NOW YOU SEE ME, NOW YOU DON'T: LONG TERM SOLUTIONS TO HEDGE AGAINST OVERRULING OBERGEFELL

*Nicholas Knowles**

"We have our love and affection, our tender moments, our joys and happiness, our lasting and meaningful relationships, in no smaller number than you and your heterosexuals do. And, in due time, when the sensational phase and the novelty have passed, these, too, will be shown..."
—Franklin E. Kameny, 1969

I. INTRODUCTION

The *Dobbs v. Jackson Women's Health Organization* decision threatens the sanctity of *Obergefell v. Hodges* and other LGBTQ rights.[1] Specifically, the Supreme Court redefined which rights are protected in the Fourteenth Amendment when overturning *Roe v. Wade*, thus disrupting the constitutional foundation which *Obergefell* and other LGBTQ rights are based on.[2] To hedge against an *Obergefell* overruling, this article first argues to amend state constitutions or draft other legislation to recognize and protect same-sex marriages.[3] Then, the Court should re-evaluate the Privileges or Immunities

* Nicholas Knowles received his bachelor's degree from the University of Texas at Austin, and he is currently a third-year law student at St. Mary's University School of Law. He will receive his J.D. in May 2024. This Article has benefited from thoughtful comments and conversations with Professor David Dittfurth and Professor Dale Carpenter.

[1] Cirrus Jahangiri, *What the Supreme Court's Dobbs Decision Means for LGBTQ Rights*, LEGAL AID AT WORK (Aug. 9, 2022), https://legalaidatwork.org/blog/what-the-supreme-courts-dobbs-decision-means-for-lgbtq-rights/ [https://perma.cc/3LJB-4827] (remarking LGBTQ rights are in "jeopardy" since reproductive rights and LGBTQ rights are legally intertwined).

[2] *Id.* ("LGBTQ+ people are also potentially affected by the *Dobbs* decision because of the shared constitution basis between reproductive and many LGBTQ+ rights.").

[3] *See* Audio tape: Interview with Dale Carpenter, Constitutional Law Professor, Southern Methodist University (Nov. 16, 2022) (on file with author) (offering state legislation as the best method to entrench same-sex marital rights) [hereinafter Dale Carpenter Interview].

Clause to grant fundamental rights, including the right for same-sex marriage.[4] Together, these solutions will create a long-term hedge to an *Obergefell* overruling.[5]

II. BACKGROUND

Determining whether a right is fundamental greatly alters how the government can treat these rights.[6] If a right is not considered fundamental, then it is subject to a rational-basis test.[7] This test is given little judicial scrutiny and the state action need only be reasonably related to a legitimate governmental interest.[8] Thus, the statute or legislation regulating that right is likely to be upheld.[9] If a right is considered fundamental, then it is subject to a compelling-interest test.[10] The compelling-interest test is given strict judicial scrutiny and the deprivation must represent a means that are necessary to achieve a compelling-government interest.[11] Effectively, if a right is considered fundamental by the Supreme Court, then it nearly impossible to pass discriminatory legislation against these rights.[12]

Originally, the Fourteenth Amendment's Privileges or Immunities Clause was the foundation for the protection of fundamental rights.[13] However, the Court in the *Slaughter-House Cases* incorrectly gutted the Privileges or

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[4] DAVID H. GANS & DOUGLAS T. KENDALL, THE GEM OF THE CONSTITUTION: THE TEXT AND HISTORY OF THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT 1 (2008), https://www.theusconstitution.org/wp-content/uploads/2017/12/Gem_of_the_Constitution.pdf [https://perma.cc/36QB-PJZA] (concluding the Privileges or Immunities Clause is the "gem" of the Constitutional which allows for creation of fundamental rights).

[5] *See* Dale Carpenter Interview, *supra* note 3 (advocating state legislation as the best method to hedge against an Obergefell overruling); *see also id.* (concluding the Privileges or Immunities Clause allows for creation of fundamental rights of rights inherent in citizenship.) Marriage is one of these rights allowing for same-sex couples to marry in the Constitution.

[6] City of Boerne v. Flores, 521 U.S. 507, 534 (1997) (O'Conner, J., concurring) ("Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law.").

[7] LEGAL INFO. INST., *Rational Basis Test*, CORNELL L. https://www.law.cornell.edu/wex/rational_basis_test [https://perma.cc/TEQ9-GJ83] (explaining the rational basis test is the lowest standard of constitutional protection).

[8] *Id.* (recognizing the rational basis test allows little constitutional protection against discriminatory legislation).

[9] *Id.*

[10] *Flores*, 521 U.S. at 534 (O'Conner, J., concurring) ("Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law.").

[11] David L. Hudson Jr., *Strict Scrutiny*, MIDDLE TENN. ST. UNIV. (Sept. 19, 2023), https://firstamendment.mtsu.edu/article/strict-scrutiny/ [https://perma.cc/WC3Q-TM55] (explaining the implications of strict scrutiny).

[12] *See id.* (recognizing the strict scrutiny standard is so high, it makes it nearly impossible to pass discriminatory legislation on the protected right).

[13] GANS & KENDALL, *supra* note 4, at 3 (explaining the Privileges or Immunities Clause placed emphasis on citizenship being dominant instead of subordinate and derivative).

Immunities Clause.[14] With a need for fundamental right jurisprudence to advance, the Court erroneously developed this jurisprudence in the Fourteenth Amendment's Due Process Clause.[15] This clause prohibits the government from depriving individual citizens of "life, liberty, or property" without the due process of law.[16] In 1934, *Snyder v. Massachusetts* first defined "liberty" in the Due Process Clause as "fundamental rights," requiring these rights to be "rooted in the traditions and conscience of our people as to be ranked as fundamental."[17] Most fundamental rights were incorporated to the states from the Bill of Rights,[18] however other fundamental rights exist which cannot be found in the text of the Constitution such as the right to send one's children to private school[19] and the right to marital privacy.[20]

Since 1934, the Court has battled between two main tests to define and establish fundamental rights.[21] The first test being the Nation's history and traditions test.[22] This test asks whether state laws during the Fourteenth Amendment's ratification in 1868 historically protected or restricted the right in

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[14] *See* Ilya Shapiro & Josh Blackman, *The Once and Future Privileges or Immunities Clause,* 2019 CATO SUP. CT. REV. 1207 (2019) (describing the Privileges or Immunities clause as a dead letter).

[15] Snyder v. Massachusetts, 291 U.S. 97, 105, 105 (1934) (continuing the jurisprudence in the Due Process Clause by establishing liberty in the Due Process Clause to contain rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental.").

[16] U.S. CONST. amend. XIV, § 1.

[17] *Snyder*, 291 U.S. at 105 (arguing that Massachusetts is free to regulate the procedure of its courts as long as it does not offend some principles of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental.").

[18] Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding in a unanimous decision that state courts are required to provide counsel in criminal cases to represent defendants who are unable to afford to pay their attorney); *see also* Mapp v. Ohio, 367 U.S. 643, 660 (1961) (incorporating the Fourth amendment).

[19] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.").

[20] Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (holding through penumbral rights the First, Third, Fourth, and Ninth Amendments create the right to privacy in marital relations).

[21] *See, e.g.*, Nathan S. Chapman & Kenji Yoshino, *The Fourteenth Amendment Due Process Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/articles/amendment-xiv/clauses/701 [https://perma.cc/7E6S-8W79] (explaining the individualistic test allows for "a panoply of liberties" and the other is "more restrictive: such rights would need to be 'carefully described' and, under that description, deeply rooted Nation's history and traditions").

[22] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 216 (2022) (describing two categories of fundamental rights. The first category consists of rights guaranteed by the first eight amendments and the second category asks (1) whether the right is "deeply rooted in [America's] history and tradition" and (2) whether it is essential to the Nation's "scheme of ordered liberty.").

question.[23] The second test is the individualistic test.[24] The individualistic test recognizes there are areas of an individual's life which include personal choices central to one's dignity and autonomy, and these choices should be protected from government intrusion.[25] Recently, the latter of these tests was used to protect LGBTQ liberties, most notably in *Lawrence v. Texas* and *Obergefell v. Hodges*.[26]

In 1986, *Lawrence* challenged the constitutionality of sodomy laws targeted at same-sex couples or the right to be left alone when intimate.[27] Taken in perspective of the Nation's history and traditions test, same-sex sodomy laws in 1868 were clearly not protected because thirty-seven states considered the act criminal.[28]

Instead, the Court takes an individualistic approach to fundamental rights, and found a right to be intimate inside the home.[29] The Court explains that liberty in the Due Process Clause carries an element of privacy which "protects the person from unwarranted government intrusions into a dwelling[.]"[30] Furthermore, it is tradition for the State to not have an omnipresence in our home and "other sphere of our lives and existence, outside the home[.]"[31] *Lawrence* recognized there are aspects of individual lives the government should not control, including the freedom of thought, belief, expression, and certain intimate conduct.[32] Thus, the Court shapes the fundamental rights test and finds history and tradition are the starting points, but not the ending point of a fundamental rights inquiry.[33]

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[23] *Id.* at 272 (overturning *Roe v. Wade*, the majority Court in the *Dobbs* opinion emphasizes the Court in *Roe's* "failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong.").

[24] Obergefell v. Hodges, 576 U.S. 644, 663 (2015) (explaining the Nation's history and tradition are the starting point, but not the end of the analysis. Additionally, fundamental rights can "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.").

[25] *Id.* ("[L]iberties extend to certain personal choices central to individual dignity and autonomy[.]").

[26] *See generally* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (outlawing criminal sodomy laws which targeted same-sex individuals); *Obergefell*, 576 U.S. at 665 (upholding same-sex marriages as a fundamental right).

[27] *Lawrence*, 539 U.S. at 578 (explaining the case was about two men engaged in consensual sexual intercourse and charges with violating a Texas sodomy statute).

[28] *See Bowers v. Hardwick*, 478 U.S. 186, 193 n.6 (1986) (citing thirty-seven criminal sodomy statutes, including Texas, New York, and Maine, to support the proposition that sodomy is not a fundamental right).

[29] *Lawrence*, 539 U.S. at 578 (rejecting a historical fundamental rights approach, and instead protecting spheres of an individual's life including sodomy).

[30] *Id.* at 562.

[31] *Id.*

[32] *Id.* (listing spheres fundamental rights protected that are not mentioned in the historical approach).

[33] *Id.* at 572 (quoting *County of Sacramento v. Lewis*, 532 U.S. 833, 857 (1998) (Kennedy, J., concurring) ("History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.")).

