

Reclaiming Personal Privacy Rights Through the Freedom of Intimate Association

Nancy C. Marcus*

The United States has entered a new constitutional era where substantive due process, under attack by the Supreme Court itself, can no longer be viewed as a solid foundation for the securing of personal privacy rights. In a post-Dobbs v. Jackson Women's Health Organization world, the right to personal privacy, long understood to be protected under the Fifth and Fourteenth Amendments' Due Process Clauses, is in need of a new doctrinal home. The evisceration of modern substantive due process in the context of abortion rights implicates and endangers LGBTQ+ rights and other personal privacy rights as well. As such, it is essential to identify alternative potential constitutional sources of protection for personal privacy and relationships.

This Article begins by describing various responses to Dobbs in the aftermath of the decision's release. In the first year following the Supreme Court's stripping away of substantive due process protections for abortion rights, scholars have proposed various ways to either preserve substantive due process or to establish alternative doctrinal homes for the protection of personal privacy rights. Such responses to Dobbs have often reflected concerns that even beyond reproductive rights, liberty protections for autonomy and privacy in our most personal relationships and life choices, including those of members of same-sex couples and other less traditionally protected relationships, are also in danger.

One such alternative doctrinal home for personal privacy is the freedom of intimate association. This Article describes the potential that the freedom of intimate association offers as a safe haven for the right to personal privacy, particularly for familial, romantic, and sexual intimate relationships of same-

* Nancy C. Marcus, LL.M., S.J.D., is an Associate Professor of Law at California Western School of Law. She is grateful to William Aceves, Emily Behzadi Cardenas, and David Cruz for their astute insights and suggestions, and to Jordan Mcradu Goulet for his impeccable and thorough research assistance. This Article is dedicated to the memory of the late University of California Los Angeles (UCLA) Professor Kenneth Karst, whose identification of the freedom of intimate association transformed constitutional jurisprudence and who, as this author's first mentor in the legal academy two decades ago, never let them give up on their dreams of making a meaningful difference in the world, through transformative scholarship and teaching.

sex couples and others. The Article documents the evolution of the freedom of intimate association as a hybrid right largely grounded in the First Amendment, from older privacy cases to the first case explicitly naming the freedom of intimate association, Roberts v. United States Jaycees, and beyond. This Article explains how intimate association rights are distinct from, and provide greater constitutional protections than, the expressive associational rights that have been usurped by businesses seeking to deny public accommodations to LGBTQ+ people and using the First Amendment to do so, including in the 2023 free speech case, 303 Creative LLC v. Elenis.

That said, the freedom of intimate association's evolution has included splintered interpretations and application over the years, including as to the appropriate role of tradition and history in determining the extent of protections for intimate relationships. This Article proposes a repositioning of tradition along with a reclaiming of intimacy itself to pave the path for future cases in which LGBTQ+ people and others may successfully claim the strong constitutional protections to which they are entitled for their personal relationships, through the long-neglected freedom of intimate association doctrine.

I. INTRODUCTION	1049
II. THE EVOLUTION OF HYBRID PERSONAL PRIVACY PROTECTIONS THROUGH THE FREEDOM OF INTIMATE ASSOCIATION	1056
A. The Roots of Freedom of Intimate Association: From Griswold to Roberts.....	1056
B. The Slow and Splintered Evolution of Freedom of Intimate Association Jurisprudence Since Roberts	1064
C. Sexual Intimacy Rights in the Home: Intimate Association Tensions and Missed Opportunities in Bowers and Lawrence.....	1066
III. REPOSITIONING TRADITION IN PERSONAL PRIVACY RIGHTS JURISPRUDENCE	1073
A. The History of (Evolving) Tradition and Its Role in Constitutional Privacy Protections for Intimate Associations: The FW/PBS Game Changer	1073
B. The Contrast Between the Rights-Restricting FW/PBS and Dobbs Decisions and the Rights-Affirming Lawrence and Obergefell Decisions.....	1079
C. Reconciling Competing Approaches to Tradition in Intimate Association Protections	1086
IV. RECLAIMING INTIMACY AND THE RIGHT TO PERSONAL PRIVACY THROUGH THE FREEDOM OF INTIMATE ASSOCIATION	1091

A. The Perversion of Associational Freedom Through the Elevation of Exclusion Over Intimacy: The Anti-LGBTQ+ Cases.....	1092
B. Reclaiming Intimacy	1097
C. Potential Applications, Limits Thereof, and Advantages of the Freedom of Intimate Association	1100
V. CONCLUSION	1103

I. INTRODUCTION

When the Supreme Court overturned *Roe v. Wade* and *Casey v. Planned Parenthood* with its remarkable *Dobbs v. Jackson Women’s Health Organization* decision in 2022, it concluded that there is no constitutional right to privacy under substantive due process that protects abortion.¹ To reach that conclusion, the Court did not just reverse long-standing constitutional protections for the right to abortion, but it also attacked the right to privacy more broadly as that right had long been recognized as encompassed by substantive due process.² The majority opinion in *Dobbs* even treated substantive due process itself with skepticism and condescension, describing it multiple times as “controversial.”³

The ominous separate concurring opinion of Justice Thomas even more directly threatened substantive due process, with Thomas indicating that he would do away with substantive due process altogether if he had his way, urging that the precedent of *Dobbs* should pave the path for the Court to “reconsider all of [the] Court’s substantive due process precedents, including . . . *Lawrence* and *Obergefell*.”⁴ If Justice Thomas were to succeed in building a consensus among his colleagues, the Court would strip away substantive due process protections for long recognized privacy and personal autonomy rights far beyond just abortion, including the rights of LGBTQ+ individuals and same-sex couples.

¹ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242, 2284 (2022).

² *See id.* at 2245.

³ *See id.* at 2235 (“The underlying theory on which *Casey* rested—that the Fourteenth Amendment’s Due Process Clause provides substantive, as well as procedural, protection for ‘liberty’—has long been controversial.”); *id.* at 2246 (same).

⁴ *Id.* at 2301 (Thomas, J., concurring).

Although the *Dobbs* majority denied that the opinion would necessarily lead to other related rights being taken away,⁵ there is understandable cause for the concern rippling through the LGBTQ+ community. In the year since its release, a number of scholars have noted that *Dobbs* threatens decades of progress in protecting rights of LGBTQ+ people.⁶ As the *Dobbs* dissent poignantly pointed out, while rendering substantive due process protections for abortion obsolete, the *Dobbs* majority opinion leaves dangling the many interrelated rights upon which *Roe* and *Casey* were built, through a longer line of precedent “rooted in—and [leading] to—other rights giving

⁵ See *id.* at 2277–78 (majority opinion) (“Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”).

⁶ See, e.g., Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 38 (2022) (pointing out that when the Fourteenth Amendment was added to the Constitution, there was not support in the law for constitutional rights to same-sex marriage or intimacy, and “[t]hus, the *Dobbs* majority’s protestations that its holding does not unsettle *Griswold v. Connecticut*, *Lawrence v. Texas*, and *Obergefell v. Hodges*—as those precedents do not involve the destruction of fetal life—ring a bit hollow” (footnotes omitted)); Dane Brody Chanove, *A Tough *Roe* to *Hoe*: How the Reversal of *Roe v. Wade* Threatens to Destabilize the LGBTQ+ Legal Landscape Today*, 13 U.C. IRVINE L. REV. 1041, 1043 (2023) (“Almost immediately after the Court announced its intent to hear the case, legal and political commentators began to question the continued viability of established LGBTQ+ precedent in the face of a Court willing to square against *Roe*.”); Darren Lenard Hutchinson, *Thinly Rooted: Dobbs, Tradition, and Reproductive Justice*, 65 ARIZ. L. REV. 385, 410 (2023) (“Three justices who dissented in *Obergefell* remain on the Court, and one of those, Justice Thomas, openly embraces overturning *Obergefell* in his *Dobbs* concurrence. All of these factors justify concerns regarding the vulnerability of *Obergefell* to judicial invalidation.” (footnotes omitted)); Hutchinson, *supra*, at 429 (“The Court’s logic has implications well outside of abortion and could imperil rights related to sexual intimacy, LGBTQA equality, contraception, family privacy, and sex discrimination.”); Rona Kaufman, *Privacy: Pre- and Post-Dobbs*, 61 DUQ. L. REV. 62, 77 (2023) (“[T]here are questions regarding whether *Lawrence* and *Obergefell* can survive *Dobbs*. Given that the rights to gay sex and gay marriage are less ‘deeply rooted in our nation’s history’ than the right to terminate an early-term pregnancy . . . it is difficult to understand why *Lawrence* and *Obergefell* will remain good law.” (footnote omitted)); Marc Spindelman, *The New Intersectional and Anti-Racist LGBTQIA+ Politics: Some Thoughts on the Path Ahead*, 15 CONLAWNOW 1, 2 (2023), <https://doi.org/10.2139/ssrn.4458335> (“Some threats to LGBTQIA+ rights are well-known after the Supreme Court’s *Dobbs* ruling, like the prospect of established constitutional rights to intimacy, marriage, and family life being eliminated and returned to politics.”); Spindelman, *supra*, at 9 (“Against *Dobbs*’ achievement, nobody should believe that the Court, whose conservative originalist reasoning recommends similar results for LGBTQIA+ rights, could not as quickly and easily eliminate LGBTQIA+ constitutional rights . . .”).

individuals control over their bodies and their most personal and intimate associations.”⁷

The *Dobbs* dissent warns that LGBTQ+ rights are vulnerable after *Dobbs*, cautioning, “no one should be confident that [the] majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms” including constitutional protections for same-sex marriage and intimacy.⁸

Even the *Dobbs* majority itself acknowledged that *Casey* and *Roe*, in affirming a substantive due process liberty interest in abortion, relied on a much longer line of precedent in which substantive due process was similarly recognized as protecting interracial marriage, the right to birth control, the right to reside with relatives, freedom from forced sterilization and other medical procedures, autonomy in deciding how to educate children, and LGBTQ+ rights protections affirmed in cases from *Lawrence v. Texas* to *Obergefell v. Hodges*.⁹

Dobbs is here to stay for the unforeseeable future. Its potential repercussions extend even beyond abortion, threatening other personal privacy rights as well, including those of same-sex couples and others in less traditionally respected intimate relationships. Confronting that reality, in the year following the *Dobbs* decision, scholars have proposed a myriad of alternative approaches to the protection of privacy rights, if not through substantive due process. For example, in the context of alternative abortion rights specifically, some have proposed a new focus on the First Amendment freedom of expression as protecting life-defining reproductive choices and autonomy,¹⁰ or on the

⁷ *Dobbs*, 142 S. Ct. at 2320 (Breyer, Sotomayor & Kagan, JJ., dissenting).

⁸ *Id.* at 2319.

⁹ *See id.* at 2257–58 (majority opinion) (“*Casey* relied on cases involving the right to marry a person of a different race; the right to marry while in prison; the right to obtain contraceptives; the right to reside with relatives; the right to make decisions about the education of one’s children; the right not to be sterilized without consent; and the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures [and] [r]espondents and the [s]olicitor [g]eneral also rely on post-*Casey* decisions like *Lawrence v. Texas* (right to engage in private, consensual sexual acts), and *Obergefell v. Hodges* (right to marry a person of the same sex).” (citations omitted)).

¹⁰ *See* John Villasenor, *The First Amendment and Online Access to Information About Abortion: The Constitutional and Technological Problems with Censorship*, 20 NW. J. TECH. & INTELL. PROP. 87, 103–04 (2022).

fundamental rights to travel and free movement, which protect the right to interstate travel to obtain abortion care.¹¹

Even a federal court has weighed in on alternative constitutional sources of abortion rights protections and on the legal scholarship pertaining to that issue. In a February 6, 2023, order, the District Court for the District of Columbia required the parties in *United States v. Handy* to further address the issue, explained that in *Dobbs*, the Supreme Court had ruled only that the Fourteenth Amendment, specifically, did not guarantee the right to abortion, with no other constitutional provision even being addressed by the majority or dissenting opinions or even in any of the amicus briefs, leaving open the possibility of other constitutional homes for the protection of abortion rights.¹² “Mindful that this [c]ourt is bound by holdings, and in consideration of the Supreme Court’s long-standing admonition against overapplying its own precedent,” the district court explained, “it is entirely possible that the Court might have held in *Dobbs* that some other provision of the Constitution provided a right to access reproductive services had *that* issue been raised. [But], it was not raised.”¹³

In its order, the district court explicitly acknowledged legal scholarship by Professor Andrew Koppelman that, long before the *Dobbs* decision, identified the Thirteenth Amendment as such an alternative home for abortion rights protections, as well as a Tenth Circuit decision that mentioned in passing the possibility of Thirteenth Amendment protections for reproductive rights.¹⁴ The Tenth Circuit opinion, in turn, had cited Professor Laurence Tribe’s *American Constitutional Law* treatise, quoting Professor Tribe’s conclusion that “[a] woman forced by law to submit to the pain and anxiety of carrying, delivering, and nurturing a child she does not wish to have is entitled

¹¹ See Noah Smith-Drelich, *Travel Rights in a Culture War*, 101 TEX. L. REV. ONLINE 21, 26–27 (2022), <https://doi.org/10.2139/ssrn.4199596>. Even Justice Kavanaugh’s concurrence acknowledges that the right to travel to obtain abortions in other states remains intact after *Dobbs*. See *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring).

¹² *United States v. Handy*, No. 22-096, 2023 WL 1777534, at *2 (D.D.C. Feb. 6, 2023).

¹³ *Id.*

¹⁴ *Id.* at *2 (first citing Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990); and then citing *Jane L. v. Bangerter*, 61 F.3d 1505, 1514–15 (10th Cir. 1995)).

to believe that more than a play on words links her forced labor with the concept of involuntary servitude.”¹⁵

Another group of scholars has suggested that the federal government provide reproductive services on federal land in anti-abortion states, with the Privileges and Immunities Clause protecting travel to and from those federal lands.¹⁶ Others have offered legislative solutions to protect abortion rights, including a new federal act establishing abortion as a federal right, which the Constitution’s Supremacy Clause would keep states from being able to preempt.¹⁷ Others have suggested utilizing the Employee Retirement Income Security Act, which provides out-of-state abortion access to people residing in anti-abortion states.¹⁸

Some academics, concerned about the even wider-ranging potential repercussions of *Dobbs* beyond abortion, including LGBTQ+ rights that have long been protected under the same liberty umbrella as abortion rights, have proposed ways to save substantive due process itself, critiquing the doctrinal flaws of the *Dobbs* opinion’s due process interpretation.¹⁹ Others have suggested alternative constitutional homes for the broader umbrella of rights long protected by substantive due process but now threatened by *Dobbs*, including LGBTQ+ rights.

¹⁵ *Bangerter*, 61 F.3d at 1514 (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1354 (2d ed. 1988)).

¹⁶ See David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 80–81, 87 (2023).

¹⁷ See *id.* at 53.

¹⁸ See Brendan S. Maher, *Pro-Choice Plans*, 91 GEO. WASH. L. REV. 446, 448 (2023).

