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Hints, not Holdings: Use of Precedent in *Lawrence v. Texas*

David M. Wagner*

I. INTRODUCTION

The way the Supreme Court tells the story, *Lawrence v. Texas*¹ was merely an inevitable and long-overdue piece of housecleaning. *Bowers v. Hardwick*,² we are told, was an outlier in a long string of cases establishing the constitutional sacredness of sexual conduct and its sequelae, and *Lawrence* merely removed the anomaly.³ That constitutional spring supposedly finds its headwaters at *Meyer v. Nebraska*,⁴ and flows from there into the wide river of *Planned*

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1. 123 S. Ct. 2472 (2003) (overruling *Bowers v. Hardwick*).

2. 478 U.S. 186 (1986) (holding that the Due Process right to privacy does not encompass a right to homosexual sodomy).

3. *Lawrence*, 123 S. Ct. at 2480 (the Court states, "the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion indicate. Their historical premises are not without doubt and, at the very least, are overstated." The Court tries to show the inaccuracies and misconceptions of the *Bowers* court and states, "the sweeping references by Chief Burger to the history of Western civilization . . . did not take account of other authorities . . ." *id.* at 2481.)

4. 262 U.S. 390 (1923) (holding that 14th Amendment Due Process protects the right of an elementary school language teacher to pursue his calling without undue government hindrance. Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the *Meyer* decision was interpreted to imply a right of parents to direct the upbringing of their children. Since the 1960s these two decisions have been treated as the origin of the constitutional right to "privacy" in matters of intimate relationships). See also *Lawrence* at 2476 (discussing the "broad statements of the substantive reach of liberty under the *Due Process Clause* in earlier cases.") (emphasis added). The *Lawrence* Court then cites to *Meyer*. *Lawrence* at 2481 (discussing two principal cases decided after *Bowers* that cast its holding into "even more doubt." These two principal cases are *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) and *Romer v. Evans*, 517 U.S. 620 (1996).)

Parenthood v. Casey,⁵ building a lake of Fourteenth Amendment-protected personal autonomy, whether expressed in terms of privacy,⁶ liberty,⁷ or simply due process.⁸

This narrative, however, is substantially fictional. The early cases in the standard “privacy” string-cite protect a zone of bourgeois, law-abiding normality, not a zone of personal self-definition.⁹ The later cases, beginning with *Griswold v. Connecticut*,¹⁰ protect a right of personal decision-making with regard to one issue, namely, whether to become parents. Meanwhile, more recent cases, such as *Michael H. v. Gerald D.*¹¹ and *Washington v. Glucksberg*,¹² establish that (outside the *sui generis* category of abortion), an analysis based on “history and tradition” still governs whenever the Court is called upon to protect fundamental rights not previously recognized as such.¹³

This alternative, tradition-driven narrative, it must be admitted, emerges from the cases only if one reads them in light of what they actually say. If one reads them instead as cultural signals, as hints of things much broader than their holdings, then, of course, their interpretation is also uncertain. So too is the rule of law, for two reasons: (1) the Court is utterly unpredictable if it develops its doctrine based on hints rather than holdings, and (2) the rights developed from the hints rather than the holdings, culminating in the *Casey* “mystery passage”,¹⁴

5. 505 U.S. 833 (1992) (upholding a right to abortion on the grounds that individuals must decide for themselves their “own concept of existence, of meaning, of the universe, and of the mystery of human life”). *Id.* at 851.

6. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

7. See *Casey*, 505 U.S. 833.

8. See *Meyer*, 262 U.S. 390.

9. See *infra*, notes 24-26 and accompanying text.

10. 381 U.S. 479 (1965) (holding that various ‘emanations from penumbras’ of Constitutional text create a ‘right of privacy’ that in turn creates a right of married couples to use contraceptives).

11. 491 U.S. 110 (1989) (using a history-and-tradition analysis to deny the claim that a biological father has a substantive due process right to assert parental rights over a child whose legal parents accept her and hold her forth as their own). The *Michael H.* Court citing *Griswold* states, in a plurality opinion, also stated, “Our cases reflect ‘continual insistence upon respect for the teachings of history [and] solid recognition.’” Therefore, the Court’s language supports the proposition of the author. *Id.* at 122.