Harvard Law Professor Laurence Tribe lauded *Lawrence* for its fundamental rights development equating the case's impact to be the "*Brown v. Board* of gay and lesbian America."[34] He rightly describes Justice Kennedy's majority opinion as a perfect concoction of Due Process and Equal Protection which crafts a doctrine of equal dignity.[35] Building from this interpretation of fundamental rights, *Obergefell v. Hodges* established the right for same-sex unions to marry in 2015.[36]

In the 2015 *Obergefell* opinion, the majority rejects the Nation's history and traditions test, clarifying fundamental rights have not been "reduced to any formula."[37] Justice Kennedy improves upon the individualist test by adding "these [fundamental] liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[38] Justice Kennedy believes identifying fundamental rights is an enduring part of the judicial duty while interpreting the Constitution.[39] He further explains that fundamental rights require the Court to exercise reasoned judgement in identifying interests of the person so fundamental that the state must accord them respect.[40]

The dissent in *Obergefell* rejects any use of the individualistic test, and believes the Nation's history and traditions test is the only test in considering what rights are fundamental.[41] Chief Justice Roberts warns of allowing unelected federal judges to identify fundamental rights, raising concerns about the judicial role.[42] Furthermore, he argues the dangers of "converting personal preferences into constitutional mandates" and stresses the need for "judicial self-restraint".[43] Yet, with new Justices on the Supreme Court, the test to determine

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[34] Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1895 (2004).
[35] *Id.* at 1898 (stating the Court has found the recipe so that these two achieve "universal dignity.").
[36] Obergefell v. Hodges, 576 U.S. 644 (2015) (establishing a right for same-sex marriage).
[37] *Id.* at 664 (quoting Poe v. Ullman, 337 U.S. 497, 542 (1961) (Harlan, J., dissenting)).
[38] *Id.* at 663.
[39] *Id.* at 664 (Identifying fundamental rights "requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.").
[40] *Id.* (citing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)) (arguing for the Court's duty to discern fundamental rights surpasses the Nation's history and traditions test).
[41] Palko v. Connecticut, 302 U.S. 319, 324 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), *overruled by* Malloy v. Hogan, 291 U.S. 97, 107–08 (1934)) (requiring a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."), *and* Benton v. Maryland, 395 U.S. 784, 793–94 (1969).
[42] *See* Obergefell v. Hodges, 576 U.S. 644, 695 (2015) (expressing the dissents critiques that expanding fundamental rights are resemblant of Pre-Lochner era).
[43] *Id.* at 697.

fundamental rights shifted again from an individualistic test back to the Nation's history and tradition test.[44]

III. THE *DOBBS* DECISION PLACES SAME-SEX MARRIAGE IN JEOPARDY

Minority classes should look towards the *Dobbs* opinion in evaluating their future rights, because the majority rejected the individualist approach in defining a fundamental right.[45] In *Dobbs,* the majority aligns with the Nation's history and traditions test, concluding that the Due Process Clause protects only two categories of rights.[46] The first category consists of fundamental rights guaranteed by the first eight amendments, and the second category of fundamental rights are granted by asking (1) whether the right is "deeply rooted in [America's] history and tradition" and (2) whether it is essential to the Nation's "scheme of ordered liberty."[47] Using the *Dobbs* fundamental rights logic, the future for gay liberties can be answered in two questions: Can gay liberties fit within the *Dobbs* approach to fundamental rights, and will this Court seek to overturn *Obergefell*?

A. Can gay liberties be granted under the Dobbs approach to fundamental rights?

Answering these questions warrants a deeper analysis into the two protected categories of fundamental rights defined by the *Dobbs* Court. Again, the first consists of rights guaranteed by the first eight amendments.[48] Protecting the first eight amendments, specifically the first amendment, does afford LGBTQ communities with basic freedoms such as the expression of their queer identities, but refuses to provide protection against sodomy laws or equal marriage standing.[49] Moreover, the *Obergefell* and *Lawrence* precedent does not rely on the first eight amendments, but rather these rights rely on the Fourteenth Amendment's Due Process and Equal Protection Clauses.[50] LGBTQ

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[44] *Compare* Obergefell v. Hodges, 576 U.S. 644, 644, 665–66 (2015), *with* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 237–41 (2022) (exemplifying the back-and-forth definition of fundamental rights).

[45] *See* Joe Ripley, *Concern Grows Among LGBT Community After Supreme Court's Dobbs Decision Overturns Roe v. Wade*, ACLU GEOR. (June 25, 2022), https://acluga.org/concern-grows-among-lgbt-community-after-supreme-courts-dobbs-decision-overturns-roe-v-wade [https://perma.cc/5N2X-AR7N] (raising concern among the LGBTQ community after the Dobb's decision).

[46] *See* Dobbs, 597 U.S. at 237 (reverting back and a rigid test for fundamental liberties).

[47] *Id.*

[48] *See id.* (outlining fundamental liberties necessary qualifications).

[49] *See generally* Kara Ingelhart, Jamie Gliksberg & Lee Farnsworth, *LGBT Rights and the Free Speech Clause,* ABA: GPSOLO MAG. (Apr. 14, 2020), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2020/march-april/lgbt-rights-free-speech-clause/ [https://perma.cc/UT9H-A6MP] (exemplifying LGBTQ expansion and protection of first amendment rights).

[50] *See* Obergefell v. Hodges, 576 U.S. 644, 675 (*"*[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that

rights will not develop within the first eight amendments, so the answer must lie within the second category.[51]

The second category asks (1) whether the right is "deeply rooted in [America's] history and tradition" and (2) whether it is essential to our Nation's "scheme of ordered liberty."[52] Deconstructing the second category begins first in defining what exactly is "deeply rooted in [our Nation's] history and tradition." This interpretation of our Nation's history and tradition test evaluates historical American laws to make its determination.[53] Importantly, Justice Scalia requires these historical American laws to be the laws existing in 1868 when the Fourteenth Amendment was ratified.[54] If the laws surrounding the right were supported in 1868 when the Fourteenth Amendment was ratified, then it can be seen as a fundamental right.[55] If the laws were criminal or lacking in support, then these laws are not fundamental.[56] The Court extracts this rule from the precedent case of *Washington v. Glucksberg* which held assisted suicide is not a fundamental right by evaluating the laws in effect in 1868.[57] Both the respective *Dobbs* and *Washington* Court's cite historic American laws to determine abortion and assisted suicide were not deeply rooted in our Nation's history and tradition.[58]

The 1868 time period in which the Fourteenth Amendment was ratified was not a time in which the framers considered gay, lesbian, and many other minority liberties.[59] Instead, white men mainly enjoyed liberties set forth by the fruits of

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liberty."); *See also* Lawrence v. Texas, 539 U.S. 558, 578 ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

[51] *See* Chapman & Yoshino, *supra* note 21 (Developing rights in the Bill of Rights are not the only way to create them. Fundamental rights not written in the Constitution exist and can be developed as "unenumerated rights" which the Ninth Amendment allows.).

[52] *Dobbs*, 597 U.S. at 237.

[53] Wash. v. Glucksberg, 521 U.S. 702, 710 (1997) ("We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices.").

[54] *See Dobbs*, 597 U.S. at 272 (arguing the Court in *Roe* failed to adhere to the consensus of state laws effect in 1868).

[55] *E.g.* Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (recognizing marriage as a fundamental right "older than our political parties, older than our school system.").

[56] *E.g.* Bowers v. Hardwick, 478 U.S. 186, 192–93 (1986) (examining criminal sodomy laws in 1868 to conclude these rights were not traditionally supported).

[57] *See Dobbs*, 597 U.S. at 231 (citing Washington v. Glucksberg, 521 U.S. 702 (1997)).

[58] *E.g. Glucksberg*, 521 at 710 ("In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide); *see also Dobbs*, 597 U.S. at 272 ("*Roe*'s failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong.").

[59] *See generally* Deborah Gray White*, The 1965 Voting Rights Act Made Voting a Reality for Black Women*, RUTGERS SCH. ARTS AND SCI., https://sas.rutgers.edu/news-a-events/news/newsroom/faculty/3355-the-1965-voting-rights-act-made-voting-a-reality-for-black-women [https://perma.cc/2R3D-BFP7] (arguing how black women were faced with many impediments and did not receive the benefit of voting until the 1965 voting rights act).

their own democracy.[60] Despite the plain language of the Fourteenth Amendment offering equality to all of its citizens including minorities, the Nation's history and traditions interpretation of fundamental rights resulted in protecting the 1868 status quo.[61] The practical effect not only results in Justices upholding laws created by one predominant perspective, religion, ethnicity, gender, and sexuality, but also creates substantial hurdles for minorities to obtain the same rights as the majority.[62]

For example, the Supreme Court had the opportunity to establish a woman's right to vote as fundamental in the 1874 case, *Minor v. Happersett*.[63] There, the Court rejected women's right to vote for the same reasoning echoed in *Dobbs.*[64] The Court reasoned that the Constitution, when granting citizenship, did not also grant a right of suffrage to women because they found that "in no State were all citizens permitted to vote."[65] Similarly in *Dobbs*, the majority used historical laws to leverage their argument that abortion was not unanimously supported.[66] The Court concludes if the framers would have intended for women to vote, then they "would not have left it to implication."[67]

In 1920, the Nineteenth Amendment granted women the right to vote.[68] Without the right to vote women were disadvantaged. Since they received the ability to vote, they were able to participate in important legislation to redeem the errors of history.[69] Thereafter, women aided in the Fair Labor Standards Act, which established minimum wage without regard to sex, and the Civil Rights Act, which prohibits employment discrimination on the basis of race, color, religion, national origin, or sex.[70]

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[60] *Id.* ("Indeed, while both groups had to fight for the vote, black women had to struggle against black and white men, and white women. We should remember also that while the nineteenth amendment granted the vote to all women, black women in southern states had the vote stripped from them[.]").

[61] *See generally* Christopher W. Schmidt, *The Fourteenth Amendment and the Transformation of Civil Rights*, J. CIVIL WAR ERA, March 2020, at 81, 86–87 (providing context to how the civil rights movement affected the Fourteenth Amendment).

[62] *See Dobbs*, 597 U.S. at 231 (establishing fundamental rights must be deeply rooted in the Nation's history and tradition and implicit in the concept of ordered liberty).

[63] *See* Minor v. Happersett, 88 U.S. 162, 177–78 (1874) (deciding whether a suffrage was a right of a U.S. citizen and whether the founder believed all individuals would enjoy this right).

[64] *See generally id.* (rejecting a woman's right to vote because it was not a "uniform practice long continued").

[65] *Id.* at 172.

[66] *Compare Dobbs*, 597 U.S. at 229–30 (analyzing historical laws to demonstrate a lack of support for abortion), *with Happersett*, 88 U.S. at 177–78 (analyzing historical laws like the one in New Hampshire "every male inhabitant of each town and parish with town privileges, and places unincorporated in the State, of twenty-one years of age and upwards[.]").

[67] *Happersett*, 88 U.S. at 173.

[68] *See* U.S. CONST. amend. XIX (granting the right for women to vote in 1920).

[69] *See* Lydia Dishman, *Here are all the basic rights America denied to your mother and grandmother*, FAST CO., (June 10, 2019), https://www.fastcompany.com/90360082/here-are-all-the-basic-rights-america-denied-to-your-mother-and-grandmother [https://perma.cc/KHJ3-V86Y] (demonstrating the impact women had on American politics).

[70] *See id.* (recalling important events in women's voting history).

Furthermore, the Court again impeded equality in *Scott v. Sandford* by holding the Constitution was not meant to include citizenship for Black Americans regardless of their status as free or enslaved because of the historical scope existing at the time of its origin.[71] There, the Court believed it to be "impossible" for the framers to extend citizenship to Black people.[72] Then, as in *Dobbs*, they argue "[t]he words of the Constitution should be given the meaning they were intended to bear, when that instrument was framed and adopted" and thus sealing discriminatory history into their decision.[73] Eventually, Black Americans were allowed to vote through the Thirteenth and Fourteenth Amendments to the Constitution.[74]

Scott demonstrates how limiting American's fundamental rights today to the laws of American's past can stunt equality causing long-term discrimination.[75] The Court correctly notes the framers did not intend for Black people to have equal citizenship, yet the Court blindly enforces this rule without further analysis.[76] The Court's invidious action against Black Americans continued to 1896 in *Plessy v. Ferguson* by its reprising of *Scott v. Sandford*.[77] There, the Court determined the "established usages, customs, and traditions of the people" affirm the constitutionality of Jim Crow laws.[78]

Palko v. Connecticut provides another example of the Court punting equality by utilizing historical laws.[79] It held the Fifth Amendment was not within the Court's concept of ordered liberty because abolishing both the right to jury by trial and immunity from prosecution do not violate fundamental principles of justice so rooted in the traditions and conscience of the people.[80] Later, the Court would expressly overturn *Palko* in 1969 with *Benton v. Maryland*, but not until Palko was double jeopardized and met his demise in an electric chair.[81]

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[71] Scott v. Sandford, 60 U.S. 393, 410 (1857).
[72] *Scott*, 60 U.S. at 426 (focusing on the framer's intent when analyzing whether a right should be fundamental).
[73] *Scott*, 60 U.S. at 426
[74] U.S. CONST. amend. XIII, § 1 (outlawing slavery in the United States); *see also* U.S. CONST. amend. XIV, § 2 (providing recently freed slaves the ability to vote).
[75] *See Scott*, 60 U.S. at 393.
[76] *See id.* at 426 ("The words of the Constitution should be given the meaning they were intended to bear, when that instrument was framed and adopted.").
[77] *See* Plessy v. Ferguson, 163 U.S. 537, 550 (1896) (doubling down on their decision in *Scott v. Sandford*).
[78] *Id.* at 548–49 (holding racial segregation laws did not violate the Fourteenth Amendment).
[79] *See generally*, Palko v. Connecticut, 302 U.S. 319, 325 (1937) (holding a right by jury trial is not a fundamental right because of the historical test used, thus sending Palko to his death), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).
[80] *See generally id.* at 325 (disregarding a right Americans recognize as fundamental to being an American today).
[81] *See* Benton v. Maryland, 395 U.S. 784, 794 (1969) (expressly overruling *Palko v. Connecticut*).

