

FULFILLING THE FULL PROMISE OF LIBERTY MADE IN *LAWRENCE V. TEXAS*: USING THE FUNDAMENTAL RIGHT TO SEXUAL INTIMACY TO CHALLENGE THE FDA'S POLICY AGAINST BLOOD DONATIONS FROM MEN WHO HAVE SEX WITH MEN

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*In an attempt to curb the spread of HIV, the U.S. government, through the Food and Drug Administration (FDA), bans men who have sex with men (MSM) from donating blood. The policy originated as an emergency response to the HIV/AIDS epidemic of the early 1980s, but is no longer appropriate given healthcare advancements. The policy also unconstitutionally infringes on the fundamental right to sexual intimacy articulated in *Lawrence v. Texas* by treating sex between men as categorically unsafe, stigmatizing MSM based solely on their expression of this right, and disparaging their manner of expressing this right. Rather than engaging in individualized assessments of true transmission risk, which would allow the maximum number of healthy individuals to donate, the FDA uses an overly broad policy, which still permits high-risk but non-MSM donors to give. This policy denies MSM the full promise of the liberty from *Lawrence* by preventing them from living as equal members of their communities.*

*In addition to its direct impact on MSM's lives, the FDA's policy poses multiple important and novel constitutional issues. It provides an opportunity to clarify the fundamental nature of the right in *Lawrence*. It involves conditioning of an individual's rights when that individual seeks to give to his government, inverting the traditional Unconstitutional Conditioning Doctrine's framework. Finally, it exemplifies the need for a restructuring of due process violation analysis to include government action that would not traditionally trigger constitutional review but still infringes on individual liberty.*

In this paper, I first describe the FDA's policy and the actual risk of HIV transmission by blood transfusion posed by sex between men. I then

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discuss the fundamental right to sexual intimacy in Lawrence and how courts have interpreted and applied that right. I draw a parallel between the FDA's donation policy and the military's former "Don't Ask, Don't Tell" policy prohibiting gay men and women from serving in the armed forces. In conclusion, I apply modern constitutional frameworks to the FDA's policy to show it is an unjustifiable infringement on the fundamental right to sexual intimacy.

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INTRODUCTION

In the United States, men who have sex with men (MSM) can adopt children.¹ They can serve openly in our country’s Armed Forces.² As of 2015, they can marry the person whom they love.³ They can do virtually everything that their opposite-sex oriented peers can do. MSM cannot, however, donate blood. This is because the federal government views sexual intimacy between men as inherently high risk and riskier than sex between opposite-sex individuals for transmitting the Human Immunodeficiency Virus (HIV).⁴

This is the Food and Drug Administration’s (FDA) rationale for its policy prohibiting blood donations from MSM. Intended to protect the nation’s blood supply from HIV infection,⁵ the policy exacerbates stigma about gay or bisexual men and HIV. Viewed through a constitutional lens, the FDA bases its discriminatory policy—to categorically deem MSM ineligible to donate—on how these men exercise their fundamental right to sexual intimacy.

In this paper, I argue that policies like the FDA’s violate this fundamental right to sexual intimacy. Although there is debate over whether the Court in *Lawrence v. Texas*⁶—the case that ended anti-

1. See Mollie Reilly, *Same-Sex Couples Can Now Adopt Children in All 50 States*, HUFFINGTON POST (Mar. 31, 2016, 8:26 PM), https://www.huffingtonpost.com/entry/mississippi-same-sex-adoption_us_56fdb1a3e4b083f5c607567f; see also *Foster and Adoption Laws*, MOVEMENT ADVANCEMENT PROJECT (MAP), http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws (last updated Oct. 2, 2017) (showing that same-sex couples may apply for adoption in all states, though some states may limit adoption to couples in legally recognized relationships).

2. See *infra* Part IV (discussing the military’s former “Don’t Ask, Don’t Tell” policy). Note, however, that the government echoed this policy on July 26, 2017, when President Donald J. Trump tweeted that transgender individuals will no longer be allowed to serve in the military. See Julie Hirschfield Davis & Helene Cooper, *Trump Surprises Military with a Transgender Ban*, N.Y. TIMES, July 27, 2017, at A1. But see Dave Philipps, *Judge Blocks Transgender Military Ban*, N.Y. TIMES, Oct. 31, 2017, at A1 (discussing a federal judge’s decision to temporarily block the White House policy barring transgender troops in the military because it is “suspect and likely unconstitutional”).

3. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

4. See FOOD & DRUG ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERVS., REVISED RECOMMENDATIONS FOR REDUCING THE RISK OF HUMAN IMMUNODEFICIENCY VIRUS TRANSMISSION BY BLOOD AND BLOOD PRODUCTS: GUIDANCE FOR INDUSTRY (2015) [hereinafter FDA 2015 GUIDANCE DOCUMENT].

5. *Id.* at 2.

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

sodomy laws in the United States—intended to recognize a right to intimacy that was fundamental, both *Lawrence*'s text and the nearly fifteen years of substantive due process jurisprudence since the case was decided support the right's fundamental nature. I also highlight that some government action may not rise to the level of a traditional rights deprivation, but may still prevent a fundamental right from being fully exercised. I propose that in the wake of *Obergefell v. Hodges*, as the aperture for recognizing liberty rights broadens, so, too, must courts' understandings of what constitutes a violation of those rights. Recognizing the true nature of the right to sexual intimacy and the impact that policies like the FDA's have on that right—and on those who exercise it—has relevance beyond the simple but important act of donating blood. Providing heightened protections to sexual intimacy—and recognizing when those protections are triggered—is as civically important as it is deeply personal.

I proceed in five Parts. In Part I, I discuss the FDA's policy and its history. I also provide statistics about the prevalence of HIV among MSM and information about HIV transmission, generally. In Part II, I explain why the right to sexual intimacy is fundamental. I first review the Court's opinion in *Lawrence*, which articulates this right. I then survey substantive due process jurisprudence in light of the Court's decision in *Obergefell v. Hodges*. I conclude this Part by applying that jurisprudence to the right in *Lawrence* and discussing how subsequent cases have treated it to show that the right to sexual intimacy is, in fact, fundamental. In Part III, I argue that while the FDA's policy is not likely to satisfy traditional due process deprivation standards, this issue demonstrates why a reconsideration of those standards is necessary. I argue that, with the expansion of substantive due process rights recognition suggested in *Obergefell*, so, too, should we recognize novel but important forms of deprivations. In Part IV, I use the military's former "Don't Ask, Don't Tell" policy regarding military service by gay individuals as a case study that parallels the issues in the FDA's MSM policy. I focus on two cases that occurred after *Lawrence* and that addressed the Court's treatment of the right to sexual intimacy in their opinions. Finally, in Part V, I rely on the previous Parts to conduct a heightened scrutiny review of the FDA's MSM policy. I show that heightened scrutiny is appropriate because the right to sexual intimacy is fundamental, and I find that the policy fails both the traditional strict scrutiny standard and an alternative heightened scrutiny standard borrowed from the "Don't Ask, Don't Tell" context. I conclude this paper by discussing the importance of this finding and its implications beyond the scope of blood donation.

I.

MEN WHO HAVE SEX WITH MEN MAY NOT DONATE
BLOOD IN THE UNITED STATESA. *The FDA's Policy Began as an Emergency Response to the
AIDS Epidemic*

Beginning in 1983, the FDA, a federal agency within the U.S. Department of Health and Human Services (HHS), implemented a policy prohibiting blood donations from MSM.⁷ The policy is essentially a screening mechanism, and relies entirely on self-reporting by potential donors.⁸ All potential donors are asked a series of questions prior to donation; for men, one of these questions is whether they have had sex with another man.⁹ If the answer is yes, he is prohibited from donating.¹⁰

The policy was initially enacted as an emergency response to the outbreak of HIV in the 1980s. By 1983, there were 3064 known patients with HIV in the United States, 1292 of whom had died from the virus or resulting illnesses.¹¹ By the end of 1984, the number of cases had more than doubled to 7699, with the death count nearly tripling to 3665.¹² An epidemic was growing. At the time, little was known about HIV other than its prevalence in the gay community.¹³ In its earliest days, the virus was called a gay cancer or gay-related immunodeficiency (GRID).¹⁴ Once a connection between blood and HIV transmission was identified, indefinitely deferring donations from the

7. FDA 2015 GUIDANCE DOCUMENT, *supra* note 4, at 2. Although this is a federal government policy, much of the case law discussed in this paper involves state action under the Fourteenth Amendment's Due Process and Equal Protection Clauses. Since the Supreme Court held in *Bolling v. Sharpe*, 347 U.S. 497 (1954), that the Fourteenth Amendment's Equal Protection Clause also runs against the federal government, the Fifth and Fourteenth Amendments are essentially in lock-step with respect to individual rights and government action. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 803 n.10 (2011) (discussing the Equal Protection Clause's application against the federal government). Accordingly, this paper treats precedents relating to action by the federal and state governments as equally applicable to the FDA policy.

8. See FDA 2015 GUIDANCE DOCUMENT, *supra* note 4, at 12.

9. *Id.* at 13.

10. *Id.* at 14. During the development of this paper, the author, a gay man, attempted to donate blood and was denied in the same manner described here.

11. *History of HIV and AIDS Overview*, AVERT, <https://www.avert.org/professionals/history-hiv-aids/overview> (last updated Sept. 25, 2017).

12. *Id.*

13. See generally *A Timeline of HIV/AIDS*, AIDS.GOV, <https://files.hiv.gov/s3fs-public/aidsgov-timeline.pdf> (last visited Mar. 12, 2017).

14. Lawrence K. Altman, *New Homosexual Disorder Worries Health Officials*, N.Y. TIMES (May 11, 1982), <http://www.nytimes.com/1982/05/11/science/new-homosexual-disorder-worries-health-officials.html>.

community in which the virus was most prevalent—gay men—seemed to be an appropriate emergency measure.¹⁵ Decades later, even though the medical community’s ability to prevent and treat HIV has improved to a point where the virus is readily detectable in as few as nine days,¹⁶ and where contracting HIV/AIDS is no longer a death sentence,¹⁷ the FDA policy still remains in place.

The phrase “men who have sex with men” is used to describe same-sex interactions without imputing a sexual orientation to the participants. In effect, MSM includes all gay and bisexual men, some transgender men,¹⁸ and men who identify as straight but have had sex with other men. For this reason, the FDA policy is often referred to as the “gay blood ban,” since gay and bisexual men are virtually guaranteed to be MSM and affected by the policy.¹⁹

The policy—technically a non-binding guidance document, rather than a binding agency rule²⁰—euphemistically uses the term

15. FDA 2015 GUIDANCE DOCUMENT, *supra* note 4, at 2 (“The understanding of risk factors for AIDS in 1983 informed the first blood donor deferral policy, which at the time was the only way to reduce the chance of transmission AIDS through blood product transfusion.”).

16. *Id.* at 9.

17. Unlike the early days of HIV, when diagnoses came with limited life expectancies, individuals living with HIV/AIDS today can maintain their health by taking a combination of drugs called antiretroviral therapy (ART), which also reduces the risk of transmitting the virus to sexual partners. See *HIV Treatment*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/actagainstaids/campaigns/hivtreatmentworks/stayincare/treatment.html> (last updated Feb. 8, 2016).

18. The policy allows transgender individuals to self-identify their gender when determining whether they classify as MSM. See *Eligibility Criteria by Topic*, AM. RED CROSS [hereinafter *Eligibility Criteria*], <http://www.redcrossblood.org/donating-blood/eligibility-requirements/eligibility-criteria-topic#lifestyle> (last visited Sept. 28, 2017) (laying out eligibility requirements).

19. See, e.g., Ed Coffin, *The FDA Responds to Criticism of “Loosening” Ban on Blood Donations from Gay and Bi Men*, HUFFINGTON POST (Feb. 2, 2016), http://www.huffingtonpost.com/ed-coffin/the-fda-responds-to-criti_b_6401460.html; Vann R. Newkirk II, *The Bigotry of Gay-Blood-Donation Bans*, ATLANTIC (June 13, 2016), <https://www.theatlantic.com/politics/archive/2016/06/homophobia-hiv-blood-ban-orlando-shooting/486818/>.

20. The FDA’s guidance documents are meant to provide regulated industries with a better understanding of existing regulations or of the agency’s policy or approach to a certain issue. These documents may go through public notice-and-comment, but do not establish any legally enforceable rights or responsibilities and are not legally binding on the public, the way that a rule issued under the Administrative Procedure Act would. ARTHUR N. LEVINE, FDA ENFORCEMENT MANUAL app. IV (Thompson Info. Servs. ed. 2015). Although the documents are not legally binding, the blood bank community treats this FDA guidance document as a requirement to which it must adhere. See Press Release, AABB et al., Joint Statement Regarding the U.S. Food and Drug Administration’s Guidance “Revised Recommendations for Reducing the Risk of Human Immunodeficiency Virus Transmission by Blood and Blood Products” Which Outlines the Deferral Criteria for Men Who Have Had Sex with Men (MSM)

“deferral” rather than “prohibition” or “ban” for MSM donors.²¹ For nearly three decades the MSM deferral was “indefinite”—another euphemism for “lifetime”—and remained mostly unchanged.²² In 2015, the FDA went through notice-and-comment rulemaking and issued a new guidance document, reducing the deferral period for MSM from indefinite to twelve months from the last time a man had sex with another man.²³ This change had virtually no effect for gay and bisexual men, who must either remain celibate or refrain from the simple but powerful act of donating blood.

MSM are listed as one of ten deferral categories in the current FDA guidance document. The following three categories are still subject to indefinite deferrals:

- individuals who have tested positive for HIV;
- individuals who have ever exchanged money or drugs for sex; and
- individuals who have ever engaged in non-prescription injection drug use.²⁴

The following categories of individuals are deferred for twelve months from the last time they engaged in their categorical conduct, and are presented in the same order as they appear in the FDA’s guidance document:

- individuals who have had sex with a person who has engaged in any of the conduct resulting in indefinite deferral;
- individuals who have received an allogeneic transfusion of Whole Blood or blood components;
- individuals who have had contact with another individual’s blood through percutaneous inoculation, open wounds, or mucous membranes;
- individuals who have received a tattoo or piercing, unless that individual received the tattoo or piercing in a state that regulates those activities;
- individuals with a history of syphilis or gonorrhea;

(Dec. 2016), http://www.americasblood.org/media/65991/msm_-_joint_statement_-_final_-_121316.pdf.

21. See FDA 2015 GUIDANCE DOCUMENT, *supra* note 4; *Eligibility Criteria*, *supra* note 18 (calling the policy a “lifetime deferral”). Beginning in 1985, the FDA specified that any man who had sex with a man, even once, since 1977, should be indefinitely deferred. FDA 2015 GUIDANCE DOCUMENT, *supra* note 4, at 2.

22. In 1992, the FDA amended its guidance to indefinitely defer other groups associated with HIV transmission, such as commercial sex workers and intravenous drug users. FDA 2015 GUIDANCE DOCUMENT, *supra* note 4, at 2.

23. *Id.* at 14.

24. *Id.*

- a man who has had sex with a man;
- a female who has had sex with a man who has had sex with a man.²⁵

MSM are grouped with conduct involving needles, sexually transmitted diseases, and direct contact with blood or HIV-positive individuals. Of these ten categories, MSM is the only one that has direct correlations with an immutable characteristic like sexual orientation or gender, except the “women who have sex with men who have sex with men” category, which itself relies on the MSM category.

B. Statistics About MSM and HIV Show That the Risk of Transmission by Sexual Intercourse Is Low

It is true that there is a high prevalence of HIV in the gay community relative to the general population. The Centers for Disease Control and Prevention (CDC)—also a component of HHS—estimates that, in 2015, gay and bisexual men represented eighty-two percent of new HIV cases in the United States among males aged thirteen and older, which was sixty-seven percent of all new diagnoses.²⁶ Of the 615,400 gay and bisexual men living with HIV in 2014, seventeen percent were unaware of their status.²⁷ The FDA, in its 2015 guidance document, wrote that, “the risk of HIV among MSM is more than twenty-fold higher than that of men who have sex with multiple female partners and women who have sex with multiple male partners.”²⁸ The FDA uses this to suggest a higher risk of transmission by transfusion from donations made by MSM than non-MSM, and is the justification for the FDA’s policy.²⁹

Prevalence in the community, however, is only one aspect of the actual HIV risk. Since the policy is ostensibly intended to keep HIV-positive men from donating, and it categorically bars MSM, it assumes no MSM may safely donate. Rather than make case-by-case determinations, the FDA policy is a blanket prohibition against MSM. Reviewing how HIV is transmitted and MSM’s varying transmission risks shows that the risk of HIV transmission for any one MSM is low and that such a broad prohibition is unwarranted.