12. 521 U.S. 702 (1997). The *Washington* Court stated, “We begin, as we do in all due-process cases, by examining our Nation’s history, legal traditions, and practices.” *Id.* at 710.

13. In *Michael H.*, the right claimed was that of an adulterous natural father to assert parental rights over a child, over the objections of both the natural mother and her husband, who was the child’s adopted father. 491 U.S. 110. In *Glucksberg*, the right claimed was the asserted right to physician-assisted suicide. 521 U.S. 702. Both claims failed, as being insufficiently rooted in American legal history and tradition to merit the status of “fundamental” and hence enforceable by the judiciary over the legislatures.

14. “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the

are so broad that they would devour the rule of law if taken seriously, as *Lawrence* takes them.¹⁵

Part II of this article examines the parental rights cases on which *Lawrence* relied, comparing their actual holdings and dicta with the interpretations given to those holdings and dicta in later cases. Part III similarly examines the contraception and abortion cases on which *Lawrence* relied. Part IV explains and defends my assertions about *Casey*, *Lawrence*, and the rule of law. Part V will conclude this article by examining the implications of *Lawrence* for the issue of “same-sex marriage.”

II. SUBSTANTIVE DUE PROCESS AND PARENTAL RIGHTS

As is traditional in modern substantive due process cases, the *Lawrence* Court begins¹⁶ with *Meyer v. Nebraska*¹⁷ and *Pierce v. Society of Sisters*.¹⁸ These cases are cited for their “broad statements of the substantive reach of liberty under the Due Process Clause.”¹⁹

But the statements of the substantive reach of Due Process liberty in these cases are not especially broad. We may begin with *Meyer*. This decision upheld the right of a teacher to practice his profession (one that “always has been regarded as useful and honorable”²⁰), against a statute that banned the teaching of foreign languages to grade-school students. In so doing, the Court also laid down some strong dicta²¹ about parental rights and obligations, and about how the “letter and spirit of the Constitution”²² support traditional family life in preference to Spartan

attributes of personhood were they formed under the compulsion of the State.” *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

15. *See infra* note 71 and accompanying text. *See also* *Lawrence v. Texas*, 123 S. Ct. 2472, 2489 (2003) (Scalia, J., dissenting). Justice Scalia stated that if the *Casey* “mystery passage” is applied to actions, such that all actions based on one’s “concept of existence” are constitutionally protected, then “it is the passage that ate the rule of law.” Every imaginable law governing conduct could impinge in some way on someone’s “concept of existence, of the universe, and of the mystery of human life.” *Id.*

16. *Lawrence*, 123 S. Ct. at 2476.

17. 262 U.S. 390 (1923).

18. 268 U.S. 510 (1925).

19. *Lawrence*, 123 S. Ct. at 2476.

20. *Meyer*, 262 U.S. at 400.

21. *Meyer*, 262 U.S. at 390, 399 (In a non-exclusive list of rights said to be protected by 14th Amendment Due Process, the *Meyer* Court listed the right “to marry, to establish a home and bring up children. . . .” 262 U.S. 390, 399). Additionally, the Court states, “Corresponding to the natural right [of parents in education], it is the natural duty of the parent to give his children education suitable to their station in life, and nearly all the state, including Nebraska, enforce this obligation by compulsory laws.” *Id.* at 400.

22. *Id.* at 402.

regimentation or Plato's proposal for communization of family life in THE REPUBLIC.²³

Meyer does indeed contain a list of Fourteenth Amendment-based rights that is both long and syntactically open-ended; yet it is necessary to do more than count the rights and note open-endedness in order to take the Court's point. The list is not arbitrary or without internal cohesion. Neither, therefore, is it truly open-ended.²⁴ The Court's admittedly non-exhaustive list of substantive due process rights contains the rights:

[T]o contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.²⁵

This list of rights is not a charter for prometheanism or bohemianism. Rather, it is a celebration of the ordinary. Specifically, this list portrays the average virtuous male citizen of middle America, who gets a job or starts a business, gets an education (presumably before starting the business, but no matter), gets married, has children, and takes them to church. Generally, these rights are all directed at the normal and the familiar, not the experimental or the progressive: "common occupations," "long recognized at common law,"²⁶ "orderly pursuit." These are not terms by which a court claims to know "certain truths" to which the constitutional framers were "blind."²⁷ On the contrary, they are

23. *Id.* at 401-402; *cf.* PLATO, THE REPUBLIC, Book V. I think it's plain that the Court's rejection of the Platonic/Spartan scheme is an affirmation of the alternative which that scheme aimed to replace, namely, the family. Even if this is debatable as an interpretation of The Republic, I nonetheless think it's plain as a pikestaff as an interpretation of *Pierce*, unless we attribute to Justice McReynolds a degree of Socratic sophistication that he has not ordinarily thought to have possessed.

24. The "list" is the Court's attempt in *Meyer* to give content to substantive due process. I call it open-ended simply because (just like the list of "privileges and immunities" in *Corfield v. Coryell*) the Court explicitly declares the list to be incomplete and consisting of examples only.

25. *Meyer*, 262 U.S. at 399.

26. Justice Scalia calls attention to this limitation in *Meyer* in his *Lawrence* dissent, italicizing the words "long recognized at common law," and thus scoring the Court for failing to take account of this aspect of *Meyer*. *Lawrence v. Texas*, 123 S. Ct. 2472, 2492 (2003) (Scalia, J., dissenting).

27. *Id.* at 2484. The contrast here is between the rights-recognizing role assumed by the *Meyer* Court, which is deferential toward actually-existing social structures, and the rights-recognizing (some would say, rights-creating) rule assumed by the *Lawrence* Court, which explicitly takes on itself the right/duty of recognizing rights that not only do not actually exist (sodomy is not a pillar of society the way, say, child-rearing and business entrepreneurship are) but which have actually been consistently rejected in Common Law history (as *Bowers* demonstrated). The *Meyer* Court lists rights with a respectful attitude toward the received opinion of its time, with an eye to preventing legislative interference with bourgeois structures. The *Lawrence* Court announces rights with a contemptuous attitude toward the received opinions of our times, with an eye to building a judicially authorized sexual utopia.

terms by which a court, even while claiming an extensive power of judicial review,²⁸ nonetheless humbly subjects that power to a tradition that it did not create and cannot ignore or disparage.

In *Pierce*, two years after *Meyer*, the Court made the parental-rights aspect of *Meyer* more explicit, striking down an Oregon state constitutional amendment that required all school-age students to attend public schools, effectively banning private and religious ones.²⁹ *Pierce* provides no more support than *Meyer* for a doctrine of ever-expanding liberty in personal matters. To the contrary, it described the private schools that were the actual plaintiffs in the case as “a kind of undertaking not inherently harmful, but *long regarded as useful and meritorious*.”³⁰ The liberty that the decision protected was not a contourless “personal and private life of the individual,” but specifically “the liberty of parents and guardians to direct the upbringing and education of children under their control.”³¹ A liberty that, while extensive, must be balanced against certain unquestioned state powers, including “the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils, to require . . . that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.”³²

Pierce does in fact contain a broad dictum about “[t]he fundamental theory of liberty upon which all governments in this Union repose,”³³ but what it excludes is not a power to illegalize conduct long viewed as sinful and against nature, but a power to “standardize children.”³⁴ If we want to flesh out that “fundamental theory,” we will have to go to

28. Interestingly, Justice Scalia is prominent among those who think *Meyer* and its progeny were cases of judicial overreaching. See *Troxel v. Granville*, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting). See also *Troxel*, 530 U.S. at 95-96 in which Justice Scalia states:

Pierce and *Meyer*, had they been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion. Their formulation and subsequent interpretation have been quite different, of course; and they long have been interpreted to have found in Fourteenth Amendment concepts of liberty an independent right of the parent in the “custody, care and nurture of the child,” free from state intervention. The principle exists, then, in broad formulation; yet courts must use considerable restraint, including careful adherence to the incremental instruction given by the precise facts of particular cases, as they seek to give further and more precise definition to the right.

Id. at 95-96.

29. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

30. *Pierce* at 534 (emphasis added).

31. *Id.* at 534-35.

32. *Id.* at 535.

33. *Id.*

34. *Id.*

sources outside of *Pierce*, because all we learn about it in *Pierce* is that it “excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”³⁵ Thus, under *Pierce*, there is (for example) not the slightest doubt about the right of a gay citizen who has legal custody of a child to choose non-public schools for that child. But to cite *Pierce* as authority for other aspects of that citizen’s lifestyle, aspects that were considered crimes³⁶ in the era when choosing a school for one’s child was (as it still is) considered a right, is to take the notions of evolving tradition and developing doctrine beyond any limit where one can still claim to be working within that tradition.

III. SUBSTANTIVE DUE PROCESS AND REPRODUCTIVE RIGHTS

After expansively interpreting cases establishing parental rights, the Court took a similar approach to cases establishing an individual’s right to decide when to become a parent. The Court began its analysis with *Griswold v. Connecticut* as the “most pertinent beginning.”³⁷

While the *Lawrence* Court accurately characterizes *Griswold* as having “placed emphasis on the marriage relation and the protected space of the marital bedroom,”³⁸ it overlooks the strenuous effort made by Justice Douglas in that opinion to distance the Court from any revival of Due Process based “fundamental rights” jurisprudence.³⁹ But since this is hardly the first time the post-*Griswold* Court has done this (was Justice

35. *Id.* It is not so much what the *Pierce* Court is saying but it is what it *does not* say. The Court denies a general power in the state to standardize children. Later, in *Skinner*, it was interpreted as meaning a right to procreate—but *Pierce* did not include that holding. Still later, in *Griswold*, it was interpreted as meaning a general right of family privacy that in turn implies a right to use contraceptives—but *Pierce* also did not include that holding. Most astonishingly, *Pierce* is part of the string-cite in *Roe*—but, needless to say, *Pierce* did not include abortion. Educating your children has nothing to do with abortion. *Pierce* has been ventriloquized into “holding” a lot of things that it never said, and which the Court that decided would probably (though I can’t prove this) have viewed with horror.

36. “There are 203 prosecutions for consensual, adult homosexual sodomy reported in the West Reporting system and official state reporters from the years 1880-1995.” *Lawrence*, 123 S. Ct. at 2494 (Scalia, J., dissenting) (citing WILLIAM ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 375 (1999)).

37. *Lawrence v. Texas*, 123 S. Ct. at 2476.

38. *Id.* at 2477.

39. *Griswold v. Connecticut*, 381 U.S. 479, 481-482 (1965). The author intends to make the point that the cases from *Griswold* to *Lawrence* have proceeded by picking up on cultural hints in these cases, rather than by reliance on holding or dicta. For example, *Griswold* created a right to contraceptive use by married couples—but was read in *Eisenstadt* as having created a general right to contraception. *Eisenstadt*, in turn, did not (quite) hold that minors are entitled to all the sexual rights of adults, but it was reading *Carey* as though it had. Furthermore, *Griswold*, *Eisenstadt*, *Carey*, and the abortion cases all have to do with procreation, or the avoidance thereof, but *Lawrence* generalizes this to intimate relations in general.

Douglas really trying all that hard to avoid letting *Lochner v. New York*⁴⁰ “be our guide”⁴¹). *Lawrence* next examined *Eisenstadt v. Baird*,⁴² *Carey v. Population Services International*,⁴³ and *Planned Parenthood v. Casey*.⁴⁴

These cases are more *Lochnerian* in their methodology than *Griswold*: in classic substantive Due Process fashion, they examine the challenged statutes’ purposes and/or classifications and then find them not rationally related to a legitimate state objective.⁴⁵ To that extent they provide marginally more support than does *Griswold* for the personal autonomy doctrine of *Casey* and *Lawrence*.