These cases highlight violations of civil liberties which fall onto the American minority classes as a result of this Nation's history and traditions analysis.[82] In effect, the test steals minority class citizens' right from voting, education, or equal citizenship status—rights which grant equal treatment of law with the majority of citizens.[83] It does so by asking not only which rights existed in 1868, but also who enjoyed those rights. For example, the Court in *Zablocki v. Redhail* found a right to marry, but because that right has only been historically enjoyed between men and women, it does not grant a right for same-sex marriage.[84] This interpretation insists rights equal to majority citizens are not constitutionally granted to minority citizens but must be *earned* through state vote furthering the suppression of these classes.[85] Additionally, the cases illustrate how the historical test is a weapon for legislators, inviting them to discriminate by continuing the historical tradition of treating minorities as second-class citizens.[86] Timely constitutional amendments and Supreme Court overrulings that distanced itself from the Nation's history and traditions analysis were necessary to reconstruct the history's warped perspective of equality.[87]

The question whether gay liberties would be granted under the *Dobbs* approach has a clear answer, and, in fact, has already been answered.[88] *Bowers v. Hardwick* held same-sex-sodomy laws were constitutional because the Due Process Clause did not confer any fundamental right on homosexuals to engage in acts of consensual sodomy, even if the conduct occurred in the privacy of their own homes.[89] In accordance with the deeply rooted Nation's history and tradition, the Court recognized sodomy was a criminal offense at the ratification of the Bill of Rights, noting all but five of the thirty-seven States in the Union had criminal sodomy laws.[90] It was not until 1961 that all fifty states outlawed sodomy.[91]

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[82] *See* David H. Gans, *OP-ED: The Through Line From 'Brown' to 'Dobbs'*, CONST. ACCOUNTABILITY CTR. (May 23, 2022), https://www.theusconstitution.org/news/op-ed-the-through-line-from-brown-to-dobbs/ [https://perma.cc/9UBG-7CH3] (emphasizing the various types of rights minority classes were denied which would distinguish their citizenship status from the status of the majority of people).

[83] *See id.* (noting how this lineage of cases affect minority classes only).

[84] *See* Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (holding marriage as a fundamental right).

[85] *See* Jeannie Suk Gersen, *The Respect for Marriage Act is Also a Victory for Same-Sex Marriage Opponents*, THE NEW YORKER (Dec. 8, 2022), https://www.newyorker.com/news/daily-comment/the-respect-for-marriage-act-is-also-a-victory-for-same-sex-marriage-opponents [https://perma.cc/5WS3-PD2N] (creating two classes of marriages will require these couples to fight for their rights in their own state, or force them to travel to a friendly state where the battle for marital equality is already won).

[86] *See generally id.*

[87] U.S. CONST. amend. XIX, § 2 (granting women the right to vote); *see also* U.S. CONST. amend. XIII, § 1 (outlawing slavery); U.S. CONST. amend. XIV, § 2 (granting Black citizens the right to vote and more).

[88] *See generally* Bowers v. Hardwick, 478 U.S. 186 (1986) (providing numerous examples of discriminatory LGBTQ laws).

[89] *Id.* at 192 (rejecting sodomy as a fundamental right because previous laws made it criminal).

[90] *See id.* at 192–93 (providing historical context of sodomy laws).

[91] *Id.* at 193–94.

Indeed, with this standard "it is obvious to us that neither of these formulations [referring to the Nation's history and traditions test] would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."[92] The case which overturned this decision, *Lawrence v. Texas*, now stands in jeopardy with the *Dobbs* opinion.[93] As applied to same-sex marriage, laws in 1868 outlawed same-sex marriage and currently thirty-five states ban same-sex marriage in their constitutions, state law, or both.[94] Concluding the laws demonstrate same-sex marriage rights are not traditionally supported, the next question the court asks is whether these rights are essential to our Nation's scheme of ordered liberty. [95]

The second prong of the *Dobbs* test, ordered liberty—defined as limiting and defining the boundary between competing interests—further cements previous discriminatory laws and traditions.[96] This prong allows any "critical moral question" of competing interest to be decided by public vote.[97] However, Justice Alito offers no guidance on how to define the point of competing interest, "only that there should be one."[98] So, *any* laws affecting minority rights that involve a moral question of any reason, like same-sex marriage, can compete between states.[99] Thus, this test does not provide substantive limitations on Justice's selections of historical laws to be analyzed when determining if a right is fundamental.[100]

Applying this concept to abortion, the majority determined that people evaluate abortion laws differently, specifically for its moral question.[101] Similarly, same-sex marriage and sodomy presents a critical moral question

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[92] *Id.* at 192.
[93] *See* GANS and KENDALL, *supra* note 4.
[94] *See* Elaine S. Povich, *Without Obergefell, Most States Would Have Same-Sex Marriage Bans,* PEW (July 7, 2022, 12:00 AM), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/07/without-obergefell-most-states-would-have-same-sex-marriage-bans [https://perma.cc/TF63-BNCY] (reporting thirty-five states would ban same-sex marriage).
[95] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 237–38 (2022) (outlining fundamental liberties necessary qualifications).
[96] Stephanie Guilloud, *The Supreme Court Cited "Ordered Liberty" to Overturn "Roe." What's Next?*, TRUTHOUT (July 21, 2022), https://truthout.org/articles/the-supreme-court-cited-ordered-liberty-to-overturn-roe-whats-next/ [https://perma.cc/PUV6-BLN6] (establishing ordered liberty is a dangerous concept allowing "right-wing forces that are in power to determine what 'order' means and what freedoms should be limited).
[97] *See Dobbs*, 597 U.S. at 256–57 (applying the concept of ordered liberty to abortion).
[98] Burt Likko, *Capacious, Ordered Liberty*, ORDINARY TIMES (May 16, 2022), https://ordinary-times.com/2022/05/16/capacious-ordered-liberty/ [https://perma.cc/2RZ5-TVVC] (expressing concern that the *Dobbs* opinion downplays the notion of ordered liberty).
[99] *Id.* ("Alito neither offers nor points to any guidance at all about how to best define that balance point, only that there should be one.")
[100] *See generally Dobbs*, 597 U.S. at 256 (defining elements of ordered liberty).
[101] *See id.* at 257 (conceding this debate revolves around a critical moral question).

when conflicted with religion or traditional values.[102] Therefore, it is a question of competing interests and, under this test, is not constitutionally protected and should be left to public vote.[103]

To conclude, it is clear same-sex liberties will not be protected by the *Dobbs* approach—leaving *Obergefell* and *Lawrence* incompatible with the current jurisprudence in defining fundamental rights.[104] It is important to note that *Obergefell* and *Lawrence* remain good law by relying on the doctrine of *Stare Decisis*.[105] However, this doctrine is not an inexorable command.[106] It did not protect *Roe v. Wade* from being reevaluated by the Court, and it is likely not going to protect a reevaluation of *Obergefell* and *Lawrence*.[107] These cases, praised for their achievements of LGBTQ rights, can undergo judicial review at the decision of the Supreme Court if agreed upon by four of the nine Justices.[108]

B. Will the Court Overturn Obergefell?

The *Dobbs* Court states "[n]othing in this opinion should be understood to cast doubts on precedents that do not concern abortion."[109] However, this conclusion does not logically follow the premises set out in *Dobbs*, because the heart of *Dobbs* argues abortion is not a constitutional right as it is not rooted in history and tradition—and the same is true of same-sex marriage.[110] Justice Thomas's concurrence correctly acknowledges this, and he advocates to reconsider all of the Court's fundamental right precedents, including *Lawrence*

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[102] *E.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 584 U.S. 617, 624–25 (2018) (holding a cake maker has the right to deny making a cake for a homosexual couple since it violates her right to free speech).

[103] *See Dobbs*, 597 U.S. at 257 (conceding this debate revolves around a critical moral question).

[104] *Compare* Obergefell v. Hodges, 576 U.S. 644, 644 (2015) (noting history and tradition is just the starting point and to further analyze whether the individual rights are central to one's dignity and autonomy) *with* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 237–38 (2022) (history and tradition are determinative) (demonstrating their incompatibility exemplified by inconsistently regarding some rights as fundamental and others not).

[105] *See generally Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019) (explaining this doctrine is one of precedent, which a court must follow earlier judicial decision when the same points arise again in litigation. *Stare Decisis* is latin and translates to "stand by things decided.")

[106] *See Dobbs,* 597 U.S. at 290 ("[T]raditional stare decisis factors do not weight in favor of retaining *Roe* or *Casey*[.]").

[107] Brief for Thomas E. Dobbs, M.D., M.P.H., State Health Officers of the Mississippi Department of Health, et al. as Amici Curiae Supporting Petitioners, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (amicus brief from Justice Scalia's former law clerk, Jonathan Mitchell, who argues that *Roe v. Wade* is unconstitutional and that cases underscoring LGBTQ rights are "as lawless as Roe" and therefore must be overturned).

[108] U.S. COURTS*, Supreme Court Procedures,* https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [https://perma.cc/BU2P-ZEZD] (explaining that cases will be granted a *writ of certiorari* if four of the nine Justices vote to accept a case).

[109] *Dobbs*, 597 U.S. at 290.

