Roe v. Wade* during the first twenty years after it was decided. The relatively low number of citations to *Lawrence* in state courts adds long-term validity to the observations of those who previously noted *Lawrence*’s comparatively limited impact in the first decade after it was decided.⁵³⁴

A second finding of note is that *Lawrence* did not frequently serve as a key precedent in most civil cases other than those raising LGBTQ+ civil rights claims. Perhaps that was to be expected because *Lawrence* was a criminal case; thus, one might assume that its impact would be more significant in criminal and quasi-criminal cases. Indeed, that was the case. Although the criminal cases are analyzed in another manuscript due to space limitations, it should be noted that *Lawrence* was far more narrowly construed in criminal cases than it was in the civil cases discussed in this Article.⁵³⁵

Another interesting finding from this study is that judicial demographic characteristics were not significantly related to how judges treated *Lawrence*. As Table 3 reveals, the only salient extralegal factor to rise to the level of statistical significance concerns the geographic region in which cases were decided. Before discussing that particular result in more detail, it is worthwhile to recap the qualitative results with an eye toward what they might portend for the future.

A. Business Operations and Employment Law

As Table 3 reveals, most of the cases in this study applying *Lawrence* in lawsuits concerning business operations did so neutrally. When courts needed to interpret the precedent, though, they tended to do so in an expansive manner, especially when it protected the privacy of employees from public disclosure of intimate details about their sex lives or to protect LGBTQ+ people from employment discrimination.⁵³⁶ Given

534. Black, *supra* note 25, at 330; Buchanan, *supra* note 25, at 1237; Reinheimer, *supra* note 25, at 505; Sparling, *supra* note 25, at 82.

535. See Fradella, *supra* note 234, *passim*.

536. See *supra* notes 281–302 and accompanying text.

the U.S. Supreme Court's decision in *Bostock v. Clayton County*, one hopes that judicial decisions in the business context will, at minimum, apply that precedent neutrally and, in doing so, protect LGBTQ+ people from employment discrimination.⁵³⁷

B. The Future of Fourteenth Amendment Liberty Interests in Family Law Cases

Family law has been resistant to significant changes in the wake of LGBTQ+ equality. As the family law cases in this study illustrate, at first, judges routinely construed *Lawrence* narrowly in the family law context.⁵³⁸ Over time, family law decisions relying on *Lawrence* became at least more tolerant of LGBTQ+ people.⁵³⁹ But family law's slow evolution to LGBTQ+ inclusion is not limited to the way that judges apply *Lawrence*, as evidenced by a 2020 Nebraska decision that declined to follow *Obergefell*'s central holding. In *Tyler F. v. Sara P.*, a trial court had awarded joint custody to the biological mother, biological father, and nonbiological, but legal father of a child.⁵⁴⁰ When the Supreme Court of Nebraska reversed that determination, it acknowledged an incongruity in the state's statutory framework for family law in the age of marriage equality:

We are mindful that following the U.S. Supreme Court's decision in *Obergefell v. Hodges*, our courts are now hearing cases involving two legal mothers or two legal fathers. But our current parentage statutes have not changed, and these statutes are still gender based In other words, Nebraska's statutory scheme on parentage accommodates only two parents and primarily refers to one mother and one father. Here, the trial judge recognized three legal parents (one mother and two fathers), and that is simply not supported by Nebraska law.⁵⁴¹

Assuming that *Lawrence* and *Obergefell* remain good law in spite of Justice Thomas' articulated desires to the contrary,⁵⁴² states need to undertake comprehensive revisions of their family law statutes to align them with the Fourteenth Amendment's guarantees of due process and equal protections for all persons regardless of sex, sexual orientation, or gender identity.

537. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

538. See *supra* notes 332–350 and accompanying text.

539. See *supra* notes 351–358 and accompanying text.

540. 945 N.W.2d 502 (Neb. 2020).

541. *Id.* at 513 (internal citation omitted).