¹⁹ See Hutchinson, *supra* note 6, at 391–92, 425, 427–28 (criticizing *Dobbs*’s constrained backward-looking approach to substantive due process analysis, and offering solutions including reclaiming substantive due process’ “deeply rooted” tradition analysis to center the traditions of those who have been oppressed and subjugated over time, rather than continue to frame traditionally valued principles through the lens of the oppressor class); Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1138 (2023), <https://doi.org/10.2139/ssrn.4179622> (proposing a reclaiming of originalism and constitutional history to better reflect the democratic principles of constitutionalism rather than be confined by older entrenched status hierarchies); see also Nancy C. Marcus, *Yes, Alito, There Is a Right to Privacy: Why the Leaked Dobbs Opinion Is Doctrinally Unsound*, 13 CONLAWNOW 101, 105 (2021) [hereinafter Marcus, *Yes, Alito*] (critiquing the substantive due process analysis and legal conclusions in the leaked draft of *Dobbs*, which substantially remained the same in the final draft, as based on a flawed substantive due process analysis that erroneously ties a lack of explicit enumeration—Ninth Amendment notwithstanding—or historic protection for some rights to a lack of constitutional protections).

Such proposed alternative doctrinal homes have, for instance, included the Fourth Amendment, in the context of protecting the privacy of intimate relationships and life decisions at home,²⁰ or a return to equal protection as the primary source of LGBTQ+ rights, considering the strong and still-standing precedent of *Romer v. Evans*.²¹

Other potential solutions and alternative approaches to protecting the rights of LGBTQ+ people specifically in the face of *Dobbs* have ranged from the congressionally enacted the Respect for Marriage Act²² to suggestions from scholars that, for example, abortion rights and LGBTQ+ rights should be kept distinctive so that a blow to the former does not dismantle the latter.²³ But neither approach is completely adequate to protecting the rights of same-sex couples and LGBTQ+ individuals, since the Respect for Marriage Act, by its text, only requires respect for marriages lawfully performed in other states without explicitly requiring each state to recognize same-sex marriages.²⁴ Furthermore, decoupling reproductive and LGBTQ+ rights could have troubling implications for both types of rights. The long-standing line of doctrine affirming overlapping equality, liberty, and privacy rights of individuals in their most intimate life choices, from reproductive to romantic,²⁵ should not be abandoned or further watered down to ensure continued protections of LGBTQ+ rights.

²⁰ See, e.g., Kate Kobriger, *The State as Rights-Facilitator: Reconciling Branches of Privacy Doctrine Through Consent*, 43 COLUM. J. GENDER & L. 211, 227 (2023), <https://doi.org/10.52214/cjgl.v43i2.11721> (arguing that the Fourth Amendment protects privacy rights in the context of intimate relationships and life decisions).

²¹ See, e.g., *Romer Has It*, 136 HARV. L. REV. 1936, 1943 (2023).

²² Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022) (ensuring full faith and credit will continue to be accorded to lawfully performed marriages by states that may stop allowing same-sex marriage, while not requiring nationwide marriage equality across the board).

²³ See Chanove, *supra* note 6, at 1063–64.

²⁴ The Respect for Marriage Act provides, in relevant part, “an individual shall be considered married if that individual’s marriage is between [two] individuals and is valid in the [s]tate where the marriage was entered into or, in the case of a marriage entered into outside any [s]tate, if the marriage is between [two] individuals and is valid in the place where entered into and the marriage could have been entered into in a [s]tate.” § 7, 136 Stat at 2306.

²⁵ See, for example, Helen J. Knowles, *Taking Justice Kennedy Seriously: Why Windsor Was Decided “Quite Apart from Principles of Federalism,”* 20 ROGER WILLIAMS U. L. REV. 24, 28–29 (2015); Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not “Argle Bangle”*: *The Inevitability of Marriage Equality After Windsor*, 23 TUL. J.L. & SEXUALITY 17, 39–42 (2014) [hereinafter Marcus, *Deeply Rooted*]; Nancy C. Marcus, *Beyond Romer and Lawrence: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355, 395 (2006) [hereinafter Marcus, *Beyond Romer and Lawrence*]; Laurence H. Tribe,

Therefore, other options for the doctrinal repositioning of personal privacy rights should be explored. This Article proposes that, in addition to the above potential paths for the rehomeing of privacy rights, a reclaiming of the right to personal privacy may be accomplished through the largely untapped freedom of intimate association doctrine, a doctrine that reflects the complementary hybrid relationship between the First Amendment freedom of association and personal privacy rights secured for the most intimate of associations, through and beyond the First Amendment.

The remainder of this Article focuses on the freedom of intimate association doctrine and how it can help protect privacy rights and intimate relationships in a jurisprudential landscape where substantive due process is under attack by the highest Court of the land. Part II of this Article describes the roots of freedom of intimate association, primarily in but also beyond the First Amendment, being distinct from other First Amendment rights such as those at issue in the Supreme Court's *303 Creative LLC v. Elenis* decision.²⁶ This Article describes how the freedom of intimate association evolved over the years as a hybrid source of personal privacy protections, from its foundation being set in the Supreme Court's *Griswold v. Connecticut* decision to the naming of the doctrine in *Roberts v. United States Jaycees*. This historical recounting of the origins and development of the intimate association doctrine also describes how that evolution has not always been a smooth one, between tensions in the doctrine's interpretation, including the context of sexual relationships, arguably the most intimate associations of all. Part III focuses on the particular role that tradition plays in the freedom of intimate association, whether as a limiting principle that at least in one case seemed to override the core intimacy values established in *Roberts*, or as a more expansive rights-affirming principle that allows for *evolving* traditions and contexts. In the context of the freedom of intimate association, this Article explains, the approach that best honors and reflects the constitutional precedents and principles in personal privacy rights cases is the latter. Having addressed the particular problem of the appropriate repositioning of tradition, this Article then, in Part IV, turns to the reclaiming of intimacy itself through the freedom of intimate

Lawrence v. Texas: *The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004), <https://doi.org/10.2307/4093306>, for articles describing the hybrid nature of equal liberty protections for personal privacy rights.

²⁶ See *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2331–32 (2023) (Sotomayor, J., dissenting).

association, explaining how the most intimate of associations are accorded the strongest protections, rather than larger groups seeking to exclude people from entering their business premises and club memberships.

This Article concludes that the freedom of intimate association offers a solid foundation for the heightened protection of the most personal types of relationships and privacy rights, including for members of the LGBTQ+ community who are too often in a defensive posture against freedom of association claims brought by those seeking to exclude them. It is time for members of same-sex couples and other intimate associations to reclaim principles of tradition, intimacy, and the freedom of intimate association itself.

II. THE EVOLUTION OF HYBRID PERSONAL PRIVACY PROTECTIONS THROUGH THE FREEDOM OF INTIMATE ASSOCIATION

A. *The Roots of Freedom of Intimate Association: From Griswold to Roberts*

While *Dobbs* stripped away long-established abortion rights and overruled *Roe* and *Casey*, it left untouched, at least for now, the precedent of the Supreme Court's 1965 *Griswold v. Connecticut* decision,²⁷ which, even after *Dobbs*, is still good law. *Griswold*, affirming a liberty interest in birth control access free from government interference, served as the foundation for *Casey* and *Roe*.²⁸

Most significantly, *Griswold* identified the doctrinal roots for personal privacy protections for reproductive autonomy as grounded in various constitutional provisions, including the First Amendment along with the Fifth and Fourteenth Amendment Due Process Clauses.²⁹ On the one hand, the Court noted that due process provides protections for intimate relationships, including the private decisions made between spouses and doctors regarding birth control.³⁰ On the other hand, the Court in *Griswold* proceeded to identify the right to personal privacy as established through a number of different

²⁷ *Dobbs* overruled *Roe* and *Casey* but left *Griswold* untouched. See *Roe v. Wade*, 410 U.S. 113 (1973), overruled by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2279–80 (2022); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), overruled by *Dobbs*, 142 S. Ct. at 2279–80.

²⁸ *Casey*, 505 U.S. at 849; *Roe*, 410 U.S. at 129.

²⁹ The only cases overturned by *Dobbs* were *Casey* and *Roe*. See *Dobbs*, 142 S. Ct. at 2279.

³⁰ *Griswold v. Connecticut*, 381 U.S. 479, 481–82, 484 (1965).

constitutional provisions beyond the Due Process Clauses of the Fifth and Fourteenth Amendments.³¹

The *Griswold* Court detailed a long line of cases affirming associational and privacy rights as grounded in both the First and Fourteenth Amendments, along with other Bill of Rights guarantees that create zones of privacy.³² For example, the Court identified explicit Third, Fourth, and Fifth Amendment privacy protections in various contexts and the Ninth Amendment's provision that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."³³

Ultimately, the *Griswold* Court declared a ban on contraceptive use and its possession unconstitutional as applied to married people (a ruling that the Court subsequently extended to unmarried people in *Eisenstadt v. Baird*³⁴):

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.³⁵

That right to privacy in intimate associations, the Court emphasized, is one ultimately grounded in intertwined dual rights: the rights to “*freedom to associate* and *privacy* in one’s associations.”³⁶

Despite *Griswold*'s identification of various constitutional sources of privacy rights, including the First Amendment freedom of association, subsequent cases building upon the precedent of *Griswold* focused primarily on *Griswold*'s affirmation of privacy rights in a substantive due process context, ignoring the First Amendment freedom of association discussion woven throughout the Court's analysis in that case.³⁷ That substantive due process focus on personal

³¹ *Id.* at 484.

³² *Id.* at 481–85.

³³ *Id.* at 484 (quoting U.S. CONST. amend. IX).

³⁴ *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972).

³⁵ *Griswold*, 381 U.S. at 486.

³⁶ *Id.* at 483 (emphasis added).

³⁷ *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 645 (2015); *Lawrence v. Texas*, 539 U.S. 558, 564–65 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847–

autonomy as an unenumerated but fundamental liberty interest has become the primary recognized doctrinal basis for subsequent reproductive rights and LGBTQ+ rights Supreme Court cases that cited *Griswold* and its progeny in affirming personal sexual privacy rights and liberty interests.³⁸

In Supreme Court decisions affirming constitutional protections for LGBTQ+ people (i.e., those historically denied equal rights and protections for their same-sex relationships), the Court has applied a hybrid “equal liberty” approach to equal protection and substantive due process,³⁹ rather than harkening back to the hybrid associational privacy protections that *Griswold* affirmed as reflective of both First and Fourteenth Amendment guarantees.⁴⁰ For example, focusing largely on substantive due process liberty protections in its opinion affirming sexual privacy rights of same-sex couples, the Court in *Lawrence v. Texas* described *Griswold* as the “most pertinent beginning point” of its right to privacy analysis⁴¹ and then cited cases following *Griswold* that also affirmed fundamental liberty protections for sexual privacy and autonomy, quoting the “heart of liberty” passage from *Planned Parenthood of Southeastern Pennsylvania v. Casey*:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.⁴²

While substantive due process is now under attack by the Supreme Court itself, its future uncertain, other aspects of *Griswold* may provide alternative doctrinal arguments for those seeking to protect the right to privacy in intimate life choices and relationships. In particular, among the various constitutional provisions beyond due process

48 (1992), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2279–80 (2022); *Roe v. Wade*, 410 U.S. 113, 167–69 (1973) (Stewart, J., concurring), *overruled by Dobbs*, 142 S. Ct. at 2279–80.

³⁸ See *Lawrence*, 539 U.S. at 567, 573–74; *Casey*, 505 U.S. at 847; *Casey*, 505 U.S. at 984 (Scalia, J., concurring); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 564 (1989) (Stevens, J., concurring in part and dissenting in part); *Roe*, 410 U.S. at 152–53.

³⁹ See Knowles, *supra* note 25, at 25; Marcus, *Beyond Romer and Lawrence*, *supra* note 25, at 404.

⁴⁰ *Griswold*, 381 U.S. at 482.

⁴¹ *Lawrence*, 539 U.S. at 564–65 (2003) (citing *Griswold*, 381 U.S. at 485).

⁴² *Id.* at 574 (quoting *Casey*, 505 U.S. at 851).

identified in *Griswold* as sources of the constitutional right to privacy, the freedom of association is ripe for the plucking.

Furthermore, while *Griswold* affirmed the freedom of association as a source of privacy and liberty guarantees for intimate life choices and relationships, it is not the only freedom of association Supreme Court case establishing protections for private relationships and decisions under the First Amendment. To the contrary, *Griswold* laid the foundation for the Supreme Court's subsequent *Roberts v. United States Jaycees* decision⁴³ that could, and perhaps should, come to supplement *Griswold* as a seminal decision affirming sexual privacy rights and allowing for their continued protection in future cases.

To appreciate the significance of *Roberts*, it is helpful to begin with the scholarly preface to that case, a law review article that has been credited for coining the specific “freedom of intimate association” nomenclature that the Supreme Court subsequently, in essence, adopted in its *Roberts* decision.⁴⁴ The 1980 article, *The Freedom of Intimate Association*, by UCLA law professor Kenneth Karst, explored a previously unexamined aspect of *Griswold v. Connecticut*: the opinion's affirmation of a hybrid right to privacy and intimate association grounded in the First, Fourth, Fifth, and Fourteenth Amendments, with particularly deep roots in First Amendment guarantees.⁴⁵ Proposing a broader reading of *Griswold* than its traditional interpretation, Karst explained that *Griswold* was far from just a due process decision, but was rather an opinion that, at its core, recognized and affirmed the constitutional freedom of intimate association as protected by the First Amendment and other constitutional provisions.⁴⁶

Rather than describing *Griswold* as an outlier in its adherence to freedom of intimate association principles, Karst traced a line of fifty cases leading up to *Griswold* in which the freedom of intimate

⁴³ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–19 (1984).

⁴⁴ See, e.g., Joshua P. Roling, Note, *Functional Intimate Association Analysis: A Doctrinal Shift to Save the Roberts Framework*, 61 DUKE L.J. 903, 909 (2012); Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. C.R.L.J. 269, 269–70, 279–80, 279 n.55 (2006) [hereinafter Marcus, *Freedom of Intimate Association*]; Bryan H. Wildenthal, *To Say “I Do”*: *Shahar v. Bowers*, *Same-Sex Marriage, and Public Employee Free Speech Rights*, 15 GA. ST. U. L. REV. 381, 397 n.67 (1998); Collin O'Connor Udell, *Intimate Association: Resurrecting A Hybrid Right*, 7 TEX. J. WOMEN & L. 231, 232 (1998).

⁴⁵ Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 624–25, 653 (1980), <https://doi.org/10.2307/795978>.

⁴⁶ *Id.* at 625, 653.

association, framed through First and Fourteenth Amendment jurisprudence, has functioned as an organizing principle.⁴⁷ In those cases, federal courts affirmed core intimate association values intrinsic to the protection of marriage, and other partnership and familial rights.⁴⁸ Karst further explained that in those cases, federal courts including the Supreme Court have accorded increasingly heightened protections to associations in proportion to core values of intimacy.⁴⁹ While *Griswold* involved the rights of married couples, Karst explained that a half century of precedent similarly affirmed freedom of intimate association in other contexts, even, at that point, including protections for same-sex couples.⁵⁰

Karst set forth a working definition of “intimate association” that identifies the type of association warranting heightened constitutional protections as a “close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship.”⁵¹ He further identified four core values in particular that are shared by the types of intimate associations that have been accorded greater degrees of constitutional protection over time—namely, the core values of (1) physical society, (2) caring and commitment, (3) close and enduring emotional intimacy, and (4) self-identification.⁵² Ultimately, Karst concluded that the freedom of intimate association is a useful organizing principle that affirms the importance freedom of choice in one’s intimate relationships, not just as a matter of self-expression but as a matter of moral agency and responsibility.⁵³

The Supreme Court similarly acknowledged that distinction between freedom of expressive association and freedom of intimate association as depicted in Karst’s article four years later in *Roberts v. United States Jaycees*.⁵⁴ The seminal *Roberts* opinion set forth the foundation for the intimate association doctrine that mirrored the Karstian identification of the freedom of intimate association as a viable organizing principle for protecting personal privacy in intimate

⁴⁷ *Id.* 624–25, 653–55, 653 nn.131–32, 655 n.141.