[110] Michael C. Dorf, *Will the Supreme Court Respect the Respect for Marriage Act?*, VERDICT JUSTIA (Nov. 21, 2022), https://verdict.justia.com/2022/11/21/will-the-supreme-court-respect-the-respect-for-marriage-act [https://perma.cc/YEE2-R9MD] (arguing the reasoning between Dobbs is inconsistent with the precedent's logic in establishing same-sex marriage).

and *Obergefell*.[111] Compare his opinion with Justice Kavanaugh's concurrence seeking to restrain the majority's opinion stating "overruling *Roe* does *not* mean the overruling of those precedents and does *not* threaten or cast doubt on those [*Griswold v. Connecticut, Eisenstadt v. Baird, Loving v Virginia,* and *Obergefell v. Hodges*] precedents."[112] However, Justice Kavanaugh stands alone in this concurrence, and his language provides the underlying truth that these precedents stand—at least for now.[113]

The Court weighs five factors whilst considering overruling precedent and diverging from *Stare Decisis*.[114] First the Court reviews the nature of the case's error.[115] In *Dobbs*, the Court condemned the constitutional analysis in *Roe* by claiming it usurped the public's power to decide this moral question and perpetuated the individualistic test.[116] Similarly, the *Obergefell* test accomplishes the same legal effect by usurping the citizens' right to vote whether a same-sex couples should have a right to marry.[117]

Secondly, the Court analyzes the quality of the reasoning.[118] In *Dobbs*, the Court criticizes the *Roe* Court because of its failure to base its decision within the historical timeframe fundamental rights are subject to.[119] A *Stare Decisis* analysis of *Lawrence* and *Obergefell* will share the same critique as evidenced by *Bowers* reasoning to uphold same-sex sodomy laws, and the current thirty-five state bans on same-sex marriage.[120]

Thirdly, the Court must analyze workability—which they define as whether the rule "can be understood and applied in a consistent and predictable manner."[121] The Court attacks workability in *Roe* based on its undue burden

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[111] *See Dobbs*, 597 U.S. at 332 (Thomas, J., concurring) (contending Fourteenth Amendment jurisprudence should be revised including *Griswold, Lawrence*, and *Obergefell*).
[112] *Dobbs*, 597 U.S. at 346 (Kavanaugh, J., concurring).
[113] *Id.* (Kavanaugh, J., concurring) (aiming to limit the majority's opinion).
[114] Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31, 138 S. Ct. 2448, 2478 (2018) ("Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important[.]").
[115] *See generally Dobbs*, 597 U.S. at 268–90 (outlining the five factors to break from Stare Decisis).
[116] *Id.* at 269 (describing *Casey* as "calling both sides of the national controversy to resolve their debate, but in doing so, *Casey* necessarily declared a winning side.").
[117] Obergefell v. Hodges, 576 U.S. 644, 686 (2015) (Roberts, Chief J., dissenting) ("[The majority] contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex. But this Court is not a legislature.").
[118] *See generally Dobbs*, 597 U.S. at 268–292 (outlining the five factors to break from Stare Decisis).
[119] *Dobbs*, 597 U.S. at 235 (mentioning that the Constitution does not contain abortion rights, nor did the *Roe* Court rely on laws existing in 1868).
[120] *E.g.*, Bowers v. Hardwick, 478 U.S. 186,192–93 (1986) (exemplifying in 1868, all but five of the 37 states had criminal sodomy laws).
[121] *Dobbs*, 597 U.S. at 220.

test because the test heavily relies on judges' discretion to weigh certain factors.[122] The dissent in *Obergefell* has already planted the seeds to attack workability.[123] There, the dissent's "immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people" causing concern that *Obergefell* can be expanded to include polygamous marriage thus destroying the two person union our governmental regulations are built upon.[124]

Fourthly, the Court considers the effect on other areas of law.[125] The *Dobbs* Court's main concern with *Roe* is that it distorted First Amendment principles along with other unrelated legal doctrines.[126] The Court may easily critique *Obergefell* for disrupting the standard of fundamental rights and departing from a traditional man and female union.[127]

Finally, the Court must consider reliance interests which arise "where advance planning of great precision is most obviously a necessity."[128] This prong examines whether the precedent law created a reliance for specific individuals, groups and organizations, the government, courts, and society at large.[129]

Great debate exists whether the Court will overturn *Obergefell*.[130] Southern Methodist University ("SMU") constitutional law Professor, Dale Carpenter, noted the reliance prong to be the stable post for *Obergefell* to maintain its status as precedent.[131] Unlike abortions, which typically do not require long term planning, marriage involves many financial benefits and

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[122] *Id.* at 280 (arguing the test is "obscure" and ambiguous, so that it is difficult to apply).

[123] Obergefell v. Hodges, 576 U.S. 644, 704 (2015) (Roberts, Chief J., dissenting) (fearing the possibility that *Obergefell* can be used to protect polyamorous couples).

[124] *Obergefell*, 576 U.S. at, 704 (Roberts, Chief J., dissenting)

[125] *See generally Dobbs*, 597 U.S. at 268–70 (outlining the five factors to break from Stare Decisis).

[126] *Id.* at 286–87 ("The Court's abortion cases have diluted the strict standard for facial constitutional challenges. They have ignored the Court's third-party standing doctrine. They have disregarded standard *res judicata* principles. They have flouted the ordinary rules on the severability of unconstitutional provisions, as well as the rule that statutes should be read where possible to avoid unconstitutionality. And they have distorted First Amendment doctrines.").

[127] *Obergefell*, 576 U.S. at 689 (Roberts, Chief J., dissenting) (arguing the universal definition of a marriage between a man and a woman is "no historical coincidence" and that it is a political issue for the Nation to debate).

[128] *Dobbs*, 597 U.S. at 287 (quoting Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 856 (1992)).

[129] *See* Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, WASH. & LEE L. REV., Spring 2010, at 411, 452 ("The universe of reliance interests can be usefully (if roughly) divided into four categories: reliance by specific individuals, groups, and organizations; reliance by governments; reliance by courts; and reliance by society at large.").

[130] Victoria A. Brownworth, *Analysis: Supreme Court to Overturn Roe v. Wade – Is Obergefell Next?,* PHILADELPHIA GAY NEWS (May 4, 2022, 4:47pm), https://epgn.com/2022/05/04/analysis-supreme-court-to-overturn-roe-v-wade-is-obergefell-next/ [https://perma.cc/U2UV-E9NK] (summarizing debates surrounding the overturning of *Obergefell*).

[131] Dale Carpenter Interview, *supra* note 3 (same–sex marriage union create long term plans from a right law has previously recognized which is unlike the *Dobbs'* analysis regarding abortion because there are no concrete interests and long–term plans typically involved).

perhaps even citizenship.[132] Destroying existing same-sex marriages would be detrimental to those in them, and, as a result, it will rupture government protections already connected to these unions.[133]

On the other hand, Laurence Tribe noted that the Court in *Dobbs* created an opening for incursions on LGBTQ rights.[134] Additionally, St. Mary's University constitutional law Professor, David Dittfurth, believes the Court will overrule *Dobbs*.[135] He explains the *Dobbs* Court weakened the *Stare Decisis* doctrine because, *Stare Decisis*, although not an inexorable command, requires extremely persuasive reasoning to overturn precedent which was not sufficiently presented in the *Dobbs* opinion overturning *Roe*.[136] Overall, it is difficult to predict when the Supreme Court will overrule precedent, because it is not clear how these factors should be weighed and it grants the Justices significant discretion.[137]

Regardless of the debate, the mere presence of *Dobbs* has a transformative effect on the current state of marriage equality.[138] Currently, thirty-five states ban sex-sex marriage in their constitutions, state law, or both.[139] If *Obergefell* were to be overturned, states would automatically reinstate these anti-marriage

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[132] Dale Carpenter Interview, *supra* note 3 (explaining the reliance prong regarding abortion is different because the Court reasoned abortions are a "quick and immediate need that people experience.").

[133] Dale Carpenter Interview, *supra* note 3 (discussing the long-term-reliance interests the Court usually analyzes are things like contracts and how the previous law would effect people's lives today if taken away).

[134] *See* Isabella Cho & Brandon Kingdollar, *After Roe Dismantled, Harvard Experts Condemn, Defend Landmark Decision*, HARV. CRIMSON (June 25, 2022), https://www.thecrimson.com/article/2022/6/25/dobbs-experts-reax/ [https://perma.cc/5WMT-842J] (recognizing the impact the decision had on LGBT issues).

[135] Audio tape: Interview with David Dittfurth, Constitutional Law Professor, St. Mary's University School of Law in San Antonio, Tex. (Nov. 11, 2022) (on file with author) [hereinafter David Dittfurth Interview].

[136] *Id.* (explaining the Court voided *Stare Decisis* principles overturning *Roe* and would apply the same analysis to *Obergefell*).

[137] LEGAL INFO. INST., *ArtIII.S1.7.2.2.2 Stare Decisis Factors*, CORNELL L., https://www.law.cornell.edu/constitution-conan/article-3/section-1/stare-decisis-factors [https://perma.cc/5YZT-BD85] (detailing the history of overruling precedents and analyzing how the Courts weighed the *Stare Decisis* factors).

[138] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 264 (2022) ("Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.").

[139] Povich, *supra* note 94 (reporting thirty–five states would ban same-sex marriage).

laws—a legal effect seen once *Dobbs* overruled *Roe*.[140] Marriage equality needs to be protected now before the possible overturning of *Obergefell*.[141]

IV. LEGISLATIVE SOLUTIONS

A. Federal Solutions

To hedge against *Dobb's* historical analysis and its threat on *Obergefell*, two legislative avenues can provide the same federal protections as *Obergefell*: amending the Constitution to provide for same-sex marriage or passage of a federal bill through the Senate.[142] The first option is not viable as "[i]t is very difficult to amend the Constitution" as the *Dobbs* majority mentions, and indeed it is.[143] Passing a constitutional amendment requires a proposal by two-thirds of both the House of Representatives and the Senate, and then three-fourths of the states must ratify the amendment.[144]

The second avenue to federally protect these rights is through the passing of a federal bill. The Senate recently passed the 2022 Respect for Marriage Act (Act) which provides the gay and lesbian communities only some rights which *Obergefell* achieved.[145]

The Act brandishes two main accomplishments. First, the Act repealed and replaced the Defense of Marriage Act defining marriage for purposes of federal law as a man and woman, and included same-sex couples in its marriage definition.[146] Second, the Act requires other states to recognize same-sex

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[140] Dorf, *supra* note 110 ("If Congress enacts the RMA and the Supreme Court subsequently overrules *Obergefell*, same-sex couples residing in states that do not of their own accord recognize the legality of their marriages would have to go to the trouble and expense of traveling to a state that does in order to receive full recognition in their home state.").

[141] Jahangiri, *supra* note 1 (encouraging LGBT families to contact senators and codify same-sex protections to help safeguard LGBT rights).

[142] Dale Carpenter Interview, *supra* note 3 (advocating to secure *Obergefell* rights through the states to hedge against a potential overturning); *see also* Jahangiri, *supra* note 1 (encouraging audience to call their Senators to provide protections in case *Obergefell* is overturned).

[143] *See generally* Talia Brenner, *(H)our History Lesson: Teaching Engaged Citizenship, Amending the U.S. Constitution,* NPS (July 31, 2023), https://www.nps.gov/articles/000/teaching-civics-amending-the-u-s-constitution.htm#:~:text=Second%2C%20compared%20to%20other%20ways, this%20has%20never%20happened%20before [https://perma.cc/94PE-9V7Q] (explaining two-thirds of both houses of Congress must pass the amendment. Then, three-fourths of all states must ratify the amendment. Since 1789, the Constitution was amended 27 times, the first ten of these amendments are collectively known as the Bill of Rights).

[144] *See* U.S. CONST. art. V (Notwithstanding the option to amend the Constitution through a constitutional convention called for by two-thirds of the State legislatures, because none of the 27 amendments have been proposed through this method).

[145] *See generally* Respect for Marriage Act, H.R. 8404, 117th Cong. (2022) (recognizing the act does not mandate state to issue same–sex marriage licenses).

[146] Defense of Marriage Act (DOMA) of 1996, Pub. L. No. 104-199, 110 Stat. 2419, *invalidated by* Obergefell v. Hodges, 576 U.S. 644 (2015) ("[T]he word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

marriages if the couple was married in a state that permits same-sex marriage.[147] For example, if a same-sex couple were to marry in California, a state which permits same-sex marriage, and move to Alabama, a state which would likely enforce its state constitutional ban on same-sex marriage adopted in 2006, then the Act will require Alabama to recognize the marriage but not license one.[148]

Despite the Act's achievement, it is limited in three key protections as compared to *Obergefell*.[149] First, the Act conceded that any nonprofit religious organizations may decline to "provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage."[150] LGBTQ advocates have long debated their rights between religious groups, but this federal statute concedes these debates favoring the religious groups.[151]

Second, it will prohibit states from denying the validity of same-sex unions legitimately conducted in other states, but it will not require the states themselves to license same-sex marriages as *Obergefell* does.[152] This will result in same-sex couples being forced to travel to a friendly state for their marriage to be recognized.[153] Similar to abortions, it will invite state legislatures to make laws hindering this process by making it timely and costly for same-sex couples to receive the same benefits of marriage as heterosexual couples.[154] As a result, the Act will result in two classes of marriage in our country: one that is available in every state and another that may be entered into only in some states.[155] On its face, it is discriminatory towards same-sex couples.[156]

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[147] Respect for Marriage Act, H.R. 8404, 117th Cong. § 7 (2022) (requiring states to recognize same–sex marriage validly recognized in other states).