For MSM engaging in unprotected anal sex, the risk of infection for an HIV-negative insertive partner—the “topping” or “top” part-

25. *Id.* at 14–15.

26. *HIV Among Gay and Bisexual Men*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hiv/group/msm/index.html> (last updated Sept. 27, 2017).

27. *Id.*

28. FDA 2015 GUIDANCE DOCUMENT, *supra* note 4, at 10.

29. *See generally id.*

ner—with an HIV-positive receptive partner—the “bottom”— is 0.11% if the top is circumcised and 0.62% if he is uncircumcised; that is, respectively, 1 in 909 sexual encounters and 1 in 161 sexual encounters.³⁰ For an HIV-negative bottom having sex with an HIV-positive top—who ejaculates inside his partner—the risk is higher, at 1.43% or 1 in 70 sexual encounters.³¹ These statistics are based on anal sex practiced without any safe-sex considerations, such as condoms or medication like PrEP and PEP.³² HIV-positive and negative individuals practicing safe-sex presumably have significantly lower risks of infection, and thus pose a lower risk of transmission by transfusion.

The FDA’s definition of sex also belies the true risk of transmission by sexual intimacy. The CDC describes anal sex as the riskiest sexual behavior for infection and transmission of HIV, followed by vaginal sex, with “activities like oral sex, touching, and kissing carry[ing] little to no risk.”³³ The FDA’s guidance document, however, includes anal, oral, and vaginal sex in its single, broad definition of “sex” in “men who have sex with men” without regard for the variance in transmission rates between these forms of contact or for how the use of protection may reduce these rates.³⁴ All three of these forms of sexual intimacy have low risks of transmission, but treating vaginal and oral sex, which have a much lower risk,³⁵ as the same in kind as anal sex draws a false equivalency.

These statistics reflect the sexual activity of MSM having sex with HIV-positive partners or with one or more partners of unknown status. For MSM in monogamous relationships in which both partners are HIV-negative, the risk of HIV transmission is zero percent. Using more precise screening questions could therefore distinguish between

30. Trenton Straube, *Against All Odds: What Are Your Chances of Getting HIV in These Scenarios?*, Poz (Mar. 26, 2014), <https://www.poz.com/article/HIV-risk-25382-5829>.

31. *Id.* If the HIV-positive top does not ejaculate inside the bottoming partner, the risk is lowered to 1 in 154 sexual encounters. *Id.*

32. PrEP (pre-exposure prophylactic) and PEP (post-exposure prophylactic) are medications that HIV-negative individuals can take to reduce their risk of infection. PrEP is taken daily as a preventative measure and PEP is taken as emergency medication upon exposure. See *PEP and PrEP*, GMHC, <http://www.gmhc.org/prep> (last visited Mar. 15, 2017).

33. *Anal Sex and HIV Risk*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hiv/risk/analsex.html> (last updated Oct. 27, 2016).

34. FDA 2015 GUIDANCE DOCUMENT, *supra* note 4, at 13 n.6.

35. Oral sex, for both individuals, has a negligible risk, whereas vaginal sex has a risk of 0.0004% for men and 0.0008% for women. *HIV Risk Behaviors*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html> (last updated Dec. 4, 2015).

low risk and higher risk sex between MSM and could identify high-risk non-MSM donors.

The FDA acknowledges that when MSM potential donors self-report their HIV status, they do so reliably. In its 2015 guidance document, the agency cited a study showing the prevalence of HIV-infected blood from self-reporting MSM donors as 0.25%, as compared to 11–12% among the general MSM population.³⁶ This suggests that potential donors have a greater awareness of their HIV status than non-donors. Since the ban is already reliant on self-reporting of MSM status, a shift to self-reporting of HIV status would not represent a dramatic change in procedure.³⁷

There are two final important points which bear on this issue. First, all blood is tested post-donation for a variety of infections, including HIV,³⁸ and second, the current risk of transmission by transfusion is 1 in 1.47 million, which is significantly less likely than the rate of 1 in 2500 prior to HIV testing.³⁹ The means of effectively screening donated blood are already in place. In its guidance document, the FDA shares that no transmission of HIV has been documented through “U.S.-licensed plasma-derived products in the past two decades.”⁴⁰ This provides an important backdrop to the FDA’s policy.

However, in response to claims that post-donation testing alone would be a sufficient precaution to allow MSM to donate blood, the FDA concludes in its 2015 policy that post-donation testing alone “could potentially” allow an increase in the rate of transmission by transfusion.⁴¹ Despite the fact that there is only a nine-day window period during which recent HIV infections may be undetected by the nucleic acid testing method that the agency uses, and despite the low probability that someone who has been recently infected—which is itself a low probability—will decide to donate during that window

36. FDA 2015 GUIDANCE DOCUMENT, *supra* note 4, at 6.

37. The FDA’s Guidance Document provides questions for blood donation organizations to include in their donor screening questionnaire. See *Revised Recommendations for Reducing the Risk of Human Immunodeficiency Virus Transmission by Blood and Blood Products: Questions and Answers*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/biologicsbloodvaccines/bloodbloodproducts/questionsaboutblood/ucm108186.htm> (last updated Dec. 21, 2015) (discussing blood donation organizations’ implementation of FDA guidelines).

38. *Infectious Disease Testing*, AM. RED CROSS, <http://www.redcrossblood.org/learn-about-blood/blood-testing> (last visited Sept. 28, 2017); *What Happens to Donated Blood?*, AM. RED CROSS, <http://www.redcrossblood.org/learn-about-blood/what-happens-donated-blood> (last visited Sept. 28, 2017).

39. FDA 2015 GUIDANCE DOCUMENT, *supra* note 4, at 2.

40. *Id.*

41. *Id.* at 9.

period, the FDA asserts that the approximately 50,000 new HIV infections that occur each year in the United States could result in an increase in infected donations.⁴² The document raises and dismisses three alternative testing procedures as, respectively, overly burdensome,⁴³ unreliable,⁴⁴ or insufficiently supported by data.⁴⁵

The FDA's discussion of alternative procedures is not exhaustive. For example, in finding that one alternative is overly burdensome and costly, the FDA implicitly places cost-saving over inclusivity. Further, if the government is willing to explicitly entertain such a cost-benefit analysis, it should also weigh the benefits of the estimated increase in donations that would result from lifting the ban against the costs of testing and the extremely low chance that one blood recipient will be infected by an HIV-positive donation that is not caught during testing. It engages in no such analysis.

The FDA policy uses MSM status as a proxy for transmission risk because of the prevalence of new HIV infections in that population.⁴⁶ This is an overly broad proxy. Sex between men is not inherently riskier than sex between opposite-sex individuals—a man and a woman face similar risks when they have sex with an HIV-positive top⁴⁷—nor are the MSM-specific risks difficult to protect against. Rather, the behavior of only some men who have sex with men poses a high risk of transmission, though in absolute terms the risk is still low, at less than two percent.⁴⁸ These statistics suggest that the highest HIV risk to MSM comes from engaging in unprotected anal sex⁴⁹ with

42. *Id.*

43. *Id.* at 10 (describing pre-donation testing as logistically complex).

44. *Id.* (describing individual donor risk assessment as unreliable due to high rates of infidelity between sexual partners, of both same and opposite sex).

45. *Id.* (discussing the lack of data on deferral periods shorter than one year).

46. *See id.* at 4 (discussing rates of new infection among MSM).

47. While there are fewer studies of the risk from anal sex between men and women, it is estimated that the per-act risk of anal intercourse for women is thought to be around ten times higher than the per-act risk for vaginal intercourse, which suggests a risk of about 0.8% or 1 in 125. The risk for bottom men, with ejaculation, is approximately 0.65% or 1 in 154. These data are comparable, and even suggest that anal sex creates a higher risk for women than for men, although it may be practiced less frequently by women. *HIV Risk Levels for the Insertive and Receptive Partner in Different Types of Sexual Intercourse*, AIDS MAP, <https://www.aidsmap.com/HIV-risk-levels-for-the-insertive-and-receptive-partner-in-different-types-of-sexual-intercourse/page/1443490/#item1443493> (last visited Dec. 2, 2017).

48. *See supra* notes 27–32 and accompanying text.

49. HIV can be transmitted through other types of sexual encounters, but anal sex—for the receptive partner—has the highest risk. Oral sex, for both individuals, has a negligible risk, whereas vaginal sex has a risk of 0.0004% for men and 0.0008% for women. *HIV Risk Behaviors*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html> (last updated Dec. 4, 2015).

partners of unknown status in a community with a higher rate of HIV than the general population. It is important to remember, too, that all blood is tested post-donation. Instead of identifying and focusing on actual and specific risk factors—such as unprotected sex with HIV-positive partners or with partners of unknown HIV-status—which could help identify risky individuals, the FDA makes categorical conclusions about MSM behavior that it uses as the basis for its donation policy.

C. Denying Blood Donations Based on Donors' Sexual Conduct Is an Important Social and Constitutional Issue

The FDA's MSM blood donation policy involves four important questions about social inclusion and constitutional rights, each with significant implications for MSM and non-MSM alike. First, this policy—which turns on sexual conduct—raises the same issue as *Bowers v. Hardwick*⁵⁰ and *Lawrence v. Texas*⁵¹: is there a fundamental substantive due process right to sexual intimacy? Acknowledging a fundamental right to sexual intimacy has significant implications for gays, lesbians, and bisexuals, as well as straight-identifying MSM. Although the *Obergefell* Court, while proclaiming marriage equality, cited the *Lawrence* opinion as a change in the perception of gays from “outlaw to outcast,”⁵² recognizing same-sex sexual conduct as an equal form of sexual intimacy with opposite-sex sexual conduct would further welcome gays in from the social and legal fringes.

Second, the FDA policy involves the unique situation in which an individual seeks to give to society, by way of the government, and the government rejects his offer.⁵³ Here, MSM seek to donate blood that would be used to help sick individuals, but the FDA prohibits the donation. While there is a well-developed doctrine of unconstitutional conditions that prevents the government from conditioning the grants or benefits *it gives* on the waiver of some constitutional right by the recipient,⁵⁴ there is no clear reciprocal doctrine for when the govern-

50. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

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

52. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

53. Barbara M. Masser et al., *The Psychology of Blood Donation: Current Research and Future Directions*, 22 *TRANSFUSION MED. REVS.* 215, 215 (2008) (internal citations omitted) (describing blood donation as “an odd kind of gift” given by “life’s best gift givers”).

54. See generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 *HARV. L. REV.* 1413 (1989); see also *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (internal citation omitted) (“For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to ‘pro-

ment *receives from* an individual and how it may or may not condition the giver's rights or behavior. This doctrinal gap exposes rights-holders to the same deprivation as those facing traditional unconstitutional conditioning, but in a context that impacts fewer people.

Third, the nature of blood donation elevates this issue from one of purely private and individual action to that of civic importance, bordering on civic duty. There are few benefits that donors receive in return for giving blood. The literature on blood donation psychology suggests that these benefits consist of improved mood and recognition within one's community, rather than specific returns or material benefits.⁵⁵ Still, blood donation is a simple but powerful social activity and contribution. The various organizations that form America's blood donation and blood bank infrastructure consistently stress the ongoing need for donations—even proclaiming blood emergencies⁵⁶—and the important role that donors play. Blood drives and other opportunities to donate are a plea for individuals to serve as caregivers for society at large. Donations are distributed to patients anonymously, such that a donor cannot pick and choose to whom he gives, which reinforces blood donation's civic tenor.⁵⁷ The FDA's policy robs the men it affects of the opportunity to participate in this activity as equal citizens alongside non-MSM, and does so based on an overbroad generalization. I discuss the importance of this deprivation in Part III, *infra*,

duce a result which (it) could not command directly.' Such interference with constitutional rights is impermissible.") (alteration in original) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

55. See, e.g., Eamonn Ferguson et al., *Blood Donation Is an Act of Benevolence Rather than Altruism*, 27 HEALTH PSYCH. 327, 327–28 (2008) (proposing that donors receive a perceived benefit such that donation is not truly altruistic). The American Red Cross lists five benefits of donating on its website: "it feels great to donate!"; free juice and cookies; most individual donors can spare the blood, but there is a need for donations; donors ensure there is blood available when it is needed; and "you will be someone's hero—in fact, you could help save more than one life with just one donation." *Donating Blood*, AM. RED CROSS, <http://www.redcrossblood.org/donating-blood> (last visited Apr. 30, 2017).

56. See Press Release, Am. Red Cross, Red Cross Issues Emergency Call for Blood and Platelet Donations Amid Severe Winter Blood Shortage (Jan. 4, 2017) (available at <http://www.redcross.org/news/press-release/Red-Cross-issues-emergency-call-for-blood-and-platelet-donations-amid-severe-winter-blood-shortage>); Press Release, N.Y. Blood Ctr., NYBC Urges Public to Donate at Blood Drives, Center and Mobile Units to Replenish the Community's Critically Low Blood Supply (June 14, 2016), <http://nybloodcenter.org/about-us/press-room/new-york-blood-center-declares-blood-emergency/>.

57. See WORLD HEALTH ORG., CTRS. FOR DISEASE CONTROL & PREVENTION & INT'L FED'N OF RED CROSS & RED CRESCENT SOC'YS, BLOOD DONOR COUNSELING: IMPLEMENTATION GUIDELINES (2014) (discussing ethical and legal considerations in blood donor counselling related to donor privacy).

including the social, psychological, and physical risks that the FDA policy poses for MSM.

Finally, the FDA policy presents a novel constitutional problem because it does not fit within the traditional due process framework,⁵⁸ but should still be considered a constitutional deprivation. By using sexual conduct to categorically exclude them from blood donation, the government disparages and burdens MSM's exercise of the fundamental right to sexual intimacy. That engaging in constitutionally protected same-sex sexual intimacy triggers government discrimination raises constitutional red flags, even though blood donation itself is not a constitutional issue. While the policy does not prevent any man from having sex with men, it uses constitutional conduct to condition non-constitutional activity—donating blood—and in doing so prevents MSM from achieving “the full promise of liberty” called for by the Constitution.⁵⁹ I argue in Part III, *infra*, that this is sufficient to elicit constitutional review, and I therefore use traditional due process terminology, such as deprivation, throughout this paper.

Each of these points—the fundamental nature of the right to intimacy, the unique unconstitutional conditioning of an individual's gift to society and the government, the deeply civic nature of donation itself, and the implications that this conditioning has on MSM's fundamental rights—requires that the government justify its MSM blood donation policy.

In this paper, however, I do not claim that there is a positive right to donate blood. As Justice Thomas discusses in his dissent in *Obergefell*, positive rights are rights to action by the government or some other actor, whereas negative rights provide “freedom from” interference by others in private lives and activities.⁶⁰ The U.S. Constitution has traditionally been used to protect negative rights by limiting the government's ability to violate its citizens' privacy, not to require acts by the government.⁶¹ Professor Kenji Yoshino draws a clear distinction between the Court's approach to positive and negative rights using its decisions in *Cruzan v. Director, Missouri Department of Health*,⁶² and *Washington v. Glucksberg*.⁶³ The Court in *Cruzan* was

58. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2632 (2015) (Thomas, J., dissenting) (“To invoke the protection of the Due Process Clause at all—whether under a theory of ‘substantive’ or ‘procedural’ due process—a party must first identify a deprivation of ‘life, liberty, or property.’”).

59. *Id.* at 2600 (majority opinion).

60. *Id.* at 2635 (Thomas, J., dissenting).

61. See, e.g., Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 159 (2015).

62. 497 U.S. 261 (1990).

willing to recognize a negative right to refuse life-giving care, but in *Glucksberg* the Court rejected a positive right to assisted suicide.⁶⁴ As Yoshino wrote, “the freedom *from* being forced to stay alive was distinguished from the freedom *to* choose death.”⁶⁵ The ban at issue here does not violate a positive right to donate blood because no such right has been recognized; rather, it represents an infringement onto the negative fundamental right to sexual intimacy.

There are few recent examples of the judiciary taking up the issues discussed here, particularly the individual-as-donor and government-as-recipient dynamic and inverted unconstitutional conditioning. One such example is the military’s former “Don’t Ask, Don’t Tell” policy, discussed in Part IV, *infra*. As with the FDA’s, this policy turned on the sexual conduct of those who volunteered to serve their country, which is certainly a “gift” to society. “Don’t Ask, Don’t Tell” therefore provides a uniquely relevant case study for the MSM policy. By reviewing cases that were decided in the wake of the Court’s decision in *Lawrence*—and which directly address the nature of the right to sexual intimacy—I will show that the current MSM and the former “Don’t Ask, Don’t Tell” policies are based on similarly feeble government rationales that fail a heightened level of scrutiny.