⁴⁸ *Id.* at 625.

⁴⁹ *Id.* at 626–27.

⁵⁰ *Id.* at 658.

⁵¹ Karst, *supra* note 45, at 629.

⁵² *Id.* at 630, 632–33, 635.

⁵³ *Id.* at 692.

⁵⁴ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

relationships.⁵⁵ Although, in *Roberts*, the Court rejected a freedom of intimate association claim that the Jaycees, a private club, brought to justify engaging in sex discrimination through gender-based club membership restrictions, the Court nonetheless embraced the intimate association organizing principle itself.⁵⁶

The *Roberts* decision was the first to explicitly identify the freedom of intimate association as one of the two types of freedom of association protected by the First Amendment, echoing that same description in Karst's article—the first law review article to name the freedom of intimate association.⁵⁷ While Karst's article had described freedom of association as a hybrid right in which the First Amendment played a role along with numerous other Bill of Rights privacy sources and the Fourteenth Amendment, *Roberts* described the freedom of association even more as a First Amendment right, with the Court describing the right of association protected under the First Amendment as including not only a right of expressive association but also a right of intimate association.⁵⁸

That said, as Karst had,⁵⁹ the *Roberts* Court also explained that the intimate associational right has constitutional roots even beyond the First Amendment, describing the right to “freedom of intimate association” as a fundamental liberty interest that “preserv[es] . . . certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the [s]tate” and to “enter into and maintain certain intimate human relationships.”⁶⁰ Thus, the Court explained, the freedom of intimate association exists both as a First Amendment right of expression and as a fundamental component of personal liberty under the Fourteenth and Fifth Amendments, concluding that in some instances, “freedom of association in both its forms may be implicated.”⁶¹

⁵⁵ *See id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 617–18.

⁵⁸ *Id.*

⁵⁹ Karst, *supra* note 45, at 624–25.

⁶⁰ *Roberts*, 468 U.S. at 617–18. In her concurrence, Justice O'Connor further explained that the right of association is a long-recognized First Amendment right, tracing the right of association as protected by the First Amendment to the 1958 *NAACP v. Alabama* decision. *See id.* at 632–33 (O'Connor, J., concurring in part and concurring in the judgment) (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–66 (1958)).

⁶¹ *Id.* at 618 (majority opinion).

While some scholars tracking the evolution of the freedom of intimate association have interpreted the right as being exclusively a First Amendment right rather than a Fourteenth Amendment substantive due process right, others recognize it as a hybrid right with roots in both the First Amendment and other constitutional amendments affirming the right to privacy and personal liberty.⁶² Similar conflicting descriptions of intimate association as either a hybrid right or just a First Amendment right (or just a due process liberty interest) have also played out in the circuit split among courts of appeals interpreting the intimate association doctrine.⁶³

All things considered, while the First Amendment is a primary locus of free association generally, a hybrid understanding of the freedom of intimate association aptly reflects the original *Roberts* analysis. In *Roberts*, the Court recognized of the freedom of intimate association as a long-standing right grounded not only in the Fourteenth Amendment but also under the Bill of Rights more broadly (including the First Amendment).⁶⁴ In doing so, the Court cited a long line of privacy rights cases mirroring those cases Professor Karst had identified in his article:

The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the [s]tate. Without precisely identifying every consideration that may underlie this type of constitutional protection, we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the [n.]ation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the [s]tate. Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability

⁶² Compare Gwynne L. Skinner, *Intimate Association and the First Amendment*, 3 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 1, 24 (1993) (describing intimate association as a First Amendment right and not a Fourteenth Amendment right), with O'Connor Udell, *supra* note 44, at 242, and Marcus, *Freedom of Intimate Association*, *supra* note 44, at 287-88.

⁶³ See discussion *infra* Part II.B.

⁶⁴ *Roberts*, 468 U.S. at 618.

independently to define one's identity that is central to any concept of liberty.⁶⁵

One of the cases cited by *Roberts*, *Stanley v. Georgia*, is particularly noteworthy in not only describing a long-standing "right to be free . . . from unwanted governmental intrusions into one's privacy" but also recognizing that right to privacy as interrelated with First Amendment protections in the context of sexual privacy (i.e., in that case, recognizing a right to view pornography at home free from government interference).⁶⁶

Thus, the Court, in explicitly recognizing the freedom of intimate association in *Roberts*, was not creating a new right out of thin air but merely spelling out that such a right, long protected by the Court, is a deeply rooted right indeed.

Explaining the freedom of intimate association in its *Roberts* decision, the Court noted that those relationships that are protected based on such personal bonds and affiliations are limited in scope, but include family relationships, which are "distinguished by such attributes as relative smallness, a high degree of selectivity in decision to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."⁶⁷

While the *Roberts* Court offered the disclaimer that "[w]e need not mark the potentially significant points on this terrain with any precision,"⁶⁸ it also offered specific examples of types of relationships that may be accorded greater protections. For example, distinguishing family relationships and decisions regarding whom to marry, as within the realm of protected relationships, from business relationships that

⁶⁵ *Id.* (footnote omitted) (citations omitted) (first citing *Zablocki v. Redhail*, 434 U.S. 374, 383–86 (1978); then citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); then citing *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977); then citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–86 (1977); then citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–04 (1977) (plurality opinion); then citing *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974); then citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974); then citing *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); then citing *Stanley v. Illinois*, 405 U.S. 645, 651–52 (1972); then citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); then citing *Griswold v. Connecticut*, 381 U.S. 479, 482–85 (1965); then citing *Poe v. Ullman*, 367 U.S. 497, 542–45 (1961) (Harlan, J., dissenting); then citing *Patterson*, 357 U.S. at 460–62; then citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–535 (1925); then citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); and then citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

⁶⁶ *Stanley*, 394 U.S. at 564.

⁶⁷ *Roberts*, 468 U.S. at 620.

⁶⁸ *Id.*

are not,⁶⁹ the Court noted that between those poles is “a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the [s]tate.”⁷⁰

Consequently, along with describing the primary characteristics of intimate associations as including relevant factors such as smallness, intimate purpose or policies, selectivity, congeniality, and other similar pertinent characteristics, *Roberts* explained that “[d]etermining the limits of state authority over an individual’s freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship’s objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.”⁷¹ Thus, mirroring the list of values described by Karst, *Roberts* established varying degrees of constitutional protection for intimate associations, depending on pertinent characteristics that indicate the existence of particularly intimate relationships.⁷²

B. *The Slow and Splintered Evolution of Freedom of Intimate Association Jurisprudence Since Roberts*

In *Roberts v. United States Jaycees*, the private club’s invocation of intimate association in a challenge to the anti-discrimination provisions of the Minnesota Human Rights Act was unsuccessful.⁷³ While it provided guidance for future cases brought by those entitled to intimate association protections due to their “size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent,” the Court concluded that in that case, “several features of the Jaycees clearly place the organization outside of the category of relationships worthy of this kind of constitutional protection.”⁷⁴

In the near half century that has lapsed since the *Roberts* case, despite the invitational roadmap laid out by the Court for future intimate association claims, the Supreme Court has yet to be presented with a case where it found those criteria were met. After *Roberts*, the

⁶⁹ *Id.* (comparing, for example, *Loving v. Virginia*, 388 U.S. 1, 12 (1967), with *Ry. Mail Ass’n. v. Corsi*, 326 U.S. 88, 93–94 (1945)).

⁷⁰ *Id.* (citing *Runyon v. McCrary*, 427 U.S. 160, 187–89 (1976) (Powell, J., concurring)).

⁷¹ *Id.*

⁷² Compare *id.*, with Karst, *supra* note 45, at 629–30, 632–33, 635.

⁷³ *Roberts*, 468 U.S. at 611, 620.

⁷⁴ *Id.* at 620.

few Supreme Court cases involving intimate association claims did not result in any opinions in which the Court explicitly followed *Roberts* to grant intimate association claims.⁷⁵

In the 1986 *Bowers v. Hardwick* decision discussed in more detail below (and since overturned by *Lawrence v. Texas*), the Court refused to even consider the intimate association arguments of Michael Hardwick in his challenge to his sodomy conviction.⁷⁶ After *Bowers*, the freedom of intimate association was invoked unsuccessfully by rotary clubs and private clubs challenging public accommodations laws,⁷⁷ by the owner of a dance hall challenging an age-restriction ordinance,⁷⁸ by prisoners challenging visitor restrictions,⁷⁹ by the Boy Scouts seeking to exclude gays from positions of leadership,⁸⁰ and by those seeking to rent out motel owners seeking to rent rooms out by the hour, presumably to sex workers and their customers.⁸¹ In each of those cases, the Court rejected those intimate association claims.⁸²

The Court's discussion of intimate association in most of these cases was sparse and cursory. For example, in *City of Dallas v. Stanglin*, the Court's intimate association analysis consisted of this single dismissive sentence: "It is clear beyond cavil that dance-hall patrons, who may number 1,000 on any given night, are not engaged in the sort of 'intimate human relationships' referred to in *Roberts*."⁸³ Similarly, in its *FW/PBS v. City of Dallas* decision, discussed in more detail below, the Court rejected an intimate association claim brought in the context of paid sex work encounters in a hotel, dedicating only a

⁷⁵ See *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 547 (1987); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988); *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989); *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644–45 (2000); *Dale*, 530 U.S. at 698 n.26 (Stevens, J., dissenting); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 237 (1990) (plurality opinion).

⁷⁶ See discussion *infra* Part II.C (discussing *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003)).

⁷⁷ *Rotary Club*, 481 U.S. at 547; *N.Y. State Club Ass'n*, 487 U.S. at 11 (ruling on a challenge to public accommodations law brought on behalf of 125 private clubs).

⁷⁸ *Stanglin*, 490 U.S. at 24.

⁷⁹ *Overton*, 539 U.S. at 131.

⁸⁰ *Dale*, 530 U.S. at 644–45; *id.* at 698 n.26 (Stevens, J., dissenting).

⁸¹ *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 237 (1990) (plurality opinion).

⁸² See *id.*; *Rotary Club*, 481 U.S. at 546; *N.Y. State Club Ass'n*, 487 U.S. at 12; *Stanglin*, 490 U.S. at 24; *Overton*, 539 U.S. at 131; *Dale*, 530 U.S. at 659.

⁸³ *Stanglin*, 490 U.S. at 24 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617 (1984)).

paragraph to the intimate association claim.⁸⁴ And in *Boy Scouts of America v. Dale*, while the Court did grant the Boy Scout's expressive association claim,⁸⁵ in a cursory footnote, the dissent rejected out of hand its intimate association claim, noting that although the exact contours of the freedom intimate association are unclear, regardless, due to its large size, broad scope, and lack of selectivity, the Boy Scouts did not meet that the criteria.⁸⁶

The fact that the Court has yet to explicitly apply *Roberts* to rule in favor of intimate association claims may make litigants less willing to present such claims to the Court. As a result, the freedom of intimate association doctrine instead has been gathering metaphoric dust, a long-neglected doctrine in contrast with the more common framing of claims for autonomy in sexual autonomy and personal relationships based on equal protection and/or due process grounds under the Fourteenth Amendment.

That said, the Supreme Court's LGBTQ+ rights decisions in *Lawrence v. Texas* and *Obergefell v. Hodges*, overturning *Bowers v. Hardwick* and recognizing equal marriage rights for same-sex couples, respectively, were cases in which the Court, while not expressly applying *Roberts*, affirmed the intimate association rights of the parties in those cases.⁸⁷ The doctrinal support those cases may provide to future intimate association claims would be much stronger, however, if they had more explicitly addressed the freedom of intimate association.

C. *Sexual Intimacy Rights in the Home: Intimate Association Tensions and Missed Opportunities in Bowers and Lawrence*

Although, in the immediate aftermath of *Roberts*, intimate association claims were largely unsuccessful, that was not for lack of effort on the part of litigants. For example, two years after the *Roberts v. United States Jaycees* decision, the respondent-defendant Michael Hardwick, in challenging the criminal sodomy statute under which he had been convicted, had raised an intimate association claim in *Bowers v. Hardwick*.⁸⁸ Specifically, he cited *Roberts* to condemn the state of

⁸⁴ *FW/PBS*, 493 U.S. at 237 (plurality opinion); see also discussion *supra* Parts II.A, II.B.

⁸⁵ *Dale*, 530 U.S. at 659.

⁸⁶ *Id.* at 698 n.26 (Stevens, J., dissenting).

⁸⁷ See discussion *infra* Part IV.

⁸⁸ Brief for Respondent at *9, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), 1986 WL 720442, at *1.

Georgia's position in that case that it could subject even "the most intimate" of human relationships" to criminal prosecution.⁸⁹ Hardwick argued, again quoting *Roberts*, "because the Bill of Rights is designed to secure individual liberty, it must afford . . . certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the [s]tate."⁹⁰ The Eleventh Circuit agreed with Hardwick, ruling that "[t]he activity [Hardwick] hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation."⁹¹

At the Supreme Court level, in his *Bowers* dissent, Justice Blackmun also agreed, recognizing as cognizable Hardwick's claims to "constitutionally protected interests in privacy and freedom of intimate association,"⁹² as had the Eleventh Circuit.⁹³ Explicitly citing Professor Karst's *The Freedom of Intimate Association* article, Justice Blackmun poignantly wrote:

Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality." The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a [n]ation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.⁹⁴

In his acknowledgement of the freedom of intimate association as according protections to sexual relationships, Blackmun also acknowledged the intertwined relationship between the right to privacy and freedom of intimate association. He wrote that "the right of an individual to conduct intimate relationships in the intimacy of

⁸⁹ *Id.*

⁹⁰ *Id.* (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984)).

⁹¹ *Hardwick v. Bowers*, 760 F.2d 1202, 1212 (11th Cir. 1985), *rev'd*, *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁹² *Bowers*, 478 U.S. at 202 (Blackmun, J., dissenting).

⁹³ *Hardwick*, 760 F.2d at 1212.