[148] Dorf, *supra* note 110 (exemplifying the shortcoming of the Respect for Marriage Act).

[149] Dorian Rhea Debussy, *Biden signs marriage equality bill into law - but the Respect for Marriage Act has a Few Key Limitations*, THE CONVERSATION (Dec. 7, 2022, 8:43AM), https://theconversation.com/biden-signs-marriage-equality-bill-into-law-but-the-respect-for-marriage-act-has-a-few-key-limitations-195709 [https://perma.cc/QT7R-JB8J].

[150] Respect for Marriage Act, H.R. 8404, 117th Cong. § 7 (2022) (note the limitation that nonprofit religious organizations and its employees can deny same-sex marriage ceremonies).

[151] Gersen, *supra* note 85 (favoring religious groups makes a resolution of conflict between gay and religious groups in a way that it arguably was not before).

[152] *See* James Esseks, *Here's What You Need to Know About the House Passage of the Respect for Marriage Act,* ACLU (July 21, 2022), https://www.aclu.org/news/lgbtq-rights/what-you-need-to-know-about-the-respect-for-marriage-act [https://perma.cc/MT4A-DAKQ] (outlining the limitations of the Respect for Marriage Act).

[153] Debussy, *supra* note 149 (bringing attention to the realities same-sex couples will face in states opposed to same-sex marriage).

[154] *Id.* (comparing the similar effects seen in abortions as a result of *Dobbs*. Adding it will create a "flurry of lawsuits" at a state level).

[155] Gersen, *supra* note 85 (recognizing the equality Obergefell granted, but this bill lacks).

[156] *See id.* (creating two classes of citizens is discriminatory towards same-sex couples).

Thirdly, the Act does not provide for marriage equality, let alone, long-term equality.[157] Cornell Law Professor, Michael Dorf, argues, "[t]he [Respect for Marriage Act] cannot guarantee marriage equality for the long run, but for now, it seems like a sensible, if limited, hedge against the possibility of an even more reactionary Supreme Court."[158] Additionally, the Act raises the question whether it is constitutional under the Article IV, Section 1 Full Faith and Credit Clause.[159] Will the Court uphold the interstate requirement to recognize out-of-state same-sex marriages in a post-*Obergefell* world?[160] The Tenth Amendment of the Constitution requires powers not delegated by the Constitution to be reserved to the states, so has Congress gone too far?[161] Perhaps, the Court may become prompted to overrule *Obergefell* claiming to remove the restraints on the democratic process, and point to the Act as an example of how people can be represented in this process.[162]

The Act is the first line of defense if *Obergefell* is overturned, and it favors the rights of religious groups over those of gay couples, discriminates against same-sex couples by creating two classes of marriages, and fails to create a long-lasting solution to hedge against Obergefell.[163] The Act acts only as a glass layer of protection and once shattered, it exposes the states same-sex marital bans.[164] To firmly protect same-sex marriage rights, all states must recognize and entrench these unions into their laws.[165]

B. State Solutions

SMU Law Professor, Dale Carpenter, recognizes the most accessible long-term solution will be to amend every state constitution and legislation to permit same-sex marriage.[166] Before *Obergefell*, the LGBTQ community has tried for

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[157] *See, e.g.,* Laurence Tribe (@tribelaw), X (Nov. 28, 2022, 6:56 AM), https://twitter.com/tribelaw/status/1597212922228674560 [https://perma.cc/72GP-QYUZ] (explaining that the Respect for Marriage act is not a long term solution because of its shortcomings).

[158] Dorf, *supra* note 110.

[159] *Id.* (incorporating state definitions is a standard approach when defining terms for federal law).

[160] *Id.* (raising constitutional questions that the Court may ask when examining the RMA).

[161] *Id.* (insisting the Respect for Marriage Act did not go further to establish same-sex marriage protections equal to *Obergefell* is because it would violate the Tenth Amendment of the Constitution).

[162] *See* Gersen, *supra* note 85 (insisting the Respect for Marriage Act raises many questions in how the Court will approach a re-evaluation of this case).

[163] Dorf, *supra* note 110 (pointing out the legal implications of the Respect for Marriage Act); *see also* Gersen, *supra* note 85 (pointing out how the Act fails to provide same-sex couples the protections of Obergefell, despite it being celebrated).

[164] Dorf, *supra* note 110 ("[I]t is likely if not certain that if the Supreme Court were to overrule *Obergefell*, and in the absence of the RMA, the Court would allow states that forbid same-sex marriages to deny recognition to such marriages celebrated out of state.").

[165] *See* Dale Carpenter Interview, *supra* note 3 (offering state legislation as the best method to entrench same-sex marital rights).

[166] *Id.* (advocating for this solution to provide long-term protections).

decades to establish marital rights.[167] The gay rights movement began in 1924 and notably contained the Matthew Shepard Act, National March on Washington, and the Stonewall Riots.[168] These movements paved the way for states to permit same-sex marriage.[169] However, this movement only proved successful in a few states.[170]

Compared within the last ten years, remarkable improvements in LGBTQ support have been made.[171] In 2004, only thirty-one percent of Americans supported same-sex marriage.[172] While in 2019, the support had risen to sixty-one percent.[173] Another poll taken in 2022 analyzes the largest battleground states for same-sex marriage including Texas, Alabama, Arkansas, and Utah.[174] Overall, these states held sixty-four percent of likely voters in 2022 support protecting the national right to same-sex marriage.[175] Today support for same-sex marriage equality is at 71%.[176] Now is the time to protect same-sex unions in every state while public support is at an all-time high.[177]

Despite unprecedented public support, bills are routinely introduced to attack LGBTQ rights.[178] The American Civil Liberties Union currently tracks 508 anti-LGBTQ bills in the United States.[179] Some bills target access to healthcare, others restrict LGBTQ rights to free expression, and bills continue to be introduced including bans on same-sex marriage to prepare for an

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[167] *See Gay Rights*, HISTORY, (Apr. 27, 2022), https://www.history.com/topics/gay-rights/history-of-gay-rights [https://perma.cc/484K-D8HF] (In 1924, a German immigrant founded the Society for Human Rights which is "the first documented gay rights organization in the United States.").

[168] *Id.* (providing examples of notable movement in LGBTQ rights history).

[169] *Id.* (illustrating the timeline to granting same-sex marriage).

[170] Povich, *supra* note 94 (reporting thirty-five states would ban same-sex marriage).

[171] *See* PEW RSCH. CTR., *Attitudes on Same-Sex Marriage* (May 14, 2019), https://www.pewresearch.org/religion/fact-sheet/changing-attitudes-on-gay-marriage/ [https://perma.cc/VK42-5CMK] (improving from 31% support to 61% supporting same-sex marriage).

[172] *Id.* (providing data on same-sex marriage support across all states).

[173] *Id.* (reflecting a rising tolerance to same-sex marriage support across all states).

[174] HUM. RTS. CAMPAIGN, *New Poll: Two-Thirds of Likely Voters in Battleground States Support Marriage Equality*, (Sept. 14, 2022), https://www.hrc.org/news/new-poll-two-thirds-of-likely-voters-in-battleground-states-support-marriage-equality [https://perma.cc/9K2Z-BMXZ].

[175] *Id.*

[176] *See* Justin McCarthy, *Same-Sex Marriage Support Inches Up to New High of 71%*, GALLUP (June 1, 2022), https://news.gallup.com/poll/393197/same-sex-marriage-support-inches-new-high.aspx [https://perma.cc/AKS3-DAPH] (emphasizing a 71% support for same-sex marriage is an all-time high).

[177] *See* HUM. RTS. CAMPAIGN, *supra* note174; *see also* Dale Carpenter Interview, *supra* note 3 (noting this as a viable solution to firmly hedge against overruling *Obergefell*).

[178] ACLU, *Mapping Attacks on LGBTQ Rights in U.S. State Legislature*, https://www.aclu.org/legislative-attacks-on-lgbtq-rights (Feb. 14, 2023), [https://perma.cc/C58D-98WD] (tracking all anti-LGBTQ bills being introduced to state legislature to undermine same-sex marriage or other LGBTQ rights).

[179] *Id.* (noting bills focused on civil rights, healthcare, education, marriage, and more).

Obergefell overturning.[180] For long term marriage equality, the fight for state recognition must continue.[181]

Although a solution through state legislature is most accessible, it is also unsatisfactory.[182] *Obergefell's* strength is that it accomplished what the states cannot.[183] It expanded the scope of fundamental rights in the Constitution through the individualistic test and protected same-sex couples from state discrimination.[184] Furthermore, the dangers lying in interpreting constitutional rights through the Nation's history and traditions test are avoided when the Court reshapes, limits, or ignores the test.[185] In 1954, *Brown v. Board of Education* retreated from the historical test, instead promoting empirical data to overturn *Plessy v. Ferguson*.[186] Additionally, the Court in *Benton v. Maryland* does not even mention the concept of ordered liberty once—the concept which *Palko v. Connecticut* relied so heavily on to reject Palko's jury by trial.[187] Instead, the Court relies on incorporation as a "trend" of the due process of law, and therefore finds the Fifth Amendment part of that trend too.[188] The Court recognizes errors brought forth with this test, but fails to formulate it to maintain a fluent precedent to withstand the lapse of time.

To resolve these issues, the Constitution provides another area to develop fundamental rights—the Privileges or Immunities Clause.[189] This clause is currently in a comatose state, but there exists a way to revive it.[190]

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[180] *Id.* (creating hardships on same-sex couples to marry if *Obergefell* is overturned).
[181] *See* Dale Carpenter Interview*, supra* note 3 (advocating for this solution to provide long-term protections).
[182] *See* Gersen, *supra* note 85 (favoring religious over same-sex couples, and creating two classes of marriage if *Obergefell* is overturned).
[183] *Id.* (failing to equalize marriage and choosing religion over same-sex marriage).
[184] Obergefell v. Hodges, 576 U.S. 644, 663–65 (2015) (granting constitutional protection of same-sex marriage which supersedes state legislation).
[185] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (relying on empirical data instead of the historical analysis); Benton v. Maryland, 395 U.S. 784 (1969) (avoiding the concept of ordered liberty and took an individualistic approach because it was the current trend of the law).
[186] *Brown*, 347 U.S. at 494 (creating scholarly frustration because the scientific data circumvented the necessary discussion about the fundamental rights test).
[187] *Compare* Benton v. Maryland, 395 U.S. 784 (1969) (failing to address or re-evaluate the concept of ordered liberty*) with* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (holding a right by jury trial is not a fundamental right because of the historical test used, thus sending Palko to his death), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).
[188] *Id.* at 794–95 ("Recently, however, this Court has 'increasingly looked to the specific guarantees of the Bill of Rights to determine whether a state criminal trial was conducted with due process of law.' . . .We today only recognize the inevitable.")
[189] McDonald v. City of Chi., 561 U.S. 742, 812 (2010) ("[T]he original meaning of the . . . [Privileges or Immunities Clause] offers a superior alternative, and that a return to that meaning would allow this Court to enforce the rights the Fourteenth Amendment is designed to protect with greater clarity and predictability than the substantive due process framework has so far managed.").
[190] Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretatio*n, 108 HARV. L. REV. 1221, 1223-1303 (1995) (advocating on the behalf of many scholars when stating the *Slaughter-House Cases* "[i]ncorrectly gutted" the Clause).