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

C. *The Future of LGBTQ+ Civil Rights in the Shadow of the First Amendment*

Given that neither *Masterpiece Cakeshop*⁵⁴³ nor *Fulton*⁵⁴⁴ involved nondiscrimination protections that were both generally applicable and neutral with respect to religion as required by *Smith*,⁵⁴⁵ it remains to be seen whether laws barring discrimination on the basis of sexual orientation that meet the *Smith* standard can withstand First Amendment challenges. It is noteworthy, however, that several current U.S. Supreme Court Justices have indicated their willingness—if not outright desire—to overrule *Smith* and replace it with a constitutional framework that might insulate anti-LGBTQ+ discrimination in the name of religious freedom.⁵⁴⁶ In short, the current composition of the Court suggests bleak times lie ahead for LGBTQ+ people who, despite precedents stating that “gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,” may find themselves subjected to purportedly religious-based discrimination without legal remedy.

D. *Other Type of Substantive Due Process Claims*

The miscellaneous cases in the study raised a diverse series of questions about the civil law reach of privacy and autonomy rights. Among others, the cases grappled with issues ranging from restrictions on abortion and assisted suicide, to the scope of informational privacy and parental rights.⁵⁴⁷

1. Abortion

In the wake of *Dobbs* overturning substantive due process protections for abortion, the nature and scope of the rights to privacy and bodily autonomy under state constitutional law will likely become even more important than they were during the period of time in which the cases in this study were decided. As with the geographical divide with regard to LGBTQ+ civil rights, similar divisions have emerged with regard to women’s control over their own reproductive choices. To wit,

543. *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm’n*, 138 S. Ct. 1719, 1720 (2018).

544. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1874–75 (2021).

545. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 884 (1990).

546. *Fulton*, 141 S. Ct. at 882–83 (2021) (Barrett and Kavanaugh, J.J., concurring); *id.* at 1883–1926 (Alito, Thomas, and Gorsuch, J.J., concurring).

547. *See supra* notes 447–535 and accompanying text.

in the wake of *Dobbs*, roughly fourteen states—most of which are “red” states in the South and Midwest—have enacted law either completely banning abortions or severely curtailing their availability.⁵⁴⁸ By contrast, there are few restrictions on abortion during the first half of pregnancy in the Northeast and Pacific coastal states.⁵⁴⁹

2. Active Euthanasia

Dobbs represents a significant retreat from *Lawrence*’s approach to looking beyond history and tradition to protect liberty interests without resorting to a fundamental rights analysis.⁵⁵⁰ Indeed, *Dobbs* cited *Washington v. Glucksberg* to support its analysis that substantive due process only protects rights “‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’”⁵⁵¹ It is therefore highly unlikely that state or federal courts would depart from *Glucksberg*’s holding that the Fourteenth Amendment does not protect any rights attendant to assisted suicide.⁵⁵² Of course, state courts might find that their state constitutions provide some limited right in this regard.⁵⁵³ Alternatively, state legislative actions or statewide ballot initiatives might cause more jurisdictions to join the District of Columbia and the ten states that currently permit mentally competent, terminally ill people to elect medical aid in active euthanasia.⁵⁵⁴ But *Dobbs* strongly

548. Kaia Hubbard & Christopher Wolf, *Where State Abortion Laws Stand Without Roe*, U.S NEWS & WORLD REP. (Aug. 30, 2022, 2:01 PM), <https://www.usnews.com/news/best-states/articles/a-guide-to-abortion-laws-by-state> [<https://perma.cc/XRV6-XR4Y>] (noting abortion bans in Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, and Texas; significant restrictions on abortions in Florida, Georgia, Ohio, and Utah; and bans or significant restrictions potentially on the horizon in Arizona, Michigan, North Dakota, West Virginia, and Wisconsin).

549. *Id.*

550. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

551. *Id.* (“The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’” (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997))).

552. *Glucksberg*, 521 U.S. at 728.

553. See *supra* notes 455–458 and accompanying text; cf. *Baxter v. Montana*, 224 P.3d 1211, 1214–15 (Mont. 2009) (allowing physician-assisted on statutory grounds because state law provided that consent could be a defense to homicide under certain circumstances).