II.

THERE IS A FUNDAMENTAL RIGHT TO SEXUAL INTIMACY

The FDA’s MSM policy infringes upon the right to sexual intimacy, which the Court most thoroughly discussed first in *Bowers v. Hardwick* and then in *Lawrence v. Texas*. The *Bowers* Court, considering a Georgia law criminalizing sodomy, held that there was no fundamental right to homosexual sodomy and upheld the law under rational-basis review.⁶⁶ The *Lawrence* Court, however, reversed *Bowers* and held there is a right to sexual intimacy and that Texas lacked sufficient justification for criminalizing the protected activity.⁶⁷

After *Lawrence*, many asked an important question about the nature of that right: is it fundamental?⁶⁸ This is a critical question, as due process claims involving fundamental rights receive strict scrutiny,

63. 521 U.S. 702 (1997).

64. Yoshino, *supra* note 61, at 159 (discussing *Cruzan* and *Glucksberg*).

65. *Id.*

66. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

67. *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003).

68. See, e.g., Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1955 (2004) (clarifying the fundamental nature of the liberty right in *Lawrence*); Hannah Hicks, *To the Right to Intimacy and Beyond: A Constitutional Argument for the Right to Sex in Mental*

rather than simply rational-basis review.⁶⁹ Strict scrutiny sets the demanding standard that, to burden a fundamental right, the government action must be justified by a compelling government interest and the action must be narrowly tailored to that interest.⁷⁰ Rational-basis review, however, would simply require that the action be rationally related to a legitimate government interest, a much lower standard.⁷¹ Unlike its equal protection analogue, the due process regime is binary and does not have an intermediate scrutiny standard of review.⁷²

It is worth noting that *Bowers* was making its way to the Court at the same time that the HIV epidemic struck the United States.⁷³ It is also noteworthy that the Court reached a narrow, gay-specific decision, even though the anti-sodomy law in question applied to both same- and opposite-sex individuals.⁷⁴ This was the backdrop against which the *Lawrence* Court made its historic decision, reversing *Bowers* and holding that anti-sodomy laws are unconstitutional.

A. *Lawrence Articulates a Right to Intimacy*

In *Lawrence*, the Court examined a Texas statute that—unlike the law in *Bowers*—criminalized “certain intimate sexual conduct” between two people of the same sex.⁷⁵ At the time, in 2003, four states had the same or similar sodomy laws on the books,⁷⁶ which appeared constitutional under *Bowers*. Specifically, the Court granted certiorari to consider three questions: whether the statute violated the Equal Protection Clause, whether it violated the Due Process Clause, and whether the Court should overrule *Bowers*.⁷⁷ Writing for a five-Justice

Health Facilities, 40 N.Y.U. REV. L. & SOC. CHANGE 621, 632–41 (2016) (discussing a circuit split in interpreting *Lawrence*).

69. See, e.g., *Reno v. Flores*, 507 U.S. 292, 302 (1993).

70. *Id.*

71. *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r*, 194 F. Supp. 3d 818, 831 (S.D. Ind. 2016) (internal citation omitted) (“When a fundamental right is not at stake . . . [i]t is ultimately the plaintiff’s burden to demonstrate that the challenged law lacks a rational relationship with a legitimate government interest . . .”).

72. See *The Supreme Court—Leading Cases*, 106 HARV. L. REV. 163, 211, 219 (1992) (discussing the lack of an intermediate standard for analyzing substantive due process claims and proposing the adoption of such a standard).

73. The *Bowers* opinion was delivered on June 30, 1986, during the first years of the HIV epidemic. See *Bowers v. Hardwick*, 478 U.S. 186 (1986); see also *A Timeline of HIV and AIDS*, *supra* note 13 (noting that the first official reporting of what became known as the AIDS epidemic was in 1981).

74. *Lawrence v. Texas*, 539 U.S. 558, 566 (2003).

75. *Id.* at 562.

76. *Id.* at 573 (noting that thirteen states prohibited sodomy, as in *Bowers*, but only four specified homosexual conduct).

77. *Id.* at 564.

majority, Justice Kennedy focused on the Due Process Clause's liberty guarantee, ultimately determining that the *Bowers* Court had erred in its holding.

Even though the Georgia statute at issue in *Bowers* and the Texas law in *Lawrence* were not identical, the Court chose to revisit its earlier decision rather than distinguish it on that basis. Justice Kennedy was explicit in his rejection of *Bowers*:

The Court began its substantive discussion in *Bowers* as follows:

"The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy"

That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake.⁷⁸

Justice Kennedy continued by describing the conduct at issue in both the Georgia and Texas statutes as "touching upon the most private human conduct, sexual behavior," and as conduct in which "adults may choose to enter . . . and still retain their dignity."⁷⁹ He was clear that "the Constitution [also] allows homosexual persons the right to make this choice."⁸⁰

Although the *Bowers* Court ruled on the more specific right to same-sex sexual intimacy, and the Texas statute outlawed same-sex conduct, the majority in *Lawrence* wrote in terms of sexual intimacy generally, without distinguishing between same- and opposite-sex activity. Justice Kennedy also identified liberty as the source of this constitutional right. Citing the Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, he wrote that "[a]t 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."⁸¹ Engaging in this liberty right could not result in criminalization, as both the Georgia and Texas laws would have, because:

The petitioners are entitled to respect for their private lives. The state cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.⁸²

Justice Kennedy used the constitutional guarantees of privacy and liberty to write that the petitioners—two men who were caught having

78. *Id.* at 566–67 (citation omitted).

79. *Id.* at 567.

80. *Id.*

81. *Id.* at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

82. *Id.* at 578.

consensual sex together in the privacy of Lawrence's home⁸³—had the right to engage in sexual conduct that reflected their existence without government intervention.

Despite this lofty language, Justice Kennedy concluded his opinion with a seemingly low level of scrutiny: “The Texas statute furthers no *legitimate* state interest which can justify its intrusion into the personal and private life of the individual.”⁸⁴ This terminology—legitimate government interest—is associated with the rational-basis standard of review applied to rights that are not considered fundamental.⁸⁵ Although this resulted in confusion after *Lawrence* as to the nature of the right,⁸⁶ the tenor of the liberty and privacy cases that Justice Kennedy cited in his opinion ring of fundamental rights.⁸⁷

Justice O'Connor, concurring in judgment only, wrote separately in *Lawrence* to undertake an Equal Protection Clause analysis. She explicitly applied rational-basis review.⁸⁸ Whereas Justice Kennedy treated the *Bowers* and *Lawrence* statutes as same in-kind, Justice O'Connor distinguished the Texas law for targeting same-sex individuals, and would have left the earlier Georgia decision—which she joined⁸⁹—in place:

83. Although the case centers on the fact that the two plaintiffs, Lawrence and Garner, were caught having sex in violation of the Texas law, there is some speculation that this is a fiction, born at the time of the arrest and perpetuated throughout the trial. See David Oshinsky, *Strange Justice: The Story of Lawrence v. Texas*, by Dale Carpenter, N.Y. TIMES (Mar. 18, 2012), <http://www.nytimes.com/2012/03/18/books/review/the-story-of-lawrence-v-texas-by-dale-carpenter.html> (“‘I thought, ‘My God, we didn’t have sex,’” Lawrence recalled.”).

84. *Lawrence*, 539 U.S. at 578 (emphasis added).

85. See *id.* at 582 (O'Connor, J., concurring) (discussing the standard applied in *Bowers*).

86. As recently as March 17, 2017, the Eleventh Circuit granted a rehearing en banc to reconsider its 2014 opinion that upheld a local ban on the sale of sex toys given the Supreme Court's decisions in *Lawrence*, *Windsor*, and *Obergefell*. Flanigan's Enters., Inc. v. City of Sandy Springs, 864 F.3d 1258 (11th Cir. Mar. 14, 2017) (mem.). But see Flanigan's Enters., Inc. v. City of Sandy Springs, 868 F.3d 1248 (11th Cir. 2017) (dismissing the case upon repeal of the ban in question).

87. See, e.g., *Lawrence*, 539 U.S. at 565 (first citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), and then citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)); *id.* at 565–66 (discussing *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Roe v. Wade*, 410 U.S. 113 (1973), and *Carey v. Population Servs. Int'l*, 431 U.S. 678 (2010)); *id.* at 573 (discussing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)) (“The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”).

88. *Id.* at 580 (O'Connor, J., concurring).

89. *Bowers v. Hardwick*, 478 U.S. 186, 187 (1986).

The statute at issue here makes sodomy a crime only if a person “engages in deviate sexual intercourse with another individual of the same sex.” Tex. Penal Code Ann. § 21.06(a) (2003). Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by § 21.06.⁹⁰

From this, Justice O’Connor determined that the only government interest at play in Texas was moral disapproval of homosexuality.⁹¹ She wrote: “Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’”⁹²

Justice O’Connor did not engage in a substantive due process review of the Texas law—thereby side-stepping the question of whether there is a fundamental right to sexual intimacy—but warned that “so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society.”⁹³ This reflects her preference for the political system, not the judiciary, as a means of correcting bad law: by enforcing equal application of existing laws, the Court could encourage disgruntled citizens to exercise their political rights to overturn bad laws.

Joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia dissented, disapproving in large part of the manner by which the Court overturned *Bowers*. He argued that although the majority overruled the outcome of *Bowers*⁹⁴—that anti-sodomy laws are constitutional—the Court ignored the underlying question presented in that case: whether there is a fundamental right to engage in homosex-

90. *Lawrence*, 539 U.S. at 581.

91. *Id.* at 582.

92. *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)). In response to Texas’s argument that the law discriminated against homosexual conduct, not homosexual people, the Justice wrote:

While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas’ [sic] sodomy law is targeted at more than conduct. It is instead directed towards gay persons as a class.

Id. at 583.

93. *Id.* at 584–85.

94. The Justice criticized the majority for overturning *Bowers* without following the traditional approach to *stare decisis* used in *Casey*. See *id.* at 587–88 (Scalia, J., dissenting).

ual sodomy.⁹⁵ Rather than attack the premise of substantive due process protections,⁹⁶ Justice Scalia explained that only *fundamental* rights, as determined by the test in *Washington v Glucksberg*,⁹⁷ warrant heightened protections, and that the Court in *Lawrence* failed to establish homosexual sodomy as a fundamental right.⁹⁸ He rejected the majority's discussion of an "emerging awareness" of liberty with respect to "matters pertaining to sex"⁹⁹ in favor of what he described as a long history of laws against sodomy in general, including opposite-sex sodomy.¹⁰⁰ In short, Justice Scalia did not consider sodomy—let alone sodomy between same-sex individuals—worthy of heightened scrutiny. Despite Justice O'Connor's concurrence, he concluded that "majoritarian sexual morality" was a permissible government interest suitable to survive a rational-basis test.¹⁰¹

Justice Scalia was also quick to dismiss Justice O'Connor's Equal Protection Clause analysis as incorrectly using a standard of review that is something more than rational-basis review.¹⁰² First, he said she was incorrect to claim discrimination of any kind, since the same-sex restriction applied equally to men and women.¹⁰³ He refused to consider the targeting of a conduct that is associated with a group of people—here, same-sex sodomy with gays and lesbians—as intentional discrimination against those people.¹⁰⁴ In the alternative, he ar-

95. *Id.* at 586.

96. Justice Thomas, who joined Justice Scalia's dissent, wrote separately, in two paragraphs, to make clear that he refused to recognize rights that are not explicitly enumerated in the Constitution, even though he considered the Texas law to be "uncommonly silly." *Id.* at 605–06 (Thomas, J., dissenting).

97. 521 U.S. 702 (1997); see also *infra* notes 145–156 and accompanying text.

98. *Lawrence*, 539 U.S. at 592–94 (Scalia, J., dissenting). The Justice wrote: The Court today does not overrule [the] holding [in *Bowers*.] Not once does it describe homosexual sodomy as a "fundamental right" or "fundamental liberty interest," nor does it subject the Texas statute to strict scrutiny. Instead, having failed to establish that the right to homosexual sodomy is "deeply rooted in this Nation's history and tradition," the Court concludes that the application of Texas's statute to petitioners' conduct fails the rational-basis test, and overrules *Bowers*' holding to the contrary.

99. *Id.* at 597–98 (citing *id.* at 572 (majority opinion)).

100. *Id.* at 595–96 (Scalia, J., dissenting).

101. *Id.* at 599.

102. Justice Scalia also criticized Justice O'Connor for suggesting a "more searching form of rational basis review" and then failing to precisely articulate what that review is and citing, in his opinion, cases that suggest any laws "exhibiting a desire to harm a politically unpopular group are invalid *even though* there may be a conceivable rational basis to support." *Id.* at 601 (internal citation omitted).

103. *Id.* at 599–600.

104. *Id.* at 600–01 (arguing that since the law applies to gay and straight men and women—men are as prohibited from engaging in sodomy with other men as women

gued that even if this were discrimination on the basis of sexual orientation, that would garner only rational-basis review, and that the law would still be justified under that level of scrutiny, “which [the Court’s] cases show is satisfied by the enforcement of traditional notions of sexual morality.”¹⁰⁵

As reflected in the Justices’ opinions, the status of sexual intimacy after *Lawrence* was not clear.¹⁰⁶ A majority of the Court in *Lawrence* struck down a law that criminalized same-sex sodomy on the grounds that it violated a constitutional liberty interest, but then applied something like rational-basis review. Further, as Justice Scalia’s dissent noted, the majority acted as if the right to intimacy is fundamental, but did not apply the established test for identifying fundamental rights:

Most of the rest of today’s opinion has no relevance to its actual holding—that the Texas statute “furthers no legitimate state interest which can justify” its application to petitioners under rational-basis review. *Ante*, at 2484 (overruling *Bowers* to the extent it sustained Georgia’s antisodomy statute under the rational-basis test). Though there is discussion of “fundamental proposition[s],” *ante*, at 2477, and “fundamental decisions,” *ibid.*, nowhere does the Court’s opinion declare that homosexual sodomy is a “fundamental right” under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a “fundamental right.”¹⁰⁷

Justice Scalia was technically correct, but his critique sacrificed substance for form. In his view, the fact that the majority did not employ the correct, more stringent standard for fundamental rights foreclosed the possibility that the Court viewed the right as fundamental. To rely so heavily on the applied level of scrutiny in discerning whether a right is fundamental puts the cart before the horse. A fundamental right that fails the hyper-deferential rational-basis review is almost certain to also fail the stringent strict scrutiny standard. If the Court had upheld Texas’s anti-sodomy law under rational-basis review, that

are with other women—it does not discriminate against those groups). Justice Scalia also defends the “equal application” by citing its usage in state marriage laws: Men are equally prohibited from marrying men as women are from women, so there cannot be an equal protection claim. *Id.* at 600. Since *Obergefell v. Hodges* made clear that same-sex couples share in the fundamental right to marry, this argument no longer carries any weight.

105. *Id.* at 601.

106. See, e.g., Cook v. Gates, 528 F.3d 42, n.5–6 (1st Cir. 2008) (discussing some courts and commentators that read *Lawrence* as requiring rational-basis review and others as having recognized a protected liberty requiring strict scrutiny).

107. *Lawrence*, 539 U.S. at 587 (Scalia, J., dissenting).

would have been a strong indication that the right to sexual intimacy is not fundamental, but Texas's failure at that level does not preclude the right from being fundamental.

Put differently, and assuming the right to sexual intimacy is fundamental, the Court should expect the anti-sodomy law to fail a rational-basis review, whereas we would expect the law to survive if the right in question were not fundamental. There is, therefore, nothing extraordinary about the outcome of the majority's application. The majority may have erred in applying the lower standard, but its mistake is not as fatal as Justice Scalia suggested. At most, the *Lawrence* opinion leaves open the question of whether the law would have survived a traditional strict scrutiny analysis.

Further, the Justice was too quick to label the *Lawrence* majority's standard as rational-basis review. True, Justice Kennedy wrote that the Texas statute "furthers no *legitimate* state interest which can *justify* its intrusion into the personal and private life of an individual."¹⁰⁸ Justice Scalia's dissent harps on the "legitimate state interest" language to show that the Court applied rational-basis review, since it is typical of that standard.¹⁰⁹ He did not draw attention, however, to the "which can justify" portion of the standard applied in *Lawrence*, which is not typical of rational-basis review and is more similar to the burdens associated with heightened scrutiny. While it may be unclear which standard Justice Kennedy applied, the standard is not traditional rational basis, as Justice Scalia claimed.