But at the level of the decisions’ actual holdings and rationales, there turns out to be less than meets the eye. *Eisenstadt*, for instance, is best known (whether for praise or blame) for its virtual equation of the married and non-married states,⁴⁶ which followed a mere seven years upon the dicta in *Griswold* about marriage being “sacred”⁴⁷ that held the statute in *Griswold* as being uniquely offensive because of its intrusion into “an intimate relation of husband and wife.”⁴⁸ But if we ask what right *Eisenstadt* actually protects, the passage just cited gives the answer. It is not a general right of the unmarried to have all the privileges of the married, but rather their right to strict scrutiny of a statute that intrudes into “matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁴⁹

The three cases the *Eisenstadt* Court then cites⁵⁰ are of limited assistance in discerning what other “matters” these may be. *Skinner v. Oklahoma*, also dealt with procreation, albeit from a “right to” approach rather than (as in *Eisenstadt*) a “right not to” approach.⁵¹ *Stanley v. Georgia*, dealt with at-home consumption of obscenity, which the Court

40. 198 U.S. 45 (1905).

41. *Griswold*, 381 U.S. at 482

42. 405 U.S. 438 (1972).

43. 431 U.S. 678 (1977).

44. 505 U.S. 833 (1992).

45. *But see* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973) (showing that *Lochner*, however objectionable, was a more legally disciplined decision than *Roe*.).

46. 405 U.S. at 453-454. The court states, that “the rights must be the same for the unmarried and the married alike.” *Eisenstadt* at 454. The court continues, “the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons.” However, what *Eisenstadt* did *not* say was that contraception is a fundamental right, or that the “immorality of contraception” can never be the basis for legislation. *Id.* at 452-454.

47. 381 U.S. 479, 486 (1965).

48. *Id.* at 482.

49. 405 U.S. at 453.

50. *Id.*

51. *See Skinner v. Oklahoma*, 316 U.S. 535 (1942).

has repeatedly held to be otherwise inside the scope of First Amendment protection as regards production or trafficking,⁵² hardly a beacon for the treatment of sodomy in *Lawrence*.⁵³ Finally, *Jacobson v. Massachusetts*, which is remarkably inapposite, as the plaintiff there *failed* to convince the Court that his religious objections exempted him from a mandatory vaccination program.⁵⁴

Judge Bork, well-known as a conservative judge, in a judicial critique of the Supreme Court's privacy cases, illustrated the proper interpretation of *Eisenstadt* in his remarks for a panel of the Court of Appeals for the D.C. Circuit:

In order to apply *Eisenstadt* to a future case not involving the same personal decision, a court would have to know whether the challenged governmental regulation was "unwarranted" and whether the regulation was of a matter "so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* itself does not provide any criteria by which either of those decisions can be made.⁵⁵

Most interestingly, the *Eisenstadt* Court specifically raised the question, "[M]ay [the statute] be sustained simply as a prohibition on contraception?"⁵⁶ The reader expects a big "no," but it never arrives, at least not from the Supreme Court itself. The opinion quotes the underlying Court of Appeals decision that states, "To say that contraceptives are immoral as such . . . conflicts with fundamental human rights."⁵⁷ But on this the Supreme Court comments: "We need not *and do not, however, decide that important question* in this case," because the Equal Protection issue (treating the married and the unmarried differently with regard to the interest in not begetting a child) solves the case.⁵⁸

From *Eisenstadt*, the Court proceeds to *Carey v. Population Services International*,⁵⁹ finding in *Carey* the principle that "the reasoning of *Griswold* could not be confined to the protection of the rights of married adults."⁶⁰ But *Carey* made clear the exact right it was protecting:

The fatal fallacy in [the state's] argument is that it overlooks the underlying premise of those decisions [*Griswold* and *Eisenstadt*] that

52. See, e.g., *Osborne v. Ohio*, 495 U.S. 103 (1990) (substantially limiting *Stanley*).

53. 394 U.S. 557 (1969).

54. 197 U.S. 11 (1905).

55. *Dronenburg v. Zech*, 741 F.2d 1388, 1393-94 (D.C. Cir. 1984) (presumably overruled by *Lawrence*, but still a good read).

56. *Eisenstadt v. Baird*, 405 U.S. 438, 452 (1972).

57. *Baird v. Eisenstadt*, 429 F.2d 1398, 1402 (1st Cir. 1970).

58. *Eisenstadt v. Baird*, 405 U.S. 438, 452 (1972) (emphasis added).