⁹⁴ *Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting) (citations omitted) (first citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977); then citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973); then citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); then citing *Roe v. Wade*, 410 U.S. 113, 153 (1973); and then citing Karst, *supra* note 45, at 637).

his or her own home seems to me to be the heart of the Constitution's protection of privacy."⁹⁵ Blackmun concluded, "depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent."⁹⁶

In contrast with Blackmun's dissenting opinion, however, the Supreme Court majority opinion in *Bowers v. Hardwick* completely sidestepped Hardwick's intimate association claims, not even acknowledging that such a constitutional claim was on the table.⁹⁷ Instead, the Court reframed the issue in that case in the narrow terms of whether there was a "fundamental right upon homosexuals to engage in sodomy," which it then answered in the negative.⁹⁸ For that reframing of the issue, Justice Blackmun severely chastised the majority with the admonition that "[i]n its haste to reverse the Court of Appeals [for the Eleventh Circuit] and hold that the Constitution does not 'confe[r] a fundamental right upon homosexuals to engage in sodomy,' . . . the majority has distorted the question this case presents."⁹⁹

Quoting *Roberts v. United States Jaycees* along with a longer line of Supreme Court cases embracing protections for intimate life decisions and relationships, Justice Blackmun maintained, contrary to the majority opinion, that the plaintiff in that case validly claimed that the sodomy statute in that case interfered with both the right to privacy and freedom of intimate association.¹⁰⁰ Blackmun explained that the "ability independently to define one's identity that is central to any concept of liberty" cannot truly be exercised in a vacuum; we all depend on the "emotional enrichment from close ties with others."¹⁰¹

Years later, when the Supreme Court reversed itself, overturning *Bowers* in *Lawrence v. Texas*, the majority in *Lawrence* chastised the *Bowers* majority, just as Justice Blackmun had, for its disingenuousness in its inappropriately narrow reframing of the long-standing constitutional right to personal autonomy and privacy in intimate life choices,

⁹⁵ *Id.* at 208.

⁹⁶ *Id.* at 214.

⁹⁷ *Id.* at 190 (majority opinion).

⁹⁸ *Id.*

⁹⁹ *Id.* at 200 (Blackmun, J., dissenting) (alteration in original) (citation omitted).

¹⁰⁰ *Bowers*, 478 U.S. at 202-06 (Blackmun, J., dissenting).

¹⁰¹ *Id.* at 205 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984)).

minimizing that right as merely being about the right to homosexual sex.¹⁰² The *Lawrence* Court charged *Bowers* with failing to appreciate the extent of the liberty at stake:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.¹⁰³

This tension between the overly narrow framing of rights in *Bowers* and the broader, more principle-focused approach in *Lawrence*, illustrates how, in the evaluation of constitutional protections for intimate conduct and relationships, framing is everything. In the passage above, *Lawrence* condemned the “right to homosexual sodomy” framing by *Bowers* as fundamentally flawed, explaining that the inquiry of whether the liberty interest in that case was a constitutionally protected fundamental right should instead be framed in terms of the broader right to privacy in intimate life choices—a right that has historically and traditionally been protected over the ages.¹⁰⁴

In addition, by analogizing to a long line of precedent affirming privacy and personal autonomy rights that stand in stark contrast with both the *Bowers* and *Dobbs* majority opinions, the *Lawrence* decision was more akin to *Roberts* in its powerful affirmations of liberty and privacy protections for intimate associations. For example, the *Lawrence* opinion began with an explanation that liberty protects individuals not only from unwarranted government intrusion into the home but also that “there are other spheres of our lives and existence, outside the home, where the [s]tate should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self

¹⁰² *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

¹⁰³ *Id.*; see also Marcus, *Beyond Romer and Lawrence*, *supra* note 25, at 395 (describing the tension between narrow and broad formulations of fundamental rights, including that between the *Bowers* and *Lawrence* opinions).

¹⁰⁴ *Lawrence*, 539 U.S. at 566–67.

that includes freedom of thought, belief, expression, and certain intimate conduct.”¹⁰⁵

Lawrence condemned sodomy bans for “seek[ing] to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals,” further explaining that adults have constitutionally protected autonomy in entering into relationships in their own homes and private lives, including sexual relationships, because “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”¹⁰⁶

At least two lower federal courts have noted the similarities between *Roberts* and *Lawrence* in their protections of intimate relationships through hybrid constitutional protections.

In *Citizens for Equal Protection v. Bruning*, the first federal court decision to overturn a state same-sex marriage ban,¹⁰⁷ doing so through an intimate association analysis, the court explicitly cited both *Roberts* and *Lawrence* in support of its statement:

The intimate relationships that have been accorded full constitutional protection are marriage, the begetting and bearing of children, child-rearing and education, and cohabitation with relatives. . . . Between the opposing poles of a marital relationship on one hand and a large business enterprise on the other, lie “a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the [s]tate.”¹⁰⁸

And in *Flaskamp v. Dearborn Public Schools*, the Sixth Circuit linked *Roberts* and *Lawrence* as in essence protecting the same intimate association rights, explaining that “[t]he Supreme Court has . . . held that ‘certain kinds of personal bonds,’ and ‘certain [kinds of] intimate conduct,’ are protected by the substantive component of the Due

¹⁰⁵ *Id.* at 562.

¹⁰⁶ *Id.* at 567.

¹⁰⁷ See Toni Lester, *Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?*, 14 AM. U. J. GENDER SOC. POL’Y & L. 253, 307–08 (2006).

¹⁰⁸ *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 992–93 (D. Neb. 2005) (citations omitted) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984)) (citing *Lawrence*, 539 U.S. at 578–79).

Process Clause.”¹⁰⁹ As *Flaskamp* further explains, quoting both *Roberts* and *Lawrence*:

Whether called a right to intimate association or a right to privacy the point is similar: “choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the [s]tate because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.”¹¹⁰

Rather than explicitly invoke *Roberts* and its hybrid freedom of intimate association protections directly, however, *Lawrence*, at least on its surface, confined the issue and analysis in that opinion to a more traditional Fourteenth Amendment inquiry focused on equal protection and due process.¹¹¹ On the one hand, the *Lawrence* majority opinion mirrored Justice Blackmun’s *Bowers* dissent to the extent that both Justice Blackmun’s dissent and the *Lawrence* majority decried the *Bowers* majority’s narrow articulation of the fundamental rights at stake,¹¹² and instead endorsed a broad approach to the freedom to choose with whom one is intimate.¹¹³ On the other hand, however,

¹⁰⁹ *Flaskamp v. Dearborn Pub. Schs.*, 385 F.3d 935, 942 (6th Cir. 2004) (alteration in original) (citations omitted) (first citing *Roberts*, 468 U.S. at 618; and then citing *Lawrence*, 539 U.S. at 562).

¹¹⁰ *Flaskamp*, 385 F.3d at 942 (citations omitted) (quoting *Roberts*, 468 U.S. at 617–18) (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.” (quoting *Lawrence*, 539 U.S. at 567)).

¹¹¹ See *Lawrence*, 539 U.S. at 564 (identifying the three questions the Supreme Court accepted certiorari to answer).

1. Whether petitioners’ criminal convictions under the Texas ‘Homosexual Conduct’ law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of the laws.

2. Whether petitioners’ criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.

3. Whether *Bowers v. Hardwick* should be overruled.

Id. (citations omitted).

¹¹² See *id.* Compare *id.*, with *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (“This case is no more about ‘a fundamental right to engage in homosexual sodomy,’ as the Court purports to declare, than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about ‘the most comprehensive of rights and the right most valued by civilized men,’ namely, ‘the right to be let alone.’” (citations omitted)).

¹¹³ Compare *Lawrence*, 539 U.S. at 578, with *Bowers*, 478 U.S. at 205–06 (Blackmun, J., dissenting).

whereas Justice Blackmun had also been forceful in decrying the *Bowers* majority's failure to recognize the "unconstitutional intrusion into [Hardwick's] privacy and his right of intimate association,"¹¹⁴ the *Lawrence* majority, like the *Bowers* majority, was silent on the issue.¹¹⁵ The *Lawrence* majority did not explicitly address the applicability of the freedom of intimate association even in the face of a claim involving the most intimate form of association: private sexual relationships.

As such, while it represented a watershed moment in the affirmation of liberty protections for sexual minorities, *Lawrence* fell short of remedying other doctrinal infirmities of the prior *Bowers* decision. *Lawrence's* failure to address the freedom of intimate association issue was a missed opportunity, as the Court's explicit acknowledgement of that right could have sent the signal to future litigants that the freedom of intimate association is a viable alternative constitutional source of personal privacy protections.

Now, after *Dobbs*, the time is (again)¹¹⁶ ripe to revisit the intimate association protections explicitly set forth by *Roberts* and at least implicitly reaffirmed through *Lawrence*. The freedom of intimate association may serve as an alternative doctrinal home for the right to personal privacy in sexuality and other intimate relationships. Reclaiming intimate association in the process of rehomeing the right to personal privacy, however, simultaneously requires reclaiming the meaning of intimacy itself, as well as the appropriate positioning of tradition and history in the analysis of constitutional rights protections. The rest of this Article will explain those two necessary components of establishing the freedom of intimate association as a solid foundation for future personal privacy rights protections.

¹¹⁴ *Bowers*, 478 U.S. at 201 (Blackmun, J., dissenting) (emphasis added).

¹¹⁵ See generally *Lawrence*, 539 U.S. at 562 (affirming liberty protections for sexual minorities but staying silent on the issue of the recognition of the right to intimate association).

¹¹⁶ See Marcus, *Freedom of Intimate Association*, *supra* note 44, at 299 ("[T]he time has finally come to clarify the parameters and protections that define the freedom of intimate association.").

III. REPOSITIONING TRADITION IN PERSONAL PRIVACY RIGHTS JURISPRUDENCE

A. *The History of (Evolving) Tradition and Its Role in Constitutional Privacy Protections for Intimate Associations: The FW/PBS Game Changer*

In the aftermath of *Roberts*, not only did the Court fail to further define the precise contours of the freedom of intimate association, but also, one subsequent case spawned additional confusion about the doctrine as the Court appeared to abandon the established *Roberts* factors in favor of an almost exclusive focus on tradition. *FW/PBS v. City of Dallas* is the only post-*Roberts* case in which the Court addressed intimate association claims in a sexual intimacy context. *FW/PBS* involved the rights of those seeking to rent out hotel rooms for short periods of time, presumably for sex work. In that case, the Court, rather than explaining what the freedom of intimate association is, only described what it is not.¹¹⁷

Specifically, the *FW/PBS* Court ruled that a sexual relationship in a hotel room that lasts fewer than ten hours is not the type of relationships constitutionally protected under the freedom of intimate association doctrine.¹¹⁸ Most pertinently, the Court's discussion in *FW/PBS* of whether the freedom of intimate association applies to a short-lived sexual encounter in a hotel room did not even mention the primary "size, purpose, policies, selectivity, [and] congeniality" factors from the *Roberts* decision (all of which arguably would apply to any private sexual encounters between two people).¹¹⁹ Rather, in addressing whether a sexually oriented business ordinance restricting short term motel room rentals infringed upon the freedom of association, *FW/PBS* narrowed its inquiry to merely whether a relationship is the type that plays a critical role in the culture and traditions of our country, rather than applying the *Roberts* intimacy factors.¹²⁰

The Court's analysis of the freedom of intimate association claim was quite cursory, consisting merely of the following single paragraph:

¹¹⁷ *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990) (plurality opinion).

¹¹⁸ *Id.*

¹¹⁹ Compare *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984), with *FW/PBS*, 493 U.S. at 237 (plurality opinion).

¹²⁰ Compare *FW/PBS*, 493 U.S. at 220–21, 237 (plurality opinion) (inquiring merely into a relationship's role in the culture and traditions of our country), with *Roberts*, 468 U.S. at 620 (applying intimacy factors).

The motel owners also assert that the 10-hour limitation on the rental of motel rooms places an unconstitutional burden on the right to freedom of association recognized in *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) (“Bill of Rights . . . must afford the formation and preservation of certain kinds of highly personal relationships.”). . . . [W]e do not believe that limiting motel room rentals to 10 hours will have any discernible effect on the sorts of traditional personal bonds to which we referred in *Roberts*. Any “personal bonds” that are formed from the use of a motel room for fewer than 10 hours are not those that have “played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.” We therefore reject the motel owners’ challenge to the ordinance.¹²¹

This language does not represent a *complete* deviation from *Roberts*. *Roberts* did, after all, allow consideration of “other characteristics [beyond just size, purpose, policies, selectivity and congeniality] that in a particular case may be pertinent.”¹²² *Roberts* also spoke of those highly personal relationships as including personal bonds that have “played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs . . . thereby foster[ing] diversity and act[ing] as critical buffers between the individual and the power of the [s]tate.”¹²³

That said, *FW/PBS* at best failed to engage in the same kind of substantive discussion of freedom of intimate association as found in *Roberts*. At worst, the case misrepresented the intimate association rule established in *Roberts* by omitting the key factors *Roberts* set forth for consideration in an intimate association case.

As one scholar who documented conflicting interpretations of *Roberts* through 1998 further observed, the confusion resulting from *FW/PBS* came not only from the *FW/PBS* case “eschewing the use of the *Roberts* factors” but also from its misleadingly incomplete quotation of *Roberts* that disproportionately emphasized tradition while omitting *Roberts*’s reference to diversity as a value that should be considered along with tradition.¹²⁴ *FW/PBS* did not provide any more specific guidance

¹²¹ *FW/PBS*, 493 U.S. at 237 (plurality opinion) (citations omitted) (citing *Roberts*, 468 U.S. at 618–19).

¹²² *Roberts*, 468 U.S. at 620.

¹²³ *Id.* at 618–19.

¹²⁴ O’Connor Udell, *supra* note 44, at 254.

Importantly, in *FW/PBS*, Justice O’Connor merely asserted that the bonds formed in motel rooms “are not those that have ‘played a critical role in the culture and traditions of the [n]ation by cultivating and

as to what type of personal relationships may be deemed to have played such a role in the nation's culture and traditions.

As a result of the tension between the thorough *Roberts* description of intimate association and the comparatively brief *FW/PBS* intimate association discussion that emphasized tradition rather than the key *Roberts* factors,¹²⁵ the federal circuits have been split in the aftermath of *FW/PBS* in interpreting the intimate association doctrine.¹²⁶ Some circuits have interpreted *FW/PBS* as precluding constitutional protections for personal privacy and autonomy in the contexts of adultery and other less traditionally accepted relationships.¹²⁷ This contrasts with *Lawrence*, *Obergefell*, and circuit court cases following them in recognizing protections at least for same-sex relationships.

The circuits have also been split over the correct level of scrutiny to apply to intimate association claims. While some courts have recognized that intimate association claims require heightened scrutiny, others are more likely to apply a lower standard of review. In some cases involving public employers' interference with intimate relationships, for instance, courts may apply more deference to

transmitting shared ideals and beliefs.” Readers may recognize the quote as the confusing sentence from *Roberts* that simultaneously invoked the values of tradition and diversity. In an important move, Justice O'Connor omitted the second half of the sentence that discussed diversity. Since one need not include an ellipsis “when using quoted language as a phrase or clause” (as opposed to a full sentence), there was nothing to signal to posterity that part of the sentence was missing.

Id. at 242–43 (footnotes omitted).

¹²⁵ That is, smallness, intimate purpose or policies, selectivity, congeniality, and other similar pertinent characteristics reflecting the deep attachments, commitments, and other critical aspects of an intimate relationship. *Roberts*, 468 U.S. at 619–20.

¹²⁶ See O'Connor Udell, *supra* note 44, at 243 (describing how, at the time of the article's publication in 1998, “the confusion among the lower courts is epidemic. A circuit-by-circuit examination reveals the depth of the disparity, which exists along the axes of scope, applicable test, and doctrinal foundation”); Cornelia Sage Russell, *Shahar v. Bowers: Intimate Association and the First Amendment*, 45 EMORY L.J. 1479, 1494–95 (1996) (describing the circuit split as of 1996); Marcus, *Freedom of Intimate Association*, *supra* note 44, at 287–88 (describing circuit splits as of 2006).