Finally, Justice Scalia's continued focus on the right to "homosexual sodomy"¹¹⁰ downplays one of the most important components of the majority opinion. In comparing the *Bowers* and *Lawrence* decisions, with their different underlying statutes, the majority implied that the right it discussed was the more general right to intimacy rather than the more specific right to homosexual sodomy. Although Justice Kennedy was not explicit on this point, he was clear at the conclusion of his opinion that Justice Stevens's dissent in *Bowers* should have governed in that case.¹¹¹ In *Bowers*, Justice Stevens repeatedly emphasized the Court's error in separating same-sex sodomy from opposite-sex sodomy, given that the Georgia statute was facially neutral, and that anti-sodomy laws violate a general right to sexual intimacy,

108. *Lawrence*, 539 U.S. at 578 (both emphases added).

109. *Id.* at 586 (Scalia, J., dissenting).

110. *Id.*

111. *Id.* at 560 (majority opinion).

not a same-sex specific right.¹¹² If Justice Kennedy in *Lawrence* endorsed Justice Stevens's dissent in *Bowers*, then what he upheld in *Lawrence* was the more general right to sexual intimacy, not a same- or opposite-sex specific right.

Taken in its totality, despite its lack of specific key phrases or applied frameworks, Justice Kennedy's opinion in *Lawrence* described a fundamental right to sexual intimacy, for same- and opposite-sex individuals, alike.¹¹³ That sexual intimacy is a fundamental right becomes even clearer when viewed through the lens of modern substantive due process. The next section will discuss the current state of this jurisprudence and will then apply it to the right in *Lawrence*.

B. *The Current State of Substantive Due Process Review*

Professor Cass Sunstein has described the Due Process Clause as a backward-looking guarantee of individual rights, as compared to the Equal Protection Clause's forward-looking guarantee of equal treatment by the government.¹¹⁴ This due process guarantee applies not only to the procedural and enumerated rights provided by the Due Process Clauses in the Fifth and Fourteenth Amendments of the Constitution, but also to a series of unenumerated rights, alternatively

112. See *Bowers v. Hardwick*, 478 U.S. 186, 215 (1986) (Stevens, J., dissenting) ("The history of the Georgia statute before us clearly reveals this traditional prohibition of heterosexual, as well as homosexual, sodomy."); *id.* at 218 ("Paradoxical as it may seem, our prior cases thus establish that a State may not prohibit sodomy within 'the sacred precincts of marital bedrooms,' *Griswold*, 381 U.S., at 485, or, indeed, between unmarried heterosexual adults. *Eisenstadt*, 405 U.S., at 453. In all events, it is perfectly clear that the State of Georgia may not totally prohibit the conduct proscribed by § 16-6-2 of the Georgia Criminal Code."); *id.* at 220 ("The Court orders the dismissal of respondent's complaint even though the State's statute prohibits all sodomy; even though that prohibition is concededly unconstitutional with respect to heterosexuals; and even though the State's *post hoc* explanations for selective application are belied by the State's own actions.").

113. The First Circuit in *Cook v. Gates* discussed four reasons why *Lawrence* should be interpreted as recognizing a protected liberty interest: First, doctrinally, Justice Kennedy relied on cases such as *Griswold*, *Eisenstadt*, *Roe*, and *Casey*, each of which recognize a protected liberty interest; second, linguistically, Justice Kennedy's choice of language supports the recognition of such a right; third, *Lawrence* relies on Justice Stevens's *Bowers* dissent, which argues for a fundamental liberty right in overturning that precedent; and fourth, rational-basis review would have been appropriate in the face of morality-based legislation, but not for fundamental rights, which explains why the Court did not employ rational-basis review. 528 F.3d 42, 52-53 (1st Cir. 2008); see also *id.* at 53-54 (discussing why courts in other circuits that interpret *Lawrence* differently are incorrect).

114. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988).

known as “substantive due process rights” or “liberty rights.” It is this latter category that guarantees the right to sexual intimacy.

Griswold v. Connecticut and its progeny are key cases for understanding the right to intimate association in the era of modern substantive due process rights.¹¹⁵ In *Griswold*, the Court struck down a law criminalizing the use of contraception by recognizing a right to marital privacy within the penumbras of the First, Third, Fourth, and Fifth Amendments.¹¹⁶ To recognize unenumerated rights, the Court drew textual support from the Ninth Amendment’s distinction between enumerated rights and “others retained by the people.”¹¹⁷

The concurring Justices in *Griswold* focused not on privacy, but on liberty. Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, rejected the incorporation of the Bill of Rights into the Fourteenth Amendment’s Due Process Clause, but drew on the Bill of Rights’ principles, recognizing that “the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights.”¹¹⁸ Justice Harlan entirely rejected the other Justices’ reliance on the Bill of Rights.¹¹⁹ Instead, he drew on his own dissent in *Poe v. Ullman*,¹²⁰ discussed below, to argue that the Fourteenth Amendment “stands . . . on its own bottom”¹²¹ and that the inquiry should be whether the Connecticut statute “violates basic values implicit in the concept of ordered liberty.”¹²² Finally, Justice White’s concurrence also relied on the liberty guaranteed by the Fourteenth Amendment.¹²³

115. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015) (tracing the right to intimate association from *Griswold* to *Lawrence*).

116. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (describing the conceptions of privacy that emanate from the First, Third, Fourth, and Fifth Amendments).

117. *Id.*; see also Yoshino, *supra* note 61, at 148 (discussing the Ninth Amendment’s textual support for unenumerated rights).

118. *Griswold*, 381 U.S. at 486 (Goldberg, J., concurring).

119. *Id.* at 500 (Harlan, J., concurring) (expressing concern that striking the Connecticut statute under the incorporation of the Bill of Rights limits the Fourteenth Amendment’s own process guarantees).

120. *Poe v. Ullman*, 367 U.S. 497 (1961).

121. *Griswold*, 381 U.S. at 500 (Harlan, J., concurring).

122. *Id.* (internal citation omitted).

123. *Id.* at 502 (White, J., concurring) (“It would be unduly repetitious, and belaboring the obvious, to expound on the impact of this statute on the liberty guaranteed by the Fourteenth Amendment against arbitrary or capricious denials or on the nature of this liberty.”).

Griswold spurred a line of cases that secure unenumerated rights as the fountainhead for modern individual liberties.¹²⁴ Nearly forty years later, in *Lawrence*, Justice Kennedy wrote that, though they are unenumerated, the Framers intended for the rights discussed in *Griswold* to be identified and exercised in their own time:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or of the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have that insight. . . . As the Constitution endures, persons in every generation can [therefore] invoke its principles in their own search for greater freedom.¹²⁵

In addition to questioning whether these unenumerated rights exist, courts and scholars ask, presuming they do exist, how they should be identified. Over time, two tests emerged. The first was articulated by Justice Harlan in his famous dissent in *Poe v. Ullman*,¹²⁶ and the second came from Chief Justice Rehnquist's majority opinion in *Washington v. Glucksberg*.¹²⁷ The former eschews formalism while the latter epitomizes it.

Like *Griswold*, *Poe* concerned the constitutionality of a Connecticut law prohibiting the use of contraception.¹²⁸ Although the case was dismissed on justiciability grounds,¹²⁹ Justice Harlan addressed the merits of the constitutional issue in his dissent:

I consider that this Connecticut legislation . . . violates the Fourteenth Amendment. I believe that a statute making it a criminal offense for married couples to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life.¹³⁰

Acknowledging that this claim relied on "no explicit language of the Constitution," Justice Harlan provided a "framework of Constitutional principles in which . . . the issue must be judged."¹³¹ His framework suggested a balance between respect for history and room for contemporary judgment, stressing the need for flexibility:

124. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2619–20 (2015) (Roberts, C.J., dissenting) (discussing *Griswold* as the first of the cases dealing with the "right to be left alone").

125. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

126. 367 U.S. 497, 539–45 (1961).

127. 521 U.S. 702 (1997).

128. *Poe*, 367 U.S. at 498.

129. *Id.* at 508–09.

130. *Id.* at 539 (Harlan, J., dissenting).

131. *Id.*

Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having 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. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.¹³²

Justice Harlan looked to the historical treatment of rights for support in determining their constitutionality, but, importantly, explicitly rejected the use of a formula in favor of common law sensibility that balances individual liberties against government interests without being "shackled to the past."¹³³ A majority of the Justices in *Griswold* relied on Harlan's dissent in *Poe* in various ways.¹³⁴

Nearly three decades later, however, in *Michael H. v. Gerald D.*,¹³⁵ the Court began to crystalize a more formulaic test for identifying substantive due process rights. The case involved a challenge to a California statute that presumed that a child born to a married woman was the biological child of the woman's husband.¹³⁶ Because Michael H. fathered a child with a woman who was married to Gerald D., California law did not recognize Michael H. as a legal parent.¹³⁷ Writing for a plurality, Justice Scalia concluded that based on a historical review, there was no support for protecting the rights of a natural father with respect to a child conceived with a married woman.¹³⁸ Michael H.'s claim that he had a paternal right protected by the Due Process Clause's liberty interest failed. The Court applied a rational basis standard of review, and upheld the statute.

132. *Id.* at 542.

133. Yoshino, *supra* note 61, at 150 (discussing Justice Harlan's approach in *Poe*).

134. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (recognizing the penumbras around rights in the Bill of Rights); *id.* at 494–95 (Goldberg, J., concurring) (agreeing that liberty emanates from enumerated constitutional guarantees); *id.* at 500 (Harlan, J., concurring) (agreeing with and citing to himself in *Poe*); *id.* at 506 (White, J., concurring) (reflecting on the history of contraceptive sales in Connecticut, as discussed in *Poe*).

135. 491 U.S. 110 (1989).

136. *Id.* at 117–118.

137. *Id.* at 113–19.

138. *Id.* at 111.

Justice Scalia's analysis in *Michael H.* is relevant to our liberty interest inquiries for two reasons. First, he placed heavy reliance on the historical treatment of such fathers, perhaps more than Justice Harlan's dissent advised.¹³⁹ Second, in a footnote which only Chief Justice Rehnquist joined, Justice Scalia suggested the historical analysis of potential fundamental rights should focus on the most specific articulation of the asserted right.¹⁴⁰ He framed Michael D.'s claim as "the natural father's rights vis-à-vis a child whose mother is married to another man," instead of the more general "parenthood," "family relationships," or "emotional attachments in general."¹⁴¹ While tradition may have supported the more general articulations, it undermined the most specific one. Justice Scalia claimed the need for "the most specific tradition" was necessary "if arbitrary decisionmaking is to be avoided."¹⁴² This footnote, which was not part of the Court's binding holding, laid out a more formulaic standard for substantive due process review than Justice Harlan's dissent in *Poe*.

The Court continued to hone this review in *Washington v. Glucksberg*, in which it articulated a specific formula, despite Justice Harlan's contention that "Due Process has not been reduced to any formula."¹⁴³ Respondents in *Glucksberg*—a group of doctors, patients, and non-profit organizations—brought a constitutional challenge to a law prohibiting assisted suicide in the State of Washington. They based their argument on a liberty interest in choosing to end one's life by physician-assisted suicide, as protected by the Fourteenth Amendment's Due Process Clause.¹⁴⁴ Given that physician-assisted suicide was hotly debated in a number of state legislatures at the time, the Court declined to extend its liberty protections under the Due Process Clause, thereby declining to recognize the practice as a fundamental right, since doing so would place the question of whether it merits protection "outside the arena of public debate and legislative action."¹⁴⁵ The Court cautioned that it must "exercise the utmost care" when recognizing fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of [the] Court."¹⁴⁶

139. *Id.* at 124–27.

140. *Id.* at 127–28 n.6.

141. *Id.*

142. *Id.*

143. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

144. *Washington v. Glucksberg*, 521 U.S. 702, 708 (1997).

145. *Id.* at 719–20.

146. *Id.*

The *Glucksberg* Court used a two-pronged approach to identify fundamental substantive due process rights, moving away from Justice Harlan's approach in his dissent in *Poe* and drawing more from Justice Scalia's footnote in *Michael H.* First, rights and liberties protected by the Due Process Clause must objectively be "deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."¹⁴⁷ Second, substantive due process claims must provide a "careful description of the asserted fundamental liberty interest."¹⁴⁸ The Chief Justice, who authored the opinion, was concerned that the Harlan standard from *Poe* would not sufficiently "rein in the subjective elements that are necessarily present in due process judicial review,"¹⁴⁹ and so codified Justice Scalia's levels of generality footnote that the Chief Justice had joined in *Michael H.* within the second prong's careful description requirement.

The *Glucksberg* Court applied the second prong first, in order to frame the respondents' claim in a very specific fashion:

The Washington statute at issue in this case prohibits "aid[ing] another person to attempt suicide" . . . and, thus, the question before us is whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.¹⁵⁰

Having carefully described the asserted right,¹⁵¹ the Court focused on whether that specific right—assisted suicide—is deeply rooted in the nation's history. It explained that almost every state criminalized assisting suicide and that the nation had a long history of protecting life

147. *Id.* at 720–21 (internal citation omitted).

148. *Id.* at 721 (internal citation omitted).

149. *Id.* at 722.

150. *Id.* at 723.

151. The Court rejected respondents' argument that the protected interest was a more general one, which may have had historical support: the liberty to make end-of-life decisions. *Id.* at 722–23. Respondents relied on *Cruzan v. Director of Missouri Department of Health*, 497 U.S. 261 (1990), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), for this claim. *Id.* In *Cruzan*, the Court considered and protected the right to refuse life-sustaining medical treatment based in part on a review of the informed consent doctrine. *Cruzan*, 497 U.S. at 269–85. The same rationale does not apply to assisted suicide. In *Casey*, the Court noted its tradition of interpreting the Due Process Clause to protect "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Casey*, 505 U.S. at 851. The Court in *Glucksberg*, however, clarified that just because many of the rights protected by the Due Process Clause "sound in personal autonomy" does not mean that all personal decisions are fundamental and protected. *Glucksberg*, 521 U.S. at 727. Respondents' claims failed to sufficiently describe the right in question as one with a basis in the nation's history.

and prohibiting suicide, dating back to the colonies.¹⁵² The Court concluded that while there were “serious, thoughtful examinations of physician-assisted suicide,” the nation’s “laws have consistently condemned, and continue[d] to prohibit, assisting suicide.”¹⁵³

Relying on its discussion of the states’ historical opposition to assisted suicide, the Court held that the asserted right was not deeply rooted in the nation’s traditions: “[T]o hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.”¹⁵⁴ Since the first prong is conjunctive, the asserted right in *Glucksberg* failed for lack of historical rooting without reaching an ordered liberty analysis. Finding that the right to assisted suicide was not a fundamental liberty interest under the Due Process Clause, the Court determined that the Washington statute was rationally related to the state’s legitimate interest in the preservation of life and thus survived rational-basis review.¹⁵⁵

The *Glucksberg* Court’s two-pronged test became the dominant means for assessing novel substantive due process claims.¹⁵⁶ There was, however, one notable instance in which the Court omitted the test in its majority opinion during a rights analysis: *Lawrence v. Texas*. Still, the test from *Glucksberg* remained the primary means of determining fundamental substantive due process rights for nearly two decades.¹⁵⁷

Despite the *Glucksberg* test’s apparent entrenchment in substantive due process jurisprudence, the Court seemed to veer away from that formulaic approach in its 2015 decision, *Obergefell v. Hodges*, which recognized marriage as a fundamental right available to all individuals, including same-sex couples.¹⁵⁸ Justice Kennedy, for the Court, wrote that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex

152. *Glucksberg*, 521 U.S. at 710–16.

153. *Id.* at 719.

154. *Id.* at 723.

155. *Id.* at 728.

156. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2621 (2015) (Roberts, C.J., dissenting) (describing *Glucksberg* as “the leading modern case setting the bounds of substantive due process”).

157. See Brian Hawkins, Note, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409, 411 (2006) (discussing surveys that show *Glucksberg* as the dominant means of Due Process analysis in the post-*Lawrence* era); *id.* at 426 (explaining that 71.5% of surveyed cases use the *Glucksberg* “history and tradition” inquiry in substantive due process decisions).

158. *Obergefell*, 135 S. Ct. at 2608.

may not be deprived of that right and that liberty.”¹⁵⁹ Note that the Justice did not identify a right to same-sex marriage, separate from the historic practice of opposite-sex marriage, but instead wrote about marriage generally as a right that cannot be denied to same-sex couples.