59. 431 U.S. 678 (1977).

60. *Lawrence v. Texas*, 123 S. Ct. 2472, 2477 (2003).

the Constitution protects the right of the individual. . . to be free from unwarranted governmental intrusion into. . . the decision whether to bear or beget a child. . . Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions *in matters of childbearing* from unjustified intrusion by the State.

. . .

This is so not because there is an independent fundamental right of access to contraceptives, but because such access is essential to exercise [sic] of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold*, *Eisenstadt v. Baird*, and *Roe v. Wade*.⁶¹

Throughout the modern substantive due process cases from 1965 to 1992, the Court may have been hinting at a broad doctrine on personal autonomy centering on sexual activity, but it issued no holding to that effect. However, it did contain dicta about “a right of personal privacy, or a guarantee of certain areas or zones of privacy.”⁶² Furthermore, a “hidden agenda” argument is always possible, especially given that the same panel of Justices offered contradictory dicta about marriage in *Griswold*⁶³ and *Eisenstadt*,⁶⁴ without a change in Court personnel that would account for the difference.⁶⁵

61. *Carey*, 431 U.S. at 687-89 (first and second ellipses in original) (internal citations omitted) (emphasis added).

62. *Id.* at 684 (citing *Roe v. Wade*, 410 U.S. 113, 152 (1973)).

63. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). (“intimate to the degree of being sacred”).

64. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). (“not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup”).

65. Between 1965 and 1972, Chief Justice Warren was replaced by Chief Justice Burger; Justice Goldberg was replaced first by Justice Fortas and then by Justice Blackmun, Justice Black was replaced by Justice Powell, Justice Clark was replaced by Justice Marshall, and Justice Harlan was replaced by Justice Rehnquist. Justices Douglas, Brennan, Stewart and White were on the Court throughout the period under discussion. See GEOFFREY STONE ET AL., *CONSTITUTIONAL LAW* xciv-xcvii (4th ed. 2001). Together these changes would suggest no net change of heart from “right” to “left” on the nature of marriage. The Warren-to-Burger and Harlan-to-Rehnquist changes were arguably changes from “left” to “right,” relatively speaking. (Being new to the Court at the time, neither Powell nor Rehnquist took part in *Eisenstadt*. It is doubtful that they would have changed the outcome, as Chief Justice Burger was the only dissenter.) The Goldberg-to-Blackmun change is about a wash in terms of moral worldviews. Justice Black, having dissented in *Griswold*, does not figure in this analysis. In short, changes in Court membership cannot account for the *Griswold*-to-*Eisenstadt* change in the dicta on marriage. For this reason, the ode to marriage given us by the frequently-married Justice Douglas may without grave injustice be considered more rhetorical than candid.

IV. PLANNED PARENTHOOD V. CASEY

Of the precedents cited by the *Lawrence* Court, *Planned Parenthood v. Casey* is the only one it did not twist to some extent. Unlike the abovementioned cases, *Casey* comes pre-twisted. Pre-twisted in the sense that previous cases had only hinted at a doctrine of personal autonomy or privacy included in the 14th Amendment. The question here is why *Casey*, rather than the later-decided *Washington v. Glucksberg*,⁶⁶ controls.

In *Glucksberg*, with *Casey* and its “mystery passage”⁶⁷ decided a mere five years earlier and presumably still good law, the Court nonetheless reaffirmed its pre-*Casey* due process methodology of cleaving closely to “our Nation’s history, legal traditions, and practices.”⁶⁸ Referring particularly to the “mystery passage,” the *Glucksberg* Court glossed it as no more than a restatement of the history-and-tradition approach, and concluded: “That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and *Casey* did not suggest otherwise.”⁶⁹

Whether *Casey* did or did not suggest otherwise is open to debate;⁷⁰ the *Glucksberg* opinion does, after all, give us primarily the *Casey* dissenters’ take on what *Casey* means.⁷¹ But as a matter of precedent, the *Lawrence* Court might have been expected to deal with *Glucksberg* in some way as significant intervening case law, especially since it makes much of *Casey* as intervening case law.⁷²

66. 521 U.S. 702 (1997).