V. RESTORING THE ORIGINAL INTENT OF THE PRIVILEGES OR IMMUNITIES CLAUSE

The original intent of the Privileges *or* Immunities Clause were to establish individual rights not expressly stated in the Constitution.[191] These rights are better known as fundamental rights.[192] When the *Slaughter-House Cases* gutted the Privileges or Immunities Clause, the Court began creating these rights in the Due Process Clause instead.[193] Section One of the Fourteenth Amendment provides four constitutional guarantees, and at issue are the second and third guarantee:[194]

> (1) All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.
> (2) No State shall make or enforce any law which shall abridge the *privileges or immunities* of *citizens* of the United States;
> (3) nor shall any State deprive any person of life, *liberty*, or property, without *due process of law;*
> (4) nor deny to any person within its jurisdiction the equal protection of the laws.

A. The Original Intent of the Privileges or Immunities Clause

The Fourteenth Amendment's Privileges *or* Immunities Clause intended purpose can be realized when Justice Washington first defined the Article IV, Section Two, Privileges *and* Immunities Clause in *Corfield v. Coryell*, holding rights protected by the clause belong to all citizens "which have, at all times, been enjoyed by the citizens of the several states."[195] These rights include "[p]rotection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety."[196] The majority added, "[t]hese, and many other

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[191] Randy E. Barnett, *Foreword: What's So Wicked About Lochner?*, 1 NYU J. L. & LIBERTY 325, 330 (2005) ("The Privileges or Immunities Clause, therefore, protects all 'citizens,' whether white or black, born or naturalized in the United States. Over the past fifteen years, legal scholars have come to acknowledge that 'privileges or immunities' was a reference both to natural rights and also to positive rights of citizenship established by the government, such as the right to trial by jury in the Fifth Amendment.").

[192] LEGAL INFO. INST., *Substantive Due Process*, CORNELL L., https://www.law.cornell.edu/wex/substantive_due_process (last updated Apr. 2022) [https://perma.cc/L8P4-KC7K].

[193] Barnett, *supra* note 191, at 331 (arguing this misplacement of rights distorted the original meaning of the Fourteenth Amendment by forcing the Court to employ these rights in the Due Process Clause).

[194] U.S. CONST. amend. XIV, § 1. (emphasis added).

[195] Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823).

[196] *Id*. at 551–52.

[fundamental rights] which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state. . . ."[197] The purpose of this clause is to create "the better [Union] to secure and perpetuate mutual friendship and intercourse among the people of the different states[.]"[198] Notice that *Corfield's* interpretation is imbued with natural rights principles and liberally applies the definition of fundamental rights.[199]

The Privileges *or* Immunities Clause was crafted to secure rights protected by the Bill of Rights, as well as fundamental rights.[200] In framing the Fourteenth Amendment, Senator Howard invoked *Corfield's* interpretation of the Privileges *or* Immunities Clause and the Declaration of Independence to provide natural rights and true equality which would be protected by the Fourteenth Amendment.[201] The Declaration of Independence's immortal words that "all men are created equal" and "endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness" provided the goals of this Amendment.[202] Serving as the authoritative meaning of the Privileges or Immunity's clause, the 39th Congress repeatedly cited *Corfield* during the Fourteenth Amendment's ratification in 1868.[203]

In congressional debates, both Senator Jacob Howard and Representative John Bingham, the two leading spokesmen for the Fourteenth Amendment, advanced two central points to the 39th Congress: the Privileges or Immunities Clause would safeguard the fundamental rights set out in the Bill of Rights, and that, in line with the *Corfield* interpretation of fundamental rights, the Clause would give broad protection to fundamental rights, including safeguarding all the fundamental rights of citizenship not expressly written in the Fourteenth Amendment.[204] The following excepts from the 39th Congressional debate in 1865 affirm the drafters understanding of fundamental rights.

> Now sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution . . . some by the first eight amendments of the Constitution; and it is a fact worthy of attention that . . . all

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[197] *Id*. at 252.
[198] *Id.* at 552.
[199] *Id.* (emphasizing rights for the individual to "pursue and obtain happiness and safety" and to grant "enjoyment of life and liberty.").
[200] *See* GANS & KENDALL, *supra* note 4, at 8 (proving the Privileges or Immunities Clause original intent through analysis of the 39th Congress discussions).
[201] *See id.* at 9 (explaining that these were the two primary influences at the core of the Fourteenth Amendment).
[202] *See id.* (providing the principles that drove the discussion when framing the Fourteenth Amendment).
[203] *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1269 (1992) ("Even more significant, members of the Thirty-ninth Congress regularly linked the Bill of Rights with the classic common law rights of individuals exemplified in Blackstone, *Corfield*, and the Civil Rights Act of 1866.").
[204] CONG. GLOBE, 39th Cong., 1st Sess. 1072 (1866) (emphasizing these two rights continuously pointed out were the understood and intended effect of the 39th Congress).

> of these immunities, privileges, rights, thus guaranteed by the Constitution, or recognized by it, are secured to the citizen solely as a citizen of the United States . . . . They do not operate in the slightest as a prohibition upon State legislation. [205]

> [T]here is no power given in the Constitution to enforce and carry out any of these guarantees. . . . [T]hey stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles in them . . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these fundamental guarantees.[206]

Additionally, when crafting their amendment, the framers intended for other rights not written in their drafting of the amendment.[207] The Fourteenth Amendment along with the Ninth Amendment, a rule of constitutional construction which constitutes that even if a right is not written into the Constitution, it does not follow that the right cannot be included as a protection in the Constitution.[208] The effect of the Ninth Amendment was intended and observed in the 39th congressional debates:

> In the enumeration of natural and personal rights to be protected, the framers of the Constitution apparently specified everything they could think of—"life," "liberty," "property," "freedom of speech," "freedom of the press," "freedom in the exercise of religion," "security of person," &c; and then, lest something essential in the specifications should have been overlooked, it was provided in the ninth amendment that "the enumeration in the Constitution of certain rights should not be construed to deny or disparage other rights not enumerated. This amendment completed the document. It left no personal or natural right to be invaded or impaired by construction. All these rights are established by the fundamental law.[209]

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[205] *See id.* at 2765 (quoting Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823)).
[206] *See id.* at 2765–66.
[207] *See id.* at 1072 (recognizing and understanding the effect of the Ninth Amendment).
[208] *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").
[209] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1072 (1886) (indicating these rights were intended to go beyond incorporating the Bill of Rights to provide unenumerated rights).

The starkest difference between how the Court discusses fundamental rights then and now lies in the debate of meaningful citizenship.[210] The 39th Congress sought to protect Black Americans by ensuring states could not pass laws denying their rights.[211] Additionally, members of Congress discussed rights such as the right to personal security and bodily integrity, the right to access courts, the right to free movement, and the right to have a family and direct the upbringing of children.[212] Thus, the debate of the Fourteenth Amendment's fundamental rights, since its inception, focused on the rights inherent in citizenship—not of which classes of citizens these laws would protect.[213]

This debate is necessary when discussing rights entitled to each citizen that are safeguarded against states, but most importantly for minorities that lack legal and congressional representation.[214] The *Dobbs* approach would not be as problematic for the reasons described if the test only concerned itself with which rights were traditionally protected and not with which class of citizen does this right historically protect.[215] However, the Court stripped away this conversation when the Privileges or Immunities Clause was "sapped,"[216] "gutted,"[217] and had met its "premature demise"[218] in the *Slaughter-House Cases.*

B. The Slaughter-House Cases Effect on the Privileges or Immunities Clause

Only five years after the ratification of the Fourteenth Amendment, the Privileges or Immunities Clause became effectively repealed by the *Slaughter-House Case* in 1873.[219] In the *Slaughter-House Cases*, a group of butchers argued Louisiana's new law, which restricted slaughterhouse operation in New Orleans to a single corporation, violated their right to practice their trade and

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[210] *Compare* GANS & KENDALL, *supra* note 4, at 9 (exemplifying framers discussed rights central to citizenship) *with* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 270–71 (2022) (redirecting conversation to states law existing at the time the Fourteenth Amendment was ratified).
[211] *See* GANS & KENDALL, *supra* note 4, at 10 (The framers, seeking to further the principles of the Declaration, knew from recent experience that the States, particularly in the South, could not be entrusted to comply with these guarantees.)
[212] *See id*. at 9 (providing examples of rights the Congress debated to be inherent in citizenship).
[213] *See id.* at 10 (emphasizing that Privileges or Immunities Clause acted to give rights to grant full citizenship that were life, liberty, or pursuit of happiness).
[214] *See generally id.* at 3 (deriving fundamental rights from a text that mentions citizenship, the Court would have to engage in what would be considered rights inherent in citizenship).
[215] *See id.* (noting that *Dobbs* would not be as problematic if it did not concern itself with which groups of citizens it protected).
[216] *See* Saenz v. Roe, 526 U.S. 489, 527–28 (1999) (Thomas, J. dissenting) ("The *Slaughter-House Cases* sapped the [Privileges or Immunities] Clause of any meaning.").
[217] *See* Tribe, *supra* note 190, at 1299 (arguing the *Slaughter-House Cases* "[i]ncorrectly gutted" the Clause).
[218] *See* Shapiro & Blackman, *supra* note 14, at 1208 (describing the Privileges or Immunities clause as a dead letter only for it to re-emerge in scholarly writing).
[219] *See generally* Slaughter-House Cases, 83 U.S. 36 (1872) (effectively gutting the Privilege or Immunities Clause in 1873 by rendering it a dead letter).

earn a livelihood under the monopoly.[220] In a narrow reading of the Fourteenth Amendment, the Court maintained that the Fourteenth Amendment only served to guarantee Black citizens equal rights—not all citizens of America.[221] For its holding, the Court construed the Privileges or Immunities Clause only to protect rights that pertain to federal U.S. citizenship, not state citizenship.[222] In effect, the Privileges or Immunities Clause is no longer a vessel for fundamental rights—its clear and intended purpose.[223]

The Court affirmed its voided meaning in the landmark case of *McDonald v. Chicago*.[224] The Court had to decide whether to incorporate fundamental rights in the Due Process Clause or the Privileges or Immunities Clause.[225] Finally, the Justices were presented with "an opportunity to re-examine, and begin the process of restoring the meaning of the Fourteenth Amendment agreed upon by those who ratified it."[226] Although Justice Thomas' concurrence recognized a more "faithful" and straightforward path to this conclusion through the Privileges or Immunities clause, the majority Court found it unnecessary to disrupt the *Slaughter-House* precedent.[227] Since the Court ruled on *McDonald* in 2010, there has been only the slightest impact on federal litigation, and the Privileges or Immunities Clause remains void.[228]

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[220] *See generally id.* at 101–02 (Field, J., dissenting) (arguing the state-held monopoly violated the butchers fourteenth amendment rights to earn a living and thus denying them of liberty and property without due process of law).

[221] *See id.* at 37 ("[T]he main purpose of all the last three amendments was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men, who had formerly held them in slavery.").

[222] *See Slaughter-House Cases*, 83 U.S. 36 at 74 ("[The Privileges or Immunities Clause] speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States.").

[223] *See* Barnett, *supra* note 191, at 330 ("Ever since *The Slaughter-House Cases* were decided in 1873, the Privileges or Immunities Clause has been effectively redacted from the Fourteenth Amendment. Not too long afterwards, the Due Process Clause was expanded beyond the procedures by which laws are applied to persons and became applicable to the laws themselves. Enter the so-called "substantive due process" of statutes.").

[224] *See* McDonald v. City of Chi., 561 U.S. 742, 791 (2010) (holding the second amendment was to be incorporated through the Due Process Clause, not the Privileges or Immunities Clause).