¹²⁷ See, e.g., *Flaskamp v. Dearborn Pub. Schs.*, 385 F.3d 935, 943 (6th Cir. 2004) (denying intimate association protections to protect sexual relationships between teachers and former students); *Marcum v. McWhorter*, 308 F.3d 635, 638–43 (6th Cir. 2002) (relying on *FW/PBS* and *Bowers* and invoking history and tradition to deny intimate association protections to members of a cohabitating adulterous romantic couple); *Shahar v. Bowers*, 114 F.3d 1097, 1099–101 (11th Cir. 1997) (denying intimate association claim by public employee subjected to job offer withdrawal because of her lesbian relationship).

government defendants by employing the *Pickering* test.¹²⁸ Under that test, the employer and employee interests are weighed in public speech or expression cases, as opposed to focusing on the *Roberts* factors, which, as one scholar has documented, has resulted in mixed results in such intimate association cases brought by public employees.¹²⁹

More profoundly, *FW/PBS*'s overemphasis of tradition to the exclusion of other *Roberts* factors has resulted in a substantial degree of tension and conflict as to the appropriate role of tradition in intimate association rights evaluations. To resolve that tension, it is helpful to keep in mind that the original *Roberts* passage that *FW/PBS* had itself cited included some key cases that (like the *Roberts* factors themselves) *FW/PBS* did not mention at all, including *Zablocki v. Redhail* and *Griswold v. Connecticut*.¹³⁰ Both of those cases had affirmed fundamental privacy rights for married couples, even in less traditionally rooted contexts. For example, in *Zablocki*, the Court affirmed the fundamental right of parents who are delinquent on child support payments to get married, and, in *Griswold*, the Court upheld the right of married couples to obtain modern birth control, though neither right was necessarily grounded in long-standing history and traditions of legal protection.¹³¹

The *Roberts* Court also cited the famous Brandeis dissent in *Olmstead*, affirming the historical roots for a broad right to privacy that includes protections for citizens' emotions, sensations, thoughts, and beliefs, and documenting the founders of this nation's intent to "confer[], as against the [g]overnment, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."¹³² Similarly, in *Palko v. Connecticut*, the first modern substantive

¹²⁸ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

¹²⁹ See Matthew W. Green, Jr., *Lawrence: An Unlikely Catalyst for Massive Disruption in the Sphere of Government Employee Privacy and Intimate Association Claims*, 29 BERKELEY J. EMP. & LAB. L. 311, 319–32 (2008).

¹³⁰ See *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990) (plurality opinion) (citing *Roberts*, 468 U.S. at 618–19); see also *Roberts*, 468 U.S. at 618–19 (first citing *Zablocki v. Redhail*, 434 U.S. 374, 383–86 (1978) (affirming the right to marry as among the personal decisions that constitute "privacy older than the Bill of Rights Marriage is . . . intimate to the degree of being sacred. . . . [I]t is . . . an association for as noble a purpose as any involved in our prior decisions"); and then citing *Griswold v. Connecticut*, 381 U.S. 479, 482–85 (1965)).

¹³¹ See *Zablocki*, 434 U.S. at 387, 390–91; *Griswold*, 381 U.S. at 485–86.

¹³² *Roberts*, 468 U.S. at 619 (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)).

due process case,¹³³ the Court had defined fundamental rights in terms of a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,”¹³⁴ which supports an approach to tradition that focuses on the broad principles that have been traditionally honored in our country, rather than on specific acts.

In contrast with that principle-focused approach, the *FW/PBS* Court instead invoked tradition to deny protections to specific acts that the Court described as not historically protected.¹³⁵ In doing so, the *FW/PBS* Court committed the same error as the *Bowers* Court and failed to follow the accepted framework for analyzing intimate association protections.

Other cases central to the *Roberts* Court’s intimate association analysis but ignored in the *FW/PBS* intimate association discussion included those involving unique or nontraditional intimate relationship contexts. For example, in addition to *Zablocki* and *Griswold*, the cases cited by *Roberts* but ignored in the corresponding *FW/PBS* discussion,¹³⁶ included *Moore v. City of East Cleveland*, a case in which the Fourteenth Amendment’s “freedom of personal choice in

¹³³ See Howard J. Vogel, *The “Ordered Liberty” of Substantive Due Process and the Future of Constitutional Law as a Rhetorical Art: Variations on a Theme from Justice Cardozo in the United States Supreme Court*, 70 ALB. L. REV. 1473, 1474 (2007); Lisa K. Parshall, *Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights*, 69 ALB. L. REV. 237, 252 n.98 (2005); Martin D. Carcieri, *Obama, the Fourteenth Amendment, and the Drug War*, 44 AKRON L. REV. 303, 311 (2011).

¹³⁴ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) (first citing *Brown v. Mississippi*, 297 U.S. 278, 285 (1936); and then citing *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926)).

¹³⁵ *FW/PBS*, 493 U.S. at 237 (plurality opinion).

¹³⁶ Compare *id.* at 237 (first citing *Roberts*, 468 U.S. at 618; and then citing *Craig v. Boren*, 429 U.S. 190, 192 (1976)), with *Roberts*, 468 U.S. at 619 (first citing *Zablocki*, 434 U.S. at 383–86; then citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–04 (1977) (plurality opinion); then citing *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); then citing *Griswold*, 381 U.S. at 482–85; then citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925); then citing *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974); then citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–62 (1958); then citing *Poe v. Ullman*, 367 U.S. 497, 542–45 (1961) (Harlan, J., dissenting); then citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); then citing *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977); then citing *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684–86 (1977); then citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974); then citing *Stanley v. Illinois*, 405 U.S. 645, 651–52 (1972); then citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); and then citing *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)).

matters of marriage and family life” was explicitly extended to nontraditional family protections.¹³⁷

Other opinions that the Court cited in *Moore*, in turn, had similarly endorsed fundamental constitutional protections for circumstances and relationships not traditionally protected. For example, *Moore* cited *Cleveland Board of Education v. LaFleur*, a 1974 decision in which the Court affirmed the rights of pregnant schoolteachers to not be deemed presumptively unfit to teach.¹³⁸ *Moore* also cited Justice Harlan’s dissent from the 1961 *Poe v. Ullman* case¹³⁹ for the constitutional mandate that the courts must have “regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.”¹⁴⁰

Roberts cited those and other cases describing tradition in a broad and expansive sense for the principle that “the constitutional shelter afforded such [intimate] relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty.”¹⁴¹

In *303 Creative*, addressing the precedent of *Roberts* in the context of businesses discriminating against LGBTQ+ people, the dissenting opinion further described the evolving nature of tradition, observing

¹³⁷ *Moore*, 431 U.S. at 499, 506 (plurality opinion) (applying fundamental privacy rights protections to extended family members living together despite not being a more traditional nuclear family (quoting *LaFleur*, 414 U.S. at 639–40)).

¹³⁸ *Moore*, 431 U.S. at 499 (plurality opinion) (quoting *LaFleur*, 414 U.S. at 639–40); *LaFleur*, 414 U.S. at 634–35, 645–46 (“[I]n *Stanley*, the Court held that an Illinois statute containing an irrebuttable presumption that unmarried fathers are incompetent to raise their children violated the Due Process Clause.” (citation omitted) (citing *Stanley*, 405 U.S. 645)); see also *Roberts*, 468 U.S. at 619 (citing *Stanley*, 405 U.S. 645).

¹³⁹ *Poe*, 367 U.S. at 497 (involving a challenge to a state birth control ban).

¹⁴⁰ *Moore*, 431 U.S. at 501–02 (plurality opinion) (quoting *Poe*, 367 U.S. at 542–43 (Harlan, J., dissenting)). It should be noted, however, that even Justice Harlan’s *Poe* dissent, while embracing the need for evolving constitutional protections and traditions, also sporadically expressed solidarity with states’ criminalization of homosexual conduct and other consensual sexual acts that were commonly condemned and criminalized at the time. See, e.g., *Poe*, 367 U.S. at 546, 552 (Harlan, J., dissenting).

¹⁴¹ *Roberts*, 468 U.S. at 619 (first citing *Quilloin*, 434 U.S. at 255; then citing *Smith*, 431 U.S. at 844; then citing *Carey*, 431 U.S. at 684–86; then citing *LaFleur*, 414 U.S. at 639–40; then citing *Stanley*, 405 U.S. at 651–52; then citing *Stanley*, 394 U.S. at 564; and then citing *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)).

that “[t]he legal duty of a business open to the public to serve the public without unjust discrimination is deeply rooted in our history[,]” and adding that “[t]he true power of this principle, however, lies in its capacity to evolve, as society comes to understand more forms of unjust discrimination and, hence, to include more persons as full and equal members of ‘the public.’”¹⁴²

Applying those same principles in intimate association cases as well, tradition should not be interpreted in an overly restrictive manner in intimate association cases. *FW/PBS*’s disproportionate and narrow focus on tradition to the exclusion of acknowledging the primary countervailing values set forth in *Roberts* is deserving of critique and begging of reconciliation with *Roberts*’s more substantive intimate association analysis that is framed around the honoring of principle-focused personal privacy and autonomy.

B. *The Contrast Between the Rights-Restricting FW/PBS and Dobbs Decisions and the Rights-Affirming Lawrence and Obergefell Decisions*

FW/PBS is not the only case in need of reconciliation with the intimate association principles affirmed in *Roberts*. Returning to *Dobbs*, despite the powerful language in *Roberts* affirming liberty and autonomy protections for intimate relationships, the fact remains that the *Dobbs* Court is one constituted of Justices blatantly hostile to a such an expansive approach to intimate association protections, at least as accorded through substantive due process.

To effectively address *Dobbs*, as with *FW/PBS*, it is important to resolve the doctrinal tensions arising from competing approaches to tradition and other principles. In the attacks on substantive due process waged by the majority opinion and Justice Thomas’s concurrence in *Dobbs*, that hostility toward substantive due process was largely couched in terms of respect for tradition and history, a half century’s worth of abortion rights precedent notwithstanding.¹⁴³ In contrast, the dissent in *Dobbs* was more consistent with opinions such as those in *Griswold*, *Zablocki*, *Moore*, *LaFleur*, and *Lawrence*,¹⁴⁴ and with

¹⁴² 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2323–25, 2334 (2023) (Sotomayor, J., dissenting).

¹⁴³ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245–57 (2022); *id.* at 2300–01 (Thomas, J., concurring).

¹⁴⁴ See discussion *infra* Part III.C (discussing broader principle-focused and rights-affirming approaches to liberty and tradition as exemplified in such cases).

Justice Harlan's description of tradition as a "living thing,"¹⁴⁵ with the *Dobbs* dissent sharply criticizing the majority's approach to tradition as defined by "those living in 1868."¹⁴⁶ Further, the dissent pointed out the majority's narrow approach to tradition, fetishizing the norms of 1868, consequently remains constrained by the views of the *men* in power in 1868—women having few rights or power over anything, let alone their own bodies, at that time¹⁴⁷—begging the questions of *which* traditions, and *whose* traditions, are determinative of rights under a tradition-focused analysis.

As some scholars have described the competing approaches to tradition in substantive due process cases in the aftermath of *Dobbs*, "[w]e can distinguish between two competing conceptions of tradition in the due process inquiry: tradition as historical practices versus tradition as aspirational principles."¹⁴⁸ While *Dobbs* approached history and tradition in terms of historical practices specific to 1868 (i.e., the year the Fourteenth Amendment was adopted), the substantive due process approach to liberty protections "from *Meyer* and *Pierce* in the nineteen twenties to *Roe*, *Casey*, and *Obergefell* instead conceives traditions as a 'living thing' or aspirational principles."¹⁴⁹

As Professor Darren Hutchinson has noted, the narrow approach to tradition should be especially inapplicable to same-sex marriage and intimacy because the Supreme Court's *Obergefell* decision affirming same-sex marriage rights explicitly rejected an overly narrow approach to liberty protections in cases involving marriage and other forms of intimacy:

Glucksberg did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.¹⁵⁰

¹⁴⁵ *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

¹⁴⁶ *Dobbs*, 142 S. Ct. at 2329 (Breyer, Sotomayor & Kagan, JJ., dissenting); see also Linda C. McClain & James E. Fleming, *Ordered Liberty After Dobbs*, 35 J. AM. ACAD. MATRIM. LAWS. 623, 630 (2023).

¹⁴⁷ *Dobbs*, 142 S. Ct. at 2324 (Breyer, Sotomayor & Kagan, JJ., dissenting).

¹⁴⁸ McClain & Fleming, *supra* note 146, at 630.

¹⁴⁹ *Id.*

¹⁵⁰ See Hutchinson, *supra* note 6, at 405 (emphasis omitted) (quoting *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015)) (citing *Roe v. Wade*, 410 U.S. 113, 154 (1973)).

While the appropriate role of tradition has been a matter of debate in substantive due process discourse, it is important to resolve similar tensions in a freedom of intimate association context as well, in order to successfully advance the freedom of intimate association doctrine. Further, any such assessment of the appropriate role of tradition in intimate association cases must begin with the Supreme Court's analysis in *Roberts*, emphasizing precedents that represented tradition as an evolving thing, such as the previously described cases including *Griswold*, *Zablocki*, *Moore*, and Justice Harlan's dissent in *Poe v. Ullman*.¹⁵¹ Additionally, the *Roberts* Court built its discussion upon reproductive rights precedents including not only *Griswold* but also subsequent reproductive rights cases, such as *Carey v. Population Services International*.¹⁵²

Those cases overlapped with the precedents similarly referenced by the Supreme Court years later in *Lawrence v. Texas*. More specifically, in *Lawrence*, overturning *Bowers v. Hardwick* and its decision upholding sodomy bans as violating the fundamental privacy rights of consenting adults, the Court traced the progeny of *Griswold* and *Lawrence*, explaining that “[a]fter *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship.”¹⁵³ As in *Roberts*, the *Lawrence* Court cited *Carey v. Population Services International*,¹⁵⁴ a case that extended the constitutional right to privacy in obtaining birth control beyond the context of married adults, for the first time explicitly affirming the right of sixteen-year-old minors to obtain contraceptives.¹⁵⁵

As had Justice Blackmun's *Bowers* dissent, the *Lawrence* majority opinion described tradition as a living, evolving thing and explained that therefore rights cannot be constitutionally denied to individuals

¹⁵¹ See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–19 (first citing *Zablocki v. Redhail*, 434 U.S. 374, 383–86 (1978)); then citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–04 (1977) (plurality opinion); then citing *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); then citing *Griswold v. Connecticut*, 381 U.S. 479, 482–85 (1965); then citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); then citing *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974); then citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–62 (1958); and then citing *Poe v. Ullman*, 367 U.S. 497, 542–45 (1961) (Harlan, J., dissenting).

¹⁵² See *Roberts*, 468 U.S. at 619–20 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–86 (1977)).

¹⁵³ *Lawrence v. Texas*, 539 U.S. 558, 565, 578 (2003).

¹⁵⁴ See *Roberts*, 468 U.S. at 619 (citing *Carey*, 431 U.S. at 684–86 (1977)); *Lawrence*, 539 U.S. at 566 (citing *Carey*, 431 U.S. 678).