67. See *supra* note 15.

68. 521 U.S. at 710.

69. *Id.* at 727-28 (internal citations omitted).

70. One who read the “mystery passage” broadly was Judge Reinhardt of the 9th Circuit in his en banc opinion in *Compassion in Dying v. Washington*, 79 F.3d 790, 813-14 (1996), *rev’d sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997). Opponents of *Roe* and *Casey* have voiced similar views. See, e.g., Gerard V. Bradley, *Mighty Casey at the Bat*, CATHOLIC DOSSIER, May-June, 1999, <http://www.catholic.net/rcc/Periodicals/Dossier/MAYJUN99/Casey.html> (visited November 7, 2003).

71. The opinion for the Court in *Glucksberg* was written by Chief Justice Rehnquist, joined by Justices O’Connor, Scalia, Kennedy, and Thomas. Thus, three of the four *Casey* dissenters are speaking here; the fourth, Justice White, had since retired. Justice O’Connor, a co-author of the three-Justice controlling opinion in *Casey*, joins the *Casey* dissenters in their conservative interpretation of *Casey* – and pointedly declines in *Lawrence* to join in the overruling of *Bowers v. Hardwick*. *Lawrence v. Texas*, 123 S. Ct. 2472, 2485 (2003) (O’Connor, J., concurring in judgment). That leaves only Justice Kennedy pinned in an apparent contradiction, endorsing one view in *Glucksberg* (*Casey* merely rearticulates the history-and-tradition doctrine of modern substantive due process) and another in *Lawrence* (*Casey* protects those who “seek autonomy” for the “purposes” enumerated in the *Casey* mystery passage). *Id.* at 2481-82.

72. *Lawrence*, 123 S. Ct. at 2481, arguing that *Casey* is one of “[t]wo principal cases decided after *Bowers* [that have] cast its holding into even more doubt.” The other, the Court says, is *Romer*

Yet the opinion of the Court in *Lawrence* contains no reference to *Glucksberg* at all. The right claimed as “fundamental” in *Glucksberg* – physician-assisted suicide – was found by the Court to be at odds with centuries of common law teaching viewing suicide as a crime.⁷³ Since the Court in *Lawrence* is sure that the historical teaching of *Bowers v. Hardwick*⁷⁴ was wrong and that our legal tradition has treated private consensual sodomy rather benignly,⁷⁵ and did not “target[] same-sex couples . . . until the 1970s,”⁷⁶ why not make history the basis of comparison with *Glucksberg*? Why not say: “Whereas suicide has been so long viewed as a crime in our legal tradition that it cannot now be viewed as a right, homosexuality, in contrast, was tolerated recently, and therefore private, consensual sodomy is ‘deeply rooted in our nation’s history and tradition’ even though physician-assisted suicide is not.” In other words, if the Court is sure that *Glucksberg* has historical support while *Bowers* does not, why not say so? Does the court really think so?⁷⁷

V. LAWRENCE V. TEXAS AND SAME-SEX MARRIAGE

The remaining issue is the relevance of *Lawrence* to the issue of same-sex marriage. But as the *Lawrence* Court’s non-treatment of *Glucksberg* demonstrates, this is impossible to predict. I agree with both Justice Scalia⁷⁸ that, on the one hand, after *Lawrence*, there is no principled reason for the Court to decline to hold that the Constitution requires that marriage licenses be issued to all who demand them, regardless of sex or orientation. But the Court is not above ignoring applicable principles from its own precedents. The analogy is *Planned Parenthood v. Casey*, where it adopted a broad personal autonomy

v. Evans, 517 U.S. 620 (1996) (finding no rational basis for a state constitutional amendment barring enactment by state or localities of laws protecting homosexuals as such). See also Justice Scalia’s observation: “I do not quarrel with the Court’s claim that *Romer v. Evans* ‘eroded’ the ‘foundations’ of *Bowers*’ rational-basis holding. But *Roe* and *Casey* have been equally ‘eroded’ by *Washington v. Glucksberg*, which held that *only* fundamental rights which are ‘deeply rooted in this Nation’s history and tradition’ qualify for anything other than rational basis scrutiny under the doctrine of ‘substantive due process.’” *Lawrence*, 123 S. Ct. at 2489 (Scalia, J., dissenting) (internal citations omitted) (emphasis in original).