[225] *See generally id.* at 813 (Thomas, J., concurring) (raising this as an opportunity to reestablish the foundation of the Fourteenth Amendment)

[226] *Id.*

[227] *Id.* at 805–06 (Thomas, J., concurring) (advocating to use the Privileges or Immunities clause as the vessel for substantive due process rights).

[228] *See* Shapiro & Blackman, *supra* note 14 (demonstrating that from 2010 to 2019, the Privileges or Immunities Clause has been cited by the Supreme Court only three times, and all from Justice Thomas.

Instead, the Due Process Clause became the vessel for substantive rights.[229] The Due Process Clause, however, was understood as it was expressly written, prohibiting the government from depriving "any person of life, liberty, or property, without due process of law."[230] John Hart Ely famously wrote "there is simply no avoiding the fact that the word that follows 'due' is 'process.' . . . [S]ubstantive due process' is a contradiction in terms – sort of like 'green pastel redness.'"[231] Unlike the Privileges or Immunities Clause that harbored *Corfield's* understanding of fundamental rights, the Due Process Clause was intended only for procedural rights leading to fundamental rights developing inappropriately.[232]

Corfield's perspective on fundamental rights were lost in translation and replaced with an intent curated by the Court.[233] The *Dred Scott* decision was the first to redefine fundamental rights and established a fundamental right to hold property, including slaves.[234] Overtime, this jurisprudence developed without incorporating *Corfield's* interpretation of fundamental rights in the Privileges or Immunities Clause within the Due Process Clause.[235] Redirecting the fundamental rights into a the Due Process Clause which is not fit to consider citizenship led to a disarray of fundamental rights and the Fourteenth Amendment.[236]

Scholars consider the *Slaughter-House Cases* to be blatantly and maliciously wrong.[237] Yale Law Professor, Akhil Amar believing, "[v]irtually no serious modern scholar-left, right, and center—thinks that [*Slaughter-House*] is a plausible reading of the [Fourteenth Amendment]."[238] Justice Field's dissent in the *Slaughter-House Cases* foresaw its legal effect remaking the majority's narrow reading of the Fourteenth Amendment "a vain and idle

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[229] *See* Barnett, *supra* note 191, at 330 ("Not too long [after *Slaughter-House*], the Due Process Clause was expanded beyond the procedures by which laws are applied to persons and became applicable to the laws themselves. Enter the so-called 'substantive due process' of statutes.").
[230] U.S. CONST. amend. XIV, § 1.
[231] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (Harvard Univ. Press rev. ed. 1980).
[232] *See* GANS & KENDALL, *supra* note 4, at 22 (arguing "the Due Process Clause does not offer a secure textual footing for the protection of substantive liberty.").
[233] *Id.* (noting the *Dred Scott v. Sanford* decision was the first to establish this re-interpretation).
[234] *See id.* (holding the right to own property, and ironically slaves, was a fundamental right).
[235] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 237–38 (2022) (outlining the necessary qualifications of substantive due process).
[236] Barnett, *supra* note 191, at 332 ("As a result of *The Slaughter-House Cases*, then, the entire Fourteenth Amendment was distorted, as the Due Process and Equal Protection Clauses were stretched beyond their original meaning to restore a portion of the original meaning of the Privileges or Immunities Clause."
[237] *See* Doug Kendall, *Don't Trash the Constitution, Justice Scalia,* CONST. ACCOUNTABILITY CTR. (Mar. 2, 2010), https://www.theusconstitution.org/blog/dont-trash-the-constitution-justice-scalia/ [https://perma.cc/2VQB-87SD] (filing a brief in *McDonald* on behalf of preeminent constitutional scholars across the ideological spectrum, urging all justices to restore the Privileges or Immunities Clause).
[238] *See id.* (summarizing the *Slaughter-House* ruling).

enactment."[239] He fiercely argued that although Black Americans may have been the primary cause of the amendment, the language expressly embraces all citizens.[240] Although Justice Field's interpretation of the Amendment's application to all citizens became adopted by the Court, the Privileges or Immunities Clause remains hollow.

The *Slaughter-House Cases* are subject to overruling, but they are also unconstitutional.[241] Given that the Privileges or Immunities Clause was effectively repealed in the *Slaughter-House Cases*, the Court unconstitutionally amended a right belonging to the people's elected representatives clearly expressed in Article V of the Constitution.[242] There are only two ways to amend the Constitution.[243] First, amendments may be proposed either by Congress, through a joint resolution passed by a two-thirds vote, or by a convention called by Congress in response to applications from two-thirds of the state legislatures.[244] In addition, *Marbury v. Madison* held no clause in the Constitution could be "intended to be without effect" supporting the notion that the decision went beyond the Court's judicial duty.[245]

Justice Thomas repeatedly adheres to revisiting the Privileges or Immunities Clause.[246] Justice Thomas noted in *McDonald* the poor reasoning in the *Slaughter-House Cases*, and the "circular" reasoning in *Cruikshank*,[247] created flawed precedents resulting in "litigants seeking federal protection of fundamental rights" in the Due Process Clause.[248] Later, in *Saenz*, he warns of the power hidden in the Clause—its ability to create fundamental rights.[249] His dissent first concedes the "current disarray of our Fourteenth Amendment

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[239] *See Slaughter-House Cases*, 83 U.S. 36, 96 (1872) (Field, J., dissenting) (foreshadowing the gutting of the clause).

[240] *See id.* (emphasizing the "inhibition" to recognize all citizens will have a "profound significance and consequence.").

[241] David Dittfurth Interview, *supra* note 135 (arguing that the *Slaughter-House Cases* were an unconstitutional decision).

[242] David Dittfurth Interview, *supra* note 135 (arguing that the Slaughter-House usurped a power belonging to the elected representatives); *See also* McDonald v. City of Chi., 561 U.S. 742, 813 (2010) (Thomas J. concurring) (arguing the *Slaughter House Cases* contradicted *Marbury v. Madison*).

[243] *See generally* U.S. CONST. art. V (outlining how the Constitution can be amended).

[244] *See id.* (providing one of the two ways to amend the Constitution).

[245] Marbury v. Madison, 5 U.S. 137, 174 (1803).

[246] *See* Saenz v. Roe, 526 U.S. 489, 528 (1999) (Thomas J., dissenting) ("I would be open to reevaluating its meaning in an appropriate case.").

[247] *See* United States v. Cruikshank, 92 U.S. 542, 554–55 (1876) (limiting the Fourteenth Amendment to only protect from state action).

[248] *See* McDonald v. City of Chicago, III., 561 U.S. 742, 809 (2010) (Thomas, J., concurring) (focusing on the consequences of the *Slaughter-House Cases* and spill over into the Due Process Clause).

[249] *Saenz*, 526 U.S. at 527–28 (Thomas, J. dissenting) (quoting Moore v. East Cleveland, 431 U.S. 494, 502 (1977) (admitting the Privileges or Immunities Clause can become a "convenient tool for inventing new rights.").

jurisprudence" for relying on the Due Process Clause to create fundamental rights.[250] Second, he reveals his excitement to revisit the Privileges or Immunities Clause, but calls to quickly apply an originalist interpretation on the congressional intent.[251] Lastly, he warns the Court the continued ignorance of the Privileges or Immunities Clause "may yet transform the clause into a tool to constitutionalize (and thus entrench) positive rights . . ." into the Constitution.[252] This is precisely what the Court should do. [253]

VI. THE SOLUTION

A. Introduction of the Citizenship Test

Despite no unanimous test developed, the Nation's history and traditions will be involved in any fundamental rights decisions, acting as a barrier to long-term equality.[254] The Court has attempted many times to broaden liberties, but they have not prevailed to guarantee long term rights.[255] Even in *Obergefell,* Justice Kennedy requires the Nation's history and traditions as the beginning point of analysis to establish fundamental rights.[256] In addition, the *Dobbs* Court's emphasis in overruling decisions which do not align with the historical approach*,* embeds the historical approach into the Due Process Clause.[257] To challenge this is to engage in Sisyphus's punishment at the timely expense of LGBTQ and other minorities liberties.[258] The Justices need a bold solution to protect from the erosion of minority constitutional rights. Justices must restore the original meaning of fundamental rights by implementing a citizenship test.

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[250] *See id.* (Thomas, J. dissenting) (emphasis added) (quoting Moore v. East Cleveland, 431 U.S. 494, 502 (1977)) ("I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence[.]").

[251] *See id.* at 528 (Thomas, J. dissenting) (emphasis added) (quoting Moore v. East Cleveland, 431 U.S. 494, 502 (1977)) ("I would be open to reevaluating its meaning in an appropriate case. Before invoking the Clause, however, we should endeavor to understand what the framers of the Fourteenth Amendment thought that it meant.").

[252] See Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to The States*, GEO. J. L. & PUB. POL'Y (Winter 2010), at 4, 83 (arguing that future cases may allow positive rights through this Clause if the Court does not enforce an originalist interpretation to the Clause).

[253] *See generally Saenz*, 526 U.S. at 528 (Thomas, J. dissenting) (emphasis added) (quoting Moore v. East Cleveland, 431 U.S. 494, 502 (1977) (creating fundamental rights in the Privileges or Immunities Clause).

[254] *E.g.*, Obergefell v. Hodges, 576 U.S. 644, 697 (2015) (exemplifying that even the *Obergefell* Court required the Nation's history and traditions as the beginning point of liberty analysis).

[255] *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 260–61 (2022) (rejecting *Obergefell's* approach towards fundamental rights despite precedent).

[256] *See Obergefell*, 576 U.S. at 645 (stating "[h]istory and tradition guide and discipline the inquiry but do not set its outer boundaries," but emphasizing this approach has become embedded in determining fundamental rights).

[257] *See Dobbs*, 597 U.S. at 264 (stating "in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.").

[258] ACLU, *supra* note 178 (tracking 508 anti-LGBTQ bills being introduced to state legislature to undermine same-sex marriage or other LGBTQ rights).

The citizenship test will consider rights inherent to enjoy full and equal citizenship.[259]

B. The Three Premises to Establish the Citizenship Test

First, the Court must overrule the *Slaughter-House Cases* and implement the citizenship test.[260] Overruling the *Slaughter-House Cases* will allow access to create fundamental rights within the Privileges or Immunities Clause, providing Justices the route to establish liberties inherent in citizenship as originally intended by the ratifiers of the Fourteenth Amendment.[261]

Once the *Slaughter-House Cases* are overturned, the Court will restore the original legislative intent of the 39th Congress to the Privileges or immunities clause by evaluating what rights are inherent within citizenship.[262] Working from a text that explicitly protects the fundamental rights of citizens, "the Supreme Court would have to engage the constitutional principles of citizenship, and consider what substantive constitutional rights inhere in citizenship."[263] Answering this question allows the Court to debate and protect the ideals of equality.[264] In doing so, the Court will engage in the many complexities in deciding which rights deprive its citizens of "full and equal" citizenship if they are not applied equally.[265]

Justice Ginsburg exemplifies a similar analysis of full and equal citizenship in her dissent in the 2007 case, *Gonzales v. Carhart.*[266] There, Justice Ginsburg emphasizes if a woman does not have a right to an abortion, she will lose her autonomy and not be able "to participate equally in the economic and social life of the Nation."[267] Failure to protect this right will subject a woman to life

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[259] *See generally* GANS & KENDALL, *supra* note 4 at 34. (fulfilling the Privileges or Immunities Clause means restoring the original intent which focused on a conversation of rights inherent in citizenship).

[260] Kendall, *supra* note 237 (calling to overturn the *Slaughter-house* cases to restore the legal basis of fundamental rights by a variety of scholars filing an amicus brief during *McDonald v. Chicago*).

[261] *See* GANS & KENDALL, *supra* note 4, at 6 ("From our very beginnings, Americans used the words 'privileges' and 'immunities' interchangeably with words like 'rights' or 'liberties.'").