¹⁵⁵ *Carey*, 431 U.S. at 693.

merely because their conduct has previously been criminalized (contrary to the opposite recent analysis in *Dobbs*).¹⁵⁶ Quoting *Planned Parenthood v. Casey* (again illustrating the intertwined nature of LGBTQ+ and reproductive rights precedents), *Lawrence* admonished that, regardless of the extent to which certain behavior has been strongly condemned as immoral and even criminalized:

These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. “Our obligation is to define the liberty of all, not to mandate our own moral code.”¹⁵⁷

“[N]either history nor tradition [can] save a law” that violates a liberty interest, the *Lawrence* Court explained, adding that in examining whether a right is constitutionally protected as a fundamental right, “[h]istory and tradition are the starting point but not in all cases the ending point.”¹⁵⁸

Lawrence’s discussion of the role of tradition in protecting intimate relationships stands in notable contrast with the discussion of tradition by the majority opinion of *Dobbs* and can also provide guidance in reconciling the tradition-focused intimate association discussion with the broader intimate association discussion in *Roberts*. *Lawrence* helps illustrate, for example, how *Dobbs* applied an overly rigid interpretation of the appropriate role of tradition in protecting fundamental liberties, with *Dobbs* denying such protections where a particular act was once criminalized,¹⁵⁹ and framing liberty interests in terms of specific, narrowly described acts rather than broader principles.¹⁶⁰ The *Lawrence* opinion, in contrast with *Dobbs*, recognized that criminalization of an act can itself be unconstitutional, rather than

¹⁵⁶ Compare *Lawrence*, 539 U.S. at 577–79, and *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting), with *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2252–53 (2022).

¹⁵⁷ *Lawrence*, 539 U.S. at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

¹⁵⁸ *Id.* at 572, 577–78 (first quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring); and then quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

¹⁵⁹ See Marcus, *Yes, Alito, supra* note 19, at 103, 106–07, 112 (pointing out the logical fallacy of such an approach to tradition under which there would be no protected liberty interest in obtaining birth control, or marrying someone of a different race, all of which were at some point in historical criminal acts).

¹⁶⁰ See, e.g., *Dobbs*, 142 S. Ct. at 2244 (“[T]he critical question [is] whether the Constitution, properly understood, confers a right to obtain an abortion.”).

(as the *Dobbs* majority suggests) criminal law itself being what establishes whether a given act is constitutionally protected.¹⁶¹

As to the tensions between *Dobbs*'s and *Lawrence*'s discussions of the appropriate role of tradition in protecting personal privacy and autonomy, *Lawrence* traced the deep roots of the right to privacy in personal life choices, identifying the tradition of honoring privacy and autonomy as the source of protections of particular intimate associations (in that case, a sexual date between two men in the privacy of one of their homes).¹⁶² *Lawrence* explained that whether a particular right is to be considered a liberty interest deeply rooted in the nation's histories and traditions requires an examination that should not be conducted through an absurdly narrow lens, but rather should focus on the traditional roots of the principles at play.¹⁶³

After *Lawrence* came cases that reaffirmed the importance of evolving traditions and adherence to broader, historically protected constitutional principles, including the same-sex marriage opinion in *Obergefell*. Building upon the *Lawrence* precedent, the Court in *Obergefell* rejected the narrowly framed argument that there was no deeply rooted right to same-sex marriage.¹⁶⁴ Instead, the Court framed the right at issue more broadly, in terms of the fundamental liberty interest to marry the person of one's choice, free from government interference with such personal, intimate life choices and relationships.¹⁶⁵

Although it is the case that *Lawrence* represented a missed opportunity for the Court to explicitly revisit the freedom of intimate association in the context of affirming sexual privacy and autonomy, both *Lawrence* and *Obergefell* may still in a sense be categorized as intimate association cases. That is the case in part because of the recurring themes of and references in both cases to the liberty interests at play as involving autonomy in intimate conduct.¹⁶⁶

¹⁶¹ See *Lawrence*, 539 U.S. at 578.

¹⁶² *Id.* at 574, 578 (quoting *Casey*, 505 U.S. at 851).

¹⁶³ *Id.* at 578–79.

¹⁶⁴ See *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015); *Lawrence*, 539 U.S. at 578.

¹⁶⁵ *Obergefell*, 576 U.S. at 681.

¹⁶⁶ See *id.*; see also *Lawrence*, 539 U.S. at 562 (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. . . . The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.”); *Lawrence*, 539 U.S. at 566 (describing the parallel facts of *Bowers* and *Lawrence* as both involving criminal treatment of men “engaging in intimate sexual conduct”); *Lawrence*, 539 U.S. at 574 (describing constitutional protections for autonomy of persons in making

But *Obergefell*, even more than *Lawrence*, explicitly invokes intimate association, even if not explicitly citing *Roberts*. *Obergefell* involved the constitutional privacy claims of those involved in same-sex intimacy, but this time in the context of marriage.¹⁶⁷ The Court expressly referenced *Lawrence* and intimate association in the same breath, while affirming the equal right of same-sex couples to marry.¹⁶⁸ The Court explained that one of the principles in the Court's jurisprudence in cases leading up to *Obergefell* was that the right to marry is fundamental because, as *Griswold* described it, marriage is "intimate to the degree of being sacred," and "an association that promotes a way of life, not causes; a harmony in living, not political faiths; [and] a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."¹⁶⁹ Then, explicitly citing *Lawrence*, the Court continued:

As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in *intimate association* without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.¹⁷⁰

Thus, in the context of affirming the equal right of same-sex couples to marry, the Court linked that right to the same intimate association

personal decisions regarding marriage, family relationships, contraceptive choice, and other matters "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy" (quoting *Casey*, 505 U.S. at 851)); *Lawrence*, 539 U.S. at 567 ("This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

¹⁶⁷ *Obergefell*, 576 U.S. at 681.

¹⁶⁸ *Id.* at 666, 681 (citing *Lawrence*, 539 U.S. at 574).

¹⁶⁹ *Id.* at 666–67 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

¹⁷⁰ *Id.* at 667 (emphasis added) (citations omitted) (citing *Lawrence*, 539 U.S. at 567).

rights affirmed in *Lawrence*, a right that informs the unconstitutionality of laws (no matter how long-standing the traditional views they reflect) that would criminalize the love of same-sex couples.

The *Obergefell* Court even more explicitly acknowledged the freedom of intimate association as a principle distinct from others upon which it based its decision.¹⁷¹ The Court cited cases including *Griswold* and *Lawrence* to explain that, in regard to the fundamental right to marry:

The intimate association protected by this right was central to *Griswold v. Connecticut*, which held the Constitution protects the right of married couples to use contraception. . . . Same-sex couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense.¹⁷²

Thus, the Supreme Court's LGBTQ+ rights decisions in *Obergefell* and *Lawrence* (the first explicitly and the second implicitly) both affirmed the intimate association principles of *Roberts*, in the context of two of the most intimate types of associations imaginable: marriage and sexual relationships (which, of course, are ideally not always mutually exclusive).

Both cases also emphasized the importance of honoring broad constitutional principles beyond narrow restrictions on rights. For example, *Lawrence* rejected the "right to homosexual sodomy" articulation of the right in that case as overly narrow, recognizing that the real right at issue was the traditionally honored liberty interest in personal privacy in one's most intimate life choices.¹⁷³ *Obergefell* similarly rejected the articulation of the issue in that case as defined by whether there has traditionally been recognized a "right to same-sex marriage," again more appropriately identifying that right as falling within the broader umbrella of protected liberty interests.¹⁷⁴

To some extent, *Dobbs*, however, turns that framing once again on its head, shifting from a broad to a narrow approach to understanding traditionally protected liberty interests. Its reframing of personal privacy rights in overly narrow terms may be seen as reimposing the same *Bowers*-like approach that had been eschewed by the Court in

¹⁷¹ *Id.* at 646.

¹⁷² *Id.* (emphasis added) (citations omitted).

¹⁷³ *Lawrence*, 539 U.S. at 578.

¹⁷⁴ *See id.* at 671.

Lawrence and *Obergefell*, at least in the framing of substantive due process rights. Instead of heeding *Lawrence*'s admonitions against framing fundamental rights in narrow terms rather broad principles, *Dobbs* echoed the narrow framing of rights of *Bowers* (i.e., reframing the liberty interest in personal privacy that had previously been recognized in *Roe*, *Casey*, and other reproductive rights cases as merely a "right to abortion," which it then declared not constitutionally protected).¹⁷⁵

As such, there is legitimate cause for concern by members of the LGBTQ+ community and their advocates. The current Supreme Court, having reverted to a framework for constitutional protections of intimate life choices more aligned with *Bowers* than with *Lawrence* and *Obergefell*, has reframed fundamental rights and liberty interests in terms of narrow acts and traditions, rather than of broader, traditionally respected personal privacy and autonomy principles.¹⁷⁶

With the Court having stripped away abortion protections in *Dobbs* through an overly narrow focus and emphasis on past criminal laws, there is the potential danger that the Court could apply similar logic to deny protections to other previously criminalized intimate life choices. Under such an approach, same-sex and even interracial marriages, not to mention the right to birth control, could lose their constitutional protections as well. To avoid that, tradition must be resituated and reclaimed in accordance with the rights-affirming decisions, such as *Lawrence* and *Obergefell*, and the intimate association protections they extend—discriminatory traditions of yore be damned.

C. *Reconciling Competing Approaches to Tradition in Intimate Association Protections*

While *Dobbs v. Jackson Women's Health Organization* certainly does not bode well for the future of fundamental rights as protected by substantive due process, intimate association could be a different story. *Dobbs* did not overturn *Lawrence* and *Obergefell*, the two Supreme Court cases in which the Court affirmed the intimate associational rights of same-sex couples.¹⁷⁷ Not only are the holdings of *Lawrence* and

¹⁷⁵ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022).

¹⁷⁶ See *id.* at 2258 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)) (citing *Compassion in Dying v. Washington*, 85 F.3d 1440, 1440, 1444–45 (9th Cir. 1996) (O'Scannlain, J., dissenting)).

¹⁷⁷ See *id.* ("[T]he dissent suggests that our decision calls into question . . . *Lawrence* and *Obergefell*. But we have stated unequivocally that '[n]othing in this

Obergefell still good law but also their intimate association analytical underpinnings remain solid as well, separate and apart from the fragility of the substantive due process doctrine.

Lawrence and *Obergefell* (decided by many of the same Justices sitting on the bench at the time of the *Dobbs* decision)¹⁷⁸ both expose the flawed rationale of upholding unconstitutional laws in the name of what was once traditionally criminalized, while also acknowledging intimate association rights for same-sex couples (despite a lack of historic protections for them). As such, both decisions provide a profound counterweight to the blow struck by *Dobbs* to substantive due process in an abortion context.

Not to completely abandon all hope for substantive due process protections, however, there are strong arguments to be made that, even in a substantive due process context, there is a history and tradition of understanding “liberty” to be an evolving concept, with those protected rights expanding as society and lawmakers become more enlightened over time.¹⁷⁹ As the Court in *Lawrence* explained, what matters is not the past criminalization of any given conduct, but rather, our laws and traditions in the past half century.¹⁸⁰

These references show an emerging awareness that constitutional liberty guarantees accord substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. “[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”¹⁸¹

Similarly, the *Lawrence* Court endorsed the language in Justice Stevens’s dissent in *Bowers* explaining that Supreme Court precedent clearly establishes that “the fact that the governing majority in a [s]tate has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from

opinion should be understood to cast doubt on precedents that do not concern abortion.” (alteration in original) (citations omitted)).

¹⁷⁸ See *Obergefell v. Hodges*, 576 U.S. 644, 644 (2015); *Dobbs*, 142 S. Ct. at 2239.

¹⁷⁹ See Marcus, *Beyond Romer and Lawrence*, *supra* note 25, at 360, 363, 365 (documenting constitutional history of embracing evolving tradition). See *supra* Part I, for additional arguments that substantive due process may still be, doctrinally speaking, a viable source of personal privacy and liberty interests, even if the current Supreme Court is hostile to that rights-protecting line of doctrine.

¹⁸⁰ *Lawrence v. Texas*, 539 U.S. 558, 597–98 (2003).

¹⁸¹ *Id.* at 571–72 (alteration in original) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

constitutional attack.”¹⁸² As Justice Stevens’s dissent and the *Lawrence* majority concluded, individual decisions by married and unmarried persons alike “concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.”¹⁸³

The closing language of the *Lawrence* opinion reinforces this understanding of constitutional liberty as a necessarily evolving concept and doctrine, stating that had the drafters of the Bill of Rights and Fourteenth Amendment known every possible component of liberty, “they would have been more specific,” but “[t]hey did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”¹⁸⁴ The *Lawrence* Court concluded with the eloquent affirmation summarizing the principle that “[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”¹⁸⁵

This forceful and eloquent language from the Court clarifies that the proper positioning of history and tradition in an analysis of liberty protections of intimate relationships is not one that denies legal protections based on traditional disfavor by a judgmental majority. *Dobbs* does not necessarily toll the demise of the past century’s protections under substantive due process nor reverse a longer constitutional history of respecting tradition itself as an evolving, not stagnant, thing.

While *Lawrence*, *Obergefell*, and other cases established the evolving nature of liberty in a substantive due process context, the evolving constitutionalist approach to history and tradition has not been confined to substantive due process cases and contexts. More generally, Thomas Jefferson wrote in 1816 that law “must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the

¹⁸² *Id.* at 577–78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

¹⁸³ *Id.* at 578 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

¹⁸⁴ *Id.* at 578–79.

¹⁸⁵ *Id.* at 579.

times.”¹⁸⁶ Jefferson warned that “[w]e might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain as under the regimen of their barbarous ancestors.”¹⁸⁷

Similarly, even as far back as in early twentieth-century cases, the Supreme Court explained that constitutional rights “must draw [their] meaning from the evolving standards of decency that mark the progress of a maturing society,”¹⁸⁸ and that protections under the constitution may “acquire meaning as public opinion becomes enlightened by a humane justice.”¹⁸⁹ More recently, the Court affirmed that in the context of traditionally criminalized acts in particular, the traditional nature of such prohibitions do not insulate the criminal laws from constitutional challenge, ruling that “neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack.”¹⁹⁰

Furthermore, *Lawrence’s* explanation that privacy rights’ protections for intimate sexual relationships may not be constrained by criminal laws based on traditional moral judgments conflicts dramatically with *Dobbs’s* analysis, the opening words of which described abortion as “present[ing] a profound moral issue” that “[f]or the first 185 years after the adoption of the Constitution, each [s]tate was permitted to address” in accordance with its citizens’ moral views.¹⁹¹ The *Dobbs* opinion then devoted thirty pages—half of the opinion—to justifying the overturning of *Roe* and *Casey* by reference to pre-1973 criminal laws condemning abortion.¹⁹² While overturning *Roe* and *Casey*, however, *Dobbs* did not overturn *Lawrence* or other cases that served as the doctrinal foundation for *Lawrence*.¹⁹³ Indeed, while the disclaimer may be taken with a grain of salt, as even the *Dobbs* dissent suggested,¹⁹⁴ the majority opinion specifically limited its holding to the context of abortion, emphasizing, “the dissent suggests

¹⁸⁶ *Schneiderman v. United States*, 320 U.S. 118, 137 n.15 (1943).