73. *Glucksberg*, 521 U.S. at 710-19.

74. 478 U.S. 186 (1986) (collecting common law authorities to the effect that sodomy is a crime).

75. *Lawrence*, 123 S. Ct. at 2478-80.

76. *Id.* at 2479.

77. Alternatively, is *Glucksberg* merely being fattened for the kill? In the next physician-assisted suicide case, will *Lawrence* count as significant intervening case law “casting doubt” on *Glucksberg*?

78. *Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting) (calling the Court “manipulative” in its application of *stare decisis*).

doctrine, and *Washington v. Glucksberg*, where, asked to apply that doctrine to assisted suicide, it declined, with very little explanation.

The Court in *Lawrence* left itself certain verbal escape hatches available, if and when the issue is squarely presented. For instance, the Court declined to read the Fourteenth Amendment as requiring state recognition of same-sex marriage. “The [challenged] statutes,” the Court writes, “do seek to control a personal relationship that, *whether or not entitled to formal recognition in the law*, is within the liberty of persons to choose without being punished as criminals.”⁷⁹ The italicized passage gives the Court complete flexibility in the future to find that *Lawrence* implicitly recognized a right to same-sex marriage, or that it implicitly declined to do so.

In the next paragraph, the Court criticizes “attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person . . .,”⁸⁰ One might ask, doesn’t the entire corpus of marriage law both “define the meaning of a relationship” to a considerable extent, and also, “set its boundaries” to a considerable extent? Read on:—“or abuse of an institution the law protects.”⁸¹ Does the Court have any particular “institution” in mind? No institution other than marriage fits the context. What other “institution” is relevant to a discussion of the limits of government’s power to regulate intimate associations? Adoption, perhaps; but marriage still fits the context best. Obviously, the Court is hinting that states may, even after *Lawrence*, “protect”⁸² marriage – meaning, presumably, marriage as it was understood before and until *Lawrence* itself.

If the Court, in a future case, does not wish to go as far as a constitutional right to same-sex marriage, the aforementioned passages will be more than enough to make the case that *Lawrence* does not require it to do so. On the other hand, in other dicta, the Court lays a foundation in the other direction: “[O]ur laws and traditions in the past half century . . . show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”⁸³ If the Court were to decide that the time had come to announce a constitutional right to same-sex

79. 123 S. Ct. at 2478 (emphasis added).

80. *Id.*

81. *Id.* The Court, through this language, is trying to have it both ways. It is putting severe limits on the ability of states to set boundaries to intimate relationships, as governments have done for centuries; yet it seems to want to carve out an exception safe-harbor for what it calls “an institution that the law protects”—and which, evidently, the law can (at least for now) continue to protect.

82. *Id.*

83. *Id.* at 2480.

marriage, this dictum and the holding of *Lawrence* that “demean[ing]” the “existence” of homosexual persons is an impermissible legislative effect⁸⁴ (regardless of legislative intent) would likewise give the Court all the precedential paperweights it would need.

VI. CONCLUSION

Ever since *Griswold*, which verbally reaffirmed the death of substantive due process while actually re-inaugurating it in a new form, the Court’s substantive due process cases mostly have been exercises in narrow holdings followed by broad interpretations of those holdings in later cases. One case’s hints become the next case’s holdings. In this regard, if in no other way, *Lawrence* is indisputably part of a tradition, even if one only 38 years old.

84. *Id.* at 2484. This is the closest thing to a legal holding that I can find in *Lawrence*. Significantly, as Justice Scalia repeatedly observes in his dissent, the Court nowhere holds that sodomy is, in fact, a constitutional right. 123 S. Ct. at 2488 (Scalia, J., dissenting) (“[N]owhere does the Court’s opinion declare that homosexual sodomy is a ‘fundamental right’ under the Due Process Clause”); *id.* at 2492 (“The Court today does not overrule this holding [of *Bowers*]. Not once does it describe homosexual sodomy as a ‘fundamental right’ or a ‘fundamental liberty interest’ . . .”).