The thrust of the Justice’s analysis in articulating this right relied on *Poe* and explicitly favored a balancing approach rather than the constraints of history required by *Glucksberg*:

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, has not been reduced to a formula. Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. . . . History and tradition guide and discipline this inquiry but do not set its outer boundaries.¹⁶⁰

Justice Kennedy offered a lens through which to view those unenumerated rights that receive fundamental liberty protection: they are “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”¹⁶¹ This places substantive due process rights squarely in the realm of liberty, autonomy, and dignity.

In addition to adopting a less historical focus, Justice Kennedy rejected *Glucksberg*’s tendency towards describing a more granular right. In response to petitioners, who argued that respondents sought access to a new right—same-sex marriage, which is specific in terms of Justice Scalia’s order of abstraction¹⁶²—the Justice replied that the right in question was in fact the more abstract right to marriage:

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.¹⁶³

Justice Kennedy only engaged *Glucksberg* to distinguish it from the case before him, and potentially from any case outside the scope of physician-assisted suicide. Without overruling it, he marginalized the highly formulaic test and its requirement of specificity. The actual

159. *Id.* at 2591.

160. *Id.* at 2598 (internal citations omitted) (citing *Poe* and *Lawrence*).

161. *Id.* at 2597.

162. See *supra* notes 139–142 and accompanying text.

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

substantive due process review that Justice Kennedy applied took the form of a balancing exercise of four principles relating to marriage,¹⁶⁴ quite a departure from the rigid, element-based and conjunctive *Glucksberg* test.

The final dramatic break that Justice Kennedy made from the tradition-oriented *Glucksberg* test—and even from the tradition-tolerant *Poe* balancing—was to suggest that substantive due process rights can be found by looking to contemporary society. Though due process rights have generally been backwards-looking,¹⁶⁵ Justice Kennedy wrote in *Obergefell* that “[t]he right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.”¹⁶⁶ This is a far cry from *Glucksberg*’s “deeply rooted” requirement. Taken together with Justice Kennedy’s belief that the Framers understood liberty to be an expansive concept not to be restricted by shortsightedness,¹⁶⁷ this is an escape hatch from our nation’s dark history that allows for a forward-looking substantive due process analysis, reading fundamental rights even—or perhaps, especially—when there has historically been oppression.

The Justice further highlighted the working relationship between liberty and equality. After recognizing the right to marry under the Due Process Clause, for both same- and opposite-sex couples, Justice Kennedy explained that the right to marriage is also upheld by the Equal Protection Clause, and that the two clauses “are connected in a profound way, though they set forth independent principles.”¹⁶⁸ Justice Kennedy suggested a two-step mechanism involving both the Due Process and Equal Protection Clauses by which rights are identified using the due process jurisprudence and then are equally applied to

164. *Id.* at 2599–602 (focusing on: i) the individual autonomy inherent to marriage, ii) the unique role marriage plays in supporting two-person unions, iii) marriage as a safeguard for children and families, and iv) marriage as a keystone of our nation’s social order).

165. See Sunstein, *supra* note 114, at 1163.

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

167. See *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (“Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They 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. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”).

168. *Obergefell*, 135 S. Ct. at 2605–06.

other groups—even those who have history been denied them—using equal protection principles.

C. *Sexual Intimacy Is a Fundamental Right Under Both the Glucksberg and Obergefell Standards*

Although the *Lawrence* Court did not apply the then-prevailing *Glucksberg* test when it articulated the fundamental right to sexual intimacy, that right is identifiable as fundamental under both the *Glucksberg* and *Obergefell* standards. In the post-*Obergefell* substantive due process jurisprudence, the Court appears to accept a less formulaic approach to liberty rights analyses. Still, each of the two approaches—*Glucksberg* and *Obergefell*—if properly applied, would yield a fundamental right to sexual intimacy.

I. *Glucksberg*

In applying the traditional *Glucksberg* test, which the *Lawrence* Court omitted, I begin as the *Glucksberg* Court did, with the second prong. The right in *Lawrence* is the more general right to sexual intimacy, as indicated by Justice Kennedy's admonishment of the *Bowers* Court for incorrectly focusing on the more specific same-sex sexual intimacy.¹⁶⁹ *Glucksberg* calls for a "careful description of the asserted fundamental liberty interest,"¹⁷⁰ not the most specific one. As with the right to marry, there is no need for a same-sex specific right when individuals engaged in same- and opposite-sex sexual intimacy can access the same, carefully described, general right to sexual intimacy.

Moving to the test's first prong—that the articulated right be "deeply rooted in this Nation's history and tradition . . . and implicit to the concept of ordered liberty"¹⁷¹—sex itself has not been outlawed in the United States in general terms. While there is a history of restrictions with respect to the age, relationship, and willingness of the partners, these have either been struck down or justified by the government's interest.¹⁷² Sex—not same- or opposite-sex sex, but consensual sex, generally—has deep roots in this country, as reflected in the Court's procreation jurisprudence, which indirectly recognizes

169. *Lawrence*, 539 U.S. at 566–67.

170. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal citation omitted).

171. *Id.* at 720–21 (internal citation omitted).

172. *See, e.g., Michael M. v. Superior Court*, 450 U.S. 464, 466 (1981) (upholding a California "statutory rape" law that defines unlawful sex as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years").

the fundamental nature of sex.¹⁷³ *Griswold*¹⁷⁴ and *Eisenstadt v. Baird*,¹⁷⁵ too, involved a tradition of consensual, private sex that the Court acknowledged.

Although sexual intimacy does satisfy this test, the Court in *Obergefell* specifically said that *Glucksberg* may not be appropriate for a discussion of intimacy rights.¹⁷⁶ As such, a failure under *Glucksberg* would not have been fatal to the right's fundamental nature.

2. Obergefell

The *Obergefell* Court's analysis closely resembles the *Poe* test, and more clearly highlights the importance of liberty, autonomy, and dignity. Justice Kennedy wrote as a guiding principle that the rights warranting liberty protections are those that involve "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."¹⁷⁷ Following this principle, the *Obergefell* test confirms a fundamental right to intimacy.

The decision to have sex with another person—of the same- or opposite-sex—meets each of Justice Kennedy's suggested criteria. It is a personal choice. That choice involves both dignity¹⁷⁸ and autonomy. Personal sexual choices are closely related to personal identity and beliefs, inherent in the liberty of a person, which garner fundamental protections.¹⁷⁹ The *Obergefell* analysis aligns sexual intimacy with other intimate liberty rights, thereby recognizing its fundamental nature.¹⁸⁰

173. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (discussing how marriage and procreation are fundamental rights).

174. *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring) (noting that it is "difficult to imagine what is more private or more intimate than a husband and wife's marital relations").

175. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending the privacy protection recognized for married persons in *Griswold* to single persons).

176. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). ("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.").

177. *Id.* at 2597.

178. *Lawrence* is particularly relevant to the dignity component of this choice, since the criminalization of same-sex intimacy robbed the participants of their dignity and of coequal existence with heterosexual neighbors. See *Lawrence v. Texas*, 539 U.S. 558, 560, 567, 574–75 (2003).

179. *Obergefell*, 135 S. Ct. at 2604 (protecting the right to marry as "inherent in the liberty of the person").

180. *Id.* at 2598–99 (describing a line of cases that help to define the right to marry and involve constitutional liberties, which include *Lawrence*, 539 U.S. at 574; *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978);

Although the Court never applied the *Glucksberg* test to the right to sexual intimacy, and the *Obergefell* test post-dates *Lawrence* by twelve years, both tests produce the same result: Under the liberty guarantee of the Due Process Clause, there is a fundamental right to sexual intimacy.

D. Justice Kennedy Views the Lawrence Right as Fundamental

Justice Kennedy used the *Lawrence* right as a backdrop in his discussion of the fundamental right to marry in *Obergefell*. In doing so, he made clear that he—and by extension, the *Obergefell* majority—viewed the right to sexual intimacy to be as fundamental as the right to marry. Justice Kennedy did this first explicitly, while discussing the historic treatment of gays, when he lamented that *Bowers* “upheld state action that denied gays and lesbians a *fundamental* right and caused them pain and humiliation.”¹⁸¹ Because the right denied in *Bowers* was that of sexual intimacy, Justice Kennedy recognized its fundamental nature.

Justice Kennedy also implied that sexual intimacy is a fundamental right by placing it in the same family of rights as marriage. In his second *Obergefell* balancing factor—that “the right to marry is fundamental because it supports a two-person union”¹⁸²—Justice Kennedy evoked *Lawrence* to underscore equal access to intimate association. In doing so, the Justice described the freedom of intimate association as an expansive one: “[W]hile *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”¹⁸³ This language—that freedom does not “stop” at a certain point—evokes an expansive protection that fits with the Justice’s vision of the Due Process Clause involving a forward-looking scope.¹⁸⁴

The right to sexual intimacy, sharing roots with the right to marriage, warrants more than just protection against criminalization, which was the relevant question in *Lawrence*; it receives the full promise and protection of the Constitution’s liberty guarantee. *Lawrence*, by striking anti-sodomy laws, ended an era in which same-sex

Loving v. Virginia, 388 U.S. 1, 12 (1967); and Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).

181. *Id.* at 2606 (emphasis added).

182. *Id.* at 2599.

183. *Id.* at 2600.

184. See *supra* notes 164–167 and accompanying text.

couples were viewed as outlaws. Without government recognition and protections, however, this group remained outcasts. In *Obergefell*, Justice Kennedy acknowledged that liberty demands more for those who are judged for their sexual intimacies. It would be peculiar for Justice Kennedy to have chosen *Obergefell* to introduce his progressive steps of sexual intimacy protections—from outlaw to outcast—if he did not intend the next step to place this right alongside marriage as equals in liberty.

As a fundamental liberty, sexual intimacy is not absolutely protected. Rather, the government may not subject those who engage in that right to discrimination unless it is truly necessary.¹⁸⁵ Before reviewing the effect of the FDA’s policy on the sexual intimacy right, however, I will discuss in Part III, *infra*, the need to reassess how we identify due process deprivations, which trigger constitutional review, to reflect the shift in the recognition of rights themselves seen in *Obergefell*.

III.

THE FDA’S POLICY POSES A LEGITIMATE DUE PROCESS CLAUSE CONCERN

In this paper, I use traditional due process terminology for government action, such as deprive,¹⁸⁶ infringe,¹⁸⁷ interfere,¹⁸⁸ and intrude.¹⁸⁹ This is based on the argument below that the effects of the FDA’s policy on MSM’s fundamental right to sexual intimacy are sufficient to trigger constitutional review.

A. *Traditional Due Process Deprivation and the Need for a Revised Standard*

Due process violations occur when an individual is deprived of his or her possessions or rights without constitutionally sufficient pro-

185. See *supra* note 69 and accompanying text.

186. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (discussing “governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause”).

187. See, e.g., *Meachum v. Fano*, 427 U.S. 215, 223–24 (1976) (inquiring into whether the transfer of a prisoner infringed on the prisoner’s due process rights).

188. See, e.g., *Cook v. Gates*, 528 F.3d 42, 49 (1st Cir. 2008) (“The substantive component of due process ‘provides heightened protection against government interference with certain fundamental rights and liberty interests.’” (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997))).

189. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (discussing whether a city regulation that intrudes on “matters of marriage and family” violates the Due Process Clause).

cedure or justification.¹⁹⁰ The Due Process Clause provides that no State shall “deprive any person of life, liberty, or property, without due process of law.”¹⁹¹ In the context of substantive rights, which fall under the clause’s “liberty” protection,¹⁹² a violation typically takes the form of a law preventing a right-holder from engaging in that right or punishing him for doing so.¹⁹³ With marriage, the Court has repeatedly struck down laws that limit one’s ability to marry whom he or she chooses.¹⁹⁴ The Court has also held that laws restricting parents’ rights over their children’s education and upbringing violate parents’ liberty rights.¹⁹⁵ In *Lawrence*, the Court found that a law criminalizing sodomy between two men violated their right to sexual intimacy.¹⁹⁶ Part II, *supra*, explains that this right to sexual intimacy is a fundamental one.

Due process claims therefore involve some government action that deprives or infringes upon an individual’s ability to exercise a fundamental right. Plaintiffs in cases such as *Loving v. Virginia*, *Zablocki v. Redhail*, and *Turner v. Safley* could marry, just not those whom they chose, or not without permission.¹⁹⁷ Parents in *Meyer v. Nebraska* and *Pierce v. Society of Sisters* could educate their children,

190. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“To deny this fundamental freedom [to marry] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.”).

191. U.S. CONST. amend XIV, § 1; see also U.S. CONST. amend V, § 1 (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . .”).

192. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–98 (2015) (discussing the Due Process Clause in the Fourteenth Amendment and its liberty protection as “extend[ing] to certain personal choices central to individual dignity and autonomy” and citing to *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), and *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965)).

193. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 397, 403 (1923) (striking down a law that prevented parents from teaching their children German in school).

194. See, e.g., *Turner v. Safley*, 482 U.S. 78, 94–99 (1987) (finding facially invalid a prison regulation preventing inmates from marrying without permission of the prison warden); *Zablocki v. Redhail*, 434 U.S. 374, 383–91 (1978) (striking down a Wisconsin statute that required non-custodial parents owing child support to receive a court order before remarrying); *Loving*, 388 U.S. at 2 (invalidating a law that prevented interracial marriage involving white persons).

195. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (invalidating an act that required public school attendance); *Meyer*, 262 U.S. at 397 (striking down a law that prevented parents from teaching their children German in school).

196. *Lawrence v. Texas*, 539 U.S. 558, 562, 578 (2003) (finding that Texas’s anti-sodomy law violated the right to sexual intimacy).

197. See *supra* note 194.

but not in their preferred forum or languages.¹⁹⁸ John Lawrence and Tyron Garner, plaintiffs in *Lawrence*, faced the dilemma of engaging in sexual intimacy and risking criminal charges for their consensual conduct or not engaging in sexual intimacy with their preferred partner.¹⁹⁹

In *Obergefell*, the Court suggested a shift away from a rigid, formulaic conception of substantive due process towards a more bespoke, balancing approach to identifying liberty rights. I discuss this shift in depth in Section II.B, *supra*, and suggest here that such a shift in the doctrine is appropriate not just in identifying rights, but also in judging government action that deprives, infringes upon, or implicates these rights. As Justice Kennedy wrote in *Lawrence*:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They 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. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.²⁰⁰

If identification of rights can change overtime to reflect contemporary generations, so, too, should we modernize our view of what constitutes a violation of due process by broadening the standard to include actions that do not explicitly deprive a right-holder, but that taken independently or in the aggregate mar the right itself and offend our common-sense understanding of liberty. Such a broadening would recognize the FDA's policy as a violation of MSM's fundamental right to sexual intimacy, since it discriminates against potential donors based on their sexual conduct, categorically labeling them as unfit to donate.

There is, of course, the potential for a slippery slope: If we recognize discrimination as a due process deprivation, what's next? The slippery slope is a provocative trope in the history of the gay rights movement: "If same-sex couples can marry, what's next? People will be marrying their dogs!"²⁰¹ I have two responses to this concern.

198. See *supra* note 195.

199. See *supra* note 196.

200. *Lawrence*, 539 U.S. at 578–79.

201. See, e.g., Mark Joseph Stern, *Fox News, the Network Where "Spouse" Clearly Includes Your Dog*, SLATE (July 9, 2014, 11:32 AM), http://www.slate.com/blogs/outward/2014/07/09/fox_news_compares_gay_marriage_to_dog_marriage.html.

First, it is important to distinguish the substantive due process jurisprudence, in which slippery slope concerns are common,²⁰² from an expansion in the due process deprivation framework. The former concerns new rights, while the latter is merely the treatment of existing rights. In this Part, I argue that we should liberalize recognition of deprivations, not more readily identify new rights. This is an important distinction because recognizing a deprivation only requires the government to justify its actions. It does not change the level of scrutiny—as the recognition of new rights does—but simply requires the articulation of whatever level of scrutiny the right in question garners. Deprivation recognition is therefore merely an accountability mechanism; it does not guarantee that a right will or will not ultimately be protected or infringed upon.

Second, an opening of the due process deprivation framework does not actually represent a seismic shift in due process jurisprudence. In a 1972 case in which a professor at a public school raised a due process claim after his contract was not renewed, the Courts made clear:

[E]ven though a person has no “right” to a valuable governmental benefit . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests[.] . . . For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which [it] could not command directly. Such interference with constitutional rights is impermissible.²⁰³

The Court is therefore already willing to consider due process claims based on government activity that infringes on constitutional rights when the infringement centers on activity to which there is no right, such as public employment and benefits.²⁰⁴ It is not a huge step from here to also recognize instances in which the government rejects individuals’ gifts—rather than refusing to give to individuals—as “produc[ing] a result which (it) could not command directly”²⁰⁵: the restriction of a constitutional right.

202. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 783–86 (1997) (Souter, J., concurring) (discussing the risk of a slippery slope if assisted suicide is recognized as a substantive due process right).

203. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (internal citation omitted).

204. See *id.* (listing public employment and public benefits as examples of activities with no constitutional basis).

205. *Id.*

Updating the standard of due process violations would therefore allow for the fuller enjoyment of existing rights without opening the floodgates to new rights recognition.

B. The FDA's Policy Deprives MSM of Their Due Process Rights

The FDA's policy does not create the kind of direct deprivation found in *Loving*, *Zablocki*, or *Turner*. The policy in no way prevents MSM from engaging in consensual sexual conduct, and so does not represent a traditional deprivation sufficient to trigger due process review. Nor does it fall into the category of an unconstitutional condition, as discussed earlier, since there is no government-given benefit at play in which MSM have an interest.²⁰⁶ MSM donors seek to give, and there is no right or interest associated with gifting blood to the government.

The policy does, however, impact MSM's rights. While the FDA does not prevent MSM from having sex, it conditions that private conduct on forgoing a powerful civic activity, maintains a historical stigma about gay men's health, and forces some men to make potentially damaging personal or professional decisions. Each of these points is discussed in more detail below.

First, the donation policy imposes a social harm on MSM by preventing them from participating in an important civic activity: the simple but powerful act of donating blood. In doing so, it defies the espoused American mores of inclusivity and belonging by excluding MSM because of identity- and affiliation-based conduct, rather than individual circumstances. Blood donation, while not a protected activity, is a civic duty from which MSM are barred.²⁰⁷ Two similar activities are military service, discussed in Part IV, *infra*, and the ability to serve on a jury. The ability to perform these civic duties is a core American value. The U.S. Citizenship and Immigration Services informs prospective citizens that, along with the rights they will enjoy as citizens, they must accept certain social responsibilities.²⁰⁸ These re-

206. See *supra* note 54 and accompanying text; see also generally *Sindermann*, 408 U.S. at 603 (holding that a respondent must be given an opportunity to prove the legitimacy of his claim of entitlement to continued employment and proof of such a property interest would require college officials to grant a hearing at respondent's request, though it would not entitle respondent to reinstatement); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569, 578–79 (1972) (holding that respondent had no legal interest at stake and so could not make a due process claim when his state employer did not rehire him after a one-year contract).

207. See *supra* Section I.C (discussing blood donation as a civic duty).

208. *Citizenship Rights and Responsibilities*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/citizenship/learners/citizenship-rights-and-responsibilities> (last

sponsibilities include: staying informed of the issues affecting your community; respecting the rights, belief, and opinions of others; participating in your local community; serving on a jury when called upon; and defending the country if the need should arise.²⁰⁹ As we saw with the attack at Pulse nightclub in Orlando during the summer of 2016, after which MSM were prevented from donating blood for members of their own community,²¹⁰ the FDA policy prevents some men from fulfilling the civic responsibilities that the U.S. government expects of its citizens. This is a form of harm that places conditions and limitations on sexual intimacy: MSM cannot both exercise their full liberty and remain civic contributors. Put differently, engaging in constitutionally protected conduct has the effect of triggering a government policy that diminishes MSM's civic standing.

Second, the FDA policy casts MSM as pariahs based on their sexual intimacy and perpetuates a culture of "othering" LGBTQ individuals. Preventing MSM from donating inherently questions the health of their blood and labels their behavior as unsafe, even when every safety precaution is used, such as condoms and PrEP.²¹¹ Dispelling harmful misconceptions about sexuality is a hallmark of the LGBTQ rights movement.²¹² When the Court in *Lawrence* invalidated a law criminalizing same-sex sodomy, MSM conduct itself was decriminalized.²¹³ Twelve years later, Justice Kennedy, who authored the *Lawrence* majority opinion, noted that *Lawrence* represented a shift from "[o]utlaw to outcast" for gays, but that "it [did] not achieve the full promise of freedom."²¹⁴ Their status was de-criminalized, but most MSM were still left at society's fringes. The recognition of the universal right to marry in *Obergefell* represented another step in from those fringes.²¹⁵ The FDA's policy, however, upholds the old stigma

visited Sept. 21, 2017) (outlining the rights and responsibilities associated with citizenship).

209. *Id.*

210. Natalie DiBlasio, *Thousands Donate Blood in Orlando, FDA Rules Ban Sexually Active Gay Men*, USA TODAY (June 13, 2016, 7:41 AM), <http://www.usatoday.com/story/news/2016/06/12/orlando-blood-bank-crisis-waives-gay-donation-restrictions/85789648/>.

211. See note 32 and accompanying text.

212. See John-Manuel Andriote, *The LGBT Health Movement, 40 Years Since Homosexuality Was a Mental Illness*, ATLANTIC (June 28, 2013), <https://www.theatlantic.com/health/archive/2013/06/the-lgbt-health-movement-40-years-since-homosexuality-was-a-mental-illness/277154/> (discussing "the ongoing fallout of discrimination on LGBT health," as well as the "progress that's been made").

213. *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding that Texas's anti-sodomy law violated the right to sexual intimacy).

214. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

215. *Id.*

of HIV/AIDS as a gay disease and keeps MSM, in part, as a social “other,” inhibiting modern civil rights efforts.

Third, the FDA’s policy risks forcing some MSM to broadcast their private sexual conduct. MSM who are asked to donate are put into a potentially difficult position. They can share that they are MSM and therefore be prevented from donating, or they can conceal their status and either decline to donate on some other grounds or donate despite the ban. Some MSM may be comfortable sharing this aspect of their identity, but for others this poses both psychological and social risks. “Outing” of MSM is understood to be an unacceptable and condemnable action, and nonconsensual outing can have deep psychological and even fatal repercussions.²¹⁶ For MSM who live and work in states without statutory protections against sexual orientation discrimination, being outed by the inability to participate in a blood drive could also result in both termination by an employer and eviction by a landlord; with twenty-eight states currently lacking sexual orientation protections,²¹⁷ this is a reality that many men face when deciding whether to broadcast their sexual orientation and personal lives. For still others, broadcasting their MSM status may put them at risk of physical harm.²¹⁸ The FDA policy has the effect of forcing private information from men, which, in addition to causing traditional forms of due process deprivations, such as loss of employment,²¹⁹ poses cognizable physical and psychological harms.

Taken together, the impacts of the FDA policy have the effect of casting MSM as second-class citizens in civic, public health, and societal contexts. It also exacerbates factors that threaten MSM’s mental and physical wellbeing. This is a hefty price to pay for the right to sexual intimacy, an activity in which MSM should be able to engage

216. See, e.g., Ian Parker, *The Story of a Suicide*, NEW YORKER (Feb. 6, 2012), <http://www.newyorker.com/magazine/2012/02/06/the-story-of-a-suicide> (describing the suicide of a Rutgers University freshman after his roommate secretly observed him with another male and tweeted about the interaction); Gaya Polat, ‘Outing’ Gays Is a Humiliating Act of Violence, HAARETZ (Dec. 18, 2014), <http://www.haaretz.com/opinion/.premium-1.632426> (recounting the author’s own humiliation and embarrassment at being “outed” in the workplace).

217. *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT (MAP), http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last updated Oct. 2, 2017).

218. Liam Stack, *Anti-Gay Attacks Not Covered by West Virginia Hate Crime Law, Court Rules*, N.Y. TIMES (May 12, 2017), <https://www.nytimes.com/2017/05/12/us/anti-gay-hate-crimes-west-virginia-court.html> (describing an attack against two gay men that was not covered by a hate crime statute).

219. See *infra* Section IV.A (discussing *Witt v. Dep’t of Air Force*, 527 F.3d 806 (9th Cir. 2008), in which a member of the armed forces was discharged because of her private sexual conduct).

free of unjustified government involvement. The FDA policy does not prevent MSM from having sexual intercourse, but it does impose a cost on this constitutionally-protected activity.

Courts should revise the due process framework to include government actions such as the FDA policy as triggers for constitutional review. The Constitution's "full promise of liberty"²²⁰ requires more than the ability to engage in protected activity free from physical or legal restraint. That promise means that participation in the fundamental right to sexual intimacy will not negatively impact the right-holder. Due process analysis should reflect this. Government policy can still survive such an analysis if sufficiently justified, but the current lack of any scrutiny leaves MSM vulnerable to the FDA's ongoing violations of their rights.

The next part reviews an area in which courts have already grappled with a government policy that infringes on MSM's fundamental right to sexual intimacy: the government's former "Don't Ask, Don't Tell" policy.

IV.

"DON'T ASK, DON'T TELL" AS A CASE STUDY FOR THE FUNDAMENTAL RIGHT TO SEXUAL INTIMACY

"Don't Ask, Don't Tell" (DADT) was the United States' official policy on military service by gay, bisexual, and lesbian individuals from November 30, 1993, when the Clinton Administration adopted it,²²¹ to September 20, 2011, when it was repealed by the Obama Administration.²²² Under DADT, the armed forces could discharge servicemembers for "homosexual conduct."²²³

Specifically, while DADT was in effect, a gay servicemember could be discharged if he or she: (i) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts[;]" (ii) "stated that he or she is a homosexual or bisexual, or words to that effect[;]" or (iii) "has married or attempted to marry a person known to be of the same biological sex."²²⁴

220. *Obergefell*, 135 S. Ct. at 2600.

221. 10 U.S.C. § 654 (1993); see also Paul F. Horvitz, "Don't Ask, Don't Tell, Don't Pursue" Is White House's Compromise Solution: New U.S. Military Policy Tolerates Homosexuals, N.Y. TIMES (July 20, 1993), http://www.nytimes.com/1993/07/20/news/20iht-gay_1.html.

222. Elizabeth Bumiller, *Obama Ends "Don't Ask, Don't Tell" Policy*, N.Y. TIMES (July 22, 2011), <http://www.nytimes.com/2011/07/23/us/23military.html>.

223. Don't Ask, Don't Tell, 10 U.S.C. § 654 (repealed 2011).

224. *Id.*

Though the letter of the law did not allow discharge for simply being gay—servicemembers had to act on their homosexuality in some way—the effect was to exclude gays from serving or to force them to remain closeted while serving, essentially abstaining from any conduct in line with their identity as gays, lesbians, or bisexuals. The policy turned on how servicemembers executed their right to intimate sexual conduct, not simply on an identity they associated with that conduct.

The DADT and MSM policies share several important features. Both policies turn on same-sex conduct. Like blood donation, military service is both an optional gift to society made through the government and is a praiseworthy civic act. Also like blood donation, servicemembers make their contribution to society in general, rather than to specific, known individuals. DADT litigation therefore serves as an example of how courts should treat government conditioning of individuals' elective activities, specifically in the context of sexual intimacy.

DADT differs from the FDA's policy in that it typically represents a traditional due process deprivation—namely, MSM servicemembers being discharged from the armed forces without due process, or MSM being excluded from the many benefits available to those who do serve²²⁵—but it is still informative for the novel due process claim discussed in Part III, *supra*.

Before its repeal, DADT was challenged in the federal circuits, but the issue never reached the Supreme Court on the merits.²²⁶ These challenges therefore never provided a nationwide precedent on either the nature of the right to sexual intimacy or how courts should approach these cases. Nevertheless, as an analog to the MSM policy, DADT serves as both a bellwether for potential litigation and a cautionary tale for opponents to blood donation reform, since—as the cases discussed below demonstrate—when faced with a substantive due process challenge to its military policy, the government's justifications for its intrusion into servicemembers' protected intimacy were insufficient.

225. See generally *Veterans Benefits Administration*, U.S. DEP'T OF VETERANS AFF., <https://www.benefits.va.gov/benefits/> (last visited Aug. 27, 2017) (detailing benefits available to veterans).

226. This is based on WestLaw searches conducted on December 6, 2017 for “Don’t Ask, Don’t Tell” and “10 U.S.C. § 654” that returned two cases before the Supreme Court, neither of which directly addressed the military policy.

A. Witt v. Department of the Air Force

Of all the cases brought against DADT, the most relevant to the MSM policy and the fundamental right to sexual intimacy is *Witt v. Department of the Air Force*.²²⁷ *Witt* was originally brought in 2006, three years after *Lawrence* was decided. The district and circuit courts that heard the case therefore directly engaged with whether *Lawrence* articulated a fundamental right. Judge Gould, writing the majority opinion for *Witt* in the Ninth Circuit, noted that only one other circuit at the time had explicitly addressed the question of the *Lawrence* right and the level of scrutiny it drew,²²⁸ which meant it was essentially a matter of first impression.

The plaintiff in *Witt*, an Air Force Major who was honorably discharged because of her relationship with a civilian woman, challenged DADT and argued that *Lawrence*'s reliance on cases such as *Casey*²²⁹ and *Roe*,²³⁰ and the Justices' use of language like "substantial protections" suggest heightened scrutiny applies to matters of sexual intimacy.²³¹ The Air Force relied on *Lawrence*'s plain language, focusing on the Court's attention to the lack of "legitimate state interest"—rational-basis terminology, as discussed earlier²³²—and the lack of explicit mention of heightened scrutiny, to argue that there was no heightened scrutiny in *Lawrence*.²³³ Presented with two compelling arguments, the Court of Appeals proceeded to "analyze *Lawrence* by considering what the Court actually *did*, rather than dissecting isolated pieces of text."²³⁴

The Court of Appeals for the Ninth Circuit recognized that DADT constituted an intrusion "upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*."²³⁵ It therefore set out to determine the proper level of scrutiny for this government intrusion. The court found that the *Lawrence* ma-

227. *Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008).

228. *Id.* at 815 ("[T]he Eleventh Circuit upheld a law that forbade homosexuals from adopting children, explicitly holding that *Lawrence* did not apply strict scrutiny. Otherwise, our sister circuits are silent."); *see also, id.* at 816 (discussing a decision from the United States Court of Appeals for the Armed Forces that did not read *Lawrence* as identifying a fundamental right, but which still applied a bespoke form of heightened scrutiny).

229. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

230. *Roe v. Wade*, 410 U.S. 113 (1973).

231. *Witt*, 527 F.3d at 814–15.

232. *See supra* note 84 and accompanying text. *But see supra* note 108 and accompanying text.

233. *Witt*, 527 F.3d at 815 (citing *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

234. *Id.* at 816.

235. *Id.* at 819.

jority applied a form of heightened scrutiny,²³⁶ though not the traditional strict scrutiny used for due process claims that garner more than rational basis.²³⁷ The Court of Appeals instead looked to a 2003 case, *Sell v. United States*,²³⁸ that developed a novel standard of review for state-intrusion into individual liberty that “resembles and expands upon the analysis performed in *Lawrence*.”²³⁹ The *Witt* court developed a three-part test from *Sell*. To uphold the government action, a court must find that: (i) the government interest at stake is important; (ii) the government intrusion must significantly advance that important interest; and (iii) a less intrusive means is unlikely to achieve substantially the same results (alternatively understood as requiring that the government intrusion is necessary).²⁴⁰ These factors were originally used to address a substantive due process claim in *Sell*,²⁴¹ and in *Witt* they were applied to balance individual liberties with government interests while cutting away categorical prejudice.

Applying the first *Sell* factor to DADT, the Court of Appeals acknowledged that “it is clear that the government advances an important government interest. DADT concerns the management of the military.”²⁴² Continuing, the court found that the second and third factors

236. *Id.* at 813 (finding that “*Lawrence* requires something more than traditional rational basis review”).

237. *Id.* at 817–18 (explaining that the court “hesitate[s] to apply strict scrutiny when the Supreme Court did not discuss narrow tailoring or a compelling state interest in *Lawrence*”). *But see id.* at 822 (Canby, J., concurring) (“In my view, the so-called ‘Don’t Ask, Don’t Tell’ statute, 10 U.S.C. § 654, must be subjected to strict scrutiny.”).

238. *Sell v. United States*, 539 U.S. 166 (2003). The matter before the *Sell* court was whether the Constitution permitted the government to forcibly administer antipsychotic drugs to a mentally-ill defendant to make the defendant competent to stand trial. The *Witt* court found the context in *Sell* to be different, but the analysis informative. *Witt*, 527 F.3d at 818.

239. *Witt*, 527 F.3d at 818.

240. *Id.* at 818–19. The *Sell* court included a fourth factor (the administration of drugs must be medically appropriate), but the *Witt* court determined that it was “too specific to the medical context of *Sell*” to be generally applicable. *Id.* at 819.