[262] *Id*. at 3.

[263] *Id.*

[264] *See* David Dittfurth Interview, *supra* note 135 (explaining the Privileges or Immunities Clause with a test inherent in citizenship will open the door to a living Constitution by escaping the time restraints set forth in the Nation's history and traditions test).

[265] *See generally* GANS & KENDALL, *supra* note 4 (deciding these complex questions will fulfill necessary debates surrounding citizenship).

[266] *See generally* Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (arguing a women's right to an abortion allows her to fulfill the full potential of citizenship and autonomy equal to others).

[267] *See id.* at 171 (Ginsburg, J., dissenting) (emphasizing pre-existing generalizations about women have suppressed these rights and hindered equal and full participation of citizenship).

discourse and she will not be able to enjoy equal citizenship stature.[268] These legal impediments will hinder full and equal participation of citizenship as the history and plain language of the Privileges or Immunity Clause seeks to protect.[269]

Second, Justices must concede to the *Dobb's* historical interpretation of the Due Process Clause.[270] The tug-of-war the Court pulls with itself reduced to a black or white ideology—if a Justice wishes to go towards individualist rights not embedded in history, then they are turning their head to the traditional approach subjecting their opinions to judicial review.[271] These divergent interpretations fail to develop a clear and consistent rule that defines American citizens' basic liberties.[272]

On this premise, the citizenship test cooperates with the *Dobbs* historical test to select and establish fundamental rights. When employing the citizenship test to consider the rights inherent to enjoy full and equal citizenship, the Court should recognize those fundamental rights interpreted in the *Dobbs* historical test and grant that fundamental right to all classes of citizens when reasonable.[273] For example, the Court has already found through the Nation's history and traditions test the fundamental right for one man and one woman to marry in the case of *Zablocki v. Redhail*.[274] Through the citizenship test, the question will then present itself: If this right is so fundamental to the Nation's history and tradition, then is it also a right to be considered inherent within citizenship of the Constitution?[275] Suddenly, the question shifts from considering what classes of people the right protected at the time of ratification, to what right has been historically protected.[276] Clearly, a two-person marriage serves an important historical and government significance with Justice Marshall writing in *Zablocki,* "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred," and without that right

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[268] *Id.* at 172 (Ginsburg, J., dissenting) ("Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.").

[269] *Gonzales*, 550 U.S. at 172 (Ginsburg, J., dissenting) (arguing legal impediments on a women's right to choose an abortion will not allow her to enjoy full citizenship).

[270] *See generally* Lawrence v. Texas, 539 U.S. 558, 572 (2003) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998)) (recognizing "[h]istory and tradition are the starting point" but requires another layer of analysis to fulfill equal citizenship status to all classes of people).

[271] *See* Tribe, *supra* note 34, at 1897.

[272] *See id.* (recognizing historical obscurity in defining fundamental rights).

[273] *See generally* David Dittfurth Interview, *supra* note 135 (agreeing with the idea to take rights afforded by the historical approach and "raising them up" to make them equal to all people when reasonable).

[274] *See* Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding marriage as a fundamental right).

[275] *See id.* (recognizing "[m]arriage is one of the 'basic civil rights of man', fundamental to our very existence and survival," so why not for all citizens?).

[276] *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966) (emphasizing the right to vote in "a free and unimpaired manner is preservative of other basic civil and political rights . . ." brings no historical emphasis on which class of citizens could vote or were faced with poll taxes at time of ratification).

granted to same-sex couples then their citizenship would neither be full nor equal.[277]

This example also illustrates how these concepts work together in legal harmony.[278] The Nation's history and traditions test serves to identify and preserve the celebrated union between a man and woman, then protects it from any government intrusion securing it as a fundamental right.[279] Additionally, the citizenship test brings a different layer of analysis to the same right equalizing it to all unions regardless of sex.[280] Thus, this test will equalize rights historically protected by those able to fully participate in democracy at the time of ratification, to the minority class of citizens who were not able to.

Thirdly, this solution expressly rejects the total transfer of fundamental rights in the Due Process Clause to the Privileges or Immunities Clause, and rather advocates for a partial displacement of only rights inherent in citizenship to the Privileges or Immunities.[281] Considering that the Due Process Clause is not the proper vessel for liberties inherent in citizenship, these rights should be displaced in the Privileges or Immunities Clause.[282] This will burden the Court to pull apart liberties inherent into equal citizenship and rights that belong in the Due Process Clause—restoring the foundation of the Fourteenth Amendment.[283] This buffs *Stare Decisis* and ensures liberties protected by the Fourteenth Amendment are not frequently overturned.[284]

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[277] *See Zablocki*, 434 U.S. at 383 (recognizing "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promises a way of life, not cause; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.").

[278] *See generally Harper*, 383 U.S. at 667–68 (recognizing the right to vote without poll taxes due to its importance of preserving all other rights, and not analyzing which classes of citizens had poll taxes at time of ratification).

[279] Zablocki, 434 U.S. at 383 (holding marriage as a fundamental right utilizing the same analysis as the *Dobb's* test).

[280] *See* Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (determining rights "to participate equally in the economic and social life of the Nation.").

[281] *See* Saenz v. Roe, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting) (noting if fundamental rights were to be re-established in the Privileges or Immunities Clause, then "[w]e should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence.").

[282] *See generally* Barnett, *supra* note 191, at 331 (arguing the "redaction" of the Privileges or Immunities Clause displaced the guarantees in the Fourteenth Amendment and thus the Substantive Due Process clauses are in the incorrect clause with no constitutional footing).

[283] GANS & KENDALL, *supra* note 4, at 34. (instructing the Courts to "protect the substantive liberty that inheres in the citizenship the Fourteenth Amendment creates and defines.").

[284] *See* Barnett, *supra* note 191, at 331–32 (arguing that gutting the *Slaughter-House Cases* offset the Fourteenth Amendment creating no textual footing for fundamental rights in the Due Process Clause).

These premises will restore the Constitution's original meaning and compromise the Court's tug-of-war in defining fundamental rights.[285] By having two tests create fundamental rights—one test within the scope of the Nation's history and tradition in the Due Process Clause, and the second test in the scope of inherent citizenship in the Privileges or Immunities Clause—it will require the Court to be restricted to each other's scope of analysis rather than redefining fundamental rights based solely in the Due Process Clause.[286] For example, if this test were to be established, the court cannot consider history and tradition to analyze the fundamental rights within rights inherent in citizenship, nor can the Court consider what is inherent in citizenship under the historical approach.[287] Thus, this two-field test will contain each respective test, their relevant questions, considerations, and conversations to finally allow the compromise the Court requires in the Fourteenth Amendment.[288] Ultimately, this solution will lead to predictable fundamental rights jurisprudence.

VII. CONCLUSION

Fundamental rights are an area of constitutional law that have been debated by the Court since 1897.[289] Yet, no unanimous jurisprudential development has been established—leaving citizens to question which of their rights today will be temporary.[290] Despite the Justices' emphasis on *Stare Decisis,* the Court does not restrain itself from redefining fundamental rights.[291] If history repeats itself, then the *Dobbs* approach will result in the analysis made in *Bower's* majority and *Obergefell's* dissent, paving the route for the Court to overturn same-sex marriage.[292]

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[285] *See* Tribe, *supra* note 34, at 1897 ("[I]f one is to broaden the vistas of freedom beyond the list, one must turn from the properly conservative and suitably backward-looking domain of substantive due process[.]").

[286] *See generally* GANS & KENDALL, *supra* note 4, at 3 ("Working from a text that explicitly protects the substantive liberties of citizens, the Supreme Court would have to engage the constitutional principles of citizenship, and consider what substantive constitutional rights inhere in citizenship.").

[287] *See generally id.*

[288] *See generally id.* at viii (calling the Court to engage in more debate and argument about the question of how the court "should look to citizenship principles to inform the set of rights protected by the Clause.").

[289] *E.g.*, GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 460 (13th ed. 1997) (establishing *Allegeyer v. Louisiana* is widely held as the beginning of the Lochner Era and the developing jurisprudence of fundamental rights).

[290] *Compare* Obergefell v. Hodges, 576 U.S. 644, 644 (2015) (noting history and tradition is just the starting point), *with* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 237–38 (2022) (history and tradition are determinative) (exemplifying the back-and-forth definition of fundamental rights).

[291] *See Dobbs*, 597 U.S. at 263–64 (rejecting stare decisis to correct an erroneous constitutional decision).

[292] Gans, *supra* note 82 (arguing the *Dobbs* approach repackages the claims made in *Bowers v. Hardwick* threatening a number a fundamental right beyond *Roe v. Wade*).

A sudden overturning of *Obergefell* could leave same-sex marriage and other LGBTQ rights at stake.[293] The erosion of these rights would be devastating to the equality of this community.[294] To hedge against this looming possibility, voters need to act now to amend states laws and constitutions to recognize and permit same-sex marriages while public approval for same-sex marriage is at an all-time high.[295]

Although state and federal legislation work as a long-term hedge against an Obergefell overruling, this solution is one that will invite discrimination to same-sex couples, if same-sex marriage is not recognized as a fundamental right.[296] This violates notions of equality framers of the Fourteenth Amendment intended to create.[297] Thus, a constitutional solution will prove a necessary avenue for marriage equality and other LGBTQ liberties.[298]

The framers made clear that citizenship was not an empty promise.[299] Their promise was to provide equality between all citizens, and for too long these rights escaped into America's political landscape.[300] The Court must overrule the *Slaughter-House Cases* to remedy the Courts improper gutting of the Privileges or Immunities Clause, and then establish the citizenship test to restore the original intent of the Privileges or Immunities Clause and fundamental

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[293] *See Dobbs*, 597 U.S. at 264 (*"*Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.").

[294] *See generally* James Esseks, *The Roe Draft Signals a Potential New Front in the Already-Raging War Against the LGBTQ Community,* ACLU (May 9, 2022), https://www.aclu.org/news/lgbtq-rights/the-roe-draft-signals-a-potential-new-front-in-the-already-raging-war-against-the-lgbtq-community [https://perma.cc/6WXM-9CQA] ("[*Dobbs*] represents a new and profoundly disturbing front in the current attack on LGBTQ people in America, but it's just one aspect of a war that is already well underway. That's not an effort to downplay the significance of this draft opinion for LGBTQ people, it just means we all need to wake up to the fact that we are already deep in the fight for our lives.").

[295] McCarthy, *supra* note 176 (emphasizing a 71% support for same-sex marriage as an all-time high).

[296] *See generally* Gersen, *supra* note 85 (favoring religious over same-sex couples, and creating two classes of marriage if *Obergefell* is overturned).

[297] *See* Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230) (emphasizing rights for the individual to "pursue and obtain happiness and safety" and to grant "enjoyment of life and liberty.").

[298] *See generally* Esseks, *supra* note 152 (establishing the failures of equality in current LGBTQ legislation).

[299] *See Corfield*, 6 F. Cas. at 551–52 (emphasizing rights for the individual to "pursue and obtain happiness and safety" and to grant "enjoyment of life and liberty.").

[300] *E.g.* Minor v. Happersett, 88 U.S. 162, 165 (1874) (denying women's suffrage as a right to vote).

rights.[301] The result will enable the Privileges or Immunities Clause to fulfill *Obergefell*'s equal protection of same-sex marriage.[302]

[301] *See generally* McDonald v. City of Chi., 561 U.S. 747, 806 (2010) (Thomas, J., concurring) (counting two Justices who advocated for the re-establishment of substantive rights through the Privileges or Immunities Clause rather than Due Process).

[302] *See Corfield*, 6 F. Cas. at 552 (recognizing the Privileges or Immunities Clause can protect rights such as: rights of liberty, to form families, control upbringing of children, and rights of personal security and bodily integrity).