¹⁸⁷ *Id.*

¹⁸⁸ *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

¹⁸⁹ *Weems v. United States*, 217 U.S. 349, 378 (1910).

¹⁹⁰ *Williams v. Illinois*, 399 U.S. 235, 239 (1970).

¹⁹¹ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2240 (2022).

¹⁹² *See id.* at 2240–43, 2246, 2248–55, 2259–60, 2267, apps. at 2285–2300 (cataloguing pre-1869 laws that the majority described as criminalizing abortion).

¹⁹³ *See id.* at 2280.

¹⁹⁴ *See id.* at 2330–31 (Breyer, Sotomayor & Kagan, JJ., dissenting).

that our decision calls into question *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*. But we have stated unequivocally that “[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”¹⁹⁵ Consequently, there remains in *Lawrence* and its progeny doctrinal support for calling into question future legal arguments, analyses, and opinions that rely on the aspect of *Dobbs* that rationalized taking away individual rights by reference to past histories of morally condemning and criminalizing the exercise of those rights.

Thus, even after *FW/PBS*, in the context of personal privacy rights, historical cases following the precedent of *Roberts*, such as *Lawrence*, *Obergefell*, have established that the concept of honoring traditionally protected liberty interests is not a stagnant one that precludes constitutional protections for even nontraditional intimate associations. To the contrary, intimate sexual and romantic relationships are accorded heightened protections, and should be shielded from the attacks on fundamental liberty interests and personal autonomy represented by the rights-reversing *Dobbs* decision. *FW/PBS*’s tradition emphasis notwithstanding, the Court’s past admonitions that history and tradition are living, evolving things can help recenter modern discourse on protecting privacy rights after *Dobbs*.

Ultimately, tradition can be understood both as a necessarily evolving and principle-focused inquiry and as a less important consideration than the other values set forth in *Roberts* as defining intimate association protections. Refocusing on LGBTQ+ rights through an intimate association lens broad enough to reflect the importance of all the *Roberts* values facilitates a paradigm shift that honors long-standing principles protecting intimate life choices and relationships. Such traditionally honored principles and values must, as a matter of constitutional law, outweigh the discrimination any particular forms of intimacy have historically encountered to elevate personal privacy rights over prejudicial practices of the past.

¹⁹⁵ *Id.* at 2280 (majority opinion) (citations omitted).

IV. RECLAIMING INTIMACY AND THE RIGHT TO PERSONAL PRIVACY
THROUGH THE FREEDOM OF INTIMATE ASSOCIATION

The preservation of personal privacy rights, particularly for same-sex couples, may, as described above,¹⁹⁶ be grounded in the long-established constitutional principles that support providing heightened protections to intimate associations, because of, rather than despite, this nation's history and traditions including those of honoring personal privacy and autonomy. Cases, such as *Lawrence* and *Obergefell*, that affirm LGBTQ+ rights underscore the Constitution's promise of protections for the most intimate of associations, such as the romantic and sexual relationships of people of any sexual orientation.

Those cases, along with *Roberts*, provide critical doctrinal support for transitioning from a purely substantive due process analysis (which is a less welcoming doctrinal road to navigate after *Dobbs*) to one incorporating hybrid First and Fourteenth Amendment rights to privacy and intimate association under the Constitution. To traverse that bridge from the vulnerable land of substantive due process to the newer promising landscape of intimate association and restore principles of tradition and history to their proper place, another principle even more central to intimate association should also be revisited and recentered: intimacy itself.

The reclamation of the right to associate by those in need of intimate association protections, and more broadly, the reclamation of intimacy itself in constitutional jurisprudence, is long overdue. For too many years, it has been those individuals seeking to justify discrimination who have invoked the freedom of association, rather than individuals who are in need of protection from such discrimination.

The remainder of this Part traces some of the history of cases hostile to LGBTQ+ rights brought in the name of the freedom of intimate association, and contrasts that line of cases with an aspirational potential repositioning of freedom of association claims that would prioritize those that implicate intimacy and those, such as members of same-sex couples, who are particularly in need of its liberty protections for their intimate relationships.

¹⁹⁶ See discussion *supra* Part III.C.

A. *The Perversion of Associational Freedom Through the Elevation of Exclusion Over Intimacy: The Anti-LGBTQ+ Cases*

After *Roberts*, while there has been a dearth of intimate association claims brought by LGBTQ+ plaintiffs, there has been no such dearth of claims in the name of freedom of association by those seeking to exclude LGBTQ+ people from businesses, club memberships, and the like. Rather than focus on the intimacy values that the Court in *Roberts* sought to protect, such cases have instead, and perversely, elevated the value of discriminatory exclusion that the Court in *Roberts* actually attempted to limit in its freedom of intimate association analysis and holding, rather than honoring values of intimacy.

For example, in *Boy Scouts of America v. Dale*, as previously described,¹⁹⁷ the Boy Scouts invoked intimate association to defend excluding gay people from leadership positions in the Boy Scouts.¹⁹⁸ While the Supreme Court implicitly rejected that intimate association claim by deciding the case on expressive association grounds instead, consistent with Justice Stevens's dissent explanation noting the inapplicability of *Roberts* because "it is impossible to conclude that being a member of the Boy Scouts ranks among those intimate relationships falling within this right, such as marriage, bearing children, rearing children, and cohabitation with relatives."¹⁹⁹

Similarly, in another case that was a blow to LGBTQ+ people, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Court had similarly ruled for an organization seeking to exclude LGBTQ+ people after the organization invoked the freedom of association to justify excluding the Irish-American Gay, Lesbian, and Bisexual Group of Boston (GLIB) from participation in a Saint Patrick's Day Parade in Boston.²⁰⁰ Nevertheless, as in *Dale*, that case was not decided on intimate association grounds; rather, the Court ruled that the public accommodations law at issue violated the defendant's right to *expressive* association.²⁰¹

Even in *Romer v. Evans*, the first major LGBTQ+ victory at the Supreme Court level, the parties seeking to defend a state constitutional amendment denying civil rights protections for gay,

¹⁹⁷ See *supra* notes 85–86 and accompanying text.

¹⁹⁸ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 646 (2000).

¹⁹⁹ *Id.* at 644; *id.* at 698 n.26 (Stevens, J., dissenting) (citing Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 545 (1987)).

²⁰⁰ See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 559, 563 (1995).

²⁰¹ See *id.* at 578.

lesbian, and bisexual people, had invoked associational rights.²⁰² But, the Court rejected those arguments, concluding that associational rights do not justify denying gay, lesbian, and bisexual people equal protection under the law.²⁰³

More recently, however, in its *303 Creative LLC v. Elenis* decision issued at the end of its 2022–23 term, the Supreme Court cited *Dale* and *Hurley* repeatedly in dicta to signal its receptivity towards arguments by businesses that they are entitled to exclude LGBTQ+ people on expressive association grounds.²⁰⁴ Nevertheless, citing *Roberts v. United States Jaycees* along with *Hurley*, the *303 Creative* majority agreed with the dissent “that governments in this country have a ‘compelling interest’ in eliminating discrimination in places of public accommodation.”²⁰⁵ Additionally, in responding to the dissent, which addressed *Roberts* at length on that point,²⁰⁶ the majority opinion in *303 Creative* further distinguished *Roberts* as less applicable than *Dale* and *Hurley* to cases like *303 Creative* involving expressive association.²⁰⁷ And the *303 Creative* dissent emphasized that even in *Roberts*, the Court had held that application of a public accommodations statute to compel the Jaycees’s acceptance of female members did not infringe upon the organization’s expressive association rights either.²⁰⁸

As such, *303 Creative* did not limit the intimate association doctrine in *Roberts* whatsoever, but rather respected the *Roberts* distinction between expressive and intimate association.²⁰⁹ Furthermore, any discussion in *303 Creative* of the freedom of association, whether intimate or expressive, is merely dicta, the case having been decided on free speech, not freedom of association grounds.²¹⁰

²⁰² *Romer v. Evans*, 517 U.S. 620, 635 (1996).

²⁰³ *Id.* (“The primary rationale the [s]tate offers for Amendment 2 is respect for other citizens’ freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. . . . [W]e find it impossible to credit [these justifications].”).

²⁰⁴ *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2310–13 (2023).

²⁰⁵ *Id.* at 2314; *see also id.* at 2325, 2337, 2338–39 n.11 (Sotomayor, J., dissenting).

²⁰⁶ *See id.* at 2325, 2337, 2338–39 n.11 (Sotomayor, J., dissenting).

²⁰⁷ *Id.* at 2320 n.6 (majority opinion).

²⁰⁸ *Id.* at 2332 (Sotomayor, J., dissenting).

²⁰⁹ *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 619–20 (1984).

²¹⁰ *See 303 Creative*, 143 S. Ct. at 2308 (“The question we face is whether that course violates the Free Speech Clause of the First Amendment.”).

That said, the more substantive discussion of *Roberts* by the dissent in *303 Creative* can provide particularly helpful guidance for future claims involving discrimination against LGBTQ+ in the name of freedom of association. As the *303 Creative* dissent described (uncontradicted by the majority opinion in that case), *Roberts* and other cases ensure the constitutional principle of equal dignity by protecting laws requiring equal access to accommodations, with commercial entities even less entitled to claim First Amendment rights to deny services to certain categories of customers.²¹¹

Thus, to the extent that *Dale* and *Hurley* represent successful invocations of the freedom of *expressive* association as grounds for groups to evade public accommodations laws in their exclusion of LGBTQ+ people from their membership and activities, they should not be viewed as precluding successful *intimate* association claims made by LGBTQ+ individuals themselves. That is the case because *Dale* and *Hurley*, properly understood, are Supreme Court decisions based on expressive association principles, but not the freedom of intimate association.²¹² Similarly, *Romer v. Evans* was in the end purely an equal protection case, not a freedom of association case at all,²¹³ and *303 Creative LLC v. Elenis* was a free speech, not freedom of intimate association, case.²¹⁴ Consequently, none of those cases establish negative precedent precluding future successful intimate association claims brought by LGBTQ+ plaintiffs.

In contrast, a precedent that more directly and harmfully implicates intimate association rights, at least for those in the Eleventh Circuit, was that court's *Shahar v. Bowers* case.²¹⁵ In that case, a lesbian attorney who was offered a job with the Georgia Department of Law had her job offer rescinded by Attorney General Michael Bowers,²¹⁶

²¹¹ See *id.* at 2332–33 (Sotomayor, J., dissenting) (“A shopkeeper . . . has no constitutional right to deal only with persons of one sex.” (quoting *Roberts*, 468 U.S. at 634)).

²¹² See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 566 (1995).

²¹³ See *Romer v. Evans*, 517 U.S. 620, 623 (1996).

²¹⁴ See *303 Creative*, 143 S. Ct. at 2307–08 (majority opinion).

²¹⁵ *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc).

²¹⁶ Yes, the same Bowers from *Bowers v. Hardwick*. See *Shahar*, 114 F.3d at 1104 (“As both parties acknowledge, this case arises against the backdrop of an ongoing controversy in Georgia about homosexual sodomy, homosexual marriages, and other related issues, including a sodomy prosecution—in which the [a]ttorney [g]eneral’s staff was engaged—resulting in the well-known Supreme Court decision in *Bowers v. Hardwick*.” (citation omitted)).

after she disclosed her plans to marry her same-sex partner.²¹⁷ Originally, the Eleventh Circuit recognized the case as one implicating the First Amendment freedom of intimate association, triggering strict scrutiny rather than deference to the state, and ruled in favor of the plaintiff.²¹⁸ The Eleventh Circuit then reversed itself, however, vacating that decision upon en banc review.²¹⁹ The final Eleventh Circuit decision on the case's merits, notably one issued before the Supreme Court reversed *Bowers v. Hardwick*, rejected Shahar's claim to intimate association rights.²²⁰ The court's rationale in reaching that conclusion notably included its emphasis that at that point in time, "[g]iven the culture and traditions of the Nation, considerable doubt exists that [the] [p]laintiff has a constitutionally protected federal right to be 'married' to another woman: the question about the right of intimate association."²²¹ Applying the *Pickering* balancing test applicable to public employers' speech restrictions rather than the form of heightened scrutiny due to intimate associations under *Roberts*, the court concluded that even if Shahar had such rights, the attorney general employer's actions toward her were still lawful.²²²

Most notably, the Eleventh Circuit sustained the employer's actions because of what it described as the government's interest in following the precedent of *Bowers v. Hardwick* in continuing to deny rights to same-sex couples, which as of 1997 was still good law.²²³ The fact that *Bowers* is no longer good law after *Lawrence* should render *Shahar v. Bowers*, if not explicitly overturned, no longer a threat to those seeking to protect intimate associational rights, even in the Eleventh Circuit.

While those attempts to use the freedom of association as a weapon against LGBTQ+ people, rather than as a protection for personal relationships, have been largely unsuccessful, such cases may make some LGBTQ+ litigators shy away from bringing intimate

²¹⁷ *Shahar*, 114 F.3d at 1100–01.

²¹⁸ *Shahar v. Bowers*, 70 F.3d 1218, 1224 (11th Cir. 1995), *reh'g en banc granted, opinion vacated*, 78 F.3d 499 (11th Cir. 1996), *reh'g en banc*, 114 F.3d 1097 (11th Cir. 1997).

²¹⁹ *Shahar*, 70 F.3d 1218, *rev'd en banc*, 114 F.3d 1097.

²²⁰ *Shahar*, 114 F.3d at 1099.

²²¹ *Id.* (first citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237–39 (1990) (plurality opinion); and then citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–19 (1984)).

²²² *Id.* at 1110.

²²³ *Id.* at 1104.

association claims. But they should not; it is time to take that ground back. Particularly after *Dobbs*, the freedom of intimate association baby need not be thrown out with the substantive due process bathwater. Those seeking constitutional protections for personal privacy rights should not be hasty in dismissing the potential viability of intimate association claims. This is the case for a variety of reasons.

First, as described above, none of those cases in which the Court upheld the right to take exclusionary and discriminatory actions against LGBTQ+ people were intimate association cases at all. Second, circling back to the *Shahar* case, the fact that the Eleventh Circuit justified its holding by invoking the importance of complying with *Bowers*, which has since been overruled by *Lawrence*, actually underscores the necessarily evolving nature of tradition itself in identifying constitutional rights. Third, and relatedly, the particular aspect of *Bowers* to which the *Shahar* court paid explicit homage was its narrow approach to tradition and history. As *Bowers* falls, so too should fall the narrow tradition-based rationale for denying personal privacy rights.

This line of cases, ominous as they may seem for LGBTQ+ rights, ironically pave a path for future personal privacy rights protections, as they further illustrate the contours of the freedom of intimate association as something quite distinct from the type of associational rights that has mutated into a weapon for those seeking exclusion rather than intimacy. In other words, the above cases mark the clear delineation between the freedom of expressive association, as too often invoked (but largely unsuccessfully)²²⁴ by groups seeking to exclude people from organizations and businesses, and the freedom of intimate association, which protects intimacy not inclusion.

Left intact after the barrage of attacks on LGBTQ+ people in the name of freedom not to associate, the less commonly invoked, yet still viable freedom of intimate association doctrine, as set forth in *Roberts* and followed at least implicitly in subsequent LGBTQ+ rights cases such as *Lawrence* and *Obergefell*, remains a solid basis for freedom of intimate association constitutional claims.