241. *Sell*, 539 U.S. at 175 (the question before the Court was whether the lower court erred in its decision regarding “an important ‘liberty’ that the Constitution guarantees”).

242. *Witt*, 527 F.3d at 821. While one could easily question whether gay service members pose *any* threat to military management, and whether that amorphous interest should satisfy this factor, the court explained that “judicial deference to . . . congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.” *Id.* (citing *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)). The court essentially deferred to the Air Force on the first factor. *See also Horvitz, supra* note 221 (explaining that the government’s putative justification for DADT was to ensure the management of the military and to protect unit cohesion and troop morale).

could not be applied based on the existing record and remanded the case to allow the district court to develop them further.²⁴³ The court denied a petition for rehearing en banc.²⁴⁴

On remand, the Western District of Washington found that DADT failed the second factor, that the government intrusion significantly advance an important government interest. Witt's outstanding service record and expert testimony led the court to believe that her discharge could not have significantly furthered the military's mission of advancing unit morale and cohesion, two components of military management articulated by the government in support of its argument.²⁴⁵ Specifically, the court found there "is nothing in the record before this Court suggesting that the [*sic*] sexual orientation (acknowledged or suspected) has negatively impacted the performance, dedication or enthusiasm of [Major Witt's unit]."²⁴⁶ With the failure at factor two of the conjunctive test, the court held that DADT failed the *Sell* standard, since if the policy did not significantly further the government interest under prong two, it could not possibly be necessary to further that interest under prong three.²⁴⁷ DADT therefore violated Major Witt's substantive due process rights as articulated in *Lawrence* without sufficient justification.

The *Sell* test—as articulated in *Witt*—is a powerful form of heightened scrutiny for assessing questions of intimacy. It uses exacting inquiries to separate prejudice from instances in which a government interest justifiably infringes on constitutional rights. Although the test shares language with the intermediate scrutiny standard applied to equal protection claims of classification made by sex²⁴⁸ and illegitimacy²⁴⁹—that the government's action be substantially related to its important interest²⁵⁰—the due process and equal protection analyses apply different standards of review such that similar language need not tether one standard to the other.²⁵¹ Also, courts that adopt the

243. *Witt*, 527 F.3d at 822.

244. *Witt v. Dep't of Air Force*, 548 F.3d 1264, 1265 (9th Cir. 2008) (en banc).

245. *Witt v. U.S. Dep't of Air Force*, 739 F. Supp. 2d 1308, 1315 (W.D. Wash. 2010).

246. *Id.* at 1315.

247. *Id.* at 1316.

248. *Craig v. Boren*, 429 U.S. 190 (1976).

249. *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (invalidating a statute that treated illegitimate children differently because it failed intermediate scrutiny).

250. *Craig*, 429 U.S. at 204.

251. It is important to note that while these claims—those against the FDA and DADT policies—could be brought under the Equal Protection Clause, that strategy does not perfectly map onto the affected populations, nor does it capture the fundamentality of the right to sexual intimacy as a basis for discrimination. MSM includes

Sell and *Witt* standards refer to “heightened scrutiny” rather than the more specific “intermediate scrutiny.”²⁵²

Due process review differs from the equal protection context in that it involves a binary standard: Courts apply heightened scrutiny for infringements on fundamental rights and rational-basis review for all other government restrictions.²⁵³ There is no intermediate standard for due process inquiries. The existence of another form of heightened scrutiny in *Witt* follows this binary approach to due process review. By articulating a test that is clearly more exacting than rational basis, the *Sell* and *Witt* courts applied heightened scrutiny. We can see, too, from the language in prongs two and three of the *Sell* test that its means analysis is much closer to the narrow tailoring of strict scrutiny than the “substantially related” of equal protection’s intermediate scrutiny. Both strict scrutiny and *Sell* inquire into whether the means are the least intrusive available.²⁵⁴ Whether or not the *Sell* standard is equivalent to traditional strict scrutiny, it is certainly more stringent than rational-basis review.

The fundamental right to sexual intimacy is not the only protected liberty that draws heightened scrutiny but deviates from traditional strict scrutiny. A woman’s right to an abortion,²⁵⁵ parental

non-LGBTQ identifying men, so the sexual orientation discrimination claim fails to reflect the entire category of men whom the FDA policy targets. Even a claim based on gender discrimination, which garners heightened scrutiny and correctly maps the population, focuses on the individuals involved in the activity, not the fundamental nature of the activity itself. Such a strategy would fail to advance this paper’s main premise—that the right to sexual intimacy is fundamental—and would garner only intermediate scrutiny, as opposed to the more exacting strict scrutiny used for fundamental rights. This is why I have focused on due process claims, rather than claims under the Equal Protection Clause.

252. See, e.g., *In re Balas*, 449 B.R. 567, 575 (Bankr. C.D. Cal. 2011) (citing *Witt v. Dep’t of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008)) (“As in *Witt*, heightened scrutiny should be the standard in this case . . .”).

253. *Witt v. Dep’t of Air Force*, 548 F.3d 1264, 1272–73 (9th Cir. 2008) (en banc) (O’Scannlain, J., dissenting).

254. See, e.g., *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2208 (2016) (discussing the Supreme Court’s standard for strict scrutiny in the context of race and the Equal Protection Clause, requiring that race only be used when necessary and that means less reliant on classification be used when possible); *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000) (discussing strict scrutiny in the context of the First Amendment’s free speech guarantee as requiring the least restrictive means of furthering the government’s compelling interest).

255. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (applying an “undue burden” standard, not strict scrutiny, to the fundamental right to an abortion); see also *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–10 (2016) (confirming that the right to an abortion is fundamental by criticizing the Fifth Circuit for applying an inappropriately low level of review to “the regulation of a constitutionally protected personal liberty”).

autonomy,²⁵⁶ and the freedom from bodily restraint²⁵⁷ are all fundamental rights for which courts have applied something other than strict scrutiny. These examples demonstrate that fundamental due process rights are not limited to traditional analysis. Justice Kennedy's analysis of the right in *Lawrence*²⁵⁸ and the court's review in *Witt*²⁵⁹ both describe a liberty interest that is fundamental in nature, despite the lack of traditional strict scrutiny in either case.

Three Ninth Circuit judges dissented from the *Witt* court's denial of the government's petition for an en banc rehearing. Although their opinions have no binding authority, their arguments are endemic to criticism of the *Lawrence* right's fundamental nature and merit examination here. Judge O'Scannlain authored the most probing of the dissents, in which he argued that the three-judge panel that adopted the *Sell* test and remanded the case misidentified this case as invoking the *Lawrence* right at all.

As a threshold matter, Judge O'Scannlain viewed *Lawrence* as concerning the narrow matter of "an outlier criminal statute punishing private, consensual homosexual conduct in the home."²⁶⁰ He quoted *Lawrence* to note that the Court in that case explicitly limited the reach of its holding: "The present case does not . . . involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."²⁶¹ He continued, noting that "[i]f one combines the holding with this self-imposed regulation, one comes to the inexorable conclusion that a *Lawrence* case requires, at least, a criminal sanction on private conduct. Put in the negative, *Lawrence* did not deal with laws addressed to public conduct or non-criminal statutes."²⁶²

Judge O'Scannlain's argument contains two critical weaknesses. The first is that just because the Court in *Lawrence* had before it a criminal statute does not mean the reach of the liberty right it applied

256. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); see also *id.* at 80 (Thomas, J., concurring in judgment) (noting that while the plurality and concurring Justices recognize the fundamental nature of the right in question, they do not apply the traditional strict scrutiny standard).

257. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982) (upholding a standard of review for "liberty interests in safety and freedom from unreasonable restraints" that "is lower than the 'compelling' or 'substantial' necessity tests").

258. See *supra* Section II.A.

259. See *supra* Section IV.A.

260. *Witt*, 548 F.3d at 1269 (O'Scannlain, J., dissenting).

261. *Id.* at 1268 (quoting *Lawrence v. Texas*, 529 U.S. 558, 578 (2003)).

262. *Id.* at 1269.

there is so limited. As Justice Kennedy said of the *Bowers* Court, Judge O’Scannlain failed “to appreciate the extent of the liberty at stake.”²⁶³ When parsing the following *Lawrence* passage, discussed earlier, the Ninth Circuit judge drew an overly narrow understanding of the fundamental right to sexual intimacy:

The petitioners are entitled to respect for their private lives. The state cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.²⁶⁴

Judge O’Scannlain takes “intervention” in the context of *Lawrence* to mean only criminal sanctions.²⁶⁵ Instead of identifying the right itself as protection against criminalization, he could have understood criminalization to be the specific form of government intervention at issue in that case, leaving the right to be applied freely in other contexts. Judge O’Scannlain read a universal requirement from one particular application of the right. In his view, the only right at issue in *Lawrence* is the right to be free from criminalization, not the greater right to sexual intimacy free from any government interference that Justice Kennedy described: “the full right to engage in their conduct without intervention of the government.”²⁶⁶

The second critical weakness is retrospective: holdings subsequent to Judge O’Scannlain’s *Witt* dissent, notably *Obergefell*, have proven Judge O’Scannlain wrong. Justice Kennedy cited to *Lawrence* in *Obergefell* when he wrote that “[h]istory and tradition guide and discipline” the Court’s inquiry into the identification and protection of fundamental rights, “but do not set its outer boundaries.”²⁶⁷ He also cited *Lawrence* as an example of how the “Court’s cases have expressed constitutional principles of broader reach.”²⁶⁸ Finally, in one of the opinion’s most recognizable statements, Justice Kennedy made clear that “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

263. *Lawrence*, 539 U.S. at 566–67.

264. *Id.* at 578.

265. *Witt*, 548 F.3d at 1269 (O’Scannlain, J., dissenting).

266. *Lawrence*, 539 U.S. at 579. This misinterpretation also runs against Justice O’Connor’s concurrence in *Lawrence*, see *supra* notes 91–93 and accompanying text, in which she rejects moral judgment as a justification for disparate treatment. Once decriminalized, MSM conduct should not be restricted on moral grounds. While some MSM pose scientific, as opposed to moral, risks of HIV transmission, many do not. See *supra* Section I.B.

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

268. *Id.*

may be a step forward, but it does not achieve the full promise of liberty.”²⁶⁹ Taken together, with particular emphasis on this last statement, the Court in *Obergefell* clearly recognized the liberty right in *Lawrence* as extending beyond the realm of government criminalization of sexual intimacy.

Obergefell also cuts against Judge O’Scannlain’s claim that *Lawrence* is forever restricted by its own internal limitation, that the government need not “give formal recognition to any relationship that homosexual persons seek to enter.”²⁷⁰ One of *Obergefell*’s many remarkable outcomes is that the Court seemed to frame the right to marriage as a positive one. The Court granted certiorari on two questions: whether the states must grant marriage licenses to same-sex couples and whether states must recognize the marriages of same-sex couples licensed and performed out of state.²⁷¹ It answered both in the affirmative, thereby doing exactly what Judge O’Scannlain said *Lawrence* did not require: formal recognition of a relationship between homosexuals.²⁷² Whether or not the 2003 Court intended to refrain from such recognition, the 2015 Court clearly provided it.

Finally, Judge O’Scannlain attempted to demonstrate that the right to sexual intimacy is not fundamental by relying on the familiar twin arguments that the *Lawrence* Court neither applied the *Glucksberg* test nor used strict scrutiny, both hallmarks of traditional fundamental rights jurisprudence.²⁷³ Neither, however, are fatal, and both have already been addressed in this paper: the *Obergefell* Court distinguished *Glucksberg* by narrowing its applicability to physician-assisted suicide such that its omission from *Lawrence* is no longer remarkable;²⁷⁴ and the implacable need for strict scrutiny to determine the fundamental nature of a right puts the cart before the horse and falls prey to the formulization of liberty rights that Justice Harlan cautioned against in *Poe*²⁷⁵ and that was rejected by Justice Kennedy in *Obergefell*.²⁷⁶

269. *Id.* at 2600.

270. *Lawrence*, 539 U.S. at 578.

271. *Obergefell*, 135 S. Ct. at 2593.

272. *Id.* at 2608 (finding that the Constitution grants same-sex couples “equal dignity in the eyes of the law”).

273. *Witt v. Dep’t of Air Force*, 548 F.3d 1264, 1273–75 (9th Cir. 2008) (en banc) (O’Scannlain, J., dissenting).

274. *See supra* note 163 and accompanying text.

275. *See supra* note 132 and accompanying text.

276. *See supra* note 160 and accompanying text.

B. Log Cabin Republicans v. United States

Just one month after *Witt* was remanded and the District Court for the Western District of Washington issued its opinion, the District Court for the Central District of California heard *Log Cabin Republicans v. United States*,²⁷⁷ in which a non-profit organization brought a facial challenge against DADT on behalf of its members. In addition to freedom of speech, freedom of association, and freedom to petition claims under the First Amendment,²⁷⁸ the group alleged that DADT violated substantive due process rights, particularly those “identified in *Lawrence* as rights associated with the ‘autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.’”²⁷⁹ Relying on *Witt*, the court found that the policy infringed on a fundamental right and failed the *Sell* test;²⁸⁰ the district court therefore ruled in favor of the Log Cabin Republicans and issued a nationwide permanent injunction barring DADT’s enforcement.²⁸¹ This district court holding—as well as the orders subsequently granting, lifting, and then reconsidering and reinstating a stay of the injunction²⁸²—was ultimately vacated for mootness by the Ninth Circuit when the U.S. Government repealed DADT.²⁸³

Though vacated, *Log Cabin Republicans* is a valuable addition to *Witt*, particularly with respect to whether DADT furthers the government’s purported interests and is necessary to those interests. Importantly—and unlike *Witt*, which involved an as-applied challenge, a motion to dismiss, and remand on a specific question—the case went to trial on the merits for a facial challenge. The district court did an extensive review of the relevant facts supporting both sides’ claims and used them to guide its application of the *Sell* factors. This was an important opportunity to place facts above prejudice. Most of the court’s lengthy opinion concerns evidence about whether the policy furthered the government’s interest in military readiness and unit cohesion and whether the policy was necessary to advance that interest. The court reviewed numerous expert reports and testimonies—each of

277. *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010).

278. *Id.* at 888.

279. *Id.* at 909 (quoting *Lawrence v. Texas*, 539 U.S. 558, 562 (2003)).

280. *Id.* at 911 (providing the court’s standard of review).

281. *Id.* at 929.

282. See *Log Cabin Republicans v. United States*, No. 10-56634, 2010 WL 4136210 (9th Cir. Oct. 20, 2010) (granting a stay); *Log Cabin Republicans v. United States*, No. 10-56634, 2011 WL 2637191 (9th Cir. July 6, 2011) (lifting the stay); *Log Cabin Republicans v. United States*, No. 10-56634, 2011 WL 2982102 (9th Cir. July 15, 2011) (reconsidering and reinstating the stay).

283. *Log Cabin Republicans v. United States*, 658 F.3d 1162 (9th Cir. 2011).

which it discussed in its opinion—and then explained how DADT may actually be detrimental to the government’s interests.²⁸⁴ Ultimately the court found that DADT failed at prongs two and three: the policy did not further the government’s interests²⁸⁵ nor was it necessary to those interests.²⁸⁶

Witt and *Log Cabin Republicans*, as Ninth Circuit cases, would not be binding in a challenge to the FDA policy brought outside that circuit. They are, however, uniquely instructive. In addition to providing a framework for assessing the same liberty claim that a MSM claim would entail, the DADT challenges were successfully brought in the hyper-deferential military context,²⁸⁷ which is similar to the FDA’s public health context.²⁸⁸ For each policy, opponents incorrectly claim there would be serious consequences if the policies were enjoined or struck: a weakened military and a compromised blood supply. Relatedly, both policies require the application of a rigorous legal framework to protect individual rights, even in the face of potentially dire circumstances.

V.

CHALLENGING THE FDA POLICY

A close examination of the *Lawrence* Court’s discussion of the right to sexual intimacy, of the *Obergefell* Court’s approach to substantive due process review, and of courts’ handling of a similar circumstance with DADT, supports the fundamental nature of the right to sexual intimacy under the Due Process Clause’s liberty guarantee. As with the military prohibition against gays openly serving their country, the FDA’s blood policy “constitutes an intrusion ‘upon the personal and private lives of homosexuals [and other MSM], in a manner that implicates the rights identified in *Lawrence*, and is subject to heightened scrutiny.’”²⁸⁹

284. *Log Cabin Republicans*, 716 F. Supp. 2d at 911–20 (discussing expert reports and the ways in which DADT does not advance—and may even be counter-productive to—the government’s interests).