554. See *Physician-Assisted Suicide Fast Facts*, CNN (May 26, 2022, 11:40 AM), <https://www.cnn.com/2014/11/26/us/physician-assisted-suicide-fast-facts> [<https://perma.cc/9RDS-5M9V>].

signals that *Lawrence* will not be judicially interpreted to provide such rights as a matter of federal constitutional law.

3. Informational Privacy

In 2011, the U.S. Supreme Court avoided determining whether there is a constitutional right to information privacy in a case in which it assumed, for the sake of argument, that such a right existed, but nonetheless would not bar disclosure of the information at issue in the case (which concerned asking potential NASA employees about their treatment or counseling for recent illegal-drug use).⁵⁵⁵ Until the Court squarely addresses whether the constitution protects the right “to control the acquisition or dissemination of information about [oneself],”⁵⁵⁶ courts strive to contour the scope of privacy protections under “a patchwork of common law, statutes, and constitutional protections.”⁵⁵⁷ The cases in the present study suggest that courts are, on the whole, quite amenable to claims of informational privacy. They appear to be particularly willing to protect intimate personal information for public disclosure, especially when the information touches on statutorily recognized or constitutionally protected liberty interests.⁵⁵⁸

E. *Lawrence’s Geographic Divide*

On the fifteenth anniversary of *Lawrence v. Texas*, journalists Emma Platoff and Sydney Greene published a newspaper story in which they referred to *Lawrence* as a “watershed moment” for LGBTQ+ people—one that opened doors to “new jobs, new opportunities, and new freedom in their skin.”⁵⁵⁹ But they also reported that despite U.S. Supreme Court wins in *Lawrence* and *Obergefell*, many LGBTQ+ Texans were “still reckoning with the legal and political landscape in a state where they have few protections against discrimination and their rights as couples [were]

555. Nat’l Aeronautics & Space Admin. v. Nelson, 562 U.S. 134, 151–52 (2011).

556. Nina A. Kohn, *Outliving Civil Rights*, 86 WASH U. L. REV. 1053, 1067–68 (2009); see also Larry J. Pittman, *The Elusive Constitutional Right to Informational Privacy*, 19 NEV. L.J. 135, 141 (2018) (positing that the “liberty interest component of the Fourteenth Amendment provides support for a constitutional right to informational privacy” that is “consistent with the Court’s substantive due process precedents . . .” (internal citations omitted)).

557. Laura Ruppalt, *The Impact of Silver Alerts on an Older Adult’s Right to Informational Privacy*, 27 GEO. MASON L. REV. 651, 666 (2020).

558. See *supra* notes 474–493 and accompanying text.

559. Emma Platoff & Sydney Greene, *Fifteen Years After Landmark Gay Rights Case, Same-Sex Couples in Texas Still Face Challenges in Court*, TEX. TRIB. (June 26, 2018, 1:00 PM), <https://www.texastribune.org/2018/06/26/fifteen-years-after-landmark-gay-rights-win-same-sex-couples-face-anot/> [https://perma.cc/V469-YD7S].

again being questioned in court.”⁵⁶⁰ The story went on to quote law professor Dale Carpenter, who opined that the “almost casual dismissal of the rights of gay people” which had been “characteristic of Texas courts before *Lawrence*” continued in the courts at that time. The Texas Supreme Court’s decision in *Pidgeon v. Turner* undergirded that conclusion.⁵⁶¹

