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The Fact That X States Failed To Criminalize An Act in 1868 Does Not Mean That Committing The Act Is A Fundamental Right

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Bowers v. Hardwick found that prohibitions on sodomy had "ancient roots." Justice White observed that when the 14th Amendment was ratified "all but 5 of the 37 States in the Union had criminal sodomy laws." He concluded that "[a]gainst this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."

Two decades later, Justice Kennedy cast doubt on this position in *Lawrence v. Texas*.

Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said: "**Proscriptions against that conduct have ancient roots**." *Id.*, at 192. In academic writings, and in many of the scholarly *amicus* briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*. **Brief for Cato Institute as *Amicus Curiae* 16—17**; Brief for American Civil Liberties Union et al. as *Amici Curiae* 15—21; Brief for Professors of History et al. as *Amici Curiae* 3—10. **We need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance**.

The Cato brief, which was written by William Eskridge, found errors with *Bowers's* historical account. The brief explained that states prohibited sodomy "as applied to male-female as well as male-male." Given this history, the brief argues, the "sodomy laws were aimed at public conduct and sexual activities that were not consensual." In other words, the laws were not targeted at disapproving of homosexual relationships. Therefore, the brief concluded, "[b]ecause of this incomplete reading of history and its inconsistency with *Evans* and this Court's privacy precedents, *Hardwick*'s interpretation of the Due Process Clause should be overruled."

I have long been bothered by this passage from Justice Kennedy's opinion, and the argument from the Cato brief. (I became an adjunct scholar at Cato more than a decade after the brief was filed). I'll assume the Cato brief is accurate, and the *Bowers* Court's history was wrong. In 1868, X states criminalized all types of sodomy, and did not focus on consensual sodomy. Even if this

fact were true, we cannot so simply conclude that consensual sodomy was a fundamental right. The failure to criminalize an act does not mean that committing the act is a fundamental right. *Bowers*, as well as *Glucksberg*, asked whether a right is "deeply rooted in this Nation's history and tradition." To show that a right to consensual sodomy is "deeply rooted," you need to show more than X states did not expressly criminalize it. This history, at most, suggests that the democratic process, and not the courts, made decisions concerning this conduct. Of course Justice Kennedy did not like the *Glucksberg* test. (Neither did Cato). But thankfully, he stopped short of overruling it in *Obergefell*. And I think the *Gluckbserg* test will make a comeback in *Dobbs*.

There is another comeback in *Dobbs*. John Finnis and Robby George filed an amicus brief that urges the Court to overrule *Roe*. They make a similar argument as the one adopted by Justice White in *Bowers*.

The Union in 1868 comprised 37 States, of which 30 had statutory abortion prohibitions. Most were classified as defining "offenses against the person," with applying before and after quickening. And Congress, legislating for Alaska and the District of Columbia shortly after ratification of the Fourteenth Amendment, referred to unborn children as "person[s]."

Aaron Tang wrote a response. He argues that Finnis and George miscounted the states. Indeed, he splices the numbers in a similar fashion that Eskridge did.

This Article uncovers several historical errors on which the claim is founded. For example, the oft-repeated 27 figure includes states whose high courts interpreted the relevant abortion laws not to apply before quickening, or the first sign of fetal movement at roughly sixteen weeks of pregnancy. The 27 count also includes states whose abortion laws punished only particularly dangerous forms of abortion (e.g., via poison), while permitting safer procedures. Other mistakes abound. In one instance, pro-life originalists count a state as prohibiting abortion pre-quickening even though the relevant law was enacted after the Fourteenth Amendment.

After assessing the evidence, my best sense is that when the Fourteenth Amendment was ratified, just 15 of 37 states deemed abortion unlawful at all points in pregnancy. In the other 22 states, pregnant persons were free to obtain an abortion at any time before quickening. The public in most states would have thus understood most abortions—those performed before roughly sixteen weeks—to be perfectly lawful when the Fourteenth Amendment was ratified.

I have no idea who has the better count. For argument's sake, I will assume Tang is right. From an originalist perspective, the fact that 15 out of 37 states banned abortion at all stages is pretty damn good evidence that right was not fundamental. The threshold for a fundamental right is quite high. How can we say a right is fundamental if nearly half the states criminalized it? Again, Justice Kennedy and others reject the "deeply rooted" argument. *Obergefell* had to disregard the overwhelming majority of states that had protected opposite-sex marriage: Kennedy wrote:

The 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.

Indeed, the reference to "ancient" sources in *Obergefell* was a not-too-subtle throwback to *Bowers*. But if we adhere to the *Glucksberg* framework, Tang's article *supports* the originalist

case that abortion is not deeply rooted. For originalists, even if Finnis and George are wrong, and Tang is right, *Roe* still would be wrong.

Moreover, the fact that 22 states permitted abortion at certain stages suggests that this decision ought to be decided by the democratic process. This history supports the anti-*Roe* position: this decision about abortion belongs to the elected branches, rather than to the courts.

What would it take to make the originalist case that the right to abortion is "deeply rooted," and was considered fundamental in 1868? Perhaps if it was mentioned in the same breath as other well-known fundamental rights: the freedom of speech, freedom of conscience, liberty of contract, the right to keep and bear arms, and so on. We can cite chapter and verse to support these other rights. But simply looking to states that failed to criminalize an act is not enough.

I have long been critical of this line of reasoning from *Lawrence*. It was dubious in *Obergefell*. I hope it does not recur in *Dobbs*.

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