Thus, to the extent that groups seeking to exclude LGBTQ+ people from their ranks have invoked other doctrines, or even other forms of associational rights, to justify their discrimination, such efforts, if anything, should fuel rather than thwart the future efforts of

²²⁴ See *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13–14 (1988); *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989).

those seeking to secure intimate association protections for same-sex relationships and other forms of sexual intimacy.

B. *Reclaiming Intimacy*

Moving forward, the success of intimate association claims requires not just reclaiming tradition, but also reclaiming intimacy itself.

After all, unlike the freedom of expressive association, freedom of intimate association, is—at its core—about intimacy. While that may seem like an obvious statement, intimacy itself is too often lost in the discussion of freedom of association, whether because of the framing of claims that are more focused on the right of a large group to exclude gay people than on actual intimacy-focused privacy rights, or because, as in *FW/PBS*, the analysis has been overly focused on tradition to the detriment of minimizing the core intimacy values set forth in *Roberts*. Nevertheless, as *Roberts* is still very much good law, the presence of those values—smallness, intimate purpose or policies, selectivity, congeniality, and other similar pertinent characteristics—should remain a good indicator of the likelihood of an intimate association claim’s success, even in cases involving claimed intimate association rights of groups beyond familial, sexual, and romantic relationships.²²⁵

As to the meaning of intimacy itself, a 2022 essay by Professor David Cruz, “Making Sex Matter: Common Restrooms as ‘Intimate Spaces,’”²²⁶ explores another modern trend implicating intimacy and the importance of how intimacy is defined. His article describes a “restrooms as intimate” trope created by anti-transgender activists and lawmakers who seek to exclude transgender people from bathrooms matching their gender identity.²²⁷ Those employing the “restrooms as intimate” trope do so through rhetoric citing even *Griswold* to describe bathrooms as “intimate spaces,” which they then argue limits the equal protection and Title IX protections that would otherwise require allowing transgender people access to bathrooms that match their gender identity.²²⁸

²²⁵ See Gregory F. Hauser, *Intimate Associations Under the Law: The Rights of Social Fraternities to Exist and to Be Free from Undue Interference by Host Institutions*, 24 J. COLL. & U. L. 59, 67–77 (1997) (citing several cases focusing on the size of a private organization).

²²⁶ David B. Cruz, *Making Sex Matter: Common Restrooms as “Intimate” Spaces?*, 40 J.L. & INEQUAL. 99 (2022).

²²⁷ *Id.* at 101–05.

²²⁸ *Id.* at 102–03.

Drawing on work of legal philosophers and scholars who have defined intimacy in terms of close relationships, love and emotional safety, and other factors, Cruz critiques the co-opting of “intimacy” as a justification for denying transgender people access to the bathroom matching their gender identity.²²⁹ Reclaiming the precedent of *Griswold* along with the principle of intimacy, Cruz explains that common restrooms cannot fairly be described as “intimate” spaces because intimacy is generally defined and understood in terms of close relationships involving respect, love, friendship, trust, emotional safety, and intimate bodily interactions between people.²³⁰ Thus, public bathrooms are neither private (especially in the case of bathrooms with exposed urinals) nor intimate associations.

That distinction is useful in a freedom of intimate association context as well, with the attempted cruel co-opting of intimacy to perpetuate discrimination against transgender people illustrating both why LGBTQ+ people need to take back the concept of intimacy and how they can do so. Beyond the context of bathrooms, Title IX, and equal protection claims, intimacy in the context of freedom of association should be appropriately repositioned and defined as well. Instead of having freedom of intimate association primarily claimed by groups of people seeking to discriminate or exclude others, those seeking constitutional protections for truly personal relationships can recenter the focus on intimacy and its core values, as similarly described by *Roberts* and by Professors Cruz and Karst.

Central to any meaningful discussion of intimate association protections must be the *Roberts* description of degrees of intimacy in relationships and correspondingly varying degrees of protection, with the most private, relational, and personal relationships accorded the highest degree of protection. The *Roberts* sliding-scale framework is reflected in the comparative lack of success of larger clubs and organizations that tried to claim intimate association protections after *Roberts*, as opposed to those in more private romantic and sexual relationships that were recognized as intimate associations entitled to constitutional protection in *Lawrence* and *Obergefell*.²³¹

²²⁹ *Id.* at 105–08, 110–11.

²³⁰ *Id.* at 105–08, 110–11, 114.

²³¹ Compare, e.g., *Bd. of Dirs. of Rotary Int’l v. Rotary Club*, 481 U.S. 537, 547 n.6 (1987), and *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 11–12 (1988), and *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989), with *Lawrence v. Texas*, 539 U.S. 558, 567, 578 (2003), and *Obergefell v. Hodges*, 576 U.S. 644, 667 (2015).

While those claiming a freedom of association right to exclude others selectively focus on only one of the key *Roberts* factors, a more viable and meaningful intimate association claim should not focus primarily on either selectivity (a value for those seeking to exclude, not protect, relationships) or tradition (as in the *FW/PBS* analysis that was devoid of reference to the other *Roberts* factors), but rather consider the other factors as well. Upon consideration of all the main *Roberts* factors, it makes sense to extend greater constitutional protection to romantic and sexual partnerships than to clubs and organizations.

To recap, those intimate association factors that are listed as typical indicia of constitutionally protected relationships are smallness, selectivity in decisions to begin and maintain affiliations, seclusion from others, and congeniality.²³² It follows that romantic, sexual, and familial relationships should therefore be more highly protected than the relationships between larger clubs and their members, and between businesses and their customers, because (1) the size of romantic, sexual, and familial relationships are much *smaller* as compared to those involved in larger clubs and businesses; (2) romantic, sexual, and family relationships are generally much more *selective* (particularly in the context of personal choices regarding whom to be intimate or start a family with); (3) romantic, sexual, and familial relationships are generally more *secluded* from others, as romantic and sexual intimacy (especially the latter) generally happens behind closed doors, not open to large groups or the public, with even nonsexual family relationships that largely develop in the privacy of the home are more secluded than larger clubs or businesses, which are open to large numbers of people or the public at large; and (4) romantic, sexual, and familial relationships are more *congenial*, with sexual and romantic relationships being the most affectionate of all, and other family relationships also involving much more intimate degrees of congeniality than large clubs and businesses.

Thus, although it may be that relationships between larger clubs and their members are often the subject of claims, they are the least entitled to protection. Those in the most intimate of relationships can be assured that theirs are truly entitled to claim the greatest degree of protection under the intimate association doctrine.

²³² *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619–20 (1984).

C. *Potential Applications, Limits Thereof, and Advantages of the Freedom of Intimate Association*

When assessing how to move forward with intimate association claims for the protection of romantic, sexual, and familial relationships, it is helpful to keep in mind which types of such relationships have in past Supreme Court cases been granted or denied protections, and in which contexts.

As discussed throughout this Article, while the Supreme Court has not yet applied *Roberts* expressly in granting freedom of intimate association claims, the freedom of intimate association has at least been implicitly recognized in *Lawrence*, affirming personal privacy rights in sexual relationships at home, and in *Obergefell*, a same-sex marriage case. In contrast, the Court has not yet been willing to extend those protections to sexual relationships that are short-lived and occur in hotel rooms.²³³ Beyond those poles, however, the Court has explained that there remains a spectrum of various types of relationships that may be protected. Thus, in addition to same-sex relationships, the sexual privacy protections accorded to couples in *Lawrence* should extend as well to other romantic sexual relationships that are consummated in the privacy of the home, and perhaps even beyond to some degree, whether different-sex relationships, or polyamorous relationships involving a small, select number of people.

The context in which such protections may apply include not just freedom from discrimination and criminal persecution, but also affirmative protections, such as the right to live as a nontraditional, nonnuclear family with the same affirmative rights and benefits as a married man and wife in a 1950s-style nuclear family. Housing rights cases have already recognized those intimate association protections, such as in *City of Cleburne v. Cleburne Living Center*, affirming the rights of disabled individuals to live in a group home;²³⁴ in the concurrence of *Department of Agriculture v. Moreno*, which explicitly references protections for intimate associations in the context of households of unrelated persons and their rights to food stamps;²³⁵ and in other contexts. In the context of housing and zoning law, for example, Justice Stevens's concurrence in *Moore v. City of East Cleveland*, explained, quoting a New York State case, that ordinances restricting

²³³ *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990) (plurality opinion).

²³⁴ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435 (1985).

²³⁵ *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 541 (1973) (Douglas, J., concurring).

occupancy of single-family dwellings to related individuals may be invalid because “[z]oning is intended to control types of housing and living and not the genetic or intimate internal family relations of human beings.”²³⁶

Other related protections grounded in the freedom of intimate association should extend as well to members of same-sex couples, other less traditional families, and romantic or sexual relationships seeking the right to live with the partners or family members of their choice. On that front, there is a new wave of work transpiring in the protection of polyamorous and other nontraditional romantic and family structures, whether in discrimination against or in the context of more affirmative housing rights protections.²³⁷ While this is a new and evolving area of legal protections, it is grounded in fundamental principles of law that have long been the basis for protections to families and other intimate associations in evolving contexts. In future cases, members of same-sex couples and other less traditionally accepted relationships can avail themselves of the constitutional protections offered through the freedom of intimate association doctrine.

There are certainly limitations to intimate association. For example, its applicability to abortion through an argument that a pregnant person should not be forced into an intimate relationship with a future child or child’s father against her will may generate pushback from those who view abortion as the destruction of human life or who view the argument as too attenuated. Another limitation is that LGBTQ+ people must be mindful of how others may continue to attempt to use the doctrine against them, with freedom of association claims also being brought by those seeking to exclude LGBTQ+

²³⁶ *Moore v. City of E. Cleveland*, 431 U.S. 494, 517 n.9 (1977) (Stevens, J., concurring) (plurality opinion) (quoting *City of White Plains v. Ferraioli*, 313 N.E.2d 756, 758 (N.Y. 1974)); see also Rigel C. Oliveri, *Single-Family Zoning, Intimate Association, and the Right to Choose Household Companions*, 67 FLA. L. REV. 1401, 1427–29 (2015) (describing *Lawrence*, as well as other recent housing cases involving the right to choose whom one lives with, as cases that support a right of intimate association that extends to the home, grounded in liberty or decisional autonomy).

²³⁷ See Valeriya Safronova, *Interested in Polyamory? Check Out These Places*, N.Y. TIMES (May 16, 2023), <https://www.nytimes.com/2023/05/16/style/polyamory-somerville.html> (discussing how legislation granting domestic partnership rights to people in polyamorous relationships and banning discrimination in city employment and policing based on “family or relationship structure” has cemented Somerville, Massachusetts as a “safe haven” for its nonmonogamous residents).

individuals from businesses, clubs—as they have been in the past—or, more recently, bathrooms.

If intimacy and tradition are reclaimed, and intimate association restored to its original meaning under *Roberts*, the doctrine can be a strong and viable avenue for future claims for personal privacy protections, as discussed throughout this Article. Indeed, an intimate association focused approach to privacy rights offers substantial advantages to future LGBTQ+ plaintiffs and others seeking its protection for their personal, intimate relationships.

First, after *Dobbs*, while substantive due process is under attack, *Roe* and *Casey* are overturned, and other substantive due process cases are threatened, *Roberts*, as an intimate association case, is not a substantive due process case, and it remains good law. Although it is a hybrid right, its strong First Amendment roots offer additional long-standing constitutional protections that other liberty arguments may not be as firmly grounded in.

Second, the Court has shown receptiveness in past LGBTQ+ rights cases such as *Lawrence* and *Obergefell* to the heightened protection of intimate associations. While the makeup of the Court may have changed since those decisions, even after the addition of Justices Gorsuch and Kavanaugh—whom some feared might be hostile to LGBTQ+ rights—the Court remained surprisingly receptive to protecting the rights of LGBTQ+ individuals, as evidenced in part from its *Bostock v. Clayton County* decision, authored by Justice Gorsuch and establishing that Title VII's sex discrimination protections extend to LGBTQ+ people.²³⁸ At the very least, the *Bostock* Court did not show hostility towards LGBTQ+ people similar to the *Dobbs* Court's hostility towards abortion.

Third, the *Bostock* case underscores another advantage of intimate association. The *Bostock* Court ultimately grounded its majority opinion in a textualist analysis,²³⁹ indicating that the current Supreme Court is more receptive towards arguments for rights grounded in statutory or constitutional text, as opposed to arguments based on substantive due process. Whereas substantive due process has been criticized as not grounded enough in the text of the Constitution,²⁴⁰

²³⁸ See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020).

²³⁹ See Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 119–20 (2020), <https://doi.org/10.1086/714594>.

²⁴⁰ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2301 (Thomas, J., concurring) (“[T]ext and history provide little support for modern substantive due

the freedom of intimate association has not been similarly disparaged as ungrounded in constitutional text. One reason for freedom of intimate association not having been subjected to the same type of criticism is that, while it is a hybrid right to some degree, it is explicitly derived from and strongly rooted in the First Amendment's explicit promises of freedom of assembly and freedom of expression. Such First Amendment rights are the primary doctrinal anchor for the freedom of association and its protections for intimate gatherings or assemblies, as well as expression. Thus, with the freedom of association being more explicitly grounded in the First Amendment than in the oft-criticized substantive due process doctrine, repositioning the right to privacy to align with the freedom of association may also be a way to appeal to the textualists (such as Justice Gorsuch) and substantive due process skeptics on the Court.

As a final note, as previously discussed, the Supreme Court's ruling in *303 Creative LLC v. Elenis* is unlikely to change the landscape of intimate association. Even though, like some intimate association arguments, *303 Creative LLC* involved First Amendment assertions of business owners competing against the rights of LGBTQ+ individuals to be free from discrimination, the particular First Amendment rights at issue there pertained to freedom of speech, not freedom of association.²⁴¹

As such, even after *303 Creative* and *Dobbs*, the freedom of intimate association remains a solid and viable alternative doctrinal home for the personal privacy rights of individuals, one that can be a refuge for the protection of intimate relationships, while the future of substantive due process is precariously uncertain.

V. CONCLUSION

For people in intimate romantic, sexual, and familial relationships, including members of same-sex couples, the freedom of intimate association can provide a safe haven for personal privacy protections. The Supreme Court has long recognized heightened constitutional protections for intimate relationships, with *Roberts* explicitly naming those protections in its establishment of the freedom for intimate association doctrine. In the years since *Roberts*, however, the freedom of association has been disproportionately represented by claims least deserving of associational protections: those by businesses

process doctrine[.]” (quoting *United States v. Vaello Madero*, 142 S. Ct. 1539, 1545 (2022) (Thomas, J., dissenting)).

²⁴¹ See *supra* notes 204–11 and accompanying text.

and larger groups seeking to exclude others, rather than claims brought by those in the most intimate types of relationships that are, under *Roberts*, supposed to be accorded the highest degree of protection. This country, however, has a long-standing history of respecting the privacy of families and other intimate relationships, and of taking constitutional protections for those relationships seriously.

From historically accepted to modern versions of intimate relationships, the comparable size, selectivity, seclusion and congeniality of the most personal and intimate relationships are entitled to the strongest of constitutional protections. Those in intimate personal relationships should no longer shy away from the claiming of such constitutional rights through the freedom of intimate association doctrine.