Pidgeon v. Turner arose before *Obergefell* when the mayor of Houston extended benefits to the same-sex spouses of city employees who got legally married in other states, thereby treating them the same way the city handled benefits for opposite-sex spouses.⁵⁶² A group of antiequality taxpayers challenged that action in court, claiming that it expended “significant public funds on an illegal activity.”⁵⁶³ A trial court granted the plaintiffs’ requested injunction prohibiting Houston from furnishing the benefits in question and the mayor appealed.⁵⁶⁴ While the case was pending, the *Obergefell* decision brought marriage equality to all U.S. states and, as a result, the plaintiffs in *Pidgeon* filed a supplemental brief arguing that *Obergefell* did not require “states to pay taxpayer-funded benefits to same-sex relationships . . . because federal courts cannot ‘commandeer state spending decisions.’”⁵⁶⁵ Relying on *Obergefell*, the appeals court lifted the injunction.⁵⁶⁶ The taxpayers appealed and the Supreme Court of Texas sided with them and remanded the case for a full evidentiary hearing to “fully explor[e] *Obergefell*’s reach and ramifications.”⁵⁶⁷

It took until late April of 2021 before a decision on the merits was issued on remand. The court did not cite *Lawrence*, but instead relied on *Obergefell* and *Pavan v. Smith*.⁵⁶⁸ In *Pavan*, the U.S. Supreme Court summarily reversed a decision of the Arkansas Supreme Court which had upheld the validity of a law that prevented a birth mother’s same-sex spouse from being listed on their child’s birth certificate.⁵⁶⁹ The Court reasoned that under the law in question, “same-sex parents in Arkansas lack[ed] the same right as opposite-sex parents to be listed on a child’s birth certificate,” a disparate treatment under law that *Obergefell*

560. *Id.*

561. 538 S.W.3d 73 (Tex. 2017).

562. *Id.* at 78.

563. *Id.*

564. *Id.* at 79–80.

565. *Id.* at 80.

566. *Id.* at 80 (citing 477 S.W.3d 353, 355 (Tex. App. 2015)).

567. *Id.* at 89.

568. 137 S. Ct. 2075, 2078 (2017) (per curiam).

569. *State v. Pavan*, 505 S.W.3d 169, 177 (Ark. 2016) (upholding ARK. CODE § 20–18–401 (1989)).

proscribes.⁵⁷⁰ Applying these key precedents to the *Pidgeon* plaintiffs' cause of action, the Texas Court of Appeals ruled in favor of the City of Houston:

[A]ppellants urge us to enforce a law providing for marriage on separate terms and conditions as applied to employment benefits: one for different-sex couples that includes benefits and one for same-sex couples that excludes them. Because appellants' attempt to prevent the City from offering employment benefits to married same-sex couples on the same terms and conditions as married different-sex couples cannot be reconciled with the requirements of the U.S. Constitution; we reject it.⁵⁷¹

Pavan and *Pidgeon* illustrate that *Obergefell* was not given full and immediate effect by the high courts of Arkansas and Texas, respectively. But they are just two examples of the ways in which state courts in certain geographic regions narrowly construe key precedents to avoid granting full equality to LGBTQ+ people.

The findings from the present study demonstrate that courts in the South are less likely to interpret *Lawrence v. Texas* in expansive ways that benefit the due process and equal protection rights of LGBTQ+ people than their counterparts are in the Northeast or West. These empirically derived results are not surprising, especially with regard to courts in the South. That region "has the most hostile policy landscape in the country for LGBTQ issues, as Southern states are far less likely to have LGBTQ-inclusive laws and protections, and instead are far more likely to have harmful, discriminatory laws."⁵⁷² As journalist and social commentator Frank Bruni previously noted,

There's no such thing as [LGBTQ+] life in America, a country even more divided on this front than on others. There's [LGBTQ+] life in a group of essentially progressive places like New York, Maryland, Oregon and California, which bans government-funded travel to states it deems unduly discriminatory. Then there is [LGBTQ+] life on that blacklist, which includes Texas, Kansas, Mississippi and South Dakota.⁵⁷³

570. *Pavan*, 137 S. Ct. at 2078.

571. *Pidgeon v. Turner*, 625 S.W.3d 583, 603 (Tex. App. 2021), *review denied*, No. 21-0510, 2022 WL 1696441 (Tex. May 27, 2022).