285. *Id.* at 911 (the Act does not “significantly further[] the Government’s interest in military readiness or unit cohesion”).

286. *Id.* at 919 (the Government failed to show that the Act “is ‘necessary’ to achieve [its interests]”).

287. *See, e.g., Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981) (discussing the Court’s deference to Congress in matters of national security and military affairs).

288. *See infra* Section V.A.

289. *Log Cabin Republicans*, 716 F. Supp. 2d at 911 (quoting *Witt v. Dep’t of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008)).

The right to sexual intimacy is fundamental and garners some form of exacting heightened scrutiny, whether under traditional due process jurisprudence or that of the Ninth Circuit. Either standard of review shows the FDA's policy towards MSM blood donations fails to justify its intrusion upon this liberty right. Just as it is imperative to view the DADT jurisprudence through the lens of military deference,²⁹⁰ however, a review of the FDA's policy must be done in the context of the judiciary's treatment of public health law.

A. *The Government's Interest in Public Health Is Both Compelling and Important, But Not Absolute*

The Supreme Court has provided rich case law addressing the tension between individual rights and the government's need to address public health needs. In 1905, in *Jacobson v. Massachusetts*,²⁹¹ the Court upheld a state law mandating small pox vaccinations against a claim that the requirement violated constitutional liberty rights.²⁹² The Court reasoned that the law was permissible because "the legislature of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the Board of Health, that was necessary for the public health or the public safety."²⁹³ In 1927, however, in *Buck v. Bell*, the Court looked to *Jacobson* but eliminated its necessity requirement, supporting a more generalized interest in public health when it upheld the involuntary sterilization of "feeble minded" persons.²⁹⁴

Although modified by cases like *Buck*, *Jacobson* still serves as a basis for modern public health law.²⁹⁵ During the latter half of the twentieth century, however, there have been significant changes in both the state's power to protect public health and the Court's recogni-

290. See *supra* note 288 and accompanying text.

291. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

292. *Id.* at 25–28.

293. *Id.* at 27.

294. *Buck v. Bell*, 274 U.S. 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Three generations of imbeciles are enough."); see also Wendy K. Mariner, George J. Annas & Leonard H. Glantz, *Jacobson v. Massachusetts: It's Not Your Great-Great-Grandfather's Public Health Law*, 95 AM. J. PUB. HEALTH 581, 584 (2005) (discussing *Jacobson* as a source of modern health law jurisprudence and *Buck* for the modern approach's lack of urgency requirement).

295. See generally Mariner, Annas, & Glantz, *supra* note 294.

tion of individual liberty as an important limit to that power.²⁹⁶ In particular, there has been a rise of personal liberties vis-à-vis state interests, as seen in cases like *Griswold* and its progeny, which demonstrate a shift in the context of personal decision-making.²⁹⁷ For example, modern debates over the appropriateness of government-required quarantines show that, to uphold public health measures that clash with individual rights, courts would likely require “clear and convincing evidence that the individual actually has, or has been exposed to, a contagious disease *and* is likely to transmit the disease to others if not confined.”²⁹⁸ While not expressly employing *Jacobson*’s necessity requirement,²⁹⁹ which has an inherent urgency component, this modern approach to government infringements on personal liberties in the name of public health incorporates strong due process protections and suggests an exacting standard.³⁰⁰

The government’s interest in protecting the U.S. blood supply from contamination by HIV falls somewhere in between a generalized interest in public health and a necessary and urgent one. When the FDA’s policy was first passed, the circumstances greatly resembled those in *Jacobson*: there was an epidemic and a poor understanding of the virus and how it spread.³⁰¹ Now, however, with significant advancements in the HIV/AIDS field, the scenario more closely resembles a quarantine, where individuals, or narrowly drawn categories of individuals, may have their rights infringed upon when there is clear

296. *Id.* at 585.

297. See *id.* at 586.

298. *Id.* at 587 (internal quotation marks omitted).

299. *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905) (“But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.”).

300. See Sarah Pope, Nisha Sherry & Elizabeth Webster, *Protecting Civil Liberties During Quarantine and Isolation in Public Health Emergencies*, AM. B. ASS’N: LAW PRAC. TODAY (Apr. 2011), https://www.americanbar.org/content/dam/aba/publications/law_practice_today/protecting_civil_liberties_during_quarantine_and_isolation_in_public_health_emergencies.authcheckdam.pdf (discussing how the state must meet five threshold requirements to ensure that civil liberties are protected during public health emergencies).

301. See, e.g., Natasha Geiling, *The Confusing and At-Times Counterproductive 1980s Response to the AIDS Epidemic*, SMITHSONIAN MAG. (Dec. 4, 2013), <http://www.smithsonianmag.com/history/the-confusing-and-at-times-counterproductive-1980s-response-to-the-aids-epidemic-180948611/> (discussing the uncertainty and fear surrounding HIV/AIDS when the virus first appeared in the early 1980s).

and convincing evidence that they pose a risk.³⁰² Acknowledging that the government's interest in protecting the blood supply is compelling—and therefore satisfies part of the strict scrutiny standard and is sufficiently “important” for *Sell*'s first prong—the Court's public health jurisprudence suggests that this interest is not infallible and does not draw the same level of deference typically afforded to military decision-making. Nor does the compelling interest in public health shutdown or override the Court's means of reviewing constitutional claims. Cases like *Jacobson* provide a framework for addressing these claims when applying relevant standards of review.

B. Traditional Strict Scrutiny

If, as I argue, the *Lawrence* Court articulated a fundamental right to sexual intimacy, and we accept the modernized deprivation framework discussed in Part III, *supra*, then courts should apply traditional strict scrutiny to a government action that intrudes upon that right, including the FDA's policy. It seems clear that the FDA's interest in protecting the blood supply from HIV infection is a compelling one, given the harm that transmission by transfusion would inflict on blood recipients. The question is then whether the categorical ban on donations by MSM is narrowly tailored to that interest. Here, there is a problem with the policy's tailoring: it is both overly broad and under-inclusive, suggesting that it is not narrowly tailored to the government's policy.

The MSM policy is overly broad because it prevents HIV-negative men who pose no threat to the government interest from donating. This includes men who engage in activities that are high risk for transmission, such as unprotected receptive anal sex with partners of unknown HIV status, but who are still HIV-negative. It also includes men who pose no risk of transmission by transfusion, such as men in monogamous relationships in which both individuals have tested HIV-negative.³⁰³

The policy is also under-inclusive because there are individuals who pose the same risk of donating HIV-positive blood as MSM but whom the government has not included in its categorical deferral policy. If an HIV-positive man has anal sex with an HIV-negative woman, she is as likely to be infected with HIV as an HIV-negative

302. I draw a parallel between the FDA's policy and quarantine solely to highlight the differences and similarities between treatment of a health risk. It is not my intention to suggest, nor would I condone, the quarantining of HIV-positive individuals.

303. See *supra* notes 30–35 and accompanying text.

MSM bottom would be.³⁰⁴ Similarly, an HIV-negative man having anal sex with an HIV-positive woman has the same risk of infection as an HIV-negative MSM top would with an HIV-positive bottom.³⁰⁵

The policy's overly broad and under-inclusive nature suggests that although it appears to take seriously the risk of transmission by transfusion for MSM, it does not treat other similarly risky individuals the same way. Imagine a landlord who, in an effort to prevent large dogs from damaging her property, only prohibits tenants from having Great Danes. If the goal is protecting the hardwood floors, a Doberman Pinscher is just as risky, but has not been prohibited. A government policy that is properly tailored to its interest would specify at a more granular level what sexual conduct actually poses a risk of HIV infection—to overcome the overly broad failing—and then apply it evenly to all potential donors—thereby resolving the under inclusivity. The FDA could screen both MSM and non-MSM donors who engage in anal sex—since this act poses the highest risk of HIV transmission—or anyone who has sex with one or more partners of unknown HIV status. Instead, the government categorically bars donations from MSM only. A guiding principle for a well-tailored policy is that it should permit men in monogamous and HIV-negative sexual relationships to donate, but should defer anyone who has had unprotected anal sex with one or more partners of unknown HIV status and has not since tested HIV-negative.³⁰⁶ Remember, too, that all blood is tested after donation.³⁰⁷

While improper tailoring is often an indicator of an impermissible state interest—such as white supremacy in *Loving v. Virginia*³⁰⁸ or racial animus in *Korematsu v. United States*³⁰⁹—the interest here is legitimately about public health. The root of this poor tailoring is the policy's *Jacobson*-esque issuance as an emergency measure when HIV/AIDS first spread. But the emergency justification is no longer applicable. The FDA's policy is a blunt one, and the overly broad and under-inclusive category it creates is not narrowly tailored to the government's interest in preventing the spread of HIV through blood donation and transfusion.

304. See *supra* note 47 and accompanying text.

305. Again, the risk of infection per encounter is low, see *supra* notes 30–35 and accompanying text, but the point is that the risk is the same for same- and opposite-sex partners in these positions.

306. See *supra* note 42 and accompanying text (discussing window period for HIV testing).

307. See *supra* note 38 and accompanying text.

308. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

309. *Korematsu v. United States*, 323 U.S. 214, 243 (Jackson, J, dissenting).

The FDA's MSM policy is also in tension with another compelling government interest: maintaining enough blood in the national blood supply. There is need for more blood.³¹⁰ The MSM policy has the effect of limiting the pool of potential donors who could safely contribute. A study by the Williams Institute at U.C.L.A. School of Law found that completely lifting the FDA policy would result in an annual increase in safe donations by 615,300 pints of blood.³¹¹ With the need for blood as high as forty-thousand pints a day,³¹² any means of safely increasing the supply should be taken. With its MSM policy, however, the FDA prohibits donation of life-saving blood. Given the post-donation testing that all blood goes through, the MSM policy undercuts this parallel and compelling interest in maintaining enough blood.

C. *The Sell Test*

By implicating a fundamental liberty right, the FDA's policy may also draw the unique form of heightened scrutiny provided in *Witt*. DADT failed at the second *Sell* prong in *Witt* and the second and third prongs in *Log Cabin Republicans* because it did not actually further the government's purported interest.³¹³ Those prongs serve a similar function to the tailoring inquiry in strict scrutiny: does the means truly achieve the stated end goal, and is there a less intrusive means of achieving that goal? With DADT, the reviewing courts found that the policy did not further the espoused goal of military management and morale.³¹⁴

Applying the *Sell* test as articulated in *Witt*³¹⁵ to the FDA's MSM policy also reveals a shortcoming at prong three. Regarding the first prong, protecting the blood supply from HIV infection is an important government interest. Regarding the second, it is debatable whether the MSM policy "significantly" advances that government interest. While the FDA 2015 Guidance Document cited studies that show a history of male-to-male sexual contact is associated with a

310. See *supra* note 56 and accompanying text (discussing how the Red Cross and other organizations have issued emergency calls for blood donations).

311. AYAKO MIYASHITA & GARY J. GATES, WILLIAMS INST., UPDATE: EFFECTS OF LIFTING BLOOD DONATION BANS ON MEN WHO HAVE SEX WITH MEN 2 (Sept. 2014).

312. *Blood Is Always Needed*, AM.'S BLOOD CTRS., <http://www.americasblood.org/about-blood/blood-is-always-needed.aspx> (last visited May 15, 2017).

313. See *supra* Part IV (discussing *Witt* and *Log Cabin Republicans*).

314. See *id.*

315. The *Sell* test requires that: i) a court must find the government interests at stake are important; ii) the government intrusion must significantly advance that important interest; and iii) a less intrusive means must be unlikely to achieve substantially same results. *Witt v. Dep't of Air Force*, 527 F.3d 806, 818–19 (9th Cir. 2008).

sixty-two-fold increased risk of HIV infection,³¹⁶ the same document noted that HIV-positive MSM donors can successfully self-select.³¹⁷ This suggests that the relatively high prevalence of HIV among MSM does not necessarily mean there is a higher risk of transmission from MSM donors.³¹⁸ Since the policy's failing at prong three is clearer, though, and it is a conjunctive test, I skip to the last prong. Failure there is sufficient to strike the policy.

Prong three of the *Sell* test asks whether a less intrusive means is unlikely to achieve substantially the same results. A less intrusive means exists: basing screening questions for all potential donors on actual risk factors associated with HIV transmission, rather than using the MSM category as a blunt and imperfect proxy, while maintaining current post-donation testing practices. This is less intrusive than the current policy because it would allow MSM who pose zero threat, such as HIV-negative men in monogamous relationships with HIV-negative men, to fully enjoy their sexual intimacy and still donate. It would be more successful because it also screens non-MSM potential donors who pose a similar risk of transfusion, and so would further the government's interest. Though intrusive on these donors' rights, it is justifiable under the *Jacobson* factors because it would determine which individuals "actually [have], or [have] been exposed to, a contagious disease and [are] likely to transmit the disease to others if not confined."³¹⁹ Since there is a less intrusive and more effective means, the MSM policy fails the *Sell* test at prong three. By expressly inquiring into more effective policies, the *Sell* test simultaneously strikes the government's policy and provides an alternative.

CONCLUSION

It has been over a decade since the Court held that anti-sodomy laws violate the right to sexual intimacy in *Lawrence v. Texas*. Despite the intervening milestones in LGBTQ rights, some still question whether the right in *Lawrence* is fundamental. This paper sought to end that uncertainty and to show the importance of the fundamental right to sexual intimacy through the lens of both the FDA's current MSM blood donation policy and the military's former "Don't Ask, Don't Tell" policy. Each is an example of the real and detrimental impact government actions have on MSM when they infringe on this

316. FDA 2015 GUIDANCE DOCUMENT, *supra* note 4, at 5.

317. *Id.* at 6.

318. *See supra* Section I.B (discussing why the FDA's use of MSM as a proxy for transmission risk is overly broad).

319. *See* Mariner, Annas, & Glantz, *supra* note 294, at 587.

fundamental right, and how important it is for courts to rigorously scrutinize the rationale underlying these government actions to ensure that the policies are appropriately tailored to the government's interests.

As applied to the FDA policy, the traditional strict scrutiny and *Sell* standards of review each ask a very basic question: To protect the blood supply from HIV, must the government use the MSM policy, which has negative effects on MSM's fundamental right to sexual intimacy? The answer is "no." These two heightened scrutiny tests show that the policy is overly broad and under-inclusive and that there are more effective and less intrusive means available to achieve the same end goal.

Not only does this analysis answer the question posed in *Bowers* over three decades ago about the existence of a constitutional right to sexual intimacy, that answer—yes, there is such a right, and it is fundamental—has articulable benefits for MSM currently impacted by the FDA's policy. Lifting the ban would help to lower some of the barriers that many MSM still face. It would civically empower those who choose to donate, while removing a stigma and risk of discriminatory treatment for all MSM, regardless of their decision to donate.

The FDA's policy, which is limited in its immediate scope and effect to MSM,³²⁰ is also a vehicle for exploring the broader questions discussed in this paper. In addressing the nature of the right to sexual intimacy, this paper furthers the substantive due process jurisprudence developed by the Court in *Obergefell* and suggests that the Court's shift away from rigid rights recognition requires a corresponding expansion in deprivation jurisprudence. The Constitution, as understood by Justice Kennedy, requires not only the bare ability to exercise one's rights, but also the government respect necessary for those rights to be exercised free of disparagement, discrimination, and stigma. For some, this may be the most difficult component of this paper to accept, despite its essential place in the overall argument. But the need to reexamine due process jurisprudence from both sides of a right—its recognition and its deprivation—is critical to giving rights any meaning. To adopt *Obergefell*'s and Justice Harlan's approach to substantive due process but maintain traditional deprivation standards risks recognizing rights without providing mechanisms to protect them.

320. The policy's limited scope does not dilute its significance. In the aftermath of the 2016 attack at Pulse, a gay nightclub in Orlando, Florida, there was an outpouring of support and blood donations from the general population. Gay and bisexual men were not, however, permitted to give and help their own community during this time of need because of the FDA's policy. See DiBlasio, *supra* note 210.

As Justice Kennedy wrote in *Obergefell*, the overturning of sodomy laws in *Lawrence* marked a shift from outlaw to outcast for many in the LGBTQ community. The Court permitted same-sex sexual intimacy by decriminalizing it, but the government, by denying them the opportunity to donate, still conditions this protected conduct and requires MSM to trade in their civic equality to practice their fundamental right. Recognition of the fundamental right to sexual intimacy and the FDA's policy as a violation of that right has implications beyond blood donation: it represents another step for MSM—and others whose sexual conduct renders them “outcast”—closer to achieving “the full promise of liberty.”³²¹

321. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).