572. MOVEMENT ADVANCEMENT PROJECT & CAMPAIGN FOR SOUTHERN EQUALITY, TELLING A NEW SOUTHERN STORY: LGBTQ RESILIENCE, RESISTANCE, AND LEADERSHIP, at ii (2020), https://www.lgbtmap.org/file/2020-report-southern_broad.pdf [<https://perma.cc/D8GA-TP8B>].

573. Frank Bruni, Opinion, *The Worst (and Best) Places to Be Gay in America*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/interactive/2017/08/25/opinion/sunday/worst-and-best-places-to-be-gay.html> [<https://perma.cc/V7Y8-KT7V>].

That, of course, does not mean that anti-LGBTQ+ animus does not exist everywhere; it does. As Judge Stone's bizarre opinion in *Price v. New York City Board of Education* demonstrates,⁵⁷⁴ even judges in supposedly liberal New York City can be hostile to substantive due process and, therefore, bend over backward to avoid application of key precedents applying the constitutional doctrine. But there is little doubt that legal backlash to substantive due process cases recognizing LGBTQ+ rights, in particular, appears to be more geographically concentrated in some areas than others. Consider, for example, that the states enacting "Don't Say Gay" bills, "bathroom bills," and the like are concentrated in the states where courts narrowly construed *Lawrence* to limit due process and equal protection rights far more frequently than they broadly interpreted the precedent to expand such rights.⁵⁷⁵

Jon Davidson, the former legal director for Lambda Legal—one of the leading LGBTQ+ rights organizations in the United States, is quoted as saying that the "southeastern quarter, from Texas to South Carolina . . . may well generate more than half of the lawsuits that Lambda becomes involved in."⁵⁷⁶ This study's results calls into question the wisdom of resorting to the courts in those states. Since the cases were decided before *Dobbs* curtailed substantive due process rights, lawyers litigating LGBTQ+ rights cases in jurisdictions that are less accepting of those rights may be well advised to ground their federal constitutional claims in equal protection and First Amendment arguments, and in state constitutional due process guarantees since *Lawrence's* approach to substantive due process under the Fourteenth Amendment is now in question.

F. Some Final Thoughts

In 2011, law professor Carlos Ball eloquently wrote on the striking disparity between judicial hesitancy to make constitutional rulings on liberty grounds and judicial confidence in making constitutional rulings

574. 837 N.Y.S.2d 507 (Sup. Ct. 2007).

575. States proposing or enacting such laws include Alabama, Arizona, Florida, Georgia, Indiana, Iowa, Kentucky, Louisiana, Missouri, Ohio, Oklahoma, South Carolina, Tennessee, and Utah. See Dustin Jones & Jonathan Franklin, *Not Just Florida. More Than a Dozen States Propose So-Called 'Don't Say Gay' Bills*, NPR (Apr. 10, 2022, 7:01 AM), <https://www.npr.org/2022/04/10/1091543359/15-states-dont-say-gay-anti-transgender-bills> [<https://perma.cc/V6QB-VQ5X>]; Orion Rummier, *10 Anti-LGBTQ+ Bills Impacting Students Go into Effect Across Six States*, THE 19TH (July 1, 2022, 1:58 PM), <https://19thnews.org/2022/07/florida-dont-say-gay-other-anti-lgbtq-bills-take-effect/> [<https://perma.cc/AUT5-4CJ7>].

576. Bruni, *supra* note 573.

rooted in equality principles.⁵⁷⁷ He attributed some of that disparity to how *Brown v. Board of Education* became one of the most celebrated U.S. Supreme Court decisions of all time,⁵⁷⁸ whereas several due process precedents—especially *Lochner v. New York* and *Roe v. Wade*—were among the Court’s more controversial decisions.⁵⁷⁹ Ball also noted that equality review is often perceived as reinforcing democratic ideals, whereas liberty review is viewed as antidemocratic.⁵⁸⁰ Although he went on to spend the rest of his article explaining why liberty review was just as constitutionally valid as equality review, the Court’s retreat in *Dobbs* from *Lawrence*’s approach to liberty suggests that a majority of the Justices who currently sit on the Court consider liberty review to be highly suspect. In fact, the majority told us so in no uncertain terms:

“Liberty” is a capacious term. As Lincoln once said: “We all declare for Liberty; but in using the same word we do not all mean the same thing”

In interpreting what is meant by the Fourteenth Amendment’s reference to “liberty,” we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been “reluctant” to recognize rights that are not mentioned in the Constitution.⁵⁸¹

To be sure, the Court in *Dobbs* did not declare substantive due process protections of liberty to be dead (unlike Judge Stone did in his *Pierce* diatribe). But it clearly resituated such interests back into the realm of history and tradition in ways that *Lawrence* and *Obergefell* had largely eschewed. In light of this recoiling, it seems likely that judges will be more hesitant to give *Lawrence* an expansive substantive due process reading beyond its clear implications for limiting the criminalization of private sexual intimacy between consenting adults.⁵⁸² If that trend

577. Carlos A. Ball, *Why Liberty Judicial Review Is As Legitimate As Equality Review: The Case of Gay Rights Jurisprudence*, 14 U. PA. J. CONST. L. 1 (2011).

578. *Id.* at 4 (citing *Brown v. Bd. of Educ.*, Topeka, Kan., 347 U.S. 483 (1954)).

579. *Id.* at (citing *Lochner v. New York*, 198 U.S. 45, 57 (1905) (invalidating a law that prohibited bakers from working more than sixty-hours per week on due process grounds); *Roe v. Wade*, 410 U.S. 113 (1973) (holding due process protects a woman’s right to choose to have an abortion during the first trimester of pregnancy)).

580. *Id.* at 4–5.

581. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2247 (2022) (internal citations omitted).

582. For instance, *Dobbs* presages that courts will not embrace Kevin Kennedy’s suggestion that substantive due process should protect a right to “a life-sustaining climate” because that is “fundamental to a free and ordered society.” Kevin Kennedy, *Watching the World Burn: Substantive Due Process and the Right to A Sustainable Climate*, 93 TEMP. L. REV. ONLINE 61, 62 (2021) (quoting *Juliana v. United States*, 217 F. Supp. 3d 1224, 1248–50 (D. Or. 2016), *rev’d*, 947 F.3d 1159 (9th Cir. 2020)).

materializes, the results of this study suggest that it will have little impact on business and employment law. But narrow interpretations of liberty portend that, at least in the more conservative areas of the United States, LGBTQ+ civil rights litigation may face a renewed uphill battle.

VI. EPILOGUE

This Article did not address the ways in which courts have applied *Lawrence* in criminal cases. But “stay tuned;” the *Tulane Journal of Law and Sexuality* will publish the second part of this study next year.⁵⁸³ As a preview, here are some key findings.

First, criminal courts applied *Lawrence* in a broad array of cases that most frequently dealt with one of the following six categories of criminal offenses: (1) noncommercial, consensual sex offenses (e.g., sodomy, adultery, and fornication); (2) prostitution and related commercial sex offenses; (3) obscenity and pornography; (4) sexual assault and statutory rape; (5) other sex crimes (e.g., bigamy, incest, lewdness/public sexual indecency, indecent exposure, voyeurism, revenge porn, and the knowing transmission of sexually-transmitted infections); and (6) post-conviction claims filed by people convicted of sex offenses (e.g., challenges to sex offender registry classifications or restrictions, or involuntary civil commitments of so-called sexual predators).⁵⁸⁴ Second, across all of these types of crimes, courts largely construed *Lawrence* even more narrowly than civil courts did.⁵⁸⁵ Third, Justice Scalia was wrong; his concerns about how *Lawrence* signaled the end of morals offenses never materialized.⁵⁸⁶ Finally, the geographic divide reported in this Article on civil applications of *Lawrence* repeated itself in criminal and quasi-criminal contexts.⁵⁸⁷ More insights to come in Volume 33!

583. See Fradella, *supra* note 234, *passim*.

584. *Id.*

585. *Id.*

586. *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

587. Fradella, *supra* note 234, *passim*.